



**U.S. Equal Employment Opportunity Commission**

# **U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN Fiscal Years 2017 - 2021**

## **EXECUTIVE SUMMARY**

In December 2012, the U.S. Equal Employment Opportunity Commission (EEOC or Commission) issued a Strategic Enforcement Plan (SEP) for Fiscal Years 2013-2016. The SEP established substantive area priorities and set forth strategies to integrate all components of EEOC's private, public, and federal sector enforcement to have a sustainable impact in advancing equal opportunity and freedom from discrimination in the workplace.

Over the past few years, the Commission has evaluated the agency's progress in implementing the SEP. Generally, the SEP has resulted in increased focus by staff on the substantive area priorities and increased collaboration among staff. EEOC has seen real progress in the coordination of its enforcement and guidance and in the development of the law on several SEP issues such as background screens that adversely affect racial and ethnic communities and leave policies that discriminate against workers with disabilities. As part of its integrated approach under the SEP, EEOC has taken proactive steps to ensure consistent policies and positions in the private and federal sectors.

Feedback from a formal evaluation of the SEP as well as from EEOC staff indicates that some of the substantive area priorities need modification to ensure more consistent implementation. The evaluation also supports further development of

coordinated strategies to address the SEP priority areas in order to fully realize the SEP's goal of sustainable impact through strategic law enforcement.

The Commission adopts this SEP for Fiscal Years 2017-2021 to set forth its continued commitment to focus efforts on those activities likely to have strategic impact in advancing equal opportunity and freedom from discrimination in the workplace. The Commission defines strategic impact as a significant effect on the development of the law or on promoting compliance across a large organization, community, or industry. This focus on strategic impact requires EEOC to shift attention in certain areas and to reduce resources spent on activities that may not have strategic impact.

The Commission reaffirms its substantive area priorities, with some modifications and additions to sharpen the agency's focus and update emerging issues of concern. The Commission clarifies the manner in which these SEP substantive area priorities will be integrated into its charge management system, Priority Charge Handling Procedures (PCHP). The Commission reaffirms the importance of strengthening the integration of staff efforts across programs and offices and ensuring accountability to operate as "One EEOC." These efforts are essential to ensure that the agency's resources are leveraged most effectively.

The Commission makes the following changes in the SEP substantive area priorities:

- 1) The Commission revises the priority on Immigrant, Migrant and Other Vulnerable Workers to have district offices and our federal sector program identify vulnerable workers and underserved communities within their areas for focused attention. This provides additional support to the development or strengthening of significant partnerships with these groups, which is Performance Measure 8 in the Commission's **[Strategic Plan for Fiscal Years 2012-2016](https://www.eeoc.gov/united-states-equal-employment-opportunity-commission-strategic-plan-fiscal-years-2012-2016)** (**<https://www.eeoc.gov/united-states-equal-employment-opportunity-commission-strategic-plan-fiscal-years-2012-2016>**).
- 2) Under the Emerging and Developing Issues priority, the Commission narrows the issues under the Americans with Disabilities Act that fall within the category to qualification standards and inflexible leave policies that discriminate against individuals with disabilities.
- 3) Under the Emerging and Developing Issues priority, the Commission adds two areas. The Commission adds a new priority to address issues related to complex employment relationships and structures in the 21<sup>st</sup> century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy. The

Commission also adds a focus on backlash discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, as tragic events in the United States and abroad have increased the likelihood of discrimination against these communities.

- 4) The Commission continues to focus on gender-based pay discrimination. In addition, in recognition of the pay disparities that persist based on race, ethnicity, and for individuals with disabilities and other protected groups, the Commission extends its equal pay priority to explicitly reach all workers.
- 5) The Commission removes the term "retaliatory actions" from the access to the legal system priority as the term was undefined and resulted in inconsistent application. The Commission refines this priority to focus on significant retaliatory practices that effectively dissuade others in the workplace from exercising their rights, as well as to focus on retaliatory policies.

EEOC's substantive area priorities for Fiscal Years 2017-2021 (explained on pp. 6-9) are:

1. Eliminating Barriers in Recruitment and Hiring.
2. Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination.
3. Addressing Selected Emerging and Developing Issues.
4. Ensuring Equal Pay Protections for All Workers.
5. Preserving Access to the Legal System.
6. Preventing Systemic Harassment.

The national priorities of the SEP are complemented by district-level and federal sector priorities, recognizing that particular issues most salient to these communities also demand focused attention.

## **I. GUIDING PRINCIPLES OF THE STRATEGIC ENFORCEMENT PLAN**

Three principles guided the development of the SEP for Fiscal Years 2013 to 2016. These same principles continue to undergird this SEP for Fiscal Years 2017 to 2021.

## **A. A Targeted Approach - focused attention on priorities where government efforts can have strategic impact**

A targeted approach means Commission staff focus more of their attention and the agency's resources on a common set of priorities, as identified in this SEP, in order to reduce the incidence of those discriminatory practices, strengthen the law, and improve working conditions. This includes more proactive efforts in identifying those issues. It also includes the careful use of Commissioner Charges and directed investigations as effective tools to investigate practices and policies that may be more widespread or of a different nature than the allegations in an individual charge.

