FEDERAL Employment Law Insider

An update on new federal law and regulation affecting your workplace

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DISCRIMINATION

EEOC files historic Title VII sex discrimination cases

by Vijaya Surampudi
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The Equal Employment Opportunity Commission (EEOC) has filed its first two lawsuits charging private-sector employers with sex discrimination on the basis of sexual orientation. Since 2013, the EEOC has been investigating private-sector complaints of sexual orientation discrimination. The recent cases, which were filed by the EEOC's Philadelphia district office, are the first to allege that Title VII of the Civil Rights Act of 1964 bars discrimination based on sexual orientation.

Supervisors' comments lead to lawsuits

In *EEOC v. Scott Medical Health Center P.C.*, filed in the U.S. District Court for the Western District of Pennsylvania, the EEOC brought suit on behalf of a former telemarketing employee. The agency alleged that a supervisor subjected the employee to a sexually hostile work environment by directing homophobic comments at his sexual history, lifestyle, and orientation. The agency further alleged that management's failure to take action caused the employee to quit rather than face further harassment.

The agency also brought *EEOC v. IFCO Systems* in the U.S. District Court for the District of Maryland. The EEOC claimed in this lawsuit that a lesbian forklift operator was harassed by her supervisor, who made comments directed at her sexual orientation and appearance, including:

- "I want to turn you back into a woman."
- "I want you to like men again."
- "Are you a girl or a man?"

The employee was fired just a few days after she complained about her manager's comments.

These new lawsuits highlight the EEOC's increasingly proactive stance that Title VII's protections against sex discrimination include employees and job applicants who do not conform to gender stereotypes or have had romantic relationships with same-sex partners.

Bottom line

The federal circuit courts have not yet recognized the EEOC's interpretation that Title VII prohibits sexual orientation discrimination. In fact, in cases brought by employees on their own, five federal appeals courts have ruled that Title VII doesn't cover sexual orientation. However, a number of district courts have agreed with the EEOC's interpretation.

Further, 20 states and the District of Columbia have passed legislation to protect workers from discrimination based on their sexual orientation. LGBT advocates and the civil rights community have struggled to pass similar legislation in the remaining states or get the Employment Non-Discrimination Act (ENDA) through Congress. Nonetheless, they are hopeful that more courts will begin to accept the EEOC's interpretation.

What's Inside

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Time will tell. In the meantime, employers should be aware that the EEOC is accepting and investigating charges and filing Title VII lawsuits alleging discrimination based on sexual orientation.

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UNION ORGANIZING

DOL's new 'persuader' rule a major victory for unions

by Steven R. Semler
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The U.S. Department of Labor (DOL) announced on March 24 a new "persuader activity" Final Rule that requires employers and their attorneys and consultants to file with the DOL for public disclosure all agreements and payments to attorneys and consultants for providing advice, counterorganizational campaign training, and assistance on maintaining nonunion status.

This is a major victory for unions, which have long been fighting for such a rule. The new rule reverses 57 years of law that stated attorney and consultant assistance on how to maintain nonunion status was exempt from such reporting under the "legal advice" exception of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA). The Final Rule applies to all such agreements, advice, and payments as of July 1, 2016.

Which activity must be reported?

The attorney, consultant, and employer each must report any attorney or consultant activity that has the object or purpose of dissuading employees from unionizing, including:

- Drafting union campaign literature, speeches, audiovisual presentations, or website content;
- Drafting counterorganizational talks or talking points for supervisors who meet with employees in groups or individually;
- Meeting with supervisors or management to oversee or strategize the counterorganizational strategy;
- Training supervisors in counterorganizational conduct;
- Coordinating or planning counterorganizational campaigns;
- Establishing employer policies to inhibit union activity; and
- Planning personnel actions or discipline to impact union activity.

'Legal advice' exception vastly limited

The Final Rule reverses the past precedent that enlisting attorneys or consultants for expert advice on how to lawfully campaign against unionization—given the hypertechnicalities of the National Labor Relations Act (NLRA)—is subject to the "legal advice" exception of the LMRDA's reporting and disclosure requirements. Now, oral or written agreements to provide those services and the fees paid for the services are reportable. And the information will be subject to public disclosure, meaning, for instance, that unions will be able to access the information to report to employees how much the employer is paying attorneys or consultants to persuade them to vote against unionization.

