SPECIAL REPORT

ADDRESSING THE EMPLOYMENT PRACTICES LIABILITY EXPOSURE

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Today more than ever employers of all sizes are at risk for lawsuits, government investigations, and other claims related to a variety of employment practices allegations, including wrongful termination or demotion, retaliation, discrimination, harassment, defamation, failure to comply with disability laws, wage and hour violations, and benefits litigation to name a few.

Allegations of wrongful employment practices can have a devastating and lasting effect on a company. The costs associated with addressing these claims are escalating, and jury verdicts and other penalties are increasing. They can also have a significant negative impact on morale, worker productivity, and the company's public image.

Employment practices allegations come in many forms including:

A. Private Causes of Action Against Employers

There are a number of different types of claims that can be filed against an employer alleging improper employment practices. Some common causes of action include:

1. Breach of Express or Implied Contract

   Some employees have express written employment agreements with their employers for specific periods of time, regarding compensation and other terms of employment. Where an employee asserts that one or more of those terms has been violated, a breach of contract claim may be pursued.

Breach of implied contract claims generally come in two forms in Michigan. First, an employee could maintain that an oral employment contract of indefinite duration existed, wherein the employer had only a limited right to terminate the relationship for specified reasons. In the second type of breach of implied contract claim, an employee may claim a reasonable expectation of future employment or employment benefits which were denied.

2. "Public Policy" Claims

A "public policy" type of claim involves an employee termination for a reason that goes against public policy, for instance, terminating an employee in retaliation for filing a workers' compensation claim or harassment claim, for refusing to engage in an illegal act during the course of employment.

3. Workplace Harassment

There are various federal and state statutes that prohibit workplace harassment based on a protected class such as race, religion, age, sex, etc. Sexual harassment claims are among the most common. Such suits can be based on "quid pro quo" (sexual acts as a condition for employment) or "hostile work environment" (environment of sexual nature such as posting of comics, telling of dirty jokes, etc.). Implementing and enforcing effective policies and procedures prohibiting sexual harassment can minimize these claims. This includes developing comprehensive standards for prompt investigation and disciplinary action where necessary.

4. Discrimination

A very common type of private employment claim is violation of state or federal law prohibiting discrimination. The Michigan Elliott-Larsen Civil Rights Act and Michigan Persons with Disabilities Civil Rights Act are frequently cited by employment lawyers. These laws provides for a broad group of protected classifications including race, color, religion, national origin, age, weight, height, familial status, or marital status.

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5. Whistleblowers Claims

State law also prohibits retaliation or discrimination against an employee for reporting an employer to a governmental authority for violation, or suspected violation, or a law.

6. Tort Claims

A variety of tort claims may be alleged against an employer. For example, a defamation claim could exist where an individual is not able to find a new job because of derogatory statements made by the employer. As another example, a tort claim of assault and battery or intentional infliction of emotional distress could be alleged in a suit claiming sexual harassment.

B. Governmental Actions

Aside from private lawsuits, governmental authorities also have the right to investigate certain employment complaints. For example, in Michigan, the Michigan Department of Civil Rights can open a file on an employer and demand written answers to questions, take interviews, and require the production of documents to ascertain whether discrimination or another violation of the law has occurred.

The Michigan Department of Labor Wage and Hour Division also has the ability to investigate concerns involving violation of compensation regulations. Similarly, the U.S. Department of Labor has the authority to review compliance with minimum wage and overtime regulations.

The Equal Opportunity Employment Commission (EEOC) of the federal government has the right to undertake similar investigative activities on behalf of employees or at its own initiative.

Both federal and state agencies have broad sweeping powers to sanction employers, order back pay, and to take other remedial action to prevent illegal policies and practices of an employer.

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15 PRACTICAL TIPS FOR MINIMIZING YOUR RISK

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Although the exposure to employment practices liability always exists, there are many steps any employer can take to minimize such risks:

1. **Utilize arbitration agreements signed by the employee to reduce the risk of high jury awards.**

   Recent Michigan case law benefits employers by stating that where consistently applied, arbitration agreements can be enforced. Such agreements must be treated like any other contract and the appropriate consideration must be paid to the employee. Utilizing such agreements can significantly reduce an employer's exposure to large jury verdicts in employment lawsuits.

2. **Implement and enforce effective and up-to-date employment policies.**

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   One of the first exhibits to be marked in employment litigation is the employer's personnel policy manual, job application, and other employment related documents. Attorneys specializing in employment law should be regularly involved in the updating of such a manual. These policies should usually confirm the existence of an "at-will" employment arrangement so as to guard against suits alleging wrongful discharge and breach of contract. A comprehensive legal review will minimize the risk of ambiguous or conflicting policies.

