

New Year, New EEOC: What They're Up To and How You're Affected

Exploring Recent Developments and Guidance from the Equal Employment Opportunities Commission

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TOPICS TO BE COVERED

- Proposed Changes to EEO-1 Reporting Requirements
- Implementation of the new EEOC Portal System
- Renewed Focus on Retaliation Claims
- Focus on Prohibiting Discrimination Against Muslims
- Best practices for drafting effective position statements



New Respondent Portal System

What is it?

- EEOC's Digital Charge System allows online exchange of documents and communication by parties to an EEOC charge and the EEOC
- http://www.eeoc.gov/employers/respondent_portal_users_guide.cfm
- All charges filed on or after 1-1-2016
- Phase 1 allows an employer to
 - communicate with the EEOC online
 - view and download the charge
 - review and respond to an invitation to mediate
 - submit a position statement and attachments
 - submit a response to a Request for Information
 - provide or verify contact information including designation of a Legal Representative



Sign In Page

EEOC Respondent Portal

Welcome to the EEOC Respondent Portal, where you can find information about the charge filed against you or your organization, communicate with an EEOC Representative and upload files and evidence pertaining to the charge.

Charge Number
430-2016-00000

Password

[Sign In](#)

[Change Password](#)
[Forgot Password](#)

Charge Page

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
EEOC Respondent Portal

Charge of Discrimination User Guide | Logout

Your Organization: A RESTAURANT, INC.
Your EEOC contact is : Joe Investigator , joe.investigator@eEOC.gov Update Organization Name **1**

Required Please select a response to the Mediation Offer on this page by **January 23, 2016**. If you choose "No", please provide a **statement of your position** on the issues covered in this charge, with copies of any supporting documentation by **February 08, 2016**. For guidance on how to best prepare your Position Statement, please review **Effective Position Statements**, as EEOC has revised its procedures related to the content and release of position statements, effective January 1, 2016. **2**

Charge: 430-2016-00190 **3**

The charge of employment discrimination that has been filed against your organization by **Jason Q. Private**, Charge No. 430-2016-00190 is available for you to view. Please click [here](#) to open and view a copy of the charge.

Statutes and circumstances of alleged discrimination:

- The Americans with Disabilities Act (ADA)
 - Disability
- Title VII of the Civil Rights Act (Title VII)
 - Color
 - Race

Would you like to participate in the Mediation of this charge? **4**

Your Partner in Workplace Solutions

 We invite you to participate in the EEOC's Mediation Program regarding Charge 430-2016-00190. Mediation is a no-cost, voluntary, and confidential opportunity to work with a third party neutral and the Charging Party to discuss and resolve the EEOC Charge **before** the EEOC investigates the charge. If you choose to participate in mediation, you are not required to submit a position statement or to submit a response to the charge at this time. If the matter is resolved through mediation, no EEOC investigation will occur.

Yes
 Undecided
 No

Confirm

- Why Mediation? -

The main benefits of participating in the EEOC's Mediation Program:

1. **Mediation works, saves time and money, and avoids litigation.** In studies conducted by the EEOC, Respondents overwhelmingly say they would choose to participate in mediation again. The EEOC Mediation Program successfully resolves more than 75% of charges mediated. Most mediations are completed in one session and parties are free to pursue a global resolution of all issues between them. Legal representation is not required because mediation is an informal process. A mediated

Contacts **5**

+ Add Organization Contact

• R. Q. Contact (Primary)

Corporate Contact
A RESTAURANT, INC.
9 Any Road
Suite 1400 - Room 13
Charlotte, NC 28210
r.q.contact@mailinator.com
(704) 123-0988 (main)
[Update](#) [Delete](#)

+ Add Legal Representative

No records found.

