Discrimination Principles for NY Employers

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DISCRIMINATION

New York has numerous employment-related anti-discrimination laws. The most significant are the New York State Human Rights Law, Article 23-A of the Correction Law, the New York Labor Law, and the New York City Human Rights Law.

The New York State Human Rights Law prohibits employers from discriminating against employees on the basis of age (18 and older), color, creed, disability, familial status, marital status, military status, national origin (including ancestry), predisposing genetic characteristic, race, sex, sexual orientation (including actual or perceived), heterosexuality, homosexuality, and gender identity or expression.

Effective February 8, 2020, the New York State Human Rights Law covers employers of all sizes. The Human Rights Law also covers employment agencies and labor organizations. (Before these changes took effect, the Human Rights Law applied to employers with 4 or more employees).

In addition to New York State Human Rights Law, the federal Title VII prohibits employment discrimination based on race, color, sex, religion and national origin. It covers public and private employers who have 15 or more employees (volunteers, independent contractors and directors in corporations are not counted as part of this total). To determine if an employer has 15 or more employees, employers should determine the number of both full- and part-time employees on the payroll. For employers hovering around the 15-employee threshold, coverage exists if the employer had 15 or more employees in 20 or more calendar weeks of the current or prior calendar year.

Companies holding contracts or subcontracts with the federal government are subject to additional non-discrimination and affirmative action obligations according to the federal Executive Order program. Executive Orders 11246 and 11375 mandate that covered contractors undertake affirmative action efforts to promote full employment opportunities for minorities and females. Federal contractors are also required to take affirmative action for disabled workers under the Rehabilitation Act and for certain veterans under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). Contractors doing business with the State of New York or units of local government are also generally required to undertake affirmative action efforts as part of their contract obligations.

Employers should become familiar with the following statutes in order to lessen their exposure to costly litigation and avoid liability for damages that can result from a determination that an employer has violated one of these statutes.

PROHIBITED CONDUCT

Covered employers cannot refuse to hire, terminate, or otherwise discriminate against any person in wages or other terms and conditions of employment because of membership in a protected class, including domestic violence victim status. Limited exceptions exist for consideration of age in certain limited circumstances, certain religious organizations, and some affirmative action plans.

Employers also cannot:

- Make statements in job advertisements, applications, and publications that suggest any limitation, specification, or discrimination against any protected class, except where there is a bona fide occupational qualification.
- Discriminate against individuals in connection with certain apprentice training programs based on a protected characteristic.
- Harass on the basis of a protected characteristic.
- Retaliate on the basis of the employee engaging in protected activity.
- Discriminate against individuals in connection with an internship based on a protected characteristic or retaliate against an intern for opposing discrimination.
- Compel a pregnant employee to take a leave of absence, unless the employee cannot perform her job functions because of the pregnancy.
- Except under limited circumstances, ask about or take adverse action based on an individual's arrest or criminal accusation that is no longer pending and was resolved favorably or adjourned in contemplation of dismissal.
- Deny employment to any individual in violation of Article 23-A.
- Actually or attempt to aid, abet, incite, compel, or coerce any violation of the New York Human Rights Law.
- Discriminate against a blind person, a person who is deaf or hard of hearing, or a person with a disability because that person uses a guide, hearing, or service dog, respectively.
- In certain circumstances, an employer must make reasonable accommodations to applicants or employees:

Under the New York Human Rights Law, individual supervisors may be personally liable for violations of the Law if the supervisor has an ownership interest in the employer or authority to do more than carry out personnel decisions made by others. This is often a question of fact that

is heavily litigated, with the individual supervisor denying that he/she was a supervisor or an employer for purposes of liability under the Human Rights Law.

In addition, an individual employee may be held liable is if the supervisor aides or abets an unlawful discriminatory practice or discriminates against an individual based on his/her arrest or criminal record, regardless of the individual's supervisor status.

DISPARATE TREATMENT

A disparate treatment claim is essentially comprised of two elements:

1. the employer treated the applicant or employee differently than other applicants or employees not within that individual's protected class, and
2. the employer's differential treatment was intentional.

An employee who brings a disparate treatment claim under Title VII is alleging that the employer treated him or her differently than others because of his or her race, color, religion, sex or national origin. While most disparate treatment claims allege that the employee was treated less favorably due to membership in one of the protected classes, employers need to be aware that courts have found discrimination where an employer's differential treatment resulted in the same treatment. For example, an employer's use of segregated facilities would constitute disparate treatment, even if the facilities are equal in all outward respects. Discrimination results from the badge of inferiority that attaches to being treated differently on account of membership in a protected category.

