THE LAW OFFICES OF ALEX W. CRAIGIE

You've Been Sued, Now What? A Roadmap Through An Employment Lawsuit

California employers facing their first employment lawsuit can be in for a rude awakening. Such lawsuits are a harsh introduction to the challenges and biases of the American legal system. They're also a massive drain on resources, particularly for a small business.

The aim of this White Paper is to help you through this process. We believe that knowledge is power and we want to help you understand how these suits typically play out, at least in California courts. We also think you should be prepared for the challenges you are going to encounter as your lawyers prepare your defense and respond to demands by the court and the party who is suing you. You should also get an idea when there may be an opportunity for your lawyers to ask the court to dispose of the case. Finally, we discuss when it might logically make sense to attempt to reach a settlement (if you conclude it's in your best interest to do so).

A View From 30,000 Feet

At the outset, let's try to maintain a constructive mindset. California can be a wonderful place to live and do business. But employers here face the strictest employment laws anywhere. To make matters worse, our laws generally allow an employee who wins her suit to also recover attorney's fees. For this reason, the lawsuit may be driven as much by a greedy attorney as by a disgruntled employee.

The best way to avoid these lawsuits is to take steps in advance to learn and carefully follow the rules governing the employment relationship. Fortunately, resources are available. We frequently provide free or low-cost training, alerts and updates, to help prevent your company from facing a claim or suit. When an employee complains to you, or you face the decision to fire or discipline an employee, we recommend you consult with an employment attorney or experienced HR consultant.

Before The Lawsuit Was Filed

Employment disputes often begin with an administrative claim. Some laws require the employee to exhaust certain administrative remedies, which could include bringing a claim with the Equal Employment Opportunity Commission (EEOC) or a similar state agency.

In many instances, you may have already investigated the claim internally. The importance of a prompt, thorough and well-documented investigation of employee complaints cannot be overstated. While many complaints never ripen into a lawsuit, the *work product* of the investigation (i.e., the notes or statements) should be written and treated as though it will be the first exhibit shown to a jury.

When You Receive the Summons and Complaint

When you become aware of the lawsuit through personal delivery of the summons and complaint, it triggers two (2) important obligations. First, identify any policy of insurance that could conceivably provide coverage, and notify that insurance carrier in writing of the suit. Resist the temptation to conclude—without obtaining a thorough opinion directly from your carrier—that insurance coverage does not exist. Early notification is crucial, as a carrier may point to unreasonable delay in giving notice as an excuse to deny coverage.

Second, determine when a "response" to the complaint is due and prevent a "default" from being entered. A default can lead to an automatic judgment against the company, and can be entered if you do not formally respond within the statutory period (often 30 days). If there is insurance coverage, your carrier should assign an attorney who will respond to the complaint. If there is no insurance, or the insurance company is slow to respond to your notice, you must promptly retain an attorney to protect against a default.

A word about choosing a lawyer. Employers often look to the lawyer who faithfully assisted the company in drafting contracts, negotiating leases or obtaining financing to defend them in a lawsuit. This may not be wise, depending on whether the lawyer has experience defending employment disputes. California employment laws are complex. We recommend interviewing alternative counsel. It is also wise to ask for an estimate of the fees and expenses that are contemplated, understanding that many factors can impact the costs of defending any lawsuit. Many law firms, including the Law Offices of Alex W. Craigie, are pleased to discuss alternative fee arrangements, including reduced rates, blended rates or flat fees, to help manage expenses and make them more predictable.

At this stage, most experienced attorneys will draft a "litigation hold" memo that instructs certain employees to preserve documents concerning the subject of the lawsuit. Preserving these documents can be crucial to defending the suit, and a "hold" that is followed will help protect you against being criticized or punished by the court for failing to preserve documents that could be "evidence."

It may also become necessary to search for electronically stored communications (email) with or about the employee who is suing you. If followed, the instructions in the "hold" will help ensure these are preserved in the event the company periodically purges emails from its system.

Responding to the Complaint

Depending on the nature and quality of the claims contained in the complaint, your lawyers will prepare and file a response. If the complaint is insufficient in some crucial aspect, they may file a challenge to the complaint and asks the court to review it in light of the relevant law.

Alternatively, if the complaint is adequate, your lawyer will file a response called an "answer," which admits or denies the allegations in the complaint. The answer also identifies known "defenses" you expect to rely on. If proven, a defense could absolve or reduce your liability.

Discovery

Once the complaint and answer have been filed, the "discovery" phase of the case typically commences. "Discovery" refers to both parties' gathering of information and documents necessary to pursue (or defend) their side of the case. Responding to discovery can be tedious, expensive and a time-consuming drain on company resources. Although it can shape the outcome of the case, companies targeted by employment complaints sometimes try to cut corners in responding to discovery. This is a huge mistake.

The most common discovery methods are document requests. Attorneys representing the employee send "requests" (or "demands") for certain categories of documents or tangible items. The company's attorney will work with contacts within the company to find the requested materials. These are copied, numbered and provided to the requesting party. If any of the materials being sought would infringe on employee privacy or reveal company secrets, the court may be asked to enter a "protective order" to limit dissemination.

