

PART IV: REPRESENTING THE EMPLOYER

Chapter 13: Preliminary Matters

Task 51: Assess Employer's Risks and Liabilities

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TASK 51

Assess Employer's Risks and Liabilities

I. WHAT AND WHY [§13.1]

The case begins for the employer's attorney when the employer receives the charge of discrimination. Several steps must be taken to fully and adequately assess the employer's risks and liabilities:

- Determine whether the employer has an available insurance policy that may cover the potential claim.
- Interview the alleged harasser and any witnesses.
- Interview company decision-makers.
- Review documents.
- Take steps to end ongoing harassment, if necessary.
- Estimate the cost of defense.

A prompt evaluation of the company's potential liability may save the employer money. As long as the claim is pending, back pay will continue to accrue, as will the plaintiff's attorney's fees. The longer the matter is in dispute, the more entrenched the parties may become as to their respective positions and the more money the company will need to spend on attorney's fees.

II. WHEN [§13.2]

Start the evaluation process as soon as the claim is asserted against the company.

If the plaintiff is still working for the company and the allegations include ongoing harassment, take immediate action to stop the harassment. See Chapter 3, Workplace Investigation.

If the company has insurance, promptly notify the carrier of the claim. Most policies require prompt notice as a condition of coverage. This notification will also ensure that the proof-of-loss

claim is made before any filing deadline specified in the policy.

III. HOW [§13.3]

A. Determine if Employer Has Insurance Coverage [§13.4]

Caveat: Different types of insurance policies cover different types of conduct and/or injuries. Insurance coverage issues are a matter of state law, and the law varies from state to state. The discussion below provides an overview of the basic coverage of common types of policies. Carefully research the law in your state to determine the nature and extent of the insurer's duty to defend and/or indemnify your client.

1. Comprehensive General Liability [§13.5]

Comprehensive general liability (CGL) policies cover accidental occurrences (negligent acts), but do not cover intentional acts (intentional torts) and/or intentional harms. Many CGL policies specifically exclude coverage for injuries to an employee arising out of his or her employment. This coverage may vary depending on the relevant insurance statutes in your state. Some companies now specifically offer coverage for employment discrimination matters, at an additional premium. These policies, if purchased by the employer, would cover the defense of claims of sexual harassment and sex discrimination.

2. Workers' Compensation [§13.6]

Workers' compensation policies, in general, provide coverage for injuries to an employee sustained in the course and scope of his or her employment, but do not cover intentional torts. Some workers' compensation laws preclude coverage for emotional distress related claims, unless directly linked to a specific catastrophic fact pattern (e.g., teacher suffers emotional distress when one student kills another in classroom). Because Title VII deals with intentional conduct, the employer cannot rely on policies that do not cover intentional conduct (e.g., workers' compensation policies). *American States Insurance Co. v. Natchez Steam Laundry*, 131 F.3d 551 (5th Cir. 1998).

3. Employment Practices Liability [§13.7]

Employment practices liability (EPL) policies insure against injuries not covered by workers' compensation (e.g., intentional torts). EPL coverage may be included with the employer's workers' compensation policies. These policies may also cover claims of sexual harassment and sex dis-

crimination. The employer should review the policy carefully to determine the full extent of the coverage.

4. Errors & Omissions [§13.8]

Errors and omissions policies cover the acts and omissions of the company's management personnel performed during the course of the employee's employment. Errors and omissions policies may not cover employment discrimination claims, unless specifically referenced in the policy. The employer should review the policy carefully to determine the full extent of the coverage it is purchasing.

5. Directors & Officers [§13.9]

Directors' and officers' and partners' liability policies provide coverage for the actions of a company's directors, officers and/or partners, taken in the course of their job duties. Again, the policy should be reviewed carefully to determine if it covers both intentional and negligent acts. Claims under Title VII will be held to be intentional, not negligent, acts.

B. Determine Extent of Coverage [§13.10]

1. Duty to Defend or Indemnify [§13.11]

Review the policies to determine if the insurer has a duty to defend and/or a duty to indemnify. The duty to defend generally is broader than the duty to indemnify. Thus, the insurer may have to defend the entire action even if only one claim falls within the policy coverage. *See Foreman v. Continental Casualty Co.*, 770 F.2d 487 (5th Cir. 1985); *Previews, Inc. v. California Union Insurance*, 640 F.2d 1026 (9th Cir. 1981). The duty to defend will permit the payment of defendant's legal fees, but any judgment entered against the defendant will be its responsibility financially. Between back pay, front pay, compensatory and punitive damages, and the plaintiff's legal fees and costs, that amount will quickly reach six figures, if the case goes to trial.

