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You've Been Served – What Now? Strategies for Analyzing and Responding to Employment Discrimination Complaints

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You've Been Served – Now What?

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Introduction

Roadmap

a. Determine whether the complaint was properly served.
b. Take all necessary steps to preserve evidence.
c. Ascertain whether the complaint was filed in the correct venue/forum.
d. Determine whether the complaint contains any fatal flaws.
e. Decide whether to respond to the complaint with an answer or motion to dismiss.
f. Identify and assert any and all available affirmative defenses.

Receipt of the Complaint

A. Service

i. The first step is to determine whether proper service was effectuated.

a) How was the complaint served?

1. The rules of service vary in each jurisdiction, so it is important to check whether the complaint was served in accordance with those rules.
2. For example, some states allow service by certified mail, but others require in-person service. The rules of service could also vary by municipality. Philadelphia, for instance, has different service rules than the rest of Pennsylvania.
3. In federal court, the plaintiff is required to deliver a copy of the summons and complaint to an officer, or managing or general agent, or deliver the complaint and summons to an agent authorized by law to receive service of process. Alternatively, a plaintiff may use the method of service of the state in which the federal court sits. FRCP 4(e)(1).

Receipt of the Complaint (continued)

b) Was the service proper?

1. In federal court, for example, the rules require the plaintiff give the defendant "notice" of the lawsuit, the summons, with the complaint attached to effectuate proper service. Federal Rule Civil Procedure 4(a)(1) and 4(c)(1).

B. Determine the deadline to respond.

i. Federal Rule of Civil Procedure 12(1)(a) requires that defendants respond to a complaint within 21 days of service. As always, confirm this deadline with the court's local rules.

ii. If a defendant waives service of process under FRCP 4(d), the time to respond is extended to 60 days.

Submit a Request for Information

A. Employment lawsuits often begin as charges filed with administrative agencies (more on this later).

B. Once a lawsuit has been filed in court, the parties may be entitled to collect information from the agency with which the charge was filed.

C. File a Freedom of Information Act ("FOIA") or Section 83 request for all agency records related to claim.

   i. Both will provide the EEOC file, but a FOIA request identifies the type of information withheld/redacted from the file (for example, medical information or material pertaining to settlement or mediation)

   ii. FOIA requests can take a long time, so submit your request early on

   iii. Section 83 requests are processed more quickly, but the file is "sanitized."

D. The files received from the agency can assist in determining when the charge was filed, whether the lawsuit is timely, and whether the allegations have changed.

Preservation of Evidence

A. Take steps to preserve evidence.
   i. This step is *critical*.
   ii. The rules regarding preservation of evidence vary in each jurisdiction, but generally, once litigation is filed, threatened, or "reasonably foreseeable," parties have a duty to preserve evidence. *In re Rembrandt Techs. LP Patent Litig.,* 899 F.3d 1254, 1269 (Fed. Cir. 2018); *Bull v. United Parcel Serv., Inc.*, 665 F.3d 68, 73 (3d Cir. 2012).
   iii. Issue litigation hold notices.
      a) A litigation hold is a notification that is sent from a company's legal team or outside counsel to employees instructing the employees to preserve and refrain from deleting electronically stored information ("ESI") such as emails, as well as hard copy documents.

Preservation of Evidence

b) Who should receive the litigation hold?

1. Any individual who may be in possession of information or documents that are relevant to the claims and defenses of the lawsuit should receive a copy of the litigation hold notice.
   i. In the employment context, these individuals typically include direct supervisors and/or managers, decision-makers, human resources personnel, and colleagues that are known or believed to have information.
2. The company's internal information technology ("IT") team or email provider should also receive a copy.
   i. It is important to expressly instruct the IT team or email provider that any auto-delete schedules for emails must be suspended, and that the suspension remains in effect until they are notified otherwise.
   ii. Before issuing this litigation hold, discuss with IT what repositories of ESI exist and how best to preserve and prepare them to be searched in discovery.

Preservation of Evidence

c) What types materials and repositories are encompassed in a litigation hold?

