EEO – PROCEDURAL

by

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I. INTRODUCTION.

A keen understanding of the procedural prerequisites and administrative exhaustion schemes that apply to most federal and state employment discrimination statutes is absolutely critical for any attorney practicing in the area of employment discrimination law. Attorneys representing plaintiffs need this understanding in order to avoid dismissal, whereas defense practitioners must possess this knowledge in order to eliminate and/or reduce their clients' risk of civil liability. In this portion of the Certification Review Course materials, we will discuss the various federal and state employment discrimination laws that possess procedural prerequisites and administrative exhaustion requirements. We will also carefully focus upon the similarities and differences that exist under the statutes containing these procedural prerequisites and administrative exhaustion requirements to bringing suit.

II. THE APPLICABLE LAWS AND REGULATIONS.

A. Employment Discrimination Statutes Containing Procedural Prerequisites and/or Administrative Exhaustion Requirements. The federal and Florida employment discrimination statutes containing procedural prerequisites and/or administrative exhaustion requirements are as follows:

1. **Title VII of the Civil Rights Act of 1964 ("Title VII").**
2. **Age Discrimination in Employment Act of 1967 ("ADEA").**
3. **Americans with Disabilities Act of 1990 ("ADA").**
4. **Genetic Information Non-Discrimination Act of 2008 ("GINA")**
5. **Florida Civil Rights Act of 1992 ("FCRA").**

Generally speaking, a claimant seeking to bring a lawsuit for employment discrimination under one or more of these statutes must first file a charge of discrimination with an administrative agency, such as the U.S. Equal Employment Opportunity Commission ("EEOC"), the Florida Commission on Human Relations ("FCHR"), or a local fair employment practices agency

[1] These materials are distributed by the Sass Law Firm for informational purposes only. These materials should not be considered legal advice and should not be used as such.
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("FEPA"), before being able to initiate a civil action.[3] Depending upon the statutes at issue, additional pre-suit prerequisites and/or administrative exhaustion requirements may also need to be satisfied.

B. Employment Discrimination Statutes That Do Not Contain Procedural Prerequisites and/or Administrative Exhaustion Requirements. The federal and Florida employment discrimination statutes that do not contain procedural prerequisites and/or administrative exhaustion requirements are as follows:

1. **Section 1981 of the Civil Rights Act of 1866.**
2. **Equal Pay Act of 1963 ("EPA").**
3. **Family and Medical Leave Act ("FMLA").**
4. **Florida AIDS, AIDS-Related Complex, and HIV Discrimination Act.**

Unlike the federal and state statutes mentioned in Section II.A. above, claimants bringing suit for employment discrimination under these statutes may immediately proceed with a civil action without having to satisfy statutory conditions precedent and/or exhaust administrative remedies before the EEOC, the FCHR, or a local FEPA.

C. Local Fair Employment Practices Ordinances. In addition to the federal and state statutes, several counties and cities within Florida have local FEPAs that enforce fair employment practice ordinances which are implemented on a municipal or county level. Generally, the substantive provisions of these ordinances are at least as comprehensive as the federal statutes, but sometimes they are broader.

D. A Brief Overview of the Coverage of Title VII, the ADEA, the ADA, GINA, and the FCRA. Admittedly, threshold coverage issues, such as: (1) how many employees must an employer employ in order to be covered under the various federal and state employment discrimination laws; (2) who constitutes an "employee"; and/or (3) how employees are actually counted for determining "covered employer" or "covered entity" status, do not concern either procedural prerequisites or issues of administrative exhaustion and are therefore beyond the purview of these written materials. Nevertheless, a brief discussion of these threshold coverage issues may prove helpful in understanding the procedural prerequisites and administrative exhaustion schemes discussed below.

1. Title VII. Title VII prohibits discrimination in employment because of race, color, religion, sex, or national origin, as well as retaliation. Sex is specifically defined to include pregnancy. Title VII covers employers engaged in an industry affecting commerce that have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year. Title VII also covers employment agencies and labor organizations. Bona fide private membership clubs are exempt. See 42 U.S.C. § 2000e. Title VII also contains exemptions for, inter alia, aliens employed outside of any state and religious corporations, societies and educational institutions where it is necessary to employ individuals of a particular religion to perform certain work. See 42 U.S.C. § 2000e-l(a).

[3] FEPAs are also sometimes referred to as "deferral" or "referral" agencies.

2. The ADEA. The ADEA is based on the Fair Labor Standards Act. Its substantive and procedural requirements are thus a little different from those of Title VII/ADA/GINA. The ADEA prohibits employers, labor organizations and employment agencies from discriminating against individuals in employment on the basis of age if the individual is 40 years of age or older, and also prohibits retaliation. See 29 U.S.C. § 623. An employer is a person engaged in an industry affecting commerce who has 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year.

3. The ADA. The ADA prohibits employment discrimination against a qualified individual with a disability because of the individual's disability or those who are regarded as disabled, and also prohibits retaliation. Like Title VII, the ADA covers employers in an industry affecting commerce with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year. Again, bona fide private membership clubs are exempt. Labor organizations and employment agencies are covered. See 42 U.S.C. § 12111. The ADA's enforcement mechanisms adopt those set forth in Title VII at 42 U.S.C. § 2000e-5. See 42 U.S.C. § 12117(b).

4. GINA. Title II of GINA prohibits employment discrimination based on genetic information. Like Title VII and the ADA, GINA covers employers in an industry affecting commerce with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year. Bona fide private membership clubs are exempt. Labor organizations and employment agencies are covered. 42 U.S.C. § 2000ff(2)(B). GINA's enforcement mechanisms adopt those set forth in Title VII at 42 U.S.C. § 2000ff-6.

5. The FCRA. The FCRA prohibits employment discrimination by employers because of race, color, religion, sex, pregnancy, national origin, age, handicap or marital status, and also prohibits retaliation. See Fla. Stat. § 760.10. An employer is defined as a person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. See Fla. Stat. § 760.02(7).

6. Defining and Counting Employees for Determining Threshold Coverage.

The term "employee" is basically defined in all of the statutes as "an individual employed by an employer," which definition is then followed by a list of exceptions. The U.S. Supreme Court has endorsed the "payroll method" for determining whether an employer has 15 or more employees on any given day in a week. See Walters v. Metropolitan Educational Enterprises, Inc., 519 U.S. 202, 207 (1997). Under this method, it can be determined whether an employer has an employment relationship with an employee by whether the employee appears on the payroll during each day of the week, regardless of whether the employee is actually working that day. Part-time employees are also counted under this method.

With regard to the FCRA, determining the number of employees is not limited to those located or working in Florida. Sinclair v. De Jay Corp., 170 F.3d 1045, 1047 (11th Cir. 1999). Rather, it depends on the employer's total number of employees regardless of location. Id. Thus, if an employer only has two employees in Florida, but has twenty employees

in other states, this is sufficient to meet the fifteen employee threshold for coverage under the FCHR.

Titles do not control whether an individual is an employee. Courts usually apply the "economic realities" test or "control" test, or a hybrid of these tests, to determine if an individual is an employee. While independent contractors are generally not employees, merely identifying an employee as an "independent contractor" will not change the reality of whether the person is in fact a contractor as opposed to an employee. The EEOC, FCHR, or FEPA will review all of the facts and circumstances to determine if an individual is truly an independent contractor.

