

3C's of EEO

Civility, Compliance, & Culture



Navigating Workplace Discrimination and EEOC Charges

Dilip Gokhale | **Field Office Director**
U.S. Equal Employment Opportunity Commission
Philadelphia District | Cleveland Field Office



EEOC Training Institute


1

EEOC Mission

Prevent and remedy unlawful employment discrimination and advance equal opportunity for all.

EEOC Vision

Fair and inclusive workplaces with equal opportunity for all.



EEOC Training Institute

2

The Commission & General Counsel



Charlotte A. Burrows,
Chair



Jocelyn Samuels,
Vice Chair



Andrea R. Lucas,
Commissioner

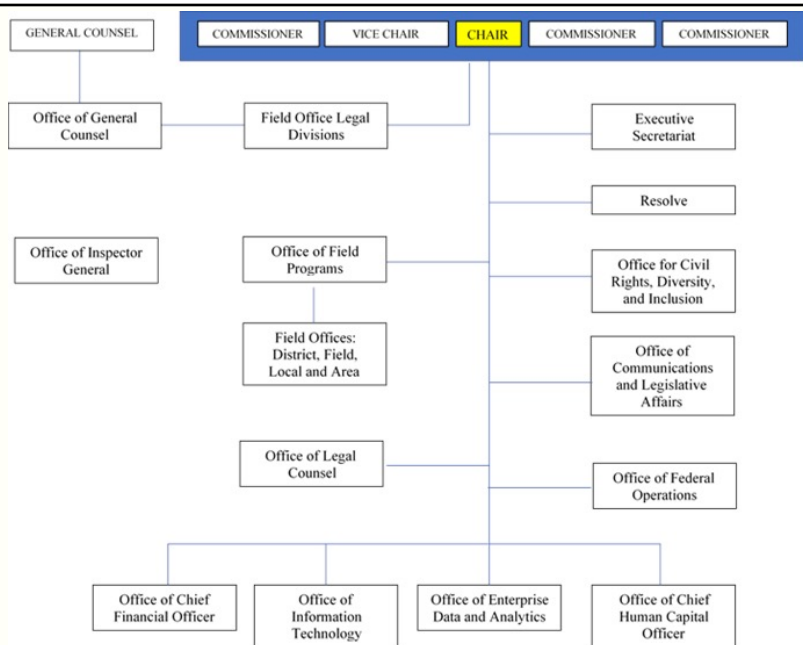


Kalpana Kotagal,
Commissioner

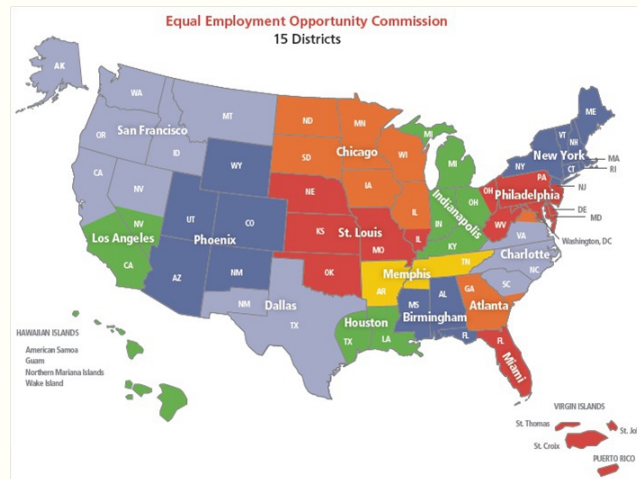


Karla Gilbride,
General Counsel

EEOC Organizational Chart



EEOC Districts (53 Offices + HQ)



What is EEOC's Role?

- ▶ Enforce federal laws prohibiting discrimination in employment
- ▶ Educate and encourage voluntary compliance
- ▶ Investigate and resolve Charges of discrimination (against employers in private sector, state and local governments)
- ▶ Resolve federal sector hearings and appeals
- ▶ Litigate in federal court, when necessary

What laws are enforced by the EEOC?

