

RISK MANAGEMENT: WHAT TO DO WHEN YOU SEE AN EMPLOYMENT CLAIM TURNING INTO LITIGATION

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- I. UNDERSTAND POTENTIAL DAMAGES, INCLUDING MITIGATING RISK AND LIABILITIES ARISING FROM EMPLOYMENT CLAIMS – INCLUDING HOW TO DOCUMENT THE CASE TO STRENGTHEN CLAIMS AND DEFENSES
 - A. Common Claims
 1. Elliot Larson Civil Rights Act (“ELCRA”)
 2. TITLE VII (Civil Rights)
 3. Fair Labor Standard Act, 29 USC 201 *et seq.* (“FLSA”)
 4. Employment Agreements
 5. Several other legal claims include, for example:
 - a. Leave laws (Family Medical Leave Act, Michigan Paid Medical Leave, other state leaves)
 - b. National Labor Relations Act ... and so much more!
 - B. ELRCA and Title VII
 1. State statute that prohibits discrimination against employees in protected class
 2. State claims (covering employers with 1 or more employee) are available to more employers than Title VII (which only covers employers with 15 or more employees)
 3. Protected classes (broader than federal)
 - a. Federal: Race, color, religion, sex (gender identity and expression), pregnancy, national origin, citizenship
 - b. Michigan: height, weight, marital status, and misdemeanor arrest record
 - c. Two theories for discrimination claims:
 - i. Disparate impact
 - ii. Disparate treatment
 - d. Two kinds of harassment claims:

- i. Quid Pro Quo
 - ii. Hostile Work Environment
- 4. Disparate Treatment
 - a. **Intentional** discrimination because of protected class
 - b. Elements
 - i. Member of protected class
 - ii. Subject to adverse employment action
 - iii. Qualified for job
 - iv. Replaced by unprotected person
 - c. Defense
 - i. Legitimate, non-discriminatory purpose for decision
 - d. Examples
 - i. Sex/Pregnancy case
 - (A) Only manager knew
 - (B) Employee wanted part-time to pursue real estate career
 - (C) Replaced with non-pregnant employer
 - ii. Race – African American dental assistant
 - (A) White employees with less seniority were being promoted before Plaintiff
 - (B) Employer stated that Plaintiff did not perform well and did the minimum
- 5. Disparate Impact
 - a. Employment practice has adverse impact on protected group – policies and procedures
 - b. Less common

- c. Plaintiffs must establish membership in a protected class and that they were treated differently than persons of a different class for the same or similar conduct.
- d. Examples
 - i. US Women's soccer case
 - (A) Policy led to unequal pay – settled for \$24 million¹
 - (B) The filing disparaged players on the U.S. women's national team, saying they "do not perform equal work requiring equal skill [and] effort" because "the overall soccer-playing ability required to compete at the senior men's national team level is materially influenced by the level of certain physical attributes such as speed and strength."
 - ii. Alspaugh v Commission on Law Enforcement Standards, 246 Mich App 547 (2001)
 - (A) Michigan State Police fitness test
 - (B) Plaintiff alleged disparate treatment on older candidates
 - (C) Different standard for male versus female
 - (D) Plaintiffs were older males and wanted a lower standard for older applicants too
 - (E) Holding – there would be no claim because Plaintiff's didn't pass the test
 - (F) Vice versa – if Plaintiff's did pass, and if a younger applicant was selected, that would constitute a claim

6. Harassment

- a. Elements
 - i. Member of protected class

¹ [https://www.espn.com/soccer/united-states-usaw/story/4599482/uswntus-soccer-federation-settle-equal-pay-lawsuit-for-\\$24-million](https://www.espn.com/soccer/united-states-usaw/story/4599482/uswntus-soccer-federation-settle-equal-pay-lawsuit-for-$24-million)

- ii. Subjected to offensive conduct based on a protected class that is either **pervasive** or **severe**
 - b. Defense
 - i. Prompt remedial action
 - c. Examples:
 - i. The perverted boss
 - (A) Repeated sexual comments and jokes to female employees
 - (B) Address situation promptly to prevent the action from continuing
- 7. Steps an employer should take
 - a. Disparate treatment
 - i. When any employee has a performance issue, complaint, behavioral issues, etc., it should be documented in detail
 - ii. Process for voicing complaints
 - iii. Action and investigation of complaints
- 8. Disparate impact
 - a. Policies and procedures should be the same for all
 - b. If an exception is made, it should be to favor a protected class, not the opposite
- C. Risk Management and Documentation
 - 1. Steps an employer should take to take when a claim is asserted
 - a. Conduct internal investigation
 - b. Use independent (counsel) if necessary
 - c. Create a timeline of events
 - d. Takes notes
- D. FLSA
 - 1. What is an FLSA claim?

