

Litigation Data: 6 Months With and 6 Without COVID-19

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The EEOC recently released its Enforcement and Litigation Data for Fiscal Year 2020, which ran from September 2019 to September 30, 2020—6 months before (September 2019 – March 2020) and 6 months during the COVID-19 pandemic (March 2020 – September 2020)—and several interesting trends emerged. Looking back, it is hard to say if the trends we see now would remain the same if everything hadn't come to a complete halt exactly one year ago. Regardless, the EEOC started a new fiscal year on October 2020, and with the pandemic still raging on we can look to last year's litigation data to provide hints about what we might expect as we go forward.

Number of Charges Dropped But Recovery Soared

Defying earlier predictions, the number of charges filed fell again in FY 2020. With just 67,448 charges filed, 2020 saw the lowest amount of filed charges since 1997. Why? No one can say, but it's likely that the pandemic and the resulting shutdown, mass layoffs, and remote work played a big role. Despite a lower number of charges, the agency still managed to recover a whopping \$106.1 million for charging parties and other aggrieved individuals—the largest recovery through the EEOC's litigation program in the past 16 years. The EEOC filed 93 merit suits and resolved 165 merit lawsuits. Title VII suits brought in the largest recovery, but ADA claims accounted for \$15.7 million, nearly double last year's recovery, and Age Discrimination in Employment claim recoveries increased by over \$15 million to \$16.3 million.

Does this show a trend of fewer employment lawsuits? Not likely. This could indicate that plaintiffs are not going through the EEOC as they had in the past. In fact, in our practice, we saw fewer formal charges but an increase in threatening attorney letters. We also saw an increase in state and local charges and lawsuits, which may not have been filed with the EEOC.

Retaliation Rising

And despite decreasing charges, employers should still take notice of the types of claims which were filed. The report shows that even though claims were down, the agency still secured \$439.2 million for victims through voluntary resolutions and litigation. The EEOC also increased its merit factor resolution rate from 15.6 percent in FY 2019 to 17.4 percent in FY 2020. Additionally, with a new administration that promises to be more worker-friendly, 2021 may be record year for claims. As this post will show, the data in the EEOC report further confirms many of the areas we have warned employers to look out for in the current year.

Notably, retaliation remained the most frequently cited claim, accounting for 55.8% of all filed charges. Following behind were disability (36.1 percent), race (32.7 percent) and sex (31.7 percent).

Focus on Disability

Disability discrimination claims remained a focus for the agency. And, it is no surprise that these claims, especially with the pandemic, remain a large portion of charges filed with the EEOC. While the number of claims filed in nearly every other category decreased, the number of disability claims increased slightly. Discrimination claims reached their highest ever percentage of all charges filed, continuing a growing trend present since 2008.

Disability issues are not going to abate in 2021. Indeed, with employees who have been working from home are asked to return to the office, and lingering fears of COVID-19 persists, claims under the Americans with Disabilities Act (ADA) will continue to be a space to watch in 2021.

Pregnancy Claims Increasing

While the number of pregnancy discrimination charges has been decreasing over the past several years, a cool \$15.3 million was still secured for charging parties and other aggrieved individuals on such claims, representing an increase of one million dollars since FY 2012. We cautioned employers that pregnancy discrimination will likely be a hot issue in 2021 and could bring an increasing numbers of charges and recoveries in the new year.

LGBTQ Issues to Watch

Claims of LGBTQ discrimination have been a growing enforcement priority for the agency. The EEOC data show 1,857 charges were filed for LGBTQ-based sex discrimination. While this is slight dip from last year, it is over 1,000 more charges than were filed in 2013, when the agency first started tracking such charges. The agency also increased its merit factor resolution rate and secured \$6 million for charging parties and other aggrieved individuals. We anticipate LGBTQ rights will continue to be an enforcement priority in 2021.

Pay Equity Remains an Issue

The EEOC also continues to increasingly focus on Equal Pay Act claims. In FY 2020, Equal Pay Act claims remained at 1.5 percent of all charges filed. This represents a gradual trend of increasing percentage of all charges filed since 2011, and a return to 2002 levels. The agency secured \$10.7 million for charging parties and other aggrieved individuals on such claims. While that was almost half of what was recovered in FY 2019, it is nearly double the amount recovered five years ago. In our prior [blog](#), we anticipated pay equity will be a major trend in the upcoming year. As promised in her campaign, Vice President Harris and the Biden administration will likely support any efforts for pay equity legislation. These efforts will likely mean even more Equal Pay Act claims will be filed in the current year.

Conclusion

Despite general decreases in overall number of charges, employers should not let their guard down, especially under the new administration. Employers should particularly take heed of the significant increase in monetary recoveries through litigation. As we mentioned before, employers should be particularly cautious of retaliation and discrimination claims. Here are some best practices for employer for the remainder of 2021.

- Continue to provide regular training and make sure internal complaint and investigation procedures and policies are properly followed.
- Review and retrain management and HR personnel on how to respond to requests for accommodation.

- Review and update pregnancy leave polices to ensure compliance with current federal and state laws.
- Proactively conduct pay equity audit to ensure there are no gender disparities.