25 Ideas for Mitigating Employment Practices Risk

The economic downturn has created a surge in employment practices claims, creating a situation where firms in many industries are more likely to face an employment claim than suffer a property or general liability loss.[1]

The number of workplace discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) increased 15 percent in 2008[2], with the largest increases in age-based wrongful termination actions, employer retaliation claims and sexual discrimination charges. Recent political actions, including the 2008 federal Americans with Disabilities Act amendments[3] and the 2009 Lilly Ledbetter Fair Pay Act[4], may impart even greater risk on employers. As well[5], the 6th Fulbright & Jaworski Litigation Trends Survey[6] shows employment litigation increases with jobless rate, which may be headed to 12 or 13 percent[7].

According to Jury Verdict Research (JVR)[8], jury awards in employment practices cases hit an average of $549,670 and a median cost of $77,875 in 2007. JVR also found 41 percent of juries in these cases awarded more than $100k, and 5 percent more than $1m. Even if the employer prevails, the cost of defending an employment practices suit can be substantial. According to Progressive Insurance, typical defense costs in a single-plaintiff employment practices case include:

ADMINISTRATIVE CHARGE AGAINST A BUSINESS

Defense of an EEOC or Administrative Charge	$4,000-$7,000

LAWSUIT FILED AGAINST A BUSINESS

Answer to a lawsuit filed Begin discovery of evidence	$12,000-$18,000
Pretrial filings and preparation Additional motions and responses, excessive document analysis and review, written case evaluations or status reports and settlement-related matters.	$20,000-$30,000
Mediation	$10,000-$15,000
Motion for summary judgment filed Includes reply brief	$8,000-$12,000
Trial	$15,000-$25,000
Total	$69,000-$107,000

This total excludes the cost to appeal an adverse verdict.

Costs to defend an employment practices class action suit may be $3m or more.

As a practical matter, an employer can not eliminate its employment practices exposure. However, there are actions that can mitigate their risk. Kibble & Prentice has assembled 25 "best practices" that should be part of every organization's employment practices risk management program.

25 "BEST PRACTICES"

DURING HIRING

1. To promote compliance with EEOC and state fair employment statutes, do not include questions in the employment application or interview that directly or indirectly address an applicant's age (except to verify the applicant is at least 18 yrs. old), height and weight, marital status, number and ages of dependents, race, gender, religion, national origin, or childbearing, pregnancy, or family obligations; whether an applicant has filed a workers' compensation claim; whether an applicant has been arrested; or whether an applicant has a handicap.

   Avoid questions that have a disparate impact on certain protected classes, such as:
   - Are you a native born U.S. citizen?
   - When did you become a naturalized U.S. citizen?
   - Do you own or rent your home?
   - Do you have children?
   - How long have you lived at your current address?
   - When did you graduate from high school?

2. To comply with the ADA, do not include questions in the employment application or interview that address an applicant's treatment for, or the existence of various physical or mental conditions, diseases or addictions.

3. In the employment application, add a disclaimer stating that the document does not represent an employment contract. Advise applicants their employment status will be "at will." Require applicants to acknowledge this statement in writing.

4. Include in the application a provision whereby the applicant authorizes the employer to run an employer-mandated drug test and background check. Run legally-compliant background checks and use information obtained in a background check only

[1] Employment Practices Risk Management Association, http://www.eprma.org/index4272006.html
[2] Charge Statistics FY 1997 Through FY 2008, The U.S. Equal Employment Opportunity Commission, http://www.eeoc.gov/stats/charges.html
[3] Notice Concerning The Americans With Disabilities Act (ADA) Amendments Act of 2008, The U.S. Equal Employment Opportunity Commission, http://www.eeoc.gov/ada/amendments_notice.html
[4] Lilly Ledbetter Fair Pay Act of 2009: What's Next for Employers?, Brett A. Gorovsky, J.D., CCH, 2009 (http://www.cch.com/Press/news/CCHWhitePaper_LedbetterFairPayAct.pdf)
[5]
[6] Fulbright's 6th Annual Litigation Trends Survey Report, Fulbright & Jaworski L.L.P., http://www.fulbright.com
[7] U.S. Unemployment Rate Headed to 12%-13%, Economist Says, Real Time Economics, November 11, 2009, http://blogs.wsj.com/economics/2009/11/11/us-unemployment-rate-headed-to-12-13-economist-says/
[8] Jury Verdict Research, Employment Practice Liability: Jury Award Trends and Statistics, 2008 edition

to evaluate a candidate. Advise those involved in hiring to make no promises regarding job security, duration of employment, or reasons that would warrant discharge.

KNOW THE LAWS

5. Comply with and follow changes to applicable State and Federal laws, including, but not limited to:
   - Title VII of the Civil Rights Act of 1964 (Title VII)
   - Equal Pay Act of 1963 (EPA)
   - Age Discrimination in Employment Act of 1967 (ADEA)
   - Title I and Title V of the Americans with Disabilities Act of 1990 (ADA)
   - Sections 501 and 505 of the Rehabilitation Act of 1973
   - Civil Rights Act of 1991
   - For employers with at least 50 employees, the Family and Medical Leave Act of 1993 (FMLA)
   - 2009 Lilly Ledbetter Fair Pay Act

6. Establish an effective, enforceable, and applicable framework of employment practices policies and procedures in the form of an up-to-date employee handbook. It should clearly establish the employer's policies and procedures regarding attendance, behavior, discrimination and harassment, and comply with State and Federal employment laws.

