Pro-Actively Addressing And Preparing For EEOC Investigations & Lawsuits
Speakers

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Goals For Today’s Presentation

- Understanding The New EEOC’s New Litigation Stance
- Recognizing When You Are Being Targeted By The EEOC
- Keeping Your Powder Dry In Systemic Investigations To Maximize Your Defense Strategy Goals
- Conciliation - A Critical Stage: Ideas & Tactics
- Taking Control Of Early Stages Of EEOC-Initiated Lawsuits
Know Your Adversary: The Bigger, Stronger, Faster EEOC

How We Got Here:

2005: Systemic Initiative
2006 to 2011: Dramatic Increase in Large-Scale Activity
January 2012: New 2012-2016 Strategic Plan
June and July 2012: Public Comment on Strategic Enforcement Plan
July – September 2012: EEOC Year-End Countdown
Know Your Adversary: The Bigger, Stronger, Faster EEOC

Emerging Face Of The EEOC

► Initiatives:
  • “National Law Firm Model”
  • EEOC Trial Team Program
  • EEOC Appellate Program

► Better Deployment Of Resources
► Expanded Systemic Investigation Capabilities
► Augmented Technical Abilities
► Stronger Bench Of Experts
Shifting Legal Landscape - Two Steps Forward, One Step Back

- **EEOC v. CRST Van Lines** - Huge Win For Employers
- **EEOC v. YRC** – Big Win For The EEOC
- **EEOC v. United Road Towing, Inc.** - “Not So Fast”
- **EEOC v. Evans Fruit** - Pragmatic Approach
High Level Strategic Considerations Post-CRST

- It is **IMPERATIVE** to think strategically **Early** and **Often**

- Every communication should be viewed as an exhibit to a future motion to a federal district court judge

- The 4 “R”s of any communication with the EEOC:
  - Reasonable
  - Respectful
  - Requesting Information
  - Resolute
High Level Strategic Considerations Post-CRST

• Keeping The Ball In The EEOC’s Court

• Litigate In A Manner So That It Is Always The EEOC That Walks Away From A Reasonable Position

• “Why?” Is Not A Bad Word
  ► Why This Legal Theory
  ► Why These Components Of An Information Request
  ► Why Now
  ► Why This Size Of A Conciliation Demand
  ► Why This Scope Of A Class
Are You A Target For The EEOC’s Systemic Initiative?

• **Popular Targets** - A Question Of: LOCATION LOCATION LOCATION:

  ► District Offices Still Determine Their Own “Hot Spots”

  - **TARGET:** Industry Leaders/Brand Names
  - **TARGET:** National/Regional/Local “Big Kid On The Block”
  - **TARGET:** Particular Industries/”Low Hanging Fruit”
  - **TARGET:** Employers Of “Vulnerable Populations” (e.g., Uneducated, Young, Non-English Speaking, Immigrant Workers)
Are You A Target For The EEOC’s Systemic Initiative?

- Particular Legal Theories
  - TARGET: Hiring Issues/Background & Credit Checks
  - TARGET: Veterans Issues / ADA
  - TARGET: EPA Claims
  - TARGET: Pay & Promotions

- “Second Bite” Opportunities

- Small And Mid-Sized Employers – “We’re Still Watching You”
Tell-Tale Signs Of Being An EEOC Target

• Know Your Investigator (Systemic Investigators)

• High Charge Concentration In One (Or More) EEOC District(s)

• Systemic Allegations On The Face Of The Charge (An Easy Miss In The Field)

• Expansive Requests For Information & ESI

• Scrutiny Of Employer Policies And Practices
Keeping Your Powder Dry In Systemic Investigations

- The Tail Wagging The Dog: eDiscovery And Key Document Retention Issues
  - EEOC Opportunistic Tactics With ESI
  - Harsh Judicial Treatment Of “The Dog Ate My Homework” Excuse
  - Missed Opportunity: Preserve Positive Evidence
Keeping Your Powder Dry In Systemic Investigations

• Handling The Broad RFI
  ► EEOC Leverage Is Its Subpoena Power - Case Law Is Problematic

  ► Phased Production Of Materials And Data Can Lower Curb Appeal

  ► “What You Really Want Is…” - Showing The EEOC What You Want It To See

  ► How To Build A Strong “Burdensome” Argument

  ► Build A Position Of Reasonableness
Keeping Your Powder Dry In Systemic Investigations

