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EEOC Trends and Tips for Dealing with EEOC Charges

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As most of you are aware, the Equal Employment Opportunity Commission (“EEOC”) is a federal agency that investigates certain charges of discrimination filed against employers. Employers in Idaho may be required to respond to charges filed with the agency either directly or through a co-filing with the Idaho Human Rights Commission. The Seattle office of the EEOC, which is now a smaller field office with fewer employees, covers employers in the state of Idaho. Commissioner Ishimaru with the EEOC in Washington, D.C., recently spoke at a seminar in Seattle about initiatives and trends within the EEOC, which are important for you to be aware of and to understand. This article will cover those points and some general reminders about dealing with agency charges.

EEOC Trends

One of the EEOC’s current initiatives is called E-RACE (Eradicating Racism and Colorism from Employment), which involves a comprehensive five-year plan with goals and objectives. The agency is refocusing its attention and resources on claims of race and color discrimination and litigation associated with those claims. This includes goals of improving charge processing for these types of claims and devoting resources to increasing public awareness about race and color discrimination in employment. Commissioner Ishimaru noted the initiative was intended to address racism across all people of color.

In part this initiative is fueled by the statistical trends on charges filed by employees, as charges of race discrimination continue to be the most common type of charge filed with the EEOC. In 2007, race-based charges constituted over one-third, or 37% of the total charges filed in that year. Notably, the overall number of charges filed with the EEOC increased nearly 10% last year, countering a downward trend in filings since 2002. For the first time in 2007, retaliation charges ranked second behind race charges as the most common charge, followed in third place by charges of sex discrimination.

Another agency initiative is a focus on or shift to systemic patterns of discrimination. Class action lawsuits that include groups of employees from a particular employer now constitute one-third of all the litigation filed directly by the EEOC against employers. It is anticipated that this initiative will be combined with the E-RACE initiative, so employers should expect careful attention to individual and potential class-wide claims of race and color discrimination by the EEOC.

Tips for Dealing with EEOC Charges

Charges received in Seattle are normally categorized up front based on the potential merits of the case. Because the Seattle office is now a field office with fewer staff members, processing times on charges have increased over recent years. Employers may now receive a notice instructing them to retain records related to an employee who has filed a complaint while the formal charge is being prepared,

with the charge and a request for a position statement or other information to follow. In response, you would want to maintain things like employment records, records related to an investigation into complaints by the employee, witness statements, handbooks, and training materials. Employee emails should also be retained and are a particular area of interest under rules in federal courts concerning discovery of electronic communications. Despite significant processing delays on the agency side, you are still required to prepare and submit a position statements within the timeframe requested when the formal charge is prepared and sent to the employer.

When you receive an EEOC charge, you should always consider whether the alleged violation applies to your particular business. Sometimes charges are based on laws that do not apply to certain smaller employers and unfortunately there is not always uniformity in the application of the various laws and the minimum number of employees under each. For example, the EEOC may investigate race and color discrimination claims under a federal law that applies to employers with 15 or more employees. The Idaho Human Rights Commission, however, only investigates similar state laws applying to employers with 5 or more employees. Additionally, sometimes charges may not be timely filed. You should seek legal advice if you are not clear on these initial issues of the application of various laws.

Your response to a charge is critical and should be part of a well prepared plan. Your response will determine in part whether the charge is found to have merit by the agency. It often also plays into a decision down the road by the employee to file a lawsuit. In Idaho, agency investigations and ultimate determinations (either the charge has merit which is known as a “cause” or “probable cause” finding, or the charge has no merit, a “no cause” or “no probable cause” finding) are not. Regardless, the position statement or other information you provide to the agency is discoverable by the employee and has the potential to be used well beyond the investigation and ultimate conclusion by the agency.

It is important for you to address and respond to each allegation or claim made in the charge. For example, under Idaho Human Rights Commission regulations, any allegation not specifically denied, unless you can say you are without knowledge to either admit or deny the allegation, is deemed to be admitted.

Normally the EEOC may not extend the investigation beyond the claims reasonably related to the original charge filed by the employee. Given the agency initiatives on race/color and on class action cases, you should anticipate the potential that the investigation may be broadened beyond an individual charge under the facts of a particular case. You should also consider this when submitting information in support of or asserting various positions in your statement to the EEOC. Under both EEOC and Idaho Human Rights Commission regulations, charges may be amended before a final agency decision is made in order to “amplify” allegations in the charge. Consequently, you should always note in your position statement that you may present further information as the investigation proceeds.

Sometimes the EEOC charge is the first time an employer hears of a particular complaint from an employee. It is advisable to conduct a prompt investigation just as you would if hearing the complaint directly from the employee. Particularly given the increased number of charges associated with claims of retaliation, it should be part of your standard practice to advise the employee, if they are still working for your organization and if an interview is needed, that they will not be retaliated against for filing the charge with the agency. You should also advise witnesses of the “no retaliation” practice and advise them they may be contacted by the EEOC as a part of their investigation into the complaint. An employer representative may be present during EEOC interviews of managers and other key personnel, but a representative may not have that same right for non-managerial interviews by the agency.

Final Thoughts

Employers should be aware that EEOC charges overall are again on the rise and that race-based claims, the most frequent charge made, will get increased agency attention and processing priority in the years to come. It is more important than ever that you have good policies and practices in place to prevent and address these complaints as well as systems to appropriately and thoroughly respond to EEOC charges with these trends and initiatives in mind.