1. Emails
   i. All recipients of the notice should be instructed not to delete emails that may be relevant to the claims and/or defenses, *even if in their personal email accounts*.
2. Text messages
   i. All recipients should be instructed to preserve text messages relevant to claims or defenses, *even if on their personal cell phones*.
3. Company chat/instant messages
4. Social media, blogs, or other online forum postings
   i. All recipients should be instructed to preserve *even if on their personal accounts*.
5. Hardware such as laptops, cell phones, external memory drives, etc.
6. Hard copies of files or other documents (e.g., personnel records, demonstratives, sign-in sheets, logs, etc.)
7. Surveillance systems, if appropriate (e.g., cameras)

Preservation of Evidence

d) What categories of information and subject matters are encompassed in a litigation hold?

1. Information relating to the "adverse action" (e.g. any information relating to the decision to terminate, transfer, demote, etc.)
2. Personnel files of comparators
   i. It is better to define "comparators" broadly at the outset of litigation. Remember, just because a subject/repository is included in your litigation hold, does not mean it must be produced in discovery later.
   ii. These include any files that are kept "off-site."
3. Any documents relating to investigations into the plaintiff's complaints
4. Records of complaints made by the plaintiff or about the same subject matter
   i. For example, if the plaintiff has alleged a specific manager harassed him/her, information relating to other complaints about that manager should be preserved.
5. Payroll records
6. Policies that were in place during the relevant time periods (e.g. employee handbooks, leave policies, etc.)

Preservation of Evidence

e) How often does the litigation hold notice need to be updated and/or re-sent?

1. The litigation hold notice should make it clear that the obligation to preserve evidence is ongoing. For example, if the case began at an administrative agency such as the EEOC, the litigation hold should remain in effect through any subsequent court proceedings.
2. The litigation hold notice must be revised, updated, and re-sent to all appropriate recipients as the case evolves. For example, if the plaintiff amends his/her complaint, the notice may need to be expanded to encompass any new allegations.

Preservation of Evidence

iv. Begin collecting necessary information.

a) Strongly consider conducting preliminary interviews with key witnesses regarding the allegations in the complaint (to the extent not conducted at administrative charge stage)

b) Particularly if you anticipate terminating the employment of a potential witness (e.g., pursuant to a reduction in force), it would be beneficial to interview that person ahead of time.

v. Failure to preserve evidence, or spoliation of evidence, can result in severe sanctions, including monetary fines, adverse inferences, losing the availability of certain affirmative defense, or, in worst case scenarios, default judgment. *See* Rule 37(e).

Preservation of Evidence

a) For example, in 2017, the EEOC moved for sanctions against JBS USA, LLC, a beef processing plant, alleging that the company failed to preserve records relating to "slowdowns" and "downtime" in its production. The evidence was relevant to the employee's claim of religious discrimination because the employer argued that it could not allow unscheduled prayer breaks as the breaks caused an undue burden on the employer's production schedule. The U.S. District Court for the District of Colorado granted the EEOC's motion and barred the employer from presenting evidence, testimony, or arguments that unscheduled prayer breaks caused production line slowdowns or stoppages. *EEOC v. JBS USA, LLC*, Case No. 10-CV-02103, 2017 U.S. Dist. LEXIS 122908 (D. Colo. Aug. 4, 2017).

b) Similarly, the U.S. District Court for the Northern District of Illinois granted a plaintiff's motions for sanctions against a employer-defendant, finding that the defendant "at the very least, it bollixed its litigation hold – and it has done so to a staggering degree and at every turn." *Franklin v. Howard Brown Health Ctr.*, No. 17 C 8376, 2018 WL 4784668, at *1 (N.D. Ill. Oct. 4, 2018).