Directors and board members are generally not employees, but they will be considered employees if they perform traditional employee duties and are subject to control by the employer or organization. See EEOC v. Pettegrove Truck Service, Inc., 716 F. Supp. 1430 (S.D. Fla. 1989); Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440 (2003) (identifying six factors to evaluate whether a shareholder-director is an employee for counting employees). This is true even if the board member or director is not drawing a salary. Similarly, partners who are partners in name only and do not actively participate in the management of the partnership may be considered employees rather than employers. EEOC v. Sidlev Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002); Simpson v. Ernst & Young, 100 F.3d 436 (6th Cir. 1996).

Typically, volunteers are not considered employees, even though they may receive reimbursement for work-related expenses and/or certain kinds of fringe benefits such as workers' compensation insurance or gratuitous bonuses. See e.g., Hall v. Delaware Council on Crime and Justice, 780 F. Supp. 241 (D. Del. 1992); York v. Association of the Bar of the City of New York, 2001 WL 776944 (S.D.N.Y. 2001).

Title VII excludes employers who are foreign persons not controlled by an American employer. 42 U.S.C. § 2000e-1(c)(2). Thus, for purposes of Title VII, if a domestic and foreign employer are considered a single employer, and the foreign employer controls the domestic employer, then Title VII likely will not allow the combining of domestic employees and foreign employees to meet the jurisdictional requirements. Mousa v. Lauda Air Luftfahrt, 258 F. Supp. 2d 1329, 1335 (S.D. Fla. 2003). Conversely, under the FCRA, there is no geographical limitations so foreign based employees may be included in the 15-employee jurisdictional count. Id.

E. Procedural Regulations Applicable to Title VII, ADA, GINA, ADEA and FCRA Claims. The EEOC has issued a set of procedural regulations that apply to Title VII, the ADA, and GINA. These regulations are codified at 29 C.F.R. §§ 1601.1-1601.93. By contrast, the EEOC has promulgated a separate set of procedural regulations for the ADEA, which are codified at 29 C.F.R. §§ 1626.1-1621.22. Similarly, the FCRA also has enacted procedural regulations pertaining to charges of discrimination. The FCHR's procedural guidelines concerning the FCRA are codified at Chapter 60Y-5 of the Florida Administrative Code ("F.A.C."). Although these regulations are interpretive rules and not legislative enactments, they are given deference by both state and federal courts and are usually observed unless

demonstrated to be contrary to the law. See EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991).

III. THE CHARGE FILING PROCESS.

As set forth above, in most circumstances, a claimant suing his or her employer under Title VII, the ADEA, the ADA, GINA, or the FCRA cannot simply file his or her complaint of discrimination with the court, but instead must first exhaust his or her administrative remedies before a federal, state or local agency authorized to investigate alleged violations of the statutes.

A. Who Can File a Charge? Title VII, the ADA, GINA, and the FCRA all state that a charge of discrimination may be filed by an "aggrieved person." See 42 U.S.C. § 2000e-5(b); 42 U.S.C. § 12117(a); and Fla. Stat. § 760.11(1). Similarly, the procedural regulations applicable to the ADEA state that aggrieved persons may also file charges of discrimination. See 29 C.F.R. § 1626.3. Unfortunately, none of these statutes, or their respective procedural regulations, defines precisely what or who is an "aggrieved person." As a result, this issue has been hotly contested in the courts. Although the question of precisely who or what constitutes an aggrieved person is a substantive legal issue that exceeds the scope of this presentation, suffice it to say that suits addressing whether an individual or an entity is an aggrieved party can be segregated into five distinct categories:

- Charges filed by persons who are members of the protected group and affected by an adverse employment action;
- Charges filed by persons who are members of the protected group but who are not directly affected by an adverse employment action;
- Charges filed by individuals who are not members of the protected group but still claim to be "aggrieved";
- Charges filed by an organization claiming to be an aggrieved person; and
- Charges filed by "testers" (i.e., individuals who apply for positions of employment they do not intend to accept in order to uncover unlawful hiring practices).

See Lindemann, et al., Employment Discrimination Law, at 25-1, Part II, (5th ed. 2012).

In the vast majority of instances, the aggrieved person filing the charge of discrimination is actually an individual claiming to be the victim of an unlawful employment practice. It should be noted, however, that in addition to aggrieved persons, other individuals and entities may be permitted to file charges of discrimination under Title VII, the ADEA, the ADA, GINA, and the FCRA.

1. Title VII/ADA/GINA. Under Title VII, the ADA, and GINA, charges can be filed on behalf of any person claiming to be aggrieved or by a member of the Commission

(EEOC). See 42 U.S.C. § 2000e-5(b). Charges filed on behalf of aggrieved persons can be filed by any individual, agency, or organization. See 29 C.F.R. § 1601.7. Charges filed by the Commission are known as "commissioner charges" and may be filed in the name of the commissioner or on behalf of an aggrieved person. See 29 C.F.R. § 1601.11(b).

2. ADEA. Although the text of the ADEA is silent about who, other than the alleged victim of discrimination, can file a charge of discrimination, the procedural regulations interpreting the statute state that charges can be filed both "by and on behalf of the aggrieved person . . . ." See 29 C.F.R. § 1626.3. Notably, neither the text of the ADEA, nor its procedural regulations, specifically states that the Commission can file a charge of discrimination on behalf of an aggrieved person. However, the procedural regulations interpreting the ADEA do state that "[w]here the information [received by the EEOC from any source] discloses a possible violation, the appropriate Commission office may render assistance in the filing of a charge." See 29 C.F.R. § 1626.4. Based upon this regulation, both the EEOC and most courts have adopted the view that the EEOC may file charges on behalf of aggrieved persons under the ADEA.

3. FCRA. The text of the FCRA merely states that "any person aggrieved by a violation of ss. 760.01-760.10 may file a [charge] with the [FCHR]. . . ." See Fla. Stat. § 760.11(1). Thus, one might conclude that others who are not aggrieved would not be permitted to file charges. This is not the case, however, as the procedural regulations interpreting the FCRA provide that in addition to an aggrieved person, the Attorney General, Commissioners of the FCHR, and the FCHR also have the authority to file charges. See F.A.C. § 60Y-5.001(1).

B. Form and Verification Requirements of Title VII, ADEA, ADA, GINA and FCRA Charges. For the most part, the form of charges filed under Title VII, the ADA, GINA, the ADEA and the FCRA are identical. All charges must be in writing and must be signed by the individual or entity filing the charge. There is one significant difference concerning the form of a charge that warrants noting: Title VII, ADA, GINA, and FCRA charges require verification (i.e., the charge must be attested to under oath), whereas ADEA charges do not. Compare 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.9; Fla. Stat. § 760.11(1); F.A.C. § 60Y-5.001(5) with 29 C.F.R. § 1626.6. Most courts that have addressed the issue, including the United States Court of Appeals for the Eleventh Circuit, have determined that the verification of Title VII and ADA charges is mandatory. See e.g., Butler v. Greif, Inc., 325 Fed. Appx. 748, 749-750 (11th Cir. 2008); Rizo v. Alabama Dep't of Human Resources, 228 Fed. Appx. 832, 836 (11th Cir. 2007); Vason v. City of Montgomery, Alabama, 240 F.3d 905 (11th Cir. 2001).

