

PUBLICATION

EEOC: Show Me Yours, but I Won't Let You See Theirs

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Most employers know the drill: employee feels as though he/she has been the subject of a discriminatory or retaliatory act by their employer; employee contacts the Equal Employment Opportunity Commission (EEOC); employee files a Charge with the EEOC (becomes the Charging Party); then the employer receives a Notice of Charge from the EEOC, along with a Request for Information which normally asks for a position statement.

Prior to January 1, 2016, when an employer or its agent prepared and submitted a position statement to the EEOC, the position statement *was not* shared with the Charging Party, until if and when a Notice of Right to Sue was issued and the Charging Party requested such from the EEOC through a Freedom of Information Act (FOIA) request. However, just recently, the EEOC issued a press release announcing that it has implemented nationwide procedures that provide for the release of the employer's (referred to affectionately as Respondent) position statement (*and* any non-confidential attachments to such) to the Charging Party or their representative (*a/k/a* plaintiff's attorney) upon request *during* the investigation of the charge of discrimination or retaliation. Moreover, not only will the EEOC share the employer's position statement (and non-confidential attachments) with the Charging Party, but also it will provide the Charging Party with 20 days to respond, either in writing or orally, to the employer's position statement. Nonetheless, the Charging Party's "response" *will not* be provided to the employer during the investigation.

These procedures became effective for any request from the EEOC to an employer for a position statement on or after January 1, 2016.

Why is this change of procedure significant for my organization?

As a refresher, the position statement is the most important document that an employer will submit to the EEOC during the investigation of a Charge of discrimination for several reasons:

1. to correct any factual misstatements made by the Charging Party;
2. to supply any additional factual information that is usually omitted by the Charging Party;
3. to attempt to focus the EEOC investigator(s) on the relevant issues;
4. to refute unfounded allegations;
5. to establish credibility or a relationship of trust with the EEOC;
6. to persuade the EEOC investigator to issue a determination of insufficient evidence to establish a violation of the law; and
7. to possibly discourage plaintiff's counsel from pursuing a weak or unfounded case.

Consequently, it is imperative that the position statement be authoritative and factually accurate, comprehensive, reader friendly, consistent, focused and goal oriented. The employer wants to convince the EEOC at this stage that its version of the events is the correct one and that the proper legal conclusion is a "no cause" determination.

However, with the new procedures in place, employers (or their agents) will want to pay even greater attention to the several factors listed above in order to derail, as much as possible, a Charging Party from being able to convincingly question the veracity of the employer's position statement in their response to the EEOC. A poorly

drafted and challenged position statement could lead to an on-site investigation by the EEOC, a broadening of the scope of the EEOC's investigation, additional requests for information, lengthening the investigation, increased chance of a "cause" finding, and worst of all, the initiation of litigation by the EEOC.

Also important for the employer is to make sure that it submits "confidential" information in separately labeled attachments along with an explanation justifying the confidential nature of the information. The EEOC considers the following to be information that is "confidential":

- sensitive medical information (except for the Charging Party's medical information);
- social Security numbers;
- confidential commercial or financial information;
- trade secrets information;
- non-relevant personally identifiable information of witnesses, comparators or third parties, such as, social security numbers, dates of birth (in non-age cases), home addresses, personal telephone numbers, and personal email addresses; and
- any reference to charges filed against the same employer by other charging parties.

It is vital to keep in mind that these new procedures, especially allowing early access to the employer's position statement and other documentation, will most likely give the Charging Party and their counsel insight into the employer's litigation defense strategy. Thus, armed with this knowledge, the Charging Party may be better equipped to anticipate the employer's response to a lawsuit and draft their complaint accordingly.

EEOC's Digital Charge System

Along with the new procedures regarding position statements above, the EEOC has also implemented Phase I of its Digital Charge System, which it claims to be a secure online portal to transmit and receive documents between the parties to a charge and the EEOC. A unique password is assigned to each charge that is filed, which the employer must use to access the system (the employer has the ability to change the password if it prefers). Phase I allows the employer against whom a charge has been filed to communicate with the EEOC by electronically downloading the charge, reviewing an invitation to mediate and respond, and submitting a position statement and response to the request for information. It also allows the employer to provide and verify its contact information (and include the designation of legal counsel, if applicable). Phase II is expected to be implemented later in 2016 which will allow Charging Parties to access the system. Employers (and their agents) are expected to communicate with the EEOC through this portal unless the employer does not have the technical capability to access the system.

Thus far, reports on how well the portal works have been favorable. It appears to be a fairly easy system to access and is user-friendly. A couple of notes: once a file is uploaded it cannot be deleted and, whatever name the document or file is given cannot be changed and will be reflected on the site once it is uploaded. Obviously, in light of this, care should be exercised in naming the files or documents.