The exception for nonreportable legal advice is now extremely limited by the new rule to things like:

- Explaining the law, *but not for the purpose of persuading how to maintain nonunion status;*
- Reviewing employer-prepared counterorganizational literature for lawfulness and grammar, *but not to revise it for the purpose of achieving or enhancing persuasion against unionization;*
- Advising the employer about legal decisions or courses of conduct; and
- Representing the employer in legal proceedings or collective bargaining negotiations.

Employers' activities in buying "off the shelf" counterorganizational literature not customized for their workplace or attending trade association seminars on how to maintain nonunion status are exempted from the rule.

Bottom line

We predict a major legal attack against the new persuader rule. The very government that has made it so difficult for employers to know how to lawfully campaign against union organizing now plans to penalize employers for getting legal advice on how to lawfully resist unionization. The rule will force public disclosure of agreements and fees spent by an employer to maintain its nonunion status, resulting in exploitation by unions to attempt to embarrass the employer for "being generous with its attorneys but not with its employees."

Moreover, the new rule creates an unenforceable quagmire. Assume, for instance, that an employer drafts a piece of campaign literature informing employees that they may be "fired for going out on strike." The employer asks its attorney if the campaign literature is acceptable, and the attorney responds that the threat of termination is an illegal statement. The attorney's opinion about the illegality of the employer's statement does not trigger a reporting requirement under the rule.

But if the attorney goes on to propose a correction to the statement—for instance, revising it to state that

"employees who go out on strike for more pay may be subject to permanent replacement"—then the attorney arguably is engaging in persuader activity that triggers reporting by the attorney and the employer. Ironically, the conundrum created by the new rule may force employers into unwittingly committing legal violations in their opposition to union campaigns to avoid triggering their reporting obligations.

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INSIDE OSHA

OSHA penalties set to skyrocket this summer

by Eric J. Conn
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For as long as I have been practicing law focused on occupational safety and health (more than 15 years now), three things have remained constant:

(1) The maximum per-violation penalty authorized by the Occupational Safety and Health Act (OSH Act) has been $7,000 for "serious" violations and $70,000 for "repeat" or "willful" violations.

(2) The assistant secretary of labor for the Occupational Safety and Health Administration (OSHA) makes an annual pilgrimage to Capitol Hill, where he or she pounds on the table and demands that Congress enact reform legislation to increase the maximum penalties that OSHA can assign (reciting common refrains like: "Employers can be fined more for mistreating cattle on federal lands than for allowing an employee fatality!").

(3) There has been one iteration or another of such reform legislation (usually dubbed "Protecting America's Workers Act") floating around Congress and stalling before it even gets out of committee.

Yet last fall, the Republican-controlled House and Senate notwithstanding, through the back door came a congressionally mandated increase in OSHA civil penalties of nearly 80%. It was a bizarre parting gift from former Speaker of the House John Boehner, perhaps part of his effort to "clear the barn" for his successor.

The much publicized Bipartisan Budget Act of 2015 garnered broad support as the culmination of budget negotiations to resolve questions about whether the United States would avoid defaulting on its debt and remain open for business. While the public was focused on the portions of the law that would keep the government from shutting down, no one noticed the law's much less publicized provisions that mandated a nearly 80% cost-of-living "catch-up" adjustment in OSHA penalties to be implemented this year as well as indefinite periodic increases to match the rising costs of living in the future.

Cost of living goes up a lot in 25 years

The Bipartisan Budget Act of 2015 was passed by both houses of Congress and signed into law by President Barack Obama last November. Section 701 of the Act, titled "Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015," gives OSHA the green light to increase penalty amounts to catch up with cost-of-living adjustments since the last time OSHA's civil penalties were raised, which was in 1990.

Specifically, the provision authorizing the civil penalties adjustment provides for a one-time "catch-up adjustment" that must be implemented no later than August 1, 2016. The catch-up adjustment is based on the difference between the Consumer Price Index (CPI) at the time of the last increase in OSHA civil penalties in 1990 (the October 1990 CPI) and the CPI at the time the Budget Act was negotiated (the October 2015 CPI reported on November 17, 2015). The October 1990 CPI was 133.5, and the October 2015 CPI was 237.838—which means there was a 78% increase.

Assuming OSHA elects to increase penalties by the maximum allowable 78% (and we have to expect the agency will avail itself of that full authority), the maximum civil penalties for alleged "serious" violations will increase from $7,000 per violation to approximately $12,500, and for alleged "willful" or "repeat" violations from $70,000 per violation to approximately $125,000. After the initial catch-up increase, the Budget Act authorizes OSHA to adjust penalties upward as the CPI continues to rise year after year.

What does an increase mean for employers?

