THE AGENCY AWAKENS

EEOC Enforcement Trends in 2016
and beyond

April 13, 2016

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THE AGENCY AWAKENS

I. Update on the Commission's Strategic Enforcement Plan
II. Trends in charge filings and EEOC litigation
III. Major cases decided in 2015
    A. Mach Mining
    B. Abercrombie
    C. Young
IV. Big issues to watch in 2016
    A. ADA emerging issues
    B. Equal Pay Act claims
    C. Sexual orientation and gender issues
    D. Background checks in hiring decisions
    E. Guidance on independent contractors

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EEOC 101

- Bipartisan body of five members appointed by the President and confirmed by the Senate
- Enforces anti-discrimination laws in employment and promotes for equal employment opportunity
  - Title VII of the Civil Rights Act of 1964
  - The Age Discrimination in Employment Act of 1967 (ADEA)
  - The Equal Pay Act of 1963 (EPA)
  - Section 501 of the Rehabilitation Act of 1973
  - American with Disabilities Act of 1990 (ADA)
  - Genetic Information Nondiscrimination Act of 2008 (GINA)

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STRATEGIC ENFORCEMENT PLAN (SEP) 2013 - 2016

- Eliminating barriers in recruitment and hiring
- Protecting immigrant, migrant and other vulnerable workers
- Addressing emerging and developing Issues
- Enforcing equal pay laws
- Preserving access to the legal system
- Preventing harassment through systemic enforcement and targeted outreach

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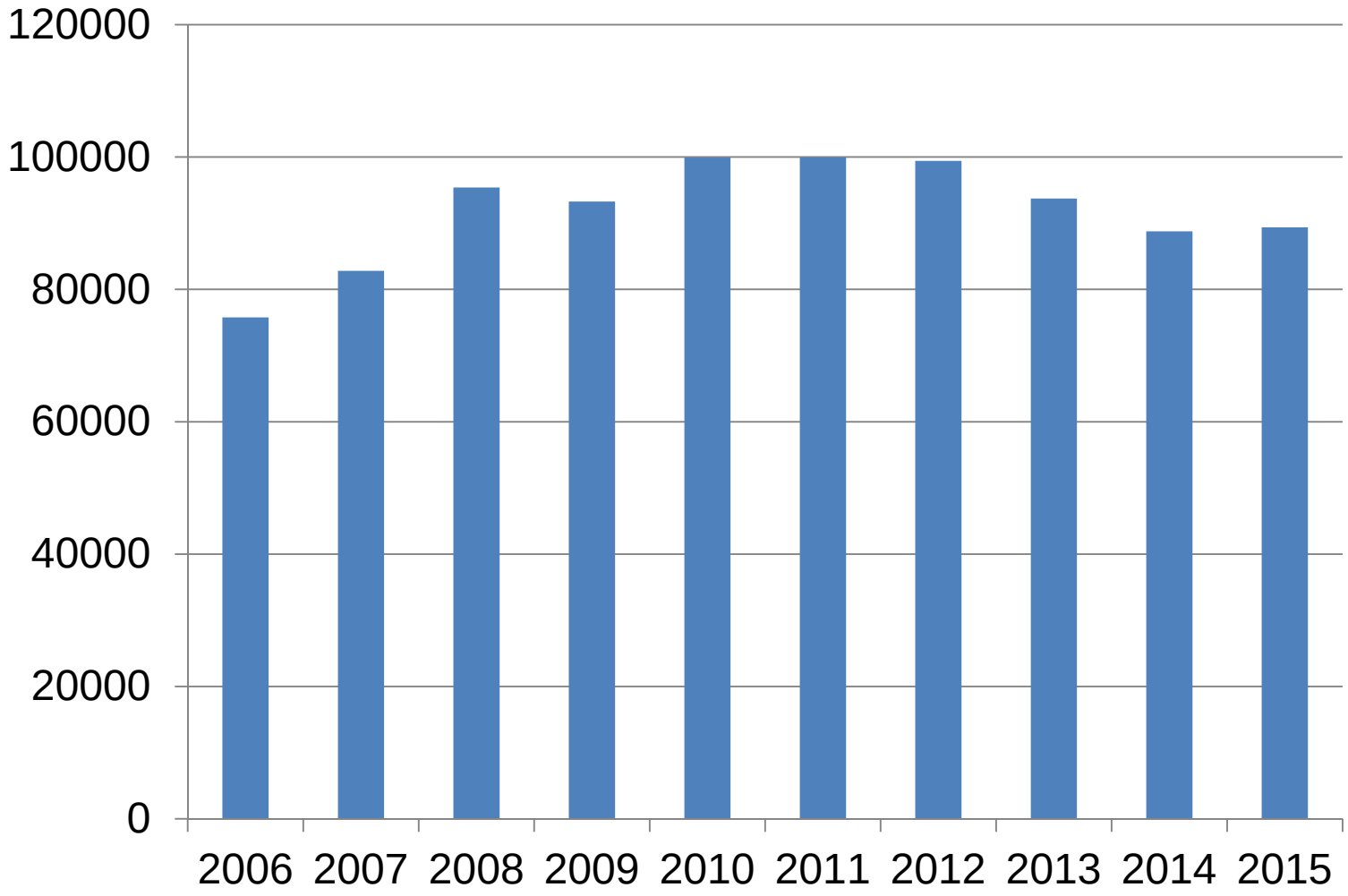
EEOC CHARGE FILINGS



