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## A Pragmatic Approach to Resolving Employment Lawsuits: A Guide For Businesses

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Orange County businesses have been hit with an avalanche of employment and wrongful termination lawsuits since the recession began in 2008. This article will provide some practical advice and pragmatic solutions for businesses affected by this litigation epidemic.

### 1. Background of Employment Litigation Problem

The cycle is simple. Because of the bad economy, a company is forced to lay off some of its workforce. No wrongful intent is involved; it is a difficult, but necessary business decision. These laid-off employees are unable to find new jobs. As a consequence, they become plaintiffs, coming up with some pretext for being laid off and filing wrongful termination lawsuits against their former employers.

It is a classic case of a double jolt of bad news: a company already suffering from the economic downturn now has to deal with expensive litigation.

The crisis has become an epidemic. Based on new case filing reports from Orange County, at least 10 to 15 new employment-related lawsuits are filed every week in Orange County Superior Court. It is certain that the large majority of these cases are meritless. Nevertheless, these cases will linger in the court system, usually for at least a year. Typically they are settled on the eve of trial, as neither side wants to go through an extended trial. By that time, however, the company has frequently spent huge amounts of money on its defense.

Further exacerbating the problem, many employment lawsuits being filed today are denominated as purported class actions. Class-action employment lawsuits seek redress for alleged violations of various technical requirements for employers, such as overtime, lunch and rest breaks, vacation pay, record-keeping and general employment related practices.

Unfortunately, lawsuits filed as a purported class action become classified as "complex" and are exempt from normal judicial management timelines that require most cases to go to trial within approximately one year. Thus, these class action cases can take many years to work through the litigation process. Further, the discovery, depositions and motions that relate to the process of class action certification can be extremely time consuming and expensive, not to mention highly invasive for businesses being sued.

### 2. Pragmatic Solutions For Dealing With Employment Litigation

#### A. Conducting Due Diligence of Plaintiff's Case: An Objective Analysis

The first step in properly dealing with employment litigation is to conduct an extensive factual analysis of the Plaintiff's claim. Because the first few months of litigation may not have much activity, many companies back-burner the hard decisions that need to be made in a short-sighted attempt to save money. Conversely, many companies will adopt a knee-jerk, scorched earth approach to being sued.

Neither approach is advisable or prudent. Rather, a company should conduct a systematic due diligence of the Plaintiff's claims, looking at the potential exposure in an objective, big-picture manner. In fact, forming a litigation committee may be most advisable.

It is very important to gather all documents, especially e-mails, and systematically analyze the "paper trail" which may expose a company to liability. It is also important to interview all potential witnesses, especially the supervisors and managers who had the most contact with the Plaintiff.

A company and its counsel must look at what potential witnesses the Plaintiff may try to recruit to support their position. For example, if a friend of the Plaintiff has also been laid off, that person may be adverse to the company, even if they are not a plaintiff themselves.

After conducting this objective due diligence, a company should make a reasoned decision whether it should seek settlement and at what cost. The ultimate decision is based in large part on defense costs: instead of spending huge amounts on attorney's fees before discussing settlement, why not use that money to resolve the matter. Successfully managing an employment lawsuit is a business decision that should be handled like all others, based on an informed cost benefit analysis.

#### B. Look at the Lawsuit From Plaintiff's Perspective

Part of any pragmatic approach to defending employment and class action matters is to look at the Plaintiff's perspective. This approach is rooted in a real understanding of that the Plaintiff's law firm actually wants and would accept to settle the matter. Such an analysis allows the defendant to assess the merits and cost of a case and if the case has some merit, avoid prolonging the case and paying more as a result.

Much of the responsibility for this analysis falls on defense counsel. Ultimately, defense counsel is the steward of its clients' money. It is counsel's responsibility to advise its client when continued litigation of the case will not yield a lower settlement. Non-productive litigation by defense counsel simply drives up the cost of settlement, especially in class action matters, where the defendant, if liable, must pay the counsel that represents the class.

Accordingly, it is a significant advantage to have defense counsel advising the client who has both plaintiff and defense experience. For example, Callahan & Blaine has successfully handled hundreds of employment and class action lawsuits in both the plaintiff and defense sides. Thus,

the firm's ability to understand the milestones of an employment cases are based on the fact that it has actually represented plaintiffs in employment and class action cases. This has given Callahan & Blaine a unique perspective on how the traditional "big firm solution," to grind down the other side, is of little or no value.

#### C. One Client's Perspective on Early Settlement of Class Action Litigation

Many corporations are already veterans of the employment class action wars. Once a company has been through the mill a few times, it gets a different perspective. Here is one representative client's perspective:

**"I only wish I had understood from the beginning what the key milestones are in the litigation of a class action. I feel like the firm which represented us in the past basically spent a million dollars and then said it is "now time to settle." We eventually resolved the matter in mediation for \$1.7 million, however, it later became clear that the plaintiffs' counsel would have taken the same deal before we spent our first \$250,000 in litigations costs. The defense tactic that our counsel chose delayed resolution, and drove up the plaintiffs' attorney fees which ultimately we had to pay for under the employment laws."**

Many defense firms try to create the impression that class actions are complicated and require significant lawyer time to narrow the issues. This is frequently not accurate. The proper approach is for the defense counsel to take the responsibility to demystify the employment and class action case so that the client can understand why counsel suggests certain actions early in the case. In this manner, the client can make intelligent business decisions regarding proper handling of the case.

#### D. Preparing For a Rainy Day: Insurance Issues

In today's hyper-litigious times, companies are well-served by purchasing full and comprehensive insurance coverage. In the employment area, this requires the purchase of Employment Practices Liability Coverage, at a minimum.

However, it is also important to understand that through a variety of insurance rules and principles, general liability insurance policies also provide coverage for an incredibly broad variety of employment lawsuits. The reality is that general liability policies can potentially provide coverage for virtually every type of commercial litigation lawsuit, through coverages such as advertising injury and personal injury. These include business litigation business lawsuits that center on allegations typically not covered by general liability policies – such as breach of contract, partnership disputes and employment lawsuits – that nevertheless frequently involve secondary allegations of defamation, disparagement, invasion of privacy or related torts which do implicate insurance coverage. See *Buss v. Transamerica* (1997) 16 Cal.4th 35.

### 3. Conclusion

Successfully managing an employment lawsuit is a business decision that should be handled like all others, based on an informed cost benefit analysis. Defense counsel must be a partner in this process, including preparation of an objective, due diligence analysis of the case at the beginning of the lawsuit.

#### Daniel J. Callahan

Daniel J. Callahan is the managing partner and founder of the Santa Ana-based law firm, Callahan & Blaine. Mr. Callahan specializes in complex business litigation, including employment and class action matters. Mr. Callahan recently obtained a unanimous defense verdict on behalf of one of Orange County's largest companies in a two-month long employment discrimination jury trial. Mr. Callahan has also obtained the largest jury verdict in the history of Orange County, a \$934 million verdict on behalf of Beckman Coulter in a complex business litigation case.

Among his many accolades and accomplishments, Mr. Callahan has been named one of the "Top Ten Attorneys" in the United States by National Law Journal and "California Business Trial of the Year" by California Lawyer. Mr. Callahan can be reached at 714.241.4444 or dan@callahan-law.com.



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