



Episode 32: “All Your EEOC Questions Answered, Part 2, With Maureen Kielt”

Speakers: Ari Kwiatowski, Barclay Damon, and Maureen Kielt,
Director of EEOC’s Local Buffalo Office

[Ari Kwiatowski]: Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[Ari]: Hi, everyone. Welcome back to “All Your EEOC Questions Answered.” A one-on-one conversation with the director of the EEOC, Buffalo Local Office, Maureen Kielt. This is part two. So the second week that we’re joined by Maureen. Maureen, good morning. Welcome.

[Maureen Kielt]: Thank you. Good to be here. Enjoying it.

[Ari]: Great. And thanks for coming back. We really appreciate it. To our listeners, if you listened to last week’s episode, you know, Maureen really gave us a lot of helpful information about the EEOC, the agency, how it’s organized, and mediation. So today we’re going to pick back up right where we left off and dive in and dig in to talking about what happens when mediation fails or if mediation is not offered. And that is the EEOC’s investigation. So, Maureen, first question for you. Who actually does the investigation? And can you tell us a little bit about how many investigators you have, and the EEOC has?

[Maureen]: Okay. I would love to. Ordinarily, I have a staff of eight investigators. It’s been a while since we have had a staff of eight investigators. We lost a couple of mediators. One of our investigators passed away a few years ago. I left investigation and became the director of the office in 2020. Our investigator Jeremy Boyd left, and he’s now the mediator. So I’m down to four investigators. I’m hoping that we’re going to be able to hire, hopefully, by the end of our fiscal year, which ends the end of September. So, low on investigators. And right now, we don’t have support staff because my two support staff individuals, one retired, the other one went to another agency to actually do the job she went to school for. So we were really sad to see her go because she was really awesome and very helpful. So we have four investigators and that’s who does the investigations. I still do some residual investigations myself, or help investigators with their workloads. Just because you’ve got to do what you’ve got to do.

[Ari]: Well, your “many hats,” right?

[Maureen]: Exactly. Exactly.

[Ari]: So you told us about the investigators, Maureen. Can you tell our listeners just a rundown or an overview? Because I know we could probably talk for a long time about this, but what does the investigation generally entail? So if you’re you know, if mediation is not offered or maybe you’re an employer or a respondent, you go to mediation, it doesn’t work out. What can you expect as a respondent in terms of the investigation?

[Maureen]: Okay. So once the case comes back from mediation, it’s usually assigned to me. So you’ll probably notice, why is Maureen Kielt on all of these cases? It’s because I review and then I assign back to an investigator, or I may assign it to a different investigator, depending on people’s

caseloads. There are a lot of things that go into that. So when they...when the case comes back from mediation that's assigned to me, I review the case again, refresh it in my head, assign it back to the investigator and might say, ask for this or ask for that because it may be something that we didn't think about. It's fresh eyes, so to speak. So you usually get a request for position statement and you'll get a request for information, or what we refer to as an RFI. Some of them are just perfunctory RFIs. And, you know, we're just looking for some details. Other cases, we may determine that we need more than just basic details. So we'll ask for employee records. We'll ask for payroll records, personnel files, whether or not you are federal contractors, things along that nature, just to kind of get a lay of the land, so to speak, and take a look at the company as a whole...and having those kind of things available for us just helps us get a feel for what the company is all about and what's going on there. What does it look like? What does the landscape look like? So you'll be asked to provide that documentation. We do give people extensions. Two weeks, that's all you get. Unless it's some sort of extenuating circumstance. And then, you know, I'm happy to discuss that with you. And there are times I mean, we have a holiday coming up. I just gave somebody a three-week extension because it's going to be crazy. It's a long holiday. And so I'll give an extension for that reason. If there's...somebody's in court, somebody is... has a death in the family or is sick. I mean, in COVID, we were giving lots of extensions because people were dealing with that. So that would be the beginning of our investigative process.

[Ari]: So, Maureen, we...as a respondent, you receive the basically request for a position statement and requests for information. I know that the EEOC does some other things in terms of the investigation, like you mentioned on-site employee interviews. Do those things normally occur after you guys get the information that you've initially requested from the respondent or that kind of concurrently? Or is it... every case is different?

