CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

ADVANCING ETHICS, COOPERATION AND EDUCATION

2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

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

Roundtable 3: Thursday, April 10, 2014 (3:30 pm – 4:30 pm)

Sexual Harassment and Retaliation Claims: Managing Exposure, Conflicts of Interest, and Coverage Issues

I. Exposure in Sexual Harassment and Retaliation Claims

A. Evaluating the Significant Exposure for Harassment and Retaliation Claims

In 2012, the EEOC received 37,836 retaliation-based charges, up significantly from the 22,768 charges received only ten years earlier in 2002. This growth reflects an ongoing trend to include a retaliation claim in most charges filed, especially in conjunction with a claim of sexual harassment. The exposure for these types of claims can be significant. For instance, in 2012, a jury returned a $167 million verdict in a sexual harassment/retaliation lawsuit involving a single plaintiff. *See Chopourian v. Catholic Healthcare West*, No. 2:09-CV-02972-KJM-KJN, 2012 WL 1551728 (E.D. Cal. April 30, 2012). Just this past year, a federal jury returned a verdict in a lawsuit brought by the EEOC awarding a total of more than $20 million to eight former employees of a Florida vacation agency who allegedly suffered sexual harassment and retaliation. *See EEOC v. Four Amigos Travel, Inc., et al.*, No. 8:11-cv-1163-T-26MAP (M.D. Fla.). Following the verdict, the EEOC's Miami district director stated: "Every employer needs to take action to remedy sexual harassment, which is a serious situation requiring serious attention. The EEOC will continue to aggressively pursue employers who tolerate and/or dismiss verbal and physical forms of sexual harassment in the workplace." Given both the significant growth of harassment and retaliation claims as well as the EEOC's particular focus on these claims, employers and insurers must be mindful of ways to recognize and reduce exposure for these claims.

B. Checklist for Avoiding Additional Retaliation Claims and Other Potential Claimants

When an EEOC charge is filed, there are certain steps that employers may take to limit additional retaliation claims and other potential claimants:

1. Ensure that the employer has separated the charging party and the alleged harasser to avoid any further complaints of harassment or allegations that the employer did not take steps to prevent harassment;

2. Verify that the investigation of the initial internal complaints has been conducted by an impartial party in a fair manner;

3. Review the adequacy of the employer's investigation of internal complaints and ensure that the investigation is thorough and well-documented;

4. Confirm that the employer has adequate documentation of any discipline taken against the alleged harasser as well as documentation of any additional training the alleged harasser received regarding harassment and retaliation;

5. Secure sworn statements from all employees regarding their knowledge of the employer's anti-harassment and anti-retaliation policies, including the employer's complaint procedures, as well as stating that they did not personally observe or experience any harassment; and

6. Ensure the employer is monitoring the workplace for potential claims of retaliation and is periodically following up with the charging party to ensure no retaliation has occurred.

C. Strategies to Limit Damages and Recoverable Attorneys' Fees

One rarely used option available for limiting damages and recoverable attorneys' fees is to make an unconditional offer of reinstatement. In *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219 (1982), the United States Supreme Court held that an employee's rejection of an unconditional offer of reinstatement stops the accumulation of back pay. The Court held that this offer both serves the goal of facilitating the employer's compliance with the fair employment laws, while satisfying the employee's duty of mitigation. The employee may accept the offer without being required to surrender any of the claims for relief in the lawsuit, and the employee may not reject the offer on the ground that the offer is not accompanied by the other relief sought in the lawsuit. In a case where the harasser's conduct results in a plaintiff's termination, the harasser is later terminated on suspicion of misconduct, and the employer wants to reconcile with the plaintiff, the offer of reinstatement may be a viable option.

An offer of judgment is another option that may enable a defendant to reduce recoverable attorneys' fees and encourage plaintiff's counsel to reasonably assess case value. Rule 68 of the Federal Rules of Civil Procedure effectively imposes penalties on a plaintiff-employee who: (1) rejects a reasonable settlement offer made by a defendant-employer; and (2) is unable to obtain a verdict that exceeds that settlement offer. Pursuant to Section (b), if the employee fails to accept the offer, the offer will be deemed to be "withdrawn." If the plaintiff obtains a judgment that is lower in value than the unaccepted offer, the plaintiff is liable to pay for all post-offer costs. Although costs are usually relatively minimal, in fee-shifting cases, including sexual harassment and retaliation cases, an offer of judgment can operate to cut off the plaintiff's attorneys' fees if a plaintiff later recovers less than the value of the offer. *See Marek v. Chesny*, 473 U.S. 1 (1985) (finding that defendants were not liable for attorneys' fees incurred by plaintiff after pretrial offer of settlement where plaintiff recovered judgment less than offer). Even if the offer of judgment is rejected, the risk for both the plaintiff-employee and plaintiff's attorney stemming from a reasonable offer of judgment early in litigation may result in more fruitful and earlier settlement discussions.

