

PLUNKETT COONEY
ATTORNEYS & COUNSELORS AT LAW

'TAKING' THE CHARGE

Your Game Plan for Challenging EEOC Foul Calls

Presented by
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Today's Presenters




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Outline of Today's Presentation

- Involved statutes
- EEOC power/process
- Position statements
- Interviews
- Conciliation
- Preparing for litigation



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Investigatory & Enforcement Powers

- **Equal Employment Opportunity Commission (EEOC)**
 - Private Sector & Federal Sector Enforcement Programs. The following federal laws prohibit workplace discrimination and are enforced by EEOC:

Continued



Investigatory & Enforcement Powers

- **Title VII (including the Pregnancy Discrimination Act)**
 - Illegal to discriminate on the basis of race, color, religion, national origin, sex
 - Illegal to discriminate because of pregnancy, childbirth, medical condition related to pregnancy/childbirth

Continued



Investigatory & Enforcement Powers

- **Equal Pay Act of 1963**
 - Illegal to pay different wages to men and women if they perform equal work in the same workplace

Continued



Investigatory & Enforcement Powers

- **Age Discrimination in Employment Act of 1967**
 - Protects people who are 40 years old or older from discrimination because of age
- **Title I of the Americans with Disabilities Act of 1990**
 - Illegal to discriminate against a qualified person with a disability
- **Sections 102/103 of the Civil Rights Act of 1991**
 - Permits jury trials and compensatory and punitive damage awards in intentional discrimination cases

Continued



Investigatory & Enforcement Powers

- **Sections 501/505 of Rehabilitation Act of 1973**
 - Illegal to discriminate against a qualified person with a disability in the federal government
- **Genetic Information Nondiscrimination Act of 2008**
 - Illegal to discriminate against employees or applicants because of genetic information (genetic tests/family medical history)

Continued



Investigatory & Enforcement Powers

- **Michigan Department of Civil Rights (MDCR)**
 - State counterpart to the EEOC
 - Enforces two state laws:
 - Elliott-Larsen Civil Rights Act
 - Race, color, national origin, gender, religion, height, weight, marital status, misdemeanor arrest record
 - Persons with Disabilities Civil Rights Act



Service of the Charge of Discrimination

- Most common way employers find out about a charge of discrimination:
 - Email to company’s president/CEO
 - Investigators will *literally* “Google” “President/CEO” of “COMPANY NAME” and then email a document advising that a charge has been made and/or finalized.
 - Important to read the first notification carefully



What Do I Do Next?

- Sometimes the EEOC will notify the company that an individual has made a charge but no other specifics and no charge details will be provided.
 - Nothing to do in this circumstance but wait
- Sometimes the EEOC will provide the specific charge document and make specific requests.
 - This should trigger retention of attorney/internal review, litigation hold, and (potentially) an internal investigation.



Example

The Digital Charge System makes investigations and communications with charging parties and respondents more efficient by digitizing charge documents. The charge is available for you to download from the EEOC Respondent Portal, EEOC’s secure online system.

Please follow these instructions to view the charge within ten (10) days of receiving this Notice:

1. Access EEOC’s secure online system: <https://nsg.eeoc.gov/rsp/login.jsf>
2. Enter this EEOC Charge No.: 471-2018-01412
3. Enter this temporary password: xg2374nq

Once you log into the system, you can view and download the charge, and electronically submit documents to EEOC. The system will also advise you of possible actions or responses, and identify your EEOC point of contact for this charge.

If you are unable to log into the EEOC Respondent Portal or have any questions regarding the Digital Charge System, you can send an email to Detroit@eeoc.gov.



Example

Preservation of Records Requirement

EEOC regulations require respondents to preserve all payroll and personnel records relevant to the charge until final disposition of the charge or litigation. 29 CFR §1602.14. For more information on your obligation to preserve records, see <http://eeoc.gov/employers/recordkeeping.cfm>.

Non-Retaliation Requirements

The laws enforced by the EEOC prohibit retaliation against any individual because s/he has filed a charge, testified, assisted or participated in an investigation, proceeding or hearing under these laws. Persons filing charges of discrimination are advised of these Non-Retaliation Requirements and are instructed to notify EEOC if any attempt at retaliation is made. For more information, see <http://www.eeoc.gov/laws/types/facts-retal.cfm>.

