Barley Snyder

Employment Law Update June 2009

PUBLISHED ON
June 1, 2009

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Risk Management Alert: Trends in Discrimination Claim Filings and How to Protect Your Company from Liability

By: Jennifer Craighead Carey

The Equal Employment Opportunity Commission (EEOC) recently issued its fiscal year 2008 statistics on claims filed with the agency. Against the backdrop of a bad economy, corporate downsizing, a poor job market and emerging government enforcement, the EEOC saw a rise in charges filed against private sector employers of 15.2% in fiscal year 2008. The EEOC also reported recouping some $376 million dollars in monetary relief for victims of discrimination.

Of special note, the EEOC reported a rise in charge filings in all categories of employment discrimination. The areas of discrimination that reported the highest increases were: age (28.7%) and retaliation (27.6%). The increase in age charges is, at least in part, related to the economy and the downsizing of employees. The increase in retaliation charges is likely the result of recent cases from the U.S. Supreme Court which make it easier for employees to bring claims of retaliation against an employer even in the absence of a specific adverse job action.

Employers confronting a climate of increased vulnerability to charge filings should take this opportunity to develop risk management strategies that take a proactive approach to preventing claims and put the employer in the best light to defend such claims. To that end, employers should consider the following:

1. Review and update employee handbooks and consider having an employment law attorney review the handbook for legal compliance.

Among other policies, employee handbooks should include a policy on harassment that enables employees to report illegal harassment of any nature, not just sexual harassment complaints. The harassment policy

should also prohibit retaliation and include a mechanism to report complaints of retaliation. In light of the recent changes to the Americans With Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA), all handbooks should include an updated FMLA policy and a separate policy on compliance with the ADA. The ADA policy should include a procedural mechanism for employees to make requests for reasonable accommodation. In addition, employers need to consider modifying their policies to include the prohibition on genetic information discrimination under the Genetic Information Nondiscrimination Act of 2008 (GINA), which will take effect on November 21 of this year.

2. In light of GINA, employers should also review their post-offer/pre-employment medical examination process to ensure that their examinations are not so comprehensive as to seek information in a health history format or otherwise which solicits genetic information prohibited by GINA.

3. In conducting workforce reductions -- or job eliminations, layoffs, reorganizations, restructurings or other terms for employment actions that cause people to involuntarily lose their jobs for business or economic reasons -- employers should make sure they have developed a written plan of action that includes clearly articulated criteria for employee selection. This plan should be reviewed against any policies the employer has in place for dealing with layoffs.

Employers also need to consider whether their actions have a disparate impact on a protected group and whether less intrusive methods to mitigate this impact exist that will accomplish the employer's business needs. If employers require employees to sign separation agreements in conjunction with a layoff that includes a general release of claims, including claims under the Age Discrimination In Employment Act (ADEA), employers need to ensure that they comply with the Older Workers' Benefit Protection Act (OWBPA). The OWBPA includes very specific time periods for consideration of such agreements and has detailed disclosure requirements. Employers using such agreements should have them reviewed by legal counsel to ensure that the agreements continue to be legally valid and that the employer has complied with all laws governing such agreements, including the OWBPA.

4. Consider conducting training of employees and supervisors in critical areas of the law. Such training should include:

Periodic training of the entire workforce on the employer's harassment and discrimination policies, with enhanced training for managers and supervisors on their responsibilities to address such conduct in the workplace and to handle complaints (whether formal or informal).

Training of managers and supervisors on the implications of retaliation in the workplace.

Training of managers and supervisors on ADA compliance.

Training of managers and supervisors on FMLA compliance.

Training of all key personnel in human resources and management on the importance of documentation in the workforce, and strategies for discipline/termination and performance evaluations which mitigate legal risks.

The attorneys in our Employment Law Group regularly review employee handbooks and separation agreements, and assist employers in workplace training. If you would like our assistance, please contact Jennifer Craighead or any of our employment attorneys.

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Trends in Workers' Compensation Cases

By: Richard L. Hackman and W. Jeffrey Sidebottom

Several years ago, the Pennsylvania legislature amended the Workers' Compensation Act to include two changes regarding the workers' compensation litigation system. Now that these changes have been in place for several years, we are seeing that they have had a generally positive impact on employers' cases.