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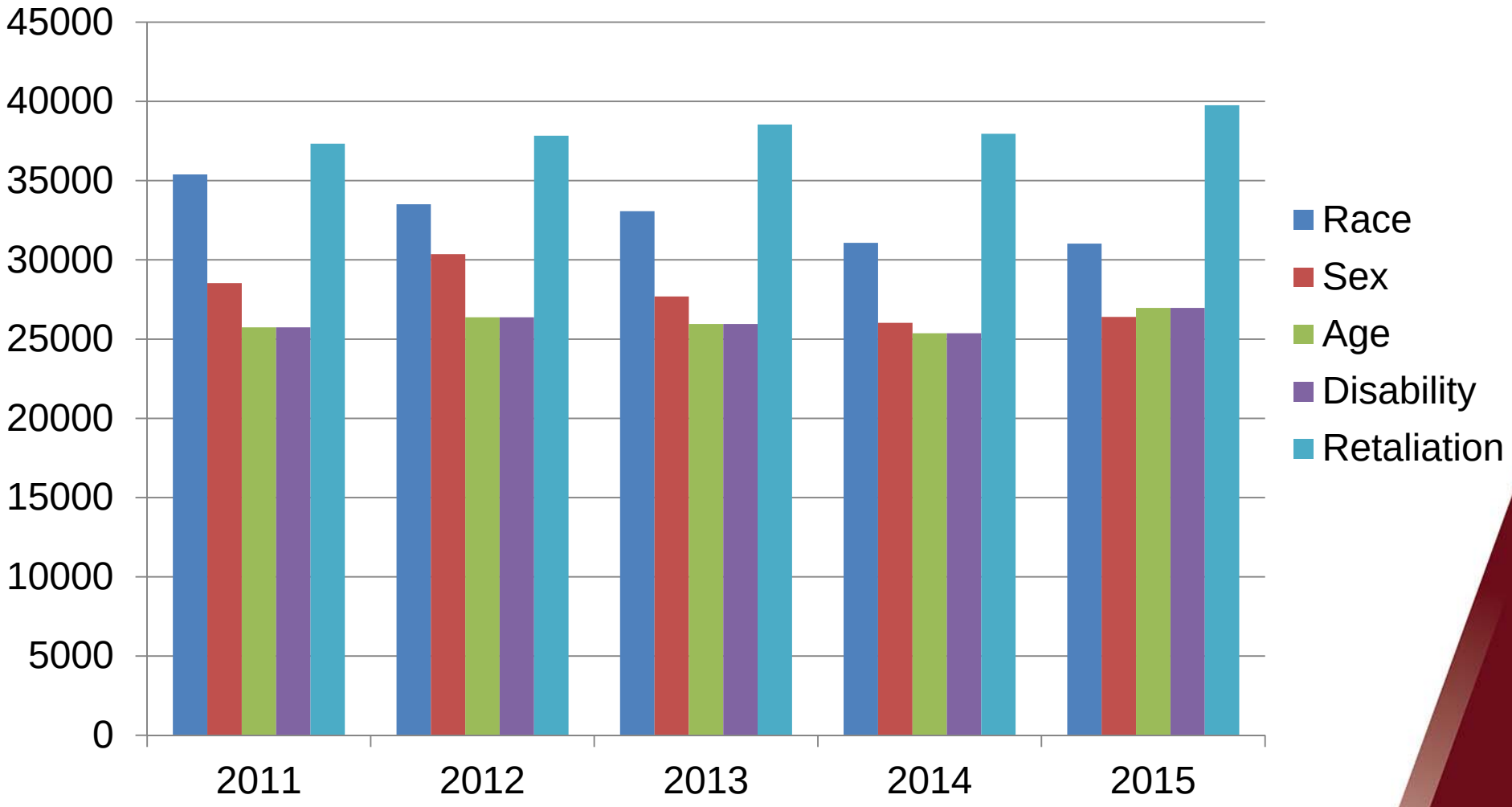
EEOC CHARGES FOR PAST FIVE YEARS BY TYPE