Charge Documents **6**

+ Upload Documents

Notice of Charge
(Notice of Charge) Jan 8, 2016

430-2016-00190_Private, Jason Q Jr. v. A Restaurant
(Charge of Discrimination) Jan 8, 2016

Position Statement Instructions

10.1 Submitting a Digital Position Statement to EEOC

If the EEOC asks your organization to provide a Position Statement, you can submit that document to EEOC through the Portal by following these steps:

- Step 1.** Click **+ Upload Documents**.
- Step 2.** In the **Upload Documents** pop-up, click **Choose File(s) to Upload** and select the Position Statement you want to submit, using the standard **Open** window, or by "dragging and dropping" that Position Statement from its file location into the area below **Choose File(s) to Upload**.
- Step 3.** Select the **Document Type**:
 - Position Statement
 - Position Statement Attachments - Non-Confidential
 - Position Statement Attachments - Confidential
- Step 4.** Click **Save Upload** to submit the Position Statement and attachments to EEOC. Once the Position Statement and attachments have been submitted, you will not be able to retract the documents.
- Step 5.** A message at the top of the Charge of Discrimination Page informs you that the document has been successfully submitted to EEOC, and the Position Statement is listed under **Charge Documents**. Your organization's designated Organization Contact(s) or Legal Representative(s) will also receive an email notification that the document was received by EEOC (see Chapter 1).

New Respondent Portal System

- **How do I sign up?**
 - Contact local EEOC office to provide email address for future charges [HIGHLY RECOMMEND]
 - Paper notice of charge with log-in instructions for first time users
- **Can I opt out?**
 - Only if your company does not have technological capability
- **Only the Respondent can access the system**
 - Charging party access is incorporated in Phase 2
- **Can I see other documents filed by charging party?**
 - Can only access notice of charge, the charge of discrimination, the invitation to mediate, the request for a position statement and the request for information during Phase 1
- **Who can access my filings?**
 - Authorized EEOC staff only, however, the EEOC may share position statements and non-confidential attachments with charging parties or their counsel.

Challenges

- incomplete documents
- portal updates
- wrong person identified as Respondent's representative
- Confidentiality

Effective Position Statements

What should a position statement include?

- Specific, factual responses to every allegation of the charge
 - Clearly explain the Respondent's version of the facts and identify the specific documents and witnesses supporting its position
 - If no supporting documentary evidence is submitted, the EEOC may conclude that Respondent has no evidence to support its defense to the allegations of the charge (consider affidavit)
- Provide any other facts, outside the allegations, which you deem relevant for EEOC's consideration
- A position statement that simply denies the allegations without providing your position or supporting information is not sufficient.
- **An effective position statement is clear, concise, complete and responsive.**

Effective Position Statements

Checklist for an Effective Position Statement

- Address each alleged discriminatory act and your position regarding it and provide copies of documents supporting your position and/or version of the events.
- Provide a description of the organization; include the organization's legal name and address, the name, address, title, telephone number and email address of the person responsible for responding to the charge, the primary nature of the business, and the number of employees. A staffing or organizational chart is also useful in helping to focus the investigation.
- Provide any applicable practices, policies or procedures applicable to the allegations in the charge.
- Identify any individuals other than the Charging Party who have been similarly affected by these practices, policies or procedures; describe the circumstances in which the practices, policies, or procedures have been applied.
- Explain why individuals who were in a similar situation to the Charging Party were not similarly affected.
- Identify official(s) who made decisions or took action relating to the matter(s) raised in the charge.
- Be specific about date(s), action(s) and location(s) applicable to this case.
- Provide internal investigations of the alleged incidents or grievance hearing reports.
- Inform EEOC if the matter has been resolved or can be resolved; if it can be resolved, please indicate your proposal for resolution.

Effective Position Statements

Examples of Effective Supporting Documentary Evidence

- **Example 1:** Charging Party alleges sexual harassment

You may submit statements or affidavits from witnesses with direct knowledge of the alleged events and/or from the alleged harasser responding to the CP's allegations.

- **Example 2:** Charging Party alleges racial discrimination in pay

You may submit payroll records showing that the compensation of all employees in positions comparable to Charging Party, and information regarding their racial category, criteria for setting pay, and how each employee's pay was determined.

- **Example 3:** Charging Party alleges she was fired because of her age (55)

You may submit personnel records documenting the reasons for her termination.