Employers are also subject to claims under Title VII for discrimination against a group of employees or job applicants because of some protected group characteristic. A group of employees may bring a Title VII claim alleging that the employer has a formal policy of discrimination or the employees may allege the employer followed an informal pattern of discrimination against individual members of a protected group.

An employee cannot succeed with a disparate treatment claim by simply showing that he or she suffered some adverse employment action. To the contrary, the central issue in a disparate treatment claim is whether the employer's actions were motivated by discrimination and so, an employee must be able to prove discriminatory intent brought about the adverse employment action.

AVOIDING DISCRIMINATION

Employers should consider implementing the following measures to reduce their exposure to a claim based on discrimination, harassment or retaliation:

- **Update policies and apply them uniformly.** One of the most important precautionary measures an employer can take to protect itself from a lawsuit is to ensure that all policies illustrate practices that are in compliance with federal and state laws. In addition, an employer should make certain that all supervisory personnel understand each policy and apply it uniformly to each employee.
- **Conduct honest employee evaluations.** Performance evaluations can serve as a powerful tool for employers in defending against discrimination claims. However, if supervisors do not utilize them effectively, evaluations can be equally helpful to litigious employees. For example, as an employer, you do not want to terminate an employee for poor performance and then discover that the employee has received nothing but stellar reviews from his or her supervisors. Even if the supervisors give everyone a glowing review, these kinds of performance evaluations can be used by the employee as evidence to prove that the "poor performance" explanation is simply pretext for the real (discriminatory) reason. Therefore, it is imperative that employers train all supervisory and management employees to conduct honest performance evaluations.
- **Document poor performance and bad conduct promptly.** Like performance evaluations, conduct reports help to demonstrate an employee's performance problems. Employees should be made aware of all discipline policies and employers are cautioned to document all disciplinary measures taken against an employee. The absence of write-ups of discipline or counseling may be evidence that the employee was performing the job adequately.
- **Provide employees with honest explanations for employment decisions.** Initiating an adverse employment action (e.g., discipline) is rarely a pleasant experience for either employers or employees. However, an employer should be candid with employees when discussing reasons for demotions, transfers, discipline or termination. Do not downplay the seriousness of conduct or policy violations in order to avoid an awkward confrontation. Such an attempt to avoid hurting the feelings of the employee can serve as the basis for a future lawsuit.

DISPARATE IMPACT

Unlike disparate treatment, which focuses on intentional discrimination towards an individual due to his or her membership in a protected group, the essence of a disparate impact claim is that an employer's seemingly neutral policy or practice is unlawful because it has a significant adverse impact upon a protected group. Common examples are minimum education requirements, height and weight standards, and pre-employment test scores. The fact that the employer had no discriminatory intent does not shield an employer from liability if the implementation of a policy or procedure results in a discriminatory impact, unless the policy is justified by business necessity. As is the case with disparate treatment claims, an employee bears the burden of proving that a particular policy has a disproportionately adverse impact on a protected class.

Plaintiffs often rely on statistical evidence to satisfy this burden. Examples of statistical evidence frequently relied upon include:

- selection rates
- pass/fail rates on qualifying exams
- population/workforce comparisons

Put simply, a plaintiff must show that a particular employment practice produced discriminatory results. An employer can defend a disparate impact claim by challenging the adequacy of the plaintiff's statistical information, such as by showing that a more refined analysis does not support a finding of disparate impact. Alternatively, an employer may demonstrate that the business practice or hiring device at issue is justified by business necessity and is related to the requirements of a job. Even if the employer is able to put forth such evidence, an employee can still prevail on a claim of disparate impact by showing that an equally effective hiring device or employment practice was available to the employer that had a less severe impact on members of the protected group.

ENFORCEMENT OF ANTI-DISCRIMINATION LAWS

Title VII is enforced by both the US Equal Employment Opportunity Commission (EEOC) and through private lawsuits filed in federal or state courts. Before bringing a suit in court, a plaintiff must file a charge of discrimination (a charge) with the EEOC. Because New York has a state and several local agencies that also seek to prevent discrimination in the workplace, the basic time frame for filing a charge with the EEOC is 300 days after the employee had notice of the alleged discriminatory event. If the employee's claim is based on allegations that the employer maintained a continuous discriminatory practice, the employee must file the charge within 300 days of the last occurrence of the alleged discriminatory practice. In the case of alleged salary discrimination, under the Lilly Ledbetter Act, each paycheck that contains discriminatory compensation is a separate violation regardless of when the discrimination began.

