

A large graphic on the left side of the slide, consisting of a dark blue horizontal bar. Overlapping this bar is a complex geometric shape made of several triangles in various shades of blue and green. The shape is roughly arrow-like, pointing to the right.

## Breakfast Briefing: Year in Review and Crystal Ball Predictions for 2018



# What to Expect from OSHA in 2018

# 2017 RE-CAP

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- 2017 was a strange year for OSHA
- Dr. David Michaels and OSHA's Senior management quit in November, 2016
- Agency has been headless for entire year
- Agency originally paralyzed
  - No press releases
  - Rulemaking delayed
  - Significant cases froze without leadership
- Largely reverted back to normal business operations by mid-year





# Looking Ahead To 2018



## New Head of OSHA

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- Scott Mugno is (likely) taking over as head of OSHA
- VP of Safety for FedEx
- Understands safety challenges from business view point
- Unknown agenda but expected to bring back cooperative compliance emphasis
- Unclear how he will approach enforcement, but confirmation testimony suggests he may continue aggressive enforcement
- (Note: at its core, OSHA remains an enforcement agency)

# Continued Aggressive Enforcement

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- Irrespective of Mugno's appointment we expect to see continued aggressive enforcement in 2018
- Will likely take Mugno a year to get people and policies in place even if he wants to re-focus away from enforcement
- Eight years of enforcement emphasis is now baked into the system:
  - Revised Penalty Policy
  - Emphasis on Repeat Citations
  - Issuance of Revised Recordkeeping Rules
  - Non-English Speaking Employees
  - Enhanced use of General Duty Clause Citations
  - Revised Rules on Fall Protection – Walking/Working Surfaces
  - Serious Injury Reporting
  - Explosion of Whistleblower Investigations



# Revised Penalty Structure

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- OSHA penalties increased to Consumer Price Index (CPI)

	<u>Prior Maximum</u>	<u>January 1, 2017</u>
• Other Than Serious	\$7,000	\$12,675
• Serious	\$7,000	\$12,675
• Willful	\$70,000	\$126,749
• Repeat	\$70,000	\$126,749

- Will be revised every following year

# Repeat Citations

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- OSHA has greatly expanded the use of repeat citations
- Penalties increased substantially
- Easy for OSHA to use prior citations against an employer
  - Know your OSHA history
- The frequency of large six figure repeat citations has expanded greatly





# Revised Recordkeeping Rule

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- Major revision of Recordkeeping Rule
- Further evidence of aggressive enforcement
- For first time certain employers are required to file OSHA Injury and Illness documentation directly with OSHA in electronic format – **December 15, 2017 deadline for 300A's**
  - More than 250 employees at any facility
  - Employers in certain high hazard industries



# Revised Recordkeeping Rule

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Contains anti-retaliation provisions regarding employer policies on:

- Requirement to timely report injuries or illnesses to employer
  - OSHA believes “immediate” reporting requirement is retaliatory
- Post-accident mandatory drug and alcohol testing
  - OSHA believes the accident must be “reasonably related” to drug/alcohol use otherwise it is retaliatory.



# Native Language Requirements



- All training must be given in a language that the employee understands
- Certain OSHA regulations require “training”, others require Employer to prove training was “effective” or “understood”
- OSHA looks at how employer provides work instructions to employees and whether it is different than safety training (e.g. safety training in English but supervisor gives work instructions in Spanish)
- OSHA interviews employees to determine whether they understand English only training (e.g. if employee cannot speak English but all training documents are English only)
- Bilingual trainers and documentation may be required to prove training was compliant
- OSHA has been aggressively citing training violations and we expect this to continue in 2018

# Aggressive Enforcement

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## Enhanced Use of General Duty Clause

- Combustible Dust
- Ergonomics
- Workplace Violence
- Heat Illness/Cold Exposure



# Revised Walking-Working Surface Standard – Fall Protection

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- Revised standard became effective January 17, 2017 with phased in dates for specific hazards
- Standard is now fully in effect and OSHA is enforcing it
- Changes rules for fall hazards and hazards related to walking-working surfaces
- Expect OSHA to cite for violations of the new standard
- Employers should review new rule to ensure compliance

# Serious Injury/Fatality Reporting Obligations

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- All fatalities, including those caused by heart attack, must be reported to OSHA within 8 hours. State Plans can be more restrictive
- All workplace incidents that result in hospitalization for treatment, an amputation or loss of any eye must be reported to OSHA within 24 hours of the incident. State Plans can be more restrictive
  - OSHA must investigate
  - May result in on-site or rapid response investigation request
    - Be careful not to make admissions
  - Failure to report is an automatic \$5,000 penalty

# Whistleblower Laws

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- Have seen an explosion of whistleblower claims under both federal and state law
- Potential employer liability if:
  - Employee engages in “Protected Activity” (e.g., makes complaint to supervisor), and
  - Employee Suffers “Adverse Action” (e.g., termination, discipline, loss of benefits), and
  - Employer takes Adverse Action and Retaliates against Employee because of Protected Activity
- Recent highly public whistleblower cases (Weinstein, Lauer, etc...) have emboldened employees to claim whistleblower status
- OSHA investigates whistleblower claims brought under 22 separate statutes (e.g. DOT, FAA, environmental, safety, FDA)

# How to Reduce the Risk of OSHA Citations

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## Take Away:

- Focus on hazards that are at core of your business
- Focus on hazards that are driving your OSHA recordables
- Review OSHA 300 logs and workers compensation runs to see what is driving workplace injuries





# EEOC Initiated Litigation

# What We Will Cover

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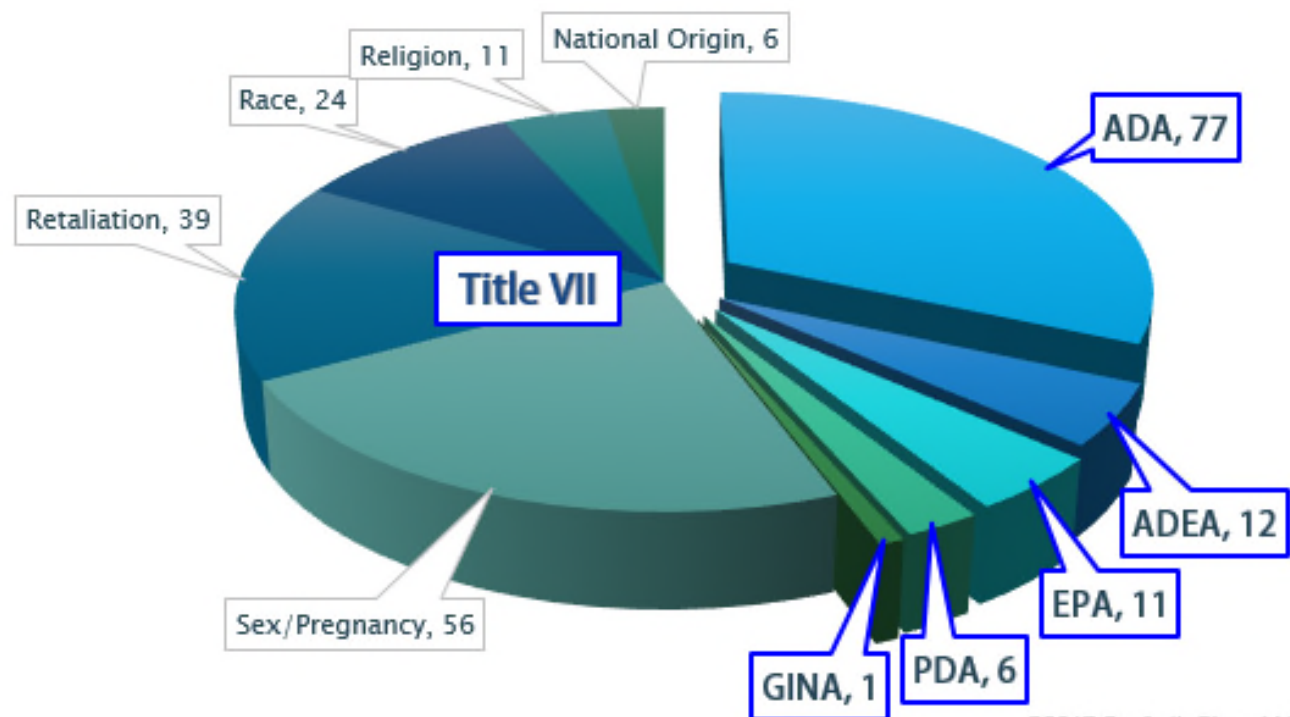
- 1** Important EEOC Litigation Statistics
- 2** EEOC Outreach Highlights
- 3** Focus By The EEOC On LGBTQ Protections
- 4** Looking Ahead to 2018

# FY 2017 EEOC Litigation Statistics – Filings

What types of cases are being filed?

