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Monitored Injunctive Relief:

7 Key Elements for Effective, Long-Term Results



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Negotiating monitored injunctive relief is a worthwhile endeavor for all parties.

Aside from a financial settlement, what plaintiffs want is to change the underlying conditions which led to the lawsuit. Defendants want to move beyond the litigation and reduce their liability in a cost-effective manner that doesn't interfere with their ability to run their business.

Ideally, both plaintiffs and defendants also are interested in seeing a positive outcome with lasting results from what has often been a long, challenging legal process.

This white paper addresses the seven key elements that will ensure these outcomes and more.

Monitored Injunctive Relief: The Basics

Monitored Injunctive relief, as part of a consent decree or settlement, is often agreed to as a way to build the capacity for long-term compliance and understanding. It also is intended to ensure the litigation has a more lasting, meaningful impact than it would if the defendant merely wrote a check to compensate the plaintiff.

Neutral third-party monitoring of injunctive relief, which involves the hiring of an independent firm or individual, paid for by the defendant, will ensure that all terms of the consent decree are carried out as they were intended. By agreeing to have consent decrees monitored by an independent third party, plaintiffs and defendants can be sure that both the letter and spirit of the law and the terms of the particular settlement will be followed.

Most importantly, perhaps, for both parties, is that monitored injunctive relief helps to prevent future situations that may lead to further litigation.

Third-party monitoring of injunctive relief may include:

- Policy review and development
- Matched pair discrimination testing
- Compliance-based mystery shopping
- Training development and delivery
- Complaint intake and investigation
- Claims administration
- Program implementation for special initiatives tailored to violations
- Document retention and review
- Reporting and compliance analysis

Monitored injunctive relief creates an environment for structured and cultural change within a company, as required actions create the opportunity to change a defendant's practices, and the length of time involved creates the opportunity for corporate buy in.

Without neutral monitored injunctive relief, there is:

- No independent assurance of change in policies or practices
- No independent assurance employees will be trained properly
- No independent assurance management will prioritize the issues that led to the litigation
- No independent assurance of protection from retaliation

Ultimately, monitored injunctive relief minimizes a corporation's future liability and maximizes its opportunity for long-term success.

Here are the seven key elements that help lead to positive outcomes in monitored injunctive relief.

1. Draft an Effective & Meaningful Monitoring Agreement

Both parties should consider the following when negotiating a monitored injunctive relief agreement.

- Be creative; the most unique and comprehensive remedies make real change happen.
- Select monitors jointly. Defendants should not choose monitors "subject to plaintiff's approval" but rather, both parties should be very involved in the selection process.
- Define the monitor's responsibility and authority clearly.
- Establish coherent timelines.
- Decide on how monitor removal will be handled if it becomes necessary.
- Term of the Injunctive Relief/Order. Consider the very persuasive compliance incentive of early dismissal or extension, depending on effort/results.

2. Select the Right Monitor

Once the settlement has been negotiated, it's time to choose a qualified, appropriate monitor. Things to consider include:

- ***Prior monitoring experience***

Make sure that a monitor has relevant experience with injunctive relief and that they demonstrate an in-depth understanding of the process. The best monitors will have experience with private legal firms as well as with government entities like the Equal Employment Opportunity Commission, Attorney General Offices, or the Department of Justice.

- ***Reputation for independence/neutrality***

A third-party monitor should be completely neutral, with no close relationships with either the plaintiff or the defendant. Specifically the monitor should not have served an expert witness—as neutrality should always be their main goal. It is important to speak with references for any prospective monitor.

- ***Availability/Time***

Depending on the responsibilities, monitoring injunctive relief can be a full-time commitment, not something an attorney can do on the side successfully. Make sure the firm you consider has the staff and infrastructure to serve the role.

- ***Cost***

Cost should be openly discussed and clarified. Third-party monitors should be compensated fairly but not excessively. With excessive compensation the monitor-defendant relationship could be altered or tainted, with the monitor becoming beholden to “their client.”

Red Flags!

Signs of Ineffective Monitoring

- Missed deadlines
- Late reports (or none at all)
- Office located at the defendant's headquarters
- Advocating for the defendant repeatedly
- Excessive compensation
- “Cozy” relationship with defendants

3. Include a Review/Revision of Relevant Policies

Whatever issue led to the initial litigation should be addressed specifically in the monitored injunctive relief agreement via a review and/or revision of relevant company policies. These policies may include:

- Non-Discrimination
- Harassment
- Retaliation
- Complaint Process
- EEO/Diversity Policies

- Investigations
- Discipline
- Compensation
- Attendance
- Job selection and promotions
- Performance appraisals and annual reviews
- ADA - Interactive Process/Reasonable Accommodation

Independent monitoring will help ensure that:

- All policies are developed, rewritten, etc. in consultation with all parties.
- Policies are written in a way that is clear and easy to understand.
- Policies are translated effectively for a multi-lingual workforce.
- Consequences for policy violations are clear.
- Management accountability for adhering to and enforcing policies is highlighted.
- New or revised policies include a receipt verification and are added to the document retention list.

4. Develop a Customized Training Program

Training initiatives should be focused on the law, new policies, and how these apply to the specific workplace and job responsibilities. An effective training program should be part of every settlement agreement.

