Episode 33: "All Your EEOC Questions Answered, Part 3, With Maureen Kielt"

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

[Ari Kwiatkowski]: 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]: Hey, everyone, welcome back to "All Your EEOC Questions Answered." A one-on-one conversation with the director of the EEOC, Buffalo Local Office. This is part three and I am so excited and pleased to have Maureen Kielt, who is the EEOC director for the Buffalo Local Office, back for her final episode, this time in terms of talking about the EEOC. This week we are focusing on what are the outcomes of an EEOC investigation, Maureen. So firstly, welcome back. Thanks for joining.

[Maureen Kielt]: Thank you. Thank you. Always a pleasure.

[Ari]: And so to our listeners, if you listened to the first couple of episodes, you know, we talked about the EEOC, the investigation process, all the things that the investigation phase of handling a charge entails. And we talked about position statements, and we talked about the timeframe for the investigation. Maureen, today I want to focus on the possible outcomes of the investigation. So if you don't mind starting us off, let's dig in. What are generally the possible outcomes to an investigation?

[Maureen]: Well, there's three outcomes is what I always tell people. First, charging party can ask for their notice of the right to sue so we will issue them the notice, the right to sue. Usually we discourage issuing that under 180 days because the courts don't really like that. However, during pandemic and in certain circumstances, we have been issuing more frequently under that 180 day kind of like guideline for notices of right to sue.

[Ari]: Maureen—and I don't mean to interrupt, but do you mind explaining that to our listeners? Because we get a lot of questions about that, about the 180 day and actually requesting the right to sue, because sometimes that catches people off guard as well.

[Maureen]: Yes. Yes. Okay. So charging parties may decide that they don't want to wait for an investigation. They just want to move into federal court. You can't file in federal court without a notice of right to sue from the EEOC. So it's part of the process. And if you saw the other podcasts, you'll know when I said a charging party is entitled to two things under the law: They're entitled to a charge. And they're entitled to a notice, right to sue. So they'll request that. I think that 180 days goes back to when we initially set up statute of limitations. 180 days...in states that do not have state and local agencies to do investigations, have a statute of limitations of 180 days to file a charge. In New York State, we have New York State Division of Human Rights, which extends our 180 days to 300 days to file a charge; that's for statute of limitations. And with New York State, it's 365 days to file under state law.

[Ari]: Yes.

[Maureen]: So in the best of all worlds, and this was set up 50-plus years ago, the expectation is we should

be able to finish an investigation within 180 days; that rarely happens. That's right. This is the real world.

[Ari]: Yeah.

[Maureen]: So the expectation is, you know, we shouldn't be issuing those notices before 180 days so that we can complete an investigation. And like I said, in rare instances, we will issue that under the 180 day threshold, we may have somebody who has a terminal illness. We may have somebody who has filed before and is already in court, is filing a second or third claim.

[Ari]: Yes.

[Maureen]: And so they want to put that all together in their in their court filing. So we'll issue that with regards to combining that with their court filing. So that would be another instance where we would issue that notice the right to sue early; after 180 days if the charging party wants to ask for notice of the right to sue, we can issue it at that point, too. There is a caveat to that, though. If this is a case that the EEOC is...thinks that it might affect other people, so there may be more harmed parties, the EEOC does have the prerogative to deny that based on an investigation that's ongoing. That rarely happens that we're going to deny a request for notice of right to sue. But it's out there. It can happen. So that's one way that an investigation ends. The next two are pretty easy. Either we find cause or we don't find cause. So if we don't find cause because that's the easiest explanation.

[Ari]: Yes.

[Maureen]: We issue a notice of right to sue. That means the evidence doesn't support or there's not enough evidence to support a cause finding. And we are not sure that further investigation is going to get us any further. So we'll issue a notice, a "no probable cause" finding and the charging party can pursue that in court themselves. The other way as if we find cause. So when we find cause, that means there's enough evidence; so that burden of proof is around 51% where we can, you know, make that that jump and say there's enough here to show that we believe that there is a probable cause, that there's probably been a violation of the law. And then we issue that cause determination. That's what we call a letter of determination or LOD. You may have seen that in your travels, so to speak.

[Ari]: Right. Yes.

