Systemic Discrimination

Responding to EEOC Investigations and Litigation

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As part of its continued focus on litigating systemic discrimination cases, it is increasingly common for the Equal Employment Opportunity Commission (EEOC) to serve broad information requests and subpoenas on employers during the investigative process. Therefore, employers and their counsel should understand their options and develop a strategy for responding to the EEOC.

The EEOC announced its Systemic Initiative in 2006, and made identifying, investigating and litigating systemic discrimination cases one of the EEOC's top priorities. Systemic discrimination involves "pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area" (*EEOC: Strategic Plan for Fiscal Years 2012–2016*). In its Strategic Enforcement Plan for fiscal years (FY) 2013 through 2016, the EEOC reaffirmed its commitment to eliminating systemic discrimination, with a current focus on eliminating systemic barriers to recruitment and hiring (*EEOC: Strategic Enforcement Plan FY 2013–2016*).

In connection with the Systemic Initiative, the EEOC's strategic enforcement tools include:

- Issuing broad information requests and subpoenas on employers that are named as respondents in EEOC charges, particularly when the EEOC suspects systemic discrimination.
- Filing pattern or practice class lawsuits in federal court.

This article explores:

- Practical tips for responding to and challenging EEOC information requests and subpoenas.
- The EEOC's "sue first, ask questions later" litigation strategy.
- Best practices when the EEOC signals its intent to pursue a systemic discrimination case.

>> For information on responding to single plaintiff EEOC charges and employment discrimination litigation, search Preventing and Responding to an EEOC Charge Toolkit and Employment Litigation: Single Plaintiff Employment Discrimination Toolkit on our website.

RESPONDING TO EEOC INFORMATION REQUESTS

During the EEOC's investigation of a charge, the EEOC may serve the respondent employer with information requests that seek production of documents and data related to the charging party's allegations. Under applicable statutes and regulations, the EEOC may seek "evidence including, but not limited to, books, records, correspondence, or documents" that is relevant

to the charge (*29 C.F.R. § 1601.16 (2012)*). However, the standard of relevance is not especially constraining. In practice, the EEOC may seek "virtually any material *that might cast light on* the allegations against the employer" (*EEOC v. Shell Oil Co., 466 U.S. 54, 68-69 (1984)* (emphasis added)).

Given this broad standard of relevance, the EEOC may request anything from employee handbooks to sensitive personnel files to evidence of internal complaints of discrimination. The EEOC also may request an electronic database that contains a wide variety of information, such as a nationwide roster of employees that specifies their:

- Names.
- Job titles.
- Phone numbers.
- Addresses.
- Known protected class characteristics, such as age, race and gender, among others.
- Compensation.
- Performance ratings.
- Reasons for discharge.

Understandably, many employers are reluctant to produce this type of sensitive information for fear of:

- Prompting the EEOC to expand its investigation beyond the scope of an initial charge.
- Providing what is in essence a roll-call of putative class members.

By all measures, however, an employer served with a broad EEOC information request should open a collaborative dialogue with the assigned EEOC investigator. Taking an unnecessarily adversarial or aggressive approach is likely to cause the EEOC to assume that the employer is hiding damaging documents or data that the EEOC may not hesitate to subpoena (see below *Responding to EEOC Subpoenas*).

LIMITING THE SCOPE OF THE INFORMATION REQUEST

If the EEOC serves an information request on the employer during the investigation, the employer's best strategy usually is to work with the EEOC to limit the scope of the information request. The employer and its counsel should consider collaborative steps, such as:

- Asking for extensions on the suggested document production deadlines, if additional time will permit the employer to obtain and produce a meaningful sample of responsive information.
- Suggesting alternative methods of production, such as:
  - rolling productions;
  - sample productions;
  - invitations to inspect sources that are not easy to produce; and
  - production of information in a format available to the employer, even if not the format requested by the EEOC.
- Explaining to the EEOC investigator why certain information is not available or would be difficult for the employer to produce (see below *Challenges to Unduly Burdensome Requests* and *Challenges to Overly Broad Requests*).

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ASSESSING THE INFORMATION AVAILABLE

If an employer receives an EEOC information request, the employer and its counsel should discuss:

- Whether the employer has all or a portion of the requested information in its possession and what format the information is in.
- How to locate and obtain the requested information that is within the employer's information and storage systems.
- Any specific burdens or costs associated with producing the requested information.
- Alternative sources of information within the employer's records that would:
  - be easier to gather and produce to the EEOC; and
  - provide the information requested by the EEOC.

