

## DEFENDING AGAINST EMPLOYEE COMPLAINTS AND LITIGATING

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An employee may make a claim or raise a complaint against his or her employer in various ways. For example, the employee may make a claim to someone in the company, the employee might make a claim directly to the Equal Employment Opportunity Commission or the Human Rights Commission, or the employee could file a lawsuit against the employer. In fact, the employee could make a claim through a combination of any of these methods. The following is an overview of how to respond to an employee's complaint in these various situations.

### A. Internal Complaint.

Employees may raise complaints of sexual harassment, discrimination, or any other unlawful conduct to their supervisors, managers, or others. Having an open door policy which allows employees to raise their complaints, and having the supervisors and managers commit to listen and respond to those complaints, may prevent litigation by correcting problems before the aggrieved employee retains a lawyer and/or institutes litigation.

When an employee makes a complaint, the employer has a duty to investigate the complaint and respond to the employee. The employer must act promptly. For an employer to act promptly, it is helpful to have an investigation plan in place so that it can be implemented immediately upon hearing a complaint.

The investigative process means interviewing employees and responding to the complaint. The same person should conduct all of the company's investigations, such as an HR person or, if there is no one within the company who is the appropriate person to conduct the investigation, the employer may want to hire an outside consultant to investigate. Of primary importance is having the investigator be a calm, objective evaluator who will keep the investigation and the outcome confidential from other employees. As part of the investigation process, the investigator should set up a confidential investigative file, marking it "confidential," and limiting access to the file to only the few employees with a "need to know."

The employer must prepare a plan of how to investigate, which includes where to conduct the investigation, creating a list of who to talk to, and determining in which order to interview the witnesses (but be flexible about the order as the investigator may want to change it as the interviews progress). All interviews should be conducted in a

private setting, but give the complainant the option to be interviewed off premises if he or she does not want to be interviewed at work.

Generally, the complainant should be interviewed first, followed by the accused, and then any witnesses. The following steps should be taken in the interview:

- Advise the witness that the company takes all complainants seriously and has a policy against harassment and other forms of discrimination.
- The investigator should advise the witness of: the investigator's role; that the company is conducting a prompt, thorough, and impartial investigation; the nature of the concerns that have led to the interview; how the interview will be conducted; that a report will be prepared at the end of the investigation; that the investigator cannot promise confidentiality; that the investigative process is very serious; and the importance of giving accurate information.
- During the interview, the investigator should ask open-ended questions and then take notes about the factual responses (without giving any legal conclusions, such as identifying behavior as "harassment" when the employee has not used that term). The investigator should write notes in the words used by the witness. The investigator should be thorough, obtaining dates, details, other witnesses, similar occurrences, any documents the witness has related to the matter, and the "who, what, when, where, how, anything else" questions. Be aware that any notes taken could be discoverable.
- It is helpful to ask the complainant what he or she hopes will come of the employer's investigation. Oftentimes the complainant just wants the conduct to stop, to be moved to a different shift or department, or for the person complained about to be aware that the complainant does not appreciate the conduct.
- It is also helpful to have a script of what the investigator intends to state and ask during each interview, so that nothing is forgotten.
- At the end of each interview, the investigator should advise the witness that he or she should keep the complaint and investigation confidential. Also advise the witness that when the investigation is complete, the employer will take the appropriate corrective action and the company will not tolerate any retaliation against the complainant. Then, review the notes with the witness and make any corrections. The witness should sign off on the notes.

Once all of the witnesses have been interviewed, relevant documentation should be reviewed, such as personnel files, past warnings, and relevant incident reports. Then the investigator should prepare a written summary of the investigation including the behavior complained of, a description of the steps taken to investigate including the names of witnesses interviewed, an objective report of the facts, and any comments on credibility of the witnesses. The summary should be given to the company's decision-maker in this matter, who should determine the appropriate discipline, if any. Appropriate corrective action could include an oral warning, written warning, transfer, termination, or conducting company-wide trainings or hanging company-wide postings.

At the end of the investigation process, the employer should provide written letters to the complainant and accused, which letters identify the nature of the complaint, the investigation conducted, the conclusions reached, the corrective action taken, and reiterating the companies policies against harassment, discrimination, and other unlawful conduct, and welcoming future complaints.

While the investigation may seem daunting to an employer, remember that a prompt and thorough investigation at this stage can help avoid the employee filing an agency complaint or filing a lawsuit.

