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Underestimating the EEOC Makes Bad Business for N.J. Employers

The commission is taking aggressive steps to deter and remedy discriminatory or retaliatory employment practices

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Disability accommodation, pregnancy discrimination, equal pay and discrimination in the hiring process headlined the 2012 list of the most prominent legal issues to be scrutinized by the Equal Employment Opportunity Commission (EEOC). In fact, according to the EEOC's Strategic Enforcement Plan, which took effect on Oct. 1, and will remain in effect until Sept. 30, 2016, these issues, and others, have been identified as current emerging issues that the EEOC will target under the four-year plan. Significant lawsuits, regulatory developments, settlements and related activities by the EEOC have highlighted the commission's aggressive efforts to deter and remedy discriminatory or retaliatory employment practices under federal anti-discrimination laws. New Jersey employers must take notice, as the EEOC has seen a marked increase in the number of charges filed against private and public employers since last year. Following are some of the enforcement-related trends, as well as a look at what employers should be concerned about.

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Disability Discrimination

Perhaps the most prominent of the EEOC's recent enforcement efforts are cases alleging violations of the Americans with Disability Act (ADA). In fact, the EEOC collected a record total of $103.4 million in monetary relief for cases alleging violations of the ADA in 2011 alone. One could certainly argue that such significant recoveries are explained, in part, by the enactment of the ADA Amendments Act of 2008 (ADAAA). Although the act was effective on Jan. 1, 2009, the EEOC's final regulations implementing the ADAAA were not issued until March 29, 2011, and employers are now beginning to feel the effects of the amendments.

Of particular note is the ADAAA's focus on employers who rely on "qualification standards" in the hiring, promotion and reassignment of workers, and what must be done to reasonably accommodate those who claim a disability. To illustrate, several recent cases have focused on whether "uncorrected vision" tests, high school diploma requirements and "physical re-qualification" exams violate the ADA, as those who are screened out of jobs because of such tests may be "regarded as" having a disability under the ADA. Employers utilizing "qualification standards" must ensure that they are job-related and consistent with business necessity.

The ADAAA has also allowed more job applicants and employees to claim protection under the ADA given the broad definition of "disability" advocated by the EEOC. While the actual definition of "disability" remains the same — "an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment" — the interpretation of what qualifies as a disability under this definition has changed. This, in turn, has created a flood of additional lawsuits brought under the ADA; an increase of approximately 6,000 lawsuits from 2008 to 2011.

Recently, the EEOC agreed to settle a lawsuit alleging disability discrimination where the employer prohibited applicants and employees from working if they were taking legally prescribed narcotic medications. EEOC Press Release dated Oct. 3, 2012. The complaint alleged that the action was taken because the employer "perceived" persons taking narcotic medications as being "disabled." This lawsuit serves as an important reminder that employers may be better protected against disability discrimination claims when they

spend less time trying to confirm the existence of a disability and more time engaging in the interactive process with employees who request accommodations.

Another area garnering much attention from the EEOC is an employer's use of blanket rules or policies involving leaves of absence. Cases challenging employers who enforce fixed leave-of-absence policies, where an employment action is taken after an individual remains on leave for disability-related reasons beyond a specified time period, abound. A consent decree resolving a disability discrimination lawsuit filed against a supermarket chain, which included a $3.2 million payment and extensive remedial relief, highlights the importance of this issue. According to the EEOC, the employer had a policy and practice of terminating employees with disabilities at the end of their medical leaves of absence rather than bringing them back to work with reasonable accommodations. Approximately 1,000 employees were allegedly terminated under this policy since 2003. EEOC Press Release dated Jan. 1, 2011. In an interesting turn of events for the EEOC, on Oct. 18, the District Court of New Jersey dismissed certain claims, on statute of limitations grounds, of a "pattern and practice" action brought by the EEOC against a health-care system that is alleged to have terminated employees who were ineligible for FMLA leave after a seven-day absence and refused to extend leave beyond the 12 weeks provided by the FMLA for those who were eligible, finding that the 300-day filing requirement applied to the EEOC.