Legal Representation

Although you do not have to be represented by an attorney while we handle this charge, you have a right, and may wish to retain an attorney to represent you. If you do retain an attorney, please provide the attorney's contact information when you log in to the online system.

Please retain this notice for your records.



Generally – Two Options

- Position Statement
 - Investigation
- Mediation
 - Mutual choice
 - EEOC has internal mediation program
 - Can also select private mediator
 - Mediation will put investigation on hold.



EEOC Mediation Process

- www.eeoc.gov/eeoc/mediation/

10 Reasons to Mediate



Should We Mediate?

- **Pros**
 - Allows for resolution in a friendly way
 - Charge generally resolved in less than three months
 - No lengthy investigation or litigation
 - No fee to either party
 - Attorney permitted to attend
- **Cons**
 - Could be a waste of time and money (paying an attorney)
 - In some cases it is more expensive than filing a Position Statement
 - Sometimes unrepresented individuals are unreasonable and have unrealistic settlement expectations
 - May set a “floor” for future settlement negotiations



If Mediation is Out of the Question...

- **Investigation**
 - If a charge is not sent to mediation, or if mediation does not resolve the charge, the employer is required to submit a position statement and an investigation is conducted.
 - Resource regarding “Effective Position Statements”
 - www.eeoc.gov/employers/position_statements.cfm

Continued



Importance of Position Statements

- Well-written and reasoned position statements often results in a matter quickly being closed.
 - No additional investigation
 - No requests for records
 - No requests for interviews
 - Less time, effort and money



Crafting Position Statements

- **Be concise, straightforward and non-argumentative**
 - Sample outline:
 - Summary of allegations
 - Introduction to the company
 - Applicable policies (EEO, non-discrimination, accommodations, etc.)
 - Charging party’s employment history
 - Reason for termination/other alleged “adverse employment action”
 - Conclusion with brief analysis

Continued



Crafting Position Statements

- **Emphasize commitment to statutes and investigative process**
 - Be willing to cooperate at all stages.



What NOT to do in Position Statements

- Become argumentative
- Overstate performance/employment problems
 - Every statement needs to be supported by evidence.
- Use inflammatory language (i.e., “liar,” “manipulator,” “fraud”)

Continued



What NOT to do in Position Statements

- Include too much legalese or detailed legal argument (EEOC is aware of the applicable law and tends to be more focused on the facts)
- Fail to include specifics or cite to documentation that supports your position



What Happens Next?

- You wait
 - And wait
 - And wait
 - And maybe wait some more
- Generally, do not reach out and ask for updates.



And Then What?

- Typical outcomes
 - Request for additional information
 - Specific documents
 - EEOC subpoena power
 - Try to negotiate – often times a middle ground can be found
 - Do not recommend a hard-line approach

Continued



And Then What?

- Most frequently: interviews
 - Management – attorneys can be present
 - Lower-level employees – attorneys do not have the right to be present



Witness Preparation

- What do you do when an attorney cannot be present?
 - Advise all witnesses to tell the truth.
 - Remind each and every witness about the company's prohibition against retaliation.
 - Do not condition any job benefit on a particular performance or outcome .
 - Do not follow-up with witnesses to find out what was asked and how they responded.



And Then What?

- “Dismissal and Notice of Rights”
 - Issued if EEOC concludes investigation does not establish a violation of the law
 - Informs the complainant that he or she has the right to file a lawsuit in federal court within 90 days of receipt of the letter. The three-year statute of limitations still applies to state court claims.



Finding of Reasonable Cause

- "Letter of Determination"
 - Issued if EEOC determines there is "reasonable cause" to believe discrimination has occurred.
 - Invites parties to join the agency in seeking to settle the charge through an informal and confidential process known as **conciliation**.



What is 'Conciliation?'

- Conciliation is a voluntary process, and the parties must agree to the resolution — neither the EEOC nor the employer can be forced to accept particular terms.
- EEOC is required by Title VII to attempt to resolve findings of discrimination on charges through conciliation.
 - Resource
 - eoc.gov/eoc/newsroom/wysk/conciliation_litigation.cfm



Conciliation Conference

- Options after receiving conciliation demand:
 - Written response or setup a "Conciliation Conference"
 - During this process, investigators work with employers and charging parties to develop an appropriate remedy for the discrimination.
 - It is essentially the final opportunity to resolve the charge prior to EEOC considering the matter for litigation.



