Administrative Agencies

The Regulatory Environment

February 2016

Littler
Employment & Labor Law Solutions Worldwide™

Federal Agency Activity

- The federal agencies have bigger budgets and more investigators than ever before
- Their tactics are more aggressive
- Informational campaigns to employees (and of course, SmartPhone apps)
- Lofty enforcement agendas

Agency Functions

1. Rule-making: agency fleshes out statutes, using technical expertise.

2. Adjudicating.

3. Investigating.

Forbes The Best States For Business And Careers

Rank	State	Business Costs Rank	Labor Supply Rank	Regulatory Environment Rank ▲	Economic Climate Rank	Growth Prospects Rank	Quality of Life Rank	Population
44		44	29	28	45	25	50	737,625

Policymaking has moved from Congress to Administration

Recent Federal Contractor Initiatives

- OFCCP's Veterans and Disability Regulations
- Executive Order Raising the Minimum Wage
- Executive Order Regarding Non-Retaliation in Discussing Compensation
- Proposed Rule re Compensation Data Collection Tool and OFCCP's Equal Pay Report Form
- Executive Order re Fair Pay and Safe Workplaces
- Executive Order re Sexual Orientation and Gender Identity
- OFCCP's New Scheduling Letter and Itemized Listing

Minimum Salary Level For Exempt

For white collar exempt:

DOL expected to set the minimum salary at the 40th percentile of full-time “non-hourly paid” employees.

- Currently: $455/wk ($23,660/yr)
- Alaska: $780/wk ($40,560/yr)
- Expected: $970/wk ($50,400/yr)

Wednesday, February 17, 2016

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DOL's Proposed Changes to the White Collar Regulations: What Should Employers Do Now?

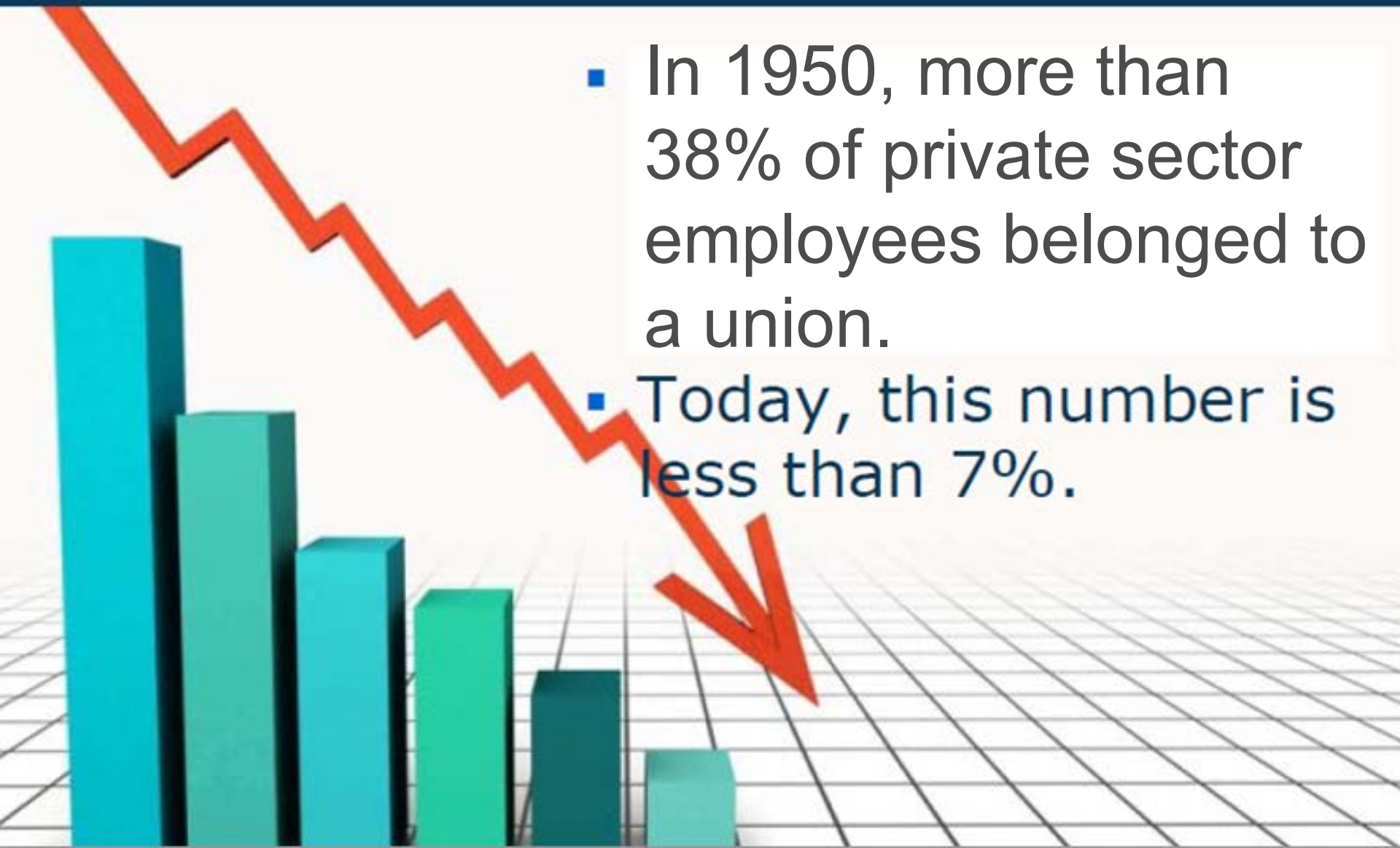
Registration & Breakfast: 8:00 a.m. – 8:30 a.m.
Program: 8:30 a.m. – 10:30 a.m.

To Register:

Email jrlopez@littler.com or call Nancy Kruse at 907.561.1214.

The NLRB: Not Just About Union Workplaces Anymore

"The State of the Union" – Yesterday and Today



- In 1950, more than 38% of private sector employees belonged to a union.
- Today, this number is less than 7%.

The NLRB'S Agenda

The decline in union membership has caused several agenda items for the current NLRB:

- Enhance unions' efforts to organize
- Expand the universe for such activity to happen
- Weaken employers' abilities to defend against such efforts
- Weaken employer workplace policies by aggressive application of Section 7

Micro Units

- In NLRB *Specialty Healthcare,* 357 N.L.R.B. No. 93 (August 26, 2011), the Board established that union proposed bargaining units will invariably be deemed appropriate, unless the employer can show that a larger unit of employees share an "overwhelming" community of interest with those in the petitioned-for unit
- Decision is leading to small, “micro” bargaining units that are easier to organize and more difficult for employers to administratively manage
- NLRB is regularly applying the “overwhelming community of interest” test

Micro Units

- It is often difficult for an employer to prove an “overwhelming community of interest” in a unit other than the one identified by a union
- Ability to target small groups gives unions flexibility and may lead to increased organizing
- However, unions may not want to pursue smaller units

How Quick is a "Quickie" Election?

