

InfoPAKSM

Responding to Equal Employment Opportunity Agency Charges of Discrimination

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Responding to Equal Employment Opportunity Agency Charges of Discrimination

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This InfoPAKSM provides an overview of the administrative process and the necessary steps the employer must take to properly respond to an agency charge of discrimination. A quick and thorough response is necessary when your organization is approached by an agency investigator. This InfoPAK contains helpful strategies to minimize the impact in such cases. Accordingly, this InfoPAK contains key procedures to implement for an internal investigation and formal response to a discrimination charge, potentially preventing future, unwarranted allegations.

The information in this InfoPAK should not be construed as legal advice or legal opinion on specific facts, and should not be considered representative of the views of Jackson Lewis or its lawyers, or of ACC or any of its lawyers, unless expressly stated. Further, this InfoPAK is not intended as a definitive statement on the subject. Rather, this InfoPAK is intended to serve as a tool for readers, providing practical information to the in-house practitioner.

This material was compiled by **Jackson Lewis LLP**, the 2013 Sponsor of the ACC Employment & Labor Law Committee. For more information on Jackson Lewis LLP visit their website at www.jacksonlewis.com, or see the "About Jackson Lewis" section of this InfoPAK

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Contents

I.	Introduction	6
II.	Legal Overview	6
A.	Federal Laws.....	6
1.	Title VII and Title II of the Civil Rights Act of 1964	6
2.	Age Discrimination in Employment Act (“ADEA”)	6
3.	Americans with Disabilities Act (“ADA”)	6
4.	Equal Pay Act (“EPA”).....	7
5.	Pregnancy Discrimination Act (“PDA”).....	7
6.	Genetic Information Non-Discrimination Act (“GINA”).....	7
B.	State Laws	7
III.	Some Statistics: Recent Trends in Equal Employment Opportunity Commission Filings	7
A.	Types of Charges Filed	7
B.	Monetary Benefits Collected.....	8
C.	EEOC 2013-2016 Strategic Enforcement Plan and Recent Trends.....	8
IV.	The Administrative Process – How It Works	9
A.	How a Charge is Filed.....	9
B.	Dual Filed Charges.....	9
C.	State or Local Agency Procedure	10
D.	Employer’s Response	10
E.	Alternative Dispute Resolution	10
V.	Steps to Follow When You Receive a Charge	11
A.	Review the Charge	11
B.	Notification of No-Retaliation Policy	11
C.	Contact with the Agency Investigator.....	11
D.	Initial Contact with Agency Investigator.....	12
E.	Document All Contact with Agency	12
F.	Determine Basis for Charge and Scope of Investigation.....	12
G.	Determine Timeliness of Charge	12
H.	Agency Requests for Documents.....	12

I.	Litigation Hold	13
J.	Importance of a Well-Prepared Response to the Charge.....	13
VI.	Investigation of the Facts Underlying the Charge.....	13
A.	Factual Investigation.....	13
B.	Why Investigate?	13
C.	The Goals of the Investigation	14
VII.	Conducting the Investigation.....	14
A.	Who Should Conduct the Investigation?	14
B.	Investigator Selection Criteria	14
C.	What the Company Investigator Should Know	15
I.	Aim of the Investigation	15
2.	Who to Notify of the Charge and Why.....	15
3.	Investigation Essentials.....	15
VIII.	Document Review	15
A.	Where to Start.....	15
B.	Charging Party's Employment History	16
C.	Internal Complaint Files.....	16
D.	The Accused and Other Witnesses.....	16
E.	Comparative Data.....	16
F.	Employer Policies	17
IX.	Witness Interviews.....	18
A.	Generally	18
B.	Interview with Charging Party	19
C.	The Accused Harasser or Discriminator	20
D.	Other Witnesses.....	20
E.	Follow-Up Interviews.....	21
X.	About Harassment Investigations	21
A.	Timeliness of the Investigation.....	21
B.	Prompt Remedial Action	21
C.	Determine Each and Every Allegation.....	22
XI.	Documenting the Investigation	22

A.	Segregation of Investigative File	22
B.	What to Record for the Investigative File.....	22
C.	Investigative Notes	22
D.	What Should Not Be Contained in Investigative Notes	23
E.	Contents of Investigative File	23
XII.	Preparing the Position Statement	24
A.	Introductory Material.....	24
B.	Charging Party's Employment History	24
C.	Explain Legitimate, Non-Discriminatory Reason for the Disputed Decision.....	24
D.	Use of Comparative Data	25
E.	Response to Each Allegation in the Charge.....	25
F.	Conclusion.....	26
G.	Chart of Claims, Defenses, and Relevant Documents	26
	I. Claims, <i>Prima Facie</i> Requirements, Defenses, and Documents	28
XIII.	Responding to the Administrative Agency's Request for Documents or Request for Additional Information	40
A.	General Considerations.....	40
B.	Responding to Administrative Subpoenas	40
XIV.	Participating in a Fact Finding Conference	40
XV.	Agency Requests for On-Site Interviews	41
XVI.	Agency Determinations.....	41
XVII.	Conciliation.....	42
XVIII.	About Jackson Lewis	43
XIX.	Sample Position Statement	44
XX.	Additional Resources	49

I. Introduction

Discrimination lawsuits have become one of the most frequently filed employment-related litigation claims. There have been an alarming number of multi-million-dollar jury verdicts against employers and/or settlements based on claims of sexual harassment, race, age, gender, and other prohibited forms of discrimination and an equally alarming rise in the number and frequency of retaliation claims.

Almost every discrimination lawsuit is preceded by an administrative charge and agency investigation. The manner in which an employer responds to the charge can have a critical impact on its exposure in a lawsuit that may follow the charge. This InfoPAK provides an overview of the administrative process and the necessary steps the employer must take to properly respond to an agency charge of discrimination.

II. Legal Overview

There are numerous laws, both federal and state, that, individually and in concert, allow individuals to bring several types of discrimination claims.

A. Federal Laws

The following are the most common federal laws under which most discrimination and employment claims are brought. Federal laws apply to all states.

1. Title VII and Title II of the Civil Rights Act of 1964

Title VII and Title II prohibit discrimination against guests, employees, and applicants on the basis of race, color, sex (including pregnancy), national origin, and religion. Title VII and other federal discrimination laws also protect employees from retaliation for complaining of discrimination, filing a charge, or assisting in an investigation of discrimination.

2. Age Discrimination in Employment Act (“ADEA”)

The ADEA prohibits employment discrimination against people 40 years of age and older.

3. Americans with Disabilities Act (“ADA”)

The ADA is a federal law prohibiting discrimination against individuals (employees, applicants, and guests) with a disability and requires the provision of a reasonable accommodation to someone who is legally disabled. The ADA Amendments Act of 2008 (“ADAAA”), which expressly overturned several landmark Supreme Court decisions narrowly interpreting the definition of “disability,” significantly expanded the protections afforded to disabled individuals. As a result, many more health conditions may now be considered “disabilities” under the ADA, for which reasonable accommodation such as additional job-protected leave may be

required.

4. Equal Pay Act (“EPA”)

The Equal Pay Act is an amendment to the Fair Labor Standards Act that prohibits paying different wages to employees of different sexes who perform equal work under similar conditions.

5. Pregnancy Discrimination Act (“PDA”)

The PDA is an amendment to Title VII that prohibits discrimination against an employee because of pregnancy.

6. Genetic Information Non-Discrimination Act (“GINA”)

GINA prohibits discrimination in employment on the basis of genetic information.

B. State Laws

State laws only apply to the states in which they are enacted. Many states have passed laws that prohibit discrimination. Often these laws mirror federal statutes. However, in some cases these laws provide additional or increased protections not required by federal laws, such as prohibiting discrimination based on marital status or sexual orientation.

III. Some Statistics: Recent Trends in Equal Employment Opportunity Commission Filings

A. Types of Charges Filed

Prior to any discussion of the administrative process, statistics from the Equal Employment Opportunity Commission (“EEOC”) provide employers with some information regarding recent trends in the charges filed, as well as a breakdown of the nature of the charges filed with the Commission. The EEOC statistics indicate that charges filed with the agency have been on the rise. The data shows that 99,412 private sector charges were filed with the EEOC in fiscal year (“FY”) 2012, almost exactly the same as the 99,947 filed in FY 2011 and 99,922 filed in FY 2010. Of the 99,412 charges filed in fiscal year 2012, 33.7% were race discrimination charges, 30.5% were gender discrimination charges, 23% were age discrimination charges, 10.9% were national origin discrimination charges, and 3.8% were religious discrimination charges. Retaliation charges under all statutes (Title VII, ADEA, ADA, and EPA) constituted 38.1% of the total number of charges filed. The trend regarding the type of charges filed has remained fairly constant. In 2011, charges containing race discrimination claims were 35.4% of all charges filed, while gender discrimination claims were contained in 28.5% of charges. In FY 2011, 11.8% of charges contained a national origin

claim, 4.2% a religion claim, 37.4% a retaliation claim, and 23.5% contained age claims. Disability discrimination charges have also remained consistent going from 25.8% in 2011 to 26.5% in 2012. The number of disability discrimination charges, however, climbed substantially from only 20.4% in 2008.

B. Monetary Benefits Collected

In FY 2010, the agency filed 155 new lawsuits and resolved 283 suits, resulting in a monetary recovery of approximately \$44.2 million. In FY 2011, the EEOC filed 300 lawsuits against employers and resolved 312 lawsuits, resulting in monetary recovery of approximately \$91 million. It is important to note that even if the agency investigation is inconclusive, under most circumstances the Charging party will have the option to file a lawsuit based on the charge. Therefore, the employer's response to the charge is absolutely critical to preventing future litigation and possible liability. While there were fewer lawsuits filed by the EEOC in 2012, the EEOC's General Counsel has promised that the cases that the EEOC will be filing will be those with the "broadest possible impact."

C. EEOC 2013-2016 Strategic Enforcement Plan and Recent Trends

On December 17, 2012, the EEOC's Commissioners approved a Strategic Enforcement Plan ("SEP") with the purpose of establishing the EEOC's enforcement priorities. The SEP lists as the EEOC's first priority its goal in eliminating barriers in recruitment and hiring. This focus on hiring and recruiting discrimination includes not only intentional "disparate treatment" discrimination, but also "disparate impact" discrimination, i.e., "facially neutral recruitment and hiring practices that adversely impact particular groups." The EEOC's SEP indicates that the EEOC intends to investigate employers utilizing broad job screening programs which might have a disparate impact on a particular race or gender, e.g., pre-employment tests and background checks.

In addition to focusing on employment screening tools, the EEOC's SEP lists other areas of focus, including the following initiatives:

- Protecting immigrant, migrant and other vulnerable workers;
- Addressing emerging and developing issues including: reasonable accommodation and employer-asserted defenses under the ADA; accommodating pregnancy-related limitations; seeking protection for lesbian, gay, bisexual, and transgender individuals; and
- Enforcing equal pay laws through the use of "directed investigations" and Commissioner charges.

The EEOC's SEP was issued a few months after the EEOC issued its updated 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions ("Criminal Background Guidance"). This Criminal Background Guidance finds the use of criminal background records to have a disparate impact against racial minorities and recommends that employers perform an individualized assessment before taking an adverse employment action against an applicant or employee who has a criminal record that would otherwise disqualify that applicant or employee from employment. Since issuing this Guidance, the EEOC has filed two disparate impact criminal background lawsuits, and in both cases alleged that the defendants have failed to engage in an individualized assessment prior to making decisions based on criminal

background records.

