



EEOC Attorneys Share Seven Ways That Employers May Improve EEO Practices and Reduce Liability Exposure

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Navigating the complexities and intricacies of the many existing federal, state and local employment laws and regulations is not easy. For this reason, despite an employer's best efforts to act within the boundaries of the law, it may find itself embroiled in litigation with an employee or former employee. During a June 11, 2008 American Law Institute-American Bar Association teleconference, Equal Employment Opportunity Commission ("EEOC") regional attorneys shared seven common errors employers consistently make in their equal employment opportunity ("EEO") practices. Employers may avoid or lessen liability down the road by considering and revising their existing practices and procedures to ensure that they do not make these costly errors.

Common Errors Employers Make.

1. Failure to Train.

Failing to train, or improperly training supervisors regarding supervisory and co-worker harassment is a frequent cause of employer liability. Supervisors must understand: (a) what actions may constitute unlawful harassment; (b) what responsibilities they have (pursuant to the employer's relevant anti-harassment policy or procedure) if a complaint is made; and (c) what actions may constitute unlawful retaliation against the complaining individual. In addition to supervisory training, an employer should provide general anti-harassment training to all its employees, which should be tailored to the particular needs, environment and workforce.

2. Flawed Investigations and Retaliation.

Failing to promptly investigate a complaint of unlawful conduct, or failing to conduct a thorough and complete investigation into any such complaint, may limit an employer's ability to defend against a subsequent lawsuit arising out of that complaint. Further still, it is important that an employer take appropriate corrective action when the investigation findings so warrant. Ignoring a finding of improper conduct not only renders the investigation useless, but it similarly adversely affects an employer's potential defenses to liability down the road.

3. Sex Discrimination and Caregivers.

Due to changing workforce demographics, caregiver discrimination charges are on the rise. While discrimination laws do not prohibit discrimination against caregivers per se, the adverse treatment of such individuals can lead to charges of sex or race discrimination. For this reason, employers should take care not to ask employment candidates whether they have children and/or caregiving responsibilities. Regarding disability leave, if an employer's practice is to allow disability leave for non-workplace related injuries, leave should similarly be afforded to women for pregnancy-related disabilities.

4. Disability-Related Inquiries.

Employers frequently become confused with when and what they may ask employment candidates about their health and/or physical capabilities. The Americans with Disabilities Act ("ADA") provides three critical stages for medical questioning. At the pre-offer stage, an employer may not ask *any* medical-related questions or require any medical examination of an employment candidate. After a conditional offer of employment has been made, an employer may require the candidate to undergo a

medical exam *if* the same requirements apply to all employees. These same restrictions apply during the active employment stage. Hiring personnel need to know they may not reject an applicant due to that applicant's disability (or perceived disability) unless it is job-related and consistent with business necessity.

5. Confidentiality of Medical Information.

An employer may disclose an employee's medical information only under *limited* circumstances, such as: (a) when it is necessary to share it with supervisors, managers and/or safety personnel; and (b) when required by government agencies. Under no circumstances should an employer disclose an employee's disability in a reference letter to a future employer.

6. Reasonable Accommodations.

Employers should resist going on "fishing expeditions" in response to an employer's request for accommodation for a disability by requiring that employee to submit his or her complete medical records in support of the accommodation request. Instead, the request for the employee's medical records must be a "focused inquiry" for only those documents necessary to show that the employee, in fact, has a disability and needs a reasonable accommodation.

7. Stereotypes Without Information.

Employers may expose themselves to potential liability when they take actions based on stereotypes. Instead, employers should focus on facts, circumstances and employee conduct, as opposed to labels or assumptions, when evaluating situations requiring employer action.

Employer Guidance and Best Practices.

Ensuring that current policies and procedures as practiced do not result in committing one of the seven common employer errors identified by the EEOC can significantly reduce an employer's exposure to liability. The EEOC's compliance manual, which assists employers in determining whether a particular practice may be unlawful, may similarly assist in reducing an employer's liability risk. That manual can be found through the EEOC's website at www.eeoc.gov/policycompJiance.htmlenforcement. When in doubt, however, it is always advisable to seek advice and counsel from an experienced labor and employment attorney.

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