## **B. An Integrated Approach - collaboration, coordination and consistency**

A guiding principle of the SEP is that EEOC staff, offices and programs operate as "One EEOC." This requires collaboration, coordination and sharing of information among staff, offices, and program areas, as well as between members of the Commission and offices in headquarters and across the country. It requires consistent procedures in dealing with the public among offices across the country.

The agency has had significant success in integrating its efforts on priority issues, through increased collaboration, coordination and sharing of information. Progress has been made in a coordinated fashion on various priorities, such as removing barriers to hire in the operation of criminal background screens, preventing and remedying systemic harassment, advancing emerging and developing issues such as ensuring anti-discrimination protection for LGBT people, and safeguarding ADA protections in the application of leave policies under the ADA.

There has also been increased collaboration between our private and federal sector programs to ensure consistent positions and coordinated outreach. The multi-year plans for communication, outreach and research, approved pursuant to the first SEP, have helped set a path for additional coordinated efforts. Finally, EEOC has begun to implement more consistent procedures through its Digital Charge System, an online portal for the secure transmission of charge documents and communications. This SEP continues to be grounded in the principles that continuing and increased collaboration, coordination and sharing of information will assist the Commission in operating in a strategic fashion.

## **C. Accountability – taking ownership to achieve results given existing resources**

As a government agency charged with enforcing the nation's anti-discrimination laws, EEOC is accountable to the public it serves to ensure its resources are used most effectively to enforce the law. Accountability means taking ownership to achieve the results sought within existing resources and circumstances. EEOC is accountable for strong enforcement of the nation's federal civil rights laws and for excellent service to the public. Meeting the public's expectations for EEOC's services has historically challenged EEOC as the demand for the agency's services has always outpaced the available resources.

The SEP guides the agency to focus its resources to promote increased and lasting compliance with equal employment laws and to more efficiently provide services. The SEP and the District and Federal Complement Plans provide staff the guidance and direction needed to make informed decisions about how to allocate their time and the agency's resources.

## **II. PRINCIPLE ONE: A MORE TARGETED APPROACH TO STRENGTHEN STRATEGIC ENFORCEMENT**

### **A. Focus on Strategic Impact to Effectively Use Government Resources**

To be effective as a national law enforcement agency, the Commission must focus on those activities that have strategic impact. The Commission defines strategic impact as a significant effect on the development of the law or on promoting compliance across a large organization, community, or industry. It is the significance of a particular issue and the potential outcome that determines strategic impact, in addition to the number of individuals affected.

Systemic investigations and lawsuits typically have strategic impact as they address significant legal issues or policies, or have a wide influence on an industry, occupation or geographic area, as underscored in ***Advancing Opportunity - A Review of the Systemic Program of the U.S. Equal Employment Opportunity***

**<https://www.eeoc.gov/advancing-opportunity-review-systemic-program-us-equal-employment-opportunity-commission>**. The Commission reaffirms its commitment to a nationwide, strategic, and coordinated systemic program as one of EEOC's top priorities.

The Commission also recognizes that an individual charge or case can have strategic impact, as defined above. Effective strategic enforcement includes a balance of individual and systemic cases, and of national and local issues, recognizing that each may have strategic impact in varied ways.

The Commission's identification of a set of substantive area priorities under this SEP recognizes that focused and collective work on these areas will also have strategic impact. Assessing the likely strategic impact of an effort and the resources needed to achieve that impact will guide EEOC's enforcement decisions on all issues, including SEP substantive area priorities. The Commission will continue to vigorously pursue matters and issues that are not identified within the SEP's substantive area priorities where government enforcement will have a strategic impact in advancing workplace opportunity.

This SEP also affirms the proactive strategies outlined in EEOC's **[Research and Data Plan \(https://www.eeoc.gov/equal-employment-opportunity-commission-research-and-data-plan\)](https://www.eeoc.gov/equal-employment-opportunity-commission-research-and-data-plan)**, **[Agency-Wide Communications and Outreach Plan, \(https://www.eeoc.gov/eeoc-agency-wide-communications-and-outreach-plan-september-2015\)](https://www.eeoc.gov/eeoc-agency-wide-communications-and-outreach-plan-september-2015)** the **[Commissioners Report of the Select Task Force on the Study of Harassment in the Workplace, \(https://www.eeoc.gov/select-task-force-study-harassment-workplace\)](https://www.eeoc.gov/select-task-force-study-harassment-workplace)** and **[Advancing Opportunity - A Review of The Systemic Program of the U.S. Equal Employment Opportunity Commission \(https://www.eeoc.gov/advancing-opportunity-review-systemic-program-us-equal-employment-opportunity-commission\)](https://www.eeoc.gov/advancing-opportunity-review-systemic-program-us-equal-employment-opportunity-commission)**. Research, in particular, can illuminate the causes of frequent violations and thereby assist in devising effective solutions. This proactive approach informs effective preventive and remedial strategies, where the interests of the employees, employer, and EEOC align to result in lasting improvements to workplace practices and policies.

