When the EEOC Comes Knocking
Anticipating and Responding to Discrimination Investigations and Litigation

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:
Alison B. Marshall, Partner, Jones Day, Washington, D.C.
Teresa R. Tracy, Principal, Gladstone Michel Weisberg Willner & Sloane, Los Angeles
Maritoni D. Kane, Counsel, Mayer Brown, Chicago

Tuesday, September 21, 2010
The conference begins at:
1 pm Eastern
12 pm Central
11 am Mountain
10 am Pacific

You can access the audio portion of the conference on the telephone or by using your computer's speakers. Please refer to the dial in/ log in instructions emailed to registrants.
EEOC INVESTIGATIONS ON THE RISE

Proactive Strategies to Respond to Discrimination Investigations and Prevail in Claims

September 21, 2010
10:00 am to 11:30 am PST
1:00 pm to 2:30 pm EST

Sponsored by Strafford

Teresa R. Tracy, Esq.
Gladstone Michel Weisberg Willner & Sloane, ALC
4551 Glencoe Avenue, Ste. 300
Marina del Rey, CA 90292
Tel. (310) 821-9000, x717
ttracy@gladstonemichel.com
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I. CURRENT EEOC ENFORCEMENT TRENDS

   A. Systemic Cases

      The EEOC is currently focusing much of its efforts on systemic cases. In FY 2009, it filed 111 lawsuits on behalf of classes of individuals. At the end of FY 2009, 39 Commissioners’ charges were under investigation, compared with only 15 such charges in investigation as of March 2006, when the EEOC launched its Systemic Initiative. Systemic investigations based on charges filed by the public also increased significantly. In FY 2009, the Commission filed 19 new systemic cases. These cases cover a broad range of current issues, such as the use of credit history and criminal conviction records to exclude applicants for employment and the use of inflexible leave policies to deny reasonable accommodations to qualified employees with disabilities.

      To assist it to better handle these systemic cases, in FY 2009, the EEOC not only started to develop a strong systemic-oriented skill set in EEOC staff, but it hired several experts in the fields of statistics, industrial psychology, and labor market economics to partner with district offices on larger cases. It also invested in technology tools to assist with these cases, and successfully linked its two major databases (the EEO-1 reports and its charge and case management databases).

      To accomplish the goals of its initiative, the EEOC anticipates a shift in the composition of its litigation docket over time, with fewer smaller, individual cases and more cases on behalf of larger groups. While acknowledging that this will lead to a decline in the total number of lawsuits filed each year compared with the past, it expects that the overall impact of agency litigation will be enhanced as larger cases are filed and resolved.

Here is a sample of significant resolutions of systemic discrimination lawsuits in FY 2009:

- **EEOC v. Gold’n Plump Poultry, Inc. and EEOC v. The Work Connection** (D. Minn.) (resolved Mar. 31, 2009). In companion suits against a mid-west poultry processor and a staffing agency, EEOC alleged failure to accommodate Muslim employees’ religious prayer requirements and objection to handling pork. A consent decree provided $215,000 to 128 employees, and required the employer to add a 10-minute break, the time of which will vary according to the daily Muslim prayer schedule. The staffing agency was required to pay $150,000 to 28 applicants, along with offering placement with the employer as positions become available.
• **EEOC v. Pitt Ohio Express, LLC** (N.D. Ohio) (resolved Jan. 22, 2009). A suit against a regional transportation carrier alleged failure to hire women as truck drivers and dockworkers at four Ohio terminals, as well as failure to retain employment applications as required. A five-year consent decree provided a $2.43 million class settlement fund, and 40 offers of employment to eligible claimants (26 for drivers and 14 for dockworkers).

• **EEOC v. Area Erectors, Inc.** (N.D. Ill.) (resolved May 27, 2009). A midwest steel and precast concrete erection company discriminated against an apprentice ironworker and a class of African Americans in union referrals when they were laid off or fired after much shorter periods of work than white referrals; the company also failed to file EEO-1 reports. The consent decree provided $630,000 to be allocated among 24 claimants and immediate or priority reinstatement. EEOC named seven unions as Rule 19 nonaligned parties, all of whom were signatories to the decree, which gave the decree’s mandates priority to the extent they conflict with any provision of the unions’ collective bargaining agreements.

• **EEOC v. Sears, Roebuck and Co.** (N.D. Ill.) (resolved Sept. 29, 2009). EEOC filed suit against a national retailer alleging that it failed to accommodate and discharged a class of employees with disabilities whose leave needs exceeded an inflexible one-year maximum workers’ compensation leave policy. A consent decree establishes a $6.2 million settlement fund to be allocated by the EEOC among about 400 qualified claimants. The decree further provides for revision of the employer’s workers’ compensation and reasonable accommodation policies to ensure compliance with the ADA.

• **EEOC v. First Wireless Group, Inc.** (E.D.N.Y.) (resolved Oct. 29, 2008). A suit against a New York cell phone re-manufacturer alleged that a class of Hispanic employees was paid lower wages than similarly-situated Asian employees and then given unequal discipline and discharged in retaliation for complaining. A consent decree awarded $435,000 in back pay or compensatory damages to 38 claimants plus 8 hours of annual training to specified management staff and review of the compensation system to ensure that it does not discriminate against Hispanic employees.

