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## **Federal Employment Law Update 2019-2020**

**Danielle K. Herring**

Author Contact Information:  
Danielle K. Herring  
Littler Mendelson, P.C.  
1301 McKinney Street, Suite 1900  
Houston, Texas 77010  
dherring@littler.com  
(713) 652-4735

## **I.**

### **INTRODUCTION**

The latter part of 2019 and into 2020 were shaping up to be active times on the employment law front. In January 2020, alone, over 800 labor and employment-related bills, ordinances, and regulations were considered at the state and local levels. On the federal level, the United States Supreme Court and administrative agencies, in particular, remained engaged, but nothing monumental occurred. That is, until what was once a mysterious illness in China spread across the globe as the coronavirus (COVID-19) pandemic, causing fatalities, sickening millions and shutting down countless offices and businesses around the world. The pandemic has promoted significant administrative and legislative action that has reshaped the framework of a number of federal employment laws.

## **II.**

### **2019-2020: AGENCIES, LAWS, REGULATIONS AND EXECUTIVE ORDERS**

#### **A. AGENCY DEVELOPMENTS**

##### **1. Equal Employment Opportunity Commission**

The composition of the EEOC and its leadership were among the most notable developments in FY 2019. The EEOC began 2019 with the loss of its quorum, when then-Commissioner Chai Feldblum (D)'s term expired in early January. That left only two sitting members—Acting Chair Victoria A. Lipnic (R) and Commissioner Charlotte Burrows (D); three sitting commissioners are required for a quorum of the five-member Commission. In December 2018, while it still had a quorum, the Commission delegated significant authority to its field offices, such that day-to-day operations of the agency were not significantly impacted in the absence of a quorum. Significant policy or litigation matters were put on hold during this time (the Commission was also among those federal agencies that were shuttered for the 35-day government shutdown).

In May 2019, the U.S. Senate confirmed Janet Dhillon as Chair of the EEOC, restoring its quorum and, for the first time in the current administration, giving the EEOC a Republican majority. Chair Dhillon will serve a term ending July 1, 2022. Upon Chair Dhillon's confirmation, Acting Chair Lipnic resumed her role as a commissioner with a term scheduled to end on July 1, 2020 (although, as we have seen in the past, given the Commission's holdover rules, if she is not reconfirmed she may continue to serve past the expiration of her term, potentially until early January 2021).

In August 2019, the Senate re-confirmed Democratic Commissioner Burrows for a term ending July 1, 2023. At the same time, it confirmed Sharon Fast Gustafson as the EEOC's general counsel. Gustafson is the first woman to hold the position of general counsel in the agency's 50+ year history, and the first confirmed general counsel in the current administration (for the first two and a half years of the administration, the GC role had been filled on an acting basis by a career EEOC attorney).

As of this writing, there remain two vacant Commissioner seats—one Republican, one Democratic. In July 2019, the president nominated Keith Sonderling, who currently serves as

deputy administrator of the Wage and Hour Division at the U.S. Department of Labor, to fill the Republican seat (if confirmed, his term would expire on July 1, 2024). Sonderling's nomination expired at the end of the congressional session in December 2019, and will need to be resubmitted by the White House during the 2020 session. On March 2, 2020, the White House announced its intent to nominate private-sector attorney Andrea Lucas (R) (who would succeed Commissioner Victoria A. Lipnic (R) at the expiration of her term this year) and civil rights attorney Jocelyn Samuels (D) to the Commission; their nominations are likely to be formally submitted to the Senate in the near future. Sonderling's nomination for the open Republican seat will likely be resubmitted to the Senate at the same time.<sup>1</sup>

#### **a. EEOC Enforcement Priorities**

The EEOC continues to operate under the Strategic Enforcement Plan (SEP) it adopted in 2016, which covers Fiscal Years 2017-2021. That SEP sets forth the agency's enforcement priorities in greater detail, and identifies core areas of interest where the agency will focus its limited resources.<sup>2</sup> These priorities include:

- Eliminating barriers in recruitment and hiring that discriminate against protected classes, including “exclusionary policies and practices” and “screening tools that disproportionately impact workers based on their protected status”;
- Protecting vulnerable workers, including immigrant and migrant workers and underserved communities, from discrimination by way of job segregation, harassment, trafficking, pay discrimination, and retaliation;
- Addressing selected emerging and developing legal issues, including ADA qualification standards and “inflexible” leave policies; accommodation of pregnancy-related limitations; protection of LGBT workers; complex or non-traditional employment relationships and the on-demand economy; and “backlash” religion or national origin discrimination against certain workers;
- Ensuring equal pay protections for all workers, not solely on the basis of sex, but on all other protected bases;
- Preserving access to the legal system via close scrutiny of “overly broad” waivers, releases, and mandatory arbitration agreements; applicant and employee data and retention policies; and “significant” retaliatory practices; and
- Preventing systemic harassment, including policies, practices, or patterns of workplace harassment.

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<sup>1</sup> Littler Mendelson, P.C. ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2019 (March 2020) (citations omitted).

<sup>2</sup> EEOC, *Strategic Enforcement Plan Fiscal Years 2017 – 2021*, available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

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