After a charge is filed, the EEOC either investigates the claim or defers the investigation to the state or local agency which has jurisdiction. In most cases the EEOC will give the parties the opportunity to resolve the matter through participation in its voluntary mediation program. Besides avoiding the cost of responding to an investigation, the mediation program offers a way to resolve the charge much more quickly for the parties since EEOC investigations typically take ten months to resolve. The administrative agency uses a "reasonable cause" standard to determine whether it is more likely than not that discrimination took place. The focus is on whether the employee has established some evidence of discrimination as well as whether there is any evidence that the employer's stated reasons for the employment decision are not credible. If the EEOC determines there is "reasonable cause" to believe the employee's charges are true, it then attempts to eliminate the unlawful discrimination by persuading the employer to eliminate the discriminatory practice and provide relief to the employee. If the EEOC determines that there is no "reasonable cause" to believe the employee's charges are true, it will issue notice to the employee of his or her right to bring a private lawsuit (often referred to as a right-to-sue letter). Lawsuits must be brought within 90 days of receipt of this notice or they will be untimely.

The New York State Division of Human Rights administers and enforces the New York Human Rights Law. An individual has the option of filing a complaint with one of the following entities:

- With the Division of Human Rights, within three years after the alleged unlawful discriminatory practice for sexual harassment complaints.

- With the New York City Commission on Human Rights within 1 year after the alleged unlawful discriminatory conduct occurred.
- In a New York State court under the New York City or New York State Human Rights Law, within 3 years after the alleged unlawful discriminatory practice.

REMEDIES

Title VII remedies aim to eradicate discrimination and to "make whole" individual victims of discrimination by restoring them to the position they would have been in had the discrimination never occurred. Title VII also provides for monetary damages. They may be awarded only against employers and not against the individual managers or supervisors who are found to have acted with a discriminatory intent or impact. Examples of available remedies include:

- **Injunctive Relief.** Courts may enjoin unlawful employment practices such as job requirements, educational requirements, scored tests and age limits.
- **Back Pay.** Back pay awards typically reflect lost wages and benefits up until the end of the trial/hearing.
- **Retroactive Seniority.** Retroactive seniority awards an aggrieved plaintiff the amount of seniority he or she would have had if the discriminatory employment action had not been taken.
- **Front Pay.** Front pay is usually allowed where reinstatement is not possible or where the plaintiff has been the victim of a discriminatory failure to hire. Front pay is based upon the time it will take for the employee to reach his or her rightful place in the company's workforce.
- **Promotion.** Similar to reinstatement, a court may require an employer to promote a successful Title VII plaintiff but is more likely to award front pay if the promotion would result in another employee's displacement.
- **Compensatory Damages.** Compensatory damages are available only as a remedy for intentional discrimination. Compensatory damages compensate an employee for noneconomic injuries such as pain and suffering, humiliation and harm to reputation.
- **Punitive Damages.** Punitive damages also are available, but only as a remedy for intentional discrimination. Punitive damages are not available against governmental employers. In determining the appropriateness of a punitive damages award, courts will consider:

    1. the degree of reprehensibility of the employer's conduct,

2. the disparity between the harm or potential harm suffered by the plaintiff and his or her punitive damages award, and
3. the difference between this particular remedy and the remedies authorized in comparable cases.

Combined compensatory and punitive damage awards will be capped at:

1. $50,000 for employers who have 15 to 100 employees
2. $100,000 for employers with 101 to 200 employees
3. $200,000 for employers with 201 to 500 employees
4. $300,000 for employers with more than 500 employees.

- Attorneys' Fees and Costs. A successful claimant can recover reasonable attorney's fees, expert witness fees and litigation costs.
- Reinstatement. Reinstatement is a preferred remedy in cases of discriminatory termination but will not be ordered if the result would be to return the employee to an excessively hostile or antagonistic work environment. In addition, courts generally will not order reinstatement if it would result in another employee's displacement.

Remedies for violations of the New York Human Rights Law include:

- Cease and desist and other forms of injunctive relief
- Back pay
- Front pay
- Uncapped compensatory damages
- Hiring, reinstatement, or upgrading, with or without back pay
- Mandatory compliance reporting
- Civil penalties of up to $50,000, or up to $100,000 if the violation is "willful, wanton, or malicious"
- Punitive damages

- Attorneys' fees to the prevailing party. Attorneys' fees will only be awarded to a defendant as a prevailing party if the action is determined to have been frivolous.

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