

**FOLEY EXECUTIVE BRIEFING SERIES**




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## HR's Role in Employment Litigation

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## Lawsuits Are Prevalent

- Employment discrimination litigation is a booming industry
  - Approximately 76,000 charges were filed with the EEOC in 2006
  - Approximately 40% of charges filed in 2006 were race-based charges
  - Approximately 30% of charges filed in 2006 were retaliation charges
  - 15,408 employment cases commenced in federal courts alone in 2006, and more in state courts and agencies

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## Sample Damages Analysis

Backpay 3 years x \$40,000/yr.	=	\$120,000
Lost Benefits (valued at 30%)	=	\$40,000
Front pay/benefits for 1 year	=	\$54,000
Compensatory damages	=	\$100,000
Punitive damages	=	\$ ???????
Plaintiff's attorneys' fees	=	\$125,000
Defense attorneys' fees and costs	=	\$150,000
<b>TOTAL</b>	=	<b>\$600,000</b>

*approx. (plus punitive damages)*

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## Other Costs

- Lost productivity of employees
- Bad publicity/damage to the Company's goodwill
- Negative ramifications internally, e.g., backlash
- Encourages more claims

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- Human resources personnel can be key

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## Litigation Process Overview

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## Typical Timeline

- Plaintiff files a complaint and serves a copy on defendant ..... Month 0
- Company files an answer..... Month 1
- Discovery process..... Months 2-8
- Parties identify expert witnesses..... Months 6-8
- Company files motion for summary judgment, parties file briefs, and the court considers and rules on that motion... Months 9-13
- TRIAL..... Month 14
- Appeal filed and briefs filed..... Months 15-20
- Appellate court decision issued..... Month 25

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## Tips

- Calendar due dates and any tickler or advance warning dates
- Know when you will be needed

April						
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

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## Fact Gathering

- Take a proactive and comprehensive approach

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## Documents

- Search at all levels of the organization
  - The corporate headquarters
  - The local facility where the plaintiff worked
  - The files of front-line managers
  - Electronic data – all emails



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## Types of Documents to Compile

- All personnel, medical, disability, benefits, worker's compensation and unemployment compensation files relating to the plaintiff
- Employee handbook/manual(s)
- Plant/facility work rules
- Relevant personnel policies
- Organization chart(s) for the facility
- Relevant job descriptions
- Emails

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## Types of Documents to Compile

- Collective bargaining agreement
- Summary plan descriptions for benefits
- Documents related to the investigation(s)
- Notes, logs, etc. of plaintiff's supervisor(s)
- Documents relating to analogous situations
- Any charge or complaint similar to plaintiff's

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## BEWARE

- Failure to produce a relevant document on a timely basis will hurt the case.
  - May preclude the Company's opportunity to use the document as evidence.
  - May be used by the plaintiff to argue to the jury that the Company concealed relevant information.

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- *NEVER* "lose" a document. It looks "bad"
  - like we're trying to hide something.



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## Document Preservation

- "Litigation Hold"
  - Suspend document destruction policy for certain archives or files.
  - Email from officer that directs all relevant players to preserve and retain relevant documents.
  - Send reminder periodically.
  - IT Department should be apprised and reminded.

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## Witness Information

- Identify persons who may be witnesses in the case
- Compile relevant information about those persons
- Make an appropriate contact with those persons

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## Identifying Relevant People

- Plaintiff's supervisor(s)
- All decision makers
- Plaintiff's immediate co-workers
- "Similarly-situated" employees

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## Tip

- Provide insight into these Company witnesses to defense counsel, such as strengths/weaknesses, relevant background information, office politics, etc.

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### Make the Appropriate Communications

- Warn these people against communicating with the plaintiff or plaintiff's counsel (or investigators) about the case.
- Notify these people that any discussions about the case may be subject to discovery. As a general rule, do not discuss it.

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### Make the Appropriate Communications

- Ask your attorney whether it's appropriate for you to interview these potential witnesses.



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### BEWARE

- Any person who "participates" is protected against retaliation

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## Consider Insurance Coverage Issues

- Employment Practices Liability Policy
- Umbrella Policy
- General Commercial Liability Policy
- Directors' and Officers' Liability Policy

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## Creating Useful Documentation

- Format all interview notes/memos as a memorandum from HR personnel to defense counsel, and label each at the top:

ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS  
WORK PRODUCT MATERIAL

MEMO

TO: Jane Smith, Defense Counsel

FROM: John Doe, Human Resource Director

DATE: March 19, 1999

RE: HR Matters

This memo is to inform you of the latest developments in our research regarding the Big Case in this employment discrimination case. It will be the principal contact for defense counsel. Eventually, I will be the point person at the Company through which communications to and from outside counsel will flow. Regarding the Big Case, in this employment discrimination case, I will be the principal contact for defense counsel. Eventually, I will be the point person at the Company through which communications to and from outside counsel will flow.

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## Creating Useful Documentation

- Write the memo knowing that it may be presented as an exhibit at trial; no snide comments, no *mea culpas*, no reflections or comments on potential liability.

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## Creating Useful Documentation

- Emphasize the facts rather than opinions or conclusions.

