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EEO Internal Investigations: Guidance for Employment Counsel

Planning and Conducting Effective Investigations of Discrimination, Retaliation and Harassment Claims

THURSDAY, SEPTEMBER 7, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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EEOC Onsite Investigations:

Conducting the Investigation & Post-Investigation Strategies

September 7, 2017

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II. CONDUCTING THE INVESTIGATION

A. GATHERING EVIDENCE/LITIGATION HOLD NOTICES

– **Litigation Holds:**

In writing to correct individuals

Issued in anticipation of litigation instructing recipients to preserve relevant documents and other information

Triggered with litigation is "reasonably anticipated"

Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598 (S.D. Tex. 2010) "Reasonable threat of litigation" varies by jurisdiction, but in general it arises when a party knows there is a credible threat that it will become involved in litigation. *Zubelake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) Examples: receipt of a demand letter, formal complaint, records subpoena, occurrence of an event that typically results in litigation, reputable media report suggesting an impending government investigation and possible litigation

Examples of cases finding duty to preserve was or was not triggered:

- *Bagley v. Yale University*, Civ. No. 3:13-CV-1890 (D. Conn. Dec. 22, 2016)(duty arose before suit filed and arguably when staff exchanged emails noting plaintiff's threat of legal action)
- *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010)(duty arose for defendants when they were planning to institute legal action)
- *Jones v. Bremen High Sch. Dist. 228*, No. 08-CV-3548 (N.D. Ill. May 25, 2010)(duty arose when party received EEOC charges)
- *D'Onofrio v. SFZ Sports Group, Inc.*, No. 06-687 (D.D.C. Aug. 24, 2010)(duty arose on receipt of letter stating that sender intended to initiate litigation and requesting preservation of electronic documents)
- *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614 (D. Colo. 2007)(no duty based on "equivocal letters" about a dispute)
- *Mosaid Tech. Inc. v. Samsung Electronics Co.*, 348 F. Supp. 2d 332, 336 (D.N.J. 2004)(duty arose when complaint served)

Preservation efforts must be reasonable. This is a case-by-case factual inquiry based on what the potential litigant knew. It is generally based on the good faith and reasonableness of the decision, including whether a legal hold is necessary and how it should be executed.

An updated litigation hold may be necessary as the investigation or case proceeds, or to remind employees of the need to preserve the data.

In *Bagley*, the court listed several factors a court might consider to determine if legal hold efforts were reasonable:

- When did a party's duty to preserve evidence arise?
- Did the party issue a litigation hold notice in order to preserve evidence?
- When did the party issue a litigation hold notice in relation to the date its duty was triggered?
- What did the litigation hold notice say?
- What did the recipients of the litigation hold notice do or say in response to the notice?
- After receiving the recipients' responses, what further action did the party giving the notice take to preserve the evidence?

Employers should consider the adoption of and compliance with an information governance policy, which could help demonstrate reasonableness and good faith in meeting the preservation obligations, in addition to an effective and defensive legal hold process.

Suspension of document retention and deletion protocols may be necessary. However, as noted in *Zubulake*, an employer is not required to preserve "every shred of paper, every email or electronic document, and every backup tape." The duty is extends to documents that the party knew or should have known were, or could be, relevant to the parties' dispute.

Documentation of preservation efforts, such as the use of electronically stored information questionnaires and custodian interviews are often advisable.

Counsel should also be sure to send a strong document preservation letter to the other party!

– **Document review**

Gathering, reviewing and preserving documents and data is a critical part of any internal investigation. Quickly doing this can assist the investigator to become familiar with the facts and issues, and can assist the investigator to develop the facts and questions for each potential witness.

Documents that are important include:

- policies, procedures, manuals
- personnel file
- supervisor notes, calendars
- emails, text messages, voice messages, including any that have been archived or saved on backup systems
- surveillance tapes
- electronic timecards, security access cards, computer access records, electronic acknowledgement of receipt
- social media
- GPS records
- time and payroll records
- pictures
- training records

Counsel should investigate whether relevant information is stored on non-employer devices, such as personal cell phones, laptops, flashdrives, etc.

– **Witness interviews**

Witness interviews are one of the most important elements of any internal investigation. Thought should be given to having an attorney conduct the interview so that if necessary it is potentially covered by the attorney-client privilege and notes or memoranda documenting the interview are similarly privileged and can also constitute attorney work product.

The timing and location of the interviews should be convenient and comfortable for the witness so that the witness is more likely to be forthcoming and candid. While order of witness interviews should be prioritized. It is very helpful to have a preliminary outline of questions and copies of relevant documents prior to the interview.

Particular care should be taken in determining whether to interview senior management. While the investigation needs to be thorough in order to be credible, there is no reason to interview those who were not involved or are not likely to have relevant information, due to the fact that the investigation may well become discoverable.

Whether to interview former employees can be a difficult decision. While they may have relevant information, a former employee may not be willing to be interviewed. Furthermore, the circumstances under which they left the employer can influence their testimony. On the other hand, it is likely better to know what they are going to say so that the employer can explain or diffuse it if necessary, rather than be surprised and caught off guard later.

Many investigators like to record the interview. While that has the advantage of precisely preserving the questions and answers, the tapes are more likely to be discoverable compared with attorney notes. Further, taping the interview may impede the witness' willingness to be as forthcoming as they might be during an unrecorded interview.

It is important to begin each interview with an introduction and warning. In *Upjohn v. United States*, 449 U.S. 383 (1981), the Supreme Court held that communications between company counsel and company employees are privileged, but the privilege belongs to the company, not to the employee. Counsel does not want to leave the witness with the mistaken impression that counsel represents the employee or that the interview will be completely confidential. Items to discuss at this stage of the interview are:

- Nature and purpose of the investigation
- Represent the corporation, not the employee
- Privilege belongs to the corporation and may be waived
- Substance of interview may be disclosed to management, board, regulators, agencies
- Expectation of cooperation
- Right to separate counsel
- Request confidentiality
- Employee can refuse to be interviewed but may face loss of job
- Lying or misleading interviewer can also lead to discipline
- Non-retaliation language

Strategies and theories of the case should not be discussed with individuals who do not need to know them. If the individual needs to know such information, it is better to have a separate discussion, so that the information will not be disclosed in the event the privilege is waived as to the investigation and interview itself.

B. MANAGING THE PEOPLE/INSTRUCTING MANAGERS

Managers should be given clear instructions regarding the confidentiality of the investigation and what to do if they become aware that employees are discussing it among themselves. This includes information regarding how to respond to inquiries from employees, the government, media, or other outside parties.

– **Former employees**

Counsel also need to be cognizant of ethics rules that may prevent a plaintiff's attorney from contacting former employees. The courts have reached conflicting conclusions on this issue.