- ▶ Title VII of the Civil Rights Act (Title VII)
- ▶ Government Employees Rights Act (GERA)
- ▶ Age Discrimination in Employment Act (ADEA)
- ▶ Equal Pay Act (EPA)
- ▶ Americans with Disabilities Act (ADA)
- ▶ Genetic Information Nondiscrimination Act (GINA)
- ▶ Pregnant Workers Fairness Act (PWFA)

What are the protected categories?

- ▶ Race
- ▶ Color
- ▶ National origin
- ▶ Religion
- ▶ Sex, including
 - Pregnancy
 - Sexual Orientation
 - Gender Identity
- ▶ Age (40 or older)
- ▶ Disability
- ▶ Genetic information
- ▶ Retaliation

Private/State & Local Sector Charge Filings (Fiscal Year 2023)

- ▶ Receipt of Charges 81,055
- ▶ Retaliation: 46,047 (56.81%)
- ▶ Disability: 29,160 (35.98%)
- ▶ Race: 27,505 (33.93%)
- ▶ Sex: 25,473 (31.43%)
- ▶ Age: 14,144 (17.45%)
- ▶ National Origin: 6,963 (8.59%)
- ▶ Color: 5,819 (7.18%)
- ▶ Pregnancy: 2,966 (3.66%)
- ▶ Religion: 4,341 (5.36%)
- ▶ Equal Pay Act: 1,012 (1.25%)
- ▶ Genetic Information: 361 (0.45%)

Common Types of Discrimination Cases

- ▶ Disparate Treatment – including, hiring, pay, assignments, discipline, discharge, etc.
- ▶ Harassment
- ▶ Disparate Impact
- ▶ Failure to accommodate – religion or disability
- ▶ Retaliation

Who is protected?

- ▶ An employee
- ▶ A temporary employee
- ▶ A job applicant
- ▶ A former employee
- ▶ Non-U.S. citizens, regardless of immigration status

Who are covered employers?

- ▶ Private sector companies with 15 or more employees
 - 20 or more under the ADEA (age)
- ▶ Educational institutions
- ▶ State and local governments
- ▶ Employment agencies
- ▶ Labor organizations
- ▶ Joint Labor- Management Apprenticeship and Training Committees (Title VII & ADA)
- ▶ Federal agencies (separate process)

Federal Sector EEO Complaint Process

- ▶ Contact your agency EEO Counselor (ADR/mediation)
- ▶ Filing a formal complaint within 45 days of the alleged discrimination
- ▶ Agency must investigate and issue a final decision within 180 days
- ▶ Request an EEOC hearing or file a complaint in federal court
- ▶ File an appeal of a final order
- ▶ Request reconsideration of the appeal decision
- ▶ File a lawsuit in federal court

Private/State & Local Sector Charge Process

- ▶ Individual contacts EEOC
- ▶ Individual files the charge (and dual-files with FEPA)
- ▶ EEOC serves notice to the employer
- ▶ Mediation
- ▶ Investigation
- ▶ Notice of Right to Sue
- ▶ Conciliation (if a violation is found)
- ▶ Possible litigation

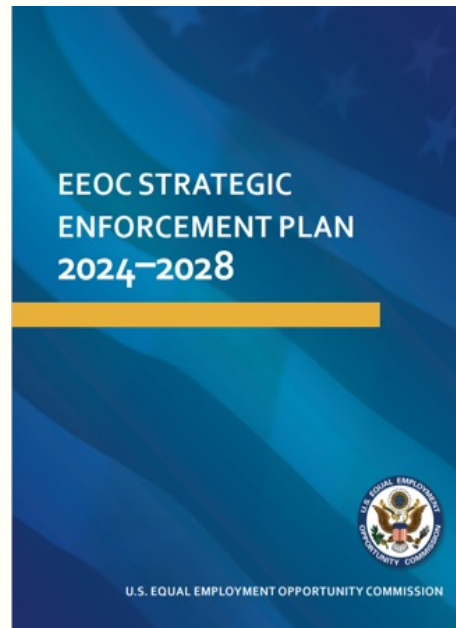


EEOC Strategic Enforcement Plan

Expands the vulnerable and underserved worker priority to include additional categories of workers who may be unaware of their rights under equal employment opportunity laws, may be reluctant or unable to exercise their legally protected rights, or have historically been underserved by federal employment discrimination protections

