

# Preventing Employment Discrimination Claims

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Among the myriad consequences of the current state of the U.S. economy and high rate of unemployment is an increase in employment discrimination claims. Former employees whose careers have stalled or who face long-term unemployment or under-employment may be more concerned with extracting a payoff than with "burning bridges," losing referrals and ending business relationships. Applicants for employment may claim that they were not hired for discriminatory reasons. Employers on the wrong end of a discrimination lawsuit may be liable not only for reinstatement and back pay, but also for attorney's and expert's fees incurred by the employee bringing the lawsuit.

Employers know that defending a discrimination claim can be costly and time-consuming. Employers need to know the policies and procedures to implement to reduce potential discrimination in the workplace and to maximize the probability of a successful defense.

Part I of this article provides example policies and procedures to implement to prevent and defend against discrimination claims at each stage of the employment relationship: hiring, employment and discharge. Part II focuses on prevention and defense of sexual harassment claims. Part III focuses on prevention and defense of claims of age discrimination. Part IV focuses on requirements to provide reasonable accommodations to disabled employees and example

policies and procedures to address requests for reasonable accommodations.

## I Prevent Discrimination Claims Throughout the Employment Relationship

Most private employers are subject to anti-discrimination laws. Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans with Disabilities Act (the "ADA") apply to private employers with 15 or more employees. The Age Discrimination in Employment Act (the "ADEA") applies to private employers with 20 or more employees. State and local counterparts to these federal laws apply to smaller employers. In determining an employer's number of employees, in general, count all part-time employees, employees within an "integrated enterprise" of two or more employers whose operations are so sufficiently intertwined that, for these purposes, the employers are considered a single employer, and shareholders who, even if not "on the payroll," are active in the operation of the business and considered employees under applicable common law principles and precedent.

Under Title VII, an employer cannot discriminate against an employee or applicant because of that person's race, color, religion, sex (including pregnancy), or national origin, or retaliate because that person com-

plained about or filed a charge of discrimination or participated in an employment discrimination investigation or lawsuit. The ADA prohibits discrimination against qualified individuals with disabilities on the basis of their disabilities. The ADEA makes it unlawful to discriminate against persons age 40 or over with respect to the terms and conditions of their employment. The ADEA as amended by the Older Workers Benefit Protection Act ("OWBPA") prohibits employers from discriminating against older workers in the denial of benefits. State age discrimination laws may offer protection at a lower age (as low as the age of majority).

## Hiring Process Recommendations

Anti-discrimination laws apply to applications, interviews and other steps in the hiring process. Employers must therefore have management-level policies and procedures in place to avoid illegal discrimination against applicants. In general, an employer must not ask a candidate to identify his or her race, religion, marital status, age, disabilities, ethnicity, country of origin, gender or sexual preferences because each of these classes is protected under anti-discrimination laws. Suggested hiring procedures include the following:

- Ask the same questions of all candidates for a particular job category. Review application forms for questions about age, marital status, gender and other protected categories. Include with

the general application forms the specific consent forms for pre-employment credit checks, driving records, criminal and other background checks, drug tests and similar procedures. Because some states ban or are moving towards limiting or banning the use of these procedures under certain circumstances, there is a need to determine, in your specific jurisdiction, what reports may be obtained and how they may be used.

■ Script typical questions that may appear innocuous yet form the basis for a claim. For example, the following is a list of objectionable questions commonly asked by interviewers despite the fact that they have the potential to invite a discrimination lawsuit:

- Where are you from?
- Are you married?
- Do you own or rent your home?
- Do you have children?
- What are your daycare arrangements?
- What religion are you?
- Do you have elderly parents?
- What year did you graduate high school/college?
- Do you have any dangerous hobbies?
- How is your health?