See, e.g., *See* Am. Prot. Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc., No. CV-LV 82-26-HDM, 1986 WL 57464, at *3-4 (D. Nev. Mar. 11, 1986) (*ex parte* contact with former employee involved with legal activities was improper). Other courts allow a lawyer to communicate with these former employees without the consent of opposing counsel. *See* Arista Records LLC v. Lime Grp. LLC, 715 F. Supp. 2d 481, 499-500 (S.D.N.Y. 2010) (declining to restrict *ex parte* communications with former employees of opposing party, but placing limitations on elicitation of confidential information); Goff v. Wheaton Indus., 145 F.R.D. 351, 353-54 (D.N.J. 1992); Nalian Truck Lines, Inc. v. Nakano Warehouse & Transp. Corp., 8 Cal. Rptr. 2d 467, 470 (Cal. Ct. App. 1992). *See generally* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 91-359 (Mar. 22, 1991) (contacts with former employees are not prohibited if the employee is unrepresented); D.C. Bar Op. 287 (2007) (lawyers may contact former employees without their adversary's consent but must disclose their identities and may not solicit privileged information of the party opponent).

Still other courts restrict interviews if the former employee was significantly involved in the events of the case. *See* Colborn v. Hardee's Food Sys., Inc., No. 2:10cv59-P-S, 2010 WL 4338353, at *1-2 (N.D. Miss. Oct. 27, 2010) (allowing *ex parte* contact with former employees of defendant *except* the employee whose conduct could be imputed to defendant to establish liability in the pending litigation); Serrano v. Cintas Corp., No. 04-40132, 2009 WL 5171802, at *3 (E.D. Mich. Dec. 23, 2009) (precluding party from conducting *ex parte* interviews with defendant's former decision makers because their conduct could be imputed to defendant to establish liability in the very litigation in which the interviews were sought); Chancellor v. Boeing, Co., 678 F. Supp. 250, 253 (D. Kan. 1988) (*ex parte* interviews with former employees are not permitted without the corporation's consent if the former employee's acts or admissions can be imputed to the corporation); Lang v. Super. Court, 826 P.2d 1228, 1233 (Ariz. Ct. App. 1992) (former employee interviews permitted unless the acts or omissions of the former employee give rise to the underlying litigation or the former employee has an ongoing relationship with the former employer in connection with the litigation).

In any case, even if the court allows the interview to take place, the attorney is prohibited from discussing any privileged communications of which the former employee is

aware. *See* Arista Records, 715 F. Supp. 2d at 499-500 (placing limitations on elicitation of confidential information during otherwise permissible *ex parte* communications with former employees of opposing parties); Weber v. Fujifilm Med. Sys., U.S.A., No. 3:10 CV 401(JBA), 2010 WL 2836720**,** at *4 (D. Conn. July 19, 2010) (forbidding counsel from attempting to discover confidential information during *ex parte* communications with former employees of party-opponent); Arnold v. Cargill Inc., No. 01-2086, 2004 WL 2203410, at *8-9 (D. Minn. Sept. 24, 2004) (noting that majority of courts allow attorneys to interview former employees *ex parte*, but disqualifying counsel due to failure to take precautions against the exchange of privileged matter); Dubois v. Gradco Sys., Inc., 136 F.R.D. 341, 347 (D. Conn. 1991); In re Home Shopping Network, Inc. Sec. Litig., No. 87-248-CIV-T-13A, 1989 WL 201085, at *2 (M.D. Fla. June 22, 1989) (counsel can question about non-privileged matters but must advise former employees that (1) the attorney-client privilege belongs to the company and cannot be waived by the employees and (2) the employees are prohibited from discussing matters where the privilege belongs to the company); Amarin Plastics, Inc. v. Md. Cup Corp., 116 F.R.D. 36, 42 (D. Mass. 1987) (attorneys cannot try to uncover strategy or opinions of other lawyer from interviews with employees or former employees).

– **Separate counsel**

There may be circumstances when the employer decides it is best to recommend that a current or former employee be represented by separate counsel, e.g., if it appears that the employer's interests may become adverse to the employee's interests at some time in the future.

In many cases, the employer will select and pay for separate counsel for a variety of reasons. In California, for example, statutory law requires the employer to reimburse an employee for expenditures necessarily incurred in the employee's work – and has been held to include defense costs in some cases.[1] Furthermore, depending on the employee's economic status, it may not be feasible for the employee to self-fund a strong defense. Thus, if the employer helps select and pay for an employee's separate counsel, it may improve employee cooperation, save time, and improve the employer's control over the litigation. While the government may view indemnification as inconsistent with governmental cooperation or even as evidence that the employer is endorsing the employee, the pros of such employer support may well outweigh the disadvantages particularly in a state with strong indemnification requirements.

[1] Under the federal Fair Labor Standards Act, an employer does not have to reimburse an employee for business expenses unless those business expenses reduce a non-exempt employee's wages below the minimum wage or decrease their overtime compensation. In the case of an exempt employee, the DOL has long taken the position that an exempt employee must actually receive the full predetermined salary amount for any week in which the employee performs any work, with limited exceptions. It is questionable whether requiring an exempt employee to dip into her own pocket for defense costs would trigger a change in exempt status.

If separate counsel is involved, the counsel for the employer and separately represented employee should consider a joint defense agreement (JDA). This is a commonly-recognized exception to the rule that attorney-client privilege and attorney work product protections are waived if the information is disclosed to a third party. A JDA can be used both defensively (to protect information from disclosure to a government entity) as well as offensively (to prevent a party to the JDA from disclosing joint defense information). In order to assert coverage by a JDA, the party seeking to enforce it will have to be able to establish that the communications were made during a joint defense effort and were designed to further that effort, the communications were intended to be confidential, and the privilege has not otherwise been waived. A JDA does not have to be written. One of the pros of a written JDA is that there is less room for misunderstanding. However, at times the mere negotiation of a detailed JDA can be lengthy and involve nuanced waivers and limitations that may or may not ever be involved, and that a written agreement may be subject to production. Regardless of whether there is a JDA, counsel for each party needs to remember that they owe an independent duty to their client

C. PRIVILEGE ISSUES

One of the first decisions in any internal investigation is whether and how to conduct the investigation with respect to protections offered by the attorney-client privilege and work product doctrine.

Counsel (both inside and outside) should be consulted on this important issue. Assuming that the decision is made to take advantage of all possible protections, the investigation must be carefully structured to avoid losing the protections through inadvertent discussions and disclosures. This will generally mean that counsel and their staff (whether inside or outside the company) will be involved in developing, analyzing, discussing, and presenting the information.

