

ASSOCIATION OF CORPORATE COUNSEL

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PREPARING EFFECTIVE POSITION STATEMENTS



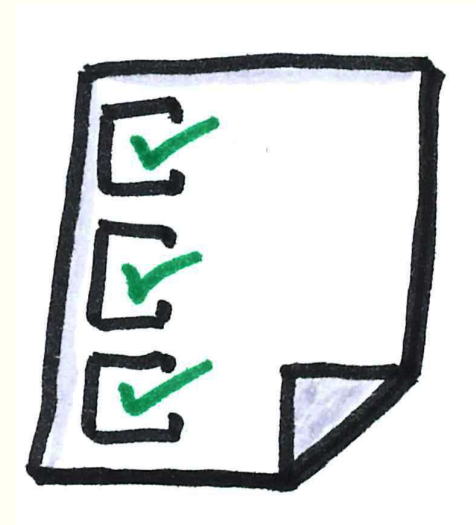
Presented by:
Mollie G. Mohan

Date:
November 19, 2021

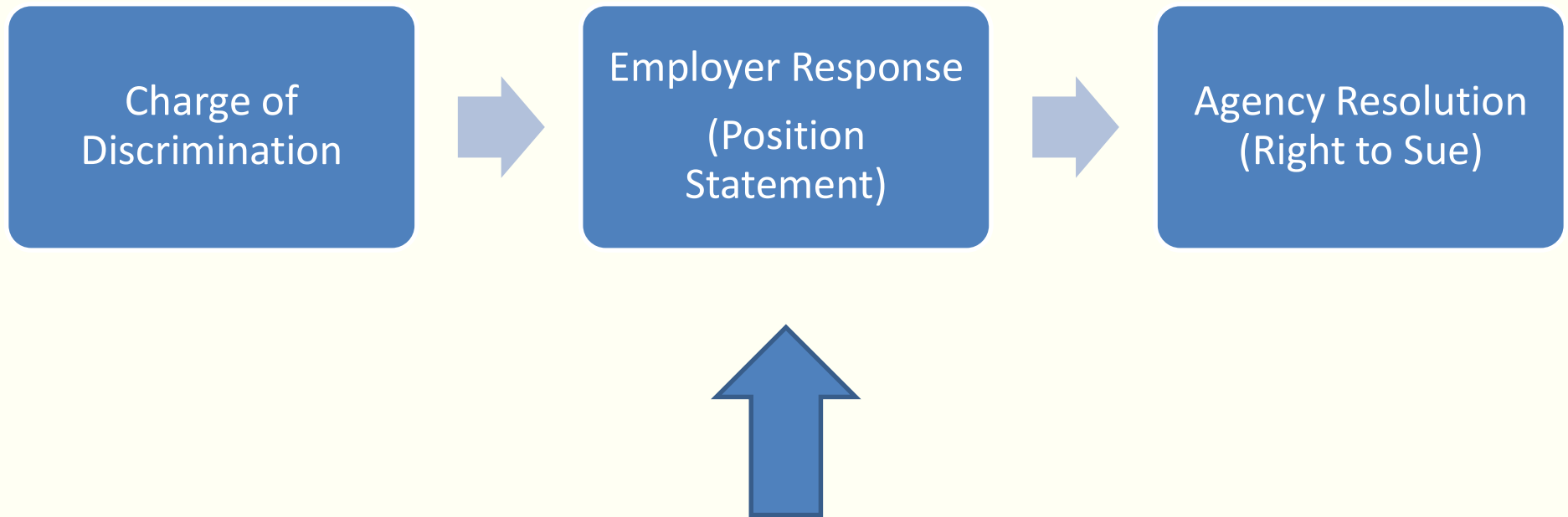
DIFFERENT
BY DESIGN

Agenda

- Purpose of Position Statements
- Updated MCHR practices
- Updated EEOC practices
- Tips for drafting effective Position Statements



Administrative Process



Purpose of Position Statement MCHR

State Respondent's position regarding all of the allegations in the complaint and provide any supporting documentation. Please see the enclosed **Guidance on providing your position statement.**

This is your opportunity to raise any and all defenses, legal or factual, in response to each of the allegations in the complaint. The position statement sets forth all of the facts relevant to respond to the allegations in the complaint, as well as any other facts you deem pertinent for the Missouri Commission on Human Rights' (MCHR's) consideration.

