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Working Through an EEOC Investigation

Presented by
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Today's Presenter



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Working Through an EEOC Investigation



From Start to Finish: Dealing with an EEOC Charge of Discrimination

- Responding to the charge
- Working through an investigation
- Mediation
- Conciliation
- Finalizing a settlement



Working Through an EEOC Investigation



CHARGE STATISTICS

	FY 1987	FY 1988	FY 1989	FY 1990	FY 1991	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004
Total Charges	26,300	26,537	27,444	28,399	29,344	30,289	31,234	32,179	33,124	34,069	35,014	35,959	36,904	37,849	38,794	39,739	40,684	41,629
Race	38.2%	38.2%	37.3%	38.2%	38.4%	38.4%	38.1%	38.4%	38.1%	38.4%	38.1%	38.4%	38.1%	38.4%	38.1%	38.4%	38.1%	38.4%
Sex	24,733	24,454	23,887	23,144	22,140	21,338	20,343	19,248	18,054	16,761	15,368	13,875	12,282	10,689	9,096	7,503	5,910	4,317
National Origin	4.7%	4.7%	5.2%	6.2%	6.9%	7.6%	8.4%	9.2%	10.0%	10.7%	11.5%	12.3%	13.1%	13.9%	14.7%	15.5%	16.3%	17.1%
Religion	3.7%	3.7%	2.8%	2.4%	2.0%	1.6%	1.1%	0.7%	0.3%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Color	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Regulation all instances	18,188	18,114	18,084	18,012	17,940	17,868	17,796	17,724	17,652	17,580	17,508	17,436	17,364	17,292	17,220	17,148	17,076	17,004
Regulation Title VII	16,368	17,246	17,882	18,762	19,402	20,042	20,682	21,322	21,962	22,602	23,242	23,882	24,522	25,162	25,802	26,442	27,082	27,722
Age	18,188	18,114	18,084	18,012	17,940	17,868	17,796	17,724	17,652	17,580	17,508	17,436	17,364	17,292	17,220	17,148	17,076	17,004
Disability	23,474	22,474	22,074	21,074	20,074	19,074	18,074	17,074	16,074	15,074	14,074	13,074	12,074	11,074	10,074	9,074	8,074	7,074
Equal Pay Act	1,126	1,074	1,022	1,012	1,002	1,012	1,022	1,032	1,042	1,052	1,062	1,072	1,082	1,092	1,102	1,112	1,122	1,132

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Your First Steps

- Understand the allegations
 - Pay special attention when the charge involves any of the six enforcement priorities in EEOC’s strategic enforcement plan:
 - Eliminating systemic barriers in recruiting and hiring
 - Protecting immigrant, migrant and other vulnerable workers

Continued

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Your First Steps

- Addressing emerging issues including those arising from the ADAAA, coverage under Title VII’s sex discrimination provisions for lesbian, gay, bisexual and transgender individuals, and accommodations for pregnancy-related limitations
- Enforcing equal pay laws

Continued

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Your First Steps

- Preserving access to the legal system
- Preventing harassment through systemic enforcement and targeted outreach
<http://www.eeoc.gov/eeoc/plan/sep.cfm>

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Your First Steps

- Gather *all* facts and documents.
 - Claimant's personnel file
 - Claimant's performance evaluations
 - Any necessary witness statements

Continued

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Your First Steps

- Talk to *everyone* involved.
 - HR professional
 - Claimant's supervisor
 - Any co-workers with knowledge of claimant's allegations/information relevant to the defense
 - If appropriate, integrate an attorney as part of the team.

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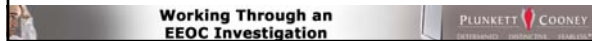
What's Next?

