Employment Practices Litigation

A Risk Management Web Seminar
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Program Overview

- Managing the risks of an employment lawsuit—what do you need to know?
- Employment litigation trends
- Lessons from employment litigation
  - Big picture
  - Your nonprofit
  - Avoiding and surviving employment claims
Managing the Risks

- First: acknowledge the risks
- Next: plan to deal with those risks
  - Practical policies
  - Effective communications

Employment Litigation Trends: Class Action Suits

- In 2002, over 2,900 class actions were filed in federal courts.
- Employment cases are one reason for the exponential increase in these claims.
- Every potentially actionable discrimination claim has been asserted at one time or another as a class action.
- Common class actions include gender, race and age discrimination cases.
Trend within a Trend:
Employment-Related Class Action Trends

- pay equity for women and minorities
  - Gender- or race-based pay discrimination
  - Failure to promote, based on gender, race or ethnicity
- wage and hour cases

What is a Class Action Suit?

- “A legal device allowing a group of individuals with a claim against a company or an individual to join together as plaintiffs in a single suit.”
  - Source: www.insweb.com
Other Employment Litigation Trends

- Lawsuits alleging hostile work environments and harassment because of disability, religion, race, and sex.

- “One person's harassment is another person's uncivil treatment. Because virtually everyone is in a protected class, anyone is in a position to claim harassment.”
  - Source: Stanley L. Goodman, Esq., Grotta Glassman

Other Employment Litigation Trends

- Pregnancy discrimination cases
  - Damages range from several thousand to millions of dollars
    - “Do you want to have babies or have a career here?”
  - Most cases filed under Title VII
  - Managers must be trained to make personnel decisions based on merit, not assumptions
Other Employment Litigation Trends

- Retaliation suits filed by whistleblowers

- EEOC data:
  - Total charges filed in 2005 = 75,428 (peak years = ’93-'95, 2002 – decline since that time)
  - Claims alleging illegal retaliation and discrimination based on disability are growing as % of total claims

Retaliation Claims

- **Rapid Rise** — Retaliation charges have doubled during the past three decades and constitute **25 percent** of all charges before the EEOC.

- **Quantifying the Exposure** — Employers facing retaliation lawsuits can be found liable for reinstatement, back pay, front pay, damages for pain and suffering, punitive damages and the plaintiff’s legal fees. Some of this depends on the particular anti-retaliation law involved.
What is Retaliation?

- “Most of the federal laws that protect employees' rights contain provisions that make it unlawful for an employer to retaliate against someone who engages in conduct which the law protects.”
  - Source: workplacefairness.org

What is Protected Conduct?

http://www.workplacefairness.org/retaliation

- “Protected conduct” includes all aspects of trying to oppose or remedy discrimination, such as: filing a charge of discrimination; threatening to file a charge; complaining about, opposing or protesting perceived discrimination against yourself or another employee; assisting someone else in opposing discrimination; giving evidence or testimony to an investigator; refusing to engage in conduct that the you believe to be unlawful; and refusing to assist an employer (by testimony or otherwise) in discriminating.
What is Protected Conduct?

- "Under the Family and Medical Leave Act (FMLA), requesting or taking medical leave or protesting your employer's refusal to allow you to take leave is considered protected conduct. Even making inquiries about a certain policy or practice of the company, or about your participation in any retirement or other plan covered by the Employee Retirement Income and Security Act (ERISA), is protected conduct."

Retaliation Remedies

- back pay,
- hiring,
- promotion,
- reinstatement,
- front pay,
- punitive damages (damages to punish the employer),
- other actions that will make an individual "whole" (in the condition she or he would have been but for the discrimination or retaliation).

Remedies also may include payment of:
- attorneys' fees,
- expert witness fees, and
- court costs.
Retaliation: Hard to Handle

- It is no surprise when a manager accused of illegal or inappropriate conduct gets angry at the employee making the allegation...

- A manager’s anger is worsened when he or she believes the charges to be false or malicious.