7. Implement a clearly defined, zero tolerance discrimination and harassment policy that defines various types of discrimination and harassment (based on race, color, religion, sex, national origin, disability, or age), gives specific examples of improper conduct, and outlines an effective complaint procedure.

8. Adopt a uniform process for creating employee personnel files, and be sure to regularly audit them for discrepancies and missing information. Also ensure the privacy of the information contained within the personnel files. Have appropriately written job descriptions that detail the essential duties, responsibilities and expectations of the position, and amply describe the physical tasks required by the job.

9. Train managers and supervisors on employment policies and procedures and the importance of proper documentation and compliance. Document disciplinary actions and other employment practices. If an employee lodges an internal complaint, conduct a prompt and meaningful investigation and, if a violation is found, take corrective action sufficient to remedy the problem.

10. Conduct periodic audits and investigations to identify wage and hour, payroll, and other administration errors with the potential to trigger class action lawsuits. If an audit or investigation reveals violations, act promptly to minimize exposure by resolving identified problems and potential claims with existing and former employees who could assert legitimate causes of action.

11. Train supervisors, managers and individuals responsible for administering Family and Medical Leave Act ("FMLA") leaves about leave policies, the types of requests that may trigger a protected leave, FMLA military family leaves, as well as other current regulations. Periodically revise and update FMLA policy and forms.

12. Ensure medical certification forms (WH-380-E and WH-380-F) comply with current regulations and modify the certification and re-certification procedures to reflect the employer's ability to directly contact the employee's medical provider to authenticate the certification form or to obtain clarification. Also, in response to changes in the COBRA continuation rules brought about by the American Recovery and Reinvestment Act of 2009 (ARRA), implement administrative procedures necessary to provide the subsidy, provide required notices to COBRA qualified beneficiaries eligible for the subsidy, implement the extended COBRA coverage periods, and amend health plan documents to reflect the changes.

13. Make sure all employees accurately record their hours worked. Be careful to properly distinguish between "exempt" employees and "non-exempt" employees (those entitled to receive overtime pay), according to the definitions in the Fair Labor Standards Act ("FLSA").

EMPLOYEE PERFORMANCE EVALUATIONS

14. Adopt an equitable and uniform format and policy for administering performance evaluations. Conduct evaluations on a periodic basis, and make sure they can be easily documented.

15. In the performance evaluation, outline future expectations or goals of the employee and provide specific recommendations for improvements of weaknesses. Advise managers and supervisors to refrain from making promises regarding future employment or advancement, and if there are any points of disagreement, invite the employee to respond in writing.

TERMINATIONS

16. Before making a decision to terminate an employee, verify the employee is aware of performance standards, work rules, or other standards based upon which he or she is being terminated. Document considerations and deliberations leading to the termination decision, and determine whether he or she is a member of any protected group.

17. Verify progressive disciplinary procedures, if any, were followed (e.g., providing the employee with multiple warnings and various opportunities to correct the behavior) – this does not apply in circumstances where the actions of the employee are severe enough to warrant immediate termination.

18. Have the employer's legal counsel and an impartial member of senior management review the personnel file and advise on the termination decision. Identify complaints, charges or grievances made by the employee that could affect the employer's right to terminate the employee.

19. Have the employee's manager or an HR officer communicate the termination to the employee in a business-like manner and with respect. No more than one additional officer or employee, such as the employee's manager or supervisor should be present during the termination to witness discussions that occur. And, as a precaution, have security at the ready to deal with possible confrontations.

20. When a dispute with a current employee seems likely, consider offering something of value to the employee in exchange for a release of claims against the employer. Verify releases include Age Discrimination in Employment Act -compliant ("ADEA") language.

REDUCTION IN FORCE

21. Use objective criteria to determine which employees should be terminated, and be prepared to demonstrate the terminations were not based on the protected class of any individual and did not have discriminatory motives or intent.

22. Consider offering severance packages, outplacement counseling and letters of recommendation.

POST-TERMINATION ISSUES

23. Know and comply with State law regarding disclosure of employee personnel files.

24. Recognize a well-documented personnel file supporting a discharge decision may discourage litigation, and an employer may disclose the file to the employee even if not required by law to do so. Never disclose an employee personnel file to a third party without a subpoena or written authorization from the employee.

25. Direct all inquires regarding references to a single source so requests are handled uniformly, and develop a policy for how to handle requests for references from prospective employers.

POINTS TO CONSIDER WHEN PURCHASING EMPLOYMENT PRACTICES LIABILITY (EPL) INSURANCE:

- Ensure "duty to defend" or "no duty to defend" language in the policy is aligned with the organization's resources and philosophy
- Verify the policy provides an affirmative coverage grant for punitive damages, except where prohibited by law, and with "most favorable venue" language
- Ensure policy specifically includes coverage for allegations of "breach of privacy"
- Verify the policy covers claims brought by a third party, such as a customer, vendor or other third party
- Verify the policy's definition of "subsidiary" does not require a subsidiary be a corporation or corporate entity, to ensure coverage for Limited Liability Corporations (LLCs), partnerships, etc.
- Structure the policy to provide a dedicated limit of liability for EPL claims individual and did not have discriminatory motives or intent

For further information, you may contact Seth Shapiro on our Risk Strategies team at **seth.shapiro@kpcom.com**.

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