

**AGENCY INVESTIGATIONS<sup>1</sup>****Employment Roundtable***By Leslie Bottomly and Sara Tait**Labor & Employment Group**April 17, 2008***I. INTRODUCTION**

It happens to most employers at some point or another: you get a letter from the Oregon Bureau of Labor and Industries (“BOLI”), or the Equal Employment Opportunity Commission (“EEOC”), or some other federal or state governmental entity informing you that your company is under investigation for a violation of one or more employment-related laws. The agency asks for your company’s response to the allegations, as well as for copies of relevant documents. You also may or may not get a related letter from the employee’s attorney or the employee himself or herself. Alternatively, some agencies (such as OR-OSHA) conduct surprise inspections, creating a great deal of anxiety and concern. A basic understanding of the administrative process will help you avoid pitfalls along the way to resolving the matter.

This memorandum briefly summarizes various types of investigations, but focuses primarily on responding to Title VII and state-equivalent employment discrimination and harassment investigations arising from employee complaints to BOLI and the EEOC. A wide variety of governmental agencies routinely engage in investigations.

**II. OVERVIEW OF THE TYPES OF INVESTIGATIONS****A. EEOC/BOLI DISCRIMINATION AND HARASSMENT INVESTIGATIONS**

Both federal and Oregon law prohibit discrimination in employment on the basis of many different protected categories, such as race, sex, age, disability, national origin, religion, and color. The EEOC and BOLI, respectively, are the administrative agencies charged with the responsibility of enforcing these laws.

In general, employees are required to file their *federal* charge of discrimination with the EEOC and/or BOLI (with whom the EEOC has a worksharing agreement) before they can pursue their federal claim in court.<sup>2</sup> Oregon discrimination and harassment claims, in contrast,

<sup>1</sup> This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings, and legal publications and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

<sup>2</sup> See 42 U.S.C. § 2000e-5; *Volovsek v. Wis. Dept. of Agriculture, Trade & Consumer Protection*, 344 F.3d 680, 686-87 (7th Cir.2003); administrative filing requirements vary depending upon the legal basis for the claim.

can generally be filed in court without filing an administrative complaint.<sup>3</sup> However, many employees choose to file state claims through the agency for a variety of reasons. For example, it may be much more cost-effective to pursue a claim through the administrative process, as there is no charge to the employee for such an investigation. In the alternative, if the employee intends to file a federal claim as well as the state claim, he or she often files with both BOLI and the EEOC for simplicity's sake. In Oregon, BOLI generally takes the lead on dually-filed complaints under the agencies' work-sharing agreement.<sup>4</sup> The EEOC generally will not take any independent action for at least the first 60 days after such a complaint is filed.<sup>5</sup>

In addition, the agencies can embark on their own investigations without an employee filing a complaint.<sup>6</sup> A good recent example of this is the well-known age discrimination investigation against Sidley Austin with respect to its partnership retirement policy.<sup>7</sup> In that case, the EEOC initiated its investigation as the result of published news reports rather than based upon a formal complaint.<sup>8</sup> It issued a subpoena to the law firm meant to assist in determining whether over 30 former equity partners who were demoted to "of counsel" status were protected as "employees" under the ADEA. Notably, not one of the former partners filed an individual complaint. The EEOC, however, had the right to pursue the employer regardless of the desires or actions of the alleged victims. It is possible for an agency to pursue a claim against an employer even when the individual employee is unable to do so. For example, in *EEOC v. Waffle House, Inc.*,<sup>9</sup> the Court held that an arbitration agreement binding on an individual complainant does not bar the EEOC from obtaining relief for the individual.

The EEOC has issued an overview of its procedures in a FAQ entitled, "EEOC Investigations—What An Employer Should Know," which is available on the agency's website.<sup>10</sup>

## **B. WAGE AND HOUR INVESTIGATIONS (INCLUDING FMLA/OFLA)**

The federal Department of Labor ("DOL")<sup>11</sup> and BOLI also investigate violations of various wage and hour laws, including alleged violations of the minimum wage, overtime, family

<sup>3</sup> See 839-003-0020 (1) (a) ("A person is not required to file a complaint of a violation of state law with the division before filing a civil suit.")