1. Amending a Title VII/ADA/GINA Charge to Cure the Lack of Verification.

According to the EEOC's procedural regulations, "[a] charge may be amended to cure technical defects or omissions, including failure to verify the charge. . . . Such amendments . . . will relate back to the date the original charge was received." See 29 C.F.R. § 1601.12(b). Notably, this procedural regulation does not specify whether an unverified charge can be amended to provide verification after the period for filing a timely charge of discrimination has already passed. As a consequence, courts that confronted this issue often reached conflicting results.

In 2002, the United States Supreme Court, in Edelman v. Lynchburg College, 535 U.S. 106 (2002), addressed this issue and determined that timely filed charges could be verified more than 180/300 days after the alleged unlawful practice under the relation back principle set forth in 29 C.F.R. § 1601.12(b). In particular, the Court in Edelman determined that a verified charge filed 313 days after the alleged unlawful employment practice related back to an earlier letter the claimant had filed with the EEOC within 300 days of the alleged unlawful practice pursuant to 29 C.F.R. § 1601.12(b).

What the Court in Edelman did not specifically address was the issue of whether a claimant could use the relation back principles of 29 C.F.R. § 1601.12(b) to verify a charge that was unverified after the date that the EEOC has issued a Dismissal and Notice of Rights (i.e., a notice of right to sue). See Employment Discrimination Law at 26-8 fn. 35. Prior to Edelman, most courts that had addressed this issue, including the Eleventh Circuit, determined that a charge could not be amended to cure a verification defect after the notice of right to sue had been issued and therefore a lawsuit predicated upon such a defective charge was doomed to fail. See e.g., Butler, 325 Fed. Appx. at 749; Vason, 240 F.3d at 908; Balazs v. Liebenthal, 32 F.3d 151 (4th Cir. 1994); Hazeur v. Federal Warranty Service Corp., 2000 WL 365013 (E.D. La. 2000). The rationale of these cases is that once a notice of right to sue is issued, the EEOC closes its file and is powerless to correct an unverified charge via 29 C.F.R. § 1601.12(b). See Danley v. Book-of-the-Month Club, Inc., 921 F. Supp. 1352 (M.D. Pa. 1996), aff'd, 107 F.3d 861 (3d Cir. 1997). At least one court prior to Edelman, however, maintained a contrary view. See Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1972).

The Eleventh Circuit, in Butler, determined that "while an attorney may file a charge on behalf of a client the attorney's signature alone will not constitute verification if the attorney does not personally swear to the truth of the facts stated in the charge and does not have personal knowledge of those facts." 325 Fed. Appx. at 749. Thus, attorneys who sign charges on behalf of their clients will rarely satisfy the verification requirements of Title VII/ADA/GINA and do so at their own peril.

2. Amending an FCHR Charge to Cure a Lack of Verification.

Similar to the EEOC, the FCHR has issued procedural regulations applicable to the FCRA. One of these regulations also deals with the amendment of charges and the relation back principle. See F.A.C. § 60Y-5.001(7). Under this Rule, amendments must be made within 60 days of the filing of the charge and with a showing of good cause. Even then, the Executive Director of the FCHR must consent to the amendment. See F.A.C. § 60Y-5.001(7)(a).

Based upon the text of the FCRA, it would appear that an unverified charge would not be capable of being verified once a civil action has been initiated, even if the Executive Director approved such an amendment, because the "commencement of such action shall divest the [FCHR] of jurisdiction of the [charge]." See Fla. Stat. § 760.11(5).

C. The Required Content of Title VII, ADEA, ADA, GINA and FCRA Charges. As far as the content of the charge is concerned, the EEOC and FCHR have stated that the following information should be contained in the charge of discrimination:

- The name, address and telephone number of the person filing the charge;
- The name, address and telephone number of the respondent;
- A clear and concise statement of the facts, including pertinent dates, constituting the unlawful employment practice;
- If known, the approximate number of employees of a respondent employer;
- If known, a statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a federal, state or local agency charged with the enforcement of fair employment practices laws and, if so, the date of such commencement and the name of the agency.

See 29 C.F.R. §§ 1601.12(a)(1)-(5), 1626.8(a)(1)-(5); F.A.C. § 60Y-5.001(6)(a)(1)-(5).

As a practical matter, however, the EEOC and FCHR will accept a charge as being sufficient even if it does not meet all of the requirements above if it is in writing, signed by the complainant or aggrieved individual, verified (unless it is an ADEA charge, as no verification is required), and generally identifies the parties and the action or practice of which is complained. See 29 C.F.R. §§ 1601.12(b), 1626.8(b); F.A.C. §60 Y-5.001(6)(b).

In 2008, the United States Supreme Court had occasion to determine what level of sufficiency is required to constitute a charge for purposes of the ADEA. See Federal Express Corp. v. Holowecki, 552 U.S. 389 (2008). The plaintiff, Holowecki, had filed an ADEA civil action prior to actually filing a charge of discrimination with the EEOC. Prior to filing her lawsuit, however, Holowecki had filed both an EEOC intake questionnaire as well as a six-page sworn affidavit. Federal Express argued that because Holowecki had not filed an actual charge of discrimination at least 60 days before she filed her lawsuit (a timeframe unique to the ADEA), her lawsuit was procedurally defective and should be dismissed. Holowecki argued that because she had filed both an intake questionnaire containing all of the information required by 29 C.F.R. § 1626.8(a)(1)-(5), as well as an affidavit providing specifics about her ADEA claim, she had provided all of the information she was required to provide.

The Supreme Court ruled that the EEOC's conclusion that Holowecki's intake questionnaire and affidavit were sufficient to constitute a charge was not unreasonable. The Court noted that the intake questionnaire included all of the information required by 29 C.F.R. § 1626.8, and moreover, the affidavit expressly contained a request for the EEOC to take remedial action against Federal Express.

D. Timeliness. In the watershed case of McDonnell Douglas v. Green, 411 U.S. 792 (1973), the United States Supreme Court noted that there were two "jurisdictional prerequisites"

to a Title VII action: "(1) filing timely charges of employment discrimination with the Commission and (2) receiving and acting upon the Commission's statutory notice of the right to sue." In Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), the Court clarified that the above-described prerequisites to suit were not truly "jurisdictional," but were rather conditions precedent which were more akin to a statute of limitations and therefore could be tolled under certain circumstances. Notwithstanding, a claimant's failure to file a timely charge of discrimination typically bars his or her ability to bring a subsequent employment discrimination lawsuit.

1. Title VII/ADA/GINA Charges.

According to 42 U.S.C. § 2000e-5(e), a Title VII, ADA, or GINA claimant must file a charge with the EEOC within 180 days of the alleged unlawful employment practice or when the claimant first knew or should have known of the discriminatory and/or retaliatory act. **If that claimant has instituted proceedings with a state or local FEPA with authority to grant or seek relief from such an unlawful employment practice, however, he or she has 300 days from the occurrence of the alleged unlawful employment practice or when the claimant first knew or should have known of the discriminatory and/or retaliatory act in which to file a charge with the EEOC**. Id.

Issues can arise as to when the claimant was required to file the charge in order to be timely. Courts have consistently held that the applicable time period to file a charge starts to run when the aggrieved person received unequivocal notice of the adverse action. Gardner v. Aviagen, 454 Fed. Appx. 724, 727 (11th Cir. 2011); Grayson v. K-Mart Corp., 79 F.3d 1086, 1100 (11th Cir. 1996); see also Cocke v. Merrill Lynch & Co., 817 F.2d 1559, 1561 (11th Cir. 1987) (stating that "a final decision to terminate the employee, rather than actual termination, constitutes the "alleged unlawful practice" that triggers the filing period") (emphasis added). Pendency of grievances, or other means of collateral review do not toll the running of the limitations period to file a charge. See Delaware State College v. Ricks, 449 U.S. 250 (1980). For constructive discharge claims based on discrimination and/or retaliation, the statute of limitations to file the charge runs from when the employee gives the employer notice of the intent to resign. Green v. Brennan, 136 S.Ct. 1769 (2016).