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## Creating Useful Documentation

- Record relevant information that is NOT known by the witness.

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- Privilege: Two types
  - Attorney-Client Privilege
  - Work Product Privilege

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## Attorney-Client Privilege

- A communication made between privileged persons
- In confidence
- For the purpose of seeking, obtaining, or providing legal assistance for the client
- The privilege must be affirmatively raised and not waived

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## Communications Made Between Privileged Persons

- Communications from the client *and* advice of counsel to the client are privileged

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## Communications Made Between Privileged Persons

- For corporations, who is the client?
  - Generally management-level employees

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## Confidentiality at the Time of Communication

- Location can be important
- Methods of communication
  - The more public the means, the less likely the privilege will be upheld



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- Circulation of counsel's opinions should be limited to those persons needing to know the details of the communication in order to act on it or comment upon it.

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## Purpose of Communication

- Legal assistance must be the *primary* purpose of the attorney-client consultation
  - To your attorney;
  - From your attorney; or
  - At the request of your attorney.
- Communications about social and unrelated business matters should not be commingled with legal advice.

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## Waiver

- The disclosure of confidential communications to a third party at a later date constitutes waiver of the attorney-client privilege.
- Inadvertent disclosure can waive the privilege.

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## Work Product Privilege

- The work product doctrine protects from disclosure documents and tangible things otherwise discoverable that were “prepared by or for a party in anticipation of litigation or for trial”

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- The work need not be performed by an attorney in order to be protected.
- Advice: If possible, memos, notes, and analysis should recite that they were prepared at the request of counsel.

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## “In Anticipation of Litigation”

- Litigation must be “imminent”

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## Waiver

- As with the attorney-client privilege, the work product privilege may be waived by intentional or inadvertent disclosure.

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## Prudent Practices

- Do not disclose or distribute communications to or from counsel to any person who is not a manager.
- Have communications with counsel only in private or through secured means.

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### Prudent Practices

- Set aside or otherwise identify all documents created after the Company had notice that the employee was pursuing a claim.
- Label all documents you create after becoming aware of a claim as “attorney-client privileged communication,” and/or “work-product material.”

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- HR Role During the Pretrial Process

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### Keep Outside Counsel Informed

- Pending Changes to Policies and/or Procedures
- Potential Disciplinary Issues
- Pending Personnel Changes
- Information Learned About the Plaintiff

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## Review of Pleadings and Other Papers Filed With the Court

- To insure factual accuracy
- To insure consistency with Company philosophy

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## Do Not Be Shy in This Process

- It is your job to question any comment or assertion made by counsel if you are not certain that it is accurate.

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## Preparing Discovery Responses

- Interrogatories
  - These are written questions to a Company that must be answered by the Company, in writing, within 30 days.
  - Request for Production of Documents (which is self-defining)

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- Answers and documents generally must be returned to the plaintiff's lawyer in approximately 30 days.

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### BEWARE

- You cannot merely rest on a manager's claim that locating the responsive documents would be too burdensome or that there probably are no documents responsive to a request.

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### Prepare! You Must Know the Following (at least)

- Plaintiff's claims and theories of the case
- The Company's defenses
- Applicable Company policies and procedures
- Your own or the HR department's involvement in the key events and the reasons or rationale for any decisions
- Your own background and training

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### You Should Be Familiar With

- Any response in any unemployment compensation proceeding
- Any information the Company produced in the prior agency proceeding
- The Company's positions asserted in court filings
- Any Company information provided in the discovery process

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- You should be especially familiar with any documents that were drafted by you or sent to you.
- You should meet with defense counsel to prepare – oftentimes several hours.

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### Important Witness Guidelines

- You must answer truthfully.
- Take your time and be deliberate.
- Take control when necessary.
- Don't speculate.
- Do not offer additional information.

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## Stay on Top of the Case

- Keep the pertinent Company managers informed.
- Consider requesting 60- or 90-day status reports from counsel.

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## HR's Role in Employment Litigation

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David Froiland practices in the Labor & Employment Practice at Foley & Lardner LLP. He represents employers before federal and state courts and administrative agencies throughout the country in all areas of employment law, with particular focus on employee benefits litigation, reductions in force, and employment discrimination cases, including class action litigation. Mr. Froiland also counsels employers on plant closing issues, harassment issues, disability accommodation, problematic terminations, and a host of other work place issues regarding the legal rights and obligations of employers. He also represents employers in labor arbitrations.

Mr. Froiland is licensed to practice in the state of Wisconsin, and numerous federal trial courts, including the United States District Courts for the Eastern and Western Districts of Wisconsin, the Northern District of Illinois, and others. He has also litigated employment law cases in other jurisdictions across the country based on case-specific bar admissions.

Mr. Froiland received his J.D. degree, *magna cum laude*, in 1997 from Indiana University, where he was editor-in-chief of the *Indiana Law Journal* and was elected to the Order of the Coif. His bachelor's degree was conferred by St. Olaf College in 1990. Before joining the firm, Mr. Froiland served as a judicial law clerk to the Hon. Jesse E. Eschbach, U.S. Court of Appeals for the Seventh Circuit.

