



EMPLOYMENT DISCRIMINATION

Employment discrimination, in one form or another, has been around for a long time, and employment-related lawsuits are a real threat to U.S. businesses. The U.S. Equal Employment Opportunity Commission (EEOC), which enforces many employment laws, reports that it received 99,412 private sector workplace discrimination charges during fiscal year 2012. The year-end data also show that retaliation (37,836), race (33,512), and sex discrimination (30,356), which includes allegations of sexual harassment and pregnancy, were the most frequently filed charges. Some claims included allegations of two or more types of discrimination.

Excessive media coverage of alleged wrongdoings has employers everywhere looking for ways to protect their interests. This issue of *Insurance Focus* explains community associations' potential employment liability, provides suggestions on how to prevent exposures (and subsequent litigation), and explains an insurance option available. Taking proactive measures to defuse liability exposures will not only save in terms of court costs, but will also help to ensure a more productive workforce.

Taking proactive measures to defuse liability exposures will ensure a more productive workforce.

What are the federal laws prohibiting job discrimination? Title VII of the Civil Rights Act of 1964 and 1991 (Title VII)

Title VII of the Civil Rights Act of 1964 and 1991 (Title VII) prohibits employment discrimination based on race, color, religion, sex, or national origin. It covers not only intentional discrimination, but also practices that have the effect of such discrimination. Discrimination cannot affect hiring, promotions, demotions, terminations, or allocation of wages and benefits.



Workplace harassment includes quid pro quo sexual harassment (granting terms and conditions of employment for sexual favors or retaliating for failure to respond to sexual advances) and a hostile work environment (repeated, unwanted imposition of offensive conduct or conduct based on race, national origin, gender, age, or religion). This law covers employers with 15 or more employees.

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A relatively new law is the Lilly Ledbetter Fair Pay Act of 2009, which clarifies that a pay discrimination claim is timely as long as the employee received at least one discriminatory paycheck within the filing period. In other words, each paycheck that delivers discriminatory compensation is a wrong actionable under the federal EEO statutes, regardless of when the discrimination began. Prior to this law, a U.S. Supreme Court decision held that the statute of limitations for presenting an equal-pay lawsuit began at the date the pay was agreed upon, not at the date of the most recent paycheck.

Equal Pay Act (EPA)

The Equal Pay Act (EPA) protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination. Employers may not reduce wages of either sex to equalize pay between men and women. A violation of the

EPA may occur where a different wage was/is paid to a person who worked in the same job before or after an employee of the opposite sex. The EPA does not provide minimum employee exceptions.

Age Discrimination in Employment Act (ADEA)

The Age Discrimination in Employment Act (ADEA) prohibits discrimination against individuals 40 years of age or older. Claims often arise in the context of reductions in force and involuntary retirement. The ADEA's broad ban against age discrimination also specifically prohibits statements or specifications in job notices or advertisements of age preference and limitations, discrimination on the basis of age by apprenticeship programs, and denial of benefits to older employees. This law covers employers with 20 or more employees.

Americans with Disabilities Act (ADA)

The Americans with Disabilities Act (ADA) prohibits employment discrimination against qualified individuals with disabilities. An individual with a disability under the ADA is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having a disability. Claims usually arise when the employer asks job applicants about their health or refuses to accommodate the disability, or when an employee develops a disability while employed. This law covers all employers with 15 or more employees.

Genetic Information Nondiscrimination Act of 2008 (GINA)

The Genetic Information Nondiscrimination Act (GINA) prohibits employment discrimination based on genetic information about an applicant, employee, or former employee. This includes a prohibition on the use of genetic information in all employment decisions; restrictions on the ability of employers and other covered entities to request or to acquire genetic information, with limited exceptions; and a requirement to maintain the confidentiality of any genetic information acquired, with limited exceptions. This law covers all employers with 15 or more employees.





Family and Medical Leave Act (FMLA)

The Family and Medical Leave Act (FMLA) requires covered employers to grant an eligible employee up to a total of 12 work weeks of unpaid leave during any 12-month period for the birth and care of the newborn child of the employee; for placement with the employee of a son or daughter for adoption or foster care; to care for an immediate family member (spouse, child, or parent) with a serious health condition; or to take medical leave when the employee is unable to work because of a serious health condition. During the leave period, the community association must keep the individual's health insurance (including dental and vision coverage) in place. Upon return from FMLA leave, an employee must be restored to the employee's original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment. This law covers employers with 50 or more employees.