<sup>4</sup> See OAR 839-003-0015.

<sup>5</sup> 42 USC 2000e-5; see 29 CFR 1601.13.

<sup>6</sup> Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f)(1) authorizes the EEOC to sue in its own name to secure relief for individuals subject to prohibited discrimination. The EEOC is also allowed to bring enforcement actions pursuant to the Age Discrimination in Employment Act, Equal Pay Act and Americans With Disabilities Act.

<sup>7</sup> See *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7<sup>th</sup> Cir. 2002); a \$27.5 million consent decree resulted in late 2007. See <http://www.eeoc.gov/press/10-5-07.html>.

<sup>8</sup> See David B. Wilkins, *Partner, Schmartner! EEOC v. Sidley Austin Brown & Wood*, 120 Harv. L. Rev. 1264, 1266 (2007); <http://www.eeoc.gov/press/10-2-06a.html> ("The investigation did not follow a formal Charge of Discrimination filed by an individual, but began after the agency received a confidential complaint from within the firm and Sidley's management itself made statements to the media that partners had been downgraded to create opportunities for younger lawyers and also referenced the firm's age-based retirement policy.")

<sup>9</sup> 534 U.S. 279 (2002).

<sup>10</sup> See <http://www.eeoc.gov/employers/investigations.html>.

leave and other related laws. The DOL regularly issues press releases on the various amounts it recovers from employers as the result of its enforcement efforts.<sup>12</sup>

The DOL's investigations may be the result of a complaint, but the agency treats all complaints (including the existence of a complaint) as confidential. In addition to responding to complaints, the agency targets some businesses or industries for investigation, *e.g.*, low wage industries that are prone to wage and hour abuses. An overview of its procedures is available in a Fact Sheet.<sup>13</sup>

### **C. OFCCP**

The Office of Federal Contract Compliance Programs ("OFCCP") enforces Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, which prohibit federal contractors and subcontractors from discriminating in employment based on race, gender, color, religion, national origin, disability, or covered veteran status. In 2007, OFCCP recovered \$51,680,950 for 22,251 employees.<sup>14</sup> This agency also conducts audits of affirmative action plans, which government contractors are required to maintain.

Employees may file complaints directly with the OFCCP.<sup>15</sup> In some instances, the OFCCP refers individual complaints to the EEOC, preferring to focus on complaints that involve groups of people.

### **D. OR-OSHA**

Oregon OSHA ("OR-OSHA") operates under a state-plan agreement with federal OSHA. OR-OSHA investigates workplace fatalities and serious injuries; conducts scheduled inspections based on criteria that reflects, among other things, the employer's history of workplace injuries and illnesses, number of employees, and the employer's industry; and conducts inspections upon complaints by employees of unsafe working conditions and referrals from another agency.<sup>16</sup> The OR-OSHA Field Inspection Reference Manual provides a good basic overview of many issues involved in OR-OSHA investigations,<sup>17</sup> along with Program Directive A-219,<sup>18</sup> which discusses the agency's policies and procedures for handling complaints relating to workplace safety and health conditions.

### **E. WORKERS' COMPENSATION**

The Oregon Workers' Compensation Division ("WCD") handles workers' compensation claims processing. Hearings are conducted before the Workers' Compensation Board on action

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<sup>11</sup> The Wage and Hour Administration of the Employment Standards Division of the DOL enforces federal wage and hour laws.

<sup>12</sup> See, *e.g.*, press releases at <http://www.dol.gov/esa/media/press/region.htm>.

<sup>13</sup> Fact Sheet #44: Visits to Employers, available at <http://www.dol.gov/esa/regs/compliance/whd/whdfs44.pdf>.

<sup>14</sup> See <http://www.dol.gov/esa/ofccp/enforc07.pdf>.

<sup>15</sup> See generally, <http://www.dol.gov/esa/regs/compliance/ofccp/pdf/pdfstart.htm>.

<sup>16</sup> See generally, <http://www.orosha.org/>.

