

One Step Ahead Series

Employment Related Liability

Risks Employers Face and How to Manage Them

A Primer for Directors & Officers

irwin siegel agency, inc.
risk management services
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INTRODUCTION

On today's litigious environment, managing your employees is a critical part of running any successful business.

The increase in exposure to employment discrimination claims has had a catastrophic economic effect on employers in virtually every industry. Even nonprofit organizations, which are exempt from many regulations, are liable for claims arising from employment practices. Employers large and small must be careful to comply with both federal and state employment laws that have gone a long way to erode the historical doctrine of "employment-at-will." Today, an employer who believes employees can be fired for any reason at all, does so at his/her own peril.

Discrimination itself is a difficult concept because it is not tangible. Rather, it is something that occurs through a thought process, which is why discrimination is most often proved inferentially. While it is not reasonable to assume you can change the way someone thinks, it is reasonable to assume you can change the way someone acts, particularly in the workplace. Because employers cannot know what their employees are thinking, it is imperative that they take the risk of this type of claim seriously.

The purpose of this booklet is to provide directors and officers with a basic understanding of the specific types of federal and state employment discrimination (and related) suits they could face, and to inform them of ways to substantially lower their risk of exposure through basic, cost-effective risk management.

Administered by: IRWIN SIEGEL AGENCY, INC.

This Primer is offered to further an understanding among its users of the types of employment practices claims they face in the ordinary course of business; how these claims can be prevented through effective risk management; and how and why basic risk management actually works. It does not purport to be a complete discussion of the subject, nor is it intended to provide a guarantee that compliance with its suggestions will avoid employment-related liability.

I. What risks do all employers face from lawsuits brought against them by their employees and, sometimes third party non-employees?

A. Employment Discrimination Statutes - FEDERAL

The most common actions **brought by employees against their employers** involve allegations of employment discrimination, and associated torts such as wrongful termination (retaliatory and constructive), defamation (both libel and slander), invasion of privacy, breach of employment contract, etc. Employment discrimination actions arise under both federal and state statutes, and usually are pursued by pleading violations of both. While state statutes can vary greatly from one another, the federal discrimination statutes apply to actions brought in federal court in **all** states. Some of the federal employment discrimination statutes under which your employees can sue you include:

1. THE CIVIL RIGHTS ACT OF 1964 - TITLE VII:

Title VII of the Civil Rights Act of 1964 makes it unlawful for an “employer” to discriminate because of an individual’s **race, color, religion, sex or national origin**. Title VII prohibits discrimination in a wide number of employment areas including advertising for jobs, apprentice programs, benefits, firing, hiring, layoffs, promotions, recalls, recruitment, testing, training and transfers. Title VII also prohibits retaliation against a person who files a charge of discrimination, participates in an investigation of discrimination or opposes an unlawful employment practice.

Under Title VII, an employer may not treat those employees who are not in a “protected class” more favorably than those who are protected (i.e. those groups listed above). To do so would result in disparate treatment (intentional) discrimination.

FACTS ABOUT TITLE VII:

- You must have at least 15 employees in order to be sued under Title VII.
- Sexual harassment is a form of discrimination prohibited by Title VII.
- Title VII (par. K) includes the Pregnancy Discrimination Act which protects against discrimination on the basis of pregnancy.
- Judicial decisions have determined (and continue to determine) what Title VII protects.
 - Same sex sexual harassment is protected. *Oncala v. Sundowner*
 - Employers are **vicariously liable** for sexual harassment committed by their supervisors. If, however, the employer implements a comprehensive sexual harassment policy with several avenues to report it, and the employee fails to report it and hasn’t suffered an adverse employment action, the employer may have an **“affirmative defense”** available to them to have the claim dismissed. *Faragher v. Boca Raton; Burlington v. Ellerth*

2. THE AMERICANS WITH DISABILITIES ACT (ADA)

The Americans With Disabilities Act (ADA) protects only “qualified” individuals who have impairments that affect a “major life activity,” and who can perform the essential functions of their jobs, with or without “reasonable accommodation.”

Title I of the ADA requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause “undue hardship.” The three categories of reasonable accommodation are:

1. Modifications or adjustments to a job applicant process;
2. Modifications or adjustments to the work environment; and
3. Modifications or adjustments that enable a qualified employee with a disability to enjoy equal benefits and privileges of employment.

A modification or adjustment satisfies the reasonable accommodation obligation if it is “effective.”¹

FACTS ABOUT THE ADA:

- You must have at least 15 employees to be sued under the ADA.
- Undue hardship is determined by the nature and cost of the accommodation needed, the company’s financial resources available to make the accommodation and the financial effect of making it, and the impact of the accommodation on the operation of the company.
- Possible reasonable accommodations include making existing facilities accessible, job restructuring, part-time or modified work schedules, acquiring or modifying equipment, changing tests, training materials or policies, providing qualified readers or interpreters and permitting use of accrued paid leave and reassignment to a vacant position.
- An employer must grant unpaid leaves of absence and return the employee to his/her former job as a reasonable accommodation. This employee must be returned to the same position unless doing so would result in undue hardship. The employer cannot penalize the employee for work missed during this time either. To do so would amount to retaliation.
- Sometimes medical leave can be covered by both the ADA and the Family Medical Leave Act (FMLA). The interplay between the two can be confusing. FMLA does differ significantly in that an eligible employee is entitled to 12 weeks of unpaid leave per 12-month period, and must be returned to the same position or “to an equivalent one.” Under the ADA, the employee must be returned to the same position, unless doing so would result in undue hardship.²

¹For further analysis regarding reasonable accommodation under the ADA see the EEOC Guidelines at: <http://www.eeoc.gov>.

