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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Bolstered by a substantial budget increase for fiscal year 2010, EEOC aims to bounce back from flat funding and staff reductions during the Bush administration. EEOC is hiring again and it is banking on a freshly trained, growing agency workforce to handle a discrimination case workload that shows no signs of diminishing. The commission starts the year with only two members, hoping that the Senate will quickly confirm President Obama's nominees for EEOC chair, two commissioner seats, and general counsel.

EEOC Seeks to Rebuild Internally While Awaiting New Agency Leadership

As the Obama administration's first year draws to a close, the Equal Employment Opportunity Commission has received the budget increase it needs to start bolstering the agency's ability to handle a growing volume of discrimination charges but it still awaits new commission leadership.

EEOC will use a \$23 million budget boost for fiscal 2010 to continue hiring additional frontline staff, including attorneys, investigators, mediators, and support staff, after eight years under the Bush administration in which the commission lost 25 percent of its workforce. EEOC had a net gain of 155 new employees during fiscal year 2009, and it is seeking to add another 140 new employees in fiscal 2010, said EEOC Acting Chairman Stuart Ishimaru, a Democrat who has held that post since January 2009.

President Obama's nomination of Jacqueline Berrien for EEOC chair remains stuck in the Senate, which failed to act on Berrien or Obama's choices for two other commission seats and EEOC general counsel before adjourning the first session of the 111th Congress.

But EEOC still confronts an enormous workload—its case backlog stood at 85,768 charges as of Sept. 30, 2009—and must make up for years of flat funding during the Bush administration. Fiscal 2009 was all about “rebuilding the infrastructure” at EEOC, and that remains the agency's top priority, Ishimaru said in a BNA interview this month.

Meanwhile, President Obama's nomination for EEOC chair, NAACP Legal Defense and Educational Fund Inc. attorney Jacqueline Berrien, remains stuck in the Senate, which failed to act on Berrien or Obama's choices for two other commission seats and EEOC general counsel before adjourning the first session of the 111th Congress.

The Senate has carried over for its next session the nominations of Berrien, Georgetown University law professor Chai Feldblum, and former Bush administration Labor Department official Victoria Lipnic for commission seats, and EEOC senior attorney P. David Lopez as EEOC general counsel. But it is uncertain when the full Senate will vote to confirm the nominees.

Two-Member Commission

In the meantime, the five-member EEOC lacks a quorum as Ishimaru and Commissioner Constance Barker, a Republican, are the sole remaining commissioners. In December, then-EEOC Acting Vice Chair Christine Griffin, Ishimaru, and Barker signed an agreement that temporarily delegates the commission's powers to Ishimaru and Barker until EEOC again has a

quorum. Griffin, whose EEOC term ended once Congress adjourned, is now deputy director at the federal Office of Personnel Management.

Ishimaru said he foresees no problems working with Barker to advance commission business. “Commissioner Barker and I have a good working relationship,” Ishimaru told BNA. “We have agreed that we will work in a cooperative fashion, that things won't go through unless everyone is happy with it.” During the period without a quorum, however, Ishimaru said, “We will be very careful that we don't do anything that would put the agency at risk.”

As he has in the past, Ishimaru praised the EEOC nominees and expressed hope that the Senate confirms them soon. “President Obama has nominated very well-qualified people for the commission and for general counsel, and I'm looking forward to having them as colleagues,” he said. “There's a lot of stuff going through Congress, but our people have made it through the [Senate Health, Education, Labor, and Pensions] Committee, they are poised for floor action, and I am hopeful that soon [EEOC] will have a full complement. And I'm excited about the possibilities once they do get here.”

If Senate action on the nominees is delayed, EEOC action on finalizing regulations implementing the ADA Amendments Act could be affected, as Barker has opposed EEOC's proposed rules. Ishimaru played down that scenario, however, saying he believes that by the time EEOC is ready to approve final changes to its Americans with Disabilities Act regulations, the new commissioners will be on board.

Focus on Building ‘Infrastructure’

Ishimaru said his focus for 2010 is much the same as in 2009: rebuilding the agency's “infrastructure” after the Bush administration years in which EEOC staffing took a “huge hit” even while discrimination charges filed reached historically high levels. “So much of this last year was really rebuilding, and giving us the tools we needed to get the agency back on track,” he told BNA.

EEOC received a record 95,402 private sector discrimination charges in fiscal 2008 and that pace has diminished only slightly, as the commission took in 93,277 charges in fiscal 2009. EEOC's case inventory was higher in the early 1990s than it is now, reaching a peak of about 111,000 charges during fiscal 1995, but EEOC also had almost 3,000 employees available then to work on the backlog.