With respect to pay disparity claims, each separate paycheck triggers a new statute of limitations for an aggrieved person to file with the EEOC and challenge any prior discriminatory conduct that impacted that aggrieved person's pay, no matter how long ago the discrimination occurred. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 125 Stat. 5 (2009).

It is important to note that if an alleged unlawful employment practice occurs in a state, or a political subdivision of a state, having a state or local law prohibiting such an unlawful practice, as well as a FEPA which grants or seeks relief from such a practice, no charge can be filed with the EEOC before either: (i) the expiration of 60 days after the institution of proceedings by the state or local FEPA; or (ii) the FEPA terminates its proceedings. See 42 U.S.C. § 2000e-5(c). The requirement that a claimant must wait to institute charge-filing proceedings with the EEOC until after the state or local agency has had an opportunity to do so is

known as "deferral." The purpose of deferral is to allow a state or local FEPA the first opportunity to resolve the alleged unlawful employment practice before resorting to the EEOC. See Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979). Deferral is both required and mandatory under Title VII, the ADA, and GINA.

2. ADEA Charges.

Pursuant to 29 U.S.C. § 626(d), an ADEA claimant must also file a charge within 180 days of the alleged unlawful event, unless the alleged unlawful practice has occurred in a state which has a law prohibiting discrimination upon the basis of age and has authorized a FEPA to grant or seek relief from such a discriminatory practice. **In such an instance, the claimant must file his or her charge of discrimination with the FEPA within 300 days of the alleged unlawful employment practice, or within 30 days of notification that the FEPA is terminating its investigation under state law, whichever occurs first**. Id.

Unlike Title VII, the ADA, and GINA, however, under the ADEA, the claimant must file his or her charge with a state (as opposed to a local) FEPA in order to obtain the longer 300-day filing period. See Oscar Mayer, 441 U.S. at 750 (citing 29 U.S.C. § 633(b)). Although this requirement is similar to the deferral requirement discussed above with respect to Title VII/ADA/GINA claims, it is called "referral" under the ADEA. Referral to a local FEPA will not suffice. As is the case under Title VII/ ADA/GINA, referral to a state FEPA is mandatory. See id.

3. FCRA Charges.

In contrast to Title VII, the ADA, GINA, and the ADEA, a claimant filing a charge of discrimination under the FCRA is permitted 365 days from the alleged unlawful employment practice to do so. See Fla. Stat. § 760.11(1). Under the FCRA, a charge is deemed filed when it is date-stamped by the FCHR, the EEOC, or any other local FEPA within Florida. The date the charge is deemed filed with the FCHR is the earliest date of filing with the FCHR, the EEOC, or the Florida FEPA. See Fla. Stat. § 760.11(1).

1. Tolling of the Charge-Filing Period.

a. Tolling under Title VII, the ADA, GINA, and the ADEA.

As set forth above, the charge-filing requirements of Title VII, the ADA, GINA, and the ADEA are not jurisdictional, but are rather are more akin to statutes of limitation. See Zipes, 455 U.S. at 385. As a result, these charge-filing time limits can, in certain circumstances, be equitably tolled and/or estopped. According to the Supreme Court, equitable tolling and/or estoppel can occur when a claimant is somehow prevented from filing a timely charge of discrimination. See Electrical Workers v. Robbins & Meyers, 429 U.S. 229 (1976).

The most common basis for equitably tolling the charge-filing limitations period of Title VII, the ADA, GINA, and the ADEA occurs when the respondent takes action that misleads the claimant and causes him or her to miss meeting the charge-filing

deadline. Some courts require the employer to have actively misled the claimant; other courts allow tolling in less malevolent circumstances. Employment Discrimination Law at 27-53, 54 (5th ed. 2012). Sometimes a claimant's excusable ignorance, if objectively reasonable, can also serve as a basis for equitable tolling. See Carter v. West Publishing Co., 225 F.3d 1258 (11th Cir. 2000) (limitations period did not begin to run until the claimant knew, or reasonably should have known, that she had been discriminated against).

Additionally, under the Servicemembers Civil Relief Act ("SCRA"), the statute of limitations to file a charge is tolled for servicemembers. See 50 U.S.C. §3936 ("The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.")

b. Tolling under the FCRA.

Similar to Title VII, the ADA, GINA, and the ADEA, the charge-filing time limit set forth in the FCRA is a statute of limitations and is also subject to tolling; unlike those statutes, the grounds for tolling the limitations periods in the FCRA are specifically set forth in Section 95.051, Florida Statutes. See Greene v. Seminole Electric Cooperative, Inc., 701 So. 2d 646 (Fla. 5th DCA 1997). Notably, the grounds for tolling set forth in Section 95.051, Florida Statutes, do not include either misleading conduct by the respondent, or a claimant's objectively reasonable ignorance of the charge-filing deadline.

Tolling under the SCRA for servicemembers applies to the FCRA as well. See 50 U.S.C. §3936.

E. Deferral/Referral Dilemmas, the Advent of Dual Filing and Work-sharing Agreements. Because of esoteric, yet important, differences among the procedural prerequisites for bringing suit under Title VII, the ADA, GINA, the ADEA, and various state and local anti-discrimination laws, unwitting employment discrimination claimants sometimes fail to exhaust their administrative remedies in jurisdictions with state and local FEPAs. Believing that Congress, when it enacted these federal civil rights statutes, had not intended the deferral/referral process to be a trap for the unwary, both the United States Supreme Court and the EEOC took action to rectify the problem.

1. Significant Supreme Court Deferral/Referral Decisions

Two cases are particularly illustrative of the Supreme Court's extreme efforts to untangle these deferral/referral dilemmas. See Oscar Mayer, 441 U.S. at 750; Mohasco Corp. v. Silver, 447 U.S. 807 (1980).

In Oscar Mayer, the claimant, Evans, had filed a charge of age discrimination in the deferral state of Iowa within 300 days of the alleged unlawful employment practice. Evans had never filed a timely charge with the state FEPA, the Iowa State Civil Rights

Commission. When Evans filed a civil action under the ADEA, Oscar Mayer moved to dismiss the suit, arguing that pursuant to 29 U.S.C. § 633(b), "no suit may be brought under section 626 of [the ADEA] before the expiration of 60 days after proceedings have been commenced under state law, unless such proceedings have been earlier terminated." Oscar Mayer argued that referral to the Iowa State Civil Rights Commission was mandatory before a civil action under the ADEA could be initiated, but that no such referral had occurred. Moreover, Oscar Mayer argued that no such referral was now possible because the statute of limitations for filing a charge with the Iowa State Civil Rights Commission (i.e., 120 days from the occurrence of the alleged unlawful act), as set forth in the Iowa Civil Rights Act, had now expired.

