



2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432

Roundtable 2: Thursday, April 10, 2014 (11:30 am – 12:30 pm)

Adopting Claims Management Process for Employment Claims—EPLI Claims are not as unique as one may think!

I. Objectives

When it comes to handling EPLI claims, many times the professionals involved have set the bar too low as related to how success should be defined in the claims handling process and in achieving the ultimate result. Many are of the opinion that obtaining a great legal result and economy/efficiency are mutually exclusive concepts. Stated another way, they are of the false opinion that the main and perhaps exclusive road to a “win” or excellent result is to spend \$100,000 in legal costs to litigate the case through a favorable MSJ determination. The panel would vehemently argue that this should really be the exception and not the rule! Rather, the claims/in-house team should focus on identifying and then, retaining, the “right” legal counsel which has a proven track record of obtaining YOUR great result. Then, claims/in-house team needs to implement processes to appropriately assess legal counsel with targeted metrics to effectively cement the paradigm of the definition of Great result to include “**The 3 E’s**” of Excellence, Economy and Efficiency!

II. Re-Defining Great Result

Case Hypothetical:

Racial Discrimination Termination Claim

Black Female terminated for poor job performance
Claims disparate treatment
Hired on from Temp to Permanent Employee Months Earlier
Allegation is that new manager discriminated against her
Her performance was satisfactory with prior mngr
“Black board” damages of \$35,000

Legal Team meeting with Employer Reveals:

Job duties switched when became permanent employee
Co-employees are of mixed races many with company for
Several years
Company "Productivity Report" shows:
Clearly deficient—worst of 10 employees
Company "Errors Reports" shows:
500% more errors than colleagues
4 write-ups for poor performance
Fired for insubordination during Counseling Session

Insured Deductible: \$20,000

RESULT A:

Pre-suit Demand of \$75,000

Defense Team opts to hold back favorable information for
fear plaintiff will create counter facts

Lawsuit filed
8 depositions
1000 documents produced
MSJ filed
MSJ GRANTED
File open for 18 months
Legal fees/expenses: \$72,000

Total Cost: \$72,000

RESULT ASSESSMENT:

Legal	Excelent/Good/Average/Bad
Economy	Excellent/Good/Average/Bad
Efficiency	Excellent /Good /Average/Bad

RESULT B:

Claims/Employer Evaluate Risk and Cost
Determine if case goes into suit --\$20,000 Deductible
Gone
Parties Pursue Pre-Suit Mediation
Case settles for \$10,000
Legal fees: \$5,000

Total Cost: \$15,000

RESULT ASSESSMENT:

Legal	Excellent /Good/Average/Bad
Economy	Excellent /Good/Average/Bad
Efficiency	Excellent /Good/Average/Bad

RESULT C:

Claims/Employer Evaluate Risk and Cost
Determine if case goes into suit --\$20,000 Deductible
Gone
Legal Team Writes Employee's Counsel Outlining
Case is loser
Overwhelming Objective Evidence of
Poor Productivity
Poor Performance
Multiple Warnings
Employee's Counsel Withdraws EEOC Charge

Legal Fees: \$5000
Indemnity: ZERO

RESULT ASSESSMENT:

Legal	Excellent /Good/Average/Bad
Economy	Excellent /Good/Average/Bad
Efficiency	Excellent /Good/Average/Bad

III. Great Results are 3 Dimensional

What we learn is that a Great result is many times should be considered 3 dimensional. It involves an excellent legal result AS WELL AS economy and efficiency. To even begin the evaluative process to establish the definition of a great result, it all begins with early evaluation and budgeting. It also begins with a "Resolution Strategy."

Of course, there are exceptions to every rule and sometimes a Great result won't involve economy or efficiency. This includes situations where perhaps the insurer or the employer needs to "send a message" to all company employees that they will fight unreasonable employment claims. Or, you

may have a situation where an unrealistic/unreasonable employee's counsel that wants a premium settlement on what amounts to a clear winner at MSJ.

IV. Great Results Begin With Counsel Retention—It takes a Unique Legal Skill Set to Deliver the 3 E's

Not all lawyers are created equal. Lawyers have varying levels of ability in the dozen or so talents expected of them when they handle a case. Yet, companies focus on specific talents many times related to specific needs. For example, if you had a very important case that you knew was going to trial, you would hire a lawyer with a PROVEN record of success at trial. If you had a very important case before an appellate court, you would retain a lawyer with a PROVEN record of excellence in the appellate arena.

You need to realize that achieving the **The 3 E's** also takes a very unique skill set. This skill set that requires excellence in persuasion, negotiation, and advocacy. Just like every lawyer is not a great trial lawyer or appellate advocate, it takes a unique lawyer to execute **The 3 E's**.