²For further discussions regarding the interplay between the ADA and the FMLA, see the EEOC Guidelines on Reasonable Accommodation, par 21 at: <http://www.eeoc.gov>.

- An employer need not withhold discipline or termination of an injured/disabled employee who violates a conduct rule. An employer never has to excuse a violation of a uniformly applied conduct rule necessary to the operation of his/her business.

3. THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

The Age Discrimination in Employment Act (ADEA) makes it unlawful for an “employer” to fail or refuse to hire, to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of said individual’s age.

The ADEA protects individuals who are 40 years of age and older.

Under the ADEA, an employer may not treat younger employees more favorably than those who are in the protected age group. To do so would result in disparate treatment (intentional) discrimination.

An employer must also not engage in any neutral employment practices that have an adverse effect on any protected group. To do so results in disparate impact (non-intentional) discrimination, unless it can be shown that the adverse impact is based on criteria which are job-related and consistent with business necessity.

FACTS ABOUT THE ADEA:

- You must have at least 20 employees in order to be sued under the ADEA.
- Employers may not enforce mandatory retirement policies, except in very limited circumstances where age has been found to be a valid qualification for doing a particular job, such as fire fighting, police work and flying airplanes.
- The ADEA protects employees from being retired against their will, regardless of age, as long as the employees can meet their employers’ legitimate expectations.

4. THE CIVIL RIGHTS ACT OF 1991

The Civil Rights Act of 1991 amended the following federal discrimination statutes: **The Civil Rights Act of 1964 (Title VII)**, the **Americans with Disabilities Act (ADA)** and the **Age Discrimination in Employment Act (ADEA)**.

The most significant impact of the Civil Rights Act of 1991 is that it made jury trials and punitive damages available to victims of intentional discrimination.

Punitive damages are “capped” by the Act. Thus, the maximum amount any one litigant can receive is as follows:

- \$50,000 [for an employer who has between 15-100 employees]
- \$100,000 [for an employer who has between 101-200 employees]
- \$200,000 [for an employer who has between 201-500 employees]
- \$300,000 [for an employer who has more than 500 employees]

One final fact about federal employment discrimination statutes is that an employee must **“exhaust administrative remedies”** before being able to sue in federal court under Title VII. This means (s)he must first file a **charge of discrimination** with the Equal Employment Opportunity Commission (EEOC) within the time allotted, and receive a **“Right to Sue”** letter from the EEOC before (s)he can file a complaint in federal court, or (s)he forever loses the right to do so.

5. THE EQUAL PAY ACT (EPA)

The Equal Pay Act prohibits discrimination on the basis of sex that occurs when employees are paid wages at a rate less than that paid to the opposite sex for equal work on jobs requiring equal skill, effort and responsibility, and which are performed under similar working conditions.

Exceptions to the Equal Pay Act include payments that are made according to:

- A seniority system.
- A merit system.
- A system which measures earnings by quantity or quality of production.
- A differential based on any factor other than sex.

FACTS ABOUT THE EQUAL PAY ACT

- Claimants can also make the same complaint of unequal pay under The Civil Rights Act of 1964 (Title VII).

6. THE FAMILY MEDICAL LEAVE ACT (FMLA)

Although the FMLA is classified as a “wage and hour” federal statute rather than a discrimination statute, employers are increasingly being sued for violations.

The FMLA gives eligible employees the right to take unpaid leave for a period of up to 12 workweeks during any 12-month period for one or more of the following reasons:

- The birth and/or care of a child.
- The placement of a child with the employee for adoption or foster care.
- To care for a spouse, child or parent with a serious health condition.
- A serious health condition that makes the employee unable to perform the functions of his/her job.

FACTS ABOUT THE FMLA:

- In order to sue under the FMLA, the employee must:
 - (i) have been employed by the employer for at least 12 months (these need not be consecutive months).
 - (ii) have at least 1,250 hours of service during the 12 month period prior to the commencement of the leave.
- An eligible employee who takes family or medical leave under the law **must be returned to the same position** held prior to the leave **or to a position equivalent** in pay, benefits and other terms and conditions of employment.
- Individual **supervisors may be personally liable** for violations of the FMLA, while there is usually no personal liability under the federal discrimination statutes listed above.
- **A serious health condition** means an “illness, injury, impairment, or physical or mental condition” that involves one of the following:
 - (i) inpatient care in a hospital, hospice or residential medical care facility;
 - (ii) continuing treatment by a health care provider.
- In all circumstances, it is the employer’s responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give **written notice** of the designation to the employee.