Purpose of Position Statement MCHR

At a minimum, it should include a **specific, factual** response to every allegation of the complaint. **The position statement should clearly explain your version of the facts and identify the specific documents and witnesses supporting the position.** A well documented position statement can help MCHR accelerate the investigation and limit requests for additional information. Keep the following points in mind as you prepare your response to the complaint:

- 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 company, including the legal name and address of the company; name, address, title, email address, and telephone number of the person responsible for responding to the complaint; primary function of the business; and the number of employees in Missouri at the time of the alleged adverse act(s). A staffing or organizational chart is also useful.
- Provide copies or descriptions of any applicable practices, policies, or procedures.

Purpose of Position Statement MCHR

- Identify any other individuals who have been similarly situated to Complainant regarding these practices, policies, or procedures. Describe the circumstances in which the practices, policies, or procedures have been applied to other individuals. Identify each person by name, job position, and protected status(es) relevant to this complaint. E.g., if Complainant alleges race discrimination, then identify the individual's race.
- Explain why any individuals who were in a similar situation to Complainant were treated differently than Complainant. **(MUST HAVE)**

Purpose of Position Statement

EEOC

Fact-Based Position Statement

This is your opportunity to raise any and all defenses, legal or factual, in response to each of the allegations of the charge. The position statement should set forth all of the facts relevant to respond to the allegations in the charge, as well as any other facts the Respondent deems pertinent to EEOC's consideration. The position statement should only refer to, but not identify, information that the Respondent asserts is sensitive medical information, or confidential commercial or financial information.

Purpose of Position Statement EEOC

EEOC also requests that you submit all documentary evidence you believe is responsive to the allegations of the charge. If you submit only an advocacy statement, unsupported by documentary evidence, EEOC may conclude that Respondent has no evidence to support its defense to the allegations of the charge.

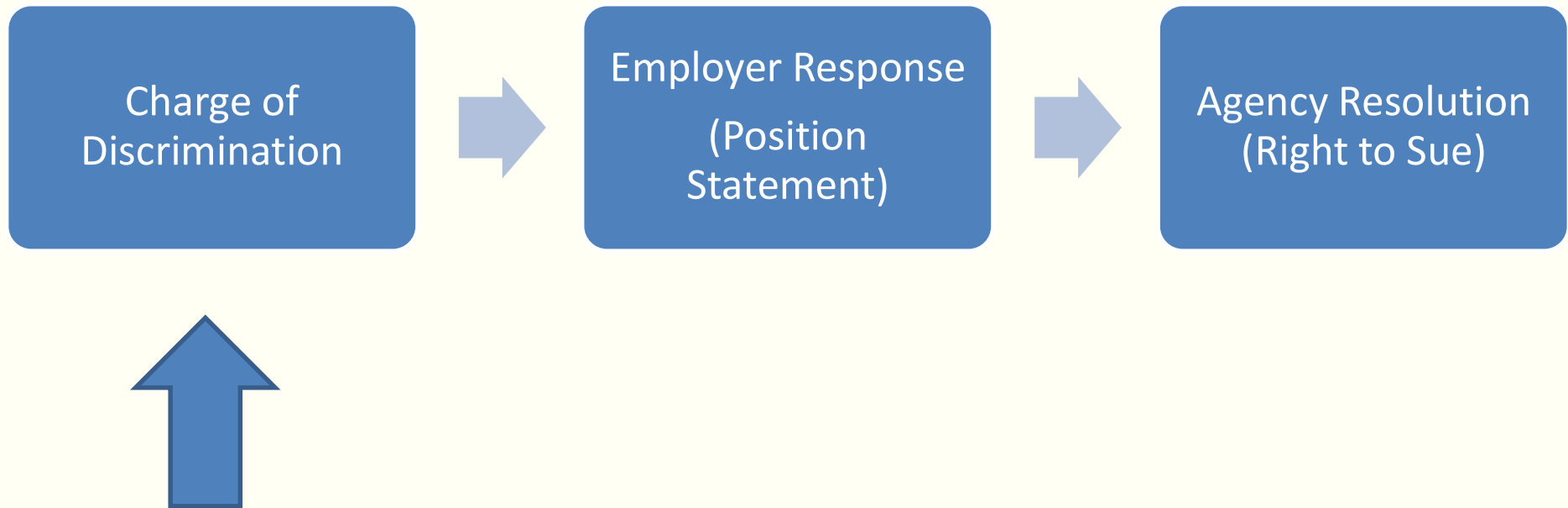
Purpose of Position Statement EEOC

- EEOC website suggests the following:
 - 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 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.

