

# Standards and Procedures for Settlement of EEOC Litigation<sup>1</sup>

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<sup>1</sup> 1 This document was issued by General Counsel Karla Gilbride on May 21, 2024. This document contains standards and procedures adopted for the benefit of the agency and shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by third parties. This document shall not be construed to create any right to judicial review involving the compliance or noncompliance of the EEOC or its employees with any matter dealt with in it. This document is not binding on any member of the public. This document supersedes the Settlement Guidance contained in the “Regional Attorneys’ Manual,” issued on April 29, 2005.

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## **A. Civil Justice Reform**

Executive Order 12988, 61 Fed. Reg. 4729 (Feb. 7, 1996), entitled “Civil Justice Reform,” includes provisions intended to “facilitate just and efficient resolution of civil claims” brought by

the federal government. It applies to EEOC Trial Attorneys assigned to a case and their supervisors, all of whom are “litigation counsel” within the meaning of the Order.

Section 1(a) of the Order requires an attempt at settlement prior to filing suit. The EEOC’s conciliation process satisfies this requirement. Section 1(b) of the Order requires that, as soon as practicable after filing suit and throughout the litigation, litigation counsel should evaluate settlement possibilities. EEOC counsel should consider initiating settlement efforts soon after filing if there appears any potential for resolving the suit without the need for taking any discovery. Counsel may make additional settlement efforts as the litigation progresses. Section 1(c)(1) of the Order directs litigation counsel to suggest use of an appropriate alternative dispute resolution (ADR) technique “[w]here the benefits of [ADR] may be derived.” Litigation counsel is in the best position to determine whether it would be appropriate to use mediation in a particular case. Thus, the Regional Attorney has authority to agree to use mediation in any case.

## **B. Settlement Authority**

### **1. General Counsel**

Congress assigned EEOC’s General Counsel “responsibility for the conduct of litigation” for the agency. 42 U.S.C. § 2000e-4(b)(1). The General Counsel controls the agency’s litigation, and thus has the authority to decide whether to settle EEOC lawsuits and on what terms. The General Counsel may delegate that authority to the Regional Attorney in any case or class of cases.

### **2. Delegation of Settlement Authority to Regional Attorneys**

The General Counsel delegates settlement authority to Regional Attorneys in all suits unless, upon authorizing litigation in the case, the General Counsel indicates that settlement authority is retained by the General Counsel. In any case where the General Counsel has retained settlement authority, the Regional Attorney cannot resolve the suit, or any claim in the suit, without approval of the General Counsel. In such cases, the General Counsel will make an independent review of the adequacy of the proposed settlement.

### **3. Cases on Appeal**

The General Counsel must approve all settlements of cases on appeal whether or not the Regional Attorney had settlement authority at the district court level. While a case is on appeal, Appellate has discretion, in consultation with the Regional Attorney, to engage in settlement efforts and to handle all settlement negotiations, including through court-ordered mediation.

## **C. General Settlement Standards**

### **1. Form**

To ensure the enforceability of Commission lawsuit resolutions, the agency's practice is that district court settlements be in the form of a consent decree or consent judgment. A consent decree is a court order rather than a contract. Thus, the word "agree" should not be used in describing what a defendant must do or not do. All injunctive terms of a consent decree should read as the court prohibiting or requiring the conduct.

When a court reviews a proposed consent decree, the court generally "pay[s] deference to the judgment of the government agency" unless the settlement is "unfair, inadequate, or unreasonable." *SEC v. Randolph*, 736 F.2d 525, 529-30 (9th Cir. 1984) ("[t]he initial determination whether the consent decree is in the public interest is best left" to the agency negotiating the decree); *cf. Mach Mining, LLC v. EEOC*, 575 U.S. 480, 492 (2015) (noting that EEOC has wide "latitude . . . to pursue voluntary compliance with the law's commands").

### **2. Scope**

The consent decree must contain a statement that it resolves only the claims raised in the Commission's complaint. If the Commission has agreed to resolve additional claims, such as those contained in pending charges resolved by the decree, those other claims must be specifically identified. The decree should contain language reserving the Commission's right to file suit on any pending charges not explicitly resolved by the decree and on subsequently filed charges. Charging parties and other aggrieved individuals should not be signatories to the decree, as (with the exception of intervenors) they are not parties to the action.

