

# Managing Litigation Costs and Prevention

All employers should evaluate and address their company's potential litigation risks before an action arises.

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Paraphrasing a 13th Century English jurist, Benjamin Franklin posited that "An ounce of prevention is worth a pound of cure."

So it is in litigation. That is why all employers should evaluate and address their company's potential litigation risks before an action arises. Auditing risk is the first step in implementing prevention policies to avoid litigation.

Because every employer is unique, exposed to different risks and subject to various federal, state and local laws, securing counsel on proper employment practices and policies before implementation can aid employers in shielding themselves from employment-related claims.

Preventative counseling ensures employers:

- Are aware of laws applicable to their particular business
- Know and understand prohibited employment practices
- Establish policies that help prevent employment-related claims from being made or provide a defense to claims made

## Managing litigation

Litigation that occurs because an employer does not have the right policies in place, or because those policies were not followed, can be very costly. And litigation in general is feared because it is regarded as expensive, unpredictable and inefficient. It is, after all, to paraphrase Ben Franklin, more costly to cure than prevent an employment-related claim, but those costs can be contained through proper litigation management.

Key, from the outset, is to conduct a risk analysis and identify the goal of the litigation. Managing legal work through this prism helps determine how to allocate (often scarce) resources during the litigation. Rigorous risk analysis permits cases to be valued appropriately by

establishing the probability of success for each component of the litigation, identifies the interrelationships of those parts, and weighs the potential outcomes.

Evaluating likely outcomes enables a litigant to select and pursue a specific course of action. Analysis, however, should be ongoing and continued throughout all phases of the litigation, as it informs what discovery is worth pursuing and what is not worth the cost to obtain.

## Matching strategy to desired outcomes

Litigation strategy is informed by the outcome desired and should address of all the outstanding issues impeding that desired outcome. Start by defining what is meant by successful litigation. Sometimes, the desired outcome is not an outright win. It may be merely to minimize damages awarded to the other side.

As litigation rarely is an all or nothing situation, the best litigation plan includes a strategy to limit the discovery that must be provided to other litigants and claims that may be made against the employer to narrow the scope of the litigation. This may include a motion to dismiss claims that cannot be substantiated early in the litigation.

## Managing litigation costs

Preemptive risk analysis and matching strategy to the desired outcome are two tools to manage litigation costs. A third, and highly effective tool to manage the uncertainty of unexpected litigation expenses is electing an alternative fee arrangement. Alternative fee arrangements can include a mix of flat fees, hourly rates and incentive bonuses.

Flat fees might be applied for work done in the course of the litigation that can be clearly defined as to the number of hours it would typically take to perform such tasks. These can encompass work the attorneys have performed repeatedly in prior litigations. Hourly rates can be applied to those aspects of the litigation that

require detailed preparation and consequential activities, such as depositions, oral argument, drafting complex motions or opposition to complex motions, briefs, memoranda to the judge and trial. Incentive fees could be paid for achieving the agreed upon desired outcome.

Alternative fee structures are often more beneficial to the client than straight hourly billing or than flat fees.

Unlike straight hourly or flat fee structures, alternative fee billing permits clients to control costs while receiving the best possible counsel, because it permits the firm to allocate necessary resources and personnel to achieve the desired result.

### **Managing the cost of discovery**

Discovery is one of the more expensive phases of litigation. Managing discovery will help contain costs, in particular the management of document discovery. For example:

- If documents originated in an electronic format, keep them that way.
- If original documents were hard copies, scan them and make them text searchable.

Controlling "metadata" can also save on electronic document production. Metadata is electronically stored information about documents that is not readily accessible to users. Try to come to an agreement with opposing counsel on what types of metadata to gather (or get a court order to that effect limiting the type of metadata to produce).

If litigants cannot agree on search terms used to search electronic files for relevant documents, obtain a court order limiting the search. The court may require the attorney to explain why and how the metadata relates to the causes of action being litigated. Best is for the attorney to be proactive in trying to persuade the court to limit discovery to what is necessary and adhere as close as possible to the litigation plan.

Finally, working directly with the client's technology department to search for needed documents and filter out unnecessary documents is a cost-effective strategy to reduce the scope of potentially relevant documents for review by attorneys.

### **Involve clients**

Clients should actively be involved in the decision making process throughout the litigation. When drawing

up the plan, an attorney should be able to anticipate what the court will require and incorporate those requirements into the plan. Require the attorney to articulate how each action taken is either needed to advance the carefully drawn litigation plan or is required by the court. If there are any surprises, require an explanation for the client.

Key to effectively managing litigation costs is putting the appropriate litigation plan in place and managing the litigation in accordance with the goals set jointly by the attorney and client. Second, is implementing an alternative billing plan that can greatly benefit the client by streamlining the fees for routine litigation tasks and ensuring quality representation throughout the litigation.

### **An ounce of prevention**

In the end, the best approach to managing litigation costs is to avoid litigation. Instituting prevention policies based on thorough risk assessment will go a long way to reduce the cost of litigation or eliminate the risk of litigation altogether. Employees should be trained on prevention policies regularly and sign acknowledgements that they received such training. Training on the policies and having a record of that training enables employers to assert a defense should litigation arise.



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