

EEOC Developments Signal Policy Changes To Come

By **Eric Dreiband** (May 12, 2022)

Two recent announcements about the U.S. Equal Employment Opportunity Commission provide the public with insight about the commission's past performance and changes to anticipate going forward.



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First, on March 28, the EEOC released a report about its prior year performance and proposed budget for 2023. The data and report reveal an incongruity between the agency's declining performance metrics and increased budget and staffing levels.

Namely, data indicate, among other metrics, that charges of discrimination were filed at the lowest rate in over two decades, and the number of lawsuits resolved and money recovered by the EEOC is also on a downward trend. Yet the EEOC significantly increased its staffing levels in 2021, enjoyed its highest budget ever, and asked Congress to increase its budget again.

The requested budget increase appears unrelated to increasing workload — since the workload is decreasing — and may signal increased enforcement and policy development action.

The requested increase may alternatively reflect year-over-year budget increases that typically happen with government agencies due to increased labor and other costs.

Second, on April 5, President Joe Biden nominated Kalpana Kotagal to serve as a commissioner of the EEOC. The announcement of a commissioner nominee signals a potential shift in control of the commission to a Democratic majority.

A shift in EEOC policy would likely follow, including in areas such as long-awaited wellness plan regulations, pay data reporting obligations, sexual harassment guidance, the use of artificial intelligence to make hiring and other employment decisions, and other areas touched on below.

Looking Backward: Enforcement Metrics Decline as Budget and Staffing Continue to Increase

The EEOC's recently released data and budget announcement reveal a continuous significant reduction in the commission's workload juxtaposed against historically high budgets and recently increased staffing at the agency.

The EEOC maintains enforcement data from 1992 to the present, and the most recent data reveal that in 2021:

- The overall number of charges, and the number of charges that allege race, sex and age discrimination, were the lowest ever recorded;
- The number of Americans with Disabilities Act charges was the lowest since 2009;

- The number of charges that alleged religious discrimination was the lowest since 2000;
- The number of Equal Pay Act charges was the lowest since 2007, and the third lowest ever recorded; and
- The number of retaliation charges filed was the lowest since 2009.[1]

The decline in charges filed appears unrelated to the COVID-19 pandemic. Indeed, the number of charges declined every year from 2016 to 2021.

In 2016, the EEOC received 91,503 charges, approximately 30,000 more than it received in 2021. Charge filings are down approximately 39% from 10 years ago.

During that same 10-year period, 2011 to 2021, the number of race discrimination charges filed annually declined by 41%, and sex discrimination charges declined by 34%.

The number of resolutions also declined. Again, the reductions predate the pandemic and occurred every year from 2017 to 2021.[2] For example, the EEOC resolved 99,109 charges in 2017 and 62,187 in 2021, a decline of more than 37%.[3]

The amount of money recovered by the commission likewise declined in 2021. In 2020, the EEOC recovered a record amount, \$535.4 million, and the litigation program recovered \$106 million, which was the highest amount in 16 years.[4]

In 2021, the EEOC recovered approximately \$485 million, a nearly 10% reduction from 2020.[5] The reduction is attributable to the EEOC's litigation program, which recovered \$34 million. This was 68% less than 2020, the lowest amount recovered by the EEOC's litigation program since 2014, and the third-lowest amount since 1992.[6]

The number of cases filed by the commission increased by 28%, from 97 in 2020 to 124 in 2021, but has continued to decline over the long term.[7]

The EEOC increased the number of lawsuits it filed after it voted to authorize the commission to consider whether to approve or deny every lawsuit recommended by the EEOC's Office of General Counsel.

The increased number of EEOC filings in 2021 does not change the overall trajectory of the EEOC's litigation program. From 1997 to 2011, the EEOC filed between 271 and 465 cases every year. From 2012 to 2021, the EEOC filed fewer than 200 cases every year except 2017 and 2018, and never filed more than 217 in any single year.[8]

The number of new systemic lawsuits remained relatively constant from 2020 to 2021, and has declined as compared to other recent years. The EEOC defines systemic cases as "pattern or practice, policy and/or class cases where the discrimination has a broad impact

on an industry, profession, company or geographic location." [9]

In 2021, the EEOC filed 13 systemic lawsuits, which is the same number of such suits it filed in 2020, and it resolved 26 systemic lawsuits, which is seven fewer than the 33 it resolved in 2020. [10]

The EEOC's systemic lawsuits recovered \$22.7 million for 1,671 aggrieved individuals in 2021, compared to \$69.9 million and 25,000 aggrieved individuals in 2020. [11]

The EEOC's 2020 and 2021 systemic filings are down substantially compared to other recent years. For example, the EEOC filed 30 systemic lawsuits in 2017 and 37 in 2018. [12]

Meanwhile, against this declining workload, the EEOC's backlog, hiring and budget all increased in 2021. The backlog increased by just over 2% and is relatively low compared to previous years, at 42,811 charges. [13]

The EEOC filled 450 positions and ended the year with more than 2,100 employees. [14]

The EEOC's 2021 budget was more than \$404 million, up from just under \$390 million in 2020. And in March, the EEOC asked Congress to increase its budget to \$464.7 million, which would be the EEOC's highest budget ever, and more than a \$100 million increase from 2017. [15]

Looking Forward: An Anticipated Shift in Control and Related Policy Changes

Biden's nomination of Kotagal to serve as a commissioner portends an upcoming shift in control, and likely related policy changes, at the agency.

