

***DRAFT for PUBLIC RELEASE***  
**U.S. EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION  
STRATEGIC ENFORCEMENT PLAN**

**09.04.12 Version**

## **I. INTRODUCTION**

The U.S. Equal Employment Opportunity Commission's (EEOC) Strategic Plan for Fiscal Years 2012 - 2016 directed the Commission to develop a Strategic Enforcement Plan (SEP) that (1) establishes priorities for the EEOC and (2) integrates all components of EEOC's private, public, and federal sector enforcement. These components include the Commission's investigation, conciliation and litigation responsibilities in the private and state and local government sectors; its remedial power and oversight responsibilities in the federal sector; its research and policy development activities; and its education and outreach efforts.<sup>1</sup>

In adopting this SEP, the EEOC takes an important step toward fulfilling its mission to "stop and remedy discriminatory practices in the workplace" so that the nation can finally realize the vision of "justice and equality in the workplace."

### ***Background***

The EEOC is a bipartisan body composed of five members who are appointed by the President and confirmed by the Senate. The President designates one member of the EEOC to serve as Chair. The Chair is responsible for the administrative operations of the EEOC and for the hiring of personnel.

The EEOC's General Counsel, also appointed by the President and confirmed by the Senate, is responsible for the conduct of litigation pursuant to the agency's statutory authority.

The EEOC is the nation's lead governmental enforcer of employment anti-discrimination laws and chief promoter of equal employment opportunity. The Commission, through its staff, is responsible for enforcing Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1967 (ADEA), the Equal Pay Act of 1963 (EPA), Section 501 of the Rehabilitation Act of 1973, Titles I and V of the Americans with Disabilities Act of 1990 (ADA), and Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA). Together, these laws protect individuals from employment discrimination on the basis of race, color, religion, sex, national origin, age, disability, or genetic information. They also make it illegal to retaliate against a person for opposing employment discrimination, filing a charge of discrimination, or participating in an investigation or lawsuit regarding employment discrimination.

The EEOC has jurisdiction to enforce the nation's anti-discrimination laws in three sectors – private, state and local government, and federal. Congress granted EEOC the power to "prevent any person from engaging in any unlawful employment practice." 42 U.S.C. § 2000e-5(a). The EEOC is charged with achieving this goal by investigating and conciliating charges brought by individuals or by Commissioners alleging unlawful discrimination by private employers and state and local government employers. Further, the General Counsel and legal staff have authority to litigate cases against private employers to enforce all of the federal equal employment opportunity laws and against state and local government employers to enforce the

ADEA and EPA. The Department of Justice has authority to bring litigation against state and local governments in Title VII, ADA, and GINA cases.

In the federal sector, the Commission has authority to hold hearings on complaints of discrimination by federal employees and applicants and to adjudicate appeals of decisions on such claims. The Commission also has oversight responsibility to review, approve, and evaluate federal agency compliance with federal equal employment opportunity laws.

The Commission is also charged with providing education and technical assistance to those with rights and responsibilities under the various employment anti-discrimination laws and with performing technical studies that will help effectuate the purposes of employment anti-discrimination laws. Finally, the Commission collects data on the private, state and local government, and federal workforces.

Since the EEOC opened its doors in 1965, the nation has made great strides towards equal employment opportunity for all. Never before in our nation's history has the American workplace been more diverse and inclusive than it is today. Greater racial and ethnic diversity can be found at every level of professional leadership; women comprise nearly half of the nation's workforce; and technological advances have made it possible for persons with disabilities to participate fully in the workplace.

Yet, despite this progress, equal employment challenges remain, and the EEOC's work is unfinished. Far too many of today's workers are still subjected to pernicious forms of discrimination, including racial and sexual harassment. The nation still confronts discriminatory practices, such as retaliation; hiring practices that limit employment opportunities based on race, national origin, sex, religion, age, and disability; and practices that exploit immigrant and vulnerable workers.

Over the last twenty years, the EEOC has seen a 38 percent rise in the number charges filed against private employers and state and local government employers. In 2011, EEOC received nearly 100,000 charges of discrimination. Of those, 85,463 charges were filed against private employers and 14,484 were filed against state and local government employers. Another 45,000 charges are dual-filed with the EEOC each year, but investigated by state and local fair employment practices agencies (FEPAs).

In FY2011, federal employees and applicants filed 16,974 complaints of alleged unlawful employment discrimination. The number of requests for hearings on federal sector complaints in FY 2011 increased by 5.3% from FY 2010 (8113 in FY 2011 compared to 7707 in FY 2010), while the number of appeals from final agency decisions increased by 13.9% (5176 appeals in FY 2011 compared to 4545 in FY 2010).

Even as the nation confronts a dramatic rise in claims of discrimination, the resources allocated to the EEOC and designated for the FEPAs have failed to keep pace. Between Fiscal Year 2000 and 2008, staffing levels and funding dropped nearly 30 percent. An infusion of resources in 2009 allowed for some rebuilding of capacity, but that was quickly stalled when funding was

reduced and hiring freezes were implemented in FY 2011 and 2012. The agency is faced with meeting all of its mission responsibilities at a time of unprecedented demand for its services, notwithstanding its limited resources.

## **II. DEVELOPING THE STRATEGIC ENFORCEMENT PLAN**

### **A. *The Strategic Plan***

On February 22, 2012, the U.S. Equal Employment Opportunity Commission approved a Strategic Plan for Fiscal Years 2012 – 2016. The plan establishes a framework for achieving the EEOC’s mission to “stop and remedy unlawful employment discrimination,” so that the nation might realize the Commission’s vision of “justice and equality in the workplace.” The plan has three objectives: 1) Combat employment discrimination through strategic law enforcement; 2) Prevent employment discrimination through education and outreach; and 3) Deliver excellent and consistent service through a skilled and diverse workforce and effective systems.<sup>2</sup>

Under its first objective, the Strategic Plan directed the Commission to develop a Strategic Enforcement Plan (SEP) that 1) establishes EEOC priorities and 2) integrates the agency’s investigation, conciliation and litigation responsibilities in the private and state and local government sectors; adjudicatory and oversight responsibilities in the federal sector; and research, policy development, and education and outreach activities. The SEP also addresses whether separate, but complementary local or federal sector plans are needed.

