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# Pro-Actively Addressing And Preparing For EEOC Investigations & Lawsuits

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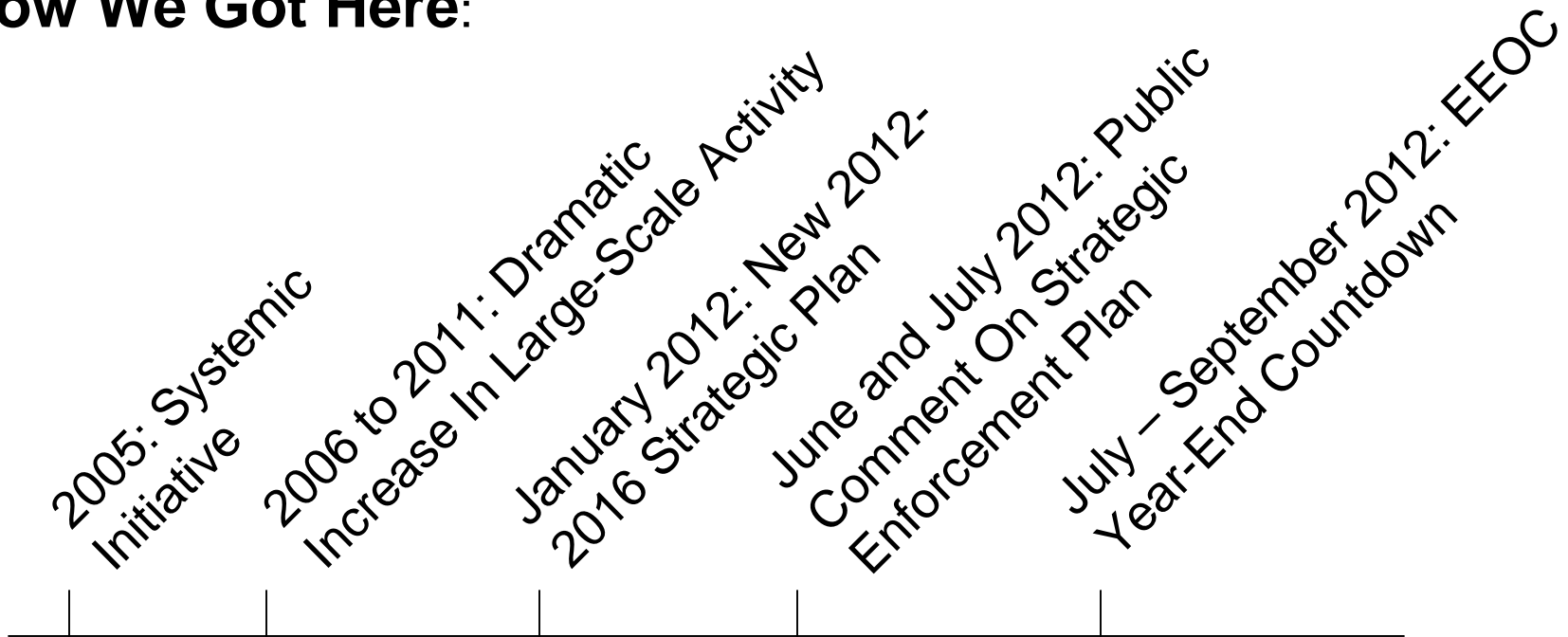


# Goals For Today's Presentation

- Understanding The New EEOC's New Litigation Stance
- Recognizing When You Are Being Targeted By The EEOC
- Keeping Your Powder Dry In Systemic Investigations To Maximize Your Defense Strategy Goals
- Conciliation - A Critical Stage: Ideas & Tactics
- Taking Control Of Early Stages Of EEOC-Initiated Lawsuits

# Know Your Adversary: The Bigger, Stronger, Faster EEOC

## How We Got Here:



# Know Your Adversary: The Bigger, Stronger, Faster EEOC

## Emerging Face Of The EEOC



### ▶ Initiatives:

- “National Law Firm Model”
- EEOC Trial Team Program
- EEOC Appellate Program

- ▶ Better Deployment Of Resources
- ▶ Expanded Systemic Investigation Capabilities
- ▶ Augmented Technical Abilities
- ▶ Stronger Bench Of Experts