■ Conversely, personal questions that are related to the job, or are essential to the applicant's ability to perform the job, may be asked, such as the applicant's:

- current address
- age (to determine that the applicant meets a minimum age requirement, e.g., for serving alcoholic beverages)

- citizenship (to determine that the applicant is either a U.S. citizen or authorized to work in the U.S.)
- fluency with a foreign language (if that is a job requirement)
- membership in relevant trade or professional organizations
- criminal record (convictions only; asking about mere arrests is not permitted)
- military experience, but only if and as it relates to job requirements

Some questions that are impermissible during the interview process may be acceptable to ask after the extension of a conditional job offer. For example, an employer must not make disability-related inquiries until after a conditional job offer has been made. Then, disability-related questions can be asked as long they are asked of all offerees for that job category.

Similarly, some questions that are impermissible during the interview process may be acceptable to ask after a person is hired, such as age and health-related questions for insurance purposes.

Some hiring processes involve physical testing procedures. When interviewing applicants for a physically-demanding job, such as in a warehouse or manufacturing facility, confirm that your testing and selection procedures do not violate anti-discrimination laws. Procedures violate anti-discrimination laws if they disproportionately exclude persons in a protected class unless the procedure can be justified. Administering a strength test may have a disparate impact on female applicants or individuals with disabilities. You need to show that the selection procedure evaluates skills needed for safe and efficient job performance and that there is no less discriminatory

alternative procedure. Determining whether there is a disparate impact may require statistical analysis.

The focus of a job interview should be on the applicant's qualifications for the job at hand. Although it may seem awkward to not engage in even some minimal personal conversation, such conversation could open the door to unlawful questions. An interviewer must therefore limit questions and testing procedures to the applicant's job experience, education, training and qualifications.

### **Employee Management Recommendations**

Most employers have an employee manual, given to all employees, that (in addition to scheduling, insurance, leave and other information and various disclaimers) includes statements, policies and procedures regarding the prevention and reporting of sexual harassment and other forms of illegal discriminations. Most employers post the various posters and other forms of notices to employees as required by law. Many employers do not, however, have more detailed management-level policies and procedures, for management eyes only, to specify how management should identify and address discriminatory conduct or report or resolve complaints of employment discrimination. Management responsibilities should include procedures to document all:

- job descriptions and job responsibilities. Specify whether regular attendance is an essential function. Update for changes in systems, technology, reporting lines and other operational matters. Review annually. At the time of hiring, and thereafter in the event of substantial changes to employment terms and conditions, attach or refer to the applicable job description when delivering an offer letter or notice of a promotion, demotion or other change.

- employee absences and the reasons for them. Retain every doctor's note or certification. Obtain a HIPPA release for all medical disclosures. Note absenteeism in performance evaluations but focus only on unexcused or unprotected absences that disrupted operations. Do not address absences for disability or pregnancy or other protected time off.
- enforcement of disciplinary measures. Strive to enforce disciplinary measures and other policies and procedures in a systematic, objective and consistent manner.
- complaints, and compliance with the employer's own policies and procedures for investigating and resolving complaints, of discrimination and harassment.
- employee performance evaluations. Have the employee acknowledge in writing receipt (but not necessarily agreement with all) of the written evaluation. These evaluations can be used to not only support promotion, demotion, compensation and other decisions, but also to develop defenses to sexual harassment claims, discussed in Part II of this article, or age discrimination claims, discuss in Part III of this article.
- requests for scheduling, ergonomic and other accommodations required under the ADA, which is discussed below in Part IV of this article.
- compliance with the employer's policies and procedures for addressing requests for accommodations under the ADA, including the complete interactive process between the employer and employee while considering or offering potential reasonable accommodations (e.g., transfer to different available position, change in hours, equipment, etc.).

In all cases, consider the precedential value of a decision or practice regarding a request for an accommodation, for example, whether the same would be implemented for all other similarly-situated employees.

