Conducting Lawful and Effective Workplace Investigations and Responding to Agency Investigations

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I. SCOPE OF THIS PAPER

An effective complaint and response system is critical to establish a defense to employment charges and lawsuits. Any number of events can trigger the need for an employer investigation. Employee complaints, grievances, demand letters, rumors of discontent, and lawsuits all often either require or suggest the prudence of an immediate, thorough, and proper investigation. Employers have long been able to shield themselves from liability under Title VII for hostile environment sexual harassment claims by showing that the company took immediate and effective corrective action in response to an employee’s initial complaint.\(^1\) In contrast, employers that fail to promptly investigate complaints have suffered the legal consequences for that failure. See Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988) (employer liable for sexual harassment where, notwithstanding plaintiffs’ complaints, no adequate investigation or remedial steps were undertaken until the women quit their jobs).\(^2\)

The clear trend in the law is to insulate employers from liability for the bad acts of employees which the employer was not in a position to stop from occurring and which the employer appropriately addressed upon discovery. The United States Supreme Court in the Faragher\(^3\) and Ellerth\(^4\) decisions made clear that employers should not face liability, at least under federal law, for inappropriate conduct by employees—even where the bad actor is a supervisor—where the employer has acted promptly and responsibly.\(^5\) Under the Court’s test for

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\(^1\) See, e.g., Juarez v. Ameritech Mobile Commc’ns, Inc., 957 F.2d 317 (7th Cir. 1992) (summary judgment in Title VII case based on company’s prompt and adequate response to plaintiff’s complaints, including a prompt investigation and suspension of the harasser); Nash v. Electrospace Sys., Inc., 9 F.3d 401, 404 (5th Cir. 1993) (no employer liability where “the company did not know nor should it have known” about the sexual harassment until the plaintiff complained); EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002 (June 18, 1999). See also Indest v. Freeman Decorating, Inc., 164 F.3d 258 (5th Cir. 1999) (applying a “prompt remedial action doctrine” to excuse employer of liability when it took prompt remedial action, even in the case of supervisor harassment).

\(^2\) An employer is obligated to complete an investigation and take appropriate corrective action even if it has no evidence that harassment is continuing. See, e.g., Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995). In Fuller, a supervisor allegedly harassed his subordinate police officer, with whom he had previously had a romantic relationship. The police department closed its internal affairs investigation prior to its completion, partly because the harassment stopped after the harasser learned that the investigation was underway. The Ninth Circuit reversed summary judgment in favor of the employer and remanded the case for trial. The court noted that mere investigation, even if the harasser’s knowledge of the investigation persuades him to stop, does not relieve the defendant of its obligation to complete its investigation and take remedial steps to stop further potential harassment, if such harassment is found.


\(^5\) Some states, such as California, impose strict liability on employers for the alleged harassing acts of supervisors. The need to promptly and effectively investigate alleged supervisory misconduct under the strict liability standard is no less compelling for several reasons. First, some courts applying Title VII and the laws of numerous states have imposed a separate affirmative duty to investigate complaints of unlawful conduct, which brings with it a distinct source of potential liability to the employer. In addition to this liability, the employer’s failure to promptly and fully investigate allegations of harassment or other improper conduct consistently colors juries’ views of other disputed
Title VII claims, where the employee who experiences “environmental” harassment does not suffer a tangible employment benefit, the employer is presumptively liable for the supervisor’s harassment, but can avoid liability by making two related showings: first, that the employer exercised “reasonable care to prevent and correct promptly any sexually harassing behavior”; and second, that the complaining employee “unreasonably failed to take advantage” of the preventative or corrective measures available under the employer’s policies and procedures.6

This affirmative defense makes it essential for an employer to have (A) effective policies prohibiting harassment and directing and encouraging employees to report harassment or other improper conduct to supervisors or managers; (B) effective procedures to promptly and effectively investigate complaints; and (C) managers well trained to identify, implement and document appropriate corrective action. The employer’s ability to document and demonstrate the existence of anti-harassment policies and procedures, the timely handling of the employee’s complaint once it is raised, and the effective investigation of the complaint will critically impact establishment of this affirmative defense to liability.

Conducting an effective investigation requires more than commitment and sincerity. It requires training. It is an axiom among professional investigators that good investigators are trained in the investigative process and proceed in a deliberate, well-considered manner. The only way to ensure that your company will meet the legal expectations placed upon it is to supply its investigators with the tools, the support and the confidence required of an effective investigation.

This paper addresses best practices for conducting prompt and effective internal investigations, including legal and ethical issues sometimes created by such investigations.

II. PICKING YOUR INVESTIGATIVE TEAM

A. Investigators to Use.

Good investigators must be able to organize an investigative plan of action to identify and interview all known witnesses; increase or shorten the witness list as a function of facts revealed in the early part of an unfolding investigation; take careful, complete, and copious notes; and maintain the confidence of information obtained.7 Not all people are instinctively sufficiently

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6 See generally Casiano v. AT & T Corp., 213 F.3d 278 (5th Cir. 2000).
7 Careful contemporaneous notes taken at the beginning of an investigation and putting as much in quotation marks from the mouth of the speaker as possible are terribly helpful to later challenge the credibility of the complainant should matters escalate into a charge or lawsuit. See Jordan v. Clark, 847 F.2d 1368 (9th Cir. 1988), cert. denied sub nom Jordan v. Hodel, 488 U.S. 1006 (1989)(sexual harassment complainant claimed that defendant manager
curious to pursue subtle leads or to connect together inferential evidence. Rather than leaving such matters to chance, you should train the investigator(s) in the various types of evidence available (discussed below) so as to maximize the potential the investigator will appropriately mine, retrieve, and sort irrelevant and distractor information from competent and persuasive evidence.

In many cases, the investigation will be subject to discovery and the investigator may be called upon to testify at a deposition or at trial. Therefore, it is important to pick an investigator who will be as eloquent as he or she is competent so that any testimony offered will be clear, confident, and convincing. Ideally, the investigator should be someone from “central casting,” putting a positive “face” on your investigation (and your subsequent defense before an administrative agency or a trier of fact in court).

Attorney investigators (whether in-house or outside counsel) can be used so long as potential evidentiary and disqualification issues are addressed. A potential waiver of the attorney-client privilege is implicated when an attorney conducts the investigation, in addition to proof problems. The waiver issue arises when counsel for the company seeks to introduce evidence at trial that she or he has developed in the course of investigation. It is inconsistent to both assert the attorney-client privilege, prohibiting discovery of the matter, while simultaneously seeking to introduce the information, or even selected portions of the information, as evidence at trial, though if the report is carefully prepared, the waiver can be avoided. The proof problem is that the lawyer as investigator may be called upon to testify, both at deposition and at trial, as a percipient witness of material relevant facts. In federal court, and in many state court jurisdictions, this would typically lead to disqualification of the lawyer from trying the lawsuit to avoid undue prejudice to the opposing side in front of the jury. (Note that the lawyer-witness rule, even if applicable, only disqualifies the lawyer from acting as an advocate at trial; other matters, such as participation in pretrial activities, signing pleadings, planning trial strategy, and pursuing settlement negotiations, are not prohibited).

had touched her improperly, but the trial court questioned her credibility in this regard because she had failed to mention this allegation during prior administrative hearings).

8 See Wellpoint Health Networks, Inc. v. Superior Court, 59 Cal. App. 4th 110, 128 (1997) (“If defendant employer hopes to prevail by showing it investigated an employee’s complaint and it took action appropriate to the findings of an investigation, then it will have to put the adequacy of the investigation directly at issue, and cannot stand on the attorney-client privilege or the work product doctrine to preclude a thorough examination of its adequacy. The defendant cannot have it both ways. If it chooses this course, it does so with the understanding that the attorney-client privilege and work product doctrine are thereby waived.”); Johnson Rauland-Borg Corp., 961 F. Supp. 208 (N.D. Ill. 1997)(employer waived attorney-client privilege with respect to legal advice given by outside attorney in connection with her investigation of employee’s sexual harassment complaints by placing the investigation at issue in Title VII action and by arguing that it was not liable because it acted reasonably by employing outside attorney to investigate matter); Harding v. Dana Transp. Co., 914 F. Supp. 1084 (D. N.J. 1996)(attorney-client privilege waived as to investigatory files of counsel who conducted investigation of sexual harassment allegations when employer raised investigation as an affirmative defense: “By asking [the attorney] to serve multiple duties, the defendants have fused the roles of internal investigator and legal advisor. Consequently, [the employer] cannot now argue that its own processes are shielded from discovery.”).

9 See Anderson Producing Co. v. Koch Oil Co., 929 S.W.3d 416 (Tex. 1996). See also Petrilli v. Dreschel, 94 F.3d 325, 329 (7th Cir. 1996)(lawyer-witness rule does not preclude in-house counsel from testifying in employee’s
waiver issues, other ethical considerations apply when a lawyer is selected to conduct the investigation. A lawyer retained by a corporation or organization to conduct an investigation represents the organization only and not any of its constituents, such as officers or employees. Corporate or organizational constituents have no right of confidentiality with regard to communications with the lawyer, but the lawyer must advise them of his position as counsel to the organization in the event of any ambiguity as to his role.\(^\text{10}\)

**B. Investigators Not to Use.**

There are some individuals the employer should *not* select to investigate a claim, including:

1. a person accused of the discrimination or wrongful act;
2. other employees with vested personal or corporate interests in the matter;
3. individuals who lack restraint and a sense of discretion (so as to avoid stirring matters up unnecessarily among employees who may be percipient witnesses);
4. someone whose personality simply does not fit with the individual(s) being investigated. (The workplace is often an emotional cauldron. As a result, information will sometimes simply not be appropriately mined because the witnesses, while feigning cooperation, simply are not forthcoming. Common sense will guide in this area, particularly in small workplaces where there may also be extant “personality conflicts.”);
5. former law enforcement personnel, whose instincts and investigative techniques, while appropriate in the law enforcement context, often can appear inappropriate or heavy-handed in the eyes of a jury or trier of fact in the civil context. Private

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\(^{10}\) See Model Rules of Prof'l Conduct R. 1.13(d)(2002); District of Columbia Bar Ethics Opinion No. 269 (1997). See, e.g., *In re Grand Jury Subpoena*, 415 F.3d 333 (4th Cir. 2005), *cert. denied sub nom., Under Seal v. United States*, 126 S. Ct. 1114 (2006) (When company began an internal review of certain business transactions, its inside and outside counsel interviewed three former employees. Later, the SEC began to investigate the same matter and a grand jury was investigation was initiated. The three employees became targets of the grand jury investigation and one of them was later indicted. When the grand jury issued a subpoena for documents relating to the interviews, the company voluntarily waived its privilege. The employees moved to quash, claiming that the lawyers investigating the business transactions individually represented each of them as well as the company and, therefore, the interviews were individually privileged. The Fourth Circuit disagreed, ruling that no individual attorney-client privilege attached to the employees’ communication with the company’s attorneys. Prior to the interviews, attorneys told the employees that the lawyers represented the company and that the company could waive the privilege if it so chose. The lawyers also told the employees that the lawyers “could” represent them; the lawyers did not say that they “did” represent them. Thus, the employees could not have reasonably believed that the investigating attorneys represented them personally during that period.).
investigation firms are often similarly problematic, although an increasing number of firms now specialize in employment-related investigations and have personnel sensitive to the issues discussed here;

6. individuals who have a close personal or professional relationship with the accused or the complainant; and

7. HR representatives poised to deliver unrelated discipline to the complaining employee (for fear that any conclusion the HR representative derives in response to the employee’s complaint will be viewed as compromised and its integrity undermined by the HR representative’s assertedly adverse (non-dispassionate) feelings for the employee).

C. Train Investigators to Develop the Five Major Types of Evidence.

There are five major types of evidence used to dispose of most employment law claims, especially discrimination and wrongful termination, as noted below.

1. Direct evidence. Direct evidence speaks for itself. It needs no external interpretation. Direct evidence establishes the fact at issue. “I did it” or “She’s too old. Let’s fire her” or “Welcome to the Company. You enjoy certain benefits here at XYZ Company, including the right only to be discharged upon a showing of ‘good cause.’” Direct evidence is rare in discrimination cases, but is extremely common in express contract cases.

2. Circumstantial evidence. Circumstantial evidence creates an “inference,” typically of one’s intent and motivation. Circumstantial evidence is the most prominent proof in discrimination cases. To prove a prima facie case of unlawful discrimination relying on circumstantial evidence, the plaintiff must show: (a) that he or she belongs to a racial minority or other protected class; (b) that he or she applied and was qualified for a job for which the employer was seeking applicants or, in the case of an incumbent, was qualified for the job he or she was holding; (c) that despite qualifications, he or she was rejected as an applicant (or suffered other adverse employment action) under circumstances which would give rise to an inference of unlawful discrimination; and (d) that after his or her rejection, the position remained open and the employer continued to seek applications from persons of complainant’s qualifications, or that the employer selected a person outside the complainant’s protected class.

3. Anecdotal evidence. Anecdotal evidence consists typically of the stories of individual alleged victims (of discrimination) relating their interests, qualifications, protected class status, and adverse action. Anecdotal evidence is typically very compelling to the jury and often helps bring the cold allegations or statistics in a case “convincingly to life.”

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12 See Teamsters v. United States, 431 U.S. 324 (1977) (plaintiffs demonstrated a prima facie case of unlawful discrimination in assignment to better-paying “over the road” truck driver jobs, but nonetheless supported their
4. **Statistical evidence.** Statistics may prove a prima facie case of unlawful employment discrimination (either “disparate treatment” or “disparate impact”) if they are sufficiently large and the data are compelling and have integrity.\(^\text{13}\)

5. **Comparative evidence.** Comparative evidence is, as its name implies, a comparison of the treatment of two types of individuals (typically useful in discrimination cases). In a hiring case, for example, the judge would hold the rejected protected class member’s application in one hand and compare it to that of the successful candidate to determine whether the rejected applicant had better qualifications than the successful candidate.\(^\text{14}\)

### III. THINGS TO DO BEFORE THE INVESTIGATION BEGINS.

There are a number of “good housekeeping” matters noted below to which the organization or outside counsel must first attend before the investigation begins.

#### A. Suspend the Organization’s Record Retention Policy as to Any Possibly Relevant Documents.

Three types of limitations attach to interrupt management’s discretion to dispose of documents which may pertain to a pending claim, grievance, charge, demand letter, or lawsuit. Failure to maintain documents required to be maintained by statute or regulation will cause particularly pointed cries of “foul play” and give even greater impetus to claims of spoliation of evidence and/or claims that an “inference” of discrimination should attach (in discrimination cases), as noted below.

First, various federal and state record retention statutes and regulations apply, most designed to assist complaining employees and third-party investigators to obtain evidence to support claims employees or applicants make. For example, EEOC Regulations at 29 C.F.R. § 1602.14 require records regarding application, promotion, termination, transfer, layoff, demotion, and rates of pay or other terms of compensation, among others, to be retained for not less than one year from the date the record was made or the personnel action was taken, whichever is later. Accordingly, the organization should at least comply with applicable record retention laws and regulations.

Second, documents an organization destroys on the eve of a lawsuit known to be coming, or in progress, may give rise to claims of “spoliation of evidence.” Courts enjoy broad latitude statistical case with the anecdotal testimony of 44 drivers in the plaintiff class who told their story of being denied such assignments while being given simultaneously either no work or lower-paying inner city drive jobs).


\(^{14}\) See *Troupe v. The May Dep’t Stores Co.*, 20 F.3d 734 (7th Cir. 1994). In *Troupe*, Judge Posner appears to make almost mandatory the use of comparative evidence for a plaintiff claiming unlawful discrimination to make out a prima facie case of unlawful discrimination.
to fashion appropriate remedies in such instances. In a particularly well-known case, a federal
district judge ordered FMC Corporation to pay sanctions and recreate, at FMC’s expense,
affirmative action plans and other equal employment opportunity data it had destroyed (pursuant
to its normal record retention policy) on the eve of a rumored class action sex discrimination
lawsuit.15

B. Collect and Examine All Computer Resources.

When conducting an investigation, an employer may wish to search the company’s
computer database for evidence of an employee’s misconduct. Examples of places to search
include the following:

1. **Computer Network.** A majority of businesses use client-server computer networks that
store files on a central server. At a minimum, examination should include the server’s
hard disk and the hard disks of relevant employees;

2. **Removable disks and CDs.** Employers should examine information stored on
removable disks such as 3 ½” floppy disc, on high-density zip disks that store
significantly more information and on CDs (now standard on most laptops) which store
great volumes of information;

3. **PCMCIA Cards.** Computers can have one or more slots that accept removable memory
cards. These cards can store information that may be useful to an employer during an
investigation;

4. **Personal Digital Assistants.** These include programs such as personal electronic
organizers to maintain a user’s calendar, phone and “to do” lists; Palm Pilots, Handspring
Visors; and Blackberries, etc.;

5. **Temporary Files.** These are created for a particular computer session and then
automatically deleted. For example, word processing backup files are temporary files. If
a session is terminated improperly, the temporary file will not be deleted. These files
may reveal items that are not otherwise obtainable;

6. **Swap Files.** Computer operating systems use portions of the hard drive as virtual
memory called swap files. They contain fragments of e-mail, spreadsheets, word
processing documents and information related to Internet activity;

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15 *Cappellupo v. FMC Corp.*, 126 F.R.D. 545 (D. Minn. 1984). More serious consequences may result from such
treasurer of Texaco, Inc., indicted by federal grand jury on criminal charges of conspiring to obstruct justice for his
alleged acts in destroying documents in an employment discrimination case against the company; defendants could
be prosecuted under obstruction of justice statute).
7. **Embedded Information.** Embedded information about a document is not visible when a document is printed. Such information includes file editing history, dates and embedded comments of employees who have worked on a document;

8. **Audit Trails, Computer Logos and Access Lists.** Most network software automatically records information about use of the computer system. Audit trails and computer logs provide detailed information about who accesses the system, and at what time and on which computer station, as well as information on who modified a file and when. Access lists provide information about who has access to files and programs on the system;

9. **Cache Files, Browser and Cookie Histories.** Computers store a user’s frequently visited Web sites in cache files that are not overwritten until erased by new information. Browser histories record the online address of each location visited on the Internet by a particular user. When a user views a Web site, that Web site installs a small data file called a cookie on a user’s hard disk. Information on cache files, browser history and cookie history can be used to discover an employee’s Internet activities; and

10. **Tape Backups.** Most businesses possess backup tapes of all computer activity. These backup tapes are usually destroyed according to a document retention schedule. Such tapes are sometimes stored off-site.

