

Recordkeeping Requirements

EEOC Regulations require that employers keep all personnel or employment records for one year. If an employee is involuntarily terminated, his/her personnel records must be retained for one year from the date of termination.

Under ADEA recordkeeping requirements, employers must also keep all payroll records for three years. Additionally, employers must keep on file any employee benefit plan (such as pension and insurance plans) and any written seniority or merit system for the full period the plan or system is in effect and for at least one year after its termination.

Under Fair Labor Standards Act (FLSA) recordkeeping requirements applicable to the EPA, employers must keep payroll records for at least three years. In addition, employers must keep for at least two years all records (including wage rates, job evaluations, seniority and merit systems, and collective bargaining agreements) that explain the basis for paying different wages to employees of opposite sexes in the same establishment.

These requirements apply to all employers covered by Federal anti-discrimination laws, regardless of whether a charge has been filed against the employer.

When a Charge Has Been Filed

The EEOC Notice of Charge form that you receive should explain the agency's record keeping requirements. When an EEOC charge has been filed against your company, you should retain personnel or employment records relating to the issues under investigation as a result of the charge, including those related to the charging party or other persons alleged to be aggrieved and to all other employees holding or seeking positions similar to that held or sought by the affected individual(s).

Once a charge is filed, these records must be kept until the final disposition of the charge or any lawsuit based on the charge. When a charge is not resolved after investigation, and the charging party has received a notice of right to sue, "final disposition" means the date of expiration of the 90-day statutory period within which the aggrieved person may bring suit or, where suit is brought by the charging party or the EEOC, the date on which the litigation is terminated, including any appeals.

Summary of Selected Recordkeeping Obligations in 29 CFR Part 1602

These recordkeeping regulations require covered entities to retain personnel and employment records that they make or use in the course of their business. The specific requirements of these regulations are set forth below.¹

- A. **All Personnel and Employment Records** made or used (including, but not limited to, requests for reasonable accommodation, application forms submitted by applicants, and records dealing with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay, compensation, tenure, selection for training or apprenticeship, or other terms of employment) must be preserved for the following periods:
 - 1. Private employers must retain such records for **one year** from the date of making the record or the personnel action involved, whichever occurs later, but in the case of involuntary termination of an employee, they must retain the terminated employee's personnel or employment records for **one year** from the date of termination.
 - 2. Educational Institutions and State and Local Governments must retain such records for **two years** from the date of the making of the record or the personnel action involved, whichever occurs later, but in the case of involuntary termination of an employee, they must retain the terminated employee's personnel or employment records for **two years** from the date of termination.
- B. **Other Records** must be retained for the following periods:
 - 1. Labor Unions which are "referral unions" must retain all membership and referral records (including applications for same) for a period of **one year** from the date of making the record.
 - 2. Apprenticeship Committees that control apprenticeship programs must retain all apprenticeship records, including, but not necessarily limited to, requests for reasonable accommodation, test papers completed by applicants, and records of interviews, for a period of **two years** from the date of making of the record.
- C. **Records Relating to a Charge of Discrimination**

Where a charge of discrimination has been filed under Title VII, the ADA, or GINA, or where a civil action has been brought by the Commission or the Attorney General, the respondent private employer, state or local government employer, educational institution employer, labor union, or apprenticeship committee must retain all records related to the charge or action until final disposition of the charge or action. The date of final disposition

means the date of expiration of the statutory period within which the aggrieved person may bring an action in a U.S. District Court or, where such an action has been brought, the date on which such litigation is terminated.

Facts About Retaliation

An employer may not fire, demote, harass or otherwise "retaliate" against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination. The same laws that prohibit discrimination based on race, color, sex, religion, national origin, age, and disability, as well as wage differences between men and women performing substantially equal work, also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding.

In addition to the protections against retaliation that are included in all of the laws enforced by EEOC, the Americans with Disabilities Act (ADA) also protects individuals from coercion, intimidation, threat, harassment, or interference in their exercise of their own rights or their encouragement of someone else's exercise of rights granted by the ADA.

There are three main terms that are used to describe retaliation. Retaliation occurs when an employer, employment agency, or labor organization takes an **adverse action** against a **covered individual** because he or she engaged in a **protected activity**. These three terms are described below.

Adverse Action

An adverse action is an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding. Examples of adverse actions include:

- employment actions such as termination, refusal to hire, and denial of promotion,
- other actions affecting employment such as threats, unjustified negative evaluations, unjustified negative references, or increased surveillance, and
- any other action such as an assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights.

Adverse actions do not include petty slights and annoyances, such as stray negative comments in an otherwise positive or neutral evaluation, "snubbing" a colleague, or negative comments that are justified by an employee's poor work performance or history.

