Administrative Agencies

The Regulatory Environment

February 4, 2015

Littler
Employment & Labor Law Solutions Worldwide™

Agency Functions

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

2. Adjudicating.

3. Investigating.

Forbes

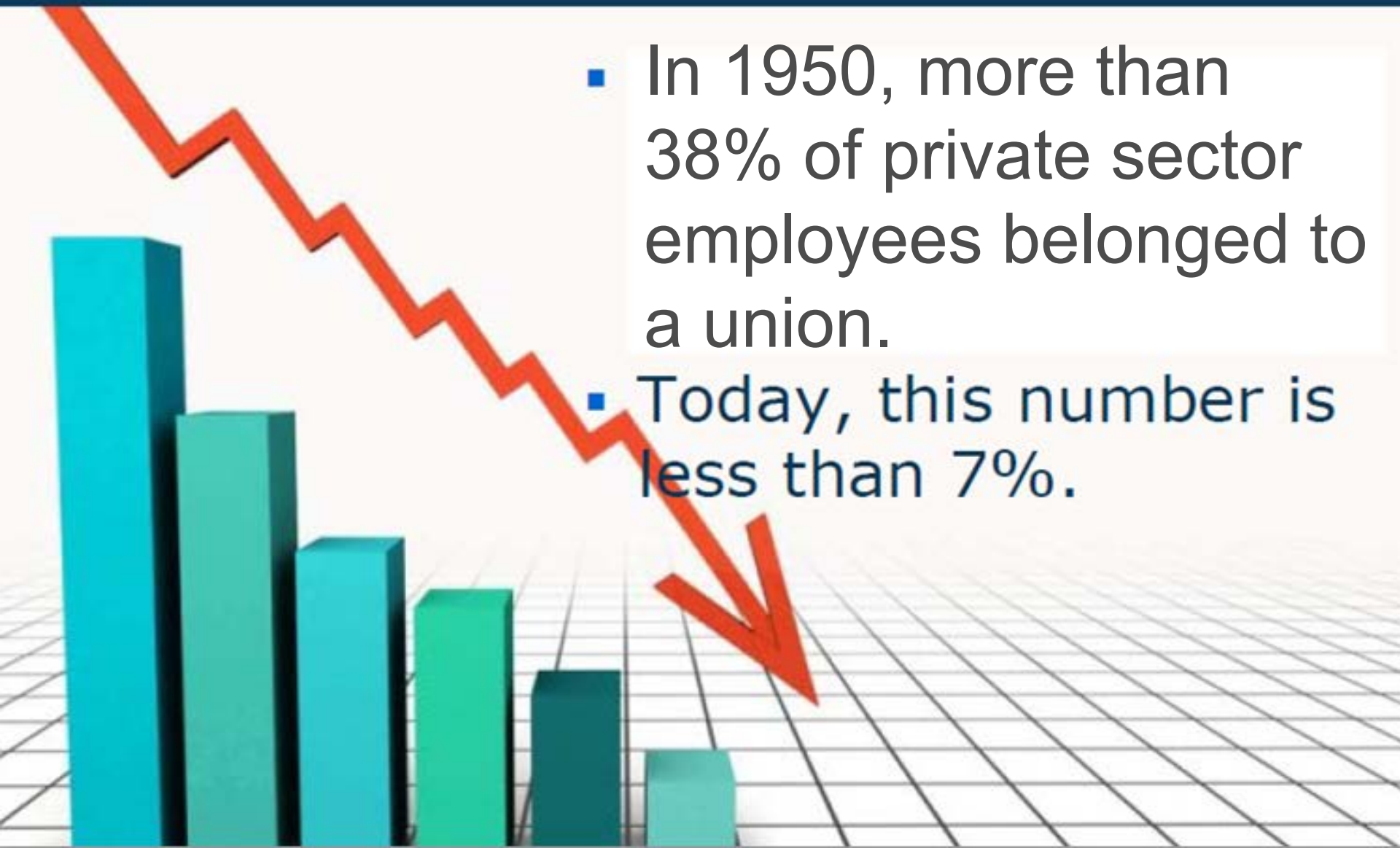
The Best States For Business And Careers

Rank	State	Business Costs Rank	Labor Supply Rank	Regulatory Environment Rank ▲	Economic Climate Rank	Growth Prospects Rank	Quality of Life Rank	Population
38		37	27	43	14	14	44	738,500

Policymaking has moved from Congress to Administration

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

Union of College Athletes?

- Northwestern U. football team members are ruled to be "employees" so that they may vote on union representation
- Unprecedented, though the NLRB held in 2004 that college graduate students are not employees (Bush-era decision)
- NLRA does not cover public sector employees, such as those employed by state universities and colleges

