

In this issue:

- Employment Testing and EEO
- Job Bias Charges Rise 9% in 2007, EEOC Reports
- Identity Theft Prevention Program
- First Expansion of FMLA

First Expansion of FMLA

The National Defense Authorization Act of 2008, signed in January 2008, includes the first expansion of FMLA since the law was originally passed in 1993.

This expansion of FMLA grants additional rights to the family members of military personnel. Specifically, family members of military personnel may now take up to 26 weeks of leave within a 12 month period for the purpose of caring for an injured service member.

An additional expansion of FMLA included in this bill allows for family members of military personnel to take up to 12 weeks of leave in a 12 month period due to "any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation."

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COMPLIANCE HIGHLIGHT

Employment Testing and EEO

Employers often use tests and other selection procedures to screen job applicants and current employees for promotion. There are many different types of tests and selection procedures, including cognitive tests, personality tests, medical examinations, credit checks, and criminal background checks.

The use of tests and other selection procedures can be a very effective means of determining which applicants or employees are most qualified for a particular job. However, use of these tools can violate the federal anti-discrimination laws if an employer intentionally uses them to discriminate based on race, color, sex, national origin, religion, disability, or age (40 or older). Use of tests and other selection procedures can also violate the federal anti-discrimination laws if they disproportionately exclude people in a particular group by race, sex, or another covered basis, unless the employer can justify the test or procedure under the law.

Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1990 (ADA), and the Age Discrimination in Employment Act of 1967 (ADEA) prohibit the use of discriminatory employment tests and selection procedures.

ENFORCEMENT UPDATE

Job Bias Charges Rise 9% in 2007, EEOC Reports

The U.S. Equal Employment Opportunity Commission (EEOC) received a total of 82,792 private sector discrimination charge filings last fiscal year, the highest volume of incoming charges since 2002 and the largest annual increase (9%) since the early 1990s, the agency reported it as part of its Fiscal Year 2007 enforcement and litigation statistics. The data also show that the EEOC recovered \$345 million in monetary relief for job bias victims.

"Corporate America needs to do a better job of proactively preventing discrimination and addressing complaints promptly and effectively," said Commission Chair Naomi C. Earp. "To ensure that equality of opportunity becomes a reality in the 21st century workplace, employers need to place a

There has been an increase in employment testing due in part to post 9-11 security concerns as well as concerns about workplace violence, safety, and liability. In addition, the large-scale adoption of online job applications has motivated employers to seek efficient ways to screen large numbers of online applicants in a non-subjective way.

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Employer Best Practices for Testing and Selection

Employers should administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age (40 or

older), or disability.

Employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used. The test or selection procedure must be job-related and its results appropriate for the employer's purpose. While a test vendor's documentation supporting the validity of a test may be helpful, the employer is still responsible for ensuring that its tests are valid.

If a selection procedure screens out a protected group, the employer should determine whether

(Continued on page 2)

premium on fostering inclusive and discrimination-free work environments for all individuals."

According to the EEOC's FY 2007 data, allegations of discrimination based on race, retaliation, and sex were the most frequently filed charges, continuing a long-term trend. Additionally, nearly all major charge categories showed double digit percentage increases from the prior year – a rare occurrence. The jump in charge filings may be due to a combination of factors, including greater awareness of the law, changing economic conditions, and increased diversity and demographic shifts in the labor force.

(Continued on page 2)

Section 125 Plan Document (con't)

there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure. For example, if the selection procedure is a test, the employer should determine whether another test would predict job performance but not disproportionately exclude the protected group.

To ensure that a test or selection procedure remains predictive of success in a job, employers should keep abreast of changes in job requirements and should update the test specifications or selection procedures accordingly.

Employers should ensure that tests and selection procedures are not adopted casually by managers who know little about these processes. A test or selection procedure can be an effective management tool, but no test or selection procedure should be implemented without an understanding of its effectiveness and limitations for the organization, its appropriateness for a specific job, and whether it can be appropriately administered and scored.

① For additional information on employment testing visit the EEOC website (<http://www.eeoc.gov>).

