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## Mediation Of EEOC Charges: Not Always An Option

*Law360, New York (May 19, 2010)* -- An employer faced with a charge of discrimination filed with the Equal Employment Opportunity Commission often weighs pursuing mediation in an effort to resolve the matter prior to the EEOC conducting an investigation or making a determination. In 2009, the EEOC conducted approximately 11,600 mediations. However, despite its high success rate (over 70 percent of charges mediated are resolved) predetermination mediation may not always be an option with the EEOC.

The EEOC gives charges a priority ranking when they are filed. This ranking, which is not always readily shared with a respondent/employer, is generally assigned to a charge before the EEOC receives any documentation or response from the employer and can dictate whether mediation will be an option. Charges will be classified as "A," "B," or "C," with "A" charges being given the highest priority.

An "A" classification means that the EEOC has determined that it does not need additional evidence to determine that the matter will likely result in a probable cause finding and/or the allegations fit within an enforcement plan. For example, a charge that exemplifies what the EEOC considers to be systemic discrimination will be given a high priority ranking. The EEOC may also further classify an "A" charge as "A-1," which means the charge will receive the most attention from the EEOC, including, possibly, a decision by the EEOC to initiate litigation.

A "B" classification is an indication that the EEOC needs more information before it can determine whether a charge has merit. President Obama has requested an increase to the EEOC's FY 2011 budget, which, if approved, will allow the EEOC to hire more investigators and devote more resources to handling charges, especially those given high priority.

Charges receiving an "A" or "A-1" classification may not be eligible for mediation. Whether mediation is an option will depend on the facts involved, the systemic nature of the allegations, public policy concerns and whether the charge falls within a particular area of concern for the EEOC. The EEOC's mediation guidelines specifically state that charges alleging an Equal Pay Act ("EPA") violation may not be mediated. It is not clear whether charges containing EPA claims are automatically given "A" or "A-1" designations.

Given that the classification is often not disclosed by the EEOC even upon inquiry, it may be difficult to determine what classification the EEOC has given a particular charge. An employer, or its counsel, should review a charge closely upon receipt. If the mediation box on the cover sheet accompanying the charge is not checked, it may be a sign that the charge has received an "A" or "A-1" classification. If no EPA violation is alleged, and the employer is still interested in pursuing mediation, it can inquire as to whether mediation is available but should not be surprised if the EEOC denies its request to mediate. A charge that includes significant detail may also be an indication that it is a matter to which the EEOC has assigned high priority.

Understanding this classification process and being diligent in reviewing the charge for hints as to what classification it has received is important for an employer who is evaluating how to proceed when faced with a charge. If mediation is not offered as an option, the employer should prepare for a thorough EEOC investigation by strictly scrutinizing the facts behind the alleged wrongful action and making sure that a complete investigation is done before responding to the charge. Be sure to gather and preserve all supporting documentation and thoroughly prepare any witnesses with whom the EEOC may want to speak.

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