

navigating a dynamic  
risk landscape

NAVIGATING A DYNAMIC  
RISK LANDSCAPE:  
EMPLOYMENT-RELATED EXPOSURES  
OF PRIVATE COMPANIES

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# NAVIGATING A DYNAMIC RISK LANDSCAPE: EMPLOYMENT-RELATED EXPOSURES OF PRIVATE COMPANIES



## Introduction

Have employers ever been more exposed to allegations of harassment, discrimination, retaliation and failure to adhere to minimum wage and overtime rules? The number of charges filed by employees with the Equal Employment Opportunity Commission (EEOC) is near an all-time high, and lawsuits brought by employees represent one of the most common types of litigation faced by employers of all sizes.

Two recent decisions by the US Supreme Court narrow the scope of Title VII of the Civil Rights Act of 1964. These decisions, touted as a “big win” for employers, limit the circumstances under which employees can

pursue allegations of discrimination against their employers. It remains to be seen, however, if these decisions in fact reduce the number of employment-related claims, especially since employers are subject to numerous other federal and state laws that can ensnare them in regulatory enforcement actions and litigation. The situation becomes yet more challenging as regulatory enforcement is ramped up, new classes are proposed for protected status, and the lines between work and leisure are blurred by technology.

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More than ever it is imperative that owners and managers of private companies of all sizes be vigilant about maintaining a workplace free of harassment and discrimination and in compliance with both federal and state employment laws. How they achieve those objectives however, becomes increasingly difficult in a dynamic environment where the risk landscape is constantly reshaped by social, economic and political forces. Employers of all sizes can implement policies and procedures to help mitigate the risk of a lawsuit, and insurance can offset the financial consequences if, despite their best efforts, the employer is nonetheless sued.

*The U.S. Equal Employment Opportunity Commission (EEOC) is the government agency responsible for enforcing federal laws concerning discrimination against a job applicant or an employee.*

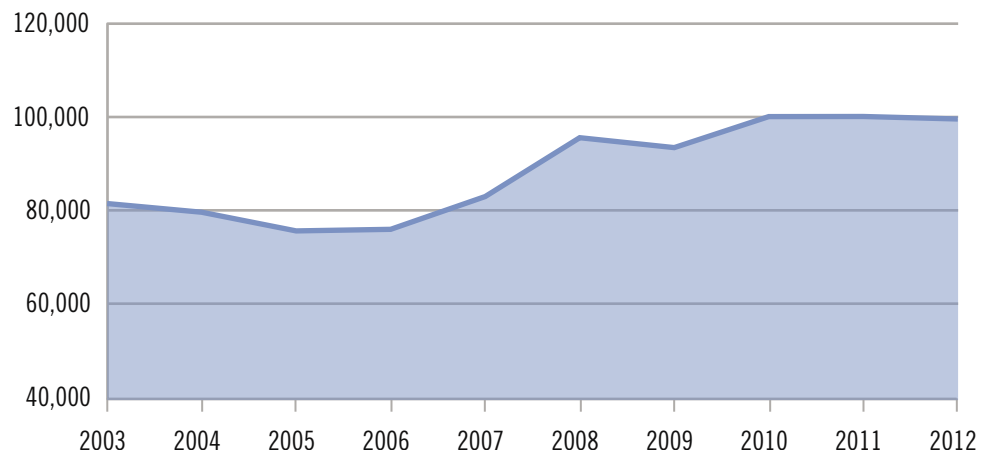
## Employment laws: A liability minefield for employers

Every employer is subject to the common law rulings, statutes, administrative rules and legislation that comprise employment law. Title VII of the Civil Rights Act of 1964 is the principal federal law addressing discrimination in workplace, but almost all states also have employment-related discrimination laws. These laws offer protection against discrimination based on various factors including race, gender, age, marital status, national origin, religion and disability. A growing number of state laws also include protections based on sexual orientation. Additionally, federal and state laws address other workplace issues such as leaves for family and medical reasons, and minimum wage and overtime pay.

