27th Annual Kentucky HR Update

The EEOC

Presentation by Cindy Effinger

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The EEOC's Jurisdiction

- The Equal Pay Act of 1963 (included in the Fair Labor Standards Act)
- Title VII of the Civil Rights Act of 1964
- Pregnancy Discrimination Act of 1978
- Age Discrimination in Employment Act of 1967
- Rehabilitation Act of 1973
- Americans with Disabilities Act of 1990
- Genetic Information Nondiscrimination Act of 2008
- Lilly Ledbetter Fair Pay Act of 2009

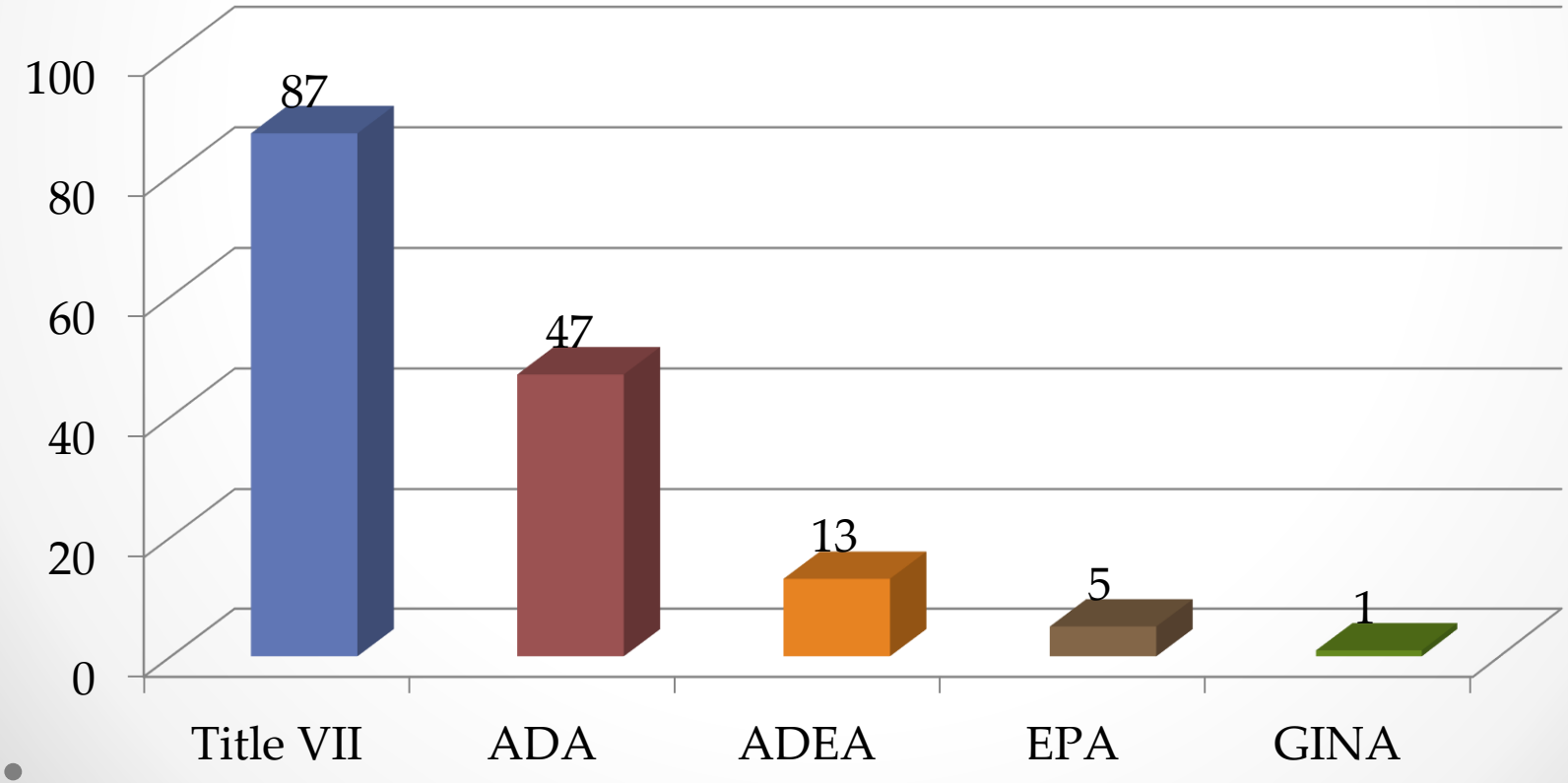
2014 In Review

Litigation

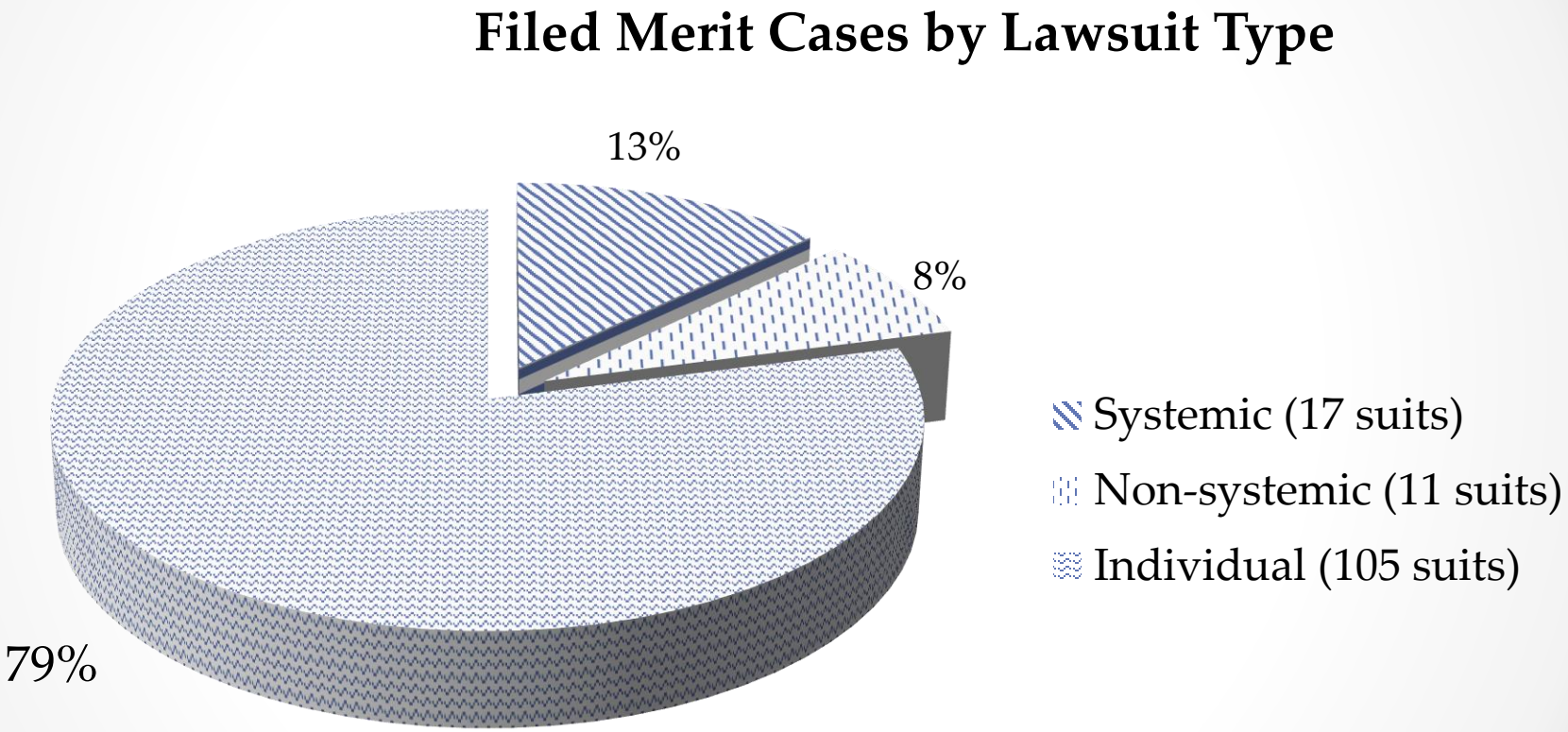
Merit lawsuits: include direct suits and interventions alleging violations of the substantive provisions of the statutes enforced by the Commission and suits to enforce administrative settlements.

