EEOC's Aggressive Systemic Discrimination Initiative: Employer Strategies
Responding to Expansive Requests for Information, Subpoenas and "Sue First, Ask Questions Later" Approach

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EEOC Systemic Discrimination Initiative: How to Beat the Full Court Press

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Agenda

1. EEOC’s Enforcement Priorities

2. Position statements and requests for information: Artfully crafting a response.

3. Subpoenas: How to respond? Flight or Fight?

4. Addressing EEOC’s “sue first, ask questions later” strategy

5. Best Practices: How to minimize agency contact
EEOC’s Focus on Systemic Investigations and Litigation
Systemic enforcement

- EEOC adopted systemic initiative in 2006 based on task force recommendations:
  - Outreach
  - Analytics
  - Coordination
  - Employee evaluations
  - Local level involvement
  - Law firm model
- EEOC has reiterated the importance of this effort in its revised strategic enforcement plan
- EEOC targets: specific industries and geographic areas for enforcement
EEOC Strategic Enforcement Plan: Priorities

1) Eliminating systemic barriers in recruitment and hiring.

2) Protecting immigrant, migrant, and other vulnerable workers.

3) Addressing emerging issues – current issues identified in plan: ADA issues, pregnancy discrimination, and LGBT coverage.

4) Enforcing equal pay laws.

5) Preserving access to the legal system – retaliation and releases.

6) Combating harassment.
Beginnings of Systemic Lawsuits

- Charge has been filed as a pattern claim
  - Individual claim turning into a large scale claim
  - Settled claim can spur investigation as well

- Directed investigation – potential ADEA (age) or equal pay violation
  - Specific to those statutes: 29 U.S.C. § 626(a); 29 U.S.C. §211

- Commissioner charge – Title VII investigation (Section 707)
  - Section707 authorizes EEOC to bring suit against an employer who “is engaged in pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII].”
EEOC v. Bass Pro Outdoor World

4:11-CV-3425 (S.D. Tex. 2014)

- Systemic race discrimination allegations
- Potentially upwards of 1,000 claimants
- Up to $300,000,000 in damages
- EEOC asked court to allow it to pursue § 706 claims using the § 707 method of proving pattern or practice allegations, and district court allowed it
- District court granted defendant’s motion for interlocutory appeal of whether (a) EEOC must identify, investigate and conciliate claims of specific persons before bringing § 706 claims; and (b) EEOC my use pattern or practice method to prove § 706 claims
- Appeal remains pending before Fifth Circuit
EEOC Performance and Accountability report

Systemic Enforcement Initiative by the Numbers

- **Investigations**
  - 260 systemic investigations completed
  - 78 settlement and conciliation agreements
    - $13 million in relief

- **Lawsuits**
  - 133 merits lawsuits filed
  - 105 individual suits
  - 11 non-systemic class suits
  - 17 systemic suits (13% of filings)
  - End of FY 2014, 228 cases on active docket, 57 (or 25%) of which were systemic
Potential Costs: Investigations

- Settlement with company because of failure to hire over race $4,600,000.
- Conciliation agreement to class members at a restaurant over hiring practices $1,000,000.
- Agreement to provide monetary relief to woman not hired by a trucking company and train all human resource employees $530,000.
- Settlement with companies to provide accommodation to employees with disabilities $500,000.
Potential Costs: Lawsuits

- **EEOC v. Pitre Buick**, No. 1:11-CV-00875 (D.N.M. 2014)
  - Car dealership sexual harassment suit, $2,100,000.

  - Health provider with ADA and FMLA violations, $1,400,000.