Preservation of Evidence

c) The plaintiff in *Franklin* requested the defendant produce "[a]ny and all emails *and text messages*" relating to communications about the plaintiff over an eight-month span. As it turned out, the plaintiff was actually looking for instant messages – which he alleged was the method of communication used to harass him. The defendant was unable to produce more than two instant message communications – the rest had been lost or erased.

   i. The defendant could not locate the plaintiff's work computer.

   ii. The computer hard drive of one of the alleged harassers had been erased after the plaintiff threatened litigation.

   iii. The defendant's IT department did not disable the automatic deletion schedule for the instant messages.

d) That the defendant failed to issue a timely litigation hold notice. Notably, the employer only delayed issuing the litigation hold by one month. The plaintiff threatened a lawsuit on July 24, 2015, but the company did not issue a litigation hold until August 28, 2015.

   i. The notice was seriously deficient as it contained "no indication what employees were to do with documents or electronic files and information that had to be preserved, or how they should be preserved, and there was no indication that they should forward or deliver the information, files, etc., to defendant's legal department." *Id.*

Preservation of Evidence

e) In granting the plaintiff's motion and opposing sanctions on the defendant, the court in *Franklin* ordered the plaintiff be allowed to present evidence regarding the defendant's destruction/failure to preserve ESI, and that the the trial judge to be allowed to decide whether an adverse inference instruction is appropriate.

f) This decision demonstrates that it is not enough to simply send employees and/or IT personnel a notice to preserve relevant information. Employers and counsel must take an active role in ensuring the litigation hold is being enforced, that it covers relevant and necessary topics, and that recipients understand their obligations.

Identify Obvious Issues in the Complaint

A. Were the correct parties named?
   i. A basic, but critical step.
   ii. Are there joint employer issues to consider?
      a) "Two entities may be 'co-employers' or 'joint employers' of one employee for purposes of Title VII" and other employment statutes. *Faush v. Tuesday Morning, Inc.,* 808 F.3d 208, 215 (3d Cir. 2015) (citation omitted).
      b) Joint employer issues may arise when two or more businesses co-determine or share control over employees' pay, schedule, and/or duties.
   iii. Is there another entity that should be substituted in place of the named defendant?
   iv. Is there another entity that should be indemnifying the named defendant (*e.g.*, the staffing agency or contractor?)
   v. Is there a basis for arguing that neither the named defendant nor any related entity employed the plaintiff?

Identify Obvious Issues in the Complaint (continued)

B. Forum and venue considerations

i. Was the suit brought in the correct forum (state v. federal)?

a) Even if the forum is not correct, is it preferable to your case?

b) Are there grounds for removal?

1. Is the case a matter of federal question?
   i. Has plaintiff pled a claim under a federal statute such as Title VII or ERISA?
   ii. Has plaintiff pled a purported common law/state law claim that actually is a federal claim? (*e.g.*, common-law claim for unpaid benefits that would be preempted by ERISA)
2. Are the parties diverse?
   i. Diversity applies if the plaintiff and defendant are "citizens" of different states, and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332.

Identify Obvious Issues in the Complaint (continued)

3. A party has 30 days from the date the initial pleading that makes case eligible for removal to remove to federal court. 28 U.S.C. § 1446(b).
   i. A case becomes eligible for removal once proper service has been effectuated.
   ii. "A named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service." *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999).
   iii. Removal is filed with the district court. Notice of the removal is typically filed with the state court (but check local rules).
4. A case cannot be removed under diversity of citizenship if more than one year has passed from the complaint's filing date.

Identify Obvious Issues in the Complaint (continued)

5. Federal courts are often preferable for employer defendants for a number of reasons: summary judgment standard is usually more favorable; discovery is more structured; juries may be less plaintiff-friendly (depending on jurisdiction); generally, higher quality of judges; more robust settlement/mediation procedures.
6. Also, compensatory & punitive damages capped under many federal civil rights statutes (e.g., Title VII, ADA).

Identify Obvious Issues in the Complaint (continued)

ii. Class Action Fairness Act

a) The Class Action Fairness Act ("CAFA") confers federal subject matter removal jurisdiction over purported class actions filed in state court when, among other things, there is an amount-in-controversy exceeding $5,000,000 (aggregate sum of each individual plaintiff's claims). 28 U.S.C. § 1332(d)(2).

b) Minimal geographic diversity. Under CAFA, geographic minimal diversity is met when any member of a class of plaintiffs is:

1. A citizen of a state different from any defendant;
2. A foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a state; or
3. A citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state.

Identify Obvious Issues in the Complaint (continued)

iii. Is there an arbitration agreement? If so, you likely want to compel arbitration.

a) Starting point: you put arbitration agreements in place for a reason – to use them!

b) Assess the enforceability of your arbitration agreement.

c) Note: even if there is an arbitration agreement in place, the plaintiff may not consent to arbitration, which could result in costly motion practice (though the threat of seeking costs often "encourages" consent).