The impact of these increases cannot be understated. During fiscal year (FY) 2014, OSHA issued approximately $144 million in civil penalties to employers across approximately 36,000 workplace inspections. Factoring in a 78% penalty increase over last year's total penalty amount, OSHA fines would have been approximately $256 million.

Procedurally, the Budget Act directs OSHA to promulgate the penalty increases through an interim Final Rule, which allows the changes to become effective immediately upon publication in the *Federal Register,* with comments by stakeholders to be solicited after the fact. However, the agency is taking the position that the penalty increases will apply to all citations issued after the implementation date, even those issued for currently ongoing inspections. This quasi-retroactive application of the new regulation means that workplaces under

continued on pg. 5

FEDERAL CONTRACTOR CORNER

OFCCP has few victories in fight to close pay gap

by H. Juanita M. Beecher
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A recent investigative report by the *Wall Street Journal* (*WSJ*) found that the Office of Federal Contract Compliance Programs (OFCCP) has made little progress in its fight to close the gender pay gap despite a significant increase in money and staff. For fiscal year (FY) 2015, the agency collected $592,845 from eight contractors in cases in which it alleged discrimination against women and men based on sex. Federal contractors and OFCCP supporters who disagree on whether there is a gender pay gap agree that the OFCCP doesn't have the statistical or other expertise to find pay discrimination.

Between January 2010 and September 2015, the agency collected only $5 million for alleged pay discrimination on behalf of about 2,500 workers. The *WSJ* article compares that amount to the $5.5 million the agency collected in one case under the George W. Bush administration. The OFCCP's largest pay discrimination settlement last year was with Savannah River Nuclear Solutions for about $235,000 on behalf of 72 women and African-American men.

OFCCP Director Patricia Shiu said in an interview with the *WSJ* that the low recovery numbers reflect her efforts to focus the agency's efforts on complex cases, such as systemic pay discrimination affecting numerous workers, rather than the entry-level hiring cases that have been the agency's primary focus for many years. According to Shiu, her agency is pursuing "dozens of very big systemic discrimination cases throughout all kinds of industries." She added, "You'll see a real uptick in 2016, 2017, 2018."

However, so far in FY 2016, the agency has settled one pay case for about $329,000, although it has filed suit against B&H Foto & Electronics Corp. for pay discrimination against Hispanic workers.

In addition to settling fewer cases, the OFCCP is completing fewer audits than at any time in its recent history. Based on information received through a Freedom of Information Act (FOIA) request, the *WSJ* found that the OFCCP completed only 2,603 compliance audits in FY 2015. That compares with 3,839 audits in FY 2014 and a goal of 4,290 for FY 2015. Shiu's response to questions about the shortfall was that the numbers don't tell the full story and setting an artificial target encourages the staff to close cases rather than dig in when needed. "We're looking for results, not arbitrary numbers," said Shiu.

In response to questions about the agency's results, supporters and critics agree that recent results are "underwhelming." While supporters such as Marc Bendick, a labor economist and workplace discrimination expert, argue that the OFCCP's "enforcement devices are pretty feeble" to root out misconduct he describes as "widespread," critics like David Cohen of DCI Consulting argue that pay discrimination is not the norm because most contractors monitor their pay structures since they are subject to frequent OFCCP audits.

In 2010, President Barack Obama, through his National Equal Pay Task Force, challenged federal agencies to improve their coordination and enforce pay laws more aggressively. To improve its ability to fight pay discrimination, the OFCCP received a budgetary increase, going from $82 million to $105 million in the current fiscal year.

In 2013, Shiu changed the agency's audit rules, including requiring contractors to submit all employee salaries during each audit. According to contractors, the changes have created logjams at the agency, with audits that once took six months ballooning to two to three years. Properly analyzing individual pay data requires work by statisticians, HR professionals, and economists, which experts on both sides say the agency does not have. In response, Shiu said the OFCCP is "better run now than it has ever [been] since its inception."

Written testimony provided at EEOC public hearing

The panelists who testified at the Equal Employment Opportunity Commission's (EEOC) public hearing on March 16, 2016, provided written testimony about their support for, or concerns about, the agency's proposed changes to the EEO-1 that would require employers to report employee pay data.