[Maureen]: So when we issue the letter of determination, we always send an invitation to conciliate. So this is an opportunity for, again, the parties to come together to see whether or not there's some sort of relief that we can negotiate on their behalf. And unlike mediation, where the mediator is more neutral, once we find cause, we have a tendency to advocate more on the side of the charging party, because our bigger picture is to make sure that the law is followed and that we put things in place through a conciliation agreement so that things like this don't happen again with that employer. We can ask for monetary damages. That can be back pay, front pay, resume costs, you know, things along that nature...out-of-pocket expenses that the charging party would not have, had if they not been discriminated against. Okay, so we can ask for that. I will never send out an agreement that doesn't have some sort of monitoring. So that's a reporting element. So every quarter, for example, the employer will send us a report that says we haven't had any instances of people coming to us with allegations of discrimination, or we had this, this is what we did. Here's our investigation. This was the outcome. So we'll monitor anywhere on the average from three to five years that monitoring takes place on a quarterly basis. So you just send that in.

[Ari]: Right.

[Maureen]: We can ask for things like resume, a you know, a neutral reference and things of that nature. We can be very, very inventive again when it comes to resolution. So one of my investigators had a case a few years ago and the employer didn't have access to cash; to something that could be paid, a check. So what my investigator negotiated was a card and this was a fast food place—for X amount of money. And this individual could go in and swipe the card until they reached the limit of whatever that was, $2,000 in food, okay, meals, whatever it was. And that worked. And that was that, was awesome, right, out of the box thinking. And that's what I really, really love about the process is you really can think out of the box.

[Ari]: Yeah.

[Maureen]: We can say, hey, you know what, let's give X amount of money. I heard a case one time. It was a severe sexual harassment case. And actually the attorney suggests to me, Maureen, let's give $20,000 to the women's shelter at the City Mission. And I'm like, that's a fabulous idea. I love that. It shows it's a good faith, goodwill gesture. And it bodes really well and reflects well on the employer who is now, you know...

[Ari]: Yes.

[Maureen]: Remiss in the behavior that was allowed to happen at the workplace. So we have that. We monitor I mean, the sky's the limit when it comes to those kinds of things. But a good settlement agreement or conciliation agreement allows the parties to resolve this without having to go to court. There are some caveats that you won't see me sign off on because I will sign off on all those agreements—there can't be any tender back. The employee needs to be able to talk about what happened to them. That's the EEOC's opinion is they have a right to talk about what happened to them; that's protected by law. No non-disparagement clause because again, it kind of ties into that whole idea that the employees should be allowed to talk about what happened to them. Off the top of...No rehire, no rehire, because that's considered retaliatory here. We're going to give you this money. You can never work for us again.

[Ari]: Right?

[Maureen]: I understand where that motivation comes from. But for example, I had a case one time in...this was back in the day where we kind of like said, if you paid $500 to the charging party's attorney, well, then they can use that to get an attorney to consult with. And we used to let a lot of other things slide like no rehire then that's a no and it has been for quite a while now.

[Ari]: Right.

[Maureen]: But the whole reason for that is, is...let's say you're ABC company and so somebody agrees that they're not going to be hired. So they go and work for XYZ company and down the road ABC buys XYZ. Now you've told them that they can't work for you anymore because there is no rehire clause in this conciliation agreement. Now this individual...that's retaliatory because. Because they're not working for you. They're working for them. Right? You just happened to like buy them. So when we're talking about those kinds of terms, that is not something that I will agree with...ever. So things of that nature in theory. Most attorneys realize this now and put clauses in their agreements and their settlements that the EEOC is not participating in.

[Ari]: Right.

[Maureen]: And they will agree to those terms in our conciliation agreements as well, because they do know and they do realize it, that we frown upon those kind of things in an agreement.

[Ari]: Yep. So, Maureen, let me ask this, because I know we spent a lot of time last week talking about—and the week before, really—talking about mediation. And I was curious for purposes of conciliation and this is different, as we discussed, is the investigator, the one who was negotiating basically on behalf of the charging party at that point?

[Maureen]: Yes, yes. Yes. So basically how it works is the investigator goes to the charging party and says, what is it that you want? Give me your damages information. So we'll ask them; have you looked for work? Where have you? I mean, we try to mitigate the damages right from the top while we will mitigate. Where have you worked, where we applied, how long were you out of work? How much are you making now as supposed to how much were you making before? So if they're making less, we may ask for that information or that moneys, but they have to be able to document that for us. So we will take a look at that. If there's pain and suffering, we'll ask for documentation to substantiate that. So we won't ask for pain and suffering unless we are sure that this is really something that can be substantiated. Things of that nature. The investigator gets all that information together, does an analysis, puts together the agreement and then presents it to the respondent. And then at that point, we go back and forth between the parties. But ultimately, the investigator decides whether or not it's a fair exchange.