[Maureen]: Every case is different. Every case is different. And prior we talked about whether or not we've identified possibly a case that may have more than one potential harmed party, we may ask for more information on that kind of a case. Just again, to get to the lay of the land and to see if, you know, if the allegations are credible, because sometimes they're not credible. And the only way we can do that is take a look at that kind of stuff. We can also do a fact-finding conference, which ordinarily—in pre-pandemic times—we would bring people to the office and we would do a fact finding conference. I did a lot of fact-finding conferences. I thought it was a very useful tool. You put respondent on one side and charging party and whoever on the other side. And there was kind of like a little hearing, so to speak, where everybody gets an opportunity to voice what's going on. As, I was saying it does provide opportunity to reach a settlement, because sometimes when you're in the room together, the employers going to hear something that they maybe didn't hear or didn't realize before. And the same thing with the charging party, they're going to hear something or realize something that they were not aware of. So that's a really good tool, and one of my favorites as an investigator, was a fact-finding conference.

[Ari]: Yeah, that's such a good point, because I think it's really interesting. Even as an attorney representing employers, respondents, when you're in that environment and you are able to hear from the charging party themselves, at least their version of the events, which obviously only so much can come across in the charge. Right. You're not getting all the detail, all the feelings, things like that. And I think it does lend an interesting perspective, Maureen, are those, in your experience normally conducted prior to the submission of a position statement or the response for request or ...

[Maureen]: It depends on the investigator, because every investigator kind of has their own style. I'm sure a lot of people remember David King. He was an investigator and then he was a mediator for a really long time. And then he went back to investigation before he retired. It was kind of his thing. He scheduled a fact-finding conference for just about every charge that came across his desk. And that's how he started his investigation. And sometimes he would say, bring your position statement to the fact-finding. And that worked well for him. The nice thing about the EEOC is that

the way you conduct your investigation plays to your strengths. So, you know, that really worked for him. That's not always something that works for everybody. Some people will, you know, as you know, you want to have some sort of semblance of the facts before you go into a meeting like that so you can wrap your head around what's going on. He was a very "shoot from the hip" kind of guy. So it worked for him.

[Ari]: Right.

[Maureen]: So it depends on the investigator—I always wanted to at least have a position statement. I'd like to have all my documentation in front of me before I bring the parties together, because then I just have a clearer picture of what's going on and where I think something is going. And sometimes when you're in a fact-finding conference, what you think you're going to hear and where you're going changes completely. And that's both sides, which again, which is the tool I always liked because it really it really gave you a better idea of what was happening.

[Ari]: Yes, that makes sense, Maureen. So, you know, I know you mentioned requests for information. And, you know, a lot of the requests that we see when representing respondents are kind of the basic information you talked about, you know, payroll records, the charging party's personnel file. And then, you know, as you mentioned, sometimes they are more encompassing. You know, at least in my experience, it depends really on the nature of the charge.

[Maureen]: Yeah.

[Ari]: So, Maureen, I did want to talk a little bit about on-site visits; and I know you mentioned that briefly last week. In my experience, an on-site visit isn't necessarily super common, especially in the pandemic, of course. But you know what's really the purpose of that? And is there...do you think that that's a tool that's often used by investigators, or is that really just investigator-specific?

[Maureen]: Again, it is. It is. It's encouraged. But again, investigators, you know, depending on workload and things of that nature, everybody determines what it is that they need in order to move forward and make a decision and do an analysis. For me as an investigator, and again, I'm sure a lot of the attorneys watching this have had me at their place of employment; at their clients place of employment. I love an on-site investigation, and here's why: I think it's good for the employer. I like to see the lay of the land. I want to see...This is what the employee said. This is their allegation, is that possible in this environment? I mean, I had an on-site one time where I went, and we had a charging party who kept saying he's making faces at me in the mirror, making faces at me in the mirror. And I did an on-site and I sat in that chair and I was like, yeah, that could not happen. So...

