

Guess What? The EEOC Doesn't Always Need an Individual Charge to Investigate Possible Discrimination at Your Workplace

LABOR & EMPLOYMENT | JUNE 9, 2020



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On June 5, 2020, the Equal Employment Opportunity Commission (EEOC) published a new webpage reminding us of the agency's authority under certain circumstances to commence a discrimination investigation even absent receipt of a charge from a private party.

Indeed, Congress expressly authorizes the commission — meaning the EEOC's five-member governing authority — to issue what is called a "commissioner charge" where it believes, based on anecdotal or other information, that an employer is engaging in discriminatory employment practices in violation of three of the laws it enforces: Title VII of the Civil Rights Act (Title VII), the Americans with Disabilities Act (ADA), and the employment provisions of the Genetic Information Nondiscrimination Act (GINA).

Under Title VII, the ADA, and GINA, an individual generally is required to exhaust administrative remedies by filing a charge of discrimination with the EEOC before he or she will be allowed to bring suit in federal court. Just as an individual (or an agency or organization acting on an aggrieved person's behalf) may file a charge accusing an employer of discriminating on the basis of race, color, religion, sex, national origin, disability, or genetic information, so too may the EEOC approve and file a Title VII, disability, or genetic discrimination charge in its own name.

Thus, EEOC investigations of claims brought under Title VII, the ADA, or GINA are charge-driven. In other words, unlike other federal watchdogs like the Labor Department's Office of Federal Contract Compliance Programs that have general audit authority over a covered employer's EEO practices, the EEOC's power to investigate alleged discrimination under Title VII, the ADA, and GINA stems from, and is generally limited to, the four corners of a valid, written charge. As to the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA), however, the EEOC may initiate an administrative investigation — called a "directed investigation" — even absent a written charge or even an identifiable victim.

The EEOC's new website content explains how agency-initiated charges are filed, investigated, and resolved. It explains, for instance, that a commissioner charge or directed investigation most often comes about as a result of:

- An EEOC field office learning about possible workplace discrimination via "direct observation, from local community leaders, advocacy groups, and FEP partners, or through the sharing of information between the EEOC and the U.S. Departments of Justice, Labor, and other federal agencies";
- The agency learning during the course of an existing investigation about "one or more new allegations of discrimination" that are unrelated to the matters raised in the underlying charge "that could be better investigated through a Commissioner charge or directed investigation filed by another EEOC office"; or
- An individual commissioner coming to learn about or suspect possible workplace discrimination and "asks a field office to investigate the allegations."

Although the EEOC exercises its commissioner charge and directed investigation authority relatively infrequently compared to the total number of charges filed and investigated each year, employers should take note that these potentially powerful administrative tools exist and are at the agency's ready disposal.

Beware the EEOC Commissioner Charge

EEOC commissioner charges are used most often to go after suspected systemic or pattern-or-practice discrimination affecting broad classes of individuals, as opposed to a single aggrieved person — which increases the scope and complexity, and raises the financial stake, of responding to and defending them. Indeed, the EEOC considers commissioner charges to be among the types of cases, once in litigation, "that may involve a major expenditure of agency resources, including staffing and staff time, and/or expenses associated with extensive discovery or expert witnesses."

As the EEOC observed in its 2006 Systemic Discrimination Task Force Report:

EEOC has a unique ability to identify potential systemic cases. The agency has access to substantial data, including information on employment trends and demographic changes, that can help identify possible systemic discrimination. This data gives EEOC particular insight into areas such as hiring discrimination, where victims of discrimination often are not aware that they may have been denied employment based on unlawful criteria. Such information, combined with the Commission's ability to use ... a Commissioner Charge ... where a possible victim of discrimination has not filed a charge, provides EEOC with the crucial tools needed to uncover systemic employment discrimination.

Thus, especially given their public interest and class-based nature, commissioner charges are the very kind that the EEOC may be inclined to pursue in litigation if after an investigation reasonable cause is found and a settlement "acceptable to the commission" cannot be reached. For example, in a 2018 public enforcement action that was filed following the investigation of a commissioner charge, the EEOC alleged that a manufacturing company failed to hire women into certain entry-level positions and subjected "the few women hired into other positions" to sex-based harassment. That case, brought on behalf of a 50-person class, quickly settled for approximately \$625,000.

Worth noting, unlike private litigants, the EEOC is not bound by federal rules governing class certification, adding greater risk and uncertainty to the prospect of having to defend a class-based EEOC lawsuit that is filed in federal court. For that reason, it may be well worth the effort to periodically conduct a personnel practices "self-audit," which may reveal gaps or issues that if left unresolved could lead to potential systemic issues.

Take Proactive Steps to Minimize Risk of a Directed Investigation

Both the ADEA and the EPA permit the EEOC to investigate suspected age discrimination and sex-based compensation discrimination, respectively, even in the absence of a filed charge. Any number of employment practices could give rise to a directed investigation, such as, for instance:

- Limiting job opportunities for older workers by considering only "recent college graduates" for entry-level job openings.
- Using age-based data algorithms or "keyword" searches to screen job applicants.
- Soliciting and tracking applicant date-of-birth information.
- Paying men a higher starting salary than women hired to perform the same or substantially the same job.

Some of the strategies an employer can use to avoid issues like these may include:

Training your talent acquisition staff on how to avoid unintended bias in the recruitment and hiring process. Missteps in how applicants are vetted, or seemingly innocuous questions contained in an online application system, or other aspects of the process could disadvantage applicants of a particular protected group — like those over age 40 — or be perceived as such by an agency investigator who decides to "test" the process by submitting his or her own "application."

Holding managers accountable for ensuring that talent acquisition staff are following the rules and that they are regularly reviewing how job applicants are being screened and advanced.

Reviewing your policies to ensure they don't contain language or requirements that could be construed as biased or lead to disproportionately unfavorable outcomes for certain protected groups, such as would occur as part of a general self-audit as described above.