State Law Claims

Employment-related claims are also covered under state law. Statutory claims largely mirror federal discrimination statutes; many states and municipalities have also enacted protections against discrimination and harassment based on sexual orientation, status as a parent, marital status, and political affiliation. State laws may also provide an additional source of punitive damages, which may be unlimited. State law claims usually arise in the context of wrongful termination and are often brought in conjunction with federal claims.

Who enforces these laws?

All of these laws are enforced by the Equal Opportunity Employment Commission (EEOC), with the exception of the FMLA, which is enforced by the U.S. Department of Labor.

What remedies are available when discrimination is found?

The "relief" or remedies available for employment discrimination, whether caused by intentional acts or by practices that have a discriminatory effect, may include:

- back pay,
- hiring,



- promotion,
- reinstatement,
- front pay,
- reasonable accommodation, or
- other actions that will make an individual "whole" (in the condition he would have been but for the discrimination).

Remedies also may include the payment of attorneys' fees, expert witness fees, and court costs.

STATUTE COMPARISON	
Statute	Minimum Number of Employees
Title VII.....	15
EPA	No Minimum
ADEA	20
ADA	15
FMLA	50
GINA.....	15

Under most EEOC-enforced laws, compensatory and punitive damages also may be available where intentional discrimination is found. Damages may be available to compensate for actual monetary losses, for future monetary losses, and for mental anguish and inconvenience. Punitive damages also may be available if an employer acted with malice or reckless indifference.

The employer also may be required to take corrective or preventive actions to cure the source of the identified discrimination and minimize the chance of its recurrence, as well as discontinue the specific discriminatory practices involved in the case.

How do we reduce exposure?

Knowing the statutes under which employment-related claims fall is the first step employers can take to reduce their employment practices exposure. Taking proactive measures to defuse liability exposures is the next important step.

Use an employee handbook

First and foremost, associations should have an employee handbook, which should be used to document legal positions and policies regarding such issues as work hours, email

use, sick leave, employee behavior, and disciplinary action employers may take when rules are violated or expectations are not met.

Many employment practices lawsuits arise because employers allow one employee, or a group of employees, to behave differently from others. Handbooks can help prevent such an environment. Through employee signatures on appropriate documents, employers should require employees to acknowledge that they received the handbook and that they acknowledge the expectations of the employer.

Have a written policy statement

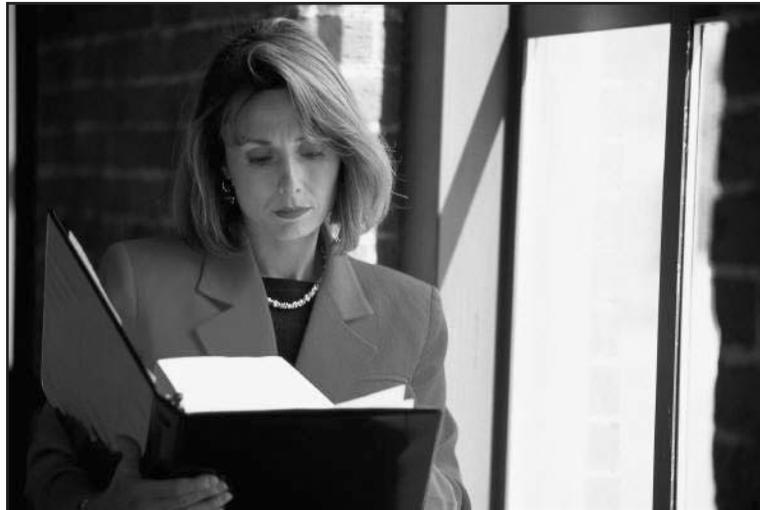
A written policy statement that clearly defines the association attitude concerning conduct and performance expectations is also a good idea. Such a statement demonstrates that the association's policy is clear and

non-discriminatory. This personnel statement should be readily available to all employees. Care should be taken that any policy statements are carefully worded, as they have been shown to have the force of law.

Should a lawsuit be brought, documentation indicating that an anti-discriminatory policy was in place would be helpful, although by itself will not exonerate an employer or association. Part of this policy statement should define the grievance procedure if and when a complaint is made: whom to notify; that the complaint is confidential; the expectations regarding a timely response; and what action to expect with regard to a hearing on the matter.

Hold orientation and training programs

In addition, associations can hold orientation and training programs that convey expectations and help defuse discrimination situations before they have a chance to develop. By making such training sessions mandatory for all employees, an association demonstrates its unwillingness to tolerate employment discrimination at any level.





