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Elizabeth Torphy-Donzella

Handling EEOC Systemic and Individual Discrimination Investigations and Litigation

by Elizabeth Torphy-Donzella and Lindsey A. White, Shawe & Rosenthal, LLP

This practice note addresses how to effectively represent an employer in both individual and systemic investigations and litigations by the U.S. Equal Employment Opportunity Commission (EEOC or Commission). The EEOC investigates cases against public and private employers arising under federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Genetic Information Nondiscrimination Act (GINA), and the Equal Pay Act (EPA). The Commission has authority to litigate against private employers under all of these statutes, and against public employers under the ADEA and the EPA. This practice note discusses the following issues:

- What Is the EEOC's Systemic Program?
- What Types of Charges Are Most Likely to Become Systemic Investigations?
- Defending against an Individual or Systemic EEOC Investigation
- Conciliating Individual and Systemic Charges
- Litigating an Individual Case against the EEOC
- Litigating a Systemic Case against the EEOC

For information on federal anti-discrimination laws, including those that the EEOC enforces, see the Discrimination and Retaliation – EEO Laws and Protections practice note page. For more information on EEOC charges, see Understanding Agency Enforcement of Anti-discrimination Laws, Drafting an EEOC Position Statement, and Conciliating EEOC Charges.

What Is the EEOC's Systemic Program?

In 2006, the Commission unanimously voted to establish a nationwide systemic cases program. Systemic cases are "pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area." While systemic cases typically involve a class of individuals, they may also originate from other sources, such as a single charging party alleging that a policy is discriminatory.

As part of this program, EEOC offices must identify systemic cases early. The Commission has adopted a national law firm model to litigate systemic cases, which means that offices across the country collaborate to litigate these cases.

On February 22, 2012, by a four-to-one vote, the Commission reaffirmed its commitment to the systemic cases program through the Strategic Plan for fiscal years 2012–2016. The Strategic Plan sets a target percentage of the Commission's litigation docket for systemic cases. Over the past five years, the EEOC has increased its systemic investigations by 250%. The systemic program has achieved settlements providing compensation to over 71,000 individuals since 2006.

What Types of Charges Are Most Likely to Become Systemic Investigations?

On December 17, 2012, the Commission voted three-to-one to approve the Strategic Enforcement Plan (SEP), which established national priorities for enforcement and litigation. The SEP provides a public window into the Commission's top enforcement priorities.

The EEOC prioritizes "[m]eritorious systemic charges and cases that raise SEP or district priority issues" over "individual priority matters and over all non-priority matters, whether individual or systemic" under the SEP.

On October 17, 2016, the EEOC updated the SEP to establish the following six priorities for fiscal years 2017-2021:

(1) Eliminating barriers in recruitment and hiring

(2) Protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination

(3) Addressing selected emerging and developing issues

(4) Ensuring equal pay protections for all workers

(5) Preserving access to the legal system

(6) Preventing systemic harassment

The EEOC did not make sweeping changes from the 2012-2016 SEP, but clarified several priorities. The Commission revised the second priority to instruct regional, district, and local offices to identify underserved communities for additional attention.

With respect to priority three, the Commission clarified that the emerging issues it will prioritize under the ADA are limited to "qualification standards and inflexible leave policies that discriminate against individuals with disabilities." In addition, the Commission added a new priority to emerging issues to address complex employment relationships and the 21st century workplace. Finally, under priority three, the EEOC added a "focus on backlash discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, as tragic events in the United States and abroad have increased the likelihood of discrimination against these communities."

As for priority four, the Commission expanded its focus to include pay discrimination on any basis, not just sex.

For priority five, the Commission clarified that it will "focus on significant retaliatory practices that effectively dissuade others in the workplace from exercising their rights, as well as . . . on retaliatory policies."

Defending against an Individual or Systemic EEOC Investigation

The EEOC received 89,385 charges of discrimination in fiscal year 2015, so the odds are good that at some point, an employer will find itself the target of an investigation. This section addresses what to expect in individual and systemic investigations, and strategic considerations in responding to Requests for Information (RFIs) and subpoenas. For additional information on EEOC investigations, see Understanding Agency Enforcement of Anti-discrimination Laws.

Notice of Charge Filing

Often employers know to expect a charge of discrimination because the employee has lodged an internal complaint. Other times, an employer's first inkling of a problem is when it receives a notice of charge filing from the EEOC (or a state or local agency). The EEOC must serve this notice within 10 days of receiving it.