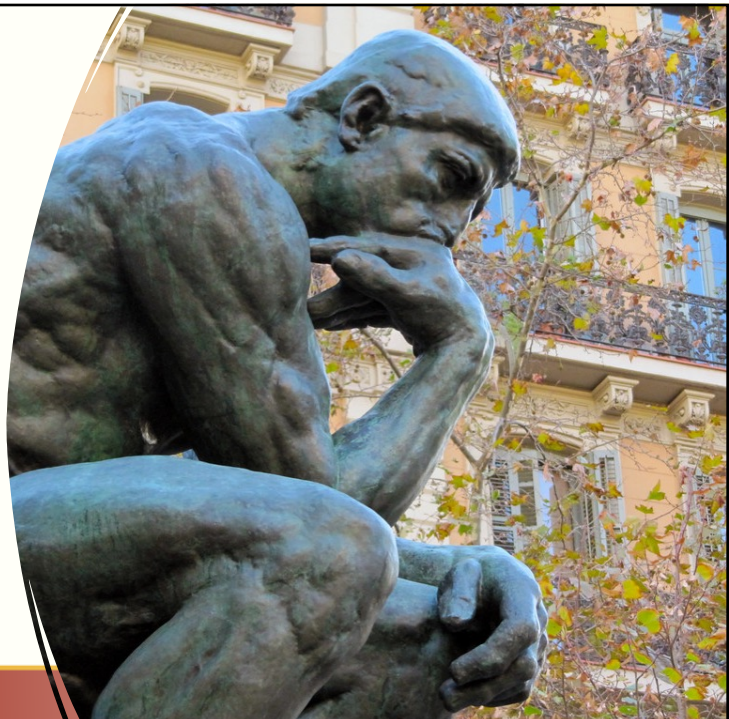
Recognizes employers' increasing use of technology including artificial intelligence or machine learning, to target job advertisements, recruit applicants, and make or assist in hiring and other employment decisions, practices, or policies;

Updates the emerging and developing issues priority to include protecting workers affected by pregnancy, childbirth, or related medical conditions, including under the Pregnant Workers Fairness Act; employment discrimination associated with the long-term effects of the COVID-19 pandemic, including Long COVID; and technology-related employment discrimination; and preserve access to the legal system by focusing on overly broad waivers, releases, nondisclosure agreements, or non-disparagement agreements.



Algorithmic Tools and Artificial Intelligence

- ▶ Hiring is rarely a single decision, but rather a funnel: a series of decisions that culminate in a job offer or a rejection.
- ▶ The hiring process starts well before anyone submits an actual job application, and jobseekers can be disadvantaged or rejected at any stage. Importantly, while new hiring tools rarely make affirmative hiring decisions, they



Look At Hiring and Promotion Polices

- ▶ Algorithms play an increasingly fundamental role in our lives, and the workplace is no exception. Accelerated by the Covid-19 crisis, the adoption of data-driven algorithmic systems that control how, when and where we work has rapidly increased.
- ▶ Although over 90% of employers claimed to prioritize disability, only 4% included workers with disability in [DEIA] initiatives.”
- ▶ More than half of the 6,000 global employers surveyed by AARP in 2020 revealed that they do not include age in diversity and inclusion policies.”

Hiring and Promotion Polices

- ▶ Using algorithms to advise and work alongside human line managers, but not to replace them - a human manager should always have final responsibility for any workplace decisions.
- ▶ Line manager training on how to understand algorithms and how to handle an ever-increasing amount of data responsibly.
- ▶ Greater transparency for employees (and prospective employees) about when algorithms are being used and how they can be challenged, particularly in recruitment, assignment of work and performance management.