The U.S. Equal Employment Opportunity Commission (EEOC) is the government agency responsible for enforcing federal laws concerning discrimination against a job applicant or an employee. Most employers with at least 15 employees are covered by EEOC laws. In addition to Title VII, the EEOC enforces other federal laws dealing with issues such as age discrimination, gender pay gap, disabled employees, and the use of genetic information in employment decisions.

The number of charges filed with EEOC grew sharply from about 75,000 in FY 2005 to nearly 100,000 in FY 2010. New charges have since held steady at the nearly 100,000 level. (Exhibit 1) The uptick is likely attributable to the surge in unemployment during the economic downturn. Even if it lacks merit, an EEOC complaint can lead to time and money spent responding to requests for information, disruptive investigations, legal bills, negative publicity and, if the complaint is upheld, expensive damages.

**EEOC Total Charges**



*Employment-related issues, and consequently the types of charges filed with the EEOC and lawsuits filed in the courts, change over time in response to changing social, economic and political conditions.*

EEOC enforcement suits filed show a very different trend. After averaging about 400 for a number of years, the trend has been generally downward since 2005, with a sharp drop-off in 2012. Employment law firm Seyfarth Shaw notes however, that the EEOC traded a “shotgun for sniper fire in FY 2012.” Despite a lower number of suits filed, recoveries reached a record \$365.4 million.<sup>1</sup>

The drop off in suits filed by the EEOC has had little impact on the overall level of employment-related litigation experienced by U.S. companies. If the EEOC does not sue after investigating a complaint, the employer is not necessarily off the hook. The statutes enforced by the EEOC give a charging party the right to file a lawsuit in federal court within 90 days of receiving a dismissal notice from the EEOC. Disgruntled employees and job applicants may also be able to pursue actions under state labor and employment laws.

It remains to be seen how the recent Supreme Court decisions concerning discrimination suits will impact EEOC charge filings and litigation trends. The decision specifically concerned Title VII, and the impact on the number of charges and lawsuits filed relative to other state and federal laws is unclear.

Another federal law employers increasingly are concerned about is the Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards. Violations of the minimum wage and overtime provisions of the FLSA can be enforced by the United States Secretary of Labor through civil actions, while the Department of Justice (“DOJ”) can bring criminal actions for “willful” violations of the Act.

FLSA enforcement actions have increased sharply over the past several years, and the Department of Labor’s 2014 budget calls for further increases in enforcement of the FLSA. This includes nearly \$14 million to combat the misclassification of workers as independent contractors, and an additional \$3.4 million for the Wage and Hour Division for greater enforcement of the FLSA and the Family and Medical Leave Act.

## Recent trends and developments

It is thought that the recession was likely responsible for the significant uptick in charges filed with the EEOC. A logical assumption is that an improving economy will result in a sharp decline in the number of filings. This, however, has not yet proved to be the case. New EEOC filings remain at a near-record level despite improving economic conditions, and employment-related suits remain one of the most common types of litigation faced by businesses.

*Smartphones and tablets blur the line between work and non-work as people essentially carry the workplace with them at all times.*

Employment-related issues, and consequently the types of charges filed with the EEOC and lawsuits filed in the courts, change over time in response to changing social, economic and political conditions. Age-related charges filed with the EEOC, for example, have steadily trended upward as the workforce grows older. With an increasingly diverse workforce, allegations of religious discrimination have been on the rise: charges filed with EEOC alleging religious discrimination, as a percentage of all charge filings, grew 77 percent between 2001 and 2011.<sup>2</sup>

Technology and changing patterns of interactions among people also pose new challenges for businesses. Many companies research job applicants on Facebook and elsewhere on the Internet. Some companies ask applicants to provide their Facebook usernames and passwords to login to Facebook during job interviews, or to “friend” their interviewers to allow access to private posts. This can raise privacy issues and may open companies to potential charges of discrimination if, for example, a Facebook profile reveals a job applicant belongs to a protected class. Several states now make it illegal for employers to request social networking passwords or non-public online account information from employees or job applicants.