3. **Be cognizant of pre-employment inquiries.**

   In Michigan, like in most states, employers are limited in what they can ask at the time of considering a prospective employee. For example, the age, race or sex of an applicant cannot be asked. There are other less obvious requirements such as the prohibition against asking an applicant if he or she has ever been arrested. If you would like a list of prohibited questions, please call or write the Marsh and McLennan Agency.

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4. **Ensure that your company is complying with wage and hour regulations.**

   Federal and state wage and overtime rules are complex and frequently misunderstood by employers. According to an October, 2007 article in Business Week magazine, wage and hour litigation has exploded across the country since the beginning of this decade. The article notes that in recent years, companies have paid out billions to settle wage and hour claims which are generally brought on behalf of large groups of employees. The article notes an $18 million settlement in 2003 by Starbucks in connection with a wage and hour case brought by store managers in California, and, in the past two years Wal-Mart has been hit with jury verdicts of $172 million to workers in California, and $78.5 million in Pennsylvania.

   Employers should seek specific legal counsel from an attorney knowledgeable about employment law in order to ascertain compliance with federal and state wage and hour laws.

5. **Obtain legal counsel if a lawyer calls you or if you question whether termination or disciplinary action is appropriate.**

   There is no substitute for obtaining legal advice if presented with an employment situation that could give rise to a claim. Employers should avoid attempting to handle such matters on their own given the highly specialized regulations and laws which may apply. Moreover, any statements made might be used against the employer at a later time.

6. **Be cognizant of the fact that personnel files of other employees may be the subject of review in litigation.**

   Many plaintiffs' lawyers attempt to obtain documents from an employer before filing suit. If an employer is asked for documents, the request should be forwarded to legal counsel instead of simply producing the documents given the issues of confidentiality. In fact, this policy should be applied to all documents whether related to personnel files or not.

7. **E-mail is the plaintiff's attorney's new best friend.**

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Crafty plaintiffs' lawyers have wised up to the technological age where e-mail is in almost universal use. Specialized computer companies can obtain such email and computer messages from an employer's computer system, even if such messages have previously been "erased." Employers should adopt a communication policy prohibiting non-business use of computers and phones, including e-mail, voice mail and Internet access.

8. **Use acknowledgement forms**.

   One of the most effective tools in defending companies in litigation are documents, particularly those signed by the former employee plaintiff. Employers should use error-proof systems for obtaining signatures on acknowledgement forms and at-will policies, as well as other important documents.

9. **Implement an "iron-clad" harassment /sexual harassment policy that includes a "notice to employer" provision.**

   All personnel manuals should include anti-sexual harassment policies which are carefully drafted by legal counsel. Internal policies and procedures should also be developed to govern the investigation of all alleged employee misconduct.

10. **At-will policies should be the rule rather than the exception unless employment contracts are used.**

    Although in Michigan the general rule is that an at-will employment arrangement is presumed, employers should take active steps to clearly solidify such policies for the sake of consistency. These types of claims can be minimized through having a consistently applied "at-will" employment policy that denies the existence of a contractual relationship with the employee. More specifically, the employer establishes in writing that either the employer or the employee can terminate the relationship with or without cause or notice.

11. **Avoid giving negative feedback to potential employers.**

    Acknowledging employment dates and job title should generally be the limit of the information provided to prospective employers. Even then, it

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is highly recommended that employers respond in writing to only those requests which are reduced to writing. No information should be given out over the phone.

12. Save all documents and notes, regardless of how trivial.

At the time of a claim or suit, much emphasis will be placed on documentary evidence to show the scope of the employment relationship and what was expected of the employee claimant. This underscores the need to retain all documentation.

13. Utilize employee benefit plan systems and procedures to avoid COBRA and ERISA claims.

Also note that insurance coverage can be purchased for mistakes in administering employee benefit programs, and such coverage should be included in every commercial insurance program. The additional cost for such coverage, if any, is nominal.

14. Purchase employment practices liability insurance which is less expensive than you might think.

Employment practices liability coverages are widely available today. Such coverages may be as inexpensive as $750 per year and can be purchased to cover defense costs and judgments for a host of employment claims. Such coverage should be included or at least considered as a staple to virtually every commercial insurance program.

15. Where an Employment Practices Exclusion applies to your liability insurance, have your agent be sure it only applies to claims by the wrongdoer.

Otherwise, workplace violence incidents would arguably not be covered for any injured employee.

This Special Report is general in nature and is not designed to provide specific legal advice for any employer-employee situation or for your organization in particular. More specific advice should be obtained from legal counsel.

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uncertainty and the analysis could be materially affective if any underlying assumptions, conditions, information or factors are inaccurate or incomplete or should change.

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