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As the Economy Stumbles, Employment Discrimination Claims Climb

By Barbara Reeves Neal

Nationally, we are seeing a surge in employment discrimination claims, including age, gender, pregnancy and disability claims. The U.S. Equal Employment Opportunity Commission (EEOC) saw the highest increase in discrimination charge filings last fiscal year, the largest annual increase (9%) since the early 1990s. After several years of falling and/or nearly flat year-to-year comparisons, filings jumped from 75,768 in fiscal year 2006 to 82,792 in fiscal year 2007. According to the EEOC, nearly all major charge categories showed significant percentage increases from the prior year — a rare occurrence.

Prospects for improvement in these numbers are dim. In early September 2008, the government released figures showing that the American economy lost 84,000 private non-farm jobs in August, the eighth straight month of job losses. The unemployment rate jumped to 6.1% in August, the highest in nearly five years. Both figures were worse than economists had forecast.

Even employers with carefully structured HR policies in place are finding themselves on the receiving end of more discrimination claims in this environment. Employers are finding it necessary to cut costs and jobs. Job cuts and the elimination or reduction of raises make for unhappy employees, and unhappy employees are more likely to consider their legal options in a challenged economy than in times of economic strength.

A Closer Look at the Problem

How can an employer avoid becoming another defendant in this surge in employment discrimination claims? To understand how to deal with this problem, employers first need to analyze the underlying factors that have contributed to this increase in employment discrimination claims. Employees are unhappy, that much is clear. Tolstoy's famous observation about families ("All happy families resemble one another, each unhappy family is unhappy in its own way") applies to employees: The unhappy older employee is unhappy for different reasons and responds differently than the unhappy new entrant into the workplace or the unhappy middle manager who has been passed over for promotion repeatedly.

For example, the falling stock market has caused many older employees to defer retirement plans in light of their shrunken 401K plans. At the same time, employers, worrying that an older work force means a more expensive work force (higher salaries and wages, higher health care costs, more frequent injuries and illness) may be, consciously or not, looking for ways to speed their older (and more highly compensated) employees toward earlier retirement.

At the other end of the age spectrum, complaints are on the rise from new employees just entering the market. A Los Angeles employment attorney noted that the younger generation of employees expects to be treated a certain way. They may not accept criticism or poor evaluations and may lack the patience to work toward improving their performance. The attorney sees an increase in lawsuits that seem to arise out of minor slights or insults, but which are clearly viewed as a major offense by the employee. Are these young employees too easily offended or is the workplace really becoming a more hostile place?

Looking for Goldmines

Across the board, employees who are concerned about shrinking pay checks and disappearing jobs tend to look for a goldmine in their lawsuits. With no signs of an early economic turnaround in sight, employers can expect that the surge in employment claims will continue. Unless you have a staff of full-time psychiatrists monitoring your employees for levels of and reasons for dissatisfaction, employers are not likely to be able to identify potential discrimination claims before they surface. Assuming that they have already implemented the careful hiring and disciplinary practices recommended by their HR specialists and employment lawyers, what else can they do to protect themselves from becoming a target of these expensive lawsuits?

What to Do

One effective option is to open up the lines of communication as early as possible with unhappy employees in order to identify the root cause of the problem and deal with it before it gets out of hand. Of course, the company should want to attack the problem before the relationship deteriorates and costly litigation ensues. An even bigger issue, however, may be discouraging 'copycats' among fired employees who may not have legitimate claims, but think they have nothing to lose by filing a discrimination claim.

This is where a mediator is invaluable. Establishing a process that will allow a truly neutral mediator to meet with the

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parties very early on, to identify the root of the problem and to keep the proceedings as private as possible, cannot only save the costs of litigation, but can save reputations, relationships and emotional well-being.

Structuring an Internal Resolution Process

Internal resolution processes, including mediation and non-binding internal arbitration, provide a forum for the employee to have his or her complaints heard without the need to go to court. The first requirement is a workable internal ADR structure that has the respect of employees and the support of senior management. The key to success is having the right skilled professional mediator to handle the most difficult cases.

- Develop an informal and progressive internal grievance procedure. An employee who is having a problem in the workplace wants to be listened to, to be treated with respect and to find a solution. An employer mostly wants management to determine if there is a problem, and how it can be fixed or overcome. Make it easy for an employee to raise a complaint and have a full discussion with the relevant supervisor and/manager, with a trained HR professional or independent mediator involved to keep the process constructive and under control.
- Provide for mediation or neutral evaluation if internal resolution fails. A skilled mediator can keep the parties talking until they either find common ground for resolving their dispute or at least fully understand each others' position even if they are not yet ready to come to a settlement. Neutral evaluation is an increasingly popular form of ADR in which the parties present their positions to a neutral who then provides them with an evaluation of the strengths and weaknesses of their positions. This is done in the presence of both parties by a neutral that has legal expertise in the type of matter in dispute. After hearing and considering the neutral's evaluation, the parties are in a better position to attempt to reach settlement themselves or with the guidance of the neutral serving as mediator.
- Avoid the urge to conduct a confidential adversarial investigation. So many employee complaints that could have been resolved by careful, considerate handling harden into litigation after a heavy-handed investigation is launched. The complaining employee feels compelled to put forward his or her strongest complaints and arguments, lining up fellow employees as witnesses and hardening everyone's position. The accused supervisor feels just that: accused, and becomes defensive and bitter. Once an investigator has blazed his way through the company, people become wedded to their adversarial positions and mediation and conciliation become impossible. If you must conduct an investigation, keep the concerned parties abreast of what is happening. Too often, when the internal investigation gets started, the people who are most concerned are cut off from communication. This leads to employee dissatisfaction, and surprise at the ultimate result — and that leads to litigation.
- If you decide to provide an arbitration option, pay careful attention to protect the employee's rights. Specify an ADR provider that has a deep roster of experienced and trained mediators and arbitrators and has a set of clear employment arbitration rules that will withstand judicial scrutiny for procedural and substantive fairness. (*See* JAMS Employment Arbitration Rules and Procedures, www.jamsadr.com/rules/employment-guide.asp.) Employment arbitration must protect the employee from fees that he would not be paying in court, and must provide for the same remedies as available in court, including, in some jurisdictions, the class action option.
- Implement these changes carefully and in accordance with relevant employment and benefits law. An employer cannot unilaterally change the terms of the employment relationship by adding mandatory mediation or arbitration requirements. Changes to plans and employment terms must be handled in accordance with appropriate notice and consideration.
- Communicate, communicate, communicate! Talk with all employees; the ones being adversely affected by changes; the ones known to have issues; talk with managers and supervisors about talking with employees. If there are sensitive issues, bring in a professional mediator to talk with the people involved and to provide the employer and employee with a unbiased and objective evaluation of the situation.

Conclusion

There are no guarantees that an employer can avoid litigation in every case, but these procedures have helped reduce litigation in companies that have used them, and have fostered a better workplace environment.