The first major change was that the law now requires the workers' compensation judge to issue a Scheduling Order outlining the time limits that the parties have to complete their case. By establishing deadlines for when depositions need to be taken, the scheduling order requirement has helped to move litigation along at a faster pace. Prior to this change, there were judges who did not place any requirement on the amount of time parties had to complete their case. In those situations, employers would often see their cases drag out for years rather than being pushed toward a prompt conclusion. Now that judges establish time limits for the parties to complete their case, we are seeing a trend of more prompt case completion. While it is still difficult for employers and businesses to understand why it takes six to nine months to complete a case, at least the trend is moving in the right direction with the time from filing a petition to reaching a decision decreasing every year.

The second major change was the requirement that judges schedule a mandatory mediation session to see if the parties could resolve the case without ongoing litigation. Before this change, the parties could agree to voluntary mediation. However, now that mandatory mediation is required unless both parties believe that mediation would be futile, there has been a cultural change in the system that encourages more discussion of settlement rather than proceeding through full litigation in every case.

We have found mediation to be very helpful to our clients in many respects. First, if the mediation process takes place early enough in the litigation process, substantial legal costs involved in defending the matter can be saved, in addition to avoiding the costs of medical depositions. Secondly, mediation gives employers some leeway in deciding whether to proceed through the litigation or to settle a case and avoid the risk of an adverse decision, which may be less expensive in the long run. An additional advantage of mediation is that our firm typically requests, for our client's benefit, a letter of resignation and general employment release as part of the consideration in any settlement. That

request does add value to the settlement proposal, and we believe that if a claimant is going to settle a workers' compensation case, in most cases the parties want to end the employment relationship as well.

Finally, one of the advantages of a mediation is that with the assistance of the mediator -- who is a workers' compensation judge not assigned to the case -- we find that claimants who start out with very unreasonable expectations can become more reasonable after talking to a mediator regarding what a case may be worth for settlement purposes. The settlement figure arrived at during a mediation is often one that our clients can accept in an effort to close out a case and avoid the risk of an adverse decision. By the same token, however, if a claimant continues to have unreasonable expectations even after the mediation process, then we can proceed with a full and aggressive defense of the case. Thus, mediation is one of many tools that can be used for the benefit of our clients as it provides options and can, many times, result in a reasonable and satisfactory settlement that concludes the litigation process in a much more timely manner.

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U.S. Supreme Court Rules Union May Waive Employee's Rights to Litigate Discrimination Claims in Federal Court

By: David R. Keller

In a close 5 to 4 vote, the U.S. Supreme Court recently held that when a union contract clearly requires employees to resolve their discrimination claims under Title VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act (ADEA) in arbitration, the employee must use the grievance and arbitration procedure of the Collective Bargaining Agreement between the union and the employer to resolve those claims and may not bring a lawsuit in federal court to do so.

In *14 Penn Plaza LLC v. Pyett*, the Union and an association of employers had a contract expressly stating that claims made under Title VII, the Americans with Disabilities Act, the ADEA and state discrimination laws "shall be subject to the grievance and arbitration procedures . . . as the sole and exclusive remedy for violations."

When employees were reassigned to lower paid positions and believed their employer did so because of their age, a grievance was filed under the Collective Bargaining Agreement. Although two other grievances about the reassignment proceeded to arbitration, the Union withdrew the age discrimination grievance and did not pursue an arbitration remedy. The employees then filed a discrimination complaint with the EEOC and ultimately sued in federal court under the ADEA. The employer sought to have the lawsuit dismissed because there was a Collective Bargaining Agreement holding that arbitration was the sole and exclusive remedy.

In its ruling on April 1, 2009, the Supreme Court agreed with the employer, holding that although a Collective Bargaining Agreement cannot waive the substantive right to be free from age discrimination, it can waive the rights of workers to go into court as a remedy. According to the Supreme Court, a union and an employer, bargaining collectively in good faith, may agree that all employment-related discrimination claims will be

resolved in arbitration, rather than in court. The Supreme Court called such a provision in a Collective Bargaining Agreement one that "easily qualifies as a condition of employment that is subject to mandatory bargaining."

Employers with Collective Bargaining Agreements may wish to consider the impact of the *14 Penn Plaza LLC* case. Labor contract provisions such as the one negotiated here are not commonplace, in large part because of the history of cases that have not upheld such a provision. Going forward, however, employers may wish to consider seeking to include such provisions when negotiations take place. With no such provision in the Collective Bargaining Agreement, an employee may persuade the union to arbitrate his or her claim of discharge without "just cause." Even if the employee loses the arbitration, he or she remains free to seek a remedy in federal court under the applicable discrimination laws. By inserting a provision in the Collective Bargaining Agreement requiring employees to resolve all discrimination cases through the arbitration procedure, the employee gets only one opportunity to bring a discrimination claim, and that opportunity is one that is often less expensive and time consuming for the employer.