## **B. Substantive Area Priorities for Fiscal Years 2017 - 2021**

The Commission's goal in identifying a set of substantive area priorities is to ensure that the agency's resources are targeted to advance equal opportunity and freedom

from discrimination in the workplace in circumstances where government enforcement is most likely to achieve broad and lasting impact. This is particularly important in integrating the SEP substantive area priorities with the agency's PCHP charge management system, to align enforcement resources with the priorities set forth in the SEP. The Commission anticipates that each of these substantive area priorities will require the development of a multi-pronged response to include enforcement, education and outreach, research, and policy development.

In evaluating whether to revise the substantive area priorities for this SEP, the Commission relied on the same criteria it used to identify these priorities in its first SEP, as these criteria provide key indicators about the significance of the agency's efforts. These criteria are:

1. Issues that will have broad impact because of the number of individuals, employers or employment practices affected;
2. Issues affecting workers who may lack an awareness of their legal protections or who may be reluctant or unable to exercise their rights;
3. Issues involving developing areas of the law, where the expertise of the Commission is particularly salient;
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 government enforcement, based on the Commission's access to information, data, and research.

## **C. National Substantive Area Priorities**

The following are the substantive area priorities for the SEP for Fiscal Years 2017-2021. These are a subset of issues that may have strategic impact, as described above.

### **1. Eliminating Barriers in Recruitment and Hiring**

EEOC will focus on class-based recruitment and hiring practices that discriminate against racial, ethnic, and religious groups, older workers, women, and people with disabilities. These include exclusionary policies and practices, the channeling/steering of individuals into specific jobs due to their status in a particular group, job segregation, restrictive application processes (including online systems that are inaccessible to individuals with disabilities), and screening tools that disproportionately impact workers based on their protected status (e.g., pre-

employment tests, background checks impacting African Americans and Latinos, date-of-birth inquiries impacting older workers, and medical questionnaires impacting individuals with disabilities).

The growth of the temporary workforce, the increasing use of data-driven selection devices, and the lack of diversity in certain industries and workplaces such as technology and policing, are also areas of particular concern. This priority typically involves systemic cases. However, a claim by an individual or small group may fall within this priority if it raises a policy, practice or pattern of discrimination.

## **2. Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination**

EEOC will focus on job segregation, harassment, trafficking, pay, retaliation and other policies and practices against vulnerable workers, including immigrant and migrant workers, as well as persons perceived to be members of these groups, and against members of underserved communities. These workers are often unaware of their rights under the equal employment laws, or reluctant or unable to exercise them. Their work status, language, financial circumstances, or lack of work experience make them particularly vulnerable to discriminatory practices or policies.

To implement this priority, district offices and the agency's federal sector program will identify vulnerable workers and underserved communities for focused attention, based on their assessment of how EEOC can most effectively utilize government resources to address the local issues of concern for these groups. For instance, employment discrimination against members of Native American tribes might be a focus for some offices as part of this priority.

## **3. Addressing Selected Emerging and Developing Issues**

As a government agency, EEOC is responsible for monitoring trends and developments in the law, workplace practices, and labor force demographics. Under this SEP, EEOC will continue to prioritize issues that may be emerging or developing. Given EEOC's research, data collection, and receipt of charges in the private and public sectors, and adjudication of complaints and oversight in the federal sector, the agency is well-situated to address these issues.

Because of the nature of this priority category, the Commission may choose to add or remove particular issues as the law develops, through an interim amendment to

the SEP. The following issues currently fall within this category:

- a) Qualification standards and inflexible leave policies that discriminate against individuals with disabilities;
- b) Accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA);
- c) Protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex;
- d) Clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy; and
- e) Addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the United States and abroad.

#### **4. Ensuring Equal Pay Protections for All Workers**

EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII. Because pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups, the Commission will also focus on compensation systems and practices that discriminate based on any protected basis, including the intersection of protected bases, under any of the federal anti-discrimination statutes.

#### **5. Preserving Access to the Legal System**

EEOC will focus on policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede EEOC's investigative or enforcement efforts. Specifically, EEOC will focus on: 1) overly broad waivers, releases, and mandatory arbitration provisions (e.g., waivers or releases that limit substantive rights, deter or prohibit filing charges with EEOC, or deter or prohibit providing information to assist in the investigation or prosecution of discrimination claims); 2) employers' failure to maintain and retain applicant and employee data and records required by EEOC regulations; and 3) significant retaliatory practices that effectively dissuade others

in the workplace from exercising their rights. For example, firing a senior director who reports a pattern of discrimination at the workplace sends a strong message to others not to complain about or to report discrimination.

Claims alleging overly broad waivers, releases and arbitration typically involve systemic cases. However, such a claim by an individual or small group may fall within this priority if it raises a policy, practice or pattern of retaliation.

