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**VIGOROUS LAW ENFORCEMENT – VEGAS STYLE: DEALING WITH THE EEOC AND ITS LAS VEGAS OFFICE  
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Imagine being faced with one of the following scenarios:

- Just a few weeks after receiving an administrative charge of discrimination, an investigator for the Equal Employment Opportunity Commission (EEOC) calls to schedule an “on-site investigation” at your client’s facility because the agency has already decided the case is a “vehicle for litigation” against your client despite having no knowledge of your client’s defenses.
- The EEOC issues an adverse finding against your client, stating that there is “reasonable cause to believe” your client violated federal law. You accept the EEOC’s invitation to participate in “conciliation” in an attempt to settle the case. However, at the conciliation conference, the EEOC investigator blocks your efforts to discuss any of the facts by bluntly stating, “We have no obligation to tell you what our investigation uncovered.”
- An EEOC investigator demands that you bring a former supervisor accused of engaging in sexual harassment to a conciliation conference. When you protest, the investigator responds that the EEOC will not conciliate without the former supervisor present. You comply, and during the conciliation conference, the claimant is permitted to launch into a tirade directed at the former supervisor, who is then told by the EEOC investigator to sit outside the conference room for most of the remainder of the conference.

No, you have not crossed over into the “Twilight Zone.” Real companies and their counsel have lived these events during investigations by an often aggressive and hard-hitting EEOC. Now that the EEOC has a local office in downtown Las Vegas at the Lloyd D. George Federal Building, anyone representing Nevada employers is more likely to encounter this federal agency.

***Overview of the EEOC***

The EEOC is an independent federal agency, originally created by Congress in 1964 to enforce Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, national origin, color, sex, and religion. The EEOC also enforces the Equal Pay Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Employees who intend to sue their employers under one of these statutes must first exhaust their administrative remedies available through the EEOC.

In general, the EEOC’s investigative process has a few basic steps: (1) processing a charge of discrimination containing scant allegations; (2) requesting a response from the named employer and the production of documents; (3) interviewing witnesses; and sometimes (4) “visiting” the employer’s worksite, after which the EEOC issues a Letter of Determination as to the probable merits of the charge. The EEOC has broad subpoena power, with a very low threshold governing judicial enforcement.

Following this administrative review, one of two things typically occurs:

- The EEOC finds no cause to believe discrimination occurred, closes the case and, at the same time, issues a Notice of Right-to-Sue allowing the claimant 90 days within which to file a lawsuit and press forward in the courts.

The EEOC finds “reasonable cause” to believe a violation of federal law has occurred. In this situation, the EEOC can either directly sue the employer or issue a Right-to-Sue letter and leave it to the employee to file a lawsuit.

However, before suing an employer, the EEOC is required to engage in efforts to resolve the case short of litigation. As stated in Title VII, the EEOC must pursue “informal methods of conference, conciliation and persuasion.”

### ***EEOC’s Case Priority System***

Your client’s experience with the EEOC depends upon how the charge against it is ranked, as EEOC charges are classified as falling within one of three priority levels during or immediately after the intake of the charge:<sup>1</sup>

Category “A” charges are those that appear to the EEOC, more likely than not, to involve actionable discrimination that falls within the EEOC’s National Enforcement Plan, which identifies key enforcement issues and sets out a plan for administrative enforcement and litigation. Category A cases often involve allegations of “systemic” discrimination, *i.e.*, discrimination of a class of individuals where the alleged discrimination has a broad impact on a company, industry, profession, or geographic location.

Category “B” charges are those where “further evidence is needed to determine whether it is more likely than not that a violation has occurred.”

Category “C” charges are viewed as lacking merit and are thus subject to immediate dismissal.

### ***EEOC’s Mediation Program***

The EEOC maintains a very effective and confidential mediation program utilizing experienced mediators who are “fire-walled” from its investigative team. However, because of its case prioritization system, the EEOC typically refuses to offer participation in its mediation program before starting its investigation into Category A cases absent all parties requesting to do so. Thankfully, with the majority of Category B charges, employers are usually (but not always) offered an opportunity to participate in EEOC’s mediation program before proceeding to investigation.

Many employers in Nevada and throughout the country have experienced excellent results with the EEOC’s mediation program, because it allows for an early review of the facts and the opportunity for an economical settlement. Thus, when it is offered, employers should take advantage of it. Even if not offered, employers should still make the request.

### ***The Investigation***

Employers typically find the EEOC’s investigation process quite unsatisfying. While under EEOC’s internal guidelines, its investigators are required to identify the scope of the investigation and provide, to both the respondent and the charging party, the opportunity to respond to the others evidence prior to analyzing that evidence,<sup>2</sup> EEOC investigators frequently resist doing so, simply telling employers and their counsel to read the charge and undertake their own investigation. The EEOC’s practice in this regard is troubling, particularly given that the EEOC also refuses to discuss their investigatory findings at any conciliation conference.