Even if the prior protected activity alleged wrongdoing by a different employer, retaliatory adverse actions are unlawful. For example, it is unlawful for a worker's current employer to retaliate against him for pursuing an EEO charge against a former employer.

Of course, employees are not excused from continuing to perform their jobs or follow their company's legitimate workplace rules just because they have filed a complaint with the EEOC or opposed discrimination..

Covered Individuals

Covered individuals are people who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, or disability. Individuals who have a close association with someone who has engaged in such protected activity also are covered individuals. For example, it is illegal to terminate an employee because his spouse participated in employment discrimination litigation.

Individuals who have brought attention to violations of law other than employment discrimination are NOT covered individuals for purposes of anti-discrimination retaliation laws. For example, "whistleblowers" who raise ethical, financial, or other concerns unrelated to employment discrimination are not protected by the EEOC enforced laws.

Protected Activity

Protected activity includes:

Opposition to a practice believed to be unlawful discrimination

Opposition is informing an employer that you believe that he/she is engaging in prohibited discrimination. Opposition is protected from retaliation as long as it is based on a reasonable, good-faith belief that the complained of practice violates anti-discrimination law; and the manner of the opposition is reasonable.

Examples of protected opposition include:

- Complaining to anyone about alleged discrimination against oneself or others;
- Threatening to file a charge of discrimination;
- Picketing in opposition to discrimination; or
- Refusing to obey an order reasonably believed to be discriminatory.

Examples of activities that are NOT protected opposition include:

- Actions that interfere with job performance so as to render the employee ineffective; or
- Unlawful activities such as acts or threats of violence.

Participation in an employment discrimination proceeding.

Participation means taking part in an employment discrimination proceeding. Participation is protected activity even if the proceeding involved claims that ultimately were found to be invalid. Examples of participation include:

- Filing a charge of employment discrimination;
- Cooperating with an internal investigation of alleged discriminatory practices; or
- Serving as a witness in an EEO investigation or litigation.

A protected activity can also include requesting a reasonable accommodation based on religion or disability.

The Charge Handling Process

When a charge is filed against you, you will be notified within 10 days that a charge of discrimination has been filed and you will be provided with the name and contact information for the investigator assigned to your case. A charge does not constitute a finding that your company engaged in discrimination. The EEOC has a responsibility to investigate and determine whether there is a reasonable cause to believe discrimination occurred.

In many cases, you may opt to resolve a charge early in the process through mediation or settlement. At the start of an investigation, EEOC will advise you if your charge is eligible for mediation, but feel free to ask the investigator about the settlement option. **Mediation and settlement are voluntary resolutions.**

During the investigation, you and the Charging Party will be asked to provide information. Your investigator will evaluate the information submitted to determine whether unlawful discrimination has taken place. You may be asked to:

- submit a **statement of position**. This is your opportunity to tell your side of the story and you should take advantage of it.
- respond to a **Request for Information (RFI)**. The RFI may ask you to submit copies of personnel policies, Charging Party's personnel files, the personnel files of other individuals and other relevant information.
- permit an **on-site visit**. While you may view such a visit as being disruptive to your operations, our experience has been that such visits greatly expedite the fact-finding process and may help achieve quicker resolutions. In some cases, an on-site visit may be an alternative to a RFI if requested documents are made available for viewing or photocopying.
- provide contact information for or have employees available for **witness interviews**. You may be present during interviews with management personnel, but an investigator is allowed to conduct interviews of non-management level employees without your presence or permission.

If the charge was not dismissed by the EEOC when it was received, that means there was some basis for proceeding with further investigation. There are many cases where it is unclear whether discrimination may have occurred and an investigation is necessary. You are encouraged to present any facts that you believe show the allegations are incorrect or do not amount to a violation of the law. An employer's input and cooperation will assist EEOC in promptly and thoroughly investigating a charge.

- Work with the investigator to identify the most efficient and least burdensome way to gather relevant evidence.
- You should submit a prompt response to the EEOC and provide the information requested, even if you believe the charge is frivolous.
If there are extenuating circumstances preventing a timely response from you, contact your investigator to work out a new due date for the information.
- Provide complete and accurate information in response to requests from your investigator.
- The average time it takes to process an EEOC investigation is about 182 days.
Our experience shows that undue delay in responding to requests for information extends the time it takes to complete an investigation.
- If you have concerns regarding the scope of the information being sought, advise the investigator. Although EEOC is entitled to all information relevant to the allegations contained in the charge, and has the authority to subpoena such information, in some instances, the information request may be modified.
- Keep relevant documents. If you are unsure whether a document is needed, ask your investigator. By law, you are required to keep certain documents for a set period of time.

