A Timely Analysis of Legal Developments

ASAP®

In This Issue:

June 2009

On June 8, 2009, Wisconsin Governor Jim Doyle signed into law a bill that allows successful plaintiffs to recover compensatory and punitive damages under the Wisconsin Fair Employment Act (WFEA). Prior to this change, remedies were limited to reinstatement, back pay and attorneys' fees. The result of this law is that employers' potential exposure under the WFEA has increased.

Raising the Stakes for Employers in Discrimination Claims in Wisconsin

By Dale L. Deitchler and Jonathan O. Levine

On June 8, 2009, Wisconsin Governor Jim Doyle signed into law a bill that allows successful plaintiffs to recover compensatory and punitive damages under the Wisconsin Fair Employment Act (WFEA). Prior to this change, remedies were limited to reinstatement, back pay and attorneys' fees. The result of this law is that employers' potential exposure under the WFEA has increased.

Compensatory/Punitive Damages

The WFEA amendments take effect "the day after publication or the 2nd day after publication of the 2009-2011 biennial budget act, whichever is later."

Under the new law, after all administrative proceedings before the Department of Workforce Development (DWD) and appeals to the Labor and Industry Review Commission (LIRC) have been completed, the DWD or a prevailing claimant may file suit in circuit court to recover compensatory and punitive damages plus reasonable costs and attorneys' fees. Unless the underlying liability determination is overturned, compensatory and punitive damages *must* be awarded in an amount the court or jury finds "appropriate," subject to the following caps:

- $50,000 if the business employs 15 to 100 workers;
- $100,000 if the business employs 101 to 200 employees;
- $200,00 if the business employs 201 to 500 workers; and
- Up to $300,000 if the business employs 501 or more workers.

Punitive damages are to be awarded if a plaintiff shows that the employer acted maliciously or with an intentional disregard of the plaintiff's rights. To fall within these statutory ranges, the relevant employee threshold must be met in each of 20 or more calendar weeks in the current or preceding year. The damage caps are subject to adjustment by the DWD in future years based on changes in the consumer price index.

Minimizing the Risk of Employment Discrimination Litigation

The ultimate significance of the WFEA amendments remains to be seen. Under the old law, it was common for plaintiffs to use the early stages of the WFEA process for discovery and then file suit in federal court where the right to a jury trial and more expansive remedies exist. Now, plaintiffs may simply choose to exhaust the WFEA process, raising the stakes for employers at all stages of the WFEA process. These amendments may change employers' defense strategies in areas such as: (1) the drafting of a position statement; (2) settlement/mediation; (3) the defense of "no probable cause" hearings, or hearings on the merits of a complaint; (4) appeals to LIRC; and (5) litigation in state courts.

Even with the increased remedies under the WFEA, however, employers should remember that the best defense remains a good offense:

1. Hire the right people using appropriate procedures – *e.g.*, application forms; interviews; references; drug testing; background checks; FCRA compliance; personality testing.
2. Make sure that your anti-discrimination, harassment and other employment policies are well-written, widely distributed and consistently enforced.
3. Conduct regular training with your managers, supervisors and employees, making compliance a top company priority.
4. Investigate and address employee complaints in a prompt, thorough and fair manner, taking steps to ensure that no retaliation is allowed to occur.
5. Give employees timely and accurate performance evaluations.
6. Document all relevant employment actions, assuring that disciplinary forms, reviews and the like are accurate, straightforward and do not include irrelevant or personal commentaries that could embarrass or expose the company.
7. Prepare an appropriate process for handling and communicating disciplinary actions or termination decisions, considering how a finder of fact might perceive the company's words and actions.
8. Be mindful of confidentiality and the need for discretion in communications. Use extreme patience and caution when communicating with others. In today's high-tech world, everything you say and do may be captured electronically or on video.
9. Consider whether and under what circumstances it makes sense to offer an employee a severance package in exchange for a release.
10. Don't go it alone. Human resources professionals and qualified counsel can help.

Dale L. Deitchler is a Shareholder Littler's Minneapolis office. Jonathan O. Levine is a Shareholder in Littler's Milwaukee office. If you would like further information, please contact your Littler attorney at 1.888.LITTLER, info@littler.com, Mr. Deitchler at ddeitchler@littler.com, or Mr. Levine at jlevine@littler.com.