



# ***Understanding and Navigating the EEOC's 2013-2016 Strategic Enforcement Plan***



October 9, 2013

# Background on the EEOC's Strategic Enforcement Plan (SEP) 2013-2016

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## EEOC identified its enforcement priorities based on following factors

- Issues that will have a broad impact
- Issues involving developing areas of law
- Issues affecting workers who lack awareness of their rights
- Issues involving practices that impede or impair enforcement
- Issues that may be best addressed by government enforcement

# EEOC SEP

## Six Enforcement Priorities

1. Eliminating Barriers in Recruitment and Hiring
2. Protecting Immigrant, Migrant and Other Vulnerable Workers
3. Addressing Emerging and Developing Issues
4. Enforcing Equal Pay Laws
5. Preserving Access to the Legal System
6. Preventing Harassment Through Systemic Enforcement and Targeted Outreach



# Priority No. 1

## Eliminating Barriers in Recruiting and Hiring

Focus on class-based intentional recruitment and hiring discrimination and facially neutral recruitment and hiring practices that discriminate against:

- Racial groups
- Ethnic groups
- Religious groups
- Older workers
- Women
- People with disabilities



# Priority 1 (cont.)

## Eliminating Barriers in Recruiting and Hiring

- Targeted practices include:
  - Exclusionary policies and practices
  - Channeling or steering of individuals into specific jobs due to their status in a particular group
  - Restrictive application processes
  - Use of screening tools



# Priority 1 (cont.)

## Eliminating Barriers in Recruiting and Hiring

Exclusionary policies and practices (examples):

- Suit alleging restaurant refused to hire African Americans as servers, waitresses, hostesses and bartenders, and maintained a segregated workforce. *EEOC v. Stone Pony Pizza, Inc.* (N.D. Miss. May 17, 2013)
- EEOC claimed employer engaged in nationwide pattern or practice of failing to hire female applicants for “yard jockey” and other operative positions in distribution centers. *EEOC v. Performance Food Grp., Inc.* (D. Md. June 13, 2013)
- Recruiting through media directed at a specific ethnic group and hiring only from that group. *EEOC v. Scrub, Inc.* (N.D. Ill Nov. 9, 2010)



## Priority 1 (cont.)

### Eliminating Barriers in Recruiting and Hiring

Channeling or steering of individuals into specific jobs due to their status in a particular group (example)

- Women applying for positions were told only that waitressing, dishwashing and maid services positions were open. *EEOC v. Preferred Labor LLC (D. Mass. July 6, 2009)*



# Priority 1 (cont.)

## Eliminating Barriers in Recruiting and Hiring

### Restrictive application processes (examples)

- Pre-offer disability related inquiries. *EEOC v. Celadon Trucking Services, Inc. (S.D. Ind. 2012)*
- Requirement that females truck driver applicants be trained only by female trainers. *EEOC v. New Prime Inc. (W.D. Mo. 2011)*





# Priority 1 (cont.)

## Eliminating Barriers in Recruiting and Hiring

Use of screening tools such as:

- Pre-employment tests
  - Use of written test that had a disparate impact on African Americans. *EEOC v. Automotive Components Holdings, et al.* (S.D. Ohio Dec. 20, 2007)
- Background checks
  - Credit reports claimed to have a disparate impact on African American applicants *EEOC v. Kaplan*, (N.D. Ohio Jan. 28, 2013)\*\*
  - Arrest and conviction records. EEOC issued Enforcement Guidance on Apr. 25, 2012.
- Date-of-birth inquiries



# Priority 1 (cont.)

## Eliminating Barriers in Recruiting and Hiring

### Arrest and Conviction Records

#### The Purpose of the Guidelines: Why is the EEOC Pursuing These Claims?

- A growing percentage of Americans have had contact with the criminal justice system.
- More than 7.3 million people are probationers, parolees, prisoners, or jail inmates.
- Assuming incarceration rates remain the same,
  - 1 in 17 white men will serve time in prison, compared with
  - 1 in 6 Hispanic men
  - 1 in 3 African American men