Anti-harassment policy

- ▶ Be written and well-disseminated
- ▶ Protect against retaliation
- ▶ Define workplace harassment
- ▶ Establish a complaints procedure
- ▶ Create multiple paths in the complaints process
- ▶ Establish disciplinary action
- ▶ Ensure confidentiality

Anti-harassment policy continued

- ▶ Clear explanation of prohibited conduct
- ▶ Prompt, thorough, and impartial investigation
- ▶ Immediate, appropriate corrective action

How to be respectful with gender identity

- ▶ You don't have to understand what it means for someone to be non-binary or transgender to respect them.
- ▶ Use the name a person asks you to use
- ▶ Try not to make assumptions about people's gender
- ▶ If you're not sure what pronouns someone uses, ask
- ▶ Be careful and considerate about what questions you ask.

Appropriate Corrective Action

- ▶ Stop Harassment Immediately
- ▶ Investigate
- ▶ Protect Against Retaliation
- ▶ Provide Appropriate Relief

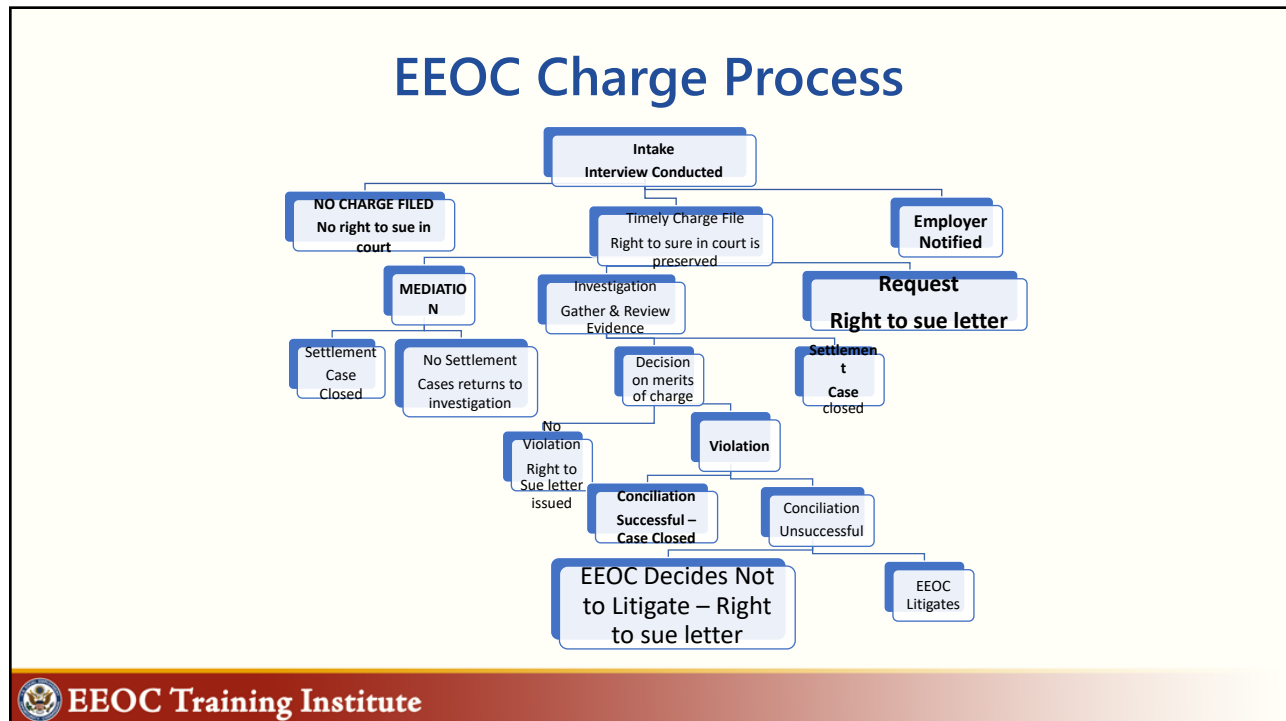
Corrective actions to stop and prevent

- ▶ Examples include:
 - Oral or written warning or reprimand
 - Transfer or reassignment of harasser
 - Demotion
 - Suspension or discharge
 - Training or counseling harasser
 - Monitoring harasser

EEOC Findings

- ▶ Workplace harassment remains a persistent problem.
- ▶ Workplace harassment too often goes unreported.
- ▶ There is a compelling business case for preventing harassment.
- ▶ Leadership and accountability can prevent harassment.
- ▶ Workplace risk factors should be evaluated.
- ▶ Training is important, but it needs to be the right training.
- ▶ Employers should consider *workplace civility training* and *bystander intervention training*.

