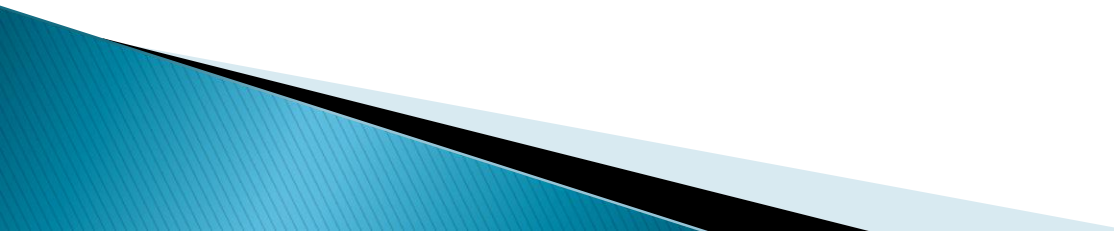


EEOC Process and the Rights of Federal Employees

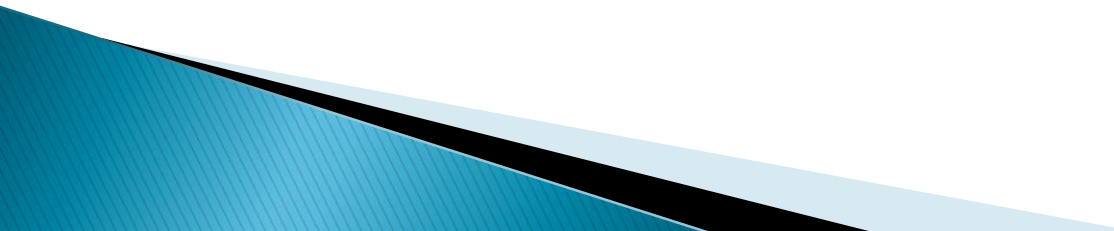
Wendy Musell
Stewart & Musell, LLP

Who Is A Covered Federal Employee?

- ▶ In 2011, the federal government is the Nation's largest employer with about 2.0 million civilian employees.
 - ▶ 600,000 employees approximately in the US Postal Service
 - ▶ Laws govern applicants and employees for federal employment.
- 

Laws that Protect Federal Employees

Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e, et. seq.) prohibiting discrimination on the basis of race, color, religion, sex, national origin and retaliation (reprisal) for protected EEO activity.



Sexual Orientation

- ▶ The Obama–Biden Administration does not discriminate on the basis of race, color, religion, sex, age, national origin, veteran status, sexual orientation, gender identity, disability, or any other basis of discrimination prohibited by law.
- [White House Jobs Site](https://www.whitehouse.gov/jobs) [whitehouse.gov]

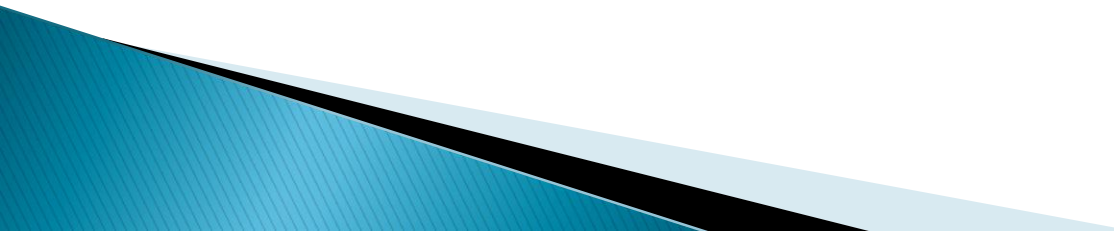
Gender Identity and Sexual Orientation

- ▶ **Gender Identity Discrimination** held to be discrimination because of sex and therefore is covered under Title VII of the Civil Rights Act of 1964. *See Macy v. Department of Justice*
- ▶ **Sex Stereotyping**
Claims by Lesbian, Gay and Bisexual applicants and employees governed by Title VII. *See Veretto v. U.S. Postal Service*, EEOC Appeal No. 0120110873 (July 1, 2011); *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649 (Dec. 20, 2011).

Age Discrimination and Harassment

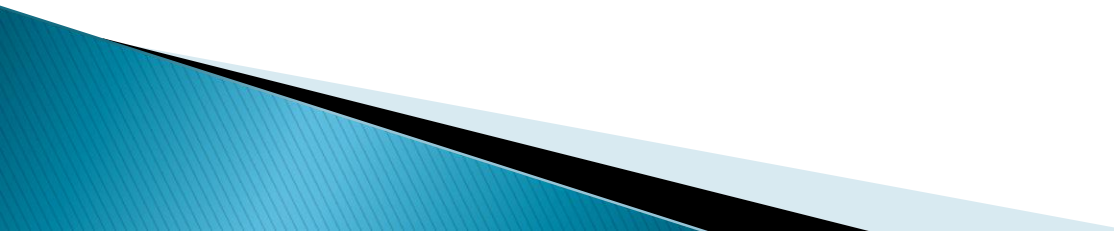
- ▶ Age Discrimination in Employment Act (ADEA), as amended (29 U.S.C. § 633a) protects workers age 40 and older from discrimination in hiring, discharge, pay, promotions, fringe benefits and other aspects of employment.
- ▶ Age discrimination involves treating someone less favorably because of his age.
- ▶ The Age Discrimination in Employment Act (ADEA) only forbids age discrimination against people who are age 40 or older.
- ▶ An employment policy or practice that applies to everyone, regardless of age, can be illegal if it has a negative impact on applicants or employees age 40 or older and is not based on a reasonable factor other than age (RFOA).