- According to the Seyfarth EEOC Tracker, Title VII and ADA led the pack
- Within Title VII, sex discrimination and retaliation were highest on the agenda

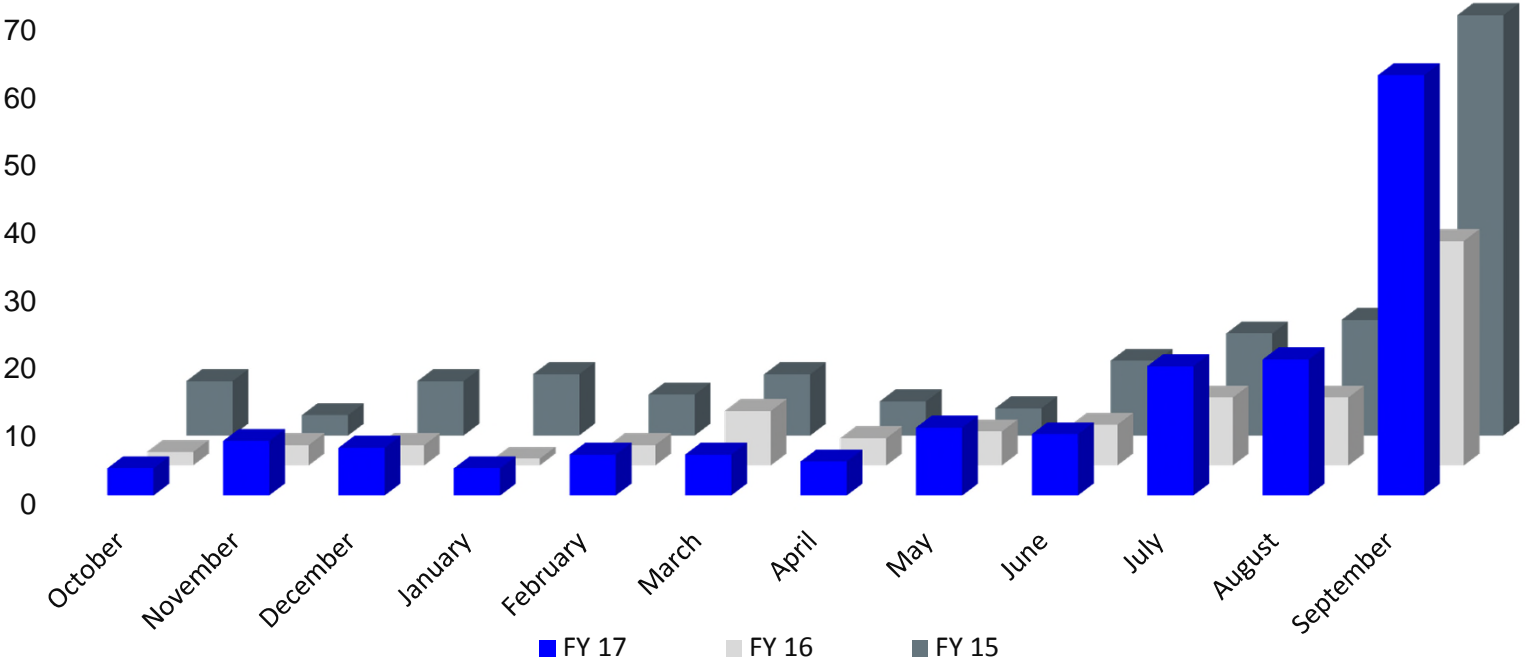
Filings By Statute FY 2017



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# FY 2017 EEOC Litigation Statistics – Filings By Month

Cases Filed By Month FY 2015 – 2017



# FY 2017 EEOC Litigation Statistics – Filings

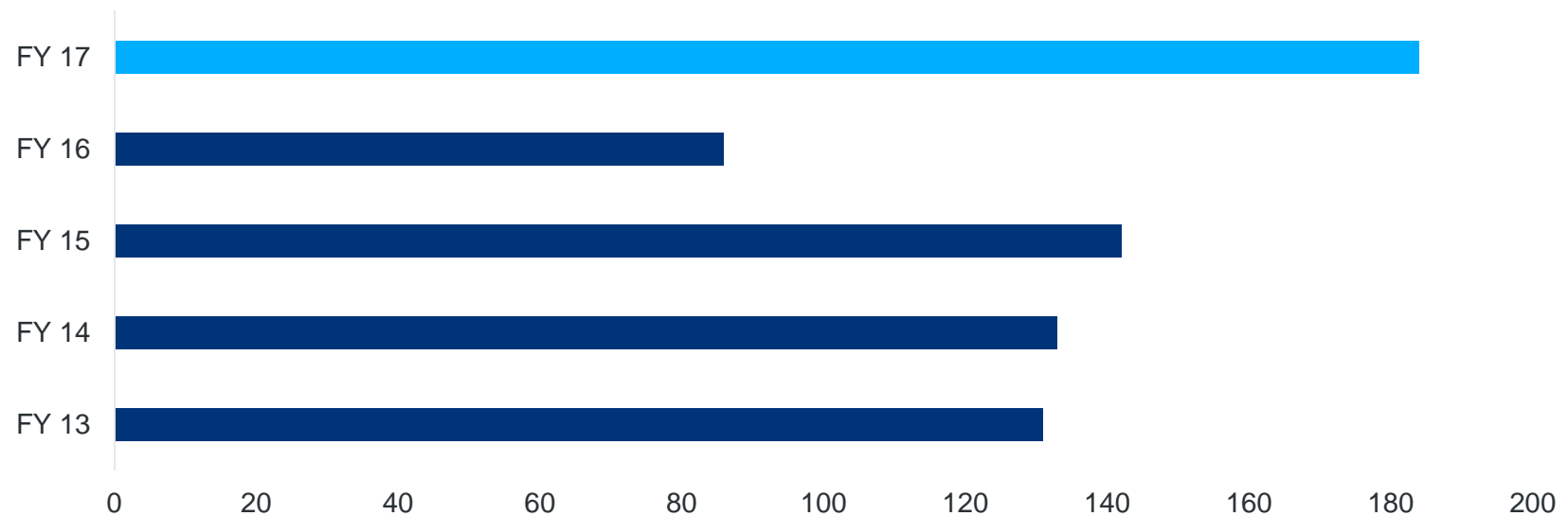


# FY 2017 EEOC Litigation Statistics – Filings

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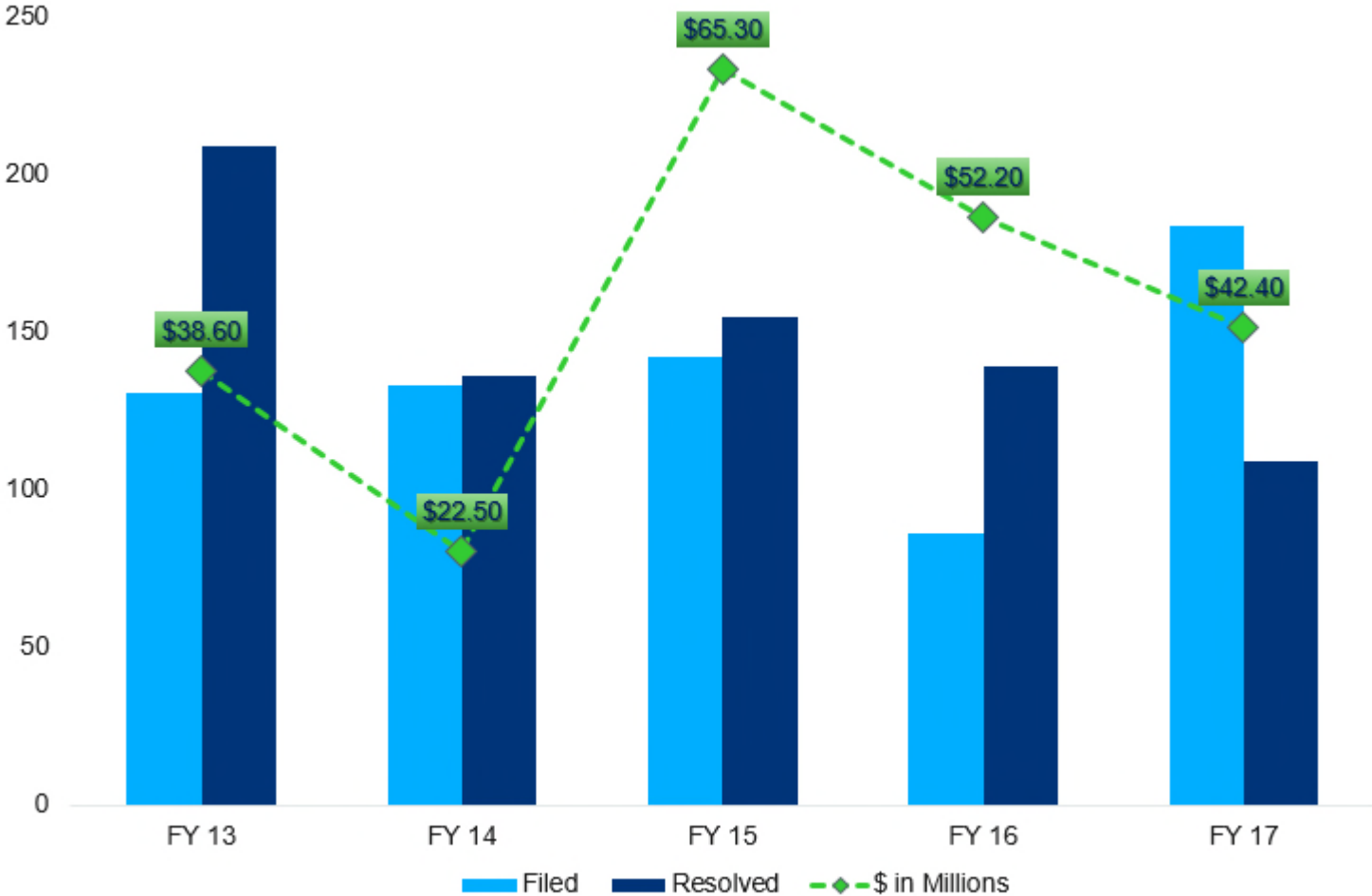
- **184** merits lawsuits filed in FY 2017
  - 86 filed in FY 2016
  - 142 filed in FY 2015
  - 133 filed in FY 2014
  - 131 filed in FY 2013

