WHEN THE AGENCY COMES KNOCKIN':
Workplace Investigations and Audits[1]
Employment Law Seminar

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I. INTRODUCTION

In a time of government cutbacks, federal and state agencies are under pressure to demonstrate their ability to crack down on companies that are not following the laws the agency is meant to enforce. Audits and investigations often result in penalties or fines. The strategic plans of the employment-related agencies generally show goals or strategies of increasing government investigations and audits, often laying out specifically targeted areas of concern and recovery amounts.[2] In addition, government agencies are making inroads into prior barriers which limited the information agencies could share with each other, which means an increased likelihood that one agency or audit investigation may lead to another.[3] In Oregon, the Interagency Compliance Network is tasked with gathering and sharing information relating to businesses that violate taxation and employment laws. Agency audits and investigations often trigger private lawsuits.[4]

An investigation usually starts with a letter from the agency, for example 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. Alternatively, some agencies

[1] 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. The author has utilized substantially the previous work of his partner, Leslie Bottomly, *Agency Investigations*, April 17, 2008.

[2] *See, e.g.*, Oregon Employment Department 2011-2013 Strategic Plan (highlighting joint agency audit efforts on worker classification, as well as requesting additional investigators and revenue agents to handle the recent large increase in workload; also noting minimum expectations for recovery), http://www.oregon.gov/EMPLOY/ADMIN/docs/Oregon_Employment_Department_Strategic_Plan_2011-2013_FINAL.pdf?ga=t; OFCCP Congressional Budget Justification (Feb. 14, 2011) (highlighting an increase in compliance officers, increase in onsite investigations, and recovery of $9,750,272 in financial settlements, as well as the intent to look at worker misclassification issues), http://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V2-04.pdf.

[3] *See* ORS 670.700-705.

[4] The U.S. Department of Labor recently announced an ABA-approved attorney referral program to assist claimants in obtaining counsel for private lawsuits. http://www.dol.gov/whd/resources/ABAReferralPolicy.htm (program established Dec. 13, 2010).

(such as OR-OSHA) conduct surprise inspections. A basic understanding of the administrative process, and engaging experienced counsel in matters of significance, will help you avoid pitfalls in resolving issues that arise.

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

II. OVERVIEW OF AGENCY INVESTIGATIONS

A. EEOC/BOLI DISCRIMINATION AND HARASSMENT INVESTIGATIONS

Both federal and Oregon law prohibit discrimination in employment on the basis of a variety of 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.[5] Oregon discrimination and harassment claims, in contrast, can generally be filed in court without filing an administrative complaint.[6] 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.[7] The EEOC generally will not take any independent action for at least the first 60 days after such a complaint is filed.[8]

In addition, the agencies can embark on their own investigations without an employee filing a complaint.[9] It is also 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.*,[10] the Court held that an arbitration agreement binding on an individual complainant does not bar the EEOC from obtaining relief for the individual.

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[5] *See* 42 USC § 2000e-5; *Volovsek v. Wis. Dept. of Agriculture, Trade & Consumer Protection*, 344 F3d 680, 686-87 (7th Cir 2003); administrative filing requirements vary depending upon the legal basis for the claim.

[6] *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.")

[7] *See* OAR 839-003-0015.

[8] 42 USC 2000e-5; *see* 29 CFR 1601.13.

[9] Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 USC §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.

[10] 534 US 279 (2002).

BOLI and the EEOC, like many agencies, post on their websites information relating to their procedures. It is helpful to review the applicable agency guidelines, policies, and agency enforcement manuals to get an understanding of how the agency is likely to proceed with the claim at issue.[11] Counsel experienced in the area can analyze agency directives, interpretation, orders and case law and advise regarding the risks to the company in the matter and how best to proceed.

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

The federal Department of Labor ("DOL")[12] and BOLI also investigate violations of wage and hour laws, including alleged violations of the minimum wage, overtime, family leave and other related laws. The DOL regularly issues press releases on the amounts it recovers from employers as the result of its enforcement efforts.[13]

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.[14]

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. This agency also conducts audits of affirmative action plans, which government contractors are required to maintain. In 2010, it completed 4,960 compliance evaluations, found violations at 1071 facilities, and obtained $9,750,272 in financial settlements. It also conducted 107 complaint investigations.[15]

Employees may file complaints directly with the OFCCP.[16] 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 accidents; conducts scheduled inspections based on criteria that reflect, among other things, the employer's history of workplace injuries and illnesses, number of

