

TIPS ON WHETHER TO FIGHT OR SETTLE & INSURING AGAINST EMPLOYEE LAWSUITS

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I. TIPS ON WHETHER TO FIGHT OR SETTLE

Should a lawsuit be filed against you by an employee, there are a number of actions an employer may take to determine whether to settle or fight to ensure the best possible outcome.

A. Learn the Case Early

1. Contact legal counsel immediately (and/or insurance carrier as applicable).
2. Undertake a detailed factual investigation to determine the merits of the complaint.
3. Identify and contact all witnesses and get their responses to the factual assertions in the complaint.

B. Safeguard Documents

1. Take prompt steps to identify relevant documents and safeguard them (actual trial may not occur for many years).
2. Adverse evidentiary inferences can be drawn against an employer that fails to produce documents it was under a legal duty to maintain.
3. Send memos to all witnesses (and IT Dept.) advising them to preserve all documents, whether in hard copy or electronic format, that may be pertinent to the case (e.g., "litigation hold memo.").

C. Safeguard Witnesses

1. Advise employees to avoid public discussions of the lawsuit.
2. Warn witnesses that they may be contacted by the employee ("plaintiff") or the employee's counsel. Advise employees that they are not obligated to speak with the plaintiff or his counsel and should decline to do so. Such contacts by the plaintiff or his counsel are generally designed to obtain information to discredit the employer at trial. Note that ethical rules governing the conduct of attorneys restrict an opposing counsel from contacting an employer's management employees.
3. If a favorable witness is about to retire, transfer, or be terminated, give your attorney advance notification. Your attorney may wish to depose the witness before s/he is notified of the job termination. Loss of witnesses may change the settlement posture of the case as

well as impact the likelihood of prevailing on merits. Give your attorney an opportunity to have input before the witness is alienated or leaves the jurisdiction.

D. Develop and Implement Strategic Plan

1. Employers should focus attention on the development and implementation of an effective defense plan and on requiring defense counsel to think strategically.
2. Factors to consider in developing an effective defense plan:
 - Analysis of the ability or propensities of opposing counsel;
 - Assessment of the forum;
 - Appraisal of tendencies of the judge;
 - Analysis of the strength of the facts, the legal defenses and the witnesses;
 - Assessment of the credibility and "likeability" of the plaintiff as well as the decision maker;
 - The goals of the employer; and
 - Whether the challenged conduct would appear fair to a reasonable person.
3. Employers should engage defense counsel in discussion about the case strategy at the beginning of the case and should periodically discuss the defense strategy as the case progresses.
4. Good questions for employers to pose to defense counsel are:
 - Have you interviewed all of the witnesses and read the relevant documents?
 - What is your assessment of the merits of the case?
 - What is your strategy for defending this case?
 - What weaknesses do you see in the defense?
 - Is there any evidence to counter that weakness or strategy to minimize its impact?
 - What do you see as the greatest strength in the defense?
 - What types of tactics are most effective against the opposing counsel?
 - What are the propensities of the judge and how should we proceed in light of those propensities?
 - How do you believe the case would play to a jury?
 - What opportunities do you see for early settlement of this case?

- Do you have a strategy for bringing this case to a prompt resolution?
- What are the costs you anticipate in defending this action?

E. Decide on Settlement Early

1. Thoroughly and frankly discuss the potential cost of litigation, likelihood of success, and realistic settlement options with defense counsel soon after the lawsuit is filed.
2. If inclined to settle a case, do so early on, before attorney fees become an impediment. Too often employers wait until after they have expended \$50,000 to \$100,000 in attorney fees before they give serious consideration to settlement. It makes little economic sense to allow attorney fees to mount before giving serious consideration to settlement.
3. Early settlement may not always be possible since the plaintiff's valuation of their case may be greatly exaggerated at the outset of litigation. Consider a third party mediator.

F. Factors to Consider When Deciding Whether to Settle

1. Although each case presents its own set of unique facts which impact upon the decision to settle, employers should always consider the following factors in deciding whether and when to settle:
 - Likelihood of success on the merits;
 - Bottom-line cost of litigating the matter to conclusion;
 - Potential financial exposure from an adverse decision;
 - Strength and availability of key witnesses;
 - Potential for generating additional suits by other employees;
 - Manpower costs/disruption to operations;
 - Litigation methods/skill of opposing counsel;
 - Tendencies of the appointed judge;
 - Forum (administrative agency, state vs. federal court);
 - Principles at stake, sending a message;
 - Public relations issues – adverse media coverage;
 - Employee's employment history;
 - Strength of documentation;
 - Potential operational impact of adverse judgment

II. INSURING AGAINST EMPLOYEE LAWSUITS

A. **The Potential Upside of Insurance Against Employee Lawsuits**

1. The American workplace has changed dramatically over the past twenty five years. The laws impacting on the recruitment, hiring, and management of employees have evolved into a complex and comprehensive umbrella of employee protections.
2. Potential for costly and disruptive litigation arising from improper personnel actions is very high in the modern workplace.
3. Unlike the past, today's employees are very much aware of their legal rights (e.g., televised court proceedings; training).
4. Employee loyalty has declined with the advent of wide-scale downsizing and the recurring publicity given to extravagant compensation packages for high-level corporate executives.
5. Large jury awards have fueled employee interest in pursuing litigation to resolve workplace disputes.

