



## The New EEOC under Obama

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## More Money, More Activity



- Budget increase of \$344M in 2009
- \$23M boost to \$367M for 2010
- EEOC workforce grew by 155 in 2009
  - 125 additional investigators
  - 22 trial attorneys; 50 support staff; 10 paralegals; 5 experts
- More hiring anticipated in 2010 (140 hires projected)



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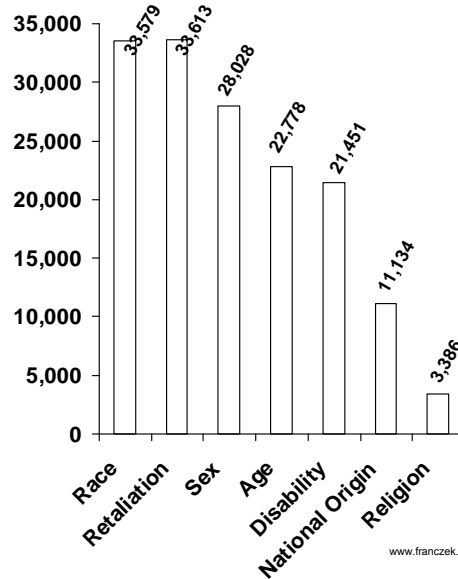
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38

## New Faces, New Agendas

- EEOC
  - Current Acting Chair: Chairman Stuart Ishimaru (D)
  - Waiting for Senate to confirm nominees:
    - EEOC chair: Jacqueline Berrien, NAACP attorney);
    - Two commissioner seats: Chair Fledblum, Georgetown Law Professor and Victoria Lipnic, former Bush Admin. Official); and
    - General Counsel (P. David Lopez, EEOC Sr. Attorney)
  - Field attorneys excited about having “one of them” as General Counsel
  - Likely result is more litigation

## Higher volume of EEOC Charges in 2009

- 93,277 charges filed in fiscal 2009
- 2nd highest total in 20 years



## EEOC Charges in 2009

- Types of charges
  - Race – 36%
  - Retaliation – 36%
  - Sex – 30%
  - Age – 24%
  - Disability – 23%
  - National Origin – 12%
  - Religion – 4%
- Record relief of \$366 million through administrative enforcement

## EEOC Activity in 2009-2010

- Federal Court activity increase
  - EEOC filed 281 merit suits in 2009
  - 111 suits sought class relief
  - 32 suits for subpoena enforcement
  - Remaining activity refer to individual substantive claims



## EEOC Anticipated Priorities in 2010

- Regroup and Rebuild:
  - Backlog of 85,768 charges – end of fiscal 2009; estimate backlog will reach 104,450 in fiscal 2011
  - EEOC looking to streamline charge inventory – “Priority Charge Handling Procedures”
  - Proposed regulations would require EEOC to notify complainant that he/she can request right to sue letter if agency not done with investigation within 180 days.



## EEOC Anticipated Priorities in 2010

- Systemic Discrimination!
- EEOC “E-RACE” Initiative (Eradicating Racism And Colorism from Employment)
  - Designed to improve EEOC’s efforts to free workplace of race and color discrimination.
  - Focus on race and color issues that have class and systemic implications



## EEOC Activity in 2009-2010



- Interest in Selection Criteria such as Background Checks
  - If practice has disparate impact, criteria must be job related and consistent with business necessity
  - Must consider: nature and gravity of offense, time passed and nature of job

## EEOC Tactics

- Increased interviews
- Multiple and overly broad requests for information
- Records retention
- Electronic records
- Expanding individual charges
- Targeting nationwide policies
- Subpoenas



## “Winning” Strategies



- Controlled cooperation
- Do not provide names and contact information of other potential “victims”
- Petitions to revoke/modify subpoenas
- Befriend junior level EEOC attorney/investigator
- Press the EEOC to identify “victims” and outline the underlying basis of the charge
- Reduce the scope of the charge (positions, time frame, protected class)

## There is Hope!



- EEOC authority does have its limits
- ***EEOC v. CRST Van Expedited, Inc.***  
07 CV 95 (N.D. Iowa)
  - District court found that EEOC improperly pursued “pattern and practice” theory of sexual harassment without conducting any investigation into the specific allegations of individual “aggrieved persons, or trying ”
  - Court awarded employer \$4 million + in attorneys fees

## EEOC Activity in 2009-2010

### ■ More ADA Activity Predicted

- EEOC received a record number of disability discrimination charges in FY 2009.
- ADA Amendments Act (ADAAA) broadened coverage ensures that trend will continue.



## EEOC Activity in 2009-2010

- EEOC's Chicago District Office has targeted employers with "inflexible" leave policies.
  - ***EEOC v. Sears Roebuck***  
(Consent Decree for \$6.2 million and significant remedial relief – approved 2/4/10)
  - ***EEOC v. SuperValu, Jewel-Osco*** (Filed 9/11/09)
  - ***EEOC v. UPS*** (Filed 8/27/09)



## EEOC Position on Leave Policies



- Maximum leave policies are not per se unlawful
- But policies must incorporate case-by-case assessment
- No credit for past leave granted
- Reasonable accommodation may include assignment to temporary light duty position and/or additional leave

## EEOC Initiatives in 2010



- Anticipated Regulatory/Legislative Initiatives:
  - Regulations that accompany Genetic Information Non-Discrimination Act (GINA): prohibits employment discrimination on the basis of “genetic information” and restricts employer access to such information
  - Regulations accompanying ADA Amendments Act



## Why Does This Matter?

- The average defense cost to an employer to defend a single plaintiff case is likely to exceed \$200K through trial
- Cost of EEOC initiated Litigation Even Greater
- Average Discrimination Jury Verdicts
  - Age: \$250,000
  - Sex-based: \$200,000
  - Disability: \$217,000
  - Race: \$172,500
  - Retaliation: \$200,000



*Employment Practice Liability: Jury Awards Trends & Statistics, 2008 Ed.*

## What can employers do?

- Review hiring/promotion criteria
  - Look for potential disparate impact on protected groups
  - Make sure that criteria measure actual job requirements
- Review and revise leave of absence and accommodation policies
- Approach EEOC investigations with new vigor