[Ari]: Yes. And Maureen, you know, I almost hate to ask, but I think we need to ask: if conciliation fails or if the parties can't agree to anything, what happens then internally at the EEOC?

[Maureen]: Okay. Two different things. Okay. At that point, if this is a case that the investigator thinks might be a litigation vehicle for the EEOC, it will be upgraded to our legal department to review to see if this is a vehicle for litigation, whether they want to do that. Or we can issue a notice of right to sue, failed conciliation and the charging party then takes their notice of right to sue and files in federal court. Or if the EEOC determines that this is a case that we feel will be beneficial in promoting the law, then it might be something that we want to litigate and we'll move forward that way.

[Ari]: Okay. So when you say that you want to litigate and because I just want to explain to our listeners, Maureen, because, you know, we have handled or worked with the EEOC on cases where the EEOC has basically sued on behalf of the charging party and we represent the employer. So can you just explain basically what that means? Because I think seeing EEOC on the other side of the "v" is, you know, understandably, I think concerning or it just can you just explain what it means?

[Maureen]: So I might sit down with the investigator and we'll talk about whether or not we think this is something that is important enough that the EEOC needs to make a statement. It might be, you know, I'm going to use Me Too movement as an example. In the midst of all of that that was going on in that focus. I mean, if we had cases where there was severe sexual harassment and we had several harmed parties and the employer was unreasonable, which that happens sometimes, right? Or we find cause and we say, yeah, we have enough evidence where we can show that this is a problem and a pattern. We, we might recommend that legal take a look and see if this is a vehicle for litigation. So we'll sit down with the attorneys once we make that determination. And at that point, you know, we'll go forward and file a federal lawsuit.

[Ari]: And just to clarify, Maureen, because I know the answer to this, just because I have worked with some of the attorneys who are in Buffalo, but the EEOC does have its own attorneys as well that handle these types of issues, correct?

[Maureen]: That is correct. That is correct. So we have a legal division. Again, when the EEOC first started 50 years ago, it was all investigators. We did not litigate cases, but that has evolved over time. And we do have a legal unit, a legal department that goes all the way up to headquarters and our general counsel and they work solely on developing those cases in litigation. So, you know, they

go through that whole process, which of course, you're familiar with, you know, filing the case, going to mediation in the court system, you know, document revealing it, all of that type of stuff; evidence.

[Ari]: Yes. Slogging through...

[Maureen]: We have a whole department that does that.

[Ari]: Yes. Yes. And I did want to point that out, Maureen, because I think, you know, as you kind of pointed out, you think EEOC, you don't necessarily think about the US having its own team of lawyers that are focused on litigation. I think predominantly about the investigation. So I'm glad we touched on that. But one thing I wanted to spend some time on, Maureen, and you've mentioned it a couple times, is the right to sue letter. Can you just explain just briefly what that means? And because one question that we often get on behalf of an employer is, the EEOC has basically closed its file, it seems like. So it seems like the EEOC is telling the charging party to sue us. And I know that's not actually what's happening. You're just explaining the rights. But if you could just explain to our listeners basically what that letter means.

[Maureen]: Yes. So, yes, the...when you get a notice, a right to sue and you're free to file in federal court, it does mean that the EEOC's investigation is now closed. It is sealed unless there's a court filing, because many times people don't file within the guidelines of that notice the right to sue. So it's a 90 day notice, a right to sue. So you have approximately 90 days from receipt of that notice to file in federal court. It's to take your claims to court. And yes, to sue the employer if they believe that they have a case. And again, just because the EEOC doesn't find cause does not mean that they have not taken that notice of right to sue and been successful in court. Sometimes it is more successful in court because you put people on the stand in front of a judge and stories change, as you well know. So what happened here is not what's happening here.

[Ari]: Right.

[Maureen]: But that's the right of the charging party to be able to pursue that when they don't agree with our finding. Right. So that notice of a right to sue is good for 90 days, approximately. It's 90 days upon receipt. So I think there's a build-in of a few days on either end. Because sometimes we don't know. I mean mail delays if it goes through the mail, even when we upload it to the portal, not everybody signs in right away. It might be a couple of days before they sign in and when that first started happening in the portal, I was getting a lot of phone calls from both sides going like I literally didn't download it until this day, but it's dated that day.

