SEYFARTH SHAW LLP
ATTORNEYS

131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
(312) 460-5000
fax (312) 460-7000
www.seyfarth.com

Writer's direct phone
(312) 460-5965

Writer's e-mail
gmaatman@seyfarth.com

June 19, 2012

Via Electronic Mail
Strategic.plan@eeoc.gov

Executive Officer
Office of the Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Re: EEOC's 2012 – 2016 Strategic Enforcement Plan - Written Submission Of Seyfath Shaw LLP

Dear Executive Officer:

On behalf of Seyfarth Shaw LLP, we respectfully submit these comments in response to the June 5, 2012 Press Release requesting written submissions regarding the Equal Employment Opportunity Commission's development of its next 3-year Strategic Enforcement Plan (the "Plan").[1]

Seyfarth believes most employers applaud any opportunity to provide input into the agency's strategic goals – after all, the agency and employers share a common goal of discrimination-free workplaces and vigorous enforcement of anti-discrimination rights. At the same time, the Commission's belated request for input on its strategic goals after they have been developed creates some skepticism by the private sector as to whether employers' voices will be heard. Thus, we appreciate the opportunity to provide information in support of the EEOC's efforts to craft the Plan for Fiscal Years 2012 – 2016, and hope that this will have a meaningful impact on how the EEOC approaches interactions with employers in the years to come.

Founded in 1945, Seyfarth is recognized as one of the "go to" labor and employment law firms for employers. Attorneys from our Complex Discrimination Litigation Practice Group have litigated against – and, where possible, cooperated with – the EEOC in hundreds of litigation

[1] *See, U.S. Equal Employment Opportunity Commission Strategic Plan for Fiscal Years 2012 – 2016*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm (last visited June 7, 2012).

matters. Indeed, Seyfarth is currently representing employers in what we understand are the three largest EEOC lawsuits presently pending in the United States.

The co-authors of this submission, Gerald L. Maatman, Jr. and Christopher J. DeGroff, primarily focus on defending employers sued in employment-related class actions and EEOC lawsuits brought in federal and state courts throughout the United States.

Mr. Maatman is a partner in the Chicago and New York offices of Seyfarth and is the co-chair of the Firm's Complex Discrimination Practice Group. Due to his work on litigation opposite the EEOC in many of its most significant cases, the Government has asked Mr. Maatman to lecture on defense of EEOC litigation at the Commission's annual training symposium for its trial attorneys handling systemic litigation. Mr. Maatman has served as lead defense counsel in some of the largest pattern or practice lawsuits in the Commission's history. A frequent writer and commentator on EEOC litigation subjects, he is also the editor of Seyfarth's Workplace Class Action Report, a comprehensive annual compendium of complex litigation decisions, and the editor of the Firm's blog entitled workplaceclassaction.com.

Mr. DeGroff is a partner in Seyfarth's Chicago office and is also co-chair of the Complex Discrimination Practice Group. Mr. DeGroff has extensive experience litigating against the EEOC, both at the early charge stage and in large-scale EEOC pattern or practice litigation. He has developed innovative strategies for addressing wide-ranging governmental request for information and has handled complex regional and national EEOC investigations, often resulting in no action being taken against the employers he represents. Mr. DeGroff has also crafted state-of-the-art tools to track subtle trends in agency change and litigation filings. Mr. DeGroff has written extensively on these trends and cutting edge tactics employed by the EEOC and has been regularly asked to speak on those topics.

Given Seyfarth's depth and breadth of experience with the agency, we are in a unique position to provide useful insight on the Plan. What follows is a non-exhaustive discussion of some of the recurring issues we see in the EEOC's practices as they relate to the Plan. Our discussion is anchored in the EEOC's own articulation of its mission: an agency that was "designed to encourage voluntary compliance with the anti-discrimination laws and to assist employers, employees and stakeholder groups to understand and prevent discrimination."[2]

In our view, the EEOC has strayed from this core tenet, and is focused more on political viability and achieving internal metrics than it is on accomplishing the true goal of real-world impact equal employment opportunities. We respectfully submit that the Commission's Plan can be enhanced and improved by taking account of these issues of concern to employers.