Identify Obvious Issues in the Complaint (continued)

iv. Was the lawsuit brought in the correct venue?

a) A civil action may be brought in any:

1. judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
2. judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
3. if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action. 28 U.S.C. § 1391.

Identify Obvious Issues in the Complaint (continued)

b) Forum Non Conveniens

1. A defendant can seek to transfer a case to another forum if the plaintiff's chosen forum is "'oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience, or . . . the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems.'" *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429, 127 S. Ct. 1184, 1190, 167 L. Ed. 2d 15 (2007) (citations omitted).

Presenter to read NY Code

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Please notate it carefully

The presenter will only be able to read the code twice and will not be able to repeat it or email it to you.

Thank you!

Responding to the Complaint

A. Analyze whether you want to file a motion to dismiss or answer.
   i. Do you need to raise the argument on a motion to dismiss or risk waiver? The following claims must be raised by motion:
      a) lack of subject-matter jurisdiction;
      b) lack of personal jurisdiction;
      c) improper venue;
      d) insufficient process;
      e) insufficient service of process;
      f) failure to state a claim upon which relief can be granted; and
      g) failure to join a party.

Responding to the Complaint (continued)

B. Has the complaint sufficiently pled a cause of action?

i. If not, a motion to dismiss may be appropriate.

ii. Under the standard in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), a complaint must include *facts* (i.e. not mere legal "conclusions") that give rise to a "plausible" – not merely conceivable – entitlement to relief.

iii. Pros and cons of filing a *Twombly* motion

Responding to the Complaint (continued)

C. *Prima facie* elements of causes of action

i. Has the plaintiff pled each element for his/her *prima facie* case?

a) For example, in a Title VII failure-to-hire case, the plaintiff must allege that:

1. He/she belongs to a protected class;
2. He/she applied and was qualified for the job;
3. He/she was rejected for the position despite having the qualifications; and
4. The position remained open after his/her rejection, and the employer continued to seek applications from other people with similar qualifications to the plaintiff.

b) If the plaintiff has not sufficiently pled his/her *prima facie* case, you may want to consider moving to dismiss.

Responding to the Complaint (continued)

D. Has the plaintiff pled remedies or rights that are unavailable to him/her?

   i. Examples:

      a) Punitive damages are not available in ADEA, FMLA or FLSA cases

      b) Punitive damages are not available under certain state laws

      c) Right to jury trial is not available under certain state laws

   ii. By educating your adversary that his/her client cannot collect punitive damages by way of a motion to dismiss or motion to strike, you may be able to encourage an early resolution.

E. Individual liability

   i. Generally, there is no individual liability under federal civil rights statutes (Title VII, ADA, ADEA, etc.), but individual liability may be available under state laws (PHRA).

Responding to the Complaint (continued)

F. Specific pleading issues

i. Pattern and practice claims

a) Private plaintiffs (often in a class action) or the EEOC must "establish by a preponderance of the evidence that [ ] discrimination was the company's standard operating procedure the regular rather than the unusual practice." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, 97 S. Ct. 1843, 1855, 52 L. Ed. 2d 396 (1977).

b) The plaintiff(s) must also identify other employees similarly affected by the discriminatory practice.

c) There can be steep consequences in failing to challenge pattern and practice allegations.

d) The single plaintiff and pattern and practice

e) Pre-litigation warning signs

Responding to the Complaint (continued)

ii. Wage and Hour

a) Has the plaintiff attempted to plead gap time claims (wage and hour)?

1. Gap time claims are not viable unless the plaintiffs have pled that they have worked more than 40 hours in a week and that there was uncompensated time in excess of 40 hours. *Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 109 (2d Cir. 2013).

b) Has the plaintiff(s) pled the case as a class/collective action?

1. Don't allow the plaintiffs to "hide" behind the class.

Responding to the Complaint (continued)

G. There may be strategic decisions to wait until summary judgment to "show your hand."
   i. If you file a motion to dismiss, the plaintiff may be able to amend his/her complaint to correct any defects.
   ii. A plaintiff will not be able to amend his/her complaint in response to a motion for summary judgment.
   iii. You may want to let the statute of limitations run on a claim before seeking to dismiss the claim.

