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EEOC Reports Record Numbers for Fiscal Year 2011

More workers than ever filed charges with the U.S. Equal Employment Opportunity Commission (EEOC) this past fiscal year. According to the EEOC's [Annual Performance Report for Fiscal Year 2011](#), the EEOC received a record number of bias charges—a total of 99,947 charges, the highest number of new charges in the agency's history.

The Annual Performance Report also highlights other key successes:

- A 10 percent decrease in the EEOC's backlog of pending charges;
- Approximately 5.4 million individuals benefitted from changes in employment policies or practices in their workplace during the past fiscal year due to EEOC's enforcement programs in both the private and federal sectors;
- Through the private-sector national mediation program, complainants received more than \$170 million and 9,831 cases were brought to resolution (5 percent more resolution than in FY2010 and highest number ever);
- In the federal sector, the EEOC resolved 7,672 requests for hearings, securing more than \$58 million in relief for complaining parties. Also, the EEOC resolved 4,510 appeals of final agency determinations; and
- Through administrative enforcement, the EEOC obtained more than \$364.6 million in monetary benefits for victims of workplace discrimination (highest amount ever through administrative enforcement).

Comprehensive enforcement and litigation statistics for fiscal year 2011 will be available in early 2012.

For more information regarding this article, please contact [Deanna Atchley](#).

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OFCCP's Proposed Rule Revising Regulations on Disabled Employees and Applicants

On December 9, 2011, a [Notice of Proposed Rulemaking](#) was published in the federal register that would revise the regulations at 41 C.F.R. Part 60-741 implementing the non-discrimination and affirmative action provisions of Sec. 503 of the Rehabilitation Act of 1973. The rule proposes a requirement that federal contractors establish a hiring goal of 7 percent of their employees be persons with disabilities in each job group of the contractors' workforce as reported in their affirmative action program.

The proposed rule also contains language clarifying which regulations are mandatory and which are only recommended, as well as:



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- A provision requiring contractors to identify vacancies and training programs for which disabled applicants and employees were considered, provide a written statement explaining the circumstances for rejecting the disabled applicant or employee, as well as a description of the reasonable accommodations that were offered. The provision also requires contractors to annually review their personnel processes to ensure that its obligations are being met;
- A provision requiring contractors to develop and implement written procedures for processing requests for reasonable accommodation;
- Provisions requiring enhanced data collection with respect to disabled employees.

As a result of initial negative reaction to the proposed rule, on December 20, 2011, Policy Branch Chief Naomi Levin clarified that the proposal for a 7 percent hiring goal for disabled persons is not intended to be a quota, but as an "aspirational equal employment opportunity objective." Lewin emphasized that contractors will not violate the law if they do not meet the goal. Instead, the Office of Federal Contract Compliance Programs intends to use the 7 percent proposal as a tool for measuring contractors' progress toward full equal opportunity employment.

Despite this clarification, expect significant debate over this proposed rule especially as employers struggle with how to balance tracking to meet these "goals," while at the same time not running afoul of requirements under the Americans with Disabilities Act Amendments Act (ADAAA).

For more information regarding this article, please contact [Jesse Tanksley](#) or [Stephanie Scheck](#).

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Expect EEOC Continued Crackdown in 2012 on Hiring Practices, Medical Examinations and Leave Policies

The ADA prohibits the use of "qualification standards, employment tests or other selection criteria that screen out or tend to screen out" disabled applicants, unless the test or qualification standard is "job-related for the position in question and is consistent with business necessity." The EEOC appears skeptical about any testing criteria employers use to screen out applicants and recent cases suggest new efforts by the EEOC to crack down potential employer discrimination against disabled individuals in the hiring process.

Specifically, the EEOC appears particularly concerned with employers' use of personality tests on the theory that such tests tend to screen out those who suffer from disabilities. In an on-going Third Circuit case, the EEOC is investigating an employer's use of a personality test



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intended to measure "the human traits and underlie strong service orientation and interpersonal skills." See *EEOC v. Kronos, Inc.*, 620 F.3d 287 (3rd Cir. 2010).

In this case, the complainant who suffers from hearing and speech impairment filed a charge with the EEOC after being denied employment, and the EEOC investigation was launched thereafter. This case has not yet moved beyond the investigative phase, but we will continue to monitor it and update you as litigation proceeds. Nevertheless, this case demonstrates that the EEOC has singled out hiring tests as an area of focus for discrimination investigations.

The EEOC also has recently pursued a broader application of the ADA's limits on medical examinations. The ADA prohibits employers from using medical tests or making inquiries as to whether an employee is disabled, "unless such examination or inquiry is shown to be job-related and consistent with business necessity."