It is likely that at some point in the administrative stage or later litigation, some or all of the information developed will be disclosed to a governmental agency and perhaps even the other side. While this may require at least a partial waiver of the protections afforded by the attorney-client privilege, attorney work product should be carefully protected. Thus, it is important to include the person identified as the person who will ultimately testify about the information in the development of the information.

The most likely participants in the investigation include:

1. Internal company resources with critical expertise who will make good witnesses, if necessary (e.g., Human Resources, Payroll, IT)

2. Consultants and testifying experts

3. Subject matter experts

Discussions with and among these individuals must be conducted so as to protect against losing the privileged status of the discussion. In particular, the person(s) designated to receive the report(s) regarding the investigation should be cautioned about ways to avoid waiving the privilege.

Obviously, the attorney-client privilege only attaches when counsel is involved. This has sometimes raised unexpected issues for employers. *Costco Wholesale Corp. v. Super. Court*, 219 P.3d 736, 766 (Cal. 2009) (opinion letter prepared by outside counsel that contained employee interview statements was privileged, in part, because counsel was acting in a legal capacity when she interviewed the employees); *Shew v. Freedom of Info. Comm'n*, 714 A.2d 664, 360 670-71 (Conn. 1998) (employee interviews conducted by outside counsel are privileged when attorney acts in legal capacity and not as mere investigator, employees are currently employed by entity, and the interviews relate to the requested legal advice and are made in confidence); *Claude P. Bamberger International, Inc. v. Rohm & Haas Co.*, No. Civ. 96-1041(WGB), 1997 WL 33762249 (D.N.J. Dec. 29, 1997) (memorandum containing the results from an in-house investigation conducted by a non-attorney at the request of in-house counsel not protected; a non-attorney conducted the investigation and sent the memo to a non-attorney

and only copied in-house counsel on the document; and the memo was "the end result of a business investigation into the justifications for a business decision, not a tool to be used by in-house counsel or the legal department to help render legal advice."

See also, Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 603 (8th Cir. 1977) (report prepared by outside counsel based on interviews with corporate employees not protected by attorney-client privilege because counsel "was employed solely for the purpose of making an investigation of facts and to make business recommendations with respect to the future conduct of [the employer]"; the work done by counsel could just as easily have been performed by nonlawyers); *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 295 F.R.D. 28, 38, 44-46 (E.D.N.Y. 2013), *aff'd*, 2014 WL 223173 (E.D.N.Y. Jan. 21, 2014) (communications of outside counsel who supervised and directed an internal investigation as adjunct member of the human resources team were not privileged where the predominant purpose was to provide human resources, or business advice, not legal advice); *In re Syncor ERISA Litig.*, 229 F.R.D. 636, 645 (C.D. Cal. 2005) (documents prepared during internal investigation were created with intent to disclose to government and thus were never privileged) (citations omitted); *Lewis v. Wells Fargo & Co.*, 266 F.R.D. 433, 441-43 (N.D. Cal. 2010) (interview notes and a questionnaire completed by employees to determine compliance with the Fair Labor Standards Act were not privileged. "The [company's] fatal flaw [ ] was that it did not clarify to the employees completing the questionnaire that it needed the information to obtain legal advice." The questionnaire indicated that it was being administered as part of a routine review, not to seek legal advice, and it did not contain a confidentiality warning).

On the other hand, the work product doctrine can extend to an internal investigation done in anticipation of litigation, whether it is conducted by counsel or other agents of the employer. *Geller v. N. Shore Long Island Jewish Health Sys.*, No. CV 10-170(ADS)(ETB), 2011 WL 5507572, at *2-4 (E.D.N.Y. Nov. 9, 2011) (investigative documents prepared by non-attorney compliance officer were subject to work project protection because they were prepared at the direction of counsel in anticipation of litigation); *Wagoner v. Pfizer, Inc.*, No. 07-1229-JTM, 2008 WL 821952, at *3-5 (D. Kan. Mar. 26, 2008) (notes and summaries prepared by a non-attorney at the direction of in-house counsel following an employment discrimination claim were protected); *Peterson v. Wallace Computer Servs., Inc.*, 984 F. Supp. 821, 824 (D. Vt. 1997) (notes and memoranda from investigation done by director of human resources and plant manager were work product prepared in anticipation of litigation); *Treat v. Tom Kelley Buick Pontiac GMC, Inc.*, No. 1:08-CV-173, 2009 WL 1543651, at *6-7 (N.D. Ind. June 2, 2009) outside counsel's investigation materials were protected work product because the purpose of the investigation was to respond to EEOC charges).

– **Advice of counsel defense**

While the "advice of counsel" defense may serve to blunt the effect of the agency's (or later, an employee/plaintiff's) attack on the reasons for the employer's decisions and perhaps serve as the basis for arguing that punitive damages should not be awarded, the use of this defense may waive the attorney-client privilege even as to trial counsel. Thus, this issue should be carefully considered in deciding who as counsel should be involved in the investigation and

advice, the jurisdiction in which any action may be litigated, and the likelihood that the "advice of counsel" defense will be used.

Cases that have considered the "advice of counsel" defense include:

» *In re Seagate Technology, LLC*, 2007 U.S. App. LEXIS 19768 (Fed. Cir. 2007)*(*as a general proposition, asserting the advice of counsel defense and disclosing opinions of opinion counsel do not constitute waiver of the attorney-client privilege for communications with trial counsel)

» *Informatica Corp. v. Bus. Objects Data Integration, Inc.*, 454 F.Supp.2d 957 (N.D. Cal. 2006)(waiver applied to trial counsel)

» *Collaboration Props., Inc. v. Polycom, Inc.*, 224 F.R.D. 473, 476 (N.D. Cal 2004); *Ampex Corp. v. Eastman Kodak Co.*, 2006 U.S. Dist. LEXIS 48702 (D. Del. July 17, 2006)(waiver not extended to trial counsel)

» *Intex Recreation Corp. v. Team Worldwide Corp.*, 439 F.Supp.2d 46 (D.D.C. 2006*)*; *Beneficial Franchise Co., Inc. v. Bank One, N.A.*, 205 F.R.D. 212 (N.D. Ill. 2001*)*; *Micron Separations, Inc. v. Pall Corp.*, 159 F.R.D. 361 (D. Mass. 1995)(waiver extended to trial counsel only for communications contradicting or casting doubt on the opinions asserted)

» *Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir. 1999)(employer contended that it consulted with its attorneys regarding the obligations imposed upon it by the FLSA, but it had not asserted and would not assert reliance on advice of counsel as a predicate for its good faith beliefs; court found that privilege had been waived and ordered limited depositions of both the trial counsel and in-house counsel based on the employer's failure to object to questions designed to elicit privileged information and failure to halt executive/deponents' responses to all such questions, and one executive indicated that the employer had solicited advice equally from these attorneys)