---

[2] *EEOC Investigations - What An Employer Should Know*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://archive.eeoc.gov/employers/investigations.html (last visited June 12, 2012); *see* 42 U.S.C. §§ 2000e-5(b)-(c) (recognizing the importance of voluntary compliance by employers); 42 U.S.C. §§ 2000e-5(d) (explaining that the federal government has ultimate enforcement responsibility).

I. The Strategic Enforcement Plan Should Address The EEOC's "Hide The Ball" Tactics"

We start with the EEOC's focus on large-scale, high-impact and high-profile investigations and cases. The EEOC reported that, "[w]hile . . . [the EEOC's past] focus has primarily been on individual cases of discrimination, the agency has stated its bipartisan desire to shift emphasis to combating systemic discrimination."[3] In recent years, the EEOC made good on this promise – touting its systemic program that it describes as "crucial to battling unlawful patterns or practices of discrimination which have a broad impact on an industry, profession, company, or geographic location."[4]

This shift in focus and accompanying aggressive tactics and tone has come at a cost to the EEOC's core tenants. With alarming and increasing frequency, the EEOC's efforts to expand the scope and profile of systemic litigation has meant that the EEOC has drifted from its central statutory mandate that it may pursue civil action against a respondent employer *only after* it has satisfied its statutory duty to "eliminate [the] alleged unlawful employment practice through informal methods of conference, conciliation and persuasion" as a precondition to filing an action.[5] The EEOC often engages in "hide the ball" tactics in an attempt to leverage anecdotal or even outright unsubstantiated claims of discrimination into big-ticket settlements. In our experience, many EEOC investigators are far too quick to shut employers out of the investigative process and deem conciliation a failure. As even the President of the Equal Employment Advisory Counsel stated in a meeting addressing the EEOC's effectiveness, "[t]his cursory treatment of conciliation by some of the EEOC's investigative staff falls short of satisfying the agency's statutory conciliation obligations, and undermines the concept of voluntary settlement as the preferred means of resolving discrimination charges. Much more needs to be done to assure that all charges in which reasonable cause has been found are subject to meaningful, good faith conciliation efforts."[6]

This phenomenon is by no means uniform. There are individual agency staff, counsel, and leadership at all levels who consistently work with employers to achieve positive resolution of matters that arise. Indeed, the EEOC employs some of the best employment practitioners this firm has encountered. These positive experiences, however, make the more common "stonewalling" tactics even more pronounced, and serve as the exception that proves the rule.

It is therefore essential for the Plan to recognize intolerance for these questionable litigation tactics in large-scale pattern or practice cases. The Plan also should account for closer oversight relative to EEOC investigators and attorneys who fail to adhere to standard litigation devices and

---

[3] *U.S. Equal Employment Opportunity Commission: FY 2011 Congressional Budget Justification, Submitted to the Congress of the United States February 2010*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/plan/upload/Final-FY-2011-Congressional-Budget-Justification.pdf (last visited July 13, 2012).

[4] *Id.*

[5] 42 U.S.C. § 2000e-5(b).

[6] *Meeting of September 8, 2003, Washington D.C. on Repositioning for New Realities: Securing EEOC's Continued Effectiveness, Remarks of Jeffrey A. Norris, President, Equal Employment Advisory Council*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Sept. 8, 2003), http://archive.eeoc.gov/abouteeoc/meetings/9-8-03/eeac.html.

sound judgment in wielding the Commission's power. The following is an overview of some of the more pronounced concerns.

