

Top Ten Practice Pointers for Responding to a Charge of Discrimination

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The Equal Employment Opportunity Commission (“EEOC”) and New Mexico Human Rights Division (“NMHRD”)² have jurisdiction over claims involving allegations of discrimination brought by employees in the state of New Mexico. This article addresses the top ten practice pointers for attorneys responding to a charge of discrimination filed with the EEOC or NMHRD.

1. Evaluation of the Charge. Prior to commencing an investigation or examining client documents, it is essential to review the charge of discrimination and supporting documents forwarded by the EEOC or NMHRD. It is important to note the following:
 - a) Preliminarily, it is necessary to determine the deadlines set by the agency. Typically, a deadline is listed for purposes of responding to the invitation to mediate the charge. To the extent insufficient time is provided for purposes of conducting your initial investigation, it is a good idea to contact the mediator to request an extension of the invitation to mediate deadline. Similarly, an extension request should be made of the agency if you require additional time to gather evidence that will be included in the response to the charge.
 - b) Each charge of discrimination includes a section wherein the charging party identifies the basis upon which the discrimination claim is asserted and a section within which the particulars of the claim are set forth. A charge of discrimination can be filed with the EEOC for age, race, color, sex, religion, gender, pregnancy, national origin, disability, and retaliation.³ The NMHRD has jurisdiction over the following additional categories: spousal affiliation, sexual orientation, pregnancy, housing, credit, ancestry, gender identity, serious medical condition and public accommodation.⁴ Identification of the category of discrimination will allow you to determine the scope of your investigation.

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² The City of Albuquerque Human Rights Board (“HRB”) likewise has jurisdiction over claims of discrimination brought by employees within city limits. The practice pointers outlined in this article are equally applicable to claims filed before the HRB.

³ The EEOC also has jurisdiction over claims involving the Equal Pay Act. See 29 U.S.C. § 206.

⁴ See New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 et. seq.

- c) Identify the dates within which the discrimination took place. Under Title VII of the Civil Rights Act of 1964 (“Title VII”), the New Mexico Human Rights Act, the Age Discrimination in Employment Act (“ADEA”), the Americans with Disabilities Act (“ADA”), and the Pregnancy Discrimination Act all provide that a charging party must file a charge of discrimination within three hundred (300) days of the underlying discriminatory act.⁵ In the event the charging party alleges the underlying discriminatory act took place beyond the three hundred day limitation period, you should make note of the untimely charge. However, anticipate that the agency will still require a full response to the charge and address the factual allegations and *prima facie* elements required to sustain the claim.
 - d) Other jurisdictional considerations. You will want to confirm that the employer has a sufficient number of employees to be made subject to the applicable statute under which the charge has been filed. Under Title VII and the ADA, the EEOC has jurisdiction over claims involving employers who employ fifteen (15) or more employees.⁶ However, the jurisdiction statutory minimum for claims involving the ADEA is twenty (20) or more employees and the Equal Pay Act (“EPA”) applies to most employers with one or more employees.⁷ Generally, jurisdiction over NMHRA claims will exist when an employer has four (4) or more employees.⁸
2. Conduct a thorough on-site investigation. Our experience has shown that conducting a prompt and thorough on-site investigation is the best way to evaluate the claims asserted by a charging party. Typically, this entails interviewing managers and supervisors who have information regarding the allegations set forth in the charge. In some cases, you will find that management has already conducted its own pre-charge investigation regarding the incident giving rise to the alleged discrimination. To the extent statements from other employees regarding the alleged discriminatory act are included in the employer’s investigatory file it is always a good idea to conduct your own follow-up interview with the employees who previously provided statements. Likewise, if managers or supervisors identify other employees with relevant information, this is the perfect opportunity to interview other potential witnesses. The on-site investigation is a good tool to utilize in determining the credibility of witnesses and gathering all documentary evidence pertaining to the charge. Obtaining and reviewing the personnel file prior to the on-site visit also tends to expedite handling of the initial investigation. A final benefit from conducting the on-site

⁵ See 42 U.S.C. § 2000e-5(e)(1) (Title VII and PDA); 29 U.S.C. § 626(d) (ADEA); 42 U.S.C. § 12117(a) (ADA).

⁶ See 42 U.S.C. 2000e(b).

⁷ See 29 U.S.C. § 630(b) (ADEA); 29 U.S.C. 216(b) (EPA).

⁸ See § 28-1-2, NMSA 1978. Jurisdiction over NMHRA spousal affiliation claims will exist only when employer have fifty (50) or more employees. See § 28-1-7(a), NMSA 1978. Additionally, sexual orientation and gender identity claims can be brought by employees only when employers have fifteen (15) or more employees. *Id.*

investigation relates to preservation of relevant evidence which can help the employer prevent future spoliation claims.

