

Emerging Trends in Employment Practices Liability

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Introduction to Employment Practices Liability

- Employers may face liability in almost every aspect of their dealings with employees and job applicants.
- Employment practice liability comprises state and federal cases in which the cause of action is **discrimination, retaliation, wrongful termination, or violation of whistleblower laws.**
- Cases frequently involve multiple contentions, such as sexual harassment and a hostile work environment.
- Also includes cases involving the Family and Medical Leave Act and the Equal Pay Act, as well as equivalent state statutes.

Discrimination

- Discrimination can include claims that pertain to any employee or applicant for employment because of violation of federal law or the equivalent state statutes that restrict discrimination based on **age, disability, national origin, pregnancy, race, religion, sex or sexual orientation.**
- Many states, counties and municipalities have fair employment practice laws or other laws that also restrict discrimination.
- Claims of discrimination may be premised upon aspects of the employment relationship, including, but not limited to **hiring, firing, promotion, and provision of employment-related fringe benefits.**

Hostile Work Environment

- A hostile work environment exists when an employee is subjected to harassment that is so severe or pervasive that it alters the conditions of their employment and creates an abusive working environment.
- The work environment must be objectively and subjectively offensive.
- Claims of hostile work environment initially were recognized in the context of sex discrimination, but they have since been recognized for other protected classes as well, such as race and disability.

Retaliation

- Retaliation includes general claims of retaliatory actions by an employer against an employee, retaliation due to employees filing workers' compensation or discrimination claims, and cases where the plaintiffs were retaliated against after refusing to compromise ethical standards or participating in another employee's discrimination or sexual harassment suit.
- To prove a claim of retaliation, an employee generally must show (1) that he engaged in a protected activity, (2) that he subsequently was subjected to an adverse employment action, and (3) that there was a causal connection between the protected activity and the adverse action.

Sexual Harassment

- Sexual harassment occurs when supervisors or coworkers make unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.
- Claims can take two forms: “quid pro quo” and “hostile environment”
- **Quid pro quo** is a situation in which the victim’s willingness to comply with sexual requests is a factor in getting a job, promotion, better shift, or any favorable work benefit.
- A **hostile work environment** is one in which an atmosphere of a sexually degrading conduct or harassment is allowed, i.e. dirty jokes, unending sexual banter, or offensive physical contact.

Wrongful Termination

- **Wrongful termination** is the general phrase that is used to describe a termination from employment that violates the law.
- Also includes **Constructive discharge** – a legal doctrine that changes what appears on the surface to be a voluntary resignation into a termination.

Whistleblower

- A variety of federal and state statutes to establish workplace and environmental health standards prohibit employers from retaliating against whistleblowers who make complaints regarding potential violations of the acts.
- In addition, under the First and 14th Amendments to the U.S. Constitutions, state and local government officials are prohibited from retaliating against whistleblowers.

Employment Litigation on the rise

Reasons why employment litigation is on the rise:

- Changing laws – increased protection for employees
- Increased wage transparency
- Can be difficult to navigate, leading to violations
- So easy to file an EEOC charge.

Plaintiff Recovery

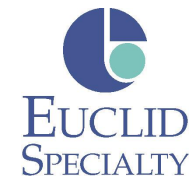
- Employees/applicants have a fair chance at recovery
- National statistics for plaintiff recovery probability on EPL claims in federal district court – 46% in 2016 (up from 45% in 2015)
- National statistics for plaintiff recovery probability in EPL claims in state courts = 50% in 2016 (up from 41% in 2015)
- Mean average of recovery for employment cases in 2016 was \$375,162.

Agency Action



- Easily accessible to all employees who wish to have their situations investigated OR employees/applicants can obtain their immediate right to sue letter – free services offered like mediation
- Equal Opportunity Commission
 - In 2016, over 84,000 charges were filed with the EEOC.
 - Slight decrease from last year, when over 91,500 charges were filed with the EEOC
 - Utah employees can also file with Utah Anti-Discrimination and Labor Division.