A. As Courts Reject The EEOC's Attempts To Stonewall And Mislead Employers, The Strategic Enforcement Plan Should Likewise Provide For Closer Oversight Of Agency Personnel To Avoid Such Problems

Although the EEOC has touted its "sue first, ask questions later" tactics as sufficient to satisfy the EEOC's investigation and conciliation obligations, the EEOC is not immune from pre-lawsuit requirements.[7] Numerous cases around the country have put a spotlight on these requirements, and have instructed the EEOC on where it is falling short. One example from the U.S. District Court for the Eastern District of Washington is *EEOC v. Evans Fruit Co., Inc.*, which offers guidance to the EEOC of what actions arguably satisfy its pre-investigation good faith requirement.[8] The Court in that case stated the EEOC must "be more forthcoming regarding the type of damages sought" and suggested that good faith efforts to conciliate include offering "some justification of the amount of damages sought, potential size of the class, general temporal scope of the allegations, and the potential number of individuals . . . alleged to be involved in the harassment."[9]

Unfortunately, even this bare-bones information is often a jealously guarded secret in discussions with the EEOC. More than a few employers have shared stories of how the EEOC "just doesn't fight fair." Expanding single worker charges into wide-ranging systemic investigations, negotiating via "take-it-or-leave-it" settlement demands while threatening to file a "big case," or sometimes litigating with a "shoot first and aim later" philosophy exemplify EEOC tactics that federal judges continue to deem inappropriate if not abusive. The concern that the EEOC continues to engage in minimal pre-suit investigation and conciliation efforts is by no means theoretical. The EEOC is, of course, very familiar with the example of *EEOC v. CRST Van Expedited, Inc.*, where the agency stonewalled the company in explaining who it sought to represent; that tactic ultimately resulted in the Court entertaining – and granting – a motion for $4.5 million in sanctions.[10] In that instance, the EEOC did not, and could not, provide the employer with the names of the class members or even a general indication of the size of the class before filing suit.[11] As a result, the Eight Circuit established a critical distinction between facts developed during the EEOC's pre-lawsuit administrative investigation upon which the Commission may sue as opposed to "new facts"

---

[7] *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012) (hereinafter "*EEOC v. CRST Van Expedited*").
[8] *EEOC v. Evans Fruit Co., Inc.*, Case No. 10-CV-03033, 2012 U.S. Dist. LEXIS 72836 (E.D. Wash. May 24, 2012) (hereinafter "*EEOC v. Evans Fruit*").
[9] In *EEOC v. Evans Fruit*, the employers continually requested the EEOC's investigation findings and made attempts to engage in conciliation efforts despite unresponsive replies from the Commission. Evans Fruit's efforts to compel investigation information and conciliation with the EEOC are a quintessential example of pre-suit investigations in practice. It follows that the U.S. District Court for the Eastern District of Washington reasoned that the EEOC's abrupt declaration that conciliation efforts were "unsuccessful" without any explanation was unreasonable and granted defendant's motion for summary judgment. *Id.* at *22.
[10] *EEOC v. CRST Van Expedited*, 679 F.3d 657 (8th Cir. 2012).
[11] *Id.*

learned during the discovery phase of the lawsuit, which the EEOC may not use "as a fishing expedition" to uncover more claims.[12]

The Eight Circuit further noted that the EEOC's complaint failed to identify the number of alleged similarly-situated employees, and that only after the commencement of the lawsuit and through discovery did the EEOC seek to ascertain the size of the class.[13] The Eight Circuit determined that the EEOC's litigation strategy was "untenable" because it forced CRST to litigate a "moving target" of allegedly aggrieved persons and created a risk for "never-ending" discovery.[14] In short, the Eight Circuit decision admonished that the EEOC cannot use discovery as a way to find its class members, but instead the EEOC must identify its class members during its investigation and then must conciliate those claims.[15]

Other courts echo the *EEOC v. CRST Van Expedited, Inc.* decision, finding that agency tactics based on stonewalling or misleading employers can have severe consequences. In *EEOC o/b/o Serrano, et al v. Cintas Corp.*, the U.S. District Court for the Eastern District of Michigan awarded the employer $2,638,443 in fees and costs after the EEOC refused to identify the women it represented in a gender discrimination case, claiming they should only be identified in a later phase of the case.[16] The Court disagreed with the EEOC, noting that the "Defendant quite reasonably seeks to focus its attention upon the specific women on whose behalf the EEOC intends to seek damages. The information is relevant to the issues in controversy . . . and the EEOC has no principled reason to withhold it."[17] The ruling is, in effect, a resounding defeat for the EEOC's current systemic litigation program.