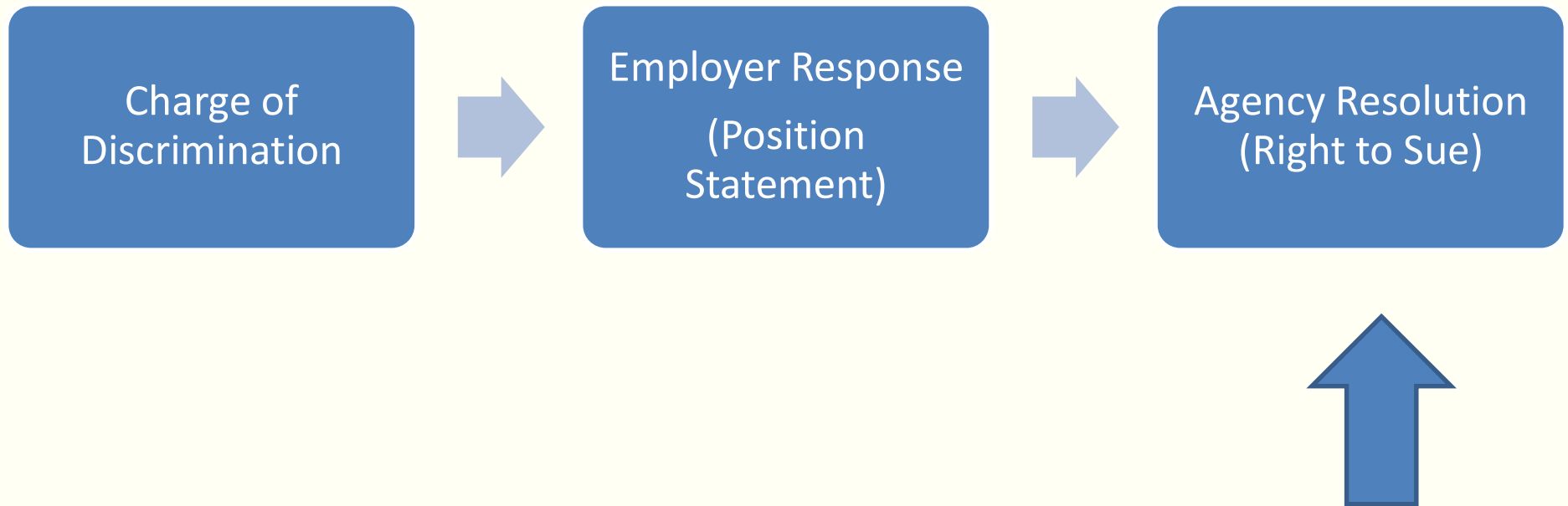
Purpose of Position Statement EEOC

- EEOC website suggests the following:
 - 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.

Administrative Process



Administrative Process



Right to Sue Letters

EEOC Form 161 (11/2020)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To:

From:

*On behalf of person(s) aggrieved whose identity is
CONFIDENTIAL (29 CFR §1601.7(a))*

EEOC Charge No.

EEOC Representative

Telephone No.

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.

Your allegations did not involve a disability as defined by the Americans With Disabilities Act.

The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

Your charge was not timely filed with EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge.

The EEOC issues the following determination: The EEOC will not proceed further with its investigation, and makes no determination about whether further investigation would establish violations of the statute. This does not mean the claims have no merit. This determination does not certify that the respondent is in compliance with the statutes. The EEOC makes no finding as to the merits of any other issues that might be construed as having been raised by this charge.

The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

Other (*briefly state*)

Right to Sue Letters

EEOC Form 161-A (11/2020)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE *(CONCILIATION FAILURE)*

To:

From:

*On behalf of person(s) aggrieved whose identity is
CONFIDENTIAL (29 CFR §1601.7(a))*

EEOC Charge No.

EEOC Representative

Telephone No.