Smartphones and tablets blur the line between work and non-work as people essentially carry the workplace with them at all times. Should an employee who answers an evening email be compensated for his or her time? Can an employee who criticizes his or her employer during non-work hours on a social networking site be terminated? Do abusive Facebook posts by a supervisor during off hours constitute harassment under federal and state employment laws? A growing body of case law is answering these questions – typically not in favor of employers.

American society is undergoing rapid change and, as it does, new types of discrimination move to the forefront. In some cases, employees look to existing laws for protection, but often laws are amended or new laws are passed to address the concerns of specific groups. Emerging trends that employers should be aware of include benefits for same sex couples, medical marijuana in the workplace, discrimination against obese workers and discrimination related to healthcare incentive plans. Regulators also are increasingly concerned about pre-employment screens, such as criminal background checks, that may disproportionately impact minorities and other protected groups.

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## Pre-employment screens

“The hiring process is the number one enforcement initiative of the EEOC,” according to Jerry Maatman, a partner of employment law specialist Seyfarth Shaw LLP. “Regulators want to know ‘How do you hire? Do you use tests? Do you use screens? Are they aligned with labor needs?’ They want employers to justify why they are legitimate.”

Of particular concern to regulators is reliance on background checks, especially criminal records, to screen job applicants. While employers may find these types of pre-employment screens helpful in weeding out less desirable candidates, they also may be illegal if used incorrectly. In April 2012, the EEOC signaled that it would begin to crack down on employers who use the criminal histories of job applicants to discriminate against them illegally. True to its word, the EEOC has begun filing suits against companies that, in its assessment, violate Title VII of the Civil Rights Act “by implementing and utilizing a criminal background policy that [results] in employees ... being screened out for employment.”<sup>3</sup>

In June of this year one of the largest transportation companies in North America agreed to settle a race discrimination charge filed by the EEOC over claims that an African-American job candidate was denied a truck driver position based on a criminal conviction record. The EEOC contended that the conviction was unrelated to the duties of the job. Also in June, the EEOC filed suit against an auto manufacturing facility in South Carolina and a large discount retailer in the United States over what the agency contends are illegal use of criminal background checks for employment purposes.

The EEOC issued updated enforcement guidance on employer use of arrest and conviction records on April 25, 2012. According to the agency, a criminal record “should prevent him or her from employment only to the extent that it is evident that the applicant cannot be trusted to perform the duties of the position.”<sup>4</sup> Several state laws also limit the use of arrest and conviction records by prospective employers.

In a recent setback to the EEOC, the U.S. District Court for the Northern District of Maryland dismissed a race discrimination lawsuit alleging that a company’s criminal background checks on all job applicants violated Title VII by disparately impacting African-American job seekers. The judge ruled that the EEOC failed to supply reliable expert testimony and statistical analysis demonstrating disparate impact stemming from the use of criminal records as an employment screen.<sup>5</sup>

*Medical marijuana is legal in about a third of the United States, leaving lawyers struggling to figure out what to advise their clients about medical marijuana use in the workplace.*

## Sexual orientation/benefits for same sex couples

In recent years, lesbian, gay, bisexual and transgender workers have sought protection against workplace discrimination. Many states and municipalities also have enacted protections against discrimination and harassment based on sexual orientation <sup>6</sup>

Although there is still no federal law that prohibits discrimination based on sexual orientation in employment, Congress has enacted protections against hate crimes based on gender identity, and the EEOC has held that discrimination against a transgender is discrimination because of sex and therefore is covered under Title VII of the Civil Rights Act of 1964.<sup>7</sup>

The Supreme Court's recent ruling striking down key sections of the federal Defense of Marriage Act has employers scrambling to ensure that their employee benefit plans are compliant with the law. The impact of the decision is reasonably clear in the 13 states and the District of Columbia where same sex marriage is legal. The effect of the ruling is less certain in the other 37 states. Particularly problematic is the situation where a couple married in a state permitting same sex marriage moves to a state where such marriages are not recognized. This and related situations undoubtedly will generate litigation in the coming years, and almost certainly will result in new laws addressing the rights of same sex couples.

## Medical marijuana

Medical marijuana is legal in about a third of the United States, leaving lawyers struggling to figure out what to advise their clients about medical marijuana use in the workplace. The situation is complicated by the fact that the federal government still views marijuana as illegal.