Joining the growing line of cases reflecting judicial intolerance for current EEOC litigation tactics, the ruling in *EEOC v. Peoplemark, Inc.* represents more support for employers targeted by questionable government-initiated litigation.[18] *EEOC v. Peoplemark* involved a civil complaint filed by the EEOC against a temporary staffing company. The EEOC alleged the company maintained a no-hire policy against persons with a criminal record, which resulted in a disparate impact on African-Americans in violation of Title VII.[19] Peoplemark argued that the EEOC had deliberately caused the company to incur attorney's fees and expert fees when it should have known that the company did not have the blanket no-hire policy. The U.S. District Court for the Western District of Michigan agreed with Peoplemark and held that if the EEOC conducted a proper investigation, it would have know this critical flaw before it even filed the case.[20] In one of the

---

[12] *Id.* at 669-70.
[13] *Id.* at 675.
[14] *Id.* at 676.
[15] *Id.* at 677.
[16] *EEOC o/b/o Serrano, et al v. Cintas Corp.*, 2010 U.S. Dist. LEXIS 18130 (E.D. Mich. Aug. 4, 2011).
[17] *Id.* at *6.
[18] *EEOC v. Peoplemark, Inc.*, 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2011).
[19] *Id.*
[20] *Id.*

largest sanction awards ever against the Commission, the Court ordered the EEOC to pay fees and costs to Peoplemark in the amount of $751,942.48.[21]

B. The Strategic Enforcement Plan Should Call For An End To The EEOC's "Hide The Ball" Tactics

The preceding are just a handful of the examples demonstrating a growing intolerance for the EEOC's litigation tactics. We respectfully submit that the EEOC should not simply use these cases to establish the outer edge of the envelope for its decisions. Instead, use of these tactics come at a greater cost. The EEOC's mechanisms for investigating and conciliating matters have developed an atmosphere of substantial mistrust, suspicion, and cynicism among employers. When threatened with multi-million dollar lawsuits based on the thinnest reeds of evidence, employers have no choice but to challenge the EEOC's allegations and "take no prisoners" views. In fact, this has created a knee-jerk reaction among many in the employer community to resist *any* EEOC investigation, often galvanizing employers against cooperation with the Commission. The Plan must acknowledge that employers want to know if there are problems in their facilities, and engaging in an open investigation and conciliation will therefore further both the EEOC and employers' interests.

Seyfarth urges that the Plan should address these significant problems. There are a number of ways that the EEOC can achieve this goal. For example, the EEOC could be far more transparent when it is launching a systemic investigation through implementing a charge analysis that sets forth the basis of the investigation, what prompted the concerns, and what the EEOC needs to address those concerns. The agency presumably already internally conducts this charge analysis. The EEOC notes in its Priority Charge Handling Task Force manual that it triages charges using the now-familiar "A" "B" "C" system, with "A" charges being high-profile, likely for litigation matters, and "C" being low-value cases.[22] Yet, the EEOC refuses to provide this "bucketing" information to employers, leaving them to guess about the severity and the scope of the charge they face. When later asked for this information through FOIA requests, the EEOC continually rebuffs the requests on the ground that it involves the "deliberative process." The Plan should build in components of transparency and communication with employers who are facing systemic investigations. We submit that the systemic nature of a charge should appear on the face of the charge itself – perhaps a specific charge designation (not unlike the existing A-B-C system) or even a systemic investigation "check box." This fits squarely with the EEOC's core mission of helping employers voluntarily achieve a discrimination-free workplace. "Gotcha" tactics simply have no place in these high-stake situations.

