# PREFACE TO SECOND EDITION

*This Second Edition is current through March 2014.*

Change abounds at the EEOC. As this book is going to print, the EEOC is in the most experimental period of its 42 years as a civil rights litigant, beginning with a transformational program to refocus the EEOC's resources that was initiated by the EEOC during the administration of President George W. Bush and brought to full flower by EEOC leaders in the administration of President Obama. The agency's discretionary litigation and investigation prerogatives are now being turned in new directions as the EEOC seeks to expand the reach of the laws it enforces. For example, the EEOC is now interpreting its founding statute broadly to enlarge its authority beyond charges filed by individuals and commissioners, erase the statute of limitations for "pattern or practice cases" that imposes a 180/300 day charge filing period, reduce to a practical nullity the limit on the scope of its investigation once a charge is filed, eliminate the requirement that it engage in conciliation in all cases, extend disparate impact claims to require employers to rationalize all policies, and expand the definition of "sex discrimination" to prohibit discrimination against transgender and other groups.

Many of these positions are an outgrowth of five developments: the 2006 systemic initiative, the Berrien Commission's strategic enforcement plan, a change in litigation philosophy from law enforcer to law maker, the freedom given to regional attorneys by the general counsel to chart their own course, and broad interpretation by the courts of the EEOC's subpoena authority. This second edition is intended to provide readers with the tools to understand how the EEOC's shift occurred and to equip readers with the information needed to make good decisions on how to address the client's interest when it finds itself in the sights of the EEOC.

Practitioners, and even government officials, including those charged with some form of oversight of the agency, have difficulty

understanding the EEOC, or knowing how it functions during the sub-litigation stages of EEOC charge processing. This is understandable. Most of the EEOC's policies are publicly available, but its practices, including practice variations from office to office, are harder to ascertain. Much of its work is performed in secret. Information about the specifics of charges, investigations, conciliations, and conciliated settlements is inaccessible by outsiders because it is shielded by confidentiality laws intended to protect charging parties and respondents. Perhaps unintentionally, this confidentiality has had an important collateral benefit to the EEOC. Its investigators and lawyers have access to information about the agency's predilections, proclivities and tactics—most of which are equitable and fair, but some not—that is not available to respondents and others, making this information hard for outsiders to gather, except from personal observation, the few details to be gleaned from cases with procedural snafus that end up in court, and the occasional published reports of the Government Accounting Office.

Even the EEOC's terminology can be perplexing. "Commission" is used to identify the group of five commissioners, as in "the Commission approved the policy guidance." But, it also is used to mean the EEOC as an institutional whole, as in "the Commission conducts investigations." The EEOC has "regional attorneys" but no regions. The EEOC has a "general counsel," and a "legal counsel," who work independently of the other, with different responsibilities. We have provided a glossary to help you.

The Commission, and by this, we mean the body of five commissioners, is responsible for establishing the interpretative policies of the EEOC. These policies go through innumerable drafts and layers of review, and are even subject to coordinating review with other affected federal agencies. Accordingly, it is correct to say that they are the work of serious and careful deliberation by and at the direction of the commissioners. However, even these policies leave gaps for issues that arise and those gaps can be filled—within the boundaries of existing commissioner-approved interpretive policies—by the legal counsel's office (often in consultation with the Chair) via question and answer documents, fact sheets, or informal discussion letters, none of which may ever be subject to deliberation or a vote. It can be surprising how little is known about these

interpretations, yet they are a resource and relied on by investigators handling the charges affecting practitioners' clients. More strikingly, the general counsel, who has no direct reporting relationship to the commissioners, interprets laws during the EEOC's litigation without the approval of the commissioners, including positions in the EEOC's cases before the federal courts of appeals. In this way the general counsel and, by delegation, the regional attorneys have as significant a role in the development of Title VII, the ADEA, the ADA, the EPA, and GINA as do the commissioners, except that statutory interpretations argued by the regional attorneys do not go through layers of review and are not the product of serious and careful deliberation by the commissioners or anyone else except for the regional attorney's staff, in most cases.

We know of no other place to obtain the information necessary to guide practitioners through the EEOC's process, so we have continued this book with this Second Edition. The preface to the first edition, published in 2005, described the aim of this book as to demystify the EEOC by explaining how and where EEOC decisions are made, and the influences and institutional biases that shape them. To keep readers current and to address what we see as a more aggressive EEOC, this second edition eliminates chapters and sections that have become obsolete. The EEOC has restructured internal practices to better accomplish the EEOC's publicly stated goals, made improvements in information sharing among offices, and coordinates staffing under a "national law firm" model. The EEOC now encourages the use of fact finding conferences (which had largely been abandoned) to streamline charge processing and increase settlement opportunities. In addition, Section 83 of the Compliance Manual, which discusses the EEOC's disclosure of information from its internal files, has been structurally modified in scope and responsibility in part to free up litigation resources.

Updates have been made in this second edition to reflect these changes and other developments concerning, for example, the EEOC's use of subpoenas, its litigation, conciliation, and settlement policies, and its use of experts. This edition also discusses the EEOC's statistical workload, including the volume of charges and litigation and how the EEOC's changes have impacted that

volume. In addition, the edition provides statistics on the EEOC's much-touted early mediation program so that readers can objectively assess its impact.

We hope that readers find these updates and additions, and the book generally, useful in understanding and representing clients before the EEOC.

DONALD R. LIVINGSTON
Washington, D.C.

REED L. RUSSELL
Tampa, Florida

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