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Beware EEOC's Broad Power: Protect Your Trade Secrets

By: Karen Elliott. ***Tuesday, August 14th, 2012***

With EEOC complaints on the rise, employers should take note of a recent opinion reminding them that the EEOC may access "virtually any material that might cast light on the allegations against the employer."

The EEOC is the **Equal Employment Opportunity Commission**, and it is tasked with investigating employee charges of discrimination. When reviewing the EEOC's **request for information (and more here)** to conduct an investigation, the Fourth Circuit Court of Appeals recently noted that it will "defer to an agency's own appraisal of what is relevant so long as it is not obviously wrong." So, although the court will not allow the EEOC to discover everything, the Court has held that whether the material requested is relevant, the relevancy requirement is "not especially constraining."

The recent case at issue is **EEOC v. Randstad**, decided July 18, 2012, by the Fourth Circuit Court of Appeals. The employer, Randstad, had objected to the scope of the EEOC's discovery request, and won the first round of arguments that the request was too broad. The appeals court reversed, allowing the broad discovery request.

Employers often object to complying with the scope of materials requested by the EEOC during **an investigation**. The first notice may simply be a "request" for documents. If cooperation does not follow, the EEOC has the right to issue what is called an administrative subpoena for the information. As this case highlights, successfully objecting to the scope of the EEOC's subpoena is difficult.

The EEOC is most likely to seek broad discovery when the employee filing discrimination charges (known as the charging party) claims the act of discrimination is related to the employer's specific broad based policies or practices. For example, a company may have a rigid policy of **not hiring anyone who has a felony conviction** or a no fault attendance policy. The EEOC is concerned these policies may result in systemic, discriminatory hiring results, and will be looking for information to ferret out these policies and the resulting hiring practices,

This recent legal opinion serves as a reminder to employers of key issues to consider when facing an EEOC charge.

- The EEOC's reach is broad, broader than the employee's is during the **discovery process** for litigation. Employers should remember that the charging party may request a copy of their charge file

from the EEOC within 90 days after receiving his or her Right to Sue Notice, or during subsequent litigation. If the EEOC requested a broad array of information, that information will be obtainable by the employee subject to only a few limitations. (Remember that employers, too, may use the **Freedom of Information Act** to similarly request the charging party's file.)

- The employer does not have to release to charging party's information that is deemed to qualify as confidential commercial information. Therefore, the employer should be sure to clearly identify all such qualifying information as trade secrets or confidential commercial information before releasing it to the EEOC.
- Also disclosed to the charging party is the employer's position statement. This statement can then serve as possible evidence on behalf of the charging party. Therefore, the employer should consider the position statement carefully to balance the need between presenting its case to the EEOC and the possibility that the position statement may later be used against the employer during subsequent litigation.

If you should have questions about how to respond to an EEOC request for information, talk with a **Virginia employment lawyer**. Any one on our team at **Sands Anderson PC** would be glad to speak with you.