

**THE EEOC IS AFTER ME? AN
EMPLOYEE SUED THE PRACTICE?
“THAT WOULD NEVER HAPPEN TO ME”
AND OTHER EMPLOYMENT PRACTICES
LIABILTY MYTHS AND REALITIES**

Laura Lapidus, Esq.
Employment Practices Liability
Risk Control Consulting Director
March 21, 2014

AAHA

NASHVILLE

2014

March 20-23

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Why Should You Be Concerned About Employment Law?

- 93,727 private-sector discrimination charges received by the Equal Employment Opportunity Commission (“EEOC”) in FY 2013

<http://www.eeoc.gov/eeoc/newsroom/release/12-16-13.cfm>

- A record high \$372.1 million in monetary benefits secured by the EEOC in FY 2013 from the resolution of administrative charges
 - an additional \$39 million through litigation

<http://www.eeoc.gov/eeoc/newsroom/release/12-16-13.cfm>

www.eeoc.gov

Litigation Statistics

- Discrimination
 - Median award - \$199,200
 - Mean award - \$606,004
 - 21% of verdicts were between \$100,000 and \$249,000
 - 17% of verdicts were between \$250,000 and \$499,000
 - Median settlement - \$100,000
 - Mean settlement - \$178,063

- Employment Practice Liability: Jury Award Trends and Statistics, 2012-2013 Edition

It's Not Just the Damage Awards and Settlements

- Average Cost to Defend a Single-Plaintiff Employment Case to Conclusion (excluding any amount paid in settlement or verdict award)
 - \$50,000 – \$90,000 - (response of 33% of companies)
 - \$100,000 – \$499,000 - (response of 42% of companies)

Fullbright & Jaworski 6th Annual Litigation Trends Survey (2009)

- Reports estimate that the average cost of defending an employment discrimination case from beginning to end is approximately \$250,000.
 - <http://blog.thomasecon.com/litigation-avoidance/the-proactive-employer-publishes-its-first-book/#comments>
- Important Distinction - “fee shifting” provisions

Employment Law

The Equal Employment Opportunity Commission (EEOC)

- Responsible for enforcing fair employment practices laws such as:
 - **Title VII of the Civil Rights Act of 1964 (Title VII)**
(42 U.S.C. §2000a *et seq.*)
 - Prohibits discrimination and harassment based on gender, race, color, religion or national origin
 - **The Equal Pay Act of 1963** (29 U.S.C. § 206(d) *et seq.*)
 - Prohibits gender discrimination in pay
 - **Age Discrimination in Employment Act of 1967 (ADEA)**
(29 U.S.C. § 621 *et seq.*)
 - Prohibits discrimination based upon age (over 40 years old)

* Because not all liability insurance policies provide coverage for claims brought under one or more of the above-referenced laws, review your policy and consult with your broker to determine the coverage provided by your policy.

EEOC (continued)

- Responsible for enforcing fair employment practices laws such as:
 - **Americans with Disabilities Act of 1990 (ADA)**
(42 U.S.C. § 12101 *et seq.*)
 - Prohibits discrimination against employees with physical or mental disabilities
 - Requires reasonable accommodation of qualified individuals with disabilities
 - **Genetic Information Non-Discrimination Act of 2008**
(42 U.S.C. § 2000ff *et seq.*)
 - Prohibits discrimination based upon genetic information

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United States Department of Labor (DOL)

- Responsible for enforcing employment laws such as:
 - **Family and Medical Leave Act (FMLA)** (29 U.S.C. § 2601 *et seq.*)
 - Eligible employees can take up to 12 weeks of unpaid, job-protected leave for:
 - the birth of a child,
 - the placement of a child for adoption or foster care,
 - To care for a child, spouse or parent who has a serious health condition, or for the employee's own health condition, or
 - a military exigency leave.
 - Up to 26 weeks may be taken in order to provide care to a family member injured in the military

*Because not all liability insurance policies provide coverage for claims brought under one or more of the above-referenced laws, review your policy and consult with your broker to determine what coverage is provided by your policy.

United States Department of Labor (continued)

- Responsible for enforcing employment laws such as:
 - **Fair Labor Standards Act (FLSA)**
(9 U.S.C. § 201 *et seq.*)
 - governs minimum wages and maximum hours of work
 - includes the requirement of overtime payment for employees that do not fit within specified exemption

* Because not all liability insurance policies provide coverage for claims brought under one or more of the above-referenced laws, you should review your policy and consult with your broker to determine what coverage is provided by your policy.

