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yourHRdepartment, Inc.

the loss prevention experts

EPL Facts & Findings

EPL Lawsuit Awards & Settlements -- Information You Cannot Afford To Ignore

"Jury Verdicts Research" recently published their 2007 edition of "Employment Practices Liability, Jury Award Trends and Statistics". Here are some highlights that you and your clients should know:

1. The average *compensatory* award for discrimination cases was $485,298. This reflects a continuing trend up. The average compensatory award was $52,000 higher than the average compensatory award in 2003. Remember that a "compensatory" award does not include punitive damages or attorney fees.

2. In any employment case filed in federal court, there is a 16% chance the award will exceed $1 million and a 67% chance that the award will exceed $100,000 based on data from 2000 through 2006. Again, attorney fees are not included in these figures.

3. The average compensatory award in all federal court employment cases was $493,534 (higher than ever before) and reflects a 45% increase since 2000. In 2000, the average compensatory award was $332,264.

4. State courts continue to offer plaintiffs higher awards in discrimination cases. Compensatory awards are 39% higher in state court cases overall, based on data from 2000-2006. Wrongful termination claims are 260% higher in state court cases.

5. If an employment lawsuit goes to trial, plaintiffs are more likely to win than the defendant/employer. In state court, plaintiffs won 67% of all trials (63% in federal court).

6. Of course, most lawsuits settle before trial. The cost to settle an employment lawsuit has grown significantly over the last 5 years, from an average of $130,476 in 2001 to $310,845 in 2006. That's an increase of over 230% in the last 5 years.

Independent Work Authorization Verifications May Result in Discrimination

There has been a lot of buzz about the Department of Homeland Security's "safe harbor" regulations and the steps that employers receiving "no-match letters" can take to avoid liability for employing unauthorized workers. Since these regulations have been placed on hold, employers may be wondering whether they should be proactive by reviewing their employees' work authorizations. In most cases, the answer is a resounding "NO".

Generally, an employer who has not received a no-match letter or DHS Notice of Suspect Documents is not required to take any action regarding the employment authorization or immigration status of its employees. Federal law prohibits employers from hiring or continuing to employ a person whom the employer knows is not authorized to work in the United States. While the law does not permit an employer to look the other way when presented with information indicating that an employee may be unauthorized, it does not require employers to go out looking for such information either.

The recent publicity surrounding ICE raids, huge fines for hiring illegal aliens, and stories of employers facing criminal charges

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and jail time may tempt companies to "settle the issue once and for all" by revivifying Social Security numbers, examining employees' I-9 forms or otherwise taking the initiative to mount their own investigations of employee work authorization status. When employers head down this path, they step into a minefield of potential discrimination issues.

For example, an employer taking this route would first need to decide which employees to investigate. Perhaps the employer feels the "most likely" candidates for investigation are employees whose native language is not English, who speak English with an accent, who have Hispanic or Asian surnames, or whose appearance or mannerisms lead the employer to believe that they may be foreign-born. Decisions to investigate the work authorization status of employees on the basis of any of these criteria would likely expose the employer to lawsuits for national origin discrimination.

It may seem logical to avoid national origin discrimination claims by simply examining the work authorization of each and every employee on the payroll, e.g., by submitting every employee's Social Security Number to the federal E-Verify program. However, this too presents the danger of straying over the line into illegal discrimination. Consider that 70% of no-match letters issued by the SSA pertain to employees who are authorized to work in the United States. One of the main contexts in which this occurs is the employee who no longer "matches" because she has changed her name due to marriage or divorce. As men do not change their surnames when they get married or divorced, an employer that launches an investigation of all employees will generally come across this type of discrepancy in regard to female employees only. Those employees, who will justifiably be upset with having their work authorization challenged, are likely to sue the employer claiming illegal discrimination based on sex and marital status. Additionally, E-Verify may not be used to check the Social Security numbers of existing employees; only new hires may be subject to this procedure.

Employers who decide to ignore the dangers should think about how they plan to proceed when their investigations turn up employee documents that arouse their suspicions. Remember, federal law prohibits employers from requiring additional or different documentation beyond the requirements of Form I-9.

The glaring exception to all of this, of course, is the unusual case in which an employer obtains actual knowledge that an employee is not authorized to work in the United States such as when an employee admits that she lacks work authorization or is in the United States illegally.

Employers are not free to ignore such information, as federal law prohibits employers from knowingly continuing to employ unauthorized individuals. To avoid civil and criminal liability, an employer that gains actual knowledge of an employee's unauthorized status must immediately terminate that person's employment.

How should an employer react to allegations that a particular employee may not be authorized to work in the United States? For example, it is possible that an employee could tip off her employer that a coworker is "illegal." The danger, of course, is that the information provided may be erroneous. Such allegations could be the result of misunderstandings among coworkers or could even reflect an informant's own racial or ethnic bias. This does not mean that an employer should discount information that is volunteered, however. The employer should promptly investigate the truth of the allegations. A logical starting place would be to ask the informant to explain how she arrived at her conclusions. The employer should document every step of its investigation in writing. If the employee is ultimately determined to be unauthorized and is terminated, thorough documentation of the process provides the employer with the evidence it may need in the event that a discrimination claim ensues.

Finally, what is the best practice regarding verification of an employee's right to work in the United States? Complete the I-9 correctly at the time the employee is hired and review the documents presented to ensure they appear valid. By following the correct procedure from the onset, employers can avoid questioning whether they are employing unlawful workers down the road.

Who are we?

YourHRdepartment, Inc. is an expert team of HR professionals that provide quality comprehensive loss prevention services to the EPLI industry. Our distinguishing features include an on-line HR management system that provides state specific information for all 50 states, plus unlimited telephone support provided by experienced HR professionals. In addition, our services include a dedicated customer service staff who ensure clients are made aware of the valuable HR tools included with their EPL policy.

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