

# **HOW TO PREPARE YOUR ORGANIZATION TO STAY OFF THE EEOC'S TARGET LIST**

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## **I. OVERVIEW**

- A. A Brief Overview of the EEOC, Its Process, Recent Statistics, and How It Differs from the Michigan Department of Civil Rights.
- B. Recognizing Recent Changes to the Laws, Caselaw, and the Internal Structure of the EEOC.
- C. Understanding How These Changes Affect Employers.
- D. Tips: Dos and Don'ts to Stay Off the EEOC's Target List.

## **II. A BRIEF OVERVIEW OF THE EEOC**

- A. The Equal Employment Opportunity Commission (EEOC) is a federal governmental agency created by the Civil Rights Act of 1964, tasked with interpreting and enforcing Title VII's prohibitions against employment discrimination, harassment, and retaliation.
  - 1. Under the laws enforced by EEOC, it is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.
  - 2. It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.
- B. The EEOC's process.
  - 1. EEOC receives a charge from an employee, whether it be discrimination, sexual harassment, hostile work environment, or retaliation.

- a. Tip: if an employee requests a copy of their personnel file under Michigan's Bullard Plawecki Act, employers should treat the request as the employee's first step in suing the employer.
  - i. Employers should take the time to review the personnel file and make sure all other documents are in order in case a lawsuit is filed.
2. Within 10 days, the charge is sent to the employer, along with a request to respond in writing.
  - a. An employer generally has 30 days to gather the information requested and to submit its position statement and attachments to the EEOC.
    - i. Tip: It is easy to ask the EEOC for a 30 day extension to respond.
3. The EEOC may investigate by visiting the employer, gathering documents, and interviewing employees.
  - a. Tip: Onsite investigations and interviews are rare if a detailed position statement is provided.
4. Mediation options are offered by the EEOC during this process.
  - a. Tip: Don't mediate unless you want to settle or you want to learn more about the employee's potential evidence.
5. The EEOC may give the employee a Notice-of-Right-to-Sue, which allows the employee to file a lawsuit themselves.
  - a. The employee has a 90 day deadline to file a lawsuit after receiving the Notice-of-Right-to-Sue.
6. If violations are found, the EEOC will try to reach an agreement with the employer.
  - a. If the two sides cannot reach an agreement, the EEOC can either file a lawsuit on behalf of the employee or give the

employee a Notice-of-Right-to-Sue, so they can file the lawsuit themselves.

i. Tip: The EEOC rarely files a lawsuit.

C. In 2018 the EEOC received 76,418 charges.

1. These litigation statics are for FY 2018 ended September 30, 2018.

2. The EEOC resolved 90,558 charges of discrimination.

a. They secured \$505 million for victims.

b. They handled over 519,000 calls, 34,600 emails and more than 200,000 inquiries, reflecting a significant public demand.

D. Data shows that as of FY 2018, retaliation continued to be the most frequently filed charge with the agency, followed by sex, disability and race.

1. The EEOC received 7,609 sexual harassment charges.

a. This is a 13.6% increase from 2017.

2. The charge numbers are as follows:

a. Retaliation: 39,469 (51.6 percent of all charges filed)

b. Sex: 24,655 (32.3 percent)

c. Disability: 24,605 (32.2 percent)

d. Race: 24,600 (32.2 percent)

e. Age: 16,911 (22.1 percent)

f. National Origin: 7,106 (9.3 percent)

g. Color: 3,166 (4.1 percent)

h. Religion: 2,859 (3.7 percent)

i. Equal Pay Act: 1,066 (1.4 percent)

j. Genetic Information: 220 (.3 percent)

i. The total is greater than 100% because some charges allege multiple bases.

3. The EEOC legal staff filed 199 merit-based lawsuits alleging discrimination in 2018. This included:
  - a. 117 individual suits, 45 suits involving multiple victims or discriminatory policies, and 37 systemic discrimination cases.
  - b. At the end of the fiscal year, the EEOC had 302 cases on its active docket.
  - c. The EEOC achieved a successful outcome in 95.7 percent of all district court resolutions.
  - d. The EEOC obtained \$56.6 million in monetary benefits for victims of sexual harassment.
  
