

When an Employee Becomes a Legal Threat

Four signals that a complaint has changed character, and what to do in the 48 hours after you spot one.

6FILLABLE
TOOLS

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Every box and line in the tools is fillable. Complete them in any PDF reader and save a copy for your records.

Dealing with employee issues is a regular part of HR procedure, but sometimes what begins as a regular HR issue can snowball into something that opens the company to potential legal liability. It can be easy to overlook a problem that might become a lawsuit, or alternatively, to escalate an issue that might lead to nothing.

“Rather than trying to read the tea leaves, organizations are much better positioned to recognize developing legal issues when they have good, consistent systems in place. That means clear policies, regular policy review and updates, practical training, standard operating procedures where appropriate, good recordkeeping and tracking, and clear responsibilities among management, HR and legal. Everyone should understand what they own and when to escalate.”

LEO TYREE, CONSTANGY, BROOKS, SMITH & PROPHETE

01 When it stops being routine

Below are four examples of signals that an issue could evolve into a legal liability, whatever it looked like when it landed on your desk.

Signal screen

TOOL 1

MATTER OR REFERENCE	DATE RECEIVED	SCREENED BY	
SIGNAL	WHAT IT POINTS TO	PRESENT	DATE SPOTTED
The same complaint keeps coming out of one department.	Repeat complaints from one team point at a condition rather than an incident.	☐	
A complaint names a protected characteristic.	Once race, age, disability, pregnancy, religion or national origin shows up, the company is on notice.	☐	
It's the second complaint about the same manager, even if the first one was resolved.	Two complaints can point to a pattern the company knew about.	☐	
A matter you'd normally settle informally turns formal or adversarial.	When a category of issue you've always handled in a conversation starts arriving in writing, that change is the signal.	☐	

FROM COUNSEL: WHAT COUNTS AS PROTECTED

“Under federal anti-discrimination law, protected characteristics include race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), national origin, age (40 and older), disability, and genetic information. State and local laws may protect additional characteristics,” says Tyree.

“Legal issues can arise from protected activity or other statutory rights, such as reporting discrimination or harassment, requesting an accommodation, taking protected leave, raising certain wage or workplace concerns, or participating in an investigation,” points out Tyree.

Any signal present? Start the 48-hour triage on the next page.

The first 48 hours

Triage is the whole job here. You won't resolve the complaint in 48 hours and shouldn't try to, but the decisions you make in that window are crucial.

Triage checklist

TOOL 2

SIGNAL SPOTTED (DATE AND TIME)

48-HOUR MARK (DATE AND TIME)

#	STEP	OWNER	DONE BY
☐	1 Handle any safety issue first. A credible threat moves ahead of everything else on this list.	_____	_____
☐	2 Get it to the right people, which is not automatically the most senior people. Depending on the matter, that group can include HR, management, in-house legal, compliance, or outside counsel. Know where the law limits what you can disclose, and to whom.	_____	_____
☐	3 Take everyone named in the complaint out of the response to it. No one implicated gets a hand in how the company answers.	_____	_____
☐	4 Check what the company has already decided. "Don't assume that because the company has a good process on paper, that process was followed in practice," says Tyree.	_____	_____
☐	5 Make an initial assessment. What is actually being alleged, what management already knew, and what you hold that supports or contradicts the claim. That sorts what needs attention today from what needs a fuller review.	_____	_____
☐	6 Find out what's underneath it. Is there a history here, a prior incident, a dispute the complaint is the latest chapter of? You can't solve a problem you only know one side of.	_____	_____
☐	7 Preserve the evidence now. Before anything routine deletes it.	_____	_____

COUNSEL'S NOTE ON STEP 2: THE PROBLEM DECIDES THE ROOM

"A credible threat of workplace violence may require immediate involvement from security, facilities, law enforcement, or others responsible for workplace safety," says Tyree. "A wage-and-hour dispute calls for a very different group, perhaps HR, payroll, legal, or those responsible for timekeeping and compensation. The nature of the problem should determine who is brought into the room."

COUNSEL'S NOTE ON STEP 7: PRESERVATION AND LITIGATION HOLDS

"I would make a distinction between preserving relevant information and issuing a formal litigation hold. I would not say that every employee issue with potential legal implications automatically requires a litigation hold in the first 48 hours," says Tyree. "Generally, the trigger is when litigation is reasonably anticipated. Sometimes that is obvious, such as when a lawsuit or agency charge has been filed. But the obligation can arise earlier depending on the circumstances, including a demand letter, a threat of litigation, a preservation request, or other facts showing that litigation is reasonably foreseeable."

Initial assessment

TOOL 2

Step 2. Who's in the room, and why

Step 3. Named in the complaint, out of the response

Step 5. What is actually being alleged?

What did management already know?

Where does process on paper differ from practice? (Step 4)

What you hold that supports the claim

What you hold that contradicts it

Needs attention today

Needs a fuller review

Step 6. What's underneath it? History, prior incidents, the dispute this is the latest chapter of

When leadership is involved

Some complaints reach far enough up the org chart that nobody inside the building can investigate them cleanly. That's when an outside investigator earns their fee.

"Outside counsel can be particularly valuable when senior leadership is involved, the people who would normally handle the matter have a conflict, the issue is unusually sensitive or complex, or litigation or regulatory action is becoming a realistic possibility."