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[11] http://www.eeoc.gov/employers/process.cfm; http://archive.eeoc.gov/employers/investigations.html.
[12] The Wage and Hour Administration of the Employment Standards Division of the DOL enforces federal wage and hour laws.
[13] *See, e.g.*, press releases at *http://www.dol.gov/opa/media/press/opa/main.htm*.
[14] Fact Sheet #44: Visits to Employers, available at *http://www.dol.gov/whd/regs/compliance/whdfs44.pdf*.
[15] http://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V2-04.pdf.
[16] *See generally, http://www.dol.gov/ofccp/regs/compliance/pdf/pdfstart.htm*.

employees, and the employer's industry; and conducts inspections upon complaints by employees of unsafe working conditions and referrals from another agency.[17] The OR-OSHA Field Inspection Reference Manual provides a good basic overview of many issues involved in OR-OSHA investigations,[18] along with Program Directive A-219,[19] which discusses the agency's policies and procedures for handling complaints relating to workplace safety and health conditions. The agency also publishes "What to Expect From an Oregon OSHA Inspection" on its website.[20]

The US Department of Labor has also delegated to federal OSHA the responsibility to investigate claims of discrimination under the provisions of multiple "whistleblower" statutes, including multiple environmental statutes and the Sarbanes-Oxley Act.[21]

E. WORKERS' COMPENSATION

The Oregon Workers' Compensation Division ("WCD") handles workers' compensation claims processing. In addition to conducting hearings before the Workers' Compensation Board on a worker's right to compensation or the amount of the compensation,[22] the WCD investigates fraud and system abuse complaints against employers (as well as against medical providers, insurers, attorneys, and vocational providers).[23] While for the most part the workers' compensation system prevents related tort lawsuits against employers for workplace injuries, there are exceptions which should be discussed with counsel for workplace injuries involving potential third-party litigation and/or large potential damages. Contractors and other non-employees (third parties) injured in the workplace may sue for damages in civil court. Also, the Oregon Supreme Court has ruled in *Smothers v. Gresham Transfer, Inc.*[24] that the rule limiting injured employees to their workers' compensation remedy is unconstitutional in cases where the injured worker's claim was denied because the worker failed to meet a standard higher than that available at common law, namely, that the work-related incident was the "*major*" contributing cause of the injury. The court relied on the fact that the common law standard of proving negligence was lower when the Oregon Constitution became effective in 1857; holding the injured worker to the higher standard in the workers' compensation system deprived that worker of a remedy available at common law, and is, therefore, unconstitutional. The employer should discuss early with experienced counsel any cases involving potentially high damages if the case were allowed to proceed in civil court.

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[17] *See generally*, http://www.orosha.org/.
[18] http://www.orosha.org/enforce/firm2009cog.doc.
[19] http://www.cbs.state.or.us/external/osha/pdf/pds/pd-219.pdf.
[20] http://www.orosha.org/pdf/workshops/106w.pdf.
[21] *See generally*, http://www.dol.gov/compliance/guide/whistle.htm and OSHA Whistleblower Investigations Manual, http://www.osha.gov/OshDoc/Directive_pdf/DIS_0-0_9.pdf.
[22] *See* ORS 656.283.
[23] *See generally*, http://wcd.oregon.gov/compliance/bcu/strength.html.
[24] 332 Or 83, 124, 23 P3d 333 (2001).

F. IMMIGRATION

The US Bureau of Citizenship and Immigration Services (part of the Department of Homeland Security) enforces the Immigration Reform and Control Act of 1986 ("IRCA").[25] 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.[26] Immigration and Customs Enforcement ("ICE") audits may result in significant fines and criminal charges, as can be seen on the agency's news releases.[27]

G. OREGON EMPLOYMENT DEPARTMENT—UNEMPLOYMENT

The Oregon Employment Department[28] 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), and gathers 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.[29] 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). These agencies are taking a very close look at whether employers have properly classified employees as exempt and whether contractors are truly independent. If not, the agencies are pursuing actions requiring reclassification, payment of back taxes, penalties and interest.

III. THE PROCESS

Each agency has its own rules, procedures, and policies for navigating their audit and investigative processes. These can vary considerably, as can the method of appealing any adverse finding outside the agency to the court system, so it is important to consult with counsel who is experienced with the particular agency involved in an audit or investigation.

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[25] Public Law 99-603 (Act of 11/6/86), 8 USC § 1324a, *et seq.*

[26] *See generally*, http://www.ice.gov/news/library/factsheets/i9-inspection.htm; http://www.ice.gov/news/library/factsheets/worksite.htm.