### **3. Confidentiality and Other Prohibited Terms**

Once the Commission has filed suit, the agency will not enter into settlements that are subject to confidentiality provisions or any other restrictions on disclosure of the suit, facts or allegations relating to the suit, or the settlement or its terms by the EEOC, charging parties, or other aggrieved individuals. The principle of openness in government requires that the public have access to the results of the agency's litigation activities, so that it can assess whether the Commission is using its resources appropriately and effectively. Additionally, it is important for entities covered by federal employment discrimination laws to be aware of the agency's enforcement activities.

Therefore, resolutions of Commission suits must contain all settlement terms (including the total amount of any monetary recovery) and be filed in the public court record. The Commission must be free to respond fully to inquiries regarding the suit and resolution and to provide upon request the resolution documents and any nonprivileged, case-related documents. Commission attorneys must oppose attempts to seal or otherwise prevent public access to the consent decree. If, over the Commission's objections, a court issues an order preventing such access, the General Counsel will determine whether to appeal the order.

Resolutions of Commission suits must not contain provisions that chill or deter the exercise of protected rights or have the effect of diminishing an individual's rights. Accordingly, no consent decree resolving a Commission suit, or any associated documents, may require that any individual refrain from disparaging the defendant or entities related to the defendant, or refrain from seeking future employment with the defendant or related entities. Similarly, no consent decree resolving a Commission suit, or any associated documents, may require any individual to agree to a shorter statute of limitations than that provided by statute for any future claims, to agree to refrain from filing future charges of employment discrimination with the EEOC or any other government agency, or to agree not to participate in a future EEOC investigation or otherwise communicate with the EEOC or any other government agency.

#### **4. Press Releases**

The Commission's policy is to issue a press release upon settlement of a Commission suit. Issuing a press release is an important component of the Commission's responsibility to inform the public about its law enforcement activities. Neither the issuance nor the content of the press release should be the subject of negotiation.

#### **5. Handling of Money**

Commission personnel may not assume responsibility for handling any monetary awards to any aggrieved individuals and may not distribute funds, in any form, that are intended for such individuals. Awards to individuals should be distributed by the defendant or a mutually agreed-upon third party. The costs of distribution, including the cost of any third-party claims administrator, should be borne by the defendant. Distribution costs must not be deducted from the award fund (or from interest on the fund). Monetary distribution tasks should be well-defined and subject to clear timeframes, and a procedure should be established for the Commission to verify that the required distributions took place.

#### **6. Breach**

The consent decree should address how it will be enforced in the event of a defendant's failure to comply. Consent decrees often contain provisions that require the EEOC to notify the defendant and attempt informal resolution prior to seeking court intervention over an alleged breach of the decree. In addition to requiring notice of an alleged breach, these provisions typically provide the defendant a specified time in which to remedy its alleged non-compliance before the EEOC contacts the court. Notice-of-breach provisions should expressly provide for exceptions to the waiting period in situations where a delay in seeking court enforcement may cause harm to the Commission or aggrieved individuals.

Because the consent decree is a court order, the mechanism for court enforcement is a motion to enforce the consent decree and may also include an application for an order to show cause why the defendant should not be held in contempt for failure to comply with the consent decree. These motions may be premised on a breach of any material term of the decree, such as the defendant's failure to pay aggrieved individuals in a timely manner, failure to submit required reports to the EEOC, or failure to comply with an injunction. The EEOC may request various forms of relief in its motion, including the payment of attorney's fees and the court's extension

of the duration of the decree to permit further monitoring (*see, e.g., EEOC v. SuperValu*, No. 09-C-5637, 2014 U.S. Dist. LEXIS 169215 (N.D. Ill. Dec. 2, 2014)), and imposing a periodic monetary penalty until the defendant complies (*see, e.g., EEOC v. Wal-Mart Stores, Inc.*, 147 F. Supp. 2d 980 (D. Ariz. 2001)).