### **B. *SEP Process***

The SEP is the product of an extensive effort by staff and Commissioners and broad public input. A Work Group consisting of a cross-section of field and headquarters staff, led by Chair Jacqueline Berrien, General Counsel David Lopez, and Memphis District Director Katharine Kores provided significant input to the Commission. *See Appendix A for a list of Work Group members.*

On June 5, 2012, the Commission solicited written input on the SEP’s development. In response, comments were received from more than 100 individuals, organizations, and coalitions internal and external to the agency and from across the nation. *See Appendix B for June 5 release.*

On July 18, 2012, the Commission held a public meeting to receive input from more than 30 stakeholders on the issues they believed should be addressed in the plan. *See Appendix C for the press release.*

On September 4, 2012, the Commission released a draft of the SEP for public comment.

### **C. Guiding Principles**

The Commission is guided by the belief that targeted enforcement efforts will have the broadest impact to prevent and remedy discriminatory practices in the workplace. Targeted enforcement also supports effective management of the agency's charge inventory, as a clearly defined set of priorities informs categorization of charges to promote timely and efficient resolution. Finally, the Commission recognizes that in order to make the best use of limited resources, the agency will have to undertake an integrated approach to its work, one that mobilizes all segments of agency operations and emphasizes effectiveness, efficiency and consistency.

**1. A Targeted Approach.** A targeted approach means focused attention on a clearly-identified set of issues and implementation strategies.

A targeted approach contemplates that certain priorities will receive a greater share of agency time and resources, even as the Commission carries out its statutory obligations. Federal agencies, as well as private entities, often utilize targeted enforcement of specific practices or industries to secure compliance while managing their limited resources.<sup>3</sup> Indeed, the Priority Charge Handling Procedures (PCHP), adopted by the EEOC in 1995, specified that priorities under the National Enforcement Plan and local enforcement plans would be the top category of charges in the investigative process. For agencies that receive complaints, this form of targeting shifts the enforcement paradigm from complaint-driven to priority-driven. It also provides agency leadership and staff with clear guidance regarding the appropriate allocation of available resources.

**2. An Integrated Approach.** An integrated approach ensures the full use of communications, outreach, education, training, research, and technology as tools to advance the agency's overall mission in concert with administrative enforcement (investigations, mediations, and conciliations) and legal enforcement (litigation, amicus curiae participation, and policy development in the private and state and local government sectors, and hearings and appeals in the federal sector). An integrated approach also envisions collaboration and coordination among staff, offices, and program areas and promotes the sharing of information and strategies. Moreover, an integrated approach requires that all internal agency plans, policies, and procedures be designed and/or reconciled to reduce inefficiency and inconsistency, to maximize customer service, and to further the ultimate goals of the agency.

An integrated approach also recognizes that, where possible, enforcement in all three sectors should be coordinated and consistent. Further, Commission policies and positions that apply to private employers and state and local governments should, where applicable, be applied to the federal government as an employer as well.

**3. Accountability.** No organization can operate well without consistent standards of quality and service. At the same time, an organization cannot operate well if every decision is made centrally. The SEP sets forth clear standards for communicating with the Commission, so that the Commission may exercise its statutory responsibilities and ensure that a strategic, integrated and consistent enforcement approach is carried out.

#### ***D. Previous Plans***

The Commission's previous efforts to establish priorities, integrate enforcement, and manage the charge inventory consisted of the National Enforcement Plan, Priority Charge Handling Procedures, Comprehensive Enforcement Program, and Systemic Task Force Recommendations.

**Priority Charge Handling Procedures.** In 1995, the Commission adopted a Priority Charge Handling Procedures (PCHP) system to categorize and expedite the handling of its charge inventory and to allow the agency to focus its resources on strategic enforcement. PCHP revoked the full investigation protocol of the 1980s. The PCHP system was designed to work in tandem with the National Enforcement Plan so that the agency would focus investigative resources on issues identified in the National Enforcement Plan and Local Enforcement Plans. In 2010, the EEOC undertook efforts to improve the agency's charge inventory management under PCHP.

**National Enforcement Plan of 1996.** Approved by the Commission in 1996, the National Enforcement Plan (NEP) articulated the general principles governing the Commission's enforcement efforts, established national enforcement priorities, set parameters for Local Enforcement Plans (LEPs), and delegated significant litigation authority to the General Counsel. The SEP reaffirms the delegation of litigation authority set forth in the NEP, but replaces the remainder of the NEP.

**Comprehensive Enforcement Program of 2000.** In 2000, Chair Ida Castro initiated a Comprehensive Enforcement Program (CEP) to recommend best practices for administrative and legal enforcement coordination in the development of cases. In 2011, Chair Jacqueline Berrien, General Counsel David Lopez, and Director of the Office of Field Programs Nicholas Inzeo, reaffirmed the importance of these principles in directives to field staff.

**Systemic Task Force Recommendations of 2006.** The recommendations of the Systemic Task Force, unanimously adopted by the Commission in 2006, established a nationwide systemic program as a top priority of the Commission. In adopting the Systemic Task Force Report, the Commission sought to change how EEOC operated by requiring plans and procedures for early identification of systemic cases, by deploying the resources needed for successful systemic enforcement, and by implementing a national law firm model. Through the SEP, the Commission reaffirms the approach and principles of the Systemic Task Force, that systemic enforcement must be strategic, nationwide, coordinated and adequately resourced.