Although the Supreme Court agreed with Oscar Mayer that 29 U.S.C. § 633(b) mandated Evans must first commence state administrative proceedings before filing a civil action under the ADEA, it disagreed that he must do so within the limitations period established by the Iowa Civil Rights Act. Instead, the Court held that "state limitations periods cannot govern the efficacy of the federal remedy . . . ," and ruled that Evans' ADEA action be held in abatement until he could commence proceedings under state law by filing a charge of discrimination (albeit an untimely one) with the Iowa State Civil Rights Commission.[4]

Just months after issuing its decision in Oscar Mayer, the Supreme Court faced another thorny deferral dilemma. In Mohasco Corporation, the claimant, Silver, filed a charge of religious discrimination with the EEOC 291 days after the date of his termination. Silver claimed to have been subjected to an unlawful employment practice in New York, a deferral state. What Silver had not done was commence state proceedings under New York law. Somewhat similar to 29 U.S.C. § 633(b) of the ADEA, 42 U.S.C. § 2000e-5(c) states that "no charge may be filed under [42 U.S.C. § 2000e-5(b) of Title VII] by the person aggrieved before the expiration of 60 days after proceedings have been commenced under State or local law, unless such proceedings have been earlier terminated . . . ."[5] Immediately upon receiving the charge, and before the passage of 300 days from the date of Silver's termination, the EEOC deferred the charge to the New York State Division of Human Rights; however, the New York State Division of Human Rights did not terminate proceedings on Silver's charge prior to the passage of this 300 day deadline. Ultimately, the EEOC concluded its investigation and issued Silver a notice of right to sue. Thereafter, Silver commenced a Title VII religious discrimination lawsuit against Mohasco Corporation.

Mohasco Corporation filed a motion for summary judgment arguing that Silver's charge of discrimination could not have been filed with the EEOC on the 291st day after his termination – i.e., the date the EEOC had received it – because he had not initiated state proceedings at least 60 days before filing his charge with the EEOC, nor had the New York State Division of Human Rights terminated its proceedings before the passage of the 300-day limitation period applicable to deferral states. The Supreme Court agreed with Mohasco

[4] Nine years later, the Supreme Court, in EEOC v. Commercial Office Prods. Co., used an identical analysis in a Title VII case to argue that a claimant's failure to file a charge with a state deferral agency within the limitations period established by state law was not fatal to a Title VII civil action.

[5] Note, however, that 29 U.S.C. § 633(b) states "no civil action" will be filed before commencement of state proceedings, whereas 42 U.S.C. § 2000e-5(c) states "no charge" will be filed before commencement of state proceedings.

Corporation. According to the Court, if a claimant fails to initiate state proceedings prior to filing a charge with the EEOC, his charge must be filed with the EEOC no later than the 240th day after the alleged unlawful event, in order to allow the state or local FEPA at least 60 days to resolve the claim in accordance with 42 U.S.C. § 2000e-5(c). Charges received by the EEOC after the 240th day would only be deemed timely if they were deferred to the state or local FEPA and the FEPA voluntarily terminated the state proceedings before the passage of the 300th day.

A classic Mohasco Corporation deferral dilemma occurred in Maynard v. Pneumatic Products. Corp., 256 F.3d 1259 (11th Cir. 2001). In that case, Maynard filed his charge with the EEOC 292 days after his termination, but could not prove that he had timely filed his charge with the FCHR. As a result, his case was dismissed. See also, Armstrong v. Lockheed-Martin Beryllium Corp., 990 F. Supp. 1395 (M.D. Fla. 1997) (although individual intended to dual file the charge, her failure to check the dual file box prevented her from exhausting her administrative remedies under state law).

2. Work-sharing Agreements.

In contrast to the United States Supreme Court, the EEOC has attempted to resolve the problem of coordinating federal, state and local charge filing requirements by entering into contractual agreements with state and local FEPAs known as "work-sharing agreements." The criteria for being deemed a FEPA for the purposes of Title VII/ADA/GINA are set forth at 29 C.F.R. Part 1601, subpart H. Section 1601.24 lists current FEPAs that can receive and process charges. When a FEPA becomes certified, the EEOC will generally accept its findings without individual case-by-case substantial weight reviews. See 29 C.F.R. § 1601.75. Detailed procedures for the processing of charges between the FEPAs and the EEOC are set out at 29 C.F.R. § 1601.13.

Under the ADEA, FEPAs that may accept referrals of age cases are set forth in 29 C.F.R. § 1626.9. Note that 29 C.F.R. § 1626.10 only allows the EEOC to enter into work-sharing agreements with state FEPAs (not local ones) for the processing of age discrimination charges.

Work-sharing agreements have been developed to comply with the deferral and referral requirements of the federal statutes and are primarily used to divide charges by type and geography to determine which agency will initially process the charge or complaint. Work-sharing agreements are public record and may be obtained from the EEOC. Local FEPAs will accept initial responsibility for a certain number of charges that originate in their geographic area. The FCHR and EEOC basically divide their jurisdiction through the middle of the state. Other considerations, such as the timeliness of the charge, work load and the particular issue, may affect which agency processes a charge.

Under the agreement, the EEOC and the FEPA are allowed to receive and accept charges as an agent of the other for the purposes of charge filing so that filing with one agency also constitutes filing with the other agency. See McGhee v. Sterling Casino Lines, L.P., 833 So. 2d 271, 272 (Fla. 5th DCA 2002) (under the work-sharing agreement, each agency has appointed the other as an agent for, inter alia, receiving charges.).

Importantly, under these work-sharing agreements, if the EEOC receives a charge of discrimination on or after the 240th day in a deferral state that has not previously instituted state or local proceedings, the state or local FEPA agrees to waive its right under 42 U.S.C. § 2000e-5(c) to exclusively process, investigate, and/or resolve the charge. This allows the EEOC to immediately accept the charge as filed and avoids the dilemma faced by the claimant in Mohasco Corporation.

F. The Single Filing Rule: An Exception to the Charge Filing Requirement. There is an exception to the requirement that every individual must timely file a charge of discrimination before he or she may participate in a lawsuit under one of the federal statutes. This exception is known as the "single-filing rule" or "piggy-back rule." Under that rule, in multiple plaintiff actions, co-plaintiffs with individual claims arising out of similar discriminatory treatment in the same time frame do not have to separately satisfy the charge-filing requirement if one plaintiff has filed a charge of discrimination. Two requirements must be met, however, to satisfy the single-filing rule: (a) at least one plaintiff must have timely filed a charge; and (b) the individual claims of the plaintiffs who filed and did not file charges must have arisen out of similar treatment in the same time frame. Forehand v. Florida State Hospital at Chattahoochee, 89 F.3d 1562, 1555-1556 (11th Cir. 1996); Jackson v. Seaboard Coast Line R.R. Co., 678 F.2d 992, 1011 (11th Cir. 1982).

IV. NOTIFICATION TO THE RESPONDENT.

A. What Constitutes Notice under Title VII/ADA/GINA? Pursuant to the unambiguous text of 42 U.S.C. § 2000e-5(b), the EEOC is to notify the respondent of a Title VII/ADA/GINA charge within 10 days of the date it receives a charge. Most courts who address the issue have held that the EEOC's failure to provide the respondent with notice of a charge within 10 days does not affect subsequent litigation by a private litigant (however, it may sometimes bar a suit subsequently filed by the EEOC). See Employment Discrimination Law at 26-27 (5th ed. 2012). This notice is supposed to include the date, place, and circumstances of the alleged unlawful employment practice asserted in the charge. See 42 U.S.C. § 2000e-5(b).

