Avoiding Employment Claims

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AGENDA

• Review of federal employment laws
• What to expect if a legal claim is made
• Strategies to avoid legal claims
• Questions

The Equal Employment Opportunity Commission
The “EEOC”

• Federal agency responsible for enforcing federal employment laws.
• Commissioners appointed by the President, confirmed by the Senate.
• Headquartered in Washington, D.C., with 53 district or field offices throughout the United States.
  – Alabama: Birmingham and Mobile
THE EEOC

- Investigates charges of discrimination and harassment.
- Determines whether there is reasonable cause to believe discrimination occurred.
- Attempts to settle employment discrimination charges.
- Files employment discrimination lawsuits.
- Issues regulations.

Laws Enforced by the EEOC

- Title VII of the Civil Rights Act of 1964, as amended ("Title VII") - prohibits discrimination against and harassment of employees and applicants on the basis of:
  - Race
  - Color
  - Sex (including pregnancy)
  - National Origin
  - Religion
  - Title VII also prohibits retaliation against employees for:
    - Complaining of discrimination or harassment
    - Filing a discrimination or harassment charge
    - Assisting or participating in a discrimination investigation.

- Age Discrimination in Employment Act ("ADEA")
  - Prohibits employment discrimination against and harassment of people age 40 years and older. Also prohibits retaliation for protected activity.

- Americans with Disabilities Act ("ADA")
  - Prohibits discrimination on the basis of disability against qualified individuals. Also prohibits harassment and retaliation for protected activity. 2008 Amendments ("ADAAA") expanded definition of disability, among other things.
Laws Enforced by EEOC

- Equal Pay Act ("EPA")
  - Prohibits paying different wages to employees of different sexes who perform substantially equal work under similar conditions.
- Genetic Information Nondiscrimination Act of 2008 ("GINA")
  - Prohibits employment discrimination based on genetic information and retaliation related to genetic discrimination.

Prohibited Employment Practices

Discrimination on protected bases is prohibited in every aspect of employment, including:

- Job advertisements
- Recruitment
- Application and hiring
- Training
- Job assignments and promotions
- Pay and benefits
- Working conditions
- Discipline and discharge

Prohibited Employment Practices

HARASSMENT

Two types:
1. Quid Pro Quo: Employment terms, conditions, or benefits are conditioned on victim's submission to unwelcome sexual advances made by supervisor.
2. Hostile Work Environment: Workplace sufficiently permeated with severe and pervasive insult, intimidation, and/or ridicule based on a person's race, national origin, sex, religion, age, or disability that a reasonable person would find it hostile or abusive.
Also, illegal to harass someone because they complained about discrimination, filed a charge, or participated in an employment discrimination investigation or lawsuit.
Hostile Work Environment

Forms:
- Vulgar comments
- Stories or jokes
- Slurs
- Graffiti
- Offensive documents or postings (emails)
- Leering
- Inappropriate verbal or physical contact

Can be created or contributed to by managers, co-workers and/or customers or vendors.

Avoiding Liability:
- If offensive conduct by a supervisor, Employer must prove that it exercised reasonable care to prevent and then promptly corrected the harassing behavior, and Victim must have unreasonably failed to take advantage of the corrective measures provided by the employer.
- If offensive conduct by a co-worker, Employee must prove that the employer knew or had reason to know about the behavior but failed to take proper corrective action.

THE EEOC Administrative Process: How it Works and What to Expect
- Charge filed by aggrieved applicant, employee or former employee ("Charging Party") within 180 calendar days from date of alleged harm.
- Notice of charge to employer.
- Consider early resolution of the dispute.
The EEOC Administrative Process: How it Works and What to Expect

Employer’s response

Internal:
• Review the charge and any request for documents
• Determine scope of investigation
• No retaliation
• Litigation hold
• Investigate/Review of documents
• Prepare Position Statement and supporting documents

To EEOC:
• Timely submit Position Statement
• Provide documents in response to Request for Information

Position Statements and Document Requests

Documents typically provided to and/or requested by the EEOC:
• Charging Party’s personnel file
• Charging Party’s job description
• Internal complaint files
• Personnel file of the accused and other witnesses
• Personnel file of similarly situated employees
• Comparative data
• Employer policies