# Shifting Legal Landscape - Two Steps Forward, One Step Back

- ***EEOC v. CRST Van Lines*** - Huge Win For Employers
- ***EEOC v. YRC*** – Big Win For The EEOC
- ***EEOC v. United Road Towing, Inc.*** - “Not So Fast”
- ***EEOC v. Evans Fruit*** - Pragmatic Approach

# High Level Strategic Considerations Post-CRST

- It Is **IMPERATIVE** To Think Strategically Early And Often
- Every Communication Should Be Viewed As An Exhibit To A Future Motion To A Federal District Court Judge
- The 4 “R”s Of Any Communication With The EEOC:
  - Reasonable
  - Respectful
  - Requesting Information
  - Resolute

# High Level Strategic Considerations Post-CRST

- Keeping The Ball In The EEOC's Court
- Litigate In A Manner So That It Is Always The EEOC That Walks Away From A Reasonable Position
- “Why?” Is Not A Bad Word
  - ▶ **Why** This Legal Theory
  - ▶ **Why** These Components Of An Information Request
  - ▶ **Why** Now
  - ▶ **Why** This Size Of A Conciliation Demand
  - ▶ **Why** This Scope Of A Class



# Are You A Target For The EEOC's Systemic Initiative?

- **Popular Targets** - A Question Of: LOCATION LOCATION LOCATION:
  - ▶ District Offices Still Determine Their Own “Hot Spots”
  - ◎ TARGET: Industry Leaders/Brand Names
  - ◎ TARGET: National/Regional/Local “Big Kid On The Block”
  - ◎ TARGET: Particular Industries/”Low Hanging Fruit”
  - ◎ TARGET: Employers Of “Vulnerable Populations” (e.g., Uneducated, Young, Non-English Speaking, Immigrant Workers)

# Are You A Target For The EEOC's Systemic Initiative?

- Particular Legal Theories
  - ◎ TARGET: Hiring Issues/Background & Credit Checks
  - ◎ TARGET: Veterans Issues / ADA
  - ◎ TARGET: EPA Claims
  - ◎ TARGET: Pay & Promotions
- “Second Bite” Opportunities
- Small And Mid-Sized Employers – “*We’re Still Watching You*”

# Tell-Tale Signs Of Being An EEOC Target



- Know Your Investigator (Systemic Investigators)
- High Charge Concentration In One (Or More) EEOC District(s)
- Systemic Allegations On The Face Of The Charge (An Easy Miss In The Field)
- Expansive Requests For Information & ESI
- Scrutiny Of Employer Policies And Practices

# Keeping Your Powder Dry In Systemic Investigations

- The Tail Wagging The Dog: eDiscovery And Key Document Retention Issues
  - ▶ EEOC Opportunistic Tactics With ESI
  - ▶ Harsh Judicial Treatment Of “The Dog Ate My Homework” Excuse
  - ▶ Missed Opportunity: Preserve Positive Evidence



# Keeping Your Powder Dry In Systemic Investigations

- Handling The Broad RFI
  - ▶ EEOC Leverage Is Its Subpoena Power - Case Law Is Problematic
  - ▶ Phased Production Of Materials And Data Can Lower Curb Appeal
  - ▶ “What You Really Want Is...” - Showing The EEOC What You Want It To See
  - ▶ How To Build A Strong “Burdenome” Argument
  - ▶ Build A Position Of Reasonableness

# Keeping Your Powder Dry In Systemic Investigations

- Emerging EEOC Investigative Tactics
  - ▶ Town Hall Meetings
  - ▶ Radio Ads
  - ▶ Directed Investigations / Commissioner's Charge
  - ▶ Partnering With Special Interest Groups & Plaintiffs' Bar
  - ▶ Detailed EEOC ESI Preservation Letter



