



Episode 46: “What to Know About the CT Commission on Human Rights and Opportunities, Part 2,” With Dan Elliott

Speakers: Ari Kwiatkowski and Dan Elliott, Barclay Damon

[Ari Kwiatkowski]: Hi, everyone, this is a *Barclay Damon Live* broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[Ari]: Hi, guys. Welcome to what to know about the Connecticut CHRO with Dan Elliott, part two. I am thrilled to welcome Dan back this week as we continue our discussion on how to respond to complaints filed with the CHRO, Dan, welcome back.

[Dan]: Ari, how are you?

[Ari]: I’m good. I’m great. Thanks so much again for joining us.

[Dan]: Of course. My pleasure.

[Ari]: Great. So, Dan, let’s kind of hop into it. Just to remind our listeners, last week our episode left off and we basically had gone through kind of like the preliminary stages. And this week we are chugging along in our hypothetical or in the process in what actually happens when a complaint was filed with the CHRO. So, Dan, let’s assume that the employer has submitted its position statement, any supporting documentation, what is the next step in the process for the CHRO?

[Dan]: So the next step in the process after the employer submits its responding papers is the case assessment review, which we discussed a little bit last time. And if the case is retained at the case assessment review, then the next step in the process would be mandatory mediation. Mediation is mandated by statute here in Connecticut. Now, last time we discussed pre-answer conciliation a little bit. If a pre-answer reconciliation had been conducted earlier in the case, then the commission doesn’t have to do a mandatory mediation. But they could if they wish. So it’s a mediation, just like any other mediation would be; it’s presided over by a CHRO investigator who will be a mediator rather than an investigator in this instance. If the case settles, great. If it does not, then we proceed on to the next step in the investigatory process.

[Ari]: And I think you’re a little clairvoyant, Dan, because my next question was going to be anticipating that you would discuss mediation and kind of the points that you just hit on. Let’s assume the parties were not able to work something out, like you said, and mediation has failed. It has not settled at this stage. Can you tell our listeners a little bit about the next step in the process?

[Dan]: Sure. So the first thing I should mention is something called “early legal intervention.” Now, if the case is not resolved in mandatory mediation, then either of the parties or the CHRO itself has the ability by statute to request what’s called early legal intervention. And essentially what that is, that’s a request for a commission legal counsel to take a look at the case and to decide whether, and in what form, the case should proceed. In other words, should it go to a public hearing? Should it code with fact-finding investigation? Or should the complainant receive a release of jurisdiction? So that is one option to keep in mind. Early legal intervention.

[Ari]: Okay. Glad you brought that up then, because I think that's kind of a little bit unique to Connecticut that type of relief, I'll say, for lack of a better word.

[Dan]: It's an extra layer of review.

[Ari]: Yes. So I'm glad you touched on that. Dan, one of the things that we get questions on, at least in New York and I think Connecticut has basically an analog or a counterpart is the fact-finding conference. Can you talk a little bit about that, and what it is, and how it relates to kind of the steps that we've just been discussing?

[Dan]: Sure. So once we go to the phase of the investigation, the fact-finding conference tends to be the main feature of the investigatory process. An investigator will be appointed by the CHRO executive director and that investigator has a number of statutory powers in terms of investigating the complaint. They can conduct witness interviews, they can conduct a site visit if they so wish. They have subpoena power, and they can conduct what's called the fact-finding conference and what that is. It's presided over by the investigator. It is recorded. And the investigator will typically conduct an interview with the complainant, with the employer, and with any other witnesses that may be relevant to the claim.

[Ari]: So I want to just touch on a couple of things about the fact-finding conference, Dan, because, you know, our listeners are who have listened to the podcast or who have employees in both Connecticut and New York have heard us talk about this. And I know you said that it's recorded, which I think is pretty specific to Connecticut, because in New York, typically the fact-finding conference is not recorded. But in terms of, you know, just the process or logistics in Connecticut right now, is that mostly occurring remotely? Is it in person? Is it a hybrid or what's going on with the CHRO in that respect?

[Dan]: It's mostly remote these days, ever since the pandemic started and it's up to the discretion of the commission sometimes we see it done by video conference, by Microsoft Teams, sometimes it's conducted by telephonic conference as well. But mostly remote.

[Ari]: Though I know you mentioned a few minutes ago, Dan, the investigator having the power to conduct interviews, to contact the parties. You know, one of the questions that we get a lot in the context of New York when these things come up, is this issue of contacting current and former employees. Because obviously, if you're an employer in Connecticut and you've been named an age discrimination complaint and you know that, you know, the complaint is going to be investigated, I think that's a concern. And in New York, there's, you know, some limits on who you can contact if there are higher ups in a company and things like that. So can you educate our listeners a little bit about those issues as it relates to witness issues?

[Dan]: Yeah, sure. So when a fact-finding conference is scheduled, typically the investigator will make a request of the employer as to what witnesses it is requesting that the employer produce. So in the first instance, you know, that request will typically go to the employer. If there are other former employees or persons who are not technically within the control of the employer, the investigator does have the power to seek their testimony or their cooperation. And typically the employer will be notified that these folks are being sought out.