Position statements typically include:
• Background information about employer and its operations
• Charging Party’s employment history
• Response to each charge allegation
• Explanation of the legitimate, non-discriminatory and non-retaliatory reasons for actions taken against Charging Party and any other defenses
• Use of comparative data
<table>
<thead>
<tr>
<th>Type of Claim: Discrimination based on:</th>
<th>Charging Party Must Establish:</th>
<th>Possible Defenses:</th>
<th>Relevant Documents:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Race</td>
<td>Charging party is a member of a protected class.</td>
<td>Demonstrate that charging party cannot establish required elements of his claim. For example, he did not suffer an adverse employment action.</td>
<td>Charging party's personnel file.</td>
</tr>
<tr>
<td>Color</td>
<td>He experienced an adverse employment action.</td>
<td>Dispute any of charging party's factual allegations.</td>
<td>Charging party's job description.</td>
</tr>
<tr>
<td>Sex</td>
<td>He was treated differently than similarly situated individuals in the protected class under similar circumstances.</td>
<td>Establish a legitimate, nondiscriminatory business reason for the adverse employment action.</td>
<td>Personnel files of similarly situated employees.</td>
</tr>
<tr>
<td>National Origin</td>
<td></td>
<td></td>
<td>Job descriptions of similarly situated employees.</td>
</tr>
<tr>
<td>Pregnancy</td>
<td></td>
<td></td>
<td>All documents regarding the adverse employment action.</td>
</tr>
</tbody>
</table>

The EEOC Administrative Process: How it Works and What to Expect

- Request for Additional Information
  - Additional documents
  - Fact finding conference
  - On-site interviews
- Agency Determination
  - Dismissal and Notice of Rights (a/k/a “Right-to-Sue” letter)
  - Letter of Determination
  - Conciliation
  - EEOC brings lawsuit or issues Notice of Right to Sue to Charging Party
The EEOC Administrative Process: How it Works and What to Expect

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EEOC Files Suit
Separate Compliance Issues

Other Federal Laws With Significant Litigation Risk

Within jurisdiction of Department of Labor ("DOL"), Wage and Hour Division:

1. Fair Labor Standards Act ("FLSA")
2. Family and Medical Leave Act ("FMLA")

Unlike Title VII, no exhaustion of administrative remedies requirement. But employees may file complaints with DOL, with investigation process to follow.

FLSA Basics

• Minimum wage
• Overtime unless exempt
• 1.5 times regular rate for 40+ hours
  (NOT OKAY TO "COMP" TIME WHERE EMPLOYEE GETS 1 HOUR OFF FOR WORKING ONE HOUR OVERTIME)
• Restriction of minors’ jobs/hours
• Strict analysis of exempt vs. non-exempt
• Strict recordkeeping of hours worked and wages paid to non-exempt employees
**FLSA Basics**

- Reasonable break time for nursing mothers to express milk.
- Employers must provide a place, other than a bathroom, that is shielded from view and free from intrusion.

**FMLA Basics**

- Up to 12 weeks of unpaid leave in a 12-month period to eligible employees for the serious health condition of the employee or a family member, for birth or adoption of child, or because a child, spouse, or parent of the employee has been called to active military duty.
- Up to 26 weeks of unpaid leave during 12-month period to care for spouse, child, or parent who is an injured member of the military.

**FMLA Basics**

- Employer responsibilities:
  - Inform employees of FMLA rights
  - Grant intermittent leave when requested
  - Restore employee returning from leave to same or substantially equivalent position held before leave
  - Don’t retaliate against employee for taking leave
Best Practices and Strategies to Avoid Legal Claims

**Top ADA Tips**
- Job descriptions should clearly identify essential job functions, including physical requirements.
- Pre-offer: No medical exams and no inquiries regarding disability, perceived disability, worker’s compensation history, absence related to illness or prior drug/alcohol use.
- Engage in interactive process to determine the needs of an employee who requests an accommodation.
- Prohibit and enforce policies against harassment.
- Keep employee medical information in separate, confidential file, apart from regular employee personnel file.
- Consult HRL.

**Top ADEA Tips**
- Do not ask applicant’s age at any point during application process.
- Prohibit all age-related comments from the workplace pursuant to anti-harassment policy.
- Base any adverse employment actions on factors other than age (or other protected characteristics).
- Apply performance standards, policies and procedures, and access to benefits uniformly without regard to age.
- Document poor performance and disciplinary measures taken against employees.