Age Based Harassment

- ▶ It is unlawful to harass a person because of his or her age.
 - ▶ Harassment can include, for example, offensive remarks about a person's age when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision.
- 

Equal Pay Act (EPA)

29 U.S.C. § 206(d),
prohibiting gender-based
discrimination in the
payment of wages to men
and women performing
substantially equal work in
the same establishment



The Equal Pay Act requires that men and women in the same workplace be given equal pay for equal work.

The jobs must to **substantially equal**, but not identical.

Job Titles are not dispositive, the content of the jobs determines if they are substantially equal.

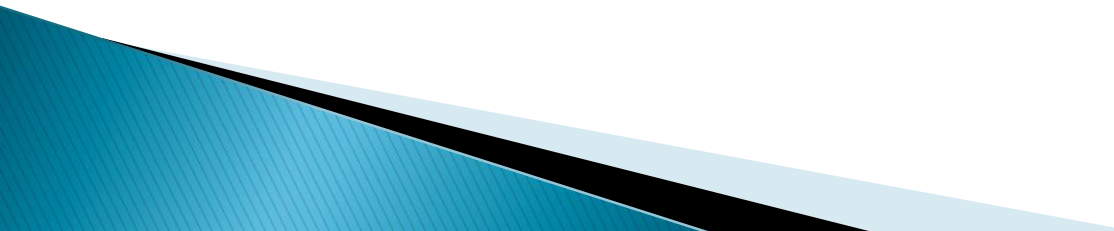
All forms of pay are considered, i.e. salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, reimbursement for travel expenses, and benefits.

Can't lower the pay of preferred sex to achieve "equality."

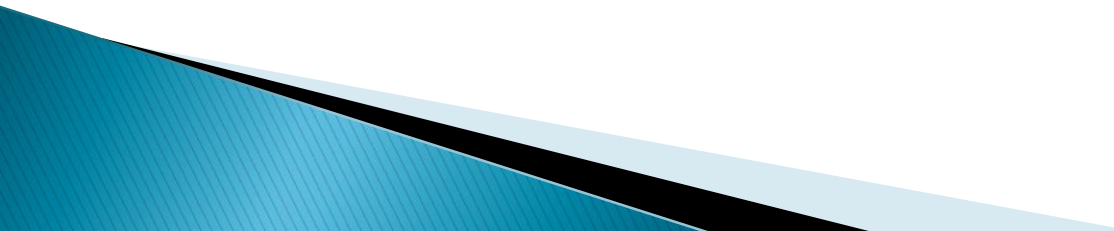


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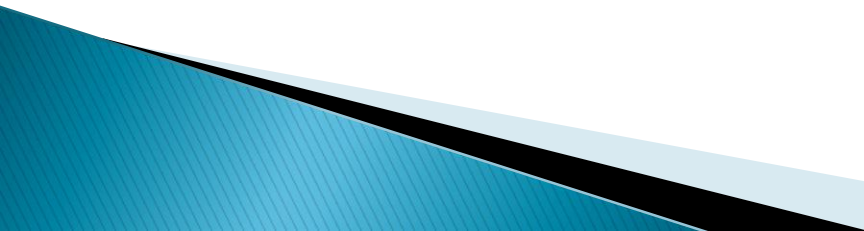
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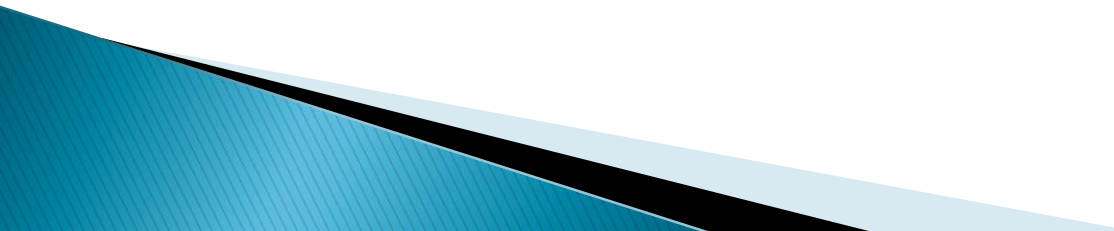
Disability Discrimination and Harassment