# Keeping Your Powder Dry In Systemic Investigations

- Capturing Key Witness Testimony Before It's Too Late
- Early Expert Statistical Analysis - Putting Your Best Foot Forward (And Finding Those Land Mines First)
- Guard Against Retaliation - Real And Perceived
- Pro-Active Development Of Positive Facts
  - ▶ Collect The Good
  - ▶ Discard The Bad
  - ▶ Create The Rest
- In Case Of Fire Break Glass: A Solid Media Plan
  - ▶ Focus On Internal Audience, Customers, And General Public

# Core Tenets Of Conciliation And Tactics

- What To Expect When Conciliating With The EEOC
  - ▶ Timing, Tone, And Procedures
- Drivers In EEOC Conciliation: Monetary And Programmic Elements
  - ▶ The EEOC Is A Political Animal, Making It Unlike Any Other Adversary You Will Face In Litigation
  - ▶ Monetary Relief Is Still A Key Metric
  - ▶ Heavy Emphasis On “Targeted Programmic Relief”
  - ▶ The “Phantom Class” Problem



# Core Tenets Of Conciliation And Tactics

- Common EEOC Tactics
  - ▶ The See-Saw Of Monetary Relief And Programmic Relief – Playing Them Off Each Other
  - ▶ Beware Of The Used Car Sale Technique - “I Need To Ask My Manager”
  - ▶ Post-Determination Requests For Information
  - ▶ “Trust Us - There’s Discrimination”
  - ▶ “You [Employer] Tell *Us* [The EEOC] What The Settlement Proposal On Damages Should Be....”

# Key Provisions In Most Conciliation Agreements

- Recitation Of Case
- Term Of The Agreement
- Injunction Versus Prohibited Conduct
- Non-Admission Of Liability & The EEOC's Efforts To Narrow The Scope Of Such A Clause
- Problems With Releases (EEOC And Claimants/Charging Party)

# Key Provisions In Most Conciliation Agreements

- Monetary Relief
  - ▶ Formula / Discretion In Distributing The Fund
  - ▶ Settlement Administrator
  - ▶ Residual / *Cy Pres*

# Key Provisions In Most Conciliation Agreements

- Programmatic Relief
  - ▶ Posting
  - ▶ Training
  - ▶ Policy Review
  - ▶ Outside Monitor
  - ▶ Access To Information / Reporting
  - ▶ More Exotic Relief (Adjusting Relationships With Third Parties, Creating A Hiring Registry, EEOC Approval Of HR Functions, Etc.)

# Key Provisions In Most Conciliation Agreements

- Confidentiality – A Range Of Typical Options
  - ▶ Absolute Confidentiality
  - ▶ Joint/Neutral Press Release
  - ▶ Release With Advance Notice
  - ▶ No Confidentiality



# Taking Control Of Early Stages Of EEOC-Initiated Lawsuits

- What To Expect:
  - ▶ Spartan Complaint
  - ▶ Same-Day Press Release
  - ▶ Media Inquiries
  - ▶ Customer/Employee Inquiries
  - ▶ ESI Preservation Letter

# Taking Control Of Early Stages Of EEOC-Initiated Lawsuits

- The First 30 Days
  - ▶ Critical Period
  - ▶ Must-Do's (Where Early Strategy Pays Off - Most Will Already Be Done)
    - **DO** Update / Issue Litigation Hold
    - **DO** Collect And Preserve Key Information
    - **DO** Consider Dispositive Motions – VERY IMPORTANT
    - **DO** Create A Qualified, Informed Company Case Team
      - Hr
      - Legal: Internal And External
      - It
      - Public Relations

# Taking Control Of Early Stages Of EEOC-Initiated Lawsuits

- Must-NOT's
  - ▶ **DON'T** Do *Anything* That Appears Like Retaliation
  - ▶ **DON'T** Reach For The Checkbook - The EEOC's Reach Often Exceeds Its Grasp
  - ▶ **DON'T** Arbitrarily Grant The EEOC Extensions Or Seek Them If Not Necessary – Big Advantages To Keeping The Pressure On The EEOC





# Key Takeaway

**An Early, Comprehensive, And  
Well-Planned Out Pro-Active  
Defense Strategy  
*Will Yield Significant Dividends***

# Additional Resources

- [www.workplaceclassaction.com](http://www.workplaceclassaction.com)
- [www.eeoccountdown.com](http://www.eeoccountdown.com)