LEO TYREE

Other triggers: egregious allegations like sexual misconduct, active litigation, a perception of bias in the internal process, or simply not having the bandwidth to run a complex investigation while doing your day job.

The conflict test is the one people get wrong. "If the person who would normally handle the investigation is involved in the allegations, reports to someone who is, or otherwise has a meaningful conflict, consider using someone else," says Tyree.

Call the investigator in before the in-house decisions are locked, so they can help shape the response instead of arriving in time to justify one that's already been made.

Outside investigator check

TOOL 3

Triggers present

- ☐ Senior leadership is involved
- ☐ The people who would normally handle it have a conflict
- ☐ The issue is unusually sensitive or complex
- ☐ Litigation or regulatory action is becoming a realistic possibility
- ☐ Egregious allegations, like sexual misconduct
- ☐ Active litigation
- ☐ A perception of bias in the internal process
- ☐ Not enough bandwidth to run a complex investigation

Conflict test for your internal investigator

- ☐ Is involved in the allegations
- ☐ Reports to someone who is
- ☐ Otherwise has a meaningful conflict

Any box checked here: consider using someone else.

INVESTIGATOR

BROUGHT IN ON

BEFORE DECISIONS LOCKED?

Separating the parties

If the respondent controls the org chart, work out which people need to be apart for the duration. Whatever you decide, the complainant doesn't absorb the cost of it. Moving them to a worse assignment to keep the peace is its own problem. Where separation isn't necessary, put safeguards around the areas that need them and leave it there.

Who needs to be apart, and for how long

Safeguards, where separation isn't necessary

- ☐ The complainant's assignment is no worse than it was before the complaint.

Documentation and retention

Good documentation in a legal matter comes from documenting well before there was a legal matter. It has to be how the organization already operates.

"If the record suddenly becomes much more detailed only after an employee raises a concern, that can create questions of its own. What may change once litigation becomes reasonably foreseeable is the need to address preservation, confidentiality, and privilege. But the basic rule stays the same: write what happened, what you did, and why you did it. Don't editorialize."

LEO TYREE

So keep it factual and first-hand, and leave the speculation out. When you're not sure whether something is worth documenting, document it. Contemporaneous notes beat reconstructed ones every time, and if you do have to memorialize something after the fact, say that's what you're doing. "Whatever the format, keep it factual and accurate, and don't go back and 'clean up' the file once litigation becomes possible," says Tyree.

Then look at your deletion and retention schedules. If routine practice would destroy anything relevant to the matter, suspend it.

File check

TOOL 4

- ☐ Each entry says what happened, what you did, and why you did it.
- ☐ Entries are factual and first-hand, with no speculation and no editorializing.
- ☐ Notes are contemporaneous. Anything memorialized after the fact says so.
- ☐ Nothing in the file has been cleaned up since litigation became possible.
- ☐ Deletion and retention schedules checked. Routine deletion suspended for anything relevant.

SYSTEM OR RECORD TYPE	NORMAL SCHEDULE	SUSPENDED BY	DATE

Pressure-test the decision before you make it

Terminations, PIPs, demotions and role eliminations all draw scrutiny. Run them through this before they happen.

Pre-decision worksheet

TOOL 5

EMPLOYEE

DECISION OWNER

DATE

Action under review: ☐ Termination ☐ PIP ☐ Demotion ☐ Role elimination

Start with the record

The actual reason for the action

The documentation that supports that reason

Normal policy and procedure were followed: ☐ Yes ☐ No

IF NO, WHAT DIFFERED

Then zoom out to the employee's recent history

Did they complain, request leave, ask for an accommodation, or participate in an investigation? Know that any of that is protected activity, and the timing of your action will be read against it.

IN THEIR RECENT HISTORY, DID THEY	YES	DATE	NOTES
Complain	☐		
Request leave	☐		
Ask for an accommodation	☐		
Participate in an investigation	☐		

The timing question

What you're establishing is that the decision was underway before the protected activity. If someone's performance has been a problem for 6 months, the contemporaneous record of those 6 months can help separate a documented performance case from a retaliation claim. If that record doesn't exist yet, it's too late to create it.

DECISION GOT UNDERWAY

EARLIEST PROTECTED ACTIVITY

What in the contemporaneous record shows the decision came first

Where HR makes it worse

Reaching a conclusion early and leaning into that confirmation bias is a common pitfall.

“Deciding immediately that the employee is right, that the employee is wrong, or that a longtime manager ‘would never do that’ can influence everything that follows. Taking a complaint seriously also doesn’t require treating anyone as guilty before the facts are known. Good process and basic humanity are not competing objectives.”

LEO TYREE

Some other reliable ways to make a bad situation worse? Sitting on the investigation, losing track of what happens to the complainant after the complaint, closing the matter without a documented resolution, and letting a manager investigate their own team.

Before you close it

TOOL 6

☐ Nobody on the response decided who was right before the facts were in.

☐ The investigation kept moving. Nothing sat.

☐ You know what has happened to the complainant since the complaint.

☐ The resolution is documented.

☐ No manager investigated their own team.

RESOLUTION RECORDED IN

CLOSED BY

DATE CLOSED

And then there's the overcorrection.

“Fear of litigation can create problems too. HR still has a workplace to manage. You can create risk by acting badly, but you can also create risk by becoming afraid to manage.”

LEO TYREE

This guide is general information, not legal advice. Consult counsel licensed in your jurisdiction about any specific matter.