- ▶ Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 et seq., prohibiting discrimination against individuals with disabilities.
 - ▶ Federal employees are governed by the Rehabilitation Act, not the Americans with Disabilities Act (ADA). However, courts look to the ADA for guidance.
- 

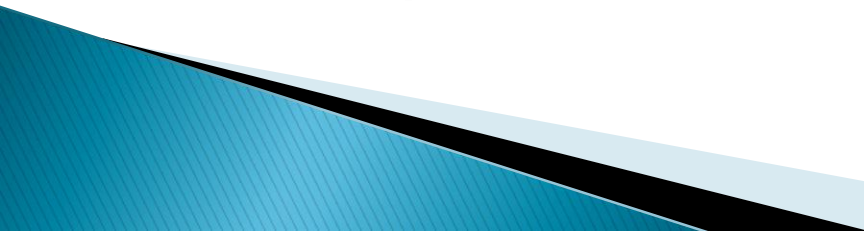
Genetic Information Discrimination

- ▶ Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits genetic information discrimination in employment, effective date November 21, 2009.
 - ▶ Discrimination on the basis of genetic information in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, benefits, or any other term or condition of employment.
- 

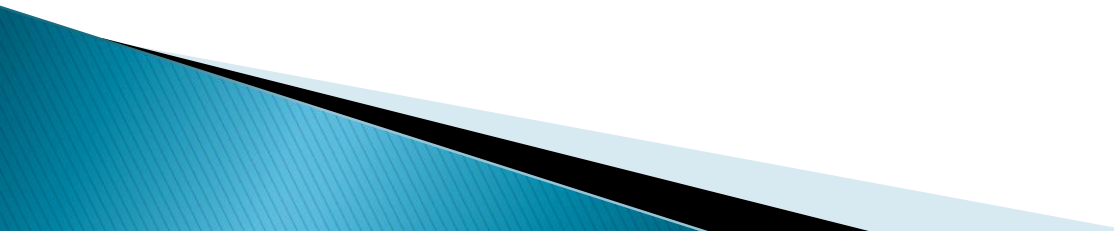
GINA

- ▶ Harassment Prohibited related to the genetic information of an employee or applicant, or that of family members. Severe or pervasive standard.
 - ▶ No Retaliation Provision: Can't retaliate against an employee for opposing practice unlawful under GINA
 - ▶ Unlawful to collect or disseminate genetic information, with certain exceptions.
 - ▶ Genetic information must be kept in a separate file.
- 

Pregnancy Discrimination

- ▶ The Pregnancy Discrimination Act (PDA) is an amendment to Title VII of the Civil Rights Act of 1964.
 - ▶ Discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII.
 - ▶ Women affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees who are similar in their ability or inability to work.
 - ▶ Overlap with FMLA, Rehabilitation Act.
- 

Reprisal

- ▶ Rehabilitation Act, Title VII, GINA, EPA, ADEA all prohibit retaliation.
 - ▶ Illegal to fire, demote, harass, or otherwise “retaliate” against applicants or employees because they filed a charge of discrimination, because they complained to their employer or other covered entity about discrimination on the job, or because they participated in an employment discrimination proceeding (such as an investigation or lawsuit).
 - ▶ Even if EEOC ruled Complainant did not meet burden for underlying complaint.
- 

What is the EEOC?

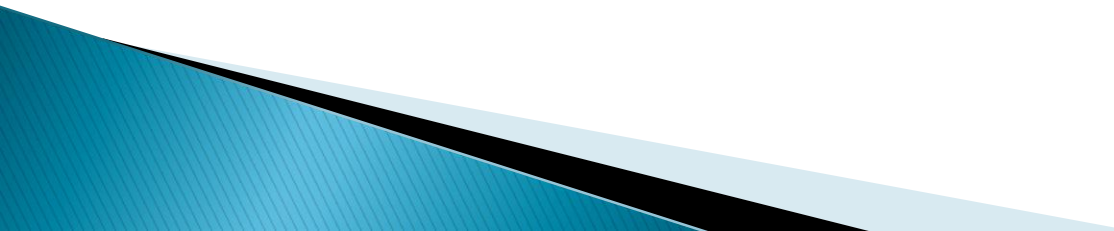
- ▶ The U. S. Equal Employment Opportunity Commission (EEOC) is an agency in the Executive Branch of the United States Government. EEOC was established and became operational on July 2, 1965. EEOC's primary missions in relation to federal employees are promotion of equality of opportunity in the federal workplace and enforcement of federal laws prohibiting employment discrimination against federal employees.

Where do I Start?

