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ST. THOMAS, U.S. VIRGIN ISLANDS

FEBRUARY 14, 1981

OUTLINE OF EEOC PROCEDURES UNDER
THE ADEA AND EQUAL PAY ACT

I. INTRODUCTION

Age and Equal Pay jurisdiction came to EEOC in July 1979 as a result of Reorganization Plan No. 1 of 1978. 43 Fed. Reg. 19807. EEOC's procedures in processing Age and Equal Pay charges are similar to Labor's, but have a slightly different emphasis.

II. ADEA - General View

EEOC feels that Age and Title VII charges are similar because; (1) primary mechanism for invoking both statutes is individual charges; (2) both statutes are settlement oriented; and (3) both have high volume of charges -- 5,000 ADEA charges filed with Labor in 1979 -- Commission in first year (1980) received 8,000 charges. Age Act has more visibility at EEOC. Note, Labor never issued procedural regulations under the ADEA but the Commission has proposed procedural regulations which are now out for notice and comment. 46 Fed. Reg. 9970 (January 30, 1981). Comments must be filed by March 31, 1981

III. ADEA - Intake

EEOC's intake is different than Labor's. Generally Labor had to wait for a charge or complaint. EEOC counsels anyone filing a Title VII charge between ages 40-70, about the Age Act. Staff asks questions focusing on whether age was the basis of an adverse employment decision; procedures under ADEA explained. Intake officer will explain to charging party the administrative procedures under ADEA; stressing: full investigation may or may not take place; EEOC controls the scope and depth of each investigation; charge may be referred and actually processed by state FEP agency.

IV. ADEA Charges

An individual has the right to file a charge with the EEOC. ADEA charges are similar to Title VII charges in that they both generally describe discriminatory acts -- not conclusory. If an individual files a charge: (1) it should be timely filed with the EEOC but note EEOC may process a charge not timely filed; (2) the charging party or the EEOC has the right to file a lawsuit in court; and (3) the respondent will receive a copy of the charge or notification of the charge. Hence, respondent learns the identity of a charging party.

V. ADEA Complaints

An individual has the option of filing a complaint rather than a charge. An individual files a complaint if they want confidentiality. If an individual files an ADEA complaint, neither a

copy of their complaint nor notification that a complaint has been filed goes to the respondent. The EEOC investigates complaints without indicating to the respondent who filed the complaint and ultimately if a violation is found and no settlement reached, EEOC can go to court. Generally, the courts have held that if an individual files a complaint rather than a charge, he or she may not have a personal right to file an ADEA suit in court.

In short, the substantive differences between a complaint and a charge are: an individual filing a charge has no right of confidentiality but does have a personal right to file suit. A complainant will have their confidentiality protected but it is doubtful whether they have the right to file an ADEA suit.

VI. Notification to Respondent

Although not required by statute, EEOC will send an actual copy of an ADEA charge within 10 days to respondent. Under Title VII, actual copies of the charge are also given to respondent within 10 days. Labor never sent copies of an ADEA charge to respondent. Under certain conditions, the Commission may elect not to send an actual copy of ADEA charge but only notification to respondent that a charge has been filed against it. During the 10 day period, an EEOC intake officer and an EEOC investigator will make a determination as to how to process a charge;

- a) Immediate settlement attempt;
- b) Continued investigation;
- c) Fact finding.

- A. Settlement cases - only small number of cases targeted for this procedure. Cases in this category are there because inefficient to utilize Commission resources. For example, charging party is represented by counsel and counsel indicates that they wish to pursue the matter in court. Another example is the requested relief is far in excess of that which can reasonably be anticipated and charging party won't compromise. Last example - amount of damages is extremely small. If the case can not be settled in most cases, it is administratively closed.

Unlike Title VII, closures under ADEA do not constitute Commission findings that the case has no merit. Thus, closure under ADEA is substantially different from Title VII.

- B. Charges and Continued Investigation - Cases involving policy and significant violations are placed in this group. These cases would undergo immediate and thorough investigation. EEOC attorneys will aid investigators in processing these charges. These cases will not be referred to state agencies.
- C. Charges Scheduled for Fact Finding - Vast majority (80%) of charges will be in this category. Much of the fact finding will be performed by state and local agencies pursuant to Work Sharing Agreements,

which are discussed in more detail later. Fact finding, regardless of whether performed by EEOC or the local state agency will follow the same steps:

- 1) at intake, charging party will give their side of story;
- 2) Commission or state agency will then send letter to respondent, seeking settlement, request for information and setting up tentative fact finding conference;
- 3) following Commission receipt of respondent's responses to information requests, EEOC discusses the responses with the charging party.

If company has raised a defense, does charging party have a rebuttal? EEOC then makes a second determination as to how to process charge:

- a) administratively close;
- b) hold fact finding conference;
- c) full scale continued investigation.