2015 / may

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
26	27	28	29	30	Petition filed and Petition and Notice of Hearing served 1	2
3	4	Notices of Petition posted 5	6	7	Statement of Position due 8	9
10	Hearing 11	Decision and Direction of Election (likely if no briefs) 12	13	*Excelsior* list due 14	15	16
17	18	19	Notice of Election posted 20	21	22	23
24/31	Election date 25	26	27	28	29	30

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17	Election date 18	19	20	21	22	23
24/31	25	26	27	28	29	30

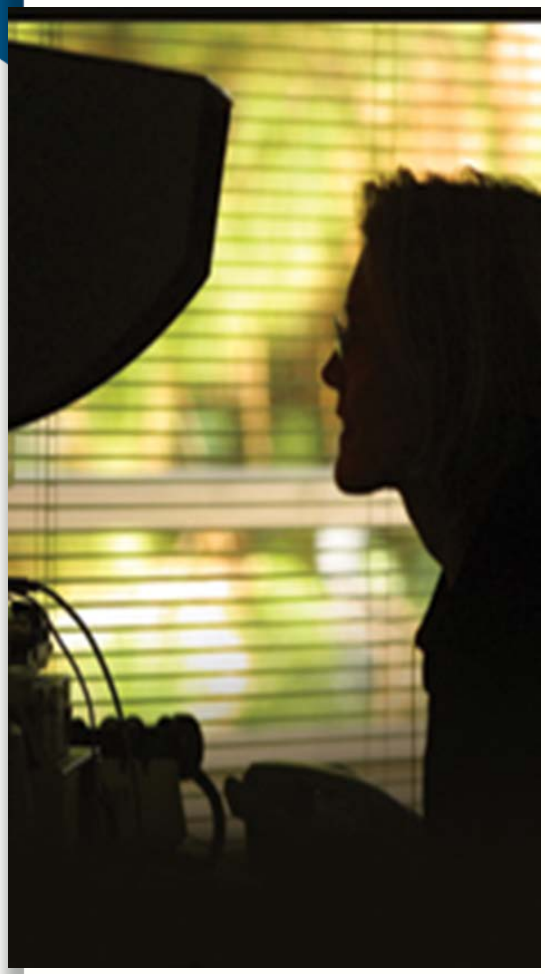
A union may waive the 10-day period it is entitled to the voter list

Purple Communications

Employees who have access to employer's e-mail system for work purposes have a presumptive right to use the e-mail system outside of work to engage in Section 7 protected activity.

Purple Communications, Inc. (December 11, 2014)

NLRB Broadens Its Reach



- **NLRA Sec. 7:**

Employees shall have the right to:

. . . Engage in other concerted activities for the purpose of collective bargaining **or *other mutual aid or protection*** . . .

- Section 7 extends to employee efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship."

Eastex Inc. v. NLRB, 437 U.S 556 (1978)

Handbooks

- Employee handbooks are the most common source of problems
- Many have one or more rules or policies that NLRB would find unlawful
- Mere maintenance of "overbroad" rules or policies violates the Act –even if rule or policy is not enforced

What's the NRLB doing here?

Employer policies are problematic when:

- employees would reasonably construe the language to prohibit Section 7 activity;
- the policy was promulgated in response to union activity; or
- the policy has been applied to restrict the exercise of Section 7 rights.

Lutheran Heritage Village – Livonia, 343 NLRB 646 (2004).

Is it Lawful?

Statement for employee to sign:

"I further agree that the at-will employment relations cannot be amended, modified, or altered in any way."

UNLAWFUL

ALJ held it violated NLRA because it "premises employment on an employee's agreement not to enter into any contract, to make any efforts, or to engage in conduct that could result in union representation and in a collective-bargaining agreement, which would amend, modify, or alter the at-will relationship."

American Red Cross (Feb. 1, 2012)

Advice Memos on At-Will Policies

Lawful Policy: "No manager . . . has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the company has the authority to make any such agreement and then only in writing."

Rocha Transportation (Oct. 31, 2012)

Lawful Policy: "No representative of the Company has authority to enter into any agreement contrary to the foregoing employment at will relationship."

Mimi's Café (Oct. 31, 2012)

Which One May Be Unlawful?

Blogging and internet posting policy ....

- Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.

- In order to maintain the Company's reputation and legal standing, the following subjects may not be discussed by associates in any form of social media:
  - Disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects.

UNLAWFUL

- Employer policy that states: "No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Company."

  Knauz BMW, 358 NLRB No. 164 (Sept. 28, 2012)

- Social media policy that allows discipline of employees for on-line statements that "damage the company, defame any individual or damage any person's reputation."

  Costco Wholesale Corp., 358 NLRB No. 106 (Sept. 7, 2012)

UNLAWFUL

- Employer policy that states:

  "Employees must maintain confidentiality of investigations."

Banner Health System 358 NLRB No.93 (July 30, 2012)

What about "Recommending" Confidentiality?

- Prior policy "required" confidentiality
- Employer revises policy to only "recommend" that employees keep investigations confidential

UNLAWFUL

Boeing Co. (2013)

Is it Lawful?

- Policy:

"[Employer] has a compelling interest in protecting the integrity of its investigations. In every investigation, [Employer] has a strong desire to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. To assist [Employer] in achieving these objectives, we must maintain the investigation and our role in it in strict confidence. If we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination."

Verso Paper (Advice Memo released January 29, 2013)

OVERBROAD: REVISE AS FOLLOWS:

"[Employer] has a compelling interest in protecting the integrity of its investigations. In every investigation, [Employer] has a strong desire to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. *[Employer] may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If [Employer] reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.*"

Verso Paper (Advice Memo released January 29, 2013)

UNLAWFUL

- Employer policy that states:

  Employees are prohibited from disclosing "any confidential or proprietary information except as required solely for the benefit of the Company in the course of performing duties as an associate of the Company …. Examples of confidential and proprietary information include …personnel file information …[and] labor relations [information]. . . ."

  Remington Lodging and Hospitality, LLC 359 NLRB No 95 (Apr. 24, 2013)

UNLAWFUL

- Employer policy that: "Prohibits employees from speaking with the media or law enforcement unless authorized; or discussing details about their job, company business, customers or other employees with anyone outside the company."

Direct TV 359 NLRB No. 54 (Jan. 25, 2013)

- Employer policy that requires employees: "not to give any information to the news media … without prior authorization from the general manager and to direct such inquiries to his attention"

Remington Lodging (Apr. 24, 2013)

Other Work Rules Under Scrutiny

- Off-Duty Access by Employees
- Walking Off the Job
- Union-Free Statements
- Union Buttons
- Logos and Uniforms
- Conflict of Interest
- Arbitration
- Fraternization
- Recordings in the Workplace
- Use of Electronic Equipment
- Solicitation and Distribution

Adopt a Policy Ensuring § 7 Rights

Consider adopting a policy that assures employees that no policies will be interpreted to impair their right to work together to improve their lot as employees. This may assist in helping your policies to pass muster with NLRB.

Joint Employer

- Test had been in place for 30+ years.
- To be an employer, an entity must exert a significant and direct degree of control over employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction of employment
- NLRB General Counsel asserted that the current standard should be abandoned. New Standard adopted in *Browning Ferris* case
- Many industries affected:
  - Franchises
  - Construction
  - Staffing agencies
  - Employee leasing companies
  - Vendors
  - Suppliers

Old and New Joint Employer Standards

BEFORE	AFTER
Joint Employer Standard	**Joint Employer Standard**
• Businesses are joint employers only when they share "direct and immediate" control over matters governing the essential terms and conditions of employment • Focus is on terms and conditions of employment including hiring, firing, discipline, supervision and direction	• Businesses would be joint employers whenever one exercises "indirect control" over the other • Focus would be on "industrial realities" that make the controlling party necessary to "meaningful collective bargaining" • Joint employer status may be found even though the "controlling" party plays no role in hiring, firing, or directing the other party's employees

D. R. Horton, Inc., & Murphy Oil USA

- D.R. Horton: NLRB rules that arbitration agreements that include class action waivers are illegal.

  D.R. Horton, Inc., 357 NLRB No. 184 (2012)

❖ 5th Circuit Court Reverses.

D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013).

- Murphy Oil USA: NLRB says "reasoning and result" of D.R. Horton was correct. Again rules that arbitration agreements that include class action waivers are illegal.

  Murphy Oil USA, Inc., 361 NLRB No. 72 (2014).