2014 In Review

The EEOC **resolved** 136 merits lawsuits in federal district courts, a substantially smaller amount than in 2013 (209). Of these resolutions, 87 contained Title VII claims, 47 contained Americans with Disabilities Act (ADA) claims, 13 contained Age Discrimination in Employment Act (ADEA) claims, five contained Equal Pay Act (EPA) claims, and one contained Genetic Information Nondiscrimination Act (GINA) claims.



2014 In Review



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2014 In Review

FY 2013 marked the first time that the Commission pursued litigation based on genetic information since the Commission issued its final regulations on GINA in 2010. In FY 2014, the Commission again filed suits under GINA, although still in small numbers – two in FY 2014 compared with three in FY 2013. While this shows that GINA cases are still on the EEOC's radar, the EEOC is still very tentative about pursuing them.

2014 In Review

The EEOC very much felt the effects of the government shutdown in early FY 2014, and the statistics concerning charges and litigation reflect that incident. Still, the agency appropriation was $20 million more than in FY 2013, and the EEOC was able to lift a two-year hiring freeze.

The agency now appears to have a smaller baseline for merits lawsuits in general, with 133 filed during FY 2014, 131 in FY 2013 and 122 in FY 2012, contrasted with 250 or more filed each year in the prior seven years.

2014 In Review

- The EEOC secured $296.1 million in monetary relief through private sector/state and local government enforcement actions, down from the record $372 million in FY 2013.

- The 136 merit suits resolved in FY 2014 brought in $22.5 million, less than the FY 2013 figure of $39 million brought in by 209 resolved suits and that lowest recovery amount in 17 years.

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2014 In Review

The EEOC is now past halfway through its FY 2012-2016 Strategic Enforcement Plan ("SEP"), which is a road map for the agency's enforcement and litigation strategy.

The SEP contains a "Systemic Initiative," which calls for the EEOC to ensure that systemic cases make up to 22-24% of its litigation docket by FY 2016. By the end of FY 2013, 23.4% of the active merit suits were systemic cases, and that number rose to 25% in FY 2014, despite a decrease in the number of systemic suits filed. However, FY 2013 saw the EEOC complete work on 300 systemic investigations, while it only completed 260 in FY 2014.

The Big Six Priorities

1. **Eliminate barriers in recruitment and hiring.**

- Address recruitment and hiring practices that allegedly discriminate against underrepresented groups.
- Analyze demographic data, job posting, application forms, and testing requirements.

The Big Six Priorities

1. **Eliminate barriers in recruitment and hiring.**

- ***EEOC v. Kaplan Higher Learning Education Corp.*, 748 F.3d 749 (6th Cir. 2014) –** EEOC challenged employer's reliance on credit history, alleging practice had disparate impact on African-Americans (summary judgment upheld for employer).

- ***EEOC v. BMW Manufacturing Co., LLC*, Case No. 13-CV-1583, 2014 U.S. Dist. LEXIS 169849 (D.S.C. Dec. 2, 2014) –** Court, in ruling in favor of the employer, noted that the EEOC used the same system of credit and criminal history checks in hiring its own personnel, which BMW showed through a discovery request. The EEOC continues to shoot itself in the foot in this way.

The Big Six Priorities

2. Protect immigrants, migrants, and other vulnerable workers.

- Investigate potentially harmful policies that affect workers who may not understand their rights.
- Implement targeted outreach & education programs to ensure these workers feel empowered to exercise these rights.

The Big Six Priorities

2. Protect immigrants, migrants, and other vulnerable workers.

EEOC v. Global Horizons et al – EEOC won summary judgment against an employer for discriminating, harassing and retaliating against farm workers.

- Employees had been subject to statements that they would be shot, deported or arrested if they didn't work harder or tried to escape, etc.
- $2.4 million settlement for 500 Thai workers

The Big Six Priorities

3. Address emerging & developing issues. Specifically, these three:

a. Reasonable accommodation under the ADA.
b. Accommodation for pregnancy-related limitation under the ADA and Pregnancy Discrimination Act.
c. Coverage of LGBT individuals under Title VII's sex discrimination provisions.

The Big Six Priorities

a. Reasonable accommodation under the ADA.

EEOC v. Ford Motor Company **(No. 12-2484 (6th Cir. Apr. 22, 2014)** – employee requested accommodation under the ADA to telecommute.