Review the state statutes, as well. Some state statutes may require indemnification. *See, e.g., Cal. Lab. Code §2802* (requiring employers to indemnify employees for losses or expenses incurred in discharge of duties or at direction of employer). These statutory obligations are different from the employer's ability to access privately purchased insurance coverage. The statutory obligation, however, may be insured against through a private insurer.

2. Coverage Exclusions [§13.12]

Exclusions from coverage will usually be for intentional acts, which are the bedrock of Title VII. Review the policy in detail, as it, rather than some representation made by the broker, for example, will control whether the insurance company has a duty to defend and/or indemnify.

3. Review Employee's Allegations [§13.13]

The employee's allegations will be critical in determining the extent of insurance coverage. If, for example, the employee alleges the individual defendant committed an intentional tort (e.g., assault and battery) coverage may be denied under the CGL policy if the individual's conduct can be imputed to the employer. *American Guarantee & Liability Ins. Co. v. Vista Medical Supply*, 699 F.Supp. 787 (N.D. Cal. 1988). However, the employer may still have coverage under its EPL policy.

If, on the other hand, it can be established that the alleged perpetrator was acting to further his personal interests and not those of the insured employer, then the intentional tort will not be imputed to the employer, and the employer may be covered against a negligence claim. *Seminole Point Hospital Corp. v. Aetna Casualty & Surety Co.*, 675 F.Supp. 44 (D.N.H. 1987) (negligent supervision).

In vicarious liability and sex discrimination cases involving the acts of a supervisor, coverage most likely will be denied (unless the policy specifically includes employment discrimination claims) because the supervisor is the company's agent and is authorized to take the adverse employment action. *Republic Indemnity Co. of America v. Schofield*, 47 Cal. App. 4th 220 (1996) (attorneys named as individual defendants in sex discrimination suit not entitled to defense under employer's liability insurance policy).

In hostile environment cases, the employer may be able to find coverage if it can show that the alleged harasser was acting outside the scope of his or her employment. *Steele v. Offshore Shipbuilding*, 867 F.2d 1311 (11th Cir. 1989). Other torts, for example, defamation, also may be covered as a "personal injury." As Title VII is an intentional discrimination statute, any policy exclusions for intentional acts will subsume the claims, including claims for punitive damages.

C. Assess Client's Exposure [§13.14]

1. Interview Company Employees and Alleged Harasser [§13.15]

Part of your assessment of the company's exposure will include an assessment of the witnesses, decision-makers and the alleged harasser. Your initial goal is to obtain a chronological description of the events that have formed the basis of the charge or complaint. Details should be gleaned from these meetings as to what happened, when, how and who witnessed the events. The decision-makers need to share with you the reasons for the adverse employment action taken, if any. The investigation conducted by the company should also be explored in detail for possible weaknesses or inconsistencies.

Your second goal in the initial interviews with company witnesses and the harasser will be to determine credibility and assess the person's strengths and weaknesses as a witness. Do you believe the person? Does he or she seem to be telling the truth? Does the person fidget, look away and tell you he or she is unable to recall numerous events? Is the person forthright and forthcoming about the events and his or her own role in the conduct?

Practice Note: Interview the complaining employee

Consider asking the employee's counsel to allow you informally to interview his or her client, in counsel's presence. If the employee refuses to cooperate, it may aid the employer's affirmative defense. On the other hand, if you interview the complaining employee, you and the employee's attorney may both become witnesses, if admissions are made by the employee as part of this "investigation." You then will have to explain to your corporate client why you cannot represent it in subsequent litigation. Finding someone neutral to conduct this investigative interview may be the best course of action.

2. Review Documents [§13.16]

a. After Acquired Evidence [§13.17]

As you review the documents related the complainant's employment, be watchful for documents reflecting activity by the employee which would have resulted in his termination had the employer learned of the activity when he was still employed (after acquired evidence). *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 115 S. Ct. 879 (1995).

In *McKennon*, an age discrimination case, the Court held that the plaintiff's removal and copying of several confidential documents did not justify barring her discrimination claim completely, but it could affect her available remedies by making reinstatement and front pay inappropriate. *Id.* at 886. In order to rely on after-acquired evidence of wrongdoing, the employer must establish that the nature of the wrongdoing was so severe that the employee would have been terminated on those grounds alone if the employer had known of the conduct at the time of the discharge. *Id.* at 886-87. An employer's abuse of this principle may result in an award of attorney's fees to the plaintiff and/or Rule 11 sanctions. *Id.* at 887.