- Your nonprofit’s supervisory staff must be trained to refrain from taking action against an accuser.

Retaliation Claims: One Example

- Female pilot complained of sex harassment, alleging that she had been fired for complaining.

- The judge dismissed the sex harassment charge, but the jury awarded $3.5 million in punitive damages for retaliation by the airline.
Harassment Claims

- Don’t limit your view to traditional harassment claims (e.g. sex-based quid pro quo and hostile environment)
- Consider:
  - Race and age-based harassment
  - Third-party harassment

Litigation Trends Survey


- Litigation areas of greatest concern: contract and labor/employment cases
- Key emerging burden: electronic discovery
- Size matters: largest companies were far more likely to be targeted
- Smaller companies less likely to settle
- Nearly 90% of all companies engaged in some sort of litigation; majority of 10% that avoided suits were small organizations
- Average time to resolve employment cases was 161 days
HR Trends Survey

- Society for Human Resource Management


Avoiding Employment Litigation

- **Ensure open, effective and informed communication** between employers (especially supervisors) and employees
  - Source: www.cnapro.com
Avoiding Employment Litigation

- **Make your HR policies real** (not imagined, never a smoke screen)
  - Wal-Mart Puerto Rico case – sexual harassment policy was in name only
  - Impractical or outdated policies that can’t be followed carefully should be eliminated or modified

- **Train your Supervisors**
  - How to manage employees in a fair and consistent manner
  - How to deal with poor performers
Avoiding Employment Litigation

- **Get help sooner, rather than later**
  - You need objective help whenever you are preparing to:
    - Terminate an employee
    - Lay-off one or more employees
    - Restructure the staffing at your nonprofit
    - Substantially reduce benefits or privileges for some or all employees

Avoiding Employment Litigation

- **Strive for Fairness**
  - Perceptions and reality
  - “Fundamental Fairness Formula”
Avoiding Employment Litigation

- **Don’t delay—revise your handbooks and policies now**
  - Litigation is a costly way to learn the importance of an effective handbook and sound employment policies
  - An ounce of prevention is worth a pound of cure

Avoiding Employment Litigation

- **Invest in HR to save $$ in the long-term**
  - Many nonprofits do not have a dedicated HR person; another position wears the HR “hat”
  - Someone juggling many responsibilities may be too busy to pay adequate attention to matters that could lead to litigation
  - When HR is a shared responsibility, policies may be interpreted differently (hint: inconsistent treatment)
  - HR person can be neutral counselor and clearinghouse
Avoiding Employment Litigation

- Consider using a *Termination Agreement and Release* when dismissing staff under less than desirable circumstances.

- Consider a **severance policy** that requires the execution of a release agreement in exchange for severance pay.

Surviving Employment Litigation

- **Preserve all documentation once you receive notice of a suit or potential suit.**
Surviving Employment Litigation

- **Promptly notify your insurance carrier** (any whose policies might provide coverage) once you receive notice of a suit or potential suit.

Surviving Employment Litigation

- **Follow the advice of counsel**
  - Once appointed, they are your beacon
  - They are committed to helping you survive
    - They focus on strategy
    - You focus on your mission
Surviving Employment Litigation

- **Don’t lose sight of your mission in the fog of litigation**
  - Treat the case like a project
  - Do not involve the entire staff in fighting the battle
  - Stay focused on the future of your nonprofit, your mission and your clients; this too shall pass

Lessons from Litigation

- **The costs of litigation exceed the $$ spent**
  - Administrative burden
  - The smaller and more vulnerable the nonprofit, the more costly litigation will be
The Next Web Seminar

- October 4, 2006 - 2:00 pm EST
- Putting Your Insurance Program Out to Bid: A Practical Approach
- Register: http://nonprofitrisk.org/training/2006/webinars_descrp.htm#090606

Coming This Month

- Taking the High Road: A Guide to Effective and Legal Employment Practices for Nonprofits
  - 2nd Edition
  - Print and online versions available beginning September 15th @ www.nonprofitrisk.org
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