## **7. Successor Liability**

Successor entities may be held liable for the discriminatory practices of entities they have purchased or merged with. *See, e.g., EEOC v. Northern Star Hospitality, Inc.*, 777 F.3d 898 (7th Cir. 2015); *EEOC v. MacMillan Bloedel Containers, Inc. and Local 544, United Paperworkers Int'l Union*, 503 F.2d 1086 (6th Cir. 1974). An important factor in establishing successor liability is notice (actual or constructive) of the claim to the subsequent employer prior to the transfer of ownership. To ensure that the obligations imposed by a settlement are carried out in the event of a transfer in ownership of the defendant, the consent decree should specify that the defendant will provide prior written notice to any potential successor, including any potential purchaser of all or a portion of the defendant's assets, of the Commission's lawsuit, the allegations raised in the Commission's complaint, and the existence and contents of the consent decree. The defendant should also be required to give notice to the EEOC when it has provided the information required by this section to a potential successor.

## **8. Compliance with Internal Revenue Code Section 162(f)**

Internal Revenue Code section 162(f) allows employers to deduct "certain amounts paid or incurred for restitution, remediation, or to come into compliance with a law." 26 U.S.C. § 162(f). It requires the EEOC to file an "information return" (Form 1098-F) with the IRS regarding amounts paid or incurred by the defendant for restitution, remediation, or to come into compliance with a law pursuant to a court order or agreement, where the EEOC expects that the total amount paid or incurred is \$50,000 or more for backpay, front pay, compensatory damages, and/or targeted equitable relief which is likely to be a cost to the employer. Attorney's fees, costs, punitive damages, and liquidated damages are excluded.

To promote clarity and ensure compliance with section 162(f), the following language must be included in all EEOC consent decrees where the defendant is not a government or non-profit entity and the total expected cost (including targeted equitable relief) is \$50,000 or more:

- The individual who should receive the copy of the Form 1098-F if the EEOC is required to issue one is: (Name and Physical Address)
- The EEOC has made no representations regarding whether the amount paid pursuant to this settlement qualifies for the deduction under the Internal Revenue Code.
- The provision of the Form 1098-F by the EEOC does not mean that the requirements to claim a deduction under the Internal Revenue Code have been met.
- Any decision about a deduction pursuant to the Internal Revenue Code will be made solely by the IRS with no input from the EEOC.

- The parties are not acting in reliance on any representations made by the EEOC regarding whether the amounts paid pursuant to this agreement qualify for a deduction under the Internal Revenue Code.

## **D. Relief in the Broader Public Interest**

### **1. Injunctions**

Injunctions addressing future compliance with the law must be focused on the conduct and claims at issue in the case, and they should be drafted in a manner that ensures enforceability. Precision is necessary to comply with the letter and purpose of Federal Rule of Civil Procedure 65(d)(1), to provide the defendant with clear notice of what conduct may result in a finding of contempt. Thus, for example, language such as, “Defendant is enjoined from discriminating on the basis of sex, including excluding women from dockworker positions” is unhelpfully broad despite the reference to the claim. Strong, direct language should be used in prohibitory injunctions.

Injunctions should not contain affirmations of a defendant’s prior or ongoing legal conduct, such as “defendant will continue to comply with Title VII” or “defendant restates its policy of nondiscrimination in employment.” A defendant’s statements of continuing legal conduct will not be accepted in place of explicit injunctive provisions requiring future compliance with the law.

### **2. Targeted Equitable Relief**

The [EEOC’s 2022-2026 Strategic Plan](#) places a high priority on obtaining targeted equitable relief in the agency’s resolutions. According to the Plan, “[t]argeted, equitable relief means any non-monetary and non-generic relief (other than the posting of notices in the workplace about the case and its resolution), which explicitly addresses the discriminatory employment practices at issue in the case, and which provides remedies to the aggrieved individuals or prevents similar violations in the future. Such relief may include customized training for supervisors and employees, development of policies and practices to deter future discrimination, and external monitoring of employer actions, as appropriate.”