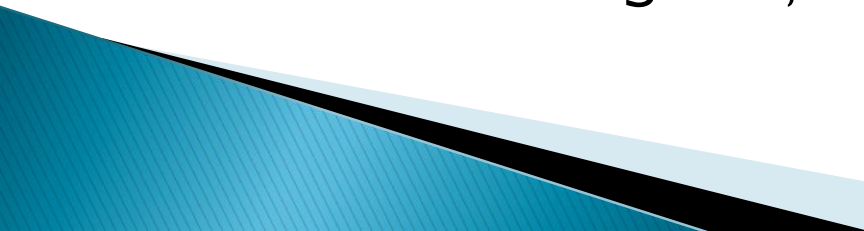
▶ 45 days to
contact EEO
Office from
Unlawful Action



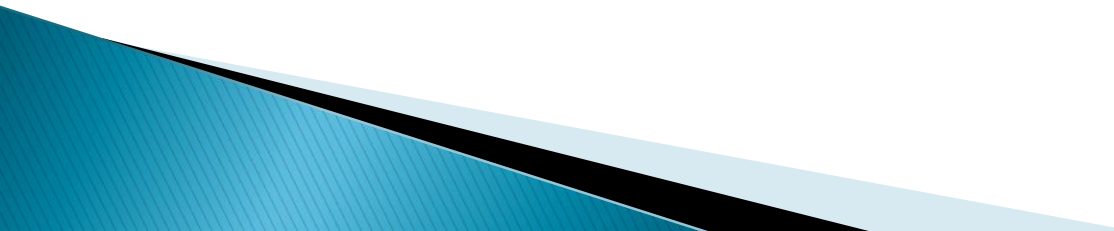
“Informal” EEO Complaint

- ▶ BEST PRACTICE TO INITIATE IN WRITING!
 - ▶ Keep a copy for your records
 - ▶ ALL BASES FOR THE COMPLAINT MUST BE INCLUDED
 - ▶ FACTS MUST ALSO BE INCLUDED, AT LEAST GENERALLY
 - ▶ Amend and relate back complaints
 - ▶ Sample forms provided
- 

Informal Complaint Process

- ▶ The counseling period should not exceed more than **30 days** from your "initial contact," unless you have requested mediation (**90 day extension**) or an extension (60 days extension).
 - ▶ Within **30 days** of your "initial contact" the final interview by the counselor must be conducted; and the counselor must issue you a Notice of Right to File a Formal Complaint. See 29 C.F.R. §167;1614.105(d).
 - ▶ Within **15 days** of your filing a formal complaint, the counselor must issue you a Counselor's Report. See 29 C.F.R. §167;1614.105(c).
- 

The EEO Agency Rep Is Not Your Friend

- ▶ 29 C.F.R. §1614.105(g) states: "The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint."
 - ▶ Conversations may not be considered as an initial contact
 - ▶ Put issues in writing, issues and facts supporting the complaint
 - ▶ Bring an attorney
- 

The Agency EEO Rep Is Not Your Friend

- ▶ Get Any Agreement in Writing
 - ▶ Extensions to the Agency Do Not Extend Complainant's Time Frames
 - ▶ EEO interviews can be used against you and will likely be recorded.
- 

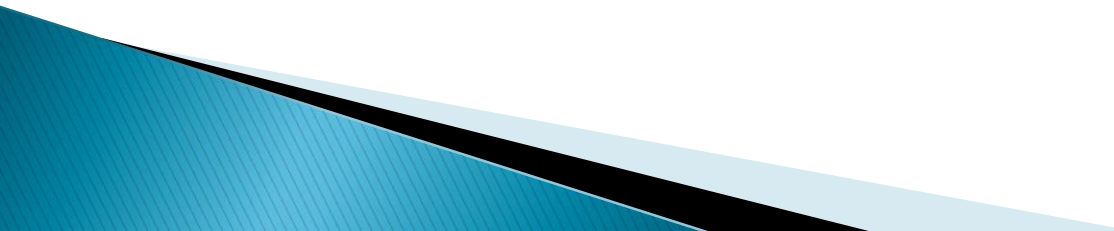
Mediation at Informal Stage

Usually Management Representative
Performs Mediation

Get agreements in writing
Extends Process for 90 Days.

FORMAL COMPLAINT PROCESS

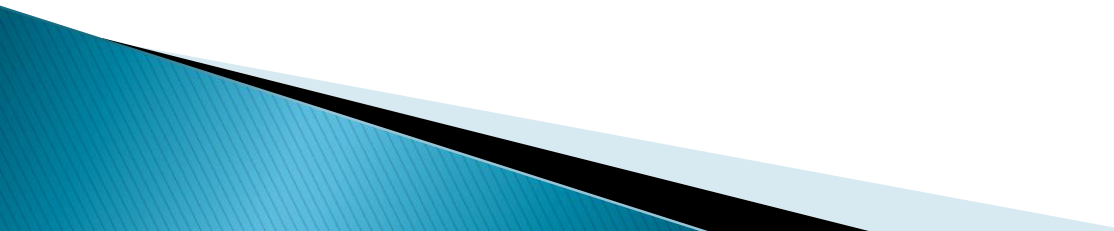
Formal Complaint Process

- ▶ Occurs After Final Interview with Agency EEO Representative at “Informal” Complaint Stage
 - ▶ Unless Time Frame Has Elapsed
 - ▶ Within **15 days** of your filing a formal complaint, the EEO Counselor must submit a Counselor Report to the Agency's EEO office and to you, summarizing your allegations and Agency's responses and the actions taken, if any.
 - ▶ See 29 C.F.R. §1614.105(c)
- 

