

The Former Employee's Demand Letter Has Arrived — Now What?

By Jonathan Fraser Light

Your client just received a demand letter from an attorney for a former employee. All such letters have the same pattern. They begin by acknowledging the representation of the disgruntled former employee. This is followed by a recitation of the most egregious fact pattern imaginable, virtually all of which the employer disputes. Next is the treatise on all the legal theories that will support the employee's claim, if a lawsuit is filed.

Then, a litany of jury verdicts with enormous damage awards flows into what this employee wants from your client. That statement is usually "We will receive 'X' if we go to trial, you [the employer] will spend 'Y' to defend yourself, but right now we are offering an 'early bird special' of 'X minus a significant amount of money.'"

That number is almost always far higher than the employer would ever consider spending at that time. The letter concludes with a 10-day deadline before an administrative claim or lawsuit is to be filed.

In most instances, the letter is not a surprise, because the termination was acrimonious in some respect. There may even have been efforts by the employer to resolve the problem by offering a severance package at the time of termination. The employer should assume that the severance package will be admissible in evidence, and so it needs to be carefully drafted to put the employer in the best possible light.

Once the employer receives the demand letter, it should immediately alert its employment law counsel. The next step is to alert the insurance carrier if the employer has employment practices liability insurance or, perhaps applicable, directors and officers liability insurance. General commercial liability policies typically will not cover employee claims (and note that employment practices liability insurance generally does not cover wage and hour claims).

Often, the employer or legal counsel ask the company's insurance broker what insurance exists to which carriers the demand should be tendered (as many as possible). This is important because the carrier will not pay any legal fees for outside counsel until the date the demand is received by the carrier. Although the carrier will likely insist on hiring its own counsel to handle the matter, if the employer can show a legitimate need for having outside counsel



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involved early on to protect its interest, the carrier will often apply that attorney's time to the retention (i.e., the deductible) on the policy. In some cases, the carrier will acquiesce to using the employer's chosen outside counsel. When employer buys the policy, it can also negotiate to have its preferred counsel pre-approved.

Internally, the employer should immediately isolate documents relating to the unhappy employee, including e-mails, personnel files, and anything else that could help defend against the claim. Many plaintiff lawyers will include in the demand letter that all electronic and hard copy materials

should be retained by the employer. Failure to do so, and proof of that failure later, could result in sanctions against the employer for destroying evidence.

Whenever an employer terminates an employee and anticipates a problem, the employer should isolate the employee's hard drive to preserve material that might incriminate the employee. Often, however, the employer simply reformats the hard drive and issues the computer to another employee. This could destroy evidence that could show a pattern of conduct that completely undermines the employee's credibility or claims.

Electronic data is one of the hottest areas of evidence, and employers need to be savvy about both maintaining computer records and accessing those records (often using outside forensic experts) to get the clearest electronic trail regarding that employee. This could include both e-mails and Internet access, particularly if the employer is trying to establish that the employee was either not a good employee substantively or the employee simply spent too much time surfing the Internet. Even outside e-mail traffic through instant messaging may be retrievable, despite an employee's best efforts to hide it.

The written response to the demand letter should be detailed and comprehensive. Our philosophy is to provide relatively full disclosure at the outset. A strong letter, supported by percipient documents such as reviews or copies of e-mail, sometimes can stop the lawsuit before it is filed.

Many plaintiffs' lawyers are most interested in those cases that will generate income with the least possible resistance, and if the employer can demonstrate early on that this will be a case that is hard to prove, susceptible to a motion for summary judgment, or otherwise just looks bad, the attorney may abandon the effort and force the disgruntled employee to seek counsel elsewhere or perhaps give up the claim. At a minimum, it may generate a relatively reasonable response by the employee's counsel, thus leading to early resolution.

Employers who are of the "not a penny for tribute" mind-set may retreat from that position once they receive a few legal bills. In addition, the facts often develop somewhat differently than were originally represented by the employer's supervisors. Thus, every employer should consider early resolution, either by way of direct negotiation or early mediation. This can be accomplished even before the lawsuit is filed in some cases, and reasonable counsel on both sides (each having client control) may be able to avoid the expense of mediation.

Sometimes there is a strategic reason to fight long and hard against an employee, perhaps because of the potential domino effect on other employees who are watching to see what happens. But this is not often a factor and employers need to be careful not to spend money and incur corporate downtime fighting claims that could be resolved quickly. The money and time might be better spent.

If the first salvo from the employee is a filing with a government agency such as the California Department of Fair Employment & Housing or the federal Equal Employment Opportunity Commission, the employer's response should be detailed and thorough. These agencies are more likely to look favorably upon the employer if the agency's representative feels that the employer is acting in good faith and making full disclosure.

Do not provide witness statements under penalty of perjury, as they can be used to impeach later. We have seen situations in which the employee's original statement as part of a DFEH filing is different from what comes out at the deposition after the employee has been thoroughly prepped and other facts have been reviewed. Also, practitioners need to remember to subpoena the DFEH or EEOC file after the administrative claim has been closed and litigation has commenced. There often are detailed investigative notes that will help the employer. In one matter it was clear from the DFEH file, but not from the materials formally received from the plaintiff during discovery, that there was a statute-of-limitations defense available.

If the employer makes the initial effort to pull together the relevant documents, counsel should carefully review the personnel file and any related materials to determine whether any follow-up investigation needs to be conducted. Any such investigation needs to be handled carefully, as it can look like the employer is back-filling to prop up an otherwise unfavorable case. This effort should be done in coordination with the employer's attorney so that the cloak of attorney-client privilege or the work product doctrine can attach. It may be that such materials will be produced at a later date because they are favorable, but on the chance that they are not, the privileges should be available.

Employers need to caution their existing employees not to discuss the claim or otherwise slander the departed employee. Employers should assume that every disgruntled employee has contacts within the company to find out what is being said.

If all the preliminary efforts to resolve the matter fail, the employer who follows these steps will at least be better prepared to defend the action and stand a better chance of avoiding liability and a large damage award.

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