B. What Constitutes Notice under the ADEA? In contrast to Title VII/ADA/GINA, the ADEA only requires that the EEOC "promptly notify all persons named in such charge as prospective defendants." See 29 U.S.C. § 626(d)(2); see also 29 C.F.R. § 1626.11. Neither the text of the ADEA nor its procedural regulations specify what kind of information this notice must contain.

C. What Constitutes Notice Under the FCRA. According to the text of the FCRA, the FCHR is required to provide notice to the person who allegedly committed the unlawful employment practice within five days of the date the charge has been filed, by mailing him, her, or it a copy of the claimant's charge of discrimination via registered mail. See Fla. Stat. § 760.11(1). As a practical matter, notice is rarely, if ever, provided within five days.

V. SUIT FILING ADMINISTRATIVE EXHAUSTION REQUIREMENTS.

A. Filing Suit under Title VII, the ADA, GINA, and the ADEA.

1. Administrative Exhaustion for Title VII/ADA/GINA Lawsuits.

To file a suit under Title VII/ADA/GINA, a claimant must typically receive a notice of right to sue. Notices against private entities are issued by the EEOC. Notices against public entities are issued by the Department of Justice. After receipt of the notice, suit must be filed within 90 days of when the charging party receives the notice of right to sue. Note that jurisdiction for Title VII/ADA/GINA actions lies in both federal and state courts. It makes no difference to the charging parties' rights whether the EEOC finds reasonable cause to believe that discrimination occurred.

2. Administrative Exhaustion for ADEA Lawsuits.

By contrast, the procedures under the ADEA are slightly different. Under the ADEA, a claimant can, but need not, await a notice of right to sue from the EEOC. Should a claimant desire to do so, he or she may file suit under the ADEA as early as 60 days after filing a charge with the EEOC. In that situation, a right to sue notice is not required. See 29 U.S.C. § 626(d). If the claimant waits until the conclusion of EEOC process and receives a notice of right to sue, he or she must file suit within 90 days of its receipt. See 29 U.S.C. § 626(e).

3. Requesting a Notice of Right to Sue before the Passage of 180 Days from the Date the Charge Was Filed with the EEOC.

The EEOC is directed to complete its administrative processing of a charge filed under Title VII/ADA/GINA within 180 days. See 42 U.S.C. § 2000e-5(f)(l). Because of the large number of charges filed every year, however, it is not been uncommon for a charge to remain pending before the EEOC for several weeks and/or months after the 180-day period has passed.[6] In order to address its large backlog of charges, the EEOC, with respect to Title VII/ADA/GINA, promulgated procedural regulations which permit it to issue right to sue notices to claimants who request them in writing. See 29 C.F.R. § 1601.28(a)(1) and (2).[7]

Pursuant to 29 C.F.R. § 1601.28(a)(1), the EEOC is authorized to issue a notice of right to sue to a Title VII/ADA/GINA claimant who requests it 180 days or more after he or she filed his or her charge with the EEOC. By contrast, 29 C.F.R. § 1601.28(a)(2) states that the EEOC can issue a claimant a notice of right to sue prior to the passage of 180 days from the date the charge was filed with the EEOC if: (a) the claimant requests such a notice in

[6] The EEOC's failure to complete an investigation within this time frame has no consequences upon the parties. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 361 (1977).

[7] Unlike Title VII/ADA/GINA, the ADEA does not require the EEOC to complete its administrative processing of a charge within 180 days. Under the administrative exhaustion scheme set forth in the ADEA, a claimant can file suit without a notice of right to sue at any time 60 days after filing a charge of age discrimination with the EEOC. See 29 U.S.C. § 626(c)(2).

writing; (b) the respondent is not a government, governmental agency, or political subdivision; and (c) the EEOC determines and certifies that it is probable that it would be unable to complete its administrative processing of the charge within 180 days of the date of the filing of the charge. Although many respondents have argued that 29 C.F.R. § 1601.28(a)(2) defeats the administrative exhaustion requirements set forth in 42 U.S.C. § 2000e-5(f) and is therefore contrary to Congress' legislative intent, the Eleventh Circuit, in Sims v. Trus Joist MacMillan, 22 F.3d 1059 (11th Cir. 1994), has upheld the regulation.

While requesting a right to sue notice before the expiration of 180 days will not be deemed a failure to exhaust administrative remedies, there are occasions where a claimant's conduct during the investigation, usually marked by a total failure to cooperate, has been determined to constitute a failure to exhaust the remedies. For example, in Forehand v. Florida State Hospital at Chattahoochee, 89 F.3d 1562 (11th Cir. 1996), the court refused to grant an equitable modification of the exhaustion rule because the individual in question actively frustrated the EEOC's attempts to investigate the charge.

4. What Happens When a Title VII/ADA/GINA Claimant Files a Lawsuit before Receiving a Notice of Right to Sue?

Sometimes claimants file lawsuits prior to receiving a notice of right to sue from the EEOC. Many courts addressing this issue have chosen not to dismiss these cases, but have found the defect cured by a subsequently issued right-to-sue notice. See Employment Discrimination Law at 27-68 (5th ed. 2012).

B. Administrative Exhaustion for FCRA Lawsuits. The FCHR is obligated to make a determination on complaints within 180 days. See Fla. Stat. § 760.11(3). If the FCHR finds that there is reasonable cause to believe that discrimination occurred, the claimant may either bring a civil action or request an administrative hearing. See Fla. Stat. § 760.11(4). If a claimant who receives a determination of reasonable cause within 180 days of the date his or her charge was filed with the FCHR elects to file a civil action, he or she has one year from the date of the issuance of the determination of reasonable cause in which to do so. See Fla. Stat. §760.11(5); Joshua v. City of Gainesville, 768 So. 2d 432, 436 (2000). By contrast, if the claimant receiving a determination of reasonable cause within 180 days of the date of the filing of his or her charge elects to have an administrative hearing, he or she must request one no later than 35 days after the issuance of the reasonable cause determination. See Fla. Stat. § 760.11(6).

If the FCHR issues a determination of no reasonable cause within 180 days of the filing of the charge, the claimant's remedy is restricted to an administrative hearing before the Division of Administrative Hearings ("DOAH"). This hearing must be requested within 35 days of the no reasonable cause determination. See Fla. Stat. § 760.11(7). The claimant may not directly proceed into court on a no cause finding. If the DOAH hearing officer issues a recommended order in the claimant's favor and it is affirmed by a final order of the FCHR, then he or she can choose to file a civil action under the FCRA within one year of the date of the FCHR's issuance of its final order. Id.

If the FCHR fails to make any finding within 180 days, the claimant may proceed

as though reasonable cause has been found. See Fla. Stat. § 760.11(8). Pursuant to the Florida Supreme Court's ruling in Joshua, a claimant then has four years to file a civil action (relying on Subsection 95.1l(3)(f), Florida Statutes). The Florida Supreme Court did not address when the four-year statute of limitations starts to run, but reliance on Title VII law would indicate that it commences when the individual receives unequivocal notice of the alleged discriminatory act. See Delaware State College v. Ricks, 449 U.S. 250 (1980).

If the FCHR makes a reasonable cause determination after 180 days but before an individual has filed suit, the individual still has the benefit of the four-year statute of limitations. Joshua, supra. The same is true if the FCHR makes a finding of no reasonable cause after the expiration of 180 days, but before the individual has filed a civil action. See Woodham v. Blue Cross and Blue Shield, Inc., 829 So. 2d 891 (Fla. 2002).

