Second Circuit Opens the Door to Expanded EEOC Subpoenas

The EEOC obtained a recent appellate victory — in *EEOC v. UPS, Inc.*, No. 08-5348, 2009 U.S. App. LEXIS 25395 (2d Cir. Nov. 19, 2009) — which significantly strengthens its ability to investigate employer practices on a nationwide basis. This Alert reviews the new ruling and its implications.

Background: The EEOC's Subpoena Power

To accomplish its stated goal of investigating and eliminating workplace discrimination, the EEOC has a number of fact-finding tools at its disposal: informal requests for information, independent interviews, employer-submitted position statements to name a few. But one of the most aggressive tools — used primarily in the face of employer resistance — is the EEOC's subpoena power. The EEOC can serve subpoenas on employers to acquire documents, data, and in some cases even sworn testimony if it feels such information is relevant to its investigation. The EEOC's subpoena power is not unlimited. Employers can challenge EEOC subpoenas by filing a Petition to Revoke or Modify the Subpoena with the Commission itself. The time period to make such a challenge is exceedingly short — just five days after receipt of the subpoena. If the employer's Petition is rejected (and it typically is), the EEOC can then seek to enforce the subpoena in federal district court.

Recently the EEOC has issued an increasing number of subpoenas seeking nationwide employment data and information, even when investigating claims involving a single Charging Party. One of the arguments employers have traditionally made to challenge subpoenas is that the EEOC seeks information beyond what is relevant to the charge it is investigating. Several cases from a variety of jurisdictions have limited the scope of an EEOC subpoena on this basis. One such decision was *EEOC v. United Parcel Service, Inc.*, 2008 U.S. Dist. LEXIS 67601 (W.D.N.Y. Sept. 3, 2008), where the district court refused to enforce an EEOC subpoena seeking nationwide employment information in a Title VII religion failure-to-accommodate case. Ever since, many employers have cited the *EEOC v. UPS* ruling for the proposition that an EEOC subpoena must be limited to what was relevant to the underlying charge.

On November 19, 2009, the U.S. Court of Appeals for the Second Circuit reversed the district court's order and remanded the case for enforcement of the EEOC's subpoena.

The Second Circuit's Opinion

In *EEOC v. UPS, Inc.*, No. 08-5348, 2009 U.S. App. LEXIS 25395 (2d Cir. Nov. 19, 2009), the Second Circuit held that the district court applied too restrictive a standard of relevance in denying enforcement of the EEOC subpoena. In this case,

UPS maintained Appearance Guidelines, prohibiting employees in public-contact positions from wearing any facial hair below the lower lip. Until 1999, UPS did not place employees who wore facial hair below the lower lip in public-contact positions. In 1999, UPS adopted a formal religious accommodation personnel policy whereby employees could request an exemption from the Appearance Guidelines for religious reasons. Under the policy, employees seeking an accommodation were expected to submit the request to their immediate supervisor, who would then forward the request on to a human resources manager for approval. In practice, accommodation requests were approved on a case-by-case basis by the human resources staff at the facility where the request was made.

In January 2006, Bilal Abdullah, a job applicant who is Muslim, filed a charge of discrimination alleging that he was denied a public-contact driver position because he refused to shave his beard. In reality, UPS did not hire Abdullah because he gave a false social security number on his application. In April 2007, a current UPS employee, Muhammad Furan, also filed a charge alleging that he was denied a public-contact driver position because he refused to shave his beard and that when he requested a religious accommodation form and an accommodation, he was denied both. Furan also alleged, "I also believe that [UPS] has a pattern or practice of refusing to accommodate the religious observances, practices and beliefs of its employees."

In the course of the EEOC's investigation, it subpoenaed: (1) all documents related to the Appearance Guidelines and a list of all jobs which are subject to the Guidelines; (2) identifying information for all job applicants denied employment because of their refusal to adhere to the Appearance Guidelines since January 1, 2004; (3) identifying information for all employees who requested a religious accommodation exemption from the Appearance Guidelines and the outcomes of those requests since January 1, 2004; and (4) identifying information for all employees who were terminated for reasons relating to the Appearance Guidelines since January 1, 2004. The requests were on a nationwide basis for UPS's entire workforce. UPS objected to the request, explaining that it did not have the information sought in any centralized location and did not keep records on job applicants who requested a religious accommodation to the Appearance Guidelines.

The EEOC then filed a subpoena enforcement action in the U.S. District Court for the Western District of New York. After a hearing, the district court denied enforcement of the subpoena, finding that nationwide information was not relevant to the specific charges being investigated by the EEOC. On appeal, the Second Circuit reversed, noting that the EEOC is entitled to "any evidence of any person being investigated . . . that related to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation." Further, the Second Circuit held that for the subpoena to be enforced, the EEOC need only show that "(1) the investigation will be conducted pursuant to a legitimate purpose, (2) the inquiry may be relevant to the purpose, (3) the information sought is not already within [the agency's] possession, and (4) that the administrative steps required . . . have been followed."

In the *EEOC v. UPS* case, the Second Circuit concluded that the EEOC was entitled to nationwide information relating to the Appearance Guidelines because they applied to all UPS facilities, UPS refused all religious accommodation before 1999, Furan had been specifically denied a religious accommodation request form, and Furan alleged a pattern and practice of failing to accommodate employees' religious beliefs. Significantly, the Second Circuit rejected UPS's argument that the subpoena was beyond the scope of the charge. Specifically, UPS had argued that the subpoena exceeded the charge because UPS ultimately accommodated Furan and because Abdullah was denied a job for giving false information on his job application. The Second Circuit, however, reasoned that these facts merely went to the merits of the charges, and that "arguments as to the merits do not prevent the EEOC from investigating the . . . charges."

Repercussions And Strategies

The *EEOC v. UPS* decision is disappointing for employers in its sweeping position on EEOC subpoenas. But the decision does not create a universal rule. *EEOC v. UPS* is not compulsory precedent outside of the Second Circuit (covering Connecticut, New York, and Vermont), and there are cases from other federal courts of appeal that are contrary to *EEOC v. UPS*. Second, given the fact-sensitive nature of the *EEOC v. UPS* decision, employers may find that their particular circumstances are distinguishable from those in the Second Circuit's case.

Assuming that the EEOC uses the *EEOC v. UPS* decision with respect to "relevance to the charge" challenges, employers may still have other objections to consider in connection with an EEOC subpoena. For example, where appropriate, the employer may argue:

- Subpoenas are anchored to time limitations based on the date the file was charged;
- The EEOC did not follow its own internal procedures prior to issuing a subpoena;
- The subpoena seeks sensitive personal information not relevant to the investigation (e.g., social security numbers and date of birth in non-age cases);
- Responding to the subpoena would be unduly burdensome or prohibitively expensive; and,
- The subpoena seeks contact information for represented management employees; and more generally.

These types of challenges to an EEOC subpoena — which may be appropriate depending on the facts — were not addressed by the Second Circuit's decision.

Finally, as a practical matter, the best defense to a subpoena is to avoid the EEOC issuing one in the first place. Employers are often best served to seek reasonable compromise positions that will provide the EEOC enough information to assess a Charging Party's claims, without compromising operational effectiveness. Sampling, phased approaches, and targeted productions will meet the dual purposes of providing the EEOC with enough information to decide that further investigation is unnecessary or impracticable, while at the same time limiting the information to be gathered and produced by the employer.

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