The notice advises the employer that the agency has received a "minimally sufficient" charge filing. This means the charging party has provided enough information for the agency to prepare a formal charge of discrimination (charge). After the charging party signs or "perfects" the charge, the EEOC sends it to the employer. A request for a position statement or invitation to mediate through the EEOC's mediation program should accompany the formalized charge.

If the charge does not include a class allegation or identify a discriminatory policy or practice that puts the employer on notice that the Commission is conducting a systemic investigation, the employer should receive a notice that the EEOC is expanding the scope of the investigation before it begins a systemic investigation. This letter should explain the statutory basis, the issue(s), and the relevant time frame for the expanded investigation.

Mediation

The EEOC's mediation program is quite effective at resolving cases prior to any investigation of the merits, and many defense attorneys hold it in high regard. In FY 2008, the mediation program achieved a 72.1% settlement rate. If you receive an invitation to mediate, you should encourage the employer to accept for several reasons:

- First, mediations are free of charge.

- Second, mediations occur prior to the position statement deadline, so if a matter settles at mediation it can be very cost-effective for the employer.

- Third, mediation can provide valuable insight into a charge's strengths and weaknesses that could help you in litigation should the matter fail to settle.

To schedule a mediation, both parties have to accept the mediation invitation. EEOC mediators, who conduct these mediations, are neutral third parties. The charging party may opt to have a legal representative participate.

Mediation is confidential, and a "firewall" exists between mediation and the enforcement/investigative unit. This means a failed mediation will not affect a later investigation. A mediation agreement will, however, be enforceable in court.

For more information on EEOC mediation, see the EEOC's Resolving a Charge fact sheet. For information on mediation more generally, see Mediating Employment Disputes and Checklist – Mediating Employment Disputes.

Writing an Effective Position Statement

If a case does not go to mediation or if the parties cannot resolve the dispute in mediation, it goes to the Enforcement Unit for an investigation. This often starts with the EEOC mediator setting a deadline for the respondent to file its position statement.

Think of the position statement as your opportunity to convince the EEOC investigator to issue a finding of no probable cause without conducting any further investigation. Investigators have staggering caseloads. Well-written and supported position statements can give them the rationale they need to dismiss the charge against the employer.

A position statement should contain all of the following:

- An explanation and identification of all related employment policies to demonstrate that the employer is committed to equal employment opportunity

- A detailed response to each allegation

- A brief statement of relevant case law

- An analysis section explaining why the charge has no basis

It is a best practice to submit documentation that supports the narrative in the position statement. Therefore, consider submitting (where applicable) the following documents:

- Related employment policies

- Relevant portions of the charging party's personnel file

- Comparator information

- All documentation of any relevant complaints by the charging party and the employer's responses

The position statement is also your opportunity to advise the EEOC of errors in the charge that could make the difference between the employer being found liable for a large sum and the EEOC dismissing the charge. Potentially determinative errors include naming the wrong entity, not demonstrating jurisdiction, and inaccurately stating the number of respondent's employees—which dictates the applicable statutory cap for compensatory and punitive damages. For more information on drafting position statements, see Drafting an EEOC Position Statement and Checklist - Responding to EEOC Charges (Including Sexual Harassment Charges). The EEOC also has guidance on what to include in a position statement.

Responding to Requests for Information

Almost every investigation will include a Request for Information (RFI). Information that investigators commonly seek includes:

- Employment policies and practices

- Information pertaining to the charging party (e.g., application, personnel file, medical information, relevant e-mails, etc.)

- An employee roster with contact information

- Comparator information (e.g., wage documents or all applications for a particular position)

- Electronically stored information (ESI) pertaining to the charge and/or charging party

Employers often bristle at requests for employee rosters and comparator information in particular. You should advise the employer to produce the requested information. If the employer refuses to produce the information and the EEOC pursues the matter in court, the employer will likely lose. Courts routinely find that the Commission may properly request such information in its investigations. You may be able to limit such requests, however. For example, you can offer to produce the roster but not provide employee social security numbers.

Employers also may resist requests for employees' medical information, but note that courts have found that this information is properly discoverable in an EEOC investigation of an ADA charge. See, e.g., E.E.O.C. v. Alliance Residential Co., 866 F. Supp. 2d 636, 645–46 (W.D. Tex. 2011) (granting the EEOC's request to enforce a subpoena which required defendant to turn over former employees' medical information).