Consent decrees should contain various forms of targeted equitable relief, as appropriate to the case and the individual employer. Every case should be treated as unique and contain carefully drafted provisions designed to provide full redress for the discriminatory practices at issue and to minimize the likelihood of their recurrence. By way of example only, it may be appropriate to include provisions for a defendant to: discipline an alleged discriminating official or harasser; issue a written apology to an aggrieved individual; provide a job coach, American Sign Language interpreter, or other accommodation for an aggrieved individual; provide for psychological counseling for an aggrieved individual; analyze and, as appropriate, revise its job descriptions; establish a complaint hotline or engage a professional third party to assist in receiving or handling complaints; conduct a pay equity audit or workplace climate surveys; or take other non-monetary measures tailored to the violations alleged in the case.

The elements of targeted equitable relief should be specific, feasible, and crafted to ensure accountability for the defendant. A defendant's obligations under the decree should include clear deadlines. In addition, the decree should specify the mode and timing of dissemination of policies or procedures required by the decree, and it should ensure that such documents are accessible to applicants and/or employees (i.e., disseminated through modalities where employees and applicants are likely to encounter them, and in languages used by the workforce and applicant pool, including ASL) to have the intended effect. Equitable relief provisions should be drafted and negotiated bearing in mind the size of the employer, the common methods of communication between the employer and its workforce or applicant pool, and any other factors that might impact the effectiveness of the relief.

### **3. Customized Training**

Training should be tailored to the defendant's workplace and workforce, as well as to the allegations in the lawsuit. Training should be designed to increase awareness of the type of conduct that could violate the law. It should include clear information on how and to whom to report inappropriate conduct, whether witnessed or experienced directly. It should also emphasize that retaliation of any kind against an employee who reports such conduct is prohibited and will result in disciplinary action.

Training should be conducted for all employees, with targeted training to managers/supervisors and human resources staff. First- and middle-level managers should receive training on how to recognize, respond to, and report unacceptable conduct. It should be made clear to all staff with supervisory responsibilities that it is a requirement of their position to report, to initiate, or to take corrective action regarding any objectionable conduct of which they become aware, regardless of whether the person engaging in the conduct is in their line of authority or whether anyone has complained to them about or asked them to correct the conduct. Individuals tasked with investigating complaints of inappropriate workplace conduct should be adequately trained on how to conduct such investigations. Trainers, training content, and training format should be identified with specificity in the decree and should be subject to EEOC approval. EEOC representatives should also have the option of attending the training.

Where appropriate, each training program should begin with a message from a senior executive that the employer considers discrimination, harassment, retaliation, and any offensive conduct in the workplace unacceptable, and that defendant is committed to preventing such conduct and remedying it quickly if it occurs. Where feasible, it is a best practice to have the executive attend and participate in the program. Training should occur regularly throughout the duration of the decree. It is a best practice to obtain evaluations at various intervals following the training, asking participants whether the training has affected their behavior or the behavior of others in the workplace. Additional ideas for effective training related to antidiscrimination, antiharassment, and antiretaliation can be found in [EEOC's Select Task Force Report on the Study of Harassment in the Workplace](#).

### **4. Implementation of Policies**

The consent decree should include provisions concerning the implementation of policies that fully address what caused or enabled the discrimination alleged in the complaint. For example, in

harassment cases, policies and complaint procedures addressing prohibited conduct should be created or revised if needed. In hiring and promotion cases where a defendant's selection procedures are alleged to have contributed to the exclusion of members of the protected class, the procedures should be revised to eliminate their discriminatory effects. Where a defendant has no antidiscrimination, antiharassment, reasonable accommodation, or antiretaliation policy (whichever is at issue), the defendant should be required to create and implement one.

Where a defendant's policies or procedures require revision, the EEOC should not draft the policy but should instead advise the defendant during negotiations of insufficient content. Additional ideas and guidance on the development of effective policies related to antidiscrimination, antiharassment, and antiretaliation can be found in [EEOC's Select Task Force Report on the Study of Harassment in the Workplace](#).

