MODRALL SPERLING

LAWYERS

Employment Law Alert

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Employment Law at Modrall Sperling

New Mexico presents unique challenges in employment law, and for more than 75 years, the experience of Modrall Sperling has spoken directly to the needs of private and public sector employers across our state. We represent them in a wide variety of matters before federal and state courts, administrative bodies, and the courts of the Navajo Nation.

While we are prepared to litigate as necessary, we use our experience to guide clients in developing stronger policies, trainings and employee handbooks that help prevent litigation in the first place.

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Tips for Conducting Employee Investigations

Investigating your employee for inappropriate conduct can be a sensitive and difficult task. An employer's decisions regarding how to conduct the investigation can have significant impact in subsequent litigation related to the investigation. This article provides tips for how New Mexico employers can turn the early stages of an employee investigation into a successful defense.

Involving an attorney early in the process can protect your investigations in future litigation. The attorney-client privilege protects communications between attorneys and their clients from disclosure if those communications were made for the purposes of obtaining legal advice. This privilege extends to communications between the client and its employees if the content of those communications is necessary to the attorney's legal opinion. If an attorney is involved from the earliest stages of an employee investigation, the attorney-client privilege can protect communications during the investigation. Whether the attorney-client privilege applies and how far it extends is a question New Mexico courts have addressed in the past. In *Gingrich v. Sandia Corporation*, the New Mexico Court of Appeals evaluated whether an investigation and the investigator's report were protected by the attorney-client privilege. The investigator was an attorney. The Court of Appeals agreed with the lower court, which held that the investigation itself was protected by attorney-client privilege, but the Court of Appeals held that the investigation report was not protected because the employer relied upon the report to discipline employees and it formed the basis for the employer's defense in the lawsuit. What does this mean for a New Mexico employer? It is crucial that any investigation be unbiased and fair. If a written report is prepared, it should be drafted with the knowledge that it might be disclosed in potential litigation. However, materials related to the investigator's interviews, including details the investigator chooses not to include in an investigation report, may be protected by attorney-client privilege if an attorney is involved in the investigation.

An employer may wonder whether it is worthwhile to obtain a written investigation report if it may be used as evidence in subsequent litigation. This is a decision the employer should make based on the specific facts at issue. However, when a written investigative report is appropriate, a thorough report can demonstrate to the jury that the employer took claims of inappropriate conduct seriously and handled each aspect of the claim responsibly. Without a contemporaneous paper trail of the steps an employer takes to remedy an inappropriate work environment, a complainant can argue that the employer fostered a locker room environment in which inappropriate conduct was rampant. In *Ocana v. American Furniture Co.,* the New Mexico Supreme Court articulated public policy in favor of an employer that prohibits, identifies, and addresses discrimination. Thus, under New Mexico law, an employer can limit its liability for inappropriate conduct by proving that it (1) exercises reasonable care to prevent and correct promptly inappropriate conduct; and (2) the aggrieved party unreasonably failed to take advantage of any corrective opportunities provided by the employer. An employer may be able to satisfy these elements with a well-written investigation report.

It is important to remember that when inappropriate conduct is investigated, the employer's inquiry should focus on whether the company's policies have been violated, rather than focusing on whether a legal wrong, i.e., harassment, discrimination, or retaliation, has occurred. If the employer's investigation focuses on whether inappropriate conduct has occurred, it preserves potential arguments that the alleged inappropriate conduct, even if

it did occur, did not constitute harassment or discrimination under applicable laws. For example, consider an internal investigation that concludes an employee violated a computer policy by circulating inappropriate jokes as compared to an internal investigation that concludes an employee committed harassment by circulating inappropriate jokes. The former will keep available the argument in subsequent litigation that the inappropriate jokes did not constitute harassment. The latter is more difficult to defend. An employee who has engaged in appropriate conduct is still subject to discipline, but one who the employer has admitted "harassed" another employee may expose the employer to liability.