The employer's counsel may learn valuable information through this due diligence. For example, the employer may have software that can produce a representative sample of responsive information in electronic format, which may be less burdensome for the employer than to produce paper copies of personnel files.

Gathering this information early in the process helps the employer and its counsel determine how to respond to the EEOC's information request. It also will help the employer and its counsel to effectively communicate with the EEOC, both to:

- Narrow the scope of the information sought based on what information is available.
- Establish a credible position with the EEOC (and, if a subpoena enforcement action follows, a court).

In addition, the employer's counsel should review the information available and determine whether the information is either:

- Helpful to the employer, which may give the employer and its counsel ammunition to aid in defending the charge and any subsequent litigation.
- Detrimental to the employer's position, which may tempt the employer to consider resolving the case early in the process before the employer incurs significant attorneys' fees.

COMMUNICATING WITH THE EEOC

After conferring with the employer and reviewing the available information, the employer's counsel should contact the EEOC investigator who issued the information request and discuss what counsel has learned from the due diligence. Depending on the circumstances, the employer's counsel may explain:

- The information that the employer will produce, when it will produce the information and the format in which it will be produced.
- Why certain sources of information are not available.
- Why obtaining and producing certain information would be burdensome, with specific reasons (see below *Challenges to Unduly Burdensome Requests*).
- What alternative sources of information exist, if any.

The employer's counsel should use this information to negotiate limits on the scope of the information request. Once the EEOC investigator understands the issues, the investigator may be willing to consider alternative proposals that will enable the EEOC to complete its investigation without imposing an undue burden or excessive costs on the employer.

The employer's counsel generally should try to engage the investigator in response to the information request before the EEOC issues a subpoena. This is because:

- The decision to issue a subpoena usually means that the EEOC has concluded that the employer is not cooperating and, worse, that the employer may be hiding something.
- Case law on EEOC subpoena enforcement actions is generally favorable to the EEOC and not favorable to employers (see below *Judicial Deference to EEOC Subpoenas*).

As with any negotiation, the employer's counsel should keep copies of all correspondence to memorialize the employer's reasonable efforts to negotiate the scope of the information request. It may become necessary to demonstrate these efforts later to:

- EEOC officials.
- A federal court in a subpoena enforcement action.

If the EEOC investigator does not agree to limit or modify unduly burdensome requests for information, the employer's counsel should consider whether to ask to speak with the investigator's supervisor or others higher up in the EEOC office where the matter is pending. However, the employer's counsel should consider that:

- The investigator may view such a request as an attempt to circumvent the investigator's authority.
- Supervisory officials at the EEOC tend to defer to investigators.

If the employer's counsel is unable to obtain any relief from an unduly burdensome or irrelevant request for information, counsel may consider speaking with EEOC officials in Washington, DC. The starting point for these discussions should be senior officials in the EEOC's Office of Field Programs (OFP), who manage EEOC field investigations. Counsel may also consider whether to appeal to the EEOC's Chair, EEOC Commissioners and the EEOC's General Counsel. However, the EEOC's Chair is typically extremely reluctant to become involved with field investigations, and EEOC Commissioners and the EEOC's General Counsel have no operational authority or control over field investigations. In addition, the employer and its counsel should consider that appealing to these EEOC officials may:

- Antagonize the EEOC investigator and others in the field office because they may view any appeal to Washington, DC as a corrupt attempt at a political "fix" to the dispute.
- The EEOC's Chair and OFP officials typically defer to field staff about the conduct of investigations and requests for information.

RESPONDING TO EEOC SUBPOENAS

The EEOC has broad authority to issue subpoenas that demand the production of information relevant to a charge. As with information requests, the definition of relevant is expansive (see above *Responding to EEOC Information Requests*). The EEOC may issue a subpoena on an employer, for example, if the employer fails to respond adequately to an EEOC information request or if the EEOC believes the employer is hiding documents or data. If an employer fails to respond to a subpoena, the EEOC may bring a subpoena enforcement action in federal court.

If an employer is served with an EEOC subpoena, it may:

- Respond to the subpoena as written.
- Petition to revoke or modify the subpoena, in certain cases.
- Partially respond or not respond to the subpoena.
- Challenge the subpoena by objecting, refusing to produce some or all of the information demanded by the subpoena and defending against any EEOC subpoena enforcement action.

