Top 10 Workplace Issues: How to Avoid New Traps & Old Pitfalls
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1. EEOC Statistics and Trends.

Over the past year we have continued to see interesting developments within the Equal Employment Opportunity Commission (“EEOC”). As forecasted by the Obama Administration, the EEOC budget rose significantly. Perhaps a direct result of that increased budget was the fact that 2009 was the second highest year of EEOC complaints nationwide (second only to 2008) with approximately 93,000 claims and in excess of $375 million recovered. Although 2010 statistics have not been released yet, it is expected that 2010 will reflect the same trends as 2009. As usual, race and sex charges were one and two, respectively. Both national origin and religion charges saw a modest increase, and not surprisingly, retaliation charges increased across the board. The most frequent charges filed in 2009 allege discrimination based on race (36%), retaliation (36%) and sex (30%), which are expected to continue through 2010. One surprise from the 2009 statistics is that age claims decreased, which is unusual following the high level of unemployment and workforce reorganizations throughout the country. Charges of disability discrimination saw a significant increase in 2009, and it is expected that there will be further significant increases in disability charges in light of the implementation of the Americans With Disabilities Act Amendments Act.

The EEOC has stated that the near-historic level of discrimination charges from 2009 could be due to numerous factors above and beyond economic conditions, such as greater accessibility of the EEOC to the public, increased diversity and demographic shifts in the labor force, employees’ greater awareness under the federal employment laws, and changes to the EEOC’s intake procedures which have simplified the process for filing a charge with the EEOC.

Bottom line for employers is that the trend over the past two years of increased discrimination charges filed with the EEOC will likely continue, and employers must now focus on doing a better job at implementing best practices within the workplace, such as:

a. implementing and following fair and reasonable employment policies and procedures which comply with federal and state employment laws;

b. knowing and understanding federal and state employment laws and knowing when to seek help with compliance;

c. consistently providing employees with candid and honest performance reviews;

d. consistently applying discipline throughout the organization; and

e. ensuring employees are treated with dignity and respect in the workplace.
Although this won’t always result in avoiding litigation, it should significantly decrease legal exposure based upon employment decisions.

2. **Minnesota Voting Leave Law.**

Since many of you had to deal with this issue earlier this week, it is important to be reminded of the fact that Minnesota amended its voting leave statute in 2010. Prior to the amendments, Minnesota’s voting leave statute required an employer to allow an employee to be absent from work during the morning of an election day and only if the employee could not otherwise find time to vote on the election day outside of his or her scheduled work hours.

The recently amended Minnesota voting leave statute now requires an employer to allow an employee to be absent from work at any time during his or her scheduled hours on election day for that time which is necessary for the employee to appear at the employee’s polling place, cast a ballot, and return to work. Minn. Stat. § 204C.04. Furthermore, an employer is no longer allowed to deny an employee time off to vote during his or her scheduled work hours even if the employee has sufficient time to vote outside of his or her scheduled working hours. Minnesota’s voting leave statute still requires an employer to pay an employee for time spent voting. Any individual who violates Minnesota’s voting leave statute is guilty of a misdemeanor.

3. **Can an Employer Discriminate Against an Employee Based Upon Political Affiliation or Belief?**

Although Minnesota, like most states, does not include as a protected classification an individual’s political affiliation or beliefs, political affiliation and/or beliefs often cross over into an individual’s religious beliefs or other protected classifications, which may be protected under either Minnesota state law or federal law. For example, an employee’s support for a particular political candidate may be based, in part or entirely, on that individual’s position on right to life, which may be a direct connection to an employee’s religious or spiritual beliefs. By way of further example, an individual may hold a particular position with respect to immigration and naturalization issues which may be a direct reflection of that person’s race or national origin.

Employers should be careful to ensure that employment related decisions, such as hiring, promotion, demotion, suspension or termination are based upon an individual’s objective performance and are not based upon a manager or supervisor’s dislike of the employee due to the employee’s political affiliation or beliefs. Managers and supervisors should also be sensitive to workplace disputes that may be based upon political debate.

