

# Workplace Discrimination Claims Can Be Avoided

By Nicholas Fortuna, Managing Partner, Allyn & Fortuna LLP

The U.S. Supreme Court is taking every opportunity to limit employers' exposure to class-action suits brought by employees and former employees, while the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board are moving fast in the other direction by expanding employer obligations.

During President Barack Obama's first term in office, Congress passed a number of employment laws broadening employers' responsibilities, including the Lilly Ledbetter Fair Pay Act. Employers have been subject to an increasing number of discrimination claims in recent years. In 2007 the number of annual claims jumped sharply, beginning a trend that has continued. Since 2007, age discrimination claims (generally referred to as a charge) filed with the EEOC increased by 32 percent, and that is just one of the many types of claims for discrimination that may be made.

Generally, charges of discrimination filed with the EEOC have jumped between 9 percent and 32 percent among the various types of discrimination in recent years. To avoid future claims of discrimination and expensive litigation, employers must understand their statutory obligations and know the policies that can be implemented. Employers should have an employee handbook containing these policies and should train their managers and employees accordingly. These policies will also help employers establish a strong defense if a claim of discrimination is made.

Federal, state and local laws provide employees with protection against discrimination in the workplace. States such as New York, New Jersey and California provide broader protections than the federal

government, while some states provide no additional protection. States that do have laws against discrimination in the workplace mostly parallel federal law, except that they may be more protective in certain aspects. When developing preventive policies in the workplace, employers should start by considering the federal statutes that provide protection against discrimination. State law should then be considered to account for any differences in coverage. Together, these laws will help define the prevention policies implemented in the workplace. Employers must learn which statutes to consult and their requirements.

## Federal EEO Laws

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, sex, color, national origin or religion. It applies to all employers with 15 or more employees and forbids discrimination in

advertising, hiring, promotion, compensation, benefits and termination. Harassment, as well as retaliation for engaging in protected conduct, is prohibited under Title VII. The scope of Title VII was expanded with the enactment of the Pregnancy Discrimination Act, which prohibits discrimination based on pregnancy and its related conditions.

The federal Americans with Disabilities Act (ADA), which also applies to employers with 15 or more employees, as well as to state and local employers, makes it unlawful for employers to discriminate against qualified individuals with disabilities when making decisions regarding hiring, firing, advancement, compensation, job training, and other terms and conditions of employment. To be entitled to protection under the ADA, an applicant or employee must be able

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to perform the essential functions of the job in question, with or without reasonable accommodation. In such a case, the employer must take reasonable steps to accommodate the applicant or employee unless the measures required would constitute an undue hardship on the employer.

The Age Discrimination in Employment Act (ADEA), which applies to employers with 20 or more employees, makes it unlawful to discriminate based on age in making decisions regarding hiring, termination, compensation, or terms and conditions of employment for applicants and employees who are 40 or older. The exception is where age is a "bona fide occupational qualification."

The Equal Pay Act (EPA) requires that men and women be given equal pay for equal work in the same establishment, including for jobs that are different but that require substantially equal skill, effort and responsibility and that are performed under similar working conditions within the same establishment.

Finally, the Genetic Information Nondiscrimination Act (GINA) makes it illegal to discriminate against employees or applicants because of an individual's genetic information, including information about an individual's genetic tests or that of the individual's family members, as well as diseases, disorders or conditions.

An employee or former employee who wants to make a claim under Title VII, the EPA, the ADEA, the ADA or GINA must file a charge with the EEOC within 180 days from when the alleged unlawful employment practice occurred. If there is a parallel state statute or proceeding involved, the employee has 300 days to file.

Failure to file within the time limits provided bars the employee from making a claim. The EEOC may

handle the claim directly or give the employee a "right to sue" letter. If the employee receives a right to sue letter, he is permitted to pursue his claims privately in federal court.

**Handbook Policies**

Once an employer is familiar with its obligations under federal law and corresponding state statutes, it should design and implement policies to prevent situations from which claims could arise. The best place to start is by

creating an employee handbook, which can be an employer's best tool to prevent employment-related claims and litigation. Employers with strong measures in place to prevent and expeditiously address employees' complaints of discrimination, harassment or

retaliation are in a significantly better position to avoid the filing of charges with the EEOC or the equivalent state or local agency. Comprehensive anti-discrimination and anti-harassment policies also will significantly limit an employer's exposure to damages in the event of litigation.

The handbook should contain a statement of diversity declaring that the employer provides equal employment opportunities without regard to race, color, religion, gender, sexual orientation, gender identity, national origin, age, disability, genetic information or marital status in accordance with applicable federal, state and local laws. The statement should make it clear that the employer's equal employment opportunity policy applies to all terms and conditions of employment.

Employee handbooks should also notify employees that sexual and other forms of harassment constitute illegal conduct and violate the employer's policies. Make

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clear that the employer has a zero-tolerance policy for employee conduct that has the purpose or effect of creating an intimidating, hostile or offensive work environment; that unreasonably interferes with an individual's work performance; or that adversely affects an individual's employment opportunities. Clearly define the types of conduct the employer considers to be harassment, such as epithets, slurs or negative stereotyping; threatening, intimidating or hostile acts; disparaging jokes; and written or graphic material that disparages or shows hostility or aversion toward an individual or group because of race, color, religion, gender, sexual orientation, national origin, age, disability, marital status, citizenship, genetic information or any other characteristic protected by law. The employer should clarify that harassment includes negative actions that take place anywhere on the employer's premises or that are circulated in the workplace, on company time or using company equipment, via e-mail, phone, voice mail, text messages, tweets, blog posts, social networking sites or other means.

For sexual harassment specifically, the employer should clearly define prohibited conduct; examples include unwelcome verbal and physical sexual advances; commentary about an individual's body; leering, whistling or touching; insulting or obscene comments or gestures; displaying sexually suggestive objects or pictures; and other physical, verbal or visual conduct of a sexual nature.

Handbooks should make employees aware that all complaints about harassment will be taken seriously and investigated and that retaliation against an employee for filing a complaint is prohibited. They should establish a procedure for making complaints about harassment as well as explain how such a complaint will be handled and investigated, whether or not it will be kept confidential, and the type of disciplinary action the employer will take against an employee who violates the anti-harassment policy. Employers should go even further and encourage reporting of all perceived incidents of discrimination or harassment. Employers should also inform employees that false and malicious complaints of harassment,

discrimination or retaliation may be the subject of appropriate disciplinary action.

The handbook should include other policies that could give rise to claims, such as the employer's electronic communications, Internet use and social media policies; the workplace safety policy; the employer's disciplinary policy; the attendance and leave policies; job descriptions; and anything that may be particular to the specific employer's business. The handbook should also contain a disclaimer that it is not intended to create an employment contract.

Every employee should sign an acknowledgment form to indicate that he or she has received and read the handbook and agrees to adhere to its policies. Separate sign-offs should be obtained in connection with the employer's social media policy, Internet use policy and electronic communications policy. Every time the employer updates its policies, new acknowledgments should be obtained from every employee.

### **Training**

Aside from having a detailed and comprehensive employee handbook, employers must also adequately train managers and supervisors on the proper and uniform implementation of the handbook policies.

Management and supervisory employees should be trained on how to recognize the signs of discrimination, harassment, retaliation, bullying and potential violence in the workplace, and how to report and address such actions. Similar training should be extended to employees, either online or through workshops. It is critical for the employer to document all training provided, all complaints filed, its investigations of all complaints, the outcome of each investigation and any disciplinary action taken against an employee.

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