The Supreme Court has ruled that employers have the right to fire workers for using marijuana. Employment lawyers, however, recommend that employers clarify their policies against marijuana use in the workplace while at the same time making sure they offer accommodations to workers who have medical conditions that require marijuana treatment. An underlying medical condition for which marijuana is prescribed may require accommodation under the Americans with Disabilities Act.



*Although overweight employees may not be a protected class under most circumstances, employers should be aware that weight discrimination may be linked to other types of illegal discrimination.*

## Obesity

Obesity is estimated to cost U.S. companies \$13 billion per year.<sup>8</sup> According to the Center for Disease Control, obesity-related conditions include heart disease, stroke, type 2 diabetes and certain types of cancer. Employers also may be concerned about obese employees who may not be physically able to do the job for which they were hired, or who may not project the type of image employers desire. Many companies are taking the attitude that if there is a way to fire or not to hire obese people, they will do so. While this approach may make sense for managing healthcare and lost time costs, it may result in other headaches, including the risk of lawsuits alleging discrimination.

In 2011, Congress amended the Americans with Disabilities Act to extend workplace disability protections to morbidly obese people, defined as those 100 percent or more above the healthy weight range for their height. In April of 2012, the EEOC settled its first case on weight-related workplace discrimination. The EEOC reached a \$125,000 settlement with a Louisiana treatment facility for chemically dependent woman which, according to the agency, fired an employee because of her severe obesity even though she was able to perform the essential functions of her job.<sup>9</sup>

Michigan is the only state to specifically ban discrimination in employment based on height or weight. Outside that one state, however, people who are overweight but not so heavy as to meet the definition of morbid obesity may not be directly covered by either federal or state protections... at least for now.

Some employment lawyers view weight discrimination as the next major workplace discrimination issue. The EEOC has sent strong signals that it plans to interpret obesity protections broadly and that employers who want to avoid lawsuits should do the same. The National Association to Advance Fat Acceptance is seeking legislation that expands current laws banning gender and race discrimination to cover physical characteristics like height and weight.

Although overweight employees may not be a protected class under most circumstances, employers should be aware that weight discrimination may be linked to other types of illegal discrimination. Conditions resulting from obesity, such as diabetes, may qualify an employee for protection under the ADA, for example. Employers may also be vulnerable to charges of gender discrimination if they enforce different weight standards for women than for men.



*Many wellness programs offer some sort of financial incentive for participation, ranging from gift cards to higher employer contributions for insurance premiums, as well as penalties like additional surcharges to employees for health insurance.*

Employers should consult an employment law attorney to determine whether their current policies and practices raise any red flags, and they should prepare for a future where discrimination based on weight will be explicitly forbidden by law.

## Employer wellness programs

Wellness programs increasingly are a common feature of employee benefits programs. In fact, 86 percent of employers responding to a survey by Fidelity Investments and the National Business Group on Health indicated that they currently offer wellness-based incentives.<sup>10</sup> The goal is to produce a healthier and more productive workforce and to reduce health insurance and healthcare costs. Employers, however, need to ensure that those programs are designed and implemented in a manner that is consistent with federal and state employment laws.

These programs potentially can cause trouble for employers if they require medical exams or ask disability-related questions, both of which could give rise to a violation of the ADA. Some experts also argue that collecting health information as part of a wellness program may violate the EEOC's regulations under the Genetic Information Nondiscrimination Act (GINA), which prohibits acquiring genetic information, including family medical history.<sup>11</sup>

Many wellness programs offer some sort of financial incentive for participation, ranging from gift cards to higher employer contributions for insurance premiums, as well as penalties like additional surcharges to employees for health insurance. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) permits employers to provide financial incentives for employees who achieve certain health goals or participate in certain health promotion programs. Employment law experts warn, however, that these penalties must be administered so as to not be in violation of state and federal laws prohibiting discrimination based on age, race, sex, and national origin.

