



2019 EEOC Update

Association of Corporate Counsel
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The **EEOC** is the federal agency responsible for enforcing most of the federal laws prohibiting employment discrimination, including harassment, retaliation, and request for accommodation, it is authorized to:

- Issue regulations.
- Investigate employment discrimination charges.
- Attempt to settle employment discrimination charges.
- File employment discrimination lawsuits.
- Engage in outreach and educational efforts to prevent employment discrimination.

The **EEOC** is comprised of five commissioners and a general counsel appointed by the President and confirmed by the Senate. The agency is based in Washington, DC with 53 field offices throughout the US. It also partners with the state and local equivalents of the **EEOC**.

Exhaustion of Administrative Remedies Requirement

Statutes enforced by the **EEOC** require claimants to exhaust their administrative remedies before filing a lawsuit. Exhausting administrative remedies means that the individual wishing to sue must first file a charge with the appropriate administrative agency and wait for that charge to be adjudicated or released before proceeding to court. Statutes enforced by the **EEOC** that include an exhaustion of administrative remedies requirement are:

- **Title VII of the Civil Rights Act of 1964** (Title VII) (including amendments by the **Pregnancy Discrimination Act** (PDA) and the Civil Rights Act of 1991).
- Title I of the **American with Disabilities Act** (ADA) (including amendments by the **Americans with Disabilities Act Amendments Act** (ADAAA), the Civil Rights Act of 1991).
- The **Age Discrimination in Employment Act** (ADEA).
- The **Genetic Information Nondiscrimination Act** (GINA).

The **Equal Pay Act** (EPA) is also enforced by the **EEOC**. However, while EPA claims may be brought before the **EEOC**, exhaustion of administrative remedies is not required.

The Administrative Process: How It Works

- What is a “Charge”
- How a Charge is Filed
- Time Limit
- Dual Filed Charges
- Early Resolution of the Dispute

Employer Initial Steps on Receipt of a Charge

- Review the Charge
- Determine Timeliness of Charge
- Determine Basis for Charge and Scope of Investigation
- Determine Person Responsible for Responding to the Charge

Employer Initial Steps on Receipt of a Charge cont.

- Notification of Policy Prohibiting Retaliation
- Initial Contact with Agency Investigator
- Document All Contact with Agency
- Agency Requests for Documents
- Litigation Hold
- Investigation of the Facts Underlying the Charge

Goals of the Investigation

- Discover the pertinent facts that support or rebut the allegations of discrimination, harassment, or retaliation.
- Document the company's prompt corrective action if the charging party made an internal complaint of discrimination or other misconduct.
- Determine whether the charging party and other similarly situated employees who have engaged in comparable misconduct or violations of work rules have been treated in a consistent manner.
- Develop written statements or other proof before employees leave the company and possibly become unavailable to provide necessary information.
- Analyze the company's potential risks in any administrative proceeding or litigation related to the charging party's allegations.

Cont'd...

Document Review

- Charging Party's Personnel File
- Charging Party's Employment History
- Internal Complaint Files
- Personnel File of the Accused and Other Witnesses
- Comparative Data
- Employer Policies

Preparing the Position Statement

- Introductory Material
- Charging Party's Employment History
- Explain Legitimate, Nondiscriminatory Reason for the Disputed Decision
- Use of Comparative Data
- Response to Each Allegation in the Charge
- Conclusion

Responding to the Administrative Agency's Request for Documents or Request for Additional Information

Agencies often request supplemental data from respondent employers. Although the agency may indicate that it needs information to close the case, each requested document should be considered on its own merits and in light of the possibility of later litigation. Although agency investigators may threaten to obtain **subpoenas**, often compromises can be negotiated with the agency investigator. Employer representatives should always remain cordial with the agency investigator.

Participation in a Fact-Finding Conference

- Before attending any fact-finding conference, all witnesses should be prepared as though they were participating in a court proceeding or **deposition**.
- Remind employees that the company's attorney does not represent non-supervisor employees.
- Care should be used when preparing non-supervisory persons for a fact-finding conference.
- The preparation process of a non-supervisory witness may not be protected from discovery in later litigation.

Agency Requests for On-Site Interviews

- A request for on-site interviews is an indication that the **EEOC** has taken a particular interest in the charge.
- When the agency investigator requests an on-site interview, the employer should remain cordial and responsive.
- If possible, ask the investigator to give you the names of the current employees or supervisors that they need to interview.

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- The employer is entitled to have counsel present for on-site interviews with supervisory employees.
 - The employer is not entitled to have counsel present for non-supervisory employee interviews with the agency investigator but, depending on the agency and investigator, this accommodation may be permitted.