An employer may also wish to prevent future misconduct by regularly monitoring its computer database. Employer search or review of an employee’s computer files and e-mail may give rise to claims of invasion of privacy or violation of the Electronic Communications Privacy Act of 1986 (“ECPA”). 18 U.S.C. §§ 2510 et seq. To minimize the risk of employee privacy rights claims, an employer should consider implementing an employee computer use policy that would enable it to monitor and search its computer databases. See Curto v. Med. World Communic’ns, Inc., 2006 WL 1318387 (E.D. N.Y. May 15, 2006) (former employee had not waived her right to assert the attorney-client privilege and work product immunity concerning documents allegedly retrieved from employer-owned laptops used by the employee during her employment at a home office; employee took reasonable precaution to prevent inadvertent disclosure in that she sent the e-mails at issue through her personal AOL account which did not go through the company’s servers, and she attempted to delete the material before turning in the laptop; the volume of material was relatively limited, and the employee promptly requested return of the e-mails upon notification).

C. **Promptly and Properly Invoke the Attorney-Client Privilege, Where Possible.**

The attorney-client privilege does not automatically attach simply because an attorney is involved in the investigation. Rather, you must observe certain procedural formalities both with respect to the inclusion of inside or outside counsel.

The privilege generally applies in federal courts when the party asserting the privilege can show that:
1. the communication involves information needed for the attorney to provide the organization with legal representation;

2. the communication relates to a matter within the employee’s scope of employment;

3. the employee was aware at the time the communication was made that the information was being given to the attorney so the attorney could provide the organization with legal services or advice; and

4. the organization intended the employee’s communications to remain confidential.\(^\text{16}\)

The majority of jurisdictions, including Texas, have adopted variants of the *Upjohn* subject matter test, by which the lawyer’s communications with even lower-level managers and employees are protected under certain circumstances.\(^\text{17}\) However, note that simply “cc’ing” a

\(^{16}\) *Upjohn v. United States*, 449 U.S. 383 (1981); *Carter v. Cornell Univ.*, 173 F.R.D. 92 (S.D. N.Y. 1997), *dism’d on other grounds*, 1997 WL 562007 (S.D. N.Y. 1997) (attorney-client privilege protected interviews with university employees conducted by university’s associate dean for human resources at request of lawyers defending university from charges of discrimination and retaliation; work product doctrine protected document prepared by dean reflecting information she accumulated in investigating claims); *In re Grand Jury Subpoena*, 599 F.2d 504, 510 (2d Cir. 1979) (preliminary internal investigation by management of foreign payments was not privileged, even though the report was later forwarded to counsel; however, a similar report prepared later by both in-house counsel and outside counsel in anticipation of litigation was both work product and privileged); *Oregon Health Sci. Univ. v. Haas*, 942 P.2d 261 (Oregon 1997)(university department head’s communication with faculty at faculty meeting regarding internal report on discrimination in department triggered by lawsuit by female physician did not waive attorney-client privilege; communication was confidential and made in furtherance of providing legal services to client, and even though no lawyer was present, statement was communication between “representatives of the client.”); *Dunn v. State Farm*, 927 F.2d 869 (5th Cir. 1991) (the rule does not demand that the communication solely contain legal analysis or advice; rather, privilege protection attaches to those communications that would facilitate the rendition of legal services or advice). Compare *Nat’l Farmer Union Prop. and Cas. Co. v. Dist. Court*, 718 P.2d 1044 (Colo. 1986) (interviews with employees concerning insurance claims investigation held not privileged, in part because there was no showing that persons interviewed by the attorneys were even informed that the attorneys were acting as counsel or told that the investigation was confidential); *Isom v. Bank of Am.*, 628 S.E.2d 458 (N.C. App. 2006) (“[A] document, which is not privileged in the hands of a client, will not be imbued with the privilege merely because the document is handed over to the attorney.”).

\(^{17}\) See *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355 (10th Cir. 1997) (legal memorandum allegedly addressing employer’s disparate treatment of women prepared for higher management by in-house attorney acting within scope of employment protected by attorney-client privilege, even if communications do not contain confidential matters; plaintiff’s affidavit by management employee referring to contents of memorandum did not waive privilege; power to waive privilege rests with corporation’s management and is normally exercised by its officers and directors); *Elec. Data Sys. Corp. v. Steingraber*, 2003 WL 21653414 (E.D. Tex. 2003); *Long v. Anderson Univ.*, 204 F.R.D. 129 (S.D. Ind. 2001) (attorney-client privilege applied to (a) electronic mail sent from university’s human resources director to dean of students regarding conversation she had with university’s legal counsel and his legal advice, (b) summary report prepared by counsel and human resources director, and (c) draft response to former student athlete’s civil rights complaint that was prepared by dean of students and sent to legal counsel, investigative conclusions and codes prepared by counsel, and letter to counsel by human resources director regarding discovery requests); *Carter*
lawyer in otherwise nonprivileged communications does not inoculate such communications from disclosure.\(^\text{18}\)

Attorneys conducting interviews of supervisory or management employees that are potentially subject to the attorney-client privilege under *Upjohn* should consider having the employee read and sign a statement prior to commencement of the interview to document that the requirements of *Upjohn* have been met.\(^\text{19}\)

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\(^{18}\) See, e.g., *SmithKline Beecham Corp. v. Teva Pharms. USA, Inc.*, 232 F.R.D. 467 (E.D. Pa. 2005) (“What would otherwise be routine, non-privileged communications between corporate officers or employees transacting general business of the company do not attain privileged status solely because in-house or outside counsel is ‘copied in’ on correspondence or memoranda.” (citations omitted)); *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So.2d 1377 (Fla. 1994) (*Upjohn* test applied but internal audits conducted by telephone company at request of counsel in response to Commission investigation did not constitute protected “communication” because lawyer was making substantive business decisions in addition to rendering legal advice); *Dawson v. New York Life Ins. Co.*, 901 F. Supp. 1362 (N.D. Ill. 1995) (communications made by general counsel, vice president, and senior vice president of company to company’s attorneys who were members of company’s control group were not made for purpose of securing legal advice and thus were not protected by attorney-client privilege in defamation action brought by former employee, where attorneys were simply called upon to provide factual information to persons receiving information; attorneys acted more as couriers of information than as legal advisors); *B.F.G. of Ill., Inc. v. Ameritech Corp.*, 2001 WL 1414468 (N.D. Ill. Nov. 13, 2001) (courts “will not tolerate the use of in-house counsel to give a veneer of privilege to otherwise nonprivileged business communications”); *City of Springfield v. Rexnord Corp.*, 196 F.R.D. 7 (D. Mass. 2000) (documents that might have been prepared with the assistance of in-house counsel in anticipation of possible litigation with Massachusetts Department of Environmental Quality Engineering were not protected by attorney-client privilege, where they were prepared in anticipation of media inquiries, and thus represented corporation’s public, albeit potential, statements); *SR Int’l Bus. Ins. Co. Ltd. v. World Trade Ctr. Props. L.L.C.*, 2003 WL 193071 (S.D.N.Y. Jan. 29, 2003) (notes taken by property insurer’s employee and another insurer’s adjuster at market and steering committee meetings were not protected by attorney-client privilege from disclosure in insurer’s suit to recover under policies, even if attorneys took part in meetings, and insurers shared common legal interest, where meetings involved ordinary business, rather than legal, matters, and attorneys later asked all non-lawyers to step out so that lawyers could meet separately).

\(^{19}\) A Model *Upjohn* statement is set forth at Attachment 1.
D. Discovery of Investigation Materials Prepared by Attorneys.

The issue of waiver of the attorney-client privilege arises when counsel for the employer seeks to introduce evidence at trial that he/she has developed in the course of investigation as the basis of the employer’s affirmative defense, as in sexual harassment cases, or otherwise in response to plaintiff’s claims.

Some courts have held that an employer waived the attorney-client privilege when it contends in a sexual harassment case that its response to plaintiff’s allegations were “reasonable” based on an investigation by outside counsel. On the other hand, where the investigative materials are reasonably segregated from the attorney’s advice and other privileged communications and the plaintiff is afforded full discovery regarding all aspects of the investigation, courts have held that the attorney-client privilege has not been waived unless a substantial portion of attorney-client communication has been disclosed to third parties.

20 See Rahn v. Junction City Foundry, Inc., 2000 WL 1679419 (D. Kan. Nov. 3, 2000) (defendant affirmatively acted in placing privileged information at issue by asserting the affirmative defense that it took prompt, effective remedial action when it became aware of sexual harassment complaint); Harding v. Dana Transp., Inc., 914 F. Supp. 1084, 1096 (D.N.J. 1996) (employer waived attorney-client privilege by relying on its lawyer’s investigation as affirmative defense to plaintiff’s sexual harassment claims: “By asking [the attorney] to serve multiple duties, the defendants have fused the roles of internal investigator and legal advisor. Consequently, [the employer] cannot now argue that its own process is shielded from discovery.”); Brownwell v. Roadway Package Sys., Inc., 185 F.R.D. 19 (N.D.N.Y. 1999) (employer waived attorney-client privilege and work product protection to prevent disclosure of statements during harassment investigation where employer raised adequacy of investigation as a defense); McGrath v. Nassau Health Care Corp., 204 F.R.D. 240 (E.D.N.Y. 2001) (in Title VII action in which employer asserted affirmative defense of appropriate remedial action, employer waived attorney-client and work product privileges and, thus, was required to produce attorney’s report of investigation and her handwritten investigative notes, and any part of reports that had been deleted or redacted); Rivera v. Kmart Corp., 190 F.R.D. 298 (D.P.R. 2000) (employer waived attorney-client privilege with regard to document pertaining to interview of store manager when it used such documents as a sword to support its position in a wrongful termination case that the employees were terminated for involvement in destruction of merchandise to be included in an insurance claim); Peterson v. Wallace Computer Servs., 984 F. Supp. 821 (D. Vt. 1997) (attorney-client privilege and work product protection did not preclude disclosure of investigative notes and memoranda where employer asserted adequacy of investigation as defense).

21 Waugh v. Pathmark Stores, Inc., 191 F.R.D. 427 (D.N.J. 2000) (fact that employer’s in-house counsel attended meeting with employer’s decision-makers, in which manager reported her factual findings from her investigation into employee’s discrimination complaints, and reviewed documents relevant to employee’s discrimination charges did not waive attorney-client privilege with respect to counsel’s participation in employer’s remediation efforts; counsel attended meeting and reviewed documents merely in his capacity as attorney for employer, counsel did not conduct investigation himself or act as decision-maker in employer’s remediation efforts, and the employer declined to rely on counsel’s advice to support its defense regarding reasonableness of its investigation or remedial measure); Walker v. County of Contra Costa, 227 F.R.D. 529 (N.D. Cal. 2005) (in a race discrimination and retaliation case against defendant county and fire chief, plaintiff employee moved to compel production of an attorney’s investigation report on the merits of employee’s claims and a report prepared by the county’s human resources department. The magistrate judge ordered production of the attorney’s report as to the pre-litigation investigation into the employee’s claims because the language in the defendants’ affirmative defense indicated that they intended to rely on the attorney’s investigation and the human resources report, which waived the attorney-client privilege. However, the attorney’s analysis of the adequacy of the investigation did not fall within the scope of the waiver since it was not relevant to the affirmative defense. Defendants’ reliance on the human resources report in their affirmative defense also waived any possible privilege, and there was no reason to believe the report contained any
Note that some courts have held that the attorney-client privilege does not apply where the attorney was acting as an investigator rather than an attorney.\textsuperscript{22}

To maximize the likelihood that the privilege may be properly invoked, an employer should, at least, do the following:

1. A person within the organization with sufficient authority to ask attorneys for legal advice and/or to act upon legal advice received should request the assistance of counsel. (Preferably, this is done through a short written communication to the lawyer creating a record memorandum to the file of the precise date after which all protected communications would be subject to the privilege);

2. Once the privilege is invoked, nonlawyer corporate managers within the organization should report to the organization’s legal department or to outside counsel thereafter, taking instruction from counsel; and

3. It is useful to recite for the record, from time to time, that the matter under consideration is proceeding pursuant to the need for legal advice. For example, investigators could begin or end written reports not only addressing them to counsel, but also requesting counsel to advise what appropriate legal options exist in light of the investigative report. Similarly, counsel should direct the nonlawyer corporate

\textsuperscript{22} See In re Tex. Farmers Ins. Exch., 990 S.W.2d 337 (Tex. App.—Texarkana 1999, orig. proceeding [mand. denied]) (attorney-client privilege does not apply where attorney was acting in any capacity other than that of an attorney, such as an investigator; trial court did not abuse its discretion in determining that an attorney hired by an insurance company to conduct witness interviews was acting as an investigator and not as an attorney). Compare In re Baptist Hosps. of Southeast Tex., 172 S.W.3d 136, 143 (Tex. App.—Beaumont 2005, no pet.) (“Performing the function of a lawyer does not preclude a litigation attorney from observing, investigating, monitoring, and evaluating the facts surrounding the matter in controversy.”); Harlandale Indep. Sch. Dist. v. Cornyn, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney was retained by school district to conduct independent investigation in her capacity as attorney for purpose of providing legal services and advice, and thus attorney’s entire report was protected by attorney-client privilege and excepted from disclosure to newspaper under Texas Public Information Act, even through attorney detailed her factual findings in discrete portion of report apart from her legal analysis and recommendations, where retention documents and witnesses demonstrated that district requested investigative report for primary purpose of obtaining legal advice) (distinguishing Tex. Farmers Ins. Exch., supra); In re Grand Jury Subpoena, 599 F.2d 504, 510-11 (2d Cir. 1979) (investigation by law firm retained to investigate and provide legal advice based on that investigation “trigger[s] the attorney-client privilege”); In re Int’l Sys. & Controls Group Sec. Litig., 91 F.R.D. 552, 557 (S.D. Tex. 1981) (confidential communications made by attorneys “hired to investigate through the trained eyes of an attorney” privileged), vacated on other grounds, 693 F.2d 1235 (5th Cir. 1982).
investigator to gather appropriate facts “to allow counsel to give appropriate legal advice to the organization.”

It is also important to note that the privilege protects only communications and does not prevent the disclosure of underlying facts. It is also necessary that the organization not “waive” the privilege by communicating the information to third parties other than those to whom disclosure would be made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for transmission of the communication. Accordingly, it is important for the investigator not to be revealing of the organization’s position or strategy of defense as interviews progress. Moreover, the investigator must be discreet so as not to “waive” the attorney-client privilege by repeating to those not necessary to the investigation information about its progress and results.

E. Arrange to Protect Attorney Work Product.

Separate from the attorney-client privilege is protection of “attorney work product.” The “work product doctrine” protects from discovery the documents, reports, communications, memoranda, mental impressions, conclusions, opinions, or legal conclusions counsel prepares in anticipation of litigation or for trial.

Like the attorney-client privilege, the work product doctrine is subject to waiver and does not protect factual information in preparation of the lawsuit.

F. Determine Immediately How to Proceed With the “Potential Conflict” Issue if, in Addition to the Company, a Manager Is Also Sued or Threatened With Suit.

The code of professional responsibility for lawyers compels each lawyer to (1) zealously pursue his/her client’s interests to the exclusion of all others and (2) maintain client confidences indefinitely unless otherwise instructed. The issue thus arises how an organization should proceed to investigate claims should its manager also be sued, or threatened with suit, since there may be a “conflict of interest” between the parties. If the organization makes the election to have one lawyer or law firm represent the defendant organization and its defendant manager(s) (as is typically the case), the possibility looms that the organization could eventually

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23 Upjohn, 449 U.S. at 395; In re Six Grand Jury Witnesses, 979 F.2d 939, 944 (2d Cir. 1992), cert. denied sub nom., XYZ Corp. v. United States, 509 U.S. 905 (1993) (communications between attorney and client regarding an internal investigation were privileged, but factual information contained in written communications, including the results of investigation, were not shielded from discovery); Ex parte Alfa Mut. Ins. Co., 631 So.2d 858 (Ala. 1993) (attorney-client privilege did not bar deposition of corporation’s general counsel regarding facts upon which he relied in authorizing corporation’s outside counsel to threaten plaintiff with sanctions).


retain as many as three law firms should a conflict develop between the interests of counsel’s clients such that counsel would want to introduce adverse evidence on behalf of one client to exonerate the other. While this scenario is a favorite ethics hypothetical, currently unresolved, the greatest fear is that counsel will have to recuse himself/herself once knowledgeable of the confidences of one client which he/she wishes to use as evidence against the other. This would necessitate the retention of two new law firms, one each to represent each of the two clients now at odds with each other.

Accordingly, at the outset of its proposed investigation, the organization must determine whether it is interviewing the manager as a “percipient witness” to what he did, saw or heard, or whether the organization is interviewing the manager as a “client.” The expensive and strategically undesirable choice is to retain two law firms at the outset – one to represent the manager’s interests and one to represent the organization’s interests. However, cost constraints and the desire to present (hopefully) a “unified defense” at trial (so as to avoid a “divide and conquer” plaintiff employee strategy) typically drives the result that one law firm represent the interest of both accused defendants through the investigation, charge process, and trial.

If the employer adopts this course, it is prudent at the outset for counsel representing the to issue “conflict letters” to both corporate defendant clients putting the defendant manager on notice and obtaining his/her consent and agreement that should a conflict in fact develop as the investigation/discovery unfolds in coming weeks, months and years, the law firm will continue to represent the employer and abandon the defense of the defendant manager. A number of jurisdictions have held that an attorney may obtain a prospective waiver of potential conflicts that may arise in the course of simultaneous representation of a corporation and a management employee. Thus, the attorney may secure the employee’s advance consent to the continued representation of the corporation in the lawsuit and in any dispute with or litigation against the employee arising out of the same transaction in the event the firm withdraws from representing the employee. Such agreements are not prohibited, provided that the lawyer can jointly represent the corporation and the employee competently, and both the corporation and the employee give their informed consent.27

In addition, the waiver should address in advance and, where possible, in writing, the impact of joint representation on the lawyer’s duty to maintain client confidences and to keep each client reasonably informed, and to obtain each client’s informed consent to the arrangement.28 The mere fact of joint representation, without more, does not provide a basis for

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27 See Reich v. Muth, 34 F.3d 240, 245 (4th Cir. 1994) (law firm representing both employer being investigated by OSHA and subpoenaed employees not required to be disqualified where both clients waived potential conflict problems, there was no evidence that the employees were coerced into the representation, and the employees had no liability exposure); Zador Corp. v. C.K. Kwan, 31 Cal. App. 4th 1285 (1995) (if attorney received informed waiver of future conflicts, attorney may withdraw from its representation of one of the clients and continue to represent the other even if otherwise confidential information would be used against the former client); ABA Formal Ethics Op. No. 05-436 (2005). (New Comment [22] to Model Rule 1.7, amended February 2002, permits a lawyer to obtain effective informed consent to a wider range of future conflicts than would have been possible under the Model Rules prior to their amendment.).