Micro Units

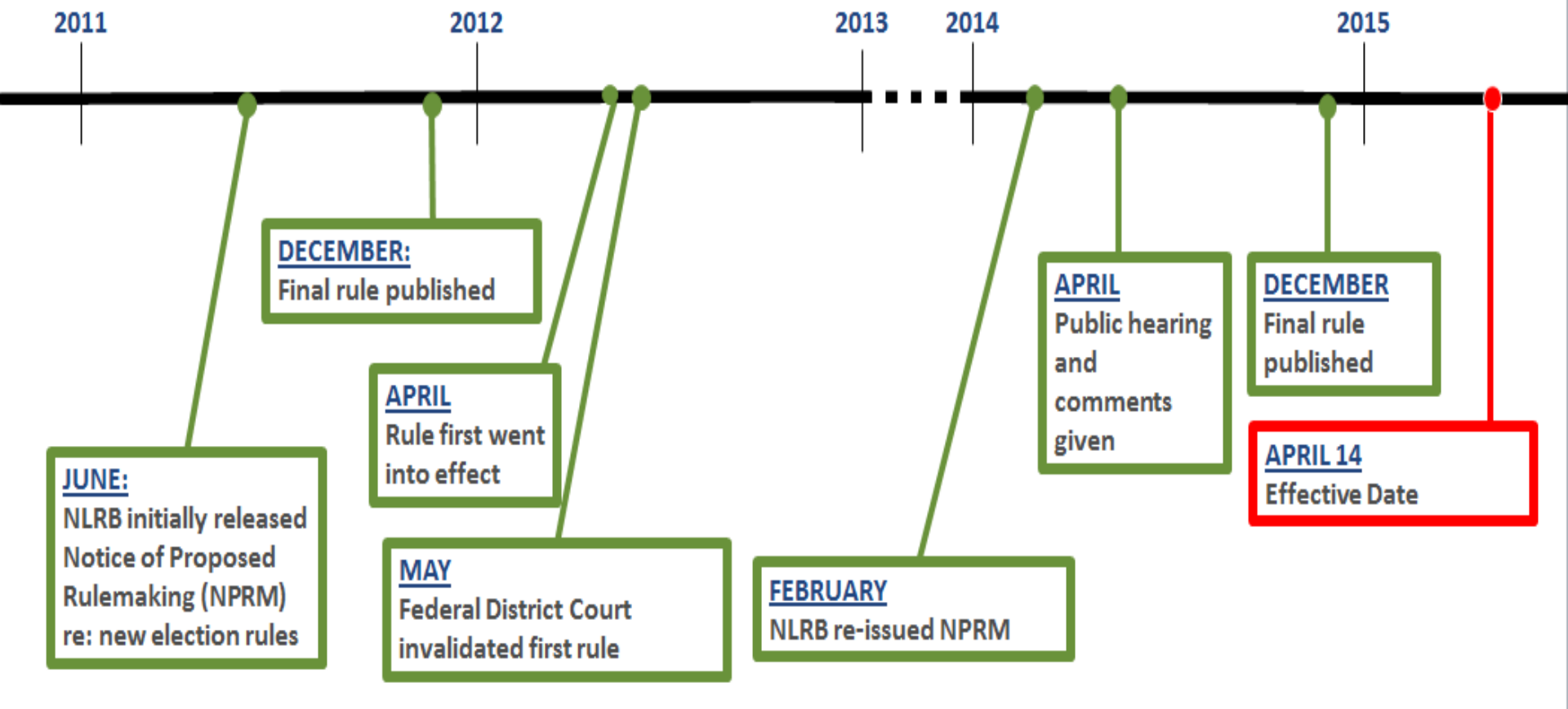
- In NLRB *Specialty Healthcare,* 357 N.L.R.B. No. 93 (August 26, 2011), the Board established that union proposed bargaining units will invariably be deemed appropriate, unless the employer can show that a larger unit of employees share an "overwhelming" community of interest with those in the petitioned-for 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

Ambush Elections:

A Brief History



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

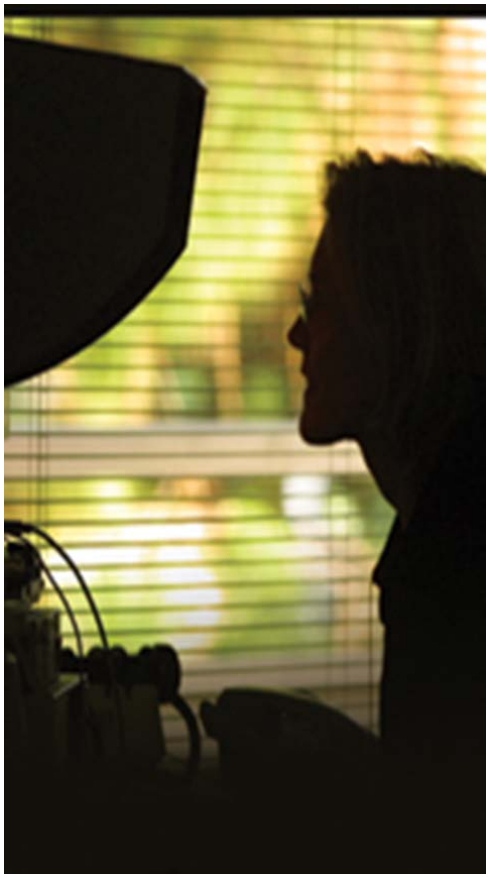
A union may waive the 10-day period it is entitled to the voter list

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 will go far in helping your policies to pass muster with NLRB.

Joint Employer

- Current test has 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
- In a recent announcement, NLRB General Counsel asserted that the current standard should be abandoned
- Currently litigating the issue in *Browning Ferris* case
- Many industries affected:
  - Franchises
  - Construction
  - Staffing agencies
  - Employee leasing companies
  - Vendors
  - Suppliers

Old and New Joint Employer Standards?

BEFORE	AFTER
Current Joint Employer Standard	**General Counsel's (Proposed) 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 control 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).