- E. The difference between the EEOC and the Michigan Department of Civil Rights.
  1. The EEOC enforces federal law, such as Title VII of the US Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA).
    - a. The EEOC takes charges from employees in every state in the United States.
    - b. The EEOC has a strong presence in the employment law community.
  2. The Michigan Department of Civil Rights investigates and resolves discrimination complaints and works to prevent discrimination through educational programs that promote voluntary compliance with civil rights laws.
    - a. Michigan Department of Civil Rights only takes charges from employees in the state of Michigan.
    - b. The Michigan Department of Civil Rights enforces two state laws:
      - i. The Elliott-Larsen Civil Rights Act #453, Public Acts of 1976, as amended.

- (a) Because the Elliott-Larsen Civil Rights Act covers some of the same jurisdictions as Title VII of the US Civil Rights Act of 1964 and the Age Discrimination in Employment Act, the Michigan Department of Civil Rights is also authorized to take and investigate complaints under those acts through an agreement with the EEOC.
  - ii. The Persons with Disabilities Civil Rights Act #220, Public Acts 1976, as amended.
- 3. The EEOC and the Michigan Department of Civil Rights often work in tandem with each other.
  - a. Commonly, if one entity dismissed a claim, the other will do the same.
- 4. Tips:
  - a. Federal law only applies to employers with 15 or more employees for Title VII claims, and 20 or more employees for age discrimination claims. The Michigan anti-discrimination law covers employers of any size.
  - b. With a federal claim, the employee must go through the EEOC first. With a state claim, the employee is not required to go through the EEOC and can go directly to the court to file a lawsuit.
  - c. The statute of limitations is often longer for state claims than for federal claims. For a federal claim, an employee has either 180-days or 300-days after the discrimination took place to file a charge with the EEOC. In Michigan, the statute of limitations for an employment discrimination claim under the Elliot-Larsen Civil Rights Act is three years. MCL 600.5805(10).

### III. RECENT CHANGES IN THE EEOC AND HOW THEY WILL AFFECT EMPLOYERS.

- A. The #MeToo Movement has had a significant impact on the EEOC.

1. From 2017 to 2018:
    - a. Sexual harassment charges with the EEOC increased by over 12%; the first increase in year-to-year harassment complaints in a decade.
    - b. Sexual harassment lawsuits filed by the EEOC increased by 50%.
    - c. Total recovery for sexual harassment complainants jumped from \$47.5 million to approximately \$70 million.
  2. With the EEOC receiving significantly more charges of sexual harassment, they are increasing the number of lawsuits filed against employers.
    - a. Employers need to take steps to prevent sexual harassment in the workplace.
      - i. This includes updating policies, providing training, and creating a safe environment.
    - b. When a complaint of sexual harassment is brought to an employer by an employee, the complaint should be handled with the utmost seriousness, care, and diligence.
- B. The EEOC has experienced recent, rapid changes in internal culture.
1. On May 15, 2019, Janet Dhillon was sworn in as the new Chair of the U.S. Equal Employment Opportunity Commission (EEOC).
    - a. Dhillon replaces Victoria A. Lipnic, who served as Acting Chair since January 2017.
      - i. Dhillon was appointed by President Donald J. Trump.
      - ii. Previously, Dhillon served as Executive Vice President, General Counsel and Corporate Secretary of JC Penney Company, Inc., and before that, as Senior Vice President, General Counsel and Chief Compliance Officer of US Airways Group, Inc.

- b. With senior staff changes, the culture changes too.
  - i. Under Dhillon's control, the EEOC may choose to take on more or less of one area of discrimination compared to others.
  - ii. New laws affecting employers may be enacted.
  - iii. New regulations affecting employers may be enacted.
- c. Also, with new staff changes, the depth of knowledge is changed.
  - i. Tenured staff with experience and knowledge has left and it takes time for new employees to learn their roles and responsibilities.
- d. This may lead to changes in how "available" and responsive EEOC is.