## **B. EEOC or HRC Complaint.**

An employee may file a complaint with the Equal Employment Opportunity Commission ("EEOC") or with the Human Rights Commission ("HRC"). The EEOC enforces the following laws: Title VII of the Civil Rights Act of 1965; the Age Discrimination in Employment Act; the Americans with Disabilities Act; the Equal Pay Act; and the Civil Rights Act. The HRC enforces the Washington Law Against Discrimination and also federal charges when accompanied by charges under the Washington Law Against Discrimination. When an employee files a complaint with both the EEOC and HRC, one agency will investigate both (typically, the HRC). Filing a complaint with the HRC is not a prerequisite to a lawsuit brought under state law but filing a complaint with the EEOC is a prerequisite to filing federal claims in court.

An employee files an agency complaint by providing his or her name, the company against whom the complaint is filed, and a very brief description of the complaint. The complaint is accompanied by a request for response, and often a request for production of specific documents. Once the employer receives a copy of the complaint, the employer has two options: 1) mediate the case; or 2) provide a written response with the appropriate backup documentation. Even if the employer provides a written response, it can agree to mediation or other settlement discussions at a later date.

To effectively defend against the employee's agency complaint, the employer should do the following: review the charge; understand the law; investigate the incident or complaint; provide a thoughtful, written response; and provide documentation. In reviewing the charge, consider whether it is timely, which means whether it is within 300 days of the unlawful practice if filed with the EEOC and within 180 days if filed with the HRC. While the complaint will provide for a response date, immediately ask for an extension if you need additional time to investigate and respond. When investigating the complaint, interview all witnesses and take detailed notes of the interview. If the information received in an interview is favorable, the witness should sign a statement and the statement should be provided to the investigator.

The employer should respond to the agency investigator assigned in the case. In providing a written response, be sure to use a cooperative and persuasive tone. State the facts and that no discrimination has taken place. The information and documentation should include company policies on the issue, such as the company's policy against discrimination. Also, it is best to show comparables, for example, if the complaint is for age discrimination, the response should show that 35% of the company's workforce is over the age of 40. Or if the complaint is for another type of discrimination, show how the company has fairly treated other similarly situated employees. Or if the employee was terminated, show that the person replacing the terminated employee is in the same protected class. You may choose to have the written response come from an attorney, which is especially important when legal interpretation is at issue. The goal is to win over the investigator at this stage.

Upon the investigator's receipt of the employer response, the investigator will review the information provided and sometimes interview witnesses. The interviewees should be prepared in advance and an attorney can attend the interviews of management-level interviewees. The investigator also may ask for further information from the employee and/or the employer. The investigator will look for discrimination in the case at hand and also will look for a pattern of discrimination. It is important to be cooperative in any further investigation while protecting yourself from unreasonable requests. Be sure to continue to assert that no discrimination took place.

Once the investigator completes the investigation, he or she will prepare a written finding. The finding will be either: 1) that there is reasonable cause to believe an unfair practice has been committed; or 2) that there is no reasonable cause to believe that an unfair practice has been committed. If it is the former, the complaint is dismissed. Dismissal, however, does not prevent the employee from filing a lawsuit. Also, the employee may appeal the agency finding, in which case the matter typically is referred to an administrative law judge to decide the matter.

### **C. Litigation.**

Litigation begins when the employee or former employee files a Complaint against the employer company and serves the company with the Complaint and a Summons. The Summons will state the amount of time the company has to file an Answer, which is usually 20, 60, or 90 days. It is often helpful to obtain legal representation immediately upon receipt of the Complaint so that the counsel can assist in gathering information about the Complaint and in preparing the Answer, as well as representing the company throughout the rest of the litigation.

Upon receipt of the Complaint, the company should conduct its own search into the facts and gather information. This will best prepare the company to defend the lawsuit. For example, the company should gather all related documents and put them into one place (and provide a copy to legal counsel). The related documents include anti-harassment policies, equal employment opportunity policies, the employee handbook, the employee's personnel file, any investigative file created in any previous investigation of the employee's complaint, any correspondence, or anything else that could be relevant to the Complaint or the company's affirmative defenses or counterclaims. The company should also contact any people involved in the facts listed in the Complaint and interview them. It is helpful for all of this to be done even before the Answer is filed to save time and money for the company in the long-run. It will avoid duplication of work throughout litigation and will be fresh in everyone's minds at the outset, as opposed to years down the road.

The company should consider its affirmative defenses and whether it has a counterclaim against the employee. Affirmative defenses include no harassment/discrimination, termination for cause, etc. Possible counterclaims are for misappropriation of trade secrets, breach of a noncompete or nondisclosure agreement, or even misappropriation of company property or funds. It is important to determine any affirmative defenses and counterclaims at the outset so that the company does not waive its right to assert them in the future.