# Priority 1 (cont.)

## Eliminating Barriers in Recruiting and Hiring

### Arrest and Conviction Records

#### EEOC Enforcement Guidance

- An employer must show that its criminal background screen is both:
  - Job related and
  - Consistent with business necessity
- EEOC believes that employers may be able to satisfy both prongs with a targeted screen that considers (at least) the following factors from *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977):
  - The nature of the crime
  - The time elapsed
  - The nature of the job

## Priority 1 (cont.)

# Eliminating Barriers in Recruiting and Hiring

## Arrest and Conviction Records

### Is Individualized Assessment Necessary?

- An employer may be able to justify its criminal background screen solely under the Green factors if the screen is narrowly tailored to show a close nexus between the criminal conduct and the job position.
- However, an individualized assessment can help employers avoid liability by considering more complete information on individuals.

# Priority 1 (cont.)

## Eliminating Barriers in Recruiting and Hiring

### Arrest and Conviction Records

#### What to Consider

- Whether the record is accurate
- The facts and circumstances surrounding the offense or conduct
- The number of offenses a person has committed
- Older age at the time of conviction, or release from prison
- Person performed the same type of work, post-conviction, without incidents of criminal conduct
- The length and consistency of employment pre- and post-conviction
- Rehabilitation efforts (education, training, etc.)
- Employment or character references
- Whether person is bonded under a federal, state, or local bonding program

## Priority 1 (cont.)

# Eliminating Barriers in Recruiting and Hiring

## Arrest and Conviction Records

### Steps in an Individualized Assessment

1. Employer informs the individual that he may be excluded due to past criminal conduct.
2. Employer provides an opportunity for the individual to show that the exclusion should not apply to him.
3. Employer considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity.

## Priority 1 (cont.)

# Eliminating Barriers in Recruiting and Hiring

## Arrest and Conviction Records

### El v. Southeastern Pennsylvania Transportation Authority, 479 F.3d 232 (3rd Cir. 2007)

- SEPTA excluded anyone ever convicted of a violent crime from being a paratransit driver.
- El, 55 year old African American man was terminated when SEPTA learned of his 2nd degree murder conviction 40 years before – when El was 15 years old.
- Court granted summary judgment to SEPTA, although it expressed “reservations” about a policy excluding all violent crimes, no matter how long ago, “in the abstract.”

## Priority 1 (cont.)

# Eliminating Barriers in Recruiting and Hiring

## Arrest and Conviction Records

### El v. Southeastern Pennsylvania Transportation Authority, 479 F.3d 232 (3rd Cir. 2007)

- Title VII requires employers to show they “distinguish between applicants [who] pose an unacceptable level of risk and those [who] do not.”
- Court considered recidivism evidence:
  - If Plaintiff had “hired an expert who testified that there is a time at which a former criminal is no longer any more likely to recidivate than the average person,” there would be a factual question for the jury.
  - Instead, the recidivism evidence presented by SEPTA’s expert, partnered with the nature of a paratransit driver’s position, including unsupervised access to vulnerable adults, required SEPTA to exercise the utmost care.



# Priority 1 (cont.)

## Eliminating Barriers in Recruiting and Hiring

### Arrest and Conviction Records (Examples)

#### *EEOC v. DolGenCorp LLC (N.D.Ill. June 11, 2013)*

- Dollar General uses a matrix of specific felonies and misdemeanors and the age of these convictions to screen all job applicants.
- One applicant was disqualified based on a 6-year-old conviction for possession of a controlled substance, although she previously worked in a similar position for 4 years (matrix excluded these types of convictions for 10 years).
- Another applicant was rejected due to an incorrect background report.
  - The applicant informed Dollar General of the incorrect information, but the company did not reverse its decision.
- Both applicants are African Americans.

# Priority 1 (cont.)

## Eliminating Barriers in Recruiting and Hiring

### Arrest and Conviction Records (Examples)

#### *EEOC v. BMW Mfg. (D.S.C. June 11, 2013)*

- Current employees required to re-apply with BMW's new contractor.
- BMW directed new contractor to conduct criminal background checks.
  - New contractor applied BMW's policy, which excludes individuals with certain convictions, regardless of when the conviction occurred.
  - The previous contractor used its own policy, which only excluded individuals with convictions within the prior 7 years.
- 88 employees were not re-hired, including 70 African Americans, because they no longer satisfied BMW's criminal conviction policy.