Occupational Safety and Health Administration

- OSHA carries out its responsibilities through workplace inspections, investigations, issuance of citations and charging of penalties
- Quasi-judicial agency, similar to the NLRB
- Develops and enforces safety and health standards
  - Some widely applicable (e.g., lockout/tagout procedures)
  - Some are industry-specific (e.g., pipeline safety, clean air, clean water)
- Where no specific rules apply, the General Duty Clause requires that: "each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees…"
- Imposes recordkeeping/reporting requirements for injuries and fatalities
- Includes anti-retaliation provisions and can constitute another type of protected activity

When OSHA Comes Knocking

- Immediately notify the appropriate person in Employee Relations, Safety and/or Legal
- Ask to see the investigator's credentials
- Escort the investigator into an office and have him/her remain there
- Ask why the inspection is taking place, and obtain a copy of the complaint (if applicable)
- Inform the investigator that it is Company policy to have the appropriate company representative in attendance for this type of inspection—and offer to reschedule the visit, or wait for that representative to arrive
- If the investigator asks if you are refusing the inspection, say that you are not, but that you are asking to briefly delay the inspection until the appropriate representative is present

More Surprise Visits

Immigration and Customs Enforcement (ICE)

- ICE auditors will typically appear in person and serve a Notice of Inspection, and you should immediately notify the appropriate person in your company to respond
- They may ask to interview the person responsible for preparing the I-9s, and the company should have a designated person to speak to ICE when this happens
- Once the Notice of Inspection is served, the company will have 3 days to make the I-9s available for inspection (this time frame is rarely extended)
- If other documents are requested (W-4s, employment applications, etc.), the company may be able to negotiate more time

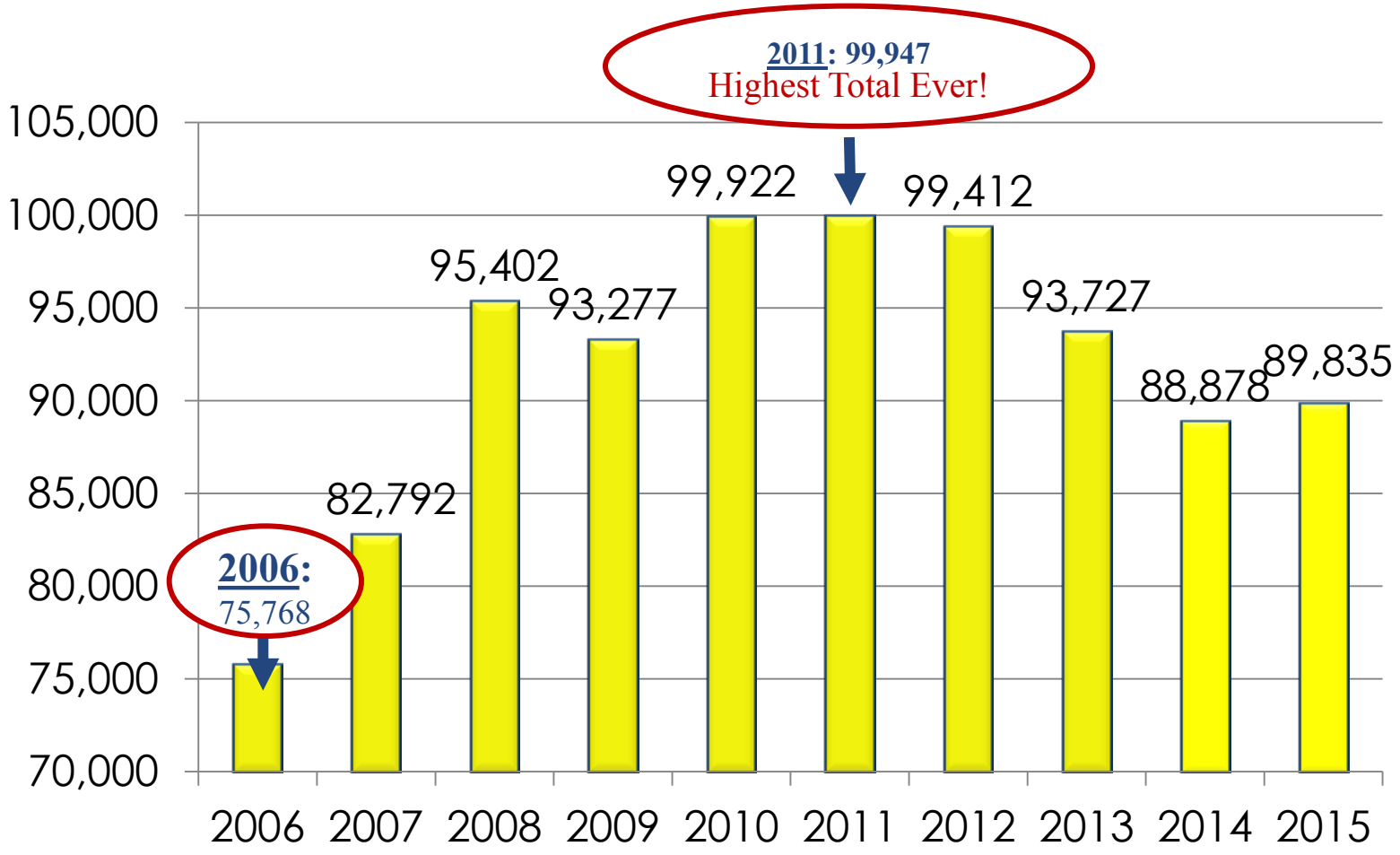
More Surprise Visits
Department of Labor (DOL)

- Likely a wage and hour or FMLA audit
- If the investigator has a subpoena, contact the appropriate person in company's Legal Department regarding acceptance
- Warrants likely demand immediate entry
- Absent a warrant (or private compliance agreement with the DOL), an employer has a right to counsel for this type of visit
  - Escort the investigator into a private office
  - Ensure cooperation and compliance with the law
  - Reschedule the meeting

EEOC

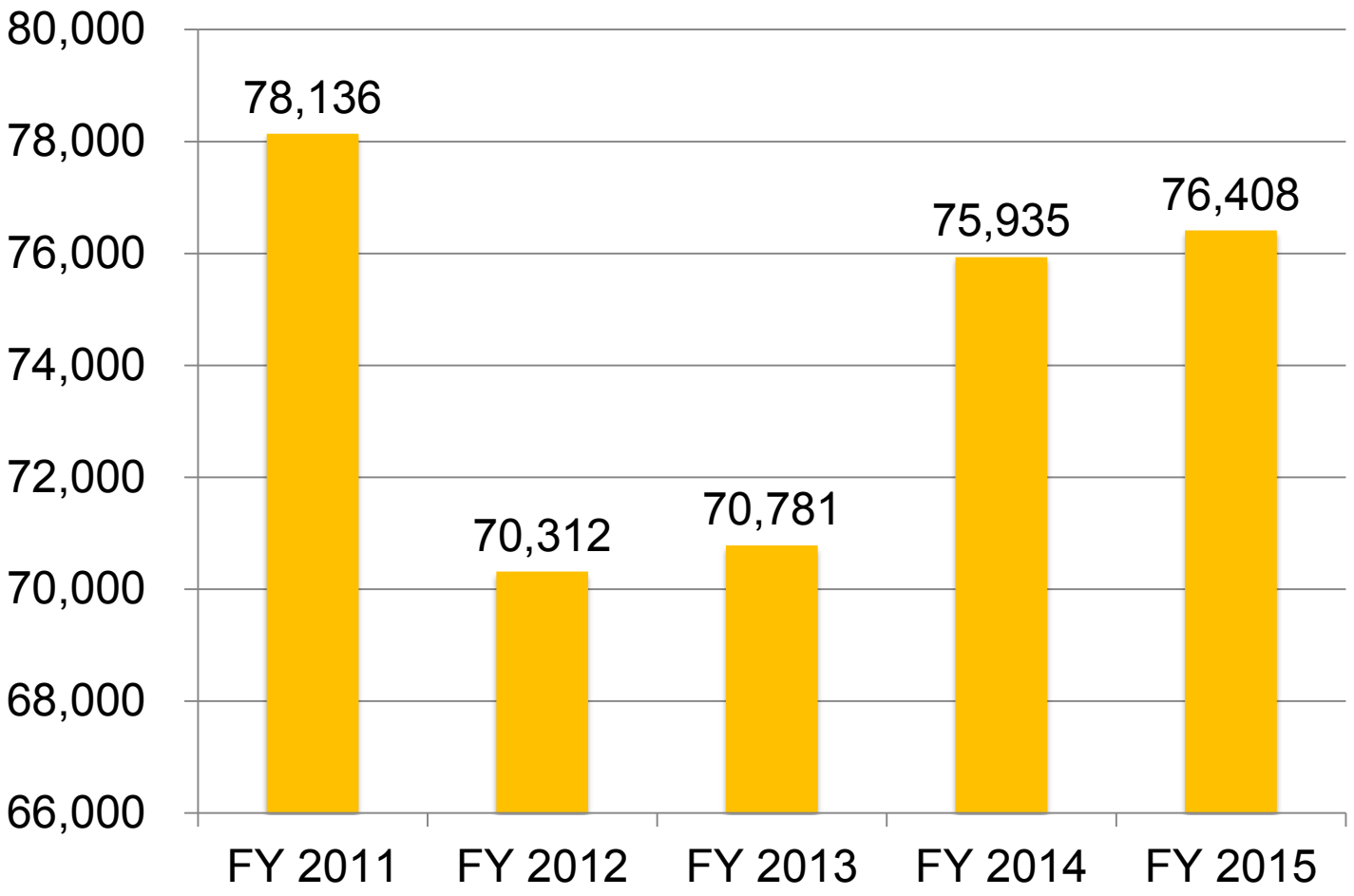
U.S. Equal Employment Opportunity Commission