- Sixth Circuit ruled that Ford did not have to accommodate such a request and did not retaliate against her for filing with the EEOC.
- Ford had well-documented her subpar performance and prior failed attempts to telecommute, and the job required face-to-face interaction.

The Big Six Priorities

EEOC v. Ford Motor Company (cont'd)

- Employee was unqualified for her position, so whether Ford showed bad faith in accommodation is moot.
- EEOC must prove that the employee is a qualified individual who can perform the essential functions of the job with reasonable accommodation.
- Core holding: If an essential function of the job requires attendance, telecommuting is not a reasonable accommodation.

The Big Six Priorities

b. Accommodation for pregnancy-related limitation under the ADA and Pregnancy Discrimination Act.

***Young v. UPS*, 575 U.S. ___ (2015)** – SCOTUS held that a pregnant plaintiff may make out a prima facie case by showing that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others similar in their ability or inability to work.

The Big Six Priorities

3. Address emerging & developing issues.

EEOC v. Abercrombie & Fitch, No. 14-86 – a woman wearing a hijab was not hired because she didn't meet an appearance policy. She didn't ask for a religious accommodation. Tenth Circuit ruled for employer, saying she had to request an accommodation. The case was argued before SCOTUS on February 23, 2015.

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The Big Six Priorities

c. Coverage of LGBT individuals under Title VII's sex discrimination provisions.

Relying on an EEOC opinion in ***Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, EEOC Appeal No. 0120120821 (Apr. 20, 2012)**, which held that "sexual stereotyping" of transgender individuals is impermissible under Title VII, EEOC filed at least two cases against employers who fired transgender employees:

- ***EEOC v. Lakeland Eye Clinic, P.A.* (M.D. Fla. Civ. No. 8:14-cv-2421-T35 AEP filed Sept. 25, 2014)**
- ***EEOC v. R.G. & G.R. Harris Funeral Homes Inc.* (E.D. Mich. Civ. No. 2:14-cv-13710-SFC-DRG filed Sept. 25, 2014).**

The Big Six Priorities

4. Enforce equal pay laws.

- Target compensation systems that allegedly discriminate on basis of gender.

The Big Six Priorities

4. Enforce equal pay laws.

- The EEOC only filed two lawsuits under the Equal Pay Act in FY 2014.
- EEOC achieved two settlements for workers under the Equal Pay Act, but lost its one major equal pay lawsuit at the district level, which was affirmed by the Second Circuit (***EEOC v. Port. Auth. Of N.Y. & N.J.*, 2014 U.S. App. LEXIS 18533 (2d Cir. Sept. 29, 2014))**

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The Big Six Priorities

5. Preserve and improve access to the legal system.

- Investigate employer policies that allegedly discourage individuals from exercising their employment rights (overly broad waiver, settlement provisions that prohibit legal action, mandatory arbitration provisions).

The Big Six Priorities

5. Preserve and improve access to the legal system.

***EEOC v. CVS Pharmacy, Inc.*, 2014 U.S. Dist. LEXIS 142937 (N.D. Ill. Oct. 7, 2014))** – at issue are non-disclosure provisions in the standard CVS separation agreement, which the EEOC contends has a chilling effect on individuals in their ability to file charges with the EEOC. This case was dismissed, but the EEOC is appealing to the Seventh Circuit.

IMPORTANT NOTE: the case was dismissed on the failure of the EEOC to engage in conciliation efforts with CVS, NOT based on the merits of the EEOC's arguments that the NDA agreement provisions have a chilling effect on the filing of claims, although the judge made points in the footnotes that a retaliation claim requires some sort of act, not a passive caveat in a form language.

The Big Six Priorities

6. Prevent harassment.

- Systemic enforcement and targeted outreach – harassment is one of the most frequent complaints in EEOC charges.

The Big Six Priorities

6. Prevent harassment.

In FY 2014, the biggest three EEOC settlements involved harassment claims. Two of those settlements exceeded $2 million, and one of them is particularly noteworthy in light of emerging trends:

In April of 2014, the EEOC settled ***EEOC v. Pitre Inc. d.b.a. Pitre Buick/Pontiac*, CIV No. 11-00875 BB/CG,** where it alleged a male lot manager of a car dealership, under the direction of the general manager, subjected several men to several egregious forms of sexual harassment, from shocking sexual comments to solicitations and regular physical contact. The company supposedly retaliated against those who objected. 55 men will receive some of the $2.1 settlement in this same-sex harassment case.