- Analyze your exposure and create game plan.
- Respond to charge or attempt to mediate/resolve immediately?
- Helpful tool → Analysis and Opinion Report:
 - Facts
 - Liability
 - Worst-case scenario
 - Best-case scenario
 - Potential damages
 - Percentage of success of dispositive motion



Position Statement

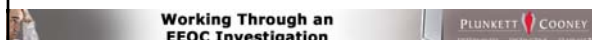
- Know your audience:
 - EEOC investigator
 - Claimant
 - Claimant's attorney
 - Judge and/or jury
 - Your position statement may be "Exhibit A" at trial
- Remember the importance of first impressions.



Position Statement

- Be as thorough as possible – lay out all of the facts.
 - Benefits: may result in an early dismissal; will assist in subsequent lawsuit
 - Converse applies: refuse to provide a detailed explanation but later do in litigation, the plaintiff will likely argue "shifting justifications" is evidence of pretext.

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Position Statement

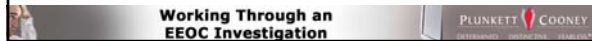
- Be structured:
 - Have separate sections and subsections with clearly labeled headings
 - Introduction
 - Background information regarding company
 - Claimant's employment
 - Claimant's performance problems
 - Decision to terminate plaintiff
 - Conclusion
- Indicate a willingness to work collaboratively



What NOT To Do When Drafting Position Statements

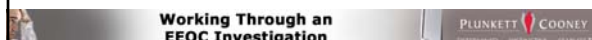
- Be indignant
- Be emotional
 - “This is ridiculous.” May be true, but does not help convince the EEOC of that fact!

Continued



What NOT To Do When Drafting Position Statements

- Be too lawyer-like
 - Avoid legalese when possible
 - Case law is typically not necessary or persuasive at this level.
- Be perfunctory
 - Take this seriously!



Investigative Process

- Know your investigator.
- Treat requests as if part of litigation discovery.
- EEOC may request specific documents.
- Be prepared for overbroad requests for information.



Continued

Investigative Process

- Work with EEOC to limit request to reasonable, relevant information
 - Remember: time lines are negotiable.
 - Providing EEOC with relevant documents with position statement may reduce likelihood of invasive document requests down the line.

EEOC's Subpoena Power

- EEOC has very broad investigative powers.
- EEOC can serve subpoenas to obtain documents, data and sworn testimony.



Continued

EEOC's Subpoena Power

- Employer has only five business days to file a petition to revoke or modify subpoena.
 - Courts have ruled after five-day period, employer has waived most potential objections.

Witness Interviews

- EEOC may request interviews via phone or in person.
- **Critical to remember: attorney may be present for interviews of management personnel.**
 - Attorney may make valid objections.
- **BUT**, EEOC may interview non-management employees without attorney present.

Prepare ALL Witnesses

- Discuss issues with each employee privately.
- Discussion should be very similar to a deposition preparation:
 - Keep calm
 - Answer the questions
 - Do not guess
 - Do not be intimidated
 - **Tell the truth**



Prepare for On-Site Visits

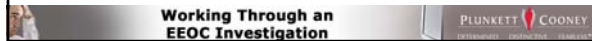
- EEOC can request an “on-site” examination of your workplace (including interviews).
- Request that EEOC specifically advise what documents it would like to review/what witnesses it would like to speak with ahead of time.
- Double check your EEOC, DOL Posting – make sure everything is current.

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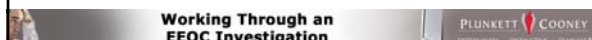
Prepare for On-Site Visits

- Avoid creating a rumor mill.
 - Hold interviews in a conference room near entrance of your company.
 - If possible, offer that you’ll make employees available for interviews at the EEOC office.



EEOC’s Mediation Program

- Mediation is often a good option for employers looking to resolve charges quickly and cheaply.
- Mediation is also beneficial when a charge appears to have merit and/or has significant potential exposure for the company.
- Mediation typically can be initiated at any time throughout the charge-handling process.



Mediation Best Practices

- Don't be afraid to mediate because it is a "sign of weakness."
 - Plethora of reasons why mediation may be the best choice for your company that do not include admissions of liability
- Come prepared.
- If you want to mediate, be prepared to put money on the table.
 - Show that you are acting in good faith and not wasting EEOC's time.