Merit Cases Filed FY 2013 - 2017



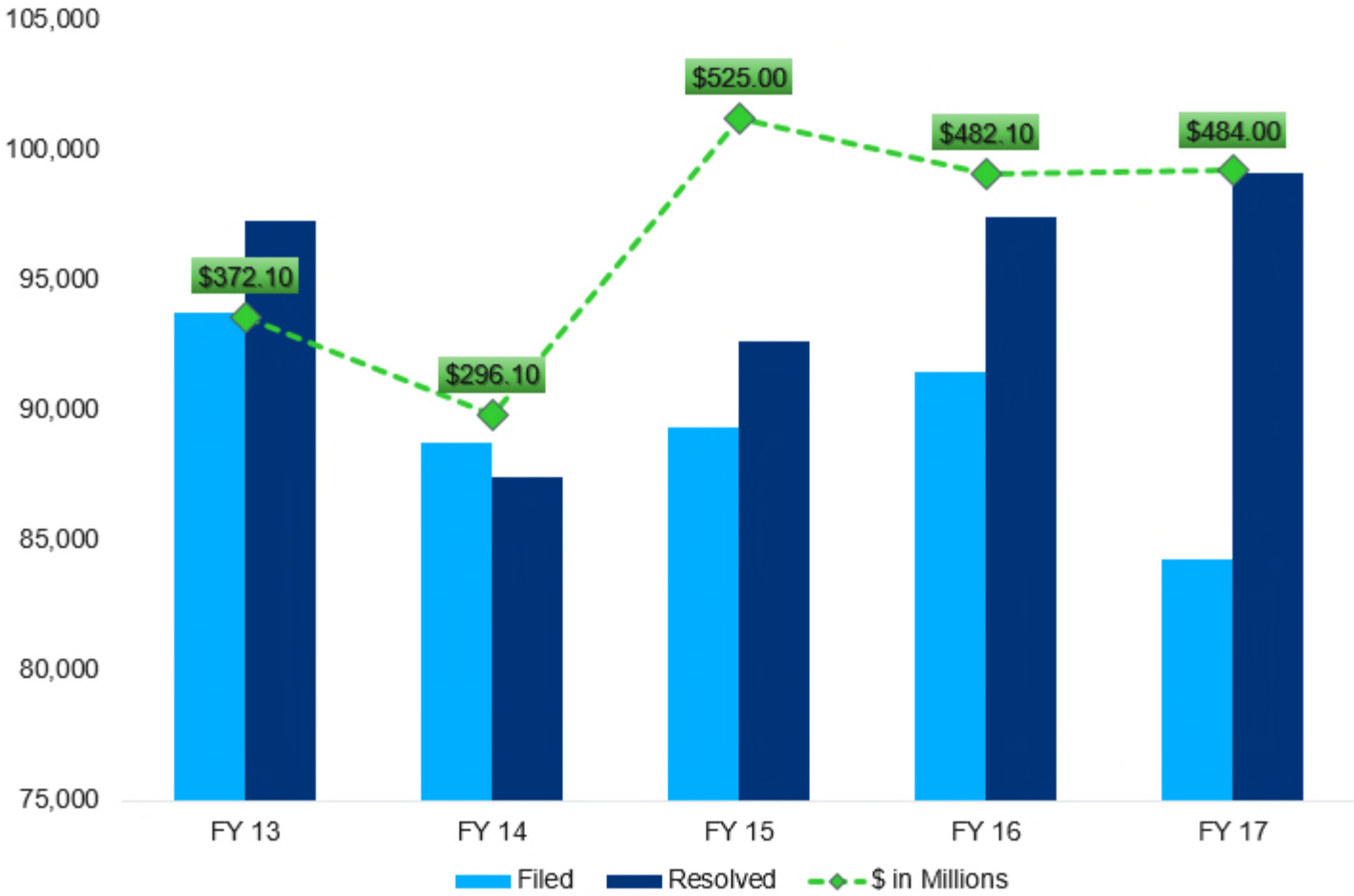
# FY 2017 EEOC Litigation Statistics – Filings

EEOC Merit Filings: Filed vs. Resolved with Settlement Dollars (in millions)



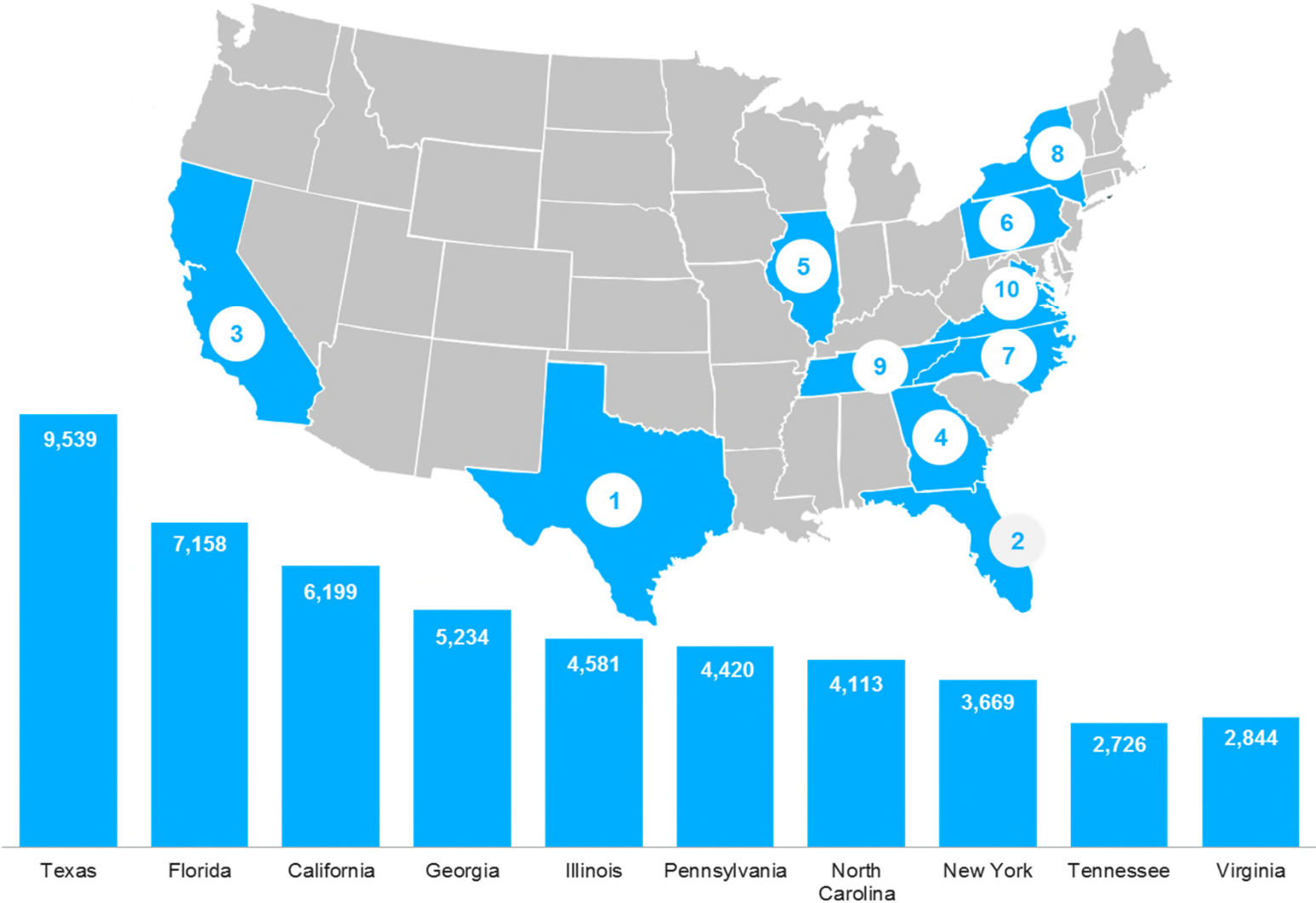
# FY 2017 EEOC Litigation Statistics – Charges

EEOC Charges: Filed vs. Resolved with Settlement Dollars (in millions)



