EEOC's New Discrimination Charge Procedures Favor Employees and Create Pitfalls For Employers

by Jillian Barron

During the past few years, the Equal Employment Opportunity Commission ("EEOC" or "agency") has steadily expanded its view of the employee rights within its purview. The agency has promulgated written guidance and has initiated litigation based on new interpretations of existing federal civil rights laws. Among other things, the EEOC has issued guidance and engaged in several lawsuits regarding the alleged discriminatory impact of employers' use of criminal background information in hiring decisions. The agency also has taken the position that sexual orientation and sexual identity, though not listed as protected factors in Title VII, are nevertheless protected under that statute because discrimination based on those factors is discrimination based on a protected factor, that is, sex.

In addition to these enlargements of the universe of substantive rights it will defend, the EEOC has taken steps to modify its procedures in ways that are likely to further support employee claims while burdening or otherwise disfavoring employers. In January 2016, for example, the agency announced a proposed change to the annual EEO-1 forms required of private employers with more than 100 employees, which is to be effective in September 2017. Under the proposal, covered employers will not only have to list the number of individuals they employ by job category, race, ethnicity, and sex, but will also have to provide employee pay data for each of those categories. In another procedural move, the EEOC has instituted new procedures for handling discrimination charges that could trip up unwary employers. This note addresses the latter development.

In general, employers need to be aware of how such developments may impact them, in order to take proactive measures that ensure compliance and help avoid unnecessary entanglement in the EEOC's web.

New Discrimination Charge Position Statement Procedures. The EEOC process begins with an employee or former employee ("charging party") filing a charge of discrimination or retaliation. Often the allegations in the formal charge are minimal and lacking in factual detail, leaving the employer to guess just what conduct is considered to have been discriminatory. Yet the EEOC requires the employer to defend itself by responding to the charge with a "position statement." The EEOC often also requests additional information and documents, such as the number of individuals employed by the employer, the employer's ownership and management structure, employment records of the charging party, and the identity and personal information of other employees who may be witnesses or comparators (people outside the charging party's protected class whom the charging party alleges were treated better).

In the past, the EEOC purportedly treated the charging party and employer somewhat similarly with regard to each other's information. Although the employee may have provided factual details to the EEOC that were not included in the charge, the employer was not permitted to access that information unless and until the investigation was done and the employee filed a lawsuit. Likewise, the agency did not provide a copy of its file, including the employer's position statement and supporting documents, to the charging party until the investigation was completed.[1] Employee and employer had to make a Freedom of Information Act request to obtain the EEOC file.

As of January 2016, the EEOC has adopted new procedures that favor the charging party. Now, upon informal request by the employee during the course of the investigation, the agency will provide not only the employer's position statement, but also any non-confidential accompanying documentation, and will give the employee an opportunity to respond to the employer's information within 20 days. In contrast, the EEOC will *not* share the employee's response to the employer's information with the employer during the investigation. According to the EEOC, the investigator *may* contact the employer if the agency determines it needs more information, including a response to the employee's rebuttal, but this hardly levels the playing field. In reality, while the employer must formulate its position statement based on what is usually only a skeletal description

of the employee's allegations, the employee is now allowed to review and respond to virtually all of the information and documentation submitted by the employer.

Recognizing that its new procedure would allow the charging party access to information the employer considers confidential, the EEOC advises that employers should "refer to, but not identify" any confidential information in their position statement and then provide that information in separate attachments labeled "Sensitive Medical Information," "Confidential Commercial Information," and so forth. The EEOC states that an employer "should" provide an explanation justifying confidential treatment, as "the agency will not accept blanket or unsupported assertions of confidentiality." The EEOC has specified limited categories of information that may be considered confidential and therefore not be shared with the charging party:

- Sensitive medical information of individuals other than the charging party
- Trade secrets or other confidential commercial or financial information
- Non-relevant personally-identifiable information of witnesses, comparators, or third parties, such as social security numbers, dates of birth in non-age cases, home addresses, personal phone numbers, and personal email addresses
- Any reference to charges filed against the employer by other employees/former employees

Notably, the list does not include personnel information of third parties, such as performance evaluations or discipline that may have been issued to coworkers; apparently, if the EEOC considers such information relevant, it may share the information, without redaction or limits on disclosure, with the charging party

Given this new process, employers responding to EEOC charges should proceed with the expectation that their material, including their position statement and attachments, generally will be provided to the charging party. As a result, employers should be particularly careful about any information they wish to keep confidential. Position statements should not specifically identify such information but state only that it is contained in the documents being provided. Further, employers must now expressly justify confidential treatment for each category of information they wish to protect from disclosure. To the extent confidential information is not absolutely necessary to the employer's defense, the safest route will be to omit it entirely. Even employers that have prepared their own responses to EEOC charges in the past may now wish to consult with legal counsel to avoid missteps during the process.

[1] Informally, however, it appears that EEOC investigators shared the gist of the employer's response with, and sometimes even paraphrased it for, the charging party so as to allow him or her to rebut the employer's information. In the author's experience, the EEOC never similarly provided employee information not contained in the charge to the employer, thus denying the employer the ability to rebut such information.