EEOC Charge Statistics



Charge	FY 2011	FY 2014	FY 2017	# Net change from 2011
Race	35,395	31,073	28,528	-6,867
Sex	28,534	26,027	25,605	-2,929
National Origin	11,833	9,579	8,299	-3,534
Religion	4,151	3,549	3,436	-715
Color	2,832	2,756	3,240	408
Retaliation - All Statutes	37,334	37,955	41,097	3,763
Age	23,465	20,588	18,376	-5,089
Disability	25,742	25,369	26,838	1,096
Equal Pay Act	919	938	996	77
GINA	245	333	206	-39
* Total Charges	99,947	88,778	84,254	

Key Emerging Trends

- The media is targeting employment practices
- General social awareness growing
- Workplace discussions are on the rise
- Trends towards transparency, continuing education, trainings, employer/employee mindfulness
- With all of these factors, it is necessary that employers are prepared to deal with the latest trends and best practices

Key Emerging Trends

Six Key Trends:

- (1) Sexual Harassment and the #MeToo Movement
- (2) Fair/Equal Pay Act
- (3) Joint Employer & Independent Contractor Issues
- (4) Wage and Hour Litigation
- (5) Prescription and Recreational Drugs in the Workplace
- (6) Leaves – Sick Time Laws

Trend #1: Sexual Harassment

- Inquiries into sexual harassment (i.e., what constitutes sexual harassment, how to press charges, etc.) has increased.
- Five-fold increase in the number of calls to the National Women's Law Center.
- EEOC has seen a sizeable influx in the number of site visits to its sexual harassment page.
- Although the number of filings were down slightly from 2016, the monetary benefits obtained through settlement were up \$46.3M, up from \$40.7M in 2016.
- Has not been a surge in sexual harassment complaints since the start of the #MeToo movement, but more workers have been threatening to sue – more pre-litigation demand letters.

Sexual Harassment

- **Retaliation** by the employer and by the alleged harasser is the most strongly associated claim with regards to sexual harassment or discrimination
- In 2017, the EEOC reported that retaliation allegations were the most common claims (48.8% of claims filed included retaliation – up from 45.9% in 2016)
- In 2017, the EEOC received 6,969 charges of sexual harassment. 16.5% of those charges filed by males.
- National Women’s Law Center reports that issues occur across male dominated industries with fewer women [like construction], services-based industries like restaurants where tips and customer approval are important, and low-wage industries like cleaning/janitorial services or agricultural jobs.

Confidentiality of Sexual Harassment

- Efforts in many states to pass legislation that would ban confidentiality provisions in settlements for sexual harassment.
- Example: In California, sexual harassment and sex discrimination settlements cannot include nondisclosure agreements.
- New Federal Tax Bill: “No deduction shall be allowed . . . for (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement”
- Preventive side: sexual harassment training is now required by law in California, Colorado, Kentucky, Oregon and Vermont.

Best Practices in the #MeToo era

- **BEFORE a Sexual Harassment Complaint:**
 - review and update your anti-harassment policy
 - consider eliminating “zero tolerance” language (otherwise victims may be reluctant to report)
 - engage in regular dissemination and small group live interactive training by a qualified trainers tailored to your workforce
 - EEOC suggests once per year may not be enough
 - Model and demand compliant behavior

Best Practices in the #MeToo era

AFTER a sexual harassment complaint:

- Investigate – fair, impartial, complete
- Take prompt and effective remedial action
- Ensure no retaliation

Rebooting the culture:

- Risk Assessment
- Create a sense of collective responsibility and sense of urgency
- Create expectations of civility
- The “tone from the top” is critical

Trend #2: Fair/Equal Pay Acts

Federal: Equal work, same location

- part of the Fair Labor Standards Act

- enforced by the EEOC prohibiting sex-based wage discrimination between men and women in the *same establishment* who perform jobs that require *substantially equal* skill, effort, and responsibility under similar working conditions.

State: varying efforts to increase wage transparency and battle the gender wage gap

- e.g., California' Fair Pay Act (SB 358) amended to strengthen the Equal Pay Act by replacing a comparison of "equal work" with a comparison of "substantially similar" work – eliminating the requirement that jobs that are compared must be located at the same establishment.

- as of January 1, 2018, California employers may no longer ask job applicants about their salary history.