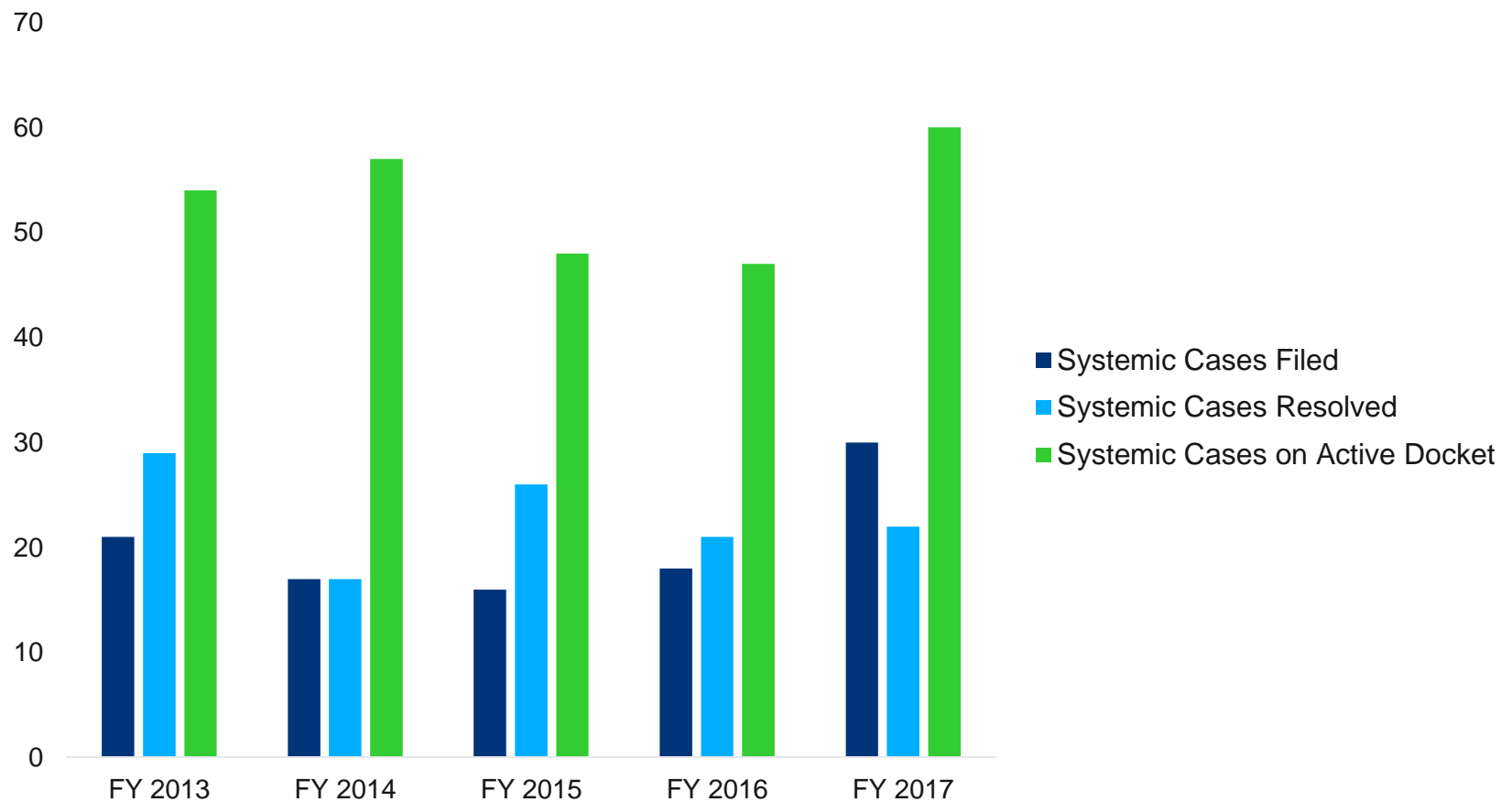


# FY 2016 Charges Filed By State – Top 10



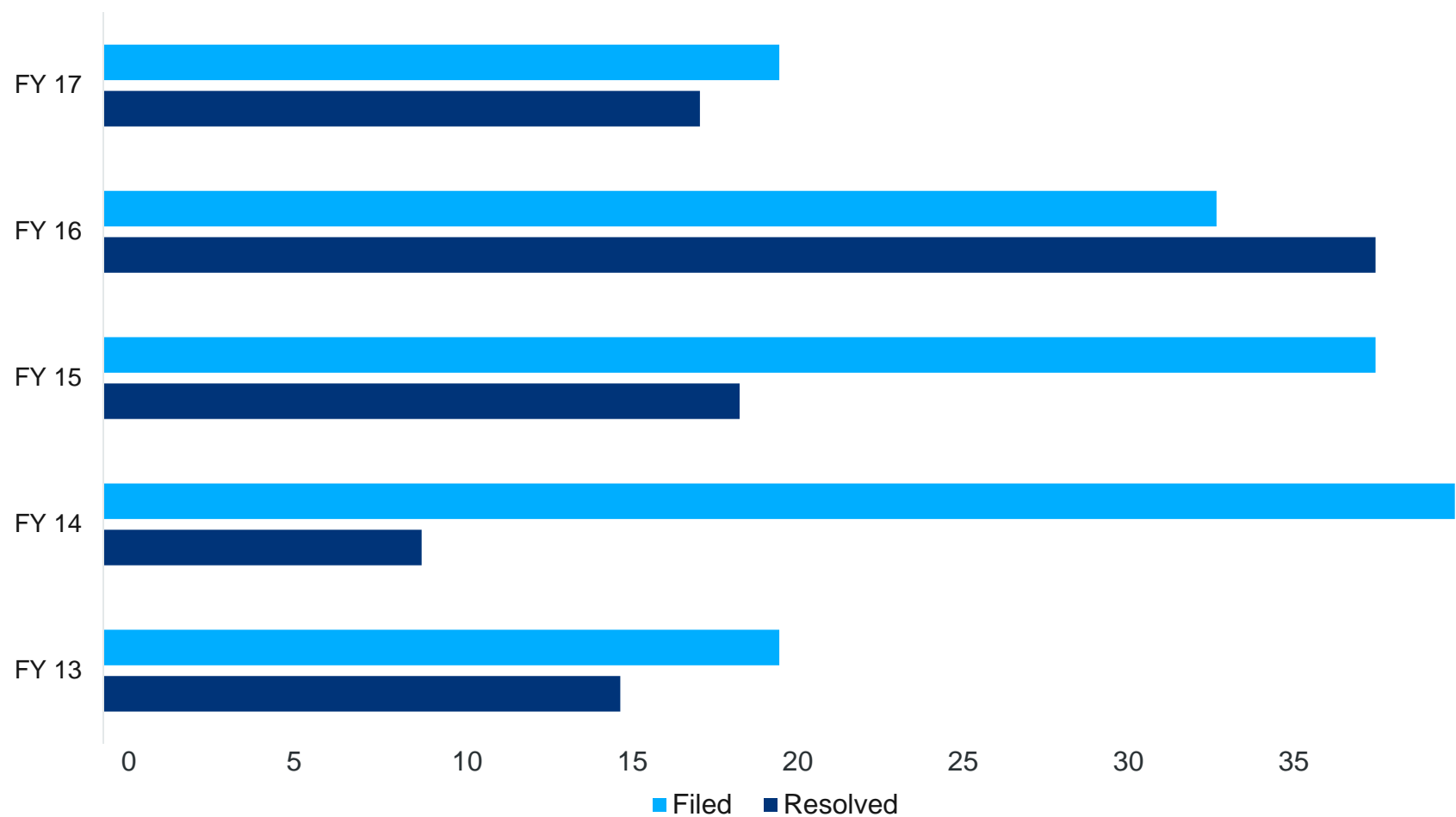
# FY 2017 EEOC Litigation Statistics – Systemic Cases

