EEOC: Position Statements On-Demand for Employees, Employers Stay in the FOIA Line

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The Equal Employment Opportunity Commission (EEOC) has changed its policy for disclosing employer position statements. Under the new procedures, charging parties are entitled to receive employer statements immediately upon request. Charging parties no longer have to wait until the EEOC's investigation is complete or they have received a Right-to-Sue letter and can get a jump start on building their case against the employer. This is a major departure from the EEOC's prior practice.

Where We Were

Before the change, the EEOC's procedure for disclosing position statements was pretty much the same for both sides. Both the charging party and the employer could make requests either through a Freedom of Information Act (FOIA) request or by going directly to the EEOC. The latter was known as a Section 83 request. The distinction was without difference as the timing was the same for both. Charging parties could not request a position statement until after receiving a Right-to-Sue letter from the EEOC. Employers could not make a request until after a lawsuit was filed.

Where We Are

Under the new policy, charging parties can make their Section 83 requests immediately after the employer submits its position statement. The EEOC will then provide the charging party with the position statement and any non-confidential supporting documentation the employer submitted. The charging party then has the option of submitting a rebuttal within 20 days after receiving and reviewing the employer's statement.

By contrast, employers cannot receive any information – including the charging party's rebuttal – until after a lawsuit is filed and it has

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made a Section 83 or FOIA request.

Where We're Going

It has always been important for employers to carefully draft their position statements, ensuring they are factually accurate and consistent with what witnesses will ultimately testify to at deposition. Under the EEOC's new procedure, employers should be even more careful. Although under the old procedure plaintiffs and their attorneys could ultimately get access to position statements, now they have additional time to craft their complaint and discovery requests based on the employer's initial response to the charge. It will therefore be especially important to draft position statements carefully and accurately so they will not serve as evidence to support claims of pretext and help plaintiffs survive summary judgment.

Because the EEOC will also hand over supporting company documents, employers will also need to be especially careful when attaching confidential documents to their position statements. Employers should also make sure to follow EEOC procedures for protecting such information from disclosure in response to a records request from the charging party.

At bottom, the EEOC's new policy emphasizes the fact that position statements should not be treated as routine or inconsequential. Instead, this new policy makes it clear that accurate, carefully drafted position statements are a critical initial step in successfully defending against a claim of discrimination.

For more information on the EEOC's new procedures for disclosing position statements, please contact Richard Moore, Steven McDevitt, or any other member of Frost Brown Todd's Labor and Employment practice group.

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