LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Discrimination Legislation And Regulations To Watch In 2023

By **Vin Gurrieri**

Law360 (January 2, 2023, 12:03 PM EST) -- The U.S. Equal Employment Opportunity Commission may finalize long-stalled guidance on harassment and revisit hot-button topics like artificial intelligence and pay data, while Congress could tackle a bill that would beef up protections for workers who have caregiving responsibilities.

Littler Mendelson PC shareholder James Paretti, former chief of staff and senior counsel to onetime acting EEOC Chair Victoria Lipnic, said much of the EEOC's agenda in the new year will depend on whether Cohen Milstein Sellers & Toll PLLC partner Kalpana Kotagal is confirmed to fill the seat recently vacated by Commissioner Janet Dhillon.

"Once they do that, then I think you'll start to see some action," Paretti said.

Congress, meanwhile, will remain split for the next two years, with Democrats retaining control of the Senate and Republicans winning a slim advantage in the House in November's midterm elections. That makes legislation getting through both chambers and to the president's desk a long shot, but not impossible, experts said.

Here, Law360 looks at legislative and regulatory developments that discrimination lawyers should watch for in the new year.

EEOC's Long-Awaited Harassment Guidance May Get Finalized

The EEOC initially approved and put out for public comment a lengthy proposed guidance late in the Obama administration that presented legal interpretations of issues related to workplace harassment.

The guidance grew out of findings from a June 2016 EEOC task force report about unlawful harassment in the workplace and included practical examples that outlined instances of harassment, as well as some practices employers could adopt.

But the guidance was never finalized after the commission sought the final green light from the Trump administration in 2017, even as the #MeToo movement spurred a national reckoning about sexual harassment.

Though any guidance the EEOC publishes may look markedly different from the draft version it floated in 2017, EEOC Chair Charlotte Burrows and Vice Chair Jocelyn Samuels have each publicly

supported issuing such guidance and have said it should be a priority for the agency.

Assuming a Democratic majority at the EEOC takes shape, the harassment guidance will likely sit atop the agency's agenda, said Sharon Perley Masling, head of Morgan Lewis & Bockius LLP's workplace culture consulting and training practice.

"Definitely, I think the chair and the vice chair have been waiting for a third Democrat to be confirmed to push their agenda forward," said Masling, who formerly served as chief of staff and senior counsel to former EEOC Commissioner Chai Feldblum.

Masling noted that the now-years-old draft version would need to address certain developments that have occurred since it was published, particularly the U.S. Supreme Court's 2020 ruling in Bostock v. Clayton County, Georgia, which held that Title VII's provision banning sex discrimination encompasses bias based on sexual orientation or gender identity.

"At this point, it likely needs to be updated. But I would expect it to be a high priority for the commission," Masling said, underscoring the fact that the guidance encompasses harassment of any kind and not just sexual harassment.

EEOC May Shed Light on Artificial Intelligence Tools

In late 2021, the commission announced a new initiative aimed at making sure that AI and other automated tools utilized by employers are deployed in a way that doesn't violate civil rights laws.

In May, the EEOC, along with the U.S. Department of Justice, issued first-of-its-kind guidance on how employers can use AI without violating federal disability law. And the White House's science and technology office in October unveiled its "AI Bill of Rights," which offered five tenets that governments and businesses should consider when deploying algorithmic technology. The EEOC has scheduled a commission meeting for Jan. 31 titled "Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier," marking its next opportunity to delve into the issue.

Littler's Paretti said the issue of artificial intelligence is ripe for the EEOC to tackle, and that the agency is doing well to educate itself before putting out policy statements or guidance. The agency's May guidance addressed what he described as "Tier-1" issues like accessibility, but that there are bigger questions still out there for the commission to sort through going forward.

"What is the agency going to expect from employers once we get past the Tier-1 issues of making sure disabled workers are able to access something [and] that there is an accommodation for them?" Paretti said "The bigger question is going to be what position are they going to take where an employer uses AI and the allegation is that it's screening people out on the basis" of a protected characteristic like race or sex and "what does it look like to validate those tools."

