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Crafting Winning EEOC Position Statements

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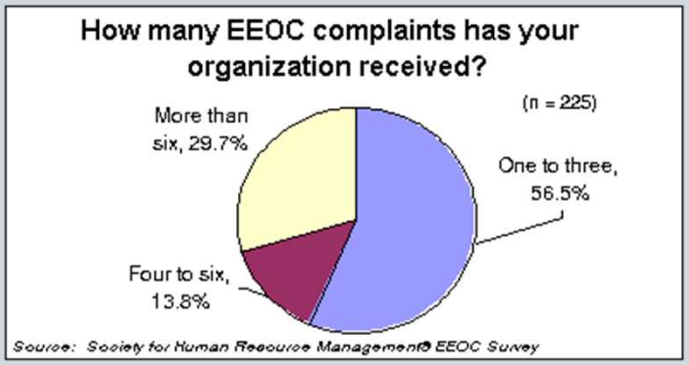
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What Is the EEOC? What Does It Do?

- The EEOC is the federal agency tasked with investigating alleged violations of and enforcing antidiscrimination laws.
  - Title VII of the Civil Rights Act
  - Pregnant Workers Fairness Act
  - Equal Pay Act
  - Age Discrimination and Employment Act
  - Americans with Disabilities Act
- The Civil Rights Division of the Arizona Attorney General's Office ("ACRD") enforces the same laws, as well as state law, and has a workshare agreement with the EEOC.







What Is a Charge?

- A Charge of Discrimination (a "charge") is a formal complaint filed by someone who alleges a violation of one or more of the laws found on the previous slide.
- Before someone sues for discrimination, harassment, or retaliation, the person must "exhaust administrative remedies" (in non-lawyer speak: go to the agency before running to court).
- This means that they must make a complaint with the EEOC or the ACRD before filing a lawsuit in court.

Charge Intake Process

- Employee completes an **intake questionnaire**.
- Investigator conducts **an intake interview** with the employee who filed a charge.
  - Most investigators are not attorneys.
  - Process is designed to screen out baseless or invalid charges (insufficient evidence, untimely, no jurisdiction, etc.).
- In general, charges are subject to a 300-day filing period (basically a statute of limitations).
- After the intake process, a charge of discrimination is prepared and signed by the employee.
- If the employee does not have an attorney (they often do not), the agency will prepare the allegation(s)/particulars section of the charge.



EEOC Form 5 (5/01)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

- [ ] FEPA
- [ ] EEOC

Arizona Attorney General's Office Civil Rights Division and EEOC

State or local Agency, if any

Name (Indicate Mr., Ms., Mrs.)	Home Phone No. (Incl Area Code)	Date of Birth

Street Address City, State and ZIP Code

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)

Name	No. Employees, Members	Phone No. (Include Area Code)

Street Address City, State and ZIP Code

Name	No. Employees, Members	Phone No. (Include Area Code)

Street Address City, State and ZIP Code

DISCRIMINATION BASED ON (Check appropriate box(es).)

- [ ] RACE
- [ ] COLOR
- [ ] SEX
- [ ] RELIGION
- [ ] NATIONAL ORIGIN
- [ ] RETALIATION
- [ ] AGE
- [ ] DISABILITY
- [ ] OTHER (Specify below.)

DATE(S) DISCRIMINATION TOOK PLACE

Earliest Latest

- [ ] CONTINUING ACTION

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

Date Charging Party Signature

NOTARY – When necessary for State and Local Agency Requirements

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year)

EEOC FORM 131 (5/01)

U. S. Equal Employment Opportunity Commission

PERSON FILING CHARGE

THIS PERSON (check one or both)

- [ ] Claims To Be Aggrieved
- [ ] Is Filing on Behalf of Other(s)

EEOC CHARGE NO.

NOTICE OF CHARGE OF DISCRIMINATION

(See the enclosed for additional information)

This is notice that a charge of employment discrimination has been filed against your organization under:

- [ ] Title VII of the Civil Rights Act
- [ ] The Americans with Disabilities Act
- [ ] The Age Discrimination in Employment Act
- [ ] The Equal Pay Act

The boxes checked below apply to our handling of this charge:

1. [ ] No action is required by you at this time.
2. [ ] Please call the EEOC Representative listed below concerning the further handling of this charge.
3. [ ] Please provide by a statement of your position on the issues covered by this charge, with copies of any supporting documentation to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.
4. [ ] Please respond fully by to the enclosed request for information and send your response to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.
5. [ ] EEOC has a Mediation program that gives parties an opportunity to resolve the issues of a charge without extensive investigation or expenditure of resources. If you would like to participate, please say so on the enclosed form and respond by to If you DO NOT wish to try Mediation, you must respond to any request(s) made above by the date(s) specified there.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

Phoenix District Office - 540
3300 North Central Ave
Suite 690
Phoenix, AZ 85012

Enclosure(s): [ ] Copy of Charge

CIRCUMSTANCES OF ALLEGED DISCRIMINATION

- [ ] RACE
- [ ] COLOR
- [ ] SEX
- [ ] RELIGION
- [ ] NATIONAL ORIGIN
- [ ] AGE
- [ ] DISABILITY
- [ ] RETALIATION
- [ ] OTHER

See enclosed copy of charge of discrimination.