Charge Filings In FY 2015



www.eeoc.gov

Backlog of Charges Increased



New "Normal" of Reduced Litigation

Year	Individual Cases	"Multiple Victim" Cases (including systemic)	Percentage of Multiple Victim Lawsuits	Total Number of EEOC "Merits" Lawsuits
2006	234	137	36%	371
2007	221	115	34%	336
2008	179	111	38%	270
2009	170	111	39.5%	281
2010	159	92	38%	250
2011	177	84	32%	261
2012	86	36	29%	122
2013	89	42	32%	131
2014	105	28*	22%	133
2015	**100**	**42****	**29.5%**	**142**

*11 multiple victim; 17 systemic
**26 multiple victim; 16 systemic

EEOC Systemic Investigations

Systemic Investigations:	2011		2012		2013		2014		2015	
Number Completed	235		240		300		260		268*	
Settlements (Conciliation)	35		65		63		78		70	
Monetary Recovery	$9.6 M		$36.2 M		$40.0 M		$13.0 M		$33.5 M	
Reasonable Cause in Systemic Charges	96	40.8%	94	39.1%	106	35%	118	45%	99	35%
Overall Reasonable Cause Findings	4,325	3.8%	4,207	3.8%	3,515	3.6%	2,745	3.1%	N/A	

See EEOC statistics, "All Statutes, FY 2007-FY 2013," available at http://eeoc.gov/eeoc/statistics/enforcement/all.cfm.

*2015 PAR refers to having "resolved" 268 systemic investigations, but this would be inconsistent with the track record over the past 4 years that referred to "completed" investigations.

Pending EEOC Litigation

	2011		2012		2013		2014		2015	
TOTAL NUMBER OF PENDING EEOC LAWSUITS	443	-	309	-	231	-	228	-	218	-
• **Individual lawsuits**	264	60%	172	55%	131	57%	140	61%	130	60%
• **Multiple victim**	116	26%	75	25%	46	20%	31	14%	40	18.3%
• **Systemic lawsuits**	63	**14%**	62	**20%**	54	**23%**	57	**25%**	**48**	**22%**

Causes of Action by Statute

Applicable Statute	Number of Lawsuits	
	2015	**2014**
Title VII	83	76
ADA	53	49
ADEA	14	12
Equal Pay	7	2
GINA	1	2

Causes of Action in EEOC Litigation

Causes of Action	2015 Statistics	2014 Statistics
ADA Claims	53	49
Sex Discrimination or Related Harassment	39	35
Retaliation	23	23
Racial Discrimination or Related Harassment	18	16
Age Discrimination	14	12
National Origin Discrimination or Related Harassment	10	10
Pregnancy Discrimination	13	13
Religious Discrimination or Related Harassment	6	7
Genetic Information Non-Discrimination Act	1	2
Multiple Claims	n/a	7

Scope of Conciliation Obligation by EEOC

***EEOC v. Mach Mining, LLC*, 135 S. Ct. 1645 (2015) – Key Rulings:**

- The Court held that, to comply with its statutory conciliation obligations, the EEOC must inform the employer about the specific discrimination allegation(s) and such notice must describe what the employer has done and which employees (or class of employees) have suffered.
- The Court further held the EEOC must try to engage the employer in a discussion in order to give the employer a chance to remedy the allegedly discriminatory practice.
- While the Court held that judicial review of these requirements is appropriate, the scope of that **judicial review is "narrow,**" explaining

  (1) The court will merely conduct a **"barebones review**" of the conciliation process, and

  (2) **the EEOC will have "expansive discretion" to decide "how to conduct conciliation efforts" and "when to end them."**

Scope of EEOC Investigation – Potential Impact on Litigation

Impact of Limited Investigation By EEOC

EEOC v. Sterling Jewelers, Inc., 2014 U.S. Dist. LEXIS 304 (W.D.N.Y. Jan. 2, 2014) (Magistrate Judge recommendation), *enforced,* 2014 U.S. Dist. LEXIS 31524 (W.D.N.Y. Mar. 10, 2014), Reversed by 2nd Circuit, 801 F. 3d 96 (2d Cir 2015)

- EEOC alleged that the employer engaged in a pattern and practice of discriminating against its female employees in promotion and compensation "throughout its stores nationwide."
- Employer moved for summary judgment on the EEOC's claims of nationwide discrimination, arguing that those claims should be dismissed because "there [was] no evidence that the EEOC conducted a nationwide investigation of its employment practices prior to commencing [the] action." Court granted SJ, holding the EEOC failed to present sufficient evidence that it conducted a nationwide investigation before it filed lawsuit.
- Second Circuit rev'd, holding that courts may only review whether EEOC conducted an investigation, not the sufficiency of its investigation. **Court relied in part of SC's *Mach Mining* decision that scope of administrative review is narrow. Request for en banc review by employer.**

Applicable Statute of Limitations in "Pattern or Practice" Litigation by EEOC

Section 706:

"…charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred" (in deferral state)

- **Discrete v. "Continuing" Violations – *See e.g. National Railroad Passenger Corp. v. Morgan*, 536 US 101 (2002) *re hostile environment claims***

Section 707 "Pattern or Practice" Claims:

Key Issue re applicable S of L:

- **300 days v. unlimited S of L**
- **Meaning of: "the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5of this title *[section 706]*."**

EEOC Strategic Enforcement Plan ("SEP")

Six Priorities Announced – Issues that have "*broad impact*" in which "*expertise of the Commission is particularly salient*," which are "best addressed" by EEOC based on "access to information, data and research."

1. ***Eliminating Barriers in Recruitment and Hiring*** **– "Racial, ethnic and religious groups, older workers, and people with disabilities." Exclusionary policies, steering, screening tools (*e.g.*, background checks, pre-employment tests, *etc.*).**
2. ***Protecting Immigrant, Migrant and Other Vulnerable Workers*** **– Those groups of individuals who are frequently unaware of their rights.**
3. ***Emerging and Developing Issues*** **– Certain ADA issues (reasonable accommodation, qualification standards, undue hardship), accommodating pregnancy limitations, LGBT coverage.**
4. ***Enforcing Equal Pay Laws*** **– Focus on gender and may use "directed investigations" and Commissioner charges to facilitate enforcement.**
5. ***Preserving Access to the Legal System*** **– By way of example, working to address retaliatory actions, overly broad waivers, and settlement provisions restricting access to Commission.**
6. ***Preventing Harassment Through Systemic Enforcement and Targeted Outreach*** **– Aside from sexual harassment, will focus on claims involving race, ethnicity, religion, and age.**

I. Barriers in Recruiting and Hiring

- **Focus on *Both* Disparate Impact and Disparate Treatment Cases**
- **Exclusionary policies and practices**
- **Channeling/steering of individuals into specific jobs**
- **Use of screening tools**
  - **Pre-employment tests**
  - **Criminal history and credit background checks**
    - Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. (April 25, 2012)
      - **Guidance focuses on disparate impact issues**
      - **Guidance focuses on Statistics** - Focuses on national conviction statistics to show how disparate impact may be established
      - EEOC suggests that employer will have burden of refuting a disparate impact determination by showing that its own applicant statistics show no adverse impact