EEOC Systemic Cases: Filed, Resolved, & On Active Docket  
FY 2013 - 2017



# FY 2017 EEOC Litigation Statistics – Subpoena Actions

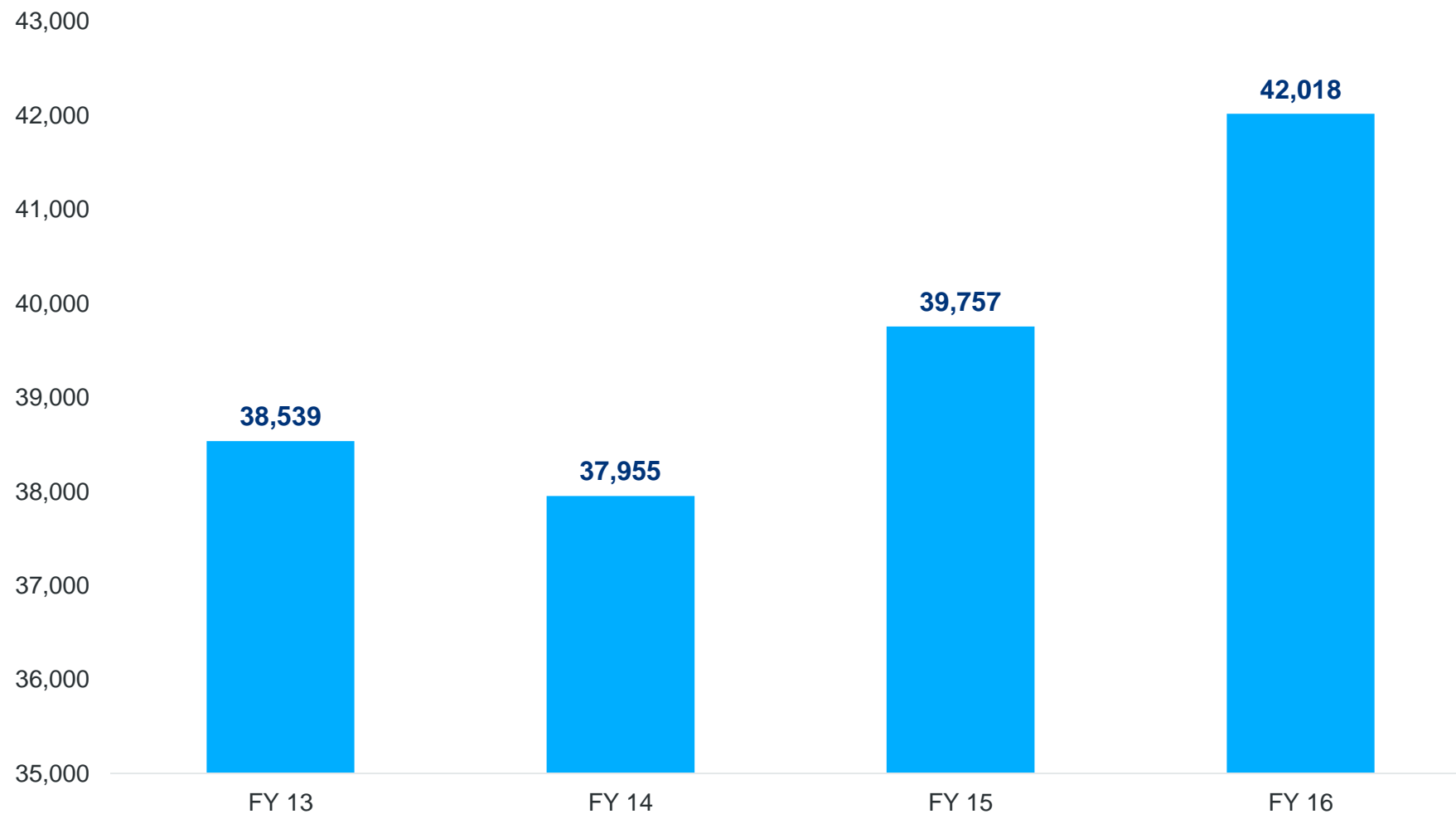
Subpoena Actions FY 2013 - 2017



# FY 2017 EEOC Litigation Statistics – Retaliation Charges

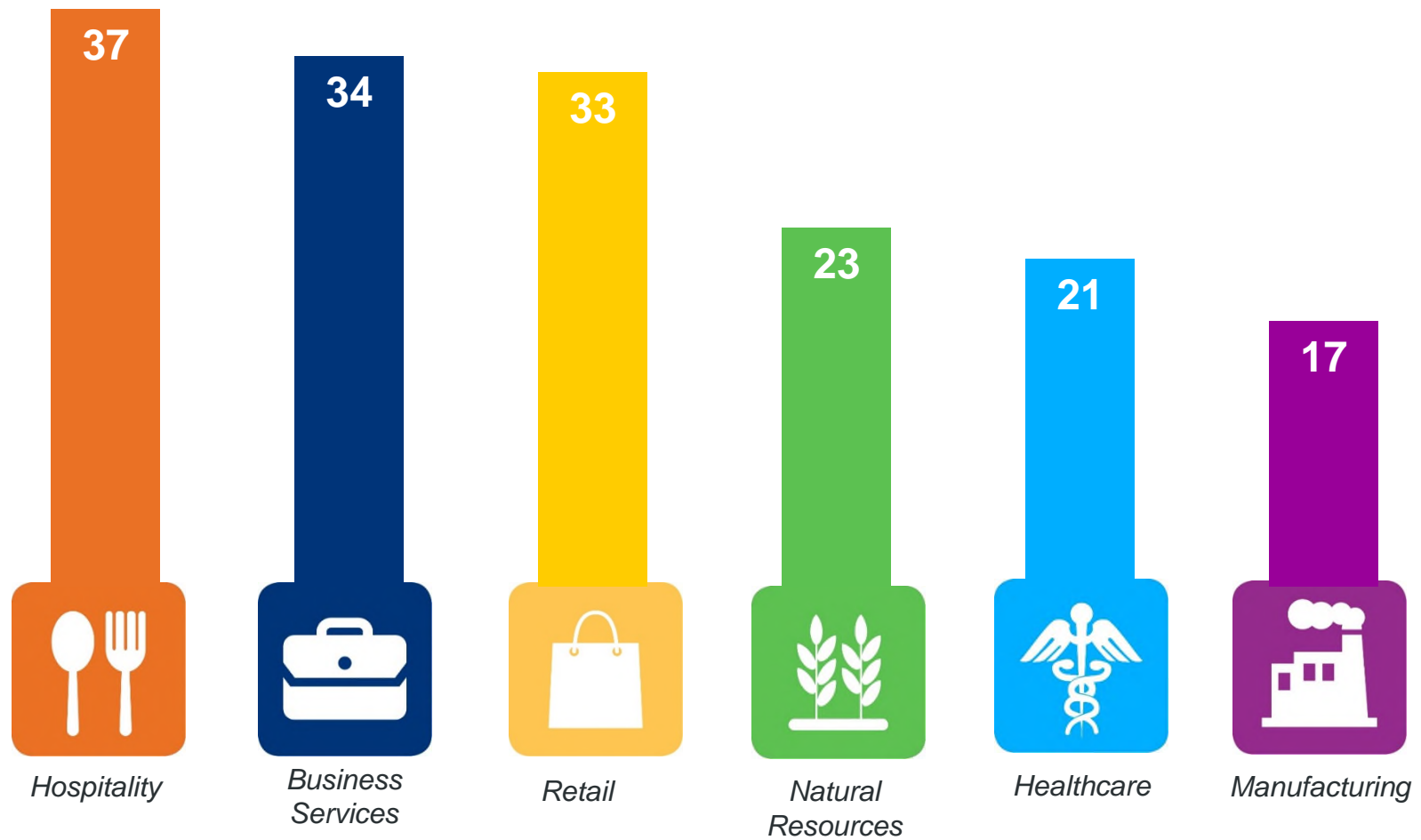
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FY 2013 – 2016 Retaliation Charges



# Industries Targeted By The EEOC

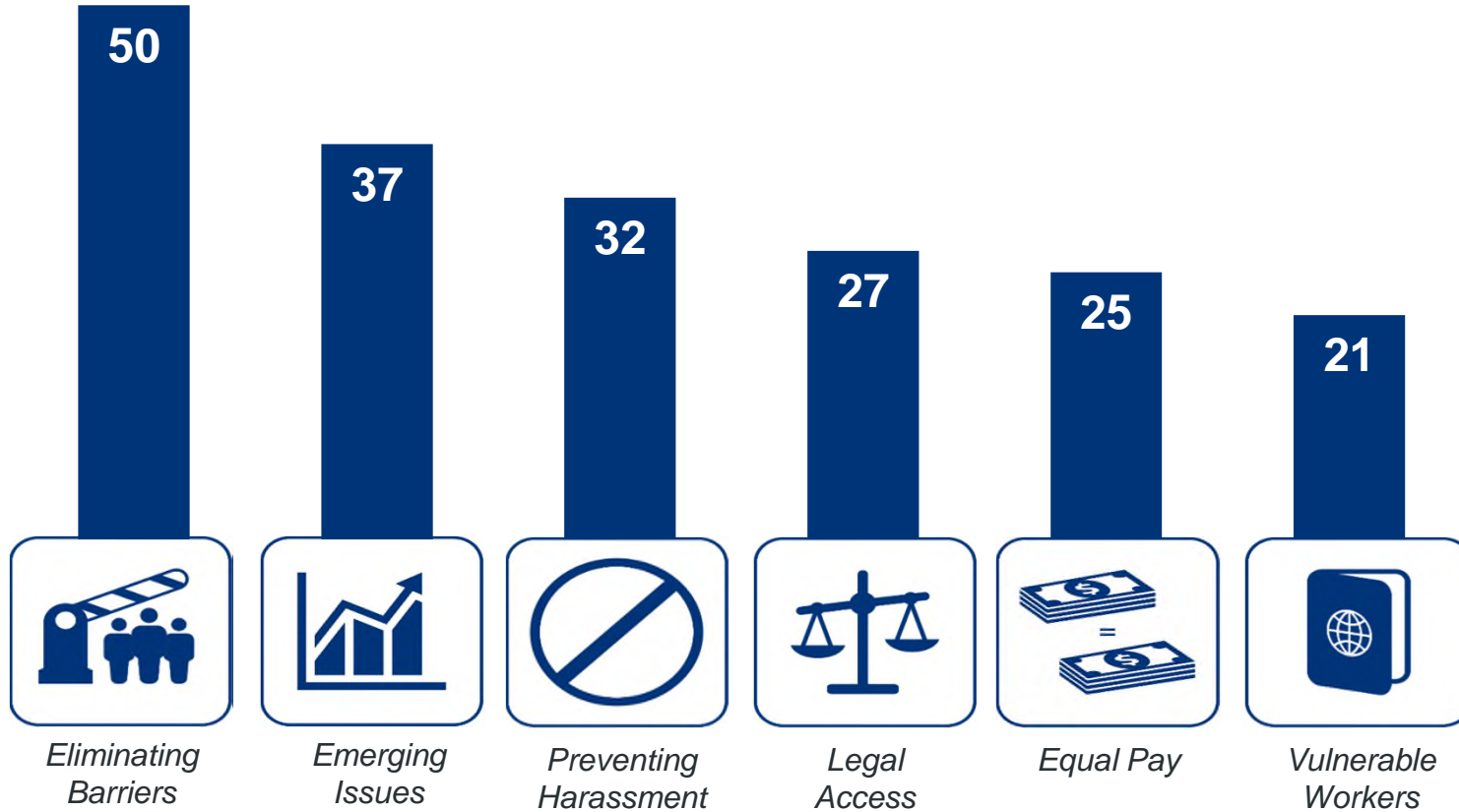
EEOC Lawsuits Filed By Industry FY 2017



# EEOC's Strategic Priorities

The EEOC's 2017 SEP Initiatives

EEOC Cases Filed By SEP Priority FY 2013 - 2017



# EEOC Outreach Highlights

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- In FY 2017, the EEOC reaffirmed its commitment to protecting vulnerable workers through community outreach and education.
- The agency began partnerships within vulnerable and underserved communities in 2012, when 90 such partnerships were established.
- Over the last three Fiscal Years, that number has continued to grow, reaching its current status of **165 active partnerships**. That number is up from 130 in FY 2015 and 140 in FY 2016.