Retaliation

- **A cause of action based on retaliation is incorporated into many employment laws.**
- **Such a cause of action is dangerous because it is:**
 - Easier to prove
 - Results in higher verdicts
 - Does not require the employee to prove underlying cause of action to succeed on retaliation cause of action

Understand State and Local Laws and Regulations

- An employer's actions also must comply with state and local laws as well as federal law
- State and local laws/regulations often:
 - Have lower employee thresholds
 - Are broader than federal law
 - Have different procedures
 - Have different interpretative case law

Common Law Causes of Action

- Wrongful Discharge/Termination in Violation of Public Policy
- Breach of Contract
- Workplace torts include:
 - Misrepresentation/fraud
 - Invasion of privacy
 - Defamation
 - Intentional infliction of emotional distress
 - Intentional interference with prospective economic advantage
 - Intentional interference with a contractual relationship
 - Negligent hiring/retention/supervision
 - Wrongful failure to employ
 - Wrongful failure to promote
 - Wrongful discipline
 - Wrongful deprivation of a career opportunity

EEOC National Priorities

EEOC Strategic Action Plan

- Eliminate barriers in recruitment and hiring
- Protect “vulnerable” workers
- Address emerging and developing issues
- Enforce equal pay laws
- Preserve access to the legal system
- Prevent harassment through systemic enforcement and targeted outreach

EEOC, *Strategic Plan for Fiscal Years 2012-2016*, http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm.

EEOC – Strategic Action Plan

- Systemic discrimination inquiries focus on disparate impact
 - Recruitment, hiring, equal pay

EEOC – Strategic Action Plan

- Hiring practices
 - Criminal background and credit checks
 - Exclusion of unemployed

Background checks – Credit History

- A credit check should be performed only if it is relevant to the position.
 - The EEOC views disqualification of an applicant based upon poor credit as an action that may result in disparate impact discrimination.
 - Some states prohibit the use of credit information in employment decisions.

Background Checks – Criminal History

- Use caution when screening based upon a record of criminal conduct.
 - EEOC guidance states that an automatic exclusion because of criminal conviction may have a disparate impact on certain protected classes.
 - Make an individual assessment of each applicant rather than automatically rejecting
 - Ensure compliance with Fair Credit Reporting Act (FCRA)
 - Ensure compliance with state laws

Application – Arrest/Conviction Questions

- Application questions regarding arrest/conviction record
 - Unlawful to be contained in application under some state and local laws (“Ban the Box” legislation)
 - EEOC guidance advises against including questions about conviction record on application
 - Better not to have it on application as an automatic “screen”
- Consult with an employment attorney regarding federal, state and local laws pertaining to criminal background checks
 - Review your applications and other forms to ensure compliance

EEOC Strategic Action Plan

- ADA
 - Accommodating disabilities via an interactive process
 - Inflexible leave provisions

Reasonable Accommodation

- An employer is required to make a reasonable accommodation of a qualified employee or applicant.
 - Unless doing so would be an undue hardship on the operation of the employer's business.

42 U.S.C. § § 12111(10)(A), (B); 12103; 12112.

- Any modification or adjustment to a job or work environment which allows a qualified employee with a disability to:
 - Participate in the job application process;
 - Perform the essential function of a job; and
 - Enjoy the benefits and/or privileges of employment.

42 U.S.C. § 12111(9)(A), (B).

Interactive Process

- The process of reasonable accommodation requires an interactive discussion with the disabled individual.
 - An employer is not required to grant a disabled employee's request for accommodation, but cannot merely decline a request outright, without exploring other options.

See 42 U.S.C. § 12111(9)(A), (B).

Inflexible Leave Provisions

- The EEOC's position is that any leave policy which provides for automatic termination of employment upon exhaustion of leave violates the ADA
 - Such policies fail to provide an opportunity to accommodate disabled employees.

EEOC Strategic Action Plan

- Prevention of harassment, including emerging and developing issues
 - LGBT issues – discrimination/harassment based upon:
 - Sexual stereotyping
 - Sexual orientation
 - Pregnancy discrimination
 - Also recent state law activity

Social Media

Social Media – Hiring Process

- In the recruitment/hiring process, there is no law which prohibits the use of public information found on a social networking site
 - BUT doing so presents many employment risks

Social Media – Hiring Process

- Risk of discrimination – disparate treatment
 - Information obtained from social media/networking sites may not be used in a discriminatory manner which violates federal, state or local law
 - TMI – too much information
 - » Social media sites may contain information regarding applicants' protected class which you would not otherwise have
- If social media is used to evaluate a candidate, it becomes a record that must be maintained.

Social Media – Hiring Process

- Risk of Discrimination – disparate impact
 - Some populations are poorly represented on certain sites

- EEOC – 15-VI EQUAL ACCESS TO JOBS
 - A. RECRUITING
 - *Who* ultimately receives employment opportunities is highly dependent on how and where the employer looks for candidates.... For example, **recruiting from racially segregated sources, such as** certain neighborhoods, schools, religious institutions, and **social networks**, leads to hiring that simply replicates societal patterns of racial segregation.

