



# Dealing With The EEOC In 2012: Strategies For Employers Targeted In The Commission's Systemic Enforcement Litigation Program

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# Today's Discussion Leaders

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# Today's Discussion Points

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**What Is Hot In The EEOC Enforcement Litigation World?**

**Key Trends And Developments In 2011 & And What To Look For In 2012**

**Noteworthy Settlements And Verdicts In 2011 & 2012 And What They Signal For Employers**

**Significant Court Rulings In 2011 & 2012 And What They Mean For Employers**

**What Should Be In Your Corporate Tool Kit?**



# Impact Of The EEOC's Systemic Initiative On Employers

## What Is The Systemic Initiative And What Does It Mean?

- **Developed in 2005-2006, But Gaining Momentum In Last 3 Years**
- **Concerted Move Toward Initiating More Systemic Cases**
- **Based On The Notion That “Where There Is Smoke (One EEOC Charge), There Is Likely To Be Fire” (Discrimination Against A Group Of Employees)**
- **Establishes A “National Law Firm Model” – Sharing Resources And Expertise**
- **Employers Will Face More “Class-Like” Cases, Which Are Not Governed By Rule 23**



## **Key Trends In 2011**

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- **An Almost Singular Focus On Systemic Discrimination Issues – “Headline Grabbing” Cases**
- **Expansive, High-Stakes Governmental Investigations**
- **Bigger EEOC Pattern Or Practice Lawsuits**
- **“Push-The-Envelope” Legal Theories & Test Cases Pursued By The EEOC**



# Leading EEOC Verdicts And Settlements In 2011

## Top Monetary Settlements:

**\$20 Million** - *EEOC v. Verizon Delaware LLC*, Case No. 11-CV-1832 (D. Md. July 6, 2011)

**\$8 Million** - *EEOC v. International Profit Associates, Inc.*, Case No. 01-CV-4427 (N.D. Ill. Mar. 28, 2011)

**\$3.4 Million** - *EEOC v. Supervalu, Inc.*, Case No. 09-CV-5637 (N.D. Ill. Jan. 3, 2011)

**\$3 Million** - *EEOC v. 3M Co.*, Case No. 09-CV-2408 (D. Minn. Aug. 22, 2011)

**\$2.2 Million** - *EEOC v. Blockbuster, Inc.*, Case No. 07-CV-2612 (D. Md. Dec. 13, 2011)



# Leading EEOC Verdicts And Settlements In 2011, cont'd

## Top Trial Verdicts:

- **\$1.5 Million** - *EEOC v. Mid-American Specialties*, Case No. 09-CV-2203 (W.D. Tenn. Mar. 4, 2011)
- **\$1.26 Million** - *EEOC v. KarenKim, Inc.*, Case No. 08-CV-1019 (N.D.N.Y. Jan. 21, 2011)

## Top Injunctive Relief Orders:

- *EEOC v. Autozone, Inc.*, Case No. 07-CV-1154 (C.D. Ill. Nov. 8, 2011) (system-wide injunction)
- *EEOC v. Apple Core Enterprises, Inc.*, Case No. 10-CV-48 (D.N.D. Sept. 1, 2011) (hiring of ombudsperson)
- *EEOC v. International Profit Associates, Inc.*, Case No. 01-CV-4427 (N.D. Ill. Mar 28, 2011) (appointment of outside monitors)



# Significant Rulings In 2011 In EEOC-Initiated Litigation

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With Regional Discretion To Pursue Initiatives, A Patchwork Of Rulings Develop Around The Country.

***“The Good, The Bad, & The Ugly”***





# Significant EEOC Rulings In 2011 - “The Good” From An Employer’s Perspective

## Summary Judgment Granted

- ***EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458 (S.D.N.Y. 2011)**  
(summary judgment in pattern or practice claim)
- ***EEOC o/b/o Serrano, et al. v. Cintas Corp.*, 2010 U.S. Dist. LEXIS 86228 (E.D. Mich. Aug. 4, 2011)** (sanction award against the EEOC of \$2,638,443)

## Motion To Dismiss Granted

- ***EEOC v. Global Horizons, Inc.*, 2011 U.S. Dist. LEXIS 127734 (D. Haw. Nov. 2, 2011)** (motion to dismiss granted)
- ***EEOC v. United Parcel Service, Inc.*, 2011 U.S. Dist. LEXIS 111464 (N.D. Ill. Sept. 28, 2011)** (motion to dismiss granted)



# Significant EEOC Rulings In 2011 - “The Good” From An Employer’s Perspective cont’d

## Statute Of Limitations

- ***EEOC v. Freeman*, 2011 U.S. Dist. LEXIS 8718 (D. Md. Jan. 31, 2011) (summary judgment – applying 300-day rule)**
- ***EEOC v. Kaplan Higher Educ. Corp.*, 790 F. Supp. 2d 619 (N.D. Ohio 2011) (motion to dismiss – applying 300-day rule)**