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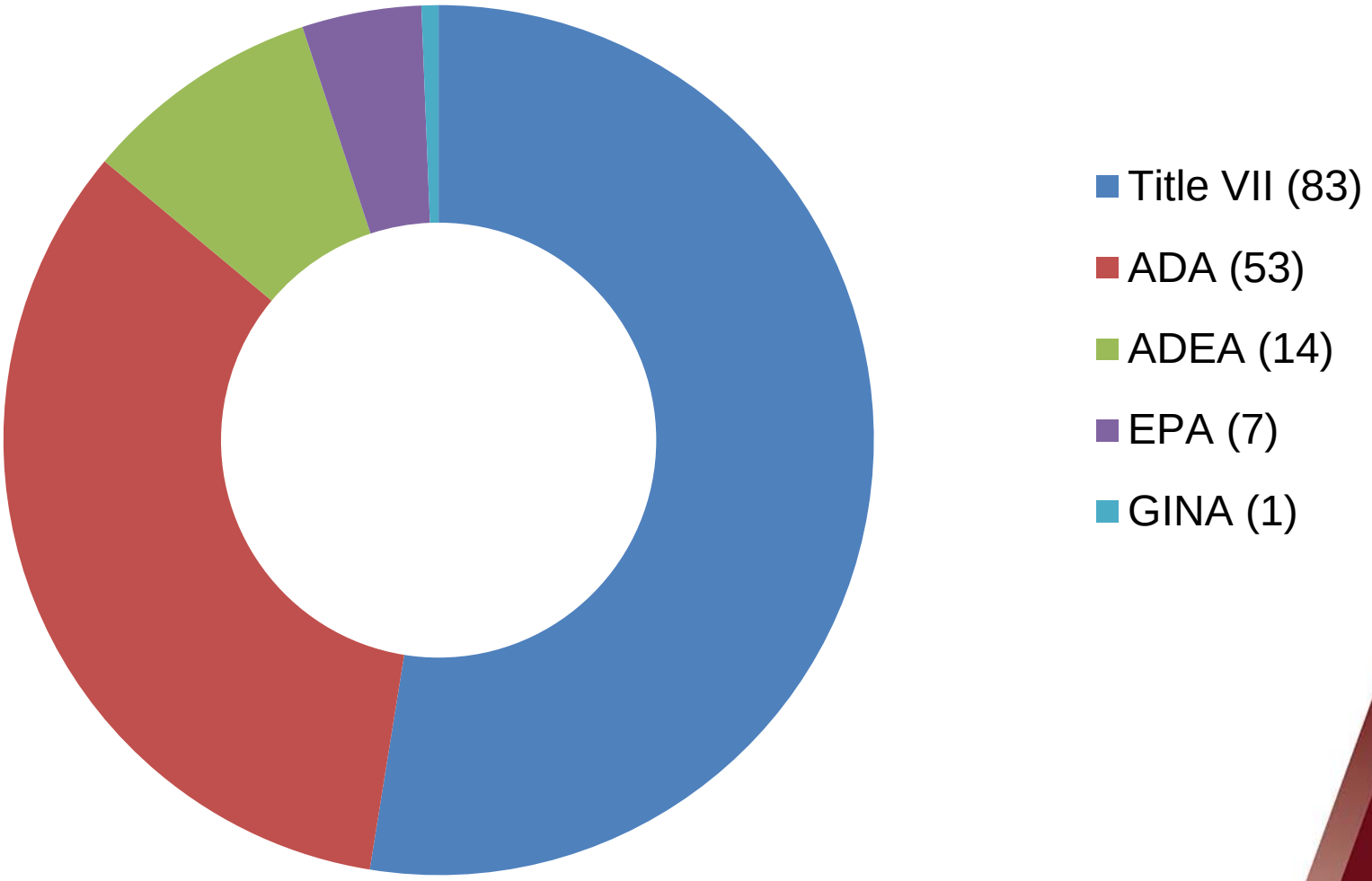
EEOC CASES FILED IN 2015 BY CASE TYPE