28 See D.C. Bar Opinion No. 296 (Feb. 15, 2000).
implied authorization to disclose one client’s confidences to another. Where express consent to share client confidences has not been obtained and one client shares in confidence relevant information that the lawyer should report to the nondisclosing client in order to keep that client reasonably informed, to satisfy his duty to the nondisclosing client, the lawyer should seek consent of the disclosing client to share the information or ask the client to disclose the information directly to the other client. If the lawyer cannot achieve disclosure, a conflict of interest is created that requires withdrawal.

G. Clarifying Who the Investigating Lawyer Represents.

Where a lawyer is retained to conduct an internal corporate investigation, it is sometimes the case that a corporate employee, director, or other constituent may presume erroneously that the corporation’s lawyer also represents the employee or constituent personally, especially where the lawyer has represented the corporation and dealt with its employees on a regular basis. This risk of confusion is more likely to occur in the context of investigations, since corporate managers and noncomplainant employees usually begin on the same “team” with the in-house lawyer and tend to feel that the lawyer represents “their” interests as well as the corporation (since in their minds these interests are identical). Internal investigations conducted by in-house attorneys present the same risk of confusion, with employees presuming that the in-house lawyer represents them personally. ABA Model Rule 1.13(d) provides that when it is reasonably apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing (such as directors, officers, members, shareholders, etc.), the lawyer must explain the identity of the client.

The issue of disqualification may arise where in the course of the investigation or representation the lawyer works with managerial employees who later bring claims against the employer. For example, in Cole v. Ruidoso Municipal Schools, the plaintiff, a former principal suing a school district in a sex discrimination and Equal Pay Act case, claimed that the school’s law firm should be disqualified because as principal she had consulted with attorneys from the firm regarding dismissal of several district employees and other “sensitive personnel matters”

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29 Id. Cf. Frontline Commc’ns Int’l, Inc. v. Sprint Commc’ns Co., 232 F. Supp. 2d 281, 288 (S.D. N.Y. 2002) (“When an attorney represents an employer and employee jointly, the employee cannot reasonably expect the attorney to keep any information from the employer.”).

30 Id.

31 See, e.g., United States v. Int’l Blvd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., 119 F.3d 210 (2d Cir. 1997) (attorneys in all cases required to clarify exactly whom they represent, and to highlight potential conflicts of interests); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978) (law firm for a trade association gave some individual members of association the impression that firm was also representing them when collecting information from the members; when matter arose for another client in which the information collected from the members might be used against them, firm was required to withdraw from representation because of conflicting confidentiality obligations to the members); D.C. Ethics Opinion No. 269 (1997) (a lawyer retained by a corporation to conduct an internal investigation represents the corporation only and not any of its constituents, such as officers or employees; corporate constituents have no right of confidentiality regarding communication with the lawyer, but the lawyer must advise them of his position as counsel for the corporation in the event of any ambiguity as to his role).
and acted on their advice.\textsuperscript{32} The Tenth Circuit held that the district court properly refused to disqualify the firm, since plaintiff consulted with the firm only for the purpose of carrying out her duties as principal and thus the attorney-client relationship was not with her individually, but as an agent of the school district.\textsuperscript{33} In circumstances where the employer’s attorney previously represented the employee individually, albeit jointly, with his former employer in prior litigation, some courts have rejected disqualification, holding that the former employee could not reasonably have assumed that the attorney would withhold information from the employer.\textsuperscript{34}

Notwithstanding cases like \textit{Cole}, some courts and ethics opinions have held that an attorney-client relationship may be implied by conduct, especially where the lawyer was not sufficiently clear to the individual corporate employee concerning who the lawyer represented and where the employee disclosed personal confidential information.\textsuperscript{35}

Even in the absence of apparent adverse interests, the in-house lawyer is advised to give a corporate “Miranda warning” in which the in-house lawyer makes clear that he/she is conducting the interview on behalf of the corporate or organizational entity and affirmatively disclaims

\textsuperscript{32} 43 F.3d 1373 (10th Cir. 1994). \textit{See also Prof’l. Serv. Indus., Inc. v. Kimbrell}, 758 F. Supp. 676 (D. Kan. 1991) (attorney-client relationship did not exist between former president of company and attorney for corporation which purchased company, and thus, former president was not entitled to have attorneys disqualified in corporation’s action against him based on conflict of interest; former president never sought or obtained legal advice or assistance on any personal issue from attorneys); \textit{Nilavar v. Mercy Health Sys.-Western Ohio}, 143 F. Supp. 2d 909 (S.D. Ohio 2001) (motion to disqualify denied where plaintiff provided no evidence that he reasonably believed attorney and attorney’s firm represented him individually; rather, the evidence showed that the plaintiff believed his communications arose as a shareholder of the corporation attorney and the attorney’s firm represented, not as an individual); \textit{Clark Capital Mgmt. Group, Inc. v. Annuity Investors Life Ins. Co.}, 149 F. Supp. 2d 193 (E.D. Pa. 2001) (implied attorney-client relationship did not arise between defendant and prospective co-counsel, by virtue of series of brief telephone conversations between defendant’s attorney and prospective co-counsel, and thus no conflict of interest arose from fact that prospective co-counsel’s firm later was retained by plaintiff in the same action; attorney initiated calls to inquire into prospective co-counsel’s interests and availability, and no offer to retain was made or accepted).

\textsuperscript{33} Id.

\textsuperscript{34} \textit{Allegaert v. Perot}, 565 F.2d 246, 250-51 (2d Cir. 1971).

\textsuperscript{35} \textit{See, e.g., Home Care Indus., Inc. v. Murray}, 154 F. Supp. 2d 861 (D. N.J. 2001) (law firm was disqualified from representing corporation in lawsuit against corporation’s former chief executive officer (“CEO”) under New Jersey Rules of Professional Conduct; firm and CEO had shared implied attorney-client relationship while CEO was employed by corporation, since CEO had sought firm’s assistance to defend him against claims by former employees of corporation, firm failed to inform CEO that it represented corporation, not CEO, firm had access to CEO’s files, thoughts, and strategies regarding employees’ claims, and firm fostered environment in which CEO felt he could confide in firm, and corporation’s suit against CEO shared common core of facts with employees’ claims against CEO); \textit{Advanced Mfg. Techs., Inc. v. Motorola, Inc.}, 2002 WL 1446953 (D. Ariz. July 2, 2002) (implied attorney-client relationship was created between nonparty retired employee of defendant and defendant’s counsel, because employee had voluntarily appeared at counsel’s office and communicated freely in preparation for deposition, and at deposition itself employee clearly stated that counsel represented him and counsel, by silence, acquiesced; protective order rather than disqualification appropriate because counsel may have been intentionally misled by employee that employee’s interests were not adverse to defendant’s, and counsel had been representing defendant for three years, and, thus, balance of equities weighed against disqualification).
representation of the constituent. This is especially important in situations where the employee has a potential claim against the corporation, or when the employee may have committed a wrong toward the corporation. Additionally, an explanation of counsel’s loyalty to the organization is often appropriate in connection with internal investigations. In disclaiming representation, counsel should explain the conflict of interest presented by the potential adversity, that the lawyer cannot represent the constituent, and that the employee’s statements may not be kept in confidence with respect to the corporation and may not be privileged. In some circumstances, counsel may wish to advise the employee to retain separate counsel.

H. No Retaliation Reminder.

Every investigation should begin by reminding the investigator to advise all organizational employee witnesses that the organization will not retaliate against the employee because of his/her cooperation with the organization. Obviously, such a promise of no retaliation is not a promise of immunity, should it turn out, for example, that the witness previously violated organizational policy and confesses evidence of same.

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36 A suggested statement: “I am conducting this interview as the attorney representing [the company] in connection with an investigation of [describe nature of investigation/proceeding]. Anything you tell me may be disclosed to company management or otherwise in connection with that proceeding. Although what you say may be considered a confidential communication between the company and its attorney, I do not represent you personally and thus cannot promise to keep anything you tell me from appropriate company officials.” Note that as a general matter, an employee has no right to counsel or Miranda warnings during a workplace interview. See, e.g., TRW, Inc. v. Superior Court, 25 Cal. App. 4th 1834 (1994), cert. denied sub nom. Ma v. TRW, Inc., 513 U.S. 1151 (1995) (employee fired for insubordination for refusing, in absence of counsel, to answer his employer’s questions about security breaches; even if Fifth Amendment could apply to this private employer interrogation, the interview was not a custodial interrogation that would trigger Miranda rights).

37 See, e.g., In re Grand Jury Subpoena, 415 F.3d 333 (4th Cir. 2005), cert. denied sub nom., Under Seal v. United States, 126 S. Ct. 1114 (2006) (When company began an internal review of certain business transactions, its inside and outside counsel interviewed three former employees. Later, the SEC began to investigate the same matter and a grand jury was investigation was initiated. The three employees became targets of the grand jury investigation and one of them was later indicted. When the grand jury issued a subpoena for documents relating to the interviews, the company voluntarily waived its privilege. The employees moved to quash, claiming that the lawyers investigating the business transactions individually represented each of them as well as the company and, therefore, the interviews were individually privileged. The Fourth Circuit disagreed, ruling that no individual attorney-client privilege attached to the employees’ communication with the company’s attorneys. Prior to the interviews, attorneys told the employees that the lawyers represented the company and that the company could waive the privilege if it so chose. The lawyers also told the employees that the lawyers “could” represent them; the lawyers did not say that they “did” represent them. Thus, the employees could not have reasonably believed that the investigating attorneys represented them personally during that period.); In re Grand Jury Subpoenas, 144 F.3d 653 (10th Cir.), cert. denied sub nom., Anderson v. United States, 525 U.S. 966 (1998) (individual corporate officers were able to assert a personal attorney-client privilege with respect to conversations with corporate counsel where they showed they approached counsel for purpose of seeking legal advice in their individual capacities rather than as representatives, and that the conversations did not concern matters within the company or the general affairs of the company); Moore v. Yarbrough, Jameson & Gray, 993 S.W.2d 760 (Tex. App.—Amarillo 1999, no pet.) (attorney can be held negligent when the attorney fails to advise a party that he is not representing her in a case where circumstances lead the party to believe that the attorney was representing her in the matter).
I. Identify and Isolate All Potentially Applicable Personnel Policies.

Before commencing the investigation, and later along the path as more information and evidence are acquired suggesting that additional policies may be implicated, the investigator should review the unfolding evidence against the standards of any applicable personnel policies. (NOTE: Once it is determined at the conclusion of the investigation that the organization and complainant have complied with all applicable organizational policies, the final step of the investigation is to examine any discrimination claims also against the organization’s practice(s) to ensure that no other employee was treated differently than the complaining employee in similar circumstances, because such “comparative evidence” would serve to provide circumstantial evidence of unlawful disparate treatment discrimination.)

J. Your Investigation Should Prepare the Organization for Potential Ex-Parte Contacts With Employees of the Defendant Organization.

The best witness a plaintiff has to an employer’s bad acts will likely be co-employees and may be a present or former manager, officer or director of the employer. Because employment litigation can take years to come to trial, a continuing source of frustration to defense lawyers is how to control employees important to the case but who leave the organization, many under circumstances that would cause them to be only too happy to assist the plaintiff. May plaintiff’s counsel contact these key witnesses? The short answer in most jurisdictions is that they may make ex parte contact with current and former employees, except those who are current “control group” members, employees whose behavior is at issue and whose action could bind the organization, and employees whose statements may constitute an admission.

The case law in this area is quite divergent. Note that, as a threshold matter, it must be shown that the attorney “knows”38 that the corporation is a “party represented by counsel”39 in the matter at the time the contact is made.40

38 See Truitt v. Superior Court, 59 Cal. App. 4th 1183 (1997) (no improper ex parte communication occurred when investigator for employee’s law firm in discrimination action contacted and obtained written statement from employee’s co-worker since law firm had no actual knowledge that railroad was represented by counsel at time of contact; constructive knowledge or knowledge that railroad employs in-house counsel insufficient unless law firm knew in fact that in-house counsel represented person being interviewed when interview was being conducted); Humco, Inc. v. Noble, 31 S.W.3d 916 (Ky. 2000) (letter from hospital administrator to attorney for former employee responding to attorney’s demand letter, which was copied to hospital’s in-house counsel, did not clearly indicate that in-house counsel was representing hospital with regard to potential employment discrimination lawsuit and thus subsequent contact by former employee’s attorney with current hospital employees was not violation of ex parte contact rule: “Individuals often copy ‘their attorney’ on letters, but that fact alone does not establish that the attorney is representing the letter-writer, nor does this record reveal any such representation”); In re Users Sys. Servs., Inc., 22 S.W.3d 331(Tex. 1999) (attorney may speak with an opponent who states that his attorney has been discharged; Rule 4.02 does not require attorney to contact a person’s former attorney to confirm the person’s statement that representation has been terminated before communicating with the person).

39 Jorgensen v. Taco Bell Corp., 50 Cal. App. 4th 1398 (1996) (action of former employee’s attorney retaining investigator to interview client’s former co-workers without former employer’s consent, seven months prior to filing sexual harassment action against former employer, did not violate ex parte communications rule); Johnson v. Cadillac Plastic Group, Inc., 930 F. Supp. 1437 (D. Colo. 1996) (corporation not a “party” at time employee’s
As to former employees, the majority of jurisdictions have held that contact with unrepresented former employees of a corporate party is appropriate.\textsuperscript{41} As to current employees, the majority of jurisdictions only prohibit \textit{ex parte} communications with current employees that have managerial responsibility with the organization that relates to the subject matter of the representation, or employees whose act or omission in connection with the subject matter of the representation may make the organization or entity of government vicariously liable for such act or omission.\textsuperscript{42} Moreover, a “blanket” assertion by counsel that the law firm represents all of the organization’s managers and employees is generally insufficient to expand the scope of prohibited contacts.\textsuperscript{43} Contact with a nonmanagerial employee may also be prohibited where the employee has possession of or access to confidential information of the represented organization.\textsuperscript{44}

\begin{footnotesize}
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\item Cf. Univ. of Louisville v. Shake, 5 S.W.3d 107 (Ky. 1999) (university failed to show it would be irreparably harmed by trial court’s refusal to disqualify former university employee’s attorney and his firm from employment discrimination case against university or to suppress any information obtained as a result of attorney’s conversation with another former university employee at a party, and thus, university was not entitled to mandamus relief, given that former employee did not reveal any confidential or privileged information to attorney).
\item Tex. R. Prof. Conduct, Rule 4.02 (former employees of corporation not within scope of \textit{ex parte} communication prohibition, even if former employee was manager or supervisor or a person whose acts or omission is the basis for the claimed liability against the corporation); Rule 2-100, California Rules of Professional Conduct, Discussion (“party” “is intended to apply only to persons employed at time of communication.”).
\item See, e.g., Ohio Ethics Op. No. 2005-3 (2005) (Despite assertion of blanket representation by counsel of the corporation and all of its current and former employees, counsel representing an interest adverse to the corporation may without the consent of corporate counsel contact (a) all current employees of the corporation, except those who supervise, direct, or regularly consult with the corporation’s lawyer concerning the matter, or whose acts or omission in connection with the matter may be imputed to the corporation for the purposes of civil or criminal liability, and (b) all former employees (unless the former employees are represented by their own counsel and then consent of such counsel is required), where counsel explains that he represents a client adverse to the corporation and informs the former employee not to divulge any communications that the former employee may have had with corporate or other counsel with respect to the matter); Utah Ethics Op. No. 04-06 (2004) (If corporate counsel has actually formed an attorney-client relationship with present and former corporate employee-witnesses, and has properly obtained informed consent to joint representation, then corporate counsel may preclude opposing counsel from interviewing them. However, in the absence of an attorney-client relationship, it is improper for corporate counsel to block opposing counsel’s access to other current corporate constituents, by asserting an attorney-client relationship, unless these individuals were control group members, their acts could be imputed to the organization or their statements would bind the corporation with respect to the matter. Similarly, it is improper to block opposing counsel’s access to any former employee in the absence of a current fully formed and proper attorney-client relationship.).
\item See Coburn v. DaimlerChrysler Serv. N. Am., 289 F. Supp. 2d 960 (N.D. Ill. 2003) (plaintiff in proposed class action against finance company failed to rebut presumption that class member, who worked for company as administrative assistant to the company’s assistant general counsel, provided or was likely to provide plaintiff’s counsel with confidential information, warranted disqualification of counsel; class member had personal incentive to transmit confidential information, information counsel requested from class member and information counsel prohibited her from discussing were closely related, and class member, who was not a lawyer, was not qualified to
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K. Practical Considerations.

Organization counsel should promptly identify and interview managerial employees and those whose admissions could bind the organization in the filed or threatened lawsuit. In addition, counsel may wish to identify and discreetly prepare other present and former employee witnesses for the inevitable call from opposing counsel. Finally, counsel should move for a protective order to safeguard any privileged communications that a prospective witness may possess. If a witness was not involved in privileged communications, counsel may find it difficult to persuade a court to restrict ex parte communications absent clear evidence the individual is presently part of the organization’s control group. Although not implicated in the cases interpreting the ex parte communications rule, counsel should not overlook how the employee’s or former employee’s actions may bind or be imputed to the employer.

IV. GENERAL CONSIDERATIONS FOR ALL INVESTIGATIONS

A. Investigate Complaints Promptly and Thoroughly.

Once a complaint is made, it should be handled as a high priority. It is prudent to ensure that the complaint is investigated and that the employee is given prompt and courteous feedback about the conclusions reached. A number of courts have also held that the employer’s investigation must be a genuine attempt to remedy the problem.45

1. Act promptly.

Although prompt investigation of any employee complaints should be important, complaints of sexual harassment must be given an even higher level of priority because the employer’s liability, or the extent of damages, may hinge on the employer’s response. To assert the defense, the employer must show “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by

determine confidentiality); E.E.O.C. v. Dana Corp., 202 F. Supp. 2d 827 (N.D. Ind. 2002) (employer did not show any reason why ex parte communication by EEOC with former managerial employee would reveal confidential, classified or privileged information, and, thus, EEOC’s ex parte communication with former managerial employee did not violate Indiana Rules of Profession Conduct); E.E.O.C. v. Midwest Emergency Assoc., Ltd., 2006 WL 495971 (N.D. Ill. 2006) (EEOC investigator’s contact with managerial witnesses, in alleged violation of the EEOC Compliance Manual, did not warrant disqualification of the EEOC as a plaintiff; the Manual is not binding law and does not create enforceable rights and there was no showing that the contact prejudiced the employer. The contact did not violate the ex parte communication rules because the investigator was not an attorney).

45 See Heelan v. Johns-Mansville Corp., 451 F. Supp. 1382, 1387-88 (D. Colo. 1978) (company’s action in merely talking once by telephone to the alleged harassing supervisor, and then dropping the matter upon his denial when there was other evidence of the alleged harassment, was not a sufficient investigation); Coley v. Consol. Rail Corp., 561 F. Supp. 645, 651 (E.D. Mich. 1982)(employer found to have constructively discharged plaintiff when it failed to act promptly in response to her complaint, causing her resignation).
the employer or to avoid harm otherwise.” *Burlington Ind., Inc. v. Ellerth.* Thus, a prompt and thorough investigation is essential.