B. Employment Discrimination Statutes - STATE

Employers need to be mindful of the employment discrimination laws in their state because some states' statutes are much broader than the federal laws. For example:

- California, District of Columbia, Hawaii and Massachusetts are among the states that provide protection against discrimination based upon sexual orientation. Sexual orientation is not yet protected under the federal discrimination statutes (Title VII).
- Maine, Michigan, Montana and South Dakota, to name a few, all but eliminate minimum employee thresholds and allow even employers with only one employee to be sued. The federal discrimination statutes require employers to have at least 15 employees, or 20 under the ADEA, in order to be sued.
- Alabama, California, Kentucky, Oregon and Tennessee are some of the states that do not have a cap on punitive damages. Under federal employment discrimination statutes (Civil Rights Act of 1991), punitive damages are capped according to the number of employees.

Moreover, certain states mandate that employees can only be fired for "cause," while others allow individual supervisor liability under their state discrimination statutes. Virtually no individual liability exists under federal employment discrimination statutes.

Employers who operate without knowledge of the employment laws in their state unduly expose themselves to liability.

C. Non-Employment Discrimination Statutes

Employers, particularly those in the mental health industry, also face risk of discrimination suits by third parties - such as from clients or consumers, rather than employees. A typical example is when a client alleges (s)he has been sexually harassed by a staff member. Another example is when a facility refuses to accept a client (or the state refuses to place an individual) on the basis of his/her race or disability. Employees can also take advantage of these non-employment discrimination statutes and, at times, it is more advantageous for them to do so.

Here are some of the **federal** statutes under which suit can be brought by third parties and employees:

1. TITLE II - AMERICANS WITH DISABILITIES ACT PUBLIC ACCOMMODATION

Title II prohibits discrimination (or segregation) on the basis of race, color, religion or national origin in places of **public accommodation**. Places of public accommodation include inns, hotels, motels, restaurants, cafeterias, lunchrooms/counters, movie theaters, concert halls, sports arenas/stadiums, etc. **Exempt:** Private clubs or other establishments not open to the public.

Our United States Supreme Court has recently determined that states are required to provide **community-based treatments rather than forced institutionalization** for individuals with mental disabilities, and refusal results in disability discrimination under Title II (*Olmstead v. L.C.*). The Court determined that community-based treatment centers are entitled to a “reasonable modification defense,” and that courts must consider the center’s available resources, including cost of providing care and the range of services provided to others with mental disabilities.

FACTS ABOUT TITLE II:

- Discrimination on the basis of sex is not protected. If a bartender refuses to serve a woman because she is a woman, Title II offers no protection.
- Title II uses a state’s statute of limitations for “personal injury” actions, which could be two years or more.
- Remedies available: *INJUNCTIVE RELIEF ONLY*. This typically means an order of the court requiring the public establishment to provide equal access or to serve the complaining party.
- Relation to other discrimination statutes: Because the only relief under Title II is “injunctive,” plaintiffs will usually sue under this statute coupled with other discrimination statutes that provide monetary recovery, such as §1981 and/or §1983.

2. CIVIL RIGHTS ACT OF 1866 (§ 1981)

RACE DISCRIMINATION IN THE MAKING OF CONTRACTS

Section 1981, which arose as a slavery abolition statute in 1866, prohibits race discrimination in the making and enforcing of contracts, including the right to equal enjoyment of all the benefits, privileges, terms and conditions of the contractual relationship.

FACTS ABOUT SECTION 1981:

- There is no need to exhaust “administrative remedies” by filing the charge with EEOC and obtaining a ‘right to sue’ letter as one would with Title VI.
- Individuals can sue private companies, **individuals** (i.e. supervisors), school districts, and those acting under “color of state law,” like the city of Austin (i.e. fire depts., police stations, etc.). There are no minimum employee thresholds to protect small companies from suit.
- There is no cap on punitive damages as there is under Title VII.
- Relation to other discrimination statutes: This statute covers contract settings, of which “employment” is one of **many**. Employees suing for race discrimination may want to file suit under this statute for all the reasons listed above. As a result, this statute, originally enacted over 100 years ago, is appearing more frequently in today’s federal discrimination complaints.

3. CIVIL RIGHTS ACT OF 1871 (§ 1983)

DISCRIMINATION ARISING FROM A CONSTITUTIONAL VIOLATION

Section 1983 protects individuals against discrimination (race, sex, age, disability, religion - see Title VII) based upon the violation (deprivation) of rights conferred by the Constitution and laws (state, federal, statutory, ordinance, regulation, etc.).

FACTS ABOUT SECTION 1983:

- This is an extremely broad statute. Any aggrieved person can sue individuals (i.e. supervisors), corporations, governments (city of New York), states (state of Arkansas), school districts, municipal corporations, etc.

- **Exemptions:** State and federal legislators are entitled to absolute immunity from suit under this statute. Executive officers are only granted “qualified” immunity. You must check who is being sued, on what grounds, and whether an immunity statute is implicated.
- **Remedies available:** Same as under Title VII, except there is no cap on punitive damages and no need to exhaust administrative remedies (file EEOC charge).
- **Relation to other discrimination statutes:** Again, if a Constitutional violation (deprivation of a right granted by law) can be found, an employee may also want to sue for discrimination under this statute where (s)he doesn’t have to first file a charge with the EEOC, and there is no cap on punitive damages.

As you can see, it is conceivable that an employee could sue for race discrimination under three separate statutes: Title VII, §1981 and §1983. There is, however, only one recovery.

