

> Client Alert

Employers Beware: EEOC Resumes Issuance of Notices of Right to Sue Following COVID-19 Related Pause

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On August 3, 2020, the U.S. Equal Employment Opportunity Commission ("EEOC") announced that it would begin, once again, issuing statutory "Notice of Right to Sue" letters in connection with charges of employment discrimination filed with the agency, after having held the issuance of such Notices in abeyance since March 21, 2020, due to COVID-19 related concerns such as physical closure of offices, inability of staff to access hard copy file documents, etc.. The lull in commencement of federal employment discrimination actions based on the issuance of Notices of Right to Sue is thus over and employers may expect a flurry of complaints to be filed in the United States District Courts alleging violations of Title VII of the Civil Rights Act of 1964, as amended ("Title VII") or the Americans with Disabilities Act, as amended ("ADA"). Claims under the Age Discrimination in Employment Act of 1967, as amended ("ADEA") do not require a Notice of Right to Sue to commence a formal lawsuit.

By way of background, the EEOC has a longstanding work sharing agreement with state and local agencies with analogous functions to the EEOC, i.e., the investigation and remediation of claims of employment discrimination. Under this work sharing agreement, only one agency in any jurisdiction will actually conduct a formal investigation of these claims and the other agencies will "accord substantial weight" to those findings and, except in rare instances, adopt such findings as their own. Thus, by way of example, in New York State, in addition to the EEOC, claims may be filed with either the New York State Division of Human Rights ("SDHR") or the New York City Commission on Human Rights ("CHR"), each of which is empowered to investigate claims under their own similar statutory scheme. The SDHR and the CHR are both referred to as "deferral agencies" because some charges filed with the EEOC are deferred to another agency for processing and investigation. Other states have their own deferral agencies which perform similar functions.

When an agency has concluded its investigation (or where a claimant expressly requests the agency to cease its processing of the claim), the EEOC upon the closure of its file, whether based on its own investigation or one of a deferral agency to which it accords substantial weight, issues a Notice of Rights which includes an express right to sue in court. The Notice of Right to Sue is issued in all case closures, regardless of whether based on (i) a finding of reasonable cause to believe that a violation of law has occurred (followed by a failure on the agency's part successfully to conciliate the case), (ii) the EEOC's conclusion that the information obtained in connection with a claimant's charge of discrimination

does not establish a violation of law, or (iii) the claimant's request that the agency cease processing the claim so that a lawsuit may be commenced. Issuance of a Notice of Right to Sue entitles the claimant to commence an action in federal (or state) court alleging violations of those federal anti-discrimination statutes noted above. The action must be brought within 90 days of receipt or the right to sue on those claims which were the subject of the prior administrative filing will be lost forever.

In its press release, the EEOC explained that it was resuming its process after recognizing that "further delays in issuing charge closure documents could negatively impact both parties' ability to protect and exercise their rights effectively." It further stated that agency managers and supervisors have already commenced review of charge resolution recommendations and that Notices of Right to Sue will begin to be issued for both charges that were held in suspense, as well as for charge resolutions that occur on and after August 3, 2020. Notices of Right to Sue that were held in suspense will be mailed out over the next six to eight weeks, beginning with those pending the longest. Employers and their counsel should therefore be prepared for the impending flurry of employment discrimination lawsuits filed as these previously delayed notices are issued.

The Morrison Cohen LLP Labor & Employment team is here to help employers navigate the effective defense of federal, state, and local employment discrimination charges as well as agency investigations of those charges, and to anticipate new lawsuits filed as a result of the EEOC's resumption of the issuance of Notice of Right to Sue letters.