It is important to utilize an approach that offers the best opportunity for true cultural change and long term usage within an organization. This can be done by making sure that content is customized to the intended audience so it is relevant, engaging and interesting.

This may include:

- ***Separate sessions for managers and non-managers***
 - Non-management employees are more comfortable to share in discussion when their supervisors are not present.
 - Management training should be more detailed in certain areas, e.g. how to conduct investigations, management accountability.

Red Flags!

Signs of Ineffective Training

Bad training is ineffective at best; at worst, it can increase liability. Watch for these signs:

- Inappropriate topics
- Inappropriate examples or exercises
- Inappropriate location
- Poor delivery or quality of training due to inexperienced trainers

- ***Job specific scenarios/exercises***
Keep trainings relevant and realistic by using practical, job-related scenarios and exercises that each audience can relate to.
- ***Multilingual trainings***
Employees will engage more and retain more from trainings when they're comfortable with the language in which they are delivered.

The best trainings will not be cookie-cutter, off-the-shelf programs but rather customized solutions that involve gaining an understanding of the organization's specific needs and then developing a relevant, effective approach. Training styles should be adapted to each audience's needs and may include train-the-trainer, live/video, and quick-start PowerPoint.

5. Create a Process for Receiving and Investigating Complaints

The independent monitor can either

- Handle the entire intake and investigation process or
- Supervise internal investigations.

Another more progressive process is for the monitor to initially handle complaints and investigations and then to gradually transition this responsibility to the company with continued independent oversight for a period of time.

Some things to consider for a complaint process include:

- Setting up a complaint hotline for intake
 - Consider multilingual access
- Establishing multiple avenues for employees to file complaints
- Ensuring the complaint process is not burdensome
- Providing unfettered access to complainants and all related individuals to conduct investigation
- Requiring reporting on complaint investigations, including number of complaints, status, outcomes

Red Flags! Signs of Ineffective Complaint Processing & Investigations

- Backlog of complaints
- Incomplete or incoherent investigations
- Repeated identical outcomes that favor the defendant
- Complete lack of complaints

6. Consider Testing/Mystery Shopping

Creative use of the investigative concept of undercover testing can quickly assess compliance and deliver results that can quickly facilitate changes in employee behavior.

Testing can be effective in:

- Public Accommodations – How are customers really being treated?
- Fair Housing – Is there fair and equal access to available housing?
- Employment – Is the hiring process the same for all?
- Complaint hotline - Is it operational?

For organizations large or small, testing can reveal what's really happening and if there is a problem- there is no other communication tool to upper management that's as effective.

7. Create a System for Reporting

Initial reports (usually within a 60-to-120-day window) to verify relevant policy revisions and training development and general programmatic implementation should be part of the monitored injunctive relief process. After that, a best practice is for semi-annual or annual reports to be delivered that involve relevant documents and compliance assessment evaluations by the monitor.

Relevant Documents

A monitor will ensure that policies are established and followed regarding the retention, preservation and destruction of all relevant documents.

Documents that may be relevant can include:

- Employment Applications
- Advertising
- Recruitment records and documents
- Performance reviews
- Attendance and payroll records
- Complaint/Investigation records
- Demographics
- Training Materials and attendance sign in forms
- Hiring/Promotion reports that include demographics of new hires and promoted individuals
- Pay analysis
- Recruiting efforts

Compliance Assessment

An independent monitor will report their findings with regard to the defendants' compliance providing detailed information and facts in a timely and consistent manner.

With these seven key elements for monitored injunctive relief, both plaintiffs and defendants can help to ensure that the litigation they endured was not in vain and that long-term, positive results will be achieved from it.

About Progressive Management Resources

Progressive Management Resources, Inc. (PMR) is a certified woman-owned management consulting firm, located in Pasadena, California with over 10 years of unparalleled experience assisting organizations with compliance concerns. Our firm's two principals, Heidi Olguin and Mona Hathout, began their work in the early nineties in the field of civil rights legal compliance with a special focus on civil rights monitoring through the use of discrimination testing, training, policy development and assessment.

Approach

Our philosophy is to offer practical plans, programs and support that help companies and organizations achieve compliance with legal mandates. We specialize in providing innovative services that can reduce exposure to liability, improve quality and positively impact the bottom line.

Our work has spanned across a broad spectrum of consumer and employee related issues, including: employment issues, consumer fraud, fair housing, insurance, lending, and public accommodations. We have assisted organizations both large and small assess and achieve the compliance and quality assurance goals, whether as a proactive independent effort, injunctive relief, or settlement agreement.

Experience

PMR has unrivaled experience in the implementation of post-litigation remedies. Specifically, we can provide highly effective and at the same time, economical, injunctive relief related services in employment, fair housing, and public accommodations, including monitoring, policy and procedure development, large scale training or testing programs and general compliance assessment.

Over the years, we have had the opportunity to design policies and training programs for more than 50,000 management and non-management employees. Additionally, we have unmatched experience in conducting matched pair testing in a wide range of formats in the areas of public accommodations, sales and rental housing, homeowner's insurance, mortgage lending and franchise investment.

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