

When Litigation Threatens

By M. Edward Taylor

Although preventative employee relations can greatly reduce the risk of employment litigation, the unfortunate reality is many employers will eventually face the threat of a lawsuit by a current or former employee. This Note examines the steps a prudent employer should take, and not take, when litigation threatens.

Work Product Privilege — Materials created in anticipation of litigation are protected by the work product privilege and generally are not subject to discovery in litigation. The privilege applies when a lawsuit has actually commenced, but also arises when a demand letter is received, when an agency commences an investigation, and even when a disgruntled employee says, “I’ll sue.” Thus, the privilege potentially can be used to protect interview notes, witness statements, and investigatory reports prepared by internal company personnel in response to threatened litigation.

Like other privileges, the work product privilege can be waived by disclosure of otherwise privileged information. The employer must therefore take care to ensure that materials prepared in anticipation of litigation are properly safeguarded. This includes keeping documents in a secure location, marking documents confidential, and restricting access to documents and confidential communications to those with a need to know the information. Of course, the employer and its counsel may ultimately decide to waive the privilege and produce otherwise privileged information, but maintaining confidentiality at the outset is key to preserving the right to invoke the work-product privilege.

Evidence — As soon as litigation is threatened a party has a duty to take reasonable steps to protect against the destruction of potentially relevant evidence. The destruction of evidence, even if inadvertent, can lead to disastrous consequences in litigation. When courts find despoliation of evidence, the remedies can range from requiring payment of the cost of reconstructing the evidence to applying an adverse inference throughout the proceeding that the evidence would have been favorable to the opposing party, and even to entering a judgment against the party that failed to preserve evidence.

As soon as litigation is threatened, all information and documents regarding the employee and the issues in dispute should be gathered. Potentially relevant information includes the employee’s entire personnel file, any investigation files, informal files and notes retained by supervisors, all communications to and from the employee, and, of course, the inevitable e-mails related to the employee or the issues in dispute. All employees who may have potentially relevant information should be informed in writing of the need to preserve all such information, including e-mail and electronically stored files. Depending on the nature and scope of the threatened claim and on the employer’s document retention program, the employer may need to suspend routine document destruction practices and revise its computer back-up process so that back-up tapes or discs are not overwritten. A back-up of all files stored on the hard drive of all computers used by the employee should be made. In some cases, consideration should be given to having a computer forensics expert create a mirror image of the hard drives on the computers used by the employee: this permits inspection of existing files and, to an extent, files that have been “deleted” by the employee.

Agency Proceedings — An employer’s receipt of a claim for unemployment compensation or an agency’s notice of the filing of a discrimination or retaliation charge is often the first indication that litigation threatens. With unemployment claims in particular, many employers assume incorrectly that nothing more is at stake than a possible charge against the employer’s experience rating if the claim is granted. Although the decision in an unemployment proceeding is deemed inadmissible as evidence under state law, the parties’ admissions in making and responding to a claim and testimony in the administrative hearing may be admissible evidence. Likewise, information provided to an agency investigating a discrimination charge is discoverable and is usually admissible in subsequent litigation. In subsequent litigation, taking a position at odds with that taken at the administrative level can greatly assist a plaintiff in avoiding summary dismissal of the case, and in establishing liability. Thus, even at the administrative level, an employer needs to carefully evaluate the claim and develop a defense strategy with due consideration to potential litigation in other forums.

Insurance Coverage — Depending on the nature of the claim and the terms of the specific insurance policy, an employment-related claim may be covered by insurance. The terms of policies differ considerably, but virtually all policies require timely notice to the insurer of a threatened claim. The failure to provide timely notice can result in the rejection of a claim. Also, the failure to properly describe the claim can result in a determination that it is not covered. The employer and its counsel should therefore confer at the outset about whether, when, and how to inform the insurer of a potential claim.

Conclusions — Litigation is a risk all employers face. The steps taken as soon as litigation threatens can sometimes help to resolve the dispute in the early stage at less cost, and can almost always help position the dispute for the best possible outcome. Conversely, taking the wrong steps, or overlooking the right steps, can greatly interfere with the employer’s ability to mount an effective defense. When litigation threatens, the prudent employer must act promptly to develop the strategy for responding appropriately in all potential forums.

This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations.



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