The transparency should not end simply by identifying systemic claims, but should include the bases for viewing them as such. Too often, employers must pursue intense, costly, and often dissatisfying negotiations to get the basic information supporting a class determination. What little

---

[21] *Id.*

[22] Paul M. Igasaki & Paul S. Miller, *Priority Charge Handling Task Force: Litigation Task Force Report*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Mar. 1998), http://archive.eeoc.gov/abouteeoc/task_reports/pchlit-1.thml.

information an employer receives is commonly bolstered with the "assurance" that the EEOC has enough evidence to support a systemic case and that the employer should "trust" that the EEOC has done its job. As noted from the decisions cited above, that is clearly not always the case. Thus, the Plan should include measures to protect employers from being subject to uncertain, vague, and conclusory investigation results. The solution could be as simple as the EEOC developing a standardized packet of information supporting a systemic determination that includes a reasonably detailed basis for the determination, the identity of the alleged victims, and any statistical or technical evidence supporting the determination.[23] If this standard package was reasonable and robust, it would dramatically increase employer confidence that they were not "boxing with shadows" and could serve the Commission's purposes of avoiding problematic cases like *EEOC v. CRST*.

We again emphasize that gamesmanship is not the EEOC's standard operating procedure. Unfortunately, however, the problems crop up in pockets scattered around the country. Inconsistency in enforcement drives many of the problems the Commission faces. The EEOC has often criticized employers for allowing unfettered discretion by decision-makers, claiming this creates a breeding ground for individual, improper agendas. If true, the EEOC is not immune to this phenomenon. We urge the EEOC to build the consistency and accountability that it rightfully demands of employers into its own procedures and practices.

II. The Strategic Enforcement Plan Needs To Address And Correct The EEOC's Abuse Of Its Subpoena Powers

To accomplish the EEOC's goal of investigating and eliminating workplace discrimination, the EEOC routinely claims that it has a number of fact-finding tools at its disposal. One of the most aggressive tools – used primarily in the face of employer resistance – is the EEOC's subpoena power.

Although the EEOC may feel differently, its subpoena power is not unlimited. A growing number of courts share the belief that the EEOC does not have unfettered subpoena power and several recent decisions have limited the EEOC's subpoena authority.[24] When addressing the Plan, the EEOC should consider cases that limit the agency's subpoena power. Case law supports the general notion that the EEOC's authority to request information and records is restricted only to evidence that is relevant to the charges under investigation.[25] This limitation on the EEOC's power gives effect to Congress' desire to prevent the Commission "from exercising unconstrained investigatory authority."[26]

---

[23] "While the EEOC is not obligated to provide the identities of all § 706 class members," it cannot bring a § 706 claim without identifying a single plaintiff. *EEOC v. Bass Pro Outdoor Wolrd*, LLC, No. 4:11-CV-03425, 2012 U.S. Dist. LEXIS 75597, at 28-29 (S.D. Tex. May 31, 2012).

[24] A comprehensive collection of recent decisions relating to the EEOC's subpoena power can be found in the Spring 2012 edition of the Labor Law Journal. *See*, Gerald L. Maatman & Christopher J. DeGroff, *EEOC-Initiated Litigation: Case Law Developments in 2011 and Trends to Watch For in 2012 Part I*, 63 LABOR LAW JOURNAL 22 (2012).

[25] *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 645 (7th Cir. 2000).

[26] *EEOC v. Loyola Univ. Med. Ctr.*, 823 F. Supp. 2d 835, 836 (N.D. Ill. Oct. 13, 2011) (hereinafter "*EEOC v. Loyola.*").