Agency Determinations

- “Reasonable Cause”.
- “Dismissal and Notice of Rights” letter or statement.
- Possible legal action.

Conciliation

- Require the employer to pay a monetary settlement, post a remedial notice, and provide employee training.
- Allow the EEOC to monitor the employer's compliance with the conciliation agreement by inspecting and copying records related to the employer's employment practices.

2019 EEOC Update

Wellness Programs

- EEOC has not yet issued proposed rules regarding wellness programs following the decision in *AARP v. EEOC*, 292 F. Supp. 3d 238 which vacated incentive limits established by the EEOC which were to take effect January 1, 2019.
- Indications that a Notice of Proposed Rulemaking will be issued in December, 2019.

Health Insurance Portability and Accountability Act & Affordable Care Act

- Wellness programs are regulated in part by HIPAA, as amended by the ACA, as well as by HIPAA's implementing regulations.
- HIPAA prohibits health plans and insurers from discriminating on the basis of "any health status related factor."
- However, covered entities may offer "premium discounts or rebates" on a plan participant's copayments or deductibles in return for that individual's compliance with a wellness program.
- 29 U.S.C. § 1182(b)(2)(B); 26 U.S.C. § 9802(b); 42 U.S.C. § 300gg-4(b).

Wellness Programs: Medical Information Collection

- Wellness programs typically involve the collection of medical information.
 - May be information regarding a disability; and/or
 - Genetic information.

ADA Limits Collection of Medical Information

- A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.
 - 42 U.S.C. §12112(d)(4)(A); 29 C.F.R. §1630.14(c)

ADA Exception Which Allows Collection

- The ADA provides that an employer may conduct medical examinations and collect employee medical history as part of an “employee health program,” as long as the employee’s participation in the program is “voluntary”.
 - 42 U.S.C. § 12112(d)(4)(B).
- “Voluntary” is not defined by the ADA.

Genetic Information Nondiscrimination Act

- GINA generally restricts the acquisition and disclosure of genetic information and prohibits the use of genetic information in making employment decisions, including discrimination against an employee or applicant because of genetic information.

- Applies to employers with 15 or more employees.

GINA Limits Collection of Genetic Information

- GINA prohibits employers from requesting, requiring, or purchasing “genetic information” from employees or their family members.
 - 42 U.S.C. § 2000ff-1(b).
- Genetic information includes an individual’s genetic tests, the genetic tests of family members such as children and spouses, and the manifestation of a disease or disorder of a family member.
 - 42 U.S.C. § 2000ff(4)(A).

GINA Exception Which Allows Collection

- Employers are permitted to collect this information as part of a wellness program, as long as the employee's provision of the information is voluntary.
 - 42 U.S.C. §§ 2000ff-1(b)(2)(A)–(B).
- “Voluntary” is not defined by GINA.

Equal Employment Opportunity Commission

- EEOC enforces the provisions of the ADA and GINA.
- For that reason, wellness programs fall within the purview of the EEOC.

EEOC & The Definition of “Voluntary”

- Prior to EEOC regulations, employer uncertainty as to whether the “voluntary” provisions of the ADA and GINA permit the use of incentives in those wellness programs that implicate ADA or GINA protected information.
- EEOC originally took the position that a wellness program was not “voluntary” if the receipt of incentives were conditioned on the employee’s disclosure of ADA or GINA protected information.
 - EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations, No. 915.002 (July 27, 2000)

EEOC & The Definition of Voluntary (continued)

- EEOC promulgated new rules reversing this position in 2016.
- 2016 ADA rule: the use of a penalty or incentive of up to 30% of the cost of self-only coverage will not render “involuntary” a wellness program that seeks the disclosure of ADA protected information. 81 Fed. Reg. at 31,133–34.
- 2016 GINA rule: permits employer sponsored wellness programs to offer incentives of up to 30% of the cost of self-only coverage for disclosure of information about a spouse’s manifestation of disease or disorder which falls within the definition of the employee’s “genetic information” under GINA. 81 Fed. Reg. at 31,144.

Wellness Programs Subject to the ADA & GINA

- Until new rules are issued, it is difficult for employers with wellness programs to predict whether incentives or penalties requiring disclosure of medical information will be accepted by the EEOC.
- Programs with medical inquiries and/or medical exams run the risk of violating provisions of the ADA and GINA. The ADA and GINA limit an employer's ability to collect employee medical information unless "voluntary."