• Emerging EEOC Investigative Tactics
  ► Town Hall Meetings
  ► Radio Ads
  ► Directed Investigations / Commissioner’s Charge
  ► Partnering With Special Interest Groups & Plaintiffs’ Bar
  ► Detailed EEOC ESI Preservation Letter
Keeping Your Powder Dry In Systemic Investigations

- Capturing Key Witness Testimony Before It’s Too Late
- Early Expert Statistical Analysis - Putting Your Best Foot Forward (And Finding Those Land Mines First)
- Guard Against Retaliation - Real And Perceived
- Pro-Active Development Of Positive Facts
  ▶ Collect The Good
  ▶ Discard The Bad
  ▶ Create The Rest
- In Case Of Fire Break Glass: A Solid Media Plan
  ▶ Focus On Internal Audience, Customers, And General Public
Core Tenets Of Conciliation And Tactics

- What To Expect When Conciliating With The EEOC
  - Timing, Tone, And Procedures

- Drivers In EEOC Conciliation: Monetary And Programmic Elements
  - The EEOC Is A Political Animal, Making It Unlike Any Other Adversary You Will Face In Litigation
  - Monetary Relief Is Still A Key Metric
  - Heavy Emphasis On “Targeted Programmic Relief”
  - The “Phantom Class” Problem
Core Tenets Of Conciliation And Tactics

• Common EEOC Tactics
  ► The See-Saw Of Monetary Relief And Programmic Relief – Playing Them Off Each Other
  ► Beware Of The Used Car Sale Technique - “I Need To Ask My Manager”
  ► Post-Determination Requests For Information
  ► “Trust Us - There’s Discrimination”
Key Provisions In Most Conciliation Agreements

- Recitation Of Case
- Term Of The Agreement
- Injunction Versus Prohibited Conduct
- Non-Admission Of Liability & The EEOC’s Efforts To Narrow The Scope Of Such A Clause
- Problems With Releases (EEOC And Claimants/Charging Party)
Key Provisions In Most Conciliation Agreements

- Monetary Relief
  - Formula / Discretion In Distributing The Fund
  - Settlement Administrator
  - Residual / Cy Pres
Key Provisions In Most Conciliation Agreements

• Programmic Relief

► Posting
► Training
► Policy Review
► Outside Monitor
► Access To Information / Reporting
► More Exotic Relief (Adjusting Relationships With Third Parties, Creating A Hiring Registry, EEOC Approval Of HR Functions, Etc.)
Key Provisions In Most Conciliation Agreements

• Confidentiality – A Range Of Typical Options

► Absolute Confidentiality
► Joint/Neutral Press Release
► Release With Advance Notice
► No Confidentiality
Taking Control Of Early Stages Of EEOC-Initiated Lawsuits

- What To Expect:
  - Spartan Complaint
  - Same-Day Press Release
  - Media Inquiries
  - Customer/Employee Inquiries
  - ESI Preservation Letter
Taking Control Of Early Stages Of
EEOC-Initiated Lawsuits

• The First 30 Days
  ► Critical Period
  ► Must-Do’s (Where Early Strategy Pays Off - Most Will Already Be Done)
    • DO Update / Issue Litigation Hold
    • DO Collect And Preserve Key Information
    • DO Consider Dispositive Motions – VERY IMPORTANT
    • DO Create A Qualified, Informed Company Case Team
      – Hr
      – Legal: Internal And External
      – It
      – Public Relations
Taking Control Of Early Stages Of EEOC-Initiated Lawsuits

• Must-NOT’s

► DON’T Do *Anything* That Appears Like Retaliation

► DON’T Reach For The Checkbook - The EEOC’s Reach Often Exceeds Its Grasp

► DON’T Arbitrarily Grant The EEOC Extensions Or Seek Them If Not Necessary – Big Advantages To Keeping The Pressure On The EEOC
Key Takeaway

An Early, Comprehensive, And Well-Planned Out Pro-Active Defense Strategy

Will Yield Significant Dividends
Additional Resources

• [www.workplaceclassaction.com](http://www.workplaceclassaction.com)

• [www.eeoccountdown.com](http://www.eeoccountdown.com)