Caution: Opens door to additional avenues of discovery

Clever plaintiff's attorneys have an additional opportunity here for attack. If the employer alleges after acquired evidence as a mechanism for cutting off damages, plaintiff's counsel will have the opportunity to discover whether the company has, in fact, fired people who have engaged in the same conduct. Thus, for example, if the employer expresses outrage over a misstatement in the plaintiff's resume, be very certain that the company CEO did not fabricate some award or honorary degree on his resume. The conduct at issue must be egregious and obviously warranting severe discipline, and it must have been treated as such in comparable situations in the past.

D. Remedy Ongoing Harassment [§13.18]

If it is clear from your initial interviews and document review that harassment has occurred, and the company's response has been less than adequate, work actively and immediately on a remedy. Allowing harassment claims to drift quietly is the frequent, short route to the federal court. For details on remedies, see Chapter 3, Workplace Investigation.

E. Make Unconditional Offer of Reinstatement [§13.19]

1. Under Appropriate Circumstances [§13.20]

If the complaining employee has been terminated or constructively discharged, the employer should consider making an unconditional offer of reinstatement. If the offer is refused, the company's liability for back pay as of the date given to the employee to respond to the offer. *Ford Motor*

Company v. EEOC, 458 U.S. 219, 102 S. Ct. 3057 (1982).

Strategy Note: *When is offer appropriate*

This strategy should be considered if the employee has recently left the company, and back pay is not significant. In addition, ascertain if the employee has a new job yet; if not, consider offering reinstatement, as the employee may be more likely to accept the offer. The decision as to whether to make an offer of reinstatement also will be driven by the company's assessment of the employee's performance. The company rightly may be resistant to offering reinstatement to a marginal employee who was on the brink of termination before.

2. Unconditional Offer [§13.21]

The offer of reinstatement must be unconditional. It cannot require a release of all claims or place other conditions on the employee's return to employment. See *Toledo v. Noble-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989) (employer liable for back pay when offer conditioned on employee dropping claim and passing polygraph test and physical examination).

3. Comparable Position [§13.22]

The offer must be for substantially equivalent employment. *Ford Motor Company*, 458 U.S. at 232. This means the employee should be offered the same position she held before the termination (assuming the alleged perpetrator is no longer in the same department) or a comparable position. A "comparable" position should have the same salary, status, job duties, and promotional opportunities as the employee's former position, but it need not be identical. *Ford Motor Company*, 458 U.S. 232.

Practice Note: *Be wary of forcing employee into different position*

Frequently, an employee will argue that the position offered was not comparable and, in fact, was worse than her previous position because she was forced to move. Review the reinstatement offer carefully to determine whether it truly is a comparable position with equal opportunities for training, advancement, etc. If it is not, consider amending the reinstatement offer to make it on an equal par with the position the employee no longer occupies.

4. Good Faith [§13.23]

The company needs to understand that a reinstatement offer is not a golden opportunity to bring the employee back into the company fold for purposes of punishment. The offer needs to be made in a good faith attempt to remedy the situation. If, after the employee is reinstated, the employer engages in a course of conduct designed to denigrate the employee, or if the employer intends to evaluate the employee's performance poorly or is exhibiting other interests in vindictive conduct, rethink the reinstatement offer. Otherwise the employer risks finding itself in the one-way tunnel of a retaliation charge under Title VII.

5. Cuts Off Back Pay [§13.24]

If the plaintiff unreasonably rejects the employer's unconditional, good faith, offer of reinstatement to a substantially equivalent position, then the employer's liability for back pay is terminated as of the date given to the employee to respond to the offer. *Ford Motor Company v. EEOC*, 458 U.S. 219, 102 S. Ct. 3057 (1982).

An unconditional offer of reinstatement does not, however, waive the employee's right to pursue legal claims. *Ford Motor Company v. EEOC*, 458 U.S. 219, 102 S. Ct. 3057 (1982).

6. Making the Offer [§13.25]

Make the offer in writing and, assuming the plaintiff is represented by counsel, deliver the offer to the attorney. The offer of reinstatement should state the position being offered, the salary, and benefits and the date by which the former employee is to respond to the offer of reinstatement.

Practice Note: *Give reasonable time to respond*

Do not undermine a good faith offer of reinstatement by demanding an immediate response from the plaintiff. Give the plaintiff a reasonable time to review the offer, confer with counsel and formulate a response.

TASK 52

Negotiate Pre-Litigation Settlement

I. WHAT AND WHY [§13.26]

Analyze the possibility of negotiating with the employee and his or her attorney to resolve the claims before a lawsuit is filed. There are numerous advantages to a pre-litigation settlement:

- *A settlement is private.* The dispute remains private and does not become a