CLIENT ALERT: EEOC Issues Nationwide Procedures Regarding Release of Position Statements and Responses

The U.S. Equal Employment Opportunity Commission ("EEOC") has announced new procedures with respect to releasing employer position statements and obtaining responses from charging parties; a link to the EEOC's press release concerning the nationwide procedures appears here. The EEOC has stated that in all cases where the agency has issued a request for a position statement on or after January 1, 2016, the EEOC will provide a copy of the position statement submitted by the employer to the charging party or his/her representatives upon the charging party's request while the EEOC investigation is in progress. The EEOC will afford the charging party the opportunity to respond to the position statement, but will not share the party's responses with the employer. The new procedures also address the EEOC's position regarding situations where an employer believes that information in support of its position is confidential and should not be shared with the charging party. The new procedures, which the EEOC says are designed to enhance its ability to gather information and strengthen its investigation of charges, serve as a reminder of the need for thoughtful preparation and review of any submission in response to a charge of discrimination.

By way of background, when the EEOC investigates a charge of employment discrimination or retaliation, it often requests that the employer provide a statement of its position addressing the allegations of the charge and providing supporting documentation. In the past, while some state agencies (including the Massachusetts Commission Against Discrimination) shared the submission with the charging party, many EEOC offices did not provide the employer's position statement to a charging party during the investigation. As a result, a charging party's first opportunity to review the employer's response often came through an information request to the EEOC after the investigation had closed or in connection with subsequent litigation. Now, however, all EEOC offices nationwide will routinely provide position statements upon request to any charging party, or that party's attorney, while the investigation is ongoing.

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The new procedures also provide that a charging party will have the opportunity to respond to the employer's position statement. The charging party's response does not have to be in writing – the charging party may simply have a meeting or a conversation with the investigator. The new procedures additionally invite charging parties to contact the EEOC to discuss any questions they may have about a respondent's position statement. The EEOC will not, however, provide any response from the charging party to the respondent during the investigation. The EEOC explains that it is giving each party the first formal document from the other side: the charge from the charging party, and the position statement from the employer. The EEOC states that if it requires additional evidence from the employer, it will contact the employer to request the information. In practice, however, this process may often result in the charging party having the last opportunity to provide information in support of its position to the EEOC.

The EEOC's new procedures also address to situations where the employer seeks to support its position by reference to confidential material, such as private personnel, financial, or business information. The EEOC acknowledges that certain data may be confidential, and makes specific reference to the confidentiality of:

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

The EEOC recommends that position statements refer to, but not specifically set out, confidential information on which the employer relies. The EEOC further suggests that respondents file any confidential information in support of their positions in separately-labeled attachments designating the nature of the confidential information. Employers must provide an explanation as to why the information is confidential, and the EEOC cautions that it will review, rather than simply accepting, the employer's justification for why the information should not be disclosed.

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The fact that charging parties will now routinely have access to position statements during the investigation reinforces the need to ensure that statements do not contain any private information which should not be shared with the charging party. The EEOC says that it "may" redact confidential information from position statements shared with charging parties; employers will, however, want to be vigilant about thoroughly reviewing statements before filing and not rely on the EEOC to independently identify and withhold sensitive information. Moreover, the new procedures serve as a reminder of the need for careful and strategic thinking in preparation of statements and responses, considering not only the impact the position statement will have on the EEOC's investigation but also what response it is likely to elicit from the charging party – and the party's attorney. Employers should contact their MBJ attorney for advice in responding to EEOC charges.

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