C. New EEO-1 reporting requirements.

- 1. In September 2016, the EEOC approved a revised EEO-1 form that would require private employers and federal contractors that met certain criteria to provide the EEOC with additional data regarding workforce pay and hours worked broken down by job categories, race, ethnicity and sex.
  - a. This new wage and hour data is intended to assist the EEOC in identifying potential discriminatory compensation practices.
  - b. In August 2017, the White House Office of Management and Budget indefinitely suspended the pay data reporting requirement.

Some considered it burdensome to collect and an invasion of privacy.

    - i. Others supported the collection.

- c. Several civil rights groups sued to enforce the revised EEO-1 form and on March 4, 2019, a federal court found the stay to be unlawful and ordered the revised EEO-1 form take effect immediately.

The EEOC sought to delay the pay reporting until 2020.

- i. At the April 3, 2019 hearing, the EEOC indicated that it could implement the pay reporting component by September 30, 2019.
  - ii. Their plan was to utilize an outside contractor at a cost in excess of \$3 million dollars.
- d. On May 3, 2019, the Department of Justice filed a Notice of Appeal in the case; however, no stay has been issued on the district court's ruling.
  - e. Currently the standard EEO-1 reporting of race, sex, and ethnicity by job category was due May 31, 2019.
2. EEO-1's new reporting requirement's effect on employers.
- a. Employers with at least 100 employees and certain federal contractors with 50 or more employees must file a Standard Form 100, Employer Identification Report (EEO-1 Form) annually identifying the number of employees who work for the organization by job category, race, sex, and ethnicity.
  - b. In the past, employers submitted the EEO-1 Form annually by September 30th reflecting the make-up of their workforce for a designated pay period during the preceding months.
  - c. The new EEO-1 reporting requirements will have an impact on employers if it continues to stand.
    - i. EEO-1 filers should be prepared to submit Component 2 data for calendar year 2017, in addition to data for calendar year 2018, by September 30, 2019, in light of



the court's recent decision in *National Women's Law Center, et al., v. Office of Management and Budget, et al.*, Civil Action No. 17-cv-2458 (D.D.C.).

- ii. Because of the short timeline and increased amount of data gathering, employers will have more work and costs in order to comply with the requirement.
  - (a) The new requirements pose significant practical challenges to collect and process the payroll data.
  - (b) Employers may wish to seek outside vendors to complete the data gathering.
  - (c) Employers may also wish to seek legal counsel to understand and ensure they are in compliance with the new requirements.

#### D. Recent Caselaw.

- 1. Recent caselaw has broadened the scope of Title VII to include sexual orientation and gender identity.
  - a. *Zarda v. Altitude Express, Inc.*
    - i. Gay former employee of a skydiving company brought an action against his employer alleging that he was fired because he failed to conform to male sex stereotypes by referring to his sexual orientation. The former employee argued he was fired in violation of Title VII and New York law.
    - ii. Although it is well-settled that gender stereotyping violates Title VII's prohibition on discrimination "because of ... sex," the Second Circuit Court of Appeals had previously held that sexual orientation discrimination claims, including claims that being gay or lesbian constitutes nonconformity with a gender stereotype, are not cognizable under Title VII. See *Simonton v. Runyon*,

232 F.3d 33, 35 (2d Cir. 2000); see also *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–23 (2d Cir. 2005).

- iii. However, in *Zarda*, the Second Circuit overturned its previous decisions and found that sexual orientation discrimination is a subset of sex discrimination because it is discrimination “because of ... sex”; and therefore, is a violation of Title VII.
- iv. On April 22, 2019, the US Supreme Court granted certiorari to hear the case, consolidated with *Bostock v. Clayton County, Georgia*. A final decision on the case should be coming within a year or so from the court.

b. *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*

- i. The EEOC brought a Title VII action against an employer alleging that employer fired a transitioning, transgender employee based on gender stereotypes and that employer administered a discriminatory clothing allowance policy.
- ii. Employee was terminated from her employment in a funeral home by the owner and operator shortly after the employee informed the owner that she intended to transition from male to female and would represent herself and dress as a woman while at work.
- iii. The Sixth Circuit Court of Appeals ruled that “[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing [the employee] because she is transgender and transitioning from male to female.” *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018),

*cert. granted, R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599 (2019).

