MANAGING THE RISK OF EMPLOYMENT LITIGATION

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I. Preventing the Lawsuit

A. Process and education – a little time and money spent on managing employment risk can avoid much larger expenses later. Education needs to be focused on both employees and supervisors.

1. Educate employees

a. Employees must acknowledge in writing that company procedure has been explained to them, but it is important that you take steps to make sure they actually understand it.

b. An employee handbook is essential.

(i) Employees should sign an acknowledgment that they have received the handbook. That acknowledgment signature and the handbook itself, however, may not constitute a contract. *Johnson v. Vatterott Educational Centers, Inc.*, 410 S.W.3d 735 (2013) In fact, many handbooks actually provide that they do not constitute a binding contract.

(ii) This can be a particular problem when attempting to enforce arbitration and non-compete/non-solicitation provisions.

(iii) This problem can be solved by requiring execution of a formal employment agreement, even if the employee is at-will. Alternatively, the employee may execute an acknowledgment that specifically states that arbitration and/or non-compete provisions

constitute a binding contract in consideration for employment.

c. Complaint procedures. The handbook should clearly state that complaints of harassment for discrimination should be made in writing to the employer.

d. A frequent defense in litigation is that the plaintiff never notified the employer of the discriminatory situation. To prevail on a claim of a hostile work environment, a plaintiff must show that the defendant was "on notice" of the issue and failed to remedy the environment. *Chambers v. Trettco, Inc.*, 463 Mich. 297 (2000)

e. Documentation must be placed in a personnel file of any disciplinary action, including a verbal warning. If it is not in writing, it did not happen.

f. These handbook provisions and notices will be exhibits at depositions and trial.

2. Educate supervisors

a. Supervisors must be educated on all company policies and procedures. A supervisor's failure to comply with them will be used against the employer in litigation.

b. When the employer is notified of a hostile or adverse employment claim, it has a duty to undertake remedial action. *Coley v. Consolidated Railcorp*, 561 F.Supp 645 (E.D. Mich. 1982) this means the employer must undertake an investigation, which will likely include interviews of other employees. The steps undertaken in this investigation must be documented, as they will be useful in litigation.

c. Supervisors must also know the rules so they do not violate them. Training of both employees and supervisors relative to proper workplace conduct should be documented.

II. Shifting the Risk of Litigation

A. Insurance and indemnification

1. Historically, insurance coverage for employment related litigation was limited. Insurers first began writing this coverage as endorsements to other policies, such as commercial general liability.

2. Insurers now provide stand-alone policies applicable to employment related losses.

B. Types of insurance available

1. Employment practices liability (EPL)

a. These policies typically provide coverage for discrimination claim arising under various laws, including the Americans With Disabilities Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination In Employment Act, the Pregnancy Discrimination Act, Genetic Information Nondiscrimination Act of 2008, as well as state law counterparts to these federal statutes.

b. These policies typically exclude or have sub-limits for certain claims, such as failure to pay wages, intentional acts, employee theft, and sexual assault.

2. Directors and officers policies

a. These policies cover claims brought against corporate directors and officers. They may apply to employment litigation, but more commonly involve shareholder litigation, which may be brought by employees.

b. These policies are often written on a reimbursement basis, meaning that the carrier will reimburse defense costs once they are incurred.

3. Other considerations

a. Fully understand the risks that are unique to your business. This is true for all types of insurance.

4. A large deductible or not?

a. This is an important consideration. A policy with a large deductible will almost certainly come at a cheaper premium. Litigation costs, however, can consume the entire amount of such a deductible.

III. Litigation Starts – Important Concerns

A. What is the proper forum for the litigation. Wherever filed, it is important to understand both the defense costs and the potential ultimate exposure, even if you have insurance.

1. Federal court

a. Plaintiff must file in federal court in order to seek the remedies available under federal statutes.

b. Generally, a party must exhaust administrative remedies. Discrimination claims will be brought to the United States

Equal Employment Opportunity Commission. The EEOC will investigate and find either reasonable cause to believe that a statute has been violated, or no reasonable cause and dismiss the action.

c. If reasonable cause, the EEOC may bring an action in its own name of behalf of the plaintiff. Alternatively, it may find reasonable cause, but not pursue the claim with the weight of the federal government.

d. If no reasonable cause is found, the EEOC will likely dismiss the claim and issue a Right to Sue letter. Once this letter is issued, a claimant has 90 days to bring litigation or risk waiver of rights under federal statutes.

2. State court

a. A plaintiff may bring an action directly in state court seeking remedies available only under state law. In Michigan, this will often be the Michigan Elliott-Larsen Civil Rights Act, M.C.L 37.2101, et seq.

b. A claimant may file a complaint with a state agency, such as the Michigan Department of Civil Rights.

c. Many of the remedies are the same, although the form is different. This includes recovery of attorney fees if the claim is successful.

3. Arbitration

a. Employment contracts often contain provisions requiring disputes to be submitted to binding arbitration.

b. Arbitration is generally less expensive than trial, although

this is not always true. It is also faster in reaching a resolution with limited rights of appeal.

c. Arbitration causes have come under fierce attack in recent years. Parties have argued they did not constitute a bargained-for exchange. *Tillman v. Macy's, Inc.*, 735 F.3d 453 (6th Cir. 2013) they have also argued that such causes are unconscionable or are invalid because they allowed an employer to change the terms. *Carey v. 24 Hour Fitness USA, Inc.*, 669 F.3d 202 (5th Cir. 2012) The Consumer Finance Protection Bureau has challenged these causes in the context of consumer transactions, particularly as they relate to class actions.

IV. Conducting the Litigation

A. The life of a lawsuit has many jumping off points, including settlement, dismissal and trial.

1. Preserve all evidence, particularly electronic data, even before a complaint is filed.

2. Spoliation – when a party destroys or loses evidence, even inadvertently, a rebuttable presumption arises that it would have been damaging to the destroying party.

B. Discovery disputes and managing expense

1. Discovery should be broad, and bring out the key issues

2. Document exchange may be voluminous and depositions extensive. Federal courts have specific rules governing the exchange of electronic discovery. Failure to comply with those rules can result in significant sanctions, as well as other strategic problems.

3. Key managerial personnel will be deposed, as will disgruntled former employees. Whether it is the EEOC or private counsel, the charging party will want to know if you have previously been involved in any similar litigation. They will also want to know of prior complaints. They will speak to former employees who will testify against the company, sometimes even before you know they exist.

4. Deposition preparation is critical. Before the deposition, you will spend the time with your attorney. It is important to answer the question that is actually asked rather than the one you think is being asked. It is also important to answer only that question and avoid lengthy narratives.

V. Resolution and Reasonable Accommodation

A. An accommodation made to a charging party must be "reasonable." This is often a defense before the litigation even commences.

B. Reinstatement may also be a remedy, particularly where the claim is brought by a governmental agency. Back pay will also likely be awarded.

C. The employer may be required to engage in retraining or subject to other injunctive relief.