Title VII of the Civil Rights Act established the commission. Title VII mandates that no more than three commissioners "shall be members of the same political party" and that the commissioners serve staggered five-year terms. [16] There are currently five commissioners at the EEOC, outlined below. [17]

Name	Party	Expiration of Term
Chair Charlotte Burrows	Democratic	2023
Vice Chair Jocelyn Samuels	Democratic	2026
Commissioner Janet Dhillon	Republican	2022
Commissioner Keith Sonderling	Republican	2024
Commissioner Andrea Lucas	Republican	2025

Janet Dhillon's term expires on July 1, and she can stay in office past July 1 if the U.S. Senate has not confirmed a successor. [18] The president's announcement about Kotagal means that she would replace Dhillon if the Senate votes to confirm the nomination. [19]

Title VII also directs the president to "designate one [commissioner] to serve as Chairman of the Commission, and one [other commissioner] to serve as Vice Chairman." [20] The chair is responsible [21] for "the administrative operations of the Commission." [22]

Biden designated Charlotte Burrows to serve as chair on Jan. 20, 2021. Thereafter, Burrows reversed some policy initiatives. For example, on Feb. 12, 2021, she notified the other

commissioners that proposed regulations concerning wellness plans were formally withdrawn.

Later, on March 14 of this year, the commission released information about the COVID-19 pandemic and employment discrimination against caregivers.[23]

More policy changes are likely to occur if and when control of the commission shifts.

One policy that may change under a new majority is the commission's litigation approval process. Currently, the EEOC can vote to authorize or deny litigation authority to any lawsuit proposed by the EEOC's Office of General Counsel.[24] However, the commission adopted the current litigation approval process on Jan. 13, 2021, by a 3-2 party-line vote.

Both Democratic commissioners, Burrows and Jocelyn Samuels, voted against permitting the commission to exercise expanded authority over the initiation of litigation.

Prior to the 2021 change, the EEOC's general counsel had near-plenary authority to initiate litigation. If and when the Senate confirms the pending nomination, the new majority may change course and delegate its authority to approve or deny authority to file particular lawsuits to the EEOC's general counsel, if one has been confirmed by that time.

Indeed, the commission's general counsel job has been vacant since Biden fired then-general counsel Sharon Gustafson in early March 2021.[25]

Per Title VII, the general counsel is "appointed by the President, by and with the advice and consent of the Senate, for a term of four years" and has "responsibility for the conduct of litigation." [26]

The general counsel also supervises the EEOC's regional attorneys and other litigators as they prosecute the commission's cases in the federal courts.[27]

Without a general counsel, the litigation continues at the direction of Burrows, as well as attorneys in the EEOC's Office of General Counsel and regional attorneys and their staff around the country.

Under a new majority, we may see progress on several recent EEOC initiatives as well.

In 2021, the EEOC launched three initiatives: (1) the Hiring Initiative to Reimagine Equity, which aims to work with the U.S. Department of Labor's Office of Federal Contract Compliance Programs to expand employment opportunities; (2) an anti-retaliation initiative with the DOL and the National Labor Relations Board; and (3) an initiative to ensure that employment-related artificial intelligence and algorithms comply with the federal civil rights laws.[28]

It remains unclear how these initiatives will actually affect the EEOC's investigations and litigation.

For example, the EEOC says that its hiring initiative will "reimagine equity and expand opportunity in hiring." [29] It does not say how it will do so, and it appears that the commission will initially study the issue by "[engaging] a broad array of stakeholders." [30]

The EEOC says that its anti-retaliation initiative will likewise "engage with employers, business organizations, labor organizations and civil rights groups in the coming year." [31]

The EEOC's Artificial Intelligence and Algorithmic Fairness Initiative promises to hold listening sessions and gather information about the use of "emerging technologies used in hiring and other employment decisions" in order to issue technical assistance about "algorithmic fairness and the use of AI in employment decisions."^[32]

Likewise, a new majority may also advance several policy issues that have remained stalled at the commission for several years. These include long-promised regulations about employer wellness plans and guidance about sexual harassment.

For now, it remains to be seen whether Congress will grant the commission's requested budget increase, or some portion of it. The EEOC's recent hiring of hundreds of investigators, attorneys and other enforcement staff suggests that the EEOC is gearing up to increase its enforcement.

Finally, it is unclear when or whether Biden plans to announce a general counsel nominee. Any nominee, if confirmed, will affect the EEOC's litigation of the very important and historic civil rights laws that are within the commission's jurisdiction.