All too frequently, *initial* efforts to find documents are too shallow. Again, detailed searches can be tedious and they now must include information stored electronically (including emails). Employees assisting in the information gathering process sometimes fail to grasp the significance of certain documents. This can result in key "game changing" or "smoking gun" documents being discovered for the first time during subsequent searches much later in the suit.

Few things seem to frustrate our clients more than learning late in the game that a previously defensible case has suddenly "gone bad" based an adverse document was found late in a case where a more diligent search would have uncovered the document much earlier. There is also the risk that the court will learn of the delay and presume that you were trying to hide something, leading to severe penalties or sanctions. Accordingly, it is a good idea to devote significant attention and resources to searching and accurately responding to document requests the first time.

Another common discovery tool, "depositions" are sworn question and answer sessions that are recorded *verbatim* by a court reporter and preserved in a booklet that is later used as evidence. They are often also videotaped. Here, again, because of the drain on time and resources associated with properly preparing an employee for deposition, the temptation exists to prepare only minimally. Another major mistake. Cases that ultimately proceed to trial can be won or lost *solely* on the testimony of a key or even minor witness in deposition. Effectively responding to deposition questions is an art and seasoned trial lawyers usually agree that every hour spent preparing the employee-witness for his or her deposition is an hour well spent.

Additional discovery methods include interrogatories (written questions) and requests for admission. The company's lawyer typically drafts responses to this discovery. However, he or she must receive your cooperation and candid information to ensure the responses are complete and correct. The term "objection" is used by attorneys responding to discovery to note technical problems with questions or requests, which justify refusing or limiting a response.

While the discovery phase of any lawsuit can seem torturous, it is crucial to the company's defense that its attorneys receive full cooperation from management, human resources or other departments.

Resolution And When Settlement Negotiations Occur?

Like most cases, employment lawsuits eventually end in settlement, "summary judgment," or a verdict following trial. Your attorney may ask the court to throw out the lawsuit using a procedure called summary judgment. After the parties have completed most of the discovery, the company files a written "motion" which "moves" the court to consider the evidence and grant judgment in favor of the company. Attorneys sometimes describe this process as a "trial on paper," and believe the expense of making such a motion is justified because, if successful, summary judgment reduces costs and eliminates the risks of going to trial.

In the employment context, motions for summary judgment are typically supported by declarations of key witnesses. Your lawyer will work with the witnesses themselves to draft declarations that are both factually accurate and tend to prove a fact of consequence to the case.

Unfortunately, because summary judgment requires the judge substitute his or her judgment for the jury, courts routinely deny such motions if they find that even a single material issue of fact is reasonably contested by the evidence. This means summary judgment is rarely granted in "he said/she said" situations.

While trial may seem like a familiar procedure, few people outside of professional trial lawyers really appreciate the risks of letting a jury decide the outcome of a case. Although it is necessary for at least one party to request a jury

trial, and employers might feel they would get a better shake by letting a judge decide the case, the employee who is suing will, in most cases, request a jury.

In addition to the risk that the jury will sympathize with the employee or punish the company with a huge verdict, preparing for trial and presenting the company's case can be extraordinarily expensive. One party is guaranteed to lose at trial, which also creates the risk that he/she/it will "appeal" a ruling, asking another court to second-guess the trial judge. This leads to further expense and delay in concluding the case. Finally, as mentioned, California and federal employment laws typically allow an employee who wins a case to receive her attorney's fees. These can exceed the jury verdict. For these reasons, trial can be the least attractive method of resolving a case.

Thus, most cases resolve through settlement. While settlement discussions can occur and be meaningful at anytime, there are a few key opportunities when negotiations may prove particularly fruitful. The first is at the very beginning, because neither party has yet invested significant money in pursuing or defending the case. At this point, however, the parties (or their lawyers) may not know or appreciate a weakness of their case. Thus, negotiations at this stage can suffer from either/both parties' overconfidence.

A second settlement opportunity can arise after the first session of the employee's deposition is completed. The employee may appreciate for the first time the challenges of pursuing the lawsuit, particularly if the deposition delved into sensitive or private topics. The deposition may also have revealed problems—or strengths—of the employee's case.

Another common time to discuss settlement is after a motion for summary judgment has been filed but before it is ruled upon. There is always some risk to the employee that the court will grant the motion, meaning she (and her lawyer) could get nothing from the suit. Depending on the strength of the motion, this can be a rare opportunity to receive a discounted settlement.

The use of a "mediator" or neutral third party can help settlement discussions and sometimes penetrate through attorney posturing or party hostilities to make negotiations more meaningful. Mediators are expensive, but they often possess special experience in employment law, jury trials, or both, making their participation worth the investment.

Conclusion

California employment lawsuits can be a bewildering experience, particularly for a small company. Owners, management and employees can find themselves pulled in many directions as lawyers work to craft an effective defense. Hopefully this paper provides a useful roadmap of the process.

With locations in Los Angeles and Santa Barbara, **The Law Offices of Alex W. Craigie** helps Central and Southern California employers prevent, manage and resolve employment disputes in a logical and cost-effective manner. Reach us at (323) 652-9451 or at Alex@CraigieLawfirm.com.

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