» *Scholtisek v. Eldre Corp.*, 441 F.Supp.2d 459 (W.D.N.Y. 2006)(employer's *in limine* motion to preclude the use of any testimony concerning certain conversations between its former human resources manager and its former executive vice president was denied where the statements were made in response to the human resources manager's inquiry concerning certain wage matters on behalf of a particular employee; former vice president had responded that she was told that the handbook had been gone over by the company's attorneys and everything in it was legal)

» *Newman v. Countrywide Home Loans, Inc.*, 144 Lab. Cas. (CCH) P34, 368; (N.D.Tex. 2001)(employer denied that its conduct was willful and asserted

a defense of good faith based on the advice of counsel; both its assertion of this defense and its disclosure of its attorney's opinion letters constituted waiver of the attorney-client privilege insofar as it related to communications to or from counsel seeking and giving advice with respect to the exempt or non-exempt status of account executives and the employer was thus ordered to produce documents relating to the methodology or formulae used to classify the employer's employees and documents used or relied upon in determining that the plaintiff's position as an account executive was an exempt position)

» *Dawson v. New York Life Ins. Co.*, 901 F.Supp. 1362 (assertion of advice of counsel defense to claim to violation of FLSA resulted in waiver of privilege as to certain discovery)

– **Litigation hold notices**

Generally, litigation hold notices are privileged, protected by the attorney-client privilege work product doctrine. *Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116 (N.D. Ga. 2007). This is particularly true when it includes information protected by the attorney-client privilege. *Muro v. Target Corp.*, 250 F.R.D. 350, 360 (N.D. Ill. 2007)(litigation hold notice privileged because it was a communication of legal advice from corporate counsel to corporate employees regarding document preservation). However, courts often permit discovery of the date of the issue, the recipients, and steps taken to preserve evidence. *Cannata v. Wyndham Worldwide Corporation*, Case No. 2:10-cv-00068-PMP-VCF (D. Nev. Aug. 16, 2010). The attorney work product doctrine may also protect litigation hold notices. *Gibson v. Ford Motor Co., supra.*

However, evidence spoliation may result in the loss of the privilege. *Major Tours Inc. v. Colorel*, Civil No. 05-3091 (D.N.J. Aug. 4, 2009)(litigation holds ordered to be produced; despite knowledge of potential legal dispute in 2003, the defendant failed to send legal hold notices until 2007, so it was likely that evidence was lost).

Similarly, the failure to observe proper litigation hold procedures may support discovery of litigation hold notices. *United States ex rel. Barko v. Halliburton Co.*, Case No. 1:05-cv-1276 (D.D.C. Nov. 20, 2014)(litigation hold notices sent to company employees not privileged because they were sent to large groups such as "all company employees," did not advise employees to keep them confidential, and in fact, instructed recipients to share the letter with others who had not received it).

– **Waiver**

There are many ways that privileges can be lost. In discrimination cases, this is particularly true.

Sample cases in which privilege issues have arisen:

» *United States v. BDO Seidman, LLP,* 492 F.3d 806 (7th Cir. 2007) (In the context of an IRS attempt to enforce administrative summonses against an accounting firm that allegedly failed to disclose potentially abusive tax shelters that it promoted, the court reviewed whether the attorney-client privilege was maintained through the common interest doctrine. The common interest doctrine is really an exception to the rule that no privilege attaches to communications between a client and an attorney in the presence of a third person and, in effect, extends the attorney-client privilege to otherwise non-confidential communications in limited circumstances, i.e., where the parties undertake a joint effort with respect to a common legal interest, and the communication is made to further an ongoing enterprise. Here, the memo in question was originally addressed to the company's outside counsel from a company employee and requested advice on a legal question. The memo was subsequently forwarded to a different law firm. The company successfully argued that it was forwarded as part of the company's effort to coordinate with the second firm regarding a common legal position that the company and the second firm would later communicate to their joint clients and that the document remained privileged despite the fact that the second firm voluntarily disclosed the memo in response to an IRS subpoena.)

  The First, Federal, Fourth, Second, Ninth and Seventh Circuits have held that litigation need not be actual or imminent for communications to be within the common interest doctrine; the Fifth Circuit has held otherwise.

» *Herrman v. Gutterguard, Inc.*, 199 Fed. Appx. 745 (11th Cir.2006*)* (defendant in FLSA collective action successfully disqualified the plaintiffs' lead counsel and his firm on the ground that a conflict of interest existed because he had previously worked at an employment defense firm which had performed a compliance audit for the parent company and affiliated companies which were now the defendants in the case)

» *In re Qwest Communications International, Inc.*, 450 F.3d 1179 (10th Cir. 2006*)(*court declined to adopt a "selective waiver rule" which would have continued the attorney-client privilege and work product protection to certain documents, despite the company's voluntary disclosure to the SEC and DOJ).

  The First, Second, Third, Fourth, Sixth, Ninth, and D.C. Circuits have also rejected the "selective waiver rule."

» *Pichler v. UNITE,* 446 F.Supp.2d 353 (E.D.Pa. 2006) (The Driver's Privacy Protection Act of 1994, 81 U.S.C.S. §§ 2721-2725 does not allow a

person to acquire personal information from the motor vehicle records for the purpose of finding and soliciting clients for a lawsuit. In order for the litigation exception to apply, there must be an actual investigation, litigation must appear likely at the time of the investigation, and the protected information acquired during the investigation must be of "use" in the litigation, meaning that there is "a reasonable likelihood that the decision maker would find the information useful in the course of the proceeding.")

» *Colindres v. Quietflex Mfg.*, 228 F.R.D. 567 (S.D.Tex. 2005) (In this discrimination class action, the defense expert sent defense counsel an unsolicited email discussing two specific questions which the court had asked. The expert subsequently submitted his supplemental report that addressed one of the two questions he discussed in the email. The email addressed the expert's understanding of the payroll data and the ability to use that data to calculate back pay, while taking into consideration individual variations caused by the piece rate wage. Defendants offered his expert testimony on the issue of calculating back pay. The court held that the email was not privileged and ordered that it be disclosed.)

The EEOC has taken the position that information and documents that are provided to it can be disclosed to the charging party, and at least under Title VII, has prevailed on this issue. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981)(EEOC can disclose information from a charging party's file to that party, but not information from the files of other charging parties who had brought claims against employer, because limited disclosure enhanced EEOC's ability to resolving charges through informal conciliation and negotiation, but Court noted that issues concerning the Trade Secrets Act and the FOIA were not before the Court).

Furthermore, in discrimination cases, the employer typically alleges in its defense that it conducted an investigation and either found no wrongdoing or took appropriate remedial action to prevent future occurrences. By making this assertion, the employer puts the merits of the internal investigation at issue in the litigation and the courts have held that the work product protection has been waived.

