



EEOC Now Releasing Position Statements to Charging Parties

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When an employee or former employee files a charge of discrimination against their employer, the EEOC has the authority to investigate. As part of the investigation, the EEOC asks the employer to submit a position statement explaining its side of the story.

In the past, the employer's position statement was not shared with the charging party during the EEOC's investigation of the charge, although it was not unheard of for the EEOC to share portions of the employer's position statement over the phone with charging parties. However, the EEOC recently [announced](#) that all position statements filed after January 1, 2016 will be released to the charging party upon request and during the investigation of the charging party's charge of discrimination. Ironically, while transparency is now required for employers, it is not required for employees. Although the charging party will be given the opportunity to file his or her own response to the position statement, the EEOC will not share the charging party's response with the employer during the pendency of the investigation.

The new procedure has a number of implications for employers. Most importantly, charging parties will now have complete and early access to employer information and arguments. With respect to confidential information, the EEOC procedure provides that only the non-confidential portion of the position statement will be released. However, the EEOC will determine what information will be considered confidential and that determination is outside of the employer's control. Therefore, employers should be particularly cautious about what information is included in a position statement provided to the EEOC and how they characterize any confidential information that is included.

Because the charging party can now review the employer's position statement and respond, the EEOC will likely conduct more follow-up investigations, resulting in additional burden on the employer at the charge stage of litigation. Additionally, employees will have an early opportunity to evaluate the employer's defenses. This gives charging parties a chance to guard against those defenses while drafting the complaint and discovery requests at the outset of a resulting lawsuit.

Take Away for Employers

Going forward, employers should avoid including confidential information within their position statements. If confidential information must be submitted then employers should consider (1) submitting it separately from the position statement or in separately marked attachments; and (2) conspicuously marking all documents that contain confidential information with a CONFIDENTIAL stamp or watermark. The EEOC has provided [guidance](#) on submission of confidential information. Additionally, employers should minimize the extent to which they discuss their legal position and analysis of the facts under the relevant law.

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