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## RESPONDING TO EEOC CHARGES AND THE EEOC ADMINISTRATIVE PROCESS

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EXPAND YOUR EXPECTATIONS™

## Who Is the EEOC?

### Equal Employment Opportunity Commission

- The federal agency with jurisdiction over all Title VII claims
- Has the power to investigate, mediate, conciliate charges
- Also has the power to bring suits on behalf of individual employees or classes of employees
- Purportedly “neutral” fact-finder
- In practice, not usually employer-friendly

**EEOC**  
U.S. Equal Employment Opportunity Commission

## How the EEOC Process Starts: The Charge

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- A charge is a written statement made by the complainant
  - it must identify the parties and the practices at issue
  - It must be filed within 180 or 300 days (depending on the state) of the alleged bad act
- Title VII requires that before an employee can file a lawsuit, they must first file a Charge of Discrimination and give the EEOC an opportunity to resolve the charge without litigation
- Once the charge is filed, EEOC has exclusive jurisdiction for 180 days
- EEOC must give employer notice of the charge within 10 days of receipt

## Notice of the Charge: What To Do

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- Obligation to preserve relevant documents (including electronic materials) begins
- Work product immunity begins
- Insurer should receive notice
- EEOC will seek further information



## What Happens Next?

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Three main stages of the EEOC process:

1. Intake
2. Mediation/Investigation
3. Dismissal or Cause Finding

But if there is a Cause Finding, two additional stages:

4. Conciliation
5. Commissioner's Lawsuit



## EEOC Charge Process

### Step 2: Mediation

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**Each charge is either assigned to The Investigation Unit or The Mediation Unit**

- The Mediation Unit is assigned cases where both parties express interest in resolving the claims at issue
  - If either side is not interested, the mediation will not take place
  - In some instances, the EEOC has refused to mediate
  - As the employer, if you take this route, you must come with a good faith intention to settle the case, i.e., bring money
  - The parties meet with a “neutral” EEOC Mediator and try to resolve the charge
- If the mediation fails, the charge will be re-assigned back to the Investigation Unit

## Mediation: The Pros and Cons

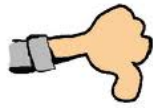
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- Pros



- It's free, cost-effective
- Employer perceived as cooperative
- Free discovery for employer

- Cons



- EEOC mediators are not actually neutral
- Committing to spend \$
- Free discovery for EEOC/complainant

## EEOC Charge Process Step 2: Investigation

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**Investigations usually consist of the following activities:**

1. Request for a position statement responding to the allegations in the charge and specific documents relevant to the investigation.
2. May send additional requests for information.
3. May request an on-site investigation.
4. Pre-Determination Interviews.



## # 1 & 2: Document Requests

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### Key documents to provide the Commission:

- Documentation justifying any disciplinary action taken (demotions, written discipline, terminations) -- attendance records; PIPs
- Company policies showing that the company treated the employee consistent with its own policies; EEO and reporting policies; posters
- Payroll records showing that an employee's pay was on par with other employee's pay, or that the employee's hours were not cut as alleged
- Where applicable, investigation files (witness statements, disciplinary actions, etc.) can be critical in getting a case dismissed. If the employer can show "prompt, remedial action" resulting in the conduct ending, the EEOC is unlikely to find "Cause"

## But Remember...

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- Anything given to the EEOC subject to a FOIA request by plaintiff (with some exceptions for information on third parties)
- But if you refuse a request:
  - EEOC can obtain a subpoena
  - May support an adverse inference to support later cause determination



