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EMPLOYMENT PRACTICES RISK REDUCTION STRATEGIES

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Workplace Investigations: What Should a Firm Do if it Receives a Complaint of Workplace Harassment or Discrimination?

Based on recent federal court decisions, it has become clear that an employer must take prompt and appropriate action when allegations of harassment, discrimination, or retaliation for having made such allegations, are made to a manager. This has been interpreted to mean that the employer must conduct a prompt, thorough, and impartial investigation, and take prompt and appropriate corrective or disciplinary action if it determines that the alleged act has occurred. This requirement is not necessarily bad for employers, as complaint investigations provide critical factual data that can either protect employers from liability or minimize damages.

The Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcing harassment and discrimination laws, has provided guidance on what the investigative process should entail. Although the EEOC's policy guidelines do not have the force of law, courts frequently cite the agency's interpretation in their rulings. To view the guidance document on how to conduct investigations, go to http://www.eeoc.gov/docs/harassment.html. The EEOC also provides its own complaint investigators with charge processing instructions. The agency instructs its investigators to look for the following information regarding the employer's investigation when evaluating a charge made through the EEOC:

Visit the AICPA Insurance Programs website, **www.cpai.com**, for more information on the management of employment practices liability risks. Our Risk Management Resource Center has valuable information for employers, including:

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If the complaining party complained to management, did the employer conduct a proper investigation?

- Was the investigation conducted promptly?
- Did the harasser have direct or indirect control over the employer's investigation?
- Did the employer effectively question the parties and others who might have had relevant information?
- Did the employer reasonably assess each party's credibility?

If the employer, as a result of its investigation, determined that the complaining party's supervisor harassed him or her, did the employer take immediate and appropriate corrective action?

- Did the employer undertake measures to stop the harassment and ensure that it would not recur?
- Did the employer undertake disciplinary measures that were proportional to the seriousness of the offense?
- Did the employer undertake measures to correct the effects of the harassment or discrimination on the complaining party?

Did the employer undertake other reasonable measures to prevent and correct harassment and discrimination?

- Did the employer instruct all supervisors to report all complaints of harassment or discrimination to appropriate officials?
- Did the employer undertake measures, such as training, to ensure that supervisors and managers understand their responsibilities under the employer's anti-harassment and discrimination policy and complaint procedure?
- Did the employer monitor supervisors' and managers' compliance with those responsibilities?
- Did the employer keep records of harassment complaints to reveal any patterns of harassment by the same individual?

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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As the above points illustrate, conducting an investigation is a serious and complex matter. An investigation that is not conducted properly can limit your firm's ability to provide an affirmative defense and minimize any resulting damage awards. Moreover, an improperly conducted investigation can subject your firm to a claim of negligent investigation or failure to reasonably investigate. A poorly handled investigation may also contribute to claims of retaliation against a complainant or defamation or wrongful discharge of the alleged harasser.

Therefore, if your firm does not already have an individual who is trained and experienced at performing complaint investigations, it is strongly recommended that your firm seek advice from an attorney experienced in employment law as soon as a complaint is received. Also, consider using a neutral, third party complaint hotline to encourage and facilitate prompt reporting and to help reduce defamation and retaliation claims. Many employees perceive internal reporting channels and systems as biased. For a fee, third party complaint hotlines allow employees to report incidents of harassment or discrimination 24 hours a day, seven days a week to an impartial third party.

A complaint investigation and any ensuing litigation can become quite costly both in actual expenses and lost billable hours for the firm. It is best to try to avoid complaints entirely by putting in place an ongoing anti-harassment/discrimination training program for all firm supervisors, managers, and employees. ■

Your Firm Has Just Received a Charge From the EEOC: Now What?

An employee who complains of harassment or discrimination can report his or her complaint to the Equal Employment Opportunity Commission (EEOC). In 2000, the number of charges brought by the EEOC against employers reached 79,896. Receiving a complaint letter from the EEOC can be a shocking event for an employer. The following information about the EEOC complaint process may help minimize the shock should your firm ever find itself on the receiving end of an EEOC complaint letter.

The EEOC enforces the following federal laws: Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act (ADEA), Equal Pay Act, and the Americans with Disabilities Act. These laws prohibit employment discrimination based on race, color, sex, religion, national origin, age, disability, or in retaliation for opposing job discrimination, filing a charge, or participating in proceedings under these laws. The EEOC's mandate is to determine in a fair and objective manner whether the laws it enforces have been violated.

The laws enforced by the EEOC cover all private employers that employ 15 or more individuals, except for ADEA, which covers employers with 20 or more employees. Any individual who believes that his or her employment rights have been violated because of his or her race, color, sex, religion, national origin, age, disability or due retaliation may file a charge of discrimination with the EEOC.

Employees must file their employment discrimination charge with the EEOC within 180 days from the date of the alleged discrimination. If the employer is also covered by a state or local employment discrimination law, the time to file a charge with the EEOC is extended to 300 days.