## **5. Monitors**

Whenever a monitor is appropriate, the monitor should have the authority to review relevant documents, speak to employees and EEOC staff, and otherwise be provided the resources necessary for an effective review of the defendant's compliance with the terms of the consent decree. Monitors should be approved by the EEOC, and the costs associated with monitoring should be borne by the defendant. The decree should require the defendant's implementation of the monitor's recommendations subject only to a contrary court order. The decree should also provide a mechanism for securing a qualified replacement acceptable to the EEOC if the monitor is unable to complete required tasks. In some cases, the EEOC may agree that a current employee of the defendant, acceptable to the EEOC, may monitor compliance with the consent decree. This must not be an individual alleged to have been complicit in the discrimination. The individual must have the knowledge, ability, and authority to ensure compliance with the requirements of the decree. In some instances, it may be appropriate to include regular, formal audits as a term of the decree, with the results reported to the EEOC.

Where appropriate, decrees should permit visits to the defendant's facility by EEOC staff or their designee upon reasonable notice. The scope of permissible EEOC staff conduct during visits — such as the extent of their examination of the premises and their ability to speak to employees and managers selected randomly — should depend on the violations at issue and the requirements under the decree.

## **6. Record Retention and Reporting**

The consent decree should describe with as much specificity as possible the records a defendant must retain during (and where applicable, after) the term of the decree. The decree should also contain provisions permitting the Commission to inspect or require production of relevant documents, whether or not the information was identified among the records the decree requires the defendant to retain, and to interview employees, including managers, who may possess relevant information.

The decree should require that information necessary for ongoing monitoring of the defendant's compliance be submitted to the Commission on a periodic basis. Reporting on all activities required under the decree is essential to the EEOC's ability to examine the defendant's

compliance and take timely enforcement action where necessary. Decrees should include reporting provisions to ensure compliance with any required relief for aggrieved individuals and targeted equitable relief. Reporting should include, as appropriate: internal discrimination or harassment complaints and personal contact information for those who made such complaints; information related to requests for reasonable accommodation; the defendant's actions taken on internal complaints and accommodation requests; information on pay determinations; information reflecting applicant flow and hiring decisions; and charges filed with the EEOC or other government entities. Decrees may also provide for the EEOC's ability to review the defendant's internal investigations and the defendant's efforts to comply with decree requirements such as audits (for example, of hiring decisions where goals have not been met), employee surveys, and exit interviews.

When discrimination has been inferred based on a statistical disparity, decrees should describe, with as much specificity as possible, the data that must be provided to allow for monitoring by the EEOC or an outside monitor. The decree should outline what fields will be in the database and the electronic format of the data file. Decrees should also specify the metrics for determining compliance – for example, in meeting hiring or promotion goals, the absence of any shortfall, or at a minimum, that any shortfall is not statistically significant (e.g., is less than two standard deviations) when using the appropriate statistical test.

## **7. Notice of Lawsuit and Settlement**

The decree should require that a defendant post in a physical and/or electronic area where the defendant's notices are commonly displayed for its employees, or otherwise distribute, an accessible notice of the lawsuit and settlement. For many workplaces, electronic posting of notices is the superior method. The purpose of the notice is to inform employees of their rights and responsibilities under the relevant antidiscrimination law(s) and the consent decree. The notice should, in layperson's language, set forth the claims resolved in the case, the requirements of the relevant law(s), the general terms of the consent decree, and EEOC contact information in case of questions. The notice should not contain any denials by a defendant. The notice should be written in languages and on media calculated to make the information accessible to the defendant's employees. In the case of limited-literacy workforces, video recitations of the notice should be considered, including videos with simultaneous ASL interpretation.

## **E. Victim-Specific Relief**

### **1. Consultation with Aggrieved Individuals Regarding Relief**

Although the EEOC determines appropriate relief in suits it files, the EEOC consults charging parties and other aggrieved individuals regarding relief the Commission is considering accepting and notifies them of the relief they will receive in the settlement. Exceptions to these requirements can be made in matters involving large numbers of, or currently unknown, aggrieved individuals. However, charging parties should always be consulted before the EEOC accepts relief offers.