[Ari]: Yes.

[Maureen]: And how can I prove that? And I'm like, I think the courts I think the judge is going to have to make a ruling on that. And I'm sure that they are. Yes. I keep in mind. Oh, we don't follow that.

[Ari]: Yeah, I think you're right, Maureen. In my experience, if you're like a day or two off, it's you know, it's kind of almost not worth fighting the battle because chances are the charging party's going to come and say, well, I received it this day. And that is probably within the realm of the 90-day time period.

[Maureen]: Exactly. Exactly. So that 90 day right to sue letter just protects that individual's right to go in and file in court and pursue this at a higher level.

[Ari]: Right. So that doesn't mean...so basically and I think this is really important and this almost underscores the importance of engaging meaningfully in mediation because the EEOC could investigate a charge and allegations and a charge and say, we don't you know, we don't think there's enough here, but that doesn't mean that the whole thing goes away. There's still 90 days for the charging party to

pursue the rights in court, whereas literally then it turns into a federal case.

[Maureen]: Yes, exactly. You're 100% correct. It does turn into a federal case. So if that 90 days expires, though, then that's it. It's done. It's laid to rest. If the charging party, and many charging parties you know, fortunately, unfortunately, depending on what side you're on, do not follow through on those notices of right to sue—for many reasons. You know, they take the EEOC at their word that there wasn't enough there...they may not have the finances, they may not have legal representation and they don't feel comfortable, you know, representing themselves. I mean, there are a lot of different reasons why someone would not pursue that notice of right to sue.

[Ari]: Right.

[Maureen]: But it's there and it protects them, and they can do that if they so desire.

[Ari]: Right. So, Maureen, I know you briefly touched on it when you mentioned that, you know, the EEOC basically closes its file. It's sealed. But I know one of the burning questions our listeners have is that... is whether the investigatory file is a public record. And I know you basically have said it isn't, but is there any way you can see it? Is there a mechanism where an employer can go to your office and take a look? Is there or is it truly just sorry, this is we're an agency this is within our province. You don't get this information...

[Maureen]: Well, that's a really interesting question, because there are, again, lots of caveats to that. So active in that. Yeah. So it depends. So at any time during the investigation, either party can request to come in and review the case file. But we will redact and there are some things that are not disclosable. So the investigators opinions, notes, thoughts, analysis on how they got from point A to point B is not discoverable. So we would take those things out of a file, a physical file. What's interesting that you say that at this point, is...since we're all virtual, almost all our records since March 17 of 2020 are now online.

[Ari]: Right.

[Maureen]: So no one's going to come in and visit and look at a point. Yeah, I honestly don't know how we're going to deal with that. That's something that down the road, obviously, we're going to have to address. And honestly, I very rarely have either party come in and say, I'd like to take a look at that file before we come to the end of the investigation. It doesn't happen very often, so I'm not too concerned about it. Once the case is closed, though...it is closed, it is government property, so to speak, so it doesn't belong to anyone except for us. So there are a couple of ways that you can see the file. The charging party can see the file any time during that first 90 days. When we issue the 90-day notice of right to sue, they can ask for a Section 83, which is something that we do locally. And we release the files, redacted...what's available under a Section 83 or you can ask for a FOIA from our New York district office. That would be David Phillips. He's the FOIA coordinator in New York. He takes care of all of those requests and he will release what's available under FOIA. At this point, the respondent does not have access to the file unless there's a lawsuit filed. Once the lawsuit is filed, all bets are off...it's now a public record and you can again, the employer needs to show proof of a court filing...anything after the 90 days, the employer and the charging party have to show proof of a court filing. And if there's a court filing, then we will release redacted documents. And again, usually that redaction would be stuff like if there's Social Security numbers on any kinds of documents, depending on the nature of the allegations, if there's ADA issues in there, we may redact that.

[Ari]: Right.

[Maureen]: Things of that nature. And again, anything that is part of the investigative process, and the thought

process of the investigator, their opinions, that type of stuff is not "FOIAble" or released under Section 83. Right. So you can see it then at that point.