RESPONDING TO SUBPOENA AS WRITTEN

An employer may respond to an EEOC subpoena as written and produce all of the requested information. This approach is typically the easiest and least costly in the short term, and may suit an employer's objectives, particularly if the employer both:

- Cannot afford legal fees to petition to revoke or modify the subpoena or otherwise challenge it at this stage.
- Is confident the information requested must be produced given the EEOC's broad subpoena power.

If the employer chooses to respond to the subpoena as written, the employer's counsel should review the documents and data being produced to understand any potential pitfalls or negative consequences, such as information contained in the production that may encourage the EEOC to broaden its investigation. The employer's counsel should also consider whether any of the information to be produced includes commercially sensitive or otherwise private or confidential information. If this information is included, counsel may request that the EEOC provide the employer with notice if anyone ever requests the information by means of the Freedom of Information Act (FOIA). This request will enable the employer to object to production of the information in response to future FOIA requests.

PETITIONING TO REVOKE OR MODIFY

Instead of responding to the subpoena, the employer may challenge the subpoena (see below *Deciding Whether to Challenge a Subpoena*). EEOC regulations authorize employers to file petitions to revoke or modify subpoenas when the EEOC issued the subpoena under any of the following statutes:

- Title VII of the Civil Rights Act of 1964 (Title VII) (for more information, search Discrimination under Title VII: Basics on our website).
- The Americans with Disabilities Act (ADA) (for more information, search Disability Discrimination under the ADA on our website).
- The Genetic Information Nondiscrimination Act (GINA) (for more information, search Discrimination: Overview on our website).

Importantly, the Equal Pay Act (EPA) and the Age Discrimination in Employment Act (ADEA) do not authorize employers to petition to revoke or modify a subpoena (for more information on the EPA and the ADEA, search Discrimination: Overview and Age Discrimination on our website).

If the employer chooses to challenge a subpoena issued under Title VII, the ADA or GINA, it must within five days of service of the subpoena petition the issuing EEOC office to revoke or modify the scope of the subpoena (*29 C.F.R. § 1601.16(b)(1) (2012)*). In the petition, the employer must identify each portion of the subpoena it does not intend to comply with and the basis for noncompliance (*29 C.F.R. § 1601.16(b)(2) (2012)*). In support of its petition, the employer should offer evidence of its reasonable efforts to:

- Explain the problems posed by the subpoena to the EEOC investigator.
- Narrow the scope of the subpoena directly with the EEOC investigator.

Within eight days of receiving the petition "or as soon as practicable," the EEOC District Director or General Counsel must:

- Decide whether to revoke or modify the petition.
- State the reasons supporting the decision.
- Submit the proposed determination to the Commission for final review.

(*29 C.F.R. § 1601.16(b)(2) (2012)*.)

Even if the employer files a petition to revoke or modify a subpoena to preserve its rights, the employer can continue to negotiate with the EEOC after the date of submission to try to reach an agreement about the production.

Although the case law on EEOC subpoena enforcement actions is generally not favorable to employers (see below *Judicial Deference to EEOC Subpoenas*), there are specific categories of requested information that may be worth an employer's effort to petition for modification. This includes information:

- That would be unduly burdensome to produce (see below *Challenges to Unduly Burdensome Requests*).
- About protected classes other than those protected classes at issue in the underlying charge (see below *Challenges to Overly Broad Requests*).
- That is legitimately protected by the attorney-client privilege and/or the work product doctrine.

>> For information on the attorney-client privilege and work product doctrine, search Attorney-Client Privilege and Work Product Doctrine Toolkit on our website.

If the employer fails to either respond to the subpoena or file a petition to revoke or modify the subpoena, the EEOC may seek to enforce the subpoena in federal court. However, no EEOC administrative subpoena can be enforced without an order by a federal court (*29 C.F.R. § 1601.16(c)-(d) (2012)*).

PARTIALLY RESPONDING OR NOT RESPONDING

An employer may decline to respond to an EEOC subpoena or may comply only partially with the subpoena. In that event, the EEOC may seek enforcement of the entire subpoena by way of a subpoena enforcement action in federal court (*29 C.F.R. § 1601.16(c)-(d) (2012)*).