TO THE PERSON AGGRIEVED:

This notice concludes the EEOC's processing of the above-numbered charge. The EEOC found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you. In addition, the EEOC has decided that it will not bring suit against the Respondent at this time based on this charge and will close its file in this case. This does not mean that the EEOC is certifying that the Respondent is in compliance with the law, or that the EEOC will not sue the Respondent later or intervene later in your lawsuit if you decide to sue on your own behalf.

Right to Sue Letters

EEOC Form 161-B (11/2020)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE (ISSUED ON REQUEST)

To:

From:

On behalf of person(s) aggrieved whose identity is
CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.

EEOC Representative

Telephone No.

(See also the additional information enclosed with this form.)

NOTICE TO THE PERSON AGGRIEVED:

Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), or the Genetic Information Nondiscrimination Act (GINA): This is your Notice of Right to Sue, issued under Title VII, the ADA or GINA based on the above-numbered charge. It has been issued at your request. Your lawsuit under Title VII, the ADA or GINA **must be filed in a federal or state court WITHIN 90 DAYS of your receipt of this notice**; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

More than 180 days have passed since the filing of this charge.

Less than 180 days have passed since the filing of this charge, but I have determined that it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing of this charge.

The EEOC is terminating its processing of this charge.

The EEOC will continue to process this charge.

Age Discrimination in Employment Act (ADEA): You may sue under the ADEA at any time from 60 days after the charge was filed until 90 days after you receive notice that we have completed action on the charge. In this regard, **the paragraph marked below applies to your case:**

The EEOC is closing your case. Therefore, your lawsuit under the ADEA **must be filed in federal or state court WITHIN 90 DAYS of your receipt of this Notice**. Otherwise, your right to sue based on the above-numbered charge will be lost.

The EEOC is continuing its handling of your ADEA case. However, if 60 days have passed since the filing of the charge, you may file suit in federal or state court under the ADEA at this time.





MCHR Updates

- MHRA, effective August 28, 2017
 - Prior system → writ with MCHR, waiver of timing defenses, etc. etc. etc.
 - MHRA amendment → clarified commission's jurisdiction
 - Charge of Discrimination is "jurisdictional condition precedent to filing a civil action under this chapter."

MCHR Updates

- “The failure to timely file a complaint with the commission ***shall deprive the commission of jurisdiction*** to investigate the complaint.”
- “The commission ***shall make a determination*** as to its jurisdiction with respect to all complaints.”
- “If a complaint is not filed within 180 days of the alleged act of discrimination, ***the commission shall lack jurisdiction*** to take any action on such a complaint other than to dismiss the complaint for lack of jurisdiction.”

MCHR Updates

I have attached a Request for Notice of Right to Sue if you and Complainant want to proceed directly to obtaining a RTS. I've also attached the below since it's so long.

However, if Complainant wants the RTS jurisdiction to extend back to November 2017, the MCHR will need evidence to establish continuing jurisdiction.

I apologize for not including this with my last email. I have attached the initial complaint and circled several places on the initial Charge where Complainant mentions that various activities "continued" or "continue". Would you please state how often - monthly, weekly, daily - and from what approximate starting point to when such comments occurred.

Since the Complaint is asserting "Continuing action" starting in November 2017, the time period over which the comments would have to occur with some frequency is all the way from November 2017 up to and through March 29, 2019 (or 180 days before Complainant filed her initial complaint).

MCHR Updates

NO RIGHT TO SUE AS TO all Allegations occurring before March 29, 2019 BECAUSE OF LACK OF JURISDICTION

The MCHR has determined that it lacks jurisdiction over your allegations that occurred prior to March 29, 2019 because your complaint was not filed within 180 days of the alleged discrimination as required by the Missouri Human Rights Act. Therefore, MCHR is administratively closing this case with regard to these allegations and terminating all MCHR proceedings relating to these allegations.

Under the Missouri Human Rights Act, the Missouri Commission on Human Rights only has jurisdiction to investigate acts of alleged discrimination purported to have occurred within 180 days prior to the filing of a complaint with the Commission. As noted above, the record reflects Complainant filed the original charge in this matter on September 25, 2019. Accordingly, the only alleged incidents of purported discrimination set out in the original charge and subsequent amendments over which the Commission would have clear jurisdiction are those occurring after March 29, 2019.

MCHR Updates

DETERMINATION OF NO VIOLATION

RE:



Based on the investigation, the Executive Director was unable to conclude that the information obtained established violations of the Missouri Human Rights Act. Therefore, MCHR is terminating its proceedings under the Missouri Human Rights Act.