### **III. PRIORITIES**

The Commission identifies the following issue priorities, with the goal and expectation that a concentrated and coordinated approach will result in reduced discrimination in these areas. Some of the priority categories, such as hiring discrimination, raise challenging and complicated issues affecting all of the protected classes, which EEOC is better situated than the private bar to address given its investigatory authority and access to data. Other priorities, such as emerging issues, are more discrete, and a concerted effort by the Commission could result in greater awareness of and compliance with equal employment laws.

The strategies for effectively addressing the priorities will vary as well. For some, a multi-pronged, coordinated enforcement, education and outreach, research and policy effort may be appropriate. For others, education and outreach may be the primary strategy. Similarly, the Commission does not expect that every EEOC office will approach every SEP priority identically or with the same level of intensity. Charge trends and demographic differences may demand a more localized approach in addressing different priorities, which will be set forth in the District Complement Plans (see Section IV.C).

#### *A. Criteria for Determining Priorities*

The Commission has identified priorities for national enforcement in the private, state and local government, and federal sectors based on the following criteria:

1. Issues that will have broad impact because of the number of individuals or employers affected;
2. Issues involving developing areas of the law, where involvement by the leading governmental agency charged with enforcing employment anti-discrimination laws is appropriate;
3. Issues affecting workers who may lack an awareness of their legal protections, or who may be reluctant or unable to exercise their rights;
4. Issues involving discriminatory practices that impede or impair full enforcement of employment anti-discrimination laws; and
5. Issues that may be best addressed by the EEOC given its access to data and research.

#### *B. Nationwide Priorities*

1. **Eliminating Systemic Barriers in Recruitment and Hiring.** The EEOC will target class-based intentional hiring discrimination and facially neutral hiring practices that adversely impact particular groups.

Racial and ethnic minorities, older workers, women, and people with disabilities continue to confront discriminatory policies and practices at the recruitment and hiring stages. These include exclusionary policies and practices, the channeling/steering of individuals into specific jobs due to their status in a particular group, restrictive application processes, and the use of screening tools (e.g., pre-employment tests, background screens, date of birth screens in online applications) that adversely impact groups protected under the law. Because of the access EEOC has to obtain data and documents and potential evidence of discrimination in recruitment and hiring, the EEOC is better situated to address these issues than individuals or private attorneys who have difficulties obtaining such information.

**2. Protecting immigrant, migrant and other vulnerable workers.** The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory language policies affecting these vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.

**3. Addressing Emerging Issues.** The EEOC will continue its efforts to address emerging employment issues in the nation's workforce. Given EEOC's research, data collection and receipt of charges and complaints in the private, public and federal sectors, the agency is well-suited to identify emerging trends and potential discriminatory practices. Swift and responsive attention to events, recently enacted legislation, and developing judicial and administrative interpretations and theories has the benefit of preventing the spread of discriminatory practices by promoting greater awareness and enabling voluntary compliance.

As an example, the EEOC undertook efforts immediately following the attacks of September 11<sup>th</sup> to address workplace backlash based upon the actual or perceived national origin and religious practices of employees. EEOC also conducted targeted education and outreach directed to employee and employer representatives. The agency followed with aggressive administrative and legal enforcement of charges and cases alleging religious and national origin discrimination.

Current emerging issues that EEOC will target include:

- ADA Amendments Act issues, particularly coverage issues, and the proper application of ADA defenses, such as undue hardship, direct threat, and business necessity;
- LGBT (lesbian, gay, bisexual and transgender individuals) coverage under Title VII sex discrimination provisions, as they may apply;<sup>4</sup>
- Accommodating pregnancy when women have been forced onto unpaid leave after being denied accommodations routinely provided to similarly situated employees.

**4. Preserving Access to the Legal System.** The EEOC will also target policies and practices intended to discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC's investigative or enforcement efforts. These policies or practices include retaliatory actions; overly broad waivers; settlement provisions that prohibit filing charges with EEOC or providing information in EEOC or other legal proceedings; and failure to retain records required by EEOC regulations.

Retaliation against individuals is the most common discriminatory practice that impedes enforcement of the federal anti-discrimination laws. Yet for all of EEOC's administrative and legal enforcement efforts over the years aimed at curbing the practice, retaliation persists and is now the largest category of charges the EEOC receives and the largest category of federal sector complaints. To improve our effectiveness, the Commission believes that a targeted outreach and education effort aimed at educating both employers and employees about their rights and responsibilities under EEO laws with respect to retaliation will make greater headway toward preventing retaliatory conduct in the workplace.

**5. Combating Harassment.** For many years, the EEOC has focused administrative and enforcement efforts to curtail workplace harassment on the basis of race, color, sex, ethnicity, age, disability and religion. Nevertheless, these practices – often the most pernicious and direct – persist. As with retaliation, it is therefore necessary to re-evaluate our strategies to be more effective, including refocusing our efforts on a national education and outreach campaign aimed at both employees and employers, many of whom struggle with how to prevent and appropriately respond to harassment in the workplace.

#### **IV. Implementation of SEP National Priorities**

The following guidelines are intended to ensure SEP priorities receive the appropriate level of agency resources and achieve the goals of a targeted and integrated national law enforcement approach.

##### ***A. Implementation of Priorities in Administrative and Legal Enforcement (Private Sector and State and Local Government Sector)***

Identifying priorities for targeted enforcement is a critical tool for strategically managing investigations and guiding case selection. Prioritization of some charges over others is a key element of PCHP as originally designed in 1995, which was premised on the development of priorities in the National and Local Enforcement Plans. The SEP will now guide prioritization of investigations and case selection, which may be supplemented by district priorities set forth in the District Complement Plans (see Section C below).

