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Federal Employment Law Update 2023-2024

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I. INTRODUCTION

The American economy is unquestionably influenced by a multitude of factors both domestic and international. The U.S. Federal Reserve recently held interest rates steady, signaling continued concern about recent news about inflation. At the same time, foreign policy concerns regarding conflicts (or potential conflicts) around the globe impact policy decisions that either directly or indirectly impact the economy. There has also been a marked shift in the labor market following the Covid-19 pandemic with changes to its structure and make-up that will likely be felt for decades to come.

At the same time that these forces are shaping and re-shaping the economy, employment policymaking from the executive and legislative branches as well as case law decisions from the judicial branch continue to influence the labor market in other ways. The current administration has promulgated numerous rules to regulate employment relationships over the last several years, with several significant updates coming to a head during the last 12 months. There have also been a myriad of court decisions that have upended and transformed the rules that govern some of the most important employment laws over the last year.

This paper and the associated presentation aim to give an overview of some of these major changes.

II. 2023-2024: AGENCY ACTIONS

A. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

1. EEOC Leadership

It was not until the fourth year of the Biden administration that the Equal Employment Opportunity Commission obtained a majority of confirmed Democratic commissioners. With the resignation of Republican former Chair Janet Dhillon in November 2022, the five-member Commission's membership was reduced to four for most of 2023. President Biden nominated plaintiffs' bar attorney **Kalpana Kotagal** to replace Commissioner Dhillon, but the Senate failed to act on her confirmation prior to adjourning. In January 2023, the White House resubmitted her nomination, and she was confirmed on July 13, 2023 for a term expiring in July 2027. The Commission is now chaired by Democratic Commissioner **Charlotte A. Burrows**, who was subsequently confirmed in November 2023 to a third term, which expires in July 2028. **Jocelyn Samuels**, also a Democrat, now serves as vice chair with a term expiring in July 2026. Republican Commissioner **Keith Sonderling**, whose term expires on July 1, 2024, and Republican Commissioner **Andrea R. Lucas**, whose term expires in July 2025, fill the two remaining seats.

The general counsel's position also remained unfilled for an extended period over the last three years since former General Counsel Sharon Fast Gustafson was removed by the White House in March 2021. President Biden nominated **Karla Gilbride**, a senior attorney at a legal advocacy non-profit firm, to serve as general counsel. After the Senate initially failed to confirm her

nomination, Gilbride was renominated and confirmed on October 17, 2023, for a term expiring in 2027.

Due to the aforementioned confirmation process, which deprived the Commission of a Democratic majority for much of the Biden Administration, Chair Burrows has been somewhat limited in her ability to revisit policies from the Trump administration or to move forward on substantive policies in-line with the Biden administration's agenda. The Chair exercises significant control over the administration and operations of the agency and its 53 offices around the country, wielding broad discretion in setting the Commission's agenda—what items the agency will consider and vote upon, and which it will not, as well as scheduling meetings of the Commission to examine issues or vote on disputed matters.

2. EEOC FY 2023 Statistics

During the past fiscal year, the EEOC received 81,055 new charges of discrimination, up from the 73,485 charges received in FY 2022.¹ The EEOC also reports that it secured over \$665 million in monetary relief for victims of employment discrimination.² This includes \$440.5 million for individuals in private sector and state and local government workplaces plus \$202 million for federal workers. The EEOC filed 143 lawsuits, which is a 50% increase over FY 2022, including 86 suits on behalf of individual charging parties, 32 non-systemic suits, and 25 systemic suits.³ These filings alleged violations covering multiple bases, including retaliation (56), sex (50), disability (43), race (24), age (12), religion (10), and national origin (8).⁴ The EEOC resolved 98 merits lawsuits with a total recovered \$22.6 million in litigation.⁵

The ongoing surge in charges has contributed to a continuing inventory of unresolved charges for FY 2023. At the end of the fiscal year there were still 51,100 pending, only a slight decrease over the prior year's backlog.⁶ According to the Commission, managing its charge inventory included fielding more than 522,000 calls from the public through the Agency's contact center, up from the 475,000 calls received in FY 2022.⁷ The EEOC also reportedly handled over 86,000 emails, which represents an increase of over 25% over the prior fiscal year.⁸ To address this increased demand, the Agency has hired more than 493 employees for new positions, with the majority being front-line staff (i.e., investigators, investigative support assistants, mediators, and attorneys), ending the year with 2,331 total employees.⁹

¹ 2023 Annual Performance Report, U.S. EQUAL EMP. OPPORTUNITY COMM'N, *A Message from the Chair*, available at <https://www.eeoc.gov/2023-annual-performance-report> (last visited May 3, 2024).

² *Id.*, *Summary of Fiscal Year 2023 Performance Highlights*.

³ *Id.*

⁴ *Id.*, *Challenging Discrimination in Federal District Court*.

⁵ *Id.*

⁶ *Id.*, *Summary of Fiscal Year 2023 Performance Highlights*.

⁷ *Id.*, *Providing Public Service through the Information Intake Group*.

⁸ *Id.*

⁹ *Id.*, *Strengthening the Enforcement Capacity of the Agency in the Private Sector*.

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