



Employers Beware: EEOC Looks to Step Up Enforcement

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In an age where government budget cuts have become the norm, the Equal Employment Opportunity Commission (“EEOC”) is requesting an \$18 million increase in its year-over-year budget for fiscal year 2012. According to the Commission, it needs more money to restore enforcement and legal staff positions, modernize technology, and expand training. The EEOC also wishes to add 30 new investigators to its staff.

Although the EEOC’s budget request could certainly fail, it is a clear indication that it is ready to step up its enforcement of federal employment laws.

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Commentators and experts have identified a few categories of discrimination which are expected to see a rise in litigation:

Disability Discrimination: The Americans with Disabilities Act (“ADA”) was amended in 2008 by the ADA Amendments Act (“ADAAA”), which has greatly expanded the pool of potential ADA claimants. Some legal experts have warned that these amendments will create headaches for employers who are faced with issues surrounding the Family and Medical Leave Act (“FMLA”) and the ADA. For example, employers that automatically terminate an employee once a set period of time has passed, such as six months or a year after the exhaustion of leave under FMLA, may face liability under the ADA because leave can be considered a “reasonable accommodation.”

Age Discrimination: Instances of age discrimination under the Age Discrimination in Employment Act (“ADEA”) are growingly increasingly common as the economy continues to sputter. For example, often times employees will give clear signals that they plan to retire, but the poor economy is causing many such employees to change their minds. In such cases, when a supervisor probes into why the employee has chosen not to retire, the EEOC is quick to impose liability if such questions are asked too often.

Succession planning that crosses the line into age discrimination isn’t the only age bias concern in this current economic climate. Layoffs also can trigger age discrimination claims. For instance, sometimes an older employee who is a little too comfortable at work can slack off and still receive positive performance reviews. That sets up a problem when an employee over 40 -- and therefore covered by the ADEA -- gets let go. It may look like age discrimination because the documentation doesn’t indicate a performance problem.

Discrimination Based on Genetic Information: In November of 2010, the EEOC published regulations implementing the part of the Genetic Information Nondiscrimination Act (“GINA”) that pertains to employers. GINA prohibits employers from discriminating on the basis of genetic information and from acquiring or disclosing genetic information. Genetic information includes family history and is broadly defined; and, since GINA is new on the books, employers haven’t had a lot of experience training on compliance.

For example, without specifically asking, employers often inadvertently learn genetic information through employee requests for reasonable accommodations, workers’ compensation inquiries, FMLA certifications, fitness-for-duty examinations, “overheard” conversations, social media, and more. Certain inquiries will be deemed permissible, such as “How are you?” and “Did they catch it early?” However, “probing” inquiries such as “Does it run in your family?” will cross the line.

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As the EEOC gears itself up for an increase in antidiscrimination enforcement, employers should ensure that their practices and procedures are in compliance and should also develop (or refine) strategies for avoiding litigation involving discrimination in the workplace.