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COURTS NARROW DUTY TO INVESTIGATE BEFORE FILING LAWSUIT

- EEOC is required to conduct an investigation and issue a reasonable cause determination before filing a lawsuit
- ***EEOC v. Sterling Jewelers Inc.*** (2d Cir. Sept. 9, 2015)
  - Court holds "[t]he sole question for judicial review is whether the EEOC conducted an investigation"
- ***EEOC v. AutoZone*** (N.D. Ill. Nov. 2, 2015)
  - Title VII does not mandate any particular investigative technique or standard

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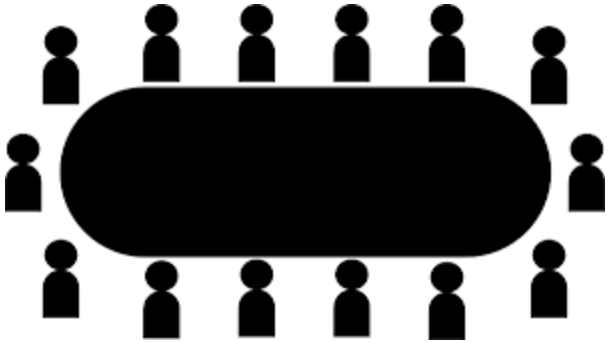
DUTY TO CONCILIATE BEFORE FILING LAWSUIT

- Commission must endeavor to eliminate alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion
- It may only file suit if it "has been unable to secure . . . a conciliation agreement acceptable to the Commission"
- What effort must the Commission make toward conciliation and is that process subject to judicial review?



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MACH MINING V. EEOC

- Female complainant filed charge with EEOC after unsuccessfully applying for a mining position
- EEOC found reasonable cause that company discriminated against a class of women who had applied for mining-related jobs
- Commission unilaterally determines that conciliation with employer has failed and files suit in district court
- Supreme Court: no deep dive into conciliation process, EEOC need only engage in some form of discussion with employer

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EEOC V. ABERCROMBIE & FITCH STORES, INC.

- Applicant interviews wearing black hijab (headscarf) and is not hired
- EEOC charges that Abercrombie violated Title VII when it failed to offer a reasonable accommodation
- Supreme Court sides with EEOC
  - "Thus . . . [a]n employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

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NOBACH V. WOODLAND VILLAGE NURSING HOME

- Nursing home activities aide refused to pray the rosary with a patient because it was against the employees' religious beliefs
- Employee is terminated five days later and she brings claims of religious discrimination
- The religious practice need only be a "motivating factor" of the employer's decision to be actionable
- Fifth Circuit rejects discrimination claim because there was no evidence that employer knew her refusal was for religious reasons

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EEOC SEEKS TO EXPAND LGBT RIGHTS

- Title VII does not include sexual orientation as a protected class
- EEOC committed to enforcing protections for LGBT individuals under laws “as they may apply”
- Sex v. Sexual Orientation v. Gender Identity
- Sex stereotyping cases based on failure to comply with particular gender norms