See, e.g., *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 295 F.R.D. 28 (E.D.N.Y. 2013), *aff'd*, 2014 WL 223173 (E.D.N.Y. Jan. 21, 2014) (any applicable work product protection waived by alleging affirmative defenses based on the reasonableness of their efforts to prevent and correct promptly any discriminatory behavior and the reasonableness of their policies and procedures for investigating and preventing discrimination); *Nelson v. NAV-RENO-GS, LLC*, No. 3:12-CV-0165-LRH (VPC), 2013 WL 2475862, at *3 (D. Nev. June 7, 2013) (defendant's assertion of the *Faragher-Ellerth* affirmative defense put internal investigation "at issue" and waived any work product protection that might apply to interview notes prepared by non-attorney HR personnel, particularly because there was no indication the notes contained mental opinions or impressions of counsel); *Angelone v. Xerox Corp.*, No. 09-CV-6019, 2011 WL

4473534, at *2 (W.D.N.Y. Sept. 26, 2011) (attorney-client privilege and work product protection waived for documents used to prepare investigation report where employer asserted *Faragher-Ellerth* defense, affirmatively putting its internal investigation at issue); *Nelsen v. Green*, No. 08-CV-1424-ST, 2010 WL 3491360, at *4-5 (D. Or. Aug. 31, 2010) (two interim draft reports prepared by an investigating officer regarding sexual harassment and discrimination claims made by a former employee ordered produced , except for the mental impressions, conclusions, opinions, or legal theories of employer's attorney because employer put its investigation at issue); *Musa-Muaremi v. Florists' Transworld Delivery, Inc.*, 270 F.R.D. 312, 318-19 (N.D. Ill. 2010) (employer waived privilege over in-house counsel's edits to an internal investigation report where employer asserted an affirmative defense of reasonable investigation, thereby putting adequacy of the investigation in issue); *Reitz v. City of Mt. Juliet*, 680 F. Supp. 2d 888, 892-95 (M.D. Tenn. 2010) (although plaintiff dropped her hostile work environment claim, employer waived attorney-client privilege and work product protection over interview memoranda prepared by outside counsel investigating her sexual harassment claims after employer, in seeking summary judgment, asserted that the outside investigator had "fully, completely, and exhaustively investigated" her claims, but employer was allowed to redact opinion work product, which was irrelevant to the remaining retaliation claim); *Emps. Committed for Justice v. Eastman Kodak Co.*, 251 F.R.D. 101, 107-08 (W.D.N.Y. 2008) (assertion that employee appraisal process was overseen by legal department, which conferred with HR on matters of racial disparities, waived privilege for those communications and analysis); *Walker v. Cnty. of Contra Costa*, 227 F.R.D. 529, 535 (N.D. Cal. 2005) (while attorney's investigation would normally be protected by both work product and attorney-client privilege, employer's intention to rely upon it as a defense to a discrimination claim resulted in waiver); *Sedillos v. Bd. of Educ. of Sch. Dist. 1 in the City & Cnty. of Denver*, 313 F. Supp. 2d 1091, 1094 (D. Colo. 2004) (decision to place advice of counsel as an issue in retaliatory transfer claim resulted in waiver of attorney-client privilege); EEOC v. Rose Casual Dining, L.P., No. Civ.A. 02-7485, 2004 WL 231287, at *3-4 (E.D. Pa. Jan. 23, 2004) (work product protection waived for investigation into dismissal where party placed the investigation at issue); McGrath v. Nassau Cnty. Health Care Corp., 204 F.R.D. 240, 245-46 (E.D.N.Y. 2001) (employer waived work product protection by invoking investigation in its defense); Brownell v. Roadway Package Sys., Inc., 185 F.R.D. 19, 25 (N.D.N.Y. 1999) (same); Harding v. Dana Transp., Inc., 914 F. Supp. 1084, 1090-1100 (D.N.J. 1996) (in case of first impression regarding discoverability of investigative materials obtained by counsel in sexual discrimination case founded on allegations of hostile work environment, the court held that the employer waived both the attorney-client privilege and work product protection as to all of outside counsel's investigative materials by raising the fact of the employer's investigation as a defense to plaintiff's allegations); Alberts v. Wickes Lumber Co., No. 93 C 4397, 1995 WL 31577, at *1-2 (N.D. Ill. Jan. 26, 1995) (holding that, because defendant intended to use evidence of its investigation into plaintiff's allegations to establish its own good faith, defendant waived privilege for all documents contained in outside counsel's investigation file). *But see* Angelone v. Xerox Corp., No. 09-CV-6019, 2011 WL 4473534, at *2 (W.D.N.Y. Sept. 26, 2011) (waiver did not exist for *post-investigation* documents that would not be referred to or relied on by Faragher-Ellerth defense); Crutcher-Sanchez v. Cnty. of Dakota, No. 8:09CV288, 2011 WL 612061, at *10 (D. Neb. Feb. 10, 2011) (generally alleging Faragher-Ellerth defense did not waive privilege for documents related to law firm investigation that took place after alleged improper termination); Malin v. Hospira, Inc., No. 08

C 4393, 2010 WL 3781284, at *2 (N.D. Ill. Sept. 21, 2010) (declining to find waiver of attorney-client privilege and work product protection as it related to defendant's internal investigation of plaintiff's EEOC charge, even though defendant raised affirmative defense that it attempted to comply with applicable antidiscrimination laws, because the defense related only to plaintiff's inability to recover punitive damages and because defendant claimed that it did not intend to use the investigation at trial); Treat v. Tom Kelley Buick Pontiac GMC, Inc., No. 1:08-CV-173, 2009 WL 1543651, at *12-13 (N.D. Ind. June 2, 2009) (employer's affirmative defense that it "exercised reasonable care" to prevent discrimination did not place its investigation into plaintiff's allegations at issue because plaintiff failed to take advantage of the employer's policies regarding discrimination, making it impossible for the employer to conduct an investigation of her claims prior to comme Two cases decided by California appellate courts indicate that very little from an internal investigation into employment discrimination claims is protected from discovery when the company raises the existence and adequacy of the investigation as a defense. In Wellpoint Health Networks, Inc. v. Superior Court, 59 Cal. App. 4th 110, 125-28 (Cal. Ct. App. 1997), the court held that pre-litigation investigative materials prepared by outside counsel were discoverable because Wellpoint had waived its privileges by putting the investigation at issue in litigation – the employer could not use the investigation both as a sword and a shield); Kaiser Found. Hosps. v. Super. Court, 66 Cal. App. 4th 1217 (Cal. Ct. App. 1998). In Kaiser, the employer, Kaiser, prior to the initiation of litigation, directed its human resources consultant, Diaz, to investigate allegations regarding a physician's allegedly "inappropriate sexual conduct." *Id.* at 1220. Diaz obtained advice from Kaiser's legal department regarding the process and progress of the investigation. *Id.* After filing suit, plaintiffs sought discovery of Kaiser's "complete investigation files." *Id.* In response to plaintiff's document request, Kaiser agreed to produce the majority of Diaz's work, including several investigation reports and investigation notes that did "not refer or relate to communication with counsel." *Id.* at 1221. Kaiser withheld or partially redacted 38 pages of documents, less than 10 percent of the investigative materials, on grounds of the attorney-client privilege, the work product protection, and the California right to privacy. *Id.* at 1221, 1225. The Kaiser court held that "[w]here a defendant has produced its files and disclosed the substance of its internal investigation conducted by non-lawyer employees, and only seeks to protect specified discrete communications which those employees had with their attorneys, disclosure of such privileged communications is simply not essential for a thorough examination of the adequacy of the investigation or a fair adjudication of the action." *Id.* at 1227 (citations omitted). The court distinguished Wellpoint, where the court was confronted with an assertion of complete privilege over all materials prepared by counsel who undertook the investigation for the employer. *Id.* at 1225-26.