[Ari]: Right.

[Maureen]: So, something that seems very credible. This now not credible. And I was able to sit in that chair. I was able to look at the environment and see, is that physically possible? That can also be a detriment to employers. I obviously I mean, because I always asked to take a tour. I want to see what's going on. I want to have an idea of what the business does, what's the interaction with the employees and management? Is there interaction between employees and management? I always look for posters. OK. I always look. Do you have your five one? Want to have your EEOC poster? Is everything there so that people understand what their rights are and how to contact somebody if they think that there's an issue. It gives me the opportunity to again get the lay of the land and take a look if someone's saying, hey, we can't accommodate because we just...that's an essential function of the job to be able to do this particular thing. And then I go on-site and I, and I look and I'm look, you could accommodate by doing this, by doing this, by doing this. So me taking a look at the work site will lend credence to what the charging party may be saying. So I just think

it's very eye-opening. And again, it gives me a better idea of where both sides are coming from. And that's not always appropriate either. An on-site, it's not always appropriate, but sometimes it's very appropriate and we like to encourage that. If that's going to help an investigator get down to what's really going on. I think it's a really great tool and like I said, it's one of my favorite. It A, puts us out into the community and B, gives us a better idea of what what employers and employees are going through. It's a great tool.

[Ari]: That makes perfect sense to me, Maureen, because even when we get to a new...as attorneys, you get a new client and you know nothing about the client first. One of the first things we'll do is say, you know, can we just come out and meet you at your facility? I just want to see what you do. Or, you know, if we get a lawsuit in or a charge, like it's just what you said. So I think it's...I love how you phrased it because I think employers automatically are a little bit hesitant. I think it's understandable when the EEOC says, you know, we want to come to your facility, your property, we want to check it out. But in the example you gave, it was really...I don't want to say exculpatory because that has a legal connotation. But really, like you were able to determine that what was alleged really physically couldn't happen. So it's not...it doesn't need to be met with suspicion, it's just this is a piece of the investigation and there's no need to panic, basically.

[Maureen]: Exactly. Exactly, exactly. You know, I just think that it's a great tool and we haven't done it in two years, two and a half years because of pandemic. But I think that we will slowly start to see that change and we will be out there and exploring different options to be able to do that in person. Right now, we have been doing that virtually, which is great, but it's very limiting, right, that interaction, that seeing how things work and how people interact and what they actually do, are they actually lifting? Are they not lifting? Is that...There's just so many questions that can be answered by going literally on the site and taking a look around and having a tour. And it fascinates me to see...to visit all these businesses and see all these different things that are going on out there in the world. And it's mind-blowing. I know a little bit about a lot of businesses.

[Ari]: That's great, though. Yeah, it's fun. I know. I feel the same way when we get a client that's, you know, any manufacturing client, any client that's developing their own products.

[Maureen]: Yes.

[Ari]: It's like, tell me more.

[Maureen]: Yes, exactly.

[Ari]: Yes. So, Maureen, we talked about requests for information. We talked about the on-site visits. You know, one of the main things I wanted to talk about with you is a position statement. So if you're a respondent, you're an employer, you're named as a respondent in a charge, you get notice of the charge and basically you need to go on the portal. We talked about that a little last week, but, you know, the information gives you the portal log-in, the default password. You go on there, you have something that says your position statement is due by this date. Can you tell our listeners just briefly, you know, what, what is the position statement and what is the purpose of it?

[Maureen]: Okay. Position statement basically is a letter that tells us your side of the story. So we want to...we know what the employee is alleging. We've drafted the charge for that employee. So now we're saying, hey, we need to hear what you have to say. So what is what is your story? What is it that you have to say to address these allegations? Basically, that's what a good position statement consists of. It addresses the facts, it addresses the allegations, it offers an explanation to the allegations. And it just reassures us that the law is being followed. So a good position statement really lays out all of that. And I also encourage attorneys—don't start throwing all kinds of case