### ***Recommended Employer Actions***

An employer’s strategy in responding to a charge will depend upon two factors: (1) the strength of its defenses, and (2) whether the charge is prioritized a Category A or B. The employer’s response to a charge should never be treated as just a “formality.” Should the EEOC find “reasonable cause,” its findings are admissible in court. Indeed, in the Ninth Circuit, it is reversible error for the court to exclude the EEOC’s finding from evidence in the employee’s lawsuit.<sup>3</sup> Additionally, statements made in affidavits and position statements are admissible in later proceedings. Thus, providing a justification for an action in litigation that is inconsistent with a prior position statement can, in and of itself, be cited as evidence of a discriminatory motive.

At a minimum, an employer should:

1. ***Put Its Employment Practices Liability Insurance Carrier On Notice.*** EPLI coverage must be ascertained quickly, as most EPLI policies are “claims-made” policies. Also, the EPLI insurer may retain counsel and pay defense costs at the administrative stage.

2. ***Preserve Relevant Evidence.*** “Litigation hold” letters should be forwarded notifying the client of the obligation to preserve the universe of documentation related to the employee, the subject matter of the claim, and possible defenses including comparative data involving other employees. You will likely need this documentation both to defend the company and to respond to an EEOC document request. EEOC regulations require that, once a charge of discrimination has been filed, an employer must preserve “all personnel records relevant to the charge” until final disposition of the charge or any lawsuit that may thereafter be filed.<sup>4</sup>

3. ***Conduct Your Own Investigation.*** There is no substitute for a prompt, frank and thorough investigation to learn what is at issue and to develop strategy. Knowledge empowers you and the client. You must try to anticipate what EEOC will look for, so that you can determine the strategy as you proceed. Even if an employer first learns of the allegations when it receives a charge and the alleged victim is no longer employed, an employer should conduct and document the most thorough investigation possible and

take corrective action if needed.<sup>5</sup> If you ascertain the existence of an unlawful policy or practice applied to employees other than the claimant, you need to work with your client to remedy the situation.

4. **Be Cooperative.** Even if you anticipate or are confronted with hard-ball tactics, counsel often finds that dealing with EEOC at the investigator level can be professional. EEOC's internal guidance is replete with references to "breaks" given to "cooperative respondents."

5. **Do Not Skimp on the Position Statement.** Every position statement should, to the extent possible, provide helpful evidence and rebut every statement made in the charge and:

- State that the response to the charge is based upon the knowledge the employer was able to garner from a very general charge in the limited time frame for response.

- Request the right to respond to adverse evidence.

- Reserve the right to supplement the response to provide additional information to the EEOC should it be determined such information is helpful to the determination of the claims. This allows the employer to bring additional information to the attention of the EEOC, or to bring additional facts into the defense to any later lawsuit, without it appearing the employer is doing so "after-the-fact."

- Even though EEOC is required to hold all submissions in confidence until litigation, state that the position statement should note the information is being provided "solely for the investigation of this charge, with the understanding this letter and the enclosed documentation will remain confidential pursuant to applicable law and not be disclosed for any other purpose." Please be advised, however, that "back door" disclosures may result from the EEOC investigator utilizing the facts in questioning witnesses and seeking a response to factual assertions.

- **Request An Opportunity to Respond to Evidence Obtained in Specifics or in the Future:** Each time counsel communicates with the EEOC, there should be a request in writing for the opportunity to respond to any adverse evidence not specifically addressed in the position statement.

- **Responding To Document Requests:** While the EEOC may attempt to narrowly-craft these requests, they still may be overly broad. If so, the employer will want to raise objections and state the reasons why the request is too broad. In addition, data may not be readily-available in the form requested by the EEOC, or there may be considerable work entailed in compiling it. Attention should be paid to alternatives which would provide the same or at least similar information as has been requested, and these alternatives should be raised along with the burdensomeness objection. It is also helpful to offer to work with the EEOC to resolve any objections.

- **On-Site Visits:** If an on-site visit is requested, interview the anticipated witnesses if you have not previously spoken with them. Also, take the time to carefully prepare your management witnesses. It is always best to also interview non-management witnesses, and, if you know ahead of time, to let them know they will be interviewed by EEOC. Inform them that the investigator may request the interviewee prepare a written statement, or the investigator may prepare one for later review and execution by the witness. Reiterate the need to be candid with the investigator and review the company's non-retaliation policy.

- **Be Alert For Expansion Into Class Issues.** Often, the nature of the EEOC's document requests or other investigative steps will indicate that the agency is pursuing class claims and using the particular charge and claimant as a springboard into deeper, darker waters. Rather than sitting back and taking it, employers are well advised to be prepared to meet class discrimination allegations with proof such did not occur. Disclosure is often the best strategy, depending upon the tactics being utilized by the EEOC.