These concerns arise because women tend to have more health problems than men and older employees tend to have more health issues than younger ones. Additionally, certain health conditions, such as obesity, diabetes and hypertension disproportionately affect members of racial minorities. Programs that penalize employees based on health criteria such as blood pressure, glucose, cholesterol and waist size run the risk of being seen as discriminatory.<sup>12</sup>

Employers with healthcare incentive programs should have an employment law attorney review their program to help ensure it meets HIPAA criteria and does not violate either state or federal employment laws.

*Regardless of size, however, most company owners and managers are well aware at least of their exposure to harassment and discrimination claims.*

## Private versus public companies: does it make a difference?

Employment laws apply to both public and private companies. Private companies, in fact, account for the vast majority of federal discrimination claims. More than 40 percent are against private companies with less than 100 employees.<sup>13</sup>

Smaller companies are targeted for all types of employment-related suits, but they have proven especially vulnerable to wage and hour suits. “Lawn care companies, restaurants, dry cleaners, ‘ma and pa’ businesses – they’re getting pelted,” according to Seyfarth Shaw’s Maatman. “The smaller the employer, the more suspect is their compliance, especially with minimum wage employees.” Maatman notes that the most active states for wage and hour claims are California, Illinois, Pennsylvania, New Jersey, New York and Massachusetts.

Small and mid-size private companies often do not have in-house legal counsel or a full human resources department to help manage their employment-related exposures. Many do not have the knowledge or resources for keeping thorough and up-to date records of employee performance. This can especially be a problem for allegations of retaliation. “Employers are vulnerable if they are missing documentation as to what motivated a job action,” according to Maatmann. “Investing in better human resource procedures can make a big difference in the outcome of these claims.”

Regardless of size, however, most company owners and managers are well aware at least of their exposure to harassment and discrimination claims. “Most employers now have some experience with employee allegations,” according to Richard Clarke, Senior Vice President of insurance brokerage firm J. Smith Lanier & Co. Clarke also confirms that there is growing awareness of wage and hour claims. But he notes that many private company owners and managers, especially those with smaller companies, are far less aware of other employee-related exposures. They also lack the resources to stay abreast of changes in exposures and in the laws.

## Risk management and insurance

Whether companies have a structured approach to managing their employment-related exposures often is a function of the size of the company. For example, an employee manual is a basic first step, but Clarke notes that it isn’t until companies have more than 100 employees that employee manuals start to become common. Maatmann observes that for smaller companies, an employee manual is often a collection of memos issued over time rather than a single organized document.

*Employment practices liability protection for smaller companies is available through a stand-alone policy, or it is often packaged with directors & officers' liability (D&O) coverage and other management liability coverages*

Regardless of size, however, companies can take steps to help reduce their exposure to lawsuits. Maatman emphasizes the importance of workplace due process in reducing claims. "If employees have the opportunity to blow off steam and to register complaints, and if they know that their employer listens and will do something about legitimate complaints, they are far less likely to go outside the company" with their grievances, according to the lawyer. He further notes that "a high ratio of internal complaints compared to external complaints tells me that workplace due process is alive and well."

Minimizing the risk of an employment-related claim is enhanced by proper management education and training. Common elements of a formalized risk management program can include:

- Creation of an employee manual with the assistance of a lawyer experienced in employment law. Employee manuals should be available in multiple languages, if necessary.
- Education of supervisors on company policies regarding permissible behaviors and employment laws. Everyone with authority to hire, fire, promote or demote employees should read and understand the employee manual.
- Corporate policies posted in the workplace and included in employee manuals.
- Standardized hiring and screening programs to avoid discrimination in hiring.
- Established procedures for addressing employee complaints about the work environment.
- Regular performance reviews. Everything that occurs and the steps taken to prevent and solve employee issues should be documented.

Even the most diligent company may be sued. Every company, regardless of size should consider purchasing insurance protection for employment-related exposures.

Employment practices liability protection for smaller companies is available through a stand-alone policy, or it is often packaged with directors & officers' liability (D&O) coverage and other management liability coverages. These policies typically help to defend businesses against claims made by employees, former employees, or potential employees for:

- Race, gender, age and other types of discrimination.
- Sexual harassment.
- Wrongful termination.
- Negligent compensation, promotion or hiring decisions.
- Breach of contract for employment.
- Employee benefits mismanagement.
- Retaliation.