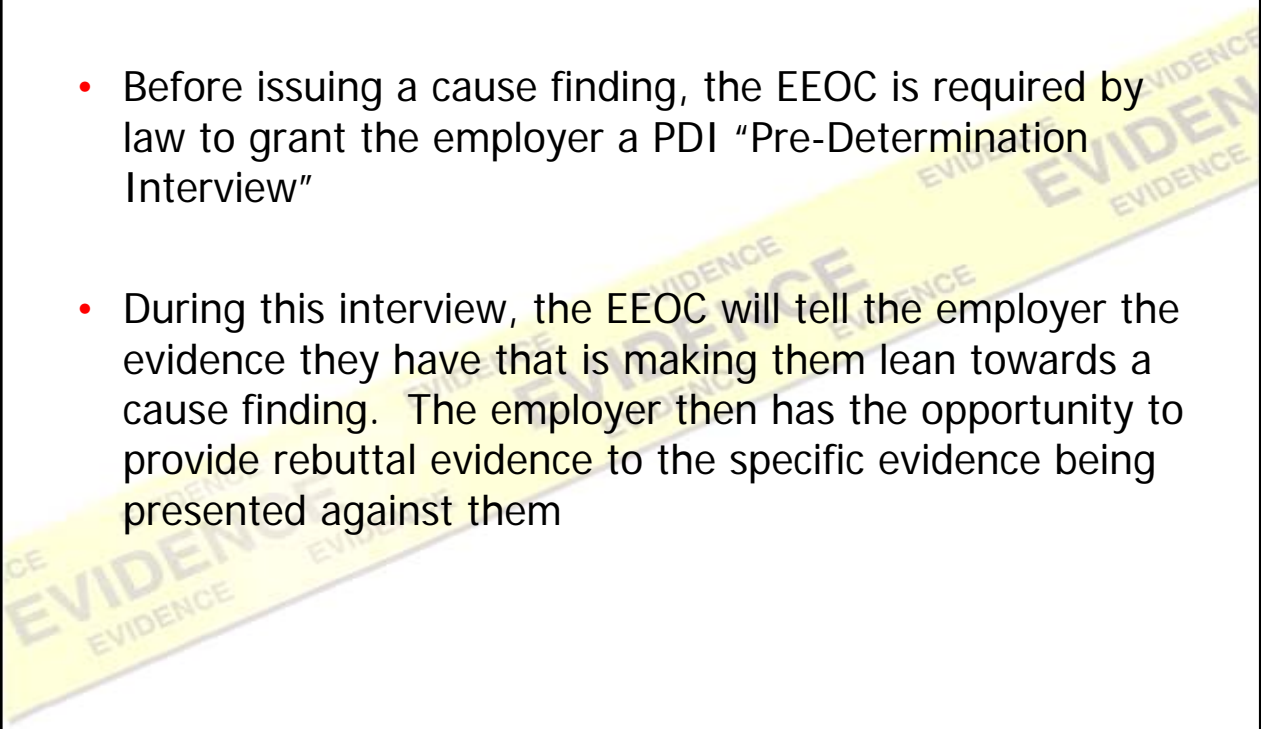
### # 3: EEOC On-Site Investigations How Do I Prepare and What Can I Expect?

- EEOC will ask to interview witnesses
  - Key witnesses v. random sampling
  - Managerial v. non-managerial
  - Employer's rights and witness prep
  - Recordings or witness affidavits
  - On-site v. off-site
- EEOC may ask to tour the facility, use as an opportunity to educate
- EEOC may ask for additional documents to be produced in advance of the on-site, or on-the-spot



### # 4: Pre-Determination Interviews

- Before issuing a cause finding, the EEOC is required by law to grant the employer a PDI "Pre-Determination Interview"
- During this interview, the EEOC will tell the employer the evidence they have that is making them lean towards a cause finding. The employer then has the opportunity to provide rebuttal evidence to the specific evidence being presented against them



### **Step 3: The EEOC Issued a “No Cause Finding” Dismissing the Charge. What Now?**

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- When the EEOC issues a “No Cause Finding,” it has determined that there is “no reasonable cause to determine that an unlawful practice occurred with respect to the employee”
- At that point, they are required by law to issue a “right-to-sue letter” to the employee
  - The employee has 90 days from the date of the Right to Sue letter in which to file a lawsuit
  - If the employee was not represented at the EEOC stage, they will now have to also seek counsel

### **Step 4: What Are the Implications of a Cause Finding or Conciliation?**

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- If the EEOC investigator determines that reasonable cause exists to conclude that discrimination did occur, the law requires the EEOC to issue a “Cause Finding” and attempt to “conciliate” the claim
- Conciliation is very different from mediation. At this stage in the process, the EEOC becomes an advocate for the employee and is no longer a “neutral”
- Oftentimes, they are not just seeking monetary relief on behalf of the employee