The pursuit of any investigation or case must be guided first and foremost by the strength of the evidence and its potential as a vehicle for strong law enforcement. Charges or cases should not be pursued, even if they fall within a priority category, unless a rigorous assessment of the merits determines significant law enforcement potential. Implementing SEP priorities through administrative and legal enforcement will require increased coordination within and between offices, particularly for systemic cases, to facilitate strategic decisions about which types of charges and cases within the SEP priorities should be pursued and where and when they should be pursued.

The Office of Field Programs and Office of the General Counsel should also ensure that they strengthen capacity in priority areas through expanded training on investigating and litigating priority issues and facilitate greater collaboration in the investigation, development, and resolution of priority charges.

##### **1. Priority Charge Handling Procedures (PCHP) Implementation**

Charges raising SEP or district priority issues shall be initially designated as Category A charges. Once an assessment of the merits has occurred, charges deemed meritorious that raise SEP or district priorities shall receive increased investigatory attention and resources to ensure timely

and quality enforcement action. As the investigation proceeds, offices are expected to re-evaluate the “A” designation and should promptly recategorize as needed.

Under PCHP, SEP and district priority charges, except for individual disability, harassment and retaliation charges, are the highest priority among Category A charges. Because of the large volume of individual disability, harassment and retaliation charges, these charges should only be categorized as category A charges if they present strong vehicles for development of the law.

PCHP also includes within the A category charges where further investigation will probably result in a cause finding and charges where irreparable harm will result unless processing is expedited. Within resource constraints, these meritorious non-priority charges may be pursued. But where they are of equal strength to an SEP or District priority charge, the priority charge should take precedence.

SEP priorities aid in the proper categorization of charges and EEOC’s continuing efforts to manage and reduce its charge inventory. Meritorious non-priority charges should receive quality, but limited investigations. Mediation or other forms of alternative dispute resolution should be considered for these charges.

## **2. Litigation Program**

Meritorious cases raising SEP or district priority issues should be given precedence in litigation recommendations and selection over non-priority issue cases. Where resources permit, meritorious cases in non-priority areas may also be filed. Nevertheless, neither the Commission nor the General Counsel will establish rigid goals as to the number of cases, priority or otherwise, that should be filed. Where appropriate, SEP priorities should also be considered in selecting cases for amicus curiae participation.

The Commission recognizes that it will not be able to litigate every case that fails conciliation, including cases that fall within the SEP. Thus, the Commission encourages the General Counsel, District Directors, and Regional Attorneys to continue to collaborate with the EEOC’s state and local partners, the private bar, and non-profit organizations to support their critical role in civil rights enforcement.

## **3. Systemic Program**

In the Strategic Plan, the Commission reaffirmed the importance of eradicating systemic discrimination and recognized that systemic enforcement continues to be a top priority for the agency.<sup>5</sup> The Commission defines systemic cases as pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area.

The Commission directs that meritorious systemic charges, investigations, and cases that raise SEP priority issues should be given precedence over non-priority matters, whether individual or systemic. As part of District Complement Plans, district offices will identify systemic issues for targeting to fully integrate systemic enforcement consistent with the SEP and the Strategic Plan.

## ***B. Strategic Enforcement Teams***

Strategic Enforcement Teams, appointed by the Chair, should develop specific, integrated and comprehensive strategies for some of the priority areas. Where appropriate, those teams should address strategies for the private, state and local government, and federal sectors, including administrative enforcement (including Directed Investigations and Commissioners Charges), litigation, amicus curiae participation, federal sector oversight, federal sector appeals, policy development, internal training, media, internal and external communications, outreach and education, and state, local, and federal agency collaboration. Teams should also identify measures for evaluating the collective success of the strategies.

The strategies developed by the teams are to be considered recommendations to the Chair, the Commissioners, the General Counsel, Program Directors, Office Directors and Regional Attorneys. Nothing in this section is meant to alter existing lines of authority.

## ***C. District Complements to the SEP***

The priorities above lay out a vision for the EEOC operating as a *whole* -- as a national enforcement agency dedicated to eradicating unlawful employment discrimination. The EEOC's 15 district offices and 38 field, area, and local offices are integral components to the SEP's appropriate implementation at the local level.

The SEP contemplates that implementation strategies, types of cases investigated, and cases filed raising SEP priority issues will vary from office to office. Yet, even as EEOC offices focus on national priorities, the Commission recognizes that local challenges and opportunities may demand targeted attention as well. Therefore, pursuant to the Strategic Plan, the SEP is required to address whether local enforcement plans should be developed. After careful consideration of previous local enforcement plan efforts, the Commission has determined that those plans are critical to effective implementation of the SEP.

Under the leadership of the General Counsel and the Director of the Office of Field Programs, each District Office Director and Regional Attorney, in consultation with Field, Local, and Area Directors in their district, shall develop a District Complement Plan to the SEP by March 29, 2013. At a minimum, these plans should 1) identify how the office will implement the SEP priorities and Strategic Enforcement Teams' strategies and 2) identify local enforcement priorities, including systemic issues, and strategies for addressing them, as appropriate.

District Complement Plans shall be submitted to the Chair for review and approval to ensure that, taken together, they effectively complement the Commission's national priorities. Prior to the Chair's approval, the plans will be circulated to the Commissioners and General Counsel for review and comment.

The District Complement Plans shall be updated as the SEP is updated, or as necessary to remain current and relevant, and will be subject to the same review and approval process detailed above.

#### ***D. Federal Sector Complement to the SEP***

The Strategic Plan also requires that the SEP address the need for a federal sector enforcement plan. After careful consideration of the differences between the EEOC's enforcement role and needs in the private and federal sectors, the Commission has determined a federal sector plan is needed.

Under the leadership of the Chair, the Director of the Office of Federal Operations and Director of the Office of Field Programs shall develop a Federal Sector Complement Plan (FCP) to the SEP by March 29, 2013.