Responding to the Complaint (continued)

H. However, a motion to dismiss can:
   i. Eliminate certain claims or defendants and limit the scope of discovery.
   ii. Force the plaintiff to articulate in greater detail the facts on which his/her claims are based, putting the defendant in a better position to conduct effective discovery.
   iii. Drive early settlement, should that be the employer's objective
   iv. Send a message

Understand and Assert All Affirmative Defenses

A. Are the plaintiff's claims asserted beyond the statute of limitations?

i. The statute of limitations ("SOL") depends on the cause of action.

a) Always verify that each of the plaintiff's claims are within the SOL.

b) Note that the SOL can differ for the same claim based on the specific factual pleadings. For example, claims of *willful* violations under the FMLA and FLSA are subject to a three-year statute of limitations. If willfulness is not pled, the statute of limitations is two years.

Understand and Assert All Affirmative Defenses (continued)

ii. Challenges in ascertaining the correct SOL

a) In hostile work environment claims, for example, it can be difficult to pinpoint the exact date the statute began to run because, in most cases, there is no one discrete event.

1. Continuing violation doctrine: When an employee alleges a hostile work environment, discriminatory acts "can occur at any time so long as they are linked in a pattern of actions which continues into the applicable limitations period." *O'Connor v. City of Newark,* 440 F.3d 125, 127 (3d Cir. 2006).
2. Retaliation and non-harassment discrimination cases are different. Typically, the operative date is the date of the "adverse action" (such as the date of termination).

Understand and Assert All Affirmative Defenses (continued)

b) Lilly Ledbetter Fair Pay Act: a Title VII pay discrimination charge must be filed within 180 days (or 300 days in a deferral state) of a discriminatory paycheck, but the 180/300 day limitation resets after every such paycheck is issued – i.e. it is not tied to the initial alleged discriminatory pay decision.

B. Does the plaintiff's case meet the relevant threshold determinations?

i. For example, does the employer employ the minimum number of employees?

a) Title VII – 15 employees
b) ADEA – 20 employees
c) ADA – 15 employees
d) FMLA – 50 employees

Understand and Assert All Affirmative Defenses (continued)

ii. Has the plaintiff established that he/she is a member of a protected class?

a) For instance, ADEA prohibits discrimination against anyone at least 40 years of age, because of that individuals age. 29 U.S.C. § 631. A plaintiff who is under the age of 40 cannot bring an age discrimination claim under the ADEA.* (note: may not be the case under state law)

iii. Does the plaintiff's complaint meet the thresholds for any state law claims?

a) The thresholds set by states often are lower than those set by federal statutes.

b) For example, the New Jersey Law Against Discrimination, applies to all employers (except federal employers), regardless of size. N.J.S.A. § 10:5-5

*There is no age limit for a litigant to bring a retaliation claim under ADEA if he/she "opposed any practice made unlawful" by the statute. *See Gomez-Perez v. Potter*, 553 U.S. 474, 492, 128 S. Ct. 1931, 1943, 170 L. Ed. 2d 887 (2008)

Understand and Assert All Affirmative Defenses (continued)

C. Were all administrative remedies exhausted?

i. Was the agency charge filed timely?

a) In general, complainant must file an administrative charge within 180 calendar days from the date the discrimination or retaliation took place.

1. However, the 180 day filing deadline is extended to 300 calendar days in a "deferral" jurisdiction where a state/local agency enforces a law that prohibits employment discrimination on the same basis

b) Complainants have 90 days from receipt of right to sue letter to file a complaint.

