Plenary 106
Lessons Learned in the Trenches from HR Nightmares

Anthony G. “Tony” Stergio
Andrews Myers, P.C.
Houston, TX

E. Todd Wilkowski
Frost Brown Todd, L.L.C.
West Chester, OH

Moderated by

Jessica Alley Haddad
Austin Industries
Dallas, TX

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As your clients are no doubt aware, life comes at you fast. Injuries happen, the feds investigate, and storms will come. The following are a collection of hypotheticals based on real-life examples of fast-moving employment-related legal issues. When your clients do not have the luxury of time, they will predictably expect you to operate under similar constraints. Understanding how to respond beforehand will help you and your client rest easier during frantic times.

Hypothetical 1. Jobsite Fatality. During a late-night concrete pour, two company co-workers are tragically killed after falling from an elevated podium. How do you advise your client and its crisis management team on addressing myriad issues in investigating and identifying the cause of the incident, preparing your client’s relevant personnel for the OSHA investigation and interviews, preserving evidence for the likely civil wrongful death actions, and getting your client’s workforce back to work safely, especially in light of significant liquidated damages exposure on a fast track project.

Communications: Assist your client in activating and mobilizing a crisis management team that can assist the on-site project personnel and best utilize company resources to prepare for a comprehensive investigation into the accident’s cause, effective communications with internal company personnel, the project owner and other key project participants and the media and address the inevitable investigation by OSHA and Plaintiffs’ counsel. This is critical to ensure that roles and responsibilities are clearly delegated and understood and that the corporate team can collaborate effectively and function at a very high level for a sustained time to address and known and unforeseen problems.

Establish written protocols with legal counsel for other project participants, including a written joint defense agreement, to allow for faster and transparent discussions, which are legally protected, about the accident investigation and how to safely and expeditiously get the project moving again.

Identify the company individuals who are classified as “management” who can bind the company, travel to the project site to meet with and fully prepare them for interviews. Insist on being present for the interviews with the OSHA investigator. Take copious notes to debrief company leadership. The company and its legal counsel cannot insist on attending interviews of non-management personnel, so recognize that any advice that you provide to these individuals in preparation of their interviews could be discoverable.

Work with internal company communications/public relations personnel or the company’s outside resources in this area to review and vet communications made both internally and externally to properly keep both internal and external stakeholders informed, protect the company’s image, and avoid making any admissions against the company’s interests.
Best Practice: Check with your client to determine if it has a written crisis management plan that it has trained on. Review the plan and become intimately familiar with it, especially with the identified crisis response team and your point of contact if a crisis occurs. If there is no written crisis management plan, strongly recommend that the company develop and implement one as part of an effective and comprehensive enterprise risk management program.

**Hypothetical 2. Natural disaster.** A natural disaster event shuts an office down for several days. How does an employer handle issues in the middle of a flood or evacuation situation? How does an employer deal with payroll issues when it has employees out of work due to emergency issues and/or office closures? How should an employer respond to employee requests and leave issues?

**Communications:** Set up a means to communicate with staff in an emergency where e-mail and/or office lines might be down. Several examples:

- Cellular phone tree
- Intranet/text group
- Let employees know expectations:
  - Office closed: don’t come to work;
  - Office open: if employees can get in safely, they should do so; otherwise, they will be compensated/forced to use leave;
  - Inform employees of mandatory job duties that must be completed notwithstanding emergency;
  - First Responders;
  - Payroll.

**Compensation:**

- Who must be paid when the office is closed due to disaster
  - Exempt employees must be paid a full salary for any week if they work any day in a work week. 29 CFR § 541.602(a).
  - If the office is open and the exempt employee does not come into work for personal reasons, due to the disaster, the employee need only be paid for days in which work occurs; no partial day deductions are permitted. 29 CFR § 541.602(b).
• Hourly employees need only to be paid for hours worked.