## **6. Preventing Systemic Harassment**

Harassment continues to be one of the most frequent complaints raised in the workplace. Over 30 percent of the charges filed with EEOC allege harassment, and the most frequent bases alleged are sex, race disability, age, national origin and religion, in order of frequency.[1] Forty-three percent of the complaints filed by federal employees in fiscal year 2015 raised harassment.[2] The most frequent bases alleged in federal sector complaints are race, disability, age, national origin, sex and religion, in order of frequency.[3] This priority typically involves systemic cases. However, a claim by an individual or small group may fall within this priority if it raises a policy, practice, or pattern of harassment. Strong enforcement with appropriate monetary relief and effective injunctive relief to prevent future harassment of all protected groups is critical, but not sufficient. In addition, the Commission believes a concerted effort to promote holistic prevention programs, including training and outreach, will greatly deter future violations.

## **D. District Complement Plans and the Federal Sector Complement Plan**

The Strategic Enforcement Plan for Fiscal Years 2013-2016 provided for the adoption of District Complement Plans and a Federal Sector Complement Plan. Such plans are designed to ensure that field offices dealing with charges in the private and public sectors, and the federal sector program that adjudicates complaints through hearings and appeals, can designate additional substantive area priorities for focused attention given the local significance of those areas.

District Directors and Regional Attorneys shall review their current plans and update them. Updated District Complement Plans shall be shared with Commissioners for review.

The Office of Federal Operations and Office of Field Programs shall work together to review and update the Federal Sector Complement Plan as needed. An updated

Federal Sector Complement Plan shall be shared with Commissioners for review.

After consultation with Commissioners, the Chair will review and approve the updated plans.

## **E. Implementing SEP Priorities**

*For EEOC to maximize its effectiveness, the agency's resources must align with its priorities.* The following guidelines are intended to ensure that the SEP substantive area priorities, as well as other charges and cases that have strategic impact, receive the attention and resources needed to advance opportunity and freedom from discrimination in the workplace.

Identification of the SEP substantive area priorities will be used for purposes of rigorous application of PCHP, for the selection of litigation and amicus briefs filed by the agency, for federal sector enforcement, and for deploying all other activities across the agency including guidance, outreach and research. The agency will also continue to vigorously pursue matters and issues that are not identified within these substantive area priorities where government enforcement will have a strategic impact.

### **1. Investigations of Charges of Discrimination**

#### **a. Diligent and Consistent Implementation of Priority Charge Handling Procedures (PCHP) to Advance Strategic Enforcement**

The Commission adopted Priority Charge Handling Procedures (PCHP) in 1995 to replace a Full Investigations policy where every charge received a full investigation without regard to the merit of the charge. After about 10 years of the Full Investigations Policy, EEOC had a pending inventory of 112,000 charges when PCHP was approved.

PCHP, as implemented, categorized charges for priority handling based on the likelihood of an investigation resulting in a finding of reasonable cause to believe discrimination occurred. PCHP emphasized that "the investigation to be made in each case should be appropriate to the particular charge, taking into account EEOC's resources."<sup>[4]</sup> PCHP also categorized charges based on whether the charge raised a national enforcement priority, as adopted by the Commission in a National Enforcement Plan in 1996, and on whether a charging party would experience irreparable harm if an investigation was delayed.<sup>[5]</sup>

In the first three years that EEOC staff applied PCHP, field offices reduced the charge inventory by more than 40 percent, using the system's procedures to expeditiously review and resolve pending charges.[6] By fiscal year 2002, continued application of PCHP coupled with the implementation of the National Mediation Program resulted in a reduction of the charge inventory to about 29,000. That year, the average time to resolve a charge was 160 days, another mark of the efficiency of diligent application of PCHP. In fiscal year 2002, EEOC had 827 investigators and received over 84,000 charges per year.

Today, EEOC has one third fewer investigators than it had in 2002. These investigators are responsible for handling about 90,000 charges received each year. As of September 30, 2016, the pending workload for investigators is over 73,000 charges,[7] and the average time to resolve a charge exceeds 300 days.

As the demand for EEOC's services continues to outpace our resources, the Commission continues to make the case for much needed additional resources. In addition, to address this demand, the Commission has undertaken a strategic and integrated approach to leverage our finite resources for maximum impact. As part of this approach, it is vital that the Commission make changes to expedite charge investigations, particularly at a time when the public expects online and timely service. The Commission is committed to improving its service to the public by streamlining its investigation of all charges through its plan for **Quality Practices for Effective Investigations and Conciliations** (<https://www.eeoc.gov/quality-practices-effective-investigations-and-conciliations>) (known as "QEP") and through a Digital Charge System to allow faster transmittal of documents between EEOC and the parties to a charge.

Together with these efforts, the Commission believes it is necessary to refine PCHP and reinforce across the agency the necessity of diligent application of PCHP to reflect current demands, finite resources, and the benefits of consistent practices in providing service to the public. In particular, the Commission believes it is essential that a clear understanding of the substantive area priorities in the SEP and the importance of strategic impact for prioritizing charges is integral to effectively applying PCHP. To achieve a manageable charge workload, the agency must redouble its efforts to consistently apply PCHP throughout the entire charge investigation to consider the strength of the information obtained, the impact of government enforcement, and available resources.