Understand and Assert All Affirmative Defenses (continued)

ii. Did the plaintiff exhaust the *claims* in his/her Complaint?

a) Certain claims must be "exhausted" or raised at the administrative level (*i.e.* discrimination, retaliation, harassment)

1. For example, if a plaintiff's EEOC charge alleges only gender discrimination, but his/her complaint also alleges a claim of religious discrimination, the plaintiff failed to exhaust his/her administrative remedies with respect to the religious discrimination claim
2. "'The exhaustion rule derives from two principal purposes: '1) to give notice of the alleged violation to the charged party; and 2) to give the EEOC an opportunity to conciliate the claim, which effectuates Title VII's goal of securing voluntary compliance.'" *Smith v. Cheyenne Ret. Inv'rs L.P.*, 904 F.3d 1159, 1164 (10th Cir. 2018) (citations omitted).

Understand and Assert All Affirmative Defenses (continued)

b) Courts will liberally construe a plaintiff's charge, but the charge "'*must* contain facts concerning the discriminatory and retaliatory actions underlying each claim.'" *Smith v. Cheyenne Ret. Inv'rs L.P.*, 904 F.3d 1159, 1165 (10th Cir. 2018) (citations omitted).

c) In determining whether a plaintiff has exhausted her administrative remedies, courts look to "'whether the acts alleged in the subsequent Title VII suit are fairly within the scope of the prior EEOC [charge], or the investigation arising therefrom.'" *Boyle v. City of Philadelphia*, 169 F. Supp. 3d 624, 628–29 (E.D. Pa. 2016) (citation omitted).

1. Whether the plaintiff "check[ed] a particular box on the charge form does not necessarily mean that a plaintiff" has exhausted or failed to exhaust her administrative remedies. *Id.* "Rather, the focus of the court should be 'the facts asserted in the EEOC [charge].'" *Id*.

Understand and Assert All Affirmative Defenses (continued)

d) There are no requirements to exhaust FMLA or FLSA claims

e) Likewise, plaintiff bringing a claim under the Equal Pay Act may skip the administrative process and file a lawsuit

f) For state law claims, exhaustion requirement depends on the state.

1. For example: Pennsylvania v. New Jersey
   i. Pennsylvania law requires administrative exhaustion of discrimination claims under state law.
   ii. New Jersey law allows claimants to choose whether to bring their discrimination claims to an administrative agency first OR take their claims directly to court.

Understand and Assert All Affirmative Defenses (continued)

iii. Assert the defense of failure to exhaust administrative remedies as soon as you become aware of it, or risk waiving it.

iv. Fort Bend County, Texas v. Davis, 139 S. Ct. 1843 (2019).

a) On June 3, 2019, the United States Supreme Court held that an employment discrimination plaintiff's failure to exhaust administrative remedies is not a "jurisdictional" prerequisite to filing suit and, therefore, federal courts may be able to hear discrimination claims under Title VII even if the litigants failed to raise those claims with the EEOC.

Understand and Assert All Affirmative Defenses (continued)

b) The Court's ruling put employers on notice that failing to promptly assert the affirmative defense of failure to exhaust administrative remedies in a job bias lawsuit may result in the employer waiving the ability to assert the defense altogether.

c) Background:

1. The plaintiff in *Fort Bend* filed a charge of discrimination with the Texas Workforce Commission ("TWC") alleging sexual harassment and retaliation against her employer.
2. While the charge was pending, the plaintiff informed her supervisor that she could not work on a particular Sunday due to a "previous religious commitment." Her supervisor did not approve the absence. The plaintiff did not report to work that Sunday and, as a result, the County terminated her employment.

Understand and Assert All Affirmative Defenses (continued)

3. Following her termination, the plaintiff submitted to the TWC an "intake questionnaire," in which she hand wrote the word "religion" next to the checklist labeled "Employment Harms or Action." However, the plaintiff did not amend her original charge of discrimination.
4. The TWC later issued the plaintiff a right-to-sue letter, and she filed a lawsuit in federal district court alleging retaliation and religious discrimination under Title VII. The district court granted summary judgment in favor of the County on all claims. The plaintiff appealed.
5. On appeal, the Fifth Circuit affirmed the district court as to the retaliation claim, but reversed dismissal of the religious discrimination claim and remanded that claim to the district court for further proceedings.

