

Discrimination claims

What to do when faced with a complaint of employee discrimination

If you receive notice that you are facing a discrimination complaint, your first inclination may be to react instantaneously to make the problem go away. But that would be a mistake, says Rodney G. Moore, a shareholder at Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.

Complaints are often filed based on the acts of managers and employees, but they can also be filed against the company based on the alleged misconduct of owners, executives or in-house counsel; and, unlike other charges filed against your company, the naming of owners or officers in the complaint inserts an added level of complexity to an already complex process.

As a result, when facing a discrimination complaint, there are steps you should take within the first days of learning of the complaint to help minimize the future impact.

“Within 24 hours, if the complaint names you personally, bring in a trusted adviser to help you make initial decisions, including the decision of retaining counsel,” says Moore. “Hopefully you have an existing relationship, but, if not, ask your adviser to identify the best counsel to meet your needs.”

Smart Business spoke with Moore about the steps to take when served with a discrimination complaint.

What is the first thing you should do after learning that you, your officers or your company is facing a discrimination complaint?

The No. 1 rule in responding to such a crisis is to avoid allowing the accused to make quick decisions based on emotions. Understand that upon learning of the complaint, the accused — even if it's you — likely lacks the emotional state of mind to make good, informed choices about the case. Often, the emotional response is ‘that liar, she is out of here.’ In the case of an owner or CEO, you should immediately consult with a trusted adviser to advise you in the decision-making process. That person can be another company executive or officer, in-house counsel or a vested manager, but make sure that it is someone who will be open and honest with you and not just tell you what he or she thinks you want to hear.

Who else do you need to contact?

If you are insured, put your insurance carrier on notice that a complaint has been filed. Your insurance carrier, through appointed counsel, can help to respond to an Equal Em-



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ployment Opportunity Commission charge or an internal complaint. The carrier can be a valued ally as you work to fight the complaint against you.

Whether choosing counsel on your own or using counsel appointed by your insurance carrier, make sure that that person has the breadth and depth of experience to match the parameters of the case. Although many attorneys may have peripheral experience in this area, you will be better served by working with someone who specializes in discrimination complaints.

How does a company learn a complaint has been filed against it or its officers?

Every employer should have a policy that addresses reporting and investigating complaints of discrimination: Employees often use this internal process. Additionally, all federal discrimination and most state discrimination lawsuits require an employee to file a Charge of Discrimination with the state or federal agency tasked with investigating discrimination before a lawsuit is filed. However, if the lawsuit is the employer's first notification on an employee complaint, the employer should promptly investigate each claim contained in the complaint. That should be done with the direction of counsel so that the re-

sults of the employer's investigation, within limits, can be shielded as work product.

If the employer has already investigated the employee's complaints, it should review the investigation files to determine whether it is necessary to take additional steps, such as obtaining written statements from witnesses or gathering further comparator information.

What other steps should an employer take?

Federal law requires that you create and send out a document preservation memo to all key parties, including direct supervisors, HR and the IT department. Although it can be costly to preserve every piece of information that might apply to the case, it can be even more costly not to do so, as the courts don't look kindly on defendants who have not taken care to preserve documents or those who have made a point of destroying them.

In addition to preserving documents, you should begin gathering together important documents, such as personnel and investigation files, comparator files, wage records, training records, and policies and procedures manuals that may be used as evidence in the case. You don't want to wait until a day before a court date to try to hunt down documents relevant to the case.

You also need to do an overall assessment of the case. Is it something that the company can get out of with a simple resolution, such as reinstating a disgruntled employee to a position, or will it require protracted litigation to resolve?

What mistakes do employers often make when first learning of a complaint?

Firing someone can be a knee-jerk reaction to learning of a complaint, but you should avoid taking any immediate action, as that could color the case against you. In addition, federal law prohibits firing someone as retaliation for filing a complaint against you or your company. Make sure that you understand the law of retaliation as it relates to an employee claiming retaliation on top of the discrimination complaint already filed. It is not uncommon for an employee to lose the underlying discrimination lawsuit, but prevail on a retaliation claim. Courts have broadened the definition of retaliation to include any act that has the impact of dissuading an employee from filing a charge of discrimination. <<

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