

# PUBLICATION

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## Are Your Company's Policies on the EEOC's Enforcement Radar?

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As part of its Strategic Plan, the U.S. Equal Employment Opportunity Commission (EEOC) has issued its Strategic Enforcement Plan (SEP) for FY 2013-2016. Pursuant to the SEP, the EEOC will concentrate its enforcement activities, i.e., litigation, in six topic areas: 1. To eliminate barriers in recruitment and hiring; 2. To protect immigrant, migrant and other vulnerable workers; 3. To address emerging and developing issues; 4. To enforce equal pay laws; 5. To preserve access to the legal system; and 6. To prevent harassment through systemic enforcement and targeted outreach. So what does the EEOC's enforcement radar mean to you?

First and foremost, now is the time to look at facially neutral policies to determine whether any of those policies have a disparate impact on a protected class. Does your application for employment inquire into past arrests? Does your company have a per se exclusion of candidates with felony convictions regardless of the nature of the crime or when the crime was committed? If so, your company may be on the EEOC's enforcement radar for disparate impact claims in your hiring procedures. Last year, the EEOC issued its "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*" The EEOC will now use its SEP to push this "Guidance" into law. For example, on June 11, 2013, the EEOC commenced separate lawsuits against BMW in federal court in South Carolina and Dollar General in federal court in Illinois, alleging that the companies' uses of criminal background checks have had disparate impacts on African-American applicants.

Second, now is the time to conduct an internal audit of your current compensation system. Confirm that people are being paid comparable wages for comparable work regardless of gender and race. Some studies show that women tend to be paid as much as 30% less than their male counterparts. Expect the EEOC, armed with the Lily Ledbetter Fair Pay Act, to address these pay discrepancies.

Third, know and train your workforce. If you have employees for whom English is not their first language, make sure that your policies and procedures are available in their native language. For example, if your workforce is largely Hispanic, have copies of your employee manual and complaint procedure in both English and Spanish. Have translators available to assist with training and with communicating between the employees, supervisors and Human Resources. Most of all, train all employees as to how to make complaints of discrimination and harassment while stressing that individuals who avail themselves of the complaint procedure will be free from retaliation.

Fourth, be sure to understand the expanded definition of "disabled" under the Americans with Disability Act (ADA), and consider leave as a possible accommodation. Even if an employee has exhausted Family and Medical Leave Act (FMLA) availability, the employee may be entitled to additional leave as an accommodation under the ADA. For example, an employee who has taken 12 weeks FMLA leave for cancer treatment may be entitled to additional leave as a reasonable accommodation for continuing once-per-week chemotherapy.

Finally, should your company find itself on the EEOC's enforcement radar, consider the possible benefits of resolving the matter at conciliation. In the event that the EEOC issues a for-cause determination to a charge of discrimination, your company will be invited to participate in conciliation. At the conciliation stage, the EEOC will consider settlements that contain confidentiality clauses. In the event that the matter is not resolved at

conciliation and the EEOC files a lawsuit, the EEOC will no longer entertain a confidential settlement. Additionally, litigation with the EEOC tends to be more expensive than litigation brought by a private attorney, as the EEOC is aggressive in pursuing its SEP.

For questions about these or any employment-related issue, please reach out to any of our more than 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.