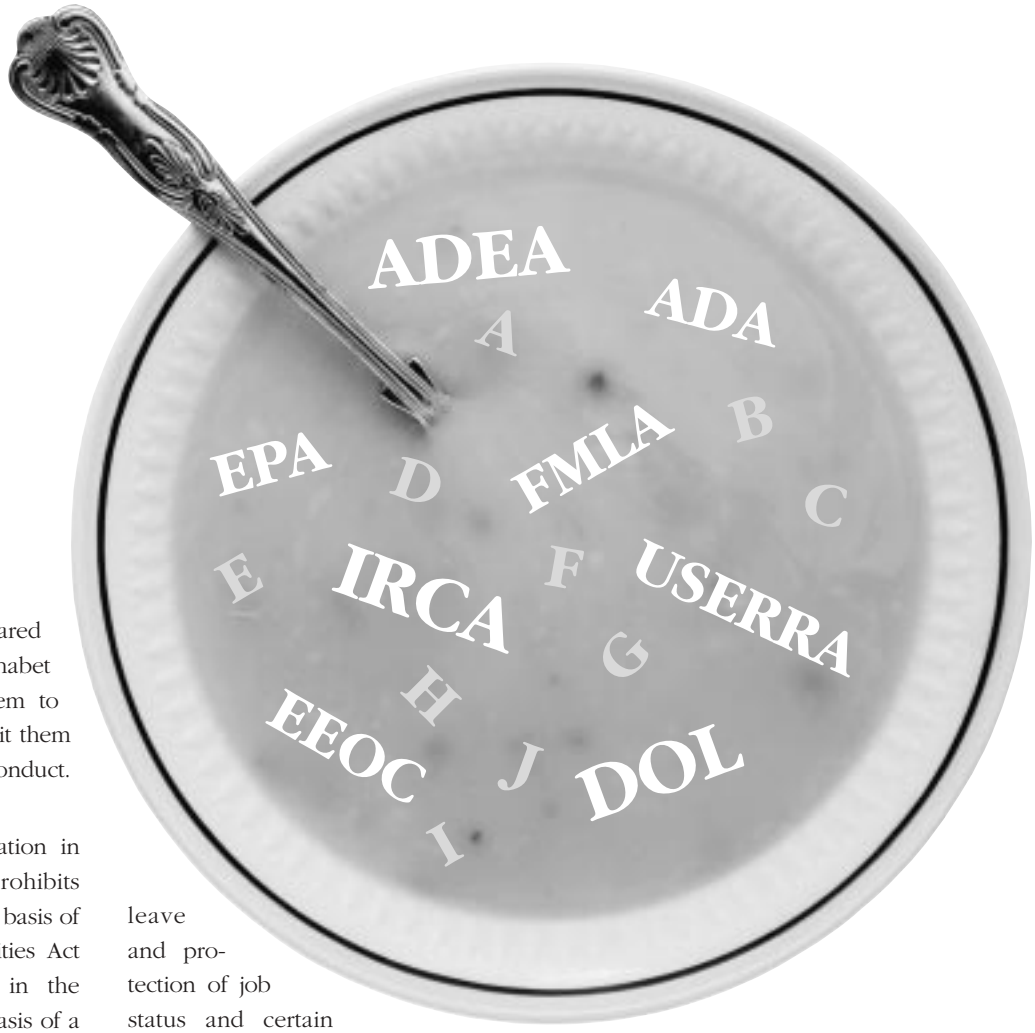
The ABCs of Preparing for an Administrative Agency Investigation

by Constantinos Panagopoulos



Employers today must be prepared to deal with a veritable alphabet soup of statutes that require them to take certain actions or that prohibit them from engaging in discriminatory conduct.

For example, the Age Discrimination in Employment Act (ADEA) prohibits employment discrimination on the basis of age. The Americans with Disabilities Act (ADA) prohibits discrimination in the employment relationship on the basis of a disability, which is defined as a physical or mental impairment that substantially limits one or more of the "major life activities" of an individual. The Equal Pay Act (EPA) provides that men and women doing "equal work" in the same "establishment" must receive equal pay, unless the employer can justify any difference on the basis of seniority, merit, a piecework system or any other non-gender-related factor. The Uniformed Services Employment and Reemployment Rights Act (USERRA) grants to employees the right to military leave and protection of job status and certain benefits upon release from military leave and prohibits discrimination against members of uniformed services.

The Immigration Reform and Control Act (IRCA) requires employers to verify employment eligibility and provides for employer sanctions for discriminatory hiring or termination on the basis of national origin or citizenship status. The Family and Medical Leave Act of 1993 (FMLA) requires employers to provide twelve weeks of leave for qualifying employees who either have serious illnesses or have to care for family members with serious illnesses. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination by employers against employees on the basis of race, color, religion, sex or national origin. Executive Order 11246 requires federal contractors and subcontractors with contracts exceeding $10,000 and federal grantees to take affirmative action to ensure that applicants are employed and employees are treated without regard to race, color, religion, sex or national origin.