- iv. On April 22, 2019, the US Supreme Court granted certiorari to hear the case and decide whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228, (1989).

c. *Fort Bend County, Texas v Davis*

- i. On June 3, 2019, the United States Supreme Court ruled that Title VII's requirement to file a charge with the EEOC is not jurisdictional. *Fort Bend Cty., Texas v. Davis*, No. 18-525, 2019 WL 2331306, at \*2 (U.S. June 3, 2019).
- ii. Davis, the plaintiff was an employee of Fort Bend County. In 2010, Davis reported to Fort Bend's human resource department that her boss was sexually harassing her. Davis' boss resigned after the allegations had been reported and was replaced by another supervisor who Davis claims retaliated against her for reporting the sexual harassment. In 2011, Davis submitted a charge to the EEOC asserting claims of harassment and retaliation. While the EEOC charge was pending, Davis was told to report to work on a Sunday. After informing her supervisors that she would be unable to be at work due to a prior commitment at her church, Davis did not show up to work and was fired. Attempting to supplement the allegations in her charge, Davis handwrote "religion" on the "Employment Harms or Actions" part of her intake questionnaire, and she checked boxes for "discharge" and "reasonable accommodation" on that form. She made no change, however, in the formal charge document. A few

months later, the Department of Justice notified Davis of her right to sue.

- iii. Davis filed suit in federal district court in 2012. Years into the litigation, Fort Bend asserted for the first time that the District Court lacked jurisdiction to adjudicate Davis' religion-based discrimination claim because she had not stated such a claim in her EEOC charge. Granting the motion, the District Court held that Davis had not satisfied the charge-filing requirement with respect to her claim of religion-based discrimination, and that the requirement qualified as "jurisdictional," which made it nonforfeitable. The 5<sup>th</sup> Circuit reversed and the Supreme Court granted certiorari on the issue of whether Title VII's charge-filing requirement was jurisdictional.
- iv. Justice Ginsburg, writing for the court, ruled that Title VII's charge-filing requirement is mandatory, but not jurisdictional. The court reasoned that the requirement to file a charge with the EEOC was a procedural obligation and "not a jurisdictional prescription delineating the adjudicatory authority of courts." *Fort Bend Cty., Texas v. Davis*, No. 18-525, 2019 WL 2331306, at \*6 (U.S. June 3, 2019).

- 2. The EEOC will enforce laws in accordance with these cases, which broadens the scope of Title VII, which will also broaden employers' liability.
  - a. Employers will now be held accountable for sexual orientation and gender identity discrimination and harassment, as well as for any retaliation for reporting discrimination or harassment.
  - b. Employers may need to adapt their policies to include prohibitions against sexual orientation and gender identity discrimination and harassment.

- c. Any discrimination or harassment based on gender identity or sexual orientation will be a violation of the law and will subject the employer to litigation by the EEOC or a private party.
- d. Employers should also be aware of when they need to raise defenses, such as when an employee does not properly file a claim with the EEOC before bringing a lawsuit.

#### IV. DOS AND DON'TS TO STAY OFF THE EEOC'S TARGET LIST

##### A. Dos:

- 1. Stick to the 7 "W" facts:
  - a. Who
  - b. What
  - c. Where
  - d. When
  - e. Why
  - f. Witness
  - g. Want (What do you want)
- 2. In the event of an investigation, follow the 6 "Rs":
  - a. Respect: Listen to various perspectives to learn the facts with an open mind.
  - b. Restraint: Prevent any unlawful conduct from continuing and disclose information on a need-to-know basis to maintain confidentiality to the extent possible.
  - c. Rules: Evaluate application of the handbook.
  - d. Respond: Be swift in investigation and taking appropriate remedial action, if necessary.
  - e. Record: Document, document, document.