D. “Other” Claims Associated with Employment Discrimination

There are many state law employment claims associated with employment discrimination for which employers are at risk of being sued. The most common is wrongful termination, which encompasses a variety of claims, including retaliatory discharge, constructive discharge and whistleblower claims. Other associated state law claims include defamation and breach of employment contract, both express and implied.

1. WRONGFUL TERMINATION

Wrongful termination claims can be difficult to prove, but not impossible. Generally, an employee must show a violation of the state’s public policy, as supported by State statute. For example, an Ohio employee sued for sexual orientation (not protected under Title VII) alleging violation of Ohio public policy as supported by a Columbus City Code. The employee won. For the most part, however, claims for wrongful termination usually allege either constructive discharge, retaliatory discharge or illegal discharge under a state’s whistleblower statute.

CONSTRUCTIVE, RETALIATORY, WHISTLEBLOWER

Constructive discharge: Even when an employer does not actually “fire” an employee, sometimes courts consider there has nevertheless been a termination by “operation of law.” This occurs when conditions are so **intolerable** that a **reasonable person** would be compelled to resign. Some examples of this are:

- Resignation to avoid hostile work environment (i.e. daily sexual harassment).
- Resignation because employer demands that the employee do something illegal.
- Forced early retirement (also violates ADEA).

Retaliatory discharge: This occurs when an employee is fired in retaliation for either pursuing a right granted by law, such as filing a claim for workers’ compensation, filing a charge of discrimination with the EEOC or for reporting violations of the law, such as reporting abuse of clients to the State - Whistleblower.

- **Title VII - Retaliation Provision:** The retaliation provision of Title VII prohibits retaliation against a person who files a charge of discrimination, participates in an investigation of discrimination or opposes an unlawful employment practice. This includes retaliation for participating in investigative proceedings or for giving depositions or testimony at administrative proceedings in connection with complaints of discrimination. Retaliation can include a number of adverse employment actions such as discharge and failure to promote.
- **Workers’ Compensation:** It is considered a retaliatory discharge if an employer terminates an employee because that employee has filed a claim for workers’ compensation benefits. The closer in time the termination is to the filing of the petition for workers’ compensation benefits, the more likely the employee is to prove retaliatory discharge.

State Whistleblower statutes: In most jurisdictions, it is illegal for an employer to fire a worker for reporting a violation of a law, refusing to participate in activity the employee believes to be illegal, and/or taking action inconsistent with “public policy” even though such action may be viewed by the employer as contrary to its business interests. If an employee acts in good faith and reports suspected illegal activities to an employer, a governmental agency or law enforcement officer, the employee may not be fired or be treated adversely.

2. DEFAMATION - SLANDER AND LIBEL

Terminated employees sometimes sue former employers for **libel** (defamation in written form) or **slander** (defamation in oral form). A **defamatory statement** is one that harms a person's reputation by lowering his/her standing in the community or deterring others from associating with him/her. **Defamation occurs** when the statement is false, communicated to a third party and no special privilege protecting the communication exists.

Truth is a defense to a claim of defamation. Note, however, that invasion of privacy claims are also associated with the intentional and unnecessary disclosure of facts about an employee. Therefore, disclosure of information about an employee, which is likely to harm his/her reputation (truthful or otherwise) should be kept to an extreme minimum.

3. BREACH OF EMPLOYMENT CONTRACT - EXPRESS OR IMPLIED

Employees often bring pendent state claims for breach of an employment contract together with their federal claims for discrimination. These employees attempt to evade the "Employment-At-Will" doctrine prevalent in most states by claiming they had an employment contract of unlimited duration with their employer, and that firing them breached that contract.³

- **Express contract: An express contract of employment merely means one that is written.** Often, employees sue for breach of express contract by alleging that the Employee Handbook constituted a contract of employment. This does not mean it is better for employers not to use handbooks. On the contrary, there are simple provisions that can be inserted in an Employee Handbook that help to prevent these claims. (Discussed later under Risk Management)
- **Implied contract: An implied contract is a contract enforced in absence of a written contract.** An employee may include a claim for breach of both implied and express contract in one complaint. Basically, the employee is saying that although there is nothing in writing, the parties nevertheless entered into an employment agreement, usually involving employment for an unlimited duration. This type of contract is very difficult to prove, and courts are cautious in finding the existence of an implied contract.

³The "Employment-At-Will" doctrine states that an employee can be fired **for any reason**, and that an employee can similarly choose to leave employment for any reason. This doctrine has been severely eroded over time by many exceptions, some of which include discrimination, retaliatory discharge, wrongful discharge, etc.

Conclusion:

As you can see, employers face the risk of being sued for employment practices under an array of both federal and state statutes. In fact, there are so many, each with its own requirements and standards, that it would be difficult for any employer to understand all of them as they relate to every day business practices. If the preceding discussion did nothing else, ideally it instilled in all employers an appreciation of their need to routinely consult labor-employment lawyers in connection with employment decisions that may adversely affect their employees.

II. Controlling the Risk - Primary and Secondary Risk Management

While it is not feasible to entirely eliminate the risk of being sued by your employees, there are many simple and cost-effective tools that employers can use to reduce this risk significantly. Through sound internal procedures (primary risk management) and selection of value-added services such as access to labor-employment lawyers (secondary risk management), employers not only can avoid suit, but can provide themselves with such strong defenses that often early dismissal is warranted.