Over the last few years, the EEOC has settled numerous nationwide ADA Maximum Leave/No Fault Attendance cases for over \$1,000,000 and settled one such matter for \$20,000,000. These settlements are based on the EEOC's theory that an employer cannot automatically terminate employees with disabilities after such persons incur a certain number of attendance points or at the end of FMLA or other maximum medical leave. Rather, according to the EEOC, an employer is obligated to extend job-protected leave beyond the amount of maximum leave provided by the employer's policy and not count certain disability-related attendance infractions, both as reasonable accommodations to persons with disabilities. In filing these lawsuits, the EEOC targets employers who automatically terminate employees with medical conditions at the end of six or twelve months of leave and employers who follow a no fault attendance policy in which points are assigned for absences even if the absence is disability-related.

IV. The Administrative Process – How It Works

A. How a Charge is Filed

Generally, administrative proceedings begin when an aggrieved employee or former employee files a charge with a state or local administrative agency and/or the EEOC. Filing an administrative charge of discrimination or retaliation starts the investigative process. Unfortunately, the administrative agencies rarely screen out meritless charges. It is the responsibility of the employer, as the respondent in the proceeding, to address and respond to the allegations in the charge.

There are certain circumstances in which an investigation begins without the filing of a charge by an aggrieved individual. Title VII, the ADA and GINA permit an EEOC Commissioner to file a charge on behalf of aggrieved individuals. Under the EPA and ADEA, the EEOC may begin a directed investigation on its own initiative, without any charge being filed.

The EEOC has taken the position that it can expand the scope of an investigation to include issues and potential victims that were not specified in the underlying charge of discrimination. Employers must take special care in how they respond to charges of discrimination. The EEOC does not hesitate to begin a class investigation based on information voluntarily provided by the employer. Courts have approved of this EEOC practice in varying degrees, particularly if the EEOC does not stray beyond the statute(s) identified in the underlying charge. Thus, any individual charge of discrimination is potentially a "class" investigation. Indeed, the EEOC has initiated systemic or "pattern or practice" investigations based on individual charges that have little merit.

B. Dual Filed Charges

Many states have enacted statutes prohibiting discrimination in employment that mirror Title VII and those states may also have administrative agencies to enforce the statutes. Likewise, some county and city governments have enacted similar statutes or ordinances and have local administrative agencies to enforce them. State or local agencies, also referred to as state deferral

agencies or fair employment practices agencies (“FEPA”), often enter into work sharing agreements with the EEOC. A work sharing agreement between the EEOC and other administrative agencies permits the agencies to decide which will investigate the charge and issue a determination. In many instances, where there is a state deferral agency or a local agency in the jurisdiction, the charge form will allow the Charging Party to choose to “dual file” the charge. Dual filing occurs when the charge is filed with both the EEOC and the state or local agency and is often assigned a charge number from both agencies. The result of “dual filing” of a charge allows the Charging Party to file a lawsuit under both the federal and state or local anti-discrimination laws, regardless of which agency investigated the charge or issued the determination. It is important to note that state and local laws differ. How and whether a Charging Party can “dual file” a charge depends on the jurisdiction in which they file.

C. State or Local Agency Procedure

Many state and local administrative agencies that enforce anti-discrimination statutes or ordinances have procedures that differ from EEOC procedures. For example, many state and local agencies allow the Charging Party to proceed to an administrative hearing when the agency has made a determination in favor of the employer. Sometimes, the agency will allow the Charging Party to proceed to an administrative hearing when it has found reasonable grounds to believe a violation of the statute has occurred. Administrative hearings can be costly and risky and may not prevent the Charging Party from filing a lawsuit under Title VII despite losing an administrative hearing. If a state or local agency is investigating a charge of discrimination filed against the employer, it is advisable to seek the assistance of legal counsel in that jurisdiction to determine the risk involved in proceeding with an administrative hearing and whether such a hearing would preclude a future lawsuit. Regardless of the administrative agency investigating the charge, the employer’s response is critical to the defense of any future lawsuit.

D. Employer’s Response

The administrative agency typically requires the employer to provide a response to the allegations in the charge. Generally, background information about the Charging Party’s employment record is requested. Employers also are asked to submit narrative responses explaining the legitimate, non-discriminatory, non-retaliatory reasons for the actions taken against the Charging Party and any other defenses to the charge the Company wishes to assert.

E. Alternative Dispute Resolution

At the outset of the administrative procedure, agencies, especially the EEOC, routinely inquire whether the employer is willing to enter into early settlement negotiations, participate in mediation, or participate in what is called a “fact finding conference.” The EEOC will not initiate mediation when a charge is considered to be without merit or when the facts are complicated, and/or involve potential class issues. Mediations and fact finding conferences are not binding proceedings. The employer has the option to consider the possibility of a settlement, make an offer it considers to be reasonable, or decline to participate or settle if the Charging Party’s demand is excessive or if the charge is without merit. The employer can consider either a monetary settlement or another remedy. When the administrative agency inquires about an early resolution to the charge, the Company should discuss this option with legal counsel prior to declining the invitation. Typically, an internal investigation will be necessary before such a determination can be

made. Depending on the underlying facts and the severity of the claims, an early resolution may be a cost-effective alternative to submitting a detailed response to the agency. An early resolution through mediation may also be preferred to a perceived risk that the individual charge may evolve into a class-based investigation.

If the employer chooses to participate in an agency mediation, the agency typically provides its own non-comprehensive settlement agreement for release of the civil rights claim(s) at issue. The employer's representative or attorney should, however, be prepared to bring an additional settlement agreement to the mediation. The employer's settlement agreement should include a waiver and release of other types of employment related claims (in exchange for additional consideration), a provision covering taxability of the settlement amount, a confidentiality provision, and any other terms the employer wants to include in the settlement agreement.

V. Steps to Follow When You Receive a Charge

A. Review the Charge

Review the entire charge and make sure it is complete and signed. Also note whether there has been an investigator assigned to the charge by the administrative agency and the date when the response is due.

B. Notification of No-Retaliation Policy

If the Charging Party is a current employee, contact the employee and contact his or her supervisor or manager to notify all individuals of the employer's "no retaliation" policy. This conversation should be documented in accordance with regular Company procedures to document other human resources-related decisions. However, limit this information to only those employees in a need-to-know position. Ask the managers or supervisors who work or previously worked with the employee, if they are involved, not to discuss the charge with anyone without an absolute need-to-know basis. Supervisors and managers should be directed not to discuss the matter with anyone except for the person responsible for investigating or responding to the charge.

C. Contact with the Agency Investigator

Only a human resources representative or other individual responsible for preparing a response to the charge should take calls from the administrative agency representative. Inform supervisors and managers that if the agency contacts them or anyone else at the location (except non-supervisory hourly employees) that the agency should contact the individual responsible for the investigation and response. The person responsible for responding to the charge should refrain from discussing the employer's position with respect to the charge with anyone until the investigation and response are completed.

D. Initial Contact with Agency Investigator

If an agency investigator has been assigned to the charge, contact the investigator by telephone and introduce yourself. Be cordial and cooperative. Do not argue the merits of the charge. If possible, ask the investigator whether the Charging Party has an attorney and request specifics regarding the allegations of the charge. If you need an extension of time to respond to the charge, which is usually the case, ask the investigator for an extension at this time. The more cooperative and cordial you are during this discussion, the more likely the investigator will agree to grant an extension of time to respond.

E. Document All Contact with Agency

Always follow your discussion with the agency investigator or other agency representative with a letter confirming, for example, the agency agreement to grant an extension of time to respond to the charge. Provide your contact information in the letter.

F. Determine Basis for Charge and Scope of Investigation

Determine the basis of the charge and review the text of the charge in detail. Is the charge alleging discrimination based on race, color, sex, religion, national origin, age, disability, retaliation, or some other basis? Review the boxes checked on the charge form regarding the type of discrimination alleged. The type of claim(s) alleged will determine the type of information and documentation you will need to obtain to provide an adequate response. Reference the guide provided in Section XII.G.1, “Claims, *Prima Facie* Requirements, Defenses, and Documents,” to determine the information necessary to respond to the specific type of allegations in the charge.

G. Determine Timeliness of Charge

Check for timeliness of the charge. If the charge is filed more than 180 days (in states without a FEPA or state deferral agency) or 300 days (in states with FEPA or state deferral agencies) following the last alleged discriminatory event (i.e., termination, lack of promotion), some or all of the allegations in the charge may be barred by time; contact legal counsel to determine whether the charge is time-barred in your jurisdiction. If the charge is time-barred, you may choose to respond to the charge with a short letter raising the defense of time-bar, instead of providing a detailed position statement. It is within the agency investigator’s discretion to agree with your position and dismiss the charge or to continue the investigation despite the time-barred claims.

H. Agency Requests for Documents

Does the charge documentation received from the agency contain a separate request for information or documents? If so, review the request for information and use it as a general guide to assess the type of information the agency will be looking for in response to the charge. Sometimes the agency uses a form to request documents to accompany the position statement. Occasionally the information requested by the agency is beyond the scope of the information necessary to address the claims in the charge. Begin to gather the information requested by the agency, to the extent possible, and discuss the scope of the information requested with legal counsel. Many agencies do not require strict compliance with document requests and consideration should be given to appropriately limiting the Company’s response. As a general

rule, it is better to provide enough information to the agency in the position statement (with attachments) to defend the allegations in the charge only, careful not to provide too much information.

I. Litigation Hold

Following receipt of a charge of discrimination, the employer may want to consider implementing what is referred to as a “litigation hold.” A “litigation hold” prevents the employer and any relevant departments or employees from destroying or discarding potential evidence related to the employee or the employee’s claims. If the employer has a document retention policy and certain documents or computer files are regularly scheduled for purging, a “litigation hold” may prevent those documents or files from being discarded. Document retention, especially electronic document retention, is becoming increasingly important in litigation across the country and is often the subject of costly discovery disputes in employment litigation that results from a charge of discrimination.

J. Importance of a Well-Prepared Response to the Charge

Remember, the position statement and accompanying documents are the employer’s official response to the Charging Party’s allegations: Anything included in the response will likely be fair game in future litigation.

VI. Investigation of the Facts Underlying the Charge

A. Factual Investigation

The first task facing the individual responsible for responding to the charge, after notice of a discrimination or retaliation charge is received, is to commence a factual investigation. As the individual responsible for responding to the claim, it is possible that that individual may already be familiar with the facts underlying the charge or may have already conducted an investigation. The following are some guidelines to follow when investigating allegations of discrimination, harassment, or retaliation, both before and after the receipt of a charge of discrimination.

B. Why Investigate?

The primary reason to perform a factual investigation is to determine whether there has been inappropriate conduct, and if so, whether effective remedial and preventive action has been taken. An equally important reason is to assess the employer’s potential liability and exposure, gather the evidence expected to be necessary to defend a potential lawsuit, and determine whether an early resolution of the claim is possible.

