

LAW OFFICE OF LORI A. GOLDSTEIN, LLC

CLIENT BULLETIN January 2013

INAUGURATE YOUR 2013 WORKPLACE RESOLUTIONS

2012 was a challenging year for employers and employees. The difficult economy and high unemployment rates continued, and many employees lost their jobs (and benefits.) Still, companies used furloughs, reduced compensation and schedules, and other creative ways to retain employees while cutting expenses. Discrimination claims decreased but private employers paid record-breaking amounts to resolve EEOC charges. Learn from 2012 statistics, administrative and court rulings, and new laws and other hot buttons for 2013.

A Look At 2012

Discrimination Claims and Damages Statistics

2012 charges decreased: While the federal Equal Employment Opportunity Commission (EEOC) experienced record-breaking charge numbers in 2011, the rate slightly decreased in 2012. EEOC received 100,389 charges in fiscal year 2011, and 99,632 charges last year.

Majority of charges alleged Title VII violations: More than 70% alleged violations of Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, sex, national origin, religion and color, and retaliation. Many had expected more disability discrimination charges based on the 2008 amendment of the Americans with Disabilities Act and additional age discrimination claims based on an aging workforce. But, Title VII received the most attention, with race first, and then sex, national origin, religion and color, respectively.

Suits by EEOC: In FY 2012, the agency filed 122 merits lawsuits, including 86 individual suits, 26 multiple-victim suits (with fewer than 20 victims) and 10 systemic suits. It resolved 254 merits lawsuits for a total monetary recovery of \$44.2 million.

Systemic EEOC Matters Increase: In FY 2012, the EEOC resolved 240 systemic investigations, securing monetary benefits of \$36.2 million through conciliation of 46 investigations and pre-determination settlements in 29 investigations. This was *four times* the amount recovered by the EEOC in systemic conciliations/pre-determination settlements in 2011.

Termination claims alleged retaliation most: Indeed, retaliation was the most common basis for discharge claimed, even more than race, sex, disability or age.

Record-Breaking Damages: EEOC collected a record \$365.4 million dollars in 2012 from private employers. The agency attributes some of this success (10% of total) to systemic (company-wide) charges of discrimination.

2012 Enforcement Updates, Employment Laws and Decisions

VCSP Reclassification Eased: The Voluntary Classification Settlement Program (VCSP), a program that the IRS initiated in 2011 to allow employers to prospectively reclassify as “employees” workers who were misclassified as “independent contractors.” The program advantages include limited federal employment tax liability, no interest or penalties, and no IRS audit or remedial action. Last month, the IRS revised the program based on taxpayer and company feedback. Among the changes, a taxpayer is

now eligible to participate even while an IRS audit is pending. However, a taxpayer cannot participate if the taxpayer is contesting in court the classification of the class or classes of workers from a previous audit by the IRS or Department of Labor

New Restrictions - Criminal Background Checks: EEOC issued new guidance to restrict criminal background checks for new hires. The agency also intends to soon focus on sexual orientation and pregnancy discrimination.

EEOC Approves Strategic Enforcement Plan for FY 2013-2016: The plan highlights six areas of focus, including:

- eliminating barriers in recruitment and hiring (targeting class-based discrimination against racial, ethnic and religious groups, and older workers, women, and people with disabilities);
- protecting immigrant, migrant and other vulnerable workers (targeting disparate pay, job segregation, harassment, trafficking, and discriminatory policies);
- addressing emerging and developing employment discrimination issues;
- enforcing equal pay laws (targeting compensation discrimination based on gender);
- preserving access to the legal system; and
- preventing harassment through systemic enforcement (rather than individual matters)

EEOC Focuses on Systemic (vs. Individual) Claims The Commission's FY 2012 systemic lawsuits included challenges to large-scale patterns of hiring and promotion discrimination against women and African-Americans, discriminatory benefits policies under the ADEA, inflexible leave policies under the ADA, and policies that discriminate based on pregnancy and on national origin. The agency will continue to pursue opportunities for class-based claims, including seeking general company policy information during investigations. The focus will likely be on applicant background checks and company leave/attendance policies vis-a-vis ADA accommodation obligations.

Seventh Circuit expands employers' ADA obligations: Employers' obligations to accommodate disabled employees under the Americans with Disabilities Act (ADA) were recently expanded by the United States Court of Appeals for the Seventh Circuit recently expanded. In *EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012), the Seventh Circuit addressed whether the ADA requires employers to give employees who are losing their positions due to a disability the option of vacant positions for which they are qualified. Reversing precedent, the Court held that the ADA requires employers to appoint employees with disabilities to vacant positions for which they are qualified, even if a more qualified candidate has applied for the vacant position. The standard ADA exception would still apply: if such accommodation would not be reasonable or would present an undue hardship.

Social Media Stayed Hot: The National Labor Relations Board pressed on with cases finding social media policies overbroad and related discipline unlawful. A key decision in November found presumptively invalid policies that forbid social media on company time. The National Labor Relations Act protects employees' rights to engage in protected activity during lunch and other break periods.

The administrative law judge ruled that DISH Network Corp.'s social media policy violated the statute by prohibiting employees from making disparaging or defamatory comments about the company, and banning employees from accessing social media sites during work hours, as well as sites containing employer resources.