The key takeaway for employers is that the ADAAA altered the dynamics for ADA compliance by expanding the law's coverage. Although increased litigation is likely, employers can protect themselves by maintaining accurate job descriptions and engaging in a well-documented, individualized accommodations process with its disabled employees.

Pregnancy Discrimination

The Pregnancy Discrimination Act (PDA) forbids discrimination based on pregnancy concerning any term or condition of employment. Pregnant employees may have additional rights under the Family and Medical Leave Act (FMLA), which is enforced by the U.S. Department of Labor. The EEOC has recently shown an increased interest in cases alleging pregnancy discrimination and the accommodation of pregnant employees. In fact, in the span of a little over one week in September 2012, the EEOC filed four pregnancy discrimination lawsuits and settled a fifth. These cases evidence the EEOC's plan to tackle pregnancy discrimination and employer accommodation of pregnant employees over the coming years.

It seems clear that policies that assume an inability to work, force a leave of absence or terminate an employee due to pregnancy will draw the attention from the EEOC. For this reason, employers should review and, if necessary, revamp their policies to ensure that they have adequate mechanisms in place to properly evaluate and track leave and accommodation requests for all pregnant employees.

Equal Pay

Enforcing the laws that require equal pay for men and women performing the same jobs has also been a priority for the EEOC as of late. To address inequality of pay issues, the EEOC has the authority to initiate a "directed investigation" to address what it believes may be systemic pay discrimination, even without a charging party, something many employers may be unaware of. Further highlighting the importance of this issue, the EEOC recently commissioned a study by the National Academy of Science to determine what data it should collect to most effectively enhance its wage discrimination enforcement efforts. And, in an attempt to avoid duplication of effort, the EEOC has announced that it will work in tandem with other federal agencies, such as the Department of Labor, Office of Federal Compliance Contract Programs and the Department of Justice in enforcing the protections of the equal pay laws.

When it comes to making pay decisions, the EEOC has stressed that men and women must be given equal pay for equal work. While the jobs need not be identical, they must be substantially equal. Thus, employers should ensure that their male and female employees are receiving equal pay for performing jobs that require substantially equal skill, effort and responsibility, and are performed under similar working conditions. Periodic review of compensation policies and practices can both detect and correct potential concerns.

Background Checks

The use of background check to screen prospective employees is another area that has been scrutinized by the EEOC. Various pre-employment inquiries, such as credit checks, social media, unemployment status and criminal background checks are utilized by many employers.

With respect to criminal background checks in particular, the EEOC, on April 25, issued enforcement guidance regarding the use of arrest and conviction records in the hiring process, updating and clarifying its prior guidance on the subject. Although the EEOC does not have the legal authority to prohibit employers from conducting criminal background checks on prospective employees, the enforcement guidance provides important insight into the EEOC's position on this issue.

Specifically, the enforcement guidance states that employers may continue to use criminal background checks as a screening tool for applicants and employees, but specifically discourages employers from asking about a criminal record on the employment application and encourages employers to conduct an individualized assessment of the applicant/employee when an adverse employment action is being contemplated because of a criminal record. To conduct the individualized assessment, employers are advised to give the applicant/employee notice of the results of the background check and an opportunity for him or her to offer additional information regarding the criminal record. The employer may thereafter engage in an analysis of factors such as the nature of the crime, the time elapsed since the conviction and the nature of the job being sought before making the ultimate decision. These factors may also assist the employer in determining whether relying on the applicant/employee's criminal background as a basis for an adverse employment action is job-related for the position in question and consistent with business necessity. If an employer has not already done so, a careful review of its hiring policies and applications is in order.

Conclusion

Increased activity by the EEOC is

not something New Jersey employers can ignore. There is little doubt that the New Jersey Law Against Discrimination provides ample opportunity for employees to raise claims of discrimination and that the majority of lawsuits brought against New Jersey employers are brought in New Jersey state courts under New Jersey law. Yet, the EEOC's increased action and sharpened focus requires New Jersey employers to take a hard look at their practices and policies. Avoiding litigation — whether brought by an individual employee or a reinvigorated EEOC — is a business imperative. ■