



EEOC Charges—How to Protect Your Firm and Your Clients



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Staffing Law
CONFERENCE



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Initial Steps

- Request extension, submit notice of appearance
- Avoid retaliation
- Document preservation

Initial Steps (cont.)

- Review of charge
 - Statute of limitations issues
 - Confirm whether dual filed with FEPA
- Review for potential EPLI coverage
- Review for staffing firm client issues
- Mediation?

Conducting the Investigation

- Who should conduct the investigation?
 - Internal personnel v. outside counsel, etc.
- Identify parties and potential witnesses
- Identify potential documents or other evidence
 - Personnel files, emails, job descriptions, relevant employment policies, etc.

Conducting the Investigation (cont.)

- How to conduct employee or witness interviews
 - Beware of making promises
 - Beware of premature conclusions
- Taking prompt corrective action, as appropriate
- Confidentiality (or lack thereof)

The Position Statement—Know Your Audience

- EEOC / FEPA
- Client / respondent
- Charging party and his or her attorney
- Courts
- The public (FOIA)

The Position Statement—Factual Background Section

- Highlight respondent's business and its EEO practices and policies
- Recount respondent's version of the facts in order to refute the allegations in the charge
 - Charging party's employment history
 - Legitimate business basis for each adverse action
- Avoid providing unnecessary information

The Position Statement—Legal Analysis Section

- Is it necessary?
- Identify the statutes at issue (Title VII, ADA, ADEA, etc.)
- Identify the theory of unlawful conduct (disparate treatment, harassment, retaliation etc.)

The Position Statement—Legal Analysis Section (cont.)

- Deny the charging party's prima facie case
 - The charging party is not in a protected class; did not experience adverse action; was not qualified for the position; and/or there are no circumstances giving rise to an inference of discrimination (e.g., use of comparative data for similarly situated employees outside the charging party's protected class)

The Position Statement—Legal Analysis Section (cont.)

- Provide a legitimate, nondiscriminatory or nonretaliatory reason for any adverse action
- Deny that the charging party can prove that the respondent's reasons are pretextual

The Position Statement—Legal Analysis Section (cont.)

- Identify potential legal defenses
 - *See outline for nonexhaustive list*
- Consider state and local issues

The Position Statement—Final Thoughts

- How to select exhibits
- The conclusion
 - Ask for what you want and explain why

Handling Requests for Information

- An EEOC Request for Information (RFI) may accompany the charge or be issued at a later date
- May contain overly burdensome or irrelevant requests

Overbroad RFIs

- Attempt to reach a reasonable compromise with the investigator
 - Explain how and why the RFI is overly burdensome, costly, or time-consuming for your firm in particular
 - Based on the scope of the investigation, attempt to limit the RFI by office location; dates in time; type of job; etc.

Overbroad RFIs (cont.)

- Attempt to reach a reasonable compromise with the investigator (cont.)
 - Request to make an initial or sample production and supplement later if need be
 - Request extensions of time and keep the investigator updated on your progress
- If a compromise is reached, memorialize it in writing via email or letter to the investigator

Overbroad RFIs (cont.)

- Stonewalling the investigator will almost certainly fail
- The EEOC has broad subpoena powers and most RFIs will be enforceable against the respondent
- Moreover, petitions to revoke or modify EEOC subpoenas have low success rates and must typically be made within five days of receipt

Things to Keep in Mind

- Retain a respectful and cooperative demeanor
- Respond promptly
- Respond accurately and do not mislead
- Redact confidential information, but mark as redacted
- Don't provide privileged communications; inform the investigator of documents withheld based on privilege

The information presented in this presentation does not represent legal advice, which should come from a legal adviser with knowledge of specific facts and circumstances.