DECIDING WHETHER TO CHALLENGE A SUBPOENA

Because the EEOC has very broad subpoena powers, an employer's decision to challenge an EEOC subpoena should

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not be taken lightly. The EEOC often aggressively defends its decision to serve a subpoena, and EEOC litigators often eagerly pursue subpoena enforcement in federal courts.

The EEOC also may publicize a subpoena enforcement action and thereby make public what is otherwise a confidential investigation. Given judicial deference typically afforded to EEOC subpoenas, the employer may not want to incur significant attorneys' fees at this early investigative stage unless it has some other strategic objective in mind (for example, delaying production of the information demanded by the subpoena).

An employer that is deciding whether to challenge an EEOC subpoena and its counsel should think strategically about how to persuade the EEOC to consider the employer's position. This may require the employer to go beyond the typical objections, such as that the requests are unduly burdensome, overly broad and not reasonably calculated to lead to the discovery of admissible evidence. For example, if the subpoena would require the employer to spend a lot of time and resources to gather and produce the requested information, the employer and its counsel may first need to determine why the costs are so burdensome and then explain to the EEOC investigator the specific costs and nature of the problem.

In assessing how burdensome it will be to produce information demanded by a subpoena, the employer and its counsel should answer the following questions:

- Does the subpoena seek information in a format that does not currently exist?
- Does the subpoena seek information about geographic locations that have nothing to do with the charging party's allegations?
- Does the subpoena seek information about employees in other protected classes?
- Is the information maintained in hard copy or electronic format?
- Do the hard copies still exist in an accessible format?
- Do the electronic copies exist in a format that can be readily accessed?
- Does the subpoena seek information that is not readily available and will be costly to retrieve, review and produce?

When strategically deciding whether to challenge a subpoena, the employer and its counsel should also consider:

- The likelihood of success.
- The cost of challenging the subpoena.
- Possible publicity that will occur because a subpoena enforcement action is a public proceeding, and the EEOC may issue and post on its website a press release about the action.

JUDICIAL DEFERENCE TO EEOC SUBPOENAS

The standard of relevance that governs EEOC subpoenas is the same broad standard that applies to information requests (see above *Responding to EEOC Information Requests*). Because the standard is so broad, the EEOC has won many recent subpoena enforcement actions. In addition, when the EEOC has lost at the district court level, the EEOC has typically appealed and prevailed in the appellate courts (see, for example, *EEOC v. Kronos Inc., 694 F.3d 351 (3d Cir. 2012)*, *EEOC v. Konica Minolta Bus. Solutions U.S.A., Inc., 639 F.3d 366 (7th Cir. 2011)*, *EEOC v. Schwan's Home Serv., 644 F.3d 742 (8th Cir. 2011)*, *EEOC v. Kronos Inc., 620 F.3d 287 (3d Cir. 2010)* and *EEOC v. United Parcel Serv., Inc., 587 F.3d 136 (2d Cir. 2009)*; but see *EEOC v. Burlington N. & Santa Fe R.R., 669 F.3d 1154 (10th Cir. 2012)*).

CHALLENGES TO UNDULY BURDENSOME REQUESTS

Before asserting undue burden as a boilerplate objection to an EEOC request for information or a subpoena, employers should consider how a court is likely to respond. Given the EEOC's broad subpoena power, courts generally are hesitant to find that an EEOC subpoena is unduly burdensome unless the employer can demonstrate that compliance would significantly disrupt the employer's operations. Courts consider a variety of factors, such as:

- The specific burden on the employer, including the expense or number of man hours required to comply with the subpoena.
- The significance of the burden on the employer in light of the employer's size and resources.

To increase the likelihood of prevailing on an undue burden argument, the employer and its counsel should paint an accurate and specific picture of the burden on the employer. The following are examples of cases where an employer used an undue burden argument in response to an EEOC information request.

Challenge Detailing Specific Burden

In *EEOC v. Quantum Foods*, the EEOC sought information related to hiring and recruiting practices for facilities other

BEST PRACTICES

Employers and their counsel should devise a long-term strategy for addressing EEOC systemic discrimination investigations and litigation. Although each case is different, best practices are identified below.