Even where a charging party or other aggrieved individual is represented by private counsel, the Commission retains the authority to accept or reject any settlement terms or conditions for the EEOC's claims, consistent with its statutory authority and the settlement standards set out herein. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002) (rejecting the notion that the EEOC's "prayer for relief could be dictated by" a charging party, and stating that "once a charge is filed, the exact opposite is true under the statute - the EEOC is in command of the process"). Nothing in this document is intended to limit or interfere with an individual's right to obtain and receive private representation.

## **2. Individual Affirmative Relief**

Individual affirmative relief, such as reinstatement, reinstatement (or front pay in lieu thereof), wage increases, promotions, transfers, and job training, should be sought in all cases where applicable. Also, where applicable, relief should include retroactive seniority and any other lost benefits, such as pension accruals. Individual affirmative relief should be sought absent strong countervailing reasons, as it is important for the effective enforcement of discrimination laws that those harmed by discrimination attain their rightful place in the workforce.

## **3. Job References**

For individuals who were employed by the defendant, it is important to secure as positive a reference as the defendant can honestly provide. Where the parties agree to a reference containing only basic employment information (such as dates of employment and position), and the defendant has had a policy of providing only such information, the EEOC should obtain the defendant's agreement to include a statement of the policy with the reference. Where possible, references should contain a statement that the individual is eligible for rehire.

## **4. Monetary Relief Generally**

Monetary relief on Commission claims can be allocated to backpay, interest, front pay, compensatory and punitive damages, and liquidated damages, in accordance with the agreement of the parties, so long as the particular relief is authorized under the statute(s) under which the case was brought and the allocations are reasonably related to the harm or loss caused by the discriminatory conduct. Required withholdings should be made from backpay, and it should be made clear at the time of agreement on backpay that the amount is exclusive of the employer's share of Social Security and Medicare contributions. Other forms of monetary relief are also taxable, but there should be no withholding. Employers should issue an IRS W-2 form in connection with all backpay and front pay awards to all individuals receiving such awards, and an IRS 1099 form in connection with all awards for interest and compensatory, punitive, and liquidated damages. Employers should provide copies of these forms to the EEOC. EEOC attorneys do not provide advice on tax consequences. A discussion of monetary relief in systemic matters is below at section F.1.

## 5. Claimant Releases

As a condition of obtaining relief on a Commission claim, claimants may release their right to recover for any claims against the defendant arising under the same facts and statute(s) and comprising the same violation(s) as were alleged in the EEOC's lawsuit.

Model release language is as follows:

In consideration for and effective upon my receipt of \$ \_\_\_\_\_ in connection with the resolution of EEOC v. \_\_\_\_\_, I waive my right to recover for any claims of [bases and issues] arising under [statute(s)] that I had against \_\_\_\_\_ prior to the date of this release and that were included in the violations alleged in the EEOC's complaint in EEOC v. \_\_\_\_\_.

However, the Commission will not permit a release that contravenes public policy or diminishes an individual's rights. *See Gen. Telephone Co. of the Northwest v. EEOC*, 446 U.S. 318, 325-26 (1980) (recognizing that Congress gave the Commission litigation authority in 1972, in part, to "bring about more effective enforcement of private rights").

As noted above at section E.1, nothing in this document is intended to limit or interfere with an individual's right to obtain and receive private representation. Further, where the agreement is knowing, voluntary, and otherwise lawful, the EEOC acknowledges that a represented claimant may agree to waive or release, for separate consideration, additional legal claims against the defendant above and beyond any conditions required for receipt of relief through the EEOC's resolution.

Commission attorneys should take care that Commission resolutions not be associated with separately negotiated release agreements that contain any of the prohibited terms described in section C.3 above. Commission attorneys are authorized to end the EEOC's participation in efforts to resolve the EEOC's claims if the attorney learns that such rights-limiting terms are being sought in separate agreements attendant to the resolution of a Commission action, even if the EEOC is not a party to the proposed agreement containing such terms.

## F. Relief in Systemic Cases

### 1. Determining Monetary Entitlement

Resolution of a systemic case will often involve a settlement fund, from which monetary relief to individuals will be distributed. Individual awards for charging parties or other identified aggrieved individuals may be set out in the consent decree, or awards may be determined as part of a claims process. The scope of the class should be clearly set out in the consent decree.

