

**EEOC Charges—How to Protect Your Firm and Your Clients**

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**Initial Steps**

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

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### 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?



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### 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.



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### 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)



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### The Position Statement—Know Your Audience

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



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### 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



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### 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.)



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### 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)



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### 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



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### The Position Statement—Legal Analysis Section (cont.)

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



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### The Position Statement—Final Thoughts

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



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### 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



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### 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.



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### 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




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### 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




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### 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




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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.



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