

PUBLICATION

You've Got Mail! The EEOC's Latest Investigation Tactic Could Be Coming to Your Corporate Inboxes

Authors: Whitney M. Dowdy

September 12, 2013

In the past few years federal agencies such as the Equal Employment Opportunity Commission (EEOC) have intensified their investigation and enforcement tactics. As recently as June, the EEOC did so in dramatic fashion, initiating contact with thousands of employees of Case New Holland Inc. (CNH) through the Company's own network, in an effort to build a class action lawsuit against the Company for age discrimination.

On August 1, 2013, CNH filed suit against the EEOC and one of its investigators, in the United States District Court for the District of Columbia. The Complaint for declaratory and injunctive relief alleges that the EEOC sent 1,330 emails to CNH business email domains, without notice to CNH, in order to solicit plaintiffs to commence a class action lawsuit against CNH. This new investigation tactic was employed prior to any finding of discrimination being made and without notice of any kind to CNH.

According to the Complaint, the EEOC initiated its investigation of CNH, and allegedly affiliated business entities, in March of 2011. CNH actively participated in the ongoing investigation, including but not limited to producing more than 600 megabytes of data requested by the EEOC. After the production of that data, for a period of approximately eighteen months, there was no communication from the EEOC about the investigation, and no determination was issued. On June 5, 2013, however, CNH learned that the EEOC sent a mass email and web-linked inquiry to 1,330 CNH (or affiliate) business email addresses of CNH employees located throughout the U.S. and Canada. These employees included more than 200 managers or others with authority to bind the Company.

The email received by CNH employees contained a link to a series of questions. When employees clicked the link they were taken to the survey page which stated "Please complete and submit this electronic questionnaire as soon as possible." CNH maintains that the survey was biased and that the questions related to age discrimination were leading and suggested answers adverse to the interests of CNH. Moreover, and potentially most troubling, there was no information in the email or on the survey about the employees' right not to complete the questionnaire.

In its Complaint, CNH argues that the EEOC's aggressive tactics were not only a disruption to its normal business operations, without prior notice to the Company, but were also in violation of the Administrative Procedures Act, and the Fourth and Fifth Amendments to the United States Constitution. Specifically, CNH alleges the EEOC has not issued any rule or regulation allowing it to send "mass business email inquiry of employees through the use of an employer's computer network" and therefore its action violated the Administrative Procedures Act's prohibition against federal agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," among other things. The Complaint further alleges the EEOC's actions violate the agency's own Compliance Manual by not providing CNH the right to be present during questioning of its employees, and finally that the EEOC's use of CNH's computer network was an unconstitutional trespass on CNH's computer network property.

In response to requests for information from CNH prior to the filing of the lawsuit, the EEOC stated that the use of the email and survey was simply an efficient way to identify potential class members. As of the date of this article, the EEOC has not formally responded to the Complaint.

We will continue to monitor this lawsuit and the Court's decision regarding the EEOC's increasingly aggressive investigation schemes to determine what employers might expect in future EEOC investigations.