C. The Goals of the Investigation

The goals of the investigation should include the following:

- Determine whether the facts alleged in the charge are correct and, if not, discern what the facts are surrounding the charge.
- Ascertain all of the pertinent facts that rebut the allegations of discrimination or retaliation.
- Document the Company's prompt corrective action if the Charging Party made an internal complaint of discrimination or other misconduct.
- Determine if the Charging Party and other similarly situated employees who have engaged in comparable misconduct or violations of work rules have been treated in a consistent manner.
- Develop written statements or other proof before employees leave the Company and possibly become unavailable to provide the necessary information.
- Permit time to analyze the Company's potential risks in any administrative or litigation proceeding related to the Charging Party's allegations. For example, will the Company be defending the use of a specific neutral employment practice that has a disparate impact against women, older employees or particular racial groups?

VII. Conducting the Investigation

A. Who Should Conduct the Investigation?

The person conducting the investigation should be impartial and should not be directly involved as a participant in the challenged conduct or decisions. If in-house counsel investigates the underlying facts, and the employer intends to rely on this investigation as part of its defense, in-house counsel could become a witness in the litigation. This is normally not preferred by the employer since in-house counsel may have also given privileged legal advice regarding the charge. That privilege could be waived by counsel participating in the initial fact finding investigation. Close consideration should be given to which individual will conduct the internal investigation of the underlying facts based on these and other considerations.

B. Investigator Selection Criteria

The person selected to conduct the investigation should:

- Understand the purpose of the investigation.
- Know the issues involved in the investigation.
- Have a demonstrated history of sensitivity to the protected group of the Charging Party.
- Be extremely familiar with the employer's policies.
- Have good interviewing skills.

- Be able to maintain confidentiality.
- Have credibility with the employees involved.
- Be able to prepare a complete and accurate report.

C. What the Company Investigator Should Know

1. Aim of the Investigation

The aim of the investigation is to find out who, what, when, where, and why pertaining to the Charging Party's allegations.

2. Who to Notify of the Charge and Why

At the outset, the Charging Party's immediate supervisors or managers should be notified of the charge. The Company investigator should inform the manager or supervisor to begin collecting all relevant documents pertaining to the Charging Party's claims such as supervisor's files, work samples, disciplinary actions, emails, logs, schedules, attendance records, notes, handwritten or typed statements, and lists of potential witnesses. Again, the Company investigator should emphasize the importance of discretion and should not be discussing the charge with employees except those on a need-to-know basis.

3. Investigation Essentials

An investigator must:

- Review the relevant documents.
- Interview the Charging Party, if still employed.
- Interview the alleged wrongdoer, the managers, or the supervisors involved in the challenged decision or actions.
- Interview all individuals identified as witnesses who may have knowledge or information concerning the alleged discrimination.
- Conduct interviews in private to prevent others who are not involved in the investigative process from overhearing any statements.

VIII. Document Review

A. Where to Start

In any investigation, the personnel file of the Charging Party is the perfect starting point for a Company investigator and should be carefully reviewed. It is important to note: Remember to centralize all personnel file documents from any locations where the Charging Party worked.

B. Charging Party's Employment History

Depending on the nature of the adverse employment actions at issue, close attention should be paid to any counseling or disciplinary notices issued to the Charging Party. It is also important to note a history of the Charging Party's employment with the Company upon review of the personnel file.

C. Internal Complaint Files

The Company investigator should review any documents related to internal complaints of perceived discrimination or harassment the Charging Party may have made to supervisors or to management personnel prior to filing the charge. The Company investigator should be mindful that information relating to the investigation of such complaints, as well as to the Charging Party, may be maintained outside of the Charging Party's central personnel file. For instance, managers often maintain separate files on employees under their supervision which may include information that is not kept in an employee's official file. This information is sometimes used to provide detailed observations regarding job performance, in creating performance appraisals, or for corrective actions. Remember to request any previous managers or supervisors to provide copies of their files, maintained in a separate location, regarding the Charging Party.

D. The Accused and Other Witnesses

The Company investigator should also review the personnel files of the other employees named in the charge (especially those of an accused harasser or alleged discriminator), and the files of any other employees whom the Company or Charging Party may seek to utilize as witnesses or "comparators."

The Company investigator should fully explore the background of the person accused of discrimination. In the termination, denial of promotion, or discipline context, it can be helpful, although not typically dispositive, to assert the "same actor" defense, i.e., a fact-finder may find it unlikely that a supervisor who hires or who has taken other supportive actions towards a Charging Party would then turn around and make an adverse decision based on a discriminatory motive. Similarly, in the hostile work environment context, whether an employee meets the definition of a supervisor will impact whether the Company is vicariously liable for that employee's conduct. The Company investigator should fully explore whether the Company can take advantage of the recent Supreme Court ruling which makes an employer vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013).

E. Comparative Data

Reviewing comparative data is an important component of any investigation. On the one hand, comparative data might show that the Charging Party was treated more harshly than similarly situated employees outside the Charging Party's protected category. This type of inconsistent comparative data generally supports an inference of disparate treatment discrimination and is not

favorable to the defense of the charge. On the other hand, comparative data is helpful to the defense of a disparate treatment charge when the data shows the Charging Party was not treated differently than other similarly situated employees who experienced comparable performance problems or engaged in similar misconduct. For example, in a race discrimination charge in which the Charging Party was terminated for insubordination or failure to meet production standards, any data showing that employees of other races were also terminated for insubordination or failure to meet production standards would assist in defending the charge. When such data is not favorable to the Company, as is sometimes the case, discuss the data results with legal counsel to determine if the scope of the information is too narrow or can be otherwise explained.

Comparative data should also be reviewed to determine if there is a potential that the EEOC might expand its investigation to include determining whether the Company's practices create a discriminatory disparate impact or demonstrate a failure to reasonably accommodate persons with disabilities. For example, the comparative data might involve all those persons who passed and failed a newly administered physical abilities test. The Company should examine that data to see if females or older workers failed the test disproportionately to determine if the data is indicative of disparate impact. Similarly, the comparative data might involve persons terminated for violating the Company's attendance policy. The Company should determine if persons with medical conditions were frequently terminated for poor attendance to evaluate whether the company was reasonably accommodating persons with disabilities.

F. Employer Policies

In addition to employee-related documents, it is imperative to review and utilize any personnel policies or procedures that relate to the employment practices about which the Charging Party complains. Specifically, the company investigator should review any policies included in the Employee Handbook (be sure to use the Handbook applicable to the Charging Party's employment) or other manual that would apply to the defense of the charge. The company investigator should determine whether the applicable policy or procedure was followed in managing the Charging Party, and if not, why an exception was made. If the Charging Party is challenging a policy as discriminatory or alleging that the Company should have made an exception to the policy as a reasonable accommodation, the Company investigator should seek advice from legal counsel.

When responding to harassment claims, the Company investigator should confirm whether the Charging Party: (1) was apprised of the employer's Harassment Policy or complaint resolution procedures as provided in the handbook or through training; and (2) utilized the procedure to bring his or her concerns to management's attention. In responding to such a charge, acknowledgment of receipt of the Handbook, signed by the Charging Party, is a critical document as well as any documentation regarding harassment training.

If your Company is responding to a charge that includes allegations of harassment, confirm whether the Charging Party has previously complained to anyone about the alleged inappropriate conduct. Also, determine whether there have been any calls or other complaints to corporate hotlines or corporate personnel originating from the location that involves the claims of harassment. If the Charging Party has complained about harassment prior to filing a charge of discrimination, the complaint should be investigated immediately and prompt corrective action should be taken.

IX. Witness Interviews

A. Generally

After the documentation is reviewed, the Company investigator should interview the Charging Party, the alleged wrongdoer, and any employees who may be potential witnesses. It is important to attempt to interview the Charging Party first to determine the most important witnesses to the investigation. In the event the Charging Party is no longer employed with the Company and is not reachable for an interview, start with the manager or supervisor to obtain the circumstances surrounding the Charging Party's resignation or discharge. Document your attempts to contact the Charging Party for an interview following the receipt of a charge.

All employees interviewed should be informed that the Company will not retaliate against them for participating in the investigative process. Employees should also be advised that while the Company will seek to maintain the confidentiality of the information provided, complete confidentiality cannot be guaranteed if it will impede the Company's ability to investigate and respond to the Charging Party's allegations. It is also important to note that if the Company investigator finds it necessary to speak with witnesses who are no longer employed with the Company, those conversations may not be protected from discovery in any subsequent litigation. Whether to interview former employees should be evaluated based on the level of involvement of the former employee in the challenged employment decision and whether the investigation could be perceived as incomplete without that former employee's input.

When taking notes during witness interviews, be especially careful not to draw any legal conclusions regarding the Charging Party's allegations. Do not, under any circumstances, make notes that contain phrases such as, "appears harassment occurred" or "probably discrimination" or "appears to be a hostile work environment." This type of notation in investigative files will cause serious problems in any future litigation. Also, be aware that investigative documents are often discoverable to the opposing party and potentially admissible in court in any subsequent litigation: Keep that in mind when making notations during witness interviews.

During the investigation, the alleged wrongdoer or other witness may refuse to be interviewed and/or may request the presence of their own legal counsel during the interview. The employer is not under any obligation to allow either the alleged wrongdoer or any other witness to have an attorney present during their interview. The Company investigator should approach this type of request by explaining what the employer is doing: simply trying to obtain the correct facts regarding the alleged discrimination and participation by those involved. Also explain that it is essential to get the full story behind the claims, and that often legal counsel prohibits this from taking place. If the employee still refuses to participate, the Company investigator can diplomatically inform that individual that their lack of participation in the investigation may result, at the conclusion of the investigation, in a negative inference against them. The Company investigator should document specifically why the employee refuses to participate in the investigation.

B. Interview with Charging Party

When interviewing the Charging Party, it is critical to refrain from creating an atmosphere of fear or mistrust. When obtaining information about the alleged discrimination, ask for “facts” about the incident, including what was said and done and what the Charging Party regards as inappropriate or discriminatory conduct. It should be noted, if the Charging Party is no longer employed with the Company or is represented by counsel, check with the Company's counsel to determine if direct contact with the charging party is appropriate. Normally, contact with a Charging Party who is employed with the Company is not a problem. However, if the Charging Party is a former employee or is currently represented by counsel, direct contact between an attorney for the employer and the Charging Party may pose an ethical problem in certain jurisdictions. The safest course when investigating allegations made by a current or former employee represented by counsel is to first have the Company's legal counsel inform the current or former employee's counsel of the need to investigate and work with opposing counsel to determine the proper manner of investigating that employee or former employee's allegations.

In a harassment investigation, it is important to ask the alleged victim if his or her job performance has been affected, how he or she responded to the alleged harasser, and whether and when the Charging Party complained about the alleged conduct. If the Charging Party claims the harassment has negatively impacted his or her job performance or mental state, specific examples should be obtained. These claims should be evaluated and, if substantiated, steps should be taken to immediately alleviate the problems identified without negatively impacting the Charging Party.

