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WHAT TO DO WHEN THE EEOC COMES KNOCKING?

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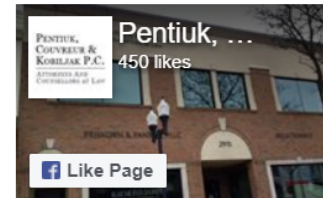
Has your co-op ever received a charge of employment discrimination? Such charges are often filed by co-op employees after termination. The terminated employee contacts the equal employment opportunity commission EEOC or a state civil rights commission and files a charge. Charges often allege the employer discriminated against employee because of race, color, creed, nationality, gender, religion or age. In the past dozen years the number of claims against employers alleging discrimination because of disability has risen dramatically.

Co-op employers are often taken by surprise by such claims. Often the claim there's no resemblance to the actual basis upon which the employee was terminated, usually poor performance. What should co-op employers do upon receiving a charge from either the equal employment opportunity or a state civil rights agency?

The first thing many co-ops do is nothing. They just hope the matter will go away. Rest assured, it will not. The First thing that you should do is contact your attorney and send the charge to him or her immediately. The EEOC often imposes very strict timelines for responding to a charge, usually 14 this 21 days. So timeliness is important.

The second thing you should do is notify your insurance company? Why is this necessary? Want your premiums go up? It is necessary because many insurance companies are declining to represent employers in lawsuits unless the employer first notified the insurance company of the original claim when filed with the EEOC. In this case it's better to be safe than sorry. Your insurance company might decline to represent you before the EEOC but the point is that they are placed on notice that such a claim exists.

Let's assume you notify your insurance company and they inform you that you do not have coverage for this type of the claim. In such cases your board needs to sit down with any management company and legal counsel. You need to review the gaps in your insurance company coverage. You need to immediately obtain insurance that will cover the type of claims that the EEOC is investigating. It is

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very important that in filling out the application for insurance that you be truthful. The co-op must disclose prior or pending claims including the claim before the EEOC. Whether or not your insurance company will actually defend you if that claim proceeds from the EEOC into a state or federal court, will depend entirely on the terms of the insurance policy.

But why risk it? Perhaps the best thing to do right now is to review your insurance coverage? Does it cover claims of employment discrimination? Does it cover claims of housing discrimination? Does it cover civil rights claims in general? Does it cover situations in which the co-op mistakenly or negligently discloses confidential information of applicants or members? And more importantly does it cover claims by applicants for housing who are not members, or persons who are applying for employment who are not employees? All these questions should be asked and answered by your insurance agent in connection with your attorney.

It is also important understand that a charge with the EEOC is not a lawsuit. The EEOC is not a court. The EEOC is charged with trying to resolve the claim or charge before the matter may proceed into a federal court. If the matter can be resolved amicably with both sides in agreement, then that is better than ignoring the matter and waiting for the lawsuit to inevitably come. In the lawsuit stakes are much higher usually the price to resolve it on the employer is more than to resolve it in the EEOC administrative setting. But this is all advice and counsel you should be receiving from your attorney based on the specific facts of the case.

The third thing that usually occurs in EEOC claims involves disclosure of documents. Usually the co-op is required to disclose its policies and procedures regarding a broad mixture of issues. The EEOC also demands a list of past and present employees and an indication of their race, disability, gender, age etc. depending on the type of employment discrimination alleged. On the other hand, the EEOC often demands information which is extremely confidential. It is important to understand how this information is going to be used. It is also important to understand how this information can ultimately be used against the employer and co-op.

Earlier this year the EEOC quietly announced new Nationwide Procedures. These new procedures state the:

“EEOC will provide the Respondent’s position statement and non-confidential attachments to Charging Parties upon request and provide them an opportunity to respond within 20 days. The Charging Party’s response will not be provided to Respondent during the investigation.” (emphasis added).

What does this mean? It means that all the documents you sent to the equal employment opportunity will also go right to the complaining employee and his or her attorney. Yet anything they file with the EEOC will never come to the

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employer co-op. The only way the employer co-op will be able to see what was filed by the employee is to submit a freedom of information act requests to the EEOC after the investigation is complete, and usually after litigation is commenced against the employer.

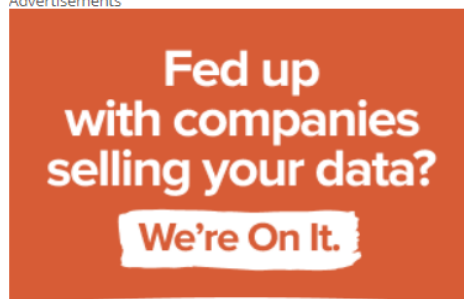
So employers have to be very careful about what they produce to the EEOC. They should avoid producing highly sensitive materials in defense of an EEOC Charge. In litigation, these materials are disclosed to a private party only after a protective order is put in place but the employer has no such protection with the equal employment opportunity commission. The employer should work carefully with its attorney in determining what documents are and are not to be produced.

At some point the equal employment opportunity commission will propose that the charge be mediated. This means that the parties are offered the opportunity to sit down and try and resolve the matter amicably. Employers should carefully consider this proposal as it may be a way to understand the terminated employee's position and determine what kind of money is being discussed to resolve the matter.

If mediation is not successful, the EEOC will continue to investigate the matter for a number of months or years. At some point the EEOC will issue a finding and provide the employee with a right to sue letter. This permits the employee to proceed to federal court if he or she wants to file a lawsuit. Of course if the employee fails to present his or her case to the equal employment opportunity first, they may not file a federal lawsuit but they still may file a lawsuit against the employer for discrimination under state law in state court.

Since this eventuality is often more likely than not, is important to have the co-op's legal counsel and/or insurance company on notice of the matter from the very beginning. This avoids the problem of making mistakes in the administrative process which back to haunt the employer if the matter proceeds to court. These mistakes are often costly. The money spent on attorney early on is generally cost-effective if the matter proceeds to litigation as your attorney's knowledge and understanding of facts and law is already up and running, if and when the lawsuit is filed.

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