VII. Fact Finding Under the ADEA

If an ADEA charge goes into fact finding, the same procedures as utilized in Title VII fact finding will be used -- a hearing conducted by an investigator. Both parties present their positions and evaluate the strength of the opposing arguments. The purpose of fact finding is for the Commission to secure enough information to settle a charge or determine whether EEOC should continue investigation. Because the statute of limitations is running, EEOC will attempt to complete the fact finding stage within 150 days after an ADEA charge is filed.

Significant percentage of conferences are expected to yield settlements. Twenty percent of cases in fact finding may continue into continued investigation.

VIII. Difference in Labor's and EEOC's Approach in Processing a Charge

It has been indicated to the Commission that Labor had an "either settle or else approach". Labor interested in conciliating immediately but not as interested as the Commission in utilizing the facts to support the process at reaching settlement. The result at Labor was that some charges settled, but most not settled and the charging parties were left to their own resources. Labor would then pick a few systemic targets.

The Commission on the otherhand will attempt to develop facts indicating violations through intake -- fact finding -- continued investigation, and then utilize those facts to settle violations during the administrative process. At various stages, a respondent is given an opportunity to assess the information developed by EEOC and an opportunity to settle i.e. - after a charge is filed, EEOC inquires about settlement; after a fact finding conference, another settlement attempt; after a letter of violation another opportunity to settle.

IX. EEOC Determination of an ADEA Violation

EEOC will make a finding of violation of the ADEA where a case is litigation worthy. Litigation worthy means Commission or a private party would be reasonable suing on the charge--

not to be confused with whether the EEOC is actually going to file suit. If a finding of litigation worthy is made, a Letter of Violation will be sent to respondent. This letter is somewhat similar to a Letter of Determination under Title VII, but a Letter of Violation also includes a section explaining that the statute of limitations (Portal to Portal Act-2 or 3 years) is tolled during a last conciliation attempt.

EEOC suits will be preceded by a formal conciliation process, in accordance with Section 7(b) of the ADEA. EEOC will inform defendant of violation; give respondent an opportunity to respond; outline relief necessary to bring respondent into compliance.

X. Closure of Charges

EEOC can administratively close a case/charge at anytime from intake thru initial settlement talks, fact finding or continued investigation. A case administratively closed is no reflection on the merits of the charge. EEOC will notify charging party of their rights to file suit when case is administratively closed.

XI. FEP Agency -- EEOC Relationship Under the ADEA

Under Title VII, charges are deferred to State and/or local government Fair Employment Practices agencies. Deferral means that the Commission will refrain from acting on a charge until a state or local agency has had a certain period of time in which to process the charge.

Under the ADEA, charges are referred to state agencies which enforce age discrimination laws comparable to the ADEA (insofar as they provide relief for individuals protected by the statute from discriminatory practices). Although the Supreme Court made clear in Evans v. Oscar Mayer, 441 U.S. 750 (1979) that the EEOC and a state agency may simultaneously process a charge and that no referral is required, the Commission has engaged in worksharing agreements with state agencies to avoid duplication of effort on such charges. Note, too that Oscar Mayer held that merely because a charging party failed to file a timely state claim that does not affect the individual's federal rights under the ADEA. Worksharing agreements have generally stipulated that each agency will process the charges it originally receives but that copies of such charges will be sent by EEOC to the state agency in question and vice versa.

In the Spring of 1981, the Commission anticipates that it will begin a program of compensating state (and local) agencies for their processing (under their law) of age discrimination charges in EEOC's workload. Contracts will be formulated providing for the amounts to be paid for each charge processed and new worksharing agreements detailing the types of charges the EEOC will pay the state and local agencies to process, will be drafted. This program is similar to that currently in place for state and local processing of Title VII charges.

XII. Miscellaneous Under the ADEA

A. Freedom of Information Act Requests

The Commission has only one set of FOIA regulations. Therefore, procedures for requesting Age, Equal Pay or Title VII material is the same.

Initial requests made to district offices or headquarters depending upon location of material sought. If request denied, appeal to the Commission. FOIA request where case still open (that is processing of charge still ongoing) Commission will only release that material which was supplied by the individual making the FOIA request. A party or third person can get nothing except that which they themselves supplied. Commission will withhold all other material based on 2 exemptions.

- 1) b(7) - ongoing law enforcement investigation. Theory - if file open to reveal the data, this may lead to interference with investigation of charge. Equality of treatment for charging party and respondent. Same position as Labor's.
- 2) b(5) - inter-agency or intra-agency memoranda which would not be available by law to a party other than an agency in litigation with the agency.

