

What Can the EEOC Do Without a Quorum?

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In the first week of the Trump administration, along with a flurry of executive orders, the President appointed Andrea Lucas as the Acting Chair of the Equal Employment Opportunity Commission (“EEOC”). Within days, he suddenly terminated two of the three sitting EEOC Commissioners (Charlotte Burrows and Jocelyn Samuels)—prior to the expiration of their terms—leaving only Ms. Lucas and one remaining Commissioner at the EEOC.

The President then terminated the sitting General Counsel Karla Gilbride and appointed a new Acting General Counsel—Andrew Rogers—in her place.

The EEOC was created by Congress through the enactment of Title VII of the Civil Rights Act of 1964. The Commission is intended to have five Commissioners, including a chair. In order to act, the Commission needs a quorum of three commissioners, which it currently does not have.

During our January 30 webinar, [Trump Reframes the EEO Agenda: What Does It Mean for Your Business?](#), we discussed the fact that these terminations left the EEOC without the necessary number to constitute a quorum. This raised a question as to how the EEOC would proceed.

How Will the EEOC Proceed?

Perhaps to quiet speculation that the agency would be “frozen,” on February 4, the EEOC published an update titled: [“The State of the EEOC: Frequently Asked Questions”](#) attempting to address many of the inquiries that legal practitioners raised in the wake of these sweeping changes.

That update stated:

1. None of the previously issued executive orders “shut down” the EEOC. The update reiterated that the Commission is a product of statutory creation, not executive authority, and would thus continue to operate.
2. Despite the lack of quorum, “the EEOC remains open for business.” The EEOC proclaimed that it will continue to intake, process, investigate, and issue resolutions of charges of discrimination.
3. The lack of quorum will not impact parties currently engaged in the EEOC process (investigation, conciliation, or settlement).
4. The EEOC can continue to file lawsuits without a quorum.

What Can the EEOC Do?

Litigation Remains Possible but Limited

The final point above raises a few interesting questions.

Currently, the full Commission (with a quorum), must decide to commence or intervene in: 1) cases involving systemic or widespread discrimination; 2) cases expected to involve major expenditures of funds and resources; 3) cases presenting issues on which the Commission has taken a position contrary to precedent in the Circuit; 4) cases presenting issues on which the General Counsel proposes to take a position contrary to precedent in the Circuit; and 5) “other cases reasonably believed to be appropriate for Commission approval in the judgment of the General Counsel” including “cases that implicate areas of law that are not settled and cases that are likely to generate public controversy.”

Thus, the Commission must have a quorum in order for them to vote to take up any of the above cases.

For cases that fall outside one of these defined categories, the General Counsel is typically required to submit those actions to the Commission for approval before proceeding to act. However, absent a quorum and by operation of delegated authority, the Commission grants to the General Counsel the authority to file such cases independently following a brief notice period.

In short, the current Commission can bring “small” or individual cases and can certainly continue to investigate claims. However, it is not clear that it can bring large or “systemic” cases, those may have to wait until the appointment and approval of new Commissioners.

What Does This Mean for Your Business?

- **Don't** expect to see new rules or amendments to guidance any time soon. Those actions will require a quorum.
- **Don't** expect the EEOC to file claims of “systemic” discrimination.
- **Do** expect that employees can continue to file complaints and the EEOC will continue to investigate. The investigation of individual or even class claims will not cease.

As this is a rapidly evolving area, please watch our blog for more updates, and contact the attorneys at Kelley Drye with any questions.