When interviewing the Charging Party:

- Give the employee or former employee the opportunity to explain, in detail, the basis for his or her charge;
- Obtain a list of people whom the employee or former employee thinks may corroborate his or her claims;
- Obtain or have the employee or former employee identify any relevant documents;
- Identify any relevant Company policies or guidelines, if applicable;
- At the conclusion of the meeting, explain that:
 - The employer is committed to compliance with the law and Company policies.
 - The employer will conduct a prompt and thorough investigation to determine whether inappropriate conduct has occurred.
 - If inappropriate conduct has occurred, it will stop and appropriate corrective action will be taken.
 - There will be no retaliation against an individual for making a complaint or participating in an investigation.
 - The employee or former employee is expected to provide a thorough, truthful accounting of what occurred, and should identify all evidence and all individuals who may have knowledge.
- Never promise confidentiality: Confirm that information will be shared with those individuals on a need-to-know basis only, and that the Company investigator will be as discreet as possible regarding the claims.

- Make sure the Charging Party feels comfortable with the Company investigator and ask the alleged victim to contact the Company investigator or the proper designated person if they have any questions or if there are additional problems related to the charge.

C. The Accused Harasser or Discriminator

When interviewing the accused harasser or discriminator, it is also important to obtain the “facts” and create a neutral position about the nature of the claim investigated. Maintaining neutrality is the most challenging aspect of interviewing the accused harasser or discriminator. The accused should be made aware that the Company is in the process of investigating the allegations set forth in the charge, and that the Company is committed to compliance with the law and its policies.

When interviewing the accused:

- Introduce yourself and explain the purpose of the interview.
- Advise the accused of the employer’s non-retaliation policy and the need for confidentiality with respect to the interview.
- Discuss each allegation in the charge or each allegation obtained from an interview with the Charging Party, if applicable.
- Refrain from disclosing the source of your information, unless it is absolutely necessary.
- Ask prepared questions: Make a list of questions prior to the interview to ensure you cover all of the allegations.
- Confirm the accuracy of the information that was obtained.
- Remind the accused of the non-retaliation policy and the importance of confidentiality. The National Labor Relations Board (“NLRB”) has taken the position that there cannot be blanket rules requiring the accused and witnesses to maintain confidentiality. *Banner Health*, 358 NLRB No. 93 (2012). Instead, in order to require confidentiality, the Company must show it has a compelling interest in protecting the integrity of its investigation, there is a need to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated and to prevent a cover-up.

D. Other Witnesses

Witness interviews are critical to verify information obtained from either the Charging Party or the accused harasser or discriminator. Interview the number of witnesses necessary to comply with the employer’s obligation to conduct a good faith investigation. For example, if the Charging Party provides the names of witnesses that will corroborate his or her claims, all of those individuals should be interviewed. Likewise, if the accused harasser or discriminator provides witnesses to rebut the Charging Party’s allegations, they must also be interviewed.

When interviewing the witnesses:

- Introduce yourself and explain the purpose of the interview.
- Explain why the witness is being interviewed.

- Advise the witness of the employer's non-retaliation policy and the importance of confidentiality with respect to the interview. See Section IV.C., above, relating to the NLRB's position on blanket requests for accommodation.
- Remain objective.
- Cover the relevant time period and all claims, allegations, or events described by the Charging Party or the accused.
- Confirm the accuracy of the information you obtained.

E. Follow-Up Interviews

The Company investigator may want to conduct follow-up interviews of the Charging Party, the accused, or other witnesses to verify, corroborate, or rebut certain facts. The Company investigator should keep follow-up interviews brief and to the point and should not disclose the source of the information or the status of the investigation to the interviewee. It is also important to remind the interviewed individual of the Company's non-retaliation policy and the need for confidentiality.

X. About Harassment Investigations

A. Timeliness of the Investigation

When handling a complaint of harassment, whether or not a charge has been filed, the complaint should be investigated immediately. The same basic principles apply to the investigation of any claim of discrimination, but it is especially critical to investigate a harassment claim as soon as it is received. A timely, thorough investigation, accompanied by prompt and appropriate remedial action, will generally provide the employer with an effective defense in subsequent litigation. It will also encourage an open workplace where employees feel comfortable reporting inappropriate conduct. On the other hand, a cursory or incomplete investigation, in which an employer does not conduct a careful review of the facts and witnesses, may create a claim that the Company knew or should have known about the inappropriate conduct and failed to take appropriate action. This will not only discourage employees from bringing complaints forward but can also deprive the Company of the ability to address the problem and defend the charge or even a subsequent lawsuit.

B. Prompt Remedial Action

While investigating allegations of hostile work environment or sexual harassment, it is critical to address, as quickly as possible, the claimed conduct and the alleged victim's work situation; assuming he or she is still employed. It may be necessary to suspend the alleged harasser pending investigation of the claims or to otherwise completely separate the parties without negatively affecting the alleged victim. It could be considered retaliatory to transfer the alleged victim to another location or position to separate him or her from the alleged wrongdoer. Suspension of the alleged harasser pending investigation will prevent the alleged victim, if still employed, from claiming there was retaliatory or continuing inappropriate conduct during the investigation process. Prompt remedial action is usually considered appropriate if it stops the alleged conduct

from continuing. The timing of the employer's action with respect to claims of harassment is critical to the Company's defense in any subsequent litigation.

C. Determine Each and Every Allegation

In investigations involving sexual harassment or other unlawful harassment, be sure to obtain a complete list of alleged acts, statements, or comments that the Charging Party construed as "harassment" or which may have constituted the alleged hostile work environment. Determine who, what, when, and where regarding each and every allegation of inappropriate conduct. It is important to get the names of anyone who may have witnessed any of the alleged conduct and interview those individuals.

XI. Documenting the Investigation

A. Segregation of Investigative File

Documentation pertaining to the investigative process should be separated from the personnel file of the alleged wrongdoer, unless the employer concludes that discrimination has occurred and discipline must be imposed. The segregated investigative file should contain the Charging Party's complaint and other documents and notes recorded or memorialized during the investigation. Additionally, the file should contain copies of the employer's policy statements (including notices and applicable handbook provisions) and a written plan of who will be interviewed.

B. What to Record for the Investigative File

It is important to record what is said during the interviewing process and what is done based on the information received, because such evidence can be used to support an employer's corrective action, or lack thereof, during and after the investigation. The contents of the investigative file should be protected and preserved as they will more than likely be used as part of the employer's defense in a potential discrimination, retaliation, defamation, or similar lawsuit filed by any of the parties involved.

C. Investigative Notes

The objective of taking thorough notes is to create an accurate record of the information received from the complaining employee, any potential witnesses to the alleged discrimination or harassment, and the alleged wrongdoer. It is important that the Company investigator keep good notes from interviews. Keeping good notes ensures an effective investigation into the employee's complaint and preserves a record of the investigation.

In taking effective investigative notes, the Company investigator should keep in mind the following:

- Take detailed notes, as close to verbatim as possible, during each interview.
- Interview notes should reflect the names of those present at the interview and the date,

time, and location of the interview.

- Interview notes should reflect the questions asked of the witness, as well as answers and any further information provided by the witness. It is helpful to outline your questions prior to the interview.
- At the conclusion of the interview, the Company investigator should review with the witness the points contained in the interview notes to confirm their accuracy and determine whether the witness has anything to add.
- Review and finalize the interview notes immediately upon completion of the interview.
- If handwritten notes are used as a basis for a more formal word-processed document, maintain and preserve the original handwritten notes. Plaintiffs' attorneys may claim spoliation if all notes are not preserved.
- Establish a system for organizing and maintaining interview notes in investigation files, separate from employees' personnel files and other investigative documents.
- Maintain any notes concerning conversations with inside or outside legal counsel on a separate piece of paper that indicates the conversation was with an attorney.

D. What Should Not Be Contained in Investigative Notes

Because the contents of the investigative file later may be revealed during litigation, care should be taken to refrain from making any derogatory or editorial notations when recording the information obtained during the witness interviews or the investigative process. The interviewer's notes should not contain the Company investigator's interpretations, beliefs, assumptions, or conclusions about the facts stated. Any personal opinions about what is being communicated to the Company investigator also should be excluded, as these statements may place the employer at a disadvantage in subsequent litigation. To better safeguard against potential lawsuits and to maintain confidentiality, the Company investigator should avoid using support staff to type, copy, file, or deliver documents contained in the investigative file.

E. Contents of Investigative File

At the conclusion of the investigation, a report can be prepared documenting the entire investigation.

If a report is prepared, it should include the following:

- A summary of the allegations.
- A summary of the individuals interviewed and the documents reviewed.
- A summation of the findings of fact.
- A discussion of the general conclusions drawn regarding the allegations.
- A discussion of the recommendations for remedial or corrective action to be taken.

All pages of the report should be marked "**Confidential, Attorney-Client Privilege/Work Product.**" If a report is generated, special care should be taken to ensure it accurately reflects the contents of the investigative notes. Additionally, all subsequent follow-up with the Charging

Party and communications with the alleged wrongdoer and other parties involved should be documented.

XII. Preparing the Position Statement

A. Introductory Material

In responding to the charge, the position statement should present the employer's case in a persuasive manner and request the agency to issue a "no probable cause" or "no reasonable cause" determination dismissing the case. Generally, the position statement should include an introductory section very briefly describing the nature of the employer's business and summarizing the Charging Party's job duties. The position statement should not provide a history of the Company, its growth or its size. In addition, the position statement should highlight the employer's Equal Employment Opportunity ("EEO") policies or Harassment Policy. The position statement should not provide a copy of the entire employee handbook or extraneous policies or forms. The Company should consider issues of disparate impact and reasonable accommodation before providing policies or practices believed to be relevant to the facts at issue in the charge. It is also helpful to include information regarding any training that employees or managers receive that is relevant to the claims made in the charge. Many employers also like to provide some legal analysis in their position statements by including citations to applicable case law. Use of legal analysis is not necessary and is not always persuasive to the investigating agency. Prior to including legal analysis, make sure the case law is binding authority in the jurisdiction and focus only on case law that sets forth the relevant burdens of proof for the type of claim in the charge. Avoid comparative decisions by courts outside your jurisdiction. Also, keep in mind that the position statement and any material submitted in support of the employer's response will become available to opposing counsel through a Freedom of Information Act ("FOIA") request once the agency has completed its investigation.

B. Charging Party's Employment History

After this introductory material, the position statement should describe information about the Charging Party's employment that is relevant to the analysis of his or her claims. Examples of such information include the Charging Party's date of hire, job progression, promotions, salary increases, transfers, and disciplinary record.

C. Explain Legitimate, Non-Discriminatory Reason for the Disputed Decision

Next, the position statement should describe, in narrative form, pertinent facts regarding the adverse employment actions about which the Charging Party complains.

In disciplinary cases, it is helpful to:

- Explain the oral and written counseling the Charging Party received.

- Attach, as exhibits to the position statement, copies of documents memorializing such counseling, including performance evaluations, warnings, and termination notices. Information and documentation of this nature is useful in establishing that the employer had a legitimate, job-related rationale for its actions.

As explained in Section III.C., EEOC Strategic Enforcement Plan and Recent Trends, the EEOC is now focused on demonstrating that certain neutral employment practices have a disparate impact against certain protected groups. Stating that an employee was “terminated for violating the Company’s consistently enforced neutral policy” may trigger the EEOC to investigate such a policy under a disparate impact theory. Therefore, rather than referring to sweeping policies, a Company is best advised to focus on how the specific Charging Party’s performance or conduct merited discipline or termination.