Litigation will progress with discovery including interrogatories, requests for production, and depositions (which you will be prepared for if you gather information at the outset). Counsel can help in responding to discovery, but is important to work with witnesses to prepare them for depositions. Sometimes the employee requests to depose a certain witness, in which case your counsel can work directly with the witness to prepare for the deposition. Sometimes the employee requests a CR 30(b)(6) witness, which means the employee is seeking to have the company designate a witness to testify about certain matters. At that point, the company should select its most knowledgeable and presentable employee. Showing the employee that the company is well-prepared and will do well in front of a jury is very advantageous to the company.

Throughout litigation, there are many opportunities to settle the case without going to trial, which settlement options are discussed below. There are also opportunities to bring various motions to narrow the issues or even decide the case altogether. But if the case does progress to trial, it is important to consider the implications of a jury versus judge-tried trial. The pros and cons of each can be weighed with your counsel, but remember that even if you do not want a jury trial, the employee could request one, which means there will be a jury. Also, it is very important for companies to have a company representative at trial, especially when there is a jury, as it gives a face to a company name. The company can choose the best representative to attend the trial and be the face for the company.

Overall, the company puts on its best defense when it is well-prepared to respond to the employee's Complaint, responds clearly and professionally to discovery, and when the company presents a "human" quality at trial by having a company representative attend.

#### **D. Litigation Hold Memorandum.**

A "litigation hold" memorandum is a memorandum instructing the company's employees to retain documents related to litigation and to cease destruction of such documents, even automatic destruction. Such memorandum is now required in federal cases and is a good idea in state cases, as well. A company should send out a litigation hold memorandum to its employees upon receipt of a Complaint or even before that, when the company reasonably anticipates litigation. Reasonably anticipating litigation could include receipt of an agency complaint or even receipt of a verbal or oral threat of litigation from an employee. When in doubt, the safer practice is for the company to send out a litigation hold memorandum.

Whom the memorandum should be sent to depends on the nature and size of the company. For example, if the company has 10 employees, the memorandum should be sent to all employees, but if the company has tens of thousands of employees in various countries, the memorandum can be sent to a targeted group who may have documents including the complaining employee's department, supervisors, etc. The memorandum should also be sent to the technology department, with express instructions to turn off all automatic destruction mechanisms for anything related to this matter. The memorandum should include: a brief overview of the Complaint or anticipated legal action; a request for employees to provide to a designated person all pertinent or related documents or information by a date certain; an instruction to not delete anything related to this matter; and an instruction to cease automatic destruction of related documents, including emails and voicemails, among other things. It is a good idea to consult legal counsel when sending out such memorandum to ensure it is sent to the

appropriate employees and contains the appropriate information, much of which must be determined on a case-by-case basis.

The consequences of failing to send a litigation hold memorandum can be costly. Courts have imposed penalties such as large monetary fines, reimbursements of opponent's litigation costs, or even the court giving instructions to juries permitting them to draw damaging inferences against the party failing to meet its discovery obligations. Therefore, it is best to send out a litigation hold memorandum so that your company does not face any of these consequences.

#### **E. Alternative Dispute Resolution.**

Approximately 95% of all cases end up settling. Incorporating some form of alternative dispute resolution ("ADR") into your business can be an effective way to avoid costly litigation. ADR should be considered when an employee first makes a complaint and also can be considered throughout the agency investigation or litigation. Possible forms of ADR include negotiation, mediation, settlement conference, neutral evaluation, mini-trial, and arbitration. The most common are negotiation, mediation, and arbitration. Negotiation is when the parties or their counsel converse to settle their differences without a third party to assist, which is the most economically effective. Mediation is when a neutral third party acts as a "go-between", shutting between the parties to try and help them reach a middle ground. Arbitration is when a neutral third party hears evidence and renders a binding decision. Each of the ADR methods is typically less costly than going through with a full trial.

Reasons to settle include saving costs, saving employee time spent on the investigation/litigation, avoiding litigation after the agency investigation, being able to have some control over the process, and resolving the matter so that the company can move forward and focus on business instead of the complaint. There may, however, be reasons not to participate in ADR. For example, a company could prefer to litigate to discourage future meritless complaints from employees and to show employees that the company will take a stand against false claims. It is important for employers to consider the pros and cons of ADR before spending too much time in the agency investigation or litigating.

#### **F. Conclusion.**

An employer's best defense for responding to an employee complaint is to investigate the complaint thoroughly, attempt to resolve the complaint before it escalates into an agency investigation or litigation, and, if it does escalate, to be well-prepared by preparing witnesses and documents at an early stage.