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LABOR BRIEF RESPONDING TO A DISCRIMINATION INVESTIGATION

Background

This labor brief provides tips for responding to an investigation of discrimination by either the federal Equal Employment Opportunity Commission (EEOC) or the state Human Rights Commission (HRC). Since it is much more likely that you will face an HRC investigation, this brief will focus on the state agency.

This brief is not intended to provide specific legal advice. If you have a specific legal issue, you should contact an attorney, and Farm Bureau has an attorney referral program for labor and employment matters.

On the subject of attorneys, a preliminary question is this: Should you hire an attorney when you are contacted by HRC or EEOC. The answer depends on whether or not you feel that there is significant liability to your company. The HRC and EEOC will discontinue an investigation if the plaintiff (your worker or former worker) files an action in court for the same matter.

The Result is a “Finding.”

The majority of investigations result in a finding of either “no reasonable cause” or “administratively closed.” The other potential finding, the one we don’t want to see, is a finding of “reasonable cause.” **Only three – five percent of the HRC claims end with a finding of reasonable cause.** However, about 15 percent of cases settle with some benefit to the plaintiff, generally obtained during the mediation process, which is discussed below.

When a case ends in a finding of reasonable cause, the HRC tries to obtain corrective action, which could be restitution to the plaintiff, policy changes at the company, management training, etc. If there is no agreement on corrective action, the case is referred to the Attorney General’s office, and from there to a hearing with another administrative agency. In addition, if the case is closed with a finding of reasonable cause and there is no mutually agreeable settlement, the plaintiff may then hire a private attorney to pursue the matter.

If a complaint is filed with both the EEOC and the HRC for the same matter, only the first filed case will be investigated. If you receive a notice from the HRC and you are in the process with

the EEOC, you should immediately notify the HRC and they will drop the claim. From a practical standpoint, EEOC investigations take a long time. It is not uncommon for the investigation to take two years or more, while HRC investigations are quicker, generally lasting 90 days or less.

What are the Common Employment Related Claims?

The Washington Law against Discrimination (WLAD) is actual many laws codified at RCW Chapter 49.60. Any individual who believes that he/she has been discriminated against based on “protected class” status can file a claim. There were 792 employment based claims filed in FY 2008, and the top five claims, in order of prevalence, were: *disability, sex, retaliation, race, and age*. Many plaintiffs allege more than one type of discrimination. Employers are beginning to see an increase in claims based on veteran status and sexual orientation, but these are still rare.

Procedure and Response

When the HRC receives a complaint, it is screened for several factors and if accepted by the agency, is assigned to an investigator, who is tasked with conducting a neutral and objective fact finding. After the plaintiff is interviewed, the employer generally receives a letter requesting information, and after the response is evaluated, there may be a visit to the work site, interviews with co-workers, etc. Although the threshold for a complaint is low (I was discriminated against), the burden of proof is on the plaintiff to prove that discrimination occurred. For example, many complaints revolve around the theory that the plaintiff was “treated differently” because she was a different race, sex, or some other protected class. In this case, the burden would fall to the plaintiff to establish: 1) she was a member of the class; 2) she was subjected to an adverse employment action by the employer; 3) she was treated differently than others who were not part of the protected class; and, 4) there is a causal link between the adverse treatment and the plaintiff’s protected class.

Suggested Response

1. Call the investigator as soon as you receive the complaint. Establish rapport. One goal of the investigator is to close the file as quickly as possible. If you can establish that you are a reasonable person and you are willing to cooperate, it will make it easier, especially if the plaintiff wastes the investigator’s time or appears unreasonable.
2. Request more time if you need it to respond. It is almost always immediately granted.
3. Tell your story. Respond in writing, and attach the information that you feel is necessary, such as a statement from a co-worker. Summarize the plaintiff’s relevant work history.
4. Many times you will get a ‘laundry list’ of requested documents. Treat this as a suggested list. You don’t need to send in all of the things on the list, but include the ones that are asked for if they are relevant to your case. If the investigator needs more or different documents, he or she will ask you for them.
5. Address the allegations of the complaint, and if you can, think about how to respond to the elements the plaintiff will need to prove, for example, that there was disparate treatment of a protected class.
6. Respond on time, be brief, and respect the investigator’s time.
7. If you have insurance for these types of issues, contact your insurance agent immediately.

Mediation or Early Resolution

You may need to make a decision as to whether you will participate in voluntary mediation. There is a significant difference between EEOC mediation and HRC mediation. In the EEOC, the mediation is conducted by a third party contracted mediator, and facts revealed in the mediation are not part of the investigation record and can not be used at trial. In the state HRC process, the alternative dispute or early resolution meeting is used as a part of the fact finding by the investigator. If the parties do not come to agreement, the HRC investigator will use information learned at the meeting to issue a finding.

Should you participate in mediation or the alternative dispute process? It depends. The state alternative dispute process is especially tricky. If the plaintiff no longer works for you, you have a strong case, the plaintiff does not have an attorney, and especially if the plaintiff is asking for an unreasonable settlement, it may be an easy choice. Remember, at the EEOC mediation you will probably be asked by the mediator to make a “good faith” offer to settle the case, i.e. a payment. Before agreeing to mediation or alternative dispute resolution, assess the merits of the case and give it some thought.

Other Issues or Questions

You can find information about the EEOC process at <http://eeoc.gov/>, and information about the HRC investigation at <http://hum.wa.gov/>. If you have received notice of an EEOC or HRC investigation, feel free to contact Kim Bresler, employer services manager, kbresler@wsfb.com, or Dan Fazio, employer services director, dfazio@wsfb.com.