

## Conquering Employment Law Conundrums Webinar Series

### Registration Open Soon For:

- March 13: Tackling Tricky Wage and Hour Topics
- April 10: Navigating an Employee Request for Accommodation
- May 15: A Cup Of Alphabet Soup To Cure A Few FMLA Ills

### Miss a Webinar in the Series?

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[www.capl原因.org/conferencesandtrainings/webinars.html](http://www.capl原因.org/conferencesandtrainings/webinars.html)

- Employee Benefits Check-Up: Are You Ready for the Affordable Care Act?  
*Presented on January 16, 2013*  
*Presented by Sheldon J. Blumling, Esq., Fisher & Phillips LLP*

## Managing the Changing Face, Risk and Cost of Discrimination

Merrily S. Archer, Esq., M.S.W.



## The *POINT*

- Employers can realize incredible cost savings by using and interpreting the EEOC's cues under its Priority Charge Handling Procedures (PCHP)
  - Proper risk evaluation promotes more cost-effective resource allocation
  - Referring every EEOC matter to outside legal counsel may be a *process*, but it's not a strategy
  - With the rising cost of defense, employers must avoid \$20K solutions to \$5K problems

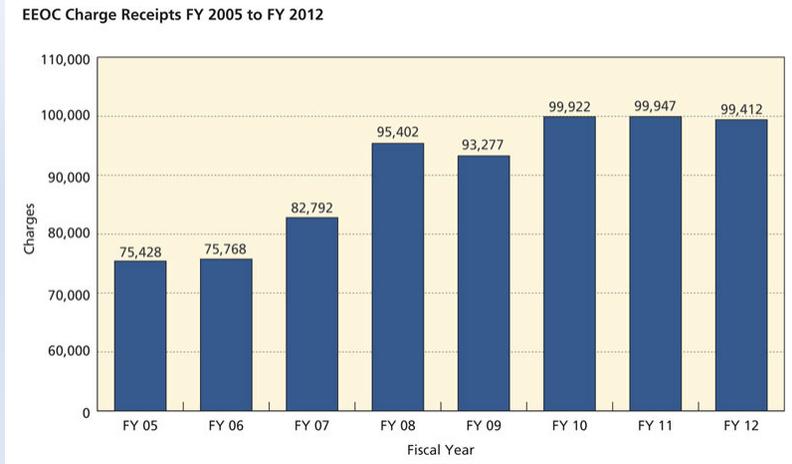


## The *Plan*

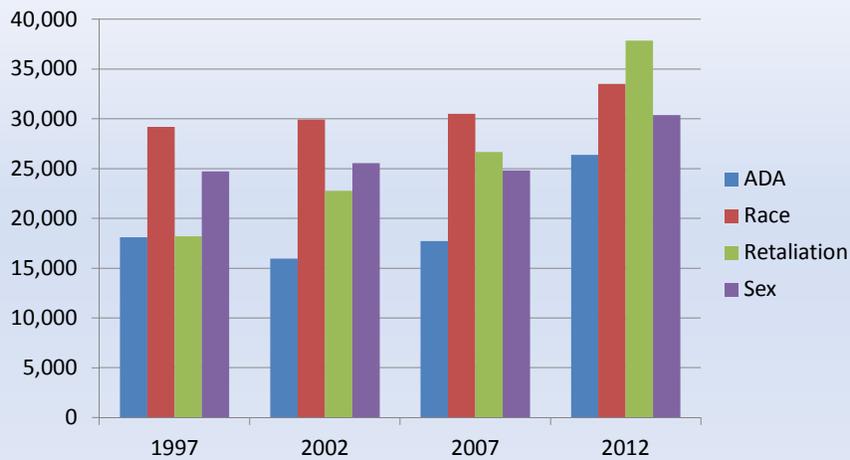
- EEOC Charging and Enforcement Trends
- EEOC's PCHP
  - EEOC's three-bucket triage
  - How to read the EEOC's PCHP cues
- Triage to differentiate high and low risk EEOC charges
- Tips for cost-effective resource allocation to manage EEOC risk



