

## EMPLOYMENT TESTS AND PERSONNEL SELECTION 2014 YEAR-END CASE LAW UPDATE

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### IS THE SUBPOENA TIDE CHANGING? POTENTIAL OPTIMISM FOR 2015

We decided to devote this year-end update on the topic of subpoena enforcement. Few things are as concerning to an employer as a government investigation, particularly one with a broad focus. With the government focused on employment tests and personnel-selection procedures, a key issue is dealing with the scope of the investigation. The government, not surprisingly, usually takes a quite broad view of its investigatory authority. The government frequently takes an individual Charge of Discrimination on a topic of interest, like testing, and uses it to initiate a full-scale, employer-wide investigation—often involving areas unrelated to the Charge.

For the past few years, as it has focused its attention on systemic discrimination, the EEOC has launched numerous investigations into employee-selection processes, including employment tests, background checks, and drug testing. In recent years, companies have been largely unable to resist burdensome subpoenas successfully, with courts often “rubber-stamping” EEOC subpoenas under the guise of deference to the agency’s interpretation of relevance. In the closing months of 2014, however, a few court decisions provide cautious optimism for potential relief heading into 2015. In November, the Eleventh Circuit affirmed a decision refusing to enforce an EEOC subpoena, and its opinion (recently adopted by another court) rejects many of the arguments frequently used by the EEOC to justify its expansive—and often abusive—approach to investigations.

### ***EEOC v. Royal Caribbean Cruises, LTD*, 771 F.3d 757 (11th Cir. 2014)**

In *Royal Caribbean Cruises*, a foreign national filed a Charge of Discrimination under the Americans with Disabilities Act (“ADA”) when the cruise liner refused to renew his employment contract after he was diagnosed with HIV and Kaposi Sarcoma. The employee had been declared fit for duty, but the company argued in its position statement that the ADA did not apply, and that it was required to follow the Bahamas Maritime Authority’s medical standards, which allegedly disqualified the individual from duty. In its investigation, the EEOC sought company-wide information regarding all employees discharged for medical reasons. When the company refused to comply, the EEOC initiated an action to enforce its subpoena. The District Court denied the application, concluding that the information sought was (1) not relevant to its investigation into an individual charge of discrimination, and (2) unduly burdensome. The Eleventh Circuit agreed, and its opinion—which has already been cited by at least one District Court to deny subpoena enforcement—is a welcome citation for employers everywhere.

## Relevance

The EEOC and NLRB take the position that courts must defer to their respective interpretations of what is relevant. This approach has been relatively successful, with some courts openly questioning the relevance and burden of subpoenas, but approving them anyway and lamenting that they feel obligated to give them the “rubber stamp.” See, e.g., *N.L.R.B. v. UPMC Presbyterian Shadyside*, 2014 WL 4348180, at \*5 (W.D. Pa. Sept. 2, 2014) (“[T]he practical effect of case law as to enforcement of subpoenas of federal government agencies is that this Court is constrained to essentially ‘rubber stamp’ the enforcement of the Subpoenas at hand.”). The EEOC also argues that it has the right to expand investigations beyond the individual to uncover other potential violations and victims of discrimination. While the EEOC’s ability to venture into other categories of discrimination has generally been blocked, the EEOC has had success expanding its investigation employer-wide to others potentially affected by the same type of discrimination. In *Royal Caribbean Cruises*, however, the Eleventh Circuit stated, “[w]e do not construe the relevancy standard so broadly.” In steadfastly tying the relevance requirement to the individual charge, the Court continued:

The relevance that is necessary to support a subpoena for the investigation of an individual charge is relevance to the contested issues that must be decided to resolve that charge, not relevance of issues that may be contested when and if future charges are brought by others.

*Id.* at 761. Because the employer conceded that it terminated the charging party because of his medical condition, “whether it refused to renew other employee’s contracts for the same reason is irrelevant.” *Id.* Employers should consider, in appropriate cases, whether it makes more sense to focus on other potential defenses, and limit an investigation, rather than contest the reason for an adverse employment decision and give the government grounds for a broader pretext inquiry.

## Burden

Courts often limit the scope of discovery based on the burdens involved in compiling the information. In investigations, however, the government has been relatively successful serving massive requests for information regardless of cost. The government argues that an employer must comply unless it can demonstrate that the production would disrupt “its normal business operations.” *Id.* at 763. In *Royal Caribbean Cruises*, the EEOC argued that the costly production would not disrupt the business operations of a “multi-billion dollar business.” *Id.* The Eleventh Circuit rejected the EEOC’s “rigid rule,” and adopted a flexible cost-benefit analysis more in line with traditional discovery principles. According to the Court, because the relevance of the information was low, the level of burden required to avoid production was lower. This is a very important conclusion for employers faced with extensive requests for information.

Potentially even more important, the Eleventh Circuit held that it was appropriate for the District Court to consider potential defenses available in the litigation. The government routinely takes the position that a court is prohibited from evaluating potential defenses in summary subpoena-enforcement actions. According to the Eleventh Circuit, however, the potential argument that the ADA did not apply was a relevant consideration “in weighing the potential benefits and hardships of enforcing the EEOC’s wide-ranging subpoena in this case.” *Id.* at 763.

## More decisions coming?

Citing the Eleventh Circuit’s decision, a District Court in Indiana similarly denied an EEOC application to enforce a broad subpoena. See *EEOC v. Forge Industrial Staffing Inc.*, 2014 WL 6673574 (S.D. Ind. Nov. 24,

2014). Like the Eleventh Circuit, the Court held that the EEOC's broader mandate to promote non-discrimination did not permit the agency to seek employer-wide information based on an individual Charge of Discrimination. *Id.* at \*4. Like the Eleventh Circuit, the Court rejected the "threatens-the-normal-operation-of-its-business" burden standard in favor of a far more flexible cost-benefit analysis. *Id.* Let's hope for more in 2015.

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