



Navigating Common Employment Complexities in Today's Corporate World

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Agenda

- Policies & Procedures
 - EEO and Wage & Hour Policies
- Internal Investigations
- Government Investigations
 - Equal Employment Opportunity Commission (“EEOC”) & South Carolina Human Affairs Commission (“SCHAC”) Investigations
 - Department of Labor (“DOL”) Investigations

Policies & Procedures

Policies and Procedure

Must have proper policies and procedures, which should include:

- Equal Employment Opportunity
 - Race, sex, gender, pregnancy, disability, national origin, etc.
- Anti-Harassment/Retaliation
- Workplace investigation
- Confidentiality (to the extent possible)
- Timekeeping & Overtime
- Job Descriptions and Employment Classifications

Updating and Revising Policies

- Reasons for Maintaining and Updating Policies and Procedures
 - Laws consistently change – i.e., recently enacted Pregnant Workers Fairness Act went into effect on June 27, 2023, etc.
 - Provides Reoccurring Notice to Employees
 - First Line of Defense for Internal and Governmental Investigations
 - Establishes Affirmative Defense

Equal Employment Opportunity Policies

Equal Employment Opportunity Policy

- 3 Major Components of EEO Policy:
 - 1. Prohibits Discrimination & Harassment
 - Clearly defines discrimination and other types of harassment, such as race and disability discrimination
 - 2. Requires Employees to Report Violations
 - Provides a process and procedure to report allegations of discrimination and harassment
 - 3. Mandatory Investigations
 - Informs employees of how allegations will be investigated and resolved

Affirmative Defense

A valid Faragher-Ellerth affirmative defense exists if

- (1) the employer exercised reasonable care to prevent and correct any harassing behavior, and
- (2) the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided or to avoid harm otherwise.

Lacasse v. Didlake, Inc., 712 F. App'x 231, 237 (4th Cir. 2018). The 4th Circuit held the following actions were sufficient to establish the employer's first prong of the *Faragher/Ellerth* defense:

- Maintaining a sexual harassment policy that contained avenues for reporting, enforced through the HR department, and providing copies to all employees;
 - Providing small group, on-site harassment training; and
 - Investigating the harassment allegation at issue, per its own policy, and issuing corrective action.
- The Court also held that the employee in question did not report the alleged harassment pursuant to the policy. She informed co-workers, who then informed management.

Losing Right To Assert Affirmative Defense

An employer's affirmative defense to harassment can be lost when:

- The victim has to report the harassment to the alleged harasser
- There are no alternative methods of reporting
- Managers fail to follow-up or respond to complaints
- Managers fail to report complaints to Human Resources
- Human Resources/Employer fail to investigate

Discrimination and Harassment Training Overview

- Courts have said issuing employment policies is not enough.
 - Employers should not solely rely on lower level employees to abide by policies and procedures.
- Management and supervisory employees are the key to complying with these laws.
 - Management and supervisory employees must understand and implement Employer's policies and procedure to be effective
- Employers should conduct at least annual in-person training to management and supervisory employees.
 - During these in-person training sessions, employees should sign-in that each attended to maintain a record.

Training Specifics

- Highlight Policies and Procedures
 - Identify and discuss EEO and Anti-Harassment policies
 - Where are the policies located?
- Reporting
 - Identify appropriate process and procedure to report allegations of discrimination and harassment
 - Who specifically should employees report to? How soon should employees report following an allegation?
- Investigation
 - Explain investigation process, the need to maintain confidentiality, and prohibition against retaliation

Wage & Hour Policies

Timekeeping Policy

- Most employers have a timekeeping policy, but it provides little help
- Detailed policies are helpful for defeating collective action certification along with other allegations of violations of the Fair Labor Standards Act (“FLSA”)
- Policy Pointers:
 - Specifically describe how time is recorded
 - Enumerate when employees may and may not work describing specific activities
 - Create mechanisms for employees to be paid during time they may not work
 - Overtime Reporting Forms
 - Employee Sign Off on Time Records

Policy Pointers (cont'd)

- Place responsibility on employees, but supervisors must also have responsibility
 - Notably, to enforce Supervisors must be aware of the pay policies
- Similar to harassment, require any unpaid time to be reported to Human Resources or payroll immediately
- Create disciplinary scheme for time recording violations
- Policies must be enforced or they are ineffective
- Show caution in changing policies
- Make sure your workweek description is accurate

Avoid Misclassification Issues

- Written Job Descriptions (that are regularly updated) are great ways to prove job duties.
 - Need to clearly define responsibilities and duties
 - FLSA Exemption Status: Administrative, Professional, Executive, Computer, or Outside Sales Roles
- Ensure payroll practices are consistent with salary basis.
 - DOL recently proposed new rule to increase minimum salary basis test to \$55,068 (current level is \$35,568)
 - Equates to an approximate wage of \$1,059 per week as opposed to current \$684 per week.
- Engage professionals before classifying individuals as independent contractors.
- Engage professionals to perform audits.