Fast action sends a message to the complainant and the harasser that the organization is serious about this issue. Moreover, to take advantage of the immunizing effect your thorough investigation may have against liability, management is well served to conduct the investigation with dispatch. Furthermore, to the extent the employer wants to assert its investigation as a defense, prompt action is essential.

2. **Take the complaint seriously.**

No complaint should be considered too trivial to act upon. Generally speaking, it is better for management to be perceived as having slightly overreacted than to have taken less action than may have been called for. Keep in mind that sexual harassment complaints are often understated because of embarrassment or fear of reprisal.

3. **Document your investigation.**

Record and memorialize your interviews. Employers have successfully used such evidence to defend themselves when the accused claims he was punished excessively or the victim claims the harasser was not punished severely enough.

4. **Keep the investigation confidential.**

Talk only to those who need to know or who you believe have information you need to verify (or discount) the complaint. In most states, management has a conditional privilege against defamation charges while investigating a sexual harassment complaint. Depending on state law, the organization may lose its privilege if it over-publicizes its investigation and conclusions.

5. **What questions to ask.**

Your common sense will guide you in investigating sexual harassment complaints. However, you may find the following helpful:

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47 *See Burlington Ind.,* 524 U.S. at 764-65.

48 The issue whether and to what extent to honor a complainant’s request for total confidentiality is problematic. Although at least one court has held that such a request may bar liability against the organization in such cases, *see Torres v. Pisano,* 116 F.3d 625 (2d Cir.), *cert. denied,* 522 U.S. 997 (1997), there may be circumstances where, notwithstanding such requests, the employer is required to act, such as where the allegations involve other alleged victims or the report is made to a corporate official obligated to take prompt action.
a. **Inquiries into whether sexual advances were unwelcome.** For sexual advances to constitute sexual harassment, they must, of course, be unwelcome. Although you will be well advised to tread delicately in this area of the investigation, you must determine in some way whether the activities complained of were indeed welcomed when they took place. In this regard, the victim’s demeanor and her behavior at work are directly related to your inquiry. On the other hand, complainant’s prior sexual conduct unrelated to the incidents at issue are not relevant to the investigation.\(^{49}\)

A proper evaluation of an employment environment that gives rise to a sexual harassment claim would invite, for example, consideration of such objective and subjective factors as the background and experience of the plaintiff and the plaintiff’s reasonable expectations upon voluntarily entering that environment. The presence of actionable sexual harassment would be different depending upon the personality of the plaintiff and the prevailing work environment and must be considered and evaluated on an ad hoc basis.

b. **What is the complainant’s attitude during the investigation?** Where she did not think that the alleged incident of sexual harassment was “that big a deal,” and where she did not want to make “a big stink about it,” and where her husband characterized the offending comment as having been made in jest, then, according to one court, the complainant’s credibility was undermined to the point where her claim was dismissed.\(^{50}\)

c. **Did the complainant participate in the incident?** A complainant’s credibility may be hurt if she is not a mere bystander in the sexual activity.\(^{51}\)

d. **What is complainant’s emotional character?** Has she filed prior lawsuits? Has she had prior emotional problems? Has she been admitted to the hospital for same? Does she have instances of prior male/female problems?

\(^{49}\) *Compare Meritor Sav. v. Vinson*, 477 U.S. 57 (1986) (complainant’s sexually provocative speech or dress “obviously” relevant to the issue of unwelcomeness of sexual advances) and *McLean v. Satellite Tech. Servs., Inc.*, 673 F. Supp. 1458, 1459 (E.D. Mo. 1987) (court found plaintiff welcomed advances based on evidence that she was anything but demure, possessed a lusty libido and was no paragon of virtue, and during employment showed a remarkable lust for those of the opposite sex, including showing off her body to her supervisor by lifting her skirt and making offers of sexual gratification to employees, customers and competitors alike, though her supervisor warned her not to do so), with *Priest v. Rotary*, 634 F. Supp. 571 (employer not permitted to explore plaintiff’s sexual history) and *Mitchell v. Hutchings*, 116 F.R.D. 481 (D. Utah 1987) (employer could discover plaintiff’s workplace behavior, but not her past sexual conduct).


e. What do you know about the accused?  What is his reputation?  Is he a womanizer?  In Toscano v. Nimmo, the accused was a womanizer by his own description.\textsuperscript{52} The court used that fact to give credence to the complainant’s charge that he favored female employees who granted him sexual favors.

f. Is the complaint late?  You may conclude that if the complainant significantly delays filing a complaint through your grievance procedure, then the incident may not have been as offensive as she or he now claims.\textsuperscript{53}

6. Discoverability of investigation material.

Some employers have a legitimate concern that notes, papers or other information gathered in the course of a harassment investigation may be self-incriminating, i.e., damaging evidence in the event of a later lawsuit.  Counsel should be obtained in such cases.  Often, it may be more important to be able to prove that a good investigation was conducted.

7. Effective investigation and remedial action may avert employer liability.

A prompt and effective investigation of sexual harassment claims, together with prompt and effective remedial action, may limit employer liability.\textsuperscript{54}

8. Employer liable once aware of sexual harassment by co-employees, thus necessitating a prompt investigation.

Courts have uniformly agreed with the position taken by the EEOC that an employer is not liable for sexual harassment perpetrated by co-employees if it does not have knowledge of their activity or if, when it learns of the harassment, it takes effective action to end it.\textsuperscript{55}

\textsuperscript{52} 570 F. Supp. 1197, 1200 (D. Del. 1983).

\textsuperscript{53} See Highlander v. K.F.C. Mgmt. Co., 805 F.2d at 650 (three months delay suggests that plaintiff was not offended in any significant way).

\textsuperscript{54} See Indest v. Freeman Decorating, Inc., 164 F.3d 258 (5th Cir. 1999); Nash v. Electrospace Sys., Inc., 9 F.3d 401 (5th Cir. 1993) (no employer liability because company immediately investigated complaint and subsequently transferred plaintiff to similar position away from the alleged offender after the company could not substantiate plaintiff’s charges of harassment); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309 (5th Cir. 1985) (during business trip company’s president personally assured plaintiff 12 hours after he learned of harassment that harasser would not be working with her after the trip ended, but plaintiff quit; court observed that manner and promptness of employer’s response to a harassment complaint should be assessed proportionately to the seriousness of the offense).

\textsuperscript{55} EEOC Guidelines, 29 C.F.R. § 1604.11(d) and § 1604.11(e); Nash v. Electrospace Sys., Inc., 9 F.3d 401 (5th Cir. 1993) (where harassment took place in private “it appears that the company did not know nor should it have known” about the sexual harassment until the plaintiff complained); Valdez v. Church’s Fried Chicken, Inc., 683 F. Supp. 596 (W.D. Tex. 1987) (plaintiff unable to show employer knew or should have known of harassment by employee team leader; neither warning by manager to team leader not to “touch the girls” nor evidence that team leader constantly flirted and touched female employees established notice of harassment); Waltman v. Int’l Paper Co., 875 F.2d 468 (5th Cir. 1989) (evidence of sexual graffiti directed at plaintiff in numerous locations in the workplace...
a. **The employee must have a reasonable avenue for giving notice.** Courts may excuse plaintiff from the requirement of showing notice if he or she can show that there was no reasonable means by which the employee could give notice.

For example, one court credited an employee’s argument that giving her employer notice of the harassment would have been futile as a practical matter, where the manager was a roommate of the alleged harasser. This was true despite the employer’s promulgation of a “fair treatment policy” in its employee handbook.\(^{56}\) This is why employers are advised to provide in their employee handbook that, where complaint to an immediate supervisor or other direct manager is not possible (such as where the complaint is against that manager), that the employee may direct the complaint to another official.

b. **Harassment outside the scope of employment.** In atmosphere cases, it is not necessarily a defense that the harassing employee was acting outside the scope of his employment. If an employer knows or has reason to know that sexual harassment is taking place, but does nothing about it, the employer may be *directly* liable for torts committed against one employee by another. Indeed, one court imposed liability even though the tort was not committed in furtherance of the employer’s business. The court reasoned that the employer could have prevented the harassment by reasonable care in hiring, supervising, or even firing the tort-feasor. Accordingly, the court imposed employer liability because the management had actual and constructive knowledge, but failed to remedy the harassment.\(^{57}\)

9. **Employer also liable once aware of sexual harassment by nonemployees, thus necessitating prompt investigation.**

Similarly, an employer is liable for sexual harassment by nonemployees, such as customers and clients, only if it had adequate notice of the harassment. One employer was found liable for requiring a female employee to cheerfully accept suggestive remarks by a nonemployee client who provided the employer a substantial amount of business.\(^{58}\)

B. **Every Employee Has a Duty of Loyalty to Respond to a Reasonable Investigation.**

What may a corporate employer do if a witness (whether complainant, alleged wrongdoing employee, or a fellow employee witness) is uncooperative? Generally, all

raised triable issue of fact as to whether harassment was so pervasive that employer had constructive knowledge of harassment by co-workers and vendors.

\(^{56}\) *Salazar v. Church’s Fried Chicken, Inc.*, 44 FEP Cases 472 (S.D. Tex. 1987).

\(^{57}\) *Hall v. Gus Constr. Co., Inc.*, 842 F.2d 1010, 1016 (8th Cir. 1988).

employees have a duty of loyalty pursuant to the common law, and some by statute, to cooperate with reasonable investigations into corporate activities, including alleged violations of organization policy and state and federal law. Clearly, if the interview is unnecessary to accomplish a proper, thorough, and exhaustive investigation, then the organization can accommodate the employees’s desire not to be involved.

1. Two types of objections are most common.

The following two scenarios are most common. First, the complainant may give the organization a “heads up” that he or she is concerned about sexual harassment at the hands of a fellow employee or manager but requests the organization to do nothing while the complaining employee seeks a “private” resolution. While it seems very tempting to accede to such a suggestion, management cannot comfortably do so, since it is now “pregnant with knowledge” of the alleged violation of organization policy and possibly of federal and state law. Such knowledge is particularly problematic for the organization if the allegation concerns a co-worker or third-party business invitee since no liability for unlawful sexual harassment otherwise attaches until the organization has knowledge of the alleged bad act(s) and does nothing, as noted above.

The best thing for the organization to do is to thank the employee for coming forward and alerting it to the possible violation of its organization policy. It should then indicate that, pursuant to its organization policies and practices, the organization will commence forthwith a confidential and discreet investigation into the allegations. Moreover, this may be the occasion for the organization’s Human Resources Manager to explain to the complaining employee that sexual harassment is not just a breach of human trust between two individuals, but is in addition a violation simultaneously of perhaps organizational policy (or practice) and state and/or federal law. Since it is the organization’s policy (and/or practice) not to tolerate violations of its organizational policies (and/or practices) and those state and federal laws which limit its management discretion (like Title VII) which additionally subject it to potential liability, the organization finds it imperative to act.

Finally, it may be the occasion for the Human Resources Manager to explain that should the “private workout” between the complaining harasser and the alleged harasser fail, the record will show that the organization had knowledge and did nothing while the alleged harassment continued. This is also another opportunity for the organization to reiterate to employees its concern (irrespective of the operation of the law) that its employees enjoy a workplace free of unwelcome sexual harassment which the organization provides to insure the happiness, productivity and comfort of its employees.

Similarly, should the alleged harasser decline to cooperate with the organization’s investigation, the organization should simply note that he or she has a duty of loyalty to cooperate with the investigation and failure to do so will lead to adverse action pursuant to organization policy (presumably up to and including termination).

Finally, this may be the occasion for the Human Resources Manager to explain to the alleged harasser what unlawful sexual harassment is and is not (since there continues to be rampant confusion in the minds of even trained managers about what it means and “where the line is.”). It may also be the occasion for the corporate Human Resources Manager to explain that the organization is not on a “witch hunt,” has not formed an opinion in advance, and is objectively seeking facts to make a determination about whether organization policy and/or state and federal law has been violated, the organization welcomes any exonerating evidence and will objectively review it.

2. **The confidentiality problem.**

Alleged victims and harassers, in addition to co-workers, often request both anonymity and confidentiality as a “precondition” to their cooperation with the corporate investigation. Many companies very quickly and uncritically grant “confidentiality” before realizing that the organization is not in a position to do so. Specifically, it may well be that the organization will need to rely on the information and provide it to state and/or federal investigators. The organization may, indeed, find it necessary to introduce the evidence into a court of law as part of its defense to a lawsuit. Accordingly, the better practice is to promise the employee that the organization will proceed with discretion and will proceed confidentially as to those who do not “need to know.” It should be noted that absolute confidentiality is not possible.\(^60\)

C. **Access to Interview Notes.**

It is also often the case that employees and manager witnesses wish to obtain a copy of the investigator’s notes. Whether to accede to such a request is a matter of management discretion and is done in many different ways as a function of corporate culture. There is no federal statute or regulation which requires a private corporation to make available to witnesses a copy of corporate investigative notes.\(^61\) However, many investigators do share a copy with witnesses they interview and request that the person interviewed review and sign the notes to insure accuracy and later avoid a claim of inaccurate reporting. Some companies allow the witness, in addition, to take a copy of the note upon request.

\(^60\) *Compare Torres v. Pisano*, 116 F.3d 625 (2d Cir.), *cert. denied*, 522 U.S. 997 (1997) (secretary that confided to supervisor that she had been harassed but asked him to keep it confidential effectively insulated employer from further liability; complaint listed relatively minor incidents, there was no indication that other employees were being harassed, and supervisor behaved reasonably in honoring secretary’s request for confidentiality and in failing to act immediately to end the harassment).

\(^61\) *Cf. Bexar County Sheriff’s Civil Serv. Comm’n v. Davis*, 802 S.W. 2d 659 (Tex. 1990), *cert. denied*, 502 U.S. 811 (1991) (state employee not entitled to names of alleged accusers and notes of investigation prior to termination, so long as employee eventually afforded opportunity to cross examine witnesses at post-termination hearing).
If such a practice is employed, the investigator should develop a habit and practice of separately recording his/her observations, mental impressions, and conclusions in a separate, private and confidential memorandum to file not disclosable to the witness so as to avoid a waiver of any attorney-client or other privilege, and to avoid revealing corporate strategy should a witness be (or later become) hostile.

D. Wind-up the Investigation With Cross Draft Memos to the Complainant and Alleged Harasser.

If the complainant has not yet filed a lawsuit and management’s conclusion is that resolution of the matter (whether in favor of the complainant or not) may resolve the claim short of litigation, the typical practice is to issue, in draft form, proposed “findings” letters to the complainant and the alleged harasser. Such a practice has the advantages that it: (1) renders an appearance of an independent impartial investigation to which a subsequently reviewing agency or court will typically pay deference; (2) renders some assurance to the complainant and alleged harasser that the complaint has been dealt with professionally and with a certain amount of due process; and (3) will help record the organization’s findings and conclusions for the record.

Such letters should (1) indicate that the organization had concluded a thorough and exhaustive investigation of the matter, (2) note the significant facts found (or the uncertainty with respect to certain facts), (3) propose a conclusion, and (4) propose a resolution. The organization should invite the recipient to review the letter for factual accuracy and response. Thereafter, the organization should undertake its final deliberations, issue a final letter to the parties, and implement the proposed resolution, if any.\(^ {62} \)

Should management conclude no unlawful sexual harassment occurred or no violation of the organization’s policies occurred, it should indicate that the complainant had not brought forward facts sufficient to make out a violation of either organizational policy or a violation of law. This approach is more gracious and technically correct than telling a complainant no violation occurred. Finally, the organization should invite the complainant to supply further facts if there are any not presently known to the organization which may serve to alter its judgment. Moreover, the organization should invite the complainant to submit further information should there be future acts of legitimate concern.

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\(^ {62} \) The final letter should set forth accurately and factually the basis for the conclusions reached. See *City of Dallas v. Moreau*, 718 S.W.2d 776 (Tex. App.–Corpus Christi 1986, writ ref’d n.r.e.), *disapproved of on other grounds by Donwerth v. Preston II Chrysler-Dodge Inc.*, 775 S.W.2d 634 (Tex. 1989). (Termination letter which set forth the factual basis for the employer’s conclusion that police officer had violated personnel rule against wrongfully firing gun, which stated that officer’s account provided no justification for firing gun under Penal Code, and which then quoted relevant sections of the Penal Code and personnel rule, was “statement of opinion” and was not libelous, since “anyone who reads the letter is given the text of the statutes and the personnel rule that forms the basis for [the employer’s] opinions, and is able to judge the conclusions for himself.”).
Should management conclude that sexual harassment occurred, it must make a command strategic decision whether to state that unlawful employment discrimination occurred, or to perhaps “fuzz” the conclusion by simply stating that a violation of “organizational policy” occurred, without reference to whether the organization is of the opinion that a violation of federal or state law occurred in addition. Such a posture may avoid galvanizing the interests of the complainant to show such a letter to a lawyer or to the EEOC, particularly if the complainant is not entirely satisfied with the remedy proposed by the organization.

It is also useful to attach a copy of the organization’s sexual harassment policy, and note the organization’s firm adherence to that policy. This will avoid any otherwise unintended impression in the mind of the complainant that the organization does not wish to hear about or address sexual harassment complaints. Rather, such a procedure will have the tonic effect of leaving the proper impression that the organization cares about unlawful sexual harassment and the welfare of its employees but in this case, there simply was just not enough evidence to cause the organization to believe that a violation occurred.

V. SPECIAL CONSIDERATIONS RELATIVE TO UNIONIZED SETTINGS

There are two special rules of investigation which pertain to members of bargaining units or those who are in the process of exercising their organizing rights:

A. Johnnie’s Poultry Statement.

In order to avoid problems with individual interviews, it is suggested that employers begin by reassuring employees under the guidelines established in the NLRB’s Johnnie’s Poultry decision.63 These safeguards were articulated in the context of questioning an employee regarding the investigation of unfair labor practice charges. The Johnnie’s Poultry safeguards are as follows: (1) The purpose of the questioning must be communicated to the employee; (2) An assurance of no reprisal must be given; (3) The employee’s participation must be obtained on a voluntary basis; (4) The questioning must take place in an atmosphere free from union animus; (5) The questioning itself must not be coercive in nature; (6) The questions must be relevant to the issues involved in the complaint; (7) The employee’s subjective state of mind must not be probed; (8) The questions must not “otherwise interfere with the statutory rights of employees.”64 Explaining these issues to an employee prior to an individual meeting should provide a significant measure of protection to any potential unfair labor practice charge. (Note that a Johnnie’s Poultry statement is necessary regardless of the employer’s intent to quash the exercise of employee rights and irrespective of how remote the interrogation appears to be relative to the alleged unlawful conduct).