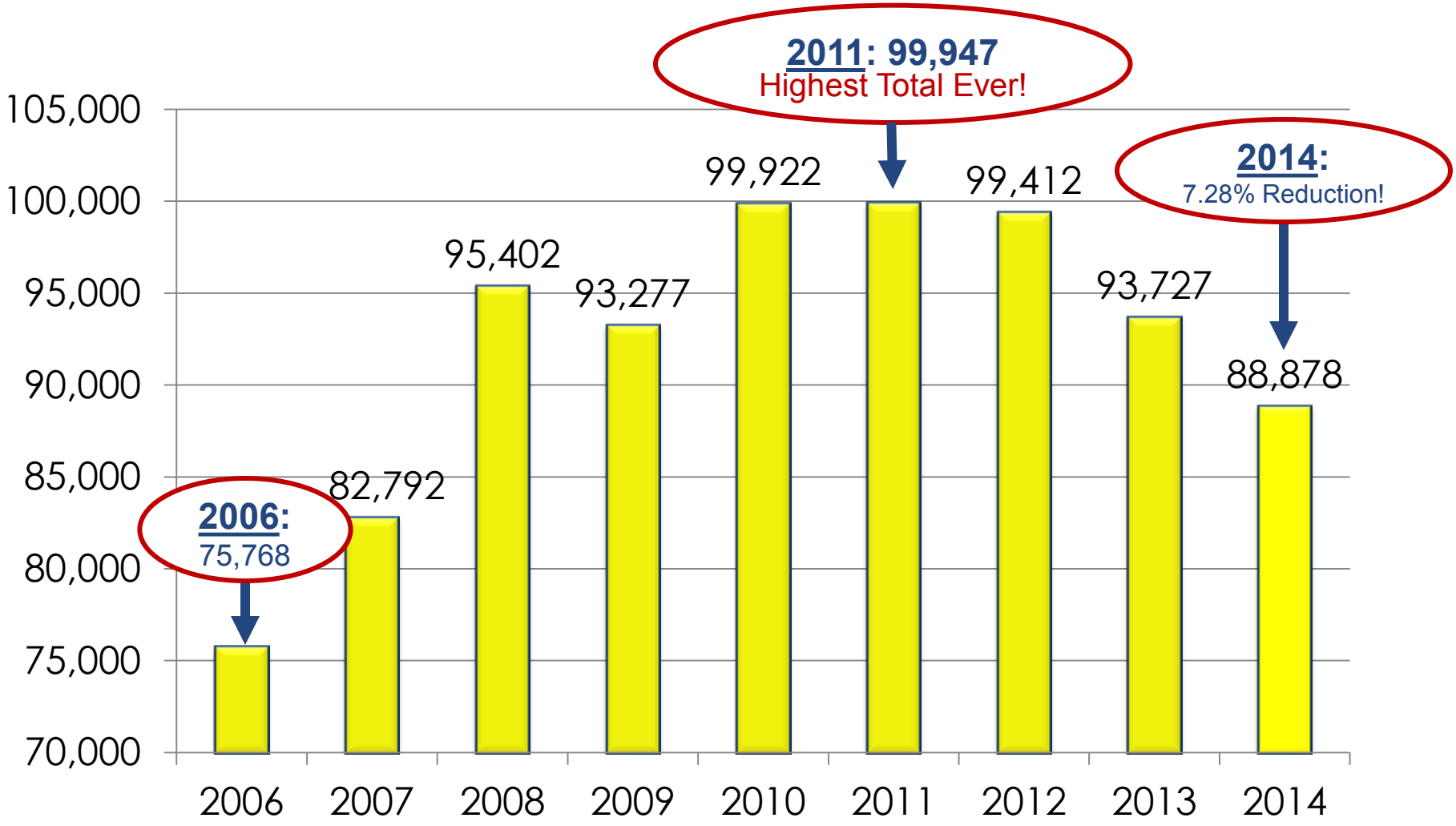
- Murphy Oil USA: NLRB says "reasoning and result" of D.R. Horton was correct. Again rules that arbitration agreements that include class action waivers are illegal.

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

EEOC

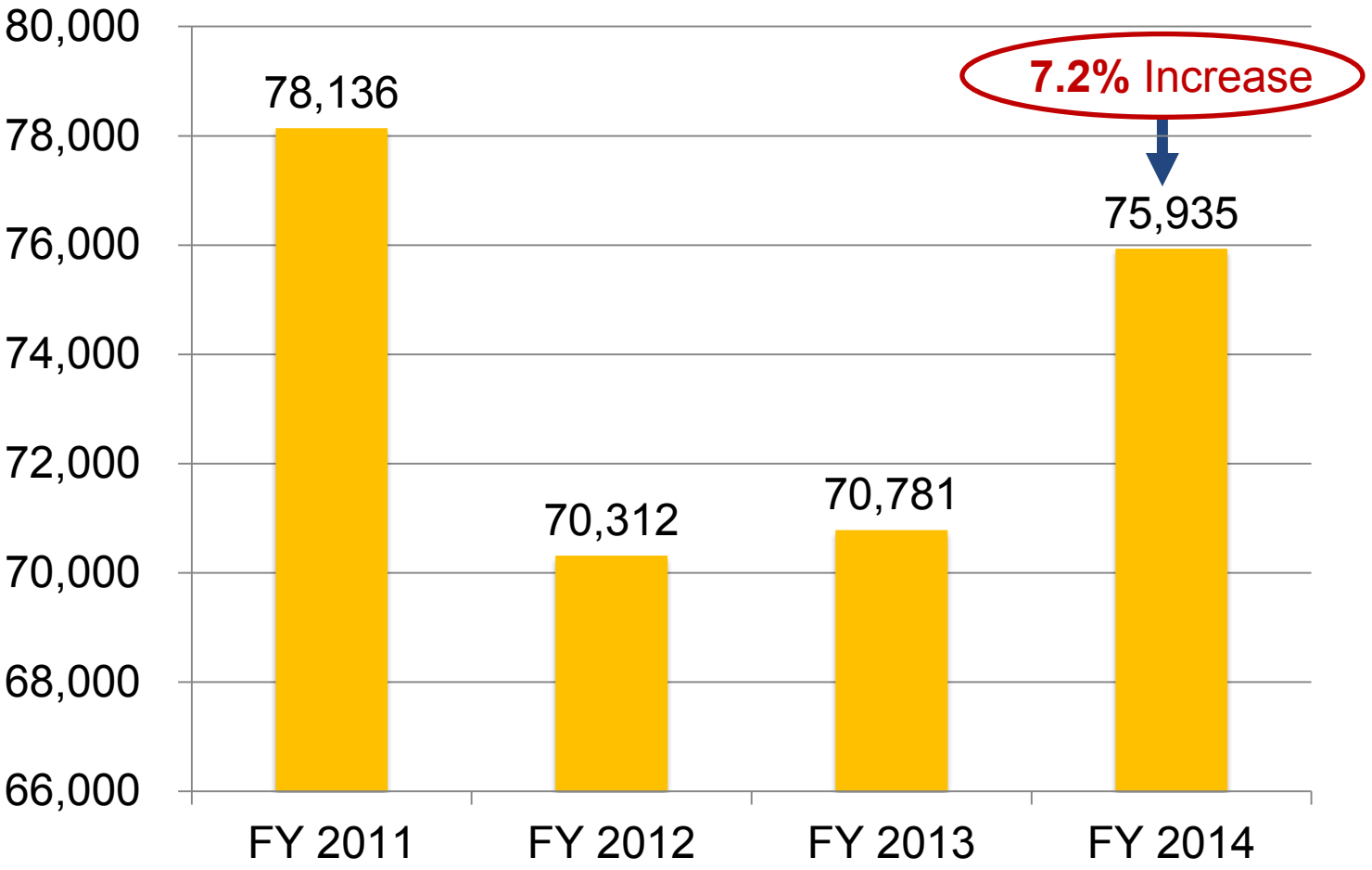
U.S. Equal Employment Opportunity Commission