FOIA Request Under Age Act for Closed files -- case administratively closed) most documents generally available except for material indicating identity of witnesses and internal memoranda. This material will be withheld based on:

7(c) - invasion of privacy;

7(d) - confidential sources; and

(b) (5) - inter and intra agency exemption.

B. ADEA Opinion Letters

At Labor, requests for opinion letters went to the Wage and Hour Administrator and were freely given. EEOC proposes to take a different approach in issuing opinion letters. A collegial, rather than an individual determination, will be made regarding the issuance. The Commission will make the determinations on opinion letters, and it has issued proposed regulation governing their issuance. These regulations are out for notice and comment.

The Commission has not yet voted on internal procedures as to how opinion letters will be processed. I anticipate the procedures will work as follows: attorneys send requests for opinion letters to the Chair; the staff then evaluates whether to respond; the Commission will then vote on whether an opinion letter is to be issued.

The opinion letter will be issued by the General Counsel at the direction of the Commission. The General Counsel's Office expects to issue more opinion letters under ADEA than Title VII because of the "benefits provision" in ADEA. Even so, not many will be issued. Last year approximately 100 opinion letter requests and no opinion letters issued. Most requests resulted in only informal letters of advice.

C. Hearings on the BFOQ Defense

Last fall the staff proposed that the Commission solicit information on the BFOQ defense with regard to failure to hire older policemen and firemen. Staff suggested hearings be held. General Counsel's Office withdrew this suggestion. No hearings or comment periods are scheduled. Commission has several police and firemen's cases involving BFOQ's awaiting trial shortly.

D. Apprenticeship

In January, two Commissioners voted to block implementation of a proposed regulation that would have made apprenticeship programs subject to jurisdiction under the Age Act. Hence, it would have been a violation of the ADEA to turn down a 65 year old applicant for an apprenticeship program. Proposal countered efforts to remedy youth unemployment and not cost effective.

No further movement on this front expected.

E. Pension Regulations

Staff still has the guidelines in draft and further study is required on defined contribution plans and on defined benefit plans. The issue is whether employers should be required to continue to pay benefits into a pension plan covering an employee who has elected to work past normal retirement age.

XIII. Equal Pay -- General Commission Perspective

Equal Pay Act is a class statute; lower volume than Age or Title VII. Under Equal Pay, an individual can file a complaint and protect their confidentiality or file a charge which is both a Title VII charge and Equal Pay charge. Under the Equal Pay Act, EEOC can also undertake directed investigations of respondents. These investigations are initiated by the staff without a complaint having been filed. Commission believes that Equal Pay Act cases are administratively more flexible than Title VII cases. Under Equal Pay no requirement to conciliate a complaint. EEOC also feels that it has greater flexibility in expanding or modifying an Equal Pay complaint than a charge under Title VII -- less obligation to the complainant. Commission will concentrate its efforts on cases that aid large numbers.

XIV. Investigative Priorities

In certain industries there is a pattern of violations; EEOC will emphasize these areas, i.e., hospitals (aid v. orderlies); schools (bus drivers, custodial workers, coaches); retail stores (sales clerks, guards); banks (tellers, loan officers); transportation; insurance (inside sales people); (colleges and universities, professors). Commission will concentrate its efforts where wage gap is greatest. Issues of particular attention; unequal credit for prior experience; merit system as a defense for wage differential; promotion to higher ranks where ranks do not represent differences in job contents.

XV. Intake Under the Equal Pay Act

Commission will explain salient features of both Title VII and Equal Pay Act to charging party;

1. Right of confidentiality under Equal Pay Act;
2. Statute of limitations under Equal Pay;
3. Liquidated damages under Equal Pay;
4. Conciliation requirements of Title VII;
5. Deferral under Title VII; and
6. Broader prohibitions under Title VII. For example;

Commission encourages Equal Pay complainants to file Title VII charges because it ensures a remedy in cases where the investigation disclosed that jobs being compared are not substantially equal, but that sex discrimination prohibited by Title VII, occurred in initial assignment of women to lower paying jobs.

Commission will discourage concurrent filing when:

Respondent not covered by Title VII (respondent engages in interstate commerce but has less than 15 employees -- the threshold for Title VII jurisdiction);

Complainant requests confidentiality;

Charge not timely filed under Title VII (more than 300 days since the last act of discrimination but less than 2 years since last act of discrimination, therefore timely under Equal Pay).

XVI. Investigation of Equal Pay Complaints

Investigator talks with complainant. Complaint is not given to respondent nor is respondent even told whether a complaint has been filed under Equal Pay. This is similar to Labor's procedures. Under Title VII, a copy of charge is given to respondent.

Under Equal Pay, after complaint filed respondent contacted and data requested. Analysis of data -- preparation of investigative plans and on-site meeting with respondent.