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EXTENDING TITLE VII TO TRANSGENDER EMPLOYEES

EEOC v. Deluxe Financial Services

- Employee with gender dysphoria transitions from male to female; employer demands verification to change sex designation on records or permit use of female restroom

EEOC v. Brousard

- Employee terminated after he refuses employer's instruction to dress as a woman

EEOC v. Lusardi

- Referring to employee with former male name, calling her "sir" and forcing her to use segregated restroom

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TRANSGENDER ISSUES IN THE WORKPLACE

- Transition planning and implementation
- Single sex restrooms and locker rooms
- Dress codes
- Personnel records and systems
- Customer and co-worker relationships

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BALDWIN V. FOXX (JULY 15, 2015)

- Sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.
- An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex.
- EEOC files two new cases in March of 2016 to expand theory

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EEOC STUMBLES IN BACKGROUND CHECK CASES

- ***EEOC v. Freeman*** (4th Cir. 2015)
  - Report had a “plethora” of “analytical fallacies,” reflected “cherry-picked” data, produced “a meaningless, skewed statistic,” and included a "mind-boggling number of errors."

- EEOC cautions employers to treat candidates and employees consistently
- Is the consideration of the conviction:
  - Job related for the position
  - Consistent with business necessity

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BAN THE BOX MOVES INTO TEXAS

- Austin "bans the box" on March 24, 2016
- Austin employers cannot:
  - Solicit information about criminal history on **job application**
  - Consider criminal history before offer of employment "conditioned **solely** on the employer's evaluation of the individual's criminal history."
- No private party cause of action but $500 penalty for violations

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EEOC FOCUS ON ADA CONCERNS

- For the 2015 Fiscal Year, a significant number of EEOC lawsuits involved ADA Claims (*i.e.*, 53 out of 142 lawsuits or 37% of all lawsuits filed by EEOC involved claims under the ADA).

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EEOC v Beverage Distributors, LLC, Case No. 11-cv-02557 (D. Colo.)

- Plaintiff Michael Sungaila is legally blind.
- When Plaintiff's position was eliminated, he obtained a higher-paying job in the Company's warehouse, but it was contingent on passing a physical examination.
- Doctor determined that Plaintiff would require workplace accommodations to mitigate the risks from his impaired vision.
- The Company concluded it could not reasonably accommodate Plaintiff's condition and rescinded the job offer in the warehouse.

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EEOC v Beverage Distributors, LLC, Case No. 11-cv-02557 (D. Colo.)

- Plaintiff filed a charge with EEOC, who filed suit on Plaintiff's behalf.
- After a 4-day jury trial, jury returned a verdict for Plaintiff.
- EEOC filed 2 post-trial motions:
  - The Company did not prove as a matter of law that Plaintiff failed to mitigate his damages
  - EEOC sought a tax-penalty offset to compensate Plaintiff for the additional tax liability resulting from the lump sum award of back pay
- The court granted both motions.

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EEOC v Beverage Distributors, LLC, Case No. 11-cv-02557 (D. Colo.)

- The Company appealed:
  - The direct-threat instruction constitutes reversible error; and
  - The district court abused its discretion in awarding the tax offset ($18,805).

- Tenth Circuit held:
  - Direct-threat jury instruction constituted reversible error; and
  - If the EEOC prevails upon retrial, Plaintiff may be entitled to a tax offset.

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EEOC v Beverage Distributors, LLC, Case No. 11-cv-02557 (D. Colo.)

- December 2015, the EEOC announced that the parties settled.

- The Company agreed to:
  - Pay $160,000 to Plaintiff
    - *Original award was $186,295*
  - Conduct ADA training
  - Revise and distribute its ADA policy and procedures
  - Report to EEOC if there are any complaints of disability discrimination

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2016 – LAWSUITS AND SETTLEMENTS

To date, in 2016, the EEOC has filed 4 new lawsuits and settled 10 lawsuits involving ADA claims.