D. Use of Comparative Data

While the Company may want to view “similarly situated” employees through a wide lens during its internal investigation, this approach may not be appropriate when advocating the Company’s position to the agency. Some jurisdictions take a narrow view of who the Charging Party can claim is similarly situated. Thus, some courts have defined “similarly situated” to mean “directly comparable in all material respects,” including reporting to the same supervisor. Because who is considered “similarly situated” may be dispositive of a claim, or lead to an expanded investigation, consider consulting with legal counsel to determine the appropriate comparative data, if any, to be provided to the agency.

Generally, it is best to provide the least amount of information necessary to defend the charge. The EEOC does not fully investigate each charge of discrimination. Focusing on the problematic nature of Charging Party’s performance or conduct often provides sufficient information for the EEOC to close its investigation. Because comparative data of “similarly situated” individuals and policy information can lead the EEOC to evaluate class related issues, the Company should use caution before providing this information at the position statement stage. Some state and local fair employment practice agencies do fully investigate each charge and require employers to provide such data as part of the initial response. If the Company decides to provide comparative data, comparisons should be limited to the smallest work unit of employees who hold positions comparable to the Charging Party’s position, such as department or facility location. However, if such a comparison renders unpersuasive results, the comparators can be expanded to provide the agency with a broader perspective of the employer’s practices, such as district or regional data.

E. Response to Each Allegation in the Charge

In addition, the written response to the EEOC should provide responsive information to each of the Charging Party’s specific allegations. The response could be as simple as a denial or could be a more detailed explanation as to the employer’s position with respect to the allegations. Simple denials do not lock the Company into a response, and should be considered if the full story regarding the denial contains embarrassing facts or if there is a concern that Company witnesses have not accurately described events at issue. Failure to adequately address each claim may be a waiver in future litigation.

F. Conclusion

Finally, the position statement should include a conclusion that summarizes the major aspects of the employer's position. Assuming the narrative recitation set forth in the position statement is comprehensive, it usually is unnecessary to submit sworn affidavits to the agency (even if such affidavits are initially requested by the agency).

G. Chart of Claims, Defenses, and Relevant Documents

The chart set forth below contains some basic guidelines for responding to an administrative charge based on the nature of the Charging Party's allegations. It should be noted at the outset that there are many different types of discrimination claims, legal burdens of proof, and possible defenses.

Specifically, there are numerous affirmative defenses that may assist in demonstrating that the Company has not engaged in unlawful discrimination. The most common affirmative defenses are undue hardship in the context of religious and disability accommodation, and the direct threat defense in the disability context, and the *Faragher/Elzerth* affirmative defenses to a claim of supervisor harassment not resulting in an adverse employment action. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

While the Charging Party bears the burden of proving discrimination, the Company may be able to obtain a dismissal from the administrative agency if the Company satisfies the burden of proof by demonstrating that an affirmative defense applies. Two points should be kept in mind on the issue of affirmative defenses. First, in its position statement, the Company should not rely solely on an affirmative defense. In a harassment claim, the Company should not only assert the affirmative defense, but also argue, if applicable, that the harassment did not take place or that any alleged conduct was not sufficiently severe or pervasive to rise to the level of unlawful harassment. Similarly, in a failure to accommodate claim, the Company should argue in the position statement, if applicable, that the Charging Party cannot meet his/her burden, e.g., the requested accommodation was not reasonable and/or the employee was not qualified to perform the essential functions of the job with or without a reasonable accommodation. Second, to prove an affirmative defense, the Company is well-advised to fully develop supportive information and provide the administrative agency with significant evidence to support the defense.

The following information is intended to assist the Company investigator in providing pertinent information in response to a charge of discrimination for review by the employer's legal counsel or human resources manager and is not intended to cover every possible administrative charge scenario.

As a starting point, the charge should be initially reviewed for certain threshold issues which might merit an immediate dismissal from the administrative agency. The Company should keep in mind that the EEOC and many state administrative agencies initially review charges to determine if the charges meet jurisdictional requirements and thus, may have already considered the issues set forth below:

- Form of the charge: has the charge been signed under oath or affirmation?
- Is every issue of alleged discrimination outside the applicable statute of limitations (180 days for the EEOC in certain states without their own fair employment practice

agencies; otherwise 300 days if the EEOC charge is dual filed with the state agency)?

- Is the basis of the charge outside the anti-discrimination statutes enforced by the administrative agency? For example, does an EEOC charge allege that action was taken on the basis of an employee's sexual orientation, marital status, age discrimination against an employee under 40 years of age, retaliation for filing a workers' compensation claim or failure to comply with the FMLA?
- Is the charging party an employee as defined by the anti-discrimination statute at issue? Volunteers, partners, chief executive officers, members of boards of directors, and major shareholders typically are not considered employees by the EEOC. Independent contractors and persons employed by staffing firms may also fail to meet the definition of employee, however an administrative agency will rarely as an initial matter dismiss a charge made by an independent contractor or temporary employee, but instead will fully investigate the charge of discrimination and at the end of the investigation make the determination as to employee status.
- Is the respondent an employer as defined by the anti-discrimination statute at issue? Employers with fewer than 15 employees are not subject to Title VII, the ADA or GINA. The minimum number of employees required for coverage under the ADEA is 20. Legal counsel should be consulted to determine how such employees are counted and whether the Company's affiliated companies might be counted under Title VII, ADA, GINA and the ADEA. Coverage under the EPA is determined based on the dollar volume of business. Bona fide private membership clubs and Native American tribes are exempted from Title VII, the ADA and GINA.
- Is the claim precluded by a prior agreement or resolution? The EEOC is not precluded from proceeding with an investigation based on a valid agreement to arbitrate made between the employee and the Company. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). Similarly, the EEOC has declined to follow its own policy guidance and been allowed by courts to proceed on behalf of charging parties who have signed agreements releasing an employer from liability. Nevertheless, an employer may wish to reference such agreements in a position statement so as not to waive later arguments that such a claim may not be brought by the individual or because the relevant state agencies may honor such agreements. In the rare event that the Charging Party received an adverse decision from a state court on the very same issues raised in the charge, the Company should request that the EEOC dismiss the charge pursuant to *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982).

Section XII.G.1, "Claims, *Prima Facie* Requirements, Defenses, and Documents" contains comprehensive charts for key issues to address when dealing with the preparation of the position statement.

I. Claims, *Prima Facie* Requirements, Defenses, and Documents

a) Charge of Discrimination Based on Race, Color, Sex, National Origin, Religion, or Pregnancy Chart - Disparate Treatment

TYPE OF CLAIM	CHARGING PARTY MUST ESTABLISH	POSSIBLE DEFENSES	RELEVANT DOCUMENTS
<p>INTENTIONAL DISCRIMINATION BASED UPON:</p> <ul style="list-style-type: none"> • RACE • COLOR • SEX • NATIONAL ORIGIN • RELIGION • PREGNANCY 	<p>He/she is a member of a protected class;</p> <p>He/she was qualified for the position at issue/performing his/her job satisfactorily;</p> <p>He/she experienced an adverse employment action; and</p> <p>He/she was treated differently than similarly situated individuals not in his/her protected class under similar circumstances.</p>	<p>Demonstrate that Charging Party is unable to establish the required elements of his/her claim. For example, he/she was not qualified for the position at issue/not performing his/her job satisfactorily, he/she did not suffer an adverse employment action or he/she was treated the same as all similarly situated employees.</p> <p>Dispute any of Charging Party's factual allegations.</p> <p>Establish a legitimate, non-</p>	<p>Focus on documents specific to Charging Party and his/her performance. Use caution in providing the EEOC with employee lists or policy documents.</p> <p>Charging Party's personnel file;</p> <p>Charging Party's job description;</p> <p>Personnel files of similarly situated employees;</p> <p>Job descriptions of similarly situated employees;</p> <p>All documents regarding the adverse employment action.</p> <p>Employee handbook;</p> <p>All documents supporting the employer's legitimate, non-discriminatory business reason.</p> <p>Employer's equal opportunity policy;</p> <p>Employer's procedure</p>

		discriminatory business reason for the adverse employment action.	for employee complaints; and All other applicable policies.
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b) Charge of Discrimination Based on Race, Color, Sex, National Origin, or Pregnancy Chart - Disparate Impact

TYPE OF CLAIM	CHARGING PARTY MUST ESTABLISH	POSSIBLE DEFENSES	RELEVANT DOCUMENTS
<p>UNINTENTIONAL DISCRIMINATION BASED UPON:</p> <ul style="list-style-type: none"> • RACE • COLOR • SEX • NATIONAL ORIGIN • PREGNANCY 	<p>A particular employment practice;</p> <p>Has had a disparate impact on the basis of race, color, sex, religion or national origin.</p> <p>If the Company proves that a practice is job related and consistent with business necessity, the Charging Party may succeed if he/she demonstrates an alternative practice without a disparate impact serves the same business goals and the Company refuses to adopt such</p>	<p>There was no adverse employment action; Charging Party is not focused on one particular employment practice; the practice Charging Party complains of was only one factor leading to an adverse employment action; there is no disparate impact on the basis of race, color, sex, religion or national origin; the challenged practice is job related for the</p>	<p>The same types of documents that might disprove a claim of disparate treatment might also establish a claim of disparate impact. Because disparate impact claims are by their nature class claims, companies are advised to contact legal counsel.</p>

	alternative employment practice.	position in question and consistent with business necessity.	
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c) Charge of Age Discrimination Chart - Disparate Treatment

TYPE OF CLAIM	CHARGING PARTY MUST ESTABLISH	POSSIBLE DEFENSES	RELEVANT DOCUMENTS
AGE DISCRIMINATION	<p>Charging Party is at least forty (40) years old;</p> <p>He/she was qualified for the position at issue/ performing his/her job satisfactorily;</p> <p>Charging Party was subjected to an adverse employment action; and</p> <p>Someone younger and similarly situated was treated more favorably.</p>	<p>Demonstrate that Charging Party is unable to establish the required elements of his/her claim.</p> <p>Dispute any of Charging Party's factual allegations.</p> <p>Establish a legitimate, non-discriminatory business reason for the adverse employment action.</p>	<p>Charging Party's personnel file;</p> <p>Personnel files of younger similarly situated employees;</p> <p>Job descriptions of similarly situated employees;</p> <p>All documents regarding the adverse employment action;</p> <p>Employee handbook;</p> <p>All documents supporting the employer's legitimate, non-discriminatory business reason;</p> <p>Employer's equal opportunity policy;</p> <p>Employer's procedure for employee complaints; and</p> <p>All other applicable policies.</p>

d) Charge of Age Discrimination Chart - Disparate Impact

TYPE OF CLAIM	CHARGING PARTY MUST ESTABLISH	POSSIBLE DEFENSES	RELEVANT DOCUMENTS
AGE DISCRIMINATION - DISPARATE IMPACT	<p>A specific employment practice;</p> <p>Has had a disparate impact against persons over 40.</p>	<p>There was no adverse employment action; Charging Party has not identified any specific test or practice; the practice charging party complains of was only one factor leading to an adverse employment action; there is no disparate impact on the basis of age; demonstrate the affirmative defense that the challenged practice is based on a reasonable factor other than age.</p>	<p>The same types of documents that might disprove a claim of disparate treatment might also establish a claim of disparate impact. Because disparate impact claims are by their nature class claims, companies are advised to contact legal counsel.</p> <p>Documents showing that the employer trained its managers to make decisions based on age-neutral factors.</p>

e) Charge of Disability Discrimination Chart - Disparate Treatment

TYPE OF CLAIM	CHARGING PARTY MUST ESTABLISH	POSSIBLE DEFENSES	RELEVANT DOCUMENTS
			Focus primarily on documents specific to Charging Party and his/her performance- use caution in considering providing the EEOC with communications requesting information from medical forms, lists of employees or policy documents.
DISABILITY DISCRIMINATION	<p>The Charging Party is an individual with a disability, which includes:</p> <ul style="list-style-type: none"> a physical or mental impairment that substantially limits one or more of the person's major life activities; a record of such an impairment; or is regarded as having such an impairment; He/she can perform the essential functions of the job with or without accommodation; and 	<p>Demonstrate that Charging Party is unable to establish the required elements of his/her claim.</p> <p>Demonstrate that the Company had no knowledge that Charging Party had a disability.</p> <p>Demonstrate Charging Party was offered/provided a reasonable accommodation.</p> <p>Demonstrate that Charging Party did not request an accommodation and the Company had no reason to believe an accommodation was needed.</p>	<p>Charging Party's personnel file;</p> <p>Any documents pertaining to Charging Party's alleged disability;</p> <p>Any documents pertaining to employer's efforts to accommodate Charging Party;</p> <p>Charging Party's job description;</p> <p>Any documents pertaining to Charging Party's job performance;</p> <p>All documents regarding the adverse employment action;</p> <p>Employee handbook;</p> <p>All documents supporting the employer's legitimate, non-discriminatory</p>