• **EEOC v. Allstate Insurance Co.** (E.D. Mo.) (resolved Sept. 11, 2009). EEOC sued a national insurance company for implementing a rehire moratorium policy, following a company-wide reorganization plan that had an adverse impact on former employee-agents who were 40 years of age or older. A settlement order provided for $4.5 million in back pay to be paid into a settlement fund and distributed in EEOC’s sole discretion.

• **EEOC v. L&T International Corporation et al.** (D.C.N.M.I.) (resolved July 28, 2009). Four related suits against a garment manufacturer alleged discrimination on the basis of national origin, age, pregnancy, and retaliation. The national origin claims asserted
that a class of Filipino packers was discriminated against in favor of Chinese workers, confined to work groups segregated by national origin, and subjected to adverse treatment concerning overtime opportunities and lunch conditions. Two consent decrees resolved the four lawsuits and provide for a total of around $1.7 Million in compensatory damages to 177 individuals (including interveners).

B. Lilly Ledbetter Fair Pay Act Claims

The Lilly Ledbetter Fair Pay Act of 2009, P. L. No. 111-2, was signed by President Obama on January 29, 2009. It became effective retroactively to May 28, 2007, the day before the Supreme Court’s decision in Ledbetter v. Goodyear Tire & Rubber Co., which the new law was designed to legislatively overturn. It applies to all claims of discriminatory compensation pending on or after that date. It allows claims for pay discrimination that first began based upon discriminatory actions that occurred prior to the usual 180/300 statutory limitations period under Title VII, the ADEA, and the ADA. It thus restores the pre-Ledbetter position of the EEOC that each paycheck that delivers discriminatory compensation is a wrong actionable under the federal EEOC statues, regardless of when the discrimination began.

Under the Act, an individual subjected to compensation discrimination Title VII, the ADEA, or the ADA can file a charge within 180/300 days of any of the following:

- when a discriminatory compensation decision or other discriminatory practice affecting compensation is adopted;

- when the individual becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or

- when the individual’s compensation is affected by the application of a discriminatory compensation decision or other discriminatory practice, including each time the individual receives compensation that is based in whole or in part on such compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or part from such discriminatory decision or practice.

The EEOC revised its Compliance Manual during 2009 to reflect the new law. This section also explains that although the time frames under the Act apply to all forms of compensation, including the payment of pension benefits, the Act was not intended to change the method for calculating when pension distributions are considered paid. Therefore, if an individual intends to file a discrimination claim based on pension benefits, the Compliance Manual advises the claimant to file a charge within 180/300 days of retirement, as pension
benefits are considered paid “upon entering retirement and not upon issuance of each annuity check.”

This new section provides the following example of an actionable claim:

After working for the Respondent for nearly 10 years as a production supervisor, CP learns she is being paid less than the other four production supervisors in her department, who are all men. Immediately after learning about the pay discrepancy, CP files an EEOC charge alleging sex-based wage discrimination in violation of Title VII. The investigation shows that CP generally received lower pay raises than her male counterparts as the result of lower performance ratings, which CP alleges to have been discriminatory. Although these performance ratings and related pay raises all occurred more than 300 days before CP filed her charge, they affected her pay within the filing period. Therefore, CP’s pay discrimination charge is timely.

The courts have already grappled with the implications of the Act. Examples of cases are:

- **Lewis v. City of Chicago, ___US___, 130 S.Ct. 2191, 176 L.Ed.2d 967 (2010).** In 1995, the City of Chicago gave a written examination to applicants seeking firefighter positions. In January 1996, the City announced it would draw candidates randomly from a list of applicants who scored at least 89 out of 100 points on the examination, whom it designated as "well qualified." That May, the City selected its first class of applicants to advance, and it repeated this process multiple times over the next six years. Beginning in March 1997, several African-American applicants who scored in the "qualified" range but had not been hired filed discrimination charges with the EEOC and received right-to-sue letters. They then filed suit, alleging (as relevant here) that the City's practice of selecting only applicants who scored 89 or above had a disparate impact on African-Americans in violation of Title VII. The District Court certified a class -- petitioners here -- of African-Americans who scored in the "qualified" range but were not hired. The court denied the City's summary judgment motion, rejecting its claim that petitioners had failed to file EEOC charges within 300 days "after the unlawful employment practice occurred," and finding instead that the City's "ongoing reliance" on the 1995 test results constituted a continuing Title VII violation.

**Held:** A plaintiff who does not file a timely charge challenging the adoption of a practice may assert a disparate-impact claim in a timely charge challenging the employer's later application of that practice as long as he alleges each of the elements of a disparate-impact claim.
The Supreme Court distinguished *Ledbetter* and other cases, characterizing them as cases that established that a Title VII plaintiff must show a “present violation within the limitations period.” For disparate treatment claims and others for which the plaintiff must show discriminatory intent, this means that the plaintiff must demonstrate deliberate discrimination within the limitations period. But for claims that do not require discriminatory intent, no such demonstration is needed.

The City and its *amici* warned that the Court’s reading will result in a host of practical problems for employers and employees alike. Employers may face new disparate-impact suits for practices they have used regularly for years. Evidence essential to their business-necessity defenses might be unavailable (or in the case of witnesses' memories, unreliable) by the time the later suits are brought. And affected employees and prospective employees may not even know they have claims if they are unaware the employer is still applying the disputed practice.

