Top Ten Considerations Before Responding to an EEOC Charge

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When you receive a charge of discrimination from the Equal Employment Opportunity Commission (EEOC) or a similar state fair employment practices agency enforcing anti-discrimination laws, including Title VII of the Civil Rights Act of 1964 (prohibiting discrimination in employment based on race, color, religion, sex, or national origin), Age Discrimination in Employment Act (prohibiting age discrimination), Americans with Disabilities Act (prohibiting disability discrimination), and the Genetic Information Non-Discrimination Act (prohibiting genetic information discrimination), it is important to make certain considerations before responding.

1. Notify and preserve.

When you receive a charge of discrimination, ensure the appropriate persons in the legal department are informed immediately. A charge of discrimination is a legal claim against your company and you should ensure that you take the necessary steps to preserve any and all relevant documents, files, e-mails, etc., that may relate to the allegations of discrimination in the charge (i.e., issue a legal hold). Determine who else in the organization needs to be informed of the charge; it may be appropriate to limit the number of people who need to know that a charge has been filed. Instruct all managerial employees whom you inform of the charge that they should not discuss the charge with anyone except you (or the person coordinating the response to the charge) and that they should refer any inquiries from any government agency or outside parties about the charge to your attention.

2. Collect all relevant documents and interview relevant witnesses.

Collect all relevant information requested in the agency questionnaire and schedule interviews with people involved in order to prepare the response. Ensure to collect all written documentation which may be relevant to the charge (for example, a manager's notes and memos; any disciplinary write-ups, e-mail communications, etc.).

3. Guard against retaliation or the appearance of retaliation.

If the charging party is a current employee, and management is informed of the charge, ensure to establish a review process (someone for management to contact who is responding or coordinating the response to the charge) before taking any actions related to or dealing with any issues involving the charging party (for example, disciplinary issues, promotional opportunities, transfers). If the charging party is a former employee, establish a point of contact to review any responses to reference checks that may be received. Warn managers that the law prohibits retaliation against an individual who has filed a charge of discrimination. You want to avoid creating a valid claim of retaliation after the charge has been filed, particularly when the underlying charge may otherwise have no merit.

4. Establish a point of contact with the EEOC or state agency.

Advise the agency in writing of the name of the person who is handling the charge and that all communications should be conducted with that individual. This contact may be a Human Resources professional or in-house or outside

attorney. This notification will hopefully ensure that further communication from the agency is promptly received by the appropriate individual. If the initial notification from the agency does not request any response or other information, it is necessary to provide only a brief letter stating, "I will be representing _____ Company in charge number _____. Please address all future correspondence and communications to me." A similar statement should be included in the position statement. Also, consider whether you will need additional time beyond the deadline indicated in the charge in which to prepare and submit your response. If so, include a request for an extension of time to respond at a future date certain.

5. Review the timeliness of the filing of the charge of discrimination.

Review the charge for timeliness of filing. In non-deferral states (where no state or local agency exists or is recognized for the type of discrimination claim), the statute of limitations for filing a charge of discrimination is typically 180 days from the last (most recent) adverse or discriminatory act. In deferral states (where there exists a state or local agency with a similar state law covering the same type of discrimination claim), the statute of limitations is typically 300 days from the date of the alleged discrimination. The timing may be even longer under certain state specific laws. It is best to highlight the fact that the charge is untimely in the beginning of your response to the charge of discrimination to ensure you do not waive this defense. But you should also provide a response to the allegations as to why there is no discrimination nonetheless.

6. Determine if there are any other proceedings involving the charging party.

Determine whether there are any other proceedings involving the same issues or persons, such as a workers' compensation claim, unemployment claim, arbitration, or unfair labor practice charge before the NLRB. Consistent positions must be taken in all proceedings. Admissions by the employee in one proceeding may be used against the employee in another proceeding and the same rule would apply to the Company. If other persons or groups within the company typically handle these other types of claims, ensure that they are notified to alert the individual responsible for handling the EEOC charge of any other claims that may arise, and that responses are coordinated.

7. Check for comparator information and same hiring decision-maker.

A key element of charging party's prima facie case to prove discrimination involves showing other similarly situated employees who engaged in similar conduct, but were treated differently. In investigating and preparing a response to a charge of discrimination, you must find these "comparator's" to the extent they exist. A key manner of disproving a charge of discrimination is to show that another individual of the opposite sex, different race, or without a disability (as appropriate) engaged in similar conduct as the charging party and was treated similarly. In those instances where "comparator's" were treated differently, it is important to show the legitimate, non-discriminatory distinguishing reason why. Similarly, it is helpful where possible to show that the decision-maker who took whatever alleged discriminatory adverse action against charging party is the same person who hired charging party—as evidence that they had no animus against the protected characteristic in the first place.

8. Consider mediation.

If mediation is offered as an option by the EEOC or state agency (which depends in part on how the EEOC categorizes the charge and whether charging party agreed to participate), strongly consider whether to participate. EEOC mediation is a free resource other than the time of those who will participate. Mediation is an informal, confidential opportunity for the company and charging party to attempt to resolve any issues between them without having to respond or participate in the discrimination charge investigation process. Remember, even if a charge of discrimination is dismissed by the EEOC, charging party still has the right to file a lawsuit against the company. Neither party has to settle the matter at mediation unless both parties agree, so you always retain the ultimate power whether to resolve the charge, and at what cost or under what conditions. Particularly if the charge is from a current employee, mediation may be a great alternative and safe outlet for management and charging party to engage in a

controlled dialogue of the issues raised by charging party.

9. Prepare a response to the charge.

After gathering all relevant information and interviewing relevant witnesses, and after deciding against participating in a mediation or a mediation failed to resolve the charge, prepare a position statement that contains the information requested in the EEOC questionnaire, rather than responding to the individual questions separately. Include a statement reserving your right to modify or supplement your response. Ensure that you highlight your company's Equal Employment Opportunity (EEO) and anti-harassment policies, discussing their importance, how employees are made aware (especially how the charging party clearly was aware). Where helpful, prepare charts with statistical information, rather than simply providing company print-outs or other documents which require the reader to further analyze. Along the same lines, do not simply state that you are attaching exhibits; describe the exhibits succinctly and clearly to spell out for the investigator how the information supports your position of no discrimination (agency investigators often do not read attached documents carefully). Generally, avoid providing affidavits; if you believe an affidavit is necessary, then ensure they are very limited in nature and have been reviewed by appropriate legal counsel first.

10. Ensure key decision-makers review the response.

Ensure that management witnesses and decision-makers involved with the events complained about by charging party have an opportunity to review the position statement prior to submitting it to the EEOC. If the charge results later in a fact-finding conference or future lawsuit, the manager's will be faced again with this response. You want to ensure, therefore, that their testimony will be consistent with what is presented in the written statement of position submitted to the EEOC.

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