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EEOC enforcement gains emphasis under Democrats

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It's been nearly 18 months since Barack Obama became president. But change is just now coming to the U.S. Equal Employment Opportunity Commission.

It's not just because the federal bureaucracy moves slowly. The agency operated without a permanent leader from January 2009 until late March. The appointment had been held up in the U.S. Senate, but Obama tapped Jacqueline Berrien as the EEOC's chair in a recess appointment.

Three other commissioners were appointed at the same time, giving the EEOC a full complement of five members.

"Democratic administrations are typically more employee-friendly than Republican ones, and the word on the street is to expect to see a shift," says Kenny Colbert, president of The Employers Association, a Charlotte-based human-resources consultant.

Berrien's background includes experience as a litigator for the NAACP Legal Defense and Educational Fund. Colbert expects to see the EEOC file more lawsuits, especially against Fortune 500 companies, under her leadership.

"The EEOC was starved under the Bush administration," says Luke Largess, a partner at Charlotte law firm Tin, Fulton, Walker & Owen. "I wouldn't be surprised if we see more litigation. As a lawyer, Berrien has always been an advocate for the individual."

Reuben Daniels, director of the EEOC's Charlotte district office for more than a decade, agrees with those assessments. "We are shifting our focus to the enforcement side," he says.

Under the Bush administration, the agency focused on outreach and educational programs for employers. This was based on the assumption that such steps would lead to a decline in acts of discrimination and complaint filings, Daniels says. However, by fiscal 2008, the number of complaints filed had increased to 95,402 from roughly 81,000 when the decade began.

At the same time, the number of EEOC investigators looking into and resolving complaints dropped significantly, to 646 in fiscal 2008 from 917 in fiscal 2000. In the Charlotte office, which covers both Carolinas and most of Virginia, the number of investigators fell to 13 from a high of 30 during that span.

That, in turn, meant delays in the resolution of complaints. At the end of March, the average processing time was 283 days, up from 216 in fiscal 2000 and 160 days in fiscal 2003. The agency has an inventory of 91,894 pending charges, up 13.5% from the same period in fiscal 2009.

"This doesn't serve employers or employees very well," Daniels says.

Adds Largess: "This is pretty discouraging for the people who depend on the EEOC."

Although lawsuits get the most attention, they account for 3% of resolved cases. Last year, the Charlotte office filed 33 cases in federal court, the second-highest rate in the nation. Investigators in the office resolved an average of 144 cases each.

"Our folks have been working their hearts out, but I do expect to see more focus on large, class kinds of cases," Daniels says.

Charlotte attorney Julie Fosbinder, who once worked at the EEOC, says that will be a welcome change.

"I have questioned the EEOC's decision-making on what cases they choose to litigate," she says. "They choose individual cases rather than class-action suits or ones with multiple litigants. I'd like them to pick cases with the potential to have a large impact. I am certainly hopeful that will change."

Funding had already begun to be addressed before Obama took office. The agency's appropriation rose to \$367.3 million in the current year from \$329.3 million in fiscal 2008. Obama has proposed increasing the budget to \$385.3 million next year.

The funding boost has had an impact. The number of investigators in Charlotte has jumped to 18 since the start of the Obama administration. Daniels says 100 may be added around the nation this year.

"Congress realized we needed additional people for our growing workload. We were not able to meet our mission," Daniels says. "People come to our door because they believe something terrible has happened to them that has a wide-ranging impact on their lives. In good times and bad, people want a fair shot in the workplace."

Daniels says with leadership now in place and with increased funding and staffing, the EEOC can "get up to speed and set priorities" in other areas that have been "lingering."

For example, he expects the agency will soon announce enforcement guidelines for three major anti-discrimination laws: the Americans With Disabilities Act Amendment Act and the Genetics Information Nondiscrimination Act, both passed in 2008, and the Lilly Ledbetter Fair Pay Act of 2009, one of the first acts signed into law by Obama.

Colbert says most employers are not aware of "the shift in climate at the EEOC." But with Berrien at the helm, he expects his organization soon will start efforts to raise awareness.

Those who are aware of the changes are making preparations.

"Companies are realizing they need to be more diligent about their documentation and make sure there are business reasons for the decisions they make," says Jonathan Crotty, an employment-law partner at Parker, Poe, Adams & Bernstein.