At a minimum, this plan should 1) identify how the federal sector will implement the SEP priorities and Strategic Enforcement Teams' strategies and 2) identify federal sector-specific enforcement priorities and strategies for addressing them, as appropriate. The priorities set forth in this SEP and the FCP will apply to the Commission's consideration of complaints received in the federal sector.

This plan should also take into consideration how federal sector-specific enforcement priorities will be reflected in the upcoming federal sector case management system, required by Performance Measure 3 of the Strategic Plan. Moreover, the plan should address how future federal sector-specific enforcement priorities will be identified in light of the forthcoming integrated data system, required by Performance Measure 5 of the Strategic Plan, which will be used to identify and address potentially discriminatory policies or practices in federal agencies.

As noted in the integration section below, the FCP may also recommend strategies for addressing integration issues in federal sector enforcement.

The Commission shall review and vote on the plan to ensure it effectively implements the Commission's national priorities.

The FCP shall be updated as the SEP is updated, or as necessary to remain current and relevant and will be subject to the same review and approval process detailed above.

#### ***E. Other Priorities***

The SEP replaces all existing enforcement priorities.

### **V. INTEGRATION**

The EEOC has been afforded many internal tools and authorities – administrative enforcement (including investigations, mediation, and conciliation), litigation, amicus curiae participation, policy development, federal sector oversight and adjudication, education, and outreach – through which it pursues its mission to stop and remedy unlawful employment discrimination. There are also agencies at the federal, state, and local level that enforce workplace anti-discrimination laws as well and with whom the EEOC partners. Ensuring that each of these components works

together efficiently and effectively is both a challenge and an opportunity for the EEOC. As noted in the guiding principles above, the Commission is committed to an integrated approach at the EEOC that overcomes these challenges and seizes these opportunities, beginning with the following requirements.

***A. Integrating Administrative and Legal Enforcement Activities in the Private and State and Local Government Sectors***

The importance of ensuring a seamless, integrated effort between the staff who investigate and conciliate charges and staff who litigate cases on behalf of the Commission has been emphasized by the Commission<sup>6</sup> and by the courts.<sup>7</sup> Indeed, the Supreme Court has recognized the importance of the integrated, sequential obligations that Congress had placed on the EEOC.<sup>8</sup>

The goal of an investigation is to determine whether there is reasonable cause to believe that discrimination has occurred. The EEOC's legal staff has skills that can help in determining whether such discrimination has occurred. As both the courts and the Commission have recognized, the agency's dedication to maintaining an objective, neutral stance as it investigates charges is entirely consistent with the active involvement by the agency's lawyers in such investigations. EEOC attorneys assume their advocacy role only after the agency has found reasonable cause to believe that discrimination occurred, and has attempted conciliation and failed.

Many EEOC offices already ensure legal staff are appropriately consulted during the administrative process, but to establish a baseline of consistency across all offices so that the "integrated, multistep enforcement procedure" that the Supreme Court referenced becomes an enduring reality, this SEP requires:

- 1. Consultation between Administrative and Legal Enforcement Staff.** The Commission reaffirms the importance of regular and meaningful consultation and collaboration between investigative and legal staff throughout the investigative and conciliation process, consistent with the directives to the field issued by the General Counsel and Director of the Office of Field Programs in 2011. District Offices shall provide Legal/Enforcement Interaction Plans to the General Counsel and the Director of the Office of Field Programs. Upon request, these plans shall be shared with the Chair and Commissioners.

Every effort should be made to ensure that this collaboration does not cause unnecessary delay in the administrative process. Indeed, the Commission expects that an integrated approach will increase quality and timeliness in the investigations of priority issues as investigative and legal staff work collaboratively on such charges.

The Commission also expects that the Quality Control Plan, required by Performance Measure 2 of the Strategic Plan for all investigations and conciliations, will incorporate the integrated approaches embraced in the SEP.

- 2. Nationwide Coordination of Systemic Enforcement.** The Systemic Program is one of the EEOC's most successful enforcement programs. At its core, the program embraces the principles of an integrated approach to enforcement by requiring that administrative and legal enforcement work together on systemic cases.

Pursuit of systemic matters raising SEP priority issues should utilize integrated strategies, including research, outreach, and communications to have the broadest impact. The investigation, conciliation, and litigation of systemic priority cases should be complete in seeking company-wide changes and compensation for all affected individuals.

Systemic enforcement should also be coordinated across EEOC districts, Offices are expected to collaborate, partner and support each other. To ensure nationwide coordination, the Commission requires the following:

To insure nationwide coordination, the Committee of Advisors on Systemic Enforcement (CASE) will provide recommendations to the Chair, Commissioners, General Counsel and field offices on what, if any, changes need to be made to the Systemic Program in light of the SEP.

### ***B. Integrating Federal Sector Activities***

While the statutory obligations of the Commission's responsibilities in the federal sector differ from the Commission's enforcement responsibilities in the private and state and local governments sectors, the same principles of targeted, integrated and consistent enforcement apply. Moreover, the same goals for equal employment opportunity should apply for employers, employees, and applicants in all sectors.

The EEOC's federal sector enforcement program has integration issues that pose potential hurdles to efficient and effective enforcement. To promote increased coordination in the federal sector, the SEP requires:

- 1. Consistent Application of Commission Policies Across the Federal Sector.** Under the leadership of the Chair, the Director of the Office of Federal Operations and Director of the Office of Field Programs should develop a plan to improve communication, oversight, and consistency across the federal sector, including consistency (a) between OFO and the hearings program, and (b) across OFO appeals units, and (c) across district units. This plan should be developed as part of, and incorporated into the FCP; and
- 2. Re-evaluation of Federal Sector Hearings Structure.** Currently, Administrative Judges who conduct hearings on federal sector complaints reside in the Office of Field Programs (OFP) and the attorneys who draft opinions on behalf of the Commission in appeals from final agency decisions reside in the Office of Federal Operations (OFO). The EEOC's internal and external stakeholders have long encouraged the Commission to consider whether this structure best serves federal agencies, employees and job applicants and best furthers the EEOC's mission. Indeed, past Chairs have evaluated the issue before and at some length, but

without final resolution. Without prejudice as to outcome, the Commission believes that in the context of the Strategic Plan, which requires this SEP and a federal sector Quality Control Plan for hearings and appeals,<sup>9</sup> this issue should be evaluated again and final recommendations made as to the appropriate placement of Administrative Judges.