- **Discuss an early settlement, if appropriate.** Based on the specific facts of the case, consider discussing an early settlement with the EEOC investigator before the EEOC issues a determination about the charge.
- **Cooperate with the EEOC.** It is important to cooperate with the EEOC during the investigation and try to persuade the investigator that the charge lacks merit, or to persuade the investigator that the EEOC should compromise or modify its demands on the employer, particularly if:
  - the employer has reached its limit as to the information it is willing or able to share with the EEOC; or
  - the EEOC may be exceeding its authority.
- **Maintain a clear written record.** It is important to record any excesses by the EEOC and, correspondingly, the employer's reasonable efforts to cooperate. The employer may be able to use this record if it:
  - petitions the Commission to revoke or modify a subpoena;
  - responds to an EEOC subpoena enforcement action; or
  - is named as a defendant in a lawsuit brought against it by the EEOC.
- **Refrain from using "scorched earth" strategies.** A scorched earth strategy, where an employer insists on destroying all avenues of reasonable negotiation with the EEOC and aggressively "dares" the EEOC to petition for and defend a subpoena enforcement action is not productive. These strategies usually do not accomplish anything other than antagonizing the EEOC and motivating the EEOC to work harder to conduct an investigation and to assemble evidence against an employer. Instead, work collaboratively with the investigator to communicate any concerns and attempt to work out compromises.
- **Consider whether to resist unduly burdensome or overly broad demands.** If the EEOC's demands are unduly burdensome or overly broad, consider the costs and benefits of resisting the demands, including:
  - the costs in time and money;
  - the employer's chances of success;
  - the employer's ultimate strategy in the case; and
  - how the employer's actions may impact a review of the record by the EEOC's attorneys, Commissioners and federal judges if the dispute escalates.

than the facility where the charging party worked (*No. 09 C 7741, 2010 WL 1693054 (N.D. Ill. Apr. 26, 2010)*). To establish an undue burden, the employer submitted a declaration setting out specific estimates of the number of man hours needed to compile, review and produce the requested information, including the need to use a forklift operator to locate and retrieve boxes of materials from a storage facility.

Among other things, the US District Court for the Northern District of Illinois limited the scope of the subpoena to the facility where the employee worked. The District Court found that requests that sought information from other facilities had no connection to the challenged action, the charging party's discharge. In addition, the District Court found that information that would require 871 man hours to produce could be an undue burden on the employer. However, the District Court did not resolve the issue because there was contradictory evidence about the 871-hour estimate and the issues were later resolved out of court.

Challenge Without Supporting Evidence

EEOC v. Aaron's Inc. involved a race discrimination charge concerning the employer's criminal background check policy (*779 F. Supp. 2d 754 (N.D. Ill. 2011)*). The EEOC sought production of an electronic database from the employer. The employer argued that the subpoena was unduly burdensome because it did not have an existing electronic database and gathering the information from warehouses would result in "exorbitant expense."

The US District Court for the Northern District of Illinois rejected this argument and determined that the employer did not meet the "difficult burden of showing that 'compliance would threaten the normal operation of business.'" The District Court reasoned that the EEOC already had agreed to accept paper copies of employee applications and background checks in lieu of an electronic database and the employer provided no supporting evidence of the claimed exorbitant expense.

No Undue Burden Based on Size of Employer

In *EEOC v. Sears, Roebuck and Co.*, the US District Court for the District of Colorado rejected the employer's undue burden argument because the employer was an "expansive organization," and the subpoena would not "seriously disrupt or hinder" its operations following the modifications made to the subpoena (*No. 10-cv-00288-WDM-KMT, 2010 WL 2692169 (D. Colo. June 8, 2010)*). In this case, the EEOC requested employee race and national origin data related to its use of an arrests and convictions reporting policy that had been the subject of a race discrimination charge.

Although the District Court rejected the undue burden argument, it denied the request to subpoena any national origin data because:

- The charging party had not made any allegations concerning her national origin.
- The charging party's use of the word "Black" in the charge did not alert the EEOC that the charging party was asserting a national origin claim.

CHALLENGES TO OVERLY BROAD REQUESTS

Similar to objections based on undue burden, courts are hesitant to limit the scope of an EEOC subpoena based on a boilerplate objection that the subpoena is overly broad. For example, courts have enforced EEOC subpoenas over objections that they were overly broad where the subpoenas sought information about alleged systemic gender discrimination and nationwide information about failure to accommodate religion. However, in some cases employers have successfully argued to limit the scope of EEOC subpoenas.

Systemic Gender Discrimination

In *EEOC v. Schwan's Home Service*, an individual filed a charge of gender discrimination, harassment and retaliation after she participated in a management training course, but was not hired for a management position (*644 F.3d 742 (8th Cir. 2011)*). The EEOC sought information related to all other participants in the management training course for a two-year period, including a gender breakdown of the course graduates and the employer's managers.