## Significant EEOC Rulings In 2011 - “The Bad” From The Employer’s Perspective

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- ***EEOC v. AutoZone, Inc.*, 2011 U.S. Dist. LEXIS 128927 (C.D. Ill. Nov. 8, 2011) (judgment ordering sweeping injunctive relief; EEOC deems this the “EEOC national law firm model at its best”)**
  
- ***EEOC v. JP Morgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 90789 (S.D. Ohio July 6, 2011) (significant deference to the EEOC’s litigation strategies and practices)**



## Significant EEOC Rulings In 2011 - “The Ugly” – Mixed Rulings For Employers

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- ***EEOC v. JBS USA, LLC*, 2011 U.S. Dist. LEXIS 87127 (D. Colo. August 8, 2011) (mixed ruling concerning the applicability of *Teamsters* model in religious discrimination/harassment case)**
- ***EEOC v. Xerxes Corp.*, 639 F.3d 658 (4th Cir. April 26, 2011) (mixed ruling in hostile work environment claim)**



## Key Rulings Thus Far From Early 2012

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- ***EEOC v. CRST Van Expedited, Inc.*, 2012 U.S. App. LEXIS 3485 (8th Cir. Feb. 22, 2012) (upholding District Court dismissal of improperly investigated and conciliated claims)**
- ***EEOC v. Product Fabricators, Inc.*, 2012 WL 264605 (8th Cir. Jan. 31, 2012) (overturning District Court's refusal to enforce consent decree)**
- ***Hosanna-Tabor Evangelical Lutheran Church And School v. EEOC*, 2012 U.S. LEXIS 578 (Jan. 11, 2012) (Supreme Court held that First Amendment bars ADA suit brought by minister/employee against church)**



## Key Rulings Thus Far From Early 2012, cont'd

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***EEOC v. Dillard's, Inc.*, 2012 U.S. Dist. LEXIS 16945 (S. D. Cal. Feb. 9, 2012) (attendance policy requiring doctor's note identifying the nature of absence violated ADA)**

***EEOC v. Management Hospitality of Racine, Inc.*, 666 F.3d 422 (7th Cir. Jan. 9, 2012) (substantially upheld a jury's verdict that an employer allowed two teenage employees to be sexually harassed in violation of Title VII)**

***EEOC et. al v. Pitre Inc.*, Case No. 11-CV-875 (D.N.M. Jan. 26, 2012) (EEOC wins preliminary injunction to prevent alleged retaliation against current and former employees involved in suit)**



## Key Case To Watch In 2012

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Appeal From *EEOC o/b/o Serrano, et al. v. Cintas Corp.*, 2011 U.S. Dist. LEXIS 86228 (E.D. Mich. Aug. 4, 2011) (fee award to employer of \$2,638,443 similar to *EEOC v. CRST*)



# What's To Come: The EEOC's 2011/2012 Budget Proposal

- **Despite Seeking A Nearly 10% Budget Increase, EEOC Budget Is Cut By Over \$6 Million (EEOC Claims “We are poor but resourceful”).**
- **According To The EEOC, "Priority For Agency Resources Continues To Be Litigation Of Systemic Cases..."**
- **The EEOC Seeks To "Prioritize Spending For The Systemic Initiative ... [Since] Systemic Cases Generate Substantial Media And Other Public Notice, [And] They Help Deter Other Employers From Engaging In Similar Prohibited Conduct."**
- **The EEOC's Submission To Congress Notes That It Expects To File More Systemic Lawsuits In 2011 And 2012**





# EEOC's Long-Term Horizon – Lessons From Its 2012-2016 Proposed Strategic Plan

- EEOC's Intention To Marry Investigative And Litigation Phases – EEOC's Strategic Goal:

- ▶ *“Use administrative and litigation mechanisms to identify and attack discriminatory policies and other instances of systemic discrimination.”*

- EEOC To Seek “Targeted Equitable Relief” For Alleged Victims – Expect High-Impact And Sweeping Demands For Programmic Relief

- EEOC's Plan To Develop Minimum Level Of Systemic Cases In Its Litigation Inventory



# The EEOC's New Administrative Investigation Strategies

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- **The “Transformation” Strategy – Based On A Single Charge**
- **Nationwide Requests For Data And Documentation Relative To Hiring, Pay, Promotions, And Terminations**
- **Broad E-Discovery, ESI And, Importantly, HRIS Requests**
- **Extensive Use Of Subpoenas And Subpoena Enforcement Actions (especially post-*CRST*)**



# EEOC's Expanding Partnering Efforts

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- **2011 Memorandum Of Understanding With OFCCP – More Robust Information Sharing**
- **EEOC Partnering With Private Counsel – Riding Coat-Tails Of Private Litigation – “Tag Team” Joint Venturing**
- **Individual Plaintiffs May Seek To Intervene In An EEOC Action To Either Have Some Control Over The Progression Of The Case, Or To “Piggyback” On The Work Done By The EEOC**



