

Manager/Supervisor Risk Management

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A twice weekly e-mail training for YCPARMIA members

TOPIC: EMPLOYMENT LIABILITY – TIME FRAMES

As previously discussed, under the California Government Code a claimant usually has six months to file a claim with the entity for bodily injury or damages. Employment liability claims arising under the EEOC and the DFEH have different claim requirements. Prior to filing a lawsuit each requires that the employee file a charge or complaint with either the federal EEOC, or the state DFEH. The EEOC requires that the charge be filed within 300 days of the alleged violation. DFEH gives the claimant up to a year to file a complaint with the agency. This usually triggers an investigation and response by the employer.

While both the EEOC and the DFEH have the right to sue the employer, the normal result of the process is for them to issue the claimant a “right to sue letter” (a prerequisite to filing suit). Rather than waiting for an investigation, the claimant can speed up the litigation process by requesting an immediate letter. Under the EEOC the claimant has 90 days from the receipt of that letter to file a suit, while under the DFEH they have one year from the date on the face of the letter to file their lawsuit.

These procedural requirements are straight forward, but there is a potentially significant issue: what date triggers the start of the process? If it is a single act like a discriminatory failure to promote it might have a definitive date. But what about harassment claims that are grounded on a series of actions over a period of time (severe and pervasive)? In these types of cases it is “the accumulation of discrete acts that results in the unlawful practice.” Each of these discrete acts can trigger the start of a statutory period, and the passage of sufficient time after the act can end that statutory period of exposure.

Recognizing that there are exceptions and qualifications that are unique to each case, we can generalize the answer by applying the Doctrine of Continuing Violations. The doctrine allows the claimant to include acts that occurred prior to the one year (DFEH) statutory period if they can show that those time-barred acts are part of a “continuing violation.” An employer may be found liable if the unlawful acts that predate the period are sufficiently connected to unlawful acts within the period (there has to be an unlawful act within the statutory period to anchor the past acts). The acts have to be sufficiently similar in nature, and connected with reasonable frequency. If they are too isolated or dissimilar the chain can be broken.

In a typical situation the claimant tries to introduce as many questionable acts over as long a period of time as possible to establish a continuing pattern that leads to an allegedly intolerable working environment. The employer, in turn, will attempt to cut off consideration of these acts and characterize them as isolated occurrences that create no pattern of mistreatment, and occurring too long ago to be relevant. The supervisor should understand that the potential exposure arising out of questionable acts can last a very long time, and that if an unlawful act or practice is recognized a concentrated effort must be made to isolate it by breaking any pattern of continuing violations.

Next topic: Employment Liability: The Ostrich defense and other axioms