RF CST Module (FOR REVIEW) LGBTQI+ Issues: Impact of Bostock Decision
Katrina Grider (508 Compliant) (05-13-22)



25

How the Charge Process Begins - INQUIRIES

- ▶ Phone
 - [1-800-669-4000](tel:1-800-669-4000) or Calling a local EEOC office
- ▶ In person
 - Outreach event or Walk-in
- ▶ Letter, Fax, Email
- ▶ PUBLIC PORTAL
- ▶ Referrals: Congress, other federal agencies, FEPAs

EEOC Training Institute

26

What is a Charge:

- ▶ Signed Statement alleging negative employment action (issue) because of protected status (basis)
- ▶ Five elements of a Charge
 1. Identifies the potential charging party
 2. Identifies the respondent by name or circumstances
 3. Describes a covered matter that could be employment discrimination [basis/issue]
 4. Can be reasonably construed as request for the EEOC to take remedial action, taking into account any expressions of concern about confidentiality or retaliation that may be inconsistent with an intent to file a charge, and
 5. Is written and signed by the potential charging party

After a Charge is filed

- ▶ Notice is provided to the Respondent within 10 days of filing
 - Respondent received Notice, Copy of Charge
- ▶ Charge is dual filed with the appropriate FEPA
- ▶ Immediate Investigation,
- ▶ Mediation, or
- ▶ Immediate dismissal and right to sue is issued

What should an Employer NOT do upon receipt of a charge of discrimination?

PANIC!!!

Don't panic if you receive a charge of discrimination from the EEOC.

Do cooperate during the investigation, and the process will move much more quickly.

Electronic Notice and Response to Charge

- ▶ Serve Notice of Charge by email
- ▶ Respondent portal
- ▶ Invitation to mediate when appropriate
- ▶ Submission of position statement and attachments through the portal
 - Confidential versus Non-Confidential information/Position Statement likely will be released to the Charging Party

EEOC's MEDIATION PROCESS

- ▶ How familiar are you with the EEOC's Mediation process?
- ▶ Have you ever been a participant in an EEOC Mediation?

Mediation

- ▶ A process where parties in dispute agree to discuss ways to resolve the dispute with the assistance of a neutral third party who is trained to help people discuss and resolve their differences.
- ▶ Four Pillars of EEOC's Mediation process:
 - Voluntary
 - Confidential
 - Neutral Mediators
 - Enforceable Agreements

Stages of the EEOC's Mediation Process

- ▶ Pre-mediation counseling / Schedule date
- ▶ EEOC uses internal staff mediators and external mediators.
- ▶ Joint Session – Opening statements
- ▶ Caucuses
- ▶ Exploring options for resolution
- ▶ Reality checks
- ▶ Agreement reached: Obtain signatures on settlement agreement
- ▶ Explain next steps in process if resolution is not reached.

Some MYTHS about Mediation and Settlement

- ▶ There is no need to mediate/settle if you did not do anything wrong.
- ▶ The Mediator/Investigator will determine whether or not discrimination has occurred.
- ▶ Paying money is the only way to resolve a case in mediation/settlement.
- ▶ If an agreement is reached in mediation, the employer is admitting guilt under the law.

Types of Resolutions

- ▶ Termination changed to resignation
- ▶ Accommodations
- ▶ Compensation
- ▶ Reinstatement
- ▶ Apology
- ▶ No contest of unemployment compensation
- ▶ Training (for employee, agency or company)
- ▶ Forgiving a loan
- ▶ Removal of disciplinary action from personnel file
- ▶ Union representation
- ▶ Offer of employment
- ▶ ... and other creative resolutions

What happens if mediation fails?