Care should be taken in crafting an offer of judgment for the purpose of limiting recoverable attorneys' fees in the event the offer is rejected. The offer itself should clearly include reasonable attorneys' fees to date and all other recoverable costs to avoid a finding by the court that the plaintiff is nonetheless entitled to his/her attorneys' fees due to ambiguity in the offer. *See Sanchez v. Prudential Pizza, Inc.*, 709 F.3d 689 (7th Cir. 2013). This option is useful where the employer suspects that the jury will award, at most, a nominal amount to the plaintiff or where the employer can reasonably estimate its liability.

II. Conflicts of Interest

A. Evaluating Need for Separate Counsel and Separate Claims Examiners

Depending on the causes of action available under state laws, alleged harassers, negligent supervisors, and even human resources professionals may find themselves named individually in harassment or retaliation suits. The potential for a conflict of interest to arise is much greater in a harassment/retaliation lawsuit than most other employment lawsuits. While retaining one attorney to represent both the employer and the alleged harasser may appear to be the most cost effective manner to defend a sexual harassment/retaliation case, joint representation in this context should be rare. Joint representation should generally be used only when an investigation discloses that the employee did not commit the harassment and thus no corrective action was taken against the employee. Otherwise, a conflict of interest between the employee and the employer will exist as an employer may avoid liability by demonstrating that it exercised reasonable care to prevent and correct the alleged sexual harassment or, for common law claims, that the alleged harasser's conduct was outside the line and scope of employment and not condoned by the employer. There may also be strategic reasons to avoid using the same attorney – for instance, to avoid the suggestion that the employer condones harassment or to avoid the possibility of disqualification. *See Lawyers As Investigators: How Ellerth and Faragher Reveal A Crisis of Ethics and Professionalism Through Trial Counsel Disqualification and Waivers of Privilege in Workplace Harassment Cases*, 24 J. Legal Prof. 261, 340 (2000). Notably, because joint representation always gives rise to the potential for a conflict mandating disqualification, the safest approach for lawyers and clients is separate counsel for the employer and individual defendant. Further, if duties of loyalty and confidentiality mandate a lawyer withdraw from representing both clients, the financial cost of attempted joint representation may be far more than beginning with separate counsel from the outset.

If the employer is confident that the plaintiff's allegations are entirely without merit and counsel determines there is no conflict that would preclude joint representation, the parties may decide to proceed with joint representation to save costs and to ensure a uniform defense strategy. If this is the case, the attorney should send both the employer and the individual defendant a conflicts letter pursuant to Rule 1.7 of the ABA Model Rules of Professional Conduct (and comparable state rules) that states: (1) the conflicts of interest that may arise between employer and employee during the course of representation; (2) the ethical standards that may prohibit a lawyer from representing a client when that representation conflicts with the attorney's responsibilities to another client; (3) the possible added cost and disruption if it were necessary for either or both to retain new counsel later; (4) that if in the future, the attorney believes representation of both employee and the employer would adversely affect either party, the attorney may withdraw from representing the employee and continue to represent the employer; and (5) counsel may disclose to the employer any information that the employee provides him/her with, and vice versa. The attorney should ensure that the conflicts letter is signed by all parties before proceeding with any significant aspect of the case. *See generally* American Bar Association, *Confidentiality When Lawyer Represents Multiple Clients in the Same or Related Matters*, Formal Op. 08-450.

Situations which require separate defense counsel may also, in some instances, make it necessary for the insurer to create separate claim files and assign separate claim examiners for the individual defendant(s) and the employer. The requirements for separate files/claim examiners vary among

companies and the ethical rules of various states and claims organizations but the essential element is that if there are facts related to one defendant which make it adverse to or create a conflict with another defendant, separate claim files and examiners must be considered. A single claims person cannot be expected to compartmentalize privileged information which must be kept confidential from one defendant to another.