The US Court of Appeals for the Eighth Circuit ordered enforcement of the subpoena and explained that the EEOC's investigation of the individual charge revealed potential systemic discrimination, which justified the EEOC's broad subpoena.

Pattern or Practice of Religious Discrimination

EEOC v. United Parcel Serv., Inc. involved an EEOC investigation that arose from two charges filed by two Muslim men who alleged that the employer failed to accommodate their Islamic religion. Specifically, the charges alleged that the employer had refused to staff either charging party as a full-time driver because both men refused to shave their facial hair for religious

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reasons. The employer asserted that employee facial hair was in derogation of its appearance guidelines for positions that have contact with the public.

The EEOC issued a subpoena that demanded production of nationwide information about:

- The employer's appearance guidelines.
- Job applicants denied employment based on a refusal to conform to appearance guidelines.
- Employees who had requested accommodations.
- Employees who were terminated based on the appearance guidelines.

(*EEOC v. United Parcel Serv., Inc., 587 F.3d 136 (2d Cir. 2009)*.)

The US Court of Appeals for the Second Circuit required the production of nationwide information. The Second Circuit reasoned that one of the charges alleged a pattern or practice of discrimination. The Second Circuit further reasoned that the employer's arguments on the merits did not prevent the EEOC from obtaining the information to investigate the EEOC charges.

Limiting the Scope of EEOC Subpoenas

Some employers have been successful in limiting the scope of EEOC subpoenas, particularly when a subpoena seeks information about a protected class not at issue in the underlying EEOC charge. For example, in *EEOC v. Kronos Inc.*, the charging party filed a charge alleging disability-related disparate treatment based on the employer's use of a personality assessment test in its hiring process.

The employer had purchased the test from a third-party vendor, and the EEOC issued a third-party administrative subpoena on the vendor to obtain documents and data relating to the test. Although the US Court of Appeals for the Third Circuit enforced the subpoena with respect to certain information, it declined to enforce the subpoena with respect to the EEOC's investigation of race discrimination because the charging party had only alleged disability discrimination. (*EEOC v. Kronos Inc., 620 F.3d 287 (3d Cir. 2010)*.)

Following the Third Circuit's 2010 decision, the US District Court for the Western District of Pennsylvania modified its order to comply with the Third Circuit's mandate by limiting certain document requests to disability-related issues. Notably, on a second appeal of the subpoena enforcement action by the EEOC, the Third Circuit declined to enforce the disability-related limitation applied by the District Court. The Third Circuit clarified that although the requests could "not specifically target documents related to race," any race-related information revealed in the broader document production could still be considered by the EEOC in its investigation and could form the basis of an EEOC Commissioner's charge, making the explicit disability-related limitation too narrow for enforcement. (*EEOC v. Kronos Inc., 694 F.3d 351 (3d Cir. 2012)*.)

In addition, in *EEOC v. Sears, Roebuck and Co.*, the US District Court for the District of Colorado limited the EEOC's requests for national origin information, which the District Court found could not be gleaned from the use of the word "race" in the underlying charge (*No. 10-cv-00288-WDM-KMT, 2010 WL 2692169 (D. Colo. June 8, 2010)*). The District Court also observed that the charging party made no allegations based on her birthplace such that the agency could not justify its request for national origin information.

COSTS OF CHALLENGING A SUBPOENA

When determining whether to challenge an EEOC subpoena, employers and their counsel should also consider the costs. Costs can include:

- Attorneys' fees.
- Negative publicity of a subpoena enforcement action, when the underlying charge investigation would otherwise have remained confidential.

Even if an employer incurs the initial costs and prevails in the district court, the EEOC usually will not hesitate to appeal to the relevant US Court of Appeals for enforcement of the subpoena. To date, the majority of appellate courts have enforced EEOC subpoenas, even when the district court did not. For that reason, the employer would likely have to produce the sought-after information at a later date.