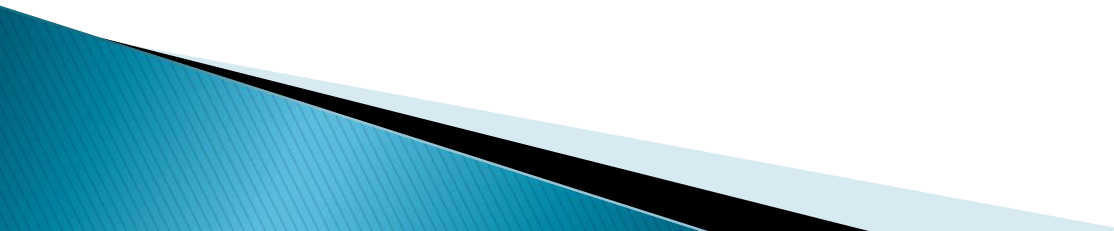
Formal Complaint Deadline For Filing

**ONLY 15 CALENDAR
DAYS**

Dismissal Issues

- ▶ If the agency does dismiss your complaint in full or part, you will receive information about how to appeal the dismissal.
 - ▶ Full Dismissals without an investigation, you have **30 days** from the day you receive the agency's dismissal to appeal.
 - ▶ For partial acceptance and partial dismissals, you must wait until the agency issues its final order on all the claims in your complaint before appealing the partial dismissal.
- 

Time Frame for the Investigation

- ▶ The agency has **180 days** from the **day you filed** your complaint to finish its investigation.
 - ▶ The investigation may be extended by another **180 days** if new events are added to your complaint or if you file new complaints that must be added to your original complaint for investigation.
 - ▶ You also have the right to agree to an extension of up to **90 days**.
- 

No Determination will be
provided



What to Expect In the Formal Process

- ▶ You will be interviewed
- ▶ You will be asked to provide documents
- ▶ You will be asked to provide a written statement
- ▶ You will have to identify witnesses
- ▶ You may be asked to answer written questions under oath
- ▶ You will be provided with an opportunity to rebut other witness statements
- ▶ You will be asked what remedies you want

When 180 Days is Up

- ▶ When the investigation is finished, the agency will give you two choices: either request a hearing before an EEOC Administrative Judge or ask the agency to issue a decision as to whether discrimination occurred.
- ▶ If more than 180 days pass and the agency has not yet finished its investigation, you can wait for the agency to complete its investigation, ask for a hearing with the EEOC, or file a lawsuit in federal district court.
- ▶ Once you ask for a hearing with the EEOC, the complaint will be handled by an EEOC Administrative Judge.

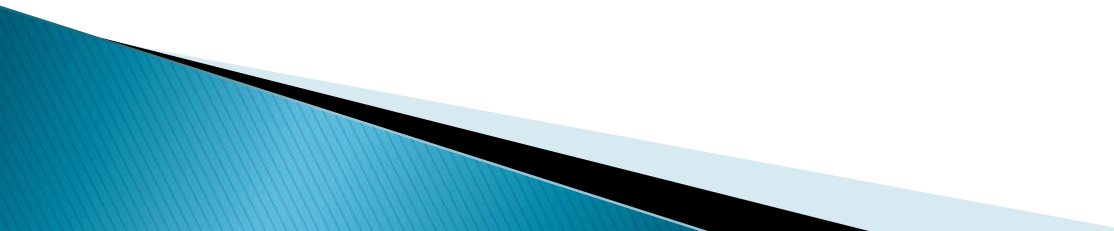
Final Agency Decision (FAD)

- ▶ Agency Decides if It Violated the Law
- ▶ Appeal to the Office of Federal Operations (OFO) or File a Lawsuit in Federal Court.
- ▶ If Appeal to OFO, subject to *de novo* review.

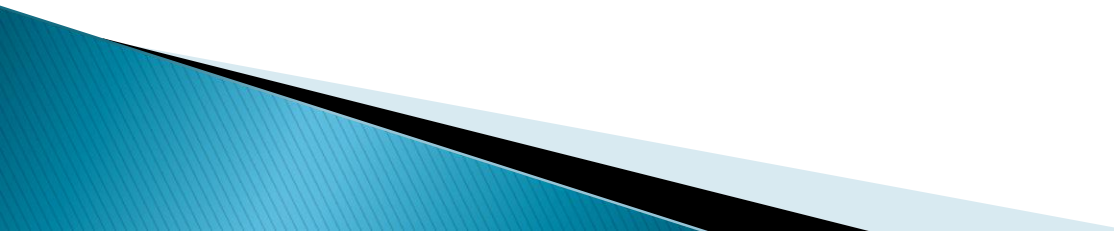
See EEOC Management Directive 110, Chapter 9, Section VI.A (November 9, 1999).