Charge Filings Decline In FY 2014



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

EEOC Systemic Investigations

Systemic Investigations:	2011		2012		2013		2014	
Number Completed	235		240		300		260	
Settlements (Conciliation)	35		65		63		78	
Monetary Recovery	**$9.6 M**		**$36.2 M**		**$40.0 M**		**$13.0 M**	
Reasonable Cause	**96**	**40.8%**	**94**	**39.1%**	**106**	**35%**	**118**	**45%**
Systemic Lawsuits Filed	23		12		21		17	

Pending EEOC Litigation

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

Causes of Action by Statute

Applicable Statute	Number of Lawsuits
Title VII	76
ADA	49
ADEA	12
Equal Pay	2
GINA	2

Causes of Action in EEOC Litigation

Causes of Action	Number of Lawsuits
ADA Claims	49
Multiple Claims	24
Retaliation	23
Sex Discrimination or Related Harassment	34
Pregnancy Discrimination	13
Racial Discrimination or Related Harassment	9
Age Discrimination	12
Religious Discrimination or Related Harassment	7
National Origin Discrimination or Related Harassment	10

Systemic Litigation – Settlements in FY 2014

- **Settled 17 systemic lawsuits, five of which included at least 100 "victims of discrimination" and nine of which included at least 20 "victims"**
- **Two settlements exceeded $2 million (i.e. race/national origin involving alleged harassment and discrimination against Thai farmworkers, and same-sex harassment claim affecting class of 55 males)**
- **Four settlements exceeding $1 million (i.e. $1.3 million involving alleged race discrimination and failure to hire for front of house positions against employer in hospitality industry; $1.45 million re: sexually hostile work environment; $1.35 million based on ADA challenge to fixed leave policy; $1.2 million involving race/national origin harassment and retaliation)**

Highlights: EEOC Successes and Failures

UNFAVORABLE TO EEOC

Scope of Litigation Limited

- *EEOC v. Sterling Jewelers* (pp. 5, 72)

Hiring Cases- Criminal/Credit History

- *EEOC v. Kaplan* (pp. 6-7, 24, 31, 34-35, 64)
- *EEOC v. Freeman (*pp. 7, 24, 31)

Religious Accommodation

- *EEOC v. Abercrombie & Fitch* (Pending before S.C) (pp. 10, 32-33)
- *EEOC v. JBS USA (pp. 10, 47-48)*

ADA – Attempt to Enjoin Wellness Program

- *EEOC v. Honeywell* (pp. 12, 37-38)

EPA

- *EEOC v. Port Authority of NY and NJ* (p. 13)

Releases

- *EEOC v. CVS Pharmacy, Inc.* (p. 14)

Attorneys' Fees

- *Propak Logistics ($189k) (4th Cir. aff'd award) (pp. 16,84)*
- *Peoplemark* ($751K)(6th Cir. rehearing denied)(pp.16, 85)

FAVORABLE TO EEOC

EEOC GC confirmed for 2nd Term/ Full Commission panel and Democratic Majority

EEOC Success in Subpoena Enforcement Actions (Appendix C) (But see *EEOC v. Royal Caribbean Cruises, Ltd*., (11th Cir. Nov. 6, 2014) (pp. 120- 130; also see 39-45); but see p. 4)

Rejection of Failure to Conciliate Defense-

- *EEOC v.. Mach Mining* (7th Cir.) (pp. 4, 55-56)

No S of L in "pattern or practice" cases

- *EEOC v. New Prime (*p. 52)
- *EEOC v. Spoa* (p. 52, footnote 437)

Protecting Vulnerable Worker

- *EEOC v. Hill Country Farms* (p. 8)

Selected Jury Awards (p. 89)

- *Sexual harassment and retaliation*
- *Racial harassment and discrimination*

Attorneys' Fees

- *CRST* ($4.7M) (Reversed and remanded by 8th Circuit) (p.15-16, 85)

What to Watch for in FY 2015

***#1* – Conciliation obligations of EEOC prior to filing suit** (pp. 53-58)

***#2* – Employer obligations involving pregnant workers** (pp. 9-10, 31-32)

#3 – EEOC challenges to use of criminal history in hiring process (pp.30-31,34-35)

***#4* – Scope of reasonable accommodation under ADA** (p. 11)

***#5* – Required accommodations involving religion** (pp. 10, 32-33)

***#6* – EEOC challenges to wellness programs** (pp. 12, 37-38)

***#7* – Nature and extent of rights of LGBT workers under Title VII** (pp. 12-13, 36)

#8 – Challenges to releases and arbitration programs (p. 14)

#9 – "Directed investigations" under EPA and ADEA and related litigation (i.e. equal pay and age discrimination)(p. 39; also see pp. 7-8, fn.48, 13)

#10 – Scope of permitted pattern or practice litigation against employers (pp. 46, 57-58)

Scope of Conciliation Obligation by EEOC

<u>Scope of Conciliation Obligation</u>: (42 U.S.C. § 2000e-5(b))

<u>Key Case Before Supreme Court</u> –

***EEOC v. Mach Mining*, 2013 U.S. App. LEXIS 25454 (7th Cir. Dec. 20, 2013). *cert. granted*, No. 13-1019 (U.S. June 30, 2014), and oral argument scheduled for January 13, 2015.**

- EEOC has argued that the "failure to conciliate" defense is merely a tactic to delay getting to the merits of equal employment litigation against an employer
- From an employer's perspective, to the extent that the Court affirms the Seventh Circuit's opinion, which effectively held that the courts will not "second guess" the EEOC's conciliation efforts, there are no safeguards to ensure that the EEOC engages in good faith conciliation
- EEOC lawsuit alleges discrimination against women since 2006, specifically in relation to hiring practices. After employer asserted the affirmative defense that the EEOC did not conciliate in good faith before bringing suit against the company. The EEOC moved for partial summary judgment on this affirmative defense. The District Court denied the motion but permitted an interlocutory appeal, and the Seventh Circuit rules in favor of the EEOC.

Scope of EEOC Investigation – Potential Impact on Litigation

Impact of Limited Investigation By EEOC

EEOC v. Sterling Jeweler's, 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), *appeal filed*, No. 14-1782 (2d Cir. Sept. 4, 2014).