In contrast, EEOC has approximately 2,300 employees as of Jan. 15 but “the situation is fluid” and the agency expects “more are coming on board soon,” according to a commission official. Although EEOC's current lack of a quorum is not ideal and employees' workloads still are too high, the official said “there is great hope and enthusiasm” among agency employees that EEOC is headed in the right direction under an administration that makes civil rights enforcement a priority. After new commission leadership comes on board, EEOC expects to “move even more quickly” to increase staffing and take other steps to cut into the backlog, the official told BNA. Gabrielle Martin, president of the EEOC employees' union, said EEOC needs “at least 3,000 employees” to give agency employees a fighting chance to handle the current workload. She

emphasized that EEOC's new hiring needs to be focused on frontline staff, including support staff.

EEOC investigators are “certainly overwhelmed” and the commission “loses the public's confidence” if it is unable to address discrimination charges within any reasonable period of time, Martin told BNA.

Martin said one effect of a March 2009 arbitration decision that EEOC was violating the Fair Labor Standards Act by not making overtime pay available to union-represented employees is that EEOC now must deal straightforwardly with staffing issues rather than rely on unpaid overtime to get the work done. Martin said she would like to see EEOC “make good decisions” about staffing levels and to work with Congress to secure more personnel and resources for the agency.

Ishimaru declined to identify an ideal number of EEOC employees, but he acknowledged that “one challenge we have is what's the right amount of work.” EEOC investigators now tend to have 100 or more cases in their inventories, which is “way too many” and “roughly double” the amount investigators handled “just a number of years ago,” he said.

“I think that what we really need to be focusing on is how you make sure that investigators and others have a workload that's realistic and that they can actually get to and provide good customer service,” Ishimaru said.

Training Called Part of the Solution

Ishimaru said he believes the “priority charge handling procedures,” instituted by then-EEOC Chair Gilbert Casellas in 1995, “continues to be a good paradigm for how the agency should operate.” That system involves classifying incoming charges into three categories based on their potential merits and consistency with EEOC's national enforcement plan, putting the most promising on a fast track and quickly dismissing those in which EEOC concludes further investigation is not likely to result in a “probable cause” finding. It sometimes has been called a “triage” system for handling EEOC charges.

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Ishimaru acknowledged that “there's a real question” whether EEOC should “try to reinvent the wheel and try to do something differently” regarding its charge-handling system. But he said the sounder approach is to retrain EEOC staff on implementing priority charge handling procedures, which might have become diluted in practice over the years. That is how EEOC focused its efforts in 2009 and it plans to continue doing so in 2010, Ishimaru said.

Increased hiring of frontline staff will continue, as will increased training for new hires and current employees, Ishimaru said. Touting the \$2.5 million spent on EEOC employee training in fiscal 2009, Ishimaru emphasized the critical nature of training, which he said has been easier to accomplish at EEOC's new headquarters in northeast Washington, D.C.

Martin expressed concern about EEOC employees not being able to do the jobs for which they were hired because support staff is lacking in field offices. Ishimaru concurred that a challenge is “right sizing, as trite as that sounds,” so EEOC employees can spend more time on the jobs in which they have expertise.

Unfinished Business

In addition to publishing regulations implementing the ADA Amendments Act, which took effect Jan. 1, 2009, EEOC anticipates finalizing regulations under the Genetic Information Nondiscrimination Act in 2010.

EEOC issued proposed regulations to implement GINA's employment title last March and after reviewing public comments, submitted a proposal for GINA final regulations to the White House Office of Management and Budget in August. But OMB has extended its review of EEOC's GINA proposal and it is uncertain when the commission will be cleared to publish a final rule. Ishimaru said EEOC has been in discussions with OMB about a GINA final rule but declined to characterize the substance of those talks. “We're waiting to get final clearance,” he told BNA. “There's always nits and details and other issues that come up; we're trying to work through that.”

Ishimaru said publication last year of EEOC's proposed GINA regulations at least provides some guidance to employers and others covered by the new law, which took effect Nov. 21, 2009. “The fact that the draft regulations have been out there [since March 2009], people understand generally where we are coming from,” he said.

As for the ADA Amendments Act, EEOC issued proposed regulations in September and received more than 600 responses during a public comment that ended Nov. 23. EEOC now is reviewing those comments and aims to publish a final rule by mid-2010, according to its latest regulatory agenda.

More ADA Activity Predicted

The ADA Amendments Act, through which Congress overturned U.S. Supreme Court decisions that narrowly interpreted the ADA's definition of disability, appears to be having an effect as EEOC received a record number of disability discrimination charges in fiscal 2009. “My guess is that the increase in charges under the ADA was due in large part to public awareness” of the 2008 law, Ishimaru said. He predicted that ADA charges could receive another boost after EEOC issues its final rule.

More ADA charges and Congress's instruction that “disability” should be liberally construed in favor of coverage probably also means more EEOC suits under the ADA, including more class actions challenging alleged systemic discrimination based on disability.

Ishimaru said it is “an open question” whether employers will react to the ADA's broader coverage by adhering to questionable employment practices or by modifying them once they see EEOC's final regulations. “My hope is that if there is a need to have more ADA class cases, that we can bring them,” Ishimaru said, adding that he had experienced “frustration” under the former version of the ADA that EEOC largely filed individual cases only. “I think to the extent that

employers have policies that discriminate on a classwide basis, they really should be the subject of enforcement activity,” Ishimaru said.