- a. Most common – wage and hour (minimum wage and overtime) owed to non-exempt employees.
 - b. Minimum wage: Failing to pay at least \$7.25 / hour
 - i. Note: State minimum wage laws may require higher hourly rate
 - c. Overtime: Must pay 1.5xs wage for any hours worked over 40 hours / week
 - i. Note: Some states have different standards (*e.g.*, hours worked in excess of 8 in one day)
2. Damages
- a. Must pay unpaid wages
 - b. Liquidated damages of equal amount (= double damages)
 - c. Attorney fees and costs
3. Multiple Exemptions
- a. Exempt employees are not entitled to minimum wage. This includes employees with exempt duties) Executive, Administrative, Professional, Computer) who are paid on a salary basis at a certain minimum level (\$684 per week, which equates to \$35,568 per year)
 - b. Domestic service – babysitting or elderly companionship, with the exception of those workers providing 20% or more of the workweek performing care services.
4. Documentation and mitigation
- a. Organized payroll record and time sheets
 - i. Construction, landscaping, outdoor labor are common problems
5. Examples:
- a. Pool case
 - i. Some weeks 40+, some weeks under 40 hours
 - ii. Owner would give random bonuses and other perks
 - iii. Records were a mess
 - iv. Employees alleged minimum wage and OT violations

- v. Collective action
 - vi. Settled
 - b. Medical billing company matter
 - i. Employee given promotion to salaried position
 - ii. Wages similar, but provided bonus opportunity
 - iii. Agreement not signed
 - iv. Employee continued to clock-in as hourly employee
 - v. Paid on salary basis
 - vi. Quit and filed OT claim
 - vii. \$6k face value
 - viii. Settlement near \$20k with fees and damages
- 6. High Stakes Litigation
 - a. Employment claims have attorney fee provisions
 - b. FLSA has attorney fee and double damages
 - i. Defending these claims requires impeccable payroll records and employment records
 - ii. Try to resolve early to avoid collective or class action
 - iii. Don't ignore demands
 - iv. Even frivolous claims should be addressed because of severity of statute
- E. Employment Agreements
 - 1. Most fertile ground for disputes. Common provisions that are disputed include:
 - a. Non-solicit
 - b. Non-compete
 - c. Confidentiality
 - d. Trade secrets

2. Mitigation
 - a. This is all about contracting
 - b. Valid covenants in scope and duration
3. Termination / separation procedures
 - a. Return of company property
 - b. Handling risky terminations – timing / severance / counsel
 - c. Handling employee or contractor’s clients vs. your clients
 - d. Carveout in agreements
4. Employment Agreement Termination
 - a. Sales rep with non-compete, non-solicit, company property (laptop, credit card, documents)
 - b. Using credit card for personal items
 - i. Client had well documented
 - c. Diverting business opportunities for kickbacks
 - d. Strategized termination
 - i. Surprise at scheduled meeting
 - ii. Escort to office to retrieve personal items then off premises
 - iii. Executed severance agreement with waiver and release

II. TRIGGER AND PRESERVE THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTIONS IN ANTICIPATION OF LITIGATION

A. Attorney-Client Privilege

1. Triggering the privilege
 - a. The attorney-client privilege attaches to direct communication between a client and his/her attorney as well as communications made through their respective agents where the **purpose is legal advice**

- b. Where an attorney's client is an organization, the privilege extends to those communications between attorneys and all agents or employees of the organization authorized to speak on its behalf in relation to the subject matter of the communication
 - c. The scope of the attorney-client privilege is narrow, attaching only to communications that are made for the **purpose of obtaining legal advice**
- 2. Significance of privilege
 - a. Once the privilege attaches, the communications are not discoverable
 - b. Adversary in litigation may not review the communications and/or documents
 - c. Communications remain confidential between you and counsel
 - d. Attorney-Client Privilege
- 3. Work Product Doctrine
 - a. any notes, working papers, memoranda or similar materials, prepared by an attorney in anticipation of litigation, are protected from discovery
 - b. Protects reports and notes from internal investigations
- 4. Scenarios to consider triggering privilege
 - a. Internal investigations and interviews – notes and reports
 - b. If conducted by counsel, privilege will attach
 - c. Sensitive communications
 - d. Discussing anticipated claims
 - e. Issues with employees
 - f. Handling sensitive issues
- 5. Triggering privilege
 - a. In-house counsel
 - i. Opinion, notes, communications, and reports are protected if it includes legal opinions, advice, and recommendations
 - ii. Designate “confidential” and “privileged”

- b. When to involve counsel
 - i. This is case by case
 - ii. When you see a storm brewing you should discuss with counsel
 - iii. There is benefit to attaching the privilege early-on
- 6. Example:
 - a. Pregnancy case
 - i. In-house counsel conducted investigation and prepared report = protected
 - ii. If a manager conducted the investigation without counsel = not privileged
- 7. Waiver of Privilege:
 - a. Copying third parties on communication with waive privilege – BE CAREFUL
 - b. Discussing with attorney in public
 - c. Employer email v personal email
 - i. Test: (1) whether the employer maintains a policy with respect to the use of those systems and what that policy entails, and (2) whether the employee was ever notified or made aware of the employer's policies and practices with respect to computer privacy and monitoring.
 - d. Determinative factor is whether the employee had a reasonable expectation of privacy