### **Discharge Process Recommendations**

Employment terminations are often difficult. Some terminations can be planned well in advance while others may occur in rapid response to internal or external events. Terminations can also negatively impact the attitude and morale of remaining employees. Regardless of whether the employee is terminated for company-wide business reasons, such as cut-backs following a merger or economic downturn, or for individualized reasons, such as poor performance or violation of policy, employers must give critical importance to documentation of the events and actions leading up to and the reasons for termination and the control of disclosure of these matters.

### **Employee Exit Interviews: Planning and Documentation**

Documentation of the facts and circumstances, and the reasons for, the termination, should always be prepared, and exit interviews should always be conducted, but particular attention should be paid these steps when the employer anticipates a potential discrimination claim.

General exit interview tips include the following:

- In advance of the exit interview:
  - have a plan in place to prevent the employee from accessing computer systems and files and other company property immediately following the termination in order to prevent destruction or theft of company property and information. The employee should not be

permitted to use a company computer after termination.

- arrange for security, for during or after the meeting, if the employee has a history of violence or could react violently.
- prepare a memorandum of statements to communicate and statements to avoid.
- prepare all documentation to be delivered during the exit interview process.
- During the exit interview:
  - address administrative matters. Reduce the need for the former employee to return or contact the company for administrative matters.
  - Deliver forms, for the employee to sign, by which the employee acknowledges in writing: (a) the obligation to return company property and (b) receipt of (i) copies of relevant performance evaluations, (ii) information and forms regarding the continuation of group health insurance, and (iii) the requested form of release, if applicable. (Releases are discussed below.)
  - Deliver payment of all sums that are payable (e.g., a final payroll check and expense reimbursement check) but are not contingent on the employee's signature and delivery of the requested release or any terms thereof. (Thus, for employees from whom a release is not requested, deliver the final payment.)
  - Conduct the exit interview as privately as possible and at either the start or end of the workday. Keep the meeting brief. At least two representatives of management should

attend. Where practical, at least one representative of management should be a member of the same protected class as the employee (e.g., same sex, race, age if over 40, etc.). Inform the employee of the termination but not the specific reason(s) for the termination. Do not initiate or tolerate a discussion of specific incidents, events or circumstances that are a part of the basis for the termination. Provide only a general description of the reason(s) that is sufficient for the employee to complete an application for unemployment benefits, which can be accomplished by simply stating whether the termination is for misconduct (e.g., theft, violation of stated policy, etc.) or for other general reasons (e.g., poor performance, lack of skill, or layoff from lack of work or elimination of position).

- At the conclusion of the exit interview, have the employee retrieve his or her personal belongings and immediately leave the premises. At least one representative of management should physically escort the employee to and from the work area.
- After the conclusion of the exit interview, prepare a memorandum of the statements made to, and by, the employee.

### **Employee Release Forms and Severance Payments**

For any case where a discrimination or harassment claim appears likely, consider requesting that the employee sign a release form. The requirements for the release to be enforceable are numerous and complex. Counsel should be consulted to prepare the release form in compliance with the law.

At a minimum, the release should expressly state that the employee

is expressly releasing claims of discrimination under Title VII, and the ADA, ADEA and OWBPA, if applicable, and all other applicable federal, state and local laws regarding employment discrimination. Among the many requirements for an enforceable release is providing the employee with the statutory minimum periods for pre-signature review and post-signature revocation, which vary depending upon the particular claims being released. The release form itself must specify the review and revocation rights afforded to the employee by law.

Consideration must be given for the release. Payment of compensation otherwise earned does not constitute consideration for the release. Severance pay will only be deemed consideration for the release if and to the extent that the amount thereof exceeds that to which the employee is already entitled. Review and comply with severance payment policies and practices. Note that severance policies may be established by custom and practice and need not have been, or may not be limited by, a written policy distributed to the employees.

For employees from whom a release is obtained, at the earlier of the time

required by applicable law or the signed release, deliver the final paycheck, including payment for all unused paid time off, if applicable, all reimbursable expenses and severance.

