EMPLOYER Gardian

EMPLOYMENT PRACTICES RISK REDUCTION STRATEGIES

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Pregnancy Bias Violates Federal and State Law

Women filed more than 4,200 pregnancy discrimination complaints with the Equal Employment Opportunity Commission in 2001. The Pregnancy Discrimination Act (PDA) of 1978 is a federal law that specifically prohibits employment discrimination on the basis of pregnancy, childbirth, or related medical conditions. The act applies to all employers with 15 or more employees, and serves to guard against the stereotype that pregnant women are less desirable employees. The law requires employers to treat pregnant workers the same way they treat other workers who have medical disabilities and cannot work. Examples of pregnancy discrimination include refusing to hire a pregnant applicant, firing or demoting a pregnant employee, and denying the same or similar job to a pregnant employee when she returns from a pregnancy-related leave. Even discrimination for the *potential* for pregnancy is a form of sex discrimination and is illegal.

Legal Employment Practices

As long as a pregnant woman can perform her job functions, an employer cannot refuse to hire her because of her pregnancy or because of the employer's prejudices about pregnant women or the prejudices of clients. If a worker is unable to perform a job because of pregnancy, the employer must treat her the same as any other temporarily disabled worker. For example, by providing modified tasks, alternative assignments, disability benefits or leave without pay.

A pregnant worker can remain on the job as long as she is able to perform the work. The employer must hold open a job for a pregnancy-related absence as long as jobs are held open for workers on sick or disability leave. The PDA also bans the employer from terminating, demoting or disciplining a worker *because* of her pregnancy. However, you can lay off or terminate a pregnant employee as long as you have a legitimate business reason and maintain objective, verifiable documentation for your decision. Also, the Act does not prohibit employment decisions based on an employee's conduct that may be caused by pregnancy. For example, an employer does not have to treat an employee who was late for work due to morning sickness any different than an employee who was equally late for a different health reason.

Benefits

Any health insurance provided by an employer must cover expenses for pregnancy-related conditions on the same basis as costs for other medical conditions, and any pregnancy-related benefits cannot be limited to married employees. If an employer provides any benefits to workers on leave, the employer must provide the same benefits for those on leave for pregnancy-related conditions.

Leave

The PDA does not explicitly require employers to grant pregnancy leave. However, the federal Family and Medical Leave Act (FMLA), which applies to firms with 50 or more employees, requires employers to provide up to 12 weeks of full-time unpaid leave to care for a newborn. Also, be aware that state laws may require you to further accommodate pregnant employees and these laws may apply to firms with fewer than 50 employees. The overlap between federal and state pregnancy leave requirements can be confusing. Consult with an attorney when drafting your firm's employee leave policy and when making employment decisions regarding pregnant employees.

The AICPA Professional and Personal Lines Insurance Programs Committee objective is to assure the availability of quality insurance products at reasonable rates for local firms and to assist them in controlling risk through education. For information about the AICPA program, call your Regional Representative or the national administrator, Aon Insurance Services, at 800-221-3023, write Aon at Aon Insurance Services, 159 East County Line Road, Hatboro, PA 19040-1218, or visit the AICPA Insurance Programs Web Site at www.cpai.com.

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Age Discrimination Can be Costly

As the American work force ages, discrimination against older workers has become an escalating issue. The U.S. Equal Employment Opportunity Commission (EEOC) recently released statistics on employment discrimination charges for fiscal year 2001 and reports that over 17,000 age discrimination complaints were filed against private employers last year. This represents a one and one-half percent increase in complaints over the previous year. Age bias claims are likely to continue to rise as a result of the increase in work force reductions caused by the recent economic downturn.

The ADEA

Age discrimination is unlawful under both federal and state employment laws. The Age Discrimination in Employment Act of 1967 (ADEA) is a federal law that protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA applies to employers with 20 or more employees and its protections apply to both employees and job applicants. However, state laws may apply to employers with fewer than 20 employees and to those under age 40 as well. For example, New York, Vermont and Wisconsin age bias laws apply to companies with only one employee and Virginia and Vermont protect workers who are age 18 or older. Under the ADEA, it is unlawful to discriminate against a person because of his or her age with respect to compensation, or any term, condition, or privilege of employment.

Except for in rare circumstances, the ADEA makes it unlawful to include age preferences, limitations, or specifications in job advertisements. The law does not specifically prohibit employers from asking an applicant's age, however, such inquiries may deter older workers from applying for employment. Also, requests for such information will be closely scrutinized to make sure that the inquiry was made for a lawful purpose and can be used as evidence of the employer's intent to discriminate.

Generally, it is illegal for an employer to mandate a specific retirement age or force older employees into early retirement. However, there are a few narrow exceptions such as airline pilots, air traffic controllers, and certain public safety officers. The ADEA also contains a special exemption allowing involuntary retirement of any employee who has attained at least 65 years of age and who for the two-year period immediately before retirement is employed in a bona fide executive or a high policy-making position, and in addition, is entitled to retirement pension benefits of $44,000 or more.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on age, or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA. Retaliation claims are also on the rise and can be even more costly to an employer than the underlying age discrimination allegation.

A valid claim for age discrimination exists if an employee is over 40 years of age, was subject to an adverse employment action and was treated differently than a younger worker. Once a valid claim is established, an employer must prove that it had a non-discriminatory reason for the termination. The EEOC is the federal agency that enforces the ADEA. Employees must file a claim with the EEOC within 180 days of the alleged discriminatory practice. State laws may also apply and in some states employees have up to 300 days to file the complaint with the EEOC.

The Costs

Under the ADEA, a court can order an employer to pay monetary damages to an employee for back pay, front pay and reimbursement of the employee's attorneys' fees and expenses. A court can also award compensatory damages for pain and suffering up to two times the employee's actual lost wages and benefits if the employer acted willfully in violating the ADEA. Punitive damages are not available under the Act.

