

Should Charging Parties Read Your Position Statement? EEOC Says Yes.

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The EEOC is implementing nationwide procedures that will disclose employer position statements - submitted in response to charges of discrimination - to charging parties and their attorneys upon request during the course of the EEOC's investigation of the charge. If the employer's position statement is provided to a charging party, there is a 20-day period for the charging party to provide a response to the EEOC, but that response will not be provided to the respondent/employer during the investigation, according to a summary posted on the [EEOC's website](#). Although it is likely that some EEOC investigators have been sharing information from the position statement on an informal basis with charging parties as part of their investigations, the formal announcement by EEOC that all charging parties will be able to read position statements and respond during the investigation is a new development. Historically, charging parties have been able to access the EEOC's investigation file (including the position statement) after the Notice of Dismissal and Right to Sue had been issued, and employers have been able to request the EEOC's investigation file after a lawsuit is filed. From a practical standpoint, employers will want to investigate charge allegations thoroughly and continue to carefully draft position statements to provide information that is factual and persuasive with an eye toward convincing not only the EEOC investigator that dismissal is warranted but also to perhaps convince the charging party (and his/her attorney) of the strength of the employer's position. Given the likelihood that an employee's attorney will request the standard operating procedure during the investigation, employers should consider getting their attorneys involved at the earliest opportunity when an EEOC charge is received. To allay concerns regarding confidential information that employers may need to provide when submitting a position statement, the EEOC is asking employers to separate out any confidential documents and file them with a confidential designation. Confidential records and information will not be provided to the charging party during the investigation, the EEOC says. In situations where confidential commercial or financial information, or sensitive medical information, is relevant to an investigation, employers are encouraged to refer to, but not identify, such information in the position statement. Supporting documents (such as medical information relevant to a disability discrimination claim under the ADA) should be in separate attachments labeled as confidential with an explanation justifying the confidentiality designation. As to the charging party's medical information, the EEOC says such information is not to be deemed confidential medical information in relation to the investigation. The new procedures apply to all EEOC position statements that the EEOC has requested from Jan. 1, 2016, going forward. The EEOC also has set up a system for digital filing of position statements. The EEOC's procedures also continue the general practice of requiring employers to file a position statement within 30 days of issuance of the charge, but EEOC will allow extensions upon request for good cause, and with a showing that the employer has been exercising diligence to prepare and submit the position statement. To assist the parties in better understanding the EEOC's expectations with respect to position

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statements submitted during an investigation, the EEOC also has published a set of guidelines in Q&A format – [one for respondents](#) and [one for charging parties](#).