EEOC 2014 CHARGE STATISTICS: DISCRIMINATION CHARGES AGAINST EMPLOYERS DROP, BUT RISKS REMAIN HIGH

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On February 4, 2015, the Equal Employment Opportunity Commission (EEOC) released its 2014 Charge Statistics reporting the number of charges of discrimination filed by employees from October 1, 2013 through September 30, 2014. The overall number of charges filed was down nearly 5,000 from prior years (the EEOC attributes the reduction in charges filed to the governmental shutdown in October 2013, but the improving economy may also be a factor). A look behind the numbers, however, reveals some interesting trends that should caution employers to remain vigilant.

<table>
<thead>
<tr>
<th></th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Charges**</td>
<td>93,277</td>
<td>99,922</td>
<td>99,947</td>
<td>99,412</td>
<td>93,727</td>
<td>88,778</td>
</tr>
<tr>
<td>Retaliation</td>
<td>33,613</td>
<td>36,258</td>
<td>37,334</td>
<td>37,836</td>
<td>38,539</td>
<td>37,955</td>
</tr>
<tr>
<td>Race</td>
<td>33,579</td>
<td>35,890</td>
<td>35,395</td>
<td>33,512</td>
<td>33,068</td>
<td>31,073</td>
</tr>
<tr>
<td>Sex</td>
<td>28,028</td>
<td>29,029</td>
<td>28,534</td>
<td>30,356</td>
<td>27,687</td>
<td>26,027</td>
</tr>
<tr>
<td>Disability</td>
<td>21,451</td>
<td>25,165</td>
<td>25,742</td>
<td>26,379</td>
<td>25,957</td>
<td>25,369</td>
</tr>
<tr>
<td>Age</td>
<td>22,778</td>
<td>23,264</td>
<td>23,465</td>
<td>22,857</td>
<td>21,396</td>
<td>20,588</td>
</tr>
<tr>
<td>National Orgin</td>
<td>11,134</td>
<td>11,304</td>
<td>11,833</td>
<td>10,883</td>
<td>10,642</td>
<td>9,579</td>
</tr>
<tr>
<td>Religion</td>
<td>3,386</td>
<td>3,790</td>
<td>4,151</td>
<td>3,811</td>
<td>3,721</td>
<td>3,549</td>
</tr>
<tr>
<td>Color</td>
<td>2,943</td>
<td>2,780</td>
<td>2,832</td>
<td>2,662</td>
<td>3,146</td>
<td>2,756</td>
</tr>
<tr>
<td>Equal Pay</td>
<td>942</td>
<td>1,044</td>
<td>919</td>
<td>1,082</td>
<td>1,019</td>
<td>938</td>
</tr>
<tr>
<td>GINA</td>
<td>-</td>
<td>201</td>
<td>245</td>
<td>280</td>
<td>333</td>
<td>333</td>
</tr>
</tbody>
</table>

First, retaliation charges were at an all-time high, representing nearly 43% of the 88,778 charges filed and thus continuing an upward trend since 2009. A considerable number of EEOC charges now include retaliation in addition to a discrimination claim. Retaliation is a question of fact, rather than a question of law. Therefore, inclusion of retaliation in a discrimination complaint makes it more difficult for an employer to win summary judgment motion in the event a lawsuit is filed as a result of the EEOC charge. In addition, retaliation claims have a greater potential for punitive damages given the necessarily intentional nature of such claims, thus making them an attractive avenue for employees and the plaintiffs’ bar.

Second, the number of race discrimination charges has stayed steady at around 35% for the past few years. This should be concerning for employers as it suggests that despite great

**When added together, the percentages above equal more than 100% because some charges included multiple allegations (e.g., discrimination and retaliation).
strides in workplace diversity, racial minorities continue to believe, rightly or wrongly, that they are subjects of discrimination. In addition, there is generally a correlation between allegations of discrimination and retaliation.