# Priority 1 (cont.)

## Eliminating Barriers in Recruiting and Hiring

### *EEOC v. Freeman, No. 8:09-02573-RWT (D. Md. Aug. 9, 2013)*

- Granted Freeman’s Summary Judgment Motion, explaining “The story of the present action has been that of a theory in search of facts to support it.”
- Court harshly criticized the numerous errors in the EEOC’s experts’ data and analysis, and the use of national statistics without evidence that such statistics were representative of the relevant applicant pool
  - “The burden is not on Defendant to conduct its own analysis to rebut the results produced . . . It is sufficient for Defendant to point out the numerous fallacies in Murphy’s report, which raise the specter of unreliability.”
- EEOC also failed to identify a specific employment practice that caused a disparate impact
  - “The EEOC has made no effort to break down what is clearly a multi-faceted, multi-step policy.”
  - “The EEOC has placed many employers in the ‘Hobson’s choice’ of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers.”

# Priority 1 (cont.)

## Eliminating Barriers in Recruiting and Hiring

*EEOC v. Bloomberg*, 07 CIV. 8383 LAP, 2013 WL 4799150 (S.D.N.Y. Sept. 9, 2013)

- Court granted Bloomberg's Summary Judgment Motion on all remaining claims brought by the EEOC on behalf of 29 non-intervening claimants.
- The Court noted that before EEOC may bring an enforcement action under Title VII, certain pre-litigation activities must be satisfied.
  - “Specifically, prior to filing suit the EEOC must: (1) receive a formal charge of discrimination against the employer; (2) provide notice of the charge to the employer; (3) investigate the charge; (4) make and give notice of its determination that there was reasonable cause to believe that a violation of Title VII occurred; and (5) make a good faith effort to conciliate the charges.”
- The Court found that EEOC “failed to satisfy its pre-litigation obligations with respect to all of the remaining Non-Intervenor claims of making a reasonable cause determination or ensuring that additional claims were reasonably related to the charge contained within the [letter of determination] so as to afford Bloomberg a reasonable opportunity to conciliate.”

# Priority 1 (cont.)

## Eliminating Barriers in Recruiting and Hiring

*EEOC v. Bloomberg*, 07 CIV. 8383 LAP, 2013 WL 4799150 (S.D.N.Y. Sept. 9, 2013)

- Court rejected EEOC’s request for a stay “to permit serious settlement discussions.” “[W]here, as here, the EEOC completely abdicates its role in the administrative process, the appropriate remedy is to bar the EEOC from seeking relief on behalf of the Non-Intervenors at trial and dismiss the EEOC's Complaint.”
  - “The Court does not impose this severe sanction lightly and recognizes that certain of the Non-Intervenor claims may be meritorious but now will never see the inside of a courtroom. However, the Court finds that allowing the EEOC to revisit conciliation at this stage of the case—after shirking its pre-litigation investigation responsibilities and spurning Bloomberg's offer of conciliation and instead engaging in extensive discovery to develop the Non-Intervenor claims—already has and would further prejudice Bloomberg. Moreover, if such a sanction were not imposed, the Court, in turn, would be sanctioning a course of action that promotes litigation in contravention of Title VII's emphasis on voluntary proceedings and informal conciliation.”

## Priority No. 2

### Protecting Immigrant, Migrant & Other Vulnerable Workers

EEOC to target:

- Disparate pay
- Job segregation
- Harassment
- Trafficking and discriminatory policies affecting vulnerable workers



## Priority No. 2 (cont.)

### Protecting Immigrant, Migrant & Other Vulnerable Workers

#### Disparate pay

- EEOC alleged that Hispanic warehouse workers paid less than non-Hispanic workers. *EEOC v. B&H Foto* (S.D. N.Y. 2009)



## Priority No. 2 (cont.)

### Protecting Immigrant, Migrant & Other Vulnerable Workers

#### Job Segregation

- Allegations that Hispanic and African-American employees assigned to less desirable and lower-paying jobs. *EEOC v. L&W Supply* (D. Ariz, Sept. 2, 2009).