The Chair shall appoint a Federal Sector Hearings Team to make recommendations as to the placement of Administrative Judges in the EEOC's structure. The EEOC's Administrative Judges Association and union should be consulted. The Commission shall review and vote on these recommendations by the end of Fiscal Year 2013.

### ***C. Integrating Education and Outreach Activities***

Congress specifically recognized the importance of education and outreach as a part of EEOC's powers when it created the Commission in 1964 and in subsequent statutory amendments.<sup>10</sup> The Office of Field Programs and the Office of Federal Operations conduct hundreds of fee-based and free technical training and assistance programs each year for employers, employees, and stakeholder groups. Additionally, the Commission issues regulations and guidance to assist employers and employees in understanding their rights and responsibilities under the federal anti-discrimination laws.

Clear and accessible information and legal guidance are crucial aspects of preventing discrimination and furthering enforcement. To ensure the public has easy access to information and technical assistance from the EEOC and that the EEOC is presenting a coordinated and consistent national message, the Commission adopts the following:

1. Under the leadership of the Chair, the Legal Counsel shall develop a multi-year plan for reviewing and updating subregulatory guidance to support and further the implementation of the SEP priorities, consistent with Performance Measure 11 in the Strategic Plan. This plan shall be shared with the Commissioners and General Counsel for review and comment.
2. Under the leadership of the Chair, the Directors of the Office of Communications and Legislative Affairs (OCLA), Office of Field Programs, and Office of Federal Operations, shall collaborate to develop a multi-year nationwide communications plan that integrates the agency's public education and outreach efforts (including program outreach, technical assistance, and legislative outreach) to ensure effective agency message development and management. The plan may have both national and local components. These offices shall also coordinate with the Strategic Enforcement Teams, to ensure the communications plan includes an education and outreach strategy for SEP and FCP priority areas. This plan shall be shared with the Commissioners and General Counsel for review and comment.
3. OCLA shall assume responsibility for the content management of the EEOC's public website, the most comprehensive vehicle for the agency's public communications.

#### ***D. Integrating Research and Enforcement***

Among the powers granted to the Commission is the power to “make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public.” Today, the authority to collect data and conduct analysis is central to the EEOC’s enforcement and educational efforts.

The Commission must be able to conduct relevant research on a timely basis for cases in litigation, and have the ability to research broad issues of employment discrimination that are not connected to pending cases. Moreover, the Commission must have the appropriate technological capacity to collect data in a useful form.

In order to enhance integration for research, the Commission adopts the following recommendation:

Under the leadership of the Chair, the Office of Research and Information Planning (ORIP), the Office of Field Programs, the Office of Federal Operations, the Office of the General Counsel, and the Office of Information Technology, shall develop a multi-year research plan that identifies research needs for the SEP priority areas and includes an integrated approach for working with all offices within the Commission. Offices shall also coordinate with the Strategic Enforcement Teams. The plan shall include a description of any upgrades or integrations that are required for the Commission’s data systems, as well as an estimate of the costs for such upgrades and integrations. This plan shall be shared with the Commissioners and General Counsel for review and comment.

#### ***E. Collaboration between the Commission and Federal Employment Practice Agencies***

State and local Fair Employment Practices Agencies (FEPAs) are critical partners in the EEOC’s enforcement of equal employment laws. As noted above, FEPAs currently investigate approximately 45,000 charges a year that are dual filed with the EEOC. In March 2011, the Commission received a report that evaluated the effectiveness of the FEPA program and its management and made a number of recommendations for improving the program.<sup>11</sup> In order to enhance integration with the FEPAs, the Commission adopts the following recommendation:

Under the leadership of the Chair, the Office of Field Programs shall develop mechanisms, including the use of model worksharing agreements and EEOC-FEPA collaborations, to encourage FEPA support of SEP and DCP priorities. This plan shall be shared with the Commissioners and General Counsel for review and comment.

#### ***F. Supporting Private Enforcement of the Federal Anti-Discrimination Laws***

The Commission has an obligation to ensure meaningful legal protections for individuals while also effectively using its resources to have the greatest impact. Headquarters and each district, field, area and local office must view their relationship with individuals, employers, and their legal representatives or advocates as cooperative. With regard to all charges, the EEOC’s staff

must share, to the greatest extent permitted under the law, information they have collected regarding the charge with charging parties, respondents, and their attorneys.

Given its limited resources, the EEOC litigates only a fraction of the charges it receives annually. In FY 2011, the Commission filed 261 lawsuits on the merits. In contrast, 16,879 federal lawsuits were filed by private litigants under the federal civil rights statutes in calendar year 2011. Suits by individuals are a critical part to the enforcement of federal anti-discrimination laws.

To better assist those charging parties whose charges are not pursued by the EEOC, District offices may provide referrals to local and state bar associations.

### ***G. Consistent Practices, Procedures, and Processes***

Consistent procedures and processes are essential within and throughout the agency's enforcement programs. A consistent approach promotes the adoption of best practices. Public input received by the Commission into the development of the Strategic Enforcement Plan criticized the agency for inconsistent practices and procedures in field offices, and for delays and a lack of quality in private sector investigations and federal sector investigations, hearings and appeals. Many stakeholders stressed the importance of consistency, quality and timeliness in agency operations as critical to the agency having a credible and effective enforcement program.