While tests used to determine illegal drug use are not considered a medical examination, as defined under the ADA, the EEOC argues that alcohol testing is permissible only when the employer has a "genuine and reasonable belief based on objective evidence that an employee is impaired by alcohol." See *EEOC v. United States Steel Corp.*, No. 2:10-dv-01284-NBF (W.D. Pa. Sept. 30, 2010).

The EEOC also appears to be targeting tests used to determine the use of certain prescription (non-illegal) drugs, including Xanax and Oxycodone. The agency argues that such tests disfavor disabled individuals while employers argue that such tests are necessary to ensure workplace safety. This position taken by the EEOC reflects the view that testing for anything other than categorically illegal drugs is permitted only when there is cause to suspect drug use and it is adversely affecting the employee's performance, which presents a very narrow reading of the ADA's statements that drug tests are not medical examinations.

Unpaid leave is another hot button issue for the EEOC, which appears to be focusing its attention on how the denial of leave affects disabled individuals. The ADA requires that where necessary, employers must provide a reasonable accommodation enabling disabled workers to perform the essential functions of their job. Many circuits have recognized that physical attendance in the workplace is an essential job function and that a request to be relieved from such essential function may not be a reasonable or even plausible accommodation.

Nevertheless, the EEOC has investigated and sued employers for an alleged failure to provide unpaid leave as a reasonable accommodation. The EEOC's [Technical Assistance Manual](#) identifies flexible leave policies as potentially required reasonable accommodations for certain disabilities. The agency does, however, recognize that an employer is not required to provide leave where it would cause undue hardship or where an employee requests indefinite leave. Nevertheless, recent cases brought by the EEOC illustrate the the commission's focus on leave under the ADA and that employers should provide more flexible leave policies for disabled individuals than nondisabled individuals. *EEOC v. Sears, Roebuck & Co.*, No. 04-cv-



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07282 (N.D. Ill. 2009) (EEOC arguing that a standard one-year workers' compensation leave policy is impermissibly inflexible because it failed to allow disabled employees additional leave or the opportunity to return to work in a different capacity).

In reviewing or updating policies in 2012, employers should be aware that the EEOC is ramping up its enforcement efforts of ADA leave policies, specifically targeting blanket leave policies.

For more information regarding this article, please contact [Molly Walsh](#).

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Boeing Employee's Age Claim Flies On – ADA Claim Crashes and Burns

In a pending lawsuit in the District of Kansas, a Boeing employee alleges both disability and age claims against Boeing. Because the employee failed to demonstrate that his condition (a visible deformity and blindness in his right eye) was a determining factor in Boeing's decision to include him in a reduction in force (RIF) or that gave rise to an inference of disability discrimination, the court granted Boeing's motion for summary judgment on plaintiff's disability claims under the ADAAA. ([Markham v The Boeing Co](#), Case No. 10-1363-MLB, December 14, 2011, Belot, M).

However, the employee's age discrimination claim under the Age Discrimination in Employment Act (ADEA) survived Boeing's motion. Plaintiff's position of captain (a supervisory position) was downgraded to security officer allegedly as a result of a RIF. A co-worker, who was also demoted, testified that the supervisor told her that she and the plaintiff were too old for the captain position, and also made reference to performance issues. While the court held that such comments did not constitute direct evidence of age discrimination, the supervisor's statement that the co-worker and plaintiff were too old was sufficient to create a genuine issue of material fact as to whether the employee was included in the RIF because of his age. Moreover, the court found that there was a nexus between the ageist comments and the employee's termination because the statements were made in conjunction with the receipt of layoff notices. While the court would not "second guess" the employer's business judgment, it noted that it must also look to the age-based comments allegedly made by the decision-maker at the time the layoff notices were received.

For more information regarding this article, please contact [Deanna Atchley](#).

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Department of Labor Announces Proposed Rule to Revise Companionship and Live-In Worker Regulations

In response to the growing demand for long-term, in-home care, the Wage & Hour Division of the Department of Labor issues a Notice of Proposed Rulemaking on December 23, 2011,, which will provide minimum wage and overtime protections for workers who provide in-home care services for the elderly and sick.

In 1974, Congress extended the coverage of the Fair Labor Standards Act (FLSA) for minimum wage and overtime protections to include "domestic service" workers who performed services of a household nature in a private home. However, the 1974 regulations also created an exemption from those protections for casual babysitters and companions for the elderly and infirm, as well as an exemption from the required overtime pay for live-in domestic workers.

With the growth of the private in-home care industry, thousands of employees of private care provider agencies fell within the companionship exemption and thus were not provided minimum wage and overtime protections. In addition, employment of the "live-in" domestic worker became a standard practice for private care providers in the industry. That did not coincide with Congress's intent in creating the exemption, which was for household-employed neighbors to watch over elderly family members.

Since in-home care employees remain among the lowest paid in the industry, the DOL seeks to narrow the definition of those covered by the companion exemption through the Proposed Rulemaking, and provide more workers with minimum wages and overtime pay protection.