• Be careful about hours worked – hourly employees answering emails/talking on phone for work problems are working.

Leave/PTO: Leave banks can be tapped for exempt and non-exempt employees if office is closed.

What if you can’t meet payroll?

  o Violation of State payday acts.
  
  o Violation of FLSA.
    • Must pay minimum wage and overtime for each work week.
    • Each work week must be evaluated separately (no averaging).
  
  o IRS employment tax issues.

Uniformed Services Employment and Reemployment Rights Act (USERRA). For those employees who are also part of an emergency services organization (such as the National Guard or a Reserve unit), the USERRA may apply. USERRA prohibits discharging, denying initial employment, denying promotion, or denying any benefit of employment because of a person’s membership, performance of service, or obligation to perform in uniformed service. 38 USCA § 4301 et. seq.

State Laws: Some state laws prevent discipline of employees who cannot make it to work due to disaster.

**Hypothetical 3. ICE Raid.** Actual or threatened ICE raids disrupt staffing for local construction projects. How can your construction clients (1) plan for ICE involvement; and (2) respond to the raids themselves.

Employment verification System

Under the Immigration Reform and Control Act, employers are required to verify the identity and employment eligibility of their employees. The failure to comply can result in criminal or civil sanctions.

8 USC 1324a prohibits employers from hiring, recruiting, or employing an alien if the employer knows that the worker is undocumented. This includes contract laborers, so an employer cannot sidestep federal law simply by knowingly hiring undocumented workers as contract laborers. But the law does provide a “good faith” defense so long as the employer complies with an Employment Verification System. 8 USC 1324a(a)(3); 8 USC 1324a(b).
Federal law requires employers to attest, under penalty of perjury, that the employer has verified that the individuals working under it are not undocumented workers by examining the individual’s authorization (US passport, resident alien card, etc.); employment authorization (social security card); and identity (driver’s license). Under 8 CFR 274a.2, Form I-9 has been designated as the means of documenting and verifying the legal status of laborers. Employers are required to maintain an I-9 Form during the employment, and for three years after the date of the hire (or for one year after the employee is terminated or no longer employed by the employer).

Federal authorities, and specifically ICE, have authority to inspect an employer’s I-9 Form. Ordinarily ICE will issue a Notice of Inspection at least 3 days in advance of any inspection, although they may use subpoenas and warrants to secure an inspection without the 3-day notice. Accordingly, the safest practice is to assume an inspection is imminent at any given time and have an I-9 compliance/Employment Verification System in place.

ICE has issued written guidance for employers to comply with internal employment eligibility verification, and for compliance with an I-9 audit. This is difficult, since 8 USC 1324a and 1324b contain anti-discrimination provisions that will bind the employer in the way it conducts an audit. The employer will want procedures in place to ensure that the I-9 audit does not target employees based on their nationality or citizenship status and is not retaliatory.

ICE recommends reviewing all I-9 forms for each employee. This has the obvious advantage of avoiding the appearance of targeting specific subsets of employees, but this may not be practical depending on the size of your client’s company. In lieu of a complete audit, Ice recommends selecting sample sizes, though these must be selected in a non-discriminatory way, or to avoid the appearance that the audit is being performed for retaliation.

The easiest way to avoid a claim of retaliation is to have a written policy, communicated to staff upon hiring, setting up the audit on a regular basis. Regular audits protect the employer’s interest in complying with the Employment Verification System, and the employee’s interest in not having the audit be used as a retaliatory tool. Deviate from the policy at your own risk.

The contractor is not required to perform the I-9 audit on its subcontractors and does not have a duty to verify the employment status of subcontractors (or review their employees I-9s). We highly recommend against doing so as it likely creates exposure if there are violations associated with the subcontractors’ employees. Also, we recommend that the subcontracts specifically remind the subcontractors of their duties under immigration law, contain indemnification and defense provisions specific to this exposure that fully protect your client and contain an affidavit where the subcontractor affirms its understanding of the legal requirements and
intentions to fully comply with them. However, it is against the law for a general contractor to knowingly hire subcontractors who use undocumented workers, or enter into an agreement with subcontractors to have them hire undocumented workers.