Plant closings, substantial layoffs or relocations of operations are subject to federal and state employee-protection laws. Additional planning, and specific legal consultation, is recommended for these matters.

## **II Prevention and Defense of Sexual Harassment Claims**

Sexual harassment requires particular attention because employers need protection against actions of even low-level employees. This section discusses the essential characteristics of sexual harassment policies, the two main forms of sexual harassment and the requirements for a defense of these claims.

### **Sexual Harassment Policies**

To truly defeat a claim of sexual harassment, an employer must prevent it in the first place. First and foremost, the employer must have

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## **Joe Armstrong Successful Defense of Employer in Sexual Harassment and Discrimination Lawsuit**

Congratulations to Joe Armstrong, who this summer obtained a defense verdict in favor of our client, the employer, in a hotly-contested sexual harassment and discrimination lawsuit brought in the U.S. District Court for the Eastern District of Pennsylvania. The case was especially challenging because the employer replaced its prior counsel with EFM after the close of discovery.

Although the employer had no policy regarding sexual harassment, Joe was able to obtain the defense verdict by demonstrating through use of the employer's internal records that the employee was terminated for legitimate business reasons.

in place at all times well-developed, written anti-harassment policies and procedures inclusive of the following:

- a written zero-tolerance policy against sexual harassment with specific procedures for reporting complaints. These policies and procedures must be given to each employee upon hiring and distributed to all employees each time the documents are revised. Each recipient must be required to acknowledge in writing having received and read the most recent policies and procedures. (A general acknowledgment that the employee received an employment manual may not be sufficient.)
- easy access to management for complaints where the complaining employee is never required to report the incident to someone in the employee's direct reporting channel
- immediate and thorough investigations of all complaints
- stern disciplinary action, including termination, against employees who are shown to have engaged in sexual harassment
- mandatory sensitivity seminars where employees are trained how not to offend members of the opposite sex
- management-level procedures that include (i) maintaining the original handwritten notes from any interviews conducted during an investigation and (ii) obtaining legal counsel to prepare a privileged report should the situation appear likely to result in litigation. Management must be made aware that its internal memoranda and other investigation documentation is not afforded the attorney-client privilege unless it is prepared for and at the request or instruction of counsel.

To defend a hostile environment sexual harassment claim, the employer must show that: (1) it has in place an effective sexual harassment policy; (2) that policy includes a mechanism by which a complaining employee can bypass any supervisors who are: (a) involved in the harassment itself and/or (b) able to alter the terms and conditions of employment for the complaining employee; and (3) the complaining employee failed to mitigate damages that could have been avoided by utilizing the employer's policy.

### Forms of Sexual Harassment

The above suggestions are relevant in various degrees to the forms of sexual harassment. There are two main forms of sexual harassment. First, is sexual harassment in the form of a *quid pro quo* (Latin for "this in exchange for that"). Second, sexual harassment may also occur when an employee is forced to endure a "hostile working environment."

*Quid pro quo* sexual harassment occurs where submission to unwelcome sexual advances is made a condition of employment, or where an individual's submission to or rejection of such conduct is used as a basis for employment decisions affecting the individual. For example, an employee who refuses the sexual advances of a supervisor may be demoted or forced to handle all of the least desirable duties in the workplace. Another example would be the employee who has earned and been promised a raise in pay, but the raise is denied following the employee's rejection of unwanted sexual advances.

*Quid pro quo*, by its own nature, requires that the harassment comes from a superior to the employee in question, for a subordinate would be unable to affect the terms and conditions of a superior's employment. Even a very low-level supervisor will be deemed an agent of the entire company when the sexual harass-

ment takes the form of a *quid pro quo*. *Quid pro quo* results in strict liability for the employer, which means that the employer cannot defend on the basis that it was unaware of the sexual harassment. Should an employer find itself defending a *quid pro quo* sexual harassment lawsuit, a strong company policy against sexual harassment coupled with prompt remedial action when complaints arise will not absolve the employer of liability but can reduce or eliminate punitive damages.