law information in there, because you know what? [Whispers] We don't read it! Because we have so many. So I skip through and I'm like, okay, I trust what you're saying. They are probably, but if I were to. Yes, but hey, I'm not in court. I'm an investigator, so we're not there yet. And in the end, I understand what you're saying here, but I just I want the meat. Give me the meat. I want I want to know what happened. I want to know how you addressed it. I want to see what your investigation consisted of. Did you do everything that you were supposed to do? And if it's something, have you taken effective action to make sure it doesn't occur again? Because that's really important too; employers need to know that they have one opportunity. And I tell this to charging parties, too. I say to them, and our investigators say to them, in that interview process, when we're screening, have you reported this? What did they do? Have they...did it happen again after you reported it? It never happened again, then they took effective action. I need to see that in your position statement. I need to see those facts. So if you put that in your position statement, that that bodes well for an employer. You know, just give me the facts. I want to see the meat. What happened?

[Ari]: Yes. And I love that. So for all of us lawyers that are listening, that little tip, because my next question, Maureen, was like, do you have any tips for us in terms of and by us, I mean respondents generally in terms of filing, you know, in terms of drafting the position statement. And I love that tip. The tip for us lawyers about case law, because, you know, we're trained to just throw it all in there...

[Maureen]: Of course, and if you were going to court, that would be very helpful. And the judge would look at that. And again, what you need to understand is investigators, for the most part, are not attorneys. We are not attorneys. We come from all walks of life. We're just very good in analysis, and looking at things and making a determination. So English majors, social science majors, we've had teachers, I'm an English/poli sci person. So we all come from different walks of life that make us investigators. Case law...???

[Ari]: I know...

[Maureen]: I mean, and again, we are familiar...because I'm going to be I'm going to be kind of, you know, two-faced here and say, like, there are some case law that I might throw back at you and say, well, in this, which is what, a big deal for the EEOC...

[Ari]: Right, right.

[Maureen]: ...this is what we're basing our opinion on. And our cause finding, the thing that you need to remember is an employer is the EEOC only needs 51%. So this is not "beyond a shadow of a doubt." It's not like criminal, it's civil. So we need 51%. So that's 51% to find a cause or 51% to dismiss the allegation. So either way, yes. So the more we have, the better of a decision that we can make when we have everything that we need to make that decision. When employers or attorneys keep things from us, then we we have to then make assumptions you know because, you know, it's called adverse inference, which I'm sure you're familiar with. I mean, if we have employers who fail to cooperate and will not give us information and we can make an adverse inference finding under the law. And what that means is you're not providing us that information because it must support what the charging party is saying.

[Ari]: Right.

[Maureen]: We never like that. I never...I hate to have to send that letter. Right. And if you're cooperative and you have a good, complete position statement and you answer as much as you can on the request for information that it's helpful in the long run for the investigation. And if there are issues or if you have questions about that request for information, you can contact your investigator. You can contact me, because we are negotiable. We listen. We can understand. You know, you can say there's thousands of people here. Can we, like narrow this down? Absolutely. We can start with

baby steps. And if we need to, we can grow those steps if that's necessary. So we're very flexible on working on that.

[Ari]: Yeah, I think that's such great advice, Maureen, because I think a lot of times there is a tendency and it's understandable for employers to be very protective of information, especially when it comes to other employees and things like that. So it's so helpful for me and our listeners and, you know, to know that if we have questions, you know, we can call the EEOC or we can try to work it out to some extent, recognizing that you guys obviously have...make the ultimate call. But I think it just underscores the importance of being cooperative and that, you know, the EEOC is not trying to trick anybody. There's a reason for asking for what's being asked for. And it's not, again, always to be looked at with suspicion. So.

[Maureen]: Correct.

[Ari]: But it sounds like to me, Maureen, in terms of the position statement, it's really important to respond and to be fact-specific and try to address pretty much every factual allegation that the charging party has made in the charge, even if it's just to say that's not true because X, Y, Z, here's the document that shows it's not true. Because I think sometimes, you know, employers will say, well, that's not really that fact's not really relevant. And my response is, well, even we can't really make that determination ourselves and let's not have it hanging out there. Let's not leave anything hanging out there in terms of what the party is saying.