Date	Name / Title of Authorized Official	Signature
	Chester V. Bailey, District Director	Chester V. Bailey

You've Received a Charge—Now What?

1. Ensure **no retaliation** against the employee (if still employed) or other employees who participate in the investigation.
   - Employers may take disciplinary action against an employee if there is a legitimate, non-discriminatory reason for doing so.
   - Treat the employee who filed a charge consistently with all other employees.
2. Ensure that all **documents** are retained.
   - Legal requirement—document destruction is sanctionable and can be used against the employer.
   - Documentation needed for position statement.



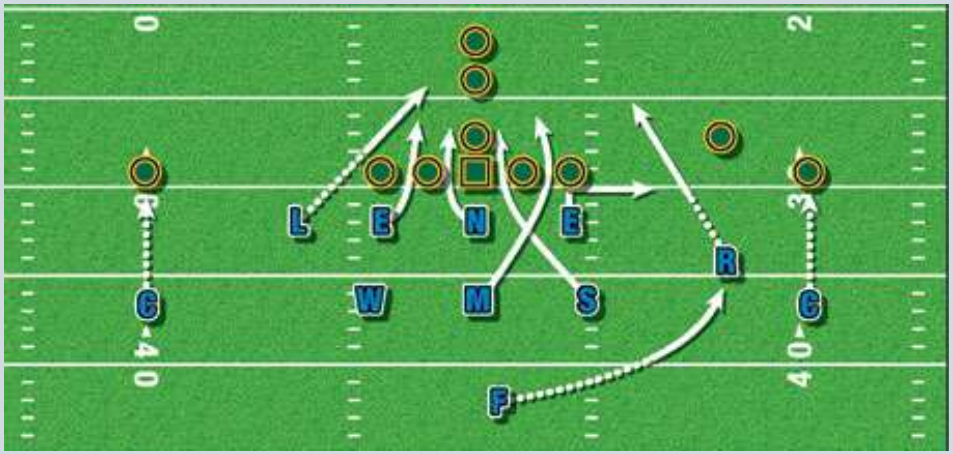


You've Received a Charge—Now What? (cont'd)

3. **Engage counsel** as soon as possible. A good lawyer will help you:
   - Evaluate risk to the organization and determine whether mediation/settlement is recommended.
   - Conduct or assist in the investigation and EEOC process.
   - Respond to agency requests.
   - Identify possible technical defenses (e.g., missed filing deadline; lack of jurisdiction; etc.)
   - Draft the best possible position statement.
4. Take note of the position statement **due date**.
5. Draft the **position statement**.

EEOC & ACRD Mediation Process

- The EEOC and ACRD offer a free mediation program.
- Mediation is an informal process in which a neutral third party assists the opposing parties to reach a voluntary, negotiated resolution of a charge of discrimination.
- Not every charge of discrimination is selected for mediation. Typically, on the notice of a charge of discrimination form, the EEOC or ACRD will inform the employer if the charge has been selected for mediation.
- Participation in mediation is voluntary.
- Information exchanged cannot be used in subsequent litigation if mediation is unsuccessful.



What Is a Position Statement?

- The employer's first chance (and one of the best chances) at resolving employment claims.
- Goals for effective position statements:
  - Short term: Convince the EEOC or ACRD that there was no unlawful conduct by the employer and get the charge dismissed.
  - Long term: Support the employer's defenses in any subsequent litigation.



Tips for Drafting Effective Position Statements

1. **Know your audience.**
   - You are not writing for a court. Most investigators are not lawyers.
   - However, case law should be used when appropriate to support the employer's arguments.
2. **Tell a compelling (but clear and concise) story.**
   - Introduce the employer—tell who you are and what you do.
   - Provide relevant background information about the charging party—length of employment, department, position, and job responsibilities.
   - Be specific about relevant information—dates, names of participants, descriptions of relevant conversations.
   - Document everything!