The next question is how do we find this unique lawyer? We all are in the evidence business. In evaluating claims, we look for and evaluate evidence on every level. We then make our litigation management decisions based on such evidence. Meanwhile, the person at the forefront of collecting the evidence, evaluating the evidence, and implementing the plan is your counsel. Hence, it is imperative that you retain counsel that has a PROVEN track record in implementing "**The 3 E's**." In effect, request EVIDENCE of this fact. Again, you want evidence because it takes a unique skill set for a lawyer to deliver **The 3's**.

In sum, request that counsel provide you a Scorecard of an the last 20 claims he/she has handled demonstrating things important to your company such as:

1. % of Claims Withdrawn Without Litigation;
2. % of Claims Resolved Pre-Litigation;
3. If case is litigated, % of MSJs Won;
4. % Number of Days Claim is Open;
5. % Attorney Fees Per Claim;
6. % Indemnity Pay out per Claim.

Also, have counsel provide attachments where applicable. In effect, the Scorecard will provide you with objective data related to counsel's commitment to and unique ability to deliver **The 3 E's**. For example, if the Scorecard shows that only 10% of claims are going into suit, that counsel has gotten several charges outright dismissed without indemnity or suit and the average Legal and Indemnity payout is \$15,000, this certainly means one thing. On the other hand, if the Scorecard shows that a large majority of counsel's cases end up in suit and then, his/her clients prevail on MSJ a minority of the time, but he/she has won 2 trials at an average cost of \$120,000, this should tell you something as well. It will then be up to you to determine how these lawyers fit in to your Great results paradigm.

V. Oversight Process

A/B. Early Evaluation and Fork in Road Determination

Once the matter is assigned, the oversight process does not cease. Rather, it just begins. Upon assignment, the defense team must provide with a legal and business analysis of the claim. The legal analysis involves assessing the good, bad and ugly of the claim including exposure, % of prevailing at MSJ or trial and jury verdict ranges. The business analysis is more complicated. It involves an assessment which may be unique to each case. The most difficult analysis and strategy normally involve the cases of **unlikely** liability. Some factors to consider include:

1. Whether the Charging Party is represented and if not, will they retain counsel;
2. Whether the Employer has a deductible and wants to “save” money off the deductible;
3. Whether the Employer needs to send a message to all employees that it fights EEOC Charges;
4. Whether there strong objective evidence that if shared with the Charging Party’s counsel may lead to a withdrawal or dismissal;
5. Whether the cost of defense exceeds the settlement value;
6. Prospects of prevailing on MSJ versus going to trial;
7. Whether it is prudent to respond to Charge or Submit to EEOC mediation;

C. Efficiency Red Flags

In the event suit is unavoidable, the next issue becomes efficiency in the handling the litigation. There are some red flag issues which lend themselves to suggest that perhaps litigation is not being handled efficiently. Some red flags would include

1. unsuccessful 12b6 motions;
2. discovery disputes (filing/defending motions to compel);
3. Failure to secure demand early in litigation;
4. Excessively expensive MSJ Brief (no need to reinvent the wheel!)
5. Change in Evaluation (MSJ is not viable; Case is worth \$100,000 not \$15,000);
6. Multiple discovery extensions;

VI. Retrospective Evaluation of Counsel

Litigation management in many ways is like the Money Ball metrics being applied in Major League Baseball. Many claims and corporate professionals will tell you “My lawyer is the best.” Which actually may be 100% accurate. But, besides a positive “feeling” or a good recent result, an overwhelming majority frankly can’t point to any objective data to prove their opinion—which may or may not be correct. Hence, insurance companies and employers retaining outside counsel should require that their counsel annually submit a Scorecard with metrics developed in-house reflecting the company’s definition of Great results. For an EPLI carrier using several lawyers in one jurisdiction, they might learn that one firm resolves 90% of their claims pre-suit with an average payout of legal/indemnity of \$15,000 and another firm resolves only 50% of their claims pre-suit with an average payout of legal/indemnity of \$90,000. Of course, on 10 claims per year, that is \$750,000 difference!

It goes without saying that there will be outliers and exceptions. Hence, there need to be tools in place to evaluate and identify when the outliers and exceptions exist. It may be as simple as striking the 2 best and 2 worst results to eliminate clear outliers. We would also recommend an annual review of Scorecards so that each claims examiner may provide context for certain claims or cases that may be

unique. All of this being said, we would submit that in the end, the numbers won't lie and at the very least, will surprise you in some way or another whether you learn that a certain firm has not achieved the results you thought or perhaps that a certain firm is doing much better than initially thought.

Finally, the most important thing that will result in the Scorecard practice is that you will be explicitly telling your outside counsel how they are being measured and how you define a Great result—and emphasizing **The 3 E's**. This will incentivize them to change their practice and focus on getting the result YOU want versus what they thought you wanted. It will also force outside counsel to align their financial interests with YOUR's. Put another way, they understand that aggressively pursuing **The 3 E's** while perhaps foregoing \$10,000 in legal fees on one matter will lead to a larger volume of cases and a steady flow of legal fees in the long term. This is a win/win for all!