Sexual Harassment

- In FY 2018, the EEOC filed 66 lawsuits challenging workplace harassment, 41 of which alleged sexual harassment. This is more than a 50 percent increase in lawsuits challenging sexual harassment over FY 2017.
- For charges alleging harassment, EEOC announced reasonable cause findings increased by 23.6 percent to nearly 1,200 in FY 2018.
- EEOC announced obtaining nearly \$70 million for victims of sexual harassment through administrative enforcement and litigation in FY 2018, up from \$47.5 million in FY 2017.
- EEOC.gov: What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment

Sexual Harassment (continued)

- The law is the same, but prudent employers will:
 - Review and update policies;
 - Provide periodic training to management and staff; and
 - Routinely make clear to employees that the company has zero tolerance for behavior that violates anti-harassment policies.
 - Staff meetings;
 - Newsletters;
 - Letters from the president.

EEO-1 Pay Data Collection

- Earlier this year, a federal judge ordered the EEOC to collect employee compensation data, reinstating a requirement that was put in place by the Obama administration.
- All employers with 100 or more employees including federal contractors with 100 or more employees have until September 30, 2019 to submit Component 2 of the EEO-1 Form.

EEO-1 Pay Data Collection

- This includes 2017 and 2018 calendar year pay data showing what employers paid to employees of different genders, races and ethnicities.
- Compliance with the September 30, 2019 deadline is still required despite a notice of appeal being filed by the United States Department of Justice in the subject litigation.

New Priority in Strategic Plan for FY2018-2022

- EEOC will focus on addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern, or South Asia descent.
- This focus will be on protecting members of these groups from backlash following tragic events in the United States and the rest of the world.

New Priorities: Strategic Plan for FY2018-2022 (continued)

- EEOC will work to clarify the application of anti-discrimination laws as employment relationships evolve including temporary workers, staffing agencies, independent contractors, and gig economy businesses (short-term contracts or freelance work as opposed to permanent jobs).
- This continues to be an important initiative to other federal agencies and state agencies.

ADA Initiative Revised

- ADA charges have been aggressively pursued for the last several years.
- In the FY2018-2022 Strategic Plan, the ADA priorities are more narrow and focus on qualification standards and inflexible leave policies that discriminate against individuals with disabilities.

ADA Initiative Revised

June 5, 2018 \$3.5 million settlement and consent decree entered in *EEOC v. Nevada Restaurant Services Inc.* is a recent EEOC victory in its campaign to target employer “maximum-leave” and “100-percent-healed” policies.

Access to the Legal System

- EEOC will focus on challenging practices that the EEOC perceives to limit employees' substantive rights or impede the EEOC's investigative or enforcement efforts.
- This includes waivers, releases of claims and mandatory arbitration provisions that the EEOC determines to be overly broad.

ADA Interactive Process

Several recent ADA lawsuits filed by the EEOC are based on allegations that employers did not engage in the interactive process.

- EEOC sued Union Pacific Railroad Company claiming an ADA violation by refusing to return an employee who once had a brain tumor to work as a custodian. According to the EEOC's lawsuit, Union Pacific imposed unlawful restrictions on the employee and then used those restrictions to justify its refusal to allow the employee to return to work as a custodian, a position Union Pacific claimed is "safety-critical." EEOC alleged that Union Pacific did not assess the employee individually and instituted blanket restrictions out of unfounded fears that the employee would suffer from sudden incapacitation due to seizures. EEOC also alleged that Union Pacific ignored the employee's own doctors' assessments that the employee was not at risk for sudden incapacitation and evidence that the employee fully recovered and had never had a seizure post-hospitalization.

ADA Interactive Process (cont.)

- EEOC sued Carefree of Colorado, which manufactures and sells RV awnings, and is alleged by the EEOC to have violated the ADA. According to the EEOC's suit, Carefree refused to hire an applicant for two open positions, assembler and packer. The applicant, who is deaf, had previous manufacturing experience and was qualified for both positions, per the EEOC. Carefree refused to hire the applicant after expressing concerns her disability could be a "challenge" and present "safety issues."

Victims of Domestic or Dating Violence & the EEOC

Victims of domestic and dating violence are not a protected class under federal EEO laws. However, the EEOC has taken the position that, under the right circumstances, such individuals may be members of other classes protected by such laws.

EEOC Examples:

- Title VII: An employer terminates an employee after learning she has been subjected to domestic violence, saying he fears the potential "drama battered women bring to the workplace."
- ADA: An employer searches an applicant's name online and learns that she was a complaining witness in a rape prosecution and received counseling for depression. The employer decides not to hire her based on a concern that she may require future time off for continuing symptoms or further treatment of depression.

Q & A - Thank you for your time and attention



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