Generally, an investigation will include:

1. A records check;
2. Observation of jobs;
3. Interviews;
4. Compliance determination;
5. Closing conference.

XVII. Scope of Equal Pay Investigations

A. Investigations of Complaints

Investigations normally will be confined to a plain reading of the complaint. From Commission's point of view, resource allocation is of primary importance, i.e., how many hours needed to complete investigation

of complaint. Case must be manageable. Investigations may be expanded where the preliminary evidence suggests large numbers of workers are involved and there are substantial violations. Unless waived, confidentiality of the complainant must be preserved. Caveat - if limiting the scope of the investigation is likely to aid the respondent in identifying complainant, Commission will take appropriate steps to insure confidentiality of the complainant, i.e., not limit scope of investigation and instead make a broad request for information. No requirement to defer or refer Equal Pay complaints to state and local agencies.

B. Directed Investigations

EEOC staff may initiate Equal Pay investigations without a complaint having been filed. Directed investigations may be initiated wherever staff feels Equal Pay violations exist.

XVIII. On Site Investigations

Commission will attempt to collect as much of the relevant data as possible prior to an on site investigation. This will include payroll records, data on possible defenses. Data requests are to be tailored narrowly to the scope of the investigation. On site investigations for Equal Pay are normal but not required.

XIX. Completion of Equal Pay Investigations

Commission can administratively close or terminate the processing of a complaint at anytime and then inform charging party of their rights. Generally, if a violation is found, the Commission will inform respondent of the violation and attempt to conciliate. If respondent fails to agree to terms, the Commission may issue a letter of violation and litigate. The Commission is not required to do any of this prior to litigation, and because the statute of limitations period continues to run until suit is filed, the Commission is concerned about the length of time in processing a complaint. Hence, if an employer is slow to turn over data, the Commission may simply terminate the investigation and sue.

XX. Concurrent Equal Pay and Title VII Cases

In concurrent cases, where there is a violation of both Equal Pay and Title VII and respondent refuses to remedy the violation -- the Commission will send a joint letter of determination under Title VII and a letter of violation of the Equal Pay Act. Then the Commission will attempt formal conciliation under Title VII and Equal Pay again. If the Commission is unsuccessful in resolving the dispute, a Title VII failure of conciliation letter goes out and EEOC may file suit.

XVII. Early Litigation Identification (ELI)

Commission has implemented an ELI program for equal pay complaints similar to the one for Title VII. For ELI cases, attorneys are brought into the case to direct and assist the investigation. These cases are potential litigation vehicles. Potential ELI cases may have some of the following elements:

Large numbers of persons affected;

Likelihood Commission will prevail on merits;

High impact;

Well settled issues which can be won easily or new and novel issues.

Two other situations which may trigger ELI handling of a charge: recurring violations and retaliation.

XXI. Opinion Letters Under the Equal Pay Act

At Labor, opinion letters were freely given; the Commission, however, has issued few opinion letters. The Commission has not published regulations concerning how to obtain opinion letters, but has informally adopted Labor's procedures.

To secure an opinion letter, request the Chair (at Labor-Wage Hour Administrator) to issue the letter. Describe the situation in as much detail as possible; lay out facts. The Commission will then vote whether an opinion letter is to be even issued. An opinion letter is drafted by the General Counsel at the direction of the Commission. Since Equal Pay came to the Commission 18 months ago, only one EPA opinion letter has been issued.

XXII. Contribution

Commission voted 4-1 last July 1, 1980, to take the position in an amicus brief to the Supreme Court in Northwest Airlines v. Transport Workers, ___ U.S. ___, 48 L.W. 3820 (June 16, 1980), that there was no right of contribution for employers against unions under the Equal Pay Act or Title VII. The case has been argued and is awaiting the Court's ruling.

The Commission has been successfully sued by Northwest Airlines for closing the Commission meeting during which the contribution issue was discussed, Northwest Airlines V. EEOC, 24 FEP 255 (D.D.C. 1980). The court held the Commission violated the Sunshine Law and ordered the tapes of the meeting to be released. The Commission has filed an appeal.

XXIII. Freedom of Information Act Requests Under Equal Pay Act

FOIA requests for Equal Pay information are processed in the same manner as Age Act requests. For information in an open Equal Pay file -- the complaint is still being processed -- the Commission will release to the person making the FOIA request only that information which the requestor themselves actually supplied during the investigation. The Commission may deny the release of other information based on 2 exemptions.

b(7)(a) -investigatory files for law enforcement purposes.

b(5) - inter and intra agency memoos which contain deliberative materials.

ADEA & EQUAL PAY ACT - 19

Under Equal Pay, if the complaint file is closed -- the processing of the complaint has ended -- then most material will be released except for internal memoes (exemption b(5)) and material which indicates the identity of witnesses exemption b(7).