Fair/Equal Pay (continued)

- Increasing trend towards wage transparency, which is likely leading to the increased litigation claiming violation of the Equal Pay Act, as well as cases claiming institutional discrimination affecting both wages and the quality of the workplace.
- Some believe that the gender wage gap is attributable to the secrecy about salaries, preventing female employees from discovering pay discrimination.
- Leading to more stringent laws regarding discrimination, retaliation and wage differentials.
- Examples: Dechert; Google Class Action; State Street Corporation.

Trend #3: Joint Employer/Independent Contractor Issues



Independent Contractors

- California now presumes that all workers are employees instead of contractors and places the burden on any entity classifying an individual as an independent contractor.
- Many gig economy businesses are premised on the use of independent contractors, and need to re-evaluate.

Joint Employer Test

Joint Employer:

- Return to the Browning Ferris standard that is easier to prove the existence of a joint employer relationship
- Under the FLSA, each of the joint employers must ensure that employee receives all employment-related rights under the FLSA
 - Payment of at least the minimum wage
 - Overtime pay
 - Adequately track hours worked
 - Main groups affected: (1) franchisors and (2) staffing agencies

Trend #4: Wage and Hour Litigation

- The Federal Labor Standards Act (FLSA) and similar state laws govern wage and hour issues, such as minimum wage, compensation and overtime pay as well as the classification of employees as exempt or non-exempt (entitled to overtime).
- The typical allegations involve claims that employees were forced to work off the clock or deprived of required overtime pay.

Trend #5: Prescription and Recreational Drugs in the Workplace

Opioid Crisis: prescription pain killers and overdoses are the leading cause of death for Americans under 50.

Prescription Drugs: ADA Laws

Drug Testing

- an employer may require a drug test as a condition of employment after a job offer is tendered but before the employee goes on payroll – must follow federal privacy laws
- random drug testing is prohibited in some states
- may drug test if “reasonable suspicion”

Trend #6: Leaves – Sick Time Laws

Paid Sick Leave: eight states and DC have paid sick time leave laws; state laws can differ from local ordinances.

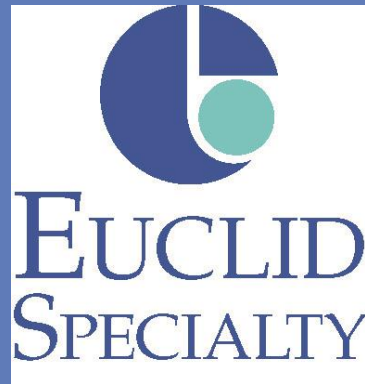
FMLA: a “covered” employer is any entity engaged in commerce that employs 50 or more employees within a 75 mile radius for each working day during each of 20 or more calendar workweeks in the current or proceeding calendar year.

FMLA leave can be taken for purposes of:

1. An employee’s serious health condition;
2. A serious health condition of the employee’s immediate family member
3. Baby bonding time;
4. An employee’s need to care for a covered military service member with a serious injury or illness;
5. Employee’s need to military qualifying exigency leave.

Conclusion

- Employers face increasing liability for employment practices in the current #MeToo high visibility era
- Employers must be proactive to mitigate their potential risks



**Fiduciary Liability Risks
For Governmental Plans**

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Introduction

Lessons from the San Diego Pension Fund Crisis:

- **First:** Volunteer trustees face serious personal liability when events beyond their control go badly.
- **Second:** Indemnification from governmental entities is not guaranteed.
- **Third:** You must protect yourself by following fiduciary best practices and purchasing fiduciary liability insurance.

Agenda

- The **first part** will outline fiduciary liability of governmental plan trustees.
- The **second part** will analyze the top fiduciary problem and claim areas for governmental plans.
- The **third part** will review how you can protect yourself, including purchasing fiduciary liability insurance.

Common Misconceptions

- Although this is changing, fiduciaries of governmental plans often believe that they are immune from personal fiduciary liability for several misplaced reasons:
 - (1) They believe they do not face liability since governmental plans are exempted from ERISA;
 - (2) They believe that sovereign immunity protects them; and
 - (3) They otherwise believe that they will be indemnified for their volunteer service.