The Court brushed this concern aside, noting that both readings of the statute produce puzzling results. Under the City's reading, if an employer adopts an unlawful practice and no timely charge is brought, it can continue using the practice indefinitely, with impunity, despite ongoing disparate impact. Equitable tolling or estoppel may allow some affected employees or applicants to sue, but many others will be left out in the cold. Moreover, the City's reading could induce plaintiffs aware of the danger of delay to file charges upon the announcement of a hiring practice, before they have any basis for believing it will produce a disparate impact.

In all events, the Court did not feel that it was the Court’s task to assess the consequences of each approach and adopt the one that produces the least mischief; rather, it chose to see its charge as giving effect to the law Congress enacted.

- *AT&T Corp. v. Hulteen*, __ U.S. __, 129 S.Ct. 1962, 173 L.Ed.2d 898 (2009). The issue in this case was whether an employer necessarily violates the Pregnancy Discrimination Act when it pays pension benefits calculated in part under an accrual rule, applied only prior to the PDA, that gave less retirement credit for pregnancy leave than for medical leave generally. The court held there is no necessary violation, and the benefit calculation rule in this case was part of a bona fide seniority system which insulated it from challenge. The Court accepted supplemental briefing on the effect of the Act, but concluded that the Act did not save the plaintiff, since there was no violation of law in the first place when the alleged wrongdoing occurred.

- *Wynes v. Kaiser Permanente Hospitals*, 2010 U.S. Dist. LEXIS 82440 (E.D. Cal., 8/13/10). The plaintiffs in this case alleged both ADEA and ADA claims, as well as a separate claim for breach of the Lilly Ledbetter Fair Pay Act of 2009. The court granted the defendant’s motion to dismiss this cause of action, noting that the purpose of the Act was to extend the statute of limitations of preexisting anti-discrimination statutes and not to create an independent cause of action.
• **Porter v. City of Columbus,** 2010 U.S.App. LEXIS 6 (6th Cir., 8/30/10). The court held that the Act did not extend the statute of limitations on his claims under the First and Fourteenth Amendment, since they did not relate to discrimination in employment, compensation-related claims under Title VII, the ADEA, the ADA, or the Rehabilitation Act. See also, **Rzepiennik v. Archstone-Smith, Inc.**, 92 Empl. Prac. Dec. (CCH) P43,580; 29 I.E.R. Cas. (BNA) 286 (10th Cir. 2009)(the Act did not extend the statute of limitations for Sarbanes-Oxley retaliation claims).

• **Tillman v. Southern Wood Preserving,** 2010 U.S.App. LEXIS 9181 (5th Cir., 5/4/10). The court held that the Act did not save the plaintiff’s time-barred claims because the Act does not apply to discrete acts such as the reprimand, the one-time exclusion from a pay raise, and the denial of overtime work.

• **Jones v. Ferguson Pontiac Buick,** 2010 U.S.App. LEXIS 5840 (10th Cir., 3/22/10). The plaintiff attempted to reopen a case that he had already settled, based upon the Act’s enactment approximately eleven months later. The court had little difficulty saying that he couldn’t do so.

• **Schuler v. Pricewaterhousecoopers, LLP,** 595 F.3d 370 (D.D.C. 2010). The plaintiffs alleged that they were denied partnership in violation of the ADEA. The court held that the Act did not serve to revive one of the plaintiff’s old claims on the ground that the plaintiff’s allegation that he was denied partnership based on age did not involve either a claim involving “discrimination in compensation” or point to a “discriminatory compensation decision or other practice.” The court agreed that in employment law the phrase "discrimination in compensation" means paying different wages or providing different benefits to similarly situated employees, not promoting one employee but not another to a more remunerative position. See also, **Matthews v. Corning Inc.**, 2010 U.S. Dist. LEXIS 96876, 9/16/10)(the Act does not apply to generalized discrimination claims, including the failure to promote); **Lipscomb v. Mabus**, 699 F.Supp.2d 171 (D.D.C. 2010)(same).


• **Russell v. County of Nassau,** 696 F.Supp.2d 213 (E.D.N.Y. 2010). Employer’s motion for summary judgment denied because, drawing all favorable inferences in plaintiff’s favor regarding the filing date of his administrative claim, assuming he is successful on his race discrimination claim, he could only recover for paychecks issued on or after October 6, 2004. Similarly, if he could demonstrate that the failure to give him cost of living increases in 1998 and 1999 were the result of race discrimination, he could recover, at most, on that claim for each paycheck he received in the position of
Director, Job Development, dating back to October 6, 2004. Finally, if he could demonstrate that he was required to perform the same out of title duties without compensation because of his race, he could recover on that claim for each paycheck he received in the position of Director, Job Development, dating back to October 6, 2004.

**Miller v. Kempthorne**, 2009 U.S.App. LEXIS 27952 (2nd Cir, 12/21/09). The plaintiff appealed from the district court’s granting of the employer’s summary judgment motion in this race, disability and age discrimination case. The decision in this aspect of the case addressed the dismissal on timeliness grounds that he was not originally hired as a permanent employee in 1994, that he was not converted to a permanent employee until 1999, when he was converted to permanent status in 1999 he was improperly placed in a lower grade level for compensation, and that deducting an improper amount from his paychecks to account for his annuity was discriminatory since the administrative error that caused subsequent deductions occurred in December 1999. Even with the benefit of the Act, the only claim rendered timely was his claim that he was classified at the wrong grade level at the time he became a permanent employee. (The court noted that the inappropriate deductions had been corrected, thus the issue was moot.)