## Priority No. 2 (cont.)

### Protecting Immigrant, Migrant & Other Vulnerable Workers

#### Harassment

- Consent decree entered 5/1/13 providing \$360k to ten Hispanic janitors alleged to have been subjected to harassment and discriminatory work conditions. *EEOC v. RJB Properties, Inc., et al.*, (N.D. Ill. March 31, 2010)
- Vegetable grower pays seasonal farm worker \$150k to settle EEOC lawsuit alleging sexual harassment and retaliation. *EEOC v. RPF Holdings, LLC* (D. Or., settled May 13, 2013)

## Priority No. 2 (cont.)

### Protecting Immigrant, Migrant & Other Vulnerable Workers

#### Trafficking

- EEOC filed suit alleging employer trafficked over 200 Thai male nationals to farms in Hawaii and Washington and subjected them to harassment and discrimination on pay. *EEOC v. Global Horizons* (D. Haw., E.D. Wash, suit filed Apr. 19, 2011)



## Priority No. 3

### Addressing Emerging Areas (ADA, Pregnancy, LGBT, GINA)



The following emerging areas are recognized as a priority:

- ADA issues including coverage, reasonable accommodation, qualification standards, undue hardship and direct threat
- Accommodating pregnancy-related limitations under the ADAAA and the Pregnancy Discrimination Act
- Coverage of lesbian, gay, bisexual and transgender individuals
- Genetic Information Nondiscrimination Act (GINA)

## Priority No. 3 (cont.)

### Addressing Emerging Areas



ADA issues including coverage, reasonable accommodation . . . (examples)

- Morbid obesity as a covered disability. *EEOC v. BAE Systems (S.D. Tex., filed Sep. 27, 2011)*.
- Leave as a reasonable accommodation. *EEOC v. ACT Teleconferencing Servs. (D. Mass, July 15, 2011)*.
- “No fault” attendance policy. *EEOC v. Verizon Maryland (D. Md., July 6, 2011)*

## Priority No. 3 (cont.)

### Addressing Emerging Areas

Accommodating pregnancy-related limitations

- Requiring pregnant employees to provide doctor's note certifying no restrictions, and discharged or forced to take leave because of restrictions unrelated to ability to do jobs. *EEOC v. Britthaven, Inc.* (M.D.N.C. March 31, 2009).



## Priority No. 3 (cont.)

### Addressing Emerging Areas

Coverage of lesbian, gay, bisexual and transgender individuals

- Sexual orientation is not a protected class, nevertheless Title VII prohibits sex stereotyping discrimination. *Castello v. Donahoe, Postmaster General, EEOC appeal No. 012011795, Dec. 20, 2011)*



# Priority No. 3 (cont.)

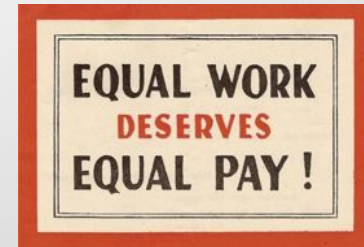
## Addressing Emerging Areas

### GINA Enforcement Efforts

- Fabric distributor pays \$50k to settle claim that it refused to hire a woman based on perceived disability, and GINA violations by asking for family medical history during post-offer medical examination. *EEOC v. Fabricut, Inc. (N.D. Ok. May 7, 2013)*
- Class action filed against nursing center claiming that policy of requesting family medical history during post-offer, pre-employment medical examinations violates GINA. *EEOC v. The Founders Pavilion, Inc. (W.D.N.Y. May 16, 2013)*

# Priority No. 4

## Enforcing Equal Pay Laws



Violation of Equal Pay Act, Title VII, ADA and ADEA  
EEOC to target compensation systems and practices that discriminate based on gender

- EEOC's focus on EPA aligns with the Lilly Ledbetter Fair Pay Act, the 1<sup>st</sup> bill signed by President Obama, which provides an unlimited statute of limitations in EPA cases because the limitations period resets with each paycheck
- From January 2010 to March 2013, EEOC obtained more than \$78 million on sex-based wage discrimination claims
- Female program specialists paid less than male counterparts. *EEOC v. Texas Dept. of Agriculture (W.D. Tx., Nov. 19, 2012)*
- Extended Stay Hotels paying female guest services representatives less than male counterparts. *EEOC v. HVM L.L.C. (D. Md. July 11, 2013)*



