Increasing Employment Practices Liability Exposure

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Storm Clouds Gather

Contracted credit markets and a weak economy are forcing companies across the globe to reduce their workforce, often by significant numbers. In the worst cases, companies are shuttering their doors altogether. Simultaneously, just as companies struggle to manage these workforce changes, the White House Administration is effecting employee-friendly legislation. In addition, a recent U.S. Supreme Court opinion may invite an increase in retaliation claims. It is clear that employment practices liability exposure is on the rise.

Increasing Ranks in Unemployment

It is well understood that a weak economy and the inevitable associated job losses exacerbate employment practices risks. This is true regardless of the veracity of any allegations by self-described victims of discrimination, as risk captures the meritless claims of former employees seeking to potentially soften the blow of newly found unemployment. In the aftermath of the dot-com bubble, for example, EEOC charges increased significantly—to a peak of 84,442 complaints in 2002. Following the 2008 financial meltdown, EEOC charges stood at their highest level, with 95,402 new charges. This represents a 15% increase over 2007, and an 11% increase from the high point in 2002.

In a healthy economy, some disgruntled workers may choose simply to move on from an unpleasant employment environment rather than to address their concerns, whether perceived or real. However, in a contracting economy, employees are less likely to find alternative employment and may feel that pursuing legal claims is their only option. With experts predicting continued unemployment—perhaps as much as 10% by 2010—increased employment litigation cannot be far behind.

New Legislation

A week after entering the White House, President Obama signed the Lilly Ledbetter Fair Pay Act of 2007 ("*Fair Pay Act*"), legislation that significantly increases exposure for claims of pay discrimination. The Act is designed to address the effect of the Supreme Court decision, *Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618 (2007) ("*Goodyear*").

Goodyear centers on the time constraint for discrimination charges; the law restricts the time period for filing to 180 days from the date of the discriminatory act or intent. In the Goodyear opinion, a distinction is made between the actual, intentional discriminatory decisions and the ensuing paychecks. Paychecks based on an alleged discriminatory decision made more than 180 days ago would not "refresh" the discriminatory act or intent necessary to bring a current claim. Thus, the *Goodyear* opinion essentially denies Title VII relief for those plaintiffs who do not discover or act upon discriminatory pay practices or discrepancies until later in their careers.

The *Fair Pay Act* effectively eliminates the statute of limitations for pay discrimination, by clarifying that each paycheck resulting from a single act of discrimination, regardless of its age, is in and of itself a new discriminatory act. Proponents laud the act for furthering the intent of equal pay, while critics fear it will open the floodgates of litigation.

The Fair Pay Act increases the potential volume, difficulty and expense of defending employment litigation. Discovering who is responsible for what decisions, along with when and how by using records from decades ago (if they even exist), could be painstaking, from both a practical and economical standpoint. The cost of discovery has been increased exponentially.

Defending employment litigation is expensive, whether the matter is an individual claim or a full-blown class action, as are settlements and judgments in such actions. A recent study found that the average jury verdict for employment cases was $627,447 for the six year period from 2001 through 2007. With the top ten private settlements for wage and hour litigation in 2008 totaling over $250 million, defending employment litigation is critical to managing risk and protecting your company's reputation and bottom line. Typical defense costs can range from as low as $10,000 for so-called nuisance suits, to $300,000 or more for a single lawsuit through its appeal. Class action defense will run considerably higher. Employment practices liability insurance is intended to help ease the burden of defense costs and smooth balance sheets in the unfortunate event of a claim.

Retaliation

Claims of retaliation account for almost one-third of all EEOC charges. The recent Supreme Court opinion in *Crawford v. Metro Government of Nashville,* Slip Opinion 06-1595, *("Crawford")* may serve to increase such claims.

The case arises out of Nashville's internal investigation into alleged sexual harassment by Gene Hughes, an employee relations director for the Nashville Metropolitan School District. The plaintiff, Vicky Crawford, did not bring charges against Mr. Hughes, but she was interviewed during the investigation because she worked in the human resources department. When questioned, Ms. Crawford surprised investigators by telling them that she herself had suffered harassment from Mr. Hughes.

Shortly after the investigation, Ms. Crawford was fired for alleged embezzlement. She subsequently brought a claim against the school district for retaliation, claiming that her discharge constituted retaliation for the statements she made during questioning in the internal investigation.

Title VII retaliation protection extends to those who oppose a given illegal practice or participate in an investigation or proceeding pursuant to that protection. The question at issue in *Crawford* was whether or not Ms. Crawford's responses to the investigative questions constituted "opposition" or "participation." The Supreme Court unanimously held that responding to an investigation may constitute the 'opposition' necessary to substantiate a retaliation claim.

The *Crawford* opinion, therefore, opens up a new class of retaliatory plaintiffs with which employers may have to deal. Employees who are subjected to harassment but have not yet voiced a complaint are now potential future claimants. Moreover, it is probable that claimants will try to extend the ruling to apply to similar anti-retaliation provisions of other statutes, such as the Americans with Disabilities Act, the Age Discrimination in Employment Act, and others.

The *Crawford* case begs, but does not resolve, the question as to whether or not silence can equal opposition. It is uncertain what type of actions by employees are enough to trigger statutory protection in the absence of direct objection to the employer. Can an employee remain silent to his employer, then complain to his friend, and still be said to have "opposed" a practice? Setting that bar too low could increase the already burgeoning number of retaliation claims.

Protecting Against Growing Risks

The challenging economic environment, coupled with a White House focus on employment rights and a more receptive Supreme Court, underscores the importance of instituting a well-structured Employment Practices Liability Insurance program. Appropriate insurance coverage will help protect your bottom line from the potentially crippling costs of employment litigation, settlements and awards. Despite the troubled economy, the Employment Practices Liability Insurance market continues to offer adequate capacity and competitive pricing. EPLI is a mature insurance product and underwriters have continually adapted their product offering to reflect the ever-changing environment. In addition, our brokers are here to guide our clients through the marketplace to obtain the best in terms and pricing for this important insurance protection.

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About Integro

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