<http://www.eeoc.gov/policy/docs/race-color.html#VI>
(emphasis added)

Social Media – Discrimination/Harassment/Retaliation

- Any conduct that harms employees, the working relationship or the working environment may create a hostile work environment.
 - Text messages and “tweets”
 - Posts/pictures on a website such as Facebook® or Myspace®
- Negative posts can be viewed as retaliatory
 - a negative recommendation may raise retaliation issues

Social Media – Wrongful Termination

- Some states prohibit taking any disciplinary action against an employee for engaging in lawful activity outside of work.
- Whistleblower complaints of potentially illegal activity are protected under both federal and state laws.
- Inaccurate and/or misleading information may lead to mistakes.
 - Example: Shirley Sherrod and the U.S. Department of Agriculture
- Recommendations of employees can be problematic
 - If you recommend an employee online, it may be difficult to later defend poor performance/termination.

Social Media – National Labor Relations Board (NLRB)

- Since 2010, the NLRB has prioritized National Labor Relations Act (NLRA) (29 U.S.C., et seq.) claims involving social media.
 - Section 7 (29 U.S.C. § 157)
 - Employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.
 - Even in the absence of a labor union, an employee is protected.

Is a Social Media Post Protected Concerted Activity?

- Concerted – is activity “engaged with or on the authority of other employees, and not solely by and on behalf of the employee himself”
 - *Meyers Industries*, 281 NLRB 882 (1986)
 - Excludes comments made solely by and on behalf of the employee himself or "mere griping" by an employee who does not seek any action
- Protected – activity is for employees’ mutual aid or protection
 - Wages;
 - Terms of employment; and/or
 - Working conditions

Protected Concerted Activity?

- Employee posted a negative remark about her supervisor on her personal Facebook® page, which drew supportive responses from co-workers and led to further negative comments about the supervisor
 - Conversation was about the employees' working conditions

*Source: NLRB Office of the General Counsel, August 18, 2011
Memorandum concerning social media cases*

Protected Concerted Activity?

- Employer disciplined an employee for profane Facebook® comments which expressed employee's frustration regarding an individual dispute with his assistant manager
 - Employee didn't seek to initiate or induce co-workers to engage in group action.

*Source: NLRB Office of the General Counsel, August 18, 2011
Memorandum concerning social media cases*

U.S. Department of Labor Initiatives

Independent Contractor Misclassification under the Fair Labor Standards Act (FLSA)

- Under the FLSA, an **employee** is entitled to:
 - At least the federal minimum wage
 - Time and one-half of the regular rate of pay for all hours worked over 40 in a work week
 - Unless an exemption applies
- Independent contractors are not employees
 - not entitled to FLSA protection

Economic Realities Test

- Extent to which the worker's services are an integral part of the employer's business
- Length and/or permanency of the relationship
- Amount of the worker's investment in facilities and materials
- Nature and degree of control by the company
- Worker's opportunities for profit and loss
- Level of skill required; amount of initiative, judgment, or foresight required

See, e.g., Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668 (1st Cir. 1998)

Independent Contractor?

- One day you discover that a pipe is leaking. You don't have anyone on staff who is a plumber. You call Otto's Plumbing Service and ask Otto to come over to fix it.
- You employ a veterinarian on a part time basis on a flexible schedule based upon the practice's needs. When working, the veterinarian works on the premises of the practice, uses the practice's equipment, wears a lab coat with the name of the practice. The veterinarian does not work for any other practice.

Potential Liability of Misclassification

- Back pay & liquidated damages
- Overtime liability if contractor would be non-exempt
- Back taxes, interest & penalties
- Social Security & FICA
- Benefit claims, 401(k), severance
- Disqualification of benefit plans
- Criminal penalties

Interns

- The U.S. Department of Labor (DOL) has increased their regulation of unpaid internships
- Generally, under the FLSA an employer that is in the “for-profit” sector must pay an individual whom an employer “suffers or permits to work.”
 - At least minimum wage and overtime, if applicable

Should an Intern be Paid?

- General rule - if your practice benefits from the intern's work, you must pay intern
 - Inquiry is who primarily benefits from the internship
- Limited exceptions
 - Intern is merely observing or learning
 - Training is for intern's own educational benefit, but only if it meets all six specified criteria

Is Internship for the Intern's Educational Benefit?

- The internship, even if it includes actual operation of the employer's facilities, is similar to training which would be given in an educational environment;
 - The internship experience is for the benefit of the intern;
 - The intern does not displace regular employees, but works under close supervision of existing staff;
 - The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
 - The intern is not necessarily entitled to a job at the conclusion of the internship; and
 - The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.
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- Fact Sheet #71, Internship Programs Under the Fair Labor Standards Act, <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>

Risk Control Recommendations

Risk Control Summary

- Review and update policies, particularly regarding hiring practices, social media, disability accommodation, and classification of employees
- Train managers regarding all policies
- Review insurance policies and take advantage of risk control products and services
- Treat employees fairly and equitably