**Hester v. North Alabama Center for Educational Excellence**, 2009 U.S. App. LEXIS 25225 (11th Cir., 11/17/09). In this compensation discrimination and retaliation case, the two sides agreed that her claims had to be remanded to the district court in light of the Act.

**Thornton v. United Parcel Service**, 587 F.3d 27 (1st Cir. 2009). The court granted rehearing to determine the effect of the Act on the timeliness of the plaintiffs compensation claim. It reversed the district court’s decision that the claim was untimely as to checks that the plaintiff received after June 20, 2006 300 days before she filed her EEOC charge if they reflected a periodic implementation of a previously made intentionally discriminatory employment decision or other practice. The court also held that the failure to answer a request for a raise qualifies as a compensation decision because the result is the same as if the request had been explicitly denied. However, it reaffirmed its earlier conclusion that an August 2006 investigation report does not constitute a compensation decision or other practice; an employer should not be liable for investigating an internal discrimination complaint and communicating its findings to the employee. The court felt that to hold otherwise would have the unfortunate effect of encouraging employers to ignore such complaints.

**Moore v. Napolitano**, 2009 U.S. Dist LEXIS 113222 (E.D. La., 12/3/09). The plaintiff was employed from approximately October 1988 to August 1995. He claims that he was retaliated against for pursuing administrative claims of race discrimination in 1994.
The court held that, with respect to federal employees, the Act effectively removed the 45-day timing requirement within which to contact an EEO Counselor with a claim, when the claim involves discriminatory compensation. Here, the plaintiff’s claim was not time-barred because he continued to receive compensation even after he filed his individual complaint.

However, the court found that the Act did not apply to his failure to promote claim because such a claim is not a “discriminatory compensation” claim.

- **Joseph v. Commonwealth of Pennsylvania**, 2009 U.S. Dist. LEXIS 107136 (E.D. Pa., 11/16/09). The Act did not apply and thus did not defeat the employer’s argument that this failure to hire claim was untimely, because a failure to hire is not a compensation decision.

- **Ragsdale v. Holder**, 2009 U.S. Dist. LEXIS 101505 (D.C.C., 11/2/09). The Act did not apply to a denial of a request for an advance of annual leave, where the federal plaintiff failed to file a charge with an EEO Counselor within 45 days of the denial.

- **Gentry v. Jackson State University**, 610 F.Supp.2d 564 (S.D. Miss. 2009). The district court held that the Supreme Court’s Ledbetter decision continues to control disparate treatment claims involving discrete discriminatory acts other than claims related to pay. The alleged denial of tenure was a discrete act with an available remedy under the Fair Pay Act because it involved a related salary increase that qualified as a "compensation decision". Same, **Rehman v. State University of New York**, 596 F. Supp. 2d 643 (E.D. N.Y. 2009); **Bush v. Orange County Corr. Dep’t.**, 597 F.Supp.2d 1293 (M.D.Fla. 2009).

- **Johnson v. District of Columbia**, 632 F.Supp.2d 20 (D.D.C. 2009). The court revived discriminatory compensation claims under the Act, but declined to apply the Act to revive harassment and retaliation claims because such actions were not a compensation practice.


- **Mikula v. Allegheny County**, 583 F.3d 181 (3d Cir. 2009). The plaintiff alleged that the employer discriminated against her on the basis of gender by failing to give her a pay raise in violation of Title VII and by paying her less than a male employee who performed substantially similar work in violation of the EPA. The court granted rehearing to determine the effect of the Act on its prior decision. It reversed the lower court’s decision that her claims were untimely as to paychecks that she received in
June 2006, and reinstated its earlier decision to the extent that it had affirmed the District Court's dismissal of Mikula's Title VII claim as untimely, stating that an August 2006 letter was not a pay decision or "other practice" because it merely provided Mikula with the results of its investigation of her internal discrimination complaint.

- **Speer v. Mountaineer Gas Co.**, 2009 U.S. Dist. LEXIS 65088 (N.D.W. Va., 7/28/09). District court found that the Act does not apply to cases where the plaintiff has failed to exhaust available administrative remedies for "discrete discriminatory acts other than pay" and dismissed with prejudice a discrimination claim where the plaintiff was not permitted to work and failed to file a claim with the EEOC within the applicable statute of limitations.

- **Schengrund v. The Pennsylvania State University**, 2009 U.S. Dist. LEXIS 90349, 107 Fair Empl. Prac. Cas. 737 (M.D. Pa., 9/30/09). The court noted that in this case, the determination that each paycheck is independently recoverable does not end the analysis under the Act because the plaintiffs suggested that the application of the discovery rule and equitable tolling effectively tolled the accrual date for all paychecks received prior to June 18, 2004 (300 days prior to the filing of their action with the EEOC) so that they are deemed to have accrued within the limitations period. The court concluded that the discovery rule yielded an accrual date of July 11, 2001 at the latest for all plaintiffs; since this 2001 date did not fall within the 300 days prior to the EEOC charge, plaintiffs could not recover for paychecks received prior to June 18, 2004 unless the court also found that equitable tolling applied to extend the statute of limitations period for these three years. As to equitable tolling, the court reviewed the evidence to see if there were instances of employer deception. Based on the facts before it, the court allowed recover for discriminatory paychecks received from March 23, 2004 to the present. This case also addressed the application of the Act to state law, which in this state was to be treated the same as federal laws except where there was something specifically different between the two laws.