Deadline to File with the EEOC

- ▶ **30 days** from the day you receive notice from the agency about your hearing rights
 - ▶ File Certified Mail or Get a Stamped Copy of the Notice of Filing with EEOC
- 

Where to File EEOC Complaint

- ▶ EEOC field office that has jurisdiction over your complaint. This information should be provided in the notice by the agency.
 - ▶ You must provide the agency's EEO Office with a copy of your hearing request.
 - ▶ EEOC Hearing Request Form Should Be provided to you. An example is included in materials.
- 

Agency Failure to Provide
ROI basis for a motion to
enforce, sanctions or
default



Agency Is Responsible for
Providing EEOC with the
Report of Investigation

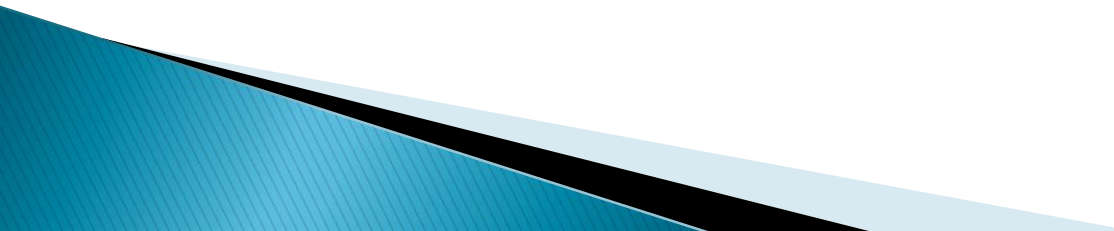
Flow Chart of Deadlines In Materials



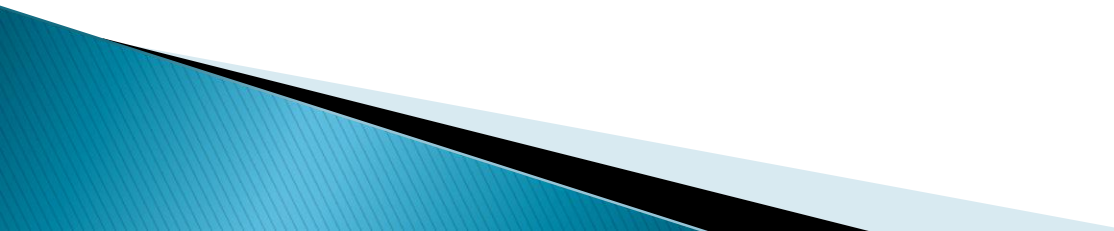
Acknowledgement and Order from EEOC ALJ

- Sets Deadlines
- Applicable statutes
- Discovery closure


Discovery before the EEOC

- ▶ Must be completed in 90 days, absent an extension by the ALJ
 - ▶ Interrogatories limited to 30 questions
 - ▶ Request for Production of Documents limited to 30 Requests
 - ▶ Requests for admissions limited to 30 requests, not including document authentication
 - ▶ Depositions are allowed
- 

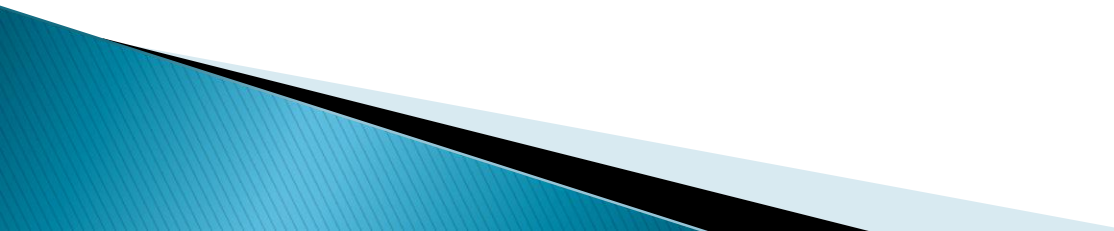
Discovery before the EEOC

- ▶ Discovery must be initiated in 20 days of receiving the Acknowledgement and Order, absent agreement by the EEOC ALJ
 - ▶ Responses to discovery are within 30 calendar days of receipt of the requests
 - ▶ Objections must be specific
 - ▶ Objections to depositions notice must be made in writing to the moving party
- 