<sup>17</sup> <http://www.cbs.state.or.us/external/osha/pdf/firm/firm.pdf>.

<sup>18</sup> <http://www.cbs.state.or.us/external/osha/pdf/pds/pd-219.pdf>.

taken involving a worker's right to compensation or the amount of the compensation.<sup>19</sup> In addition, the WCD investigates fraud and system abuse complaints against employers (as well as against medical providers, insurers, attorneys, and vocational providers).<sup>20</sup> While for the most part workers' compensation exclusivity prevents related tort lawsuits against employers for workplace injuries suffered by an employee, there are limited exceptions which should be discussed with counsel for any workplace injuries involving potential third-party litigation and/or large potential damages.

## **F. IMMIGRATION**

The US Citizenship and Immigration Services (part of the Department of Homeland Security) enforces the Immigration Reform and Control Act of 1986 ("IRCA").<sup>21</sup> The agency is authorized to conduct investigations to determine whether employers have violated the prohibitions against knowingly employing unauthorized aliens and failing to properly complete, present or retain the Employment Eligibility Verification form (Form I-9) for newly-hired individuals. Immigration and Customs Enforcement ("ICE") audits may result in significant fines and criminal charges, as was seen in the recent Del Monte plant raid in Oregon.<sup>22</sup>

## **G. OREGON EMPLOYMENT DEPARTMENT—UNEMPLOYMENT**

The Oregon Employment Department<sup>23</sup> processes workers' claims for unemployment compensation. The agency contacts the worker's last employer to verify why his or her job was terminated (which may be contested), along with gathering information about all employers for whom the worker worked during his or her "base year." In addition, the Investigations Unit of the Employment Department investigates any allegations of fraud in unemployment insurance claims. In some instances, an investigation is the result of an audit; in other instances, it is based upon a tip from an employee, employer, or other source.<sup>24</sup> An audit may result when an individual the company regards as an independent contractor is terminated and files for unemployment compensation.

## **H. TAX AUDITS**

Tax audits may be instigated by various governmental entities, including the Internal Revenue Service, the Oregon Department of Revenue, the Oregon Employment Department (unemployment insurance tax), and certain other state and local agencies.

## **III. PROCEDURES**

Each agency has its own rules, procedures, and policies for navigating the investigative process. These can vary considerably, as can the method of appealing outside the agency to the court system, so it is important to consult with someone who is familiar with the particular

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<sup>19</sup> See ORS 656.283.

<sup>20</sup> See generally, <http://wcd.oregon.gov/compliance/bcu/strength.html>.

<sup>21</sup> See generally, <http://www.formi9.com/index.aspx>.

<sup>22</sup> See generally, [http://blog.oregonlive.com/atwork/2007/06/del\\_monte\\_immigration\\_raid\\_rea.html](http://blog.oregonlive.com/atwork/2007/06/del_monte_immigration_raid_rea.html).

<sup>23</sup> See generally, <http://www.oregon.gov/EMPLOY/UI/index.shtml>.

<sup>24</sup> See generally, [http://www.oregon.gov/EMPLOY/ES/BUS/benefit\\_audit\\_information.shtml](http://www.oregon.gov/EMPLOY/ES/BUS/benefit_audit_information.shtml).

agency involved in an investigation. Here, we will discuss the procedures involved in a typical BOLI/EEOC dually-filed discrimination or harassment complaint.

## **A. THE AGENCY'S INVESTIGATION**

### **1. BASIC PROCEDURE**

#### **(a) The Complaint**

The employee usually contacts BOLI via the telephone and talks to an Intake Officer. If the employee appears to present the basis for a complaint, and the complaint is timely (generally within a year of the action that forms the basis of the complaint), a questionnaire is sent to the prospective claimant. Once the questionnaire is returned, the Intake Officer to whom the case is assigned drafts a discrimination complaint, which then is signed by the complainant. BOLI then opens a case, assigns a number and assigns a Civil Rights Senior Investigator.<sup>25</sup> If the basis for filing is covered by both Oregon and federal law, and if the complaint meets the EEOC guidelines, the complaint is automatically “dually filed” with the EEOC.<sup>26</sup>

#### **(b) Notification of the Charge**

The employer will be notified that a charge of discrimination has been filed and is provided with the name and contact information for the investigator assigned to the case.