[27] *See generally*, http://www.ice.gov/news/releases/index.htm?top25=no&year=all&month=all&state=all&topic=16.

[28] *See generally*, http://www.oregon.gov/EMPLOY/UI/index.shtml.

[29] *See generally*, http://www.oregon.gov/EMPLOY/ES/BUS/benefit_audit_information.shtml; *see also Questions and Answers about UI Tax Audits*, http://www.oregon.gov/EMPLOY/TAX/docs/uipub203.pdf?ga=t.

Audits: The various agencies' audit procedures vary significantly. At the outset, the determination of what information the agency is entitled to in an audit is straightforward. The websites of the agencies discussed above include helpful material, and experienced counsel can advise regarding regulations, statutes and case law which may apply in any given circumstance. As a general rule, the agency is entitled to relevant documentation and to speak with employees and other individuals who may have pertinent information. Also, as a general rule, it is in the employer's best interest to cooperate with the agency in the audit and to remain courteous and professional at all times. The audit usually occurs at the employer's place of business or where the relevant documents and information are maintained, and it can take hours or days to complete. There may be follow up requests for information. In some circumstances, the audit may occur with legal counsel present at the employer's place of business or at counsel's office. The auditor releases the results of the audit which may or may not result in additional money owing, penalties, additional reporting requirements and the like. The employer may comply with the findings or utilize the available process to question the findings, usually through a hearing at which the employer may provide additional information and arguments.

Investigations: Agency investigations are typically governed by the administrative (not court) process which follows the regulations and statutes applicable to the agency. In general terms following an audit, a complaint, a random inquiry, or an incident or accident as the case may be, the agency begins an investigation which may progress through multiple procedural steps all the way to a final determination which may be appealable to the courts. Here, for illustration purposes we will discuss the procedures involved in a typical BOLI/EEOC dually-filed discrimination or harassment complaint. The administrative investigation and claim procedures applicable to the other agencies follow a similar pattern.

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.[30] 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.[31] 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.[32]

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.

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[30] *See generally*, http://www.oregon.gov/BOLI/CRD/C_Crcompl.shtml.
[31] *See* OAR 839-003-0025.
[32] *See* OAR 839-003-0015.

c. Responding to the Charge and Requests for Information[33]

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 previously has not been undertaken. The employer should conduct its own investigation because, even if the agency finds no support for the complainant's charge, the complainant often still sues in court, and the employer then has to defend itself. Conducting an investigation at the outset 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.[34] The employer generally has the right to have its representative present during the interview of current *supervisory* employees.[35] BOLI permits current, non-supervisory, or former employees to request that a representative of the employer be present during BOLI interviews.[36] Interviewees generally have the right to see a summary report of their own interviews and may submit comments or corrections to the agency.[37]

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 Information Technology personnel should be contacted for assistance in ensuring preservation of the data. The destruction of data can result in adverse inferences against the employer in the proceedings, as well as other negative consequences (e.g., the judge or jury may be allowed to presume that the missing documents would be harmful to the company's case). Timeliness is extremely important; if the employer needs an extension, it should request one as promptly as possible. BOLI's notice states that the response must be provided within 14 days. "Failure to provide a response within the time provided may result in a finding based only on the information provided by the Complainant, therefore you are encouraged to provide as much information as you have within 14 days."[38]

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.[39] If the company objects to complying with any such requests, it should contact counsel

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[33] *See generally* BOLI'S CRD Response Process, http://www.oregon.gov/BOLI/CRD/C_CResponse.shtml.
[34] *See* OAR 839-003-0065; *see also* 42 USC 2000e-8; 29 CFR 1601.161.
[35] OAR 839-003-0065(4).
[36] OAR 839-003-0065(5).
[37] OAR 839-003-0065 (6).
[38] *See* http://www.oregon.gov/BOLI/CRD/C_CResponse.shtml.
[39] OAR 839-003-0065.

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.[40] 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 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.[41]

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.[42] 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.[43] 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.[44] 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

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[40] *See* OAR 839-003-0060.
[41] *Id*.
[42] ORS 659A.880.
[43] *See* ORS 659A.880; 839-003-0065(10).
[44] *See* 839-003-0065 (11).

desired beyond that contained in the agency's agreement.[45] 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.[46] According to the EEOC:

> Mediation is a form of Alternative Dispute Resolution (ADR) that is offered by the U.S. Equal Employment Opportunity Commission (EEOC) as an alternative to the traditional investigative or litigation process. 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. 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 solutions. A mediator does not impose a decision on the parties. Instead, the mediator helps the parties to agree on a mutually acceptable resolution.
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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 or other representation 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.[47]

There are both advantages and disadvantages to mediation which should be discussed with legal 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), and the parties call witnesses, and present evidence. 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

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[45] *See* 839-003-0055.
[46] 42 USC 2000e-5b; 29 CFR 1601.24.
[47] http://www.eeoc.gov/eeoc/mediation/facts.cfm.