Identity Theft Prevention Program

According to a report of the President's Identity Theft Task Force, identity theft (a fraud attempted or committed using identifying information of another person without authority), results in billions of dollars in losses each year to individuals and businesses.

The final identity theft rules require each financial institution and creditor that holds any consumer account, or other account for which there is a reasonably foreseeable risk of identity theft, to develop and implement an Identity Theft Prevention Program (Program) for combating identity theft in connection with new and existing accounts. The Program must include reasonable policies and procedures for detecting, preventing, and mitigating identity theft and enable a financial institution or creditor to:

1. Identify relevant patterns, practices, and specific forms of activity that are "red flags" signaling possible identity theft and incorporate those red flags into the Program;
2. Detect red flags that have been incorporated into the Program;
3. Respond appropriately to any red flags that are detected to prevent and mitigate identity theft; and
4. Ensure the Program is updated periodically to reflect changes in risks from identity theft.

The agencies also issued guidelines to assist financial institutions and creditors in developing and implementing a Program, including a supplement that provides examples of red flags.

The final rules also require credit and debit card issuers to develop policies and procedures to assess the validity of a request for a change of address that is followed closely by a request for an additional or replacement card. In addition, the final rules require users of consumer reports to develop reasonable policies and procedures to apply when they receive a notice of address discrepancy from a consumer reporting agency.

① For more information visit FTC's Web site (<http://www.ftc.gov>).

Job Bias Charges Rise 9% in 2007 (con't)

Last year, for the first time, retaliation was the second highest charge category (behind race), surpassing sex-based charges in total filings with EEOC offices nationwide. Historically, race has been the most frequently filed charge since the EEOC became operational in 1965. In addition to the statutory bases of discrimination, charges filed with the EEOC and state and local Fair Employment Practices Agencies (combined) also trended upward for the high visibility issues of pregnancy discrimination and sexual harassment.

During FY 2007, pregnancy charges surged to a record high level of 5,587, up 14% from the prior fiscal year's record of 4,901. Sexual harassment filings increased for the first time since FY 2000, numbering 12,510 – up 4% from the prior fiscal year's total of 12,025. Additionally, a record 16% of sexual harassment charges were filed by men, up from 9% in the early 1990s. Other year-end statistics released today show that the EEOC:

- Recovered approximately \$345 million in total monetary relief for charging parties, up 26% from the prior year's total of \$274 million. Nearly \$55 million was obtained through EEOC litigation and more than \$290 million through administrative enforcement, including mediation. Additionally, the agency obtained substantial non-monetary relief, such as employer training, policy implementation, reasonable accommodations, and other measures to promote discrimination-free workplaces.
- Resolved 72,442 private sector charges, with a historically high merit factor rate of 23%. Merit factor resolutions include mediation and other settlements and cause findings, which, if not successfully conciliated, are considered for litigation. Most meritorious charges are resolved voluntarily with employers prior to any EEOC litigation.
- Resolved a record 8,649 charges through its voluntary National Mediation Program (up 5% from the prior year's record high), with a user satisfaction rate of 96% indicating that nearly all participants would return to the program in the future. At the end of FY 2007, the EEOC had entered into 1,269 Universal Agreements to Mediate (UAMs) with employers nationwide (154 national/regional UAMs and 1,115 local UAMs) – a 15% increase from the FY 2006 level.
- Filed 336 merits lawsuits (direct suits, interventions and other enforcement actions), including 116 class cases involving multiple aggrieved parties or victims of discriminatory policies. Significant injunctive and remedial relief was also achieved through litigation settlements, jury trials and court rulings. The agency's litigation program increasingly focused on class and systemic cases as part of its national law firm model.
- Conducted a record 5,658 outreach, education and technical assistance events nationwide, reaching nearly 280,000 people. The EEOC's national outreach initiatives include E-RACE (Eradicating Racism and Colorism from Employment), Youth@Work, and LEAD (Leadership for the Employment of Americans with Disabilities). Other outreach programs focused on EEOC-enforced laws, mediation, and small business.

① For more information visit the EEOC website (<http://www.eeoc.gov>).