- **Tomlinson v. El Paso Corp.**, 2009 U.S. Dist. LEXIS 77341 (D. Co., 8/28/09); 107 Fair Empl. Prac. Cas. 194; 92 Empl. Prac. Dec. P43,665. The court initially ruled that the “wear away” period for some workers, i.e., the time that overall benefits did not grow until the cash balance benefits caught up to and exceeded the “frozen” benefits under a prior benefit program, violated the ADEA was not a basis for a claim under the ADEA because none of the plaintiffs had filed a timely charge with the EEOC. In light of the Act, the court reversed its earlier decision. In doing so, the court noted that this case did not concern payment of retirement benefits pursuant to a retirement plan, but rather the rate of accrual of benefits. The Act, according to the court, preserved the existing law concerning when a discriminatory pension
distribution or payment occurs, i.e., upon retirement, not upon the issuance of each check.

- **Beekman v. Nestle Purina Petcare Co.**, 635 F. Supp. 2d 893 (N.D. Iowa 2009). The Act did not serve to revive claims that the FMLA was violated, since they were discrete acts and not compensation decisions. Same, *Maher v. International Paper Co.*, 600 F.Supp.2d 940 (W.D. Mich. 2009).


- **EEOC v. CRST Van Expedited, Inc.**, 615 F. Supp. 2d 867 (N.D. Iowa 2009). The court rejected the EEOC’s argument that no statute of limitations applied where it (unsuccessfully) brought a case in its own name seeking pattern and practice relief for harassment. The Act did not apply; “[t]here is no indication Congress intended the Ledbetter Act to serve as a trump card that the EEOC might use to supersede all statutes of limitations in our nation’s various civil rights acts.”

II. **EEOC INVESTIGATIVE PROCESS**

C. **Discovery Strategies, Including Use of Privileges**

1. **Responding to EEOC’s Discovery Requests**

Rapid internal investigations can be critical in developing the strategy for defending a collective or class action. However, they raise numerous potential problems related to preserving privileges.

Furthermore, it is not uncommon for the EEOC to request information and documents that would otherwise be considered private and personal, perhaps even subject to protection under various statutory or judicially-created privileges. Thus, a response to such a request should strategically consider whether, when, and how to assert these privileges.

a. **Protecting Employer’s Privileges**

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.
General Counsel and outside counsel 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 the EEOC 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:

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

b. Consultants and testifying experts

c. Subject matter experts

Discussions with and among these individuals must be conducted so as to protect against losing the privileged status of the discussion.

Furthermore, while the “advice of counsel” defense may serve to blunt the effect of the EEOC’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)
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<td>Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999)</td>
<td>(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)</td>
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<td>Scholtisek v. Eldre Corp., 441 F.Supp.2d 459 (W.D.N.Y. 2006)</td>
<td>(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)</td>
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<td>Newman v. Countrywide Home Loans, Inc., 144 Lab. Cas. (CCH) P34, 368; (N.D.Tex. 2001)</td>
<td>(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)</td>
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Tips for Establishing and Maintaining Privileged Status

- Appropriately mark privileged documents
- Maintain privileged documents in a confidential manner
- Include counsel in interviews and discussions
- Be careful of non-privileged discussions
- Have preliminary database construction and manipulation performed by non-testifying personnel at direction of counsel
- Identify who will make and receive reports, and what type of report will be made

Discrimination laws include non-retaliation provisions. Therefore, make sure that everyone involved in the investigation is familiar with these provisions. In particular, when involved in EEOC investigations initiated by one of the Commissioners or a class-based claim, do not attempt to identify the employee(s) who were the basis for initiating the complaint.

Plan the scope of the investigation. Most often, the investigation will first focus on the allegations of any complaint. However, if concerns arise during the scope of the initial investigation that there may be additional violations, decide whether and to what extent to expand the investigation. Be careful that any expanded investigation is appropriately insulated from the original investigation and that it, too, is conducted in a way so as to maximize the availability of the attorney-client privilege and the work product doctrine. Do not assume that a “self-critical analysis” privilege will apply; many courts have not recognized such a privilege, and those that have recognized it have done so in limited contexts.

The investigation will almost certainly include the review of documents (e.g., personnel files, medical records), training given, and systems. If an area is lacking, consider what other information is available to “fill in the gaps.”

Prepare a witness interview outline for use at the various levels and types of employees who will be interviewed. Include non-retaliation language. Make sure that the interview focuses the questions on the facts that will be important for the defense of the case.
Counsel should be involved in making reports so as to maximize available protections. It is more important in class actions to keep upper management advised due to the larger potential damages and implications for the company’s manner of conducting its business. The person(s) designated to receive the reports should be cautioned about ways to avoid waiving any privilege protections.

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.

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, 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.

b. Providing Information on “Confidential” Basis

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).

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.)

