

Early Case Assessments in Employment Disputes: Minimizing Risks, Controlling Costs and Efficiently Resolving Claims

Creating an ECA Policy, Structuring and Implementing Effective ECAs

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+ Elements and Structure of an Effective Early Case Assessment Program

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Elements of an Effective ECA Program



- Identification of claims or disputes to which program applies
- Investigating the facts
- Analyzing and applying the applicable law
- Understanding the circumstances
- Evaluating options for resolution

+ Identifying Claims or Disputes

- Filing of suit or agency claim
- Receipt of claim letter or other complaint
- Problematic termination, disciplinary or other HR decisions
- Potential claims against employees

+ Investigating the Facts



- Collect and review employer records
- Interview employees and witnesses
- Obtain available information from employee, agency or other third party
- Evaluate from neutral perspective
 - Reality testing
 - Identify biases and conflicts of interest
 - Evaluate credibility



Analyzing the Applicable Law



- Relevant legal theories, defenses and “grey areas”
- Potential counterclaims
- Applicable measure of damages and availability of other relief, including equitable relief, punitive damages, attorneys fees, class relief



Understanding the Circumstances For Both Parties



- Are there other claimants or potential defendants?
- Are there company policies or principles at stake?
- Are there reputational concerns to employer and/or employee?
- What are the potential costs of litigation, including attorneys fees, business disruption, career disruption, uncertainty of outcome?
- Is there non-monetary relief that might be valuable to employee and acceptable to employer?

+ Evaluating Options for Resolution



- Resolution through negotiation
- Appropriateness of mediation
- Neutral fact-finding
- Arbitration
- Potentially dispositive motions
- Assertion of potential counterclaims or cross-claims

Elements and Structure of an Effective Early Case Assessment Program

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II. When to Use an ECA Program

- For any claim with actual or potential uncertainty over:
 - The Underlying Facts
 - The Scope of the Potential Problem
 - The Potential Exposure
 - Special Timing Sensitivity

A. The Underlying Facts

- Having an ECA protocol produces meaningful early fact assessment
- ECA protocol leads first to a document review of pertinent performance appraisals, PIPs and other write-ups, job descriptions, restructuring plans and adverse impact analysis, etc.
 - Jurors love evidence of process and fairness – does it exist?
- ECA protocol leads to going beyond document review to discussions with key decision-makers
 - Did anyone have (hidden) agendas?
 - Is there history between a manager and the adversely impacted employee?
 - Should the employer have intervened?

A. The Underlying Facts (cont'd)

- Is there a Cat's Paw issue under Staub v. Proctor Hospital?
- Remember, even though final decision-maker is unbiased, if he/she makes decision based on recommendations of biased subordinate – liability can result
- What role did HR play?
 - Did HR have real involvement before any adverse employment decision?

B. The Scope of the Potential Problem

- Does the action in question impact only one person or potentially a number of employees/applicants?
 - E.g., Is there a complaint about a screening device such as a test?
 - Does it impact a policy or practice of importance to the employer?
 - Does it impact a large job classification?
- Does the potential issue challenge actions by a supervisor or manager with a significant span of control?
- Does the potential issue affect multiple departments or locations?
- Is it reasonable to believe the scope of any suit and discovery can be limited?

C. The Potential Exposure

- In today's 24x7 news cycle and Twitterverse - would the issue generate broad interest?
- What is the potential reputational harm to:
 - The employer – is the employer dependent on positive public perception – e.g., a charity, personal services?
 - Key officials or managers
 - Would it be acceptable to have spouses, significant others, friends and family see the allegations on the Web?
- Is the issue one that could be pursued as a putative class or collective action?
- How much will the case cost to litigate, including e-discovery? (more later on e-discovery)
 - How do projected costs compare to the potential exposure?

C. The Potential Exposure (cont'd)

- How much disruption to the business would a full blow litigation entail?
 - Management time taken for litigation instead of running the business
- What are the potential damages at stake? Single plaintiff disability case in CA (Rodriguez v. Valley Vista Servs., Inc., BC 473793 (Cal. Super. Ct. Feb. 15, 2013)) where jury found failure to accommodate a customer service employee with panic attacks and awarded
 - \$66,000 actual
 - \$462k future economic loss
 - \$4 million past and future non-economic loss (pain and suffering)
 - \$700k future non-economic loss
 - \$16.57 million punitive

\$21,700,000 Total Award

D. Special Timing Sensitivity

- Is employer competing for federal contracts or grants?
- Is employer negotiating an acquisition?
- Is employer negotiating a sale?
- Would the litigation largely occur during the employer's busy season?

