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Workforce
MANAGEMENT

What to Do When an HR Employee Sues

When an HR staffer alleges employment discrimination, it's automatically a different kind of claim. Here's how to proceed when the claimant is someone who is likely to know damaging, embarrassing or unflattering information about the company—and might be willing to use it to bolster a case. It's not all bad news, however. Sometimes it's easier to deal with an HR claimant.

By Dexter Hamilton

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The person who opens the mail in the human resources department picks up an envelope and sees the return address of the local EEOC office. "Another employment claim," he thinks.

The prediction proves correct. The envelope holds an employment discrimination claim against the company. This, however, is no ordinary claim. This claimant is an employee in the company's human resources department. What should the company do?

First the company should recognize that claim is different from other claims, and the differences are both negative and positive. This article provides an analysis of both perspectives and some recommendations on handling such situations.

The negatives

Executives must immediately confront the fact that an HR claimant might know damaging, embarrassing or unflattering information about the company. Every organization experiences regrettable events or has employees who make mistakes or exercise poor judgment.

The HR claimant may have received complaints from other employees, investigated incidents or counseled others in connection with employee problems. Possibly privy to internal investigations as well as disciplinary or needed remedial action, the claimant could attempt to use this irrelevant but negative information to confuse issues or embarrass the company to gain advantage in their claim.

Employee problems sometimes progress into actual litigation against the company, and HR staff frequently assists the company with litigation.

In addition to possessing information about the company's approach to litigation or the strategy in a particular case, the claimant may have had privileged communications with the company's lawyers. While this information may be protected by the attorney-client privilege or the attorney work product doctrine, it is important to determine whether the claimant had access to confidential litigation information.

The company's settlement philosophy and negotiation strategies are some of the most sensitive litigation information that HR professionals know. The HR claimant may be aware of the amounts, terms or rationale for settlements that the company reached with other employees.

While irrelevant, this highly confidential information could be costly to the company. For example, settlement demands for HR claimants may be strikingly similar to settlements that the company actually reached with other employees.

In addition, employment claims frequently highlight oversights, flaws or inconsistencies in the company's policies and procedures. As these company rules are applied in particular situations or are challenged by employees, management and HR may discover that certain policies and procedures are out of date legally or are inadequate in light of the company's current operations or needs. Aware of these weaknesses, the HR claimant may carefully characterize their claim to exploit known deficiencies in policies and procedures.

Even where policies and procedures are current and completely suitable, company rules may not always be applied consistently. The company may show top performers or employees with certain personal relationships more leniency than other similarly situated employees. The HR claimant may be aware of exceptions and could use this information to resist an otherwise valid disciplinary action.

For example, an HR claimant terminated for excessive absenteeism or lateness could know of instances where these problems were overlooked with other employees. Suddenly, a valid termination could morph into an allegation of unfair treatment based upon age, gender, race or disability because of leniency showed to other employees with similar performance issues. While any employee could potentially employ this tactic, the HR claimant is likely to have more access to such information.

Perhaps the most awkward scenario exists when the HR claimant continues to work while their claim is pending. The claimant would be shielded from the investigation of the claim, but that person may have friends in the HR department privy to sensitive information.

In addition, the claimant could have acquaintances throughout the company. People naturally talk about their claims against their employer.

A chatty HR claimant can do particular damage. Like a state trooper who complains about traffic laws or a doctor who laments on the poor quality of health care, an HR employee who complains about unfair treatment by the company could cause other employees to have less confidence and respect for the company and its policies and procedures.

The positives

HR employees asserting an employment claim against the company may have some advantages. But when confronting such a claim, the company can have the upper hand.

Investigators, mediators, judges and juries may assume the HR claimant has superior knowledge of the company's policies and procedures, including available resources, employee

rights, reporting obligations, notice requirements and grievance procedures. They may also credit the claimant with a clear understanding of federal statutes, such as Title VII, FMLA, ADA or ADEA. An HR claimant's failure to act on this information will be less tolerated than with other, less knowledgeable claimants. Several other factors may make resolving these disputes a bit easier:

- Often privy to information about other claims, HR claimants may recognize that the vast majority of such claims are resolved with little or no payment.
- Familiarity with the negotiation process and outcomes could result in realistic demands, thereby making settlement, if appropriate, easier to achieve.
- Claimants could also be less likely to pursue litigation past the EEOC or state agency stage, because they tend to have a greater appreciation for emotionally draining and potentially embarrassing aspects of public litigation.
- Finally, claimants may be concerned about how public litigation could impact their future HR employment opportunities.

Steps in the right direction

As with every employment claim, conducting a thorough investigation is critical. After the investigation is complete, there should be a frank and honest assessment of the findings.

In turn, the company should agree to appropriate action based upon applicable law, company policies and procedures, the employee's contract or collective bargaining agreement, the advice of counsel and, ultimately, the best interest of the company and its employees.

Before a claim hits

Some things can't be changed once a claim is made. So it's important to plan ahead, anticipating that someday, an HR employee might be a claimant:

- Routinely stress the importance of confidentiality within the HR department.
- Be sensitive to issues of importance to HR professionals. As you know, those charged with serving others in the company frequently get overlooked. This includes meaningful performance evaluations and appropriate personnel file documentation for HR employees.
- Periodically review, correct, update and adjust company policies and procedures on a routine basis to eliminate the need to make changes in a crisis.
- Address problems as soon as they are discovered. Do not ignore problems in hopes that they will go away or never get publicized.
- Always follow the law and apply company policies and procedures in a fair and consistent manner.

When a claim hits

- Do not panic. Every employee's claim is likely to have strengths and weaknesses.
- Again, stress confidentiality within the HR department.

- Assert attorney-client privilege, anticipation-of-litigation protection, HIPAA privacy, employer-employee confidentiality and prejudice and/or irrelevance, when appropriate, if the HR claimant attempts to gain unfair advantage by using unrelated but potentially damaging information.
- Remember to use HR claimants' knowledge of the field and their potential interest in a quick and quiet resolution to your advantage.

In the aftermath

As with any significant employment claim, HR, company management and perhaps counsel should consider whether any important information was learned from the incident.

Determine whether personnel changes, updates to policies or procedures, training, counseling or other adjustments are appropriate. You may gain the protection of attorney-client privilege if you conduct such assessments as a preventive legal project, and at the direction of employment law counsel.

Finally, if the HR claimant continues to be employed by the company, it is important that he or she be permitted to continue working as if a claim were never filed. This "forgive and forget" approach is critical to ensuring a productive and positive workplace.
