Employment Discrimination Litigation Survey Results

Expert defense strategies for leading outside counsel and in-house counsel on litigating today's key issues involved in representing management

This survey examines:

1.. Future outlook on 2010 claims.
2. The continued expansion of retaliation claims.
3. Key factors contributing to age discrimination trends.
4. Benefits of arbitration.
5. "reasonable accommodations" for disabled employees and the best way to get all of these processes in place in order to avoid potential problems.
6. Challenges in filing a discrimination charge that can be covered by both the EEOC and a state FEPAs.

The volume of employment discrimination litigation has greatly increased over the last few years with no signs of slowing down. The cases are complex and the stakes involved for defendants are exceptionally high. The best plaintiff attorneys are involved in these cases and the defense bar is seeing more and more class actions and collective claims. In defending and managing these complex claims, counsel for management face a distinct uphill battle. As a result of this uphill battle, there is simply no room for error in the defense of these claims.

Consider these topics:

1. Overly-aggressive tactics and even abusive practices by opposing counsel that have made the defense of cases significantly more expensive, adding exposure to employers.

2. Credibility of company and management witnesses in front of the jury, and turnover in the workplace leading to key witnesses or decision makers being no longer with the employer.

3. Jury communication and advocacy in employment discrimination cases: Humanizing the employer, and overcoming sympathy for plaintiffs and bias against companies.

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What area of Employment Discrimination law will see the largest growth in litigation for 2010?

1. National Origin	0%
2. Race, Color	0%
3. Religion	0%
4. Sex	0%
5. Disability	60%
6. Genetic Information	0%
7. Age	40%

What are your thoughts on the continued expansion of retaliation claims and what constitutes protected activity and/or adverse action?

Top Representative Answers

It is the riskiest area for employers. It is a frequent occurrence that a court dismisses the original discrimination claim, but leaves the retaliation claim since the standard is so easy to meet when opposing summary judgment.

The proliferation of ADL and connected claims means a growth of sensibility towards human dignity in all its aspects, and a more advanced level in law systems and techiques

I beleive the challenge would remain with the ability to prove acts of retaliation. As a Human Resources professional, i understand the importance of having this type of effort and action to ensure that decisions are made with consistency and fairness

There is too much of a disparity between state and federal courts as to the appropriate standard that will be applied.

So far I'm not seeing cases with surprising results or a great expansion of the scope of what constitues protected activity.

What is the first key factor that employers must consider when making "reasonable accommodations" for disabled employees?

1. Making existing facilities used by employees readily accessible to and usable by persons with disabilities	40%
2. Job restructuring	30%
3. Modification of work schedules	10%
4. Providing additional unpaid leave	10%
5. Reassignment to a vacant position	0%
7. Acquiring or modifying equipment or devices	10%
8. Adjusting or modifying examinations, training materials, or policies; and providing qualified readers or interpreters	0%

In reference to the previous question, what is the best way to get all of these processes in place in order to avoid potential problems?

Top Representative Answers

Simply have a procedure by which an employee may engage in the interactive process with the employer to work around any disabilities.

It can't be done. Each accommodation must be dealt with on its merits and the needs and circumstances of the business at the time.

To promote proposal among the interested people (i.e. trough social networks and web enterprise 2.0 instruments) in order to facilitate an effective, active and useful participation and responsibilisation of persons with disabilities.

It would best to work with agencies to determine what is current and needed as an employer to consider for your facility as an employer. Deploy those changes and remain connected to ensure knowledge as changes occur.

The first key factor (#5) is to train your supervisory staff to be understanding, to bring in human resources at the beginning, to not say, in effect, that any additional cost is undue hardship. In connection with that, to engage in a realistic, open-minded dialogue with the employee.

Review of /coordination between workers comp, disability leave, and any "auto term" policies (e.g. automatic termination after a one-year absence

The number of age discrimination charges brought before the EEOC has increased significantly in recent years- what are some key factors contributing to this trend?

Top Representative Answers

People's sensitivity to the issue. Those with fewer employment prospects don't consider filing a charge to be a career killing act. Possibility of recovery.

The aging population of baby boomers combined with the economic crisis in which many younger workers are looking for jobs at lesser pay.

Aging population; more litigious culture and awareness of employment related laws (and misunderstanding of them)

Recession -- increased number of RIFs adversely impacting older employees.

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A poor economy, leaning those who lose job at age 40+ to fear (with some reason) they won't find another one - therefore increasing the likelihood that they will focus on ltiigating their old job rather thna focus on starting their new job; and just the sheer volume of people losing their jobs.

Stereotypes (i.e. Older workers are hard to train, lack creativity, are too cautious, cannot adapt to new technology, are more reliable, are inflexible etc...); unfriendly legislation and collective bargaining provisions making older people unattractive for enterprises (i.e. wage levels and dismissal protection depending on senority, etc..), lackness of balance between flexibility and security in the labour market for older workers; increased diversity due to demographic change; legislative and collective bargaining measures not promoting the employment participation of older workers (i.e. early/mandatory retirement, lackness of policies of reintegration of unemployed 50-plus, etc..).

With organization trying to contain cost, the most expierenced worker usually brings the most cost to a company's workforce. Again trying to maintain and contain cost, decisions are made within the workforce that impact the most cost affected areas. unfortunaly this happens to the employees that have the most tenure. When contrasted with age, it's the same group.

As a plaintiff or a defendant, what are the benefits of arbitration as a means for resolving discrimination, harassment or other employment practice claims?

Theoretically faster and cheaper but not always. Usually a better forum for the employer and it keeps the litigation out of the public domain.

As a defendant, arbitration limits the exposure and legal work (extensive discovery) that are associated with litigation.

Arbitration, and also a voluntaristic approach to this subject (i.e. codes of conduct), could help the development of good practice and the necessary change of mentality, which colud be less achievable through legislation mandatory measures

I think that it may be benefical in some situations as it relates to the plaintiff's in the meetings based on what that individual wants to accomplish from the claim. From a defendant prospective, I think is more important to resolve and address the situation internally to prevent

What are some of the challenges when filing a discrimination charge that can be covered by both the EEOC and a state FEPAs?

Most state agencies are incompetent (Illinois being a prime example.) EEOC has more enforcement authority and firepower.

Awareness of any administrative exclusivity provisions and how the state agencies may differ from the EEOC.

In Maryland, none if the attorney wants to actively litigate the charge; otherwise the biggest challenge with either agency is delay.

Getting the claimant to be clear about facts rather than opinions.

American Conference Institute would like to thank everyone who participated in this survey. Not only do these surveys help our employment law community, they also help us produce conferences that are tailored to your needs. Please join us in December for American Conference Institute's 2nd National Forum on Defending and Managing Employment Discrimination Litigation.

Issues that will be covered:

* Overly-aggressive tactics and even abusive practices by opposing counsel that have made the defense of cases significantly more expensive, adding exposure to employers

* Credibility of company and management witnesses in front of the jury, and turnover in the workplace leading to key witnesses or decision makers being no longer with the employer

* Jury communication and advocacy in employment discrimination cases: Humanizing the employer, and overcoming sympathy for plaintiffs and bias against companies

* Varying extremes in jurisdictions (e.g. federal or state, liberal or conservative state)

* Admissibility of evidence: Ensuring that evidence doesn't overwhelm the defense's case on the merits –"Me too," discriminatory motive, mixed motive, witness credibility and turnover, and beyond...

* A View from the Bench: Judges speak out on how to convey complexities to a court (including parameters of and changes to the law), effective theories/defenses, evidentiary approaches, statute of limitations, deciding cases early, discovery, forum shopping and more...

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