A. Primary Risk Management

Primary Risk Management can be summed up in two ways: (1) Good Business Practices and (2) Good Policies.

1. GOOD BUSINESS PRACTICES

There are three principles to remember about good business practices that, if implemented consistently, will substantially reduce an employer's risk of exposure to costly discrimination and other claims: (i) eliminate subjectivity, (ii) respond immediately to complaints, and (iii) document everything.

- **Eliminate Subjectivity:** Subjectivity in employment decisions affecting employees is deadly. Subjectivity leads to inconsistent treatment of employees, and inconsistent treatment forms the basis of all disparate treatment employment discrimination claims.

Subjectivity can creep into employment decisions regarding promotion, salaries, hiring criteria and inconsistent disciplinary actions. Hiring someone because you like her “attitude,” promoting an employee because you like his “personality,” and disciplining someone because (s)he is “lazy” can lead to disparate treatment and claim exposure. On the other hand, hiring someone because (s)he has a “masters degree,” promoting an employee because (s)he consistently “scored the highest” on tests for the position and disciplining all employees **consistently**, pursuant to a written disciplinary policy, will make it very difficult for employees to prove discrimination.

Why it works: Employment discrimination is most often proved **inferentially**. To do this, lawyers group “similarly situated” employees together and **make it look like** discrimination took place. This can be shown through suspicious timing or grouping. For example, an African American employee who was fired one week before his promotion can **raise the inference** that his termination was racially motivated. A forty-two year old employee who was the oldest in her work group and the only one fired for disciplinary reasons, despite the fact that the others were also disciplined, can **raise the inference** that the real reason she was fired was because of her age. Removing subjectivity and applying objective criteria consistently to all employees will make it much more difficult for claimants to raise an inference of discrimination.

- **Respond Immediately to Complaints:** Failure to respond reasonably to employee complaints (i.e. sexual harassment) not only breaches the duty the law imposes on all employers to prevent sexual harassment, but can also be seen as reckless indifference and lead to the imposition of punitive damages. The law does not expect employers to be perfect. It does, however, expect employers to act reasonably. Failure to take complaints of sexual harassment seriously can be a very costly mistake, while employers who act immediately can sometimes prevent liability even where the wrongful conduct did take place.

Why it works: Courts have been hesitant to impose liability on an employer who takes prompt, remedial action in response to an employee's complaints of harassment. For example, suspending the accused harasser pending an investigation, and then either transferring or discharging him/her if the results of the investigation substantiate the accusations, will often suffice. In addition, employers are now entitled to an **affirmative defense** (dismissal of case) if the employee fails to take advantage of an employer's sexual harassment complaint reporting procedure, and no adverse employment action (i.e. discharge) has occurred.⁴ So, despite the fact that discriminatory acts actually occurred in the above examples, no liability was imposed where the employer took immediate action.

- **Document Everything:** Employment actions such as hiring, promotions, discipline, complaints and terminations should be documented. Documentation is the tangible evidence that will support an adverse employment action (i.e. discharge) as legitimate. Therefore, documentation must be **accurate and consistent**. If an employer either fails to document or provides inconsistent documentation, employees may be able to **raise the inference** that the real reason for their discharge was an impermissible one.

Why it works: Once an employer states a legitimate reason for an employee's discharge, such as poor performance, the burden shifts back to the employee to show the employer's reason is a lie (pretext). An employee can use **lack of documentation** to demonstrate that. Another way to establish pretext is for the employee to show that all of his evaluations rated his performance as excellent, which would be inconsistent with the employer's stated reason for his discharge.

If an employee can show either of the two, the law allows courts to **infer** that the real reason for the employee's discharge was an impermissible one (i.e. the result of discrimination).

2. GOOD POLICIES

While the burden on employers to prevent discrimination in the workplace seems onerous at times, the law provides some inexpensive yet very effective tools to enable employers to significantly lower their risk of liability for employment discrimination.

- **Handbook Policies:** Having a comprehensive written handbook containing sound, legally sufficient policies pertaining to employment practices liability is a good place to start. The handbook should have an acknowledgement of receipt for the employee's signature. Once signed, even if the employee failed to read the handbook, the courts can charge him/her with having the knowledge of its contents.

Why it works: In 1998, our United States Supreme Court, through its decisions in *Ellerth* and *Faragher*, practically made it mandatory for employers to have sexual harassment policies containing adequate complaint reporting procedures. According to the Court, if an employee fails to report sexual harassment as described in Company Policy, then **no liability** would be imposed against the employer who took **reasonable care to prevent** the misconduct.

Employers who have no handbooks or written policies face a real uphill battle in defending against employment discrimination claims. If there are no written policies from which the courts can determine an employer's position on sexual harassment, the court may review a company's conduct to try and find a pattern or practice on which to base their determination. The risk the employer faces here is that a court may view several incidents of discrimination and infer the practice is company-wide.

Handbooks are only as good as the policies and procedures they contain. In order to be able use these policies as an effective risk management tool, they must be legally sufficient. The law and EEOC guidelines provide much assistance in determining content and phrasing.

- **No Contract Provision:** All employment handbooks should contain a “no contract provision.” This provision should state clearly that the handbook is not a contract, express or implied. It must also contain a statement that the policies within the handbook are subject to change by the company from time to time, without notice and as the company deems appropriate.