II. Protecting Vulnerable Workers

Protecting Immigrant, Migrant and Other Vulnerable Workers – Focus on those frequently unaware of rights – Cases frequently deal with alleged "human trafficking"- In relevant part- exploitation for purposes of compelled labor through use of force, fraud or coercion

Favorable Developments for EEOC

- *EEOC v. Signal Int'l,* Case No. 2:12-cv-00557 (E.D. La.). 500 Indian nationals allegedly required to live in "man camps" and sign employment and housing agreements. **$5 Million settlement** announced on Dec. 18, 2015.
- *EEOC v. Global Horizons, et al.*, Case No. 11-00257 (D. Hawaii, filed April 11, 2011), Case No. Cv-113-45 (E.D. Wash., filed April 19, 2011). Thai nationals allegedly enticed to work at farms based on false promises, and subsequently confiscated passports and threatened deportation if complained. Hawaii litigation- **Over $8.7 M against Global Horizons** in Hawaii litigation in FY 2014. (***Note: Dual Lawsuits filed Against Global Horizons!)***

Unfavorable Development for EEOC

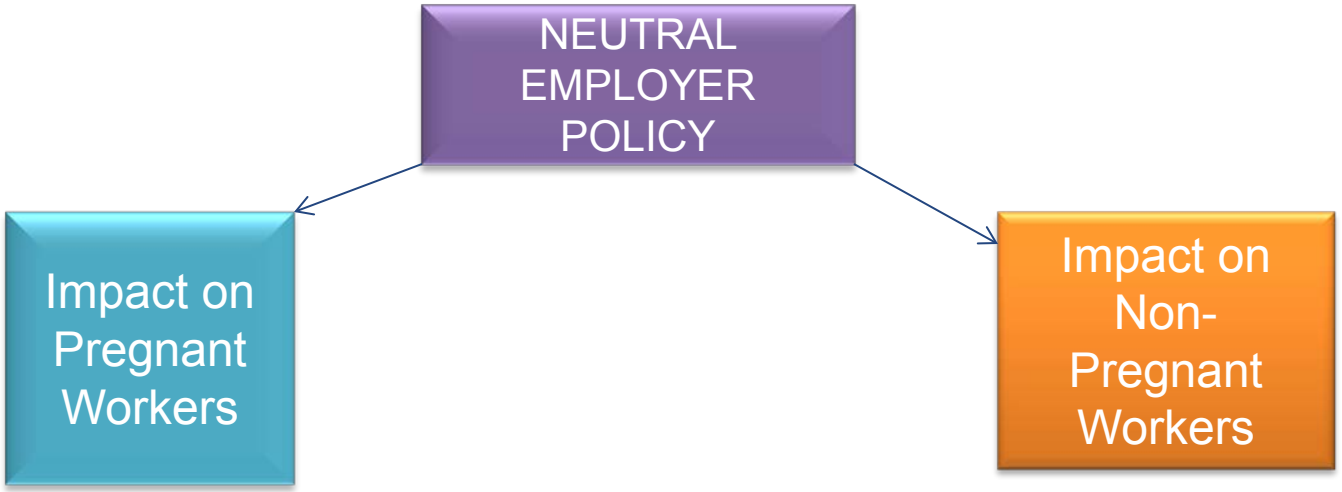
- **Court held that EEOC "pursued a frivolous theory of joint-employer liability" and "sought frivolous remedies" against grower defendants in tandem with action against farm labor contractor Global Horizons. Employers awarded over $900,000 in fees. *EEOC v. Global Horizons, Inc.*, 2015 U.S. Dist. LEXIS 148410 (E.D. Wash. Nov. 2, 2015)**

III. Emerging and Developing Issues

Key Issues Identified as EEOC Priorities:

- **Pregnancy Discrimination**
- **Religious Discrimination**
- **Americans with Disabilities Act**
- **Sexual Orientation / Gender identity**

Pregnancy: Comparison to Those "Similar in Their Ability or Inability to Work"



- If pregnant workers are treated less favorably, are the employer's legitimate, nondiscriminatory reasons sufficiently strong to justify the burden on pregnant workers?
- If there is evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers, this may give rise to an inference of intentional discrimination.
- Reason for difference in treatment cannot simply be "that it is more expensive or less convenient to add pregnant workers to the category of those whom the employer accommodates."

Impact of the ADAAA-Coverage of Temporary Disabilities Caused by Pregnancy

Accommodations for Pregnancy-Related Disabilities

- Redistributing marginal functions
- Altering how a job function is performed
- Modifying policies, equipment, or schedules
- Purchasing equipment and devices
- Additional leave
- Temporary light duty

Guidelines on the PDA

Guidance also Discuses Potential Disparate Impact Claims:

The Guidance *discusses the risk of disparate impact claims*:

- Statistical proof not required if the systematic burden on pregnant women is obvious
- The burden is on employers to prove that certain kinds of policies that disparately impact pregnant employees are job-related and consistent with business necessity
  - Example: Weight Lifting Requirement Example: Job description requires lifting 50lbs and most pregnant employees are unable to do this
  - Example: 10-day ceiling on leave and/or policy denying leave during 1st year of employment *has been found to have disparate impact on pregnant women*

III. Emerging Issues — Religious Discrimination

- **Technical Guidance.** "Religious Garb and Grooming in the Workplace: Rights and Responsibilities" *(Note: Lawsuit filed by EEOC based on alleged failure to hire individual who refused to cut hair on religious grounds. EEOC v. Mims Distributing Co., Case No. 5-14-cv-00538 (E.D.N.C., Filed Sept. 25, 2015))*
- **Must An Employee Specifically Request A Religious Accommodation-Key Issue Before SC.** *EEOC v. Abercrombie & Fitch Stores, Inc.*,2013 U.S. App. LEXIS 20028 (10th Cir. Oct. 1, 2013), *cert granted*, Docket No.14-86 (Oct. 2, 2014). Charging party denied employment based on employer's appearance policy but never specifically requested an accommodation based on her religion (i.e. wearing a hijab). Tenth Circuit upheld employer, reversed district court ruling in favor of EEOC and EEOC filed petition for cert.
- **Potential Limit on Religious Accommodation.** *EEOC v. JBS*, 2013 U. Dist. LEXIS 17963 (D. Neb. Oct. 11, 2013). Court rejected "pattern or practice" claim by group of Muslim worker for multiple prayer breaks on assembly line based on undue hardship defense involving costs, burdens and safety concerns with other employees having to work harder and faster to keep up with movement of product. Individual claims proceeding to trial

Religious Accommodations

- EEOC Does Not Care What Your Customers or Other Employees Think
  - "Customer preference is not a defense to a claim of discrimination."
  - "Neither co-worker disgruntlement nor customer preference constitutes undue hardship."
  - "An employer's reliance on the broad rubric of 'image' or marketing strategy to deny a requested religious accommodation may amount to relying on customer preference in violation of Title VII, or otherwise be insufficient to demonstrate that making an exception would cause an undue hardship on the operation of the business."

Religious Accommodation

EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 1645 (June 1, 2015)

Issue: Does failure to accommodate religious practice apply only where applicant has informed employer of the need for an accommodation??