## EEOC Charge Intake History



## The Changing Face of Discrimination



## EEOC Logic: Enforcement Trends

- Money matters, settlement pressure
  - The EEOC equates its historic collections in FY2012 (\$365.4 million) with “enforcing laws more effectively”
    - Rising cost of defense
- Perfunctory dismissals of non-priority charges
  - The EEOC equates “inventory reduction” with serving the public more efficiently
- Greater collaboration between EEOC Trial Attorneys and investigators during administrative process
  - Conciliation bullying and cost of defense settlements



## EEOC 2012-2016 Strategic Plan

February 2012

- Doing “more with less”
- Fewer but BIGGER investigations and prosecutions!
- Systemic initiative is cornerstone of plan
  - “Discriminatory hiring barriers” (i.e., qualification standards), OFCCP’s example
  - Increasing benchmarks (quotas) for systemic cases over next four years
- Less focus on *individual charges* and investigations, more on systemic
- “Integration” of investigation, conciliation and litigation
  - What about objectivity of investigations?



## 2012 Strategic *Enforcement* Plan

November 2012

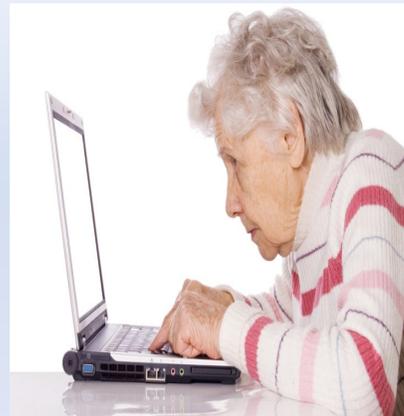
- Eliminating barriers in recruitment and hiring;
  - More systemic hiring cases
- Protecting immigrant, migrant and other vulnerable workers;
- Addressing emerging and developing employment discrimination issues;
  - Policymaking v. law enforcement
- Enforcing equal pay laws;
- Preserving access to the legal system (retaliation)
- Preventing harassment through systemic enforcement and targeted outreach.
  - Aggregating sexual harassment charges, building classes



## EEOC's

### “Discriminatory Hiring Barriers”

- ✓ Credit history
- ✓ Educational standards
- ✓ Physical, functional and performance tests
- ✓ Criminal background checks
- ✓ Anything potentially associated with age
- ✓ English only policies or English proficiency classifications
- ✓ Pay policies



## Enhancing ADA and Pregnancy Protections



- Broadened reasonable accommodation obligations
  - No automatic policies re leave
  - Employer's burden
- Focus on “qualification standards” and greater challenge to employer's determination of “essential job functions”
- Renewed interest in pregnancy



## Growth of EPL and Attorney Involvement in Workplaces

- Post-CRA 1991 EEO Risk Management Mindset
  - Insuring, not mitigating risk
    - EPL's focus on claim management v. risk management
    - Treating EPL claims like other insured business risks
- Defensive Management
  - Basic HR decisions expose employers to considerable risk
  - Employment relationship is the *most regulated*



## Triage: Smarter Risk Evaluation and Resource Allocation

- Core principles
  - Not all charges carry the same risk
    - Charge risk classification is key
    - If you misclassify, you can *usually* RECOVER
  - Most EEOC charges do NOT morph into litigation
    - Involvement of plaintiff's counsel is single biggest driver
  - Resources should match risk
  - Use the right “tool” for the job
  - When the going gets tough, the tough DIY
  - The EEOC lets you know
    - EEOC triages every charge: 3 buckets
    - EEOC offers clues with charge notice



## EEOC Priority Charge Handling Procedure (PCHP)

- Adopted in 1995 in response to increasing backlog of charges from CRA 1991
- Three-bucket triage out of INTAKE
  - A: roughly 20%
    - Targeted charge, national enforcement priority
    - Likely to lead to “reasonable cause” determination (e.g., retaliation)
    - Commissioner Charge/Directed Investigation
  - B: roughly 60%-70%
    - May lead to cause determination, cannot tell
  - C: roughly 10% - 20%
    - Dismissed out of Intake
    - Untimely, no jurisdiction, just plain crazy