Why it works: The “no contract” provision helps avoid liability for a breach of contract action brought by an employee who is usually attempting to get around the employment-at-will doctrine by claiming his/her handbook is a contract providing an unlimited duration of employment.

- **At-Will statement:** Most states are employment-at-will states, with a few states opting to fire employees for “cause” only. In at-will states, employees can be fired for any reason, as long as it is not a discriminatory (or other illegal) reason. Therefore, all handbooks in at-will states should have a statement that describes the relationship between the employer and its employees as “at-will.”

Why it works: The “at-will” statement works with the disciplinary policy as further proof to help substantiate terminations as legitimate, and to keep claimants from raising an inference that discharge was for a discriminatory reason. It also helps avoid breach of contract liability.

- **EEO Statement:** All employment handbooks should contain an Equal Employment Opportunity (EEO) statement. This provision should state that it is the company’s policy to promote equal employment, and that the company will not discriminate against any employee or applicant because of race, color, creed, religion, national origin, sex, age, disability or any other status protected by law.

Why it works: The EEO statement is further proof of an employer's good faith effort to satisfy the burden the law imposes on employers to take steps to prevent discrimination in the workplace.

- **Disciplinary Rules:** Employers get into trouble most often because of inconsistent or subjective application of disciplinary actions. For example, if four similarly situated employees (three men, one woman) were disciplined for poor performance, but only the woman was fired for it, the female employee has a basis for a disparate treatment discrimination claim. **Whether or not there was an actual intent to discriminate**, this employee now has grounds to **raise the inference**.
- **Disciplinary Rule Model:** Handbooks should contain general disciplinary rules that include two levels of offenses, one providing for immediate termination for violation of certain egregious offenses (Level I), and a second level requiring application of "progressive" discipline for lesser offenses (Level II). The description of the Level I Offenses should state that it **includes, but is not limited to**, the following offenses. Examples of Level I Offenses for which employees could be subject to immediate discharge may include violence or threats of violence, working while intoxicated or under the influence, abuse of clients, violation of the company's EEO or sexual harassment policies, etc. Choosing Level I Offenses should be up to each employer, particularly where certain offenses can be industry-specific. **Examples of specific Level II Offenses** for which progressive discipline is applied may include poor performance, excessive absenteeism, belligerence to management, etc.

Progressive discipline must be specifically defined. A good example may look like this:

Progressive Discipline (example):

First Offense: verbal warning

Second Offense: written warning

Third Offense: suspension (for one or more days)

Fourth Offense: discharge

The disciplinary policy should also define a **specific time frame** for receipt of discipline. For example, “Disciplinary action reaching the fourth stage in a twelve month period will result in discharge.”

Why it works: There are many reasons why this type of a disciplinary policy is an effective risk management tool.

- **Removes Subjectivity:** This model **removes subjectivity** from a manager/supervisor’s decision about what type of discipline to impose. Certain offenses warrant immediate discharge, while others require imposition of progressive discipline. The manager is not allowed to choose the manner of discipline - (s)he need only follow the model to determine what disciplinary action is warranted. This does two things. First, it establishes **consistency** in the disciplinary process in regard to all employees. Second, by removing **subjectivity** in lieu of a more objective approach, there is less likelihood of disparate treatment among disciplined employees.
- **Preserves At-Will Doctrine:** This model **preserves what is left of the At-Will Doctrine** by defining certain serious offenses for which immediate termination is appropriate. This is important. None of the employment statutes (Title VII, ADEA, ADA, FMLA, etc.) ever protect an employee from **misconduct**. For example, if an employee on medical leave comes to work to provide a doctor’s note to his supervisor and ends up punching him instead, neither the ADA nor FMLA will provide protection if the handbook states that immediate termination is the consequence of violent acts. If “acts of violence” had not been listed as a Level I Offense, the employer could have easily been exposed to liability under the ADA or FMLA for firing an employee who was off work due to a condition or illness.

- **Creates a Paper Trail:** Implementing a “progressive disciplinary approach” to Level II Offenses forces an employer to **create a paper trail** that will provide tangible evidence to support a discharge as lawful.
- **Sexual Harassment Policy:** It is not only crucial for employers to have good written harassment and sexual harassment policies, it is legally mandated. Our Supreme Court in both *Ellerth* and *Faragher* not only imposed a legal burden upon employers to prevent sexual harassment in the workplace, but imposed vicarious (automatic) liability upon them for sexual harassment committed by their supervisors. The Court then went on to provide employers with an **affirmative defense** (dismissal), but **only if** the employee failed to follow complaint reporting procedures outlined in the employer’s sexual harassment policy, and no adverse employment action (i.e. discharge) has taken place. The employer who fails to implement a legally sufficient sexual harassment policy will be unable to show steps taken to satisfy the burden to prevent same, and will not be entitled to an affirmative defense - dismissal.⁵
- **No Harassment:** A good sexual harassment policy should begin with a policy against **“harassment.”** It should state that it is the policy of the company to prohibit all types of harassment, including harassment based on sex, race, color, etc. The policy should then contain a legal description of harassment: verbal or physical conduct relating to an employee’s sex, race, color, etc. that has the effect of (i) creating an intimidating, hostile or offensive work environment, (ii) unreasonably interfering with the employee’s work performance, or (iii) adversely affecting the employee’s employment opportunities. Some examples of this are slurs, jokes, cartoons, stereotypes and statements based on sex, race, color, etc.