1. What Happens if an FCRA Claimant Files an FCRA Lawsuit Before the Passage of 180 Days and the Issuance of a Determination of Reasonable Cause or No Reasonable Cause by the FCHR?

It is important to note that for purposes of the FCRA, a determination of no reasonable cause from the FCHR operates differently than a "no reasonable cause" finding by the EEOC. In the latter circumstance, the claimant receives a notice of right to sue and can initiate a civil action. When the FCHR issues a determination of no reasonable cause, however, the claimant cannot directly initiate a civil action, but instead must proceed with an administrative hearing before DOAH. See Fla. Stat. § 760.11(7).

Respondents confronted with this situation typically argue that they are entitled to a dismissal because the claimant's premature filing of a civil action before the passage of either 180 days or a determination by the FCHR precludes the possibility that the FCHR might issue a determination of no reasonable cause, a result that would mandate an administrative hearing and not a civil proceeding. These respondents further argue that if more than 365 days have passed since the last discriminatory event, then this premature filing cannot be cured by the FCHR because according to the text of the FCRA, the claimant's initiation of the civil action divests the FCHR of jurisdiction to entertain the charge. See Fla. Stat. § 760.11(5).

To date, a handful of courts within Florida have addressed the issue of what to do when: (a) a claimant initiates a civil action less than 180 days after his or her charge has been filed with the FCHR; and (b) the FCHR has yet to issue any determination with respect to that charge. Where less than 365 days have passed from the occurrence of the alleged unlawful employment practice, at least one court has held that the dismissal of the action is not warranted as long as the claimant files a second, timely charge of discrimination concerning the same unlawful employment practices. See Dixon v. Sprint-Florida, Inc., 787 So. 2d 968 (Fla. 5th DCA 2001).

However, the answer is less clear where more than 365 days have passed since the alleged unlawful employment practice asserted in the FCHR charge, and may depend upon whether the claimant is in a federal or state forum. Published Florida court opinions have uniformly ruled that the premature filing of an FCRA action is fatal to a claimant's FCRA cause

of action once more than 365 days had passed from the last alleged discriminatory occurrence. See, e.g., Sweeney v. FP&L Co., Inc., 725 So. 2d 380 (Fla. 3rd DCA 1998); Brewer v. Clerk of the Circuit Court, Gadsden County, 720 So. 2d 602, 604-605 (Fla. 1st DCA 1998). The Sweeney and Brewer decisions were actually based on an earlier federal court decision that reached the same conclusion. See Ayers v. Wal-Mart Stores. Inc., 941 F. Supp. 1163 (M.D. Fla. 1996) (court dismissed with prejudice a civil action filed only 117 days after filing of a charge because of a failure to exhaust administrative remedies). But see Webb v. Worldwide Flight Services, Inc., 407 F.3d 1192 (11th Cir. 2005) (concluding that a claimant's premature filing of an FCRA suit before either the FCHR's rendering of a determination, or the passage of 180 days, was not fatal to his claims because only the "proper filing" of an FCRA action divests the FCHR of jurisdiction over the charge).

2. A Peculiar Anomaly: Right to Sue Notices from the FCHR.

The claimant in Webb received a notice of right to sue letter from the FCHR. The FCHR's issuance of a right to sue letter, however, is a peculiar occurrence in view of the fact that neither the text of the FCRA nor the FCHR's own administrative rules provide for the issuance of such a letter. Unlike Title VII, the ADA, and GINA, the FCRA contains no requirement that a claimant must receive a notice of right to sue before he or she can commence suit. Instead, a claimant is permitted to file suit as if he or she received a determination of cause at any time after 180 days have passed since the date his or her charge was filed with the FCHR. See Fla. Stat. § 760.11(8).

3. Can a Determination by the EEOC That It Is Unable to Conclude That a Violation of the Statutes Has Occurred Be Used as a Determination of No Cause for Purposes of the FCRA?

An EEOC finding that it is unable to conclude that the information obtained establishes a violation of the statutes (i.e., the language the EEOC now uses instead of a "no cause" finding), is not a determination of "no reasonable cause" for purposes of the FCRA. See e.g., Woodham, 829 So. 2d at 891; Segura v. Hunter Douglas Fabrication Co., 184 F. Supp. 2d 1227 (M.D. Fla. 2002). Thus, such a finding does not consign an individual to the state administrative process. An EEOC finding of reasonable cause also does not necessarily translate into a finding of cause by the FCHR since the FCRA makes the FCHR responsible for making its own determination on the merits of a charge. Jones v. Lakeland Regional Medical Center, 805 So. 2d 940 (Fla. 2d DCA 2002); Segura, 184 F. Supp. 2d at 1230.

C. What Triggers the 90-Day Suit-Filing Period Under Title VII, the ADA, GINA and the ADEA? Certainly, the receipt of an EEOC notice of right to sue by a claimant triggers the 90-day suit-filing period. See 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(e). Courts within the nation, however, are divided as to whether, and/or when, the 90-day period is triggered if the notice is received by someone other than the claimant or is sent to a claimant's old address.

Within the Eleventh Circuit, the 90-day period begins to run from the date the notice of right to sue is received by a member of the claimant's household. See Law v. Hercules,

Inc., 713 F.2d 691 (11th Cir. 1983) (a notice of right to sue that was picked up at the post office by the claimant's 17-year-old son at the request of claimant's wife, was deemed received as of the date of the son's receipt). Likewise, a charge received by a claimant's family member is deemed received even if the claimant is out of town at the time of receipt. See Bell v. Eagle Motor Lines, 693 F.2d 1086 (11th Cir. 1982). In certain circumstances, equitable tolling may prevent the 90-day suit-filing period. See Stallworth v. Wells Fargo Armored Services Corp., 936 F.2d 522 (11th Cir. 1991) (notice of right to sue that had been received by the claimant's nephew did not trigger the 90-day period when the claimant was represented by counsel and the EEOC, in derogation of its own policies as set forth in the EEOC Compliance Manual, failed to send a copy of the notice to the attorney). Most courts agree that the 90-day period is not tolled when a claimant moves and fails to keep the EEOC informed of his or her new address and, as a result, a notice of right to sue is then sent to the claimant's old address. See Employment Discrimination Law at 27-74 (5th ed. 2012).

D. Tolling the 90-Day Suit-filing Period for Federal Claims. The United States Supreme Court has suggested that the suit-filing period for Title VII (and ostensibly ADEA, ADA, and GINA actions) may be equitably tolled under certain circumstances. See Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990). Most courts narrowly construe the doctrine of equitable tolling with respect to the 90-day period. See Employment Discrimination Law at 27-82 (5th ed. 2012). Equitable tolling usually is permitted in situations in which the claimant is the victim of affirmative misinformation received from the EEOC. Id. at 27-83; see also Armstrong v. Martin Marietta Corp., 138 F.3d 1374 (11th Cir. 1997) (court equitably tolled suit-filing period where claimants were affirmatively misled by the EEOC concerning the appropriate statute of limitations); Browning v. AT&T Paradyne, 120 F.3d 222 (11th Cir. 1997) (court equitably tolled the suit-filing period for an ADEA action when the EEOC issued the claimant an old right to sue notice that did not reflect that the suit-filing period was now 90 days from receipt, as opposed to two or three years after the alleged unlawful employment practice had occurred). Parties can also agree to toll the suit-filing period. Additionally, as previously discussed, the suit-filing period may be tolled for servicemembers. See 50 U.S.C. § 3936, supra.