In another decision, *NLRB v. Hispanics United of Buffalo, Inc.*, the NLRB protected employees' Facebook posts venting about a coworker. A group of employees were fired for bullying and harassment for complaining on Facebook about a coworker who often criticized their job performance. This decision reached beyond earlier cases by restricting postings even about a coworker, rather than a supervisor.

Year-End News on the Economy, Unemployment, Job Market

Bad News - High Federal Unemployment Rate Continues: At the end of 2012, the federal unemployment rate was 7.8 percent. Congress' focus on debt reduction left job creation and stimulus programs by the wayside. For the first time in over 6 years, the unemployment rate for adult women was higher than for men.

Good News for Illinois: Illinois unemployment fell to 8.7% at year-end, and Illinois added more than 16,400 jobs.

Hopeful Prospects: Nationwide, the job market is stronger, and new jobs and hiring are slowly rising. Employers added 155,000 jobs in December, and we saw gains in private hiring, fewer layoffs and fewer applications for unemployment insurance.

Unemployment Benefits Extended: Those who faced expiration of benefits at year-end received an eleventh-hour rescue by Congress. In early January, Congress extended to Dec. 31, 2013, the Emergency Unemployment Compensation (EUC) and Extended Benefits (EB) programs. This means that unemployment compensation will continue for unemployed workers who are currently collecting extended benefits. Unemployed workers who run out of state benefits during 2013 will also be eligible for extended benefits.

What's New for 2013

Important new laws effective January 1 and other legal obligations face employers this year.

New social media privacy laws in 6 states: Effective in 2013, six states including Illinois have new laws preventing employers from accessing their employees' Facebook or other social media passwords (California, Delaware, Illinois, Michigan, Maryland, and New Jersey.) In Illinois, the Right to Privacy in the Workplace Act was amended to prohibit an employer from requesting or requiring an employee or applicant to provide passwords, related account information, or access to the individual's account or profile on a social networking. Expect this trend to continue in other states.

Individual Liability under Illinois Equal Pay Act: Now officers and agents may be held accountable when an employer fails to pay workers equal wages for equal work.

New FCRA Forms: Employers must begin using new Fair Credit Reporting Act (FCRA) forms no later than January 1, 2013. The FCRA regulates employers who use background checks provided by third parties, known as Consumer Reporting Agencies (CRA.) Applicants and employees must be given certain information about the scope of the background check and must consent. The 3 new forms are "A Summary of Your Rights under the Fair Credit Reporting Act," "Notice to Users of Consumer Reports: Obligations of Users under the FCRA," and "Notice to Furnishers of Information: Obligations of Furnishers under the FCRA." The key form change is that consumers must now contact the Consumer Fraud Protection Bureau, rather than the FTC, about their FCRA rights.

13 Employment Law Resolutions for 2013

1. Review and update your employee handbooks and social media policies and practices. 2012 changed the landscape and many policies are obsolete. "Employment at-will" language may need revising, according to recent NLRA decisions. Before disciplining or discharging an employee for comments made on social media, analyze whether the comments may be protected.

2. Based on the recent ADA expansion, employers must now consider transferring employees whose disability prevents them from performing their current positions (with or without reasonable accommodation), to vacant positions. Companies should also examine (or create) transfer policies to ensure compliance with these new ADA obligations.
3. Review policies and procedures to ensure compliance with the Americans with Disabilities Act (“ADA”), including reasonable accommodation and leave request processes under the ADA.
4. Review policies for accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA).
5. Be sure to use the correct FCRA forms. Violations may result in lawsuits for actual damages, attorneys’ fees, statutory damages, and punitive damages for willful violations
6. Review and update criminal background check procedures.
7. Conduct an audit of your organization’s compliance with wage and hour laws. Off-the-clock wage and hour lawsuits alleging employees are being misclassified as exempt or as independent contractors are still on top of the administration’s and plaintiff class action lawyers’ agendas.
8. Train supervisors to recognize and avoid harassment and discriminatory behavior. Make sure supervisors respond appropriately to complaints. Remember that retaliation charges are now the most common claims filed with the EEOC. Review sexual and other harassment policies to ensure policies are comprehensive, designed to combat workplace harassment, and demonstrate that the employer takes such issues seriously.
9. Review and update non-compete, non-solicit and confidentiality agreements. Enforceability depends upon the facts and circumstances of each situation and the specific terms of your agreements.
10. Analyze exit interview procedures. They not only provide information to help minimize claims, but can serve as a reminder of employees’ confidentiality, non-solicit and non-compete obligations .
11. Review attendance and leave policies and procedures in light of ADA and FMLA requirements.
12. Maintain good employment practices, including updated employee handbooks, thorough employee evaluations, and documentation of discipline, termination and other employment actions.
13. Avoid cost-cutting policies that have an unlawful disparate impact on certain protected groups, For example, refusing to hire long-term unemployed workers may affect certain racial and ethnic groups with high unemployment. Don’t ignore the important role of human resources personnel or skimp on compliance – this will only lead to increased risk and costs in the long-run.

* * * * *

This bulletin is intended to provide clients and others with general information and is not intended to provide specific legal advice or opinions. For assistance with topics addressed in this bulletin or other workplace issues, please contact Lori Goldstein at (847) 624-6640 or lori.a.goldstein@gmail.com. Visit www.lorigoldsteinlaw.com for information about the Law Office of Lori A. Goldstein, LLC.

© 2013 Lori A. Goldstein