- f. (No) Retaliation: Do not take adverse action against complainant (who makes claim in good faith) or witness participating in investigation.
3. Hire an attorney to have the benefit of attorney-client privilege.
- a. Other benefits of hiring legal representation:
    - i. Representation will be able to guide employers through the complicated processes and bureaucracy of the EEOC.
      - (a) Legal representation will understand the general expectations and requirements of discovery.
      - (b) Legal representation will know what information to share and with whom.
    - ii. Representation can assess the strength of your case.
      - (a) Local benches are more plaintiff friendly.
      - (b) State court tend to be faster.
      - (c) Advantageous if witness's timeframe is limited.
      - (d) Speed varies county to county.
    - iii. Representation should be able to give an accurate estimate of the possible damages in a case.
      - (a) This is valuable information when determining whether or not to settle a case.
    - iv. Knowledgeable representation will be able to prepare air tight position statement using the proper language.
    - v. Representation can also prepare employers to not use incriminating language.
    - vi. Representation can appropriately respond and defend if the EEOC decides to rewrite charges.

- vii. Counsel will be able to clearly argue your case and its merits.
  - viii. These cases are often very complex and depended on various factors, which proper counsel will know how to deal with.
  - ix. Counsel can help to get you the best settlement as possible.
  - x. Settlements can range from \$100 to millions of dollars.
  - xi. Counsel can also help with other issues such as the publicity of the case.
- b. Employment Practice Liability (EPL) Insurance counsel.
    - i. Companies should consider whether they have or want this insurance.
    - ii. If employers decide to have this insurance, employers should figure out which deductible plan best suits their needs.
    - iii. Tip: Maddin Hauser is on the pre-approved list of EPL Insurance counsel.
4. Have comprehensive and effective policies to prevent, manage, and respond to problems that may lead to EEOC charges.
- a. Employers should broaden their discrimination and harassment policies to include prohibitions against sexual orientation and gender identity discrimination and harassment.
  - b. Sexual Harassment Policies.
    - i. Employers should adopt a sexual harassment policy that explains prohibited conduct, provides for a confidential complaint process, and protects against retaliation.

- ii. Investigation proceedings should be laid out in the policy, as well as possible consequences for an employee that violates the policy.
      - iii. Employers should have multiple avenues for employees to report complaints. One of these avenues should be an outside party.
    - c. Employers should establish a gender-neutral dress code policy.
  - 5. Publicize and make the company's policies available to all employees.
  - 6. Take precautions when drafting employment documents.
    - a. Applications for employment should avoid asking certain questions that would give the appearance of discrimination.
      - i. Types of questions to avoid asking:
      - ii. Questions about the applicant's age.
      - iii. Questions about the applicant's race.
      - iv. Questions about the applicant's marital status.
      - v. Questions about the applicant's religion.
      - vi. Questions about the applicant's citizenship status.
      - vii. The I-9 form is the appropriate place to determine citizenship status.
    - b. Include private arbitration provisions into employment agreements.
      - i. Employers should include provisions that require employees to litigate any claims they have against the employer in private arbitration.
      - ii. However, the Supreme Court ruled in *E.E.O.C. v. Waffle House, Inc.*, if the EEOC does decide to bring a case themselves, an arbitration agreement between an employer and an employee does not prevent the EEOC



from bringing the claim in court. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002).

