

The Federal EEO Process

**LULAC National Convention and Exposition
Cincinnati, Ohio
June 27- July 2, 2011**

Overview of EEO Laws

Identifying Discrimination

Laws Enforced by the EEOC

- Title VII of the Civil Rights Act of 1964 (Title VII)
 - Age Discrimination in Employment Act of 1967 (ADEA)
 - Rehabilitation Act of 1973
 - Americans with Disabilities Act Amendments Act of 2008 (ADAAA)
 - Genetic Information Nondiscrimination Act of 2008 (GINA)
 - The Equal Pay Act of 1963
-

Title VII of the Civil Rights Act

- Prohibits discrimination based upon:
 - Race
 - Color
 - Religion
 - Sex
 - National Origin
 - Retaliation
-

ADEA

Prohibits employment discrimination against persons 40 years of age or older.

It shall be unlawful for an employer-

- ❑ to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
 - ❑ to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
 - ❑ to reduce the wage rate of any employee, because of such individual's age
-

The Rehabilitation Act

- ❑ Prohibits discrimination on the basis of disability.
 - ❑ Prohibits discrimination on the basis of being associated with someone with a disability.
-

Individual With A Disability

- An individual with a disability is someone who:
 - Has a physical or mental impairment that substantially limits one or more of that person's major life activities; or
 - has a history of such impairment; or
 - is regarded as having such an impairment.
-

ADAAA of 2008

Five key changes to the definition:

- "Substantially Limits" redefined- specifically reject high standards used by EEOC and Supreme Court
 - Provide illustrative list of major life activities that include "major bodily functions"
 - Positive effects of mitigating measures (except ordinary eyeglasses and contact lenses) cannot be considered in determining substantial limitation
 - Impairment can be substantially limiting even if episodic or in remission
 - "Regarded as" definition rewritten and expanded
-

GINA Basic Rules

- Prohibits use of genetic information to discriminate in employment. Genetic information means:
 - An individual's genetic tests
 - Genetic tests of family members
 - Family medical record

 - Restricts the deliberate acquisition of genetic information by employers and other entities.

 - Requires that covered entities keep genetic information confidential, subject to limited exceptions.
-

EXCEPTIONS

- Inadvertent Request
 - Employer-sponsored health or genetic services
 - Family Medical Leave Act
 - Purchase of documents commercially and publicly available
 - Genetic Monitoring
 - Lab/Human Forensic Remains ID
-

Equal Pay Act

- ❑ Focuses on sex discrimination in wages.
 - ❑ Violation established if it is shown that unequal wages are paid to individuals of different genders doing substantially equal work under similar conditions for the same agency.
-

Overview of EEO Complaint Process

Federal EEO Process

EEO COUNSELOR

- ❑ You must contact the EEO Counselor within **45 days** from the day the discrimination occurred.

 - ❑ EEO Counselor will give you the choice of participating either in:
 - ❑ Traditional Counseling or
 - ❑ Alternative Dispute Resolution (ADR) program

 - ❑ Notice of Right to File a Formal Complaint
-

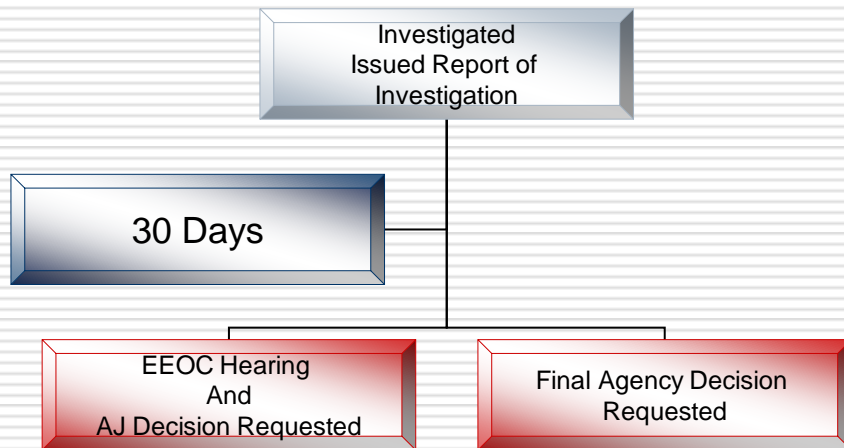
Formal Complaint

- ❑ Claims accepted or dismissed by the agency.