	<ul style="list-style-type: none"> Charging Party suffered an adverse employment action because of his/her disability, and/or employer failed to reasonably accommodate Charging Party's disability. 	<p>Demonstrate that the Charging Party's request for an accommodation was not reasonable.</p> <p>Demonstrate the affirmative defense that the Company was unable to accommodate due to undue hardship.</p> <p>Demonstrate the affirmative defense that the Charging Party posed a direct threat to health or safety to Charging Party or others in the workplace.</p> <p>Establish a legitimate, non-discriminatory business reason for the adverse employment action.</p>	<p>business reason;</p> <p>Employer's equal opportunity policy;</p> <p>Employer's policy for reporting and resolving complaints; and</p> <p>All other applicable policies.</p>
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f) Charge of Disability Discrimination-Disparate Impact

TYPE OF CLAIM	CHARGING PARTY MUST ESTABLISH	POSSIBLE DEFENSES	RELEVANT DOCUMENTS
<p>UNINTENTIONAL DISCRIMINATION BASED UPON:</p> <p>Disability</p>	<ul style="list-style-type: none"> • Particular qualification standards, employment tests or other selection criteria; • Screen out or tend to screen out an individual or class of individuals with disabilities. 	<p>Other factors screened out the individual;</p> <p>There is no statistical evidence to support a claim that a class of individuals have been screened out; the challenged particular qualification standard in question is job-related and consistent with business necessity.</p>	<p>The same types of documents that might disprove a claim of disparate treatment might also establish a claim of disparate impact. Because disparate impact claims are by their nature class claims, companies are advised to contact legal counsel.</p>

g) Charge of Sexual Harassment Chart

TYPE OF CLAIM	CHARGING PARTY MUST ESTABLISH	POSSIBLE DEFENSES	RELEVANT DOCUMENTS
SEXUAL HARASSMENT (with a tangible employment action by a supervisor (formerly Quid Pro Quo))	<ul style="list-style-type: none"> Charging Party is a member of a protected group; Charging Party was subjected to unwelcome sexual advances or other illegal harassment by a supervisor; The sexual advance was because of the Charging Party's sex; Charging Party experienced an employment action affecting a tangible aspect of the Charging Party's terms, conditions, or privileges of employment and based on rejecting or accepting the sexual advance. 	<p>Demonstrate that Charging Party is unable to establish the required elements of his/her claim. For example, no sexual advances occurred.</p> <p>Establish a legitimate, non-discriminatory business reason for the tangible employment action.</p>	<p>Charging Party's personnel file;</p> <p>Any complaints of sexual harassment by Charging Party, if any;</p> <p>Any documents pertaining to employer's investigation and response to Charging Party's complaints of sexual harassment;</p> <p>All documents regarding the adverse employment action.</p> <p>Employee handbook;</p> <p>All documents supporting the employer's legitimate, non-discriminatory business reason;</p> <p>Employer's equal opportunity policy;</p> <p>Employer's sexual harassment and non-retaliation policy;</p> <p>Employer's policy for reporting sexual harassment complaints; and</p> <p>All other applicable policies.</p>

h) Charge of Sexual Harassment/Hostile Work Environment Chart

TYPE OF CLAIM	CHARGING PARTY MUST ESTABLISH	POSSIBLE DEFENSES	RELEVANT DOCUMENTS
<p>SEXUAL HARASSMENT</p> <p>(Hostile Work Environment)</p> <p>(Also applies to claims of harassment based on other protected status, i.e., race, national origin, age).</p>	<ul style="list-style-type: none"> Charging Party is a member of a protected group; Charging Party was subject to unwelcome harassment, i.e., sexual advances, requests for sexual favors, or other conduct of a sexual nature; Harassment was based on Charging Party's sex or other protected status; The harassment was sufficiently severe or pervasive to alter terms and conditions of employment and create a discriminatorily abusive working environment; and They knew or should have known about the alleged harassment and failed to take prompt remedial action to correct (if harasser is supervisor, knowledge is presumed). 	<p>Demonstrate that Charging Party is unable to establish the required elements of his/her claim.</p> <p>Establish the affirmative defense that the Company has provided a readily accessible and effective policy for reporting and resolving complaints of harassment; and</p> <p>Charging Party unreasonably failed to avail herself of that policy, or to otherwise avoid harm.</p>	<p>Charging Party's personnel file;</p> <p>Any complaints of sexual or other harassment by Charging Party if any;</p> <p>Any documents pertaining to the employer's investigation and response to Charging Party's complaints of sexual harassment;</p> <p>Employee handbook;</p> <p>Employer's equal opportunity policy;</p> <p>Employer's sexual harassment and non-retaliation policy;</p> <p>Employer's policy for reporting sexual harassment complaints;</p> <p>All other applicable policies; and</p> <p>Training materials to demonstrate that the employer took reasonable care to prevent the harassment.</p>

i) Charge of Retaliation Chart

TYPE OF CLAIM	CHARGING PARTY MUST ESTABLISH	POSSIBLE DEFENSES	RELEVANT DOCUMENTS
RETALIATION	<ul style="list-style-type: none"> Charging Party engaged in a statutorily protected expression; Charging Party suffered an adverse employment action; There is a causal relationship between the two events. 	<p>Demonstrate that Charging Party is unable to establish the required elements of his/her claim. For example, Charging Party did not engage in a statutorily protected expression or there is no causal connection between the two events.</p> <p>Establish a legitimate, non-retaliatory business reason for the adverse employment action.</p>	<p>Charging Party's personnel file;</p> <p>Any complaints made by Charging Party;</p> <p>Any documents pertaining to Charging Party's statutorily protected expression;</p> <p>Personnel files of similarly situated employees;</p> <p>All documents regarding the adverse employment action;</p> <p>Employee handbook.</p> <p>All documents supporting the employer's legitimate, non-retaliatory business reason;</p> <p>Employer's equal opportunity policy;</p> <p>Employer's policy for reporting complaints;</p> <p>Employer's non-retaliation policy; and</p> <p>All other applicable policies.</p>

j) Charge of Unequal Pay Chart

TYPE OF CLAIM	CHARGING PARTY MUST ESTABLISH	POSSIBLE DEFENSES	RELEVANT DOCUMENTS
UNEQUAL PAY	<p>Charging Party was paid a lower wage than the wage paid to male employees;</p> <p>For performing jobs which required equal skill, effort, and responsibility, and</p> <p>Which were performed under similar working conditions.</p>	<p>Demonstrate that Charging Party is unable to establish the required elements of his/her claim. For example, Charging Party was performing a job that was not similar to the employee being paid a higher wage.</p> <p>Demonstrate as an affirmative defense that the pay differences were based on:</p> <ul style="list-style-type: none"> • a seniority system; • a merit system; • a system which measures earning by quantity or quality of production; or • any other factor other than sex. 	<p>Charging Party's personnel file;</p> <p>Charging Party's pay records;</p> <p>Personnel files and pay records of similarly situated employees;</p> <p>The job description of Charging Party and similarly situated employees;</p> <p>Employee handbook;</p> <p>All documents supporting the employer's reason for the pay differences;</p> <p>Employer's equal opportunity policy;</p> <p>Employer's policy for reporting complaints;</p> <p>Any pay policies; and</p> <p>All other applicable policies.</p>

k) Charge of Religious Accommodation Chart

TYPE OF CLAIM	CHARGING PARTY MUST ESTABLISH	POSSIBLE DEFENSES	RELEVANT DOCUMENTS
RELIGIOUS DISCRIMINATION	<ul style="list-style-type: none"> • He/she had a bona fide religious belief which conflicted with an employment duty; • He/she informed his employer of the belief and conflict; and • The religious practice was the basis for an adverse employment action and/or the employer failed to accommodate the practice. 	<p>Demonstrate that Charging Party is unable to establish the required elements of his/her claim. For example, Charging Party never notified of religious belief.</p> <p>Show the Company negotiated with the employee in a reasonable effort to accommodate the employee's religious beliefs; and satisfy the affirmative defense by showing the employer would have suffered undue hardship were it to accept the employee's proposal.</p> <p>Establish a legitimate, non-discriminatory business reason for the adverse employment action.</p>	<p>Charging Party's personnel file;</p> <p>Any documents pertaining to Charging Party's religious belief;</p> <p>Any documents pertaining to employer efforts to accommodate Charging Party;</p> <p>Personnel files of similarly situated employees;</p> <p>All documents regarding the adverse employment action;</p> <p>Employee handbook;</p> <p>All documents supporting the employer's legitimate, non-discriminatory business reason;</p> <p>Employer's equal opportunity policy;</p> <p>Employer's policy for reporting complaints; and</p> <p>All other applicable policies.</p>

A sample position statement is also provided in Section XX, "Sample Position Statement" as a reference. Every administrative charge is different and the amount of information required in a response varies greatly depending on the facts alleged.

XIII. Responding to the Administrative Agency's Request for Documents or Request for Additional Information

A. General Considerations

Regardless of what is included in the original position statement, agencies often request supplemental data. Although the agency may advise that it “needs this information to close the case,” each requested document should be considered on its own merits and in light of the possibility of subsequent litigation. Although agency investigators may threaten to obtain subpoenas, quite often compromises can be negotiated with the agency investigator. Always remain cordial with the investigator. Inform the Company's legal counsel of any requests from the administrative agency for additional information after submitting the position statement and supporting documents.

