



The EEOC Goes Electronic: FAQs On EEOC's New Electronic Pilot Program

Insights

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The Equal Employment Opportunity Commission (EEOC) recently rolled out a pilot program to electronically notify employers of new Charges filed against them. Instead of mailing the Notice of Charge of Discrimination form through conventional means, the EEOC is rolling out a new system that will notify an employer of a pending charge and allow an employer to respond to the Charge through an online portal.

This new system is catching a lot of employers by surprise, and has resulted in many questions. Fisher Phillips has developed a list of Frequently Asked Questions to aid employers in understanding this new pilot program.

What is this new system?

The EEOC is piloting a new electronic system involving an online portal called ACT Digital. If a new Charge of Discrimination is filed against you, the EEOC will email you notice of the new Charge and invite you to download a copy through the portal.

Phase I of the project only allows employers a channel of communication with the EEOC about the Charge. Charging Parties are not yet allowed electronic access. In this first phase, upon consenting to certain terms and conditions, you are able to:

- view and download the Charge;
- review an invitation to mediate and respond accordingly;
- submit a Position Statement to the EEOC; and
- provide or verify company contact information, including the designation of a legal representative.

The EEOC has indicated that employers will also be able to use ACT Digital to communicate with the EEOC regarding extensions, inquiries, and other Charge-related issues. It seems this option may already be operational in some EEOC offices.

Where is the EEOC implementing ACT Digital?

The EEOC is rolling out ACT Digital in waves. The first wave began in early May 2015 and included EEOC offices in San Francisco and Charlotte. Earlier this summer, the EEOC released the program

in a second wave of offices, which included Denver, Detroit, Indianapolis, and Phoenix. The EEOC's goal is to implement ACT Digital in all of its 53 offices by October 2015.

How will we first receive notice?

The EEOC will send an email containing a Charge notification to an employer's representative. The EEOC might obtain this email address from the Charging Party, or may obtain it from past email communications with those businesses already in the EEOC's system.

Note that this could result in a manager or supervisor receiving notice of a Charge outside his or her own department or area. We are still checking to see if the EEOC will allow employers to proactively designate an email address where all notices to the company should be sent.

Must employers use this system?

This is the most common question we've received so far. The short answer is no – for now. Employers *are currently not required* to use ACT Digital during the pilot period of implementation. Note that if you do respond to the initial email, you may be creating an obligation to use the system going forward, thereby limiting your position with regard to how the Charge is handled.

However, the EEOC is transitioning to an entirely electronic format and, as a practical matter, all employers will likely be required to use this electronic system in the future.

What if the notification email is blocked by a firewall or spam folder?

The EEOC's notification procedure includes some "fail-safes" to ensure you do not miss notifications of pending Charges. For example, the EEOC may send a hard copy of the Charge if the online portal is not accessed by the employer within approximately 10 days after the notice email is sent.

Can the Charge be viewed by the public?

No, with one exception. Each Charge has a unique portal access that you will use for the life of the case. Therefore, only people with access through the unique portal address will be able to access ACT Digital to view the Charge and your Position Statement. At this time, even the Charging Party does not have access to the online portal.

The one exception – which has always been the case – is that the public may request Charge files under the Freedom of Information Act (FOIA). The EEOC has stated that it will continue to follow its current protocols and federal regulations in responding to FOIA requests (which typically do not allow for access to the Charge while the matter is pending).

Similarly, the unique portals will close after a period of time. We do not know for sure, but it is believed the portals will be deactivated 90 to 100 days after the EEOC closes the file. Because the portals expire, you should download and retain all necessary files and documents related to the Charge if they use the electronic system.

Will state human affairs commissions use ACT Digital?

At this time, the EEOC has not indicated whether state human affairs commissions will be utilizing the ACT Digital system.

What will Phase II look like?

The EEOC has released very little information about Phase II and any speculation as to what is in the pipeline is just that – speculation. With that caveat, there are a few likely next moves.

We expect the EEOC will open the portal to Charging Parties so they may file and monitor their Charges online. It is unknown, however, whether the portals will be kept separate or combined. In the future, the EEOC may also maintain a database of the employer's prior Charges, as opposed to deactivating the portal.

What should we do immediately?

Because you could receive notice of a new Charge tomorrow, you should instruct all of your supervisors and managers today to immediately contact the HR department or in-house counsel if they get an email from the EEOC. Just as in the past you instructed them to forward on any hard copy EEOC Charge received in the mail, the same rule should apply for electronic notices.

You should take it one step further in this digital age: counsel your managers not only to forward on EEOC emails to proper company channels without responding, but also to refrain from downloading the Charge or even clicking anywhere on the email.

Phase I of the ACT Digital rollout should not drastically affect how you respond to EEOC Charges. In fact, it might make communication with the EEOC easier. As additional phases are rolled out, however, this could change. Stay tuned for more updates.

If you have any questions about this new program, or how it may affect your business, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific new EEOC program. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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