 - ❑ If the agency **accepted** the complaint, it will conduct an investigation. The agency has 180 days from the day you filed your complaint to finish the investigation.

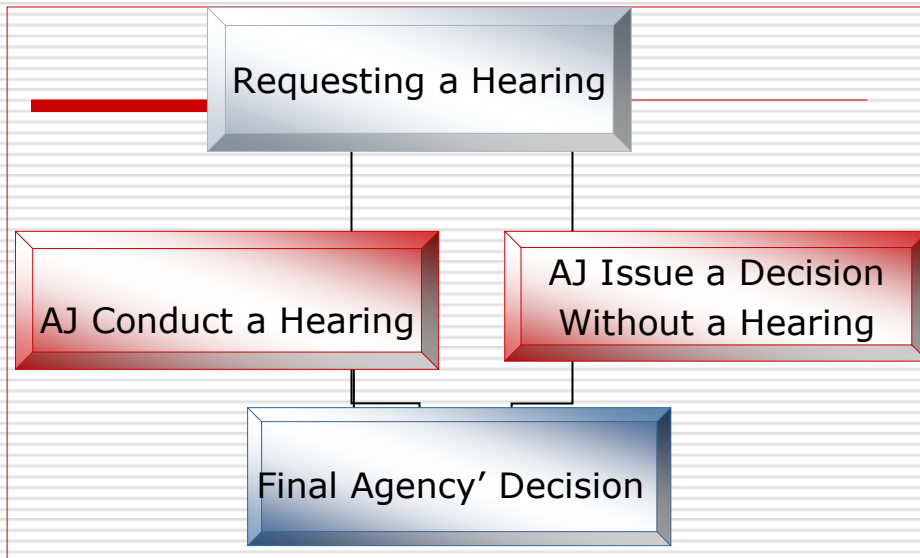
 - ❑ If the agency **dismissed** the complaint, you have the right to appeal to EEOC Office of Federal Operations.
-

Accepted Claims



Final Agency Decision

- If you ask the agency to issue a decision and no discrimination is found, or if you disagree with some part of the decision,
 - YOU HAVE THE RIGHT TO APPEAL**, to the EEOC Office of Federal Operations
-



Filing an Appeal

- ❑ Complainant have the right to appeal an agency's final order to the EEOC Office of Federal Operations.
- ❑ You must file your appeal no later than 30 days after you receive the final order.
- ❑ If the Agency disagrees with any part of the Administrative Judge's decision, it must appeal to the EEOC.

Request for Reconsideration

- ❑ If complainant or the agency, do not agree with the EEOC's decision, they can ask for a reconsideration of that decision.

 - ❑ No later than 30 days after the decision on appeal was received.
-

Filing a Civil Action

- ❑ After 180 days have passed from the day complainant filed his/her complaint, if the agency has not issued a decision and no appeal has been filed;
 - ❑ Within 90 days from the day complainant's receive the agency's decision, so long as no appeal has been filed;
 - ❑ After 180 days from the day complainant's filed his/her appeal, if the EEOC has not issued a decision; or
 - ❑ Within 90 days from the day complainant's receive the EEOC's decision on appeal.
-

Elements of a Case

Basic Elements of a complaint of
discrimination

Proving Discrimination

- Disparate Treatment
 - Disparate Impact
 - Harassment
 - Reasonable Accommodation
 - (Religion and Disability only)
-

Disparate Treatment

- ❑ The claim in a disparate treatment case is whether a person has been treated adversely because of his/her race, color, sex, national, religion, age or disability, *i.e.*, membership in a protected group.
-

Three-Part Process- Disparate Treatment

Case involving **circumstantial evidence**:

- ❑ Complaint presents a *prima facie* case:
 - ❑ Basis(es) (such as race, sex, etc.)
 - ❑ Adverse action occurred
 - ❑ A connection between the two
 - ❑ The agency must articulate a legitimate non discriminatory reason for the action taken.
 - ❑ Complainant shows agency's explanation is not true and is a pretext for discrimination.
-

