

SPECIAL REPORT SERIES

THE NUTS AND BOLTS OF AN EMPLOYMENT LAWSUIT

This report will provide you with an understanding of the employment lawsuit process that exists in most federal and state courts. This report is not intended to be exhaustive but rather to give you a general overview. You will be better prepared to communicate with your lawyers and stakeholders simply by reading this report.

Lawsuits begin with the filing of a **complaint**. The person suing is known as the *plaintiff* and the person being sued is the *defendant*. The complaint is a legal document that sets forth the plaintiff's factual and legal position. It may be a completed form or several typewritten pages and must be made in terms that allow the defending party to properly understand the plaintiff's position.

The complaint must be filed within the *applicable statute of limitations*, which is usually between one and four years, depending on the claim presented. Upon accepting complaints, the court issues a *summons*. A summons is *served* with complaints and informs defendants how much time they have to respond. This time period is 30 days in most cases.

As a general rule, the summons and complaint should be *personally served* on defendants as soon as possible. When personal service is difficult, the defendant may eventually be served through substitute service or by publication of the summons and complaint in a local newspaper.

The Civil Rights Act and many other federal and state statutes require that a complaint first be filed with the Equal Employment Opportunity Commission (EEOC), or equivalent agency, before a formal employment lawsuit can be filed. There are many agencies that require a complaint to be filed with them as soon as 30 days after the employer's alleged wrongful act. These agencies can be easily found in a local telephone directory.

Once defendants are served with a summons and complaint, they have an obligation to make a timely response. Defendants and their attorneys will analyze the complaint to determine numerous **defenses**, including whether the papers were properly served, whether the complaint was filed in the proper court and in a timely matter, as well as various other procedural and substantive defenses.

When defendants file their responsive papers, if they feel they have claims against the plaintiff, they should file what is known as a **cross-complaint**. When the basis for a cross-complaint is derived from the same set of facts as the plaintiff's complaint, then a cross-complaint is usually mandatory. A defendant may also at this time decide that *third parties* are responsible for the claimed damages, and the defendant may file a cross-complaint against those third parties. When all is said and done, there may be numerous parties who have filed complaints, cross-complaints and answers against each other.

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After the defendant eventually files an answer to the complaint the **discovery process** begins. Both the state and federal *rules of procedure* are designed to eliminate surprises in litigation. A party may discover facts by sending written questions known as *interrogatories*. They may also request the *production of documents* and take *depositions*. In the deposition process, witness testimony is taken under oath and transcribed by a court reporter. A booklet is then made of the testimony, which can be used to predetermine eventual trial testimony or to show inconsistencies in trial testimony. The deposition process is the only way to ask formal discovery questions of a witness who is not a party to the lawsuit.

The parties or their attorneys may also hire *investigators* and *experts* to assist in the discovery process and to help ready the case for settlement or trial. Experts are required when financial, technical, health and psychological issues are involved in the case. The discovery process will continue until shortly before trial. The end of the discovery process is usually used for the depositions of experts and newly discovered witnesses.

During the course of a lawsuit, the parties may file *motions* before the court requesting the legal resolution of the entire case or selected issues. If the motion relates solely to a matter of law and the facts of the complaint are accepted as true, then it is known as a *demurrer*, *motion for judgment on the pleadings* or a *motion to dismiss*. If the motion contains factual allegations that are supported by affidavits, declarations, documents, or other evidence, then the motion will be known as a *motion for summary judgment* or *motion for summary adjudication of issues*. These motions are generally filed approximately one month prior to the hearing date and the responding party generally has a number of weeks to oppose the motion. Depending on the type of motion, the losing party may *appeal* the result or file a *writ* immediately requesting review by a higher court, or wait until the end of the trial.

At any time during the lawsuit process the parties may enter into **settlement negotiations**. In light of the time, expense, emotion and uncertainty involved in the lawsuit process, smart parties will often attempt to settle the case at an early stage. Settlement negotiations at the later stages of litigation will sometimes involve *insurance adjusters* and may also be conducted with the assistance of a judge or a third party mediator.

Many parties have found that employing *mediation services* or agreeing to a *settlement conference* provides an alternative to continued litigation of a case. Lawsuits are generally *arbitrated* where there is contractual language between the parties requiring arbitration or where a judge determines that the potential dollar amount is within a set amount requiring arbitration by court rule. Let us know if you would like a copy of our Sample Mediation and Arbitration Agreement. If the arbitration is required by the court system, then the parties may stipulate to *binding arbitration* that would terminate the lawsuit at the end of the arbitration. If the parties choose *non-binding arbitration*, then they may reject the arbitration award and continue with the lawsuit process. Many times there are penalties attached to a party who ends up worse after trial than had they accepted the arbitration award.