# EEOC Outreach Breakdown FY 2015 - 2017

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2015

More than  
**3,700**  
events

**336,885**  
workers  
reached

2016

More than  
**3,600**  
events

**316,245**  
workers  
reached

2017

More than  
**4,000**  
events

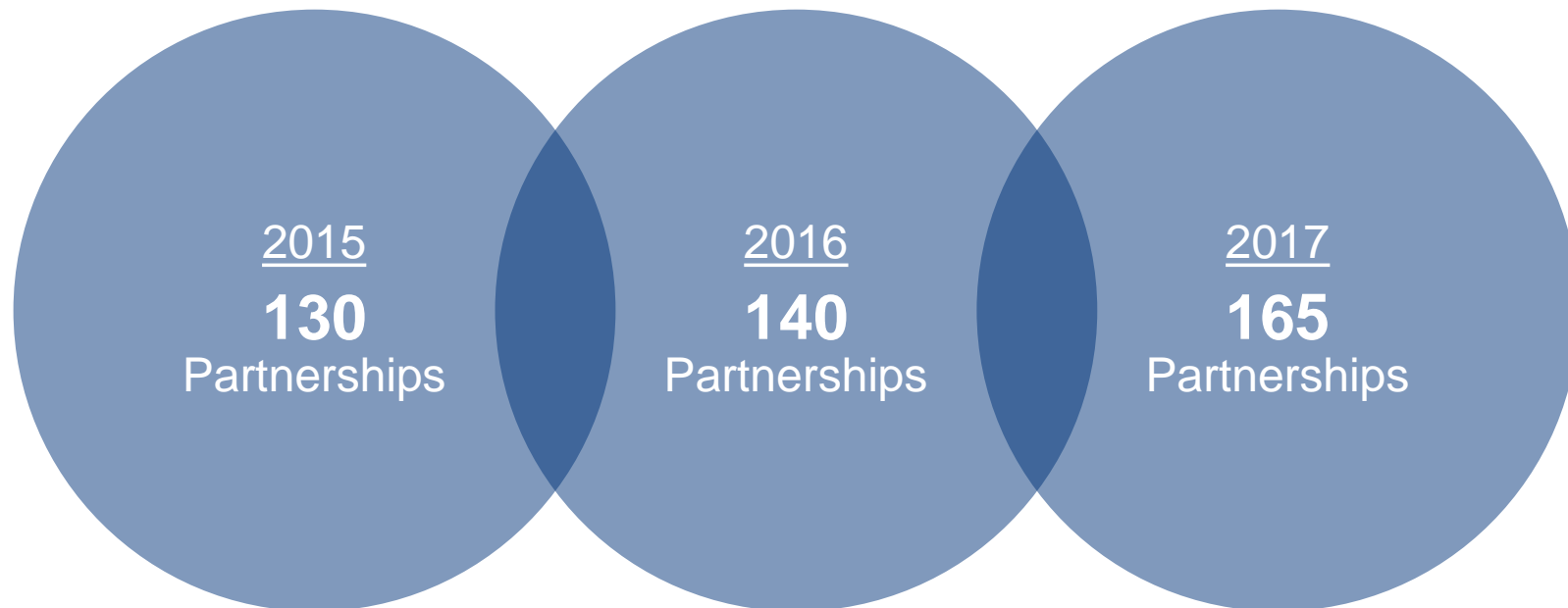
**317,239**  
workers  
reached



# EEOC Outreach Highlights – Vulnerable Workers

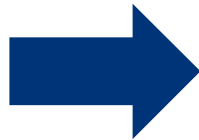
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EEOC Partnerships With Organizations  
Representing Vulnerable Workers



# Focus By The EEOC On LGBTQ Protections

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**7th circuit** opinion in *Hively*: “Person who alleges that she experienced employment discrimination on basis of her sexual orientation has put forth case of sex discrimination for Title VII purposes.”



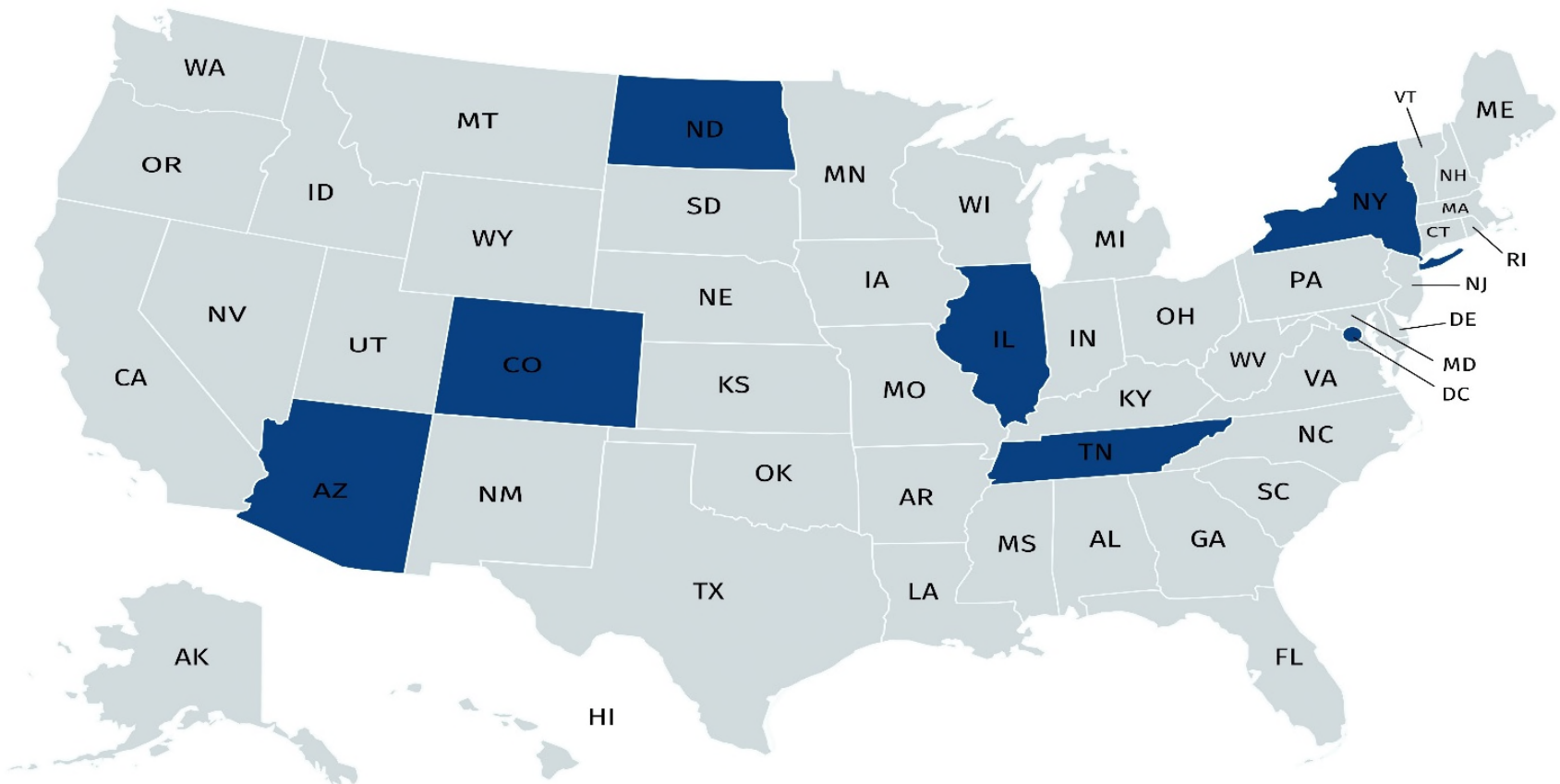
“**EEOC** interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation.”



"The sole question here is whether, as a matter of law, Title VII reaches sexual orientation discrimination. It does not, as has been settled for decades. Any efforts to amend Title VII's scope should be directed to Congress rather than the courts,"- **DOJ** amicus brief.