- Yesterday's Pub & Grille (2/11/2016)
  - ***Supervisor Refused to Hire HIV-Positive Employee for Server Position***
- Two Hawk Employment Services (2/22/2016)
  - ***Temporary Agency Refused to Hire an Applicant Because of Conditions Disclosed by Illegal Medical Inquiries***
- Grisham Farm Products (3/22/2016)
  - ***Mandatory 'Health History' Form Violated Federal Law***
- C&A Tool Engineering (4/1/2016)
  - ***Tool Company Violated Federal Law by Refusing to Hire Applicant With Vision Impairment***

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PREGNANCY DISCRIMINATION

- In 2015, the agency filed 142 lawsuits, this included at least 13 lawsuits by the EEOC involving pregnancy discrimination (frequently coupled with ADA claims).

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YOUNG V. UPS

- Young requested light duty after becoming pregnant and was denied.
- UPS claims its decision was pregnancy-neutral and PDA did not require more.
- Supreme Court: Does policy put a "significant burden" on female workers, and are the employer's legitimate nondiscriminatory reasons "not sufficiently strong" to justify that burden?

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EEOC ISSUES NEW GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES

- On June 25, 2015, based on *Young*, the EEOC reissued its pregnancy discrimination guidance.
- Women may be able to prove unlawful pregnancy discrimination if the employer accommodated some workers but refused to accommodate pregnant women.
- Employer policies that are not intended to discriminate on the basis of pregnancy may still violate the Pregnancy Discrimination Act (PDA) if the policy imposes significant burdens on pregnant employees without a sufficiently strong justification.
- Employers need to be sensitive to potential reasonable accommodation obligations under the ADA based on the expanded definition of protected disabilities in the ADA based on the ADAAA.

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PREGNANCY DISCRIMINATION

- *EEOC v Tomeidon, Inc.,dba Pharmacy Solutions,* Case No. 14-cv-3330 (N.D. TX): Two employees allegedly fired due to pregnancy. Allegations include negative remarks about one employee's pregnancy and termination after an employee requested to switch her days off to see her doctor. Both employees were terminated in the same month. Lawsuit settled for $85,000.
- *EEOC v Allup's Convenience Stor*e, 15-cv-00863 (D. N.M.): PDA and ADA claims on behalf of charging party and "similarly aggrieved pregnant women with disabilities" based on alleged forced leaves and not making reasonable accommodations.
- *EEOC v E-MDS, Inc*., Case No. 15-cv-00860 (W.D. TX): Alleged failure to accommodate a disabled pregnant employee followed by alleged unlawful termination due to pregnancy and disability. Employee had heart arrhythmia and an adrenal gland condition that limited her circulatory condition. Action brought under PDA and ADA. (*See* EEOC Press Release dated 9/25/15).
- *EEOC v Your Health Team, L.L.C*., Case No. 15-cv-02859 (N.D. TX): Complaint alleges that female home health aide terminated due to pregnancy. Employee terminated after provided release from physician that could perform all responsibilities, except that she was restricted from lifting over 25 lbs. The employee allegedly was terminated within minutes of providing the note. (*See* EEOC Press Release dated 9/15/15).

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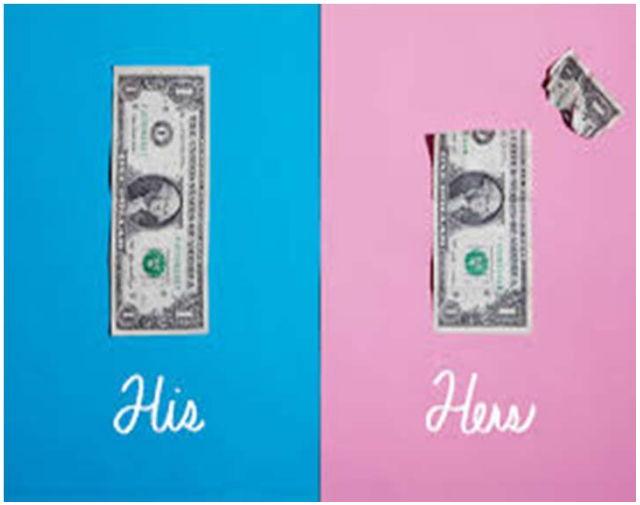
EQUAL PAY ACT RETURNS TO THE FOREFRONT

- Lily Ledbetter Fair Pay Act to expand statute of limitations for claims.
- National Equal Pay Task Force issues report on persisting pay gap in United States.
- Executive Order in 2014 bans federal contractors from retaliating against workers who discuss their salary.
- What does "any factor other than sex" mean in practice?