BakerHostetler's Amanda Godzinski said the recent trend of employers relying on technological tools, particularly as part of the hiring process, is likely to continue. In the meantime, best practices for employers that use AI in making employment decisions include "regularly evaluating those tools" to make sure they are assessing what they were intended to assess, that the traits and qualifications the tools are screening for are indeed necessary for a particular job, and looking at whether any protected classes are being disparately impacted, she said.

"The EEOC has made it really clear from the creation of that initiative … that it's looking at all federal civil rights statutes, not just disability," Godzinski said. "That's where they started with their guidance, but I think that we can expect them to continue digging into how these tools can perpetuate discrimination [in] all [classes] of discrimination."

EEO-1 Pay Data Collection Could Resurface

Besides looking at the interplay between AI and civil rights law, the commission could also set its sights on a topic that has been percolating across the last three presidential administrations: the agency's collection of employers' compensation data.

The commission's initial foray into pay data collection — known as Component 2 — kicked off when the agency finalized a rule in 2016 adding Component 2 to EEO-1 employer information reports. Those surveys must be filed annually by private employers with at least 100 employees as well as federal contractors with at least 50 employees that meet certain criteria.

Component 2 data required businesses to submit W-2 wage information and hours worked for employees within 12 specified pay bands. Component 1, which the EEOC has long collected and was unaffected by the 2016 rule, seeks demographic data from employers on race, gender and ethnicity by job category.

But before the first pay data collection could take place, President Donald Trump's administration halted the rule's implementation, which led to a lawsuit by the National Women's Law Center and the Labor Council for Latin American Advancement seeking to reinstate the survey. That effort proved successful, with U.S. District Judge Tanya Chutkan ordering the EEOC in 2019 to collect two years' worth of data, which the agency ultimately did for 2017 and 2018.

In 2020, the EEOC voted to fund an independent study by the National Academies of Sciences, Engineering and Medicine to analyze the utility of the pay data it collected pursuant to Judge Chutkan's order.

The National Academies issued a report from an expert committee over the summer that spanned 300 pages. It concluded that Component 2 data may prove useful in combating pay inequity, but that various shortcomings both in the type of information collected, and the process by which it is gathered, need to be addressed before the EEOC can use it in bias investigations, or before future surveys are conducted. The report also laid out a series of short- and long-term recommendations on how to obtain and use pay data.

EEOC chair Burrows, who has long been a proponent of collecting wage data from employers to help root out unlawful salary disparities, told reporters following the release of the National Academies' report that the agency would deliberate the future of Component 2 data and that it won't try to reinstate a collection initiative without considering input from all commissioners and the public. Samuels has echoed Burrows' position, but Republican commissioners Keith Sonderling and Andrea Lucas have each issued public statements sharply criticizing the pay data's reliability, utility and the process the agency took to collect it.

While there are "more administrative hurdles" in place for the EEOC than simply issuing guidance, Paretti said it wouldn't have to be a multiyear process for the agency to revisit the pay data issue, particularly if commissioners are already thinking about how they want to approach it based on the

National Academies' report.

"If they want to do something [on the issue], and I suspect that a Democratic majority will want to do something, I don't think it's years away," Paretti said, adding that he believes the proper approach should be notice-and-comment rulemaking.

"I think they would be foolish to just dust off the Component 2 from 2016 and putting that back online, but I don't suspect that's what they're going to do," he said. "I think they'll probably try to take into account some of the academy's recommendations. But … I'd be very surprised if the agency didn't at least try to move forward in this area."

Caregiver Bias Bill May Get a Look

In late 2022, Sen. Cory Booker, D-N.J., reintroduced the Protecting Family Caregivers from Discrimination Act, a bill that would prohibit employers from treating workers with caregiving responsibilities worse than others and involves an issue that could theoretically garner bipartisan support.

The bill would bar employers from refusing to hire, firing, or taking other adverse actions against those with family caregiving responsibilities. An adverse action is defined as depriving a worker of employment opportunities, or any other practice barred by Title VII of the Civil Rights Act of 1964.

Family members for whom caregiver responsibilities could apply include a spouse or domestic partner; a parent, a parent-in-law, a child, a sibling, or any of their spouses; grandchildren; or any other individuals related by blood or "affinity and whose association with the individual involved is equivalent of a family relationship," according to the bill.