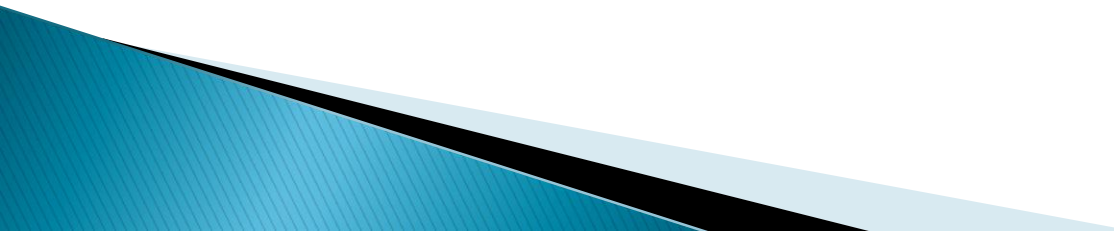
Discovery Motions Before the EEOC

- ▶ Discovery Motions must be filed within **10 days** of receipt of a deficient response or the date the discovery is received, whichever is first
 - ▶ Motions to compel must be accompanied by a declaration stating meet and confer was performed in good faith
 - ▶ Oppositions to motions to compel must be provided within **10 calendar days** of receipt of a motion
 - ▶ Reply Briefs are not required
 - ▶ Provide a Proposed Order
- 

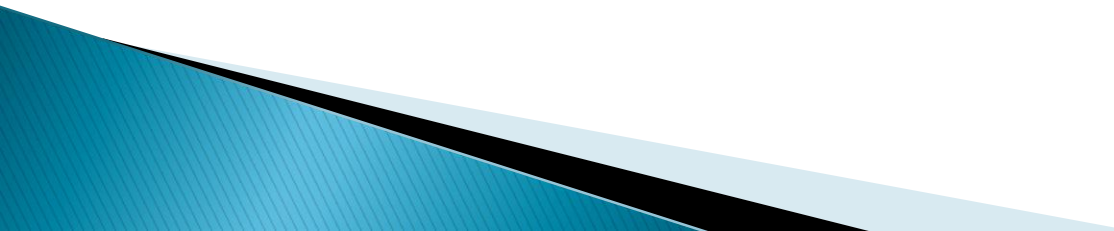
Applicable Law

- ▶ 29 C.F.R. § 1614.109
 - ▶ Chapter 7 of EEOC Management Directive 110, November 9, 1999 (EEO MD-110)
 - ▶ www.eeoc.gov
 - ▶ Read MD-110 when you take a federal employee case
- 


Sanctions Motions Before the EEOC

- ▶ Sanctions are available under 29 C.D.R. Sec. 1614.109 (f)(3)
 - ▶ Evidentiary Sanctions
 - ▶ Monetary Sanctions
 - ▶ Terminating Sanctions
- 

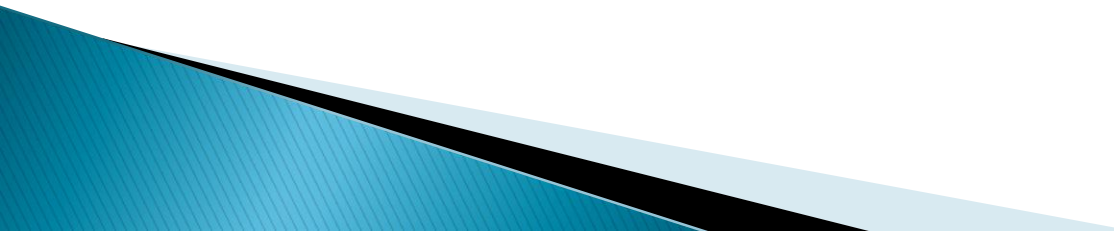
Partial Dismissal Motions

- ▶ 30 Days from Acknowledgement and Order to address any claims the Agency dismissed. *See* 29 C.F.R. Sec. 1614.107(a)
 - ▶ Failure to address dismissed claims at that time is waiver.
 - ▶ Also address amendment and consolidation motions at the earliest practicable time frame.
- 

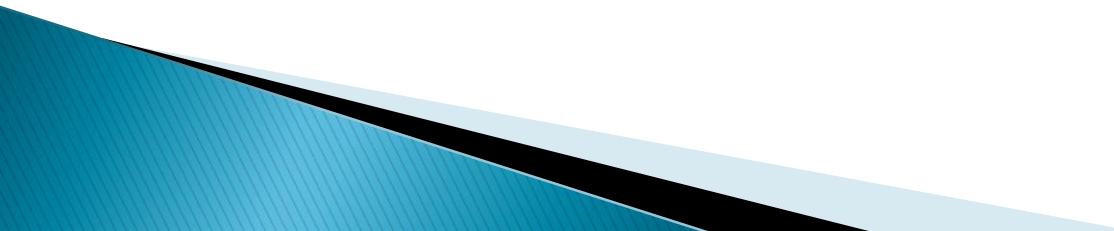
Motions for Summary Judgment

- ▶ Any party can move for Summary Adjudication or Summary Judgment pursuant to 29 C.F.R. Sec. 1614.109(g)(1)
 - ▶ Some or all material facts are not in genuine dispute and there is no genuine dispute as to credibility.
 - ▶ Must contain a statement of undisputed material facts.
- 