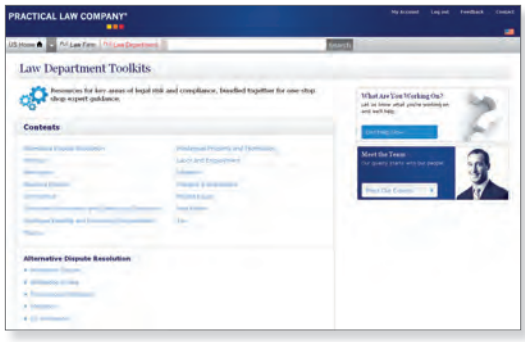
In addition, if the employer succeeds in the appellate court, the EEOC may either:

- File an amended charge to cover the scope of the sought-after information.
- Issue a Commissioner's charge, thereby resuscitating the entire investigative process.

PREVENTING AND RESPONDING TO AN EEOC CHARGE TOOLKIT

The Preventing and Responding to an EEOC Charge Toolkit available on practicallaw.com offers a collection of resources designed to help employers prevent and respond to charges of discrimination, harassment and retaliation filed with the EEOC. It features a range of continuously maintained resources, including:

- Responding to Equal Employment Opportunity Commission Charges
- Handling Employment-Related Internal Investigations
- Discrimination under Title VII: Basics
- Equal Employment Opportunity Commission Position Statement: Template Clauses
- Equal Employment Opportunity Policy
- EEOC Record Retention Schedule



THE EEOC'S "SUE FIRST, ASK QUESTIONS LATER" CASES

With the use of broad information requests and subpoenas during the investigative process to uncover potential theories of systemic discrimination litigation, the EEOC has been litigating cases in a way that some courts have coined a "sue first, ask questions later" strategy. This phrase describes the EEOC's practice of filing a systemic discrimination lawsuit on behalf of a charging party without any evidence about unidentified putative class members, and using discovery to identify and investigate claims by these class members.

This strategy presents both legal and practical problems that courts are currently grappling with, such as:

- Whether the EEOC can bring class and pattern or practice claims under either or both:
  - Section 706 of Title VII, which generally governs individual charges of discrimination, harassment and retaliation, including the EEOC's obligation to conciliate certain claims, and EEOC court cases relating to those charges (*42 U.S.C. § 2000e-5 (2012)*); and
  - Section 707 of Title VII, which explicitly authorizes the EEOC to file lawsuits alleging pattern or practice violations of Title VII (*42 U.S.C. § 2000e-6 (2012)*).
- What presuit obligations the EEOC must comply with before filing a lawsuit with allegations of class and pattern or practice claims, including whether the EEOC must:
  - identify all putative class members before filing the lawsuit;
  - investigate the claims of all putative class members;
  - issue reasonable cause determinations about all putative class members; and
  - attempt to conciliate those claims before filing a lawsuit.

While some courts have permitted the EEOC's strategy, other courts have pushed back and dismissed the EEOC's claims after the courts found that the EEOC did not identify, investigate, issue reasonable cause determinations and conciliate about class members. This has resulted in a circuit split about the legitimacy of this strategy. Because there is a circuit split about whether the EEOC is empowered to sue first and ask questions later, employers in different jurisdictions may be subject to different presuit standards until the US Supreme Court resolves the issue.

EEOC v. CRST Van Expedited, Inc.

The US Court of Appeals for the Eighth Circuit did not permit the EEOC to use the sue first, ask questions later strategy. In *EEOC v. CRST Van Expedited, Inc.*, the EEOC filed a class action sex discrimination complaint under Section 706 of Title VII and alleged that the employer subjected one charging party and similarly-situated female employees to a hostile work environment (*679 F.3d 657 (8th Cir. 2012)*). The EEOC then spent several years during discovery trying to identify the class members. The US District Court for the Northern District of Iowa dismissed the EEOC's claims on various grounds, including that the EEOC failed to investigate and conciliate on behalf of 67 of the putative class members because the EEOC had not identified them until after it had filed the lawsuit.

The Eighth Circuit affirmed most of the District Court's findings. The Eighth Circuit explained in part that although the EEOC can seek relief on behalf of individuals in addition to the charging parties, it has to discover those individuals and the alleged violations during the course of its investigation, and that it cannot use discovery in the related lawsuit as a fishing expedition to discover more class members and violations.

Serrano v. Cintas Corp.

In stark contrast to the Eighth Circuit, the US Court of Appeals for the Sixth Circuit permitted the EEOC to sue first, ask questions later in a pattern or practice gender discrimination case. In *Serrano v. Cintas Corp.*, the EEOC intervened and asserted claims of pattern or practice gender discrimination

on behalf of women who the EEOC first identified after it intervened in the lawsuit (*699 F.3d 884 (6th Cir. 2012)*).