Third, employees filed 333 charges (0.4%) alleging violation of GINA, the Genetic Information Non-Discrimination Act. When the EEOC began its enforcement of GINA in 2010, only 201 charges were filed and those charges represented 0.1% of charges filed that year. While 0.4% is not a significant percentage compared to other charges, the over 60% increase in a four-year period may signal that more employees (and their attorneys) are recognizing GINA as another source of litigation. In addition, the EEOC has taken keen interest in GINA through its focus on employers’ wellness programs as evidenced by recent lawsuits filed by the agency. In the lawsuits, the EEOC essentially alleged that some wellness programs are discriminatory against individuals with disability and genetic predispositions to certain diseases who, because of their medical and genetic conditions, may be unable to participate or may fail health assessments that are often required to obtain premium decreases or other incentives under the wellness programs.

Fourth, Texas (8,035), Florida (7528) and California (6,363) had the most number of charges. This could be attributed to a number of factors, including greater population and ongoing higher unemployment rates in those states. Texas and California are also generally considered more “employee-friendly” jurisdictions given some large and historical EPL verdicts that have emerged from those states.

Finally, despite the overall reduction in charges, the EEOC recovered over $318 million on behalf of employees through its combined enforcement, litigation and settlement efforts. Although these figures are also lower than prior years, they do support the general view that the EEOC remains aggressive and committed to seeking relief for employees through its enforcement authority.

EMPLOYMENT PRACTICES LIABILITY (EPL) COVERAGE IMPLICATIONS

At the end of 2014, average premium for employment practices liability insurance (EPLI) policies were flat to approximately 5% increase. A number of insurers have explained the “transitioning” market by noting they can no longer sustain the decreases seen during the soft market period of 2007-2012. Yet, other insurers have cited increasing frequency of single plaintiff claims in states like California and Texas as the reason for seeking higher rates and, in some cases, retentions. It is no secret that, in addition to client-specific risk profiles, EPL insurers look at the annual EEOC charge statistics as indication of what can be expected of their EPL book. Therefore, if charge statistics continue to trend downward, we expect EPL premiums to steadily follow suit or at a minimum remain flat, with the exception of accounts that may have high claim frequency and/or undergoing significant workforce activities, such as reductions in force. We expect carriers to continue to seek rates and/or retention increases in states, such as California, Florida and Texas, where the most charges were filed and insurers have long had trepidation.

Unless specifically endorsed otherwise, EEOC charges are typically included in the definition of “claim” under EPLI policies. However, late reporting of EEOC charges remains the number one reason for denial of coverage under EPLI policies. While several carriers now offer “forgiveness” of the late notice through claim savings or EEOC continuity clauses that purport to excuse the late notice (as long as the insured renews coverage with the same insurer), it is important to note that these “forgiveness” provisions or endorsements are not full proof against denial of coverage. For example, most carriers will not forgive the late notice if the insured has engaged in settlement negotiations prior to providing notice of the EEOC charge or any resulting lawsuit. Accordingly, to maximize coverage under EPLI policies, purchasers of such policies are advised to adhere strictly to the notice provisions under their policies and promptly report EEOC charges.
BEST PRACTICES FOR EMPLOYERS

The above trends in EEOC charge statistics are not comprehensive but should serve as reminders for employers that employment practices are ever-evolving and while recent court decisions have mostly favored employers, EPL is still a tremendous area of exposure for companies. Accordingly, employers should continue to, among other practices, take the following steps to mitigate EPL exposure:

- Maintain and enforce fairly and consistently a zero-tolerance anti-discrimination policy, and promptly investigate complaints of discrimination.
- Ensure that all supervisory employees have been trained and understand that retaliation of any kind – including subtle – is prohibited, even when the employee's complaint is believed to be meritless.
- Ensure that supervisors are properly trained on the requirements of GINA, the Americans with Disabilities Act (the ADA).
- Regularly update employment policies and procedures – EPL laws are constantly evolving, particularly at state levels where remedies tend to be broader for aggrieved employees.
- Ensure that separation agreements include all required provisions with respect to older workers – failure to include mandated provisions under the Age Discrimination in Employment Act, as well as the Older Workers Benefit Protection Act, could invalidate an otherwise valid release.
- Ensure social media policies do not inappropriately limit employees' rights to complain about working conditions.
- When in doubt, consult with outside legal counsel with respect to employment-related decisions before making major termination, demotion and/or reassignment decisions.
- Purchase or maintain adequate EPL insurance and work with an experienced broker who will ensure that emerging trends are addressed in the coverage – not all EPL policies are created equal.

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