Advocates, including Lisa Maatz of the American Association of University Women (AAUW), Hilary O. Shelton of the NAACP, Emily Martin of the National Women's Law Center (NWLC), Ariane Hegewisch of the Institute for Women's Policy Research (IWPR), Jocelyn Frye of the Center for American Progress (CAP), and Margot Dorfman of the U.S. Women's Chamber of

Commerce (USWCC), argued that the gender pay gap needs to be closed and that the EEO-1 proposal is a reasonable opportunity to do that. The NWLC's Martin said the EEOC should go further than the current proposal by covering more employers, narrowing the pay bands, and making the aggregated pay data public.

The management representatives—Amanda Wood of the National Association of Manufacturers (NAM); Elizabeth Milito of the National Federation of Independent Business (NFIB); Janese Murray of Exelon Corp., representing the Society for Human Resource Management (SHRM); Michael Eastman of the Equal Employment Advisory Council (EEAC); David Fortney of The OFCCP Institute; Gary Siniscalco of Orrick; and Camille Olson of Seyfarth Shaw for the U.S. Chamber of Commerce—uniformly objected to the burden the proposal would place on employers.

The OFCCP Institute's Fortney pointed out that the biggest flaw in the proposal was the EEOC's rejection of the National Academy of Sciences' (NAS) recommendation to use rates of pay. All of the management representatives agreed that annualized base pay would be more accurate than W-2 data. Olson, representing the U.S. Chamber of Commerce, raised the issue of how the data would be kept confidential and recommended that the EEOC withdraw its proposal.

For more information on the EEOC's recent hearing on the proposed EEO-1 reporting changes, see "EEOC holds public hearing on EEO-1 proposal" on pg. 7.

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continued from pg. 3

inspection right now, during the six-month statute of limitations period before the July implementation date, may be subject to the higher penalty structure.

The Budget Act allows OSHA to increase the penalty by an amount lower than the maximum permitted increase, but to do so, OSHA would have to follow a more traditional rulemaking approach. It's inconceivable that OSHA wouldn't use its maximum statutory authority, particularly given the greater rulemaking burden it would face to raise penalties by less than the maximum. In fact, earlier this month, OSHA officials indicated the agency has convened an internal work group to develop an interim Final Rule (signaling use of its full statutory authority). The interim Final Rule is expected to be issued by July of this year.

All expectations are that not only will the interim Final Rule raise the maximum statutory-based penalties, but it will also increase the minimum penalties the agency proposes under its penalty policy. Therefore, beginning this summer, allegations of even extremely minor "gotcha" infractions of the OSHA regulations may have very serious consequences.

Bottom line

This civil penalty development has greatly surprised those of us who have practiced in this area for many years. Broad-based reform of the OSH Act—including, most fundamentally, the civil penalty provisions and statutory caps—has been debated on Capitol Hill since I have been practicing OSHA law. OSHA reform has been one of those hot-button issues on which lawmakers on both sides of the aisle could never find common ground. As a result, we never expected to see a Republican-controlled Congress raise OSHA's maximum civil penalties at all, let alone at such a staggering level.

OSHA has claimed for years that it doesn't have "sharp enough teeth" to influence employers' conduct. This new law has certainly sharpened the agency's teeth, providing yet another reason why it's critically important for employers to make sure they remain in full compliance with all applicable OSHA regulations.

Eric J. Conn is a founding partner and chair of the national OSHA practice group at Conn Maciel Carey PLLC. ✤

FLSA ROUNDUP

Overtime regulations move to OMB for review

by Judith E. Kramer
Fortney & Scott, LLC

The U.S. Department of Labor (DOL) sent its overtime regulations to the Office of Information and Regulatory Affairs (OIRA) for review on March 14. OIRA is the branch of the Office of Management and Budget (OMB) that is the final way station before issuance of regulations. This means that although publication of the final rules had been scheduled for July of this year, a publication date in April or May is now more likely.

The final regulations will revise the requirements for employees to be deemed exempt from the overtime requirements of the Fair Labor Standards Act (FLSA). Last year, the DOL proposed an increase in the salary threshold for the so-called white-collar exemptions from $23,660 per year to the 40th percentile of salaries in the United States—a figure estimated to be approximately $51,000 per year. If the final regulations adopt that proposal, employees who are currently classified as exempt but earn less than $51,000 a year would no longer be exempt, and employers would be required to pay those

employees overtime whenever they work more than 40 hours in a workweek.

The final regulations may also change the "primary duty" test. Under the current regulations, an employee may be exempt, even if he spends less than 50 percent of his time performing exempt duties, as long as his primary duty or duties are exempt duties. In the final regulations, however, the DOL may adopt a new test—perhaps the test currently applied in California, under which an employee must spend more than 50 percent of his time performing exempt duties in order to be deemed exempt.

