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EEOC REOPENS FOR BUSINESS – GET READY

August 27, 2020

On August 6, the EEOC announced that it will begin issuing right to sue notices from its backlog of thousands of charges, beginning with the charges that are the oldest. The EEOC's fiscal year ends on September 30, so we expect a flood of dismissals between now and September 30. One of the factors Congress considers in its funding of the EEOC is the number of charges processed and closed. Thus, the EEOC wants to finish the fiscal year with a high-level trend of charge closures. If you have a pending charge, a dismissal may occur.

With these dismissals, we also expect a substantial increase in employment litigation. As lawyers that represent employers, the decline in litigation filings during the March to current time frame has not adversely affected our workload, because we have had so many other issues arise that are COVID-related. Plaintiff's attorneys have not been so fortunate. If plaintiffs' attorneys cannot sue or process cases, you know what the outcome is in terms of what kind of the meal they can put on their dinner table. So, with the increase of right to sue notices, we expect a substantial increase in employment litigation.

One final note about the EEOC involves the Commission's review of its conciliation process. If the EEOC concludes there is "cause" to believe discrimination occurred, the statutes require the EEOC to engage with the employer in a conciliation

process. Only 40% of conciliation processes are successful. In our view, a reason for that is because the EEOC refuses to share information about why it reached its determination and takes unreasonable negotiating positions. The EEOC recently held a town hall to consider the opportunity for more conciliations. The EEOC is focusing on transparency with the employer and flexibility in its bargaining positions. Both are welcome. Too often, the EEOC has required that employers play “pin the tail on the donkey” about evidence the EEOC reviewed to issue the “cause” determination.

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