Disparate Treatment: Direct Evidence

- ❑ Evidence that proves bias and the intent to discriminate.
 - ❑ There must be a connection, or link, between the direct evidence and the adverse action.
-

Disparate Impact

- ❑ The complainant alleges that an agency's neutral policy or practice adversely affects a protected class.
 - ❑ The burden shifts to the agency to show business necessity.
 - ❑ The complainant may rebut business necessity by showing other means available to achieve the same objective with less discriminatory impact.
-

Harassment

- Harassment is any unwelcome verbal or physical conduct based on one of the protected bases that is so objectively offensive as to alter the conditions of the victim's employment. This standard is met when:
 - Conduct culminates in a tangible employment action; or
 - The conduct was sufficiently severe or pervasive to create a hostile work environment.
-

Elements of a Harassment Claim

- Conduct must be unwelcome
 - Conduct based on a protected basis.
 - Conduct results in a tangible employment action or creates a hostile work environment.
-

Religion Accommodation

- Under Title VII, an agency has a duty of reasonable accommodation for sincerely held religious beliefs and practices unless to do so would cause an undue hardship.
 - In terms of religious accommodation, undue hardship can mean a significant cost or other non-cost factors, such as office disruption.
-

Reasonable Accommodation

- An agency is required to make a reasonable accommodation of a known mental or physical limitation of an otherwise qualified individual with a disability unless to do so would cause undue hardship.
-

Reasonable Accommodation

- Encompasses three aspects of the employment relationship:
 - The application process
 - Job performance
 - Benefits and Privileges
-

Undue Hardship

- Would impose “significant difficulty or expense.”
 - Agency has the burden of establishing undue hardship.
 - Proof that one specific accommodation would impose an undue hardship does not absolve an agency from considering other proposed or potential reasonable accommodations.
-

Resolving Workplace Disputes

Alternate Dispute Resolution (ADR) and Mediation

What is ADR?

- Process designed to reach workplace resolution such that parties bypass costs, delays and unpredictability of adversarial proceeding and adjudicatory process.
 - Include a variety of techniques such as mediation, facilitation, settlement conferences (i.e., those ordered by EEOC judges), ombudsman, etc.

 - Mediation is the overwhelming ADR process of choice.
-

Authorities Governing Federal ADR Efforts

- **Required By:**
 - ADR Act of 1996
 - EEOC Regulations

 - **Mandated by:**
 - Agency policies
 - (See personnel policies, EEO Office guidelines, legal department interpretative guidance, intranet resources, etc).

 - **Other Authorities:**
 - EEOC Statutes
 - Presidential Executive Orders
-

ADR Benefits and Advantages

- Is an essential tool for managers.
 - Provide early and mutual resolution of workplace disputes.
 - Uses fewer resources than other routes.
 - Saves agency resources for mission-related activities.
 - Enhances employee morale.
 - Encourages management cooperation.
 - Builds bridges and closes gaps between management and employee.
-

ADR Availability and Access

- ❑ Must be available during entire EEO process pursuant to EEOC regulations.
 - ❑ Should be attempted at every stage of the process.
 - ❑ Should be incorporated into EEO investigative efforts.
 - ❑ EEOC judges may attempt settlement prior to administrative hearing.
 - ❑ Allows resolution even if case in EEOC appeal stage.
 - ❑ Management must participate if agency agrees ADR is appropriate.
-

Pre-Complaint & ADR

- ❑ The EEO Counselor should advise that, where the agency agrees to offer ADR in particular case, the aggrieved person may choose between participation in the ADR program and traditional EEO Counseling activities.
 - ❑ Before this choice is made, the EEO Counselor or ADR contact person must fully inform the individual about the EEO counseling process and the ADR program.
 - ❑ The EEO Counselor must also advise the individual of his or her rights and responsibilities in the EEO complaint process.
-

Core Principles

FAIRNESS

- Voluntary
 - Neutral
 - Confidential
 - Enforceable
-

Other Core Principles

FLEXIBLE & ADAPTABLE

TRAINING & EVALUATION

Agency Discretion

- Agency is free to choose among ADR techniques.