A number of recent court decisions address FLSA issues

Court of appeals upholds DOL regulation on tip credits. Under the FLSA and DOL regulations, an employer may meet part of its minimum wage obligation through the payment of tips if certain requirements are met. The regulations also prescribe the conditions under which an employer may employ a tip-pooling arrangement that requires certain employees, typically in restaurants, to pool their tips and share in the tips collected.

In *Cumbie v. Woody Woo, Inc.,* a case decided in 2010, the U.S. Court of Appeals for the 9th Circuit held that an employer isn't bound by the tip-pooling requirements (e.g., restrictions on which employees can share in the tip pool) unless the employer is taking a tip credit toward the minimum wage requirement.

In response to the *Woody Woo* decision, the DOL issued a new regulation in 2011 extending the FLSA's tip pool restrictions to all employers, not just those that take a tip credit toward the payment of the minimum wage. The district courts in two recent cases consolidated for appeal before the 9th Circuit held that the *Woody Woo* decision foreclosed the DOL's ability to promulgate the 2011 regulation, and the regulation was therefore contrary to law. The 9th Circuit disagreed with the lower courts in a decision issued on February 23, 2016, in *Oregon Restaurant and Lodging Assoc. v. Perez.*

> **The final regulations may also change the "primary duty" test.**

The appellate court ruled that its decision in *Woody Woo* was "grounded in statutory silence" and did not foreclose the DOL's ability to regulate the tip-pooling practices of employers that do not take a tip credit. The court of appeals stated:

> Congress has not addressed the question at issue because [S]ection 203(m) [of the FLSA] is silent as to the tip[-]pooling practices of employers who do not take a tip credit. There is no convincing evidence that Congress's silence, in this context, means anything other than a refusal to tie the agency's hands. In exercising its discretion to regulate, the DOL promulgated a rule that is consistent with the FLSA's language, legislative history, and purpose.

Not all workplace complaints give rise to FLSA retaliation claims. The FLSA prohibits an employer from retaliating against an employee based on her complaints about FLSA violations. However, as the 9th Circuit recently reaffirmed, "Not all amorphous expressions of discontent related to wages and hours constitute complaints filed within the meaning of § 215(a)(3) [of the FLSA]."

Danielle Richard, who was employed by Carson Tahoe Regional Healthcare as a charge nurse, alleged that she was terminated because she complained that the manner in which the hospital was staffed prevented nurses from taking mandatory breaks, and she suggested staffing changes to fix the problem. The problem with her allegation is that the FLSA doesn't require employers to provide breaks; it merely dictates the circumstances under which break time, if provided, is compensable work time.

The district court ruled that Richard's complaint about the hospital's failure to provide breaks wasn't protected activity; therefore, she wasn't terminated for engaging in protected activity under the law. The district court granted summary judgment (dismissal without a trial) in favor of the employer.

In affirming the district court's ruling, the court of appeals set forth the legal requirements for a claim of retaliation in violation of the FLSA: "For an employee's complaint to be protected, it 'must be sufficiently clear and detailed for a reasonable employer to understand it . . . as an assertion of rights protected by the statute and a call for their protection.'" *Richard v. Carson Tahoe Regional Healthcare,* decided March 2, 2016.

Failure to inform employer of off-the-clock work no bar to recovery of overtime. Karen Lopez-Easterling, a nonexempt employee, clocked in every morning, clocked out for lunch, clocked back in at the end of lunch, and clocked out at the end of her shift. She claimed that other employees frequently interrupted her lunch break by calling on her to answer customers' questions or assist new employees. Despite a statement in the employee handbook requiring hourly employees to maintain an accurate record of all hours worked each day and prohibiting them from working off the clock under any circumstances, Lopez-Easterling never informed her supervisor that she often worked during her lunch break.

In denying the employer's motion for summary judgment, the district court held that there was some evidence that Lopez-Easterling's supervisor knew she sometimes worked during her lunch breaks. Moreover,

the court held that Lopez-Easterling had established a genuine question of material fact about whether the employer had constructive knowledge of her uncompensated overtime work.

The court cited 11th Circuit precedent holding that an employer has a duty "to inquire into the conditions prevailing in his business." The fact that her supervisor may have known about the lunch interruptions imposed a duty on the employer to inquire further. Therefore, the court concluded that a jury must be allowed to decide whether the company had knowledge of Lopez-Easterling's alleged uncompensated off-the-clock hours. *Lopez-Easterling v. Charter Communications, LLC* (S. D. Ala., decided March 9, 2016).