[Ari]: Okay. Got it. So that's a little bit different from New York because those of us who practice in New York, you know, basically the Division of Human Rights asks for contact information and then it's kind of like wait and see. And, you know, the employer will sometimes find out through the former employee they've been contacted or, you know, the employer doesn't necessarily get a heads up. So it sounds like it's a little bit different in Connecticut and maybe a little bit easier to keep track of if you're the employer.

[Dan]: It is.

[Ari]: Great. So other than what we talked about, Dan, is there any anything else in the investigatory process that we missed? I think you gave a good high-level overview, but I just wanted to double-check because you're educating me.

[Dan]: So I should mention the standard during the investigatory process. The standard is that the investigator is going to be looking at the case to determine whether or not there's probable cause to believe that discrimination occurred, discrimination or retaliation. And that will be the investigator's determination, either "no cause" or "cause" if there's a finding of no cause, no probable cause, then the complainant will have by statute, an ability to seek reconsideration of that decision. And the time period to seek reconsideration is 15 days after that. After complainant receives the decision.

[Ari]: Tight turnaround.

[Dan]: It's a pretty tight turnaround and the agency, excuse me, the commission will have 90 days to determine whether or not it is going to reconsider its decision. If no motion for reconsideration or request for reconsideration is filed, and if no ROJ or if there's no release, if there's no request for a release of jurisdiction prior to the finding of no cause, then the Commission's determination becomes final.

[Ari]: Got it. So I definitely want to talk about the outcomes a little bit in more detail, Dan, but one of the things I wanted to ask, because I think it's a question I know we get a ton in New York and I'm sure you get in Connecticut. How long does this investigatory process typically take? A loaded question.

[Dan]: It varies. It varies. By statute the decision of either reasonable cause or no reasonable cause must be issued within 190 days from the day of the case assessment review decision. So that determination is linked back to one of the preliminary steps in the process. Now, the investigator may of that seek extensions of time, for good cause shown and the investigator by statute is permitted to seek two extensions, and each extension could be for a period of three months. So long story short, it varies, but there are some parameters in the statute.

[Ari]: Understood. That make sense. So I know that, you know, we talked about a "no reasonable cause" determination. Can you educate our listeners a little bit about on all the possible outcomes of the investigation?

[Dan]: Right. So there's going to be that determination of whether there's cause or no cause. We just discussed what happens in the event of a determination of no cause. If there is a cause determination, then the next step in the process would be for the investigator to attempt to conciliate and to remove the discriminatory practice. And the investigator will have 50 days to do that. Now, if those efforts fail, then the next step in the process would be certification of the claim for a public hearing.

[Ari]: Got it. So I know you talked a little bit, Dan, about the complainant or the complaining party's ability to appeal. Does... if there is a reasonable cause or a cause determination, is that same ability available to the employer?

[Dan]: No. So at least not at that stage. The next step in the process would be conciliation and then certification for a public hearing. Now, the results of the public hearing certainly may be appealed.

[Ari]: Understood. So I think that it would be helpful to just give our listeners—I know we could probably have several episodes just on the hearing or public hearing or, you know, what, what we just referenced. But I think that for a lot of employers, parties involved in these things, that piece of it can be understandably daunting. So I'm wondering if you can just give our listeners just a little bit of an overview of the process, assuming that's conciliation, which basically is another form of mediation at this stage of the case, for lack of a better word, fails. Can you kind of just explain the public hearing and what it entails?

[Dan]: Yeah. So it's a contested proceeding. It's presided over by a human rights referee. And it is in many ways like a trial. It's conducted pursuant to the Administrative Procedures Act. So think of it as a trial, just not in court.

[Ari]: Right. And so, you know, I guess what important thing for our listeners to consider when you're kind of in the face of the case where you are at conciliation and maybe heading to a hearing is I guess the long and short of it is preparing for that hearing, attending that hearing. That's going to be a somewhat arduous process, but it's also going to cost a lot of money.

[Dan]: Absolutely. Absolutely.

[Ari]: Because it's basically a mini trial and it involves witnesses; preparing witnesses and everything that you would expect that you see on "Law and Order."

[Dan]: That's absolutely right. For some of it.

[Ari]: Yes. Well, hopefully just some of it, not SVU, the original "Law and Order." So, Dan, I really appreciate it. I think this has been a great overview of kind of the investigation process and the possible outcomes of the investigation. Before we sign off, I'm wondering if you can just share with our listeners what you think is the most important thing for employers to keep in mind during this process before the CHRO?

[Dan]: Sure. So, you know, the preparation is key. Your fact investigation is key. Have all your evidence ready. Have all your witnesses ready to tell your side of the story. And I would again, caution everyone, particularly for folks outside of Connecticut, in-house counsel, attorneys who are not admitted in Connecticut.

[Ari]: Right.

[Dan]: You need a Connecticut attorney.

[Ari]: Yes.

[Dan]: For this procedure. So if you're outside of Connecticut, don't try to go it alone. Contact your friendly Connecticut attorney.

[Ari]: Yes. Very sage advice, I think, Dan. Well, Dan, thank you so much. I really appreciate it. If you're listening and you have employees in Connecticut, this is a do not miss episode or series of episodes. Since we did two parts with Dan. And definitely tune in next week. We will have our last episode before the holiday break, the last episode of 2022. And we will talk about the DOL independent contractor issues. You definitely don't want to miss it. See you then.

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