

EEOC Issues Nationwide Policy of Providing Charging Parties with Employers' Complete Position Statements



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Most employment discrimination cases begin with agency action, in which the aggrieved employee brings his/her claim or Charge to the Equal Employment Opportunity Commission (EEOC), or its state or local agency equivalent, for investigation before bringing an action in federal or state court. Once the aggrieved employee (also known as the "Charging Party") files his/her Charge, the employer is required to respond by providing a Position Statement explaining its position, and it may attach supporting exhibits. For example, if a Charge alleged discriminatory discipline, the employer might attach exhibits showing discipline imposed on other employees.

In recent years, some EEOC offices have shared Position Statements with Charging Parties. However, last week the EEOC instituted a nationwide policy (available at <http://>

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www.eeoc.gov/eeoc/newsroom/release/position_statement_procedures.cfm) that expressly endorses not only the sharing of Position Statements, but also the sharing of any “non-confidential” exhibits.

Under the new policy, which applies to all Position Statements submitted on or after January 1, 2016, the EEOC will provide a copy of the Position Statement and any non-confidential exhibits to the Charging Party, upon the request of the Charging Party or his/her representative during the investigation. The Charging Party then has 20 days to respond to the employer’s information. The EEOC maintains that sharing the employer’s Position Statement and non-confidential exhibits will result in stronger EEOC investigations because it will receive more complete information from the parties. However, the policy explicitly refuses to provide the employer with any response from the Charging Party, which puts the employer at a disadvantage, as it creates an uneven playing field for the parties.

As a result of this new policy, employers responding to charges of discrimination being investigated by the EEOC must assume that all information contained in a Position Statement will be shared with the Charging Party. Moreover, employers should carefully consider the documents they provide to the EEOC as exhibits to Position Statements. The EEOC suggests that employers may, when appropriate, designate exhibits as containing: “Sensitive Medical Information,” “Confidential Commercial Information,” “Confidential Financial Information” or “Trade Secret Information.” However, because the EEOC will exercise its own judgment when deciding whether such information is truly entitled to be treated as confidential, employers, in consultation with counsel, should carefully consider whether to provide confidential information as exhibits.

Because Position Statements can be used as evidence in subsequent litigation, an employer should be diligent in ensuring that its Position Statement is drafted only after a thorough investigation has been conducted, and after the facts have been checked for accuracy. Otherwise, the employer may find itself in a situation where the rationale for an adverse employment action that is included in the Position Statement is inconsistent with the rationale the employer offers in litigation. An obvious contradiction can constitute a genuine dispute as to an issue of material fact, and preclude the dismissal of the action at the summary judgment stage.

In short, when drafting Position Statements, employers should:

- avoid including confidential information in the body of the statement
- attach exhibits containing confidential information only when necessary and properly identified as “confidential”
- ensure that the facts included in the Position Statement are accurate and will remain consistent with future litigation positions.