- c. Limits on the Statue of Limitations.
    - i. Employers may contractually limit that number of days an employee has to bring a claim against the employer.
    - ii. However, an employer cannot contractually prohibit an employee from filing a claim with the EEOC.
  - d. Class action waiver
    - i. Employers can contractually limit an employee's right to bring a class action lawsuit.
    - ii. This protects employers by limiting their liability to only the employee bringing the claim and not a class of employees.
7. Employers should require that every employee complete a training orientation.
- a. This is important to show that the company took steps to comply with the law. The employer looks good in the sense that they took preventative measures to prevent discrimination and harassment.
  - b. Also, it is important to be able to show that employees know what the law is.
8. Employers should make sure that they and their HR departments are up to date on new federal and state laws, EEOC regulations, and developments in the law.
9. Promote an inclusive culture in the workplace by fostering an environment of professionalism and respect for personal differences.
10. Promote open communication and early dispute resolution. This may minimize the chance of misunderstandings escalating into legally actionable EEOC problems.

11. Establish neutral and objective criteria for evaluating candidates to avoid personal stereotypes or hidden biases when making employment decisions.
12. Monitor compensation practices and performance appraisal systems for patterns of potential discrimination.
13. Attempt to withdraw EEOC claims if possible, instead of settling them.
  - a. Employers should try to settle with the employee outside of the EEOC and have the employee withdraw the charge.
  - b. Settling in the EEOC context gives the impression that the employer is guilty of the charge.
  - c. It looks much better for the employer to have a claim withdrawn than settled.
14. In Severance Agreements, employers should offer employment benefits or unused PTO to the employee in exchange for a release of all claims against the employer.
  - a. A waiver in a severance agreement generally is valid when an employee knowingly and voluntarily consents to the waiver.
    - i. The rules regarding whether a waiver is knowing and voluntary depend on the statute under which suit has been, or may be, brought.
  - b. In addition to being knowingly and voluntarily signed, a valid agreement also must:
    - i. Offer some sort of consideration, such as additional compensation, in exchange for the employee's waiver of the right to sue;
    - ii. The consideration offered for the waiver of the right to sue cannot simply be a pension benefit or payment for earned vacation or sick leave to which the employee is

already entitled but, rather, must be something of value in addition to any of the employee's existing entitlements.

iii. Not require the employee to waive future rights; and

iv. Comply with applicable state and federal laws.

c. This does not prevent the employee from reporting to the EEOC; however, the employee would not be entitled to any monetary damages, even if the EEOC does bring a case against the employer.

B. Don'ts:

1. Don't discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age, disability or genetic information.
2. Don't tolerate actions by employees of discrimination or harassment.
3. Don't retaliate against an employee for complaining about discrimination or harassment or asserting their rights in relation to discrimination or harassment, including filing a charge with the EEOC.
4. Don't ignore complaints of discrimination or harassment.
  - a. Employers need to take complaints seriously and complete a thorough investigation.
5. Don't include a provision in a severance agreement that prevents the employee from reporting to the EEOC.
  - a. Employers cannot contractually prohibit employees from reporting to the EEOC.
6. Don't be rude or difficult towards EEOC investigators.
7. Don't assume that the charge contains all the information that the investigator has. Most times, the investigator has a lot more information that is not in the charge.

- a. Tip: Plaintiff's attorneys may "ghost write" charges in order to use the EEOC process to gain information to decide if they want to take the case.
- 8. Don't make agreements that reduce the statute of limitations with regard to the timeline for filing charges with the EEOC, as opposed to the ability to bring a suit in court.
  - a. Tip: Different statutes have different time requirements for filing a claim. For example, an employee claiming employment discrimination must file a charge with the EEOC in either 180 or 300 days, as compared to an employee who is claiming a whistleblowing action only has 90 days to file a claim.

V. CONCLUSION

- A. The EEOC plays an important role in enforcing Title VII's prohibitions against employment discrimination, harassment, and retaliation.
- B. Because of this important role, employers need to be aware of changes in the law, caselaw, and internal structure of the EEOC. Employers also need to be aware of how these changes will affect them.
- C. Employers should follow the "dos and don'ts" listed above to stay off of the EEOC's target list.