## **b. Integration of Substantive Area Priorities into PCHP**

Clearly defined substantive area priorities allow the agency to consistently allocate resources where government enforcement is needed and impactful. A charge supported by strong evidence that raises an SEP substantive area priority or is likely to have strategic impact should receive priority in charge handling. These charges should receive greater investigatory attention and resources to ensure timely and quality enforcement action.

If a charge raises an SEP substantive area priority or has the potential for strategic impact and is categorized as a B charge under PCHP based on the information available at intake, expeditious review of the PCHP categorization must occur to ensure appropriate attention to the charge.

### **c. A Clear and Consistent Standard of Reasonable Cause**

The standard for reasonable cause set forth in Title VII is "reasonable cause to believe that the charge is true."<sup>[8]</sup> In adopting PCHP, the Commission sought to ensure a consistent application of the statutory standard, rescinding a policy that had set forth a higher cause standard that was commensurate with a determination that the Commission would litigate the case. Although a reasonable cause determination is a predicate for Commission litigation, the Commission's decision to litigate a case involves additional considerations, including resources and the strategic impact of the case. This SEP continues the standard that the assessment of "reasonable cause" should not consider whether a case is likely to be litigated by EEOC.

When the Commission closes an investigation and dismisses a charge, the dismissal does not constitute a finding by the Commission that discrimination has not occurred. Rather, the Commission makes a determination that "based upon its investigation, EEOC is unable to conclude that the information obtained establishes violations of the law. This does not certify that the respondent is in compliance with the law."<sup>[9]</sup> In simple terms, the closure of an investigation by EEOC does not mean that no discrimination occurred, as charging parties have a right to sue,<sup>[10]</sup> and subsequent litigation may succeed in establishing a violation.<sup>[11]</sup>

### **d. Streamlining Charge Investigations**

The largest number of charges in the agency's workload are those in which at intake, there is not enough information to determine whether it is likely that further investigation would result in a cause finding by the Commission. (These are designated as Category B charges in PCHP.) The key factor in ensuring expeditious

investigation of charges is recognizing what constitutes "sufficient information" given available resources to make this determination. PCHP describes "sufficient information" as "only that amount of evidence needed to make an informed decision as to whether it is more likely than not that a violation of the statute may be found."<sup>[12]</sup> This SEP continues to emphasize the importance of early decision making to expeditiously resolve investigations, based on that same standard.

One of the fundamental premises of PCHP is to empower staff to make prompt decisions about whether to take further investigative or settlement actions, taking into account the agency's resources. The Commission reaffirms this premise to ensure timely investigation of charges. Reducing delays in the investigation of charges benefits both employers and employees, as it avoids evidence being lost or destroyed or becoming stale, witnesses becoming unavailable or witness recollections fading, which can make cases more costly and difficult for all parties.

EEOC staff should ensure that charging parties and respondents have appropriate expectations with regard to investigations. The Commission's plan for Quality Practices for Effective Investigations and Conciliations supports such communications throughout the investigation, and particularly when EEOC is about to close an investigation. The Commission selects a limited number of charges for extensive investigations, and an even smaller subset of those charges (where conciliation does not resolve the matter) for potential litigation. Congress gave individuals the right to file suit in court, without regard to the nature or outcome of an EEOC investigation or conciliation.

## **2. Alternative Dispute Resolution Program**

As the Strategic Plan and Strategic Enforcement Plan shift resources to focus on SEP and DCP priorities, ADR continues to be an important tool to provide service and promote timely resolution of discrimination charges. The Commission encourages early resolution of charges through fact-finding conferences, pre-determination settlements or mediation throughout the course of an investigation. Category A charges may be referred to mediation as resources permit, to provide the parties an early opportunity to informally resolve the dispute. Offices should also consider increasing the use of pro bono mediators and partnering with local law school clinics to expand the capacity of the mediation program.

## **3. Litigation Program**

Meritorious cases raising SEP substantive area priorities or district priorities should be given precedence in case selection. Meritorious cases on issues outside of these priorities that are likely to have strategic impact should also be an important part of EEOC's litigation program. SEP priorities should be considered in selecting cases for amicus curiae participation. Neither the Commission nor the General Counsel will establish rigid goals as to the number of cases, priority or otherwise, that should be filed.

The Commission encourages the General Counsel, District Directors, and Regional Attorneys to continue to collaborate with the private bar, non-profit organizations, the Department of Justice, the Office of Federal Contract Compliance Programs (OFCCP), and EEOC's state and local partners to ensure efficient coordination and support their critical role in civil rights enforcement.

#### **4. Federal Sector Hearings and Appeals**

The substantive area priorities set forth in the SEP and Federal Sector Complement Plan serve several purposes in the federal sector. First, cases that raise these priorities bring the issues to the attention of the Commission for the development of more extensive opinions regarding the law. Second, EEOC's federal sector program is responsible for outreach and training to support oversight of federal agency EEO programs. Third, identifying SEP and FCP substantive area priorities in hearings and appeals provides trend information to EEOC to support federal sector outreach, training, compliance reviews, and program evaluations

EEOC conducts hearings on complaints of discrimination from federal employees or applicants. In fiscal year 2015, the agency received 7,752 requests for hearings, resolved 6,360 complaints, and had 69 administrative judges (AJs) assigned to 24 agency offices to conduct such hearings. As of September 2016, the pending workload of administrative judges exceeds 13,000 complaints, and the average time from a request for a hearing to a decision of an AJ is over 500 days.