64 Id. A Model Johnnie’s Poultry statement is set forth at Attachment 2.
B. **Weingarten Rights.**

A unionized employee has a right to request the presence of a union representative during an investigative interview that the employee reasonably believes might result in disciplinary action. The current position of the NLRB is that so-called “Weingarten rights” do not extend to non-unionized employees; however, the Board’s position on this question has been in flux over the years.

An employer, however, has no legal duty to ask an employee whether s/he wants an employee representative to be present. Employees do not have to use “magic words,” however, so long as it is reasonably understood that the employee is requesting a representative. Questions such as “Do I need a witness?” and “Can my supervisor be allowed in the interview?” have been held to be sufficient requests for “Weingarten rights.”

On the other hand, an employee who asks that his personal lawyer be present has not made a request that triggers “Weingarten rights.” A logical implication of the Medical Manors rationale is that nonemployee friends, relatives or personal lawyers cannot serve as representatives because their presence is meant to protect the particular employee being investigated and not all employees in general. No Board decision has addressed this issue, however.

Once an employee requests a representative, the employer has three options: 1) grant the employee’s request; 2) give the employee the option of either continuing the interview without representative or foregoing the interview; or 3) terminate the interview and proceed with the investigation. It is up to the employee to decide whether or not to have the interview unaccompanied by a representative or to forego any benefits that might be derived from an interview by the employer.

VI. **PRIVACY CONCERNS RAISED BY ORGANIZATIONAL INVESTIGATION TECHNIQUES**

Employee privacy expectations frequently clash with employer interests to ensure a safe and responsible workplace when employers monitor or investigate on-duty behavior. Privacy
law will generally permit an employer to reasonably investigate suspected employee misconduct. An employer that questioned an employee, for example, in a “reasonable manner and in good faith” about an altered check did not violate her right to privacy.\footnote{Cangelosi v. Schwegmann Bros. Grant Supermarkets, 379 So.2d 836 (La. App.), aff’d, 390 So.2d 196 (1980).} In contrast, an Oregon court ordered an employer to trial to defend against the tort of “outrage” after it accused a department store employee of theft and threatened and overzealously interrogated her in an attempt to force a confession. The court did so noting the employer had undertaken the “cold-blooded tactic of interrogation upon scanty evidence.”\footnote{Hall v. May Dep’t Stores Co., 637 P.2d 126 (Or.App. 1981), abrogated by McGanty v. Staudenraus, 901 P.2d 841 (Or. 1995).}

Discussed below are several employer practices that sometimes impinge on employee privacy rights, including drug testing, polygraphs, audio and video surveillance, searches and interrogations. Employers must remain cognizant of the privacy issues that may arise from such actions.

A. Drug Testing by Private Employers.

1. The Americans With Disabilities Act. The “Americans With Disabilities Act,” generally effective for employers of 15 or more, contains several sections related to drug and alcohol programs.\footnote{42 U.S.C. §§ 12101-12213 (1990).} Specifically, the Act protects users of illegal drugs who have been successfully rehabilitated or are in a rehabilitation program, against discrimination in private employment.\footnote{42 U.S.C. § 12114(a).} However, an individual who is currently engaging in the illegal use of drugs does not qualify as a protected disabled individual.\footnote{42 U.S.C. § 12111(6)(A).} Therefore, employers may lawfully prohibit the use of drugs or alcohol at the workplace, prohibit employees from being under the influence of drugs or alcohol at the workplace, hold employees responsible for alcohol and drug-related misconduct, and require employees to conform with federal drug and alcohol guidelines.\footnote{See 42 U.S.C. §§ 12112(c)(1)-(5).} The Act also condones drug testing to ensure that employees are no longer using drugs.\footnote{42 U.S.C. § 12112(d)(1). Compare Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989) (Vocational Rehabilitation Act of 1973 held to require employer to “forgive” certain alcohol-related misconduct and to give employee a chance to improve).}

2. National Labor Relations Act. Employers seeking to drug test union-represented employees face additional restrictions. The National Labor Relations Board has held that employers must bargain under the Taft-Hartley Act prior to establishing drug and alcohol-testing programs for current employees, but that bargaining is not required for testing job applicants. Such employers cannot unilaterally implement employee drug testing programs without committing an unfair labor practice.\footnote{Johnson-Bateman Co., 295 NLRB No. 26 (1989); Inland Container Corp., 298 NLRB No. 97 (1990).}
3. **Common Law Restrictions on Drug Testing.** In Texas, courts have uniformly held that an employer may require drug testing as a condition of continued employment for nonunion, at-will employees.\(^{79}\) On the other hand, employees in other states have successfully raised invasion of privacy and other theories to challenge employer drug testing.\(^{80}\)

**B. Polygraph Testing.**

The Employee Polygraph Protection Act of 1988 prohibits most private employers from using lie detector tests to screen job applicants or to test current employees unless the employer is:

1. a private security firm whose primary business purpose is to provide security services for public transportation facilities, proprietary information services, financial institutions handling currency, negotiable securities or precious commodities, or industries which pose a public safety risk;

2. authorized to manufacture, distribute or dispense controlled substances and there has been a controlled substance loss or prospective employees will have access to controlled substances;

3. investigating a workplace theft or other incident resulting in economic loss, and (a) the employee had access to the property under investigation; (b) the employer has a reasonable suspicion that the employee was involved; (c) the employer provides the employee with a written statement 48 hours before the testing takes place giving its reasons for testing particular

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\(^{79}\) *Jennings v. Minco Tech. Labs, Inc.*, 765 S.W.2d 497 (Tex. App.—Austin 1989, writ ref’d); *Kaminski v. Tex. Employment Comm’n*, 848 S.W.2d 811 (Tex. App.—Houston [14th Dist.] 1993, no writ) (employee refusal to submit to urinalysis was misconduct disqualifying employee for unemployment insurance benefits); *Tex. Employment Comm’n v. Hughes Drilling Fluids*, 746 S.W.2d 796 (Tex. App.—Tyler 1988, writ ref’d) (same).

\(^{80}\) *Semore v. Pool*, 217 Cal. App.3d 1087 (1990) (employee may state a cause of action for invasion of privacy based on the California Constitution after being discharged for failing to comply with the employer’s requirement that all employees take an eye-reaction drug test); *Luck v. Southern Pac. Transp. Co.*, 218 Cal. App. 3d 1 (1990), *cert. denied*, 498 U.S. 939 (1990) (company that operated railroads had no compelling interest in randomly testing a computer programmer for drug use, since there was no clear, direct nexus between her duties and a safety risk; the employer’s non-safety interests, such as deterrence, efficiency, competence, creating a drug free environment, enforcing rules, and ensuring public confidence, were not compelling); *Twigg v. Hercules Corp.*, 406 S.E.2d 52 (W.Va. 1990) (mandatory, random drug testing by private sector employers contrary to its state’s public policy; Employers could test in such a matter only where they have a reasonable, good faith objective suspicion of an employee’s drug use, or where an employee’s job responsibility involves public safety or safety of others); *Kelly v. Schlumberger Tech. Corp.*, 849 F.2d 41 (1st Cir. 1988) (upholding jury award for $125,000 on infliction of emotional distress claim based on direct observation urinalysis (to prevent test tampering) being an unreasonable intrusion upon seclusion).
employees; and (d) the employer maintains a written copy of the statement for at least three years. \(^{81}\)

Even where the Act allows polygraph testing, employers must adhere to strict procedural requirements. Remedies for violation of the Act include civil penalties of up to $10,000 for each violation and applicants and current employees are free to sue in federal or state court. \(^{82}\) Finally, the Act does not preempt any state or local law or collective bargaining agreement that prohibits lie detector tests or that is more restrictive than federal law.

Employees have used state constitutional provisions to challenge polygraph testing. \(^{83}\) Some states have recognized various common law theories to challenge polygraph testing, including public policy, wrongful discharge, and common law tort theories. \(^{84}\)

C. **Workplace Searches in the Private Sector.**

Employers may have a number of reasons to search in the workplace, including to prevent employee use or sale of drugs, discover weapons and other dangerous items, prevent theft or even to locate a file at an employee’s work area or desk. Searches of this kind, however, may sometimes intrude into an employee’s reasonable expectation of privacy. Courts must therefore balance the employer’s legitimate interests to conduct the search with the privacy interests of the employee to determine whether the search was reasonable under the circumstances.

The usual theory espoused in private sector workplace search cases is “intrusion upon seclusion,” based in common law privacy rights. To prevail on this theory, some courts have held the plaintiff must show that the employer itself actually invaded the employee’s privacy.


\(^{82}\) *Mennen v. Easter Stores*, 12 IER Cases (BNA) 701 (N.D. Iowa 1997) (grocery store violated EPPA when it demoted grocery manager who submitted to test after being implicated in store theft, despite store’s contention that manager was demoted because store lost trust and confidence in him and not solely because of test results, where even if store managers lost trust and confidence in manager before he submitted to polygraph test, he was allowed to continue cash handling responsibilities and was not demoted until after test results were received, and where store managers admitted grocery manager would not have been demoted had he passed polygraph test).

\(^{83}\) *Long Beach Employees Assn. v. Long Beach*, 41 Cal.3d 937 (1986) (City of Long Beach violated employee privacy rights under California Constitution by subjecting public safety officers to polygraph examination as a condition of their employment in the absence of a compelling state interest to justify such intrusive testing); *Tex. State Employees Union v. Tex. Dept. of Mental Health*, 746 S.W.2d 203 (Tex. 1987) (mandatory polygraph policy for state employees violates employees’ right to privacy under Texas Constitution, even in the absence of an explicit provision).

\(^{84}\) *See Ambrose v. Cornhusker Square, Ltd.*, 416 N.W.2d 510 (Neb. 1987) (public policy afforded private cause of action to persons terminated for refusing to take polygraph examination); *Cordle v. General Hugh Mercer Corp.*, 325 S.E.2d 111 (W.Va. 1984) (public policy exception, despite fact that plaintiffs had signed agreement to submit to polygraph examination); *O’Brien v. Papa Gino’s of Am., Inc.*, 780 F.2d 1067 (1st Cir. 1986) (employee that was discharged after taking a polygraph test that invaded his privacy was awarded $385,000 for lost wages and benefits and $50,000 for defamation).
For example, in *O’Donnell v. CBS, Inc.*, a case was brought by a former radio station executive discharged for an alleged conflict of interest. He sued his employer on a number of grounds, including an intrusion upon seclusion, claiming CBS officials received copies of papers his secretary removed from his locked credenza. The court dismissed his privacy complaint, holding that the fired executive produced no evidence demonstrating that his employer induced the secretary’s intrusion.

Employers should consider providing notice of its right to search lockers, desks, vehicles, purses, lunchboxes, briefcases, and other items without consent or knowledge and that refusal to permit such searches is grounds for discipline up to and including termination.

Personal searches constitute highly intrusive procedures under both constitutional and tort standards and therefore can only be justified if counterbalanced by a strong showing of need. Even in industries where such a need can be established, courts have required higher standards for justifying such searches. Employers should avoid conducting personal searches of employees unless absolutely necessary or obviously called for in light of suspected misconduct. A store checker ordered to disrobe in a public bathroom, for example, in front of the assistant

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85 782 F.2d 1414 (7th Cir. 1986).

86 See also *Bodewig v. K-Mart, Inc.*, 635 P.2d 657 (Or. App. 1981), review denied, 644 P.2d 1128 (Or. 1981) (strip search of sales clerk at insistence of and in presence of customer who accused employee of taking $20 stated claim of intentional infliction of emotional distress (private sector)); *Sheppard v. Beerman*, 822 F. Supp. 931 (E.D. N.Y. 1993), aff’d in part and vacated in part, 18 F.3d 147 (2d Cir.), cert. denied, 513 U.S. 816 (1994) (warrantless search of former law clerk’s desk and file cabinets; clerk had no reasonable expectation of privacy in desks, file cabinets or other work areas, which largely contained court case files and memoranda (public sector)); *K-Mart Corp. v. Trotti*, 677 S.W.2d 632 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.) (upholding sufficiency of evidence supporting jury verdict for plaintiff on invasion of privacy claim where private employer had entered employee’s locker and searched her purse; court noted that the employee had an expectation of privacy since she had purchased her own lock to put on the locker and the employer never communicated that searches of the lockers could or would occur (private sector)).

87 *Am. Postal Workers v. U.S. Postal Serv.*, 871 F.2d 556 (6th Cir. 1989) (Warrantless search of employee lockers at U.S. Postal Service facility did not violate Fourth Amendment because search was performed in accordance with waivers signed by employees which notified them that lockers were subject to random, unannounced searches by authorized postal officials.). *Accord United States v. Bunkers*, 521 F.2d 1217 (9th Cir.), cert. denied 423 U.S. 989 (1975) (employees put on notice that lockers subject to regulatory inspection and search upon reasonable suspicion of criminal activity; employees had no expectation of privacy in the government owned locker); *Gretenlord v. Ford Motor Co.*, 538 F. Supp. 331 (D. Kan. 1982) (discipline of employee for refusal to stop for vehicle search justified because employer provided clear written notice that such action would be taken).

88 See *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987) (strip searches of officers at correctional institutions required a showing of reasonable suspicion based on specific objective facts directed to person targeted for search; court disregarded consent forms that were signed by employees and held that advance consent to future unreasonable searches is not a reasonable condition of employment). *Cf. United States v. Gonzalez*, 300 F.3d 1048 (9th Cir. 2002) (holding that a government employer’s search of employee for stolen goods is reasonable, even if conducted randomly and without reasonable suspicion, so long as employee is given notice that random searches may be conducted).
manager and a customer after a customer accused her of stealing $20, successfully stated a claim for the tort of outrage.  

**Guidelines for employer searches.** Employer searches should meet the following tests:

1. search policy rationally related to a legitimate need of the employer.
2. prior communication of the search policy to employees and applicants.
3. intrusiveness of the search limited to the minimum needed to meet legitimate need of the employer.
4. employee consent—express or implied—should be obtained whenever possible (e.g., search policy is accepted work rule known by all concerned employees).
5. searches should be uniformly or randomly enforced (i.e., no discriminatory implementation).
6. the search should provide adequate safeguards for protecting employee privacy.
7. the search results should only be told to those who need to know.

**D. Custodial Interrogations.**

Employers detaining employees for questioning, even during working hours, may face false imprisonment claims. Nevertheless, most states permit employers to detain and interrogate employees for a reasonable time and in a reasonable manner.  

By giving employees the option of cooperating in an investigation or facing discharge, employers may avoid the “confinement” element of false imprisonment. Similarly, employers may seek a waiver from employees by requesting advance written consent to reasonable investigations and searches during the job application process; unreasonable searches, however, may fail to be protected by a mere waiver.

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89 Bodewig, 635 P.2d 657.


E. Surveillance, Monitoring, Eavesdropping, and Wiretapping.

1. In general.

Monitoring of employees in the workplace most commonly takes place in the form of computer and telephone monitoring.

Computer monitoring consists of keystroke counting used for performance evaluation. Telephone monitoring is used to evaluate employees manner and efficiency with consumers or other respondents (e.g., airline reservationists and telephone directory assistance operators). Video monitors are used on assembly lines and as an anti-theft precaution. A more recent method of monitoring includes biometrics identification, including hand geometry and retinal patterns.

There is very little legislation here but federal and state legislation is expected to increase with awareness of how technology affects privacy.

A few cases have been brought under Title III of the Omnibus Crime Control and Safe Streets Act. This statute provides criminal and civil penalties, actual and punitive damages and attorney’s fees and costs. A chief of police and lieutenant were found guilty of conspiring to violate the Act by placing a microphone and transmitter in a briefcase in the office of the assistant chief. The court found the assistant chief had a reasonable expectation that normal conversations in his office could not be overheard.

Some employees may not be protected from surveillance of their off-duty conduct. In one case, the Fifth Circuit held that police officers who violated police and state rules of conduct by reason of their personal conduct while under surveillance were not protected, since they enjoy no constitutionally protected right to privacy against undercover violations of department regulations.


Title III of the Omnibus Crime Control and Safe Streets Act (“Title III”), proscribes (a) the intentional interception by any person of any wire, oral, or electronic communication and (b) the intentional use of any electronic mechanical or other device to intercept any oral

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93 United States v. McIntyre, 582 F.2d 1221 (9th Cir. 1978).
communications under many circumstances, unless the activity is covered by an exception to the
prohibition. Exceptions are provided where one party to the interception has given prior consent,
unless the interception is under color of law or for a criminal or tortious purpose,\textsuperscript{96} and where
interception is over a telephone extension used by the employer in the ordinary course of its
business.\textsuperscript{97}

The business extension exception has been limited in application. In \textit{Abel v. Bonfanti}, for
example, the employer had installed a tape recorder on business lines.\textsuperscript{98} The court ruled that the
“ordinary course of business exception” does not allow a business to intercept all calls, including
personal ones. On the other hand, in \textit{Briggs v. American Filter Co.}, the court held that an
employer was within its rights to use an extension phone to listen to, and record, a conversation
between a competitor and an employee who had been suspected of, and specifically warned
against, divulging confidential company information.\textsuperscript{99} The court held that it is within the
ordinary course of business to listen in “for at least as long as the call involves the type of
information [the employer] fears is being disclosed.”\textsuperscript{100}

3. \textbf{State telephone interception statutes.}

A number of states have enacted statutes which regulate the monitoring of telephone
conversations. These statutes differ in whether the employer or agent recording the conversation
must obtain the consent from all parties to the conversation or only one party.\textsuperscript{101}

4. \textbf{Mail tampering.}

Federal law prohibits any person from taking mail addressed to another person before it
has been delivered with the intent “to obstruct the correspondence, or pry into the business or

\textsuperscript{99} 630 F.2d 414 (5th Cir. 1980).
\textsuperscript{100} \textit{Id. See also} \textit{Epps v. St. Mary’s Hosp. of Athens, Inc.}, 802 F.2d 412 (11th Cir. 1986) (call between co-workers that
was intercepted and recorded fell within the ordinary course of business exception, since it occurred during office
hours, between co-employees, over a specialized extension which connected the principal office to a substation and
congcerned scurrilous remarks about supervisory employees in their capacity as supervisors); \textit{Watkins v. L.M. Berry
& Co.}, 704 F.2d 577 (11th Cir. 1983). \textit{But see} \textit{Deal v. Spears}, 980 F.2d 1153, 1157 (8th Cir. 1992) (it was outside
ordinary course of business when employer recorded over 20 hours of an employee’s telephone conversations in an
effort to confirm her suspicions that the employee was involved in theft from the employer); \textit{Sanders v. Robert
Bosch Corp.}, 38 F.3d 736 (4th Cir. 1995) (business use justification must explain employer’s refusal to inform
employees of recording in addition to explaining actual decision to record).

secrets of another.”

Even absent the statute, an employer may be held liable for reading employee’s personal mail.

5. Federal labor law.

The NLRB has prohibited employer surveillance of employees engaged in union organizing activities. The Board and courts have also prohibited employers from creating an “impression of surveillance,” where no actual surveillance occurs. Employee destruction of property may provide legitimate business justifications for increasing surveillance of employees during a union organizing campaign. Also, where the union organizer is a nonemployee, the employer may in most cases engage in surveillance of his activities on the employer’s property.