⁵For further analysis of an employer’s vicarious liability under *Ellerth* and *Faragher*, see the EEOC Revised Guidelines at <http://www.eeoc.gov/docs/guidance>.

- **No Sexual Harassment:** The sexual harassment policy should separately define “**sexual harassment.**” The EEOC provides the following description: Sexual harassment can include, but is not limited to, unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:
 - Submission to such conduct is made either explicitly or implicitly a term or condition of the individual’s employment.
 - An individual’s submission to or rejection of such conduct is used as a basis for an employment decision concerning that individual.
 - The purpose or effect of such conduct is to substantially interfere with the individual’s work performance, or to create an intimidating, hostile or offensive work environment.
- **Complaint Reporting Procedure:** It is essential for all sexual harassment policies to contain a **complaint reporting procedure** with at least two avenues by which to report complaints. For example, the policy may say that if the employee believes (s)he is a victim of discrimination, the employee should immediately report it to his/her supervisor or, if uncomfortable to do so for any reason, then report it to the human resources department or any member of management.
- **No Retaliation:** Finally, it is imperative that the sexual harassment policy contain a **no-retaliation** provision stating that retaliation against a person who complains about harassment, files a charge of discrimination, or who otherwise participates in the investigation of harassment, will not be tolerated. This conduct is illegal under Title VII.

Why it works: This sexual harassment model is an effective risk management tool for the following reasons:

- Provides proof to satisfy an employer’s burden to prevent sexual harassment.
 - Provides an employer with an affirmative defense (early dismissal) when an employee fails to use the complaint reporting procedure, and there are no adverse employment actions (i.e. discharge).
 - Provides a “safe harbor” against imposition of punitive damages for indifference.
 - Helps to avoid retaliation claims when followed.
- **Employment Applications:** Employers often expose themselves to liability because of the information requested in employment applications. The key to properly structuring employment applications and to conducting proper interviews is to focus exclusively on job-related questions and criteria. To begin with, there are questions employers are prohibited from asking at the **pre-offer** stage, such as whether the employee has a disability, or what the nature of the disability is (unless the disability is obvious). To do so would constitute a per se violation of the ADA. It is only once a **conditional offer** is made that an employer can ask disability-related questions and conduct a medical examination. Questions concerning age, marital status, religion and the like should also be avoided since they are not job-related or consistent with a legitimate business necessity.⁶
 - **Mandatory Arbitration provisions:** Our United States Supreme Court has decided that the Federal Arbitration Act (FAA) applies to employment discrimination actions, with the limited exclusion of transportation workers.⁷ This means that mandatory arbitration agreements of employment discrimination claims, if properly drafted, are valid and enforceable.

⁶For further analysis of disability-related inquiries and applicants, see the EEOC Guidelines at: <http://www.eeoc.gov/docs/guidance>.

⁷*Circuit City Stores, Inc. v. Adams*, 523 U.S. (2001).

So far, this ruling seems to implicate only mandatory arbitration agreements contained in a contract. Places you may find a mandatory arbitration agreement in the work place include, but are not limited to, collective bargaining agreements and contracts of employment.

Use of arbitration agreements as a risk management tool: While mandatory arbitration of employment discrimination claims initially seems to be a good idea because it removes the possibility of inflated jury awards, there are also many adverse consequences to mandatory arbitration that must be considered.

- **No Appeal Process:** Most mandatory arbitration of employment issues is binding - which means the decision of the arbitrator is final, and the appeal process is very limited. The employer is bound by the decision of the arbitrator whether the employer is satisfied with it or not.
- **Agreement Seen as Employment Contract:** If the mandatory arbitration agreement is contained, for example, in an employee handbook, the employer runs the risk of a court viewing this as the employer's intent to form a contract of employment, thereby defeating the employment-at-will relationship. Even separate arbitration agreements might produce the same result where the consideration for the agreement is "continued employment."

There are less risky methods of resolving employment discrimination disputes than using mandatory arbitration agreements. Both the EEOC and federal court procedures already make mediations available to resolve discrimination claims. Between mediations, settlement conferences and summary judgments, very few discrimination claims are ever tried before juries.

Conclusion:

Implementing both good business practices and good policies (Primary Risk Management) is an inexpensive yet effective way for employers to significantly reduce their risk of exposure to employment discrimination claims. Together, they accomplish the following:

- Remove subjectivity so there is less chance of disparate treatment of employees that could lead to discrimination claims.
- Provide employers with documentation to support terminations as legitimate.
- Provide employers with an affirmative defense (dismissal).
- Provide employers with a safe harbor from imposition of punitive damages.
- Allow employers to show they have taken steps to prevent discrimination and thereby satisfy their burden to prevent same.
- Allow employers to preserve what is left of the employment-at-will doctrine and terminate employees without otherwise violating the ADA or FMLA.

Considering the significant benefit and the insignificant costs associated with Primary Risk Management, employers today cannot afford to ignore these necessary policies and procedures.