## **Conciliation**

When a "reasonable cause" letter arrives, the "fun" begins. You can anticipate that, at worst, the EEOC will sue your client and, at best, the EEOC's "cause" finding will be admissible in the claimant's lawsuit. However, settlement discussions at the conciliation stage will be unusual for attorneys accustomed to settlement practice in almost every other context. As a matter of law, the conciliation process must provide a meaningful settlement opportunity that must, at a minimum, make clear to the employer the basis for the EEOC's charges against it.<sup>6</sup> In a given case, the EEOC can fulfill its duty to conciliate by: (1) outlining to the employer the basis for its belief that a violation of the law has occurred; (2) giving the employer an opportunity to comply voluntarily with the law; and (3) reacting in a flexible and responsive way to the reasonable attitudes of the employer.<sup>7</sup> Some courts have noted "[t]he purpose of conciliation [to be] to allow the employer the opportunity to discuss the individual circumstances surrounding the alleged violation",<sup>8</sup> so keep pushing to learn the basis for the EEOC's conclusions.

Settlement at this stage can be an expensive process. The EEOC's "wish list" list of relief requested at conciliation usually involves the following:

- Economic damages - full back pay and front pay.
- Compensatory and punitive damages at the maximum recoverable amount (e.g., up to the maximum capped amounts for the size of the employer).

- In cases involving a “class” of affected employees, a large class fund to be paid out by the agency.
- Injunctive relief
  - New or redrafted internal policies.
  - Revised internal complaint-handling procedures.
  - Training of managers and employees.
  - Reporting to EEOC for 2-3 years or longer of compliance with the above.
- A waiver of confidentiality so that the EEOC can issue a press release on the settlement (even if not explicitly outlined).

Notwithstanding the EEOC’s internal guidance, the statutory emphasis on conciliation, and the courts’ guidance on proper conciliation, the reality for employers is often one where the investigator presents “a bill” for payment, with little or no discussion of the evidence supporting the conclusion that the employer has discriminated and thus should pay that bill. In a recent speech, an EEOC official justified these tactics by likening EEOC to the “FBI,” and indicating the FBI did not make such disclosures.

This approach likely falls short of the courts’ requirements. For instance, in one case a federal court held that the EEOC acted in bad faith when it issued a determination alleging sex discrimination, but failed to provide the employer with any indication of who was in the class of female employees, when and where claimants requested promotions or any other information or evidence to allow the employer to understand the EEOC’s conclusions.<sup>9</sup> Generally, even if a court finds EEOC failed to conciliate in good faith, the remedy is to remand the case back to conciliation – not exactly the promised land. In rare cases, courts have dismissed the EEOC’s lawsuit.<sup>10</sup>

When approaching conciliation, employers should have as intimate a knowledge of the facts as possible, coupled with serious appreciation of the costs of the litigation and potential recovery. You must balance the expense of “paying the bill” at conciliation with the possibilities to settle at a later time after litigation has been filed (such as the Nevada Federal District Court’s Early Neutral Evaluation program).

A well-laid paper trail should be created of all discussions with the EEOC, including those attempting to obtain information supporting the discrimination finding and compromises offered by the employer. This evidence will be useful in the event the employer moves to dismiss the case due to the agency’s failure to properly investigate and conciliate the charge.

While you are unlikely to hear Rod Serling telling you that you have crossed over into the world of EEOC investigations and conciliations, the process can be disconcerting for the uninitiated. Hopefully, this article has provided some useful guidance in navigating employers through the process.

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<sup>1</sup> EEOC, Memorandum on Charge-Handling Procedures (June 20, 1995); see also Employment Discrimination Coordinator, Part X(A), Chapter 72 (last updated March 2007) and EEOC, National Enforcement Plan, <http://www.eeoc.gov/abouteeoc/plan/nep.html> (accessed March 16, 2007).

<sup>2</sup> See, e.g., EEOC Order No. 915.002 (May 3, 1991), and Interpretative Manual Section 602, Evidence.

<sup>3</sup> *Heyne v. Caruso*, 69 F.3d 475, 1489 (9<sup>th</sup> Cir. 1995).

<sup>4</sup> See 29 C.F.R. § 1602.14.

<sup>5</sup> Under *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Swenson v. Potter*, 217 F.3d 1184, 1196 (9<sup>th</sup> Cir. 2001), an employer without prior notice of harassment may be able to defeat liability if prompt action is taken to halt the harassment.

<sup>6</sup> *E.E.O.C. v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11<sup>th</sup> Cir. 2003) (granting summary judgment to employer due to EEOC’s failure to conciliate in good faith, awarding employer attorney’s fees).

<sup>7</sup> *E.E.O.C. v. City of Chicago*, No. 85C, 7281, 1987 WL 16229, at \*3 (N.D. Ill. Aug. 26, 1987).

<sup>8</sup> *E.E.O.C. v. State of Ariz.*, Dept. of Admin., 824 F. Supp. 898, 901 (D. Az. 1991).

<sup>9</sup> *E.E.O.C. v. First Midwest Bank, N.A.*, 14 F.Supp.2d 1028, 1031-32 (N.D. Ill. 1998).

<sup>10</sup> *E.E.O.C. v. Asplundh Tree Expert Co.*, 340 F.3d at 1260.