EEOC also adjudicates appeals from federal employees, applicants or agencies on complaints of discrimination. In fiscal year 2015, the agency received 3,649 appeals, resolved 3,850 appeals, and had 31 attorneys assigned to draft appellate decisions. At the start of Fiscal Year 2016, the appellate attorneys had a pending workload of 147 appeals per attorney. EEOC resolved 42 percent of appeals within 180 days of receipt, and almost 63 percent of 3,260 appeals that exceeded 500 days in inventory. The average time to resolve an appeal was 447 days.

EEOC's Strategic Plan for Fiscal Years 2012 to 2016 called for the development of a case management system for federal sector hearings and appeals, which was adopted agency-wide in April 2015. The current case management system focuses on the timely resolution of complaints, based on the complexity of the case and the likely merits of the complaint. It provides a system to facilitate more efficient handling of hearing requests and appeals given available resources.

In addition to improving systems and streamlining procedures, additional resources would be necessary for EEOC to increase timeliness to its federal sector program by reducing the ratio of hearings to administrative judges and the ratio of appeals to attorneys.

## **5. Other Priorities**

The SEP replaces all existing enforcement priorities and initiatives. Chair initiatives should complement, rather than replace national SEP priorities.

# **III. PRINCIPLE TWO: INTEGRATING EFFORTS ACROSS EEOC**

The Commission is committed to an integrated approach at the agency that promotes broad sharing and consideration of ideas, strategies, and best practices and furthers collaboration and coordination throughout the agency, beginning with the following requirements.

## **A. Integrating Administrative Enforcement and Legal Enforcement in the Private and Public Sectors**

The Commission has a statutory responsibility to receive and investigate charges. Congress also granted EEOC discretion to determine the nature and extent of an investigation or conciliation. If the Commission determines there is reasonable cause to believe discrimination has occurred, it attempts to end the alleged unlawful practice through conciliation. If conciliation fails, the Commission has the authority to bring a civil action.

Having a seamless, integrated effort between the staff who investigate and conciliate charges and staff who litigate cases on behalf of the Commission is critical

for the agency's work to have significant impact and to provide excellent service to the public.

To establish a baseline of consistency across all offices, the SEP requires:

### **1. Consultation between Investigative and Legal Enforcement Staff**

The Commission reaffirms the importance of regular and meaningful consultation and collaboration between investigative and legal staff throughout investigations and conciliations. The Commission commends the interaction between administrative and legal enforcement that has existed in many offices and has increased further, partly as a result of the SEP, according to the SEP evaluation. In addition, the Commission commends the integrated strategies across offices that have been used to advance development of the law and systemic cases. The Commission encourages offices to continue this important collaboration and consultation. To ensure continued progress, Legal/Enforcement Interaction procedures should be updated as needed to be consistent with this SEP's refinement of PCHP, and to efficiently implement the Digital Charge System and the plan for Quality Practices for Effective Investigations and Conciliations.

### **2. Coordination of Systemic Enforcement**

The Commission commends staff for the improved coordination of systemic enforcement across EEOC districts in the past few years. Offices are expected to avoid duplication of effort and promote efficiency through collaboration, consultation and strategic partnerships. Pursuit of systemic matters should utilize integrated strategies, including research, outreach, and communications to have the broadest impact.

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

Although the statutory obligations of the Commission in the federal sector differ from the Commission's enforcement responsibilities in the private and public sectors, the same goal of advancing equal opportunity applies, as does the principle of integrated strategies. The Commission encourages the Office of Federal Operations and the Office of Field Programs to continue their efforts to improve communication, oversight, and consistency across the federal sector, including consistency between and among administrative judges and other staff of the hearings program, and attorneys in the Office of Federal Operations.

The Commission commends staff across the agency for significant collaborative efforts between the federal and private sectors, particularly with respect to protecting LGBT workers. The Commission encourages staff to extend this collaborative and coordinated approach to other SEP and FCP priorities and across the hearings and appeals programs, as well as across offices.

The Strategic Enforcement Plan for Fiscal Years 2013-2016 required the Commission to evaluate the current structure of the federal sector hearings program, specifically with respect to the placement and status of administrative judges in the Office of Field Programs, and related issues impacting the effectiveness of the program. In August 2013, the Commission authorized an evaluation by the Administrative Conference of the United States (ACUS) of the placement and status of administrative judges. ACUS provided its evaluation on March 2014, which was shared with Commissioners, the Administrative Judges Association, EEOC Council of Locals 216, the Directors of the Office of Federal Operations and the Office of Field Programs, the Senior Executive Service Advisory Counsel and agency leadership. ACUS concluded that converting administrative judges to Administrative Law Judges would require Congressional action, and that placement of the administrative judges in EEOC's organizational structure is within the discretion of the Commission. The Strategic Enforcement Plan for Fiscal Years 2017-2021 reaffirms the goal of evaluating EEOC's federal sector program and voting on the recommendations from such an evaluation.

