

Behind the Scenes at the EEOC

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Changes Under Obama Administration

- Budget
 - Between 2000 and 2008, Dropped Nearly 30%
 - FY 2009: \$14.6 Million in Additional Funding
 - FY 2010: \$23.4 Million in Additional Funding
- Staffing
 - Since 2007, Hired Over 200 Full Time Employees Nationwide
- Organization
 - Jacqueline A. Berrien, Chair
 - Chai Feldblum, Commissioner
 - Victoria Lipnic, Commissioner
 - P. David Lopez, General Counsel

Enforcement Initiatives

- Enforcement:
 - ADA AAA
 - GINA
 - Youth@Work
 - Equal Pay Enforcement Taskforce
 - E-Race

Best Practices for Responding to an EEOC Charge

- Investigation
 - Provide Complete Information
 - Articulate the Legitimate, Non-Discriminatory Reason(s) for Employment Decision
 - Share Information Regarding Credibility
- Conciliation
 - Keep in Mind Benefit of Confidentiality
 - Flexibility

Mediation with the EEOC

- During Investigation (Prior to Litigation)
- Firewall
- Free
- Confidential
- Resolution Rate: 71% (SF District)

Litigating With the EEOC

- Intervenor Counsel Involvement
- No Confidential Settlements
- Consent Decree Filed With Court
- Narrow Release of Claims

EEOC Developments

- Final Regulations Under ADAA
- Final Regulations Under GINA

Practitioner Tips: Charges & Investigations

- The outcome you want—a "no cause" finding—is most likely to occur when you make it easy
- Arrange and document your response to the charge as if you were writing the internal memorandum supporting that outcome
- You are much more likely to get a "no cause" finding through cooperation and a sense of shared venture than through combat

Practitioner Tips

Mediation

- Make sure the understanding from the outset is that the EEOC representatives at the table have authority to settle—don't get into the "authority" dance
- Don't expect your view of "common sense" to prevail—the Commission has its institutional priorities and they may not match yours
- A successful strategy may be to offer things that serve the Commission's overall objectives—training or mentoring, outreach to minority or female applicants, structured interview processes, improved postings of opportunities

Practitioner Tips

Litigating With the EEOC

- The Commission is essentially eternal, so remember that your reputation precedes you and will follow you
- The Commission is, in some respects, like an ocean liner—don't expect immediate action or decision-making
- Fight whenever necessary, but with an immortal opponent peace is sometimes better than war

Practitioner Tips

Litigating With the EEOC

- In major litigation, the Commission's litigation team may evolve and include new players; document clearly any agreements you reach with anyone on the Commission's team—better for you and for them
- Generally speaking, the Commission will enjoy some automatic credibility with the federal courts; test that at your peril
- The Commission is an institution and thus takes some institutional positions in litigation; where possible, explore the case law to see how those positions have fared in other courts