3. Mediation.⁹ Both the EEOC and NMHRA offer free mediation programs. This alternative dispute resolution mechanism affords employers the opportunity to resolve the issues addressed in a charge without incurring the cost of a time consuming investigation. During this time, the agency investigation is placed on hold. Participation in mediation does not constitute an admission of any violation of applicable law enforced by the agency. Pre-investigation settlement is particularly beneficial in matters involving unfavorable conduct by the charging party, other employees or the employer. The parties are able to circumvent the traditional agency investigative process and/or subsequent litigation. In the event the matter does not settle, the employer may obtain additional information from the charging party which may enable it to more effectively respond to the allegations in the charge.
4. Preparation of a response. The written position statement provides the employer with an opportunity to set forth its explanation of the non-discriminatory reasons for the action taken in reference to the charging party's employment. The position statement should include: (a) a summary of the allegations and a denial of the alleged discrimination; (b) a recitation of the facts¹⁰ related to the charge, including a thorough description of the charging party's employment history, the nature of the employer's business, and the charging party's job description; (c) a description of the employer's policies and procedures regarding its commitment to non-discrimination in the workplace; (d) a description of the employer's policies and procedures relating to the allegations of discrimination; and (e) a thorough analysis of applicable law pertaining to the *prima facie* elements of the claim and the non-discriminatory reasons for the employer's actions. Our experience has proven that treating the position statement like a motion for summary judgment tends to result in favorable disposition of the charge of discrimination.
5. Request for information/Questionnaire. The agency may request additional information from a respondent in a request for information (EEOC) or questionnaire (NMHRD). Such requests typically seek employer's policies, employee statements, personnel files, video evidence, lists regarding comparators, and other documentation perceived to be relevant by the agency. You should speak with the investigator if you have any concerns regarding the scope of the request for information. Limiting the scope of the request for information may be necessary where the investigator seeks voluminous documents, information over a significant time frame, or comparator lists which do not relate to the alleged discriminatory act. In some matters, the investigator will be willing to limit the

⁹Additional information regarding the EEOC's mediation program can be found at www.eeoc.gov/mediate/index.html

¹⁰ In support of the factual description, you should include copies of written employee statements and relevant portions of the charging party's personnel file.

scope of the agency's request or may seek to review limited documents during an on-site visit. Alternatively, you should raise relevant objections in your response to the request for information. This is also an opportune time to assert confidentiality to the extent the materials being produced require such protection.

6. On-site visit by the agency. In limited matters, the agency may request an on-site visit. Although the on-site agency visit may be disruptive to business operations, this should be viewed by employers as an opportunity to expedite the investigator's fact finding process and will assist in the timely resolution of the matter.¹¹ The on-site visit may also alleviate the burden associated with the production of voluminous documents requested by the investigator as s/he might ask to review the documents on-site. However, it is always important to be aware of confidentiality and trade secret considerations when producing any documents to the agency.
7. Conciliation.¹² Pursuant to federal law, the EEOC is statutorily mandated to attempt resolution of findings of discrimination through "informal methods of conference, conciliation, and persuasion."¹³ Once the parties have been informed of the evidence gathered in the investigation which establishes reasonable cause to believe that discrimination has taken place, the EEOC invites the parties to participate in voluntary conciliation of the matter.¹⁴ In the conciliation process, the investigator typically works with the parties "to develop an appropriate remedy for the discrimination."¹⁵ In this regard, the investigator takes on the dual role of mediator/facilitator. Conciliation includes negotiations between the parties and resolution of the matter between the EEOC and respondent. The EEOC may request that certain remedies be agreed to by the parties in the conciliation agreement which may require the employer to conduct additional training or policy revision. This is the final opportunity for the parties to resolve the claim informally and without incurring the cost of litigation.¹⁶
8. Professionalism. Developing a sound professional relationship with either the mediator or investigator is critical for purposes of ensuring proper resolution of the charge. Providing sufficient notice to the agency regarding delays in your investigation will ensure a good working relationship with the agency, both during the pending investigation and the handling of future matters. Cooperation is key!
9. Retaliation. In matters involving current employees, the employer should be reminded that they must not retaliate against the charging party for having filed a

¹¹ The EEOC provides additional information regarding its handling procedures during the investigation phase at www.eeoc.gov/employers/investigations.html.

¹² Information regarding the EEOC's conciliation process can be found by visiting www.eeoc.gov/employers/investigations.html#conciliation.

¹³ See 42 U.S.C. § 2000e-5.

¹⁴ See www.eeoc.gov/employers/investigations.html#conciliation.

¹⁵ Id.

¹⁶ Id.

charge of discrimination. Title VII prohibits retaliation against an employee who opposes any unlawful employment practices or files a charge with the EEOC.¹⁷ Likewise, employers must be cognizant of claims which might be filed by employees who are non-parties to the charge and either participate or refuse to participate in the underlying investigation. For example, Section 503 of the ADA provides, in pertinent part, that "no person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the Act] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the Act]."¹⁸

10. Preventing future claims. Employers should recognize that, in some cases, a charge of discrimination provides them with an opportunity to re-evaluate policies and procedures regarding equal employment opportunities. In this respect, employers should be encouraged to implement or revise policies which are not in compliance with applicable law. Similarly, when warranted, employers should undertake efforts to train both management and hourly employees regarding applicable federal and state laws pertaining to the prevention of discrimination, harassment and retaliation in the workplace.

An interactive dialogue with the agency from the moment a charge is received through submission of a response to a charge of discrimination is beneficial for all parties appearing before the agency. Each charge of discrimination has its own special considerations; however, this list provides a non-exhaustive, general outline for any practitioner responding to a charge of discrimination before the EEOC or NMHRD.

¹⁷ See 42 U.S.C.S. § 2000e-3(a).

¹⁸ See 42 U.S.C. § 12203(a).