(reinstatement, lost wages, non-economic (emotional distress) damages, attorneys' fees). Once a final order is issued, either party may appeal 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 human resource professional or in-house counsel may 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. In addition, 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, including financial information, or trade secrets during the investigation. Trade secrets and other confidential information 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.[48] 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 may also be appropriate.

Government agencies are subject to applicable public records laws (e.g., the Freedom of Information Act and similar state public records statutes), which may require or allow the agency to disclose in response to a public records request (by any person, including the media),

[48] *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 Supp2d 157 (DDC 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).

information the employer has provided the agency in the course of its audit or investigation. The Oregon Attorney General has recently proposed legislation to increase the transparency of public records in Oregon.[49] There is always the possibility that data given to a government agency will be released under such laws. Legal counsel should be contacted early in the process to assure available safeguards are in place with respect to sensitive information.

In addition to trade secrets, employers should be careful to protect privacy interests with respect to information sought by the agency. For example, the agency may seek records that will reveal private information, including medical information, pertaining to employees. 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 employees (such as redacting names or social security numbers).

B. RETALIATION; WHISTLEBLOWING; 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 employer takes an adverse action against a covered individual because he or she engaged in a protected activity. In general terms, whistleblowing occurs when an employee alerts either an agency or someone internally of a good faith belief of a company's or co-worker's violation of a state or federal law or regulation.

The complainant may still be working for the employer. Even if you are sure that the complainant does not have a valid claim, you must 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 through a large body of ever-changing case law, 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.

Importantly, an employee can recover under a retaliation theory even when it is ultimately determined that the employee was *not* discriminated against in the first place. Retaliation claims are often much easier to prove than discrimination 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 complainant in a manner that arguably constitutes retaliation.

A potential defense to claims such as harassment or "hostile work environment" is that the employer took "prompt remedial action."[50] This defense requires the employer to demonstrate

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[49] http://www.doj.state.or.us/releases/2011/rel011911a.shtml.

[50] *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

that, upon discovering the prohibited conduct or actions, the employer took prompt steps to investigate and mitigate any harm. If the complainant is still employed, the company should find ways to avoid any inference of continued discrimination or harassment. This might, for example, include changing work schedules to avoid future contact. 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. 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 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 allow the agency to do the initial discovery in their claim 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.

D. 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."[51] However, some agency determinations carry a risk of "unfair prejudice" so great that they will not be admissible in court.[52] 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.[53] 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. For example, an employer objected to the admissibility of BOLI's finding of "substantial evidence of an unlawful employment practice" in a workers' compensation discrimination case.[54] BOLI's document stated multiple findings of fact, including:

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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); s*ee also, EEOC Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors* dated June 18, 1999, page 3, http://www.eeoc.gov/policy/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).

[51] *Plummer v. Western Int'l Hotels Co., Inc*., 656 F2d 502, 504 (9th Cir. 1981).

[52] *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).

[53] *Id*; *see also Sleigh v. Jenny Craig Weight Loss Centers, Inc.*, 161 Or.App. 262, 984 P.2d 891(BOLI investigator's notice of substantial evidence of discrimination was inadmissible as hearsay), *modified*, 163 OrApp 20, 988 P2d 916 (1999).

[54] *Grassmueck v. Johnson Controls Battery Group, Inc*., 2007 WL 1989579 (D Or July 2, 2007).

- That the employer had five complaints filed against them alleging injured worker discrimination within the same time period;

- A finding that was based upon another worker's statement that he was pressured by the employer to use his own insurance for an injury rather than filing for workers' compensation and was subsequently fired after his refusal to do so.

- The employer's insistence that its formal response provided sufficient information to BOLI, although BOLI requested additional documentation from it, including a complete copy of the employee's personnel file.

The court excluded the first two findings of fact as inadmissible hearsay, while allowing the finding itself and the other findings of fact into evidence. Employers should be aware that agency determinations may be admissible in subsequent litigation.

VI. CONCLUSION

With an across-the-board increase in agency audits and investigations, and the sharing of information and results among agencies, it is more important than ever for employers to ensure they have their house in order and that they know what to do when the agency comes knocking.