4. **Social Media Snafus.**

Social media is here to stay and employee use of social media in the workplace and in the performance of job duties will also continue to increase. Facebook, MySpace, Twitter, Digg, and LinkedIn, as some examples of social media, continue to grow in use and impact in the workplace.

With the increasing use of social media in the workplace there is increasing legal exposure for employers in the following areas:
a. discriminatory or derogatory postings;
b. threats of violence;
c. disclosure of the Company’s confidential information or trade secrets;
d. defamation;
e. postings with illegal content; and
f. copyright infringement.

Furthermore, an employer’s use of social media in the hiring process can also create legal exposure for employers when an employer discovers protected class information about a prospective employee. Be careful what you ask for.

Employers are encouraged to implement or revise existing electronic use policies which specifically outlines the employer’s reasonable guidelines regarding the use and/or prohibition of social media in the workplace. Employees should be reminded that they have no expectation of privacy regarding the use of the internet and social networking sites in the workplace or using Company technology or internet access. The employer’s electronic use policy should incorporate other Company policies, such as the employer’s policy prohibiting discrimination, use of Company property and dissemination of the Company’s confidential information.

5. Minnesota’s Texting While Driving Law.

Minnesota, like many other states, has now legislated against composing, reading or sending electronic messages while driving. Minn. Stat. § 169.475. The statute defines an electronic message as a self-contained piece of digital communication that is designed or intended to be transmitted between physical devices. An electronic message includes, but is not limited to, e-mail, a text message, an instant message, a command or request to access a worldwide web page, or other data that uses a commonly recognized electronic communications protocol. An electronic message does not include voice or other data transmitted as a result of making a phone call, or data transmitted automatically by a wireless communications device without direct initiation by a person.

The restriction does not apply if a wireless communication device is used:

a. solely in a voice activated or other hands free mode;
b. for making cellular phone calls;
c. for obtaining emergency assistance to report a traffic accident, medical emergency or serious traffic hazard, or prevent a crime about to be committed;
d. in the reasonable belief that a person’s life or safety is in immediate danger; or
e. in an authorized emergency vehicle while in the performance of official duties.
Although the Minnesota statute has not been tested in the courts yet, there will likely be future discussion regarding individuals texting when the vehicle is not in motion, such as at a stop sign, stop light or on-ramp. Employers may have legal exposure for injuries due to an employee’s texting while driving if engaged in Company business or on Company time. Given the potential legal exposure associated with employees texting while driving, all employers are encouraged to include within their electronic use/social media policies a prohibition of texting while driving if an individual is using a Company owned device or if in the course and scope of employment.

6. **Americans With Disabilities Amendments Act.**

The largest increase in EEOC charges in 2009 came in the area of disability claims which likely can be attributed directly to the enactment of the ADAAA. The ADAAA revisions make it easier for individuals to bring a disability claim against either an employer or a prospective employer.

Prior to implementation of the ADAAA, the majority of disability charges were dismissed based upon the individual’s inability to establish a disability under the ADA, which is part of the prima facie case of a disability charge under the ADA. The ADAAA has changed the landscape of disability claims. Specifically, individuals are no longer required to show that they have an impairment which substantially limits one or more major life activities, but rather they need only show that their impairment significantly restricts a major life activity. The less stringent standard makes it easier for individuals to establish a disability under the ADA. Furthermore, under the ADAAA, employers are significantly limited in assessing mitigating factors in determining whether an individual is disabled. For example, an individual’s ability to control an impairment through medication may no longer be considered in determining whether the individual has a disability under the ADA. The ADAAA has diminished the significance of several ADA precedent-setting cases.

The ADAAA has switched the focus from whether an individual is disabled to a focus on the interactive process and whether the employer and employee can identify a reasonable accommodation for a qualified employee with a disability. The give-and-take of the interactive process under the ADA will usually insulate an employer from legal exposure if conducted in good faith. Employers dedicate more resources to the interactive process to determine whether an accommodation is reasonable or an undue financial hardship or undue disruption to the employer’s business operations.

7. **Workplace Bullying.**

Bullies aren’t just at school anymore. Preventing workplace bullying is an issue that is gaining momentum in the state legislatures and the courts, as evidenced by many states’ recent efforts to implement healthy workplace legislation to address abusive work environments which are not otherwise directly attributed to an individual’s membership in a protected class.

