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EMPLOYMENT LAW UPDATE

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THERE'S NOTHING QUITE LIKE A SILVER PLATTER: THE EEOC'S NEW NATIONWIDE PROCEDURES FOR RELEASING RESPONDENTS' POSITION STATEMENTS GRATIS

On Feb. 18, 2016, the Equal Employment Opportunity Commission (EEOC) issued its *Nationwide Procedures for Releasing Respondent Position Statements and Obtaining Responses from Charging Parties*, which are retroactive to all position statements submitted by employers to the EEOC on or after Jan. 1, 2016. In short, the new procedures provide charging parties and their counsel, to the extent they have one, an employer's position statement on a silver platter, with no concomitant provision of information to the employer, such as the charging party's Intake Questionnaire or the subsequent rebuttal, which he or she now has an opportunity to give within 20 days after the filing of a position statement. The procedures raise serious confidentiality concerns for employers and their counsel moving forward, especially given that the EEOC has said it received 89,385 charges of workplace discrimination in FY 2015, up from 2014, each of which necessitated an employer response. In light of the new procedures, employers should take steps to carefully segregate and justify the requested protection of any such confidential information or risk its unintended disclosure.

The New Procedures

Specifically, the new procedures provide that the EEOC will release respondent position statements and "non-confidential" attachments to a charging party or his/her representative upon request during the investigation of the discrimination charge. The stated purpose of the new rule is to "provide a consistent approach to be followed in all of EEOC's offices" to "enhance services to the public." Before Jan. 1, 2016, the Commission's standard practice had been for investigators to either read certain contents of a position statement to charging parties over the telephone or allow the charging party or his/her counsel to appear in the local office personally and read through it. Importantly, however, investigators traditionally have never provided *carte blanche* hard copies of employer position statements to a charging party for their unfettered use and access. Rather, such documents were not previously available until if and when a lawsuit was filed, which

document production would be subject to the Freedom of Information Act (FOIA). Unlike in ensuing litigation, where an employer can rest within the comfortable confines of a court's confidentiality order when producing responsive documents, there are no such protections available here. In fact, the new procedures provide that EEOC staff "may" redact confidential information "as necessary" prior to releasing it. While the new procedures do not specifically reference FOIA, undoubtedly the commission's production ability is still confined by the limitations of that act, which may provide some additional layer of insulation to employers.

Do I Get Something In Return?

No. The EEOC's new procedures provide that a charging party will have 20 days to provide a rebuttal to a respondent's position statement. However, that response will not be provided to a respondent while the investigation is pending. In other words, the Commission's position is that it is releasing the "first formal document" from each side, namely the charge itself from the charging party and the position statement from respondent. To call the comparison somewhat skewed might be an understatement, given that the charge is often a paragraph at best or two sentences at worst, and a position statement is often a full-scale brief, potentially including affidavits, exhibits and case law. The upshot is that employers will have to wait until a lawsuit is filed to FOIA the charging party's response.

Navigating the Waters

Rather than relying on "may" or "as necessary," it is now crucial that employers submitting position statements separately upload in individually labeled attachments any and all confidential information that they do not want produced to charging parties. Any employers who have submitted position statements after Jan. 1 may also want to reach out to their respective investigators and amend their responses to make these changes. Respondents must also include a specific explanation justifying the confidential nature of the information contained in the attachments. The EEOC suggests that a position statement should refer to, but not identify, the information a respondent deems sensitive medical information or confidential commercial or financial information.

What does the EEOC consider confidential such that it qualifies for a separate attachment? In its *Questions and Answers for Respondents*, the Commission provides that the following information should be 1) segregated, and 2) uploaded into separate attachments designated as such, with 3) an explanation of the justification for confidentiality:

- Sensitive medical information (except for the charging party's medical information)
- Social Security numbers
- Confidential commercial or confidential financial information
- Trade secrets information
- Non-relevant personally identifiable information of witnesses, comparators or third parties; for example, Social Security numbers, dates of birth in non-age cases, home addresses, personal phone numbers, personal email addresses, etc.
- Any reference to charges filed against the respondent by other charging parties

Included with this list is a warning from the EEOC that it will "not accept blanket or unsupported assertions of confidentiality."

Importantly, the above process should be followed not only for exhibits, but also for any substantive contents of the position statement itself. Alternatively, employers may also consider simply referencing the particularly sensitive information and indicating that, due to its nature, it will only be provided upon request. While this may result in more Commission-issued subpoenas or follow-up requests for information, it certainly will preserve all arguments as to confidentiality and, if the Commission deems the information is not crucial for its decision in any event, the information may never have to be produced.

Will this Affect Me?

The new procedures apply across-the-board to all employers who receive a charge of discrimination. The number of changes filed has increased over the past year, which should make heightened awareness of the procedures a priority for employers. Specifically, on Feb. 11, 2016, the EEOC released its *FY 2015 Enforcement and Litigation Data* indicating that retaliation charges are the most frequently filed, making up 45 percent of all private sector charges, with race-based charges next at 34.7 percent, disability at 30.2 percent, sex at 29.5 percent and age at 22.5 percent; national origin, religion and color follow thereafter. Employers should keep in mind that the EEOC interprets and enforces Title VII's prohibition of sex discrimination as prohibiting employment discrimination based on gender identity or sexual orientation, though the act itself does not delineate those categories within the scope of its coverage, nor has the Fourth Circuit opined on the same. The EEOC announced just this month that it has filed its first *two sex discrimination cases* based on sexual orientation in Pennsylvania and Maryland. Thus, addressing these emerging issues, while also navigating the new procedures in a landscape where confidential company information is paramount, will require significant diligence on the part of employers.

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