

BUSINESS BASICS | EMPLOYMENT LAW

## Best Practices For Handling Harassment and Discrimination Litigation



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### Litigation Issues

- Upon receipt of an employee-filed complaint for discrimination or harassment, the defense team should immediately check MySpace, Facebook, LinkedIn, Plaxo and other social networking sites. Information that the employee has made publicly available should be printed. Cross check the list of the employee's "friends" against a list of current or former company employees. *(This is a commonly missed step.)*
- In addition to printing information that the employee has made publicly available, make a discovery request for all online profiles, messages, photographs, videos and online communications that refer or relate to the allegations set forth in the complaint or refer or relate to feeling, emotion or mental state. *(See EEOC v. Simply Storage Management)*
- If an employee no longer has access to the information, it might also be helpful to subpoena the information. Note: Obtain written consent from the employee because the Storage Communications Act protects the privacy of user content.
- Consider using an employee's Facebook user's friends' "Walls." (This allows you to see the history of posts between two people).

### Tips on Convincing the Fact-Finder that the Investigation was Fair

- There is no such thing as a "formal" complaint. The obligation to investigate arises when an employer observes or otherwise becomes aware of acts or statements that suggest prohibited activity.
- Although you cannot require a complainant to prepare a written narrative statement, you should always ask the complainant to prepare such, providing the who, what, when, where and witnesses.
- At a minimum, a fair investigation involves the following:
  1. Gather the facts objectively without prejudice:
    - » If there is a written statement, review it first, and then always follow-up with an in-person interview with the complainant.
    - » Interview the accused.
    - » Review all relevant records including personnel files and interview witnesses.
  2. Preserve the reputations of the individuals and the company to the extent possible.
  3. Take prompt remedial action which is consistent with the company's policy and past practice.
  4. Keep in mind that the investigator's role is to enhance neutrality and fairness in the fact-gathering process. *(This is another commonly missed step.)*
    - » The investigator should draw conclusions only with respect to judging the credibility of persons involved.
    - » The investigator should not recommend whether persons should be disciplined.

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