

## Responding to MCAD and EEOC Charges: Best Practices for Massachusetts Employers

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For Massachusetts employers, receiving a Charge of Discrimination from the Massachusetts Commission Against Discrimination (MCAD) and/or the Equal Employment Opportunity Commission (EEOC) can be an unsettling experience. Beyond the legal exposure, these Charges can disrupt operations, damage morale, and create significant financial risk if not handled strategically from the outset. Considering these realities, employers are well-advised to contact experienced employment counsel upon receiving a Charge.

When faced with defending such Charges, there are several best practices employers should consider adopting to put themselves in the best position to protect their interests and limit their exposure. Before we dive into these best practices, here is a brief overview of the MCAD and EEOC.

The MCAD is the state agency charged with enforcing the Commonwealth's anti-discrimination laws, most notably M.G.L. c. 151B. Current and former employees of most Massachusetts companies have a statutory right to file a Charge of Discrimination with the MCAD alleging that their employer has discriminated against them because of a protected class (e.g., race, gender, ethnicity, age, disability, etc.) or retaliated against them for engaging in protected activity (e.g., complaining of unlawful treatment, refusing to do something unlawful).

The EEOC is a federal agency charged with enforcing several federal laws, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, among others. Many Massachusetts employees likewise have the ability to file charges of discrimination and retaliation with the EEOC for the same reasons as the MCAD. In fact, when an individual files a Charge with the



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MCAD, the Charge is frequently cross-filed with the EEOC.

Once a Charge is filed, the MCAD and/or EEOC will serve the Charge on the employer and any individuals named and will then commence an investigation.

With this overview in mind, below are several best practices to consider.

### **Preserve All Relevant Evidence Promptly**

Upon receiving a Charge, employers should put in place a litigation hold to preserve all relevant evidence concerning the matter. Relevant evidence in MCAD and EEOC cases typically includes the complainant's personnel record (containing performance reviews, manager/supervisor notes, discipline, and related documents), and emails and internal company communications discussing any matters relating to the allegations in the Charge.

To effectuate a litigation hold, businesses often – with the assistance of legal counsel – issue an explanatory memorandum to all individuals involved in the matter, including the complainant's supervisor(s), HR personnel, company leadership, and, when applicable, the complainant's coworkers, directing the parties to take immediate action to preserve any and all potentially relevant information. Companies should also enlist their IT professionals as necessary to assist with ensuring relevant emails and electronic messages are preserved.

### **Investigate the Allegations in the Charge**

One of the first things a company should do after receiving a Charge is identify all potential witnesses who may have relevant knowledge. Often, the most important witness in these cases is the decision-maker – i.e., the person who made the decision that the complainant claims is discriminatory.

Once witnesses are identified, the company may meet with these witnesses to present the allegations, ask relevant questions and obtain any necessary documents. The Company should also consider whether to involve its employment counsel in these meetings. The information learned and documents acquired in these preliminary meetings are often invaluable when preparing the company's response to the Charge, referred to as the "position statement."

### **Draft a Compelling Position Statement**

The most important document an employer will file during the course of an MCAD or EEOC investigation is the position statement. The position statement serves as the company's response to the Charge and is the company's opportunity to tell its "side of the story" and convince the MCAD and/or EEOC that there is a lack of probable cause to believe that the company engaged in unlawful conduct. In many cases, the position statement becomes the blueprint for the company's defense if litigation is later filed against the company in court. Important strategic considerations play a role in what to include and how to present evidence in position statements based on the individual case, which counsel can advise on.

An effective position statement will typically contain a chronological narrative of the events, refute complainant's factual allegations with documentary evidence (including, for example, disciplinary history, performance evaluations, investigative reports and conclusions, etc.), and clearly articulate the legitimate, non-discriminatory and non-retaliatory reason(s) for the decision(s) the company made. For example, if a company terminated an individual's employment for misconduct, the company should make that point abundantly clear to the MCAD/EEOC by describing, in detail, the specific misconduct the complainant engaged in, and the specific company policy the employee violated. In addition to factual information, an employer may have certain legal defenses that should be evaluated and included in a position statement.

Finally, companies must ensure that everything stated in the position statement is truthful, accurate, and can be supported with documentary or testimonial evidence. False or inconsistent explanations of an employer's actions in a position statement can and will come back to haunt a company.

### **Consider Early Mediation**

At the outset of most MCAD/EEOC cases, both agencies will typically offer to mediate the dispute between the parties. Mediation is entirely voluntary. If both sides do not agree to mediate, the case will continue in the investigative phase.

Depending on the circumstances, companies facing Charges may consider participating in mediation for several reasons. In particular, mediation can be used offensively as an opportunity to test the complainant's case before a neutral third party, and point out the

weaknesses and challenges in complainant's case. From a defensive perspective, early mediation, if successful, could blunt the financial cost of litigating the dispute in full, limit disruption to the business, protect the confidentiality and reputation of the business, and allow the company to manage risk and control the outcome.

### **Conclusion**

MCAD and EEOC Charges require careful and strategic handling. Employers that take a proactive, strategic approach from the start are far better positioned to minimize exposure and put themselves in the strongest position to secure a successful result.

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