The Commission anticipates that the Quality Control Plans for private sector investigations and for federal sector hearings and appeals as part of the implementation of the 2012-2016 Strategic Plan will provide focused attention to consistency and quality issues.

## **VI. DELEGATION OF AUTHORITY**

With the goals of increasing strategic enforcement, freeing the Commission to focus on policy issues, and increasing the efficiency and effectiveness of EEOC's enforcement program, the Commission delegated substantial authority to its District Directors, to its General Counsel (and through the General Counsel, to its Regional Attorneys), and to its Office of Federal Operations. This delegation has been successful and results in a more efficient and effective system than one that depends on Commission votes for all activities.

The delegation of authority from the Commission to its District Directors is codified throughout 29 C.F.R. pt. 1601. Commission regulations authorize administrative judges to hold hearings on federal sector complaints in 29 C.F.R. §1614.109, and for the Office of Federal Operations to issue decisions on appeals "on behalf of the Commission" under §1614.405.

The Commission reaffirms the Delegation of Litigation Authority to the General Counsel, as stated in Section V of the 1996 National Enforcement Plan. Each quarter, the General Counsel will report to the Commission on each new case filed pursuant to the delegated authority procedure set out above and on significant new settlements. A written report to the Commission provided prior to the meeting will briefly describe the issue, basis, and scope of the case, and

indicate whether authority to file it had been delegated to the Regional Attorney by the General Counsel. The General Counsel's report shall include an assessment of how the delegation of authority has been exercised and whether the Commission's stated goals have been better achieved as a result of the delegation. The General Counsel shall also report on significant Supreme Court decisions that affect the work of the Commission.

## **VII. EVALUATION**

The Commission believes this is an opportune moment to aim for bold and transformative change. Our belief and hope is that those who care passionately about eradicating unlawful employment discrimination will embrace the strategic enforcement and integration recommendations of the SEP.

For the Strategic Plan and the SEP to succeed, resources and performance plans must align with priorities. Performance Measure 14 in the Strategic Plan for FY 2012-2016 requires this alignment for budgetary resources. In addition, the Performance Improvement Officer and Deputy Performance Improvement Officer are responsible for insuring that performance plans are updated in accordance with the current Strategic Plan.

### ***A. Commission Oversight on Implementation of SEP***

The Commission has the responsibility to carry out its statutory mandate in a manner that provides consistent and quality service and that maximizes the impact on stopping unlawful employment discrimination. The SEP puts into place systems for regular communication with the Chair and Commissioners to fulfill their oversight responsibilities.

#### **1. Quarterly Commission Meetings on SEP Enforcement**

The Chair will convene quarterly meetings on implementation of the SEP beginning with the first quarter of FY 2013.

The Director of the Office of Field Programs shall report on significant decisions by administrative judges in the federal sector. The Director of the Office of Federal Operations shall report on significant appellate decisions by OFO attorneys. A written report by each Director to the Commission shall briefly describe the issue, basis, and scope of the significant decisions.

The Director of the Office of Field Programs shall report on major investigations, conciliations, and pre-determination settlements on SEP and District priority issues. A written report to the Commission shall briefly describe the issue, basis, and scope of the major investigations, conciliations, and settlements.

The General Counsel will report to the Commission as described in the Delegation of Authority section described above.

## **2. Annual Reporting on SEP Implementation**

The Commission will report annually on implementation of the Strategic Enforcement Plan to evaluate progress and consider recommendations for improvement.

### ***B. Timeline***

[A timeline will be included in the final plan.]

### **EFFECTIVE DATE**

The SEP will take effect October 1, 2012 and will remain in effect until September 30, 2016, or until a new Strategic Enforcement Plan is approved by the Commission.

## **APPENDIX A**

[The SEP Work Group membership roster will be included in the final plan.]

## APPENDIX B

*Press Release 6-5-12*

### **EEOC Seeks Public Input in Developing Strategic Enforcement Plan**

In February 2012, the U.S. Equal Employment Opportunity Commission (EEOC) approved a [Strategic Plan](#) for Fiscal Years 2012 – 2016. The Strategic Plan establishes a framework for achieving the EEOC's mission to stop and remedy unlawful employment discrimination by focusing on strategic law enforcement, education and outreach, and efficiently serving the public. The first performance measure of the plan requires the Commission to approve a Strategic Enforcement Plan (SEP). The Commission is now developing the SEP and would like input from the public. We encourage participation from individuals, employers, advocacy groups, agency stakeholders and other interested parties.

While no specific format is required, we are most interested in what the EEOC's national priorities should be for the next three years to have the greatest impact in combating discrimination in the workplace; and recommendations for improving enforcement, outreach and prevention, and customer service. Please also include a contact email and/or mailing address.

Suggestions must be submitted by 5:00 pm EDT on June 19, 2012 to [strategic.plan@eoc.gov](mailto:strategic.plan@eoc.gov) or received by mail at *Executive Officer, Office of the Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507*.

All submissions will be reviewed for possible inclusion in a future Commission meeting in Washington, D.C. on the development of the SEP. If selected, the author or a representative would be invited to testify before the Commission in person, via phone, or via live video.

For general inquiries about the 2012 Strategic Plan or the development of the SEP, please email [strategic.plan@eoc.gov](mailto:strategic.plan@eoc.gov) or call (202) 663-4070/(TTY: 202-663-4494). For press inquiries, please contact the Office of Communications and Legislative Affairs at (202) 663-4191 or [newsroom@eoc.gov](mailto:newsroom@eoc.gov). If you are a private citizen seeking EEOC information, please see the "Contact Us" page of our website at [www.eoc.gov/contact](http://www.eoc.gov/contact) or call 1-800-669-4000.

The EEOC enforces federal laws prohibiting employment discrimination. Further information about the EEOC is available on its web site at [www.eoc.gov](http://www.eoc.gov).