**Top Title VII Tips**
- Apply employment policies consistently to all employees and applicants. Don’t play favorites.
- Provide regular harassment training.
- Document all disciplinary action taken against employees.
- Do not provide inflated ratings in performance reviews.
- Take all complaints of discrimination and harassment seriously.
- Do not provide an employee with contradictory reasons for an adverse employment action.
Best Practices and Strategies to Avoid Legal Claims

Top Anti-Harassment Tips

• Consistently enforce TSA's anti-harassment policy.
• Provide anti-harassment training for all managerial employees.
• Ensure employees are aware of complaint procedure and multiple avenues by which victims can complain.
• Promptly and thoroughly investigate all claims of harassment.
• If harassment is proven, take steps to prevent further harassment, including disciplinary action against perpetrator.
• Refrain from taking adverse action against person complaining of harassment.

Best Practices and Strategies to Avoid Legal Claims

Retaliation Prevention

• Enforce policies consistently.
• Beware of suspicious timing.
• Investigate, investigate, investigate.
• Review entire employee history before acting.
• Consult HR/Legal.
• Before you act, ask: Would you take the same action against your best or favorite employee who did the same thing?
• Take action if appropriate.

Rule: Always treat an employee the same as though they never complained.

Best Practices and Strategies to Avoid Legal Claims

Top FMLA Tips

• Post required FMLA poster.
• Follow handbook policies and procedures.
• Provide written documentation addressing leave obligations and consequences for failing to satisfy those obligations.
• Provide employees with the medical certification required for leave and, if necessary, the certification required to return to work following leave.
• No retaliation for taking leave.
• Consult HR.
Best Practices and Strategies to Avoid Legal Claims

Top FLSA Tips

1. Train managers and employees on time-keeping.
2. Complaint system: investigate promptly and thoroughly.
3. Audit classifications and records.
4. Address any discrepancies immediately.
5. Consider remote device policy.
   • Limit during non-work hours, vacations, and leaves of absence
   • Limit to exempt employees or at express manager direction
   • Regular acknowledgements that recorded all time worked

Lilly Ledbetter Fair Pay Act of 2009

Amended Title VII, ADEA, and ADA to clarify that a discriminatory compensation decision or other practice that is unlawful under those Acts occurs each time compensation is paid.

Lilly Ledbetter Fair Pay Act of 2009

Implications for Employers

• Broadens statute of limitations for challenging pay as discriminatory
• Easier for employees to bring and litigate formerly stale discrimination claims
• Potentially exposes employers to liability for alleged discriminatory acts occurring years, or even decades, prior
• Practical problems of defending relatively ancient decision-making:
  • Decisionmakers move, retire, die
  • Lost or purged records
Compensation/Fair Pay Act Tips
- Follow Company's compensation policy and procedures
- Maintain accurate and current job descriptions
- Document, document, document compensation decisions
- Do not destroy records

Best Practices for Imposing Employee Discipline
- Adhere to the company’s written rules.
- Understand the context.
- Be consistent.
- Be prompt.
- Do not retaliate.
- Be specific.
- Be honest.
- Be discrete.
- Be fair.
- Document the disciplinary process.
- Allow employees to respond to critiques.
- Conduct a face-to-face disciplinary meeting.
- Conduct a follow-up meeting.

Best Practices for Delivering the Termination Message
- Time the decision to allow for privacy.
- Prepare for and rehearse delivery of the message.
- Have a witness.
- Be direct.
- Avoid arguments.
- Be prepared for a negative response.
- Do not interject personal statements.
- Outline the status of available employee benefits.
- Be sensitive.
Best Practices

Email Communications

- Email messages show up routinely in employment and other types of litigation.
- Treat with same care as any other form of communication.
- Assume email is a permanent record that will be discoverable in the event of an EEOC charge or lawsuit.

Do's:

- Do use email to communicate business information, instructions, and expectations
- Do use email to communicate factual information to others about employee conduct or performance that is not subject to interpretation
- Do prepare, proofread, and spell check as you would any other professional correspondence, and as if a judge or jury may read it

Don'ts:

- Do not use email to communicate your personal feelings about employees.
- Do not use email to discuss personnel actions taken or contemplated.
- Do not use email to communicate information about an employee complaint or the investigation of an employee complaint.
- Do not use email to discuss an employee’s physical or mental condition.
Best Practices

Email Communications

Don’ts continued:

• Do not use email to discuss an employee’s status in a protected group.
• Do not use email to communicate racist, sexist, religious, ethnic, or age-related jokes.
• Do not use email to communicate opinions regarding the company’s legal liability.

Final Words

Commit to following Company policies,
Apply them consistently,
Treat all with dignity, decency, and respect,
Seek advice when needed.

QUESTIONS?