Cases of Note in 2014

***EEOC v. Sterling Jewelers Inc.*, 3 F. Supp. 3d 57 (W.D.N.Y. 2014)**

- This was the EEOC's largest "pattern or practice" case in 2014, and it was dismissed with prejudice.
- 19 female employees filed charges with EEOC nationwide, alleging discrimination in pay or promotions based on sex. EEOC assigned ***ALL*** the investigations to one investigator, then brought suit.
- Magistrate Judge's report concluded that the EEOC's pre-litigation investigation was incredibly inadequate.

Cases of Note in 2014

***EEOC v. Sterling Jewelers Inc.*, (cont'd)**

- The EEOC contended that the court may not inquire into the sufficiency of an agency's investigation, but the report (adopted by the District Court judge in granting summary judgment for Sterling Jewelers) suggested that a court did have the power to determine whether an investigation had actually taken place and the scope of that investigation.
- The EEOC has a statutory duty to conduct an investigation, and parroting evidence from others does not absolve them of the requirement to conduct independent analysis.
- The case is on appeal to the Second Circuit.

Cases of Note in 2014

***EEOC v. Skanska USA Building , Inc*, 2013 U.S. App. LEXIS 24806, at *2 (6th Cir. Dec. 10, 2013)**

Who is the employer?

- Skanska was the general contractor on a build. A subcontractor, C-1, employed buck hoist operators. Skanska's white employees subjected C-1's black employees to racial harassment. When a C-1 employee complained of the harassment, Skanska canceled C-1's contract. It eventually reinstated the contract, but the harassment continued.
- The C-1 buck hoist operators filed suit against Skanska, but Skanska argued that it didn't employ them and was not an "employer" for Title VII purposes.

Cases of Note in 2014

***EEOC v. Skanska USA Building , Inc*, 2013 U.S. App. LEXIS 24806, at *2 (6th Cir. Dec. 10, 2013)**

Who is the employer?

- EEOC argued that a general contractor and a subcontractor employed individuals jointly – subcontractor was supposed to supervise, but the general exercised more control over the work
- Sixth Circuit: for Title VII purposes, two separate entities are considered to be joint employers if they share or co-determine essential terms and conditions of employment. Joint employer theory now applies in Title VII cases, but previously didn't.
- Skanska settled with the EEOC for $95,000.

Cases of Note in 2014

***EEOC v. Catastrophe Mgt. Solutions*, 2014 U.S. Dist. LEXIS 50822, at *11 (S.D. Ala. Mar. 27, 2014)**

- EEOC alleged that company policy banned dreadlocks was racially discriminatory
- Employer countered that no plausible claim for intentional discrimination has been stated
- Court agreed with employer, citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) in that a claim must allege specific facts to support a credible theory and claim. Also, Title VII protects those with immutable characteristics, but hairstyle is mutable, even if associated with certain ethnic groups.

2015 Hot Button Issues

ADA Amendments Act Issues

The ADAA made it easier to find that an individual has a disability for ADA purposes, so the litigation trend at the EEOC is towards focusing on the obligation of an employer to provide reasonable accommodations.

- Fixed/Maximum Leave Policies – EEOC, through several cases, contends that separation clauses after a specified maximum amount of leave taken are in violation of the ADA's reasonable accommodation provisions. Also at issue are requirements that employees be 100% healed when returning to work.
- Telecommuting as reasonable accommodation – The EEOC lost the first round in *Ford Motor Co.*, but the court didn't completely dispose of the idea of telecommuting as an accommodation. This trend will likely continue.

2015 Hot Button Issues

Wellness Programs

In late 2014, the EEOC filed three cases against employers on the basis of the requirements of their wellness programs, citing violations of the ADA, ADAA and GINA.

On April 20, 2015, the EEOC issued a Notice of Proposed Rulemaking that contained the following points about wellness programs:

- Wellness programs must be reasonably designed to promote health or prevent disease.
- Wellness programs must be voluntary.
- Employers may offer limited incentives for employees to participate in wellness programs or to achieve certain health outcomes.
- Medical information obtained as part of a wellness program must be kept confidential.
- Employers must provide reasonable accommodations that enable employees with disabilities to participate and to earn whatever incentives the employer offers.