Because the EEOC is statutorily required to keep all information provided during an investigation confidential, you are unlikely to prevail in court on any argument pertaining to disclosure of sensitive medical information. A best practice for employers is to mark all medical information and employee information as "confidential." This will help ensure that you are protecting the medical and employee information of employees who are not the subjects of the charge.

If you are faced with an RFI that you believe is overbroad (temporally or geographically), you may be able to negotiate the scope with the investigator. If that fails, you should unilaterally narrow the scope and produce what you believe is appropriate and see if the investigator responds by sending you a letter or issuing a subpoena. Refusing to respond at all will likely result in a subpoena, whereas providing what you believe is proper may satisfy the EEOC. In the event the employer is faced with a subpoena enforcement matter, demonstrating that you fully complied with what you believed to be reasonable will put the employer in a positive light before the EEOC Commissioners and the court.

Administrative Subpoenas: Challenges and Enforcement

Title 42 U.S.C. § 2000e–8(a) gives the EEOC subpoena authority:

> In connection with any investigation of a charge . . . the [EEOC] shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

Petitions to Revoke or Modify Subpoenas

Subpoenas issued solely pursuant to the EPA or ADEA are enforceable in federal district court immediately upon noncompliance. With the exception of subpoenas issued solely pursuant to the EPA or ADEA, when you receive an administrative subpoena with which the employer does not intend to fully comply, you must submit a Petition to Revoke or Modify:

> Any person served with a subpoena who intends not to comply shall petition the issuing Director or petition the General Counsel, if the subpoena is issued by a Commissioner, to seek its revocation or modification. Petitions must be mailed to the Director or General Counsel, as appropriate, within five days (excluding Saturdays, Sundays[,] and Federal legal holidays) after service of the subpoena. Petitions to the General Counsel shall be mailed to 131 M Street, NE., Washington DC 20507. A copy of the petition shall also be served upon the issuing official.

29 C.F.R. § 1601.16(b)(1).

Note that this regulation provides only five business days for submitting a petition. The Commission will not consider untimely petitions. If you do not timely submit a Petition to Revoke or Modify, the Legal Unit of the EEOC office conducting the investigation can utilize the procedures of section 11(2) of the National Labor Relations Act, 29 U.S.C. § 161(2), to compel enforcement of the subpoena in federal district court.

A Petition to Revoke or Modify must do both of the following:

- "[S]eparately identify each portion of the subpoena with which the petitioner does not intend to comply"
- "[S]tate, with respect to each such portion, the basis for noncompliance with the subpoena"

29 C.F.R. § 1601.16(b)(2). Designate a copy of the subpoena "Attachment A" and attach it to your petition. Id.

EEOC Determinations on Petitions to Revoke or Modify

The EEOC Commissioners will consider the Petition and issue a Determination. Although the regulations state that this will happen within eight calendar days after receipt or as soon as practicable (29 C.F.R. § 1601.16(b)(2)), in some cases the employer may wait a year or more before receiving a response.

The Determination may fully uphold the subpoena, limit its scope, or invalidate it, with the first two possibilities being the most likely. Unless it invalidates the subpoena, the Determination will include a deadline for compliance, after which the Legal Unit of the EEOC office conducting the investigation can compel enforcement of the subpoena in federal district court.

Is It Worthwhile to Fight Subpoena Enforcement? Difficult Odds for the Employer

The Commission frequently prevails when it seeks to enforce its administrative subpoenas in federal court. Accordingly, you should have a frank discussion with the employer about the costs of fighting a subpoena, the likelihood of success, and the cost of compliance with the subpoena as written. You should also research the case law in your circuit. Some circuits are more employer-friendly than others with respect to enforcing administrative subpoenas.

When considering whether to enforce an administrative subpoena, the judge considers whether the charge is valid and whether the information subpoenaed is relevant to the charge. The judge also assesses "any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose." Univ. of Penn. v. EEOC, 493 U.S. 182, 191 (1990). The judge cannot consider whether the charge is likely to result in a cause finding. See EEOC v. Shell Oil Co., 466 U.S. 54, 72 n.26 (1984).