Your investigator will:

- be available to answer most questions you have about the process.
- keep you informed about the charge process, including the rights and responsibilities of the parties at the conclusion of the investigation.
- conduct an appropriate, thorough and timely investigation.
- allow you to respond to the allegations.
- inform you of the outcome of the investigation.

Once the investigator has completed the investigation, EEOC will make a determination on the merits of the charge.

- If EEOC determines that there is no reasonable cause to believe that discrimination occurred, the charging party will be issued a letter called a **Dismissal and Notice of Rights** that tells the charging party s/he has the right to file a lawsuit in federal court within 90 days from the date of receipt of the letter. The employer will also receive a copy of this document.
- If EEOC determines there is reasonable cause to believe discrimination has occurred, both parties will be issued a **Letter of Determination** stating that there is reason to believe that discrimination occurred and inviting the parties to join the agency in seeking to resolve the charge, through an informal process known as **conciliation**.
- Where conciliation fails, EEOC has the authority to enforce violations of its statutes by filing a lawsuit in federal court. If the EEOC decides not to litigate, the charging party will receive a **Notice of Right to Sue** and may file a lawsuit in federal court within 90 days.

Facts About Mediation

Mediation is a form of Alternative Dispute Resolution (ADR) that is offered by the U.S. Equal Employment Opportunity Commission (EEOC) as an alternative to the traditional investigative or litigation process. Mediation is an informal process in which a neutral third party assists the opposing parties to reach a voluntary, negotiated resolution of a charge of discrimination. Mediation gives the parties the opportunity to discuss the issues raised in the charge, clear up misunderstandings, determine the underlying interests or concerns, find areas of agreement and, ultimately, to incorporate those areas of agreements into solutions. A mediator does not impose a decision on the parties. Instead, the mediator helps the parties to agree on a mutually acceptable resolution.

How Mediation Works

An EEOC representative will contact the employee and employer concerning their participation in the program. If both parties agree, a mediation session conducted by a trained and experienced mediator is scheduled. While it is not necessary to have an attorney or other representation in order to participate in EEOC's Mediation Program, either party may choose to do so. It is important that persons attending the mediation session have the authority to resolve the dispute. If mediation is unsuccessful, the charge is investigated like any other charge.

Advantages of Mediation

FREE

- Mediation is available at no cost to the parties.

FAIR AND NEUTRAL

- Parties have an equal say in the process and decide settlement terms, not the mediator. There is no determination of guilt or innocence in the process.

SAVES TIME AND MONEY

- Mediation usually occurs early in the charge process, and many mediations are completed in one meeting. Legal or other representation is optional but not required.

CONFIDENTIAL

- All parties sign an agreement of confidentiality. Information disclosed during mediation will not be revealed to anyone, including other EEOC investigative or legal staff.

AVOIDS LITIGATION

- Lengthy litigation CAN be avoided. Mediation costs less than a lawsuit and avoids the uncertainty of judicial outcome.

FOSTERS COOPERATION

- Mediation fosters a problem solving approach to complaints and workplace disruptions are reduced. With investigation, even if the charge is dismissed by EEOC, the underlying problems may remain, affecting others in the workforce and human resources staff.

IMPROVES COMMUNICATIONS

- Mediation provides a neutral and confidential setting where both parties can openly discuss their views on the underlying dispute.

DISCOVER THE REAL ISSUES IN YOUR WORKPLACE

- Parties share information, which can lead to a better understanding of issues affecting the workplace.

DESIGN YOUR OWN SOLUTION

- A neutral third party assists the parties in the reaching a voluntary, mutually beneficial resolution. Mediation can resolve all issues important to the parties, not just the underlying legal dispute.

EVERYONE WINS

- An independent survey showed 96% of all respondents and 91% of all charging parties who used mediation would use it again if offered.

What Employers Say

“Once the employer gets past the myth of “If we didn’t do anything wrong, we shouldn’t go to mediation” and decides to participate, the real issues in the dispute become clear. Through mediation, we have had the opportunity to proactively resolve issues and avoid potential charges in the future. We have seen the number of charges filed with EEOC against us actually decline. We believe that our participating in mediation and listening to employees’ concerns has contributed to that decline.”

Donna M. Gwin, Director of Human Resources, Eastern Division, Safeway Inc.

“Regardless of the issue or whether it has merit under Title VII, if it is draining resources, weighing on the mind of the employee, or having a negative impact on productivity, then getting the issue out on the table, mediating it and resolving it is often the smartest and most expeditious way to ensure workforce effectiveness.”

Linda I. Workman, Vice President, Workforce Effectiveness, ConAgra Foods, Inc.