

## Publications

### The Employment Litigation Tidal Wave: Critical Steps Employers Need to Take After Being Sued

#### Related Professionals

Charles F. Billington III

#### Related Services

Employment Litigation

Labor and Employment

**CLIENT ALERT** | 4.19.2021

The last two weeks in Ohio have seen a tidal wave of employment litigation.

To date, around **400 employment lawsuits** have been filed in the last two weeks. This barrage in filings covers all business demographics--employers large, mid-sized, and small across every conceivable industry. More often than not, these claims name an individual plaintiff, a manager or supervisor.

We know why: House Bill 352 became effective April 15, 2021. If you want to know more about H.B. 352, see Vorys in-depth article [here](#). H.B. 352 was nothing short of a transformation of Ohio's statutory civil rights framework.

The changes believed to be driving the flood of new employment litigation are (1) a reduction of the statute of limitations from six years to two years, (2) a clarification that supervisors and managers are no longer "employers" under Revised Code 4112 who can easily be sued personally, and (3) the addition of an administrative exhaustion requirement for claims under Revised Code 4112, making litigants first file a charge of discrimination with the Ohio Civil Rights Commission before filing suit.

In light of the new framework, many plaintiffs' attorneys chose to simply file suit, often without notice to the defendant or any pre-litigation threat letters or settlement discussions.

Now, employers who have never faced employment litigation are waking up to find they have been sued. Worse yet, they find out one of their employees is personally named in the suit. It's a scary proposition.

There are some important steps you can take immediately to help your defense:

(1) Watch for service of the complaint (the paperwork that institutes the lawsuit). If you've got a statutory agent, they will get

the service. If you don't, look for it to come via certified or express mail from the court. Personal service (like you see in the movies, "You've been served!") is permitted, but is not common.

(2) Call your in-house or outside employment counsel. Once you're served, the clock is running on your answer deadline (typically 21-28 days, depending on the court in which you're sued). It is critical to calculate an answer deadline and analyze the complaint and method of service for deficiencies. Courts won't look kindly on missed deadlines and extensions are generally freely given.

(3) Institute a litigation hold. A litigation hold is simply written instructions to relevant custodians of records telling them that a suit has been filed and they need to retain all potentially-relevant documents. While hard copy files like personal files, pay records, desk files, supervisor files, medical files, and the like are important. And don't forget about electronically-stored documents like emails, MS Office files, chat histories, instant messages, text messages, and possibly even badge swipes.

(4) Contact your IT to turn off or suspend routine destruction policies. Once you've been sued, you are under an obligation to retain all relevant documents. Far too often, a routine email or document destruction policy that was "set it and forget it" destroys relevant documents leaving a defendant at a distinct disadvantage.

(5) Contact any personally-named individual defendant employees, ask them to watch for service of the complaint or verify their service date, and consider, alongside your attorney, whether joint representation is an option or whether the individual defendant will need their own attorney. Remember, these are your employees, and they may be unsettled at the prospect of being accused of discrimination. Take the time to hear and address their concerns. Connect them with counsel where appropriate.

(6) Start collecting relevant documents and information. Personnel and medical files, pay and time records, relevant witness lists, and investigation files are a great start to building a defense. Your attorney is going to ask you for this anyway, so get ahead of the game and collect it ahead of time.

If you've been sued for employment discrimination in the last few weeks, it is now time to get your ducks in a row. Time is of the essence early in a case. The steps you take shortly after a case is filed against you and served go a long way toward a robust and aggressive defense.

Contact your Vorys attorney for an early litigation checklist you can use to help prepare your defense.