  - Global financial services provider gender discrimination, $1,500,000.
Employer Success in Litigation

- **EEOC v. Ford Motor Co., 782 F.3d 753 (6th Cir. 2015)**
  - Sixth Circuit ruled against the agency whether Ford was required to accommodate telecommuting under the ADA

- **EEOC v. CVS, 70 F. Supp. 3d 937 (N.D. IL. 2014)**
  - Court ruled against agency on its attack of CVS’s separation agreements because of a failure to conciliate

- **EEOC v. Freeman, 2015 U.S. Dist. LEXIS 118307 (4th Cir. 2015)**
  - EEOC challenged employer’s background checks as discriminatory
  - Fourth Circuit affirmed district court grant of summary judgment after excluding EEOC’s expert testimony as unreliable and order agency to pay employer $1,000,000 in attorney’s fees
EEOC’s Aggressive Systemic Discrimination Initiative: Employer Strategies

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Responding to EEOC Charges

Drafting Position Statements
and
Responding to Information Requests
Responding to EEOC Charges

Evaluating the charge

*Looking for red flags

*Drafting a position statement that doesn’t further expose you
Responding to EEOC Charges

Evaluating the charge

• Jurisdictional requirements
• Threshold issues
• Claims made
• Potential exposure to liability
• Settlement
Responding to EEOC Charges

Looking for red flags

- Scope of the allegations
- Subject matter of claims made
- Multiple claims with similar allegations
Responding to EEOC Charges

Looking for red flags (continued)

- Scope of information and document requests and/or subpoenas
- Scope of on-site investigation/interviews
- Appetite for settlement
Responding to EEOC Charges

Drafting a position statement

Draft careful and thoughtful responses

Don’t expose the employer to greater scrutiny
Responding to EEOC Charges

Drafting a position statement (continued)

• Don’t volunteer
  • Information about other employees or locations not at issue
  • Statistical data
Responding to EEOC Charges

Drafting a position statement (continued)

• Be careful about relying on uniform policies and/or practices
  - Eliminating barriers in Recruitment and Hiring
    • blanket prohibitions w/ no relation to the job
      • Pepsi Beverages ($3.13M)
      • J.B. Hunt Transport Inc. (5-year conciliation agreement & private settlement)
Responding to EEOC Charges

- Addressing Emerging and Developing Issues (ADA issues)

  • fixed leave polices

    • EEOC v. Princeton HealthCare System, 3:10-cv-04126 (D. N.J.) ($1.35M)
    • EEOC v. Interstate Distributor Company, 12-cv-02591 (D. Co.) ($4.85M)
    • EEOC v. Supervalu, Inc., 09-c-5637 (N.D. Ill.) ($3.2M)**
    • EEOC v. Verizon, 1-11-cv-01832 (D. Md.) ($20M)
    • EEOC v. Denny’s, Inc., WDQ-06-02527 (D. Md.) ($1.3M)
    • EEOC v. Sears, Roebuck and Co., 04-c-7282 (N.D. Ill.) ($6.2M)
Responding to EEOC Charges

- Addressing Sex Discrimination
  - same sex training policy
Responding to EEOC Charges

Drafting a position statement (continued)

– Dig deeper

• Even if the employer has a uniform policy and/or practice, does it conduct further analysis on a case-by-case basis?

• Spell it out
Responding to Broad Information Requests

What can the EEOC ask for?

“…evidence, including but not limited to, books, records, correspondence, or documents”

29 CFR § 1601.16

“…virtually any material that might cast light on the allegations against the employer”

Responding to Broad Information Requests

Conducting due diligence
Communicating with the EEOC
Strategies for limiting responses
Responding to Broad Information Requests

Conducting due diligence

• Determine whether the employer has the information requested and the format of the information (preserve ESI)

• Assess the burdens and costs associated with accessing, gathering and producing the information

• Determine whether alternate sources are available that contain the requested information

• Assess what information is helpful and what information is harmful to the employer
Responding to Broad Information Requests

**Communicating with the EEOC**

Play nice in the sandbox

Be cautious about coming out swinging
Responding to Broad Information Requests

Strategies for limiting responses

• Be prepared to explain the burdens and costs associated with accessing, gathering and producing the requested information

• Propose phased/rolling production

• Narrow production in a manner that makes sense, e.g., limiting production to a particular business unit or location

• Produce a representative sample

• Highlight favorable information
Subpoenas: Flight or Fight?
Subpoena power

  - Same in ADA, ADEA, GINA, and EPA.

- Compared to FY 2013, there has been uptick in subpoena enforcement actions in FY 2014.

- Respondent who wants to oppose subpoena must file a petition to revoke or modify the subpoena.
  - File with the District Director who issued the subpoena.
  - Must be filed within 5 days of receipt of subpoena.