6. Hidden cameras.

In addition to privacy concerns, the installation of a closed circuit television monitoring system has been held to be a subject of mandatory bargaining. Labor arbitrators often review the propriety of surveillance activity in the workplace. An example is the decision in A. Finkl & Sons and IAM District 8, holding that an employer properly discharged an employee for falsely claiming an inability to work. The employee asserted that he could not bend, squat, lift and needed a walker, but proof showed that the employee’s own physician had told him to stop using a walker and videotape showed him performing various yard chores, repeatedly performing the activities he indicated that he could not do. In overruling the union’s objection to the videotaped evidence gathered during a surveillance operation, the arbitrator cited the employer’s legitimate business needs in undertaking the surveillance and the reasonableness of the activity conducted. This decision indicates that courts and arbitrators will be responsive to an employer’s need to conduct legitimate video surveillance, so long as the employer can demonstrate that such surveillance closely serves a legitimate business purpose and that care is taken not to invade the employee’s legitimate personal interests.

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103 See Vernars v. Young, 539 F.2d 966 (3d Cir. 1976) (unauthorized opening and reading of mail marked “personal”).


106 Oakwood Hosp. v. N.L.R.B., 983 F.2d 698 (6th Cir. 1993).


Invasion of privacy and other tort claims will likely turn on whether the employee had a reasonable expectation of privacy in the area videotaped. For example, in Sanders v. American Broadcasting Co., an undercover reporter from ABC’s “PrimeTime Live” television show applied for and received a job as a “telepsychic” and proceeded to secretly videotape conversations she had in an open work area with plaintiff, another “telepsychic.” The court held that since the plaintiff did not have a reasonable expectation that his conversations were confidential, he could not maintain an invasion of privacy claim against ABC and the reporter. 109

7. Monitoring of computer operations.

While in recent years the plight of governments and corporations beset by a plague of computer viruses has captured public attention, many would agree that the chief threat to employer computer system security comes from insiders who can more easily penetrate their employer’s computer system security and find ways to profit from or otherwise abuse corporate computer information. One expert estimates that at least 80% of computer crimes are committed by employees. 110 Since employees remain with an employer for extended periods of time, those who abuse computer information will often do so continuously over a period of years. Such a long-term pattern of abuse poses a much greater threat to the secrets and dollars of an employer than do occasional one-time raids into a system conducted by a mercenary hacker.

Employers are particularly vulnerable to employee computer crime because employees know what information is sensitive. They may try to manipulate personnel files for their own benefit or for the benefit of those who pay them. Unhappy employees may also attempt to alter or eliminate valuable information. 111

Computers can record when employees turn their video display terminals (“VDTs”) on and off, count the number of key strokes per second, track the number of operator errors per day, and monitor employees’ telephone conversations. An estimated ten million workers are currently monitored through such techniques. Surveillance generally does not give rise to a successful claim for intentional infliction of emotion distress, even when the surveillance violates company policy. 112

The legal landscape of this debate is at the moment rather barren. One federal court dismissed an invasion of privacy claim brought in reaction to a monitored study of temporary VDT workers. 113 In dismissing the claim, the judge remarked that “the observation and

111 See, e.g., Burleson v. State, 802 S.W.2d 429 (Tex. App.—Fort Worth 1991, writ ref’d) (affirmed conviction of former employee whose computer program deleted payroll commission reports after he was fired).
recording that the number of errors the [employees] made in the tasks they were instructed to perform can hardly be considered an intrusion upon the [employees’] solitude or seclusion . . . or [their] private affairs or concerns.”

F. “Informers,” “Spies” or “Plants.”

State laws may restrict an employer’s right to use undercover agents posing as employees. Even if use of such undercover investigators is permitted, the employer must use extreme care to avoid problems of invasion of privacy or entrapment.

There is no general federal prohibition on the use of spies by employers. However, use of undercover investigators is prohibited under the National Labor Relations Act when spying on union activities of employees is involved. In general, surveillance of employees by an employer, whether with supervisors, rank-and-file employees, or outsiders, has been consistently held to violate Section 8(a)(1) of the Act.

G. Lawyer Participation in Deception by Undercover Investigators.

To be effective, both undercover agents and discrimination testers customarily misrepresent (i.e., lie about) their identities and engage in misrepresentations as to their true purposes and activities. These undercover activities are often supervised and conducted by the lawyers of the employer or organization. Generally, lawyers are prohibited from making material misrepresentations of law or fact in the course of representing a client, and from engaging in conduct that involves misrepresentations, and lawyers are, in certain circumstances, held vicariously responsible for the conduct of non-lawyers acting under their direction or under their supervision. To what extent may a lawyer supervise or participate in deceptive activities of undercover investigators?

Most of the few jurisdictions that have considered the issue have concluded that lawyers do not violate the ethics rules by supervising or participating in undercover investigations based on misrepresentations necessarily made by undercover agents solely as to their identity and

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114 Id.
119 Model Rules of Prof’l Conduct R. 8.4(c).
120 Model Rules of Prof’l Conduct R. 5.3(c) and R. 8.4(a). See also Model Code of Prof’l Responsibility DR 1-102(a)(1)(4) (lawyer prohibited from engaging in conduct involving dishonest, fraud, deceit or misrepresentation).
purpose and solely for evidence-gathering purposes, particularly where such investigations are conducted by governmental bodies.  

Of course, ethical violations may be found if the misrepresentations of an undercover investigator go beyond identity and purpose and involve fraud or perjury.  Similarly, ethics committees and courts have held that the ethics rules are violated when a lawyer uses an investigator to contact a person known to be represented by counsel.

H. Credit and Reference Checks–Fair Credit Reporting Act Issues.

Many employers routinely conduct background checks on applicants and current employees to verify the accuracy of information provided. The Fair Credit Reporting Act (FRCA) governs, among other things, the circumstances under which employers may request consumer credit reports and consumer investigative reports on prospective or active employees, and the terms under which employers may take adverse action against candidates for employment or employees whose credit reports contain negative information.

The Fair and Accurate Credit Transaction Act of 2003 (“FACT Act”) amended the FCRA to exempt from the definition of consumer report/investigative consumer report that which would otherwise be covered by the FCRA if:

1. the communication is made to the employer in connection with the investigation of
   a. suspected misconduct related to employment, or

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121 Apple Corps. Ltd. v. Int’l Collectors Soc’y, 15 F. Supp. 2d 456, 475-76 (D. N.J. 1998) (Rule “8.4(c) does not apply to misrepresentations solely as to identity of purpose and solely for evidence gathering purposes.”); Ala. Bar Op. No. RO-89-31 (1980) (it is permissible for a lawyer to direct an investigator to pose as a customer in order to determine whether the plaintiff lied about his injuries); N.Y. County Ethics Op. No. 737 (May 23, 2007) (lawyer may ethically employ an investigator who “dissembles” to third parties during an investigation, provided: (1) the investigation involves either “intellectual property” or “civil rights”; (2) the lawyer reasonably believes violations are occurring; (3) there is no other reasonable way to establish the violations; (4) the dissemblance is expressly authorized by law; (5) the lawyer does not personally violate the ethics rules; and (6) the investigator’s conduct does not rise to a fraud or crime); Utah Bar Opinion No. 02-05 (March 18, 2002) (a government lawyer who participates in a lawful covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct).

122 See In re Friedman, 392 N.E.2d 1333 (Ill. 1979) (ethical rules violated because lawyer directed the witness to commit perjury); In re Malone, 480 N.Y.S.2d 603 (1984) (lawyer who instructed officer to testify falsely under oath violated ethics rules).

123 See, e.g., ABA Informal Op. No. 663 (1967) (“If the attorney for the defendant could not himself gain the confidence of the plaintiff, visit with him and ask him questions, the attorney cannot do the same thing through a private investigator who is merely an agent for the attorney.”).

b. compliance with federal, state or local law, rules of a Self Regulatory Organization (“SRO”) (such as the New York Stock Exchange or the National Association of Securities Dealers), or any preexisting written policies of the employer;

2. it is not made for the purpose of investigating creditworthiness; and

3. it is not provided to any person except:
   a. the employer or its agent;
   b. the government;
   c. an SRO; or

Unlike reports in connection with background or credit checks, there is no requirement that the employer provide advance notice to the target of the investigation, or to obtain consent from the target regarding conduct of the investigation. However, after taking adverse action based in whole or in part on such an investigative report, the employer must give the employee a summary of the nature and substance of the report. Sources of the information in the report need not be disclosed in the summary.\footnote{15 U.S.C. § 1681a (x)(2).}

Note that FCRA requirements do not apply to companies that rely on “in-house” investigations. Also, outside investigators who do not regularly conduct investigations may not be “consumer reporting agencies” within the meaning of the FCRA.\footnote{See Hodge v. Texaco, Inc., 975 F.2d 1095 (1992) (individual’s one-time referral was not a “consumer reporting agency”); Oldroyd v. Assocs. Consumer Discount Co./PA, 863 F. Supp. 237 (E.D. Pa. 1994) (Company that did not regularly engage in practice of assembling or evaluating consumer credit information was not a “consumer reporting agency.”); Hartman v. Lisle Park Dist., 158 F. Supp.2d 869 (N.D. Ill. 2001) (a law firm essentially steps into the shoes of a corporation and thus is not an “consumer reporting agency”); Robinson v. Time Warner, 187 F.R.D. 144 (S.D. N.Y. 1999) (if outside counsel’s report was prepared to provide legal advice to the employer and not to evaluate the plaintiff and take adverse action against him, it is not an investigative consumer report within the meaning of the FCRA).}
RESPONDING TO DISCRIMINATION CLAIMS

I. INITIAL CHECKLIST FOR RESPONDING TO DISCRIMINATION CLAIMS

A. Charge Requirements.

In order to be valid, a charge of discrimination must meet the following requirements:

1. The change must be presented in writing;

2. The change must be presented under oath or affirmation.

The failure to verify a charge of discrimination is jurisdictional. However, courts recognize that it may be cured by a subsequent amendment of the charge before the EEOC acts on the matter. Only where the failure to verify causes substantial prejudice to the employer will the plaintiff’s suit be barred;\textsuperscript{128}

3. The charge must contain a clear and concise statement of facts, including pertinent dates, constituting the alleged unlawful employment practices.\textsuperscript{129}

A refusal by the EEOC to provide more detail during the preliminary investigation is apparently not jurisdictional; and\textsuperscript{130}

4. Section 706(b) requires that notice of charge must be given to employer within ten days of its filing by the complainant. However, absent clear prejudice to the employer, failure to give notice within the ten-day period is not jurisdictional.\textsuperscript{131}

\textsuperscript{128} \textit{Price v. Southwestern Bell Tel. Co.}, 687 F.2d 74, 77 (5th Cir. 1982); \textit{EEOC v. Sears, Roebuck & Co.}, 22 Fair Empl. Prac. Dec. (BNA) 1479, 1484-85 (M.D. Ala. 1980) (Sears prejudiced by six-year delay in EEOC’s failure to have Commissioner’s charge verified). \textit{But see Pijnenburg v. West Georgia Health Sys., Inc.}, 255 F.3d 1304 (11th Cir. 2001) (affirming dismissal of claim that did not qualify as a “charge” under Title VII).

\textsuperscript{129} 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.12(a)(3)(1983); \textit{EEOC v. Roadway Express, Inc.}, 750 F.2d 40, 42 n.1 (6th Cir. 1984) (holding that the charge must be facially valid but that the court need not go beneath the face of the charge to make factual allegations).

\textsuperscript{130} \textit{Miss. Chem. Corp. v. EEOC}, 786 F.2d 1013 (11th Cir. 1986).

\textsuperscript{131} \textit{EEOC v. Airguide Corp.}, 539 F.2d 1038, 1041 (5th Cir. 1976).
B. Carefully Review the Charge of Discrimination to Determine Whether Procedural and Jurisdictional Prerequisites Have Been Met.

1. Review for timeliness.

a. Title VII. Under Title VII of the Civil Rights Act of 1964 ("Title VII"), the charging party has 180 days after the “alleged unlawful employment practice occurred” in which to file a charge of discrimination.\(^{132}\) If a state fair employment practices agency law prohibits the same alleged discriminatory practice, the time limit for filing is extended to 300 days, whether or not the charges are instituted timely under state or local law.\(^{133}\) If the charge is initially filed with the FEPA the EEOC initially defers the charge to the FEPA, or the FEPA waives initial processing rights pursuant to a work-sharing agreement with the EEOC.\(^{134}\)

b. ADEA.

Charges of discrimination under the Age Discrimination in Employment Act of 1967 ("ADEA") must be filed with the EEOC within 180 days of the alleged unlawful practice, or within 300 days where the state FEPA law prohibits age discrimination.\(^{135}\)

This filing period, however, is not jurisdictional in nature.\(^{136}\) As such, the filing period may be extended for any reason, such as if an employer fails to post the required ADEA notice, if the employer actively misleads the charging party/employee, if the charging party/employee has “in some extraordinary way” been prevented from asserting his rights, or if the charging party/employee timely asserted his rights in the wrong forum.\(^{137}\)

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\(^{133}\) Mennor v. Fort Hood Nat’l Bank, 829 F.2d 553, 556 (5th Cir. 1987).


\(^{136}\) See Kephart v. Inst. of Gas Tech., 581 F.2d 1287 (7th Cir. 1978).

\(^{137}\) See Scheerer v. Rose State Coll., 950 F.2d 661 (10th Cir. 1991), cert. denied, 112 S.Ct. 2995 (1992). But see Aungst v. Westinghouse Elec. Corp., 937 F.2d 1216 (7th Cir. 1991) (refusing to grant an extension on the ground that the company induced the employee not to sue by helping him find another job), overruled in part on other grounds by Oxman v. WLS-TV, 12 F.3d 652 (7th Cir. 1993).
c. **ADA.**

Under the Americans with Disabilities Act, charges of discrimination are processed pursuant to the enforcement procedures of Title VII. 138

d. The time limit begins to run on the date the adverse decision is made and communicated to the charging party—not the date that the decision is actually effective. 139 This is true even if the employer grants the employee an internal grievance or other process to contest the decision once made. It has been held that in the event of systemic disparate treatment, each pay period that results in discriminatory compensation is a distinct and continuing violation. 140 But this holding has been explicitly limited to systemic discrimination cases, and in ordinary disparate treatment cases, even where multiple discriminatory acts have occurred, the limitations period begins once the final act is perpetrated, and the fact that a paycheck in some way reflects discriminatory acts does not render each new paycheck itself an act of its own. 141 At least one court has held that even when the employer was willing to reconsider evidence which did not amount to a recission of the decision, the time period started to run when the employee originally received notice. 142

2. **Proper Employer Identification.** Confirm that the employer is identified by the correct name. Sometimes the parent corporation is named instead of the corporate affiliate that actually employed the charging party.

3. **Sufficient number of employees to invoke jurisdiction.**

   a. Title VII defines an employer as “person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . .” 143

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139 Del. State Coll. v. Ricks, 101 S.Ct. 498 (1980) (the time of discriminatory act and not the point at which the consequences of the act become painful is the time for which the statute of limitations begins to run).
140 See Bazemore v. Friday, 478 U.S. 385 (1986).
b. It is sufficient that the required number of employees were on the payroll for 20 weeks out of a year, regardless of whether they were full-time employees or at work on every available workday.\textsuperscript{144} Thus, regular, part-time employees can be counted toward the 15-employee requirement.\textsuperscript{145}

c. The ADEA contains a similar provision, but respondent must employ 20 or more employees to come within that statute’s coverage.\textsuperscript{146}

d. Like Title VII, the ADA covers employers with 15 or more employees.\textsuperscript{147}

e. Most state FEP laws, such as the Texas Commission on Human Rights Act (“TCHRA”) require 15 employees for jurisdiction, including claims based on age discrimination.\textsuperscript{148}

Note that the Supreme Court has held that Title VII’s employee-numerosity requirement is not jurisdictional in nature and the employer’s defense on that issue can be waived if not timely asserted in court.\textsuperscript{149}

4. **Employee status.** Confirm whether the charging party is an applicant for employment or an employee as opposed to an independent contractor.\textsuperscript{150} Note that former employees may have valid claims for post-employment retaliation or discrimination.\textsuperscript{151}


\textsuperscript{146} 29 U.S.C. § 630(b) (2007).


\textsuperscript{150} See, e.g., Schweitzer v. Advanced Telemarketing Corp., 104 F.3d 761 (5th Cir. 1997) (hybrid economic realities/common law right to control test should be used as to initial inquiry whether plaintiff an “employee” for Title VII purposes).

\textsuperscript{151} See Robinson v. Shell Oil Co., 117 S.Ct. 843 (1997) (Title VII applies to retaliation claim brought by former employee subjected to negative employment references).
C. **Review the Charge With the Investigator.**

Most experienced investigators will work with employers in the investigation of discrimination charges. The investigator should be asked to explain his usual procedures concerning, for example, on-site investigations. The employer should ask the investigator what remedy the claimant requests for the alleged discrimination.

D. **Investigate the Charging Party’s Allegations.**

Since information obtained in an investigation may be subject to discovery in a subsequent lawsuit, employers may want to have their attorney perform or direct the investigation of the charge to establish a work product privilege against discovery. In addition, employers should have all investigative materials prepared by their attorney. These steps could provide protection from discovery in a subsequent lawsuit.

1. Review organization files concerning charging party, paying particular attention to disciplinary actions, documentation, employee complaints, and for other reasons, worker’s compensation claims.

2. Confidentially discuss the charging party’s allegations with his or her supervisor, persons mentioned in the charge, and those who you discover have knowledge of facts surrounding the incidents charging party describes. Be thorough and make a written record of the statement so you are not “surprised” later when additional facts come to light.

3. Obtain written and notarized statements from supervisors and employees with knowledge of facts relating to the allegations in the charge. Employees may not be compelled to produce written statements and are protected from harassment or retaliation if an employer under Section 704 of Title VII, for participating as a witness in a charge investigation.152

4. Analyze whether conciliation or settlement is a viable option based on your investigation of charging party’s allegations.

E. **Respond to the Charge.**

If you decide not to settle charging party’s claims, prepare a response to the EEOC request for information. Since any information you submit to the EEOC may be available to the charging party if the claim is subsequently litigated, you

may want to have your attorney prepare your position statement. The statement of position should correspond to all charge allegations and provide the EEOC with a legitimate, non-discriminatory reason for the organization’s actions.

In the past, the EEOC would accept all charges of discrimination received and “fully” investigate such charges. As a result of insufficient resources, the Commission has rescinded its policy of investigating every charge that is filed and seeking full remedies in every case where it finds reasonable cause to believe discrimination has occurred. The Commission now fully investigates only what it considers “meritorious” charges of discrimination, encourages settlement, and seeks “appropriate” relief. Under its new charge prioritizing system, the Commission reviews incoming charges and assigns each to one of three categories.