[Maureen]: Exactly. Exactly. And when it comes to that, that document or that witness or whatever information that you have to support your claim, that bodes well for the employer, because this is the same thing that we ask the charging party, do you have a witness? Is there any documentation? Is there...do you have anything that can help support your allegations? So I would say the same thing in a position statement or an RFI from the employer is what, what have you got to support what you're saying. And that's helpful.

[Ari]: Yes. And we've talked about this on other podcasts, Maureen, but policies, acknowledgments of policies, documenting what happened, if you are aware of something, doing the investigation, documenting the findings, these are all things that if you are unfortunately in the position where you're named as a respondent in a charge, those things are going to go a long way. And we want to give those things to the EEOC because we want to show that as an employer did the right thing.

[Maureen]: Yes, document, document, document. You can't document enough because it just again, I mean, it's there, it's concrete. It's something that everybody can look at. You know, a lot of cause cases result from the fact that middle management hasn't received the training they should have in order to document, elevate it, get some advice, go to HR, go to the in-house counsel, whoever it is, and say, look at I'm having a problem here and getting that advice on how to handle that. I can't tell you how many charges we've had that we found cause on where somebody is not doing that. They're not following through. They're not reporting...upper management or HR all of a sudden says, whoa, what is this? And again, it's about liability because that supervisory employee acts on behalf of the employer. And so training is really important and we really, really stress that employers train everybody to know what they're supposed to do when something like this happens. And if you have that in place, and your policies are in place, and you follow the policies. Because when I was first a baby investigator, one of the first things my director said to me was the policy is only as good as the paper it's written on. If nobody follows the policy, that's a problem. So in your position statement, in your answers, you can...I can't tell you how many times people are sending me policies. I'm going like, great, I love your policy. What have you done to implement that policy? Did the people follow that policy? Because if they didn't follow the policy and you have no documentation, then you can tell me I did this, this, and this. If it's not document, it's not there. Document. And I say the same thing even to our investigators. If you're talking to somebody, you

need to have that documentation. If it's not documented, it didn't happen. So I can't stress that enough. And if you have followed that and you've done that, give us a picture into that so that we can say, well, yeah, yeah.

[Ari]: Yes. So Maureen, I think this is a good segue way because one of the things I wanted to ask you and you say the policy is only as good as the paper it's written on. And I, you know, in terms of just having the policy and whether or not the policy is being implemented and applied and equally applied, one of the things that I know that the EEOC can do and has done, and I'd like you to talk about a little bit, is contact current and former employees and ask those types of questions. And so can you just talk with...talk to our listeners a little bit about, you know, the EEOC's ability to contact employees of the respondent and how that kind of works?

[Maureen]: Yes. Okay. So first I'm going to lay the groundwork. We do not contact management employees because management employees, again, they act on behalf of the employer. So the employer obviously has a right to be present, to act, you know, on behalf of that management employee or be there in a session if we are talking to that management employee. So we never seek out to talk to a management employee. I will say there have been times where I talked to someone who has not identified as management, and then I'll get to a certain point in the interview and they'll say something and I'm going like, Are you a management employee? Even though I may have asked that? But they're not...and I'll immediately...we shut down the conversation and say, you need to know we're going to end this conversation here, because I need to let the attorney or inside counsel or know what's going on here so that that's we try and follow that very, very stringently. As far as non-management employees, the law says that we can talk to them. They are not represented by the employer. So non-management employees are available to us and we don't need to have anyone's permission to talk to them. We may call them, we may send a contact letter to them. Now the new thing is to send a text. I'm dating myself. I, I don't like that, but it works.

[Ari]: So what if that's not my preferred method of communication either?