EEOC investigators interview individuals alleging employment discrimination to determine the potential merits of the charge and assess whether they will investigate or immediately dismiss the charge. The EEOC will notify the employer by mail within 10 days of receiving a charge. The employer is asked to respond to the allegations in the charge and provide documentation to substantiate its response. As soon as the EEOC receives the employer's written position statement and any other relevant evidence, they will determine whether to investigate further, propose settlement or dismiss the charge.

If the EEOC decides that there is insufficient evidence to conclude that a violation exists, the charging party is given a dismissal notice that includes the right to file a lawsuit in federal court. The laws also permit the charging party to choose to proceed to federal court instead of waiting for the EEOC to complete its investigation. In some cases, the EEOC may issue a notice of right to sue upon the charging party's request.

If the EEOC decides that there is reasonable cause to believe that discrimination occurred, the investigator explains the rationale to the employer. A written determination and an invitation to enter into conciliation discussions follow this. The purpose of these discussions is to eliminate the discrimination and provide relief to the charging party and others, if appropriate, without going to court. Negotiations will continue for a reasonable period until the case is resolved or conciliation fails. If the conciliation efforts fail, the EEOC will determine if it will sue the employer. In addition, if the EEOC receives many complaints about the same employer, it has the power to bring federal suit against the employer on its own.

A firm can resolve a charge without an investigation by using the EEOC's free mediation program. The program is voluntary at all stages of the process. Neutral mediators provide employers and charging parties the opportunity to reach mutually agreeable solutions, while making efficient use of their time and money. In the event that mediation does not result in a settlement, the charge is referred for investigation. Information disclosed by the parties during mediation will not be used as a part of the EEOC's investigation. Mediators are bound by

HELP IS JUST A TELEPHONE CALL AWAY

For immediate legal advice on employment law and practice management issues such as responding to EEOC complaints, conducting workplace investigations, and complying with affirmative action laws, call **800-569-3679**. 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.

confidentiality provisions and may not provide information about the mediation to the EEOC. While EEOC investigations can take up to 14 months to resolve, all cases successfully mediated are brought to a close within three months. Therefore, your firm may want to seriously consider mediation as an alternative method of dispute resolution.

It is also possible to receive notification of a discrimination charge by your state or local Fair Employment Practices Agency (FEPA). The EEOC works in cooperation with most of these agencies through Work Sharing Agreements. Each charge of discrimination that is covered by both an EEOC-enforced statute and an FEPA enforced law or ordinance is dual-filed under both laws. However, it is most likely that only one agency or the other will conduct an investigation. Some state and local ordinances cover more forms of discrimination than federal law. In those cases, the EEOC may dismiss a case because no discrimination was found under federal law, while the state or local agency may continue with its investigation in its effort to enforce broader state and local discrimination laws.

Monetary remedies for unlawful discrimination include awards of lost wages, prejudgment interest, and compensatory damages. Future compensatory damages and punitive damages may also be awarded, however, these two types of damages are capped up to $500,000 depending on the size of the employer.

In summary, receipt of an EEOC or local FEPA charge notice does not mean that the government is accusing your firm of discrimination. It means that someone has alleged that your firm has discriminated against him or her and the EEOC's mandate is to investigate the charge and determine whether there is a reasonable cause to believe that discrimination has occurred. If your firm receives an EEOC charge notice the firm should obtain advice from an attorney experienced in employment l aw matters prior to preparing a response. For more information on the EEOC's investigation procedures, go to www.eeoc.gov/small/chargesfiled.html. ■

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What does "affirmative action" in employment mean, and how does it affect my firm?

Affirmative action is a process whereby a business or governmental agency gives special rights in hiring or advancing to ethnic minorities to make up for past discrimination against those minorities.

Several federal laws as well as state statutes and local ordinances require certain businesses to take affirmative action. For example, Executive Order 11246 requires that federal contractors and subcontractors take affirmative action to ensure that applicants and employees are treated without regard to their race, color, religion, sex, or national origin. The Department of Labor enforces the Order and other federal affirmative actions laws through the Office of Federal Contract Compliance Programs (OFCCP). In 2000, OFCCP affirmative action enforcement resulted in $38.4 million in settlements paid by employers to employees.

Under Executive Order 11246, supply and service contractors/subcontractors with 50 or more employees and at least one federal contract/subcontract for $50,000 or more in any 12-month period must develop a written Affirmative Action Plan. Affirmative action laws do not mandate quotas. In fact, quotas are expressly forbidden by law. Affirmative Act Programs consist of three parts, (1) problem identification, (2) self-analysis, and (3) action-oriented programs that require an employer to engage in outreach and other efforts to broaden the pool of qualified candidates to include groups previously excluded. Therefore, if your firm has 50 or more employees and a federal contract for $50,000 or more, then your firm management must know and comply with its affirmative action obligations. For more information on federal affirmative action law and compliance, go to the U.S. Department of Labor's web site at http://www.dol.gov.

Contracts with a state governmental agency are not considered covered by the Executive Order. However, some states have public contractor laws that mirror the requirements of the federal affirmative action laws. So, be sure to also investigate and determine if your firm has any affirmative action obligations under state or local law.

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