Effective Position Statements

Other Considerations

- Segregate confidential information into separately marked attachments
 - Sensitive medical information (except for the Charging Party's medical info).
 - Social Security Numbers.
 - Confidential commercial or financial information.
 - Trade secrets information.
 - Non-relevant personally identifiable information of witnesses, comparators or third parties, for example, social security numbers, dates of birth in non-age cases, home addresses and personal phone numbers, etc.
 - Any reference to other charges filed against the Respondent or to other charging parties, unless the other charges are by the Charging Party.
- Provide response by the due date
 - Brief extensions may be allowed, but do not make them last minute
- Remember, the EEOC can share your position statement with the Charging Party, but they will not share the Charging Party's response with you

EEO-1 Reporting Requirements

- Proposed rules require ALL employers with 100 or more employees to add W-2 earnings and hours worked to the information included in their EEO-1 Report
- Impacted employers already provide data on gender, race, and ethnicity in their EEO-1 reports
- Employers with less than 100 employees are not required to file EEO-1 reports
- Proposed reporting requirements would begin with the September 2017 EEO-1 report

EEO-1 Reporting Requirements

What pay information must be reported?

- Aggregate W-2 earnings in 12 annual pay bands for the ten existing EEO-1 job categories
- Within each pay band, wages would need to be broken down and aggregated by gender and the EEO-1 race/ethnicity category within each band.
- The hours of work data required would also need to be broken down and aggregated for gender and race/ethnicity in the same manner. **Problem for exempt employees as most employers do not track hours worked.**

EEO-1 Reporting Requirements

The job categories are: (1) executive/senior level officials and managers; (2) first/mid-level officials and managers; (3) professionals; (4) technicians; (5) sales workers; (6) administrative support workers; (7) craft workers; (8) operatives; (9) laborers and helpers; and (10) service workers.

TABLE 2—PROPOSED EEO—1 PAY BANDS

| Pay bands | Pay bands label |
|-----------|----------------------|
| 1 | \$19,239 and under. |
| 2 | \$19,240–\$24,439. |
| 3 | \$24,440–\$30,679. |
| 4 | \$30,680–\$38,999. |
| 5 | \$39,000–\$49,919. |
| 6 | \$49,920–\$62,919. |
| 7 | \$62,920–\$80,079. |
| 8 | \$80,080–\$101,919. |
| 9 | \$101,920–\$128,959. |
| 10 | \$128,960–\$163,799. |
| 11 | \$163,800–\$207,999. |
| 12 | \$208,000 and over. |

EEO-1 Reporting Requirements

- Within each pay band, wages would need to be broken down and aggregated by gender and the EEO-1 race/ethnicity category within each band.
- The hours of work data required would also need to be broken down and aggregated for gender and race/ethnicity in the same manner.

EEO-1 Reporting Requirements

What does this mean for employers?

- Higher administrative burden: Must develop a system to gather, reconcile and merge wage and hours worked data for reporting in the EEO-1. Employers that already track wage and hours worked data will be ahead of the curve.
- Problem: Don't track hours worked for salaried employees!
- Increased liability exposure: The EEOC could use the wage and hours worked data collected to target employers for audits and investigations for improper pay practices or discrimination. Employers will likely also be exposed to a greater chance of class action equal pay suits. This data also could be a powerful resource for the EEOC in existing investigations or pending litigation.
- Share data among agencies – OFCCP, EEOC, DOL



EEO-1 Reporting Requirements

What does this mean for employers? (continued)

- Unreliable data: The wage and hours worked data gathered on the EEO-1 without context is unreliable as many factors determine an employee's wage besides hour(s) worked, such as education, performance and seniority.



EEO-1 Reporting Requirements

What can Employers do?

- Employers should conduct a **privileged** audit of pay practices to ascertain compliance with the proposed rules.
- After this privileged audit, employers should address any identified wage disparities that are due to gender and/or race/ethnicity – must maintain the privilege in this step too!
- Employers must ensure that similarly situated employees are treated the same. (i.e., look across operations and facilities)
- Review Job Descriptions and Job Titles
- Document pay decisions & legitimate business purposes for those decisions



Post-Paris and San Bernardino Discrimination Against Muslims

- In the wake of Paris and San Bernardino, the EEOC has issued new “Employer Questions and Answers” for employers concerning workers who are, or are perceived to be, Muslim or Middle Eastern and corresponding “Employee Questions and Answers” for employees.