B. Responding to Administrative Subpoenas

The EEOC is authorized to issue administrative subpoenas seeking documents, information or testimony. If an employer does not fully respond to an EEOC subpoena, the EEOC may file an enforcement action in federal court. If the EEOC's subpoena is issued pursuant to Title VII, the ADA or GINA, EEOC regulations provide an opportunity for the Company to petition the EEOC to revoke the subpoena. The EEOC Commissioners vote on whether to revoke or modify the subpoena. If the EEOC Commissioners reject the petition, the EEOC may file a subpoena enforcement action in federal court.

Petitions to revoke a Title VII, ADA or GINA subpoena must be filed with the EEOC office issuing the subpoena five business days after service from the EEOC. The EEOC's response to the petition to revoke is typically assigned to a trial attorney at the local EEOC office. Accordingly, shortly after filing the petition to revoke, there is often an opportunity to further negotiate the scope of the subpoena with the respective trial attorney.

There is no provision for petitioning to revoke ADEA or EPA subpoenas. If the employer does not comply with an ADEA or EPA subpoena, the EEOC may proceed directly to federal district court to seek enforcement.

XIV. Participating in a Fact Finding Conference

As part of the investigative process, some agencies may conduct fact finding conferences to permit the investigator assigned to the case to ask witnesses direct questions and to take notes. Generally, the investigator conducts the conference and requires that all questions be asked through him or her. This helps to avoid confrontations with witnesses, but often is frustratingly slow. Since FEPA's often face large case backlogs, it is important to keep in touch with witnesses who may leave the Company to ensure they can be available during future fact finding conferences (or at

public hearings or trials).

Before attending any fact-finding conference, all witnesses should be prepared as though they were participating in a court proceeding or deposition. Keep in mind that the Company's attorney does not represent non-supervisor employees and care should be used when preparing non-supervisory persons for a fact-finding conference. The preparation process of a non-supervisory witness may not be protected from discovery in a subsequent litigation.

The witnesses' statements to the investigator will be used in determining their credibility. If the witnesses volunteer information, provide opinions, or make inappropriate statements, these remarks can be held against the Company. To avoid misstatements, witnesses should be familiar with the representations made in the position statement and any affidavits that have been submitted to the agency during the processing of the case.

XV. Agency Requests for On-Site Interviews

In some cases, the administrative agency will request "on-site" interviews as part of the investigation. A request for "on-site" interviews is an indication that the EEOC has taken a particular interest in the charge. When such a request is made by the agency investigator, remain cordial and responsive but inform the investigator that you need to discuss the agency request with the employer's legal department. If possible, ask the investigator to give you the names of the current employees or supervisors that they need to interview. The employer is entitled to have counsel present for on-site interviews with supervisory employees. The employer is not entitled to have counsel present for non-supervisory employee interviews with the agency investigator but, depending on the agency and investigator, this accommodation may be permitted. Forward all the information to the legal department as soon as any requests are made. It is wholly within the employer's discretion to have legal representation present during on-site interviews.

XVI. Agency Determinations

At the conclusion of the investigation, the agency usually issues a "reasonable cause" determination or a "Dismissal and Notice of Rights" statement (commonly referred to as a "Right to Sue" notice) to the Charging Party. If a Dismissal and Notice of Rights is issued by the EEOC, the Charging Party has 90 days from his or her receipt of the Notice to file an action under federal law (Title VII, the ADA, or the ADEA). If a "reasonable cause" determination is made, the EEOC will attempt to conciliate the matter or may simply issue a right to sue notice. In some cases, where the EEOC finds reasonable cause, the EEOC will refer the case to the EEOC legal department for review. The EEOC legal department will determine whether to file suit on behalf of the Charging Party.

XVII. Conciliation

Conciliation is the process by which the EEOC settles a charge of discrimination when it finds reasonable cause to believe a violation of a statute at issue has occurred. If conciliation is unsuccessful, the EEOC may issue the Charging Party a notice of right to sue in court or may institute litigation against the Company on the Charging Party's behalf. EEOC conciliation agreements often: (1) require the employer to pay a monetary settlement, post a remedial notice, and provide employee training; and (2) allow the EEOC to monitor the employer's compliance with the conciliation agreement by inspecting and copying records related to the employer's employment practices. State agency procedures for determination vary and sometimes allow for a public hearing before an administrative law judge to assess the evidentiary basis for the Charging Party's allegations and the employer's defenses.

XVIII. About Jackson Lewis

Founded in 1958, Jackson Lewis, dedicated to representing management exclusively in workplace law, is one of the fastest growing workplace law firms in the U.S., with over 750 attorneys practicing in 54 locations nationwide. We have a wide-range of specialized practice areas, including: Affirmative Action and OFCCP Planning and Counseling; Disability, Leave and Health Management; Employee Benefits Counseling and Litigation; Immigration; Labor and Preventive Practices; General Employment Litigation, including Class Actions, Complex Litigation and e-Discovery; Non-Competes and Protection Against Unfair Competition; Wage and Hour Compliance; Workplace Safety and Health and Corporate Diversity Counseling. In addition, Jackson Lewis provides advice nationally in other workplace law areas, including: Reductions in Force, WARN Act; Corporate Governance and Internal Investigations; Drug Testing and Substance Abuse Management; International Employment Issues; Management Education; Alternative Dispute Resolution; Public Sector Representation; Government Relations; Collegiate and Professional Sports; and Privacy, Social Media and Information Management.

For the 11th consecutive year, Jackson Lewis has been recognized for delivering client service excellence to the world's largest corporations, once again earning a spot on the BTI Client Service A-Team. Jackson Lewis has also been recognized by in-house counsel in a comprehensive survey by BTI Consulting Group as both a "Powerhouse" and "Standout" in employment litigation. In addition, Jackson Lewis is ranked in the First Tier nationally in the category of Labor and Employment Litigation, as well as in both Employment Law and Labor Law on behalf of Management in the *U.S. News – Best Lawyers*® "Best Law Firms," and is recognized by Chambers and Legal 500. As an "AmLaw 100" firm, Jackson Lewis has one of the most active employment litigation practices in the United States, with a current caseload of over 6,500 litigations and approximately 415 class actions. And finally, Jackson Lewis is a charter member of L & E Global Employers' Counsel Worldwide, an alliance currently of 15 workplace law firms in 15 countries.

XIX. Sample Position Statement

Equal Employment Opportunity Commission

Investigator Name

Address

Re: Employee X v.
EEOC No. 150200600000

Dear Investigator:

I am writing on behalf of the Respondent. EMPLOYER Corporation ("EMPLOYER") in response to the Charge of Discrimination filed by Employee X ("Ms. X" or "Charging Party") in the above-referenced matter.

I. BACKGROUND

EMPLOYER is an equal opportunity employer and makes all employment decisions without regard to race, color, sex, religion, national origin, age, handicap or disability, marital status, veteran status or citizenship status. In addition, EMPLOYER does not tolerate sexual harassment or sex discrimination and has a well-disseminated Harassment Policy that is distributed to each newly hired employee during a mandatory orientation. Each employee is required to review EMPLOYER's Harassment Policy and sign an acknowledgment that they read and understand the policy. Further, EMPLOYER provides its Employees, through the EMPLOYER handbook, with several avenues to address complaints of inappropriate conduct, sexual harassment and discrimination.

After conducting an internal investigation of this matter, EMPLOYER has concluded that there is no factual basis or legal merit to Charging Party's allegations of sexual harassment, discrimination or retaliation. EMPLOYER made all employment decisions with respect to Ms. X's employment for legitimate non-discriminatory, non-retaliatory business reasons completely unrelated to her gender or claim of inappropriate conduct by a co-worker. After a review of this position statement and supporting documentation, EMPLOYER is confident that the EEOC will reach the same conclusion.

II. THE CHARGE

Ms. X alleges that she was discriminated against on the basis of her gender (female) and was retaliated against for complaining of alleged sexual harassment by a co-worker in violation of Title VII of the Civil Rights Act of 1964, as amended.

EMPLOYER denies that Ms. X was subjected to any discrimination or retaliation. To the contrary, Ms. X was treated fairly and any employment decisions made by EMPLOYER with respect to Ms. X's employment were for legitimate non-discriminatory, non-retaliatory reasons unrelated to her gender or complaint of inappropriate conduct by a co-worker. Each of Ms. X's allegations shall be discussed separately below.

III. EMPLOYER'S RESPONSE

A. Charging Party's Hire by Respondent.

Ms. X was hired on January 1, 2005 as an hourly employee in the EMPLOYER store location #0000 on Tree Lined Drive in Anywhere, U.S.A. Ms. X was assigned to work on the receiving team. The receiving team usually consists of approximately five to ten employees who work various shifts each week.

Receiving is responsible for unloading new merchandise from the delivery truck, checking the merchandise in and, in part, transporting the merchandise to the appropriate department for stocking or display. The receiving Employees report to a Receiving Department Manager who works many shifts with the receiving team. In addition, there is always an Assistant Manager or Manager in the location.

Ms. X participated in an EMPLOYER Orientation on or about January 1, 2005 during which she received an EMPLOYER handbook. (Exhibit 1). Ms. X signed an Orientation Completion Form on January 1, 2005 in which she acknowledged that she had learned EMPLOYER's policies and procedures, had read the EMPLOYER handbook and that she understood EMPLOYER's Harassment Policy and Equal Employment Opportunity Policy. (Exhibit 2). In addition, Ms. X acknowledged that she understood EMPLOYER's communication policy, which includes an Open Door Policy that encourages employees to go to the next level of supervision with any questions or difficulties until they "find someone who can help." Also, EMPLOYER's Harassment Policy contains explicit instruction on how to make a complaint of harassment and includes a toll free number for employees to report any problems in the workplace. (Exhibit 1).

During a typical receiving shift, the Employees are required to quickly and efficiently unload the merchandise from the delivery truck. During this process, Employees work in close proximity to one another. There are, at times, several Employees on each side of the receiving line assisting with the unloading process. The Employees do stand next to one another and it may be necessary, during the course of unloading the truck, to reach in front of another Employee or to assist another Employee in lifting the heavier objects.

B. Ms. X's Complaint of Inappropriate Conduct.

On approximately June 1, 2004, Ms. X approached the Receiving Department Manager, Mr. Y regarding another Employee, Mr. Z. Ms. X informed Mr. Y that Mr. Z sometimes "stared" at her, bumped into her in the receiving area and would stand in her way and not move while unloading the truck. Ms. X told Mr. Y that she did not want to see Mr. Z get in trouble but that she would like Mr. Z to be more conscious of his actions. Further, Ms. X told Mr. Y that she and Mr. Z were on friendly terms and that she felt comfortable talking to him about the situation. Mr. Y, aware that the two Employees were on friendly terms, informed Ms. X that he would check into her concerns and get back to her. Mr. Y then

approached the Assistant Manager, Mr. S, and informed him of Ms. X's concerns. Mr. S spoke to Ms. X and she explained that Mr. Z would "stare" at her and sometimes would touch her on the shoulder or back while they were unloading the truck.

Mr. S spoke with Mr. Y and both decided to closely monitor Mr. Z's behavior in response to Ms. X's concerns and for security purposes because they considered the "staring" behavior odd. Mr. Y personally interviewed other receiving team members, Mr. A and Mr. B, both of whom observed no inappropriate conduct by Mr. Z toward Ms. X. Further, Mr. S told Ms. X that there was a security camera set up in receiving and that Mr. Z would be closely monitoring during the shifts in which Mr. Z and Ms. X worked together. Ms. X expressed to Mr. S that the presence of the security camera was reassuring.