Hostile environment sexual harassment occurs where unwanted sexual advances and other similar conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile or offensive working environment. To succeed with a claim of this nature, the employee must prove that: (i) she suffered intentional discrimination because of her sex; (ii) the discrimination (a) was pervasive and regular, (b) detrimentally affected the plaintiff, and (c) would detrimentally affect a reasonable person of the same sex in a similar position; and (iii) employer liability. Employer liability can arise from harassment conducted not only by a supervisor but also by a co-worker or subordinate.

If the sexual harassment producing a hostile environment is conducted by a supervisor, the employer will once again face strict liability. Supervisors can contribute to a hostile environment in several ways. For example, an employer will face strict liability for sexual harassment if: (a) there exists a discriminatorily abusive work environment created by a supervisor; (b) a supervisor uses his actual or apparent authority to further the harassment; or (c) a supervisor otherwise aided in the accomplishment of the harassment.

If the sexual harassment is conducted by a co-worker or subordinate, the employer will be liable only if it

knew or should have known of the harassment and failed to take prompt remedial action. An employee may establish an employer's knowledge by showing: (1) that the employee complained to higher management; or (2) that the harassment was so pervasive that the employer will be charged with constructive knowledge.

### III Prevention and Defense of Age Discrimination Claims

Age discrimination need not be intentional. Unintentional discrimination claims may succeed under the ADEA. Age discrimination claims generally fall into two broad categories: "disparate treatment" claims and "disparate impact" claims.

Disparate treatment claims are based on an employee's allegation that he or she was treated differently than other similarly-situated employees by reason of age. These claims are typically based on circumstantial evidence because the employer does not directly or expressly allude to age as the reason for demotion or termination.

Under a disparate impact theory, the employee points to a specific test, requirement, or practice imposed by the employer that disproportionately affects older workers. Unlike discrimination claims under Title VII for race, color, religion, sex, national origin, an employer can defend itself against an ADEA disparate impact claim by demonstrating that the policy or decision in question was based on the well-established standard of "reasonable factors other than age."

An example often faced today is the employer who discharges highly-compensated employees to cut costs and remain competitive. That employer may be able to achieve the same amount of cost-savings by terminating only one or two highly-compensated employees rather than

three or four lower-paid employees. Often, the higher paid employees have more experience, and are older, than the lower-paid employees. An employer faced with these circumstances must document the factors in the decision. Simply put, the more reasonable the factors, the more merit to the defense.

Employees cannot simply allege that there was an age-based disparate impact or a generalized policy that was the cause of such an impact. The employee must isolate and identify specific employment practices that cause a statistical imbalance. Courts have long recognized that, if employees could recover without identifying specific discriminatory practices, employers could be liable for a "myriad of innocent causes that may lead to statistical imbalances."

Employers should be sure to document their reasons for making employment decisions, regardless of identity of the employee. Other effective measures to prevent discrimination claims include: (1) reviewing company policies to ensure they are age neutral (as well as gender, race, etc. neutral); (2) instituting certain record-keeping requirements, such as retaining all payroll records for at least three years after an employee's termination and keeping employee benefit plans and any written, seniority, or merit system procedures for at least one year after an employee's termination; (3) prominently post the "Equal

Employment Opportunity is the Law" poster; (4) including an anti-discrimination policy in the employee handbook; and (5) if an employee does complain about a discriminatory practice, taking the complaint seriously, investigating the complaint thoroughly and, if any merit to the complaint is found, taking action to remedy the situation.

### IV Addressing Requests for Reasonable Accommodations under the ADA

Recent amendments to the ADA, and the regulations thereunder, have made it much easier for an applicant or employee to establish an ADA-protected disability. As a result, an employer is now more likely to be obligated to comply with a request for a reasonable accommodation - and more likely to face a claim for disability discrimination if it does not comply.