2015 Hot Button Issues

"'The most common intersection of these programs and the statutes EEOC enforces occurs when the programs require medical exams or ask disability-related questions, both of which would ordinarily give rise to a violation of the Americans with Disabilities Act (ADA),' EEOC Acting Associate Legal Counsel Christopher Kuczynski told the commission.

…

Some panelists also argued that EEOC's regulations under the Genetic Information Nondiscrimination Act (GINA)-which prohibits acquiring genetic information including family medical history--should provide guidance on whether spouses of employees may be asked for health information in the context of wellness programs."

- EEOC Press Release, "Employer Wellness Programs Need Guidance to Avoid Discrimination", May 8, 2013

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Orion Energy Systems

The case, ***EEOC v. Orion Energy Systems***, was the first case filed by the EEOC against a company for its wellness plan. The EEOC is suing over a violation of the ADA in this case, and contends that Orion penalized an employee in 2009 after she declined to participate in the company's wellness program.

EEOC's allegations:

- Employee required to pay her entire health care insurance premium
- Also had to pay a $50-a-month nonparticipation penalty for a fitness component
- The employee was fired – a move that the EEOC believes was retaliatory
- Orion required medical examinations and made disability-related inquiries that were not job-related or consistent with business necessity.

The bottom line is that (a) this plan is not voluntary, and (b) employee was fired as a result of good-faith objection to the plan.

Flambeau, Inc.

This case, *EEOC v. Flambeau, Inc.*, is another case under largely the same circumstances as *Orion*. An employee of Flambeau refused to participate in biometric screening as part of a wellness program.

EEOC's allegations:

- Employee in question had insurance canceled after failing to submit to biometric screening
- Employee then forced to pay 100% of insurance premiums himself
- Flambeau required medical examinations and made disability-related inquiries that were not job-related or consistent with business necessity.

Again, (a) this plan is not voluntary, and (b) employee faced harsh penalties as a result of failing to participate in the plan. He wasn't fired, however.

Honeywell

In late summer of 2014, Honeywell announced a new requirement for employees – they and their spouses must submit to biometric testing that includes a blood draw. If they do not take the tests, the employees will be penalized thusly:

- Employees lose any HSA contributions from Honeywell, up to $1500
- Employees will be charged a $500 surcharge on their medical plan
- Employees charged a $1000 "tobacco surcharge," even if they don't smoke, and their spouse will incur a penalty of $1000 as well.

Honeywell

"Honeywell wants its employees to be well-informed about their health status not only because it promotes their wellbeing, but also because we don't believe it's fair to the employees who do work to lead healthier lifestyles to subsidize the healthcare premiums for those who do not."

- Written statement from Honeywell International

Honeywell

EEOC v. Honeywell was filed on October 27, 2014 (just out of FY 2014). EEOC contends:

- The biometric screening is not voluntary and not business-related, so it violates the ADA as an involuntary medical examination
- The inducement of the employee's spouse to undergo biometric testing is a violation of GINA - spouse health information is family medical history/genetic information

EEOC alleges that (a) the biometric screening is an involuntary medical examination, and (b) the requirement that a spouse be tested violates GINA in inducing the employee to provide family medical history/genetic information.

2015 Hot Button Issues

Sexual Orientation and Gender Identity Issues

During the first three-quarters of FY 2014, the EEOC had received 663 charges alleging sex discrimination related to sexual orientation and 140 charges alleging sex discrimination on the basis gender identity/transgender status.

This area will continue to increase going forward, with signs that the EEOC is clearly interested in pursuing these cases.

2015 Hot Button Issues

Genetic Discrimination

GINA went into effect in 2009 and the EEOC filed its first two lawsuits involving GINA claims in FY 2013. These will definitely continue to be on the EEOC's radar.

Takeaway for Employers

The EEOC suffered some serious losses in 2014, but continues with a focus on systemic cases that will garner headlines and result in big payouts. Look for continued focus in these particular areas:

- Emerging and novel claims under Title VII, such as LGBT and religious discrimination claims
- Expansive scrutiny of employer reasonable accommodations, non-disclosure agreements and wellness programs.

Employers have to stay on their toes! The EEOC is not backing off anytime soon!

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Have questions?

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