The Commission's subpoena power is broad. As the Fourth Circuit noted in reversing a district court's refusal to enforce an EEOC subpoena, courts "defer to an agency's own appraisal of what is relevant so long as it is not obviously wrong." EEOC v. Randstad et al., 685 F.3d 433, 448 (4th Cir. 2012). "[T]he role given to the Commission in the statute calls for a relevance standard broad enough to ensure that the 'Commission's ability to investigate charges of systemic discrimination not be impaired.'" EEOC v. Konica Minolta Business Solutions U.S.A., Inc., 639 F.3d 366, 369 (7th Cir. 2011) (quoting Shell Oil Co., 466 U.S. at 69)).

Finally, even if the information sought is relevant, employers may escape compliance with an EEOC subpoena based on undue burden, but such scenarios are rare. See EEOC v. Maryland Cup Corp., 785 F.2d 471, 477 (4th Cir. 1986) ("The burden of proving that an administrative subpoena is unduly burdensome is not easily met."). To show undue burden, you will need to submit declarations attesting to the number of employee hours and cost of employee time, and that compliance will severely disrupt business operations. Even with that evidence, success is still unlikely.

Appellate courts review district courts' decisions "whether to enforce or quash an EEOC subpoena . . . for abuse of discretion, not de novo." McLane Co., Inc. v. Equal Employment Opportunity Comm'n, 2017 U.S. LEXIS 2327, at *19 (Apr. 3, 2017).

Preparing for and Representing the Employer at an On-Site Investigation

Although it no longer does so very often, the EEOC has the authority to request to conduct an on-site investigation (known simply as an on-site) of current managerial and non-managerial employees. If the EEOC intends to conduct an on-site, it often sends an employer a list of employees whom the investigator wishes to interview. Be aware that any information that comes out of the on-site can be used in a cause finding and subsequent litigation, particularly if it comes from an employee who is capable of binding the company.

Courts recognize that interviewing employees is within the EEOC's investigative power, so efforts to avoid on-sites are typically futile. You may be able to limit the scope of questioning, though that too is unlikely. The best approach is to be cooperative in scheduling the on-site and object only based on privilege.

Give employees at the site advance notice of the on-site and alert them that the plaintiff may attend, unless you know for certain that he or she will not. Employment discrimination cases can create tension and hostility between the plaintiff and other employees. Thus, it is best to avoid blindsiding current employees with the plaintiff's surprise appearance in their workplace.

The investigator may try to interview non-managerial witnesses outside of your presence at the on-site. As long as there is no conflict with your representation of the employer, you may consider asserting that you represent these employees and request to attend the interviews. But the Commission may find this overbearing, so tread lightly. The EEOC investigator may also use the employee roster to interview current and former non-managerial employees outside of the on-site.

Aside from gathering information that relates to the charge during an on-site, the investigator will also examine whether the employer is posting statutorily required posters or notices, complying with recordkeeping requirements, and keeping medical and personnel records separate. Even if the EEOC dismisses the charge, it could still find the employer liable for a technical violation. Therefore, you must ensure that the employer's house is in order before the on-site investigation.

Special Considerations for Systemic Investigations

All of the above processes apply equally for systemic investigations. Systemic investigations may take several years—five or more—and contain numerous requests for information. Depending on the nature of the investigation, the RFIs may seek voluminous amounts of data.

If an investigation appears to be dragging on with long stretches of inactivity, consider whether the employer may have a viable laches defense in litigation. If so, you can lay the groundwork by gathering evidence that the delay prejudiced the employer. For example, with a long delay, employees who are crucial fact witnesses often switch jobs, and memories fade over time.

Conciliating Individual and Systemic Charges

What is Conciliation?

Before the Commission can file suit it must engage in conciliation (except with respect to charges under the EPA, for which conciliation is not mandatory). 42 U.S.C. § 2000e-5(b). Conciliation is a statutorily required pre-litigation process in which the EEOC, the charging party, and the employer attempt to privately resolve a charge for which the EEOC issued a cause finding (i.e., it found reasonable cause to believe the charge is true). Typically, the EEOC will attach a conciliation proposal to its Letter of Determination, which outlines the reasons for the cause finding (but some EEOC offices issue the conciliation proposal much later).