 - Agency can determine when to limit ADR. Factors Considered may include:
 - Case-by-case determination (i.e., irreparable harm between parties)
 - Geographical considerations (extensive travel)
 - Certain issues (harassment, non-selections, etc.)
-

Effective ADR Programs

- Adhere to core principles of ADR

 - Employ neutral parties and moderators.

 - Fit agency environment and workforce.

 - Provide parties opportunity to express.
-

Effective ADR Programs

- Alert managers of duty to participate if ADR deemed appropriate.
 - Are fair and flexible.
 - Include training and evaluation components.
 - Provide agency representative full settlement authority or access to someone who does.
-

Ensuring ADR Success!!

ALL PARTICIPANTS SHOULD:

- Know all options before beginning ADR proceedings.
 - Be informed other avenues of redress cost more.
 - Be aware that ADR is more flexible than litigation or adjudication.
 - Understand parties decide outcome and that this makes agreements easier to enforce.
 - Be assured that nothing said or done during ADR can be subject of subsequent EEO complaint.
-

ADR Neutral Must:

- Function specifically to aid the parties in resolving the dispute.
 - Have no vested interest in outcome of dispute.
 - Have training in ADR techniques and knowledge of EEO law.
 - Be neutral, honest and act in good faith.
-

ADR Programs Must:

- Contain established written procedures.
 - Maintain a system for recordkeeping.
 - Include manager and supervisor training:
 - Focused on but not limited to:
 - Managers duty to cooperate
 - Government's emphasis on mutual resolutions
 - Operation of agency's ADR procedure
 - Exposure to other ADR methods
 - Drafting settlement agreements.
-

ADR Efforts Should:

- Resolve all issues of the dispute, including non-EEO issues such as personal conflicts, bases not covered by EEO laws, etc.
 - This is useful because many EEO complaints do not involve discrimination.
 - However, non-EEO issues cannot form the bases of EEO complaints if unresolved.
-

Mediation

- Is an informal, confidential process for resolving disputes by using an impartial third-party (mediator) who meets with the employer and employee.
 - Objective: To gain assistance in voluntarily reaching an acceptable resolution on the issues surrounding dispute.
-

Mediator

- ❑ Builds trust in the process.
 - ❑ The mediator has no decision-making authority, but rather tries to assist the parties to resolve their dispute.
 - ❑ Suggests procedural routes toward agreement.
 - ❑ Offers, on an occasional basis, substantive options to expand range of resolutions under consideration.
 - ❑ May utilize individual caucuses to explore options or develop proposals.
-

Mediator Approaches

- ❑ Mediators may differ in “directiveness” or control when assisting parties.
 - ❑ Some set the stage by making minimal procedural suggestions, and intervene in the negotiations only to avoid or overcome a deadlock.
 - ❑ Others are more involved in forging the details of a resolution.
 - ❑ The parties retain control regardless of approach used.
-

Workplace Resolutions

- Must be in writing and signed by parties.
 - Contain clearly stated terms.
 - Provide information on EEOC settlement breach procedures.
 - Shall not bargain away non- waivable employee rights.
 - Have confidentiality clause if parties expect confidential terms.
 - Do not imply, require, or mean guilt.
-

Advantages of Workplace Resolutions

- Aid communications skills on all sides.
 - Reduce tension generally in the workplace.
 - Help both parties avoid costly litigation.
 - Integral part of model EEO program.
 - Provide career-enhancing tools (training, reasonable accommodation, expunged records, etc).
-

Suggestions for Improving Effectiveness

- Issue a policy from the agency head showing support to resolve disputes.
 - Increase ADR offer rate in the pre-complaint formal processes.
 - Require management participation in ADR process.
 - Provide ADR training to all management officials and employees.
 - Train Counselor on how to promote ADR.
-

Thank you for your time!!

Virginia Andreu
Attorney Advisor
Agency Oversight Division
Equal Employment Opportunity Commission
(202) 663-4575
Virginia.andreu-rosario@eeoc.gov
