

RESPONDING TO THE EMPLOYMENT LAWSUIT

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So you have been sued by a former employee, or worse, a current employee. Welcome to an ever growing and not so exclusive club. But what do you do now? How you respond can mean the difference between increasing your damages and starting actual damage control. Accordingly, disregard the following guidelines at your own risk.

Do Not Contact the Employee about the Lawsuit

The immediate reaction of some employers is to contact the employee and either chastise the employee or apologize and attempt to work out a resolution on their own. It is the natural thing to do; after all, you know this person personally. However, it is too late for this kind of talk, and what you say can and probably will be used against you in some manner. Let your attorney handle any settlement discussions.

Be Careful Who You Discuss the Case With

Do not discuss the lawsuit with other employees or third parties. What you say to one another is not confidential and can be discovered in the litigation and used to hurt your case. Similarly, employees who may have knowledge about the lawsuit should be instructed not to discuss the claim or the underlying facts of it with anyone but the company attorney.

Promptly Retain Appropriate Legal Counsel

The response to a Complaint that has been served on you is usually due in 30 days. You should therefore contact the attorney who normally handles your employment problems immediately. A regular “business lawyer” will rarely possess the knowledge and experience to handle an employment lawsuit. As most employers are aware, employment law is a rapidly expanding area, and you will require the services of someone familiar with its nuances. Promptly retaining the right attorney can avoid the unpleasant repercussions of missing deadlines and will allow you to maximize your ability to strategically defend the litigation.

Talk to Your Attorney about Possible Insurance Coverage

Most employment claims, such as sexual harassment and discrimination, are

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not covered by general liability insurance policies. However, even if you don't have employment liability insurance coverage, you should not simply assume that you have no insurance coverage for the claims made against you. Consider asking your attorney to review your insurance policy. It is possible that one or more of the claims may be covered. Also, insurers frequently agree to pay defense costs while reserving the right to deny liability at a later time.

Get Organized

In order to assist your attorney, you should prepare a list of persons who may have information about the case. A chronology of the events leading up to the lawsuit should also be prepared. These documents will save your attorney time, which will save you money. As long as these items are written for your attorney, they will be confidential and therefore protected from discovery in the lawsuit. These lists should not be distributed beyond those with a need-to-know and should be marked "Confidential Attorney-Client Communication". Also, you should copy all documents relevant to the case and forward them to your lawyer for review.

Retain All Records

Do not attempt to improve your case by destroying records, deleting computer files or belatedly preparing documents. Such efforts are inevitably discovered and could prove to be disastrous. On the contrary, computer files, expense reimbursement records, time records and other documentation should be retained and evaluated as a likely part of your strategic case defense.

Select a Liaison

It is wise to select a point person from your company who will be responsible for dealing directly with your attorney and anyone else who might be involved in the case. This individual will ensure that all communications are timely, confirm that information is consistent and accurate, and perhaps even monitor costs and fees. When handled properly, this spares the company unnecessary expense and avoids delays and misunderstandings.

Consider Alternative Dispute Resolution

Mediation or arbitration is a viable alternative which may allow the company to avoid a protracted court battle and its high legal fees and expenses. If your attorney has failed to discuss those options with you, you should initiate the discussion about them with your attorney. However, be aware that you cannot force another party to mediate or arbitrate unless you have a previously signed agreement requiring it. In addition, early mediation is not right for every case and can have negative repercussions when inappropriately timed.

Be Open to the Possibility of Settlement

Most cases settle before trial. After the initial emotional reaction to the lawsuit dies down, many employers come to terms with the idea of settlement. Depending on the facts of your case, your financial situation and a variety of other circumstances unique to each dispute, an out-of-court settlement may be a good business decision. Do not let hostilities cloud your judgment. On the other hand, paying for specious claims can embolden others to bring similar lawsuits against the company. Accordingly, consider not just the individual claim, but the overall impact that a settlement may have on the company in the future. In this regard, keep in mind that confidentiality provisions are not always effective, and persons close to the plaintiff as well as others within the company are

usually aware of the terms of any settlement.

Of course, the best lawsuit is one that never gets filed! *Think ahead and implement preventative policies and practices.* Periodically review all of your employment policies and procedures to see if the company has done all it can to minimize the possibility of a lawsuit. The “open door” policy on complaints, the discrimination, retaliation and harassment policies and the investigation policy should each be reviewed to ensure that the company’s expectations are expressed. In addition, the company should visit the issues of proper management training as well as the accuracy and thoroughness of the entire performance review process. Payroll practices and job classifications should be audited. Finally, the company should consider the use of a complaint resolution procedure and an arbitration policy to streamline the resolution of disputes when they occur.