The US District Court for the Eastern District of Michigan rejected the EEOC's attempt to litigate a pattern or practice claim on behalf of the class because it had only filed suit under Section 706 of Title VII. Among other things, the District Court dismissed the EEOC's claims as to 13 class members because the EEOC had not satisfied its presuit obligations under Section 706 with respect to these class members by:

- Investigating their claims.
- Finding reasonable cause of discrimination.
- Conciliating their claims.

The District Court also sanctioned the EEOC for its pursuit of a "'reckless 'sue first, ask questions later' strategy'" (*EEOC v. Cintas Corp., Nos. 04–40132, 06–12311, 2011 WL 3359622 (E.D. Mich. Aug. 4, 2011)*).

The Sixth Circuit reversed the District Court, finding that the EEOC could proceed on a pattern or practice claim under Section 706 because Section 706 does not exclude these claims. Among other things, the Sixth Circuit:

- Reversed the District Court's dismissal of the 13 individual claimants' cases on summary judgment because the claimants were covered by the EEOC's pattern or practice theory.
- Found that the EEOC had adequately conciliated the pattern or practice claims because its proposed conciliation agreement to the employer identified that it was seeking "class-based remedies" on behalf of similarly-situated female applicants, which the Sixth Circuit determined provided sufficient presuit notice to the employer of the pattern or practice claims.
- Noted that an EEOC charge only needs to be filed prior to a Section 706 action, and does not need to be filed in advance of the EEOC commencing a Section 707 action, effectively removing presuit investigative and conciliation obligations from Section 707 lawsuits.

DISTRICT COURT CASES

In circuits that have not yet addressed the issues related to a sue first, ask questions later strategy, district courts are similarly split. Some district courts have reduced the scope of the EEOC's class claims when the EEOC did not provide the employer with presuit notice about the scope of the class, such as in:

- ***EEOC v. Dillard's Inc.*** In this case, the US District Court for the Southern District of California dismissed the EEOC's nationwide disability discrimination charges against a department store because the EEOC failed to notify the employer during the conciliation process that it planned to file a lawsuit covering a nationwide class of employees. The District Court limited the lawsuit to employees who worked at the previously identified store location. (*EEOC v. Dillard's, Inc., No. 08 cv 1780 IEG (PCL), 2012 WL 440887 (S.D. Cal. Feb. 9, 2012)*.)
- ***EEOC v. United Parcel Serv., Inc.*** In this case, the EEOC filed a complaint concerning a 12-month disability leave policy on behalf of two named plaintiffs and an unidentified class of employees. The US District Court for the Northern District of Illinois initially determined that the EEOC could only pursue claims on behalf of the two named plaintiffs and dismissed the EEOC's class claim on behalf of all unidentified class members. (*EEOC v. United Parcel Serv., Inc., No. 09-cv-5291, 2011 WL 4538450 (N.D. Ill. Sept. 28, 2011)*.) The District Court then reversed itself and concluded that the EEOC had no obligation to identify unnamed class members in its complaint and that the EEOC's class claim could proceed (*EEOC v. United Parcel Serv., Inc., No 09-cv-5291, 2013 WL 140604, *7 (N.D. Ill. Jan. 11, 2013)*).

In contrast, other district courts have permitted the EEOC to broaden its theories of liability in a case. For example, in *EEOC v. O'Reilly Automotive Inc.*, the EEOC had received three separate charges against an employer:

- The first charge alleged wage discrimination.
- The second charge alleged a racially hostile work environment.
- The third charge alleged retaliation.

(*No. H-082429, 2010 WL 5391183 (S.D. Tex. Dec. 14, 2010)*.)

The EEOC notified the employer that the investigation had been expanded to include promotion claims, even though none of the charging parties had alleged a promotion claim. The EEOC also sent a conciliation demand to the employer seeking payments to:

- The three charging parties.
- An unidentified group of individuals who purportedly were denied promotions.

The employer rejected the conciliation, prompting the EEOC to file a lawsuit alleging both individual disparate treatment claims and a pattern or practice theory of discrimination. The US District Court for the Southern District of Texas found that the EEOC provided adequate notice that it was expanding its investigation to include promotion claims and that the investigation revealed evidence of a racially hostile work environment. The District Court rejected the employer's assertion that the EEOC's pattern or practice theory was outside the scope of the initial charges.