[Ari]: Yes. So basically that's summarized in putting aside the caveats that exist for this situation and in life generally: During the investigation if you're the respondent generally, you're not going to have access to the file. If a lawsuit was filed, you can seek to get access to it via a Freedom of Information Act request, which go to the office that you mentioned and that we you can, as a respondent, receive the records. Just they will be appropriately redacted in terms of correct information.

[Maureen]: Correct. Here's another thing that I just want to throw in there as well, because sometimes we get requests from other counsel saying like, can we have a copy of this investigation? If you're not representing, you're not getting. It's strictly...that FOIA or that Section 83 is strictly for only the parties to the charge, so only the charging party, the respondent and the respondent's counsel. So third party does not have access to those records at all.

[Ari]: Yes, really great point, Maureen. So I think we're ending our time together. Thank you again so much for joining us. This is the...these episodes are...just the value of them is immeasurable to our listeners and to employers. So thank you, Maureen. Before we break, I just wanted to ask, is there anything else that you think employers should know in terms of the investigation or anything else employers can do to help the investigation go smoothly?

[Maureen]: Again, all I can do is just reiterate. Please be cooperative with your investigator. Remember that they are neutral facts-finders that they're trying to put together evidence that either supports or does not support what the charging party is saying. And the gathering of that evidence is very helpful in making that decision, because, once again, a lot of times we think, oh, you know, maybe we need to see this. Maybe there is something there and there isn't anything there. And that's because we have access to those records and those documents to disprove what the charging party is saying. Sometimes it proves what the charging party is saying, but it is what it is.

[Ari]: Two sides to every coin, right?

[Maureen]: Yes, exactly. It is what it is. And I would rather have an employer who is being cooperative and providing that documentation. Then they have to get a subpoena or threaten somebody. I mean, nobody wants to be put in that position. I don't like to say "If you don't give it to me, I'm going to do an adverse inference or I'm going to subpoena those records."

[Ari]: Right.

[Maureen]: Or I'm going to come out on site and I'm going to look at all those records. I mean, you know, those are the big three when we don't have somebody who cooperates. Nobody wants to do that. So if we can address it at the beginning and give the investigator as much as you can to help prove your side, I think I think essentially that that bodes well on a lot of different levels. A, it shows that you're being cooperative. B, it may provide enough information for the investigator to close the case or C, it will provide information for us to move forward in the investigation, possibly with a cause finding. But it's a...again, I like to think of that as a learning experience. And I know that's sometimes a hard pill to swallow for employees or employers that, you know, we got nailed for something, but it can be a positive thing. And I'm going to leave it at this: I had a case a few years ago right before pandemic, where we found cause and it was because the company was overwhelmed. They were growing so quickly that a lot of stuff fell through the cracks. It wasn't like they were looking to be discriminatory, but they just could not keep up with what was going on with their company. And it's a show of good faith, we reached a settlement, a conciliation settlement. And that employer really took it to heart and really did use it as a learning experience because they were still expanding their business and they were buying another business, too, that

was going to expand. So this was really...it was becoming very big. I'll never forget that the...one of the owners called me and said, "Hey, Maureen, I know that nobody's officially finished signing off on this agreement, but I'm sending a check to this charging party and this charging party because it's three weeks before Christmas. And I think they could really use that money." I mean, I was totally blown away because you know what? Although I found cause they recognized, hey, this is really an issue we need to address, especially if we're going to expand our business. And I want to do something that's a goodwill gesture that sends a message to the EEOC and to my employees that I take this really seriously and we're not going to have this issue anymore because we're going to address this. I mean, that's a positive outcome for everybody. And again, in my career, I will always, always, always remember that call because that's what makes doing our job rewarding is that; that everybody wins and that to me, that's a win for both sides.

[Ari]: Yes. I think that's a great note to end on, Maureen. And I think everything...you've given us such a great insight, especially for employers, is in terms of being cooperative, trying not to be suspicious and just trying to, you know, resolve the charge and move forward. So thank you again so much for your time and to our listeners, next week, we will tell you what you need to know about federal discrimination lawsuit. So this is a great segue into that topic. And if you have faced a lawsuit, if you're an employer, if you've been, you know, the subject of a discrimination claim, you definitely don't want to miss it. Thanks again, Maureen.

[Maureen]: Thank you. It's been a pleasure. Just a pleasure. And again, let me just reiterate, I'm always available. So if there are any questions, don't hesitate to contact us. We're happy to help.

[Ari]: Absolutely. Thanks so much, Maureen.

[Maureen]: Okay, take care.

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