- Failure to file petition may foreclose ability to oppose subpoena enforcement.
Kronos, creator of employment aptitude tests, was hired by grocery chain Kroger, and became third party to EEOC’s original suit against Kroger

Disabled woman applied, took the Kronos test, and was not hired

EEOC subpoenaed Kronos for test and related data
  • Nationwide data sought

Third Circuit originally narrowed subpoena in 2010

In a subsequent opinion, Third Circuit widened the scope of the subpoena in 2012, but shifted some of the cost burden of production to EEOC
How courts decide and why it matters?

- In recent years, courts have largely ratified EEOC’s broad authority to obtain information, including by subpoena.

- Some district courts have limited EEOC subpoenas but circuit courts have generally endorsed broad EEOC view of its subpoena power.

- Transforms confidential investigation and enforcement proceedings into a public event.

- Moves an individual claim, even a settled one, into a potentially larger pattern or practice claim.
Effect of EEOC’s Broad Powers

- Individual settles, agency can still go after a broad subpoena
  - EEOC v. KB Staffing, LLC, 2014 U.S. Dist. LEXIS 147810 (M.D. Fla 2014)

- Nationwide data

- Unusual defendants
  - EEOC v. Forest County Potawatomi Community, d/b/a Potawatomi Bingo Casino, No. 13-MC-61 (E.D. Wis Oct. 2014)

- Third party companies
Challenging an EEOC Subpoena

The right circumstances may warrant a challenge to the subpoena:

- Individual investigation but broad subpoena
  - *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014)

- Meaning of “relevance” would be eviscerated

- EEOC flagrant behavior
“Sue First, Ask Questions Later”
Strategies for Employers
“Sue First, Ask Questions Later”
Strategies for Employers

• Challenge whether the EEOC met its statutory obligation to conciliate; pre-suit conduct (Mach Mining v. EEOC, EEOC v. CRST Van Expedited, Inc.; EEOC v. Sterling Jewelers, Inc.)

• Seek to trim claims (EEOC v. Freeman)
  – Assess whether to file a motion to dismiss claims arising from decisions made more than 300 days before the Charging Party filed his or her charge.
  – Assess whether to file a motion for summary judgment to dismiss claims not included in the original charge to the date on which the EEOC officially notified the Respondent that its investigation was expanding.
“Sue First, Ask Questions Later”
Strategies for Employers

• Move to compel the EEOC to make class members available for deposition, and move to dismiss those who do not present for deposition (CRST)


• Challenge the techniques or data used in the EEOC’s expert report (Freeman)
“Sue First, Ask Questions Later”
Strategies for Employers

• Move for summary judgment on pattern and practice claims (Bloomberg, LP)

• Move for summary judgment on individual claims (CRST)
  – Bankruptcy issues
  – Failure to timely report claims
  – Company’s prompt and effective response
  – No genuine issue of material facts as to essential elements of claims
Be Mindful of EEOC Guidance

- Agency’s view of the law can differ sharply from courts
  - Aspirational versus actual

- Be mindful of the guidance when crafting workplace policies
  - But do not confuse it with the law

- EEOC pregnancy guidance
  - Came out shortly before the Supreme Court decided Young v. UPS, 135 S. Ct. 1338 (2015)
  - Interpreted the Pregnancy discrimination act in a very pro-employee manner
  - Was harshly rebuked by the Court
  - Has since been revised
Subpoenas

- Keep proper records
  - Helps define scope and reasonable defenses

- Be prepared for the short window to object
  - Have multiple parties responsible for the matter
  - Vacation coverage

- Seek a conversation with the party seeking records
  - Try to learn the underlying issue, helps with confidentiality

- Object cooperatively
Conciliation – Leveraging Mach Mining

- Mach Mining, LLC v. EEOC, 134 S. Ct. 2872 (2015)
  - Supreme Court clarifies that EEOC has duty to conciliate in good faith
  - In reality, still very little judicial oversight of this practice

- Takeaways
  - Use conciliation as an opportunity to learn more about the case
  - Document all conciliation “efforts” to potentially argue bad faith by the agency
  - Last time to have claims remain confidential, so consider the Pandora's box scenario
Once in Court

- Scrutinize expert witnesses and reports
  - *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015)

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