If you are aggrieved by this decision of the MCHR, you may appeal the decision by filing a petition under § 536.150 of the Revised Statutes of Missouri in state circuit court. Any such petition must be filed in the Circuit Court of Cole County.

EEOC Updates

- EEOC confidentiality policy:
 - EEOC will provide Charging Party with employer's Position Statement and exhibits (unless designated confidential)
 - Exhibits must be segregated, marked confidential, and a justification must be provided to EEOC regarding confidentiality
 - Charging Party has 20 days to respond to employer's Position Statement
 - EEOC will not provide Charging Party's response to employer
 - EEOC will "review . . . and consider justification provided."

EEOC Updates

EEOC may release your position statement and non-confidential attachments to the Charging Party and her representative and allow them to respond to enable the EEOC to assess the credibility of the information provided by both parties. It is in the Respondent's interest to provide an effective position statement that focuses on the facts. EEOC will not release the Charging Party's response, if any, to the Respondent.

EEOC Updates

- In practice . . .
- Anything you say can and WILL be used against you in a court of law!



EEOC Updates

- EEOC pushing things up to DOJ
- Charge stalls out waiting for DOJ to issue Right to Sue
- FOIA requests denied

Interplay Between EEOC/MCHR

- *Dalton v. MCHR*, 618 S.W.3d 640 (Mo. Ct. App. 2020)
 - September 19, 2017, Dalton filed discrimination charge with EEOC
 - EEOC investigated, issued Right to Sue
 - Form 161 – “Unable to conclude the information obtained establishes violations of the statutes.”
 - EEOC file also contained an internal memo with a recommendation for Right to Sue based on “No Reasonable Cause.”

Interplay Between EEOC/MCHR

- *Dalton v. MCHR*, 618 S.W.3d 640 (Mo. Ct. App. 2020)
 - EEOC transmitted file to MCHR
 - MCHR terminated its proceedings and did ***not*** issue a Right to Sue, based on the EEOC's findings
 - So → Dalton had no legal right to bring MHRA claim
 - Filed a writ and judicial review petition against MCHR, challenging determination

Interplay Between EEOC/MCHR

- *Dalton v. MCHR*, 618 S.W.3d 640 (Mo. Ct. App. 2020)
 - Court held that EEOC properly investigated and MCHR could rely on EEOC investigation
 - Dalton appealed
 - Western District held MCHR fulfilled statutory duty to investigate by relying on EEOC investigation

Best Practices

- Position Statement Pros
 1. Deter litigation
 2. Obtain no liability/no jurisdiction determination
 3. Facilitate resolution

Best Practices

- Position Statement Cons
 1. Free discovery
 2. Ammunition regarding other claims or expanded claims
 3. Commitment to narrative

Best Practices

- Short and sweet
- Documentary support for all factual assertions
- Emphasis on legal and jurisdictional defenses
- Remember – you will be committed to this narrative for the duration of the case!
- Keep confidentiality (or the lack thereof) in mind

QUESTIONS??



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HANDLING EMPLOYEE COMPLAINTS

AVOIDING RETALIATION AND WHISTLEBLOWER CLAIMS



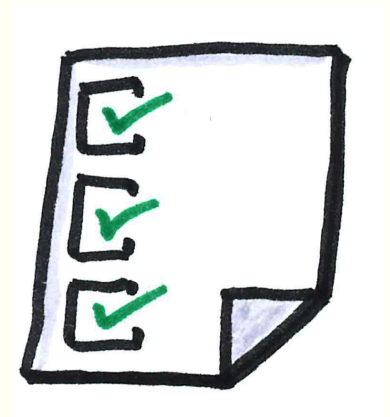
Presented by:
Mandi M. Moutray
Aigner S. Carr

Date:
November 19, 2021

DIFFERENT
BY DESIGN

Agenda

- Litigation trends
 - Retaliation Claims
 - Whistleblower Claims
- Key takeaways/best practices





Litigation Trends: Employee Complaints

Retaliation Basics

Numerous federal and state laws contain anti-retaliation provisions:

- Title VII
- MHRA
- ADEA
- ADA
- Section 1981
- Workers' Compensation

Retaliation Basics

State whistleblowing statute also prohibits retaliation:

- Whistleblower's Protection Act

Retaliation Basics

- Under anti-discrimination statutes (MHRA, Title VII, etc.):
 - Employers are prohibited from taking adverse action against an employee because the employee engaged in protected activity.
 - Protected activity = complaining about discrimination or participating in investigation into such a complaint

Adverse Action

- Adverse action
 - In discrimination cases, this means a “tangible employment action”
 - Hiring/firing, failure to promote, significant change impacting term, condition, or privilege of employment status

Adverse Action

- Adverse action
 - In retaliation cases, courts are not consistent
 - Some require an adverse action (firing, failure to hire, etc.)
 - Some apply a more lenient standard, requiring that an employee must have “suffered damages due to an act of reprisal”

Causation

- Causation
 - Employer must have purposely committed the act of reprisal (aka discipline, termination, etc.) *because of* the employee's complaint
 - Question is whether complaint was motivating factor in decision to discipline, terminate, etc.

Causation

- Causation
 - Courts look at circumstantial evidence
 - Did the employee have a good work record *prior* to the employer's action?
 - Is there *close temporal proximity* between the complaint and the employer's action?

Causation

- Causation

- Was the employee treated *atypically* (i.e. was the complaining employee treated differently than other non-complaining employees)?
- Are there facts showing that the employer's explanation for its action is *unworthy of credence*?

Whistleblower's Protection Act

- Passed in 2017, alongside the MHRA amendments
- Codifies the common law whistleblower/wrongful termination doctrine

Whistleblower's Protection Act

- Who can be sued?
 - Any entity that has six or more employees
- Who cannot be sued?
 - State of Missouri
 - Any individual employed by an employer

Whistleblower's Protection Act

- What is *prohibited*? Employer is prohibited from discharging (firing) an employee who:
 - Reports unlawful act of employer to government, officer of employer, HR, or employee's supervisor
 - Reports serious misconduct of employer that violates clear mandate of public policy from constitution, statute, or regulation
 - Refuses to carry out order of employer that would result in violation of law

Whistleblower's Protection Act

- What is permitted? Employee is NOT protected if he/she:
 - Is manager or supervisor and reporting allegedly unlawful conduct is part of job (aka complaints are part of the employee's job)
 - Complains to person or entity who allegedly committed unlawful act (aka complaints to the wrongdoer)

Whistleblower's Protection Act

- Motivating factor causation standard
 - Employee's complaint must have "actually played a role in the adverse decision or action"
- Employee may recover:
 - Back pay
 - Reimbursement of any medical bills

Whistleblower's Protection Act

- *Cooksey v. Alliance Bank* (2021)
 - Branch manager at bank had COVID-19 exposure at mother's funeral on July 9
 - Quarantined while she was experiencing symptoms and waiting for test results
 - Took more than 14 days and, when questioned by supervisors about length of leave, told them she was "awaiting further test results regarding her symptoms"

Whistleblower's Protection Act

- *Cooksey v. Alliance Bank* (2021)
 - Doctor eventually gave her return to work form, allowing employee to return July 27
 - When she returned, alleges she was “chastised” for taking off too much time and not checking in with her team
 - Sent home, put on probation
 - Came back the next day, supervisors asked her to admit she had done something wrong with COVID leave
 - She refused; her employment was then terminated

Whistleblower's Protection Act

- *Cooksey v. Alliance Bank* (2021)
 - Sued under the Emergency Paid Sick Leave Act (part of Families First Coronavirus legislation)
 - Also asserted WPA claim, stating that she was following public policy by taking leave as she should have
 - Claims she refused to work even when her employer demanded that she return
 - ***Court allowed her claim to proceed***



BEST

Key Takeaways/Best Practices

Tips to Avoid Claims

- Good news – nothing new under the sun!



Tips to Avoid Claims

- Understand the Complaint
 - Is the employee raising something that needs to be addressed?
 - If so, what is the best way to address?
 - If not, are you able to articulate why not?
- Understanding motivations
 - Why is the employee raising the complaint (Is this a legitimate concern? Is the employee facing discipline? Something else?)

Tips to Avoid Claims

- Now that the complaint has been raised
 - Do you need to investigate?
 - Who should be involved?
 - What do the policies say?
 - If not, document your decision
- Document, document, document!