#### **(c) Responding to the Charge and Requests for Information**

The employer is asked to respond in writing to the complainant's allegations. In order to do so, the employer will need to gather the relevant documents and talk to witnesses. In doing so, the employer will essentially need to conduct its own investigation if one has not previously been undertaken. Another reason to conduct an internal investigation is that, even if the agency finds no support for the complainant's charge, the complainant may still sue in court, and the employer will then have to defend itself. Conducting an investigation at this stage will help identify key witnesses and evidence and may lead to remedial actions.

The agency may also ask for relevant documents, and may ask to interview both the employer and the complainant. The agency may ask to inspect the premises (particularly in a workplace safety investigation) and may issue interrogatories (written questions), and interview the complainant's co-workers.<sup>27</sup> The employer generally has the right to have its representative present during the interview of current supervisory employees.<sup>28</sup> BOLI permits current, non-supervisory, or former employees to request that a representative of the employer be present during BOLI interviews.<sup>29</sup> Interviewees generally have the right to see a summary report of their own interviews and may submit comments or corrections to the agency.<sup>30</sup>

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<sup>25</sup> See OAR 839-003-0025.

<sup>26</sup> See OAR 839-003-0015.

<sup>27</sup> See OAR 839-003-0065; see also 42 USC 2000e-8; 29 CFR 1601.161.

<sup>28</sup> OAR 839-003-0065(4).

<sup>29</sup> OAR 839-003-0065(5).

<sup>30</sup> OAR 839-003-0065 (6).

Relevant documents may include the complainant's and any other key employees' personnel files; any applicable company policies; methods of distribution and training on policies and any related records; the results of any earlier investigations, and witness statements or notes regarding the same.

The employer should preserve all relevant electronic data. Anyone involved in the investigation should be instructed not to delete any electronic communications, and the IT department should be contacted for assistance in ensuring preservation of the data. The destruction of data can result in adverse inferences against the employer, as well as other negative consequences. Timeliness is extremely important. BOLI has a policy that responses to complaints must be received within 14 days from the date the notice of filing was sent. According to BOLI:

This allows us to meet the legislatively-imposed performance measure requiring us to provide complainants an opportunity for an in-depth interview (the main purpose of which is to review the response to the complaint), within approximately 30 days from the date of filing. Taking this step as early as possible is crucial: the burden of proof rests with the complainant, and the complaint may be dismissed quickly, thus giving both parties some closure on the issues, if the complainant is unable to refute the statements in the response. If, on the other hand, the complainant is able to provide any evidence that counters the response, the investigator will be able to more quickly follow up on the information, by setting up witness interviews and document requests. Essentially, the entire course of the investigation rests on the initial interview, therefore it is in both parties' best interests (*i.e.* provides customer service) to hold that interview very quickly after the complaint is filed.<sup>31</sup>

BOLI will generally only grant one extension to the 14-day deadline for a response.

Employers must generally respond within 21 days of an investigator's written request for documents, records, files or other sources of evidence; once again, an extension may be granted.<sup>32</sup> If the company objects to complying with any such requests, it should contact counsel as soon as possible, —BOLI may issue a subpoena to enforce its requests, and a failure to appropriately respond can have adverse consequences.

#### **(d) Fact-Finding Conferences**

BOLI may decide to hold a fact-finding conference.<sup>33</sup> The parties must both attend (or risk adverse consequences) and a BOLI representative will conduct the conference. According to BOLI, its goals are to: review the evidence; identify the disputed elements of the complaint; define and attempt to resolve the disputed elements of the complaint; and attempt to settle the complaint. BOLI schedules the conference, and will notify the parties of the time and the place. It may request information and documents, and/or issue subpoenas to compel attendance or

<sup>31</sup> <http://www.boli.state.or.us/BOLI/BOLIExternalNewsFinal.pdf>.

<sup>32</sup> OAR 839-003-0065.