# Focus By The EEOC On LGBTQ Protections

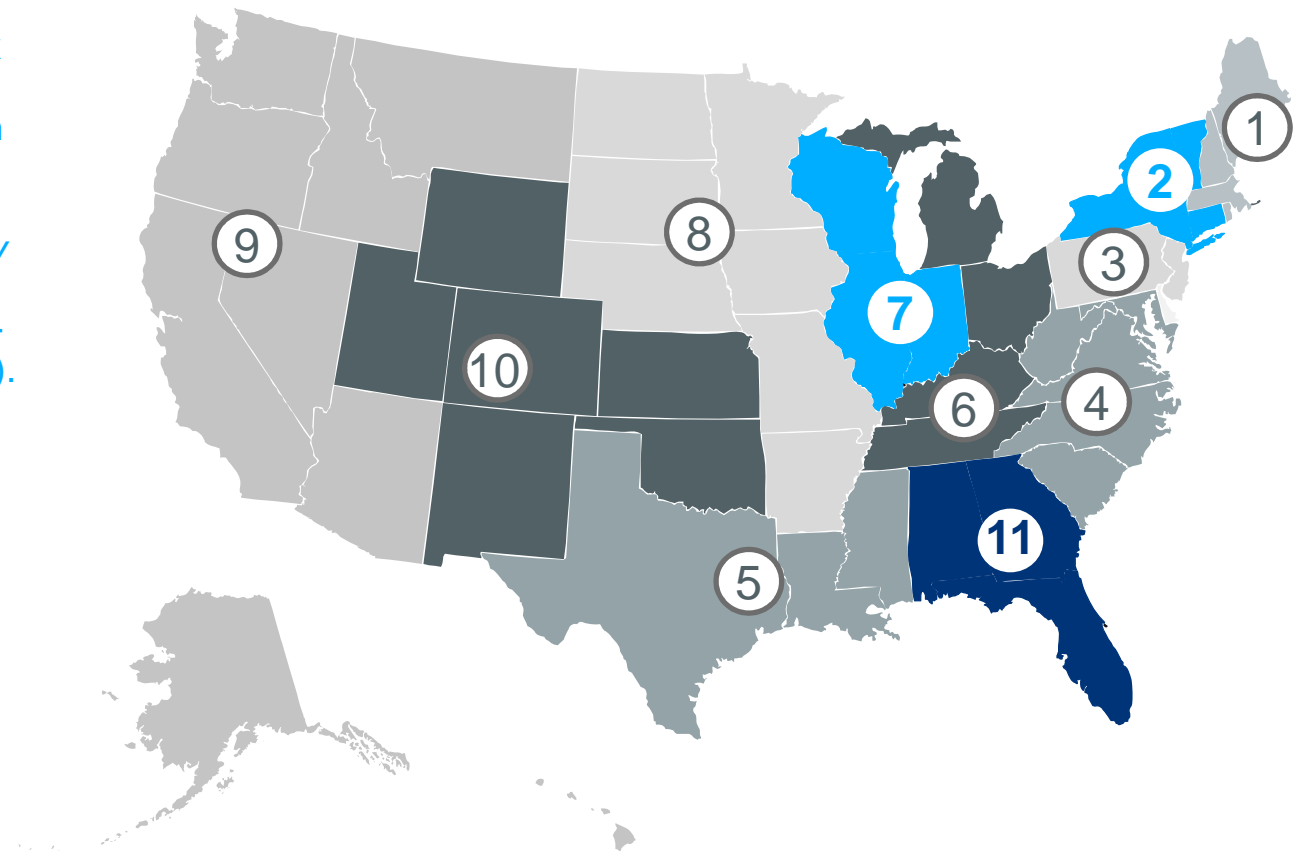
- In FY 2017, the EEOC filed merit cases involving LGBTQ discrimination in these 6 states & the District of Columbia.



# Focus By The EEOC On LGBTQ Protections

- The **2<sup>nd</sup> & 7<sup>th</sup> Circuits** agreed with the EEOC's position, ruling that sexual orientation **is** a form of sex discrimination entitled to protection under Title VII in *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 203 (2d Cir. 2017) & *Hively v. Ivy Tech Community College of Indiana*, No. 15-1720 (7th Cir. Apr. 4, 2017).
- In *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1250 (11th Cir. 2017), the **11<sup>th</sup> Circuit** ruled that sexual orientation **is not** a form of sex discrimination entitled to protection under Title VII.

Circuit Court Decisions On Sexual Orientation As A Protected Category Under Title VII



# Important Tips For Employers – Conciliation

## How Long Is Conciliation Likely To Last?

You've just received a letter of determination. How long can you expect the EEOC to engage in conciliation?

First Month						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

Second Month						
S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

Third Month						
S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

The median time spent by EEOC to conciliate a charge before sending notice that conciliation has failed is **72 days**.

# Important Tips For Employers – Conciliation

In most cases, conciliation ends in 3 months or less—sometimes faster.



For **12%**,  
conciliation ends in  
1 month or less.



For **43%**,  
conciliation ends in  
2 months or less.



For **62%**,  
conciliation ends in  
3 months or less.

# Important Tips For Employers – Conciliation

After that, the time frames become more variable.

## 6 DAYS

				1	2	3
<del>4</del>	<del>5</del>	<del>6</del>	<del>7</del>	<del>8</del>	<del>9</del>	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

The shortest conciliation  
in our analysis

## 819 DAYS

<del>695</del>	<del>696</del>	<del>697</del>	<del>698</del>	<del>699</del>	<del>700</del>	<del>701</del>
<del>791</del>	<del>792</del>	<del>793</del>	<del>794</del>	<del>795</del>	<del>796</del>	<del>797</del>
<del>798</del>	<del>800</del>	<del>801</del>	<del>802</del>	<del>803</del>	<del>804</del>	<del>805</del>
<del>806</del>	<del>807</del>	<del>808</del>	<del>809</del>	<del>810</del>	<del>811</del>	<del>812</del>
<del>813</del>	<del>814</del>	<del>815</del>	<del>816</del>	<del>817</del>	<del>818</del>	819

The longest conciliation  
in our analysis

## Looking Ahead to 2018

- Major political implications with Trump Administration's changes soon coming into effect
- New EEOC Leadership
  - Janet Dhillon & Daniel Gade awaiting Senate appointment





## Looking Ahead to 2018

- Anticipation for charge and filing numbers to decrease
- New Strategic Enforcement Plan for 2017 – 2021



# Changes in the Pay Equity Landscape



# Secret Commercial: Lucy Does Her Part to Close the Wage Gap

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# Bud Light Supports Equal Pay - Featuring: Amy Schumer & Seth Rogan

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# Pay Equity Reaches the Superbowl Audience – Courtesy of Audi

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# The Legal Landscape on Equal Pay Issues Impacting Employers:

