

EEOC charge trends contain good news & bad

Good news and some bad news for employers lurks within the EEOC charge statistics for Fiscal Year 2019. First, the good news: For the third straight year, total EEOC charges fell in FY2019. There were a total of 72,675 EEOC charges filed, 3,743 fewer than in FY2018 and a full 20% fewer than in FY2016.

Some of the drop may be attributed to a good economy. The unemployment rate currently stands at a 50-year low of 3.5%. Usually, when unemployment falls, so do EEOC charges.

Sexual harassment charges fell in FY2019, down 1.2% from the previous year. But that downward blip comes against the backdrop of a huge 13% increase in sexual harassment complaints since 2017, when the #MeToo movement caught fire. A small decline still means there are far more sexual harassment complaints finding their way to the EEOC these days.

Now the undeniably bad news: Retaliation remains the most frequent EEOC charge

53.8% of all EEOC charges filed were for retaliation. There were 39,110 employee complaints that alleged the employer retaliated against an employee for reporting or complaining about some form of discrimination.

Unfortunately for employers, retaliation cases are easy for employees to win. Their attorneys only need to convince a judge or jury that the employer punished the employee for complaining about alleged discrimination or harassment. They don't need to prove that the discrimination or harassment actually occurred. Something as minor as a shift change that results in inconvenience can be enough to win on retaliation.

The top five charge categories were:

- Retaliation: 39,110 (53.8% of all EEOC charges filed)
- Disability: 24,238 (33.4%)
- Race: 23,976 (33.0%)
- Sex: 23,532 (32.4%)
- Age: 15,573 (21.4%).

Discrimination based on national origin, color and religion, as well as violations of the Equal Pay Act and the Genetic Information Nondiscrimination Act, accounted for another 20% of EEOC charges.

More EEOC lawsuits winning class-action status

Employees managed to convert individual lawsuits against their employers into class actions at a record-breaking clip in 2019, according to the Seyfarth Shaw law firm's annual Workplace Class Action Litigation Report.

Employees' lawyers achieved the highest rate ever of certification of class actions since the firm began collecting data 16 years ago: 81% of wage-and-hour cases, 65% for ERISA cases and 64% for employment

discrimination.

Seyfarth Shaw's review of 1,467 class-action rulings uncovered these litigation trends:

Wage-and-hour filings dipped for the third straight year—6,780, down from 7,494 in 2018—despite a high class-action conversion rate.

Credit the Supreme Court's landmark 2019 ruling in *Epic Systems v. Lewis*, which forced many cases into individual arbitration that would otherwise have morphed into class-action arbitration cases.

However, settlement amounts doubled for wage-and-hour cases, jumping to \$449 million in 2019, compared to \$253 million in 2018. Settlements of government enforcement cases plummeted to \$57.5%, down from \$125 million in 2018 and \$485 million in 2017.

The U.S. Supreme Court's pro-business rulings helped employers. In recent years, the Court has issued a string of rulings that made it easier to avoid class-action litigation. Along with the *Epic Systems* ruling, other notable 2019 cases included *Lamps Plus v. Varela* and *Nutraceutical Corp. v. Lambert*. Both limited employees' ability to bring class-action lawsuits against employers.

The #MeToo movement continues to fuel class-action litigation. Of the EEOC's 2019 sex discrimination lawsuit filings, 28 included claims of sexual harassment, and 57 of 84 Title VII lawsuits were based on gender discrimination allegations. Expect #MeToo issues to remain in the spotlight in 2020.

What employers can do

Don't let your organization become one of the EEOC's charge statistics this year. Remind employees and supervisors alike that you do not tolerate any form of discrimination or harassment.

Beyond that obvious step, remember that retaliation remains the biggest litigation risk for employers. Make sure supervisors and managers understand that they must never act against an employee for engaging in protected activity. Back up your commitment with a robust anti-retaliation policy that you rigorously enforce.

If an employee has filed any kind of discrimination or harassment complaint—internally or with an enforcement agency—insist on HR approval for any significant changes to his or her working conditions.

Ensure employees know that they should immediately report to HR any retaliation they experience or witness.