

Legal Brief



Employers Face Record Number of Discrimination Charges

Here's a labor law fundamental: When the economy heads south, employment discrimination claims head north. The Equal Employment Opportunity Commission ("EEOC") has announced that more workers and job applicants filed workplace discrimination complaints in fiscal year 2010 than at any time in its 45-year history.

The number of charges filed (99,922) is 7-percent higher than fiscal year 2009 and 21-percent higher than fiscal year 2007, before the recession. In addition, the federal agency filed 250 lawsuits, settled another 285 suits, and resolved 104,999 private sector claims. These EEOC enforcement actions, mediations and other litigation cost employers a record \$404 million in payments to workers who filed claims.

What is Illegal?

In Pennsylvania, employment is "at-will," and employees may be hired and fired at will as long as those personnel decisions are not based upon race, gender, nationality, religion, age or disability. The EEOC enforces five federal laws prohibiting such employment discrimination: Title VII of the Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act (GINA).

What Increased?

For the first time, retaliation under all statutes (36,258) was the most frequently filed charge. Federal law prohibits retaliation against an employee for engaging in a "protected activity," such as raising, or collaborating, a complaint of unlawful discrimination. Retaliation claims are most frequently filed in combination

with another type of discrimination charge.

Race discrimination charges (35,890) dropped to second place, though still an increase from the prior year. However, the largest jump (17 percent) was among employees who felt they had been discriminated against because of a disability (25,165), an increase likely related to 2009 legislation that broadened the legal definition of "disabled" and to the EEOC's new public outreach efforts on the topic. Likewise, age (23,264) and religion (3,790) charges saw increases, and the EEOC received 201 charges under GINA in that statute's first year of enforcement.

The EEOC cited a number of factors for the surge in claims, including greater diversity in the work force, but the difficult job market undoubtedly played a significant role. "When the pie shrinks, your selection criteria – why you picked this person over that person – comes under much greater scrutiny," noted Merrily Archer, a former EEOC attorney for the Clinton administration, who noted a similar rise in charges in the wake of the 2001 recession.

The increase comes as the EEOC has hired an additional 300 staffers to handle the flood of cases and to clear a large backlog of pending actions. EEOC Chair Jacqueline Berrien stated that the agency has spent the past two years boosting its staff, reversing deep cuts made during the Bush administration.

What to Expect

Given the Obama administration's continued focus on aggressive enforcement of discrimination laws and the allocation of additional resources to the EEOC, together with

the effect of a struggling economy, employers now, more than ever, need to ensure that their personnel decisions are free from improper bias and are well-documented. In addition, as the increase in retaliation claims suggests, employers must take care to ensure that employment actions taken after an employee complains of perceived discrimination can be fully justified.

Employers can lower the risk of burdensome litigation and EEOC enforcement actions by reviewing their pay, promotion and decision-making practices and policies to ensure they are in compliance with the law.

MacDonald Illig attorneys are available to assist in this regard, to answer employers' inquiries regarding the EEOC, and to aid in developing best workplace practices. For more information, contact Lisa Smith Presta at MacDonald Illig at 814/870-7656 or lpresta@mijb.com.

Lisa Smith Presta is a senior partner in the law firm of MacDonald, Illig Jones & Britton LLP, where she concentrates her practice in the areas of employment litigation, commercial litigation and insurance defense. She regularly appears in state court, federal court and before administrative agencies, and is the current president of the Erie County Bar Association.