Charges are assigned to the “A” category if discrimination is “likely” to be found, there is a chance of irreparable harm, or the type of claim is an enforcement priority under the Commission’s National Enforcement Plan. Category “A” charges receive full treatment right away, with legal units beginning work before the investigators have completed their work. Category “C” charges are those where a finding of illegal discrimination is “unlikely,” the alleged illegal action does not involve a law the Commission is charged with enforcing, or the employer lacks the minimum number of employees to be covered by an enforceable law. The EEOC dismisses “C” charges after a thorough intake interview and counseling the Charging Party about the “no cause” finding. Charges assigned to the “B” category are those that require more information and investigation, and which the EEOC requests position statements. According to the Commission, “A” charges represent 18% of the agency’s pending cases, “B” charges represent 69% of the charges, “C” charges constitute about 7%, and approximately 6% of the charges are not categorized.

1. The EEOC routinely requests the employer to respond to the charge approximately four weeks after notice of the discrimination charge is sent. If you anticipate that more time will be necessary to fully investigate and respond, an extension may (and should) be requested from the EEOC investigator. Given the current backlog of EEOC charge files (in some districts, charges pending more than one year is not considered unusual), it is likely that any reasonable extension request will be granted.

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153 See Olitsky v. Spencer Gifts, Inc., 964 F.2d 1471, 1477 (5th Cir. 1992) (employer’s position statement not part of conciliation; therefore, section 706(b) did not apply and statements admissible before jury), cert. denied, 113 S. Ct. 1253 (1993); Binder v. Long Island Lighting, 933 F.2d 187, 193 (2d Cir. 1991) (employer’s written position statement admissible in ADEA action).
2. If appropriate, challenge the charge for failure to state a *prima facie* case of discrimination. To state a *prima facie* case, charging party must allege:

a. Race, national origin or sex discrimination (disparate treatment):
   
   i. Membership in the protected class;
   
   ii. Qualifications to perform job which charging party held or sought with the employer;
   
   iii. Despite qualifications, the charging party suffered an adverse employment action; and
   
   iv. Others who were similarly situated and not members of the protected class were treated more favorably (if the adverse employment action was termination, show the position was subsequently filled by a person not within the protected group) or violated the same rule for which the charging party was terminated without similar treatment by respondent.  

b. Religion:
   
   i. Charging party held a particular religious preference;
   
   ii. Respondent had knowledge of this religious preference;
   
   iii. Charging party was terminated, or other adverse action, taken on account of his or her religious preference; and
   
   iv. The position was filled by a person of another religious preference of which the respondent had knowledge.

c. Disability (Americans With Disabilities Act):
   
   i. Charging party is a qualified person with a disability;
   
   ii. Despite his disability, charging party can meet the essential qualifications of the position at issue;

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iii. The employer’s physical criteria are not “job related” or the job position may be modified to reasonably accommodate charging party’s disability.

d. Age discrimination:
   i. Charging party is within the protected age group (over 40);
   ii. Charging party was qualified for the position;
   iii. Charging party was nevertheless adversely affected; and
   iv. The employer sought a younger individual with similar qualifications to perform the work.

3. At least preliminarily, the EEOC will seek a statement of position and supporting documentation from the employer. Alternatively, the EEOC or state FEP agency may request specific documents and a statement of position. You may wish to communicate with the Commission’s investigator to narrow the issues of the charge and request for documents, eliminating any unnecessary requests. The following steps are suggested in responding to an EEOC document request:

   a. Submit documents favorable to your position.

   b. Distinguish unfavorable documents you may have to submit.

   c. Prepare a statement of position. The statement of position should be concise, containing sufficient facts to show the employer’s non-discriminatory conduct toward charging party. Refer to and attach documents. Ideally, a statement of position describes:

      i. Respondent’s business operations;
      ii. How charging party fits into the organization’s operations;
      iii. Respondent’s personnel policies and procedures and their communication to charging party;
      iv. Charging party’s employment background and counseling/disciplinary history;
      v. The facts surrounding charging party’s allegations;
      vi. Why respondent acted as it did;
vii. Respondent’s similar actions toward employees outside charging party’s protected class. In comparing charging party to those outside of the protected class, you may discover respondent treated him more favorably than others. Include examples of charging party’s more favorable treatment;

viii. Work for statistical data for organization, facility, department/position, as appropriate (consider submitting copy of organization’s EEO-1 report); and

ix. Respondent should strongly deny charging party’s discrimination allegations.

Practice Pointer: Remember that any position statement or other correspondence provided the EEOC is “on the record” and take care to ensure that Respondent’s explanation for its actions is consistent with its ultimate litigation position; inconsistency between Respondent’s explanation before the EEOC and its explanation at other stages of the litigation may constitute evidence of pretext.\(^{155}\)

d. Make clear that you will submit additional information if the EEOC requires it to exonerate respondent.

e. Employee affidavits may be requested by EEOC investigators. If possible, they should be avoided, as they constitute sworn testimony which can be used against employers and/or other organizations in subsequent litigation. If used, affidavits must be based on the employee’s personal knowledge and should address only specific relevant factual issues raised by the charge of discrimination.

4. Upon an employer’s failure or refusal to respond or cooperate with the EEOC, the Commission may issue a subpoena for production of evidence, for access to evidence and/or for testimony of witnesses. If the employer

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\(^{155}\) See, e.g., Burrell v. Dr. Pepper/Seven Up Bottling Group, Inc., 482 F.3d 408 (5th Cir. 2007) (Fact questions existed as to truthfulness of employer’s proferred reasons for not promoting employee to position of vice president of purchasing, i.e., superior “purchasing experience in the bottling industry” of white manager who was promoted, precluding summary judgment in African American manager’s race discrimination claim because, among other things, the employer offered inconsistent explanations of its reasons in its response to the EEOC, in its summary judgment motion at district court and in its brief on appeal and made no attempt to explain the inconsistency).
fails to comply with the subpoena, the EEOC may seek enforcement by the U.S. District Court.

F. Avoid Appearance of Retaliation Against the Charging Party and Witnesses.

If the complaining employee still works for respondent, treat him as if he had not filed a charge. Retaliation against charging party also violates discrimination laws. However, the fact that an employee has filed a charge of discrimination does not insulate him/her from legitimate disciplinary action.

G. EEOC On-Site Investigations.

Increasingly, the EEOC has begun to make requests for on-site investigations. If such a request is received, the employer should consult with legal counsel before responding to the requests. In most cases, an on-site investigation can be avoided by offering to supply the requested documents or access to the requested witnesses off-site.

1. Authority.

Section 2000e-8 provides that, in connection with the investigation of a charge filed under Title VII, the Commissioner shall “at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.”

2. Research reveals no case in which an employer has successfully opposed an on-site investigation by the Commission. On the contrary, where employers have received onerous interrogatories or requests for voluminous documents, courts have ordered on-site review of those documents as a form of partial relief to the employer.

H. EEOC Fact-Finding Conference.

The EEOC may hold a fact-finding conference in which the parties and witnesses may present evidence. The EEOC investigator questions the witnesses, who do not give sworn testimony. The conference is primarily an investigative forum intended to define the issues, to resolve those issues that can be resolved and to ascertain whether there is a basis for negotiated settlement of the charge.\textsuperscript{156}

\textsuperscript{156} 29 C.F.R. § 1601.15 (2007).
I. **Negotiated Settlement.**

Prior to issuance of a determination as to reasonable cause, the Commission may encourage the parties to settle the charge on mutually agreeable terms.\(^{157}\)

J. **Agency Determination and Subsequent Lawsuit.**

1. **No cause determination.**

   a. After the investigating agency makes a “no cause” determination, it will issue charging party a notice of right to sue under Title VII, ADEA, ADA and/or the state FEP law. The charging party may then bring suit within the statutory limitations period. The notice will inform the charging party that he/she has the right to file a civil action in federal court regarding the allegations of the charge within 90 days of receipt of the notice.\(^{158}\)

   b. Charging party may appeal the “no cause” determination by requesting review of the determination within 14 days following its issuance. Also, the Commission may reconsider the no cause determination on its own initiative.\(^{159}\) If charging party fails to request a review within this period, the determination becomes final. In the absence of an appeal, charging party may only pursue the matter by filing suit within 90 days following dismissal.

2. **Cause determination.**

   a. Where there is a “cause” determination, the EEOC must pursue conciliation prior to filing a lawsuit.

      i. A conciliation conference, in-person or by telephone.

      ii. The EEOC will seek full relief, including, but not limited to, reinstatement or hiring of employees, backpay, fringe benefits and promotion.

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\(^{158}\) 29 C.F.R. § 1601.19(a) (2007).

\(^{159}\) 29 C.F.R. § 1601.19(b). See Jackson v. Richards Med. Co., 961 F.2d 575 (6th Cir. 1992) (EEOC regulation allowing it to rescind dismissal of no cause determination and to vacate right to sue notice is valid – regulation consistent with Congress’ intent that discrimination complaints be resolved administratively).
iii. Negotiations with the investigator may lead to an acceptable settlement through conciliation and avoid a lawsuit and adverse publicity. \(^{160}\)

iv. The EEOC has a duty to engage in conciliation. \(^{161}\)

b. If conciliation fails, the EEOC and/or the charging party may sue respondent.

i. Charging party may sue under Title VII, ADEA and/or ADA within 90 days of receipt of a Notice of Right to Sue.

ii. Charging party may sue respondent under the state FEP act within the time prescribed under state law. This may be more restrictive than federal law.

3. Right to sue notice at charging party’s request.

a. Title VII itself does not specify whether a right-to-sue notice must be issued upon request of the charging party. However, under Commission Regulation 29 C.F.R. § 1601.28(a), a charging party may request a notice of right-to-sue at any time after 180 days have elapsed after filing of a charge with the Commission. The regulations contemplate that a right to sue notice will issue automatically upon request of the charging party. \(^{162}\)

b. If any of the following circumstances exist, a charging party’s request for a right to sue notice should be denied:

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\(^{160}\) See, generally, 29 C.F.R. §§ 1601.21, 1601.24.

\(^{161}\) See E.E.O.C. v. Asplundh Tree Expert Co., 340 F.3d 1256 (11th Cir. 2003) (EEOC violated its Title VII duty to conciliate racial harassment and retaliation dispute, warranting attorney fee award as sanction, where, after 32-month investigation in which employer cooperated, EEOC sent far-reaching remediation proposal to employer that failed to identify any theory of liability but provided only 12 business days to respond, did not acknowledge response from employer’s retained attorney that expressed desire to resolve dispute out of court but arrived just beyond arbitrary 12-day deadline, immediately sent second letter terminating conciliation and announcing intent to sue, and sued 13 days later.). Compare EEOC v. Spectrum Health Worth Home Care, 2006 WL 519779 (W.D. Mich. March 2, 2006) (EEOC did not violate its duty to conciliate claim where it provided employer with an explanation of the basis for its reasonable cause determination, offered the employer an opportunity for voluntary compliance by submitting a proposed conciliation agreement, and did not present the agreement on a take-it-or-leave-it basis; instead, it requested a response from the employer and agreed to the employer’s request for a reasonable extension of time to respond.)

i. Charge is jurisdictionally deficient. If the EEOC determines that the charge is untimely or fails to state a claim, it should dismiss the charge and issue a right-to-sue notice on that basis. 163

ii. Little investigation required to reach determination. If the charge is one where the EEOC has traditionally directed summary treatment, any early right-to-sue notice request by the charging party should be denied since the EEOC’s required determination can not be completed within the 180-day notice period.

iii. Process is nearing completion. When processing of the charge is almost complete and a no cause letter of determination is about to be issued, the EEOC should deny the request for the early right to sue notice. 164

c. However, the EEOC will continue to process a charge even after issuing a notice of right to sue under the following conditions:

i. Commissioner charges. Issuance of a right to sue letter request will not terminate the processing of a Commissioner’s charge.

ii. Charge consolidated into a systemic case. When a charge is consolidated into a systemic case, the decision whether to continue processing the charge after issuance of the notice of right to sue may be made by the unit processing the systemic case.

iii. Where continued processing would otherwise effectuate the purpose of Title VII. Processing of the charge should ordinarily continue when the charge involves an acknowledged or documented policy of the respondent, or when the evidence points to a possible pattern of disparate treatment affecting persons other than the charging party. 165

164 EEOC COMPLIANCE MANUAL (BNA), at 6:0001.
165 EEOC COMPLIANCE MANUAL (BNA), at 6:0002.
II. GENERAL STANDARD OF RELEVANCE FOR EEOC INVESTIGATIONS AND SUBPOENAS

A. General Authority.

1. Title VII confers upon the EEOC the authority to investigate charges, to issue subpoenas, and to have subpoenas enforced.\(^{166}\) Similarly, the EEOC regulations authorize the Commission to issue subpoenas requiring access to witnesses, the production of evidence and access to other evidence relevant to the charge.\(^{167}\)

2. Courts are required to enforce administrative subpoenas if the investigation is within the authority of the agency, the demand is not too indefinite or burdensome, and the information sought is reasonably relevant to the employment practice under investigation.\(^{168}\)

3. Once the EEOC makes the above showing, the court must enforce the subpoena unless the respondent demonstrates that the subpoena is unduly burdensome.\(^{169}\)

4. The EEOC is not limited to gathering information which would be relevant at trial. Rather, the EEOC is entitled to all that is relevant to the charge under investigation.\(^{170}\) This concept of relevancy is construed expansively when a charge is at the investigatory stage.\(^{171}\) This reflects Congress’ apparent endorsement of a standard that affords the EEOC access “to virtually any material that might cast light on the allegations against the employer”:

   Since the enactment of Title VII, courts have generally construed the term “relevant” liberally and have afforded the Commission

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\(^{167}\) 29 C.F.R. § 1601.16 (2007).


\(^{169}\) EEOC v. Md. Cup Corp., 785 F.2d 471, 476 (4th Cir. 1986); EEOC v. Children’s Hosp. Med. Ctr., 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc), abrogated on other grounds by Prudential Ins. Co. of Am. v. Lat, 42 F.3d 1299 (9th Cir. 1994).


\(^{171}\) New Orleans Steamship Assn. v. EEOC, 680 F.2d 23, 26 (5th Cir. 1982); Burns v. Thiokol Chem. Corp., 483 F.2d 300 (5th Cir. 1973).
access to virtually any material that might cast light on the allegations against the employer. In 1972, Congress undoubtedly was aware of the manner in which the courts were construing the concept of “relevance” and implicitly endorsed it by leaving intact the statutory definition of the Commission’s investigative authority. On the other hand, Congress did not eliminate the relevance requirement and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity.\textsuperscript{172}

5. Evidence relevant to investigation of the charge may also include evidence concerning employment practices other than those specifically charged by the complainants.\textsuperscript{173}

However, the Fifth Circuit has held that if, during investigation of a race-based charge, the EEOC discovers evidence of gender-based discrimination, it may not pursue an investigation of the gender-based discrimination under its original subpoena.\textsuperscript{174}

6. In one case, when the EEOC subpoenaed records of disciplinary actions by an employer against all of its employees during a period of almost three years in relation to an individual charge of discriminatory discharge, the court enforced the EEOC’s subpoena, finding that:

\[ \text{[R]elevance, of course, is determined by the claim under investigation. [The charging party’s] charge is based, in part, on a claim of disparate treatment. Such a claim necessarily requires discovery beyond the individual incident which precipitated his discharge. Investigation into the operation of Kentile’s disciplinary program will place Hampton’s case in context. At this stage, the appropriate context does not limit it to incidents involving similar allegations of employee misconduct. A broad overview will enable the EEOC to understand the manner in which Kentile’s disciplinary system functioned in practice.} \]

\textsuperscript{172} \textit{EEOC v. Shell Oil Co.}, supra, 466 U.S. at 63.

\textsuperscript{173} \textit{See EEOC v. Roadway Express, Inc.}, 750 F.2d 40, 42 (6th Cir. 1984) (“[T]his Court has long held that ‘evidence concerning employment practices other than those specifically charged by complainants’ may be sought by an EEOC administrative subpoena in a case involving a complaint of discriminatory discharge.”); \textit{New Orleans Steamship Assn.}, 680 F.2d at 26 (breakdown by name, race and sex of test examinees relevant in determining whether test adversely impacts on Blacks and women); \textit{EEOC v. Bay Shipbuilding Corp.}, 668 F.2d 304 (7th Cir. 1981) (“[C]ourts uniformly uphold the relevancy of EEOC subpoenas seeking information about discrimination not specifically alleged in the charge”).

\textsuperscript{174} \textit{EEOC v. Southern Farm Bureau Cas. Ins. Co.}, 271 F.3d 209 (5th Cir. 2001). \textit{See also EEOC v. United Air Lines, Inc.}, 287 F.3d 643 (7th Cir. 2002) (similarly limiting the breadth of an EEOC subpoena).
handling of similar and dissimilar incidents may shed light on the fairness of its treatment in this particular case. More specifically, it may show whether the stated reason for [charging party’s] discharge was pretextual.  

B. Challenges to EEOC Subpoenas.

1. An EEOC subpoena should be enforced so long as the underlying charge is facially valid. However, where there is a substantial question as to a threshold issue—such as jurisdiction/coverage—it may be possible to limit the EEOC’s subpoena to information relating to jurisdiction/coverage and delay requests for information relating to the merits of the charge.

2. Challenges based on lack of pending charge.

The EEOC may not continue its internal investigation of discrimination complaint once individual who brought charge has been issued right to sue letter from agency and started litigation based on the charge. The court rejected the EEOC’s attempt to subpoena information from the employer; once the alternative enforcement procedure of commencing litigation has begun, the time for the EEOC’s investigation based upon those claims has passed. However, the court noted that the EEOC could seek information through other avenues, such as a different individual’s charge or a Commissioner’s charge.

3. Challenges based on underlying merit of charge.

In enforcing an EEOC subpoena, the district court need not find that the charge is “well founded,” “verifiable,” or based on reasonable suspicion:

The district court has a responsibility to satisfy itself that the charge is valid and that the material requested is “relevant” to the investigation.

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175 EEOC v. Kentile Floors, Inc., 1986 WL 4443, 40 Fair Empl. Prac. Cas. (BNA) 1437, 40 Empl. Prac. Dec. P 36,170 (N.D. Ill. 1986). See also EEOC v. A.E. Staley Mfg. Co., 711 F.2d 780, 783 (7th Cir. 1983), cert. denied, 466 U.S. 936 (1984) (“In terms of relevanc[e], it is sufficient that ‘. . . the material subpoenaed touches a matter under investigation . . . even though the material may not be considered evidence as the term is used in the courtroom.’”).