- 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 summary judgment in favor of the employer, holding the EEOC failed to present sufficient evidence that it conducted a nationwide investigation before it filed this lawsuit. In so doing, the court noted that while courts will not review the sufficiency of the EEOC's pre-lawsuit investigation, they will review whether an investigation occurred and the scope of any investigation.

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]*."**

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

- No Court of Appeals decision on issue, but in dispute before 4th Circuit in *EEOC v. Freeman*, No. 13-2365 (Oral argument held, Oct. 29, 2014)
- Cases Have Applied 300-Day Limitation

  See e.g. *EEOC v. Optical Cable Corp.,* 169 F. Supp. 2d 539, 547 (W.D. Va. 2001)

  EEOC v. Global Horizons, Inc., 904 F. Supp. 2d 1074, 1093 (D. Haw. Nov. 8, 2012)
- Recent Cases Rejecting Application of 300 Day Limitation:

  See e.g. EEOC v. New Prime, 2014 U.S. Dist. LEXIS 112505, at *34 (W.D. Mo. Aug. 14, 2014);

  see also EEOC v. Spoa, LLC, 2013 U.S. Dist. LEXIS 148145, at **8-9, fn. 4 (D. Md. Oct. 15, 2013)

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

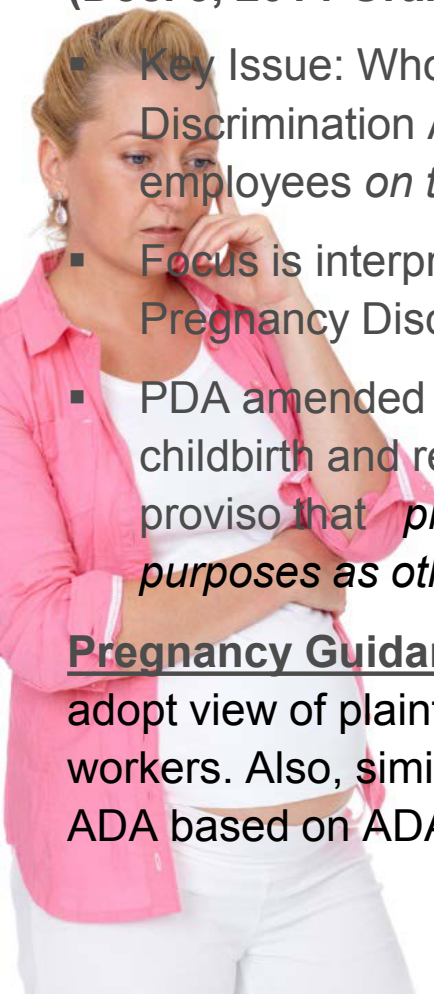
- Cases frequently deal with alleged "human trafficking"- In relevant part- exploitation for purposes of compelled labor through use of force, fraud or coercion
- Primarily handled by EEOC Regional Attorney in LA Dist. Office involving agricultural workers, but significant pending action in E.D. Louisiana involving 500 Indian nationals allegedly required to live in "man camps" and sign employment and housing agreements. *EEOC v. Signal Int'l,* Case No. 2:12-cv-00557.
- EEOC GC focuses on jury verdict in *EEOC v. Hill Country Farms* - $240 Million jury verdict based on alleged abuse and discrimination against 32 intellectually disabled workers , although reduced to $1.3M in damages, plus $1.6M for compensatory and punitives. 2014 U.S. App. LEXiS 8650 (8th Cir. May 5, 2014).

III. Emerging and Developing Issues

Key Issues Identified as EEOC Priorities:

- **Pregnancy Discrimination**
- **Religious Discrimination**
- **Americans with Disabilities Act**
- **Accommodating Pregnancy**
- **LGBT Issues**

III. Emerging Issues — Pregnancy



***Young v. UPS*- 707 F. 3d 437 (4th Cir. 2013), *cert granted*, No. 12-1226 (July 1, 2014) (Dec. 3, 2014-Oral argument held). Fourth Circuit had rejected PDA claim.**

- Key Issue: Who are the appropriate "*comparables"* based on the Pregnancy Discrimination Act? All others off work due to injury or illness (4th Circuit view) OR employees *on the job* if treated more favorably and received "light duty"
- Focus is interpretation of "definitions" section of Title VII, which was amended by the Pregnancy Discrimination Act of 1978 ("PDA")
- PDA amended definition of sex discrimination with two provisions: (1) pregnancy, childbirth and related conditions are covered by sex discrimination; and (2) second proviso that *pregnancy "shall be treated the same for all employment related purposes as other persons no so affected but similar in their ability or inability to work."*

Pregnancy Guidance Issued July 14, 2014 - Rejects view of 4th Circuit and essentially adopt view of plaintiff in *Young* that reasonable accommodation required for pregnant workers. Also, similar to other "temporary" disabilities, there may be coverage under the ADA based on ADAAA.

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."

III. Emerging Trends — ADA Claims

Reasonable Accommodation Under ADA

- *EEOC v. Ford Motor Company,* 2014 U.S App. LEXIS 7502 (6th Cir. 2014), reh'g granted, 2014 U.S. App. LEXIS 7252 (6THCir. Aug. 29, 2014) – Employer withdrew temporary permission to telecommute based on employer view that job could not be effectively performed without on-site interaction with co-workers. Sixth Circuit panel initially held that based on advancement in technology, "attendance at the workplace can no longer be assumed to mean attendance at the employer's location." On Aug. 29, 2014, the Sixth Circuit vacated and agreed to rehear.
- *EEOC v. United Parcel Service, Inc*., 2014 U.S. Dist. LEXIS 17187 (N.D. Ill. Feb. 11, 2014) - EEOC challenged policy "100% healed requirement" as "qualification standard and leave policy "administratively" terminating employment after 12 months leave. Court denied motion to dismiss second amended complaint.

III. Emerging Trends — ADA (Cont)

EEOC Challenges to Wellness Programs

- Encouragement of wellness program under Affordable Care Act (ACA)- Permits discounts and waiver and incentives to control health care costs
- EEOC has not issued guidance on wellness programs since passage of ACA, but focus based on prior ADA guidance is "voluntariness" of participation (See 7/27/00 ADA Guidance on Medical Related Inquiries and Examination)
- Since August 2014, the EEOC has filed 3 lawsuits challenging wellness programs challenging on lack of "voluntariness" of participation
  1. Lawsuits filed on 8/20/14 and 10/1/14, raising challenges to medical exams or inquiries, including required biometric testing and "health risk assessment" or face cancellation of medical insurance.
  2. Oct. 27, 2014 action involved aggressive tactic of petition for TRO and preliminary injunction during investigation stage to stop testing related to wellness programs on basis of ADA and GINA. Court denied motion on 11/6/14 .