Mediation Best Practices

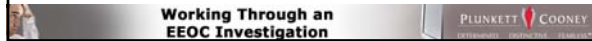


Mediation Best Practices

- Set your goals before the mediation.
 - Monetary
 - Non-monetary
- If current employee, carefully consider both outcomes
 - Severance agreement
 - Resolution that includes employee's continued employment

Mediation Best Practices

- Stay calm, collected and avoid temptation to be "right."
- If you want to resolve the case, be ready to be in it for the long haul.
 - Cases frequently settle after hours of negotiation.
 - If settlement is the goal, it is best to try to resolve matter while everyone is at the table.
 - Settlement becomes far more difficult after parties walk away and consider what occurred during mediation.
 - If you settle the case, get it in writing before you leave the mediation. (More on this later!)

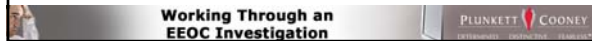


Conciliation

Conciliation

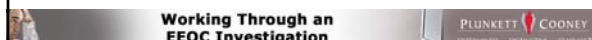
EEOC is statutorily required to attempt to resolve findings of discrimination through "informal methods of conference, conciliation, and persuasion." See 42 U.S.C. 2000e-5. After the parties have been informed by letter that the evidence gathered during the investigation establishes that there is "reasonable cause" to believe that discrimination has occurred, the parties will be invited to participate in conciliation discussions. During conciliation, your investigator will work with you and the Charging Party to develop an appropriate remedy for the discrimination. We encourage you to take advantage of this final opportunity to resolve the charge prior to EEOC considering the matter for litigation.

- Advantages of Conciliation**
1. Conciliation is a **voluntary** process.
 2. Conciliation discussions are negotiations and **counter-offers may be presented**.
 3. Conciliation offers the parties a final **opportunity to resolve the charge informally** -- after an investigation has been conducted, but before a litigation decision has been reached.
 4. Conciliation agreements **remove the uncertainty, cost and animosity** surrounding litigation.



EEOC's Duty to Conciliate

- EEOC has duty to conciliate after finding of probable cause.
- After such a finding, EEOC must try to remedy and eliminate unlawful practice through conciliation.
- If conciliation is successful, EEOC stops administrating processing (except for necessary follow up to ensure compliance).
- If conciliation fails, EEOC must send notice of that failure to respondent in Title VII and ADA cases.



Conciliation Trends

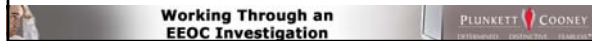
- Initial proposed conciliation agreements include monetary relief, nonmonetary relief and posting requirements.
 - Back pay and interest
 - Reinstatement (or front pay for a specific period of time)
 - Benefit contributions and restoration of seniority
 - Training for management staff
 - Post a notice to all employees.



Conciliation Trends

- “Notice to All Employees”
 - Content is problematic
 - Advises all employees a charge of discrimination was settled
 - Indicates that company will comply with federal laws preventing discrimination

Continued



Conciliation Trends

- States that company will “make whole all employees affected by any losses they suffer as a result of the difference in treatment against them”
- Informs employees that they can contact EEOC if they believe they have been discriminated against



Response to EEOC's Proposed Conciliation Agreement

- Employers have option to make a counteroffer, but there is no obligation to resolve the case through conciliation.
- Employers may ask for calculation or explanation regarding each category of monetary damages.

Structuring a Counteroffer

- Remember: no offer, regardless of how small, should be rejected off hand.
- If you have a case with bad facts or potential for large exposure, you want to keep EEOC at the table.

Continued

Structuring a Counteroffer

- Structure your counteroffer so that it mirrors EEOC's proposed conciliation agreement.
 - This applies to all terms: monetary, non-monetary and notice provision.
 - Regarding notice provisions, re-work wording so that it is clear that your company “supports and will continue to comply with . . . Federal law in all respects.”