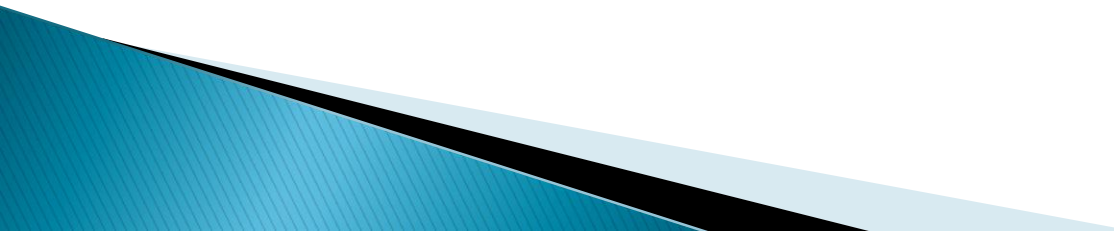
Deadlines for Motions for Summary Judgment

- ▶ Summary Judgment motions must be filed no later than **15 days** after the close of discovery
 - ▶ Opposing party must file an opposition within **15 days** from receipt of the motion
 - ▶ Reply must be serve **5 days** thereafter
 - ▶ Papers must contain citations to the factual record
 - ▶ ALJ may initiate summary judgment and dismiss the complaint.
- 

Pre-Hearing Conference

- ▶ Identification and simplification of all issues
 - ▶ Possibility of stipulations of fact;
 - ▶ Status of discovery;
 - ▶ Disposition of pending motions and resolution of objections;
 - ▶ Settlement of the case;
 - ▶ Resolution of the complaint using mediation or another ADR method or procedure.
 - ▶ Scheduling the case for a hearing on the merits (have calendars available); and
 - ▶ Any other matter likely to facilitate orderly and timely disposition of the case.
- 

Hearing Exhibits

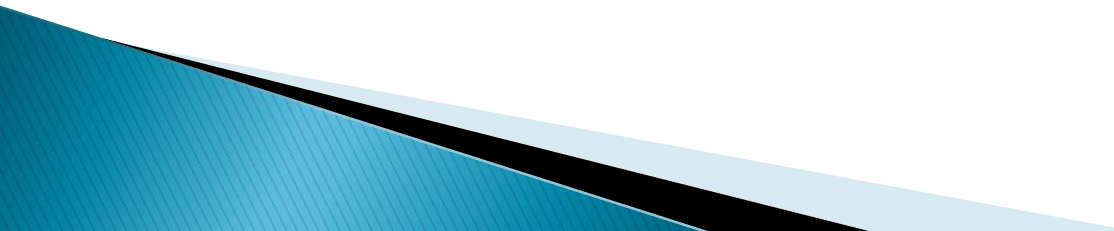
- ▶ Required to Identify witnesses likely to testify and on what topics
 - ▶ Failure to timely identify witnesses can result in ALJ excluding the witness
 - ▶ Exchange Evidence expected to be used at Hearing
 - ▶ ALJ rule on which witnesses will be allowed and which exhibits will be admitted into the record
- 

Practice Pointer


- ▶ Pre-mark exhibits
- ▶ Have a chart of witnesses, whether admitted and for what scope
- ▶ Have a chart of Evidence admitted and for what scope



EEOC Hearings

- ▶ ALJ will set the outer time limit of the hearing
 - ▶ Court reporter will be provided
 - ▶ 8 hours a day until completed, with limited breaks
 - ▶ Allowed direct and cross examination of witnesses
 - ▶ Liability and Damages are adjudicated in one hearing unless bifurcated by the ALJ
- 

Anatomy of a EEOC Hearing

- ▶ Marking of Evidence and Admission of Evidence if not already ruled upon
 - ▶ Opening Statements
 - ▶ Complainant's Witnesses and Presentation of Evidence
 - ▶ Agency Witnesses and Presentation of Evidence
 - ▶ Objections allowed
 - ▶ ALJ May Ask Questions of Witnesses
 - ▶ Experts Are Allowed
 - ▶ Closing Statements
- 

Burden of Proof

- ▶ **Complainant
For Prima Facie
Case with
Preponderance
of the Evidence**
- ▶ **Agency Must
Demonstrate
Any Affirmative
Defenses**



Decision of the ALJ

- ▶ Written Decision
- ▶ Copy of the Hearing Record
- ▶ An order entering judgment for the prevailing party
- ▶ Notice to the parties containing information about issuance of the agency's final order, appeal rights.
- ▶ Decision supposed to be in 180 days
- ▶ Agency has 40 days from decision to decide whether to implement the order and appeal rights

Agency Refuses to Implement Decision in Complainant's Favor

- ▶ Agency must file an appeal in accordance to 29 CFR Sec. 1614.110(a).

Decision Not in Complainant's Favor

- ▶ File an Action to Federal District Court

OR

- ▶ Appeal to the EEOC's Office of Federal Operations (OFO)

Attorneys' Fees and Cost

- ▶ Can be awarded by EEOC
 - ▶ Motion of a Fee Petition
 - ▶ Attorneys' fees not available in ADEA cases
- 