Companies should work with their insurance broker or agent to assure the coverage they purchase is appropriate to their needs.

## Conclusion

For private companies – especially small and mid-size companies – day-to-day demands make it difficult to keep up with complex laws and regulations. This is especially the case as the shifting social, economic and political forces reshape the risk landscape. Recent Supreme Court decisions make it more difficult for employees to pursue certain types of discrimination claims, but the broader trend still is towards more protections afforded to more classes of employees.

Private companies of all sizes are well advised to invest in creating a workplace free of harassment and discrimination and compliant with applicable employment laws. This is no simple task, but the consequences of not doing so can be severe.

Workplace due process procedures, written policies, effective communication with employees, and supervisor training can go a long way towards avoiding problems, but even the most conscientious company can run into trouble. Employment practices liability insurance, whether in a stand-alone policy or packaged with other coverages, can provide a solid backstop to a risk management program and can protect a company from potentially ruinous settlements and legal defense costs. ■

NOTES:

1 "Budget woes may significantly impact EEOC - but should employers worry too?" Seyfarth Shaw  
<http://www.lexology.com/library/detail.aspx?g=653ce773-c51b-4865-bf6c-c18b3f0eafe5>

2 "Charge Statistics: FY 1997 Through FY 2012," EEOC  
<http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>

3 "EEOC Files Suit Against Two Employers for Use of Criminal Background Checks," EEOC  
<http://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm>

4 "Pre-Employment Inquiries and Arrest & Conviction," EEOC  
[http://www.eeoc.gov/laws/practices/inquiries\\_arrest\\_conviction.cfm](http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm)

5 *Equal Employment Opportunity Commission v. Freeman (D. Md. 8/9/13)*  
[http://www.mdd.uscourts.gov/Opinions/Opinions/EEEEOC%20v.%20Freeman%20%5B09cv2573%5D%20\\_Memo%20p.%20and%20Order%20Granting%20MTD\\_%20\\_04.26.10.pdf](http://www.mdd.uscourts.gov/Opinions/Opinions/EEEEOC%20v.%20Freeman%20%5B09cv2573%5D%20_Memo%20p.%20and%20Order%20Granting%20MTD_%20_04.26.10.pdf)

6 "Federal Laws Prohibiting Job Discrimination Questions And Answers," EEOC <http://www.eeoc.gov/facts/qanda.html>

7 "Facts about Discrimination in Federal Government Employment Based on Marital Status," Political Affiliation, Status as a Parent, Sexual Orientation, or Transgender (Gender Identity) Status, EEOC <http://www.eeoc.gov/federal/otherprotections.cfm>

8 "Obesity (Screening and Counseling)," National Business Group on Health,  
<http://www.businessgrouphealth.org/pub/t2f5db16-2354-d714-512f-893cb273e701>

9 "Resources for Human Development Settles EEOC Disability Suit for \$125,000," EEOC  
<http://www.eeoc.gov/eeoc/newsroom/release/4-10-12a.cfm>

10 "Workplace health incentives: Legal discrimination?" abc15.com  
[http://www.abc15.com/dpp/marketplace/law\\_tv/workplace-health-incentives-legal-discrimination#ixzz2YGvzTqu4](http://www.abc15.com/dpp/marketplace/law_tv/workplace-health-incentives-legal-discrimination#ixzz2YGvzTqu4)

11 "Employer Wellness Programs Need Guidance to Avoid Discrimination," EEOC  
<http://www.eeoc.gov/eeoc/newsroom/release/5-8-13.cfm>

12 "Employer Wellness Programs Need Guidance to Avoid Discrimination," EEOC  
<http://www.eeoc.gov/eeoc/newsroom/release/5-8-13.cfm>

13 Jury Verdict Research, cited in "Legal Landmines - 2009 Law Changes Could Impact Your Business," EzineArticles  
<http://ezinearticles.com/?Legal-Landmines---2009-Law-Changes-Could-Impact-Your-Business&id=2270688>