The definition of workplace bullying depends upon the proposed legislation, but most states have mirrored the language found in Title VII of the Civil Rights Act of 1964 defined as a workplace in which an employee is subjected to abusive conduct that is so severe that it causes physical or psychological harm and prevents the individual from performing his or her job duties.
Workplace bullying legislation attempts to address inappropriate behavior that is not tied to an individual’s protected classification. However, it is often a fine distinction and behavior which may constitute workplace bullying is often perceived by the individual who is subjected to the bullying as a direct result of that individual’s membership in a protected class.

As the workplace becomes increasingly subject to monitoring and scrutiny, behavior by employees which falls into the realm of badgering, belittling, and creating a tense, fearful or abusive work environment will be addressed by the courts in a fashion similar to the court’s treatment of unlawful harassment discrimination under Title VII. Furthermore, if an employer facilitates, encourages or turns a blind eye to a bullying culture within its workplace, employers may also face claims of a pattern or practice of discriminatory behavior. Not surprisingly, studies have shown that the effects of workplace bullying are decreased productivity, decreased employee morale and an increase in legal exposure to claims of unfair or unlawful treatment.

Although there is a legitimate argument that healthy workplace legislation will increase the amount of frivolous litigation against employers by employees who are simply unhappy with their work environment, it appears that most states are moving in the direction of recognizing workplace bullying as an actionable claim against an employer. Employers are encouraged to include within their workplace codes of conduct policies which emphasize the employer’s culture of treating employees with dignity and respect and applying the golden rule, which is to treat others as you wish to be treated. Employers are also encouraged to train managers and supervisors to stop inappropriate behavior or bullying before it rises to the level of unlawful harassment. Employers that are diligent in addressing inappropriate conduct that has not yet risen to the level of unlawful harassment will be most successful in avoiding claims of workplace bullying.

8. The Never Ending Independent Contractor Analysis.

The Obama Administration has dedicated in excess of 25 million dollars to the U.S. Department of Labor for the purpose of employing additional personnel to enforce federal wage and hour laws. At the top of the list for the Obama Administration is cracking down on employers’ abuse of the independent contractor misclassification. Over the past several years employers have utilized independent contractors in increasing numbers in order to avoid indirect costs associated with employees, such as health care benefits, workers compensation benefits and unemployment compensation, to name a few. Unfortunately, many of the individuals classified as independent contractors may be employees.

The U.S. Department of Labor (“DOL”) and the Internal Revenue Service (“IRS”) are the two agencies most interested in how individuals are classified as either independent contractors or employees. The amount of control an employer has over a worker is still the most important factor under both the DOL and IRS; however, employers and workers have continued to push the boundaries. Perhaps the biggest mistake made by employers and workers is the mistaken belief that if both parties agree to characterize the arrangement as an independent contractor then the intent of the parties will control. Unfortunately, the DOL and the IRS are less concerned with the parties’ intent and more concerned with the reality of the work relationship.
The DOL focuses primarily on the Economic Realities Test, which focuses primarily on five factors as follows:

a. the degree of control exercised by the employer;
b. the extent of the investment by the employee and employer;
c. the degree of control to which the employee’s opportunity for profit or loss is dictated by the employer;
d. the skill set required in performing the job; and
e. the permanency of the relationship.

The IRS, on the other hand, relies on a 20 factor test which focuses on three main areas as follows:

a. behavioral control or the amount of control the employer has to direct the individual’s work;
b. financial control or whether the worker has a significant investment in the work and has an opportunity to realize a profit or loss; and
c. the type of a relationship or whether the employer provides the worker with benefits similar to an employee.

The DOL (and the IRS) will continue to increase their monitoring of the relationship between an employer and its workers. Employers are, therefore, encouraged to periodically conduct audits of their workforce to determine whether independent contractors are properly classified. Employers should focus on the DOL and IRS tests; contract language; invoicing; tax treatment; and whether the worker received employee-like benefits.