We are cognizant that other courts have permitted the EEOC to cast a broad net for information, even when the charge allegations that the government is investigating are narrow.[27] Thus, courts have taken varying positions on the scope of the EEOC's subpoena power, which appears to have prompted the EEOC to forum-shop large scale commissioner's charges in venues with more lenient subpoena authority. Even situations where courts have given the EEOC wide latitude to enforce subpoenas are prime examples that what the EEOC *can do* and what it *should do* are two different things. Employers across the country will recognize the following, regrettable pattern: the EEOC sends a wildly overboard boilerplate request for information, sometimes based on a single allegation by a sole Charging Party, and waits for the employer to push back and tailor the request for the EEOC. The haggling and posturing that follows wastes the time and resources of both the employer and the government, and sometimes ultimately results in a subpoena enforcement action. More often than not, when courts enforce the EEOC's subpoena, the agency's requests for data are tantamount to a fishing expedition.[28]

The EEOC would be well-served to consider the decision in *EEOC v. Loyola University Medical Center* ("*EEOC v. Loyola*") when reviewing the Plan.[29] In *EEOC v. Loyola*, Judge Charles Kocoras of the U.S. District Court for the Northern District of Illinois took a hard line with the EEOC, limiting the amount of information it could obtain via a subpoena stemming from an adverse investigation. The charging party alleged that Loyola discriminated against her based on disability when it required her to submit to a fitness for duty examination consisting of a blood test, a breath alcohol test, and a medical exam.[30] The EEOC sent Loyola a request for information as part of its administrative investigation, asking Loyola to divulge information relative to other employees who were ordered to take a fitness for duty examination for the supervisors specified by the EEOC's

---

[27] As we have reported in Seyfarth Shaw's Workplace Class Action Blog (www.workplaceclassaction.com), the EEOC continues to push the limits of its subpoena authority across the country, resulting in a disturbing trend in federal district courts to give the EEOC significant latitude in the scope of its investigations. *See, e.g., EEOC v. Konica Minolta Bus., Solutions U.S.A., Inc.*, 639 F.3d 366, 371 (7th Cir. 2011) (affirming the District Court's decision to enforce the EEOC's subpoena based on an individual allegation of racial discrimination); *EEOC v. Wash. Suburban Sanitary Comm'n.*, 631 F.3d 174 (4th Cir. 2011) (affirming the District Court's order enforcing the EEOC's administrative subpoena and finding that the EEOC's request for data regarding individual and systemic gender discrimination was relevant); *EEOC v. Infiniti Of Fairfield*, 2011 U.S. Dist. LEXIS 67121 (E.D. Cal. June 21, 2011) (enforcing an EEOC subpoena seeking defendant's documents relating to its age discrimination charge as well as the discrimination charge based on disability); *EEOC v. Osceola Nursing Home, LLP*, Case No. 10-CV-4 (E.D. Ark. Mar. 9, 2011) (ordering the defendant to pay $2,500 to the EEOC for having to request judicial enforcement of its subpoena seeking employee personnel files of charging parties, employee handbooks and procedures, and identification of all employees discharged during the relevant time period).

[28] *EEOC v. Kronos, Inc.*, 620 F.3d 287, 292 (3d Cir. 2010), arose out of a disability discrimination claim. The charging party applied for a job with Kroger Food Stores and was not hired based on an employment test created by Kronos. The EEOC sought testing information from Kronos through a third-party subpoena. *Id.* at 293. The EEOC also expanded its investigation to include race discrimination. *Id.* The Third Circuit allowed the EEOC's administrative subpoena as to the disability aspects of the test used by the company, because as it related to the claim of disability discrimination. *Id.* at 296. It rejected, however, the EEOC's requested race impact data. The Third Circuit reasoned that "the inquiry into potential race discrimination is not a reasonable expansion of [the] charge. Instead, the EEOC's subpoena for materials related to race constitutes an impermissible 'fishing expedition.'" *Id.* at 301.

[29] *EEOC v. Loyola*, 823 F. Supp. 2d 835.