In simplest terms, the ADA provides that an employer cannot discriminate against a "qualified" person with a "disability."

An individual with a "disability" under the ADA is one who has a physical or

mental impairment that substantially limits one or more major life activities, has a record of such impairment or is regarded by the employer as having a disability. "Major life activities" are now broadly considered and include, among other things, walking, breathing, seeing, hearing,

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speaking, learning, thinking and eating. The definition also includes the operation of major bodily function, such as functioning of the immune system, normal cell function, brain and neurological functions and endocrine functions. Prior to the recent amendments to the ADA, when determining whether a person was disabled, courts would not consider impairments to major life activities that could be easily remedied, such as using a cane to walk. Now, only ordinary eyeglasses and contact lenses may be considered when evaluating whether a person is disabled.

A disabled person is "qualified" if he or she, absent the disability, satisfies the skill, experience, education or other job-related requirements of the position and can perform the essential functions of the position at issue. If a disabled person is qualified for the position, the employer.

Recommendations for addressing a request for accommodation follow:

- Identify requests immediately. Requests may be made orally. Requests may be made by the employee's doctor or other representative.
- Obtain a HIPAA-compliant medical information release form. If the disability is not obvious, obtain documentation of the disability including a letter from the employee's doctor. Consider an employer-paid medical examination by an employer-approved doctor.
- Do not disclose the employee's disability, or accommodations granted, to those who have no need to know about it. For example, the employee's supervisors need to know but other supervisors generally do not.
- Confirm that screening tools, such as background checks or drug tests, used to disqualify on a non-disability basis were all applied to all employees and

applicants uniformly and regardless of disability.

- Determine the essential functions of the employee's job description. Essential functions need not be changed to accommodate a disabled individual. Nonessential functions are what need to be changed to accommodate a disabled individual. If an employee cannot perform the essential functions with or without an accommodation, the employee is not qualified and therefore not entitled to accommodation.
- Allow the employee to request specific accommodations. Employee preferences must be considered but do not limit or control what may constitute a reasonable accommodation. Examples of reasonable accommodation include modification to facilities, schedules or job description or assignment to a vacant position. Employers are not required to lower quality or quantity standards as an accommodation.

The key to a successful defense of a claim for disability discrimination under the ADA is for the employer to take the reasonable accommodation requirement seriously and to engage in an interactive process with the disabled person to determine if there is any reasonable accommodation the employer can make to enable the disabled person to perform the job. An employer does not have to accommodate every disabled person. An employer is free not to hire or to terminate a qualified disabled person if making the needed accommodation would impose an undue hardship on the employer's business.

An accommodation will be considered an undue hardship if it requires significant difficulty or expense on the part of the employer when con-

sidered in the specific context of the size of the business, financial resources and the nature and structure of the operation of the business. Examples of accommodations that may be considered reasonable by the courts are installing a ramp or otherwise making facilities more accessible, modifying work schedules, job restructuring, unpaid leave or reassignment to a vacant position for which the person at issue can perform the duties. An employer is not required to create a new position for the disabled person, nor must an employer remove another employee from a position to give that position to the disabled person. An employer cannot be required to lower its production standards in order to accommodate a disabled employee.

Whether or not an accommodation is an undue hardship is decided on a case by case basis depending on the employer's business circumstances at the time, and accordingly, there is no bright line test for which types of accommodation will be found reasonable. For instance, it would likely be an undue hardship for a small company with only a handful of employees to accommodate a disabled accounts payable clerk when there are no other employees available or qualified to pick up the duties of the disabled employee. On the other hand, a large company with hundreds of employees and a fully staffed internal accounting department would likely be expected to restructure the accounts payable position for the disabled employee. Courts will now scrutinize employers to make sure they tried in good faith to find a reasonable accommodation before raising the undue hardship defense.

Employers should review their written policies, supervisor training, and practices and procedures to ensure that requests for reasonable accommodations are recognized and properly handled. ■

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