Ishimaru said during a listening tour EEOC conducted last fall to publicize its ADA proposed rules, he was struck that “there continues to be, 20 years after passage of the original ADA, immense frustration at the inability of people with disabilities to be free from discrimination.” On the other hand, he said people were “very hopeful” that following the ADA Amendments Act, the law will be more effective in preventing discrimination and integrating people with disabilities more fully into the workforce.

“I am encouraged with the ADA Amendments Act, and generally with all the laws we passed, that many employers get this now, they understand they need to do it, and quite often, they are able to do it,” Ishimaru said.

Progress on Systemic Program

EEOC in 2010 will be seeking to investigate and litigate more class cases in general, as it proceeds with a renewed emphasis on combating systemic discrimination that was launched in 2006. EEOC filed 19 new suits targeting alleged systemic discrimination in fiscal 2009 and 39 commissioner's charges authorizing investigation of suspected systemic discrimination were pending as of Sept. 30, 2009, compared with 15 such charges a year earlier.

Remarking that he is pleased by the reaction within EEOC to the systemic program, which has received unanimous support from commissioners of both political parties, Ishimaru said “hard questions” remain regarding its implementation and breaking down barriers within EEOC to pursuing such cases.

“We've been getting resources this past year, experts in house, moving them, and will continue to do so to encourage the development of systemic cases,” Ishimaru said. “They don't come easy and they don't come cheap. What we tried to do this past year, again, is to try to build that infrastructure so we can be well positioned” to identify systemic cases and pursue them.

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More Coordination Among Agencies

Greater coordination among federal agencies that enforce anti-discrimination laws is a goal of the Obama administration and EEOC's recent discussions with the Justice Department's Civil Rights Division on a possible memorandum of understanding reflect that broader aim, Ishimaru said.

“Part of this is to formalize relationships through agreements and memorandums of understanding and things like that,” he said. “But part of it, too, is talking to other agencies making sure that there is line communication between people on the front lines.”

Ishimaru said EEOC also is pursuing improved relationships with the Labor Department and the Office of Personnel Management, where he is particularly hopeful that former EEOC member Christine Griffin's presence as OPM deputy director heralds a fruitful collaboration on improving diversity and anti-discrimination efforts in federal employment.

“[Griffin] and I have talked generally about how do you improve the relationship between OPM and EEOC and use both entities for their best purposes,” Ishimaru said. “And how do you improve the situation for federal employees? It's my understanding that [Griffin] will have an active role in that OPM slot moving forward.”

As for the Justice Department, Ishimaru observed that he and Thomas Perez, the assistant attorney general for civil rights, once worked together at Justice and it made sense to try to leverage their relationship into broader collaboration between EEOC and DOJ's Civil Rights Division, which has independent authority to bring “pattern or practice” suits against state and local government employers under Title VII of the 1964 Civil Rights Act.

“That is a very powerful tool and I think we can work with [Justice] on going after and identifying ‘patterns or practices’ of discrimination by state and local employers,” Ishimaru said. “That, I think, may have some impact on our backlog, but we still have the statutory obligation to investigate charges” filed with EEOC against public employers, he added.

Ishimaru said EEOC also should review its partnerships with state and local fair employment practice agencies, which could play a role in easing EEOC's workload by handling more discrimination charges. He added, however, that state and local agencies “run the gamut” regarding the scope of their legal authority and some “may have far less jurisdiction” than EEOC and “are not in a position to take up some of that slack.”

“But that's something we need to look at and better explore—how do we improve our relationship with the state and local agencies,” he said.

A Waiting Game

Ishimaru said during the coming year, he hopes EEOC “will continue to look at next-generation civil rights issues,” such as the family responsibilities discrimination that EEOC began to explore in 2007, and to “make progress” on other issues the commission has recently studied, including employers' potentially discriminatory use of credit histories and criminal background checks. “The way we work has changed, it's a new day out there, and I think some of our work, such as the [May 2007] caregiver guidance, was certainly an acknowledgement that there's a new way of working out there that [EEOC] should be fully aware of,” Ishimaru said.

But Ishimaru said he cannot set EEOC's agenda too far in advance, or conceive plans that are too ambitious, given that new, permanent agency leadership is coming. “Part of my challenge, part of my struggles this past year, is how do you run the agency, how do you move it forward, putting in place a strong infrastructure, [but] leave room for the incoming leadership to run with their ball,” Ishimaru said. “What I don't want to do, and what I try to avoid doing, is to load up this place up or burden [new leadership] with areas they may not want to get into.”

Meanwhile, Ishimaru said, “there's been plenty of work, obviously, to rebuild the infrastructure” and to deal with the mechanics of new hiring at EEOC, for example. “We would like to build a good foundation so that when the new chair gets here, [she] will be able to put her stamp on the agency and move us to higher levels,” he said. “I'm looking forward to that.”

By Kevin P. McGowan