## Priority No. 5

### Preserving Access to the Legal System

EEOC will target policies and practices that discourage or prohibit exercise of rights such as:

- Retaliation
- Overly broad waivers
- Settlement provisions that prohibit filing of charges or providing information or assisting in an investigation
- Employer's failure to maintain required records



## Priority No. 5 (cont.)

### Preserving Access to the Legal System



Settlement provisions that prohibit filing of charges or providing information or assisting in an investigation

- Suit alleged employer engaged in pattern or practice of illegally conditioning employees’ receipt of severance benefits on entering into agreement deterring filing of discrimination charges. *EEOC v. Baker & Taylor, Inc.* (N.D. Ill. May 20, 2013)
- Retaliation (and summary judgment for EEOC!) where employee refused to sign “last chance agreement” that included a provision prohibiting employee from bringing EEOC Charge. *EEOC v. Cognis Corp.* ( C.D.Ill. 2010)

# Priority No. 6

## Preventing Harassment

Priority to prevent harassment based on

- Race
- Ethnicity
- Religion
- Age
- Disability



# Priority No. 6

## Preventing Harassment

### Enforcement Examples:

- Suit claimed construction company subjected African American laborers to racially-hostile work environment and terminating them for opposing harassment. *EEOC v. Olympia Constr. Inc.*, (S.D.Ala. March 20, 2013)

# Prepare for the SEP

- Review hiring and recruiting policies and practices for disparate impact
- Self-audit compensation systems
- Emphasize individualized assessment in all ADA matters
- Retrain employees on prohibited harassment
- If a charge is received, determine whether priority issue raised



# Final Word

**HIGH PRIORITY**

“Employers and unions would thus do well to review the list of priority areas and be sure their compliance programs are up-to-date regarding these issues.”

--Chai R. Feldblum, EEOC Commissioner, Jan. 9, 2012, “3 Take-Aways from the EEOC’s Strategic Enforcement Plan”

<http://corporatelaw.jdsupra.com>

- 3 Take-Aways, according to Commissioner Feldblum
  - EEOC has a targeted enforcement focus to achieve a “demonstrable impact” on unlawful discrimination
  - EEOC will be “active and engaged”
  - EEOC will establish a “coherent and vigorous” federal sector program

# Other Recent Supreme Court Decisions Impacting Employers

## Vance v. Ball State University, 133 S.Ct. 2434 (June 24, 2013)

- Who is a supervisor for purposes of establishing vicarious liability under Title VII?
- Court rejected the “nebulous” definition proposed by the EEOC in favor of a clear rule: A supervisor has the authority to take tangible employment actions against the employee (hiring, firing, and disciplining).

# Other Recent Supreme Court Decisions Impacting Employers

## University of Texas Southwestern Medical Center v. Nassar, **133 S.Ct. 2517 (June 24, 2013)**

- Court examined whether a plaintiff must establish “but-for” causation to prevail on a Title VII retaliation claim.
- After Price Waterhouse, Congress amended Title VII’s status-based discrimination provisions to allow plaintiffs a limited recovery if they can prove unlawful discrimination was a “motivating” or “substantial” factor in the employer’s action.
- However, because Congress did not similarly modify the anti-retaliation provision to include “motivating factor” causation, retaliation claims under Title VII require the plaintiff to prove that the retaliatory conduct would not have occurred but for the employee’s protected activity.



# Other Recent Supreme Court Decisions Impacting Employers

## **United States v. Windsor, 133 S.Ct. 2675 (June 26, 2013)**

- Supreme Court struck down the federal Defense of Marriage Act (DOMA), which denied over 1,000 rights and privileges under federal law to married same-sex couples.
- In states that recognize same-sex marriages, same-sex spouses are entitled to the same federal benefits as opposite-sex spouses, including benefits deriving from the Internal Revenue Code, FMLA, ERISA, COBRA, and HIPAA.
- Employers' obligations are less clear in states that do not recognize same-sex marriage; however, there will certainly be future legal battles on equal protection grounds in these states.

# Disclaimer

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