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## Labor & Employment

### Employers Can Take Steps to Avoid Liability

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*Special to the Legal*

Employment discrimination claims continue to surge as a counter-cyclical response to the sagging economy, meaning that companies need to concentrate more than ever on ways to handle their terminations and layoffs carefully, to avoid costly litigation.

The federal agency charged with investigating employment discrimination complaints under federal law, the Equal Employment Opportunity Commission (EEOC), reported recently that 93,277 charges of discrimination were filed with the agency in 2009, second only to the 95,402 charges filed in 2008.

The heightened level of charges (nearly 20 percent above the 77,444 charges filed in 1999) has been attributed to a variety of factors, including the economy, greater public awareness of anti-discrimination laws and rights, and simplification of the EEOC's charge-filing process, according to EEOC Acting Chairman Stuart Ishimaru.

The most recent claims tend to be in areas that were less prominent a few years ago, especially age discrimination and retaliation claims. For the first time ever, there were more retaliation claims (33,613) than any other type of claims in 2009, beating out the perennial leading category, race discrimination.

Retaliation claims have been growing since the U.S. Supreme Court greatly expanded the types of employment actions that are protected against retaliation in



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*Burlington Northern & Santa Fe Railway v. White*, which stated an employee now needs to show only that the employer's actions were so adverse as to dissuade a reasonable worker in the employee's circumstances from making a charge of discrimination.

Other leading types of claims include sex discrimination (30 percent of all charges, which has been consistent for the past 10 years), age discrimination (24.4 percent of charges, up nearly one-third from 18.3 percent in 1999), and disability discrimination, up slightly from 22 percent of charges in 1999 to 23 percent in 2009. Note that employees often bring multiple discrimination and/or retaliation claims in a single complaint, so the percentages add up to more than 100 percent.

Pennsylvania and New Jersey do not vary from the national trend, based on the observations and reports in this region. The Pennsylvania Human Relations Commission reports that 3,374 new employment discrimination complaints were filed with the commission in calendar year 2009, up slightly from 3,337 in the

fiscal year ending June 20, 2008. In Pennsylvania, race discrimination, sex discrimination and retaliation claims are the most common types of claims. New Jersey's Division on Civil Rights does not publicly report the number of complaints filed under the state's Law Against Discrimination, but local practitioners and case reports seem to confirm the rise in claims on the east side of the Delaware River.

#### ECONOMY WILL CONTRIBUTE TO RISE

Regardless of the exact numbers, employers in this region can safely assume that the heightened number of charges will continue to track the rise in layoffs and firings, absent a significant improvement in the job market. Fired employees who are confident they can land in a new job often will avoid the effort and stress of a lawsuit or discrimination charge. Conversely, when the prospects are bleak for the newly unemployed — as they are now with an average 29 weeks of unemployment, according to the national Bureau of Labor Statistics — many will consider all options, including legal action, to recover their lost earnings and rectify any perceived wrongdoing.

Discrimination claims can be costly to employers. The EEOC collected \$294 million in damages and settlements in 2009, the greatest cumulative recovery ever for the agency. Private verdict awards and settlements, which make up a much larger amount, are not included in this

figure. Most employment discrimination laws — Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act, the Pennsylvania Human Relations Act and the New Jersey Law Against Discrimination, just to name a few — allow for successful plaintiffs to recover back pay, front pay, emotional distress damages (excluded under the ADEA), and attorney fees and costs. Defending against a single claim can cost more than \$100,000 in attorney fees, not to mention lost time of company managers in dealing with such cases.

## AVOIDING DISCRIMINATION CLAIMS

So what can employers do to avoid becoming just another victim of this tsunami of discrimination claims? Set forth below are seven best practices to avoid discrimination claims by employees and ex-employees:

- Train your managers on the proper ways to manage and discipline employees, including following applicable company policies, documenting the disciplinary process, and consulting with human resources. Too many lawsuits result from terminations and employment actions that do not percolate up to top management until after the employee has been terminated and the damage has been done.

- Don't rush termination decisions. Be sure you make a decision based on facts and evidence, rather than emotion or unchecked conclusions by the manager. Consider whether suspension, a written warning or a performance improvement plan might be a better way to address and consider the problem. If the situation truly warrants termination, do not delay — but don't rush to judgment either.

- Appoint a "termination czar," a top executive or human resources person to act as a gatekeeper for all termination decisions. This will ensure consistency, neutrality and some expertise and rational judgment in these decisions. Obviously, the appointed "czar" should have knowledge and experience in management and human resources, and some familiarity with the laws that apply to the workplace. Consulting in-house or outside employment counsel also can help avoid unnecessary litigation.

- Check the employee's version of events. Not all cases require an interview with the employee before the termination decision is made, but it is usually a good practice.

Doing so can avoid decisions based on misimpressions or inaccurate reports. In addition to giving the employee a chance to be heard, it provides him or her with a sense of fair play. Co-workers also will view such a practice as a sign of fairness and even-handedness by management, which may promote staff morale and neutralize complaints by the disgruntled employee.

- Document, document, document. Review the paper trail, including the employee's personnel file, recent performance reviews and any written warnings and responses, before making the decision to terminate. Also, make sure your managers and human resources personnel know how to properly document performance problems and disciplinary issues, as well as the actual termination decision and communication, including a guideline of what will be said and contemporaneous notes from the session.

Management has the ability to "create

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evidence" — powerful, truthful evidence — that will be tremendously helpful in defending the decision and avoiding distorted claims that can lead to a lawsuit and/or liability. This is especially important in a reduction in force (RIF), where multiple employees are selected for termination. The employer needs to document the reasons for the reduction, and the criteria used to select those who were laid off. Federal law also requires advanced warning and extra documentation in some RIFs — consult employment counsel to ensure you get this right.

The employer also should analyze whether the RIF will have any "disparate

impact" on a protected class (such as women, racial minorities or older workers) and, if a disparate impact is revealed, carefully review and reconsider the decision-making process to ensure it can be defended. Again, employment counsel should be consulted as to the legal standards regarding "disparate impact" claims, as well as compliance with the Older Worker Benefit Protection Act (requiring specific release language and time periods) and the Worker Adjustment and Retraining Notification Act (requiring 60-day advance notice in some mass layoffs and plant closings).

- Be nice. You may find this to be shocking, but lawyers and managers sometimes forget to be human beings. This has consequences; many employees bring suit because they were treated poorly or rudely in the termination process, not simply because they were terminated. Plan out the termination meeting and what will be said in advance, show genuine sensitivity to the employee (but do not apologize), avoid unnecessary insults or harshness, and then allow the employee to leave discretely (not escorted out by guards "like a criminal"). Such decent treatment will go a long way toward preserving the employee's dignity and avoiding legal claims.

- The payoff. If feasible, offer the employee severance pay in exchange for a release of all claims (unless, of course, the employee is being terminated for misconduct, such as theft, dishonesty or unlawful conduct). Be sure the written release complies with the Older Workers Benefit Protection Act (if applicable). Your lawyer should have the details and a good sample form for you to use. •

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