**D. Preparing for Potential Freedom of Information Act Requests**

1. **Historical Data From EEOC**

EEOC discloses records under two separate mechanisms—the Freedom of Information Act (FOIA), and an internal mechanism created in Section 83 of EEOC’s Compliance Manual. Historically, 95 percent of the disclosure requests made under these mechanisms concern closed charge files, and this disclosure pattern is expected to continue into the future. The number of charges filed with the EEOC is expected to continue increasing during FY 2011–2013, with a concomitant projection that the number of charges resolved during those years will increase as well. As a result, EEOC forecasts that its FOIA and Section 83 activity also will increase.
Based upon the anticipated number of resolutions, the number of Freedom of Information Act (FOIA) requests received by EEOC is projected to increase by six percent in FY 2011 to the low to mid-17,000s, rising by FY 2013 to the mid-18,000s. Despite this growth, the EEOC anticipates that the number of FOIA requests pending at the end of each fiscal year will continue to moderate. This is due in large part to the EEOC’s hiring of 31 dedicated records disclosure staff in FY 2009 and the acquisition of technology updates, such as redaction software and a comprehensive unified FOIA tracking system that captures FOIA data and permits the public to file requests and access status information concerning their request on-line.

The data also indicate that the number of charge file disclosure requests under Section 83 of the EEOC Compliance Manual will increase to approximately 8,000 requests in 2011 and to the mid-8,000 range by FY 2015. The growth in the number of Section 83 requests is a direct result of revisions to Section 83 of the EEOC Compliance Manual expanding its coverage to the Equal Pay Act, the Age Discrimination in Employment Act, and the newly enacted Genetic Information Nondiscrimination Act of 2008. Before this expansion, Section 83 requests only applied to records under Title VII and the ADA.

2. **The Freedom of Information Act (FOIA)**

The Freedom of Information Act, 5 U.S.C. section 552, is a statute providing a process for persons to request copies of federal agency records. As with other federal agencies, the EEOC is required to respond to such requests unless the document is protected by any of the nine exemptions and three exclusions of FOIA, contained in 5 U.S.C. section 552(b). Thus, FOIA requests can be a valuable tool for gaining access to a variety of documents and records maintained by the EEOC. One limitation is that it only applies to records that the EEOC has; it does not require the EEOC to do research, analyze data, answer written questions, or create records.

3. **Section 83**

Certain documents are available under Section 83 of the Compliance Manual without a FOIA request. The EEOC will release information contained in Title VII and ADA employment discrimination charges to the parties of the charge. This procedure is not available for ADEA or EOA charges, which must follow the FOIA procedures.

The charging party has liberal access to the information in his/her charge file under Section 83, but a respondent’s access to this information is restricted until after the charging party has filed a lawsuit.
4. *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.

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<th>There are few cases that extensively address this privilege.</th>
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<td>- <strong>EEOC v. American International Group, Inc.,</strong> 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)</td>
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<td>- <strong>EEOC v. Fina Oil and Chemical Co.,</strong> 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)</td>
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<td>- <strong>EEOC v. Albertson’s LLC.,</strong> 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)</td>
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<td>- <strong>EEOC v. Continental Airlines,</strong> 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)</td>
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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).

5. **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.

6. **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.

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<th>Some cases that have reviewed this question include:</th>
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<td>• <em>EEOC v. Int’l Profit Assocs.</em>, 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...”</td>
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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)
**III. SETTLEMENT CONSIDERATIONS**

A. **When Charges Are Not Settled Early**

1. **Constraints on Agency Investigations**

   The EEOC has an arsenal of weapons at its disposal if the charge does not resolve at a very early stage. Some of the most common are further requests for information, and interviews.

   Interviews of claimants and potential claimant-supportive witnesses can either be done on-site or off-site, and either in person or by telephone. Thus, an employer should consider who is likely to be contacted by the EEOC and whether or not to approach these individuals about the potential interview. It may be helpful to let the person know that the EEOC – a governmental agency – may be contacting them and an overview of the individual’s rights in such a circumstance, including the right not to talk to the EEOC and the right to have an attorney paid for by the employer present during any such interview. However, such discussions must be done very carefully and should be documented, so as to avoid charges that the employer was interfering in the EEOC’s investigation or implicitly discouraging the individual from talking to the EEOC or threatening retaliation for doing so.

   If the EEOC wants to schedule an on-site visit, including interviews, the employer has more control of the situation. It can, and should, attempt to arrange the visit and interviews to have minimal disruption on its operations. It can, and should, conduct its own “on-site” inspection prior to the EEOC’s arrival, to ensure that required posters are actually posted and in good condition, and that objectionable materials are removed. Furthermore, if the EEOC identifies management-level individuals (the employer should consider at what level it will designate positions as having this status) on its interview list, the employer should have pre-interview discussions with those individuals to advise them that the company has the right to have its attorney present and that the company’s decision to do so can also benefit the

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**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)
individual during the interview by clarifying questions, etc.; to go over issues and facts that the EEOC is likely to ask about; and to remind the individual of the instruction to tell the truth. The EEOC does have the authority to conduct unannounced on-site visits; this is a bad sign for the employers, since it signals that the EEOC believes the employer is being unreasonably uncooperative in the investigation.

The interview should be set up in a confidential place. We prefer someplace that is acceptably comfortable yet away from an area where the EEOC interviewer is likely to “run into” employees, since the interviewer often takes the opportunity to conduct impromptu interviews.

The employer should make copies for itself of any documents inspected by the EEOC during the visit.

