

An Introduction To Early Case Assessment

Eric L. Barnum

*Why conduct early case assessment when you
have ample opportunities for discovery?
Because it will save time, money, and help you
to stay on the court's fast track.*



AGAINST THE backdrop of rising employment claims, many courts are adopting delay reduction or “fast-track” programs, mandating that cases go to trial within a year of the filing of the civil lawsuit. *See, e.g.,* Cal. Ct. Rules 208, 209. A year can pass very quickly in the pretrial stages of employment litigation. The scheduling complications of depositions, the time needed

for document production, electronic discovery, lining up experts (and everything else) can bring that fast-track trial date up on the calendar pretty quickly. So early case assessment is essential in the employment litigation context—not just to save time and money, but to develop the best litigation strategy in the most efficient way possible.

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Since a comprehensive case assessment early in the process can avoid unnecessary costs and protect the interests of your organization, it is advisable to schedule an on-site review by counsel at the earliest opportunity.

ASSESSING THE CASE • Initially, the company should assess the relative risks of the case to determine whether it is best to attempt a resolution before or at the inception of a lawsuit. At the earliest opportunity, a thorough investigation should be conducted into the allegations contained in the complaint. This investigation should be done by counsel and include a review of the relevant documentation, as well as all applicable company policies and witness interviews.

For example, in an employment case in which a disciplinary action is challenged, the early case assessment should evaluate whether the discipline was properly documented and is consistent with the company's policies and practices. If allegations of harassment or discrimination are made, the assessment should address whether there was an investigation into those allegations. If there was not, a determination needs to be made whether those allegations should be investigated pursuant to the company's anti-harassment policy, separate and apart from any activity connected with the early case assessment, to preserve the attorney-client and attorney work product privileges. If an investigation was conducted, the

assessment should evaluate the adequacy of the investigation.

Does The Complaint Have Merit?

Since a comprehensive case assessment early in the process can avoid unnecessary costs and protect the interests of your organization, it is advisable to schedule an on-site review by counsel at the earliest opportunity. Counsel then should provide the company a written assessment that includes the following:

- A comparison of the results of counsel's factual investigation with any internal investigations; and
- An opinion about whether there may be liability and the relative strengths and weaknesses of each party's position.

How Much Will This Cost Us?

A proper cost-benefit analysis is critical to effective early case assessment. Such an analysis will bring to light any benefits of "winning" by sealing a claim for minimal cost. It may also reveal how to minimize litigation costs and gain positive results. Therefore, counsel's strategy should include:

- An evaluation of the settlement value of the case, and the probable range of verdicts if the case were to be tried;
- Recommendations for settlement strategies, including alternative dispute resolution; and
- An outline of counsel's defense strategy.

The outline of the defense strategy should include:

- Anticipated discovery;
- Motion practice (i.e., what is the realistic likelihood a motion for summary judgment will dispose of the claims?);
- Use of expert witnesses; and
- Anticipated staffing of the case.

A case budget should be prepared estimating the total projected fees and costs. One of the chief benefits of budgeting is the insight it provides to the company about the case's real worth. For instance, a budget can be very helpful in anticipating actual litigation costs, which often run well beyond the fees of outside counsel.

Preparation of a budget early in the process can facilitate a partnership between counsel and company management to develop the action plan for the anticipated or actual litigation and to isolate key issues and potential strategies. Although it may be difficult to predict the opposition's movements and tactics, these uncertainties can be built into the budget. As underlying assumptions prove true or false, the budget should be modified and refined. Thus, before the lawsuit is filed, the company can make an informed decision about whether and how to respond to the prelitigation demand and, once litigation is commenced, whether to attempt early resolution.

What Has The Organization Learned From The Complaint?

At the conclusion of counsel's assessment, regardless of the ultimate outcome of the complaint, management should have a clear picture of what has been learned. Often the case assessment will identify weaknesses in employment practices that need to be addressed, including:

- Weakness in certain administrators or managers;
- Mistakes or improper activities;
- Ambiguity, shallowness, or inconsistency in certain policies or practices; and

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- The need for special systems or safeguards to minimize future problems.

CONCLUSION • The company should attempt to prevent employment litigation by developing effective strategies before cases are filed. Established policies and practices provide channels for employees to voice complaints about problems or perceived problems. Managers and employees should understand the particulars of these procedures and how complaints are initiated. In addition, training programs should be implemented to ensure the company's management team thoroughly understands the legal issues surrounding employment practices.

The management team should be trained to understand legal issues that may arise from their employment decisions. Managers should understand that when discipline or discharge decisions need to be made, certain "due process" must be followed and certain conditions must exist before recommending or implementing an employment action. Training should cover the most common types of issues that arise, such as discrimination, harassment, and retaliation, and should identify strategies to deal with those issues.

**PRACTICE CHECKLIST FOR
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- First, determine whether the complaint has merit. Schedule an on-site meeting with the principals, and:
 - __ Review the allegations of the complaint with managers. Ask what they know about the averments, and if they know of other people who might have relevant information;
 - __ Find out if there has been an internal investigation of the facts and circumstances described by the complaint;
 - __ Gather the names of all possible witnesses and fact sources; then
 - __ Provide an opinion about whether there may be liability and the relative strengths and weaknesses of each party's position.
- Do a cost-benefit analysis. Assess:
 - __ The settlement value of the case and the probable range of verdicts if the case were to be tried; and
 - __ Possible settlement strategies, including alternative dispute resolution.
- Outline the defense strategy, addressing:
 - __ Anticipated discovery;
 - __ Motion practice (e.g., what is the realistic likelihood a motion for summary judgment will dispose of the claims?);
 - __ Use of expert witnesses; and
 - __ Anticipated staffing of the case.
- Prepare a case budget, estimating the total projected fees and costs.
- At the conclusion of the assessment, identify weaknesses in employment practices that need to be addressed by the defendant.

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