- ▶ The parties are informed that the Charge will now be moved from the Alternative Dispute Resolution Unit to the Enforcement Unit for further investigation.
- ▶ Respondent will get a message in the Portal providing for a new position statement due date.

Employer's Position Statement

- ▶ A Position Statement is one of the most critical documents an employer can submit to EEOC
- ▶ Information about the Employer
 - Legal Name
 - Type of Business
 - History and Ownership
 - Number of Employees
- ▶ Response to Allegations
 - Explanation for the Employment Actions
 - Information about how others were treated and why any individuals were treated differently than the Charging Party

Employer's Position Statement... Continued

- ▶ Identify officials who made decisions or took relevant actions
- ▶ Be specific about dates, actions, and names
- ▶ Provide copies of relevant documents
- ▶ Provide copies or descriptions of relevant practices, policies or procedures
- ▶ Inform EEOC if the matter has been resolved or can be resolved; if it can be resolved, indicate your proposal for resolution

Employer's Position Statement... Continued

- ▶ Please do not:
 - Give half the story
 - Not interview key decision-makers
 - Ignore the elephant
 - Fail to address allegations
 - Not provide relevant documents

Pre-Determination Settlement

- ▶ Either Party Can Initiate
 - EEOC Can Help Facilitate
- ▶ Settlement Ends Investigation
- ▶ No EEOC Determination or Right to Sue
- ▶ Can Help Preserve Employment Relationship

What is EEOC looking at?

- ▶ Charging Party's Allegations
- ▶ Employer's Position Statement
- ▶ Charging Party's Response to the Position Statement
- ▶ Relevant Documents and Data (obtained through Requests for Information)
- ▶ Witness Statements (obtained through Interviews, On-Site Visits, Fact Finding Conferences)

Determinations

- ▶ Standard: "Reasonable Cause"
 - "More Likely Than Not" that Discrimination Occurred?
- ▶ Insufficient Evidence (No Cause)
 - EEOC Takes No Further Action
 - Notice of Right to Sue Issued to Charging Party
 - Charging Party May Sue Privately
- ▶ Reasonable Cause Finding (Violation)
 - Conciliation Begins

Remedies to resolve an EEOC Charge

- ▶ Equitable Relief
- ▶ Back pay
- ▶ Attorney's fees
- ▶ Damages
- ▶ Hiring
- ▶ Promotion
- ▶ Reinstatement
- ▶ Front Pay
- ▶ Reasonable Accommodation



When Conciliation Fails

- ▶ Review by Legal Unit
- ▶ Lawsuit May be Filed by EEOC (or Department of Justice, in Title VII and ADA cases against state/local governments)
- ▶ EEOC Represents the Public Interest
- ▶ Charging Party May Intervene
- ▶ Pre-Trial Settlement
- ▶ Trial



Resolutions

- Dismissals or No Cause
 - No jurisdiction, Untimely, No employer/employee relationship
- Cause finding (Successful or Unsuccessful)
- Withdrawal
- Right To Sue issued upon request
- Negotiated Settlements
- Mediated resolutions

Preventive Measures

- ▶ Maintain required personnel records
 - In general, all personnel records should be maintained for one year
 - If a charge of discrimination has been filed, all records must be kept until the final disposition of the charge
- ▶ Take appropriate action when someone requests an accommodation
- ▶ Take appropriate action when someone complains of harassment
- ▶ Institute and update strong anti-harassment and anti-discrimination policies

Preventative Measures

- ▶ Avoid retaliation charges - train supervisors to be careful to treat employees who complain of discrimination the same as before
- ▶ Recruit broadly for new jobs and for internal promotions
- ▶ Ensure screening devices (tests, selection criteria) do not have adverse impact/are necessary and related to the job
- ▶ Analyze pay
- ▶ Don't ask unlawful medical questions
- ▶ Don't disclose confidential medical information

Effects of Discrimination

- ▶ High legal costs
- ▶ Damaged organizational image
- ▶ Reduced morale and productivity
- ▶ Higher employee turnover
- ▶ Higher costs for hiring and training new employees