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Did Someone Say Discrimination?

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With the advent of a new school year, children across the country are (perhaps reluctantly) starting to remind themselves of the lessons they learned in the past to get ready for the new school year. This refresher does not need to be limited to school kids, however; employers are always wise to periodically refresh the lessons they have learned in the past. Take discrimination claims, for example. All too often we see discrimination cases where an employer has failed to act after it knew or should have known that a potential discrimination claim existed. When an employer neglects to plan for the day that claims of discrimination will appear in its workplace, chooses to ignore discrimination claims, or fails to properly react to such claims, that employer will learn a costly lesson. With proper planning, however, an employer can help to reduce its exposure for discrimination claims.

Plan for the fact that discrimination claims will occur.

Last year nearly 100,000 separate claims of discrimination were filed with the Equal Employment Opportunity Commission ("EEOC"), and many practitioners estimate that the number of state law claims filed each year vastly outnumbers the claims filed in the EEOC. Thus, for most employers it is just a matter of time before they experience a claim of discrimination. So what can you do as an employer to protect yourself from such claims? First, plan for the fact that you will eventually be the recipient of a discrimination charge.

One of the most effective measures that an employer can take against discrimination claims is to simply prevent them instead of waiting to react to such a claim. The principal step in preventing discrimination is becoming familiar with what the law allows and, more importantly, what it prohibits. Familiarity should cover all areas of work practices, including interviews, pre-employment tests, pay grades,

benefits, raises and promotions and discipline. Make sure to publicize the law to employees via posters (some of which are required) or meetings, making them aware of the importance of discrimination matters and, likewise, conveying the fact that such behavior will not be tolerated.

A policy manual can also help to avoid or minimize discrimination claims. Review or create your policy manual to ensure that it is current and accurate. Every company should have a policy manual that includes a thorough anti-harassment policy and a strong statement against discrimination. Additionally, there should be a complaint mechanism that allows an employee to remedy any claims of discrimination. The Supreme Court has made it clear that where an employer has a complaint procedure in place and an employee fails to follow that procedure, claims of unlawful harassment may be limited.

It is also essential to educate your decision makers. Managers and supervisors should have at least a rudimentary understanding of what discrimination is in its various forms. Training them through an in-house program is probably the most effective way to convey needed information, though certainly not the only way. What is essential is that managers and supervisors know the warning signs and know how to react to them. Key personnel should be well-trained to take complaints and investigate them where necessary.

Do not bury your head in the sand.

Ignoring potential discrimination issues is perhaps the best way to invite a claim. If you have reason to believe that an employee is being harassed, take action. Investigate the issue and resolve it. Left to fester, the harassment will lead to liability. If an employee complains that her supervisor is not treating her fairly, investigate and determine whether there is any truth to the allegation. Remember that although an employee may be required to utilize a complaint procedure to remedy harassment, and possibly adversely affected by failing to use that procedure, discriminatory actions that result in tangible adverse employment actions (like being disciplined, terminated or not receiving a wage increase) are generally not affected by the existence of a complaint procedure. Confront suspected discrimination head on, and take prompt remedial action.

Be very cautious of employees who complain about other employees being discriminated against. The law protects employees who oppose discrimination in the work place, even if they are not themselves within any protected category, and even if they are wrong about their belief (as long as they had an objectively reasonable belief that discrimination was occurring.) Within the last two years, the number of "opposition claims" has increased tremendously. If you learn that an employee is complaining about discrimination against others, promptly investigate the accusation and inform the employee that no

adverse action will be taken because of his or her reporting of the discrimination. If you do subsequently take any adverse action against that employee, make sure that you can document and justify the action.

Employers also need to plan personnel decisions well. The most assured route to a costly discrimination suit is a poorly planned or poorly executed job termination or discipline. Employers should carefully analyze facts and circumstances, collect and maintain documentation, and be consistent with company policy and procedure. Do not assume that the problem will go away once the employee goes away.

Know how to react to potential discrimination claims.

Despite your best efforts, one day you likely will receive a complaint that an employee believes he or she has been discriminated against. How you react to that complaint will help to determine how well you will fare. The first rule to remember is that retaliating against someone who complains of discrimination constitutes a separate, additional act of discrimination. If the complainant is still employed, do not take any action that could be viewed as retaliatory. If the complainant is no longer employed by your company, make sure that you do not take any action that could be viewed to be retaliatory like providing a bad reference for the complainant.

If you do learn that an employee or ex-employee has asserted or filed a discrimination complaint, take immediate action to gather and preserve evidence. Interview co-workers and supervisors to gather facts, and make sure that you memorialize those facts in a memo. Today, electronic evidence is one of the most common ways that discrimination claims are lost or won. If the complaining employee had company email, take immediate steps to preserve that email account and all of the sent and received emails. Those emails often contain facts that help to disprove the employee's claims. Likewise, preserve any other emails on your system that refer to the complaining employee. If you fail to preserve this evidence, the employee's attorney will attempt to paint your company in a bad light, arguing more about evidence that is not present. In egregious cases of destruction of or failure to preserve documents, a judge can also sanction a party by drawing adverse inferences against the party.

When an employee files a complaint with a state agency, the agency will ask you to respond to the complaint. Be aware that your response is critically important, and what you say can and will be used against you in the future. If you make an assertion of fact, concede a point of law, or fail to raise a legal objection, that issue could be deemed admitted or waived. Thus, what you say or do not say is extremely important. An employer is well-served to have its response either drafted or at least reviewed by an employment lawyer. This small investment upfront can prevent significant costs in the future, both in

terms of attorney's fees and liability exposure.

Planning is the key.

The above discussion demonstrates that planning is the key to avoiding discrimination complaints and avoiding liability for discrimination claims. Plan your employment practices and policies to avoid giving rise to claims of discrimination. Plan how you will seek out and resolve potential issues before they lead to liability. And, lastly, plan out your response to a complaint if an employee or former employee files a complaint. Remembering and applying these lessons and effectively responding to a complaint can mean the difference between success and costly failure.

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