<sup>33</sup> See OAR 839-003-0060.

obtain documents. Counsel for one or both parties may be present (although the proceedings are informal and as such, cross-examination is not permitted). BOLI may exclude anyone from attending other than the parties themselves.<sup>34</sup>

## 2. FINDINGS

The agency's duty is to investigate the charges and determine whether there is a reasonable cause to believe discrimination occurred. BOLI has one year after a complaint is filed to issue its administrative determination.<sup>35</sup> If the EEOC is the lead agency, the process often takes longer to resolve. If the EEOC or BOLI concludes after investigation that there is no reasonable cause to believe that the law has been violated, it dismisses the charge.<sup>36</sup> It is important to remember, however, that under Title VII and Oregon's state equivalent, dismissal of the charge does not prevent the complainant from bringing a private suit. At the same time a notification of dismissal is sent out, the complainant is sent a right-to-sue notice, which lets the complainant know that he has 90 days to file a complaint in court. The complainant may opt out of the agency process by requesting such a right-to-sue notice at any time, ending the administrative proceedings.

If the agency finds substantial evidence of a violation, a "substantial evidence" determination is issued.<sup>37</sup> At this point, the agency is likely to suggest that the parties attempt to reach a voluntary settlement.

## 3. CONCILIATION (SETTLEMENT)

At any point in the proceedings, the employer and employee may propose a private settlement. If a settlement is reached, the agency will determine whether or not it is an effective remedy. If it is, and the complainant refuses to accept the settlement, the agency may close the case and issue a right-to-sue notice. If a voluntary agreement is reached through agency-facilitated conciliation, the agency drafts a "no fault" agreement that the parties sign and the case is closed. The agency maintains the right to investigate any alleged breaches of the agreement. Parties may, in addition, enter into a concurrent private settlement agreement if additional terms are desired beyond that contained in the agency's agreement.<sup>38</sup> Typically, employers want to resolve the current charge and obtain a full release of all claims.

## 4. MEDIATION

The EEOC offers mediation as an alternative to the traditional investigative process.<sup>39</sup> According to the EEOC:

Mediation is an informal process in which a neutral third party assists the opposing parties to reach a voluntary, negotiated resolution of a charge of discrimination. The decision to mediate

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<sup>34</sup> *Id.*

<sup>35</sup> ORS 659A.880.

<sup>36</sup> *See* ORS 659A.880; 839-003-0065(10).

<sup>37</sup> *See* 839-003-0065 (11).

<sup>38</sup> *See* 839-003-0055.

<sup>39</sup> 42 USC 2000e-5b; 29 CFR 1601.24.

is completely voluntary for the charging party and the employer. Mediation gives the parties the opportunity to discuss the issues raised in the charge, clear up misunderstandings, determine the underlying interests or concerns, find areas of agreement and, ultimately, to incorporate those areas of agreements into resolutions. A mediator does not resolve the charge or impose a decision on the parties. Instead, the mediator helps the parties to agree on a mutually acceptable resolution. The mediation process is strictly confidential. Information disclosed during mediation will not be revealed to anyone, including other EEOC employees.

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An EEOC representative will contact the employee and employer concerning their participation in the program. If both parties agree, a mediation session conducted by a trained and experienced mediator is scheduled. While it is not necessary to have an attorney in order to participate in EEOC's Mediation Program, either party may choose to do so. It is important that persons attending the mediation session have the authority to resolve the dispute. If mediation is unsuccessful, the charge is investigated like any other charge.<sup>40</sup>

There are both advantages and disadvantages to mediation which should be discussed with counsel. It may prevent subsequent litigation while allowing the parties to feel that they had the equivalent of their day in court.

## **5. FORMAL ADMINISTRATIVE PROCEEDINGS**

If conciliation and/or mediation fail, BOLI reviews the case to decide if it will be forwarded to a case presenter in the hearing unit for further action. If BOLI decides to go forward, it will notify the parties that a hearing will be held. If not, the case is closed and the complainant is issued a right-to-sue letter.