Federal contractors and subcontractors with at least 50 employees and with government contracts of at least $50,000 are required to maintain written affirmative action plans.

Most of those same statutes empower various agencies to investigate alleged violations. As a result, employers must be ready to respond to different agencies with different procedures and policies—whether it is a DOL investigation of alleged FMLA violations, an Equal Employment Opportunity Commission (EEOC) request for information regarding an ADEA claim or an OFCCP compliance audit. In certain circumstances, it is possible that more than one agency may investigate the same set of facts. A former employee claiming age discrimination may also claim that the employer violated the FMLA—resulting in an EEOC investigation on the first claim and a Department of Labor (DOL) investigation on the other.

When confronted with an agency investigation, an employer should conduct a thorough internal investigation before the agency in question interviews employees or asks for a written position statement. Later attempts to deviate from positions set forth or claims made during the administrative process may be used to illustrate a lack of consistency and credibility to bolster claims or defenses. In short, an employer does not want to let what it told the EEOC or another agency during an investigation to come back to haunt it in later proceedings. Through its own internal investigation, therefore, the employer will educate itself regarding the circumstances surrounding the claim, as well as the strengths and weaknesses of the facts and witnesses. The employer will then be in a better position to determine whether the claim should be settled sooner rather than later, presumably on more favorable terms prior to paying out of significant attorneys' fees.

Agencies investigating claims will often either request that the employer provide a great deal of information or ask to interview employees or review various records that the employer is required to maintain in a very short time—sometimes within a few days after the receipt of the charge or notice that the agency will be conducting an investigation. It is important that the employer have sufficient time to investigate the allegations and prepare accurate submissions to the agency.

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In many cases, therefore, the first step after receiving a charge is to ask for an extension of time. Generally, extensions will be granted. Although some agencies, like the DOL, require employers to be able to produce records quickly, they will consider (and usually grant) requests for short extensions. As a result, the employer should review the complaint or charge as soon as possible, determine how long it will take to conduct an investigation and promptly request an extension, if necessary.

Investigations entail gathering relevant documents, reviewing internal personnel policies and procedures related to the complaints and talking to those with first-hand knowledge of the facts and circumstances. An employer should not rely on notes in the file or get the necessary information secondhand. A third party's notes, no matter how thorough, may not accurately reflect what the witness said or meant.

Moreover, because witnesses and decision-makers may be required to attend a fact-finding conference, they should help prepare the employer's written submission. An employer who relies on the notes of a supervisor or who submits information or argument to an administrative agency without review or involvement of that supervisor, may find that same supervisor contradicting parts of the submission in later litigation. Inconsistent statements are evidence of pretext in discrimination cases.

Most investigating agencies request some type of written response. The employer needs to prepare a submission for the agency—after thoroughly investigating the charge by gathering documents and policies and interviewing witnesses.

The employer should use the position statement to describe who the employer is and what it does, to explain the circumstances regarding the charging party's complaint and to explain why what happened is not unlawful discrimination or a violation of the statute at issue. With each of these items, the employer should attach, and refer to, supporting documents as exhibits. Attaching relevant documents provides the investigator a stand-alone document (to which he or she can refer) without reviewing different submissions to find support for a particular statement

- The employer should provide some context for the investigator by introducing the company and providing some background on the department in which the claimant works or worked, along with an explanation of the claimant's job duties and responsibilities. A description of the claimant's duties or responsibilities is especially important if the employee was disciplined or terminated

for failure to adequately perform those duties. In such circumstances the description should explain why particular responsibilities are important to the position so that the agency understands the reason for the disciplinary action taken when the specifics are discussed in the statement of position.

- The employer should explain, and possibly quote from, the company's policies and procedures as they relate to the issue being investigated. In a sexual harassment investigation, for example, an explanation of the employer's policies and the specific procedures to be used for internal complaints of harassment will help show that the company has an effective policy to prevent or remedy alleged harassment. In addition, any other specific employer policies relevant to the dispute should be identified and possibly quoted (such as attendance and disciplinary policies where the complaint involves discipline for excessive absences).

- The employer should tell the story. For example, if the claimant alleges discriminatory failure to hire, the position at issue should be identified and the necessary qualifications explained. The employer should then compare the competing qualifications of the candidates who applied and were considered for the position and explain who was selected and why. Generally, the employer will want to detail the story.

- The employer should identify the relevant decision-makers and witnesses and, if helpful, the classes to which they belong (such as sex, race and age). It is comfortable shorthand that women usually don't discriminate against women, and blacks usually don't discriminate against blacks. It has become settled precedent that discrimination is significantly less likely if the decision-maker is the same person who hired the complainant.

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In some cases, the employer should not provide a significant amount of detail. An employer may want to provide less specific information if a claim is overly complicated, has numerous witnesses, or involves witnesses who are nervous and are therefore inconsistent in their explanations. Less specific information also may help if a claim is certain to lead to litigation where the administrative process is simply "free discovery" for a claimant's lawyer.