[30] *Id.* at 838.

information request.[31] Not content with Loyola's answer, the EEOC issued a subpoena, expanding its demand for information to all employees subjected to a fitness for duty examination during the relevant time period, and in so doing sought very sensitive details of those examinations.[32]

Judge Kocoras reasoned that this case focused on whether Loyola's fitness for duty examination was job-related. He reasoned that the medical records of other employees "shed no light whatsoever" on whether the fitness for duty examination in this matter was job related to the charging party's position.[33] Even under a broad reading of the EEOC's subpoena power, the subpoena remained unenforceable because it was "not sufficiently tailored to the particular circumstances of the investigation."[34] The Court recognized that the EEOC's subpoena powers are broad, but not unlimited.[35] Thus, the EEOC's request for all employee medical data - when the charge related to only one employee - was just too broad.

EEOC v. Loyola represents an example of pragmatic reasoning that cuts against a more lenient approach in wide-ranging EEOC investigations. A more incremental approach to requests for information could very well achieve the EEOC's investigative goals, but without wasting the time and resources of employers or the government.

III. The Strategic Enforcement Plan Should Take Account Of The Misguided Melding Of The EEOC's Investigative And Legal Elements

Next, we turn to EEOC legal staff involvement in agency investigations. This practice is troubling both in theory and in practice. In many cases, a team of at least one EEOC investigator and one EEOC attorney is assigned to a charge. The attorneys are closely involved with all phases of the investigation, including intake of charge and the investigation process. In fact, EEOC attorneys may participate jointly with investigators in on-site interviews at employer sites. These are the same lawyers who will have a hand in litigating future lawsuits against these employers. This practice of tag-teaming between legal and investigatory staff compromises the EEOC's requirement to implement "impartial" investigations. The Code of Federal Regulations sets forth express guidelines for the EEOC's investigation of complaints. It states:

> The agency must develop an ***impartial and appropriate factual record*** upon which to make findings on the claims raised by the complaint. An appropriate factual record is defined in the regulations as one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred. Investigations are conducted by the respondent agency.[36]

---

[31] *Id.* at 836-37.
[32] *Id.* at 837.
[33] *Id.* at 839.
[34] *Id.*
[35] *Id.*
[36] 29 C.F.R. § 1614.108(b) (emphasis added).

Similarly, the EEOC's web-page showcases "what an employer should know" about EEOC investigations. The EEOC itself states that it must "fairly" evaluate claims.[37] It is important to recognize, however, that the "impartial" and "fair" investigations that are conducted by the same attorneys who are building a future litigation case create the appearance (and presumably the reality) of an investigation that is anything *but* impartial or fair.

This problem is propagated by the EEOC's 2012 – 2016 Plan, which explicitly states that the agency will "integrate" the EEOC's investigation, conciliation, and litigation responsibilities for private employers and state and local government sectors.[38] Although the EEOC's stated position as "neutral" at the investigation stage has long been questioned, the EEOC's Plan makes it official. This creates a very serious problem when an investigation is, in actuality, a pre-litigation vehicle to discovery; the scope of which would not ordinarily be allowed by any federal action governed by Fed. R. Civ. P. 26 and 37. The end-game is that the lines that purportedly once existed between the EEOC's investigative arm on the one hand and its litigation arm on the other, would be erased for all practical purposes.

The Plan should not take the myopic approach of endorsing investigations that are intertwined with legal interests and involvement. We therefore suggest that the Plan establish clear marching orders that separate EEOC investigator and attorney involvement, or at least build a "Chinese wall" between the attorneys offering advice on an investigation and those who actually participate in later litigation – similar to the strict separation of the EEOC mediators in its ADR program. A Plan that addresses these concerns will offer assurance to employers and simultaneously improve an impartial investigative procedure.

