

Six Steps in Response to an EEOC Charge

Discrimination in the workplace is a very broad and intricate area of law. The Equal Employment Opportunity Commission (EEOC) is the federal agency that enforces the anti-discrimination laws detailed in Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination based on race, color, religion, sex (including pregnancy), national origin, age, disability or genetic information. Generally, private businesses with 15 or more employees who worked for the employer for at least twenty calendar weeks (in this year or last) are held accountable to anti-discrimination laws under the EEOC.

Receiving notification from the EEOC that an employee has filed a discrimination charge against your company can be a very frustrating experience—particularly when it's the first you have heard of the issue. As an employer, it is essential to react both quickly and professionally in responding to the EEOC notice. Below are six steps that break down the best method of handling an EEOC notice of charges filed.

Step 1: Choose who should investigate the claim

When dealing with a notice from the EEOC regarding a discrimination claim, the first step a company needs to take is choosing the best person for investigating allegations. The people best suited to head-up this type of investigation will include human resource personnel, the company owner, ethics or auditing personnel, outside counsel, or other outside consultants such as your resource team at TPM. Electing to have a supervisor complete the investigation should be avoided, especially if they are the ones accused of discriminatory actions.

When seeking out the best investigator for handling the claim, the individuals considered need to possess the following criteria: objectivity, interviewing and listening skills, rapport and ability to gain the confidence of witnesses, and (potentially) the ability to testify clearly in a deposition or at trial

Step 2: Identify & list the involved employees, supervisors, etc.

Establishing a complete and thorough list of any and all individuals who might have information about the discriminatory actions described in the charge (or about the complaint in general) is extremely important. This list will supply the investigator with a solid foundation of potential interviewees and where their best sources of

information can be found. Potential interviewees might include the complaining employee, employees identified in the charge, supervisors, coworkers, employees who observed the incident in question and anyone who reportedly has been discriminated against in a similar manner by the company. Other important sources of information not to be overlooked include your human resource and benefits department and EEOC personnel. These individuals may be able to offer an “all-encompassing” view of the situation that people directly involved with the claim might otherwise miss.

Step 3: Retain and collect key documents

Once a company receives an EEOC charge, additional document-retention rules kick in. Under Title VII, all personnel records relevant to the action brought against an employer (including records related to charging party and to all other employees holding similar positions, or application forms or test papers completed by unsuccessful applicants and by all other candidates for the same position) must be retained until final disposition of the charge or action.

Using the list assembled in step two, you can determine who should receive a “document hold” notice that ceases the shredding or disposal of all relevant claim-related documentation. You should also review your company's document retention policies to make sure that procedures are being followed correctly and consider which regular document-destruction policies should be stopped in order to retain the documents necessary to respond to the EEOC charge.

Notify the appropriate individuals of documentation procedures and issue document-hold notices to avoid any confusion regarding paperwork policies. Record the date that individuals receive a hold notice so you can later assess whether and when any updates are necessary. At this point, before launching the official investigation, an employer should gather background documents, including relevant company policies, complaints filed, and the personnel files of the complaining employee and other key witnesses.

Step 4. Scope of investigation – who to interview & methods used

Using your list of potential interviewees and claim-involved individuals, identify the people who need to be interviewed as part of the investigation. In order to

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make investigation interviews more comfortable and informative, especially if the investigator isn't familiar with the personnel involved; consider using a "resource witness" such as an employee of the human resource staff with whom the investigator can meet in advance for background information.

Before beginning interviews, draw out a map or sequence of which individuals are to be interviewed and when. Each investigation is unique and it is your responsibility to analyze the circumstances and decide whether to speak with the complaining employee before interviewing other witnesses or if you want to interview the person accused of discrimination toward the end of the interviews so you have a more complete understanding of the situation.

The interview format should remain consistent throughout each of the individual interviews. Some of the best options for interviewing techniques include:

- ▲ notes capturing key points
- ▲ shorthand or verbatim notes
- ▲ a statement written by witnesses in their own words
- ▲ a declaration drafted by the investigator
- ▲ an interview transcript
- ▲ audio- or video-recorded interview (with the interviewee's consent)

Step 5: Review documentation, conduct interviews

When beginning the interview and meetings process, start with a brief but succinct introduction that includes the objective of the meeting, details the claim being analyzed and provides assurance that company policy prohibits retaliation for participating in the interview. Interviewees need to feel informed and protected in order to provide the most honest, detailed and relevant information. It's important that you do not promise that the interview is completely confidential because the information gathered is likely to be used in the company's position statement as well as discussed among investigators and company owners. You can, however, reassure the individual that the information they provide will be shared only with individuals who have a need to know.

The investigator conducting interviews should be trained in various interviewing techniques so that they have the capability to ask the types of questions that will bring out the most valuable information. In general, the basic idea is to establish the who, what, when, where, and how of each alleged incident. Before ending the interview, ask if the individual is aware of other witnesses to the allegations being made that may be able to provide relevant

information. When wrapping up the interview, ask them to keep the questions asked and information provided during the interview confidential.

During the interview, connections between documentation and events witnessed should be discussed to check them for consistency. To provide the best results, the investigator needs to be neutral, objective, precise, and thorough. Any notes taken from the interview should contain only the facts as perceived by the interviewee—no add-ons such as opinions or conclusions (unless requested in a final report or required to assess an interviewee's credibility).

Step 6: Write a response in the form of a position statement

Once all interviews have been completed and all documentation reviewed and analyzed, the company needs to define their position regarding the claims in the EEOC charge. The strongest position statements are clear and to the point, thereby making it easy for the EEOC investigator to understand your position and come to the conclusion that discrimination has not occurred. The response should be non-argumentative in tone and reflect the company's willingness to cooperate with the EEOC and address the claims as filed. Overly argumentative position statements are counterproductive and show an unwillingness to cooperate which may lead to a more frustrating process with the EEOC.

Your response needs to include the company's anti-discrimination policy along with a summary of who the company is and what the company does. Using the data gleaned from your internal investigation and interviews, the response needs to provide the EEOC with a comprehensive review of the facts found relating to the charges filed as well as an overview of the company's legal arguments. Include any attachments that you feel are necessary to drive your position home including particularly important interview notes or transcripts.

Final Thoughts

If your company ever finds itself in the middle of an EEOC charge, the best action to take for the protection of your business is to create a plan to: a) promptly organize an investigation to gather information regarding the allegations; b) provide the EEOC with all the relevant information it needs to issue a "no cause" finding in order to dismiss the charge; and c) start document-retention procedures that ensure your compliance with Title VII "records to be retained" and "period of retention" requirements in order to both provide you with an accurate defense and follow record retention laws.