Internal Investigations

Investigation: First Steps

Interview the Complainant:

- **Ask detailed questions & follow-ups**
- **Are there any witnesses or others to interview?**
- **Has there been any similar misconduct?**
- **Any documents or other evidence (e.g., video)?**
- **Any other relevant information?**
- **Report any retaliation**
- **Confidentiality notice**
- **Obtain a signed statement with close-out provision**

Investigation: Second Step

- Interview each relevant and/or identified witness
- Explain the reason for the interview and why it's important
- Separate page of notes/statements for each witness
- Avoid assumptions or leading questions
- Determine any other relevant incidents, conduct, documents, or witnesses
- Explore inconsistencies
- Confidentiality issues
- Written statement, or rely on notes?

Who	(1)
What	(2)
When	(3)
Where	(4)
Why	(5)
How	(6)

Witness Legal Rights

Witnesses do:

- Have the right to band together with other Team Members and raise concerns about workplace conditions (aka “protected concerted activity”).
- Have the right to complain without threat of reprisal and/or retaliation.

Witnesses do not:

- Have the right to lie or be untruthful (although you shouldn't threaten them).
- Have the right to interfere with an ongoing investigation.
- Have the right to refuse to participate and/or otherwise cooperate.

Investigation: Final Steps

- Interview the accused
- Detailed – ask the same questions in the same order
- Confront on every allegation – insist on a direct response
- Confirm all known witnesses or other facts
- Eliminate any complainant/witness bias or reason to lie
- Address retaliation
- Obtain a Signed statement from the accused and give the accused the opportunity to review and make changes.
 - Have a close-out provision.

Who is Telling the Truth?

You should:

- Evaluate the witness' demeanor.
- Consider any potential motives and/or biases that the witness may have.
- Review any prior history between accused and accuser.
- Ask for help if you need it.

You should not:

- Go into any investigation with any preconceived notions.
- Automatically side with supervision.
- Ignore any concerns that you have about any witness' truthfulness.
- Hesitate to re-interview someone if you believe they are not being candid.

Memorializing and Preserving Investigation Evidence

- Prepare an Investigation Report
- Report Contents:
 - **Introduction**
 - Briefly describe the nature of the allegation
 - Describe the parties and their role to one another
 - Note any information given to the parties at the outset of the investigation
 - **Identify any alleged policy violation(s)**
 - **Description of any interim action taken (if any)**
 - **Scope of investigation**
 - Specify what was reviewed, over what period of time, who was interviewed
 - Reach a conclusion and recommended course of action.

Summary

- List all interview participants, time & date
- Notes should be timely and contemporaneous (or at least appear to be)
- Be accurate, clear & detailed
- Use quotation marks where appropriate to clarify speaker
- Witness signature and dates
- Facts only (no conclusions or thoughts) in retained notes
- Conclusions only in final report
- Legal advice in separate notes marked “Privileged”



Resolution / Disciplinary Action

Resolution

- What is/are appropriate remedial actions?
 - Progressive discipline
 - Last Chance Agreement
 - Termination
 - Reassignment
 - Training
- Determine who will own the final decision
- Meet with complainant? Others?
- Advise all parties against retaliation
- Monitor/follow up where appropriate

Disciplinary Separation

Do:

- **Have a witness**
- **Prepare all necessary disciplinary documents prior to meeting**
- **Be concise; it's not a two-way conversation**
- **Present any severance information**
- **End the meeting and require the employee to leave the premises**

Don't:

- **Argue; this is not a two-way conversation**
- **Allow questions about the decision or attempt to defend it**
- **Express anger even when confronted with false statements or allegations**
- **Allow the employee to talk to co-workers prior to departure**
- **Express regret, even if you feel it**

How to discipline?

- Consistency is the key to discipline.
- Progressive discipline can be a good approach.
 - It can give the opportunity for improvement.
 - It can provide for a clear plan of action if improvement does not occur.
 - It can create more consistent outcomes, and it can be easier to explain to EEOC or Court.

Common Legal Challenges To Internal Investigations

Common Problems With Investigations

- Failure to conduct investigation in a timely manner.
- Failure to interview all “potential” witnesses.
- Failure to document all interviews and conversations.
- Failure to recognize and/or address all allegations.
- Failure to offer the complainant the opportunity to offer more evidence.
- Failure to inform complainant about the results of the investigation.

The Delayed Investigation

- Typically brought about when accuser/complaining Team Member has raised the issue multiple times.
- How long is too long?
- Too much delay can impair or damage company's defenses to harassment complaints, particularly sexual harassment.
- Typically, excuses will not be accepted:
 - Travel
 - Workload
 - Covid-19 quarantine issues
- When in doubt, or when overwhelmed:
 - Get help.
 - Consult with other HR personnel.
 - Continue to communicate with complaining Team Member. Keep them updated.