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

Clear and accessible information is crucial to prevent discrimination and further enforcement. To ensure the public has easy access to information and technical assistance from EEOC and that EEOC is presenting a coordinated and consistent national message, the Commission adopted the following strategies:

### **1. Updating the Subregulatory Plan**

The Office of Legal Counsel, in consultation with the Office of General Counsel, Office of Field Programs, and Office of Federal Operations developed 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 for Fiscal Years 2012 to 2016. OLC also developed and implemented procedures for public input to guidance documents to increase

transparency and enhance the information available to the Commission in considering proposed guidance documents.

OLC shall update its Subregulatory Plan for FY 2017-2021 in consultation with the program offices listed above and submit the Plan to the Chair. In consultation with members of the Commission and agency leadership, the Chair shall review and approve the plan.

## **2. Implementation of the Communications and Outreach Plan**

In September 2015, the Chair approved a multi-year nationwide communications and outreach plan, after consultation with members of the Commission. The Office of Communications and Legislative Affairs (OCLA) is responsible for implementing the plan. The Commission reaffirms the goals and objectives set forth in that plan.

## **D. Integrating Research, Data, Enforcement, and Outreach**

Collecting and analyzing data is central to EEOC's enforcement and educational efforts. The Commission approved a multi-year research and data plan in September 2015. The Office of Research, Information and Planning (ORIP) and the Office of Information Technology (OIT) have primary responsibility for the implementation of this plan. The Commission reaffirms the goals and objectives set forth in that plan.

## **E. Collaboration with State and Local Fair Employment Practice Agencies**

State and local Fair Employment Practices Agencies (FEPAs) are critical partners in EEOC's enforcement of equal employment laws. In September 2013, the FEPAs and EEOC District Offices identified FEPA Engagement projects to involve FEPAs more fully in the pursuit of SEP and DCP priorities. District Offices should review the effectiveness of such projects and report on their findings to the Commission.

## **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.

Given its limited resources, EEOC litigates a fraction of the charges it receives annually. With regard to all charges, EEOC staff may share with the parties, to the extent permitted under the law, information to facilitate swift enforcement and early resolution of charges. To better assist individuals whose charges are not settled or litigated by EEOC, district offices shall provide information to individuals who seek to contact employment law attorneys for further assistance.

## **G. Collaboration with Other Agencies**

EEOC is one part of a multi-pronged national equal employment law enforcement effort. The Department of Justice, Department of Labor, and Fair Employment Practices Agencies (FEPAs) all play a vital role in enforcing laws prohibiting employment discrimination. The Commission commends the collaborative work that has taken place with our sister agencies over the past few years and endorses continued collaboration.

## **H. Establishing National Standard Operating Procedures, Practices, and Processes**

As a law enforcement agency, EEOC's leadership and staff interact each day with thousands of individuals -- employers, lawyers, advocates, members of the general public -- throughout the Commission's headquarters and 53 field offices. The public should receive the same high quality of service and professionalism in all of our offices. In support of the Open Government Initiative and EEOC's commitment to excellent service to the public, the procedures used by EEOC to investigate charges and adjudicate federal sector complaints must be transparent and consistent throughout our offices nationwide to enable parties to effectively participate in those systems.

The development of online charge and complaint systems will facilitate more consistent procedures that should provide a dependable level of service to the public. EEOC also implemented a nationwide procedure providing charging parties the opportunity to request and respond to respondent position statements during the investigation of their charge.

To further transparency and accountability, the Director of the Office of Field Programs and General Counsel shall submit recommendations for standard operating procedures at each stage of interaction with the parties to a charge to

ensure consistent application of the SEP and the plan for Quality Practices for Effective Investigations and Conciliations.

With respect to federal sector procedures, the Director of the Office of Federal Operations (OFO) and the Director of the Office of Field Programs (OFP) shall develop recommendations to improve communication, oversight, and consistency across the federal sector, including consistency (a) between OFO staff, administrative judges, and other staff of the hearings program, (b) across OFO appeals units, and (c) across all offices, to ensure consistent application of the SEP and FCP.

## **IV. PRINCIPLE THREE: ACCOUNTABILITY**

### **A. Continued Delegation Of Authority**

With the goal of increasing the efficiency and effectiveness of the agency's enforcement programs, the Commission has 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. The Strategic Enforcement Plan for Fiscal Years 2017-2021 reaffirms these delegations. The exceptions to the delegations described below, and the quarterly briefings at which the Commission is briefed on the work of its staff, will ensure that such delegations are paired with accountability to support good governance.

#### **1. Reasonable Cause Determinations, Settlements, and Conciliations**

The Commission reaffirms the delegation of authority to its District Directors as codified in regulations at 29 C.F.R. § 1601.