– **Withholding confidential information**

The courts have grappled with the issue of what information an employer can withhold from providing to the EEOC on confidentiality grounds. In general, unless the employer can prove a compelling reason, e.g., trade secret status, the courts will require production. However, an employer should, if the information is sufficiently sensitive, request a confidentiality agreement with the EEOC. Although the EEOC itself is reluctant to enter into such agreements, it is a good first step to requesting protection from the courts. The courts have demonstrated

their willingness to review confidentiality issues on specific items of information, and when they believe it to be appropriate, to require the EEOC to enter into such confidentiality agreement on specified items of information.

Cases in which the courts have considered confidentiality arguments include:

» *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990) (employer in Title VII case required to disclose peer review materials from an EEOC subpoena where statutory language was broad, precedent for the privilege was nonexistent, and disclosure did not infringe the right of "academic freedom" because the subpoena was content neutral).

» *Adkins v. Christie*, 488 F.3d 1324 (11th Cir. 2007) (medical peer review privilege did not apply in § 1983, 1981, 1985 racial discrimination case; by arguing that the physician fell below its standards, the hospital put other peer reviews at issue)

» *EEOC v. HWCC-TUNICA, Inc.*, 2008 U.S. Dist. LEXIS 85830 (N.D. Miss. 2008) (EEOC filed motion to compel production pursuant to a demand for production of records; request sought "any and all documents used to respond to the Complaint filed in this action" as well as documents from non-party personnel files. The court found that the former was not overbroad nor did it impinge on the attorney-client privilege or attorney work product to the extent that the company internally investigated claims of discrimination as much to resolve them as to prepare for anticipated litigation but excluded from production confidential communications between defense counsel and client and documents prepared in anticipation of litigation subject to preparation of privilege log as to the latter, the court declined to require production of the entire personnel files of the employer's former human resources personnel on the ground that it was highly unlikely that they would contain relevant information and the EEOC had contact information for these individuals)

» *EEOC v. CRST Van Expedited, Inc.*, 2008 U.S. Dist LEXIS 28113 (N.D. Iowa 2008) (in pattern and practice litigation, the employer successfully argued that the EEOC was not entitled to the name of an employee and the name of the alleged harasser unless and until the employee indicated an intent to be included in the litigation)

» *EEOC v. Sheffield Financial LLC*, 2007 U.S. Dist. LEXIS 43070 (M.D.N.C. 2007) (in this national origin discrimination case, the employer sought discovery of medical information relating to the employee's health care, mental health treatment, counseling, and similar medical information;

the EEOC resisted, claiming that the request was overbroad, irrelevant, and that the employee's mental state and medical history were not at issue because the EEOC was only seeking "garden-variety" compensatory damages; the court had little difficulty finding the requested discovery to be relevant to the issue of damages because the employee was seeking damages for "past and future emotional distress, humiliation, anxiety, inconvenience, and loss of enjoyment of life;" that there was no privilege that applied, and that any privacy concerns were adequately addressed through a consent protective order)

» *Martinez v. EEOC*, 2004 U.S. Dist. LEXISS 23182 (W.D. Tex. 2004) (employee sought the EEOC's entire investigative file of his administrative charge against his former employer; EEOC produced "public information" but withheld 17 pages on the ground that it was privileged on the ground of personal privacy and confidential source (because the investigator had promised two witnesses confidentiality); court upheld withholding everything but two envelopes)

» *Venetian Casino Resort, L.L.C. v. EEOC*, 530 F.3d 925 (D.C.C. 2008) (In response to subpoena from EEOC in an ADEA case, employer submitted commercial information that it deemed and identified as confidential. The EEOC subsequently subpoenaed more documents. When the EEOC later denied the employer's petition to revoke the subpoena, this case ensued. After finding that the details of the EEOC's disclosure policy were unclear on the record before it, the court nevertheless concluded that the record left no doubt that the EEOC had the policy of disclosing confidential information without notice to the submitter. The court remanded the case to the district court to enjoin the EEOC from disclosing the employer's confidential information without adhering to the notice and other requirements of the EEOC's regulations implementing the FOIA. The EEOC ran into trouble in this case because it had two irreconcilable policies, one of which – the Compliance Manual (Section 82) relating to the Privacy Act – apparently enabled the EEOC or, for that matter, any person asking for information, to circumvent the other regulation (29 CFR § 1610.19, et seq.) that implemented the FOIA and required pre-*release* notification for confidential commercial information.)

» *EEOC v. Bessemer Group, Inc.*, 105 Fed. Appx. 411 (3rd Cir. 2004) (employer lost argument that it should not have to comply with EEOC subpoena because it asserted that its practices were legal and thus the absence of a statutory violation rendered the purpose of the investigation illegitimate; court agreed with EEOC that more information was necessary before a dispositive legal determination could be made as to whether the

employer was in compliance with law)

» *EEOC v. Ocean City Police Department,* 820 F.2d 1378 (4th Cir. 1987) (en banc)(quashing subpoena relating to Title VII charge because the charge was untimely)

» *EEOC v. Group Health Plan,* 212 F.Supp.2d 1094 (E.D. Mo. 2002) (quashing subpoena because the charge against the employer did not involve practices covered by the ADA)

» *EEOC v. WinCo Foods, Inc.*, 2006 U.S. Dist. LEXIS 64521 (E.D. Cal. 2006) (court rejected EEOC's argument that employer failed to exhaust its administrative remedies by failing to object to subpoena and therefore waived objections; court held that compliance with 29 CFR sec. 1601.16(b) – which provides that any person served with subpoena who intends not to comply shall petition the issuing director – was not jurisdictional and inconsistent with 29 USC 161 which made such a petition discretionary)

This does not mean that an employer cannot take action where an employee violates the privacy rights of others. *See, e.g., Vaughn v. Epworth Villa,* 537 F.3d 1147 (10th Cir. 2008*)*(plaintiff filed EEOC charge alleging she was discriminatorily disciplined for errors; she later submitted the copy of the redacted medical record to prove her point. When the employer later found out about this disclosure, it terminated her. The Tenth Circuit held that the plaintiff engaged in a "protected activity" when she submitted the unredacted medical records to the EEOC. However, because she was unable to show that others who had violated the employer's policy – and possibly federal law protecting the confidentiality of medical records – had not been terminated, she failed to prove that her termination was unlawful retaliation.)