177 EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002) (In age discrimination charge against a law firm for demoting 32 equity partners where the law firm contended that the charging parties were bona fide partners not covered by the discrimination laws, EEOC subpoenaed information relating to coverage/jurisdiction and to the merits of the underlying decision; Seventh Circuit directed enforcement only of the portions of the subpoena relating to the coverage/jurisdictional issue, and held that inquiry into the merits of the charge should be deferred).

charge and more generally to assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose. However, any effort by the court to assess the likelihood that the Commission would be able to prove the claims made in the charge would be reversible error.  

Every appellate court that has considered the question has followed Shell Oil and held that the question whether the underlying charge is meritorious is irrelevant to a subpoena enforcement proceeding.  

4. Privacy challenges.

Where disclosure of confidential material is at issue, the courts may require an examination of the substance of the charging party’s claims before requiring production.  

5. Abuse of authority.

An employer can resist full enforcement of a subpoena if it is shown that there is a significant chance that the Commission is abusing its investigative authority.  

6. Burdensomeness; inconvenience.

In general, burdensomeness, inconvenience, or excessive expense will not excuse compliance with discovery requests or an EEOC investigatory

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179 Shell Oil Co., 466 U.S. at 68 n.26.

180 New Orleans Pub. Serv., Inc. v. Brown, 507 F.2d 160 (5th Cir. 1975) (no requirement that EEOC have factual basis for charge before it could subpoena documents from employer); EEOC v. S.C. Nat’l Bank, 562 F.2d 329, 332 (4th Cir. 1977) (EEOC “need only show that the exercise of its jurisdiction is supported by reasonable cause”; rejects claim that subpoena improper due to timeliness of filing charge); EEOC v. Roadway Express, Inc., 750 F.2d 40, 42 (6th Cir. 1984) (“[A subpoena enforcement proceeding] is not the proper time to litigate the merits of a claim, either procedurally or substantively.”); EEOC v. Ocean City Police Dept., 787 F.2d 955, 957 (4th Cir. 1986) (“Questions of coverage or jurisdiction, such as whether the underlying charge is timely, are not for the court to decide in a subpoena enforcement proceeding.”); EEOC v. A.E. Staley Mfg. Co., 711 F.2d 780, 783 (7th Cir. 1983), cert. denied, 466 U.S. 936 (1984); EEOC v. Peat, Marwick, Mitchell and Co., 775 F.2d 928, 930-31 (8th Cir. 1977) (reasonable cause need not be established before an EEOC subpoena can be validly issued); EEOC v. Franklin & Marshall Coll., 775 F.2d 110 (3d Cir. 1985), cert. denied, 476 U.S. 1163 (1986) (same).

181 See EEOC v. Univ. of Notre Dame du Lac, 715 F.2d 331, 337 n.4 (7th Cir. 1983).

182 United States v. Powell, 379 U.S. 48, 51 (1964); EEOC v. First Ala. Bank, 440 F. Supp. 1381 (N.D. Ala. 1977), aff’d, 611 F.2d 132 (5th Cir. 1980) (refusing to enforce administrative subpoena where the subpoena was issued as part of a “personal vendetta” by the EEOC investigator); In re EEOC, 709 F.2d 392, 400 (5th Cir. 1983) (allowing respondent to engage in discovery calculated to produce evidence that investigative subpoena should not be enforced).
subpoena so long as the information sought is relevant to the investigation. 183 The courts have generally been unsympathetic to claims that compiling evidence would be unduly burdensome based on cost in terms of time and effort. 184 But a few courts have denied discovery on the grounds of employer burden. 185

7. Location for production.

The courts have generally rejected employer objections to production of records at the EEOC offices, even where it is claimed that the records could be copied by the EEOC. 186

8. Requests requiring employer to compile data.

The subpoena power of the EEOC is not limited to the production of documents already in existence. Rather, the enabling statute grants the EEOC broad authority to require “the production of any evidence.” 187 Thus, the EEOC has the authority to compel the employer to produce evidence that does not presently exist in documentary form. 188

9. Confidentiality and other privileges.

Generally, courts have not been very receptive to claims of confidentiality by employers as a defense to an EEOC subpoena. 189

183 New Orleans Pub. Serv., Inc. v. Brown, 507 F.2d 160, 164-65 (5th Cir. 1975); Circle K Corp. v. EEOC, 501 F.2d 1052, 1055 (10th Cir. 1974).


185 See Surles ex rel. Johnson v. Greyhound Lines, Inc., 474 F.3d 288 (6th Cir. 2007) (court retains discretion to disallow an oppressive discovery request); Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 592 (5th Cir. 1978) (upheld district court ruling that plaintiff’s interrogatories were too burdensome where they sought information about all persons terminated over seven year period, approximately 7,500 employees in 32 districts and three plants).


10. Overbreadth – limited exception.

In individual charges of discrimination, broad-based requests for information by the EEOC may be denied.\(^{190}\)

11. Miscellaneous Objections. EEOC subpoenas have also been enforced over the following employer objections:

a. Charge filed outside the statute of limitations.\(^{191}\)

b. EEOC deviated from the provisions of its Compliance Manual.\(^{192}\)

investigative file was protected from disclosure under attorney-client privilege and work product doctrine, in response to EEOC’s subpoena issued in investigation of employer’s alleged Title VII violations in terminating employee after asking racially motivated questions regarding robbery; employer asserted only that when employer’s loss prevention department conducts investigation it produces report for legal department review and advice but did not specify what litigation employer was anticipating when it conducted robbery investigation; \(\text{EEOC v. Bay Shipbuilding Corp.}, \ 668 \ F.2d \ at \ 312 \ (“confidentiality \ is \ no \ excuse \ for \ noncompliance \ since \ Title \ VII \ imposes criminal \ penalties \ for \ EEOC \ personnel \ who \ publicize \ information \ obtained \ in \ the \ course \ of \ investigating \ charges \ of employment \ discrimination”); \ EEOC v. Univ. of Mexico, \ 504 \ F.2d \ at \ 1296, \ 1303 \ (same); \ EEOC v. Roadway Express, Inc., \ 750 \ F.2d \ 40, \ 41 \ (6th \ Cir. \ 1984) \ (same). \ See also Univ. of Pa. v. EEOC, \ 493 \ U.S. \ 182 \ (1990) \ (EEOC entitled to enforcement of subpoena seeking faculty peer-review materials–no privilege for peer review documents). But see \ EEOC v. Lutheran Soc. Serv., \ 186 \ F.3d \ 959 \ (D.C. Cir. \ 1999) \ (refusing to enforce EEOC subpoena for report of sexual harassment investigation prepared by counsel for Lutheran Social Services on the grounds that it is protected by the attorney-client privilege because attorneys conducted investigation in anticipation of litigation and there was no compelling need requiring disclosure). \ See also \ EEOC v. Aon Consulting, Inc., \ 2001 \ WL \ 699633 \ (S.D. Ind. April 26, 2001) \ (court granted enforcement of EEOC administrative subpoena against employer and company that developed and administered tests that employer used to screen job applicants; however, because likelihood that unprotected disclosure of tests and validation studies would cause substantial economic harm by destroying integrity and value of tests and the insufficiency of internal procedures of EEOC, EEOC would be ordered not to disclose such information to charging parties during its investigation and had to return information and all copies 180 days after day right-to-sue letter or other notice concluding the investigation, unless litigation ensued); \ EEOC v. C & P Tel. Co., \ 813 \ F. Supp. \ 874 \ (D.D.C. \ 1993) \ (court ordered production of test documents but on condition that the EEOC enter into a confidentiality agreement barring dissemination to union members, barring copying, and requiring EEOC to return documents to employer at conclusion of EEOC’s investigation). But see \ EEOC v. City of Milwaukee, \ 54 \ F. Supp. \ 2d \ 885 \ (E.D. Wis. \ 1999) \ (refusing to force the EEOC into signing a confidentiality agreement). \ See also \ EEOC v. Aon Consulting, \ 149 \ F. Supp. \ 2d \ 601 \ (S.D. Ind. \ 2001); \ EEOC v. Morgan Stanley & Co., \ 132 \ F. Supp. \ 2d \ 146 \ (S.D. N.Y. \ 2000) \ (EEOC would not be prevented from sharing information provided by firm in response to subpoenas with employees and charging parties’ attorneys).

\(^{190}\) \(\text{EEOC v. Packard Elec. Div., Gen. Motors Corp.,} \ 569 \ F.2d \ 315 \ (5th \ Cir. \ 1978) \ (in \ individual \ case \ involving employee in single unit, EEOC request for facility-wide workforce breakouts not shown to be relevant). \ See also \ EEOC v. Southern Farm Bureau Cas. Ins. Co., \ 84 \ FEP Cases \ 510 \ (E.D. La. \ 2000) \ (EEOC subpoena for gender-based information not enforced where such information not relevant to charging party’s race discrimination charge); \ EEOC v. Morgan Stanley & Co., \ 132 \ F. Supp. \ 2d \ 146 \ (S.D. N.Y. \ 2000) \ (EEOC request for “informal complaints” not enforced because vague and burden of attempting to comply “outweighs any value that a record of such ‘informal’ griping might have for the EEOC’s investigation.”).

\(^{191}\) \(\text{EEOC v. Ocean City Police Dept.,} \ 787 \ F.2d \ 955 \ (4th \ Cir. \ 1986); \ EEOC v. Tempel Steel Co., \ 814 \ F.2d \ 482, \ 485 \ (7th \ Cir. \ 1987).\)
c. Investigation barred by res judicata or collateral estoppel.\textsuperscript{193}

d. EEOC failed to defer charges to the Section 706 agency.\textsuperscript{194}

e. EEOC acted in bad faith.\textsuperscript{195}

III. RECORDKEEPING REQUIREMENTS

Employers and other entities subject to federal employment discrimination laws are required to make and keep records relevant to the determination of whether or not unlawful employment practices have been or are being committed. The following is an outline of the recordkeeping requirements for selected employment discrimination statutes.

A. Title VII.

1. \textbf{Personnel or Employment Records.} An employer should retain all personnel or employment records, including application forms or records concerning hiring, discharge, promotion, demotion, transfer or layoff, rates of pay or other terms or compensation, at least one year from the date the record was made or the personnel action taken, whichever is later.\textsuperscript{196}

2. \textbf{Records relevant to charge filed with EEOC.} Personnel records relevant to a charge of discrimination should be retained until final disposition of the charge or action.\textsuperscript{197}

3. \textbf{EEO-1 reports.} Employers covered by Title VII that have 100 or more employees must file an EEO-1 form annually. A copy of the most recent report must be kept at all times at company headquarters or at each employing unit. Records necessary for the preparation of the form should also be kept for at least one year.

\textsuperscript{192}Sunbeam Appliance Co. v. Kelley, 532 F. Supp. 96, 99-100 (N.D. Ill. 1982).

\textsuperscript{193}EEOC v. Bay Shipbuilding Corp., 668 F.2d 304, 313 (7th Cir. 1981).

\textsuperscript{194}EEOC v. Laborers, Local 75, 30 Fair Empl. Prac. Cas. (BNA) 1339, 1339-40 (N.D. Ill. 1982).

\textsuperscript{195}EEOC v. Michael Constr. Corp., 706 F.2d 244, 250-51 (8th Cir. 1983) (employer charged EEOC with issuing subpoena to force settlement). \textit{See also} EEOC v. Kmart Corp., 694 F.2d 1055, 1066-67 (6th Cir. 1982).

\textsuperscript{196}29 C.F.R. § 1602.14 (2007).

\textsuperscript{197}29 C.F.R. § 1602.14 (2007).
B. ADEA.

1. The Age Discrimination in Employment Act gives the EEOC the power to require the keeping of records “necessary or appropriate for the administration of the Act.”

2. Payroll or other records containing each employee’s name, address, date of birth, occupation, rate of pay, and compensation earned per week is required to be kept by the employer for a period of three years. The time is extended if enforcement proceedings have begun.

3. Personnel or employment records relating to hiring, discharge, promotion, demotion, transfer or layoff, rates of pay or other terms or conditions of employment must be kept by employers a minimum of one year from the date of personnel action to which the record relates. If a charge or action is filed relating to the personnel action, the records must be retained until final disposition.

C. Equal Pay Act.

The EPA requires employers to make and preserve records concerning the payment of wages, wage rates, job descriptions, job evaluations, merit and seniority systems, collective bargaining agreements and descriptions explaining any pay differentials between the sexes. The records must be kept for three years.

D. Family and Medical Leave Act.

Employers must make, keep and preserve records under the FMLA as they are required to maintain under section 11(c) of the Fair Labor Standards Act, including basic payroll data, amount of FMLA leave taken, copies of employer documents describing employee leave benefits and policies, premium payments of employee benefits and records of disputes with employees over FMLA benefits. The records must be maintained for a period of three years.

199 29 C.F.R. § 1627.3 (2007).
200 29 C.F.R. § 1627.3 (2007).
201 Id.
E. **Americans With Disabilities Act.**

The rules issued by the EEOC apply to employers under the ADA, except that no EEO reporting forms are required under the ADA.\(^{204}\)

IV. **EMPLOYER STRATEGY FOR RESPONDING TO EEOC COMPLAINTS**

To be sure, an employer’s response should be as individual as the particular charge filed against it. However, experience has shown that employers have increased their chance of a favorable result by following strategies.

A. **Get the Facts Fast.**

1. To defend against the charge, the responding corporate representative (either attorney or in-house) has to know everything that could come out during the investigation (or at a subsequent trial) which would be damaging.

2. Not just the “personnel file”—bottom drawer files as well.

3. Contact all witnesses.

4. Review policy manuals (not just current ones, but all which were in effect during employment).

5. Ongoing administrative proceedings (unemployment insurance hearings) —get transcript. Consider attending.

6. Do the “reasons for adverse employment decision” stand up? Assess witnesses—*meet them face-to-face*. How will they look to the investigator (or the jury in a subsequent trial)?

7. Should you get declarations from witnesses?

   a. There is the potential that they will be subject to being turned over to plaintiff.

   b. Signed declarations, however, have substantial advantages:

      i. Protection against the “soured” witness;

ii. Protection against departed witness;

iii. Use for summary judgment at trial; and

iv. Witnesses who sign declarations under penalty of perjury tend to be more accurate and careful about facts than when they are just “shooting the breeze” with counsel.

c. Personal view—advantages outweigh the disadvantages if statements are judiciously prepared. Each such declaration should set forth that it was given voluntarily with no threat made concerning employment nor any promise of benefit concerning employment.

8. Alert the personnel department to flag the files of key witnesses:

a. It does not help to terminate a key respondent witness immediately before conclusion of the investigation.

b. Of course, the company should not give “favored” treatment for such witnesses—but advanced warning could give the respondent representative the ability to engage in pre-termination damage control.

B. Response to Pending Administrative Claims and Proceedings Other than the Pending Charge Before the EEOC.

In addition to filing a charge with the EEOC, the charging party may also have filed claims challenging the adverse employment decision in other forums. For example, the charging party may have filed a complaint of discrimination before the Office of Federal Contract Compliance Programs, the Department of Labor (wage and hour), Occupational Safety and Health Administration, the National Labor Relations Board, or with a state unemployment insurance appeals board or workers’ compensation tribunal. The Employer should coordinate its responses regarding the reason for its decision before these various tribunals and forums.

V. SETTLEMENT AND/OR UNILATERAL ACTION TO MITIGATE CLAIMS OF BAD FAITH

The pending charge is typically not a “frozen fact” situation—what, if anything can be done to improve your chances of winning before the commission, at trial, or before, and reducing settlement costs?
A. Reversal of the decision “pending investigation” (President’s letter—”I will look into this, please provide the facts,” etc.)

B. Offer of reinstatement (conditional).
   1. Such offers are rarely accepted, but invariably take some of the fire out of the suit.
   2. If accepted, it will probably be a negotiated reinstatement with (a) clear terms for cause for termination, and (b) an agreement to arbitrate in the event of a future discharge.

C. Unconditional offer of reinstatement.

There is good authority in federal court that an unconditional offer of reinstatement tolls the continuing accrual of back pay as a matter of law.

   1. In *Ford Motor Co. v. EEOC*, the United States Supreme Court held that a bona fide, unconditional offer of reinstatement will toll back pay.\(^{205}\)
   2. In any event, such an offer is strong evidence to the jury of good faith and failure to accept is (a) fact issue of mitigation for jury on damages; and (b) casts serious doubt on plaintiffs true motive for her/his suit ($$).

D. Explore other ways in which employer can ameliorate the “bad faith” charge, to look like “good guys”, short of reinstatement.

   This will, of course, vary with the facts, but many possible options are available:

   1. Offers of assistance in finding another job (cut off back pay, reduces actual damages);
   2. Offers of neutral/favorable references; and
   3. Offers to purge personnel file/modify basis for termination (e.g., change from “discharge” to “resignation”).

ATTACHMENT 1

MODEL UPJOHN STATEMENT TO SUPERVISORY/MANAGEMENT EMPLOYEES

[Use the following statement when you are interviewing any supervisory or management employees. One approach is to simply read the statement to the supervisor or manager. Another approach which many companies find desirable is to have the supervisor or manager sign the statement at the bottom before proceeding with the interview. This statement is based on Upjohn Company v. United States, 449 U.S. 383 (1981)]

I am a lawyer and represent [the company]. This interview is for the purpose of giving legal advice to [the company]. Anything you tell me may be disclosed to the company or in connection with the [describe the proceeding].

This interview is covered by the attorney-client privilege. This means that the things I say to you during this meeting and the things you say to me during this meeting are confidential. Please do not disclose to others what is said during this meeting. You are not prohibited from discussing the underlying facts of [the matter of investigation], even if you discuss those facts with me during this interview. Rather, you are prohibited from disclosing what you and I say during this meeting.

The company will not retaliate against you because you are telling me anything unfavorable to the company [you may also wish to add: this guaranty of no-retaliation, however, is of course not a grant of immunity for any violation of company policy you may have already committed, if any.] Also, I cannot promise to keep anything you tell me confidential or secret from the company.

Finally, please let me know if opposing counsel seeks to contact you about this matter.

____________________________________  ______________________
Signature                Date

___________________________________
Name of Employee
ATTACHMENT 2

MODEL JOHNIE’S POULTRY STATEMENT

[The following statement is one which should be used with any non-supervisory union-represented employee when a company is investigating facts necessary to the preparation of an unfair labor practice charge. The statement is based on Johnnie’s Poultry, 146 NLRB 770, 55 LRRM 1403 (1964).]

That interview is for the purpose of investigating facts about issues raised in [describe the proceeding]. I am the lawyer representing [name of company] in connection with [name of proceeding]. Anything you tell me may be disclosed for use in that proceeding.

Your participation in this interview is voluntary. If you do not wish to participate, please tell me, and you are free to go.

There will be no reprisal because you either participate or refuse to participate in this interview or because you tell me anything unfavorable to the company. I cannot, however, promise to keep anything you tell me secret.

I will not inquire into your union sentiments or beliefs.

___________________________________  Date:___________________
[Signature of Non-supervisory Employee]
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