Tips for Drafting Effective Position Statements (cont'd)

3. **Be complete and accurate.**
   - Position statements are discoverable and are usually admissible evidence in litigation. Tell the whole story—the good and the bad. The bad facts all come out eventually.
     - There are often ways to address "bad" facts in a way that makes them less "bad."
   - Include relevant policies and documents and interview witnesses.
4. **Call the employee's position into doubt.**
   - Call out factual inaccuracies in the charge. Attach supporting documentation to demonstrate that the employer is correct.



Tips for Drafting Effective Position Statements (cont'd)

5. **Be responsive.**
   - Provide a legitimate, nondiscriminatory explanation for each of the alleged employer's actions. Answer every allegation.
   - Provide helpful information regarding decision-makers and co-workers.
     - Ex: A former employee, who is Hispanic, alleges he was terminated because of his national origin. There are several ways to defend this, depending on the circumstances:
       - The person who made the termination decision is also Hispanic.
       - The person who made the termination decision also made the decision to hire or promote the employee.
       - The person who made the termination decision supervises other Hispanic employees without issue.
   - Provide case law and legal arguments.

What Not to Do in a Position Statement

- Disparage the charging party.
- Make up facts, exaggerate facts, or omit adverse facts.
- Overshare or provide more information than necessary.
- Miss response deadlines.
- Be hostile with the agency, the investigator, or staff.
- Including new grounds for an adverse employment action that were not previously documented or communicated to the employee.



You've Filed—What's Next?

- EEOC could request additional information.
  - Requests for Information (RFIs) are informal.
  - Limit responses to relevant information.
  - Be cooperative but work with counsel to stop agency overreach.
  - Counsel can assist with formulating written responses.
- EEOC could conduct witness interviews.
  - Employer has the right to have counsel present during interviews of management employees, and the employer should prepare management witnesses for interviews.
  - Agencies may (and do) contact non-management witnesses directly, without the employer's permission.
  - The ACRD appears to be requesting interviews more frequently.

You've Filed—What's Next? (cont'd)

More likely than not, the charge will sit for a long time, and one day, you'll get a **charge determination**.

- Gears of government move slowly.
- EEOC is notoriously understaffed for the workload (ACRD moves faster).
- It is common for charges to remain pending for at least a year, if not longer.

> How long the investigation takes depends on many factors, including the amount of information that needs to be gathered and analyzed. On average, we take approximately 10 months to investigate a charge. We are often able to settle a charge faster through mediation (usually in less than 3 months). You can check the status of your charge by using EEOC's Online Charge Status System.

You've Filed—What's Next? (cont'd)

Two possible outcomes:

1. **Cause finding**—this is a bad (and rare) outcome.
   - Means the agency finds reasonable cause to believe that discrimination occurred.
   - Agency will conduct a conciliation process—goal is to reach a settlement agreement between the agency, the charging party, and the employer.
   - Agency will usually seek monetary recovery for the employee and economic and non-economic penalties from the employer (monetary penalties, training, postings, etc.).
   - Unsuccessful conciliation may result in a lawsuit brought by the agency.

2. **Finding of no cause**—dismissal and notice of right to sue. 
   - Does not necessarily certify that the employer was in compliance, but no further agency action is taken.
   - Agency issues right to sue notice informing the charging party of right to bring suit within 90 days.
   - If a lawsuit is not brought by the charging party within 90 days of issuance of the right to sue letter, the charging party will be barred from pursuing a claim.

Recent Developments from the EEOC

- **The EEOC is no longer enforcing disparate impact claims.**
  - Disparate Treatment: intentional discrimination based on a protected characteristic.
  - Disparate Impact: employer policies and practices that are neutral on their face but have a disproportionate adverse impact on a protected group.
    - Example: A policy requiring all prison guards to be 5'9" or taller. This policy had an adverse impact on female applicants for prison guard positions.
- **The EEOC announced that it will emphasize investigating the use of DEI initiatives to discriminate against members of majority groups.**
  - Under Title VII, DEI policies and programs may be unlawful if they involve an employer taking an employment action motivated—in whole or in part—by an employee's or applicant's protected characteristic.
- **Increase in "reverse discrimination" charges.**
  - Where individuals from a historically majority or advantaged group (often white or male) claim they are being discriminated against in favor of individuals from historically underrepresented or disadvantaged groups (such as racial minorities or women).
  - The U.S. Supreme Court in *Ames v. Ohio Department of Youth Services* found that members of a majority group are not held to a higher evidentiary standard to prove discrimination claims.

Key Takeaways

1. A position statement is your first chance (and one of the best chances) to tell your side of the story.
2. A position statement should accomplish two goals: get the charge dismissed and set up defenses for future litigation.
3. A position statement should be **clear, concise, complete and responsive**.
4. Always consider retaining counsel experienced in employment law to advise you through the charge and investigation process and in drafting the position statement.



Questions?



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