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INSIDE THE EEOC

EEOC holds public hearing on EEO-1 proposal

by H. Juanita M. Beecher
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The Equal Employment Opportunity Commission (EEOC) held a public hearing on Wednesday, March 16, 2016, to discuss the pending proposed revisions to the EEO-1 report. The proposal would require all employers with 100 or more employees to provide in their EEO-1 reports employee pay data in aggregate pay ranges as well as hours worked, beginning in 2017. During the all-day hearing, the EEOC heard from U.S. Department of Labor (DOL) officials as well as three panels composed of industry experts, employer representatives, women's advocacy groups, and academics.

After initial remarks by EEOC Chair Jenny Yang and the other commissioners, Office of Federal Contract Compliance Programs (OFCCP) Director Patricia Shiu and Debra Carr of the OFCCP's Division of Policy and Program Development provided information on comments received in response to the OFCCP's proposed Equal Pay Report and the agency's cooperation with the EEOC in implementing a single pay data collection tool.

The EEOC then received feedback from the three panels of experts. Panel members submitted written statements to the commission prior to the hearing. At the hearing, the panel members presented oral testimony and answered questions from the commissioners.

While acknowledging the persistent wage gap, the experts' statements focused on the following issues:

- Improving transparency;
- Developing a tool that can identify indicators of potential pay discrimination for further investigation; and
- Minimizing the burden on employers.

The final panel of the day engaged in a robust discussion about confidentiality concerns raised by the collection, transmission, and publication of the proposed pay information. Based on comments and testimony at the hearing, the EEOC and the panel members were focused on the burden the proposed reporting obligations would place on employers and the utility of the proposed changes.

In her closing remarks, Yang again encouraged public comments on the proposed changes. The comment period was scheduled to close on April 1. On March 22, Senator Lamar Alexander (R-Tennessee), chair of the Senate Health, Education, Labor, and Pensions Committee, sent a letter to Yang requesting a 90-day extension on the comment period.

EEOC releases details of FY 2015 workplace discrimination charges

The Equal Employment Opportunity Commission (EEOC) released detailed breakdowns of the 89,385 charges of workplace discrimination the agency received in fiscal year (FY) 2015. In FY 2015, the EEOC resolved 92,641 charges and secured more than $525 million in restitution for allegations of discrimination in private-sector as well as state and local government workplaces.

The charge numbers show the following breakdowns by bases alleged:

- Retaliation: 39,757 (44.5% of all charges filed)
- Race: 31,027 (34.7%)
- Disability: 26,968 (30.2%)
- Sex: 26,396 (29.5%)
- Age: 20,144 (22.5%)
- National origin: 9,438 (10.6%)
- Religion: 3,502 (3.9%)
- Color: 2,833 (3.2%)
- Equal Pay Act: 973 (1.1%)
- Genetic Information Nondiscrimination Act (GINA): 257 (0.3%)

In addition to the above categories, harassment allegations made up nearly 28,000 charges, or 31%. Employees claimed harassment in charges based on race, age, disability, religion, national origin, and sex, including sexual orientation and gender identity.

The agency filed 142 merits lawsuits last year, up from 133 the previous year. The majority of the lawsuits

filed alleged violations of Title VII of the Civil Rights Act of 1964, followed by suits under the Americans with Disabilities Act (ADA). This included 100 individual lawsuits and 42 lawsuits involving multiple victims of discriminatory policies, of which 16 were systemic. Legal staff resolved 155 lawsuits alleging discrimination.

In light of the fact that retaliation continues to be the leading category for charges, the EEOC is currently seeking public input on its proposed update of enforcement guidance addressing retaliation and related issues as part of its commitment to inform the public about its interpretation of the law and promote voluntary compliance.

New digital filing system

As of January 1, 2016, all of the EEOC's 53 offices have implemented Phase I of the Digital Charge System. The first phase of this system allows employers against whom a charge of employment discrimination has been filed to interact online with the EEOC through a respondent portal.

The application notifies the respondent by e-mail that a charge has been filed, and the secure respondent portal allows the respondent to:

- View and download the charge;
- Review an invitation to mediate and respond to it;
- Submit a position statement and attachments to the EEOC;
- Submit a response to an EEOC request for information; and
- Provide/verify its contact information, including the designation of a legal representative.

In 2016, the EEOC plans to expand the Digital Charge System to add a secure portal for individuals who file a charge of employment discrimination and to enhance the communications and documents transmitted through the system for both charging parties and respondents.

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