B. **The Potential Downside of Insurance Against Employee Lawsuit**

1. Most policies that provide indemnification for the costs of defending a lawsuit give the insurance company the right to choose the attorneys to defend the suit, resulting in employers being unable to use their long-standing counsel for defense of employment claims.
2. In cases where high-level executives are named as defendants, the employer may be particularly resistant to being defended by counsel selected by the insurance company, which may have little familiarity with the employer and its priorities.
3. Due to the discounted rates paid by most insurance companies, some law firms that work for insurance companies staff insurance work with junior associates, who work under the general supervision of more experienced attorneys. Thus, an employer may be reluctant to entrust potentially sensitive employment litigation to junior attorneys.
4. Employers can negotiate with an insurance company to allow them to designate the attorneys who will defend the employer in the event of an employment suit, as a precondition to purchasing insurance or renewing an insurance policy.

5. Acquiring insurance may result in the employer losing substantial control over the eventual resolution of the case.
 - An insurance company must take into account the interests of the insured and accord the insured's interests as much consideration as its own interests.
 - The employer may wish to send a message to its workforce that particular conduct will not be tolerated; or that the employer will not be blackmailed; or that the employer will defend unjust litigation to the end without settlement. The employer may also be legitimately concerned that settling a lawsuit by one employee may result in more suits by other employees.
 - Most insurance policies give the insurance company the right to settle a case within the policy limits on terms that the insurance company deems appropriate. Under some policies, if an employer objects to a settlement that is within the policy limits, the employer would be responsible to pay the amount of any later judgment in excess of the amount for which the insurance company was willing to settle. Thus, by obtaining insurance against employee suits an employer may lose some control over the litigation.
 - An insurance company must consider the possibility that a court judgment might exceed the policy limits thereby potentially exposing the insured to uninsured liability. If there is a reasonable possibility of such a judgment, the insurance company has a duty to attempt to settle the case within the policy limits. If an insurer wrongfully refused to settle for an amount within the policy limits and a judgment later entered exceeded the policy limits, the insurance company would be liable to pay the full amount of the judgment.

C. Types of Insurance Coverage for Employment Lawsuits

1. Comprehensive General Liability Insurance
 - One type of General Liability insurance covers only damages resulting from bodily injury or property damage caused by an occurrence. An occurrence requires an accident resulting in property damage or bodily injury that was neither expected nor intended from the standpoint of the insured.
 - Another type of General Liability Insurance is broader and covers damages resulting from personal injury without regard to accidental occurrences. This second type of coverage would cover torts such as libel or slander.

2. Employment Practices Liability Insurance (“EPLI”)
 - Designed to cover employment related claims.
 - Scope of coverage of EPLI policies vary widely. For example, some EPLI policies cover wrongful discharge claims while excluding employment discrimination claims. Other EPLI policies provide broad coverage against all types of employment claims.
3. Workers’ Compensation Liability Insurance
 - Provides coverage for all monies that an employer is legally obligated to pay on account of bodily injury by accident or disease sustained by any employee of the insured arising out of and in the course of his employment.
 - The insurance company defends any lawsuit against the insured
 - Typically, these policies contain an exclusion for any adverse action taken by the employer due to retaliation or discrimination against the employee for exercising rights under the workers’ compensation laws.
4. Directors and Officers Liability Insurance
 - Typically covers settlements, judgments and defense costs incurred as a result of claims premised on allegations of wrongful acts by corporate directors and officers acting in their official capacities.
5. Errors and Omissions Insurance
 - Typically provides coverage on behalf of the insured person for all losses for which the insured person is not indemnified by the insured organization and which the insured person becomes legally obligated to pay as a result of any claim made against him for any wrongful act committed by the insured person.

D. The Insured’s Duty to Cooperate

1. Most insurance policies require the insured to cooperate with the insurance company in defending a claim by providing evidence and testimony, participating in settlement conferences, hearings and trials, and cooperating with reasonable requests for assistance from defense counsel.

2. If an insured refuses to cooperate or provides false information to the insurance company, the insurance company may be relieved of its duty to indemnify or defend the insured.

E. Duty to Defend

1. An insurance company's duty to defend is generally broader than its duty to indemnify, which is limited to the specific policy terms.
2. The duty to defend includes circumstances where the alleged facts could give rise to liability under the policy. Any doubts as to the insurer's duty to defend must be resolved in favor of the insured.
3. An insurance company has a duty to defend where the insurance policy language gives the insured a reasonable expectation that the insurance company will provide a defense.
4. If any part of the claim is arguably within the scope of the policy or could be amended to come within the scope of the policy, the insurer must defend the suit and reserve its right to contest or limit indemnity coverage.

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