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Jump-Starting The EEOC's Systemic Initiative?

Law360, New York (February 25, 2010) -- In April of 2006, the Equal Employment Opportunity Commission adopted a task force recommendation to revamp the agency's systemic enforcement program. The intent of the new initiative was to increase the number of big, class-type cases being brought by the EEOC. From the beginning, the new program faced a substantial head-wind based on limited funding.

From FY 2006 through FY 2008, the agency's budget was essentially flat at approximately \$329,000,000. As a result, EEOC operated under a hiring freeze and staffing at the Office of General Counsel (OGC), which conducts the litigation, and the Office of Field Programs (OFP), which processes the charges prior to litigation dipped below acceptable levels.

The squeeze was reflected in the number of merits cases filed, which declined from 383 to 371 in FY 2006, to 336 in FY 2007, and to 290 in FY 2008. This represents a cumulative 24 percent decline in case filings over the period. Nevertheless, some progress was made in shifting toward more big case litigation.

In FY 2008, the agency filed 17 lawsuits that were "systemic" in that they involved at least 20 known claimants at the time of filing. This compares to 14 suits of that size filed in FY 2007 and 11 in FY 2006. At least to a small extent, the shift toward bigger cases could help explain the decline in the absolute number of filings.

FY 2008 also saw resolution of 15 systemic cases. Over half of these were cases involving 100 or more claimants. In FY 2007, there were only four settlements with 100 or more claimants, and in FY 2006 there were none at all.

By FY 2009, the resource squeeze appears to have caught up with the systemic program. The total of 12 systemic filings was lower than either of the prior two years. The 13 resolutions was down from 15 the prior year. Only three involved 100 or more claimants, fewer such settlements of that size than in either FY 2008 or FY 2007.

I believe the decline in case filings overall, and particularly in systemic filings, is attributable to two budget-related factors:

- 1) The shortage of litigators in the district offices means there is a limited ability to file and manage additional cases; and
- 2) The understaffing of OFP has restricted the pipeline of cases that have been investigated and conciliated and, therefore, are eligible for litigation. Indeed, the charge backlog ballooned from 39,946 at the end of FY 2006 to 73,951 at the end of FY 2008.

A Substantial Funding Increase

The change of administration and in the Congress coincided with a significant increase in funding for the agency. The FY 2009 budget increased by 4.5 percent to \$344,000,000. The administration's FY 2010 budget would increase EEOC funding by an additional 6.7 percent to \$367,000,000.

The proposed FY 2011 budget would add another 5 percent to \$385,303,000. Together, the actual 2009 budget and the 2010 and 2011 proposals would boost EEOC funding by 16.5 percent over the last year of the Bush administration.

The agency feels relatively flush. The hiring freeze is long gone as the agency is aggressively hiring for OFP as well as OGC. I understand that OGC is already in the process of adding 20 new attorneys to the district office litigation staff, an increase of 20 percent. The proposed budgets (2010 and 2011) contemplate an addition of 385 new employees at the agency. This will undoubtedly mean additional lawyers and investigators in the field.

Impact on Litigation

The additional bodies will obviously increase the capacity of the agency to investigate and conciliate charges, and to conduct additional district court litigation. OFP's hiring has included a number of statistical experts who are being assigned to the field offices.

A shortage of these resources had proved a particular impediment to processing bigger cases. The impact will not be immediate, as the new employees must be trained and integrated, but the effect should be apparent over the next several years.

It is also likely that a competition for these new resources could be created among the regional attorneys and district directors. A logical way to make the case for an increased share of the bounty would be by investigating and filing additional big cases.

This new environment creates potential dangers for employers. Employers should be alert for the hallmarks of systemic litigation: commissioner charges, directed investigations, or regular charges with broad class implications. Consolidation of a number of charges for investigation or requests for broad statistical information also could signal a systemic investigation.

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