Hearings are conducted by an Administrative Law Judge ("ALJ") (not a jury), witnesses are called, and evidence is presented. Typically, the agency, the complainant and the employer are represented by counsel. Based upon the hearing record and recommendation of the ALJ, the Commissioner of BOLI issues a final order. If the Commissioner finds for the complainant, the final order will specify a remedy similar to the relief that may be awarded by a court (reinstatement, lost wages, non-economic (emotional distress) damages, attorneys' fees). Once a final order is issued, either party may appeal it to the Oregon Court of Appeals, with possible further appeal to the Oregon Supreme Court.

## **IV. WHO SHOULD PREPARE THE RESPONSE?**

A poorly-drafted response to an Agency charge may cause significant problems down the road. In routine cases, a sophisticated and experienced HR professional or in-house counsel may

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<sup>40</sup> EEOC's Facts About Mediation, <http://www.eeoc.gov/mediate/facts.html>.

be comfortable submitting a response without the assistance of outside counsel. Specialized training in employment law is very helpful due to the complicated legal context in which these investigations typically occur. If the employer was previously unaware of the individual's complaints, an internal investigation will need to be undertaken to gather the facts.

Of course, in many instances, outside counsel should be contacted at the outset to minimize the employer's potential liability. In some instances, counsel may be able to spot defenses that are not facially apparent, or note other potential liability risks that may come to the forefront as a result of an investigation. The company's communications with the attorney may be subject to attorney-client or work product privileges. It is important that human resource professionals and other managers who learn of, or are involved in such communications, be instructed to maintain any privilege by not disclosing the communications to others.

## **V. MISCELLANEOUS ISSUES**

### **A. TRADE SECRETS; PRIVACY CONCERNS**

Agencies may seek confidential business information or trade secrets during the investigation. Trade secrets generally lose their confidential status if they are voluntarily disclosed to third-parties; therefore, it is important to protect them adequately when responding to government investigations. Many agencies provide guidance on such matters, but this is an area where further advice of counsel is often warranted. The EEOC, for example, has been known to release to third parties sensitive, confidential or proprietary company documents submitted in response to a charge of discrimination.<sup>41</sup> Therefore, companies should carefully analyze information provided to the agency, to determine whether a response can be made without producing confidential information or trade secrets. In some instances, motions to quash a subpoena or for a protective order may be warranted. Redacting information and marking confidential information appropriately should also be considered.

In addition to trade secrets, employers should be aware of privacy concerns with respect to information sought by the agency. For example, the agency may seek records that will reveal medical issues of employees other than the claimant. The agency may seek records that reveal social security numbers or financial data relating to other employees (such as payroll and salary information). In each instance, an evaluation will need to be made as to whether the employer is obligated to provide the information and/or whether steps can be taken to protect the privacy of other employees (such as redacting names or social security numbers).

### **B. DEALINGS WITH THE COMPLAINANT; RETALIATION; REMEDIAL ACTION**

An employer may not fire, demote, harass, or otherwise retaliate against an individual for filing a charge of discrimination, cooperating in an agency's investigation, participating in a discrimination proceeding, or otherwise opposing discrimination. Retaliation occurs when an

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<sup>41</sup> See generally, Mark Blondman and Brooke Iley, *Employers Should Beware of EEOC Information Requests*, The Corporate Counselor (December 6, 2006) (discussing *Venetian Casino Resort v. EEOC*, 453 F.Supp.2d 157 (D.D.C. 2006), in which the court upheld the EEOC's policy permitting complainants to obtain information submitted by employers responding to discrimination charges even if such information is confidential or trade secret information).

employer takes an adverse action against a covered individual because he or she engaged in a protected activity.

The complainant may still be working at your company. Even if you are sure that the complainant does not have a valid claim, you need to avoid taking any adverse employment action against the complainant or any employees who support the complainant. An “adverse employment action” is a term of art, defined by the courts, but it can include actions much more amorphous than termination, such as unjustified negative evaluations or references, increased surveillance, harassing or threatening behavior, or demeaning assignments. If you do need to terminate an employee, or if, for example, the complainant reapplies for a position, it is advisable to seek counsel immediately to assist with assessing the risks.