The Proposed Rulemaking outright denies the exemption to any third-party employer caregiver, rendering it available only to companion or live-in caregivers employed by the family or household. Even a caregiver employed jointly by a third party and the family is not covered by the exemption. Third-party in-home staffing agencies cannot claim the companionship exemption or the overtime exemption for live-in domestic workers. In addition to protection for overtime worked, live-in care providers must still be compensated for sleeping time if on duty for less than 24 hours and overnight. All third-party employees must be compensated for travel time between patients. The definition of "domestic service worker" has also been modified to include babysitters and elder sitters or companions, although those employed by the family or household will still qualify for the exemption.

The changes to the regulations include a limitation of the tasks that may be performed by an exempt companion, which are limited to those related to fellowship and protection, such as playing cards, watching television together, visiting with friends and neighbors, taking walks, or engaging in hobbies. Other "incidental services," such as grooming, dressing, driving to appointments or food preparation are allowable up to a maximum of 20 percent of hours worked per week, but do not include housework or medical care. Employees performing tasks not related to the fellowship and protection of the individual will be entitled to minimum wage



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and overtime protections. Thus, even family or household-employed workers that provide medical or other skilled care are entitled to FLSA protections.

Lastly, there are new recordkeeping requirements. Hours can no longer be tracked by use of an employment agreement but must be kept by daily records of hours worked. Almost two million workers would be subject to the revised companionship and live-in worker regulations.

For more information regarding this article, please contact [Erin Guffey](#) or [Stephanie Scheck](#).

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Broad Power: The EEOC's Use of Subpoenas

Title VII and other EEOC-enforced statutes, including the ADAAA and ADEA, authorize the EEOC to issue administrative subpoenas for purposes of gathering information, documents and witnesses during investigations. The EEOC has the power to subpoena "any evidence that is relevant and necessary to the resolution of any issue in an investigation, unless it would be unduly burdensome to provide the evidence." See *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69. This power is expansive — subpoenas may seek an employer's nationwide data even where the claim is for individual discrimination, and the EEOC may issue subpoenas even after the charging party has received a right-to-sue letter.

Under Title VII and the ADAAA, employers may file a petition to revoke or modify the subpoena. The petition must identify each portion of the subpoena with which the employer does not intend to comply and provide the basis for noncompliance. However, objections on the basis that a subpoena is overbroad, unduly burdensome or irrelevant are rarely successful beyond the district court level. In the event the EEOC loses a subpoena enforcement action, it may appeal the decision, and federal courts of appeals generally tend to enforce EEOC subpoenas with only limited exceptions.

In a recent Eighth Circuit case, *EEOC v. Schwan's Home Serv.*, 644 F.3d 742, 748 (8th Cir. 2011), the court affirmed the district court's holding that the EEOC subpoena was enforceable. In that case, the complainant was offered a general manager position, conditions upon her successful completion of the General Manager Development Program. After the complainant completed the program but failed to graduate due to an alleged lack of leadership qualities, Schwan's revised her offer for a different position. Complainant then filed an EEOC complaint alleging gender discrimination and retaliation. She subsequently amended the charge to allege systematic class discrimination against women.

After the charge was modified, the EEOC issued a subpoena requesting information about the gender makeup of Schwan's general managers, the selection process for the program, and a gender breakdown of successful program graduates. Schwan's petitioned to have the subpoena revoked or modified, and the EEOC slightly modified the subpoena in response.



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Schwan's then failed to fully comply with the modified subpoena, and the EEOC petitioned the district court for an order of enforcement. Among other things, Schwan's argued the subpoena was unenforceable because the amended charge was invalid due to timeliness. The district court found that this was not the proper forum to determine the validity of the amended charge and held that employers may not contest procedural or substantive merits of a charge in a subpoena enforcement action.

In support of its holding, the court stated, "the EEOC's authority to investigate is not negated simply because the party under investigation may have a valid defense to a later suit. If every possible defense, procedural or substantive, were litigated at the subpoena enforcement stage, administrative investigations obviously would be subjected to great delay." The Eighth Circuit affirmed this holding on appeal finding that the issue of validity of the amended charge was "premature" because "the appropriate time to address the timeliness issue is if and when an actual lawsuit is filed." Regarding the relevance of the subpoena, the circuit court found that it was within the scope of both the systematic gender discrimination charge and the individual discrimination charge because the individual charge "revealed potential systematic gender discrimination." In delineating what would and would not be relevant, the circuit court noted that the EEOC would not have been permitted to request information relevant to systematic gender discrimination if the underlying charge were, for example, an individual charge of race discrimination.

In reading these cases, employers should understand and be aware that federal courts will likely construe the EEOC's investigative authority as broadly as possible so as to allow a complete and thorough investigation without substantial delay.

For more information regarding this article, please contact [Molly Walsh](#).

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