[Maureen]: My whole thing is I get a lot of texts. I mean, I have probably 20 bags from AT&T that I could go collect because they my bill and I, you know, because there's a lot of that going on out there, especially during pandemic. I've never seen so many crazy text messages, but it is an option that is available to us. My preferred option is to send a letter because a letter, it comes on an official letterhead and it identifies who we are. Depending on the case, if there are witnesses that the employee has provided us, usually the employee has said the EEOC is going to call you and if they're a non-management employee, we can reach out by phone as well and talk to them. So again, a lot of times that can be detrimental to the charging party or it could be advantageous to the charging party, depending on what these witnesses have to say, which is why it's another good tool. It's a great tool. And why we don't have inside counsel or outside counsel sitting in on those conversations. And I usually when I go on-site, I usually do not interview non-management employees when I go on-site for a couple of different reasons. It can be overwhelming for non-management employees. They may feel intimidated. They may not want to talk about whether it's pro the employer or not. They may not want to talk about what happened to them or witnessed, when the employer's sitting there. So it's advantageous for both sides to be able to have that anonymity. And we are able to talk to them and get information from them. So it's a great process.

[Ari]: Yes. So, Maureen, so in terms of the investigation, I think we've touched on most of the major things that the EEOC will do or the things that the EEOC considers. One thing I wanted to ask you—and I know this might be a difficult question to answer, and I'll probably get the answer that I always give, which is a very lawyerly answer, which is “it depends.” But how long typically does an investigation take?

[Maureen]: It totally depends. So no surprise there.

[Ari]: Yes. Yes.

[Maureen]: Ordinarily, by the time you go...you have to process the charge. If it goes to mediation, then it comes out of mediation. Then we're collecting all this documentation. And if there's witnesses or this or that, an investigation pre-pandemic used to take anywhere from six months to a year. Sometimes we closed very quickly because it's very clear that the evidence is not going to support what the charging party is saying. In those cases, obviously, it's going to be much quicker. I mean, it could be within a few weeks of coming out of mediation. It could be it could be at the very beginning and never goes to mediation. As we talked about earlier, if a case...somebody insists on a charge and it doesn't meet the jurisdiction or they haven't identified a basis or a harm, then we would give them their charge and dismiss it so that they could have a notice of right to sue to go into court. So that's a very short process.

[Ari]: Right.

[Maureen]: If it's a bigger investigation or more complicated or there's a lot of moving parts, then obviously that's going to take longer. And so right now, I think that investigations are taking at least a year or longer just because of the fact that we're short-staffed and our...the volume of intake and charges that we're receiving right now...in order to dedicate, you know, the time that we need to make sure that we're doing what we should be doing on behalf of charging parties and respondents. It's taking longer. So I would say right around that one year, maybe a little bit longer, depending on the circumstances.

[Ari]: Makes sense. And I think with the pandemic, we've all kind of felt the effects of maybe being a little short staffed or just things logistically are just taking longer, right? Just right reality.

[Maureen]: So I could do a quick on-site ride, hop in the car, go over. That's not available. I could do a quick fact-finding conference and say, everybody come in on this date. And let's, you know, talk about what happened and see if there's a resolution or what the next steps are going to be. That's not available, and it hasn't been available for the last two and a half years. So that slows things down considerably because now we have this whole thing with, you know, virtual, and is the computer working? Is everybody freezing? Can you hear me? It's echoing. I mean, you name it, there's a laundry list of issues in doing investigations like this.

[Ari]: Yes, absolutely. Well, thank you so much, Maureen. This episode has been amazing. I think we've really gone through the investigatory process that the EEOC uses, and I think this has been so helpful in terms of tips for handling the investigation, the position statement, and just good information for respondent employers. So we really appreciate it. To our listeners, next week, Maureen will be joining us for her final appearance on the segment where we will talk about the possible outcomes of the investigation. So, Maureen, thank you so much again for joining.

[Maureen]: Thank you. I enjoyed talking to you.

[Ari]: And to our listeners. Tune in next week. Maureen and I will continue our discussion. We'll talk a little bit more about mediation, but mostly about the investigatory process, and employer position statements. If you have employees, if you're interested on the topic, you definitely don't want to miss it. Tune in.

[Ari]: The Labor & Employment Podcast is available on barclaydamon.com, YouTube, LinkedIn, Apple Podcasts, Spotify, and Google Podcasts. Like, follow, share, and continue to listen. Thanks.

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