Can You Tell The EEOC No?

- What if you say no to conciliation or don't respond?
 - EEOC can file a lawsuit.
 - EEOC can issue a right to sue letter with no further action.



- yes
- no
- maybe

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Telling Statistics

Year	Total Charges	Total Charges Where Reasonable Cause Found	Total Suits
2014	88,778	2,745	167
2015	89,385	3,239	174
2016	91,503	3,113	114
2017	84,254	2,909	201

- There are thousands of charges filed each year.
- Of the cases where reasonable cause is found, only 10 percent turn into litigation.
- Approximately 90 percent chance that EEOC will not proceed with litigation.

Resources: www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm
www.eeoc.gov/eeoc/statistics/enforcement/all.cfm

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'Hot Topics'

- Areas where EEOC is placing its focus:
 - Immigrant, migrant and other vulnerable workers and underserved communities
 - Backlash discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these communities

Continued

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“Hot Topics”

- Issues under the Americans with Disabilities Act that fall within the category to qualification standards and inflexible leave policies that discriminate against individuals with disabilities
- Gender-based pay discrimination as well as pay disparities based on race, ethnicity and for individuals with disabilities and other protected groups
- Complex employment relationships and structures:
 - Temporary workers
 - Staffing agencies
 - Independent contractor relationships



Preparing for Litigation

- How to use EEOC investigations/determinations to your advantage during litigation?
 - FOIA entire file
 - EEOC intake forms can be extremely valuable
 - Commit the plaintiff to the position he/she adopted as a “charging party.”



Preparing for Litigation

- Are dismissal letters admissible in subsequent litigation?
- Does a finding by the EEOC have any determinative effect on subsequent litigation?
- Is an EEOC finding of reasonable cause persuasive evidence?



Preparing for Litigation

- Always remember
 - Preserve applicable evidence.
 - Have any witness statements dated and signed.
 - Consult EEOC position statement when responding to subsequent discovery requests.
 - Shifting justifications is extremely problematic.



Best Practices

- Craft your strategy immediately upon receipt of notification of a charge.
- Identify any and all relevant evidence and witnesses at that moment in time (freshest and most accurate).
- Be straightforward, concise and consistent
- Advocacy is important but so is tone – being aggressive or argumentative often backfires.
- You do have options.
- EEOC investigations can assist employers down the line.



Questions?



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Surveys



We want to hear from you!

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Blog Zone

The Sophisticated Employer
Your legal resource for workplace management

DOL Provides Guidance to Employers on Travel Time, Break Periods Under FMLA
DOL releases practice of holding opinion letters to employers with recent guidance addressing travel time and break periods under FMLA. [Continue Reading](#)

Supreme Court Rules Mandatory Class Action Waivers Enforceable
The U.S. Supreme Court recently handed employers a valuable tool in using their mandatory class action waivers in employment agreements and arbitration. [Continue Reading](#)

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Your Game Plan for Challenging EEOC Foul Calls

Webinar: June 7 | Noon to 1:15 p.m. | Cost: Complimentary

"TAKING' THE CHARGE"
YOUR GAME PLAN FOR CHALLENGING EEOC FOUL CALLS
Date: Thursday, June 7, 2018
Time: Noon to 1:15 p.m.
Cost: Complimentary
Presented by Nicholas Chiro and Michael Thomas

Attorney: Anthony J. Chiro
Attorney: Michael J. Thomas

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Continuing Education

- Today's webinar has been approved for 1.25 general recertification credit hours through the HR Certification Institute and 1.25 professional development credits through SHRM.
- Within 48 hours of today's program, a certificate of completion will be emailed to each of you reflecting this credit. If you don't need CE credit, simply discard the certificate.



Upcoming Webinar – Save the Date

- **Sept. 20**
Harassment / Investigations
Presented by Christina Corl and Courtney Nichols
Noon – 1:15 p.m.
- **Nov. 15**
Hot Legal Topics & Updates
Presented by Laura Dinon and Claudia Orr
Noon – 1:15 p.m.



Thank You!