## PCHP Path Clues

- Administrative
  - A charges
    - RFI with charge
    - No invitation to ADR
    - Possible involvement of EEOC attorney
  - B charges
    - Invitation to ADR
    - Possible request for Position Statement, but no RFI
    - Cursory investigations, if any at all
  - C charges
    - “No action required”, but watch *Holowecki*
    - No Position Statement or ADR invitation
- Legal: A-1 (Litigation), A-2 (Cause, No Litigation)



## Three-Bucket Resource Allocation Approach



Coach  
YELLOW



Contain  
ORANGE



Coordinate  
RED



## CODE RED RISK: Coordinate

- EEOC Enforcement Priorities for 2013
  - Systemic
    - “Discriminatory *hiring* barriers” (i.e., qualification standards)
      - Credit and **criminal background** checks
      - Educational standards
      - Physical and functional tests
      - Anything potentially associated with age
    - Policies
      - English only policies or English proficiency classifications
      - Competitive reassignment under the ADA
      - Termination upon exhaustion of FMLA
      - Pay policies
  - Individual
    - ADA Expansion
      - Broadened reasonable accommodation obligations
      - Focus on “qualification standards” and greater challenge to employer’s determination of “essential job functions”



## Code Red Coordination

- Internal: herding corporate cats
  - Information Silos for RFI Responses
    - Legal
    - Risk Management
    - HR Leadership (policy)
    - HRIS
    - AA
    - Workers’ Compensation
    - FMLA/ADA Coordinators
- External: using the right “tool” for the job
  - Strategic partnerships work better and are more cost effective than entourage of lawyers



## CODE ORANGE RISK: Contain

- Individual
- Attorney-represented Charges
  - Filing of EEOC Charge within 300 days is mandatory—speed bump on road to court
    - Consider endgame: don't show full hand
    - No need to “win” case at EEOC
  - Goal of Plaintiff's counsel: maximize recovery, minimize effort, likely to accept ADR
  - EEOC or employee-side attorney may threaten other “class members” to prompt settlement
- Benchmark fees
  - Gather documents, witness statements/interviews
  - Fact-draft of Position Statement



## Code Yellow Risk

- Pro se, individual charges alleging “disparate treatment”
  - Not necessarily challenging a policy or practice, just unfair individual treatment--termination, sexual harassment, retaliation, failure to promote
- No attorney is involved
  - No demand letter
  - EEOC will likely tell you if counsel is involved
- EEOC Charge Notice
  - Invited to ADR?
  - RFI?
    - Some offices set a position statement due date on ADR-election date as incentive to mediate . . . No worries.
- YOU CAN DIY!



## Code Yellow Coaching

- Position Statement preparation (5 v. 30 hours of attorney time)
  - Training
    - Risk Recognition 101: Triage
    - Effective Storytelling using common employment themes
  - Coaching
    - Review and improve
    - Ensure consistency if later litigation
- EEOC Mediation (ADR) (5 v. 30 hours of attorney time)
  - Training on what to expect, how to maximize bargaining positions
  - Calling a “lifeline” v. having an attorney prop



## Stay Tuned . . .

- DIY EEOC Mediations: Getting Results WITHOUT Big Legal Bills
  - Understanding when/how to use outside counsel in EEOC mediations
    - March 20, 2013, HRCI and CLE credit pending
- Essential Skills for the EEOC Systemic Era: How to Use an Adverse Impact Calculator
  - Understand how to audit hiring and RIF practices for adverse impact
    - April 12, 2013, HRCI and CLE credit pending



## Basic Truths of Employment Litigation

(Cynical Observations from a Crusty Employment Litigator)

Every good deed will be punished

Truth requires proof

She who has the most paper wins

If it is not written, it did not happen

Effective people management practices, not  
employment lawyers, get results

Your outside counsel bills should reflect the varying  
degrees of risk and expense of each EEOC matter

Smart attorneys know when to get out of the way

DIY can work just as well . . . sometimes



## Final Questions/Issues



Find me!

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