Tips to Avoid Claims

- Avoid conflating discipline/performance issues with the employee's complaint
- If discipline is necessary – maintain *consistency*
 - Stick to same process for every employee (fairness!)
 - Avoid claim of arbitrary/discriminatory/retaliatory motive
 - Think about timing of discipline
- Consider communications responding to complaint – again, consistency is key
 - Fairness again!
 - Think through reason for action and maintain consistency when communicating that reason

Tips to Avoid Claims

- Training
 - Best defense is a good offense
 - Train HR AND front-line supervisors
 - Basically, anyone who would be in line to receive and/or respond to complaints

QUESTIONS??



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Immigration Update: Latest Changes of Policy



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Presidential Proclamation – Travel and COVID-19

- On October 25, 2021, President Biden revoked COVID-19 travel bans for individuals traveling directly from China, Iran, the Schengen Area, U.K., Ireland, Brazil, South Africa, and India.
- Presidential Proclamation only applies to noncitizen, nonimmigrant air travelers and does not affect visa issuance.

What are the Requirements?

- Noncitizen, nonimmigrant travelers flying to the U.S. are now required to provide the following documentation:
 - Proof of full vaccination against COVID-19 (e.g., vaccination card); **AND**
 - A negative COVID-19 test taken within **3 days** prior to departure.

Exceptions to the Policy

- Noncitizen nonimmigrants who are not fully vaccinated against COVID-19 will NOT be allowed to board a flight to the U.S., unless they meet one of the following criteria:
 - Persons on diplomatic or official foreign government travel
 - Children under 18 years of age
 - Persons with medical contraindications to receiving vaccine
 - Participants in certain COVID-19 vaccine trials
 - Persons issued a humanitarian or emergency exception

Exceptions continued

- Persons with valid visas (excluding B-1 (business) or B-2 (tourism) visas) who are citizens of a foreign country with limited COVID-19 vaccine availability – [see CDC list of countries](#)
- Members of U.S. Armed Forces or their spouses or children
- Sea crew members traveling with a C-1 and D nonimmigrant visa
- Persons whose entry is in the national interest, as determined by the Secretary of State, Secretary of Transportation, or Secretary of Homeland Security (or their designees)

Exceptions continued

- If not fully vaccinated and allowed to travel to the U.S. by air through an exception:
 - Get tested 3-5 days after arrival, unless documentation of having recovered from COVID-19 in the past 90 days.
 - Stay at home or in hotel room and self-quarantine for a full 7 days, even if test negative, unless documentation of having recovered from COVID-19 in the past 90 days.
 - Isolate if test result is positive or develop COVID-19 symptoms.
 - If intending to stay in the U.S. for 60 days or longer, must become fully vaccinated against COVID-19 within 60 days of arriving in the U.S. or as soon as medically appropriate, unless medical contraindication or too young to be vaccinated.

What is the Rule for Citizens, Nationals, Green Card Holders, and Immigrants?

- Before boarding a flight to the U.S., required to show:
 - Fully vaccinated: Proof of vaccination and a negative COVID-19 test result taken no more than **3 days** before travel.
 - NOT fully vaccinated: A negative COVID-19 test result taken no more than **1 day** before travel.
 - OR...

Citizens, Nationals, Green Card Holders, and Immigrants continued.

- If recently recovered from COVID-19, may instead travel with documentation of recovery from COVID-19 (i.e., positive COVID-19 test taken no more than 90 days before departure from a foreign country and a letter from a licensed healthcare provider or a public health official stating there is clearance to travel).

Child Travelers

- Children under 2 years old do not need to test.
- Children between the ages of 2 and 17 who are not fully vaccinated may board a flight to the U.S. with a negative COVID-19 test taken no more than **3 days** before departure if traveling with fully-vaccinated parents or guardians.
- If traveling unaccompanied or if one or more of the parents or guardians accompanying the child is not fully vaccinated, the child must present a negative COVID-19 test taken no more than **1 day** before departure.

Additional Information

- All air passengers to the United States will also be required to provide contact information to airlines before boarding.
- Wearing a mask over nose and mouth is required in indoor areas of public transportation and in U.S. transportation hubs (including on airplanes) traveling into, within, or out of the U.S. and indoors in U.S. transportation hubs (including airports).

Land Border

- When arriving at a U.S. land port of entry (POE), non-citizen travelers should be prepared to:
 - (1) provide proof of COVID-19 vaccination; and
 - (2) verbally attest to their reason for travel and COVID-19 vaccination status during a border inspection.