– **Self-critical analysis privilege**

Although the courts have severely restricted the ability of an employer to successfully assert this privilege in recognition of the fact that it could create a huge exception to the general rule of discoverability, counsel should still try to assert it when appropriate.

This privilege is generally described as applying when

- the information results from a critical self-analysis undertaken by the party seeking protection;

- the public has a strong interest in preserving the free flow of information sought;

- the information is of the type for which flow would be curtailed if discovery were allowed; and

- the document was created with the expectation that it would be kept confidential and has remained so.

See *Dowling v. Am. Haw. Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992)

When the courts have allowed this privilege to provide protection, it typically only protects the subjective portions of self-critical reports, i.e., subjective impressions and opinions or evaluations, not facts, statistics, or other objective information. *Freiermuth v. PPG Indus., Inc.*, 218 F.R.D. 694, 698 (N.D. Ala. 2003) (not applicable to documents which "merely provide facts, statistics, and rankings"); *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 304 (N.D. Ill. 1993) (protects only subjective, evaluative materials and not objective data or reports), *order clarified*, 153 F.R.D. 614 (N.D. Ill. 1993); *John v. Trane Co.*, 831 F. Supp. 855 (S.D. Fla. 1993) (employer was required to produce affirmative action plan but self-evaluative privilege protected portions containing subjective evaluations of management); *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197 (E.D.N.Y. 1992) (finding privilege to exist); *Witten v. A.H. Smith & Co.*, 100 F.R.D. 446, 449 (D. Md. 1984) (finding privilege inapplicable to the facts); *Resnick v. Am. Dental Ass'n*, 95 F.R.D. 372, 374 (N.D. Ill. 1982) (privilege protects subjective and evaluative material prepared for mandatory government reports); *Webb v. Westinghouse Elec. Corp.*, 81 F.R.D. 431, 434 (E.D. Pa. 1978); *Lewis v. Wells Fargo & Co.*, 266 F.R.D. 433, 439 (N.D. Cal. 2010) (rejecting the self-critical analysis privilege because allowing discovery of Fair Labor Standards Act audit results would not curtail such audits in the future); *Cruz v. Coach Stores, Inc.*, 196 F.R.D. 228, 232 (S.D.N.Y. 2005) ("A company has an obvious economic interest in engaging in self-evaluations of employee misconduct: it hardly needs the additional protection of a shield of privilege to investigate its own employees' alleged derelictions.").

See also, Vanek v. NutraSweet, Co., No. 92 C 0115, 1992 WL 133162 (N.D. Ill. June 11, 1992) (employee sued under Title VII after she was laid off while on maternity leave. Before the lawsuit, the employer formed a task force to set goals for diversity and an outside consultant performed an audit and made recommendations to key personnel in human resources. Held: the self-evaluative privilege did not apply because these activities were voluntary); *Steinle v. Boeing Co.*, No. 90-1377-C, 1992 WL 53752 (D. Kan. Feb. 4, 1992) (employee complained to company's internal EEOC office which investigated and concluded that there was no misclassification. In a subsequent lawsuit, the employee requested documents from the investigation. Held: no privilege; self-evaluation of individual grievances would not be affected by disclosure, because such an investigation is consistent with the business interests of management).

– **Privileges held by governmental agencies**

In any proceeding involving the EEOC or other governmental agency, the employer should be aware of and consider using available discovery procedures to obtain information from the agency. This can be done through regular discovery procedures if the matter is in litigation, or through requests for information made under the Freedom of Information Act or analogous state laws.

– **Deliberative process privilege**

This privilege protects certain predecisional, internal agency information, such as recommendations and analysis, from disclosure during litigation. The government may withhold evidence in litigation in any of the following circumstances: (1) where a statute makes certain documents or information confidential; (2) where a privilege or objection is available to any other litigant under the Federal Rules of Civil Procedure (for example, relevance, undue burden, or attorney-client privilege); or (3) where a special privilege exists unique to the government – such as the deliberative process privilege.

The EEOC typically asserts this privilege in litigation in order to protect the confidentiality of internal, deliberative material, such as documents containing the analyses, opinions, or recommendations of enforcement unit staff, and attorney memoranda containing analysis or recommendations.

There are few cases that extensively address this privilege.

» *EEOC v. American International Group, Inc.*, 1994 U.S. Dist. LEXIS 9815 (S.D.N.Y. 1994) (the court noted that the privilege only protects information which is predecisional and deliberative. It does not protect factual findings or factual material which may be severed from the deliberative portion of a report)

» *EEOC v. Fina Oil and Chemical Co.*, 14 F.R.D. 74 (E.D. Tex. 1992) (court noted that since the purpose of the privilege is to protect the full and free exchange of information in the agency, the test is whether disclosure would serve only to reveal the evaluative process by which a member of the decision-making chain arrived at his/her conclusion)

» *EEOC v. Albertson's LLC.*, 2007 U.S. Dist. LEXIS 32003 (D. Col. 2007) (EEOC's assertion of this privilege in response to a Rule 30(b)(6) deposition notice was found to be premature where not a single question had yet been asked)

» *EEOC v. Continental Airlines*, 395 F.Supp.2d 738 (N.D. Ill. 2005) (example of case in which the employer argued that even where the privilege is found to exist, its need for the information outweighs the need for the privilege)

Although EEOC attorneys can assert this privilege in litigation on their own authority (for example, in responses to discovery requests or when defending depositions), the privilege must be formally asserted by the head of the EEOC whenever the applicability of the privilege becomes an issue before a court (for example, in connection with motions to compel, for protective orders, or to quash subpoenas.