IV. The Strategic Enforcement Plan Must Address The EEOC's "Constant Inconsistency"

The Commission has engaged in a comprehensive review of its organizational structure and operations for over the past three years — but it still has significant room for improvement. The EEOC's General Counsel David Lopez has often stated that the agency operates its investigation and enforcement philosophies through a "national law firm model."[39] In theory, this method would permit the EEOC to more effectively pursue systemic discrimination allegations. In reality, the EEOC's balkanized, district-centric structure makes dealing with the EEOC like working with dozens of different, highly idiosyncratic firms.[40] It is no secret that "[a]pproaches to mediation,

---

[37] *See, EEOC Investigations - What An Employer Should Know*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://archive.eeoc.gov/employers/investigations.html (last visited June 12, 2012).

[38] *U.S. Equal Employment Opportunity Commission Strategic Plan for Fiscal Years 2012 – 2016*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm (last visited June 7, 2012).

[39] David P. Lopez, General Counsel of the U.S. EEOC stated, "I intend to further develop the national law firm model for the EEOC to combat discrimination. I look forward to working with Chair Berrien and the entire Commission to ensure equal opportunity throughout this nation." *P. David Lopez Sworn in as General Counsel of the EEOC*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Apr. 8, 2010), http://www.eeoc.gov/eeoc/newsroom/release/4-8-10.cfm (internal quotations omitted).

[40] "Along with its headquarters in Washington, D.C., the EEOC has 51 sites. The agency has offices in 32 states; nine states have multiple offices. Those states, along with their number of offices are California, 6; Texas, 4; North Carolina, 3; Florida, 2; Georgia, 2; New York, 2; Ohio, 2; Pennsylvania, 2; and Tennessee, 2." Robert J. Grossman,

cooperation between investigators and lawyers, training, and staff morale all differ in the various offices," as noted by Myra Shiplett, staff director of the National Academy of Public Administration.[41]

An article published by the *Society for Human Resource Management* addressed the EEOC's inconsistencies, and acknowledged that although the offices serve different employees and employers all over the country, there is still "reason to suspect that, whether you're a claimant or an employer, the EEOC is not as effective at preventing and resolving discrimination claims as it suggests–and that inconsistency across the regions is a major reason."[42] Because the EEOC's procedures vary among the EEOC's District, Field, Area, and Local Offices, employers are left bewildered by the shifting "rules," making it nearly impossible to effectively work with the EEOC.

Furthermore, not only are the inconsistencies geographical, but also the agendas of the various District Offices continue to change over time. Procedures that a given District Office enforced in 2010, may not be the same in 2012. "Most decisions are episodic. You don't have systemic thinking and planning that you normally see in the best-managed organizations," Shiplett says.[43] This fractured geographic and temporal method costs employers wasted time and money and is not an effective way to resolve discrimination claims. It is, therefore, necessary for the Plan to enhance consistency and uniformity among the EEOC's offices.

* * * * * * * * * * * * * * *

Although the ideas and concerns voiced above may not be revolutionary, there is at least a perception by practitioners and employers alike that the EEOC is simply not listening to these issues, and thus they bear repeating. Countless employers have raised these problems for years, and the call has even been picked up by many federal district and appellate courts. We look forward to an EEOC Plan that considers these problems, and embraces the agency's original mission to seek meaningful, voluntary compliance and resolution before litigation, rather than viewing this step as merely a box to check before rushing to the courthouse and the press.

Constant inconsistency; How will you be treated by the EEOC? That may depend on three factors: location, location, location, 48 HRMAGAZINE 12, Dec. 1, 2003, *available at* 2003 WLNR 17582883.

[41] *Id.*

[42] *Id.*

[43] *Id.*

Seyfarth Shaw appreciates the opportunity to comment in the development of the Strategic Enforcement Plan for the EEOC's national priorities for Fiscal Years 2012 – 2016. We are available for further discussion on these and other issues as the EEOC develops the Plan. Thank you for your consideration of these issues.

Respectfully submitted,

SEYFARTH SHAW LLP

Gerald Maatman, Jr., Gmaatman@seyfarth.com

Christopher DeGroff, Cdegroff@seyfarth.com