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Attorneys should start **preparing for trial** at least one hundred days before the trial date. At this point, they should make sure that they have gathered all the necessary *witnesses*, *documents* and other *evidence* needed to prove the case. They will complete *researching the law* surrounding the liability and damage issues. *Expert reports* will be prepared and a last chance will be taken at pretrial motions and possible settlement.

Depending on the court's *trial calendar*, trial will begin on the assigned date or the matter will be continued until a courtroom and judge can be found. The parties will generally have a right to *jury trial* if requested. In many courts a request for jury trial is required at the outset. It is the responsibility of the party requesting a jury to pay the jury fees. An initial deposit is generally required, along with daily fees once the trial starts. Prior to the start of the trial the attorneys will meet with the judge in his or her *chambers* and review factual and legal issues that may come up at trial, as well as the particular judge's courtroom procedures.

If one of the parties has selected a jury the trial begins with selection of the *jury panel*. This is known as the *voir dire* process. The judge and attorneys will ask the potential jurors questions to assure their fairness. A jury generally consists of 12 persons along with one, two or more alternates, depending on the anticipated length of trial. In some courts a jury may be limited to as few as six jurors.

Once the jury has been picked the plaintiff's attorney begins the trial by giving an opening statement. The **opening statement** may not be used to argue the case to the judge or jury but rather to provide a road map of evidence to be presented during the trial. The defendants usually have the option of immediately following the plaintiff's opening statement with one of their own. Sometimes the defense will reserve their opening statement until the close of the plaintiff's case.

Once opening statements have been given the **evidentiary process** begins. The Plaintiff will present the case by putting on witnesses and experts. Documents and other tangible evidence can only be introduced through a witness or expert who can lay a *foundation* for them. The defendant will then be allowed to *cross-examine* plaintiff's witness. Once the plaintiff has concluded presenting their case, the defense attorney can ask the judge for a "*non-suit*." This means that the plaintiff has failed to present a case under any theory. If the non-suit is granted, then the trial ends. If it is denied, the defendant will present their case and the plaintiff will have the opportunity to cross-examine the defense witnesses. At the conclusion of the defendant's case, the parties will have an opportunity to call *rebuttal witnesses* if necessary to refute any testimony previously given.

At the conclusion of the evidentiary process the attorneys will present their **closing arguments**, summarizing evidence that has been presented, as well as the arguments related to that evidence. At the end of closing arguments in a jury trial, the judge will read the *jury instructions*, which have been previously agreed to by the parties and the judge. Jury instructions are intended to act as legal guides to the jurors in their decision making process. After deliberation by the judge or jury the **verdict** will be rendered. In most state courts, 8 out of 12 jurors are required to agree to a civil verdict. In federal court, 9 out of 12 jurors are required to agree. If there is a six-member jury, then four or five out of six jurors must generally agree.

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If one of the parties is unsatisfied with a jury verdict they may claim that the verdict was not supported by the evidence and ask that the judge grant a *judgment notwithstanding the jury verdict* (JNOV), or they may claim that there was some form of misconduct during the trial and file a *motion requesting a new trial*. If the losing party feels that the judge has made an error of law then they may file an **appeal** to a higher court. Post-trial motions are generally related to factual determinations made in the case, and the appellate process is generally related to legal issues raised during the case. If an appeal is filed this can extend the lawsuit process for a year or more, especially if a new trial is eventually ordered. Very often the parties will continue their settlement negotiations through the course of trial and even after a verdict has been rendered.

The final phase of the litigation process is the **collection** of any judgment that may have been obtained. The ability to collect on a judgment is a major factor in deciding whether to bring a lawsuit in the first place. The court has set forth numerous procedures that allow the winning party to attach or levy upon the assets of the losing party. The court may order a *judgment debtor* to undergo an examination under oath related to any assets they may possess. In actions not involving fraudulent conduct a losing party will often declare *bankruptcy* so as to avoid paying a judgment.

Make sure you hire an attorney who is experienced with the employment litigation process. Talk to some of his or her previous clients. Get your fee agreement in writing. Make sure the firm maintains malpractice insurance. Ask for a case strategy outline and to be informed of the attorney's efforts and how the case is progressing. Ask about alternatives to litigation and early resolution of the case. For more on hiring attorneys, please see the **Special Report: *The Nuts and Bolts of How to Find, Choose and Manage a Lawyer***.

That is the employment lawsuit process in a nutshell. Not the most exciting subject, but one you'd better know if you're ever caught in it. More information can easily be obtained from your local bar association and law library or by calling our offices.