# The EEOC's Area Of Focus In 2012 And Beyond

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**New Areas Of Geographic Focus – Expansion Into Areas Typically Untouched In The Past**

**Novel Litigation Theories – Attempts To Push Non-Traditional Claims**

**A Focus On ADA, Particularly Leave Of Absence And Termination Policies**

**Hiring Cases – EEOC Views Itself As Uniquely Positioned To Litigate These “Gateway To Employment” Cases**

**Pay And Promotions – Gender/Race Disparate Impact Theories, As Well As Equal Pay (Filling The Void After *Wal-Mart Stores v. Dukes*)**

**Pregnancy Discrimination – According To EEOC, More Instances Of “Old Fashioned, Overt Discrimination” Than In Any Other Legal Theory**

**EEOC's “Trial Resource Program” Designed To Develop And Deploy Skilled Trial Lawyers**



# Successful Defense Approaches And Strategies To Systemic Investigations

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**More Comprehensive Litigation Hold Notices**

**Phased Or Stages Responses (To Diminish “Curb Appeal”)**

**Creation Of Firewalls Around Geographic Areas / Time Periods**

**Creating “Reasonableness” & Laying The Groundwork For A Subpoena Opposition**

**Selective Strategies In “Calling The EEOC’s Bluff”**



# EEOC Subpoenas

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- Record Number Of Subpoena Enforcement Actions In FY 2011
- The EEOC Is Using Its Subpoena Power As An Early Discovery Tool
- Pursuing More Aggressively Than Ever Before – Likely Impact Of *EEOC v. CRST Van Expedited, Inc.*
- Fact Of Life: There Is A Very Short Time Frame To Challenge An EEOC Subpoena (5 Days).
- Negotiation Methods To Fracture EEOC Enforcement Actions Or Position The Employer's Defenses



# Key Subpoena Ruling In 2011 And Early 2012

- ***EEOC v. Loyola Medical Center*, Case No. 11-CV-4456 (N.D. Ill. Oct. 13, 2011) (limiting subpoena despite supposedly time-barred response)**
- ***EEOC v. Schwan's Home Services*, No. 10-3022 (8th Cir. July 13, 2011) (permitting subpoena based on facially defective charge)**
- ***EEOC v. UPMC*, No. 11-MC-121 (W.D. Penn. May 24, 2011) (cutting short “fishing expedition” subpoena)**
- ***EEOC v. Konica*, No. 10-1239 (7th Cir. April 29, 2011) (granting wide latitude to EEOC to enforce its subpoenas)**
- ***EEOC v. Burlington N. Santa Fe Ry. Co.*, No. 11-1121 (10th Cir. Feb. 27, 2012) (limiting scope of ADA subpoena)**



# General Defense Pointers

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**Summary Judgment Is Exceptionally Difficult To Obtain, But Rulings In 2011 Give Employers Some Additional Ammunition (*EEOC v. Bloomberg*; *EEOC v. Freeman*)**

**Slicing And Confining The “Class” – By The Class Period, Geographic Regions, Etc. – Is The Goal**

**Experts Are Crucial To Success In Systemic Cases**

**Application of *Wal-Mart Stores v. Dukes* To EEOC-initiated Actions**





# Defense Strategies For Relating To Bifurcation Issues

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## Section 706 versus Section 707 Actions

## The EEOC Now Pursues A “Punitive Damages In Stage I” Strategy

## Key Leverage Point

**Defense Victories – *EEOC v. Sterling Jewelers*, 2011 U.S. LEXIS 44255 (W.D.N.Y. April 25, 2011); *EEOC v. McCormick & Schmick's*, 2008 U.S. Dist. LEXIS 112283 (D. Md. Nov. 4, 2008); *EEOC v. New Indianapolis Hotels, LLC*, Case No. 10-CV-1234 (S.D. Ind. Feb. 1, 2012).**



# Negotiating And Settling Litigation With The EEOC

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- **Remember Who You Are Dealing With**
- **Key Differences From Negotiating Settlements With The Private Plaintiffs' Bar**
- **Public Interest Factor**
- **Media Issues**



# Consent Decree Essentials

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## **“Ice In Winter” Strategy**

**Caveats; Training; Revised Policies; Monitoring (Internal Or External); Record-Keeping; Posting Of Notice**



# What Should Be In Your Corporate Tool Kit?

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**Robust E-Discovery And Data Management Capabilities**

**On-Going Audit Of Payroll Procedures**

**Rigorous Monitoring Of Key Employee Data (Hiring, Pay, And Promotions)**

**Ongoing Review And Assessment Of Workplace Due Process Practices**

**Capability To Track Charge Activity**

**State-Of-The-Art Leave of Absence And Anti-Retaliation Policies**



# Questions

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# How To Order The Workplace Class Action Report

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**The 2012 Workplace Class Action Report is available to clients of the firm and interested corporate counsel. To request a free copy of the report please e-mail your request to [ClassActionReport@seyfarth.com](mailto:ClassActionReport@seyfarth.com).**