The legislation follows pandemic-related guidance issued by the EEOC in early 2022 about how caregiver responsibilities are protected under laws such as the Americans with Disabilities Act, Rehabilitation Act and Title VII.

Jessica Ramey Stender, policy director at Equal Rights Advocates, said the COVID-19 pandemic highlighted the pressure that that is on caregivers when it comes to balancing their caregiving and job responsibilities.

"The fact is we know that very often, employers will discriminate against caregivers, either based on actual caregiving responsibilities, or sometimes even on perceived caregiving responsibilities," Stender said. "And without an explicit protection in a law, many of these caregivers, who are often women, but not always, don't have sufficient legal protection or sufficient legal recourse to really address this type of discrimination that they face."

Stender noted that four states and around 190 local jurisdictions already have legal safeguards in place for people with family responsibilities. While that patchwork isn't enough, it does show that those legal protections are viable and workable, she added.

"This is an area in which it is proven that you can have legal protections against caregiver discrimination, and the sky did not fall," Stender said. "Employers and employees are able to move forward with these protections in place, and as we know with all anti-discrimination law, having these protections really just make for a better workplace for everyone."

Religious Contractor Regs May Soon Be Rescinded

The Labor Department's Office of Federal Contract Compliance Programs, which polices discrimination among federal contractors, is close to finalizing a rule that would repeal Trump-era regulations that effectively allowed religious contractors to make hiring and other employment decisions based on their faith.

In a November 2021 notice, the OFCCP said it planned to wipe away those late 2020 regulations, which afforded religious contractors the same carveout from anti-discrimination obligations that churches, religious schools and other nonsecular employers receive under federal civil rights laws.

The Labor Department asked the Office of Management and Budget for final approval to yank the rules in July, but the OMB hasn't yet acted.

Lawrence Lorber, counsel at Seyfarth Shaw LLP and a former OFCCP director, said the rule's roots go back to the U.S. Supreme Court in its 2014 ruling in Burwell v. Hobby Lobby Stores Inc., which held that the Religious Freedom Restoration Act exempts closely held corporations from an Affordable Care Act mandate that they provide contraception coverage to their employees.

"It sort of revolves back to the Hobby Lobby situation as to what you could make religious contractors do. For the most part, it really pertains to benefits, and benefits is a euphemism for requiring coverage of contraceptives," Lorber said. He noted that there is also the related and emerging issue of coverage for abortion-related travel expenses.

But Lorber added: "I don't know that it's, frankly, a major issue for employers because OFCCP, even though it has jurisdiction over anything that a government contractor does, including benefits, it's not an area where the agency generally focuses on."

COVID-19 Safety Rule for Health Workers Expected

The Labor Department's Occupational Safety and Health Administration is close to finalizing a permanent standard that lays out exactly what employers in the health care sector must do to protect their workers from the coronavirus.

On Dec. 7, OSHA asked the OMB for approval of a final rule that would succeed a so-called emergency temporary standard, or ETS, that OSHA issued in June 2021 and that took immediate effect before OSHA largely stopped enforcing it six months later, as it had to do by law.

The ETS, which effectively served as a proposed rule preceding a final standard, addressed subjects like social distancing, symptom screening, employers' obligations to craft virus safety plans, and paid time off for workers to be vaccinated against the virus.

The D.C. Circuit in August rejected a petition by several nurses unions for OSHA to make its 2021 COVID-19 safety standards for health care workers permanent, with the appeals court ruling that it didn't have the authority to order OSHA to do that.

Deborah Burger, president of National Nurses United, one of the unions that was involved in the D.C. Circuit case, applauded the Labor Department's advancement of a permanent standard to the OMB and

urged the White House "to complete its review of the permanent standard as quickly as possible."

"Protecting nurses and other health care workers is of paramount importance as we face an increase in Covid-19 hospitalizations, in addition to high and increasing influenza and respiratory syncytial virus (RSV) hospitalizations," Burger said in a Dec. 8 statement. "We need a permanent standard to ensure that health care employers will protect all health care workers so they can do their jobs safely and so patients can get the care that they need."

--Additional reporting by Anne Cullen, Amanda Ottaway, Patrick Hoff, Beverly Banks and Dorothy Atkins. Editing by Bruce Goldman.