B. Secondary Risk Management

Secondary Risk Management, while more costly, is still a necessary tool in controlling the risk of employment discrimination claims. Recently, some courts have determined that merely having a written sexual harassment policy is no longer enough to show an employer's good faith in taking steps to prevent sexual harassment. These courts have demanded other evidence, such as management training. Employers face many pitfalls in running a business, no matter what the industry. For this reason, it is important for employers to take advantage of as many of the following Secondary Risk Management tools as possible.

- **Access to Labor-Employment Counsel:** Employers constantly make decisions that can have an adverse impact on their employees, such as decisions to terminate or to reduce their workforce. It is an arduous task for employers to understand all of the employment laws sufficiently to avoid violating them, while at the same time trying to run a business. Application of these laws can be confusing. For example, the interplay between the ADA and the FMLA requires determining when employees must be returned to the same job or an equal position after a medical leave of absence. To make things more difficult, the courts (federal and state) are constantly reinterpreting the breadth and application of the employment discrimination statutes. This makes having access to legal experts a necessity.
- **Management Training by Outside Counsel:** Sound policies are only as good as the management team implementing them. Because employers can't know what their employees are thinking, it is imperative that they provide management training, either on-site or through seminars, regarding safe employment practices. Management training educates the staff responsible for disciplining, hiring and firing employees, thereby reducing exposure to discrimination claims, and it demonstrates that the employer is satisfying the burden to prevent discrimination in the work place.
- **Newsletters, Websites and Other Informative Resources:** Management can regularly review current legal newsletters and websites to stay informed of the latest legal developments involving employment discrimination and associated claims. Of course, attempts by an employer to educate management can be considered further evidence of good faith efforts to prevent discrimination in the workplace.
- **Employment Practices Liability (EPL) Insurance:** Last but not least, obtaining Employment Practices Liability Insurance (EPLI) is a crucial Secondary Risk Management tool. Not only does EPLI help to defray the costs of defending employment discrimination and associated claims such as wrongful discharge actions, it performs one more significant service: **Most EPLI policies make some of the Primary and Secondary Risk Management services available to employers as “value-added services.”** Usually, the cost associated with these value-added services is significantly reduced from what they would cost an employer, absent this insurance.

III. FREQUENTLY ASKED QUESTIONS

Q: Can a conscientious employer avoid liability when one of its employees is sexually harassed?

A: Yes - if the employee has failed to take advantage of the complaint reporting procedures described in the employer's sexual harassment policy (and no adverse employment actions have occurred), and the employer has made good faith efforts to prevent sexual harassment (written policies, management training, etc.). (*Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Faragher v. Ellerth*, 118 S. Ct. 2275 (1998))

Q: Is an employer liable for same-sex sexual harassment?

A: Yes. Under Title VII an employer can be sued for same-sex sexual harassment as long as the conduct at issue constituted discrimination because of "sex." (*Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998))

Q: Can an employer avoid punitive damages when an employee is sexually harassed?

A: Yes. An employer may be afforded a safe harbor from the imposition of punitive damages under Title VII where the employer can show a good faith effort has been made to prevent sexual harassment. Because the imposition of punitive damages requires either malice or reckless indifference on the part of the employer, written sexual harassment policies go a long way to dispel any showing of such conduct. (*Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999))

Q: Can an employee who declares himself totally and permanently disabled in order to receive Social Security Disability benefits nevertheless be considered qualified under the ADA?

A: Yes. Despite claiming total and permanent disability, an employee is allowed to explain why, with reasonable accommodation, he can perform the essential functions of his job. If he can do this, he would be entitled to ADA protection. If he cannot, there is no case under the ADA. (*Cleveland v. Policy Mgmt Systems Corp.*, 526 U.S. 795 (1999))

Q: How does an employer assess a disability under the ADA?

A: An employer must assess an employee's disability in its "mitigated" state. This means determining whether there is still an impairment after imposition of "mitigating" factors (i.e. in its corrective state) such as with medication or corrective lenses. If the impairment can be corrected without other adverse effects, there is no disability under the ADA. (*Sutton v. United Air Lines*, 527 U.S. 471 (1999))

Conclusion:

The relationship between employer and employee has never been more complex. It is essential that every organization examine its employment practices and develop procedures and guidelines that will promote compliance with relevant laws, provide guidance for management, and demonstrate concern for the right of all employees to work in an environment free from discrimination.

Employers who ignore the risk of employment discrimination and associated claims because they believe it will not happen to them, do so at their own peril. Employers who understand what types of claims they could face, and who take advantage of Primary and Secondary Risk Management tools and services, will be in a far more strategically advantageous position than those who don't.

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Resources:

Other books in the One Step Ahead Series include

Dollars and Sense of Risk Management

Crisis Management and Working with the Media

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Other Employment Practices Loss Control Resources from ISA

The online Pinnacle Quality Assessment Tool includes several modules regarding employment practices.

The Exit Interview, is a booklet intended to help employers use exit interviews to improve both EPL risk management and employee retention.

If you have a D&O/EPL policy with ISA, you are also entitled to receive several value-added services from the law firm of Laner Muchin, specialists in the practice of labor and employment law since 1945. These include a Model Employee Handbook, a legal review of your current handbook with a follow-up telephone consultation and unlimited telephone advice. Laner Muchin also offers additional services to ISA's D&O insureds at discounted rates.

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