Land Border

- Individuals entering by land POEs and engaged in **essential travel** are not required to be vaccinated for COVID-19 at this time.
- Starting in January 2022, all inbound foreign national travelers seeking to enter the U.S. via land POEs—whether for essential or non-essential reasons – must provide proof of full vaccination against COVID-19.

New USCIS Policies - Work Authorization

- **November 12, 2021 Policy Alert!**
- Work Authorization for H, E, and L Spouse Dependents
- Settlement of *Shergill, et al. v. Mayorkas*
- Sounds great, but beware of limitations!

New USCIS Policies - Work Authorization

- What does the settlement mean for H-4 dependent spouses?
 - **H-4s:** USCIS will amend EAD receipt notices to include EAD auto-extension eligibility for those holding H-4 status **based on validity period on Form I-94.**
 - Remember that H-4s are not allowed to work, unless their H-1B spouse is at a certain stage of the green card process!

New USCIS Policies - Work Authorization

- What does the settlement mean for L-2 dependent spouses?
 - **L-2s:** USCIS will issue policy guidance stating that L-2 spouses are employment authorized incident to status (I-94 must be valid) and, in cooperation with CBP, change Form I-94 to indicate that bearer is L-2 spouse so it can be used as List C document for Form I-9 purposes.

New USCIS Policies - Work Authorization

Automatic extension of existing employment authorization (EAD) applies if:

- they properly filed application to renew H-4, E, or L-based EAD before expiration, and
- they have **unexpired Form I-94** showing status as H-4, E, or L nonimmigrant.

New USCIS Policies - Work Authorization

- Automatic extension of EAD will continue until earlier of:
 - (1) end date on Form I-94 showing valid status
 - (2) approval or denial of EAD renewal application, or
 - (3) 180 days from date of expiration of previous EAD.
- This is the conundrum! Spouse dependent extension of status applications cannot be expedited. This means that when the spouse I-94 expires, even when the extension was timely filed, their EAD is NOT automatically extended. Bummer!

New USCIS Policies - Work Authorization

- Updating Form I-9 in the EAD automatic extension circumstances:
 - **Form I-94** indicating **unexpired** nonimmigrant status (H-4, E, or L).
 - **Form I-797C** for timely-filed EAD renewal application (Form I-765) stating “Class requested” as “(a)(17),” “(a)(18),” or “(c)(26).”
 - **Expired EAD** issued under same category (Category A17, A18, or C26).

I-9 Flexibility Due to COVID-19

- What is the rule?
- When does the rule expire?
- What are most employers doing?

What is the rule?

- If there are ZERO employees present at a work location and a new employee is working remotely due to COVID-19, employers are not required to review employee's identity and employment authorization documents in employee's physical presence.
- BUT, if ANY employees are physically present at a work location, no exceptions are being implemented for in-person verification of identity/employment eligibility documentation.

What is the rule?

- However, if newly hired employees or existing employees are subject to COVID-19 quarantine or lockdown protocols, DHS will evaluate this on a case-by-case basis.

What is the rule?

- If workplace is completely remote, employers are required to inspect Section 2 documents remotely (e.g., over video link, fax or email, etc.) and obtain, inspect, and retain copies within **3 business days** to complete Section 2 of Form I-9.
- Employers should enter “COVID-19” as reason for physical inspection delay in Section 2 Additional Information field once physical inspection takes place after normal operations resume.
- Employers who avail themselves of this option must provide written documentation of remote onboarding and telework policy for each employee. This burden rests solely with employers.

I-9 flexibility due to COVID-19

- Once normal operations resume, employees onboarded using remote verification must report to employer within **3 business days** for in-person verification of identity and employment eligibility documentation for Form I-9.
- When documents have been physically inspected, employer should add “documents physically examined” with date of inspection to Section 2 additional information field on Form I-9, or to Section 3 as appropriate.
- Any audit of subsequent Forms I-9 would use “in-person completed date” as starting point for these employees only.
- DHS has extended Form I-9 flexibility policy until **December 31, 2021**.

I-9 flexibility due to COVID-19

- Practical Suggestions:
 - Make sure the I-9s are completed timely
 - Stagger return of workers
 - Watch for extensions of USCIS policy

QUESTIONS??







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