III. Emerging Issues – LGBT Claims

- **Priority identified as an emerging issue. No protection under Title VII based on sexual orientation or sexual identify, but EEOC has used "sex discrimination" as basis for initiating claims**
- **Prior EEOC adjudication in a federal sector case - *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).**
  - Commission used vehicle of federal administrative agency appeal.
  - Discrimination against a federal employee because of transgender status is discrimination because of sex and therefore presents a cognizable claim under Title VII – **Focus was "gender stereotyping"-** distinguish from discrimination based on sexual orientation/ not covered under Title VII.
- **At end of FY 2014, on Sept. 25, 2014, EEOC filed two lawsuit against employers based on alleged discrimination against transgender individuals and explained rights of LGBT workers on website. *See* EEOC LGBT Fact Sheet at http://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm**
- **Court file amicus brief in Seventh Circuit in support of plaintiff seeking rehearing in case involving anti-gay remarks, *Muhammad v. Caterpillar*, Appeal No. 12-173 (7th Cir. 2014)**

IV. Enforcing Equal Pay Laws

- **Focus by Obama Administration –**Obama referenced in celebration of 50th anniversary of passage of the Equal Pay Act ("EPA") in 2013. Established National Equal Pay Enforcement Task Force in 2010 involving joint agency effort by EEOC, DOL/OFCCP and other agencies, which issued report in June 2013
- **"Directed" Investigations: EEOC can self-initiate even without charging party (for both EPA and ADEA claims) – Anticipate more such investigations!!!!!**
- **But limited lawsuits to date by EEOC - 2 equal pay lawsuits in FY 2014, 4 in FY 2013.**
- **Major Setback in FY 2014- *EEOC v. Port Auth. Of N.Y & N.J.*, 2012 WL 1758128 (S.D.N.Y. May 17, 2012), aff'd 2014 U.S. App. LEXIS 18533 (2nd Cir. Sept. 29, 2014)**- Second Circuit affirmed dismissal of large scale EPA lawsuit focusing on alleged pay inequities among attorneys at Port Authority:

  "The EEOC has thus failed- despite a three year investigation- to state an EPA claim upon which relief may be granted…and we therefore dismiss that claim."

V. Preserving Access to the Legal System

Key Focus: No releases, settlements or other types of agreements restricting access to the Commission

Recent Litigation by EEOC Challenging Severance Agreements

- *See EEOC v. CVS Pharmacy*, Case No. 1:14-cv-00863 (N.D. Ill. filed: Feb. 7, 2014), in which EEOC challenged allegedly overbroad release agreement, claiming that it interfered with exercise of Title VII rights. Lawsuit initiated based on Section 707 of Act re authority to bring "pattern or practice" claims without charge. Court dismissed lawsuit based on SJ motion due to failure to conciliate prior to filing suit. 2014 U.S. dist. LEXIS 142937 (Oct. 7, 2014). Notice of appeal filed by EEOC on December 5, 2014.
- *See EEOC v. College America*, Case No. 1:14-cv-01232 (D. Colo. Apr. 30, 2013), which also involved EEOC challenge to severance agreement. Partial dismissal granted based on employer submission and representation that employee severance agreement did not waive or bar filing of charge of age discrimination. (Docket #16, Dec. 2, 2014)

Recent litigation by EEOC Challenging Arbitration Agreement

- *See EEOC v. Doherty Enterprises Inc.,* Case No. 9:14-cv-81184 (S.D. Fla., filed Sept. 18, 2014), which challenged arbitration agreement in which arbitration allegedly was sole basis for relief and agreement allegedly interfered with right to file charge of discrimination.

VI. Preventing Harassment through Systemic Enforcement/Targeted Outreach

- **Three of the EEOC's largest settlement in FY 2014 involved harassment claims**
  1) **$2.4 million** – Labor contractor in agricultural industry settled claims based on alleged pattern or practice of harassing, discriminating and retaliating against 500 Thai farmworkers (D. Hawaii, EEOC Press Release, 9/5/14)
  2) **$2.1 million** – Lot Manager at car dealership, under direction of General Manager, allegedly subjected class of men to egregious forms of sexual harassment in same-sex harassment lawsuit (D. N.M., EEOC Press Release, 4/1/14)
  3) **$1.45 million** – Company allegedly maintained hostile work environment toward 16 female mortgage banker at one facility (S.D. Ohio, EEOC Press Release, 2/3/14)
- ***But see* EEOC appeal of $4.6 million fee award**, *EEOC v. CRST Van Expedited,* 2013 US. Dist. LEXIS107822 (N.D. Iowa, Aug. 1, 2013), rev'd and remanded, 2014 U.S. App. LEXIS 24130 (8th Cir. Dec. 22, 2014) (EEOC appeal of award of attorneys' fees in harassment lawsuit based on district court dismissal of harassment claims of 154 female drivers and employer settlement of claim of charging party for $50k after seven years of litigation)