It is extremely important to remember that an employee can recover under a retaliation theory even when it is ultimately determined that she was *not* discriminated against in the first place. Retaliation claims are often much easier to prove than discrimination and/or harassment claims and some complainants may be actively looking for any indicia of retaliation. It may be necessary to take affirmative action with supervisors and co-workers to ensure that they do not take it upon themselves to express any displeasure about the complaint in a manner that arguably constitutes retaliation.

A potential defense to a claim under some circumstances is “prompt remedial action.”<sup>42</sup> This defense requires that, upon finding out about prohibited conduct or actions, the employer took prompt steps to investigate and mitigate any harm. If the complainant is still employed, the company may want to look at ways it can avoid any inference of continued discrimination or harassment. This might, for example, include switching the shift of an alleged harasser so that he no longer has regular contact with the complainant. It is important that any action taken should be fair to all parties, *i.e.*, it should not automatically be the complainant who is pulled from his or her regular duties or shift since this may be viewed as retaliation.

### **C. THE ALLEGED HARASSER**

The alleged harasser or other key parties may or may not seek their own counsel. Their interests may be adverse to that of the company and they may actively pursue claims against the employer as a result of actions or alleged actions taken as a result of the investigation (*e.g.*, wrongful termination, defamation, discrimination, and indemnification claims).

### **D. EFFECT ON RELATED LITIGATION**

Claimants may pursue litigation in the courts either subsequently to, or in some instances, concurrently with, agency investigations. In some instances, the claimant may have filed with

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<sup>42</sup> See, *e.g.*, *Burlington Industries, Inc. v. Ellerth*, 524 US 742, 765 (1998) (granting employer’s an affirmative defense to harassment under Title VII if the harassment has not culminated in a tangible employment action such as demotion or discharge and the employer proves that (1) it exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to prevent harm); see also, *EEOC Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors* dated June 18, 1999, page 3, <http://www.eeoc.gov/docs/harassment.html>; see also, *e.g.*, *El-Hakem v. BJY, Inc.*, 262 F Supp 2d 1139, 1150-51 (D Or 2003) (applying *Ellerth* to claim for race discrimination).

the administrative agency simply to satisfy a prerequisite to filing a lawsuit, and will quickly ask the agency for a “right-to-sue” letter permitting him or her to file a claim in the court system. Sometimes claimants essentially allow the agency to do their footwork and initial discovery for them. In any instance, employers should always be aware that litigation may ultimately ensue. In most instances, plaintiffs must file their court case within 90 days of the mailing of a right-to-sue letter from either BOLI and/or the EEOC.

#### **E. ADMISSIBILITY OF AGENCY FINDINGS, OPINIONS AND REPORTS**

The admissibility of agency findings in subsequent litigation is a potentially contentious issue. In general, “while prior administrative determinations are not binding, they are admissible evidence.”<sup>43</sup> However, some agency determinations carry a risk of “unfair prejudice” so great that they will not be admissible in court.<sup>44</sup> In addition, inadmissible hearsay (a statement made out of court that is offered in court as evidence to prove the truth of the matter asserted) within such determinations may limit their admissibility in court.<sup>45</sup> Courts in different jurisdictions (state and federal) often vary in their treatment of agency findings in subsequent litigation, so case-by-case analysis of such issues is necessary. Employers, however, should be aware that such agency determinations may be admissible in subsequent litigation.

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<sup>43</sup> *Plummer v. Western Int’l Hotels Co., Inc.*, 565 F.2d 502, 504 (9<sup>th</sup> Cir. 1981).

<sup>44</sup> *See generally, Grassmueck v. Johnson Controls Battery Group, Inc.*, 2007 WL 1989579 (D.Or. July 2, 2007) (discussing the admissibility of BOLI’s notice of substantial evidence determination).

<sup>45</sup> *Id*; *see also Sleight v. Jenny Craig Weight Loss Centres, Inc.*, 161 Or.App. 262, 984 P.2d 891 (BOLI investigator’s notice of substantial evidence of discrimination was inadmissible as hearsay), modified, 163 Or.App. 20, 988 P.2d 916 (1999).