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LAW ALERT – EMPLOYMENT LAW

NINTH CIRCUIT RULES THAT EEOC HAS POWER TO CONTINUE TO INVESTIGATE DISCRIMINATION CHARGES AFTER IT ISSUES A RIGHT-TO-SUE NOTICE

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In a ruling that directly conflicts with a ruling of the federal Fifth Circuit Court of Appeals, the Ninth Circuit in *EEOC v. Federal Express Corp.*, 558 F.3d 842 (9th Cir. 2009), held that the Equal Employment Opportunity Commission ("EEOC") retains the power to enforce subpoenas and investigate charges of discrimination even after it has issued a right-to-sue notice to an employee that grants the employee the right to file a lawsuit against the employer. Employers in the Ninth Circuit therefore face potential parallel litigation – defending against the employee's lawsuit, while at the same time being required to respond to EEOC requests for information and/or subpoenas.

Title VII of the Civil Rights Act proscribes various employment practices involving discrimination. The EEOC bears the primary responsibility for enforcing Title VII. When a charge of discrimination is filed, the EEOC is required to investigate the charge to determine whether there is reasonable cause to believe that it is true. In its investigation, the EEOC may seek records from the employer, interview witnesses, and issue administrative subpoenas which the EEOC can request be enforced by the court. If the EEOC determines that there is reasonable cause to believe the charge is true, and it cannot informally resolve the charge, the EEOC may bring a civil action against the employer. However, an employee may request that the EEOC issue a right-to-sue notice while the investigation is still pending.

Normally, the EEOC terminates its processing of a charge when it issues a right-to-sue notice. The EEOC decided to continue to investigate the charge in the *Federal Express* case because it involved a possible policy or pattern of discrimination affecting other employees. The Ninth Circuit court held that under the provisions of Title VII, the applicable federal regulations, and the EEOC's interpretation of its regulations, the EEOC retained that authority, under limited circumstances. The court expressly declined to follow a decision of the Fifth Circuit, which held that the EEOC's issuance of a right-to-sue notice divested the EEOC of authority to further investigate. *EEOC v. Hearst Corp.*, 103 F.3d 462 (5th Cir. 1997). The U.S. Supreme Court may be asked to resolve this conflict on a writ of certiorari, since this conflict may have a potentially significant effect on national corporations.

Another issue left open is whether the EEOC may be barred from bringing a lawsuit based upon the charge, if the employee has already filed a suit after being issued the right-to-sue notice. The Ninth Circuit concluded that whether the EEOC could file a second suit was irrelevant to whether the EEOC could continue its investigation by issuing an administrative subpoena upon the charge.

For more information, or to discuss the decision in detail, please call Jim Diamond, Erica Williams Orcharton or Xochitl Marquez at 510.836.6336.

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