- The employer should explain why the action taken was not unlawful. Documentation during the decision-making process is key since it provides a contemporaneous view of the employer's position and is less likely to be seen as an after-the-fact rationalization by the administrative agency.

The employer's explanation may include a demonstration that policies were followed consistently and that other similarly situated employees outside the protected class were treated like the charging party. In a termination case, the employer may be able to show that someone in the same protected class as the charging party replaced the charging party. In short, there are a myriad of ways to show that an employer's actions were nondiscriminatory—depending on the claim and the circumstances.

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- Key witnesses and decision-makers should be asked to review the submission to the agency to ensure that they agree with the facts as stated and to confirm that nothing significant has been missed.

Investigating agencies sometimes issue requests for documents and information in addition to asking for the employer's statement of position. When the document and information request is tailored to the allegations in the complaint, a form request is often used. A tailored form focuses the employer on the issues and gives the employer the ability to explain them.

Whether a form document is used or a tailored request is submitted, however, an employer should not produce every document in its files. Instead, the response should be adequate in the context of the claim. (Some statutes or regulations impose record-keeping requirements upon employers. An employer may have no choice but to produce those specific documents for an investigating agency.)

An adequate response may provide more or less information than that requested by the investigator. If the investigator of a complaint of race discrimination requests the names, ages, races and positions of all employees in a department, there is no reason to provide information on age, since age discrimination was not alleged in the complaint.

It may be more appropriate to provide the information requested only for the employees who worked for the same supervisor as the claimant did—if that supervisor was the decision-maker. An investigator who believes he or she needs more information to reach a decision can always ask for additional information.

Many times, however, the information will be accepted as provided, and the employer will avoid the burden of gathering additional (and possibly damaging) information.

If department-wide or even employer-wide information is helpful, the employer should consider producing that information. Indeed, if an employer has documents supporting, justifying or explaining the employment action, they should be produced. Failure to produce documents during the administrative proceedings can lead to later charges that "suddenly discovered" documents were fabricated.

The employer should not withhold clearly relevant documents that damage its position. Attempting to withhold the documents will only highlight and magnify the damage when the employer is later compelled to produce them. The employer should produce the documents and explain them in order to minimize or reduce potential damage.

Agencies may want to conduct interviews of witnesses or fact-finding conferences as a part of their investigation. Preparation is the key to participating successfully in interviews or a fact-finding.

The employer must:

- Review the accounts of the relevant events with each witness and confirm that each witness has reviewed any documentation submitted to the agency,

- Conduct a conference with important witnesses in the same room at the same time to ensure that there are no inconsistencies in recollection. Each witness should have provided much of the information relied on in drafting the submission to the agency—there should be no inconsistencies between the witness accounts and the employer's written position, and

- Inform witnesses that although an interview or fact-finding is less formal than a court proceeding, it is still a formal process that an investigator may use to reach a decision. Accordingly, witnesses should be prepared to remain professional in the proceeding in the face of possible personal attacks and emotional outbursts from the charging party.

An employer or the employer's counsel may not be permitted to attend witness interviews as counsel to the employer. In those circumstances, the employer may want to provide counsel to the employees being interviewed. Indeed, since the employer should have conducted a thorough investigation prior to any fact-finding interview and will be aware of whether there is any obvious conflict between the employer and the witnesses, the employer should know whether the same counsel might represent both the employer and the employees being interviewed. Conflicts may arise, however, if an employer is unsure whether or not an accused harasser is guilty of the conduct complained about by the accuser. Even if there is no obvious conflict, the employer should have the employees execute conflict waiver letters prior to representing them in order to eliminate a later risk of disqualification.

Even where counsel represents witnesses, an investigating agency may not want to question potential witnesses with counsel in the room. The DOL, for example, generally will not interview witnesses with anyone else in the room. If a witness requests counsel to be present, the DOL investigator will probably opt not to interview the witness at that time. Instead, the investigator will issue a written questionnaire to the employee for completion and return to the DOL. Obviously, such a procedure will permit the employee to submit a response that can be reviewed by counsel prior to submission and may be to the employer's advantage.

Investigators will almost always want to discuss settlement at some point in the process. The employer, therefore, should evaluate its position and be ready to respond appropriately when the inevitable question about settlement arises. Sometimes claims can be settled on non-economic terms or for a small amount that will not set a bad precedent.

There is always the case that may need to be settled because it is complicated or key because witnesses are hostile or no longer employed by the company. Those cases are best settled early, before hard lines are drawn and the parties have spent significant money litigating the claims. The assistance of an investigator may be the catalyst needed to settle that complex claim or even the simple claim that can be settled on non-economic terms.

A thorough investigation and a reasoned response at the agency level successfully resolves employment litigation. Preparing a response provides an employer with an opportunity to assess the strengths and weaknesses of a charging party's claim, which, in turn, can lead to a successful conclusion to the investigation, fruitful settlement discussions or the outline of the defense for a long, drawn-out battle. ⚖

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