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NEW RULES REQUIRING EEO-1 PAY REPORTING

- Companies with more than 100 employees will submit pay data on EEO-1 forms.
- Aggregate W-2 data for 12 pay bands for the EEO-1 job categories.
- Begins with the September 2017 report.
- Commission hopes employers will use it to make adjustments to their pay practices if needed.

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EEOC – STEPS TO ENSURE EQUAL PAY FOR EQUAL WORK

Here are some important steps that employers can take to ensure equal pay for equal work:

- Evaluate compensation systems annually and take action to correct problems;
- Designate individuals to monitor pay practices;
- Provide training to supervisors;
- Ensure that job related criteria are used to determine base pay, raises, overtime, and bonuses and in making decisions about performance evaluations, job assignments, and promotions; and
- Set starting salaries that eliminate discriminatory pay gaps on the basis of prior salary or salary negotiations.

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USWNT EQUAL PAY CLAIM

- EEOC charge filed on March 20, 2016 by five members of the US Women's National Team.
- Women take home between 40-70% of their male counterparts.
  - Men earn $5,000 for a loss, $6,250 for tie and $9,375 for win.
  - Women earn $0 for loss or tie and only $1,350 for win.
- Women's soccer more profitable than men's game.

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EEOC PROCEDURES FOR RELEASING POSITION STATEMENTS

- Effective Date – January 1, 2016
- EEOC has implemented nationwide procedures that provide for the release of Respondent position statements and non-confidential attachments to a Charging Party or her representative upon request during the investigation of her charge of discrimination.
- If the Respondent relies on confidential information in its position statement, it should provide such information in separately labeled attachments.
- Respondent should provide an explanation justifying the confidential nature of the information contained in the attachments.
- EEOC staff may redact confidential information as necessary prior to releasing the information to a Charging Party or her representative.

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THE DOL'S NEW INTERPRETATION OF THE INDEPENDENT CONTRACTOR TEST

- On July 15, 2015, the DOL issued an Administrator's Interpretation on the application of the FLSA "suffer or permit" standard in identifying employees who are misclassified as independent contractors.

- Reemphasizes the DOL's belief that *most workers* are employees under the FLSA.

- Multi-factor "economic realities" test focuses on whether the worker is economically dependent on the employer or truly in business for him or herself.

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THE DOL'S NEW INTERPRETATION OF THE INDEPENDENT CONTRACTOR TEST

The economic realities test typically includes an analysis of the following factors:

- (1) the extent to which the work performed is an integral part of the employer's business;
- (2) the worker's opportunity for profit or loss depending on his or her managerial skills;
- (3) the relative investments of the employer and the worker;
- (4) whether the work performed requires special skills and initiative;
- (5) the permanency of the relationship; and
- (6) the nature and degree of control by the employer.

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I-N-D-E-P-E-N-D-E-N-T – DO YOU KNOW WHAT THAT MEANS?

According to the DOL . . .

- IC's work is unlikely to be integral to the employer's business.
- IC should exercise managerial skills (*e.g.*, make decisions on staffing, advertising, and purchasing; negotiate contracts; decide which jobs to perform; etc.) in a way that affects the worker's opportunity for both profits and loss beyond the current job.
- A worker's investment must be significant in nature and magnitude relative to the employer's investment in its overall business to indicate that the worker is an independent contractor.
- The fact that a worker has specialized skills does not mean that the worker is in business for him or herself, as providing skilled labor is not the same as operating as an independent business.
- IC "typically works one project for an employer and does not necessarily work continuously or repeatedly for an employer."
- IC must actually control meaningful aspects of the work performed to the point that the worker can be viewed as conducting his or her own business.
  - The control factor should not be overemphasized by employers.

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