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[1] EEOC, Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2021, available at <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021> and EEOC, Charge Statistics FY 1992 Through FY 1996, available at <https://www.eeoc.gov/statistics/charge-statistics-fy-1992-through-fy-1996> (collectively, "EEOC Charge Statistics").

[2] EEOC, 2021 Annual Performance Report (APR), available at <https://www.eeoc.gov/2021-annual-performance-report-apr> ("EEOC 2021 APR"); EEOC Charge Statistics.

[3] EEOC 2021 APR; EEOC Charge Statistics.

[4] EEOC, Fiscal Year 2020 Agency Financial Report U.S. Equal Employment Opportunity Commission, available at <https://www.eeoc.gov/fiscal-year-2020-agency-financial-report-us-equal-employment-opportunity-commission>.

[5] EEOC 2021 Agency Financial Report.

[6] See EEOC, EEOC Litigation Statistics, FY 1997 through FY 2021, available at <https://www.eeoc.gov/statistics/eeoc-litigation-statistics-fy-1997-through-fy-2021> and EEOC Litigation Statistics, FY 1992 through FY 1996, available at <https://www.eeoc.gov/statistics/eeoc-litigation-statistics-fy-1992-through-fy-1996> (collectively, "EEOC Litigation Statistics"), and EEOC Charge Statistics.

[7] EEOC Litigation Statistics.

[8] EEOC Litigation Statistics.

[9] EEOC, Systemic Enforcement at the EEOC, available at <https://www.eeoc.gov/systemic-enforcement-eeoc>.

[10] EEOC 2021 APR.

[11] EEOC 2021 APR; EEOC, Fiscal Year 2020 Annual Performance Report, available at <https://www.eeoc.gov/fiscal-year-2020-annual-performance-report>.

[12] EEOC, Performance and Accountability Report Fiscal Year 2018, available at <https://www.eeoc.gov/performance-and-accountability-report-fiscal-year-2018>; EEOC, Performance and Accountability Report Fiscal Year 2017, available at <https://www.eeoc.gov/performance-and-accountability-report-fiscal-year-2017>.

[13] EEOC 2021 APR.

[14] EEOC 2021 APR.

[15] EEOC, Fiscal Year 2023 Congressional Budget Justification, available at <https://www.eeoc.gov/fiscal-year-2023-congressional-budget-justification>; EEOC, EEOC Budget and Staffing History 1980 to Present, available at <https://www.eeoc.gov/eeoc-budget-and-staffing-history-1980-present>.

[16] 42 U.S.C. § 2000e-4(a).

[17] EEOC Fiscal Year 2021 Agency Financial Report, available at <https://www.eeoc.gov/fiscal-year-2021-agency-financial-report> ("EEOC 2021 Agency Financial Report").

[18] 42 U.S.C. § 2000e-4(a).

[19] The press release that announced President Biden's intent to nominate Ms. Kotegal is available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/01/president-biden-announces-key-nominees-9/>.

[20] 42 U.S.C. § 2000e-4(a).

[21] 42 U.S.C. § 2000e-4(a).

[22] 42 U.S.C. § 2000e-4(a).

[23] EEOC, The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws, available at <https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment>.

[24] EEOC, What You Should Know About EEOC and Modified Delegation of Litigation Authority (Jan. 13, 2021), available at <https://www.eeoc.gov/wysk/what-you-should-know-about-eeoc-and-modified-delegation-litigation-authority>; EEOC, Resolution Concerning the Commission's Authority to Commence or Intervene in Litigation and the Commission's Interest in Information Concerning Appeals (Jan. 13, 2021), available

at <https://www.eeoc.gov/resolution-concerning-commissions-authority-commence-or-intervene-litigation-and-commissions-0>.

[25] "Biden Moves to Fire EEOC Top Lawyer Who Wouldn't Resign," Bloomberg Law, March 5, 2021, available at <https://news.bloomberglaw.com/daily-labor-report/biden-to-fire-trump-eeoc-general-counsel-who-refused-to-resign>.

[26] 42 U.S.C. § 2000e-4(b)(1).

[27] 42 U.S.C. § 2000e-4(b)(2)

[28] EEOC, EEOC Releases Fiscal Year 2021 Performance Report and Fiscal Year 2023 Budget Justification, available at <https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2021-performance-report-and-fiscal-year-2023-budget>.

[29] EEOC, Hiring Initiative to Reimagine Equity (HIRE), available at <https://www.eeoc.gov/hiring-initiative-reimagine-equity-hire>.

[30] EEOC, Hiring Initiative to Reimagine Equity (HIRE), available at <https://www.eeoc.gov/hiring-initiative-reimagine-equity-hire>.

[31] EEOC, U.S. Department of Labor, National Labor Relations Board, U.S. Equal Employment Opportunity Commission Align to End Retaliation, Promote Workers' Rights, available at <https://www.eeoc.gov/newsroom/us-department-labor-national-labor-relations-board-us-equal-employment-opportunity>.

[32] EEOC, Artificial Intelligence and Algorithmic Fairness Initiative, available at <https://www.eeoc.gov/artificial-intelligence-and-algorithmic-fairness-initiative>.