In our experience, the EEOC is generally cooperative in scheduling on-site visits and the interview schedule suggested by the employer, as long as the employer does not appear to be unduly uncooperative or appearing to unreasonably be delaying the visit.

The employer should be aware that the EEOC could widen the investigation if it has reason to believe that there are violations beyond what is alleged in the charge.

During the investigation stage, the EEOC can issue subpoenas. Employer actions that lead to such a step should be carefully considered because (a) the need for a subpoena usually indicates that the EEOC believes the employer is not cooperating, thus increasing the level of suspicion on the part of the EEOC; (b) it shows the EEOC is committed to the investigation. There are times that an employer may believe that a subpoena is advisory because of the nature of the information that the EEOC is requesting, i.e., to protect the employer in cases of severe employee unhappiness that information is being provided. In such situations, the employer should have a frank discussion with the EEOC investigator.

In the event a subpoena is issued, the employer is required to comply, just as with a subpoena issued in other litigation. Under each of the laws enforced by the EEOC except two (the ADEA and the EPA), the employer can file a petition to revoke or modify the subpoena. Under the ADEA and EPA, these procedures are not an option and the employer’s only choice is to refuse to comply; this is likely to trigger an enforcement action, which is a public proceeding.

If the evidence obtained in an investigation does not establish that discrimination occurred, this will be explained to the charging party. A required notice is then issued, closing the case and giving the charging party 90 days in which to file a lawsuit.
If the evidence establishes that discrimination has occurred, the employer and the charging party will be informed of this in a letter of determination that explains the finding. The EEOC will then attempt conciliation with the employer. If the case is successfully conciliated, if a case has previously been successfully mediated or settled, neither the EEOC nor the charging party can go to court unless the employer fails to fulfill the terms of the settlement.

If the EEOC is not able to conciliate the case, it will decide whether to bring suit in federal court. If it decides not to sue, it will issue a notice closing the case and giving the charging party 90 days in which to file a lawsuit. In Title VII and ADA cases against state or local governments, the DOJ takes these actions.

Prior to filing litigation, charging parties are always interviewed by one of the EEOC legal unit attorneys and, where practicable, other individuals who will have significant roles in the litigation as either witnesses or claimants will also be interviewed. Typically, the interviews are done in person and will explore the individual’s basis for recovery as well as other knowledge he/she may have relevant to the suit, such as information on the employer’s operations and employment practices and other individual and class claims. The EEOC attorney is also supposed to discuss with the claimant the relief to which he or she may be entitled (including the effect of any personal bankruptcy on such relief) and should obtain at least general information on back pay accrual, mitigation, and any pecuniary compensatory damages the claimant may have incurred. The EEOC attorney should also discuss the standards of obtaining non-pecuniary compensatory damages and the kinds of inquiries the employer will be entitled to make about the claimant if such damages are sought (e.g., obtaining testimony from the claimant and friends, family members, and medical professionals who may have information on subjects that may be normally private and sensitive to the individual; the possibility of a required physical or mental examination, etc.).

Although the EEOC brings suit to further the public interest in preventing employment discrimination, the considerations relevant to seeking compensatory damages are unique to each individual. Thus, claims for non-pecuniary compensatory damages should be made only for individuals who have given their express consent following discussion with the EEOC attorney regarding the possible consequences of such a claim.

Lastly, the EEOC attorney is supposed to explain during the interview the EEOC’s public interest role in the litigation, the possibility that the EEOC’s and the claimant’s interests may diverge during the litigation, and the claimant’s individual suit and intervention rights, if any. Thus, the claimant is informed that the EEOC may decide to act in a manner that the claimant believes is against his/her individual interests. If the individual has intervened in the suit, the individual will be able to pursue his/her individual interests separately if the EEOC’s interests diverge from the individual’s at any point. The individual has an unconditional right
to intervene if done in a timely manner, but the court can deny intervention if the case has progressed substantially by the time the request for intervention is made.

In ADEA and EPA cases, the claimant is also informed that the EEOC’s suit will cut off any private right of action the claimant may have.

2. Resolution of Commissioner’s Charge

A Commissioner’s Charge under Title VII and the ADA is one that is initiated by one of the EEOC Commissioners. While the ADEA and EPA do not specifically refer to Commissioner Charges, the EEOC can conduct a “directed investigation” and litigation on its own initiative under those statutes, either concurrently with the processing of a charge or as a separate matter.

Such EEOC-initiated matters can be based on the whim of the Commissioner, but is typically filed when a Commissioner believes that an employer is in violation of the law. This can be triggered by reading something in the paper, or talking to someone in a social setting. Usually a Commissioner’s Charge will be focused on allegations of systemic violations. Under the EPA and the ADEA, the EEOC can conduct an investigation even in the absence of a charge.

Most typically, a field office will believe an employer is discriminating but no individual charge has been filed, so the office will obtain public information and submit it to a Commissioner; if the Commissioner agrees, he/she will sign off and return it to the field office, thus initiating a Commissioner’s Charge. Alternatively, the Commissioner or a field office personnel has been approached by a public interest group about a suspected systemic violation.

There is no legal significance to a charge as being the traditional charge or a Commissioner’s charge, but there is a very practical significance to the employer: a Commissioner’s charge signals a particular interest on the part of a Commissioner, so it is likely that the EEOC field personnel will take particular care to thoroughly investigate and prosecute the matter.