The conciliation proposal should outline the desired remedies with specificity. The EEOC always seeks injunctive relief, such as targeted training, a policy change, or policy implementation, and will require the employer to post a notice of the conciliation agreement in a public space. Depending on the facts of the charge, the injunctive relief may also seek reinstatement, a reasonable accommodation, hiring or promotion, and/or a salary increase. Conciliations also have a monetary component, which includes back pay (including lost benefits and interest) and compensatory damages, if applicable.

For cases the Commission hopes to litigate, initial monetary demands can be shockingly high. Do not let that deter you from engaging in conciliation. The EEOC's bottom line may be much lower than the initial demand.

What Happens during Conciliation?

After receiving the conciliation proposal, you will have to determine how to respond to both its injunctive and monetary components. If you do not know how the EEOC reached its damages demand, you should request in writing that the investigator provide you with that information before making a counterproposal.

Conciliation works much like any other settlement negotiation, with both sides exchanging offers. Of course, employers can decline to engage in the conciliation process, but they do so at their peril. By declining to engage in conciliation, you run the risk that the EEOC will immediately file suit, and you will not be able to argue that conciliation is a condition precedent to the action. See EEOC v. OhioHealth Corp., 115 F. Supp. 3d 895, 898 (E.D. Ohio 2015); see also Conciliating EEOC Charges for a detailed discussion of conciliation defenses following the Supreme Court's 2015 decision in Mach Mining v. EEOC, 135 S.Ct. 1645 (2015). The best practice is to make at least a nominal counteroffer and agree to as much of the injunctive relief as is palatable.

You can also request an in-person meeting or telephone call with the EEOC investigator to discuss the conciliation, or you can exchange written demands. A direct conversation with the investigator may give you insight into the EEOC's bottom line and whether it is planning to litigate if conciliation fails.

If you successfully conciliate, the EEOC, the employer, and the charging party will all sign the conciliation agreement. The conciliation agreement is enforceable in court. If the employer wants a release of claims, you will need to negotiate that directly with the charging party outside of the EEOC process. For more information on EEOC's conciliation process, see Conciliating EEOC Charges.

Should an Employer Conciliate?

Conciliating a charge has two notable benefits. One is that the underlying allegations and resolution remain confidential. The Commission routinely issues press releases upon filing a lawsuit, and again when the suit is resolved. This can harm an employer's reputation and encourage additional charge filings. The second benefit is that the employer could save a lot of money by avoiding litigation. Of course, there are many factors to consider when deciding whether to conciliate a charge, but be sure to flag these two for the employer.

Special Considerations for Conciliating a Systemic Case

It is not unusual for a systemic conciliation to last for several months because of the scope of injunctive relief and the amount of money at stake. Ideally the agency and the employer would meet in person or by phone. If the investigator does not suggest an in-person or telephonic meeting, you should request one. It is not uncommon for EEOC attorneys to be involved in conciliation meetings for systemic cases.

Where the systemic case is a pattern or practice case involving a large number of potentially aggrieved individuals (e.g., a failure to hire case), you may want to retain a consulting expert to help you identify your exposure and potential damages. If a case like this settles in conciliation, the employer will likely have to pay for a settlement administrator to find and compensate all of the potentially aggrieved individuals.

In other respects, the strategic considerations are the same for conciliating a systemic case as they are for an individual case, with a few additional points. If the EEOC litigates your systemic charge and it settles, the settlement could be quite large. See e.g., EEOC v. BMW Mfg. Co. (D.S.C. 2015) (disparate impact case alleging that failure to hire due to failed criminal background check had a disparate impact on African American employees; settled in 2015 for job offers for up to 90 applicants and $1.6 million in relief); EEOC v. Verizon Maryland, Inc. (D. Md. 2011) (systemic denial of reasonable accommodations, discipline, and discharge based on mandatory attendance policies, resolving through a three-year consent decree providing $20 million to 800 individuals with disabilities and revised policies to require accommodation);EEOC v. Wal-Mart Stores, Inc., No. 01-CV-339 (E.D. Ky. 2010) (allegations of a systemic failure to hire women resulting in a five-year decree, $11.7 million to 4,000 women, and 150 job offers). The odds of dismissal or summary judgment are bleak for employers: EEOC has a 94% success rate in systemic lawsuits. Systemic litigation takes many years, costs a lot to defend, and will almost certainly result in numerous depositions of the employer's staff.

For these reasons, successful conciliations of systemic cases have tripled from 21% in fiscal year 2007 to 64% in fiscal year 2015.