Help is Just A Telephone Call Away

For immediate legal advice on employment law and practice management issues such as retaliation, military leave, and legal hiring practices call **800-569-3679**. As a CPA EmployerGard policyholder, your firm is entitled to 30 minutes of legal advice per month, without charge, from experienced attorneys at the national employment and labor law firm of Ford & Harrison LLP. Please have your CPA EmployerGard policy number handy.

According to EEOC statistics, the 17,000 age discrimination charges filed with the agency in 2001 resulted in over $53 million in monetary benefits paid to employees. Age discrimination claims have been resulting in higher average jury awards than all other types of discrimination. According to a recent verdict study by Jury Verdict Research, people claiming age discrimination were awarded an average of $219,000 compared to $147,799 for race discrimination, $106,728 for sex discrimination and $100,345 for disability discrimination.

Risk Reduction

The first step in minimizing the risk of age discrimination lawsuits against your firm is to become aware of your firm's overall exposure. Assess the "culture" in your firm by initiating dialogue between managers regarding age bias and learn how employees feel about older workers and how these attitudes may manifest themselves in the workplace.

Expand training programs to include instruction on age bias and acceptable age-related communications between supervisors and employees. Also, review and, if necessary, revise policies, training programs, recruiting methods, and evaluations to eliminate discriminatory language and/or implications. Older and younger workers should be treated identically when discussing career development.

Don't ask employees about their plans to retire. If an employee starts talking about retirement, seek legal advice before following up. Consistently document all individual employment problems and employment decisions.

Waivers

Perhaps your firm's greatest exposure to age discrimination claims occurs during work force reductions or layoffs. Care must be taken to assure that age bias is not a factor when determining which employees will be included in the reduction. Employers are afforded some protection through the use of waivers. When you terminate older employees during a legal reduction in force, you can request that they waive their rights under the ADEA as a part of a severance package. However, the release or waiver will only be valid and enforceable if it meets specific minimum standards set out by the ADEA that will ensure that the waiver was knowing and voluntary. It is best to consult with a competent labor attorney before implementing a reduction in staff.

As the baby boomer generation ages, workplace age discrimination claims are on the rise. CPA firms are not immune to these claims. Proactive steps should be taken to measure your firm's exposure to age bias claims and remedy any discriminatory policies or practices that may exist.

Did you know...

Job discrimination complaints filed against private employers with the Equal Employment Opportunity Commission (EEOC) increased by 1.2% last year to 80,840 - the highest level in six years?

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Who Read My E-mail?

Employee Privacy in the Electronic Workplace

Modern technology has created tension between the employer's right to control and manage his or her own business, and the employee's right to privacy. Computers, e-mail, voice mail, and the Internet are valuable tools that facilitate efficiency in the workplace. However, these same tools, if used inappropriately, can also lead to reduced worker productivity and to increased discrimination, harassment and hostile work environment lawsuits by employees.

These productivity and employer liability issues have led to the employer's need to monitor employee use of electronic communications. In an effort to maintain their privacy, employees have been legally challenging monitoring by employers in the workplace. Although, the courts have been favoring the employer in these challenges, there are still uncertainties. For this reason and for the sake of workplace harmony, there are measures employers should take to balance their management needs with the privacy rights of their employees.

Is There a Right to Privacy in the Workplace?

The misuse of workplace communication tools can create costly problems for employers. For instance, in discrimination and harassment cases the permanent nature of e-mail has proven to leave a trail of evidence, usually unfavorable to the employer, which is difficult to defend in court. Also, employee access of pornographic Web sites has led to increased hostile work environment sexual harassment claims by employees. In an effort to protect themselves from liability, employers are monitoring phone calls, voice mail, e-mail, and Internet site access so they can remedy problems before they escalate into litigation. According to an American Management Association study conducted in April 2000, more than two-thirds of employers use some form of employee surveillance.

While new technologies have made electronic monitoring a common practice, the monitoring of employees in the private workplace goes largely unregulated. On the federal level, the Fourth Amendment of the U.S. Constitution prohibits unreasonable *government* searches and seizures. However, the Fourth Amendment does not apply directly to *private* employers. On the state level, only a few states have created constitutional, statutory or common law privacy rights for employees, and those laws are largely unsettled.

Increasingly, the tests developed by the Supreme Court in various Fourth Amendment search and seizure cases are being used in the context of the private workplace. Given the unsettled nature of employee privacy rights law, it is wise for the private employer to follow the dictates of the Fourth Amendment cases. Generally, these cases, as applied to the private employer, suggest that searches and retrieval of employee communications should not be conducted on a whim, but should be of limited scope that is based on reasonable suspicion or legitimate business needs.

Protective Measures

The most important action employers can take to protect themselves from invasion of privacy lawsuits resulting from employee monitoring is to minimize employees' expectations of privacy in the workplace. The best way to accomplish this is by establishing an employee monitoring policy and monitor only for legitimate, business-related reasons. The monitoring policy should be in writing and employees should be given notice of the employer's intent to monitor, the reason for monitoring, and the form of monitoring. A good monitoring policy should address computer, telephone, e-mail, voice mail, and Internet use with the goal of eliminating any employee expectations that these communications are confidential. State privacy laws vary, so consult with an attorney experienced in employment law when drafting an electronic communication usage and monitoring policy.

Balance is Key

While it is critical that employers reduce employees' expectation of privacy in the workplace, a Big Brother atmosphere will breed worker paranoia and will have a negative affect on employee performance and loyalty. Also, rigid policies on the personal use of company communications equipment can lead to employee resentment and turnover. Balancing employee needs with employer productivity and liability needs is key in dealing with the employee privacy issue.

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