## APPENDIX C

*Press Release 7-18-12*

### **EEOC Holds Unprecedented Public Meeting to Hear Views on Strategic Enforcement Plan**

*Five Roundtable Discussions With 32 People From Many Different Viewpoints Presented*

WASHINGTON—The U.S. Equal Employment Opportunity Commission today [held an unprecedented public meeting](#) at which academics, representatives of the civil rights, business and federal sector communities, as well as former EEOC leaders and current employees presented their views about the agency’s proposed Strategic Enforcement Plan (SEP).

“We welcome the views of interested members of the public as we consider how to better leverage the EEOC’s resources to improve enforcement, outreach and customer service,” said EEOC Chair Jacqueline Berrien. “An open strategic planning process ensures that the Commission is prepared for 21st century challenges and also honors the spirit of open government.”

The Strategic Enforcement Plan grew out of the agency’s [Strategic Plan](#) (Plan) adopted at a [Commission meeting](#) on February 22, 2012, governing fiscal years 2012-2016. That Plan set forth three underlying values that will guide the work of the EEOC: commitment to justice, accountability, and integrity; and three strategic objectives: strategic law enforcement, education and outreach, and efficiently serving the public. One requirement of the Strategic Plan was to develop the SEP and have it in place by the start of fiscal year 2013—October 1, 2012.

While all cabinet level departments and agencies are required to develop Strategic Plans with enforcement components, it is highly unusual that plans are developed with so much input from the public. The EEOC sought views about what its national priorities should be for the next three years to have the greatest impact in combating discrimination in the workplace; and also recommendations for improving enforcement, outreach, and customer service. Over 80 organizations and individuals responded to the request for input, with their responses totaling more than 450 pages.

At the meeting, participants noted the importance of the EEOC continuing to use systemic investigations and litigation to target specific issues and practices where government enforcement will have the greatest impact. Several advocacy groups urged the Commission to focus its enforcement efforts on hiring discrimination and retaliation which affect so many workers, as well as focusing on pay, pregnancy, and caregiver discrimination, and developing issues under the Americans with Disabilities Act Amendments Act. Both employee and employer representatives highlighted the need for consistent practices and procedures across field offices. Participants from many different backgrounds requested the

Commission devote more resources to enhance efficient charge processing, and urged new outreach and education initiatives, including greater use of social media.

Participants in the roundtable focusing on the EEOC's federal sector program included representatives from other agencies, unions representing federal employees, and federal employee affinity groups. They noted, among other issues, the need to clarify the role of agency counsel in the investigative stage of proceedings, the need for increased oversight of federal agency enforcement, the need for training for managers on supervision as well as EEO, and for employees on navigating the complaints process.

The Commission will consider all of the input—both written and from the meeting—in crafting its SEP. That document will be posted on the Commission's website when finalized. Additionally, the comments that were submitted will be available for onsite review in the EEOC's library.

The EEOC will hold open the July 18, 2012, Commission meeting record for 15 days, and invites audience members, as well as other members of the public, to submit written comments on any issues or matters discussed at the meeting. Public comments may be mailed to Commission Meeting, EEOC Executive Officer, 131 M Street, N.W., Washington, D.C. 20507, or e-mailed to [Commissionmeetingcomments@eoc.gov](mailto:Commissionmeetingcomments@eoc.gov).

The EEOC enforces federal laws prohibiting employment discrimination. Further information about the EEOC is available on its web site at [www.eoc.gov](http://www.eoc.gov).

## ENDNOTES

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<sup>1</sup> See Strategic Plan for Fiscal Years 2012-2016, U.S. Equal Employment Opportunity Commission, available at [http://www.eeoc.gov/eeoc/plan/strategic\\_plan\\_12to16.cfm](http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm).

<sup>2</sup> See Strategic Plan for Fiscal Years 2012-2016, U.S. Equal Employment Opportunity Commission, available at [http://www.eeoc.gov/eeoc/plan/strategic\\_plan\\_12to16.cfm](http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm).

<sup>3</sup> See David Weil, *Improving Workplace Conditions Through Strategic Enforcement, A Report to the Wage and Hour Division of the Department of Labor* (2010).

<sup>4</sup> In *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012); 2012 WL 1435995 (E.E.O.C.), the Commission stated its position that discrimination against an individual because that person is transgender is discrimination because of sex.

<sup>5</sup> Performance Measure 4 of the Strategic Plan requires that the agency establish and meet a percentage goal for the number of systemic cases on the litigation docket.

<sup>6</sup> The Comprehensive Enforcement Plan (CEP) of 2000 “links and integrates every phase of the Commission’s work in the private sector program, from outreach to taking and developing charges of discrimination, investigation, and final resolution.”

<sup>7</sup> The EEOC's “power of suit and administrative process [are not] unrelated activities, [but] sequential steps in a unified scheme for securing compliance with Title VII.” *Hickey-Mitchell Co.*, 507 F.2d at 948 (alterations in original) (emphasis added) (quoting *EEOC v. E.I. DuPont de Nemours & Co.*, 373 F. Supp. 1321, 1333 (D. Del. 1974)).

<sup>8</sup> “In the Equal Employment Opportunity Act of 1972, Congress established an *integrated, multistep enforcement procedure* culminating in the EEOC's authority to bring a civil action in a federal court. That procedure begins when a charge is filed with the EEOC ... The EEOC is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true... When “the Commission (is) unable to secure . . . a conciliation agreement acceptable to the Commission, the Commission may bring a civil action...” *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 360-361 (1977) (footnotes omitted; emphasis added.)

<sup>9</sup> Performance Measure 3 of the Strategic Plan.

<sup>10</sup> 42 U.S.C. §§2000e-4(g)(3), (h), (j).

<sup>11</sup> Williams, Adley and Company Report, March 2011.