Critical Settlement Terms

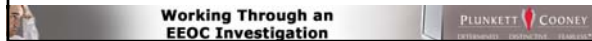
- Ensure that any resolution includes full and complete release.
 - If claimant is no longer employed, include provision specifically advising that settlement does not include reinstatement and that claimant may not re-apply for employment.

Continued



Critical Settlement Terms

- Include confidentiality/non-disparagement provision
- If the claimant is over 40, make sure you comply with OWBPA
 - 21-day consideration period and seven-day revocation period



Sample Release Provision

RELEASE OF ALL CLAIMS

CLAIMANT does hereby release and forever discharge THE COMPANY and its respective associates, owners, subsidiaries, affiliates, stockholders, predecessors, successors, heirs, assigns, agents, directors, officers, partners, representatives, insurance carriers, lawyers and

Continued



Sample Release Provision

all persons acting by, through, under or in concert with them from any and all manners of action or actions, causes of action, in law or in equity, suits, debts, liens, contracts, agreements, promises, liabilities, claims demands, damages, losses, costs, expenses or attorneys' fees of any nature whatsoever, known or unknown, fixed or contingent, which CLAIMANT now has or may hereafter have against THE COMPANY by reason of any acts, omissions, events or facts occurring or existing prior to the date hereof.

Continued



Sample Release Provision

The claims released hereunder include, without limitation, any alleged breach of any express or implied employment agreement between THE COMPANY and CLAIMANT, any breach of any covenant of good faith or fair dealing, express or implied; any alleged torts or other legal restrictions of the THE COMPANY's rights regarding CLAIMANT's relationship with THE COMPANY; any alleged violation of any federal, state or local statute or ordinance, including,

Continued



Sample Release Provision

without limitation, Title VII of the Civil Rights Act of 1964, as amended, the Federal Age Discrimination in Employment Act of 1967, as amended, The Fair Labor Standards Act, the Family and Medical Leave Act, the Michigan Persons With Disabilities Act, and the Michigan Elliott-Larsen Civil Rights Act, any claim of retaliation, or "Whistleblowing."



Finalizing the Settlement

- If in mediation and using EEOC settlement form, ensure "Exhibit A" is full and complete release.
- If settled outside of negotiation, promptly provide copy of executed release to EEOC and request withdrawal of charge.



Aftermath

- #1 priority if claimant returns to work:
 - Prohibit retaliation!
 - Be very, very careful.
 - Even if the charge was frivolous, employee will truly believe that any adverse action taken against her later is retaliation.



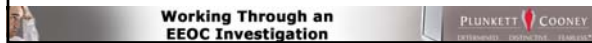
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Aftermath

- Review anti-retaliation policies with all involved management personnel.

Potential Silver Linings

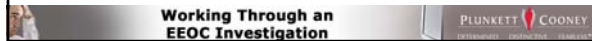
- Review internal policies/procedures in light of EEOC charge to identify areas where updates/training are needed.
- Recognize potential issues before they turn into lawsuits.
- Identify EEOC target areas and continue to monitor developing trends.
 - Remember: strategic enforcement plan!



Questions?



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Post-Webinar Survey



We want to hear from you!



Audio File of Today's Program



SEMINARS & EVENTS

WORKING THROUGH AN EEOC INVESTIGATION
September 11, 2014

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WORKING THROUGH AN EEOC INVESTIGATION

Part of **The Informed Employer Webinars Series**

Sept. 11, 2014 • Noon to 1:15 p.m. (EDT) • Complimentary Webinar

Please see Plunkett Cooney for an agenda


Working Through an EEOC Investigation

Thursday, Sept. 11, 2014 Time: Noon to 1:15 p.m. (EDT) Cost: Complimentary

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Save-the-Date: Nov. 13



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Thank You!



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Information can become outdated or inaccurate as the result of subsequent amendments to laws or the issuance of new regulations or court decisions interpreting the laws differently.

When legal advice is needed, always consult an attorney experienced in the relevant area of law.