E. Tolling of the Suit-Filing Period for the FCRA. As set forth above, issues of tolling limitations periods set forth in the FCRA are governed by Section 95.051, Florida Statutes. These grounds consist of: (1) absence of the party to be sued from the state; (2) use of a false name by the person to be sued; (3) concealment of the person to be sued within the state such that service of process cannot be effectuated; (4) adjudication of incapacity of the person to be sued before the cause of action to be sued upon accrues; and (5) the pendency of any arbitral proceeding to a dispute that is the subject of the suit being brought. See Fla. Stats. § 95.051(1)(a)-(d), (g). Notably, these statutory grounds do not include a claimant's receipt of affirmative misinformation provided by the EEOC which causes him or her to miss the suit-filing deadlines of the FCRA.

VI. DETERMINING THE SCOPE OF THE CHARGE.

Sometimes a complaint in a civil action will allege facts or claims that were not asserted by the plaintiff in his or her charge of discrimination filed with the EEOC or local FEPA. In those circumstances, the question becomes whether the court will allow the plaintiff to maintain

those claims in his or her subsequent civil action. The leading case regarding when the allegations of a charge of discrimination may limit the scope of a subsequent civil action is Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970). Sanchez involved a plaintiff who originally filed a timely EEOC charge of discrimination alleging discrimination only upon the basis of sex, but who later filed a delinquent amended charge alleging sex and national origin discrimination. Complicating matters even further, the plaintiff then brought suit alleging discrimination upon the basis of race and color. Although the trial court dismissed the plaintiff's complaint for bringing suit on claims of discrimination that did not appear on the face of her charge, the Fifth Circuit reversed and remanded the case.

According to the Fifth Circuit, the allegations in the plaintiff's untimely amended charge were permissible pursuant to the EEOC's relation-back regulation (i.e., 29 C.F.R. § 1601.12(b)), because the allegations in the amended charge were nothing more than a "mere clarification and amplification of the original charge." In this respect, the Court of Appeals ruled that it is not necessary for the words in the narrative portion of the charge "presage with literary exactitude" the allegations of the subsequent civil complaint. Instead, the test for determining whether a subsequent lawsuit can be maintained is not whether the allegations in the civil complaint can be found in the charge itself, but rather whether the EEOC, in investigating that charge, would unearth such allegations of discrimination. Since the Court of Appeals concluded that the EEOC, in investigating the plaintiff's charges, could possibly have unearthed evidence of race and color discrimination, it remanded the case to the trial court.

In ruling that the scope of a charge of discrimination is determined by the facts and claims that can be reasonably expected to grow out of the EEOC's investigation of the charge and not the allegations contained in the charge itself, the Fifth Circuit specifically rejected the notion that the plaintiff's failure to check the boxes marked "race," "color" and "national origin" on her original charge barred her lawsuit alleging race and color discrimination. Instead, it ruled that the plaintiff's failure to check boxes was nothing more than a "technical defect or omission." According to the Court of Appeals, charges of discrimination are not judicial filings and thus should be liberally, as opposed to strictly, construed.

Since Sanchez was decided over a generation ago, several courts have wrestled with the issue of what kinds of claims can be reasonably expected to grow out of the EEOC's investigation of a charge of discrimination. Typically, where a plaintiff's charge alleges one or more acts of a particular type of discrimination and then his or her subsequent civil complaint alleges additional acts asserted to be the result of the same type of discriminatory animus, most courts will determine that the additional acts are "like and related" to the acts alleged in the charge and therefore allow the claims to proceed to trial. See EEOC v. Jacksonville Shipyards, Inc., 696 F. Supp. 1438, 1444 (M.D. Fla. 1988) (promotion claim in complaint was sufficiently related to claims of job assignment discrimination and hostile work environment found in EEOC charge); see also Booth v. Pasco County, 2010 U.S. Dist. LEXIS 80287 (M.D. Fla. July 13, 2010) (finding that many Florida courts recognize that race and national origin are indistinguishable and allowing plaintiff to bring claims for race discrimination where the plaintiff checked the national origin box) (citing Henry v. University of South Florida Board of Trustees, 2009 U.S. Dist. LEXIS 115227 (M.D. Fla. 2009). Courts also hold that discrimination claims are like or related to each other if a factual relationship exists between them. Grey v. City of

Norwalk Bd. of Education, 304 F. Supp. 2d 314, 323 (D. Conn. 2004); see also Cheek v. Western & Southern Life Ins. Co., 31 F.3d 497, 501 (7th Cir. 1994) ("claims are not alike or reasonably related unless there is a factual relationship between them. This means that the EEOC charge and the complaint, must, at a minimum, describe the same conduct and implicate the same individuals.").

When a plaintiff tries to assert a type or basis of discrimination in his or her civil complaint that is different than that alleged in his or her charge of discrimination, however, a stricter test is usually applied. For example, a plaintiff who alleged only race discrimination in his charge, typically will not be allowed to assert claims of sex or age discrimination in his civil complaint, unless he can show that the new claims of discrimination are closely related to the allegations in the charge of discrimination and that the EEOC, in investigating that charge, would reasonably have been expected to have unearthed evidence of these new bases for discrimination. See Caldwell v. ServiceMaster Corp., 966 F. Supp. 33, 36 (D.D.C. 1997) (claim of sex discrimination not like or reasonably related to claims of race discrimination and retaliation). Sometimes, however, this analysis can become murky in instances in which the bases of discrimination asserted in the charge and lawsuit, although different, are closely related (as can be the case with claims of race, color and national origin discrimination). See Dixit v. City of New York Dept. of Gen. Servs., 972 F. Supp. 730, 735 (S.D.N.Y. 1997) (national origin claim in lawsuit was deemed to be like and related to claim of race discrimination in charge).

Courts typically do not require plaintiffs, after the filing of an initial charge, to file subsequent charges of discrimination concerning acts of alleged discrimination that are like and related to the type of discrimination alleged in their original charges. Additionally, in most cases, courts do not require plaintiffs to file separate charges alleging retaliation concerning acts that allegedly took place as a consequence of their filing their initial charges. See Scott v. University of Mississippi, 148 F.3d 493, 514 (5th Cir. 1998) (retaliation claim deemed to grow out of the filing of the plaintiff's initial ADEA charge).

Failure to name a corporation in the charge also may not preclude the filing of suit against the unnamed corporation based on the EEOC charge filed. See Virgo v. Riviera Beach Assocs., LTD., 30 F.3d 1350 (11th Cir. 1994). For example, if an EEOC charge only names one employer, who was a single-integrated enterprise or joint employer of an unnamed employer, a court may allow a lawsuit to also proceed against the unnamed employer. The courts will look at five factors in this analysis:

- Similarity of interest between the named party and the unnamed party;
- Whether the plaintiff could have ascertained the identity of the unnamed party at the time the EEOC charge was filed;
- Whether the unnamed parties received adequate notice of the charge;
- Whether the unnamed parties had an adequate opportunity to participate in the reconciliation process; and

- Whether the unnamed party actually was prejudiced by its exclusion from the EEOC proceedings.

Id.

VII. CONCLUSION.

The procedural prerequisites and administrative exhaustion requirements of Title VII, the ADA, GINA, the ADEA, and the FCRA are quite intricate and can often be both difficult and confusing to negotiate. Nevertheless, compliance with these prerequisites and requirements can mean the difference between winning and losing a case.

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