Litigating an Individual Case against the EEOC

Litigating individual cases against the EEOC is not particularly different than litigating individual claims of discrimination against a private plaintiff, with a few caveats. See Defending Single-Plaintiff Employment Discrimination Cases.

Litigating against the EEOC, or any governmental agency, differs from litigating against private plaintiffs' counsel because EEOC attorneys do not bill hourly and are not restricted by a private client's budget. Therefore, they might engage in more discovery than most plaintiffs' attorneys.

In addition, the EEOC is likely to view a FOIA request for a charge file as duplicative of requests for production and an attempt to circumvent Federal Rule of Civil Procedure 34. Therefore, employers are better off requesting the charge file through the discovery process than making a FOIA request.

Litigating a Systemic Case against the EEOC

Litigating systemic cases against the EEOC is an entirely different animal than litigating individual cases against the EEOC. These systemic cases are somewhat comparable to class actions, but the Commission is not governed by Rule 23 of the Federal Rules of Civil Procedure (FRCP 23). Not being bound by FRCP 23 is a major advantage for the Commission. This is because it does not have to demonstrate: (1) numerosity; (2) common questions of law or fact; (3) that claims or defenses of the representative parties are typical of the class; or (4) that the representative parties will fairly and adequately protect the interests of the class. Further, pursuant to FRCP 23, a class action must be certified, but when the Commission brings large class cases, it does not have to certify its class.

Litigating a systemic case is a marathon, not a sprint. It is not unheard of for these cases to take five to ten years, or even more. This is due in part to the sheer volume of documents, claimants, depositions, discovery disputes, briefing, and expert considerations. Of course, the basic principles of discovery—discovery requests, requests for admission, ESI, depositions—all remain the same.

Staffing a Systemic Case

With the EEOC's commitment to operate as a national law firm, it can be a formidable opponent in systemic cases. The Commission typically staffs a systemic case with one supervisory trial attorney and a core team of trial attorneys. Trial attorneys from other offices may assist with taking and defending depositions across the country.

You should also have one attorney directing all aspects of the litigation, with several attorneys on the litigation team. Of those, consider having one attorney manage expert and/or ESI issues, and another manage fact discovery.

Bifurcation of Discovery and Trial

Early in the litigation of a pattern or practice case, the EEOC may seek bifurcation of discovery and/or trial. Under the model of proof that the Supreme Court endorsed in Teamsters v. United States, 431 U.S. 324 (1977), the EEOC must prove that a defendant engaged in a pattern or practice of discrimination in the first phase of litigation (also known as the liability phase).

If the EEOC succeeds, it creates a presumption of liability that carries into the second phase (also known as the damages phase). Each claimant benefits from a presumption that the adverse action was because of his or her protected class, but the employer can present individualized evidence to refute the presumption and raise other defenses, such as failure to mitigate.

This approach can represent a tremendous cost savings to the employer. For example, suppose there are 500 claimants in a failure to hire case. Rather than depose all 500, a bifurcated discovery order could permit each side to select a small subset of claimants to depose. Written discovery can also be tailored to each phase, with damages information deferred until the second phase. Note that it is most efficient to depose each person only once. Thus, should you bifurcate, consider requesting early production of damages information for all of the claimants to be deposed in the first phase so that you can question them about all relevant information in one deposition session.

Expert Considerations in Systemic Cases

It is never too early to start thinking about your experts for a systemic case. If the systemic case is one in which the EEOC will attempt to prove its case through statistics (e.g., hiring, promotion), you will want a statistician who can analyze the relevant labor market and application flow to help refute the government's case. You will also want an ESI expert or hands-on vendor (see below).

Depending on the allegations in your case, you may also want a social scientist, vocational rehabilitation expert, or other medical expert. Consider also whether you want one or more consulting experts.

Electronically Stored Information (ESI) in Systemic Cases

You will almost certainly need either an ESI expert or an attorney who focuses on ESI within your own firm. ESI in systemic cases is extraordinarily time-consuming and complex. Even if the attorney managing the litigation is extremely well-versed in ESI, he or she will simply not have the capacity to manage both the litigation and the ESI.

Your local jurisdiction will likely require an ESI conference early on. If not, you should request a conference with EEOC counsel to discuss ESI parameters. The Commission has internal ESI specialists who handle the collection and production of ESI, so as you assemble your team, you want to ensure that you do too.

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