- Ruling: An applicant only needs to show that his/her need for an accommodation was a *"motivating factor"* in the decision not to hire.
  - Trying to avoid making a religious accommodation violates Title VII even if the employer does not have actual knowledge that a religious accommodation request will be made.
  - **"Title VII does not demand mere neutrality with regard to religious practices**…Rather, it gives them favored treatment, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual . . . because of such individual's "religious observances and practice." …**Title VII requires otherwise neutral policies to give way to the need for an accommodation."**

ADA Concerns

ADA Concerns - Most significant number of EEOC lawsuits involve ADA Claims (i.e. 37% of all lawsuits filed by EEOC in FY 2015 Involved ADA claims)

Recent Issues of Focus by EEOC:

- Fixed Leave Policies- *See EEOC v. UPS*, 1:09-cv-05291 (N.D. Ill.); *also see* contempt action upheld against employer for violating terms of consent decree, 2014 U.S. Dist. LEXIS 169215 (N.D. Ill. Dec. 2, 2014); prior EEOC lawsuits that settled in recent years demonstrate consistent "track record" on this issue
- Challenges to No-Fault Attendance Polices-$1.7 million settlement announced on 11/5/15; Pending action, *EEOC v. AutoZone, Inc*., 14-cv-3385 (N.D. Ill.) [Note: $21 million against Verizon involving similar issue] http://www.eeoc.gov/eeoc/newsroom/release/7-6-11a.cfm
- Reasonable Accommodation Issues (See next slide)
- Attacks on Wellness Programs (see separate slide)

ADA Concerns – Challenges to Wellness Programs

Selected Litigation and Related Developments - Key Issue is "Voluntariness" of Wellness Plan:

- *EEOC v. Honeywell*, Case no. 14-cv-04517 (D. Minn., Filed Oct. 27, 2014) (Petition for TRO during EEOC investigation) (Struck down by court, but potential significance beyond wellness programs)
- *EEOC v. Flambeau*, Inc., 2015 U.S. Dist. LEXIS 173482 (D. Wis. Dec. 30, 2015) (Summary Judgment in Favor of Employer)
- **EEOC Proposed Regulations on Wellness**, published in *Federal Register* on April 20, 2015 (incentive up to 30% of total cost of employee-only coverage permissible); second Proposed Rule on Oct. 30, 2015 (expands incentive up to 30% of total cost of plan in which employee and dependents are enrolled)

Gender Identify and Sexual Orientation Discrimination

Gender Identify Disorders:

- *Lusardi v. John M. McHugh, Secy, Dept. of the Army*, EEOC Appeal No. 0120133395 (April 1, 2015)(Commission held that agency violated Title VII in restricted transgender employee from using common restroom, relying on 2012 Commission decision, *Macy v. DOJ*, EEOC Appeal No. 020120821 (April 20, 2012) that discrimination against transgender individual is, by definition, sex discrimination)
- *See also* Settlement in *EEOC v. Deluxe Financial Services Corp.*, (Jan. 15, 2016) http://www.eeoc.gov/eeoc/newsroom/release/1-21-16.cfm ; Settlement in *EEOC v. Lakeland Financial* (Apr. 13, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/4-13-15.cfm.
- *See Jamal v. Saks & Co.*, 4-14-cv-01782, Docket No. 17 (S.D. Tex.) (*Amicus* brief filed Jan. 22, 2015), following defendant motion to dismiss based on claim that Title VII not apply to transgender individuals (although the case was privately resolved prior to ruling on motion to dismiss)

IV. Enforcing Equal Pay Laws

- On April 13, 2015, EEOC Chair Jenny Yang issued a statement on Equal Pay Day, and underscored: (1) according to U.S. Census income data, women earn "just 78 cents on the dollar" compared to men's average earnings; (2) since the creation by the White House of the Equal Pay Task Force in 2010, through administrative enforcement efforts "the EEOC has obtained over $85 million in monetary relief for victims of sex-based wage discrimination"; and (3) the EEOC "provided training on equal pay issues at events across the country that reached nearly 40,000 attendees *See* EEOC, *Equal Pay Day, the EEOC, and Pay Discrimination*, *available at* **http://www.eeoc.gov/eeoc/publications/equal_pay_day.cfm.**
- During FY 2015, there were only seven EPA lawsuits filed by the EEOC. A case to closely monitor, filed in April 2015, is a class-based lawsuit filed in Maryland federal court—*EEOC v. Maryland Insurance Administration,* Civil Action No. 1:15-cv-01091-JFM (D. Md.)
- "Directed" Investigations: EEOC can self-initiate even without charging party (for both EPA and ADEA claims) – Anticipate more such investigations!!!!!

V. Preserving Access to Legal System

- The EEOC's stated priority involving "preserving access to the legal system" has involved challenges to employer practices that "target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC's investigative or enforcement efforts."
- Over the past year, the EEOC has continued to pursue litigation challenging releases and an arbitration agreement, taking the view that such documents interfere with an individual's access to the Commission.
- The arguments made by the EEOC in its recent litigation may have a far broader impact for two primary reasons: (1) the EEOC is broadly interpreting its authority to file pattern-or-practice lawsuits even absent a charge of discrimination or retaliation; and (2) the EEOC has further submitted that when filing a pattern-or-practice lawsuit not based on a charge of discrimination or retaliation, it has the right to go directly to court with no duty to conciliate, which is even broader than *Mach Mining*.

Severance Agreements

- Several common provisions in severance agreements are currently under attack by EEOC
- EEOC's position is that overbroad waivers that interfere with EEOC investigations or prohibit employee access to the Commission violate Title VII

Severance Agreements

- Current Litigation: ***EEOC v. CVS Pharmacy, Inc., Case No. 14-cv-863*** **(N.D. Ill.):**
- **EEOC challenging standard provisions in release agreements**
  - **Cooperation** clause requiring employee to "*promptly notify the Company's General Counsel by telephone and in writing*" of contacts relating to legal proceedings including an "*administrative investigation*" by "*any investigator*, attorney or any other third party...."
  - **Non-disparagement** clause prohibiting any disparaging statements about the Company, its officers, directors and employees
  - **Non-disclosure of confidential information** provision prohibiting disclosure to any third party of confidential employee and other information without prior written permission of chief HR officer
  - **General release of claims** that released all "causes of action, lawsuits, proceedings, complaints, *charges*, debts contracts, judgments, damages, claims, and attorney fees," including "*any claim of unlawful discrimination of any kind....*"
  - **No pending actions; covenant not to sue** clause whereby employee represents there is no pending "*complaint*, claim, action or lawsuit" "in any deferral, state, or local court, or *agency*". Clause prohibits filing of "*any action, lawsuit, complaint or proceeding*" asserting the released claims, and requires employee to promptly reimburse "*any legal fees that the Company incurs*" for breach of the covenant not to sue
  - **Employee Breach** clause, stating in the event of the employee's material breach of the Employee Covenants section, the Company would be entitled to obtain injunctive and other relief, including fees

VI. Sexual Harassment

- The EEOC reiterated its view that harassment remains a major priority of the Commission. “Complaints of harassment … are included in 30% of the charges that we receive,” per Chair Yang.
- In March 2015, Chair Yang set up the “EEOC Select Task Force on the Study of Harassment in the Workplace,” which held meetings in October and December 2015 to address broad-based concerns of harassment and discussed recommended actions.
- The EEOC has not hesitated to aggressively pursue such claims, which included:

  (1) a $17 million sexual harassment verdict (reduced to $8.9 million due to the caps) against a produce and packing operation in Florida;

  (2) $3.8 million settlement of class-based charges against a NY utility impacting on 300 women workers; and

  (3) the 6th Circuit affirming a $1.5 million verdict involving 4 women workers, *EEOC v. New Breed Logistics,* 2015 U.S. App. LEXIS 665 (6th Cir. Apr. 22, 2015)