9. **Preserving Electronic Evidence in Employment Cases.**

Due to the ever increasing use of electronic mail in the workplace employers are faced with an increasing burden of preserving electronic evidence in the face of litigation. Employers have an obligation to preserve evidence related to an employment claim as soon as litigation is reasonably anticipated. This may be difficult for an employer to determine in the context of employment litigation prior to receiving a complaint from the employee or former employee. However, courts have found that an employee’s threat of litigation or letter from legal counsel alleging unlawful treatment may be enough to trigger an employer’s obligation to preserve electronic evidence. An employee or former employee’s filing of a charge with the EEOC or respective state agency is usually enough to trigger an obligation to preserve electronic evidence.

Since many employers have automatic procedures in place which delete e-mails after a certain timeframe it may be prudent to revisit these procedures to ensure that evidence or potential evidence is retained for an acceptable amount of time. Since it is often difficult to know the full extent of an individual’s claims and an employer’s defenses in the early stages of a dispute, an
employer’s obligation to hold certain potential evidence should be broad enough to cover all relevant areas. In the end, it is better to have the evidence and not need it since the court may make negative inferences based on the lack of the evidence and/or may subject the employer to penalties and fines for destruction of potential evidence. Due to the significant consequences of failing to preserve documents, employers should error on the side of caution and implement a legal hold as soon as possible following notice of a claim.

A legal hold memorandum should be prepared shortly after sufficient notice has been provided that there is a duty to preserve electronic evidence. The hold memorandum should be detailed enough to describe the subject matter and allegations made by the employee or former employee. All employees who may have information regarding the subject matter and allegations should be provided a copy of the legal hold memorandum and, if necessary, provided an opportunity to ask questions regarding the same.

The legal hold should be broad enough to cover all potential sources of information. This may include multiple sources of electronically stored data. For example, lap tops, personal computers, PDA’s, blackberry’s, text messages, and other social media networks. HR departments will need to work directly with IT departments in order to implement effective policies and procedures.


Minnesota law states that an employer may not deduct amounts from an employee’s wages for lost or stolen property, damage to property, or to recover any other indebtedness owed by the employee to the employer unless:

a. the employee voluntarily authorizes the deduction in writing after the loss or other indebtedness has arisen; or

b. the employee is held liable in a legal proceeding for the loss or indebtedness.

Minn. Stat. § 181.79, Subd. 1. Any amount actually deducted pursuant to § 181.79 may not exceed the amounts permitted by law for garnishment of wages. The only exception is a written agreement between the employee and employer if pursuant to:

a. a collective bargaining agreement;

b. rules established by an employer for discipline and commissioned sales persons for errors or omissions; or

c. agreements in which an employee, prior to making a purchase or loan from his employer, voluntarily authorizes in writing that the costs shall be deducted.

Employers are specifically precluded from making deductions from an employee’s wages due to, by way of example, missing or bad checks, robbery, breakage, spoilage, shortages due to errors, or deductions due to disciplinary action. An employer who makes an unlawful deduction may be liable in a civil action brought by the employee for twice the amount of the deduction or credit
taken. Furthermore, unauthorized wage deductions may result in a determination that an employee has lost his or her exempt status under the Fair Labor Standards Act (“FLSA”).

In *Erdman v. Life Time Fitness, Inc.*, 2010 WL 3502811 (Minn. September 9, 2010), the Minnesota Supreme Court recently reviewed whether Life Time Fitness’ policy of making deductions from employees’ wages due to overpayment of a pre-paid bonus resulted in the employees losing their exempt status under the Minnesota Fair Labor Standards Act (“MFLSA”). The Minnesota Supreme Court held that the managers retained their exempt status despite the deductions. However, in a similarly filed case against Life Time Fitness in federal court in 2009 the Sixth Circuit held that Life Time Fitness’ bonus deductions resulted in the managers losing exempt status under the federal FLSA. In the end, the Minnesota Supreme Court determined that the MFLSA contains sufficiently different language than the federal FLSA. Although the employer in *Erdman* prevailed, the lesson is clear: Employers should proceed with extreme caution when making any form of deduction from either an exempt or non-exempt employee’s wages.

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