B. Coordinating Defense, Billing, and Settlement Strategy with Multiple Lawyers/Claims Examiners

If separate counsel must be retained, the employer may recommend an attorney to the employee, but it should leave the final decision to the employee so as to avoid any suggestion that the employer is controlling the defense. Additionally, the insurance carrier may have the right and duty to defend pursuant to the applicable insurance policy, and that carrier may have an approved list of defense counsel from which the attorneys will be assigned. To ensure a uniform defense moving forward, the attorneys for the employer and the alleged harasser should enter into a written joint-defense agreement, if possible and enforceable in the relevant jurisdiction, making clear that communications between the parties and their attorneys as to defense and settlement strategies are to remain confidential.

While the individual defendant and the employer are often aligned in denying the allegations and defending the suit, corporate and individual defendants may have differing views on settlement. An experienced claims examiner may want to seek early resolution in a case he or she views as high exposure and the examiner's view may not be shared by corporate and individual defendants fearing a settlement may encourage more claims or constitute an admission of guilt. A more business-minded approach to settlement may be facilitated by ensuring the employer and individual understand early in the litigation the potential exposure, the anticipated time demands of litigation, and the likely defense costs through trial. An initial status report, which includes a legal and factual analysis of claims and defenses, evaluation of summary judgment prospects, report of recoverable damages, and evaluation of settlement value based on exposure, may bring all defendants to the settlement table and avoid surprise objections when negotiations begin.

When separate claim files are established for a single case, there will still need to be coordination at some level within the insurer to address issues with payment of deductibles or retentions and limits of liability. When an employer is successfully dismissed from a case that continues as to an individual, the corporate employer as the Named Insured is likely to have the continued obligation to satisfy the deductible. If there are differing opinions between defendants regarding settlement but only one defendant has financial exposure for defense costs within the retention, this may also create tension and conflicts for defense counsel and claim examiners to manage. In complicated cases with significant exposure and multiple defense counsel, both defense counsel and the claim examiners must be cognizant of eroding policy limits and, where possible, share and divide the work to preserve funds to address the financial exposure of the defendant insureds.

C. Dealing with Conflicts When They Arise

If a conflict of interest does not arise until after joint representation has commenced, whether the attorney may continue representing either of the parties is governed by Rule 1.9 of the ABA Model Rules of Professional Conduct and comparable state rules. Model Rule 1.9 provides that where the interests of the two parties are materially adverse, an attorney who has previously represented a client in a matter shall not thereafter represent another party in the same or a substantially-related matter unless the former client gives informed written consent. The rule also states that an attorney shall not use confidential information obtained from a former client to the former client's disadvantage. The conflicts letter signed at the outset of the case should address who the attorney will continue to represent (usually the employer)

and whether the employer will continue to pay defense costs for the employee. If vigorous representation cannot be provided without compromising confidences of a former client or if disclosing confidences is inevitable, counsel may have to withdraw from representing both clients and new counsel may have to be hired. *See generally* ABA Model Rules of Prof'l Conduct R. 1.7 cmts. 4 & 31.

III. Recurring Coverage Issues

Claims under Employment Practices Liability Insurance involve many coverage issues found in other types of claims made policies:

- Is the submission from the insured a Claim as defined by the policy?
- Was the Claim made (and reported, if required) during the policy period?
- Did an Insured have knowledge of the Claim or circumstances which could lead to a claim prior to the inception of the policy?
- Did the Wrongful Act occur after the policy's retroactive date?
- Is the Claim related to a prior claim in the same policy period or from a prior policy period?
- Are all of the defendants "Insureds" as defined by the policy?
- Do the alleged damages constitute Loss as defined by the policy and insurable loss under the law of the relevant jurisdiction?
- Do the alleged damages arise from a contract which would fall within a breach of contract exclusion?

A coverage issue that is unique to the EPLI context arises from the fact that certain employment actions necessarily begin with notice to an administrative agency such as the EEOC or a state or local Department of Human Rights. Although such a notice is almost always a Claim as defined by the policy, many insureds remain unaware of this and fail to report the pre-suit notice of employment claims. Other coverage issues unique to employment claims are the exclusion of damages arising from "Employment Contracts" and the exclusion for violations of the FLSA or other similar statutes.

As with all insurance policies, employers and their counsel should read and be familiar with the terms and requirements of their EPLI policies. When in doubt, notice should always be provided to the place and/or person identified in the policy. Employers and their brokers also need to be sure to provide notice to excess insurers to protect against the potential for runaway claims.