The Missing Witness

- Often, plaintiffs in litigation will contend that not enough witnesses were interviewed and/or the “right” witnesses were not interviewed.
- Again, overlooking a critical witness can damage company’s ability to claim certain defenses AND undermine your credibility as a Human Resources professional and investigator.
- To prevent such accusations:
 - Carefully consider witnesses named by accuser and accused. Determine if they have, or even potentially have, pertinent information.
 - Document reasons for NOT interviewing named witnesses (example: did not work in the area at issue at the relevant time, out on medical leave, etc.).

The Road Not Traveled

- Team Members may also allege that some or part of their concerns were not addressed, that they had more evidence, or that they never got feedback.
- They may also allege retaliation after the fact.
- To address such allegations:
 - Make sure you understand the concerns in the initial discussion.
 - If necessary, have the complainant write down his/her concerns.
 - Ask questions such as, “Is that all?” or “Anything else you want to address?”
 - Ensure completeness of investigation in follow-up discussions.
 - Continue to ensure no retaliation.

Ineffective Investigations Can Be Detrimental

- Erode confidence in the process.
- Exacerbate the underlying problem.
- Create divisiveness and/or destroy teamwork.
- Discovery Concerns.
- Create independent grounds for liability.
 - Retaliation
 - Tort Claims
- Waiver of important defenses.

Government Investigations

EEOC & SCHAC Investigations

EEOC and SCHAC Charges

- US Equal Employment Opportunity Commission (“EEOC”) is a Federal Agency
- Shares concurrent jurisdiction in South Carolina with The South Carolina Human Affairs Commission (“SCHAC”)
- Investigates specific laws:
 - Title VII of Civil Rights Act of 1964;
 - Equal Pay Act;
 - Americans with Disabilities Act
 - Age Discrimination in Employment Act;
 - Genetic Information Nondiscrimination Act.
- Employees are only eligible to file Charges of Discrimination with either the EEOC or SCHAC, not independent contractors.

Filing a Charge of Investigation

- In South Carolina, 300 days from last act of discrimination.
- The 300-day limitation operates as a statute of limitations.
- A Charge is the “first step” in an employment lawsuit.

Initial Considerations After Receiving Charge

- Employer should engage counsel to review & prepare position statement.
- Instruct all personnel who may have relevant documents that documents should be retained.
- Remind employees involved in the charge that the law prohibits retaliation.
- Notify your EPLI carrier (if applicable).

Why Should Employer Retain Counsel for Position Statement

- The EEOC will share the position statement with the charging party.
- The employer's position statement is likely admissible in court.
- The employer must identify a non-discriminatory reason for the adverse action complained of.
- The employer will be stuck with the proffered reason set forth in the position statement, if litigation ensues.
- Position statement is the “first step” in an employment lawsuit.

Two General Outcomes for EEOC Charge

1. EEOC concludes there is no reasonable cause to believe discrimination occurred and issues a Dismissal and Notice of Rights.
2. EEOC determines reasonable cause to believe discrimination occurred and issues a Letter of Determination inviting the parties to resolve the charge through the conciliation process.

Department of Labor Investigations

Department of Labor Investigations

- What do they investigate?
- Responding to DOL investigations
- Limitations on Settlement
- No damages for record-keeping violations. 29 usc sec. 216(b).

What does the DOL Investigate?

- Department of Labor conducts investigations into violations of the Fair Labor Standards Act (“FLSA”).
 - Generally FLSA requires:
 - Sets minimum wage of \$7.25 per hour;
 - Requires Employers to pay overtime, at the rate of time and one-half, if employees work more than forty (40) hours in a given workweek; and,
 - The FLSA requires employees to maintain payroll records for three (3) years.
- The FLSA is also enforced by private lawsuits. Lawsuits can be brought on an individual or collective basis.

DOL Investigations cont. . .

- DOL has statutory right to obtain time and pay records and identifying information
- DOL has the right to make surprise visits at the Company's premises and obtain payroll and time records
- DOL can also interview certain employees in private to verify payroll and time records and to identify whether specific duties of workers
- DOL Investigators are typically NOT attorneys

Responding to DOL Investigations

- Retain Outside Counsel
 - Retaining outside counsel provides a stop gap between the DOL and Employer
 - Allows counsel to review specific records before providing and producing to the DOL
 - Once records/documents have been provided to the DOL, it is difficult to control narrative
 - Also allows counsel to identify any issues prior to production
- Participate in management interviews
- Prepare witnesses, take statements
- Negotiate with DOL prior to any formal decision

Results of Investigations

- Form WH-56 - “Summary of Unpaid Wages”
- Penalties can be severe:
 - Backpay for unpaid overtime
 - Liquidated damages (unpaid wages multiplied by 2)
 - Civil Money Penalties
 - Attorney’s fees.

Questions?



350 Attorneys.



19 Offices.



1 Firm.

Results Matter.