EMPLOYEE RETALIATION ON THE RISE: EMPLOYERS BEWARE, BE EDUCATED

Retaliation in the workplace is illegal, yet the statistics show that these incidents continue to occur at an increasing rate. There has been a marked increase in the number of retaliation charges and lawsuits over the last 10 years. The number of retaliation-related charges made to the Equal Employment Opportunity Commission (EEOC) alone has increased almost 70%, from 21,613 in 2000 to 36,258 in 2010.

Incidents of retaliation in the workplace should be a major concern for employers. The potential cost to employers includes not only legal fees, potential damages and time expended to defend your organization, but could also include damage to your reputation as an employer and to employee morale.

Even though you can largely insure this risk, the best recommendation would be to avoid incidents of retaliation in the first place. In order to avoid the risk, you must first have an understanding of what retaliation means.

What is Retaliation?

Employees are protected from certain types of discrimination in the workplace through various Federal and State laws. The main Federal laws that employees look to for this protection are Title VII of the Civil Rights Act of 1964 (as amended), the Equal Pay Act of 1963, the Age Discrimination Act of 1967 (ADEA), Title I of the Americans with Disabilities Act of 1990 (ADA) and the Genetic Information Nondiscrimination Act of 2008 (GINA). Not only do these laws protect employees from acts of discrimination due to race, gender, religion, disabilities, age and so on – these laws make it illegal to fire, demote, harass or otherwise “retaliate” against an
employee or applicant because they filed a charge of discrimination or participated in a discrimination investigation or lawsuit – whether it was against you or a former employer. (Source: Equal Employment Opportunity Commission Website www.eeoc.gov). For instance, you cannot demote an employee solely because that employee filed a complaint with the EEOC alleging racial discrimination.

Now take it one step further. The U.S. Supreme Court recently ruled that this protection extended to a man who was fired from his job just three weeks after his fiancée filed an EEOC complaint against their mutual employer alleging sexual discrimination. Allegedly, the employee was fired to dissuade his fiancée from continuing with her complaint. The U.S. Supreme Court ruled that the employee has standing to sue the employer as an “aggrieved” individual under Title VII of the Civil Rights Act (Thompson vs. North American Stainless, 09-291, decided January 24, 2011).

Retaliation claims could also stem from alleged adverse actions against an employee resulting from other types of activities like “whistle-blowing” or filing a workers’ compensation claim. For example, suppose an employee submits a complaint to the Occupational Safety and Health Administration (OSHA) with regard to safety hazards in their workplace. If that employee is subsequently harassed by their supervisor as a result of that complaint, the employee may have a legitimate retaliation claim.

A successful retaliation claim generally includes an “adverse action” against a “covered individual” engaged in a “protected activity” as well as a causal connection between the adverse action and the protected activity. Adverse actions include, but are not limited to, refusal to hire, demotion, refusal to promote, harassment, negative performance evaluations, reprimands, termination or a change in hours. Protected activities include opposing unlawful practices, requesting accommodations as permitted under the law or participating in proceedings related to these unlawful practices. Covered individuals would include employees that engage in “protected activities” and, as we saw in Thompson vs. North American Stainless, may also include individuals who are closely related to these employees.
EEOC Procedures

If a retaliation claim involves adverse actions related to a protected activity that falls under a law enforced by the EEOC (such as sexual harassment under Title VII), an individual typically has 180 days to file a charge. From there, a set procedure for resolving the issue will commence. If, upon investigation, the EEOC does not reasonably believe that discrimination has occurred, the employee will be given the right to sue in Federal court within 90 days of receipt of that notice. If, upon investigation, the EEOC does believe there was discrimination, the parties will commence an informal conciliation. If that is not successful, the EEOC has the right to sue the employer. If they do not choose to sue, the EEOC will transfer that right to sue to the employee. Again, the employee has 90 days to sue the employer in Federal court. States generally offer similar protections to employees with similar procedures for enforcement.

Am I Covered?

Most well-written Employment Practices Liability policies will cover damages and defense costs incurred by an insured person (including directors, officers, leased, temporary or permanent employees, and some volunteers or independent contractors) or an insured entity for most types of retaliation claims. However, you and your insurance broker must review the definitions of “Employment Practices Wrongful Act” and “Retaliation” as well as any applicable exclusion to be sure – the devil is in the details. For instance, the claim submitted by the employee described above in Thompson v. North American Stainless would not be covered under the typical Employment Practices Liability policy because “retaliation” is usually defined in the policy to mean adverse treatment of an employee based on such person’s protected activity – not the protected activity of a related party.

Conclusion

Retaliation in the workplace is illegal, yet the statistics show that these incidents continue to occur at an increasing rate. Identifying and preventing retaliation can be
complicated. So if you find yourself faced with a retaliation claim, you should be able to rely on your Employment Practices Liability policy to provide some financial protection – but again, the devil is in the details. It is important to work with your insurance broker before a claim to ensure your Employment Practices Liability policy is properly written to cover this exposure. The best recommendation, however, is to avoid the risk whenever possible.

(Since I am an insurance broker and not an attorney, the legal information above has been provided as a summary only. You should consult an employment attorney for any specific advice regarding employment activities and potential legal violations.)

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