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Interested in Accessing Federal Stimulus Money? What you Should Know About Prevailing Wage Rates

By: Keith Mooney

Congressional passage of President Obama's Economic Stimulus Package should have a two-fold effect on Public Works projects throughout Pennsylvania. The first and most obvious is that both the Commonwealth of Pennsylvania and the multitude of local municipalities throughout the state will have the ability to access federal grant monies to design and complete Public Works projects. In addition, due to the influx of federal dollars, many municipalities may choose to utilize their state and local dollars to complete projects which were thought of as optional projects or were on their wish list. Employers desiring to provide construction services in connection with the increased amount of Public Works projects which will be undertaken must remember that these projects most likely will be subject to either the Federal Prevailing Wage Rates pursuant to the Davis-Bacon Act or the Pennsylvania Prevailing Wage Rate.

The Davis-Bacon Act requires that each contract in excess of $2,000 to which the United States or the District of Columbia is a party for the construction, alteration, or repair of public buildings or public works contain a provision setting forth the minimum wages to be paid to various classes of laborers and mechanics employed under the contract. Furthermore, Congress has extended the provisions of the Davis-Bacon Act to approximately 60 statutes which assist construction through grants, loans, and loan guarantees. Therefore, state and local projects which receive federal funding are ordinarily subject to the Federal Prevailing Wage Rates promulgated under the Davis-Bacon Act. Under the provisions of the Davis-Bacon Act, contractors or their subcontractors are required to pay workers employed directly upon the site of the work no less than the local prevailing wages and fringe benefits paid on projects of a similar nature. The responsibility for determining the local prevailing wage rates has been delegated to the Secretary of Labor.

In the event the requirements of the Davis-Bacon Act do not apply to a government construction project, it is more than likely that the requirements of the Pennsylvania Prevailing Wage Act will apply. The regulations of the Pennsylvania Prevailing Wage Act apply to all contracts for construction of public works within the Commonwealth of Pennsylvania whose cost is in excess of $25,000 and one of the parties to the contract is the Commonwealth of Pennsylvania, a Pennsylvania municipality or a municipal authority. The Pennsylvania Prevailing Wage Act requires contractors and subcontractors on qualifying public works projects to pay workers upon those projects the prevailing minimum wage rates. The Pennsylvania Prevailing Wage Rates are set by the Secretary of Labor and Industry.

In the event that a contractor or subcontractor violates either the Federal Prevailing Wage Act or the Pennsylvania Prevailing Wage Rate Act, the penalties are rather severe. A contractor or subcontractor who inadvertently violates either Act will be given a reasonable amount of time to make the affected employees whole. A contractor or subcontractor who is found to have intentionally violated the Federal Prevailing Wage Act (Davis-Bacon) will be subject to the following: contract termination; debarment from future contracts for up to three years; payment of liquidated damages to the federal government for the cost of investigation and enforcement; and suspension of contract payment already earned to offset the liabilities for unpaid wages and liquidated damages. Furthermore, a contractor or subcontractor who has falsified payroll records or required the kickback of wages from employees can be subjected to criminal and civil prosecution, the penalty for which may be fines and/or imprisonment.

A contractor or subcontractor who is found to have intentionally violated the Pennsylvania Prevailing Wage Act is subject to the following: debarment from future contracts for a period of three years; payment of liquidated damages to the Commonwealth for the cost of investigation and enforcement; and the amount of underpayment of wages due to the underpaid employees.

Although governmental entities and recipients of governmental funding whose projects are subject to prevailing wage rates have a duty to include these requirements, it is incumbent upon employers to have a working knowledge of these statutes. There is ample case law that provides that employers can be held liable for payment of the Davis-Bacon or Pennsylvania Prevailing Wage Rates upon the failure of the governmental entity or the governmentally funded recipient to provide notice in compliance with the statutes. Therefore, contractors and subcontractors need to be able to make some independent decisions regarding these statutes and at least make inquiries of the entities seeking bids regarding their applicability.
If you need guidance or advice regarding either the Federal Prevailing Wage Rate or the Pennsylvania Prevailing Wage Rate and their applicability, please contact Keith Mooney or any other member of the Barley Snyder Employment Law Group.

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