## “The Wage Gap” – It’s Everywhere



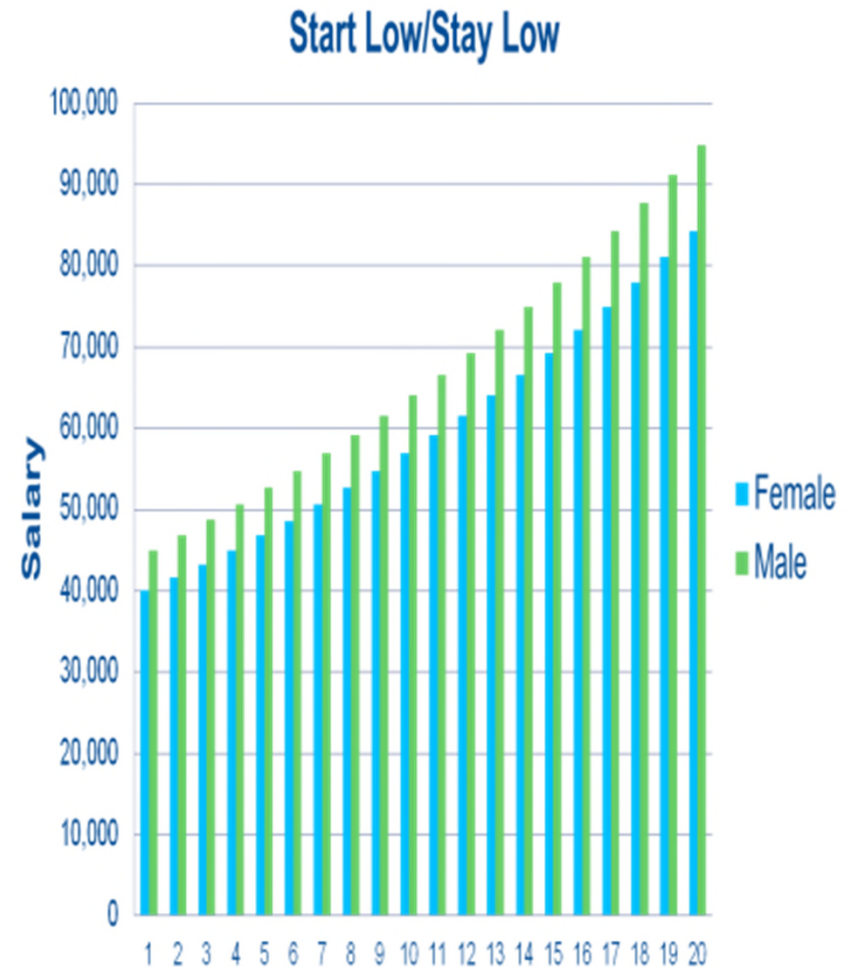


# Federal & State Law Overview

# Importance of Starting Salary Decisions

Starting salary is typically the most important pay decision

- “Start Low/Stay Low” phenomenon





# Effect of Starting Pay

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Year	Female Hire \$	Male Hire \$	Merit Increase	Difference
1990	\$ 40,000	\$ 47,000	3%	\$ (7,000)
1991	\$ 41,200	\$ 48,410	3%	\$ (7,210)
1992	\$ 42,436	\$ 49,862	3%	\$ (7,426)
1993	\$ 43,709	\$ 51,358	3%	\$ (7,649)
1994	\$ 45,020	\$ 52,899	3%	\$ (7,879)
1995	\$ 46,371	\$ 54,486	3%	\$ (8,115)
1996	\$ 47,762	\$ 56,120	4%	\$ (8,358)
1997	\$ 49,673	\$ 58,365	3%	\$ (8,693)
1998	\$ 51,163	\$ 60,116	3%	\$ (8,953)
1999	\$ 52,698	\$ 61,920	3%	\$ (9,222)
2000	\$ 54,279	\$ 63,777	3%	\$ (9,499)
2001	\$ 55,907	\$ 65,691	5%	\$ (9,784)
2002	\$ 58,702	\$ 68,975	3%	\$ (10,273)
2003	\$ 60,463	\$ 71,044	3%	\$ (10,581)
2004	\$ 62,277	\$ 73,176	3%	\$ (10,899)
2005	\$ 64,146	\$ 75,371	3%	\$ (11,225)
2006	\$ 66,070	\$ 77,632	3%	\$ (11,562)
2007	\$ 68,052	\$ 79,961	3%	\$ (11,909)
2008	\$ 70,094	\$ 82,360	3%	\$ (12,266)
2009	\$ 72,196	\$ 84,831	3%	\$ (12,634)
2010	\$ 74,362	\$ 87,376	3%	\$ (13,013)
2011	\$ 76,593	\$ 89,997	3%	\$ (13,404)
2012	\$ 78,891	\$ 92,697	3%	\$ (13,806)
2013	\$ 81,258	\$ 95,478	3%	\$ (14,220)
			<b>Total</b>	<b>\$ (245,581)</b>

# Summary of Laws Banning Prior Salary Inquiries

Currently Active	Coming Soon	Next Year (or Enjoined)
<p><b>Puerto Rico</b> (eff. 3/8/2017 but penalties begin 3/8/2018)</p> <p><b>Oregon</b> (eff. 10/06/2017; 1/1/2019; private action begins 1/1/2024)</p> <p><b>New York City</b> (eff. 10/31/2017)</p>	<p><b>Delaware</b> (eff. 12/14/2017)</p> <p><b>California</b> (eff. 1/1/2018)</p> <p>Albany County, NY (30 days after filing with NY Sec of State)</p>	<p><b>Massachusetts</b> (eff. 7/1/2018)</p> <p><b>San Francisco</b> (eff. 7/1/2018 but penalties begin 7/1/2019)</p> <p><b>Philadelphia</b> (5/2017, enjoined)</p>
<p><b>Other Jurisdictions Considering Salary History Bans</b></p>		

**Georgia**  
**New York**

**North Carolina**  
**Texas**  
**Washington**

# Prior Salary Inquiry Bans

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Prior salary often reflects differences in skills, experience, and performance

- ✓ Document these differences rather than prior salary as the reason for pay difference
- ✓ Inquire about salary *expectations*
- ✓ Document voluntary disclosures – differences in jurisdictions

Consider developing a formal policy regarding how the company sets starting salary

- ✓ Clear Standards
- ✓ Develop a Compensation Structure
- ✓ Salary guidelines
- ✓ Starting pay philosophy
- ✓ Market Considerations

# Where Are You Asking about Prior Salary Now?

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- Job applications
- Background check documents
- Phone screens
- Standard interview templates
- Compensation planning documents
- Hiring manager/recruiting training materials
- Compensation guidelines
- Disposition codes (for “salary requirements too high”)

# Best Practices for All Jurisdictions: Documentation and Training

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## Documentation:

- Develop a practice of documenting when an applicant voluntarily discloses salary history and other compensation information

## Training:

- Train recruiters, human resources professionals and any recruiting or decision-making managers about laws in the jurisdiction regarding an applicant's wage history
-

# Pending Laws Tracked in Desktop Pay Equity Reference

Download our Pay Equity Desktop Reference for state-by-state answers to 5 common questions:



- 1 Who is protected?
- 2 What type of work must be compared?
- 3 May employers rely on geographic location to explain pay differences?
- 4 What is the statute of limitations?
- 5 May employers ask about salary history?

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[http://www.seyfarth.com/dir\\_docs/publications/PE\\_01262017.pdf](http://www.seyfarth.com/dir_docs/publications/PE_01262017.pdf)

(updated October 2017)



# 2017 To 2018 And Beyond At The NLRB

# Presidential Appointees

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- 5 Member Board, serving staggered 5 year terms
- 1 General Counsel, serving a 4 year term
  - All other NLRB staff and employees are career civil servants
  - The Board's and GC's role in interpreting the NLRA







# Status of Presidential Appointments

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**January 1, 2017**

**Board: 2 to 1 Democratic Majority**

Chairman M. Pearce, D (term expires 8/27/18)

Member P. Miscimarra, R (term expires 12/16/17)

Member L. McFerran, D (term expires 12/16/19)

2 Vacancies unfilled during last year of Obama Presidency

**General Counsel: Democrat**

R. Griffin, D (term expires 11/4/17)

# Status of Presidential Appointments

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April 24, 2017

**Board: 2 to 1 Democratic majority**

*Chairman P. Miscimarra, R (Acting Chair as of 1/23/17)*

*Member M. Pearce, D*

Member L. McFerran, D

(2 Vacancies remain unfilled; no new appointments)

**General Counsel: Democrat**



# Status of Presidential Appointments

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**August 10, 2017**

**Board: 2 to 2 between Republicans and Democrats**

Chairman P. Miscimarra, R

Member M. Pearce, D

Member L. McFerran, D

*Member M. Kaplan, R (term expires 8/27/20)*

1 Vacancy waiting Senate confirmation

**General Counsel: Democrat**

# Status of Presidential Appointments

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**September 26, 2017**

**Board: 3 to 2 Republican Majority**

Chairman P. Miscimarra, R

Member M. Pearce, D

Member L. McFerran, D

Member M. Kaplan, R

*Member W. Emanuel, R (term expires 8/27/2021)*

**General Counsel: Democrat**

# Status of Presidential Appointments

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November, 2017

Board: 3 to 2 Republican Majority

General Counsel: Democrat to Republican

R. Griffin's term expired 11/4/17

P. Robb sworn in 11/17/17



# Status of Presidential Appointments

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January 1, 2018

**Board: 2 to 2 between Republicans and Democrats**

M. Pearce and L. McFerran, D

M. Kaplan and W. Emanuel, R

1 Vacancy waiting to be filled by a Republican appointee

**General Counsel: Republican**





# NLRB Process

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- **RULEMAKING** (Very Rare)

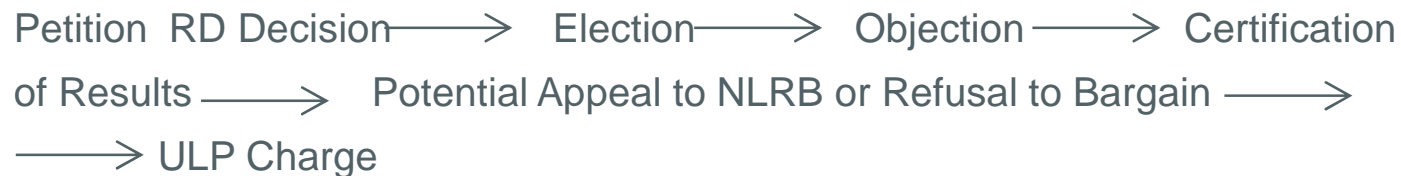


- **CASE-BY-CASE DECISIONS**

- **ULP CHARGES**



- **REPRESENTATION CASES**



# Issues For An Eventual Republican Board

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- Expedited Election Rules
- “Micro” Bargaining Units
- Joint-employer Status
- Scope Of Concerted Protected Activity





# Issues For An Eventual Republican Board

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- Workplace Rules And Policies
  - Civility
  - Confidentiality
  - Negative attitudes
  - Criticism
  - Making false statements
  - Communicating with the media
  - Photographs, videos and audio recording



# Issues For An Eventual Republican Board

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- Right To Use Employer Email
- Class Action Waivers
- Supervisory Status
- Employee Status (Adjunct Faculty; TA's)



# Issues For An Eventual Republican Board

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- Bargaining “Pre-CBA” Discipline
- Clear and unmistakable waivers in CBA’s
- Terms After CBA Expiration
  - Dues Checkoff
  - Waivers and Management Rights



# Issues For An Eventual Republican Board

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- Right To Hire Permanent Replacements
- Requesting Confidentiality During Investigations
- Imposing Successorship Obligations





**Questions?**