## Conciliation 101

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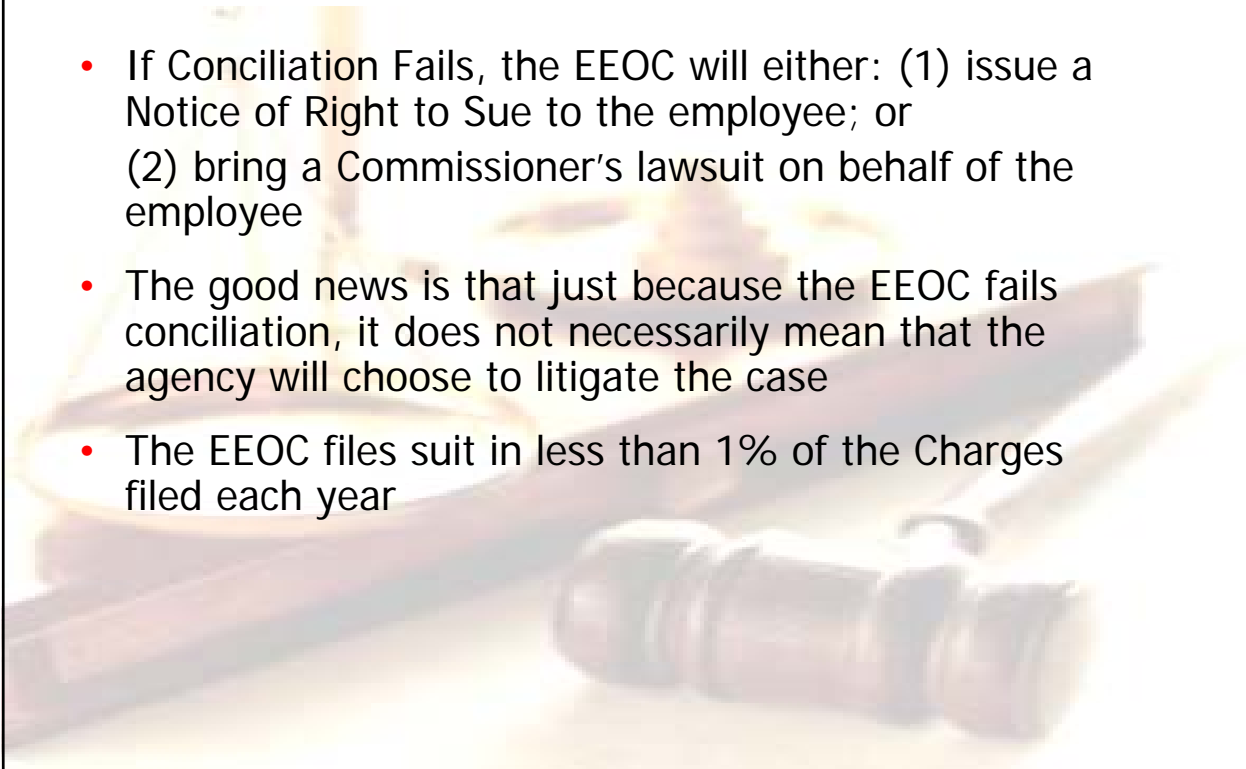
- Remember, Conciliation agreements are different than traditional settlement agreements:
  - No confidentiality
  - Lack of negotiability on certain things:
    - Injunctive relief
    - Mandatory training
    - Structural changes
  - What is negotiable:
    - Money
    - Length of time/geographic scope of injunction
  - Risk of future violations: non-discrimination provisions could be violated if future charges arise



## Step 5: What Happens If Conciliation Fails?

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- If Conciliation Fails, the EEOC will either: (1) issue a Notice of Right to Sue to the employee; or (2) bring a Commissioner's lawsuit on behalf of the employee
- The good news is that just because the EEOC fails conciliation, it does not necessarily mean that the agency will choose to litigate the case
- The EEOC files suit in less than 1% of the Charges filed each year



## **Litigating Against the EEOC: A Frustrating Opponent**

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- EEOC will try the case in public → will issue press release along with complaint
- Expect bare notice pleadings
- EEOC will claim attorney-client privilege and work product privilege for communications with charging parties and every potential class member
- Class recruitment: will send out letters immediately; minimal to no screening
- Settlement: no confidentiality



## **How Can I Prevent EEOC Charges?**

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- Follow the policies and processes your company has in place
- Have an open door to your employees
- Early workplace resolution. Address issues as they arise
- Send closure letters/conduct exit interviews