Misconceptions (1) Liability for Governmental Plan Trustees

ERISA Title I does not apply, ***BUT***:

- **ERISA Title II tax provisions apply**, imposing the exclusive benefit rule;
- **State and local law applies**: Utah has adopted the “prudent investor” rule for their retirement system;
- **Common law rules apply** – such as the duty of loyalty and duty of prudent investment.
- These laws generally mirror the fiduciary standards contained in ERISA.

The Basics of Fiduciary Liability for Governmental Plans

- **Personal Liability** for any plan losses resulting from the breach and for any profits that were attained through the misuse of plan assets.
- **Penalties:** Fiduciaries may also be liable for statutorily imposed penalties and reasonable attorney fees and costs incurred by the plaintiff.
- **Parties with Standing:** A lawsuit to establish the liability of a fiduciary may be brought by (1) any plan participant or beneficiary, (2) **co-fiduciary liability** by another plan fiduciary, or (3) a governmental entity.

Four Basic Fiduciary Duties for Investing Plan Assets



- Duty of Loyalty (Exclusive Purpose Rule)
- Duty to Act with Prudence
- Duty to Diversity Plan Assets
- Duty to Follow Plan Documents

(2) Sovereign Immunity is Limited

- Utah adopts sovereign immunity under the Utah Governmental Immunity Act
 - Immunity for negligent acts committed with the scope of employment from the “exercise or performance, or the failure to exercise or perform, a **discretionary function**”
 - Waiver of immunity as to any **contractual obligation**
 - Four potential limitations to indemnification:
 - (1) scope of employment
 - (2) whether constitutes a discretionary function
 - (3) contractual obligation waiver could apply to plan documents
 - (4) limited to negligence

(2) Sovereign Immunity is Limited (continued)

- Purchase of insurance is expressly authorized by statute
 - if insurance purchased, then insurer has no right of subrogation against government employee
- Fiduciary Insurance is your protection under Utah law

Fiduciary Liability Problem Areas



- (1) Imprudent Investments
- (2) Benefit Claims [increase in denial of duty related disability benefit] and other participant complaints
- (3) Drop plans
- (4) Funding Claims/objections to contribution assessments
- (5) Service Provider Claims
- (6) Social Investing
- (7) Prohibited Transactions/Alleged Dishonesty/Conflicts of Interest
- (8) Cyber security

How to Protect Yourself

- Maximize Indemnification Protection from the Sponsoring Organization
- Delegate to Qualified Service Providers
- Require Indemnification from All Service Providers to the Plan
- Purchase Fiduciary Liability Insurance

What is Fiduciary Liability Insurance?

- Contract under which the insurance company agrees to reimburse a benefit fund or other claimant for losses caused by violations of:
 - Fiduciary responsibility law;
 - Administrative errors or omissions;
 - IRS and other regulatory penalties, monetary sanctions and costs of required corrections
- Protects individual trustees and fund employees from personal liability
- Expressly authorized by Utah law

Special Features of Governmental Liability Insurance



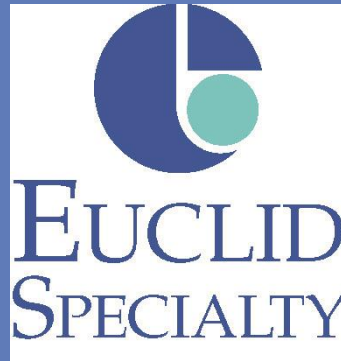
- Three different fiduciary insurance options:
 - (1) Non-indemnifiable-only coverage
 - (2) Full coverage for indemnifiable and non-indemnifiable claims
 - (3) Side A Coverage – coverage for individuals only (not the plan)
- **Reality Check**: Most fiduciary liability insurance policies for governmental plans provide coverage only for non-indemnifiable claims:
 - Limited coverage to “government-defended claims”
 - Risk if government indemnification is wrongfully withheld

About Euclid Specialty Managers, LLC



- Euclid Specialty is an insurance program administration company with the mission to protect America's employee benefit plans from complex liability. We are best known for the Euclid Vanguard fiduciary liability insurance policy, as well as our crime, cyber and management liability solutions for employee benefit plans.

- Request a copy of the Fiduciary Liability Insurance Handbook at www.euclidspecialty.com



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