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

Severance Agreements

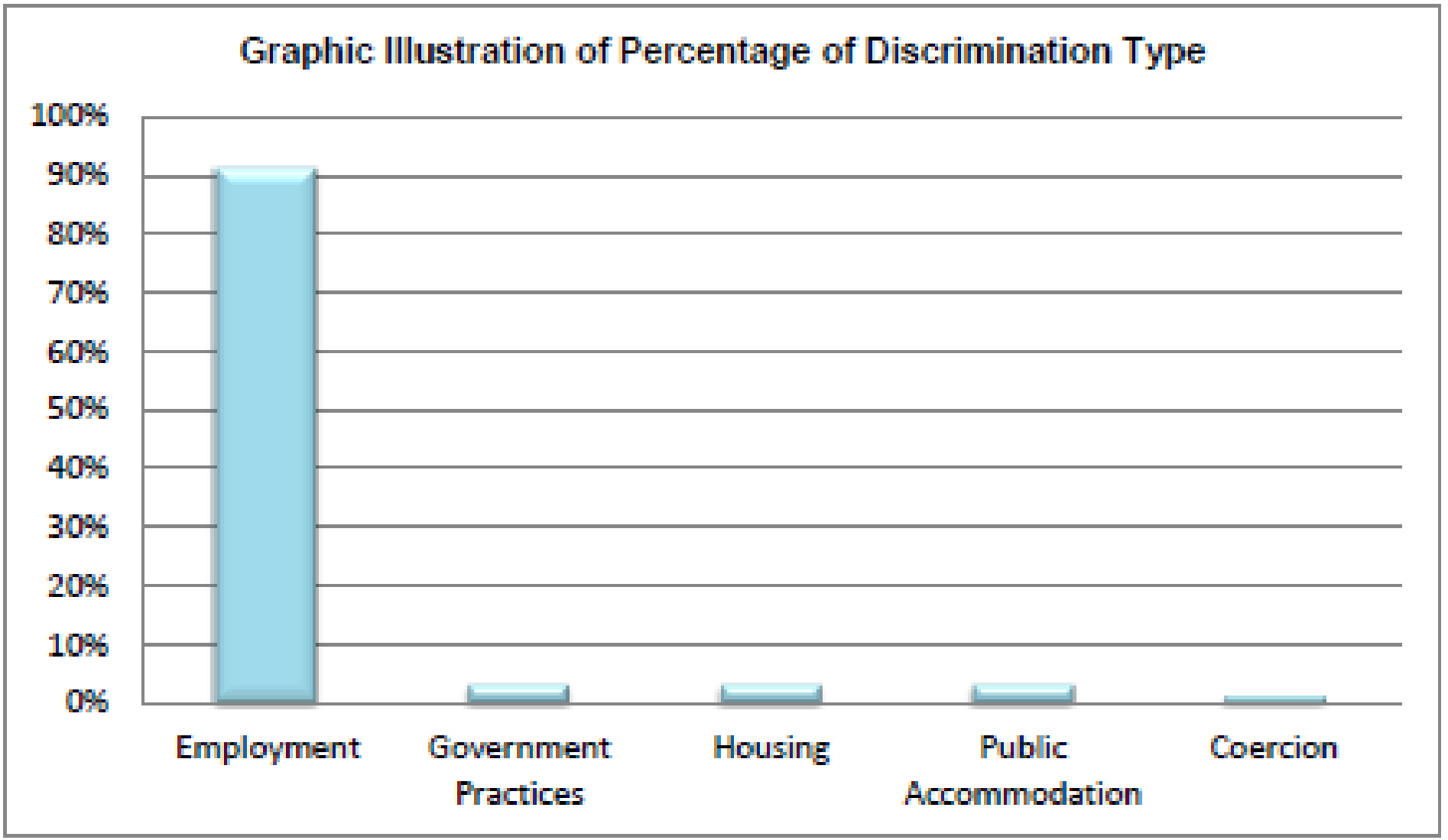
- Recent Settlement: ***EEOC v Baker & Taylor,*** **Case No. 13-cv-3729 (N.D. Ill. July 10, 2013)*:***
- EEOC alleged employer violated Title VII by conditioning receipt of severance on an overly broad severance agreement.
- Consent Decree: Employer agreed to following language in all releases:

"Nothing in this Agreement is intended to limit in any way an Employee's right or ability to file a charge or claim of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") or comparable state or local agencies. These agencies have the authority to carry out their statutory duties by investigating the charge, issuing a determination, filing a lawsuit in Federal or state court in their own name, or taking any other action authorized under these statutes. Employees retain the right to participate in such any [sic] action **and to recover any appropriate relief**. Employees retain the right to communicate with the EEOC and comparable state or local agencies and such communication can be initiated by the employee or in response to the government and is not limited by any non-disparagement obligation under this agreement."