What are some common investigation pitfalls? Asking close-ended questions is the most common investigation error. Yes or no questions provide limited information. Failing to take thorough notes is another common mistake. It is important to remember that investigations today may be important months or years from now. The final investigation report should include the allegations, the contact information of people who were interviewed, interview summaries, summaries of any documents reviewed, and the investigator's conclusion. Another common error is failing to follow-up on facts or information. For example, consider the case of an employee who states he received harassing text messages but cannot remember the date or number of messages. A thorough investigator should obtain cell phone records that could corroborate or refute the complainant's version of events.

Finally, the scope of the investigation should be flexible and the investigator should interview all witnesses who may have relevant information. A poorly conducted investigation is of no value to the employer and can actually be a detriment if a future litigant claims that the employer intentionally conducted a mediocre investigation. For example, if an employer receives a complaint of inappropriate conduct and the complainant states a fellow employee witnessed the incident, it is crucial that the investigator follow-up with the potential witness. If an employer receives a complaint of inappropriate conduct but fails to investigate the incident for six months, the investigation report will serve as a tool for the complainant in subsequent litigation to prove the employer was not diligent. An employer that is proactive early in the investigation process, that investigates claims diligently, and that creates a workplace in which complaints are addressed and resolved can use an employee investigation as a shield in subsequent litigation.

For more information, please contact Sonya R. Burke.

EEOC Proposes New Burden for Employers

On January 29, 2009, the U.S. Equal Employment Opportunity Commission (EEOC) publicized a proposed revision to the Employer Information Report (EEO-1). The Employer Information EEO-1 survey is conducted annually under the authority of Title VII of the Civil Rights Act of 1964. Based on the number of employees and federal contract activities, certain large employers are required to file an EEO-1 report on an annual basis. Currently, the EEO-1 survey requires company employment data to be categorized by race/ethnicity, gender and job category. The EEOC has proposed a revision to the EEO-1 report that would require employers, including federal contractors, with more than 100 employees to include pay data for each employee. The EEOC believes that this

additional information will assist the agency in identifying possible pay discrimination and assist employers in promoting equal pay in their workplaces. An example of the proposed EEO-1 is available here.

Employers and other members of the public who wish to submit comments have until April 1, 2016. Employers who wish to coordinate comments through Modrall Sperling can contact any member of our Employment Group.

Two Modrall Sperling Attorneys Named Employment Lawyers of the Year by *Best Lawyers®*

Two Modrall Sperling attorneys have been named as Employment Lawyers of the Year in Albuquerque by *Best Lawyers®* for 2016. Jennifer Noya and George McFall were recognized for their work in Employment Law for Individuals and Employment Law for Management, respectively.

It is the firm's strong emphasis on employment work that has created an environment for sound and efficient representation on both sides of the courtroom.

Jennifer has represented defendants in civil rights class litigation and also represents employers in employment-related disputes arising under state and federal law. She has tried cases in both state and federal district courts, and has briefed cases before the New Mexico Supreme Court, the New Mexico Court of Appeals, and the Tenth Circuit Court of Appeals. Having achieved the AV® Preeminent peer-review rating from *Martindale Hubbell*, Jennifer was selected as one of the Top 25 New Mexico Super Lawyers by *Southwest Super Lawyers®* in 2015. She was also named "Lawyer of the Year in Insurance Law" in 2012 by *Best Lawyers®*.

George has represented both private and public sector employers in state and federal courts in a wide variety of matters. He is a trained mediator and regularly advises clients in settlement negotiations and alternative dispute resolution processes. In addition to his litigation work, he advises clients on complex workplace issues arising under the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA) as well as wage and hour issues under the Fair Labor Standards Act (FLSA). George is an Employment Law Specialist certified by the New Mexico Board of Legal Specialization and has achieved the AV® Preeminent rating from *Martindale Hubbell,* the highest rating possible. He was named one of the Top 25 New Mexico Super Lawyers by *Southwest Super Lawyers®* in 2015 and also named "Lawyer of the Year in Education Law" in 2012 and "Lawyer of the Year in Labor & Employment Litigation" in 2013.

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