– **Work product doctrine**

In *EEOC v. Carrols Corp.*, 215 F.R.D. 46 (N.D.N.Y. 2003), the court ruled that questionnaires which the EEOC had sent to the employer's employees using a database supplied by the employer constituted the EEOC's work product, even though the questionnaires were completely filled out by the individuals and simply returned to the EEOC. Furthermore, the EEOC had offered to supply the employer with witness summaries that would serve to identify the witness and provide at least some insight into the witnesses' likely testimony. Thus, although the EEOC was ordered to provide the summaries that it had offered, but was not ordered to produce the actual questionnaires. Since the court made a ruling based on this doctrine, it did not address the EEOC's argument that the claimant communications were protected by the attorney-client privilege; however, it commented that it "is not at all clear that the EEOC has satisfied its obligation to factually demonstrate each of the recited elements" to successfully invoke that privilege.

On another matter in dispute, the *Carrols* court ordered the EEOC to ascertain whether it had developed statistical data relating to the incidence of sexual harassment or retaliation complaints in workforces comparable in size, turnover rate, dispersion or working conditions similar to that of the employer, rejecting the EEOC's work product doctrine argument.

– **Attorney-client privilege**

The EEOC can also assert an attorney-client privilege.

Numerous cases have held that the EEOC bears the burden of establishing which allegedly aggrieved parties it represents and the bases upon which the EEOC claims to have an attorney-client relationship with the party. This can involve an evaluation of the "client's" indication of any desire for such a relationship, as well as when such a relationship was actually established.

Some cases that have reviewed this question include:

» *EEOC v. Int'l Profit Assocs.*, 206 F.R.D. 215 (N.D. III. 2002) (the court found that certain allegedly aggrieved employees had established an attorney-client relationship with the EEOC. In doing so, however, the court did not rely merely on the fact that the EEOC claimed that the particular employees were among the allegedly aggrieved parties; instead, the court noted that the women had "contacted the EEOC via returned questionnaires or telephone calls" and that "each woman identified as a class member was asked if she wished the EEOC to act on her behalf in this lawsuit and each class member replied in the affirmative.")

» *EEOC v. Johnson & Higgins, Inc.*, 1998 U.S. Dist. LEXIS 17612, (S.D.N.Y. 1998) (holding that in connection with an EEOC enforcement action "[w]hether a privileged attorney- client relationship exists rests upon the client's intent to seek legal advice and the client's belief that he is

consulting an attorney. . . . The burden of sustaining the privilege is on the proponent - here, the EEOC")

» *EEOC v. Chemtech Int'l Corp.*, 1995 U.S. Dist. LEXIS 21877 (S.D. Tex. 1995) (finding that an attorney-client relationship existed between an aggrieved party and the EEOC based on an affidavit from the client stating that he believed that an attorney-client relationship existed)

» *EEOC v. Georgia-Pacific Corp.*, 1975 U.S. Dist. LEXIS 15377 (D. Ore. 1975*)* (finding an attorney-client relationship based on the contents of the client's letters clearly indicating that she was contacting the EEOC litigation center for expert legal advice and that she expected her communications to remain confidential). *See also, EEOC v. HBE Corp.*, 64 Fair Empl. Prac. Cas. (BNA) 1518 (E.D. Mo. 1994), rev'd in part on other grounds, 135 F.3d 543 (8th Cir. 1998); *EEOC v. Collegeville/Imagineering Ent.*, 2007 U.S. Dist. LEXIS 3764 (D. Ariz. 2007)

» *Equal Employment Opportunity Comm'n v. Morgan Stanley & Co., Inc.*, 206 F.Supp.2d 559, 561 (S.D.N.Y 2002) ("[t]he case law is not definite regarding the moment when the EEOC enters into an attorney-client relationship with the members of the class it seeks to represent." The United States Supreme Court has made clear that any order limiting communications between parties and potential class members should be based on "a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-02, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981))

» *EEOC v. Albertson's Inc.*, 2006 U.S. Dist. LEXIS 73278 (D. Col. 2006) *(*the court considered a motion by the EEOC to prohibit defense counsel from contacting allegedly aggrieved parties outside of the presence of the EEOC's lawyers. It denied the EEOC's request. The EEOC's actions merely in filing an enforcement case and identifying a group of people as being among the allegedly aggrieved parties, without more, is insufficient to create an attorney-client relationship between the allegedly aggrieved parties and the EEOC. The case cites numerous prior cases which will be helpful to defense counsel on this issue)

» *EEOC v. TIC*, 90 Fair Empl. Prac. Cas. (BNA) 737 (E.D. La. 2002) *(*considered the EEOC's motion for protective order in which it asked that the employer be precluded from engaging in ex parte communications with all potential claimants in the action. The EEOC argued that although it did not have an attorney-client relationship with all potential claimants, it was entitled to invoke the attorney-client privilege and the American Bar Association's Model Rule of Professional Conduct 4.2 to prevent the

employer from talking with potential claimants because the EEOC represents all claimants' interests in this action. After reviewing prior judicial decisions on this issue, the court concluded that the EEOC had simply not provided evidence to support its position. In addition, since the EEOC was suing with respect to applicants who had not been hired, the fear of retaliation was minimal)

III. POST-INVESTIGATION STRATEGIES

C. DETERMINING REMEDIAL ACTION

Investigations often identify misconduct and the employer may consider taking disciplinary action against the responsible individuals. This may depend on a variety of factors, including the seriousness of the employee's conduct and the strength of the evidence against him/her, the need to stop further misconduct, and the employer's obligations under federal and state employment laws.

Taking or failing to take remedial action may be both helpful and harmful depending on the circumstances. For example, the complainant may not view the discipline as being sufficiently harsh, while the employee who is being disciplined may become discontented or disloyal if the discipline is seen as being too harsh. Other employees who become aware of the decision regarding disciplinary action may also be satisfied or dissatisfied depending upon how they view the situation.

Some laws, however, require the employer to take appropriate remedial action if a violation is found. Remedial actions can include actions beyond discipline, e.g., training, new procedures, revising compliance materials, or developing new audit or overview procedures.

Employers should also consider how the EEOC or similar state agencies will interpret discipline. For example, it could be interpreted as a good faith effort to remedy the problem, or as an admission of wrongdoing. It could also be interpreted as being insufficient. Depending on the seniority of the personnel and the nature of the conduct that is the reason for the discipline, such action could also trigger some reporting requirement or otherwise become known outside the company.

The way in which reports are delivered can also be important. For example, where there is the likelihood of liability and high damages, it may be better to make informal, oral reports particularly if the problem is not likely to be remedied so as to minimize the possibility of a willful violation being found. Reports should be carefully worded to avoid conclusory language that will bury the company if it turns out that the report must be – or is inadvertently – disclosed.

D. MINIMIZING THE RISKS OF EMPLOYEE RETALIATION CLAIMS

- **Policy**
- **Warning**
- **Follow-Up**