Understand and Assert All Affirmative Defenses (continued)

6. On remand, the County argued *for the first time* that the plaintiff had failed to exhaust her administrative remedies on the religious discrimination claim, as required by Title VII.
   a. The district court agreed, finding that administrative exhaustion is a jurisdictional prerequisite in Title VII cases and that the County did not waive the defense by failing to assert it in the initial court proceeding. The plaintiff's religious discrimination claim again was dismissed.
7. On a second appeal to the Fifth Circuit, the court ruled in favor of the plaintiff, holding that the exhaustion requirement is not a jurisdictional bar to suit.
   a. The court noted that failure to exhaust can foreclose a Title VII suit, but it is an affirmative defense that must be pleaded, and the County failed to do so in a timely fashion.

Understand and Assert All Affirmative Defenses (continued)

d) Holding

1. The Supreme Court affirmed the Fifth Circuit, holding that the administrative exhaustion requirement is not a jurisdictional prerequisite to filing a federal lawsuit under Title VII.
2. In other words, employers bear the burden of asserting, as an affirmative defense, that the plaintiff has not exhausted his or her administrative remedies through the EEOC or equivalent state agency. Employers who fail to timely raise an exhaustion defense will forfeit the right to raise the defense later.

Understand and Assert All Affirmative Defenses (continued)

D. The *Faragher/Ellerth* defense

i. In general, where harassment by a supervisor on a prohibited basis does not culminate in a "tangible employment action," the employer may assert an affirmative defense by showing, by a preponderance of the evidence, that:

a) the employer exercised reasonable care to prevent and correct promptly any harassment; and

b) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Faragher v. City of Boca Raton*, 524 U.S. 774, 806 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

Understand and Assert All Affirmative Defenses (continued)

ii. For the employer to have "exercised reasonable care to prevent and correct" harassing behavior, the employer must be able to point to policies, trainings, monitoring programs, or some other steps that it has taken to prevent harassing behavior.

iii. For the employer to show the employee failed to take advantage of the employer's corrective opportunities, the employer must be able to point to a complaint procedure, or some other policy, that outlines *how* an employee can take advantage of the employer's corrective opportunities.

iv. The defense is typically unavailable if the plaintiff suffered an adverse employment action, such as a termination or demotion.

Understand and Assert All Affirmative Defenses (continued)

E. Can you limit availability of punitive damages?

i. Plaintiffs can recover punitive damages if the discriminatory conduct was intentional and if the conduct was with "malice" or with "reckless" indifference" to the federally protected rights" of the plaintiff. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535, 119 S. Ct. 2118, 2124, 144 L. Ed. 2d 494 (1999).

ii. An employer can avoid punitive damages, even if it is vicariously liable for the discriminatory conduct of a manager, if the employer can establish that it made good faith efforts to comply with anti-discrimination laws. *Id.*

Understand and Assert All Affirmative Defenses (continued)

F. The "after-acquired evidence" defense

i. After-acquired evidence in an employment lawsuit is evidence of the employee's misconduct, which the employer did not know about at the time it took the adverse action against the employee, but which it discovered at some point thereafter, that would justify the adverse employment action. *See McKennon v. Nashville Banner Pub. Co*., 513 U.S. 352, 362, 115 S. Ct. 879, 886, 130 L. Ed. 2d 852 (1995).

ii. After-acquired evidence does not render discriminatory, harassing, or retaliatory conduct "irrelevant," but instead will stop the plaintiff's accrual of back pay damages. It will also preclude the plaintiff from seeking front pay and reinstatement.

Understand and Assert All Affirmative Defenses (continued)

iii. Courts are generally flexible with the pleading requirement for after-acquired evidence defense given that many employers discover the employee's misconduct during discovery, after the complaint has been answered. *See Engle v. Physician Landing Zone*, No. CV 14-1192, 2017 WL 1854785, at *1 (W.D. Pa. May 5, 2017) (a defendant can amend its Answer to a Complaint to include the affirmative defense of after-acquired evidence based on information uncovered during discovery).

iv. However, employers should preserve the defense out of caution by pleading it in the answer.

Forcing the Issue

A. Not technically a response, but…
   i. Unconditional offer of reinstatement
      a) Cuts off accrual of back pay damages
      b) Can drive settlement
      c) Be ready for a “yes”
   ii. Offer of judgment
      a) FRCP 68; most states have analogous rule
      b) Benefits and drawbacks

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Questions?

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Thank you!

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