

Are You Discriminating Against Employees... Without Realizing It?

New EEOC report focuses on systemic discrimination.

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Aug. 29, 2007 -- In June 2007, the Equal Employment Opportunity Commission (EEOC) announced that Pemco Aeroplex, a Birmingham, Ala.-based company, had agreed to pay \$390,000 to settle a class-action lawsuit that accused the company of “engaging in a pattern or practice of race discrimination” against its African American workers. Although it has been more than 40 years since the Civil Rights Act was passed, discrimination still occurs in the workplace.

If the EEOC has its way, that will soon change. The Pemco Aeroplex case illustrates a type of class-action lawsuit that the EEOC is expected to pursue as part of its new focus on combating “systemic discrimination.” In contrast to an individual employee’s charge of discrimination, the EEOC defines systemic discrimination as “a pattern or practice, policy, and/or class in which the alleged discrimination has a far-reaching impact on an industry, profession, company, or geographic location.”

The agency’s new focus on systemic discrimination comes after a decade of little change in the annual number of discrimination charges it handles. As of 2006, EEOC data shows a 6% decline in discrimination charges filed over the past 10 years. However, despite the decrease, monetary benefits for claims have increased 30% over the same time period to nearly \$230 million.

Being targeted by the EEOC for investigation means enduring a costly, time-consuming investigation process -- and perhaps worse. Because a systemic discrimination charge typically takes the form of a class action, it can cost considerably more to defend -- even hundreds of thousands of dollars -- than an individual discrimination charge (usually less than \$10,000 in defense costs). Although larger companies may be able to absorb the cost of a

discrimination lawsuit, small to midsize firms may be financially strained or find themselves facing bankruptcy as a result of such a lawsuit.

COULD THE EEOC TARGET YOUR COMPANY?

The EEOC’s new Employer Information Report (better known as the EEO-1 report) collects broader race and ethnic information about workers at different management levels in order to help the agency identify systemic discrimination cases. Moreover, the agency offers “performance incentives” to local investigators who identify and pursue class-wide systemic discrimination claims.

The problem with systemic discrimination is that even a well-intentioned company might not realize it is behaving in a discriminatory fashion. That’s why conducting a thorough, objective analysis of employment practices is so critical.

Once September 30, 2007 -- the due date for the EEO-1 report -- comes and goes, how likely is the EEOC to peg your company for an investigation? That probably depends on a number of factors that could attract the agency’s attention:

- Demographic imbalances in hires and terminations.
- A class-action discrimination suit against the company in the past five years.
- A series of individual charges against the company alleging systematic discrimination in hiring or promotion over the past five years.
- Class-action discrimination suits against similar manufacturers in the past five years.
- A recent high-profile discrimination claim against a large manufacturer in your industry segment.
- Reputation for being a “male-dominated” industry segment (such as construction).

WHAT CAN YOUR COMPANY DO?

Fortunately, your company can take steps to ward off a possible EEOC investigation -- and avoid costly, time-consuming litigation. Here are seven recommended actions:

1. Publish and regularly disseminate company policies prohibiting all forms of discrimination, harassment, and retaliation, as well as federal and state employment policies, to all workers. This may be the most important action to take as it will establish a strong defense should a complaint occur.
2. Have a written grievance resolution process for handling internal complaints. This is the first step to alleviating problems before an employee goes to the EEOC.
3. Work with union leaders to develop and review diversity and anti-discrimination programs. A union representative could be the first person that a worker who believes he or she has been discriminated against will contact. Unions advocate for workers, so involve leaders in your anti-discrimination efforts and follow processes set forth in collective bargaining agreements (such as providing a grievance process).
4. Ensure that job recruitment activities align with the EEOC's intentions (take your cues from the EEO-1 report itself). Implement initiatives aimed at improving workforce diversity, including management- and executive-level diversity. Keep records of job advertisements and postings so you can demonstrate that all qualified applicants had opportunity to apply for it. Your company's employment application should align with the racial and ethnic categories used in the new report.
5. Implement a regular program of training and education. Train managers on their legal obligations in personnel decisions and on the potential negative impact of emails on defending against employment practices claims. Educate non-managers about your "no tolerance" policies and their obligation to immediately report any actual or perceived discrimination, harassment, and retaliation.
6. Analyze general employment practices for possible adverse impact. Include affirmative action plans and criteria used for personnel decisions. Review instances of apparent adverse impact to ensure that all criteria are job-related and supported by business necessity. Be sure you can explain why a person was hired or promoted and, just as important, why other candidates were not.
7. Follow procedures that minimize your employment practices liability (EPL) risk from a reduction in force (RIF) -- an especially fertile ground for discrimination lawsuits. For example, first be sure to base the RIF on objective criteria, such as tenure or location, not on subjective criteria, like position or job evaluations, and obtain legal advice on your RIF process. In addition, identify groups that may be adversely impacted, and hold exit interviews to identify potential problems and head them off early. Offer severance packages and waivers or releases that comply with the Older Worker Benefit Protection Act, and provide outplacement services to assist laid-off workers in finding new employment. The EEOC will do its best to monitor worker diversity, especially the advancement of women and minorities into the upper management ranks. By actively recruiting and promoting a diverse work force and generally following non-discriminatory employment practices, you can lessen your exposure to an EEOC investigation -- and the potential financial and reputation devastation of an EPL lawsuit.

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