

Publications

Labor and Employment: EEOC Announces it will Release Employers' Position Statements to Charging Parties

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Michael C. Griffaton

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The Equal Employment Opportunity Commission (EEOC) recently announced that it will now release employers' position statements and non-confidential exhibits to charging parties as a matter of course during its investigations. Employers, however, will not receive a copy of the charging party's reply. This new procedure applies to all EEOC requests for position statements made on or after January 1, 2016.

Previously, a charging party generally could obtain the position statement only after the charge was dismissed by submitting a request under the Freedom of Information Act (FOIA) or under Section 83 of the EEOC's Enforcement Manual. In some EEOC districts, the position statement also would be provided upon request. In all cases, the EEOC provided charging parties with a verbal summary of the position statement.

In crafting position statements, the EEOC advises employers to focus "on the facts relevant to the charge of discrimination and to identify the specific documents and evidence supporting its position." The EEOC's new procedures highlight the importance of an accurate, concise, straight-forward position statement.

Employers should be cautious when submitting confidential information. The EEOC notes that "confidential information" includes sensitive medical information (except for information relating to the charging party); social security numbers; confidential commercial or financial information; trade secrets; non-relevant, personally identifying information of witnesses, comparators, and third parties (such as social security numbers, dates of birth in non-age cases, and personal addresses, phone numbers, and email addresses); and references to charges filed against the employer by other charging parties. The EEOC advises employers to provide such information in separately labeled attachments like "Sensitive Medical Information," "Confidential Commercial Information," "Confidential Financial Information," or "Trade Secret Information." In addition, employers should provide "an explanation justifying the confidential nature of the information." The EEOC will "consider" the justification provided and "will not accept

blanket of unsupported assertions of confidentiality.” After considering the employer’s reason, the EEOC “may” – notably, not “will” – redact the confidential information before releasing it to the charging party.

And because the charging party will have access to the employer’s position (including the identities of the witnesses and decision-makers and key documents) during the investigation, the charging party can gain valuable insight in the employer’s defenses and strategy. This permits the charging party to artfully draft his or her reply to the position statement and, if the charge is dismissed, the allegations in the complaint. Of course, the EEOC may follow-up on statements the charging party makes in response with further requests for information. This may expand the scope of the investigation to possibly include other employees or allegations.

Contact your Vorys lawyer if you have questions about how to best respond to a charge and the EEOC’s request for information.