#### **2. Litigation**

1. As set forth in the Strategic Enforcement Plan for Fiscal Years 2012-2016, with slight modifications described below, the Commission reaffirms the delegation to the General Counsel to decide to commence or intervene in litigation in all cases except the following:

1. Cases that may involve a major expenditure of agency resources, including staffing and staff time, and/or expenses associated with extensive

- discovery or expert witnesses. This category is expected to include many systemic, pattern-or-practice or Commissioner charge cases;
2. Cases that present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals, or where the Commission has only recently adopted a position;
  3. Cases that the General Counsel reasonably believes to be appropriate for submission for Commission consideration, for example, because of their likelihood for public controversy or otherwise;
  4. All recommendations in favor of Commission participation as *amicus curiae*.

If the General Counsel has not submitted at least one litigation recommendation from each district office to the Commission for consideration by September 30th, the General Counsel will submit a report to the Commission by October 31st describing the litigation recommendations approved by the Office of General Counsel for those district offices that did not have a litigation recommendation submitted to the Commission falling within the criteria above, for the fiscal year ending on September 30<sup>th</sup>.

2. The Commission ratifies its decision to give the General Counsel the authority to redelegate to Regional Attorneys the authority to commence litigation. The Commission strongly encourages such redelegation of litigation authority as appropriate.
3. The Commission restates and ratifies its April 19, 1995 delegation to the General Counsel of the authority to refer public sector Title VII and ADA cases which fail conciliation to the Department of Justice, as well as the authority to redelegate this authority to Regional Attorneys. The Commission further authorizes delegation of authority to the General Counsel to refer public sector GINA cases which fail conciliation to the Department of Justice, as well as the authority to redelegate this authority to Regional Attorneys.

### **3. Federal Sector Hearings and Appellate Decisions**

The Commission has delegated authority to its administrative judges to hold hearings on complaints of discrimination from federal employees and applicants and make determinations. 29 C.F.R. § 1614.109. The Commission has also delegated authority to the Director of the Office of Federal Operations to review appeals and

issue decisions in complaints of discrimination from federal employees and applicants. 29 C.F.R. § 1614.404 - 405.

The Commission reaffirms its support for such delegation authority, subject to the topic areas that require circulation of opinions as set forth in the Federal Sector Circulation List, voted on by the Commission on September 28, 2015.

## B. Quarterly Briefings

To ensure appropriate governance and that the Commission is kept apprised of how the delegated authority is being used, on a quarterly basis:

- The Director of the Office of Field Programs and District Directors shall report on investigations, mediations, conciliations, and settlements of charges that have received priority attention in the previous quarter.
- The General Counsel and Regional Attorneys shall report to the Commission on litigation that has been approved, filed, or resolved in the previous quarter.
- The Director of the Office of Federal Operations shall report on appellate decisions on complaints that have been given priority attention in the previous quarter.
- The Director of the Office of Field Programs shall report on hearing decisions by administrative judges on complaints that have been given priority attention in the previous quarter.

## EFFECTIVE DATE

The SEP is effective the day following approval by the Commission and will remain in effect until superseded, modified or withdrawn by vote of a majority of members of the Commission.

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## ENDNOTES

[1] *Commissioners Report of the **Select Task Force on the Study of Harassment in the Workplace*** (<https://www.eeoc.gov/select-task-force-study-harassment-workplace>) (June 2016).

[2] *Id.*

[3] *Id.*

[4] Priority Charge Handling Procedures, at 2 (June 1995).

[5] Although PCHP as adopted envisioned that all national enforcement priorities would receive the highest priority in investigations (i.e., would be categorized as A charges), in practice many offices categorized charges raising national enforcement priorities as B charges when additional information was needed to assess the likelihood of discrimination.

[6] **Report of the Priority Charge Handling and Litigation Task Forces** (<https://www.eeoc.gov/priority-charge-handling-task-force-litigation-task-force-report>) at 3 (March 1998).

[7] This number is subject to change as additional charges received, closed, and transferred from FEPAs prior to October 1<sup>st</sup> are added to the agency's data system after that date. The official pending inventory is usually released in the agency's Performance and Accountability Report.

[8] 42 U.S.C. § 20000e-5(b)

[9] Priority Charge Handling Procedures, at 11.

[10] See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973) ("The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts."). The ADEA permits individuals to file suit without receiving a notice from EEOC, as long as 60 days have passed since the filing of a charge with EEOC. 29 U.S.C. § 626(d)(1).

[11] Individuals have a right to file a lawsuit in court as long as they have filed a charge with EEOC, regardless of the action taken by EEOC on the charge. Research indicates that the PCHP categorization has little effect on whether a complaint is filed in federal court, and no impact on the outcome of a case, except for slightly increasing the chances a B claim would settle before summary judgment. See Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 *Journal of Empirical Legal Studies* 175, 191 (June 2010). Similarly,

the likelihood of a case going to trial is not influenced by whether EEOC issues a cause determination or dismisses the charge, as "[t]rials appear to be equally likely for both scenarios." Contesting Workplace Discrimination in Court, Characteristics and Outcomes of Federal Employment Discrimination Litigation 1987-2003, 39, American Bar Foundation (2008).

**[12]** Priority Charge Handling Procedures, at 9.