Chief Considerations highlighted by EEOC’s Proactive Approach

- Reinforce Employer’s Obligations under Title VII of the Civil Rights Act of 1964
- Hiring and Other Employment Decisions
- Harassment
- Religious Accommodation
- Background Investigation



Post-Paris and San Bernardino Discrimination Against Muslims

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Post-Paris and San Bernardino Discrimination Against Muslims

Hypotheticals

Renewed Focus on Retaliation Claims

Background

- 2015 EEOC Retaliation Charges : 39,757 (44.5% of all charges filed)
- EEOC published its existing guidance on retaliation claims almost 20 years ago
- Since 1998 when the guidance was published, retaliation is the most likely claim to show up in an EEOC charge and one where the EEOC has become very employee-friendly
- The guidance is not law, but will shape how the EEOC investigates retaliation charges going forward
- EEOC's justification for proposed update to guidance
 - Retaliation is a growing problem and an area where more guidance is needed
 - The proposed update incorporates numerous significant rulings from the Supreme Court and lower courts addressing retaliation



Renewed Focus on Retaliation Claims

- What are these significant rulings that need to be incorporated?
 - Most cases are employee friendly
 - Extend Title VII protection from retaliatory acts to any adverse employment actions, not just ultimate employment actions
 - Employer's acts against a third party, such as a family member of a protected employee, can form the basis for retaliation claim
 - Broaden protections for employee and lessen burden of proof
- The proposed update provides that an employee is protected from retaliation "regardless of the reasonableness of the underlying allegations of discrimination"
- According to the EEOC, protection for participating in an EEO activity applies even if the underlying charge has no merit, was not timely filed, or lacked any reasonable basis
- The opposition clause requires some degree of reasonableness, but even advising an employer of intent to file a charge or threatening to complain in broad or ambiguous terms insulates an employee from discipline

Renewed Focus on Retaliation Claims

Are Employees Invincible?

- Guidance provides many avenues for an employee to prove that they were retaliated against
 - Employee must show that "but for" a retaliatory motive, the employer would not have acted against her
 - That sounds good, but the guidance clarifies that a retaliatory motive need not be the sole cause of the adverse action as long as it is one of the causes
 - Protection extends to internal complaints as well
- What if I have a legitimate reason for my decision?
 - The employee may "discredit" the reason and show a causal connection between the reason and the protected activity by presenting a "convincing mosaic" of circumstantial evidence
- What does "convincing mosaic" consist of?
 - Examples include suspicious timing, evidence that a coworker was treated differently, inconsistent explanations, and other "bits and pieces" that, when considered together, hint at retaliatory intent



Renewed Focus on Retaliation Claims

What should my company do?

- Train managers
 - Make supervisors aware of the various activities that are protected and equip them with strategies to avoid retaliation claims
 - Document this training and perform it on a yearly basis
- Proactively document problems
 - Train managers to document performance problems and disciplinary issues when they happen
 - One of the best defenses to a retaliation claim is a well-documented disciplinary process that began before the protected activity did
- Require Supervisors and Managers to discuss all terminations with HR or legal BEFORE terminating employee



Renewed Focus on Retaliation Claims

What should my company do? (continued)

- Get others involved
 - As soon as an employee engages in activity that is clearly protected, include another manager not involved in the protected activity in any decisions that affect the employee
 - Including a disinterested manager in decisions that follow protected activity lends more credibility to the decisions and may dispel an allegation of retaliation
- Keep complaints confidential
 - A manager cannot retaliate against an employee for engaging in protected activity they do not know about



Renewed Focus on Retaliation Claims

What should my company do? (continued)

- Enact a policy
 - If not already in place, enact an anti-retaliation policy
 - Make sure policy discusses protected activity, prohibits retaliation and provides for discipline if the policy is violated
 - Policy should include 3 reporting avenues



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