

10 Practical Steps to Avoid Employment Liability in 2010

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In January the U.S. Equal Employment Opportunity Commission (EEOC) issued a press release announcing that 93,277 workplace discrimination charges were filed with the federal agency nationwide during Fiscal Year 2009, the second highest level ever. Additionally, private sector job bias charges alleging discrimination based on disability, religion and/or national origin hit record highs. The number of charges alleging age-based discrimination reached the second-highest level ever. Continuing a decade-long trend, the most frequently filed charges with the EEOC in FY 2009 were charges alleging discrimination based on race (36%), retaliation (36%), and sex-based discrimination (30%). Monetary relief obtained by the EEOC for victims in FY 2009 totaled over \$376 million.

In releasing the statistics, EEOC Acting Chairman Stuart J. Ishimaru stated "The latest data tell us that, as the first decade of the 21st century comes to a close, the Commission's work is far from finished." The EEOC opined that the near-historic level of total discrimination charge filings may be due to multiple factors, including greater accessibility of the EEOC to the public, economic conditions, increased diversity and demographic shifts in the labor force, employees' greater awareness of their rights under the law, and changes to the agency's intake practices that cut down on the steps needed for an individual to file a charge.

Undoubtedly, from the ADA Amendments Act to new FMLA regulations to the stimulus package, 2009 was a year of change in the employment law arena. With such sweeping changes and in light of the EEOC's reported statistics for FY 2009, this is a good time to internally audit, update and review handbooks and policies. Here are some recommendations for avoiding liability in the New Year.

1. **Review and update job descriptions.** Accurate job descriptions can be an employer's best tool in ADA matters, interviewing, evaluations and workers' compensation claims. However in order for job descriptions to be a useful tool, they must be current and accurate. The New Year is a great time to review these job descriptions to ensure they are complete, accurate, and correspond to the actual duties performed.
2. **Check your postings.** The new FMLA/DOL poster has been published including the new military leave. Ensure that your DOL, state and federal and workers' compensation notifications are all current and up to date. Don't wait for the surprise audit or investigation to alert you to deficiencies.
3. **Provide harassment training.** Harassment training is a great way to reiterate the employer's commitment to a harassment free workplace. It is also a way to alert individuals to the means by which to report those concerns. This serves not only as a deterrent for harassment but may alert you to potential problems and aid in the defense of future claims.
4. **Conduct ADA training.** The ADA Amendments Act went into effect in 2009. Ensure that your team, managers, and supervisors understand the new definitions and obligations to better engage and interact with your employees and applicants.

5. **Update military leave policies.** With the recent passage and amendment to the FMLA military leave provisions for family members of military members, ensure that your policies accurately reflect the obligations under USERRA, FMLA, and any state laws with regard to protection extended to military members and their families.
6. **Review, update or implement performance evaluations.** Are you using the same evaluation forms you used a decade ago? Performance evaluations are only as good as the information they solicit. Review evaluation forms and update them to accurately capture the data you need. Train managers and employees to understand the process and the measurements utilized.
7. **Update FMLA forms.** With the new regulations that went into effect in 2009, the Department of Labor published new FMLA certification forms and notifications that must be provided to employees. Review your forms and notices and ensure they are in compliance with the new regulations and DOL requirements.
8. **Think before you layoff.** Unfortunately in these trying economic times, more and more employers are conducting layoffs or reductions in force. Before any actions are taken, ensure that you re-familiarize yourself with the WARN Act obligations and notifications required under the Older Workers Benefit Protections Act and ADEA. Severance packages and releases can be offered but there are obligations and limitations. A little extra time up front can prevent costly litigation later.
9. **Conduct a thorough handbook review.** Update your handbook to ensure that all necessary policies are included, current and reflective of the 2009 laws. Has your company grown so that you are now covered by Family and Medical Leave or other provisions that you were not previously subject? When you make these updates, indicate the date that the handbook was revised, distribute the updated policies and obtain new acknowledgements from employees.
10. **Update COBRA notices and policies.** Effective March 1, 2009, the American Recovery and Reinvestment Act of 2009 expands COBRA continuation coverage to provide a 65% federal subsidy toward COBRA premiums for up to nine months to individuals who were involuntarily terminated from their employment between September 1, 2008 and December 31, 2009. Employers are obligated to notify eligible individuals of their rights. You need to update COBRA policies and materials to include these provisions and new DOL notices; identify those employees who were involuntarily terminated after September 1, 2008 and notify them of their rights and responsibilities under ARRA; and develop processes and procedures for administration of the COBRA subsidy and reimbursement of the 65% of premiums.