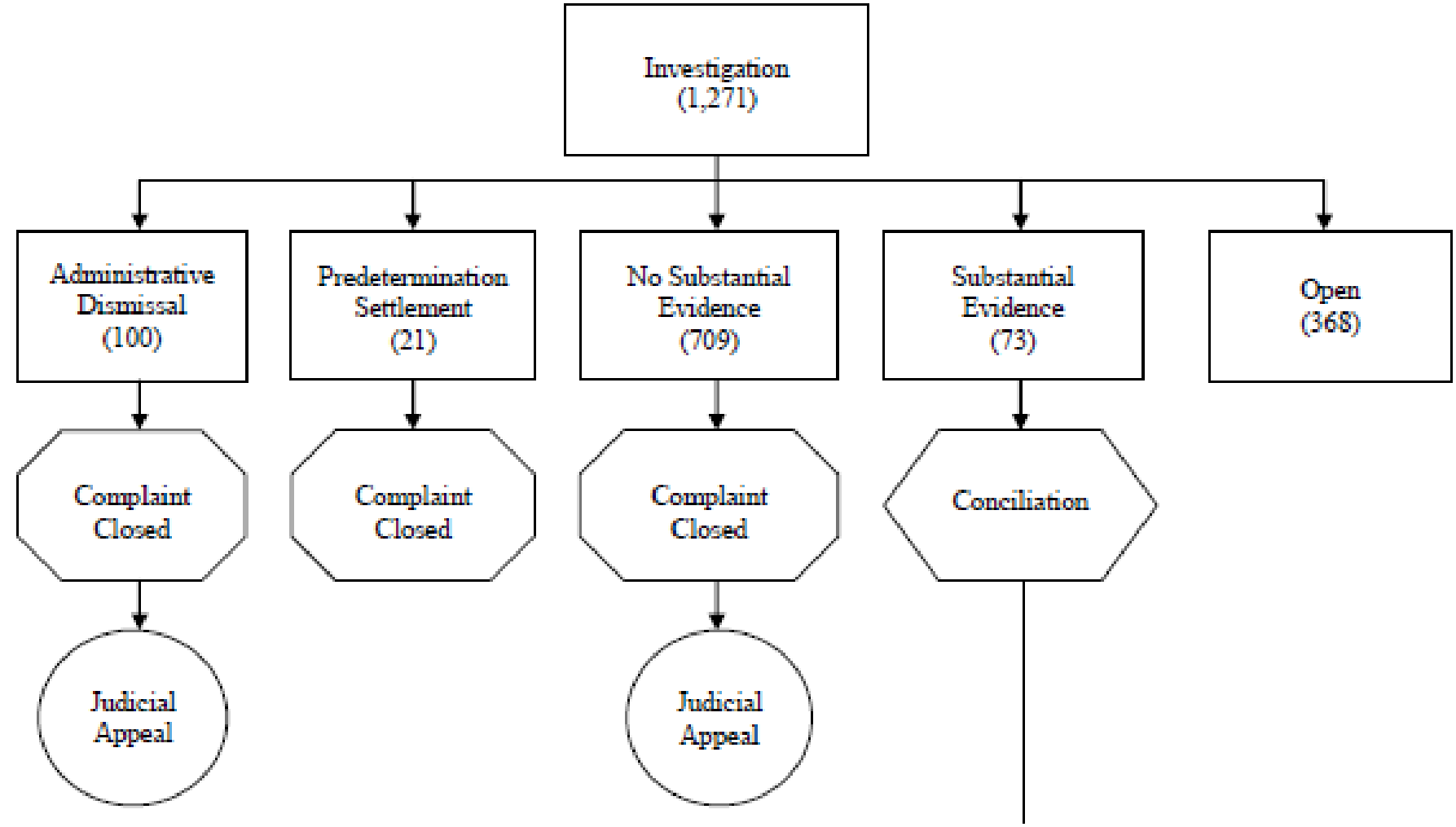
Takeaways

- **Don't underestimate EEOC, despite 2014 setbacks**
- **Take care with individual charge if it involves one of EEOC's "priorities" and potential expansion to systemic investigation**
- **Anticipate more "directed investigations" (EPA/ADEA) and/or investigations without an underlying charge (settlement and/or arbitration agreements) based on view EEOC has authority under Section 707 of Title VII re potential "pattern or practice" of discrimination**
- **Wear the hat of a "negotiator," not "litigator" during EEOC investigations and RFI's to minimize risk of subpoena and/or subpoena enforcement action**
- **Importance of volunteering information to underscore weakness of claims, including during systemic investigations, based on limited number of lawsuits initiated by EEOC—Build a strong file!**

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".

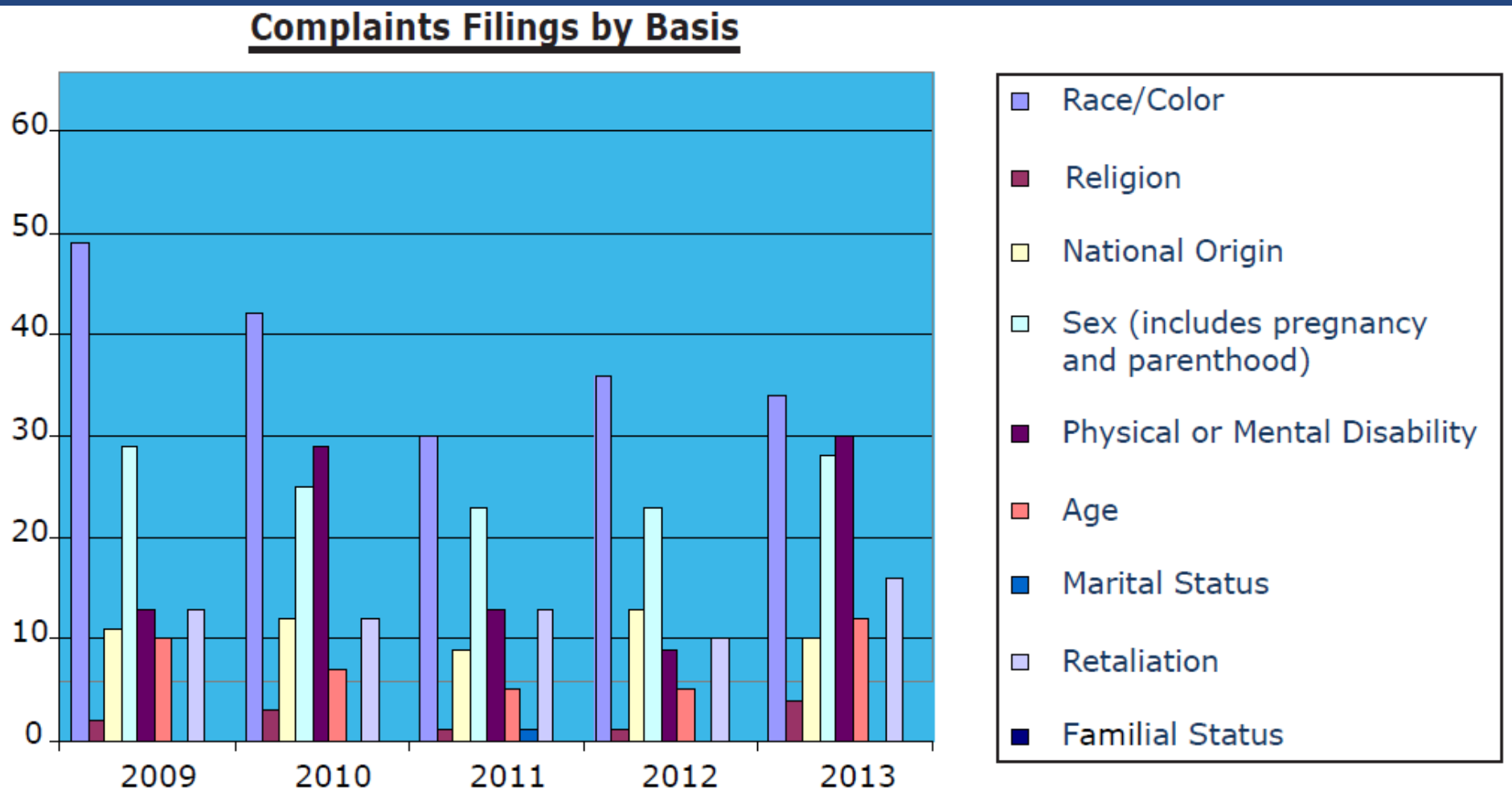
Langdon v. Champion, 752 P.2d 999 (Alaska 1988)

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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