In all cases, the EEOC retains sole discretion to determine eligibility to receive monetary relief and to allocate monetary relief. Where the EEOC has not yet identified all aggrieved individuals and determined their monetary awards prior to the execution of the consent decree, the decree should provide a procedure through which the EEOC will identify aggrieved individuals and

determine their monetary awards. The EEOC will utilize an equitable methodology to determine apportionment of the settlement fund to aggrieved individuals. In large systemic cases, at least a general outline of the factors or formula used to determine individual shares should be set forth in the decree.

When discrimination has been inferred from a statistical disparity, backpay and reinstatement relief may be based on the “shortfall” in positions to which members of the affected group would have been entitled absent the defendant’s unlawful conduct. Where appropriate, relief may also be based on the actual number of aggrieved individuals. The primary consideration is overall fairness to members of the affected group, individually and collectively. Exactness is not required.

## **2. Monetary Relief for Non-Applicants in Hiring Cases**

It is sometimes appropriate in hiring cases to seek relief for individuals who did not apply for the positions at issue. For example, individuals in the protected class may not have applied for a job because of the defendant’s reputation for engaging in discriminatory employment practices; or an employer’s recruitment methods may have excluded protected class members from the applicant pool. The deterred applicant theory may apply to transfer and promotion cases as well. Non-applicants should receive relief only if the EEOC is satisfied that they possessed the relevant qualifications for the positions at issue and would have applied but for the defendant’s discriminatory practices.

## **3. Instatement, Goals, and Affirmative Recruitment Efforts**

In hiring, discharge, or promotion cases where aggrieved individuals cannot be immediately placed in the positions lost, they should be given the first opportunity for positions when vacancies arise. When establishing such a preference, the decree should describe with specificity the eligibility requirements and the procedure by which vacancies will be filled.

Affirmative hiring or promotion goals to increase the representation of members of a protected class may be warranted as a remedial measure where there is evidence that the protected class has been disproportionately excluded from employment opportunities. Affirmative hiring or promotion goals should be tied to the specific positions at issue in the suit, and the goals should be based on availability (determined, for example, through labor market data or applicant flow) for the position. The decree should permit the defendant to meet established goals through placements that include identified aggrieved individuals. The decree should not establish rigid quotas.

Where the decree contains hiring goals, it should also require specific affirmative recruitment efforts designed to increase representation in the applicant pool, such as the strategic placement of job advertisements and reaching out to specific organizations and educational institutions. Affirmative recruitment efforts may also be appropriate in resolutions that do not include hiring or promotion goals.

#### **4. Settlement Administration**

In large systemic cases, it may be efficient to retain the services of a third party for settlement administration, usually a professional claims administrator or accounting firm, or some other business that is reliable. The cost of a claims administrator must be borne by the defendant. The consent decree should provide for EEOC assistance and involvement in the work of the claims administrator. Even where a claims administrator is involved, the consent decree must provide that the EEOC makes the final determination as to whether an individual is eligible to participate in the settlement as a claimant and the amount of the individual's award.

The consent decree should contain information about providing notice of the settlement to all individuals affected by the lawsuit. Ordinarily, notice will be sent directly to those individuals. When the issues in the case dictate, notice can also be given by other means, such as posting on the EEOC's or the defendant's website, or on a website established by the claims administrator, advertising in periodicals, online or on social media (for instance, in a failure-to-hire case where the aggrieved individuals are not readily identifiable), distribution of the notice to employees with their paychecks, or posting the notice at the employer's facilities or in union halls.

#### **5. Reversions**

No portion of the monetary relief provided for in the decree may revert to the defendant. Funds which cannot be distributed because of an inability to locate aggrieved individuals, or for any other reason, should be reallocated among identified victims. Where funds remain after reasonable reallocation efforts, they may be contributed to organizations that have the purpose of enhancing the employment opportunities of the group affected by the defendant's unlawful practices (except in EPA and ADEA actions, in which sums not paid to employees within three years are to go to the U.S. Treasury under 29 U.S.C. § 216). The program(s) or organization(s) should be selected by agreement with the defendant. Where possible, the consent decree should identify the program(s) or organization(s) to which the funds will be distributed.