THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT COMPLIANCE

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Navigating the Equal Employment Opportunity Commission's Strategic Enforcement Compliance Policies

The Equal Employment Opportunity Commission ("EEOC") has been more than willing to aggressively pursue anti-discrimination laws. As part of its new found appetite for litigation, the EEOC has developed a strategic plan for the years 2012-2016 which outlines six (6) major areas the agency will target in its enforcement policies. The enforcement priorities include:

- Protecting workers who are generally unaware of their rights, including immigrant and migrant workers;
- Targeting class based recruitment and hiring practices;
- Pay systems which discriminate based on gender;
- Strenuous enforcement of the American's with Disabilities Act relating to reasonable accommodations and undue hardship;
- Preventing retaliation against complaining employees;
- Preventing harassment in the workplace.

The EEOC has pursued these various strategic goals in a very aggressive manner. For example settlements obtained by the EEOC increased from $8.6 million in 2011 up to $36.2 million in 2012. (Statistics for 2013 are not yet available.) In addition there has been a greater emphasis on litigating cases within the EEOC's new strategic enforcement plan. Several cases have discussed this new aggressive posture and have in fact excoriated the EEOC for pursuing cases with questionable evidence and for what appears to be political as opposed to legal or protective purposes. *See EEOC v. Freeman*, Case No. RWT 09cv2573 (D. Md., Aug. 9, 2013) (mem. Decision), where Judge Roger Titus found that the EEOC made a "mockery of procedural standards" and presented "laughable" evidence.

With the EEOC's new strategic enforcement priorities in mind, care should be taken to follow a plan for avoiding and addressing possible employment claims. Unfortunately, regardless of the care taken to follow guidelines in evaluating, monitoring, tracking and documenting employee issues, claims will undoubtedly be brought. The following suggestions should help reduce the number of complaints filed and help mount a successful defense to any claims brought by either the EEOC in its regulatory mission or by individual employees seeking compensation for alleged improper employment practices.

First, Document the File – Proper documentation is difficult to accomplish on a consistent basis. It is rare to find a personnel file which is honestly and regularly documented. Often there is simply nothing in the file, or instead, there are meaningless annual reviews where everyone generally "exceeds expectations." The lack of proper attention to documentation in annual reviews may be the easy way out for a manager, but it may also make it much more difficult to defend a claim filed by a terminated employee.

Be proactive, and create a system where information is automatically and simply documented. Don't rely upon memory. The old saying, "The shortest pencil is better than the longest memory" is apt. Use that pencil and write it down. Contemporaneous notes do not have to be long and can be as simple as "October 14 – Joe is late again." Keeping all of this information contemporaneously makes your document much more credible.

One problem which generally leads to inaction is that managers do not know where to keep the information once it is written down. Does it go in the personnel file? Do I put it somewhere else? These questions can be solved with one simple rule – everything goes in the same place. A spiral notebook is sufficient, or you can create an encrypted document on your computer. More importantly, when you are thinking of terminating or disciplining Joe for repeated tardiness, there is one resource to review. Most supervisors are extremely surprised to see how many times they simply let Joe off with a warning, and the decision to discipline or terminate is often accompanied by the thought, "I should have done this long ago."

Another internal struggle which often leads to inaction is "Should I write this down, or not?" In other words, when do I know that something is important enough to document? In truth, you will never really know, so a simple rule to follow is, "When in doubt, write it down." If you think you should write it down, simply do it.

Second, Look for Training Opportunities – Remember that training about policies on equal employment, non-discrimination and sexual harassment are essential elements to an employer's defense. The seminal United States Supreme Court cases of *Burlington Indus., Inc v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) established that an employer has an affirmative obligation to adopt and distribute policies of equal employment *and also provide training to employees*. If either of these two elements are missing, then the employer may not be able to raise a defense to claims of discrimination or retaliation.

Training is essential and can take many forms. There are online training videos and programs available, which may be the simplest to implement. At the other end of the spectrum are mandatory training sessions of executives and managers conducted by professionals or outside counsel. Generally small training sessions with twenty (20) or fewer people result in better responses and interaction. Larger groups (or online training videos) may be efficient, but it

is easier for managers to not pay attention or think "this doesn't apply to me." In smaller groups discussion often occurs, examples (sometimes hypothetical, sometimes real) are raised, and all employees receive reinforcement about the importance of equal employment and freedom from harassment.

Finally, Report and Investigate Complaints– If a situation arises, it is important to take action. For example some incidents trigger mandatory reporting requirements, and all managers should be trained in and be aware of these. *Any* incident of discrimination or harassment *must* be reported to a specified company representative. Another example of mandatory reporting is when any act or threat of violence occurs in the workplace. A less obvious example may be the duty to report an employee who lacks authorization to work within the state of Arizona. Because the knowledge of managers is imputed to the employer, allowing an employee to continue to work without proper work authorization can lead to penalties including the potential loss of a business license. Finally managers should be advised that in Arizona a failure to report and investigate may lead to a claim of personal liability against the manager individually.

Once the report has been made, then an investigation can either be conducted internally or through outside sources, but be aware that any person (including an attorney) involved in an investigation becomes a potential witness in future litigation. All persons involved should be interviewed, and the content of the interviews should be documented and recorded. Employees can be told that the interviews and information will be kept confidential to the extent possible, but absolute confidentiality cannot and should not be promised. If the investigation results in a finding of responsibility and culpability, then proper discipline should follow, which should also be documented.

Conclusion – The EEOC's new strategic enforcement plan provides employers with information about the issues and topics which will be aggressively investigated (and litigated) in the next few years. Employers can use this information to assess and reduce their risk for potential claims and litigation. While no business is "bullet proof" from claims, taking the practical and proactive steps of documentation, training and investigation can reduce and possibly prevent employer liability.