Be mindful of the thin line between an employee and an independent contractor. A general contractor should not be exercising control over the work of its subcontractors, or issuing them W-9s, or doing anything else that would make the general contractor a potential or arguable co-employer. Do not institute and oversee an I-9 audit for your subcontractors. While there’s nothing wrong with requiring them, contractually, to perform their own audits, if the general contractor does them, arguably the general contractor is acting as their employer. It should go without saying that if a general contractor knows that a subcontractor employs undocumented workers, the general contractor should cease doing work with them immediately.

**Hypothetical 4. The long-delayed employment suit against a Company.** This hypothetical contemplates an employment discrimination charge languishing in the EEOC or equivalent state agency process for years, only to have a right to sue letter issue years after the events made subject of the suit occurred (termination of employment due to race, sex, age, disability, etc.).

Title VII and ADA cases can be brought within 90 days of the issuance of a right-to-sue letter. 42 U.S.C. § 2000e-5(f)(1). The employee’s obligation is to file an EEOC or an equivalent state court agency within 180 or 300 days of the discriminatory occurrence. 42 U.S.C. § 2000e-5(e)(1). There are no additional statutes of limitations imposed upon the employee. Thus, a case could be left to flounder at the EEOC or equivalent state court agency could be brought an indefinite time after the employer conduct complained of in the charge. *Howard v. Pritker*, 775 F.3d 430, 440 (D.C. Cir. 2015).

While a plaintiff has the burden of proof in employment discrimination claims, an employer bears the burden of production in various phases of an employment discrimination lawsuit.

The framework as currently applied by courts is as follows:

1. A plaintiff/employee must first establish a *prima facie* case by a preponderance of the evidence, i.e. allege facts that are adequate to support a legal claim. (see the section below for further information)

2. Then the burden of production shifts to the employer, to rebut this *prima facie* case by “articulat[ing] some legitimate, nondiscriminatory reason for the employee’s rejection.”
3. Then the plaintiff/employee may prevail only if he can show that the employer’s response is merely a pretext for behavior motivated instead by discrimination.


**Laches:**

In such circumstances, the defense of laches could be asserted; however, prevailing on that defense is generally quite difficult. *See Petrella v. Metro-Goldwyn Mayer, Inc.*, 134 S.Ct. 1962 (2014). Specifically, the defendant must show:

1. A delay in asserting a right or a claim;
2. The delay was not reasonable or excusable; and
3. Either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.

Since laches is an equitable defense, some jurisdictions limit it to cases seeking only equitable relief (not damages).

**Preservation of Business Records.**

- The best defense for such a delayed claim would be the presumed ability to justify the employment action (i.e. the termination of the plaintiff’s employment years earlier).
  - The preservation of employment investigation files is critically important:
    - Personnel files should be retained for 7 years past termination;
    - Be able to show legitimate, non-discriminatory reason for termination (i.e., employee assault of another employee).

**Use of Business Records:**

- The contents of such personnel files can be used to combat the plaintiff’s assertions of misconduct.
- Statements can be used to support the employer’s reason for terminating the employee and are admissible as evidence of employer’s reason for terminating plaintiff. These statements are not offered to prove the truth of the matter asserted and, thus, would not be hearsay. For example, an affidavit of a
former employee claiming that the plaintiff assaulted her, would not be submitted as evidence that the assault occurred, but as evidence of its influence on the employer’s decision to terminate the plaintiff. This evidence would constitute a non-discriminatory reason for the employer’s decision to terminate plaintiff.

**What if Documents Are Not Preserved?**

- Rely on testimony.

- Attack plaintiff’s evidence; plaintiff still maintains burden of proof.