Takeaways

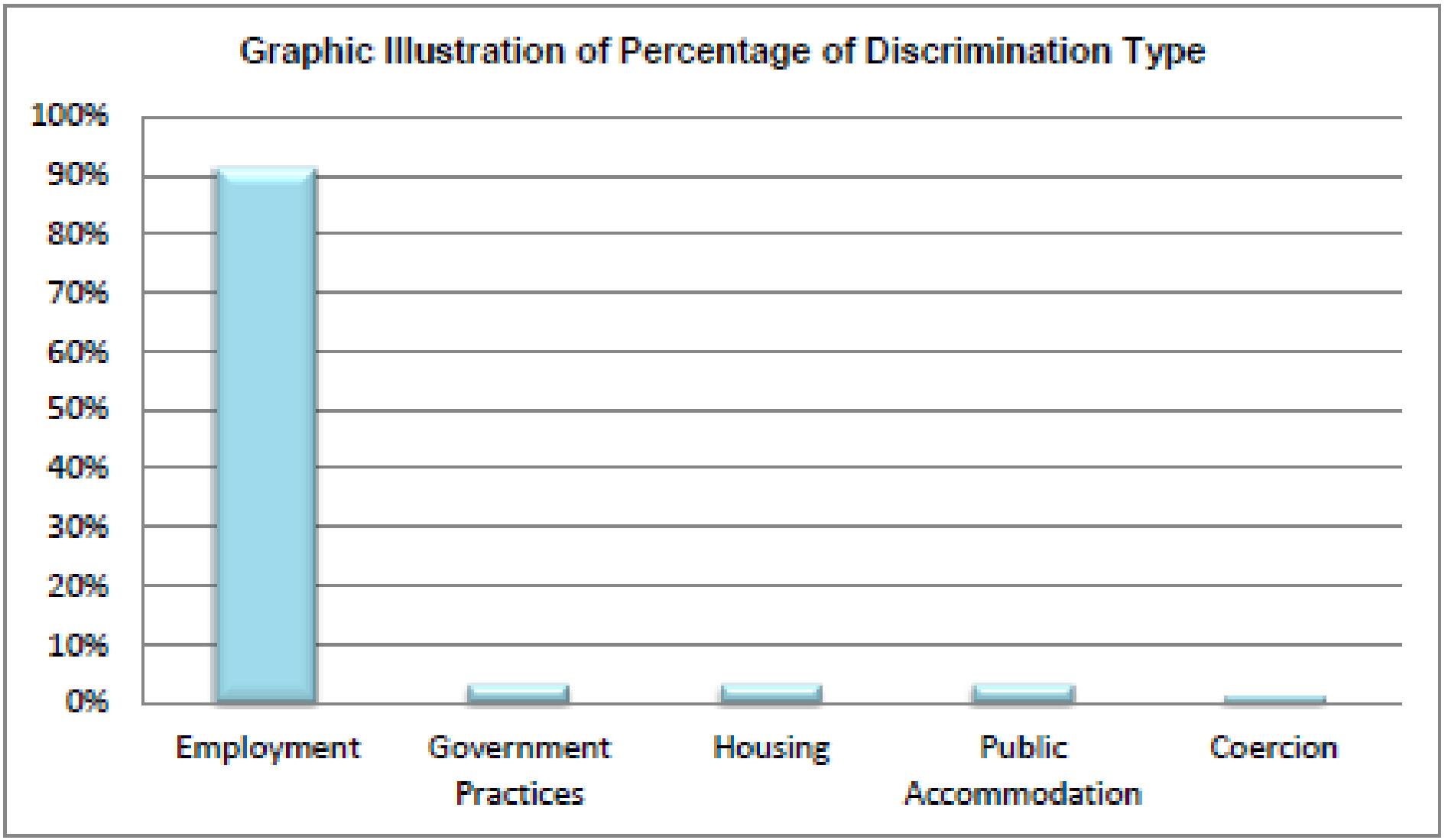
- **Take care with individual charge if it involves one of EEOC's "priorities" and potential expansion to systemic investigation**
- **Be careful in resisting requests for information based on the EEOC's broad investigative authority- Try and minimize the risk of subpoena and/or subpoena enforcement action (but there have been some inroads in 10th and 11th Circuits)**
- **If the EEOC issues a subpoena requesting documents or information, the employer may waive a right to challenge the request if not timely challenged (e.g. Title VII/ADA claims) (although no right to petition to modify or revoke with ADEA/EPA)**
- **Based on high percentage of "cause" findings with systemic charges, can't sufficiently underscore importance of volunteering strengths and being pro-active**
- **Anticipate more "directed investigations" (EPA/ADEA) and/or investigations without an underlying charge (i.e. settlement and/or arbitration agreements, despite CVS outcome in 7th Circuit)**
- **If the EEOC issues a "reasonable cause" finding, make ongoing efforts to negotiate and demonstrate a "good faith" effort to resolve the claim. A court will only conduct a "bare bones" review of the EEOC's conduct in the conciliation process, if a lawsuit is subsequently filed. (*Caveat*: Take care with dual court filings by EEOC)**

Takeaways

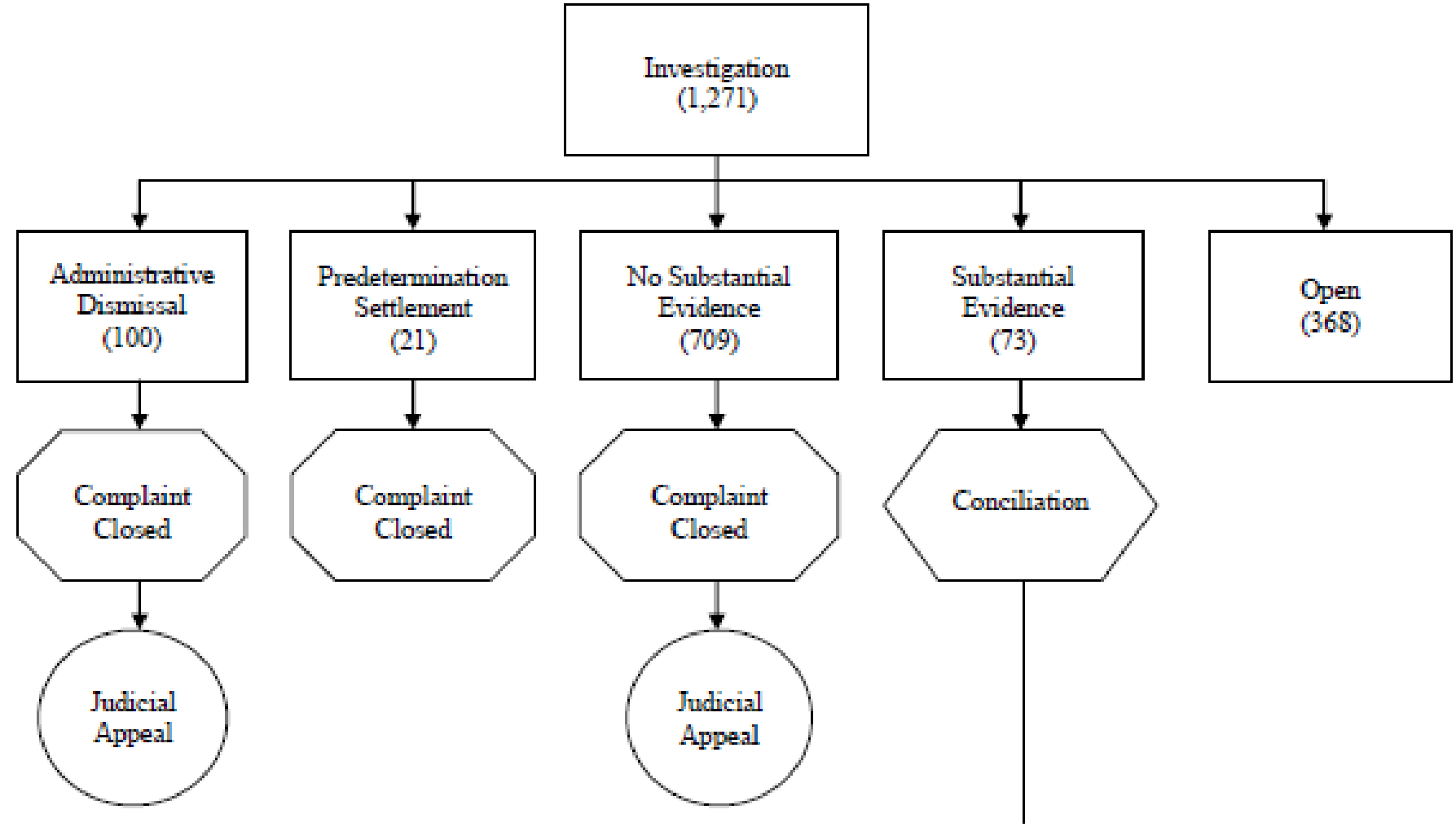
Substantive Issues:

- **Hiring Barriers – Remain front and center at EEOC- Take care with pre-employment testing, plus take care with "Phase 2" with criminal history based on *Crothall Services* case re EEO record-keeping/ adverse impact analysis**
- **Review "neutral" employment practices that may have a potential adverse impact (e.g. pregnancy/religious accommodation)**
- **ADA- Take care with LOA plans, attendance and wellness plans, and reinforce importance of engaging in interactive process**
- **Ensure policies have been updated relating to EEO commitment re sexual orientation and sexual identify**
- **Ensure severance agreements and arbitration plans make express reference that such documents do not interfere with right to file a discrimination charge (except that they waive right to relief by them or on their behalf.**
- **Annual harassment training for managers and employees as impt. as ever!**

ASCHR


Graphic Illustration of Percentage of Discrimination Type
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Employment
Government Practices
Housing
Public Accommodation
Coercion

ASCHR


Investigation
(1,271)
Administrative
Dismissal
(100)
Predetermination
Settlement
(21)
No Substantial
Evidence
(709)
Substantial
Evidence
(73)
Open
(368)
Complaint
Closed
Complaint
Closed
Complaint
Closed
Conciliation
Judicial
Appeal
Judicial
Appeal

ASCHR

Timeframe for Open Complaints and Complaints Filed to Determination^
CY 08 – CY 10

	Open*		Administrative Dismissal		Mediation		Settlement		NSE Determination		SE Determination		Administrative Hearings**		Total	
	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent
5 years or more	3	*<1%*	11	*11%*	0	*0%*	0	*0%*	2	*<1%*	1	*2%*	0	*0%*	17	*1%*
4 years	1	*<1%*	2	*2%*	0	*0%*	0	*0%*	6	*1%*	1	*2%*	3	*11%*	13	*1%*
3 years	12	*3%*	2	*2%*	0	*0%*	0	*0%*	18	*3%*	5	*11%*	6	*21%*	43	*3%*
2 years	21	*6%*	8	*8%*	0	*0%*	0	*0%*	40	*6%*	21	*47%*	15	*54%*	105	*8%*
1.5 years	30	*8%*	13	*13%*	0	*0%*	3	*14%*	104	*15%*	6	*13%*	2	*7%*	158	*12%*
1 year	40	*11%*	13	*13%*	1	*1%*	2	*10%*	158	*22%*	3	*7%*	0	*0%*	217	*16%*
270-364 days	38	*10%*	10	*10%*	1	*1%*	3	*14%*	120	*17%*	3	*7%*	0	*0%*	175	*13%*
180-269 days	46	*13%*	13	*13%*	1	*1%*	6	*29%*	131	*18%*	5	*11%*	2	*7%*	204	*15%*
1-179 days	177	*48%*	28	*28%*	65	*96%*	7	*33%*	130	*18%*	0	*0%*	0	*0%*	407	*30%*
Total	368		100		68		21		709		45		28		1,339	

Source: ASCHR CaTS database
^Discrimination Complaints include all discrimination types, but exclude the co-filed EEOC complaints not investigated by ASCHR and ASCHR remand/reopened complaints.
*Open investigations as of December 31, 2010
**Administrative Hearings includes pre-hearing settlements, administrative hearing decisions, and administrative hearing dismissals.

Control Group

Evidence Rule 503(a) defines a control group as those:

> "having authority to obtain professional legal services and to act on advice rendered pursuant thereto, on behalf of the client".

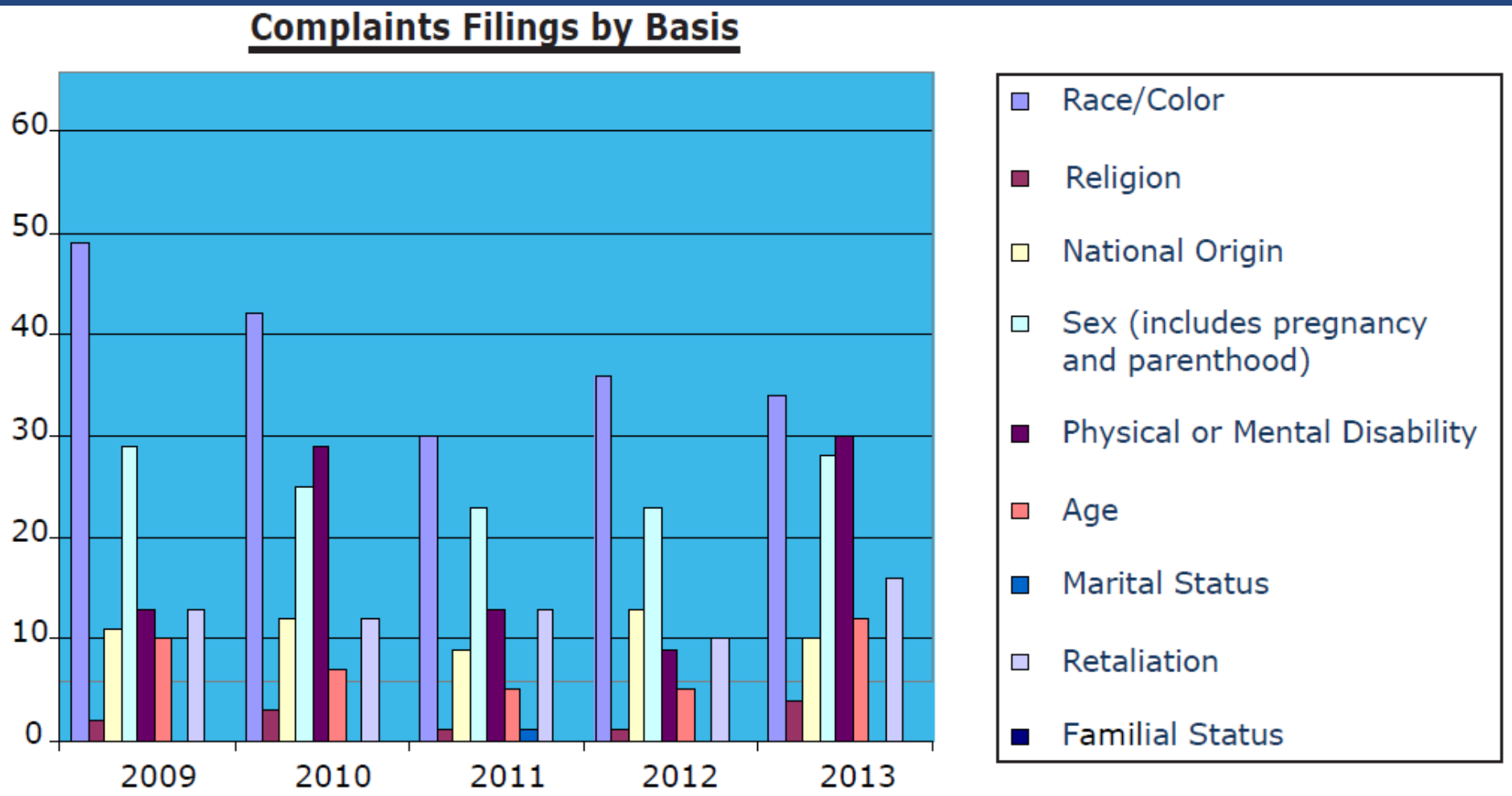
Langdon v. Champion, 752 P.2d 999 (Alaska 1988)

AERC

Complaint Filings By Area Of Discrimination

	2009	2010	2011	2012	2013
Employment	94	102	66	65	81
Housing	0	5	3	5	4
Public Accommodations	13	13	4	6	7
Financing	0	0	0	0	1
Educational Institutions	0	0	1	0	3
Practices of the MOA	0	0	1	0	0
TOTALS	107	107	75	76	96

AERC


Complaints Filings by Basis
60
50
40
30
20
10
0
2009
2010
2011
2012
2013
Race/Color
Religion
National Origin
Sex (includes pregnancy and parenthood)
Physical or Mental Disability
Age
Marital Status
Retaliation
Familial Status

Questions?

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