D. Special Timing Sensitivity (cont'd)

- Is the employer embroiled in other current claims where another case could prove problematic?
- Is the employer aware of other potential complainants with whom current complainant might make common cause?
- Are there any other unique factors to consider?

III. Preventing Runaway Cases With Effective ECA

- Use ECA to learn if potential Cat's Paw situation
- Use ECA to learn, e.g., if other potential sexual harassment claimants against the same manager
- Use ECA potentially to prevent putative class/collective claims
- Use ECA to consider if a mock presentation to a sample jury to test reactions to the case is warranted

III. Preventing Runaway Cases With Effective ECA (cont'd)

- Provides basis for possible resolution before parties have invested emotional and pecuniary capital resulting in extremely hardened positions that will produce scorched earth litigation
- Prevent employer taking one position in EEOC, state/local filings based on inadequate fact finding with employer later advancing new or additional reasons in litigation which might prove problematic to explain
 - In Justice Scalia's words, "if disbelief [of an employer's non-discriminatory reason] is accompanied by a suspicion of mendacity" it may be evidence from which a jury can find pretext. St. Mary's Honor Center v. Hicks (1993)

The Intersection of ECA Programs and E-Discovery

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ECA and E-Discovery Go Hand-In-Hand

- **Step 1 in Every New Case: Issue a Litigation Hold**
 - **In today's legal landscape, relevant information and potential evidence will more likely than not be in the form of electronically stored information ("ESI").**
 - **ESI includes e-mail, voicemail, instant and text messages, databases, metadata, digital images and any other type of file.**

ECA and E-Discovery Go Hand-In-Hand, Cont.

- **80-90% of the legal risk in e-discovery occurs at the preservation stage.**
- **Estimates suggest that document review costs can comprise anywhere from 50-90% of total litigation expenses.**

Use of E-Discovery Platforms and ECA: Culling, Filtering and Data Analytics

- **Allows for efficient searching of voluminous documents.**
- **Easy Review of Extracted Text/Metadata.**
- **Limits the amount of information required to be preserved to the given date ranges, topics, data types, custodians, etc.**

Use of E-Discovery Platforms and ECA: Culling, Filtering and Data Analytics, Cont.

- **Reduces the amount of data being fully processed, hosted, and reviewed.**
- **Creates a defensible, repeatable process that establishes authentication and preserves the chain of custody of electronically stored information.**

Potential Uses in Employment Matters

- **Initial Evaluation of Helpful/Harmful Documents**
- **Quick Assessment of What Documents are out there**
- **Test/Refine Potential Search Terms within a Document Collection**

Potential Uses in Employment Matters, Cont.

- **Identifying Potentially Relevant Custodians of Relevant Documents**
- **Eliminate Irrelevant Documents from the Collection**

Benefits

- **Search features can be used to decrease volume of documents for processing and review early on by weeding out clearly irrelevant documents and custodians**
- **Greater understanding of the data in your case will lead to more correct and defensible decisions regarding preservation, retention, search parameters, etc. in discovery, which will lead to a decreased likelihood of sanctions**
- **Strong presentation at Rule 26(f) conference can decrease disputes and associated attorney costs**

Best Practices for Implementing and Utilizing ECAs

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Step-By-Step Analysis

- **Who, What, Where, When, and How of a Case**
 - **Identify key actors, documents, and map out a timeline of events**

Step-By-Step Analysis

- **Early Cost/Benefit Analysis**
 - **Refer to past experience handling similar cases/matters**

Step-By-Step Analysis

- **Identify and Organize All Issues**
 - **Consider both factual and procedural issues and their potential legal ramifications**

Step-By-Step Analysis

- **Prepare an Overview**
 - **What key facts apply to key issues**

Step-By-Step Analysis

- **Assess Dispute and Settlement Value**
 - **Assess the potential damages in terms of actual damages sustained or the availability of exemplary damages, resources available to the adversary, etc.**

Step-By-Step Analysis

- **Develop A Strategy**
 - **Put all the pieces together**