In addition, Mr. Y again spoke to Ms. X and asked her if she would like him to set up a meeting including Ms. M, Manager, Mr. Z, Mr. Y and Ms. X in which they would discuss Ms. X's concerns. Ms. X declined the suggested meeting and instead decided to speak with Mr. Z herself about his behavior. Also, Mr. Y and Ms. X decided that she would work only on the opposite side of the receiving line from Mr. Z so that any potential physical contact between the two Employees would be minimal or eliminated. Ms. X agreed with Mr. Y, stated that she would speak with Mr. Z about his conduct and proceeded to work on the opposite side of the receiving line from Mr. Z.

A few days later, Ms. X approached Mr. Y again and told him she had spoken to Mr. Z, told Mr. Z that there was a "line that he could not cross," that the conversation went well and that there had been no further incidents with Mr. Z after she spoke with him. Mr. Y specifically asked Ms. X to let him know if she had any additional concerns regarding Mr. Z's conduct.

Ms. X never approached Mr. Y again with any additional complaint about Mr. Z. According to Mr. Y, the situation had been effectively resolved. Under the circumstances, Mr. Y's conclusion was certainly reasonable. It should be noted that Mr. Z is a tall, imposing individual. He is otherwise quiet, unassuming and has been working for EMPLOYER for almost ten years. During Mr. Z's ten years of employment with EMPLOYER no other employee has ever complained about inappropriate conduct by Mr. Z. Further, Mr. Z was interviewed and denied that he had "stared at" or "touched" Ms. X inappropriately or intentionally. He explained that he may have inadvertently bumped her while working on the receiving line but did not recall any specific incidents.

In addition, in July 2005, Human Resources Director, Ms. P spoke with Ms. X and asked her about the situation with Mr. Z. Ms. X told Ms. P that the situation was better and that she had no further problems with Mr. Z. At no time during the conversation with Ms. P did Ms. X express that she felt she had been or was being "sexually harassed" by Mr. Z or that any inappropriate conduct was taking place whatsoever.

Despite the many avenues available to Ms. X to complain of any additional perceived inappropriate conduct by Mr. Z, she failed to do so. In fact, EMPLOYER was not aware of any ongoing issue with Mr. Z until receipt of the Charge of Discrimination dated December 25, 2005, several months after Ms. X informed EMPLOYER that the purported problem with Mr. Z had been successfully resolved.

Contrary to the assertions in the Charge of Discrimination, EMPLOYER has no record of any call by Ms. X to the EMPLOYER hotline number included in EMPLOYER's Harassment Policy. Further, Ms. X never contacted EMPLOYER's Human Resources department regarding her complaint.

C. Ms. X's Retaliation Claim.

Ms. X also claims in her charge that EMPLOYER retaliated against her by threatening to terminate her employment for requesting FMLA leave. This claim is completely without merit. As provided above, Ms. X received an EMPLOYER handbook and acknowledged that she understood EMPLOYER's Attendance policy. (See Exhibits 1 & 2). EMPLOYER's Attendance policy provides that Team Members could be subject to discipline or could lose their job if they are frequently late or absent without prior approval or excuse. (Exhibit 1, Page 10). Further, the policy provides that if an Employee is absent three consecutive days in a row without calling their supervisor or manager, they could lose their job. (Exhibit 1). At all times during her employment with EMPLOYER, Ms. X was aware of this policy.

In early January 2006, Ms. X was absent from work several times due to health related issues. Those absences were excused, without documentation, and not questioned by EMPLOYER. On or about January 17, 2006, Ms. X requested an unpaid medical leave of absence. EMPLOYER granted Ms. X's request for leave of absence and confirmed her anticipated date of return to work as February 1, 2006. (Exhibit 3). During her leave of absence, Ms. P, Human Resources Manager for EMPLOYER location #000, contacted Ms. X at home on two occasions to see how she was doing, to determine whether she needed any assistance, and to obtain a status with regard to her anticipated return to work.

During the second week of March 2006, Ms. X informed EMPLOYER that her physician had released her to return to work as of March 15, 2006. Following Ms. X's return to work she began calling in sick more frequently and missing her scheduled shifts. During the same time period, other members of the receiving team were frequently absent from their scheduled shifts creating an ongoing and serious productivity problem in receiving. As such, the Receiving Department Manager, Mr. Y, began counseling employees with frequent absences.

In March 2006, Ms. X was absent from her scheduled shift on March 20th, 21st, 22nd, 23rd and 24th. On March 25, Ms. X was counseled by Mr. Y regarding her absences. (Exhibit 4). The counseling also notes that Ms. X was reporting to her scheduled shifts late, taking excessively long breaks and leaving work early without authorization. (Exhibit 4). The counseling was issued in an effort to correct an ongoing problem and had absolutely nothing to do with Ms. X's prior complaint regarding the conduct of Mr. Z, almost eight months earlier. Further, at the time of the counseling, Ms. X never mentioned any continuing inappropriate conduct by Mr. Z or that she thought the counseling had anything to do with her prior complaint.

Despite all of the methods available to Ms. X to complain about the counseling and its purported relation to her earlier complaint, she failed to do so. On March 24, 2006 Ms. X notified EMPLOYER of some work-related physical restrictions imposed by her physician. Ms. X was immediately assigned to light duty tasks during her scheduled shifts.

Notwithstanding the counseling Ms. X received on March 25, 2006, her absences continued through March, April and early May 2006.

In a letter dated April 15, 2006, Ms. M, Store Manager at store #0000, confirmed Ms. X's physical restrictions and accommodation of those restrictions with the light duty assignment. (Exhibit 5). Also in the letter, Ms. M provided, "Of your past 11 scheduled shifts, you have missed 9." The letter also sets forth Ms. X's scheduled shifts from April 15, 2006 through April 30, 2006. The letter states, "As we have accommodated the restrictions set forth by your doctor, you are expected to work these shifts in full. If you continue to call out and/or No Call No Show for your scheduled shifts, we will be forced to take corrective action, based on EMPLOYER's Policy and Procedure." (Exhibit 5). Despite Ms. X's continued absences and her failure to call and show up for her scheduled shifts on several occasions, EMPLOYER continued to work with Ms. X to continue her employment with EMPLOYER.

Based on the above, EMPLOYER in no way retaliated against Ms. X based on her prior complaint regarding the conduct of co-worker Mr. Z. To the contrary, EMPLOYER demonstrated extraordinary tolerance of Ms. X's attendance problems under the circumstances. Accordingly, Ms. X's charge of discrimination lacks merit and should be dismissed in its entirety.

IV. CONCLUSION

For the reasons discussed above in this position statement, Ms. X was not discriminated against on the basis of her gender or retaliated against at any time during her employment with EMPLOYER.

The conduct of Mr. Z, as alleged by Ms. X, that purportedly occurred in June 2005, does not rise to the level of actionable harassment. Conduct such as the "staring" and unintentional touching alleged are not sufficiently severe or pervasive to rise to the level of sexual harassment. In addition, EMPLOYER's response to Ms. X's complaint regarding Mr. Z was certainly reasonable under the circumstances and no further inappropriate conduct was ever reported by Ms. X.

Ms. X's claim of retaliation is completely without merit. EMPLOYER made every effort to work with Ms. X during and after her medical leave of absence. It was not until March 2006, when Ms. X began consistently missing her scheduled shifts without a valid medical excuse, that EMPLOYER took appropriate disciplinary action that had nothing to do with her prior complaint about Mr. Z.

Accordingly, EMPLOYER respectfully requests that the agency dismiss this charge as expeditiously as possible.

Respectfully Submitted,

EMPLOYER

XX. Additional Resources

A. ACC Resources

1. ACC Docket Articles

Condon McGlothlen and M. Margaret Banas, "New Rule May Jeopardize Settlement and Separation Agreements," *ACCA Docket* 19, no. 7 (July/ Aug. 2001): 74-86, *available at* <http://www.acc.com/legalresources/resource.cfm?show=142870>.

Theos McKinney and Michael Lotito, "The California Employment Law Revolution," *ACC Docket* 23, no. 2 (Feb. 2005): 22-47, *available at* <http://www.acc.com/legalresources/resource.cfm?show=17006>.

2. ACC Webcasts

"The First ADA Amendments Act Cases and Final EEOC Regulations: What do They Tell Us?," ACC Webcast (April 2011), *available at* <http://webcasts.acc.com/detail.php?id=893459&go=1>.

"Workplace Information Risk in the Digital Age: Monitoring Employees, Social Media Challenges, Managing Access to Data and Optimizing Flexibility," ACC Webcast (February 2011), *available at* <http://www.acc.com/legalresources/resource.cfm?show=138990>.

"The 'Systematic Discrimination' Revolution: Confronting the Risking Number of Class-Based OFCCP & EEOC Claims," ACC Webcast (May 2008), *available at* <http://www.acc.com/legalresources/resource.cfm?show=138990>.

"The Latest Trends in EEO Law: How Are They Creating Risk for Your Workplace?," ACC Webcast (Mar. 2008), *available at*

<http://www.acc.com/legalresources/resource.cfm?show=141398>.

"Responding to EEO Agency Charges of Discrimination," ACC Webcast (May 2006), *available at*

<http://www.acc.com/legalresources/resource.cfm?show=16390>.

3. Articles

"Is There a Target on Your Back? How to Prevent and Respond to an Agency Pursuit of Pattern and Practice, or Systematic Discrimination Claims," (Oct. 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=1210221>.

"Questions & Answers About Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act," The U.S. Equal Opportunity Commission (Oct. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=785419>.

"Job Applicants and the Americans with Disabilities Act," The U.S. Equal Employment Opportunity Commission (Oct. 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=785605>.

4. InfoPAKs

"Managing an Aging Workforce," ACC InfoPAK (June 2009), *available at* <http://www.acc.com/legalresources/resource.cfm?show=77398>.

5. Presentations

"The Golden Rules of Workplace Investigations," ACC Presentation (Oct.

2010), *available at*
<http://www.acc.com/legalresources/resource.cfm?show=1235721>.

“Handling Your First Discrimination or Wrongful Termination Complaint: EEO Investigation Basics,” ACC Presentation (Oct. 2008), *available at*
<http://www.acc.com/legalresources/resource.cfm?show=155058>.

6. QuickCounsel

“Equal Opportunity Overview: What You Need to Know,” ACC QuickCounsel (June 2011), *available at*
<http://www.acc.com/legalresources/quickcounsel/eeowyntk.cfm>.

“The Americans with Disabilities Act,” ACC QuickCounsel (June 2009), *available at*
<http://www.acc.com/legalresources/quickcounsel/tawda.cfm>.

“Employment Provisions of the Genetic Information Nondiscrimination Act,” ACC QuickCounsel (June 2009), *available at*
<http://www.acc.com/legalresources/quickcounsel/gina.cfm>.

7. Sample Forms & Policies

“Sample Response to EEOC Document Retention Notice,” *available at*
<http://www.acc.com/legalresources/resource.cfm?show=1210613>.

8. Top Tens

“Top Ten Considerations Before Responding to an EEOC Charge,” ACC Top Ten (Apr. 2011), *available at*
<http://www.acc.com/legalresources/publications/topten/EEOC-Charge.cfm>.