V. WHEN MATTERS ESCALATE TO LITIGATION

Once the case is in litigation, the general rules of litigation apply. Counsel for the defense should take advantage of the regular discovery procedures, and should expect the EEOC to do the same. Thus, for example, defense counsel can notice a PMK deposition on specific issues, just as could be done in litigation against an entity that was not the EEOC.
Defense counsel should, as a matter of routine, request the entire EEOC file under either a FOIA request or a production demand.

Title VII prohibits disclosure to the public of charges filed with the EEOC, and of information obtained during the EEOC’s investigation of the charges. This changes once litigation has been filed. After a lawsuit has been filed, the matter becomes a publicly-litigated case with the same potential for publicity as any other litigation.

Thus, an employer should seriously consider whether to resolve an EEOC charge prior to litigation being filed. Where particularly sensitive information is involved, resolution may be the wiser course of action.

EEOC attorneys are subject to the same ethical restrictions on disclosures as other attorneys. However, in appropriate circumstances, EEOC attorneys will respond to inquiries from the media. In addition, the EEOC now routinely issues a press release about new cases that it files. It also routinely issues a press release about case resolutions. In cases that have significant public interest implications, the EEOC may authorize a press conference, although such publicity is used sparingly.

A. Class Litigation Involving the EEOC – No Rule 23 Compliance Required

The EEOC may either bring suit in its own name or intervene in a suit brought by a private plaintiff.

If the EEOC brings suit in its own name, class certification is not subject to Rule 23 certification procedures. In General Telephone Company of the Northwest v. EEOC, the Supreme Court upheld the EEOC’s authority to seek class-wide relief for victims of discrimination, without being restricted by the class action rules applicable to private litigants. The Court emphasized that when the EEOC files suit, it acts to vindicate the “overriding public interest in equal employment opportunity.” However, if the EEOC has already filed an action on their behalf, individual employees cannot sue on their own behalf. 29 U.S.C. § 216(b)-(c).

The above principles have several consequences for employers facing EEOC litigation and their defense counsel.

First, due to the lack of any need to meet Rule 23 requirements, (a) numerosity, “similarly situated” and other factors used in class certification have no applicability; (b) the “class” can be – and often is - very small; (c) the “class” can be – and often is – not well-
defined; (c) the EEOC typically does extensive and invasive discovery to determine the definition and scope of the “class;” and (d) there is no opportunity to decertify the class.

Thus, if the EEOC intervenes in a case, it can easily turn a single-plaintiff case into a “class action,” albeit it one not subject to Rule 23.

Class actions can be filed under the Equal Pay Act, but they are subject to the FLSA class procedures that require each member to “opt in” by filing a written consent to be included in the action. 29 U.S.C. § 216(b).

B. EEOC Intervention in Individual and Class Cases

Under both Title VII and the ADA, intervention is contingent on the EEOC’s certification that the case is of “general public importance.” Generally this means that the case directly affects a large number of aggrieved individuals, involves a discriminatory policy or practice requiring injunctive relief, or has potential for addressing significant legal issues.

Other factors relevant to intervention include:

1. The EEOC’s contribution to the success of the litigation. This is the most important secondary factor in the EEOC’s decision and can include personnel and financial resources, and it is of prime importance to defense counsel. EEOC intervention means that the resources of the federal government will be brought to bear against the employer.

2. Private counsel’s ability to litigate the case effectively without EEOC participation. This factor, while related to the factor above, can also include the attorney’s general competence as an attorney, related litigation experience, and financial resources. Even where private counsel is highly skilled and able to adequately fund the case, the EEOC may intervene if to do so significantly increases the likelihood of success in an important case, e.g., if the case is particularly large or complex, or if there is a need for injunctive relief beyond what is being sought by the private plaintiff(s). If the results of the private action are not likely to be affected by the EEOC’s participation, intervention becomes less likely.

3. Because it is in the EEOC’s interest for private attorneys to accept meritorious cases, the extent to which intervention in a particular case may encourage such private litigation (separate from the case at issue) is a factor in determining whether the EEOC will intervene.

4. Normally, intervention has to occur early in the case for the EEOC to play a significant role in the litigation. Thus, the timing of the intervention is a factor.
Prior to intervention, the EEOC also has an understanding with private counsel regarding the EEOC’s role, including personnel and financial commitments, litigation strategy, relief sought (including the value of the private plaintiff’s claims), and the EEOC’s nonconfidentiality policy on settlements. Where this understanding cannot be reached, the EEOC typically declines the opportunity to intervene, although it may participate as an amicus curiae.

The EEOC’s intervention in a case can turn a relatively simple case into a class action.
Teresa R. Tracy is chair of Gladstone Michel Weisberg Willner & Sloane, ALC’s Labor & Employment Group. She has practiced exclusively in labor and employment law for 28 years and has extensive experience representing employers in wrongful termination, discrimination, harassment, wage and hour matters, class actions and traditional labor law. She also advises clients on compliance with the myriad of state and federal regulations governing employers. Ms. Tracy is the author of numerous articles. She has been selected six times by her peers as a Southern California Super Lawyer in the area of Labor and Employment. In 2005, she was named one of the “Top 75 Women Litigators” by the Los Angeles Daily Journal.

J.D., Loyola University School of Law

(310) 821-9000, x717

ttracy@gladstonemichel.com