Set regular employee reviews

Also important are regular reviews of employees' performance and set disciplinary action if they are not meeting expectations. Such action includes additional training and constructive feedback to help employees improve performance.

Properly train supervisors and managers

Supervisors are often in the best position to spot problems, so they should be thoroughly educated about potential exposures, such as sexual harassment. Also, they should be educated about the proper way to communicate more effectively with employees.

Keep good documentation

Good documentation is essential. This includes everything from getting employees' signature when they are given the employee handbook to writing down conversations with employees regarding their need for improvement.

Is insurance coverage available?

Insurance is available to protect companies from employment practices lawsuits. Employment Practices Liability Insurance (EPLI) protects employers from claims, suits, and allegations from employees arising from violations of the many federal, state, and local employment laws and regulations.

Virtually unheard of in the early 1990s, this form of insurance is gaining in popularity. In fact, more and more businesses are coming to see EPLI as an indispensable part of their insurance and risk management portfolio.

First and foremost, associations should have an employee handbook, which should be used to document legal positions and policies regarding such issues as work hours, email use, sick leave, employee behavior, and disciplinary action employers may take when rules are violated or expectations are not met.

In most employment practices lawsuits, defense costs equal or exceed the cost of the insurance. This alone should be a prime motive for inclusion of EPLI as an integral part of your overall business insurance program. Your assets should not be put in jeopardy by the uninsured expense of defending an employment related claim, suit, or allegation.

EPLI is offered as a stand-alone policy or included in some Directors & Officers Liability Insurance (D&O) policies. Coverage varies significantly from carrier to carrier, so associations should work closely with their insurance representatives to choose the best policy for their circumstances.

Where should I go for more information?

Employment practices liability is an increasing area of concern for community associations. It is critical to review your association's legal responsibilities and insurance needs with qualified professionals, including your association's legal counsel.

If you have any questions or need further information, please contact Steve Dickerson (703-205-8788 or Steve.Dickerson@usi.biz) or Theresa Melson (703-205-8753 or Theresa.Melson@usi.biz).



ASK THE EXPERT

“Ask the Expert” is a regular column in *Insurance Focus*, featuring an interview with an expert about an important insurance issue facing community associations. This month our expert is Mr. Peter Guattery, a partner with Whiteford, Taylor and Preston L.L.P., who represents public and private employers in all aspects of their employment relationship. Mr. Guattery can be reached at 410-347-9431 or pguattery@wtplaw.com.

Q: Why do we need handbooks and written guidelines for employees?

A: Employee handbooks offer employers the opportunity to communicate personnel policies, employee benefits, work rules, and standards to all employees in a single document. They also provide valuable instruction and guidance for supervisors and personnel administrators regarding the implementation and enforcement of company policies, thus fostering uniform and consistent treatment of employees and reducing the risk of discriminatory treatment.

In the context of discrimination claims, for example, investigative agencies routinely request copies of all work rules, attendance standards, and other policies relevant to the charge of discrimination. Having those policies readily available in an employee handbook can further the employer's defense to the claim, as it will demonstrate expected standards of conduct that were clearly communicated to employees. Where policies are not memorialized in writing and there is no guidance for supervisors, there is a greater risk of inconsistent treatment of similar cases. This may, in turn, raise the possibility of a finding of discriminatory treatment.

Anti-discrimination laws also require that employers develop and publish policies against harassment discrimination in general. Although such policies may be posted in the workplace, a posting may become covered over, torn down, or simply ignored by employees. By placing a harassment policy in the handbook and requiring all employees to acknowledge receipt of the handbook, the employer will have satisfied one evidentiary hurdle

in demonstrating that it has a policy in place and that it is effectively communicated to employees.

More recently, legislatures are enacting laws with specific requirements of the law be communicated to employees through the employee handbook, or requiring that employers clearly communicate their policies to employees on matters such as vacation benefits, or be subject to a legal presumption created by statute.

Handbooks also provide benefits in other areas. An almost universal basis for disqualification for unemployment benefits, for example, is whether an employee has failed to conform to expected standards of conduct. An unemployment hearing examiner will usually ask the employer to explain its rules of conduct. The handbook that provides those standards of conduct will satisfy this requirement and strengthen the employer's case.

Employee handbooks also serve to define entitlement to certain benefits such as accrued vacation pay and sick leave. Absent a state law that forbids the forfeiture of accrued vacation, an employer's written policy on whether vacation time is paid out on termination will usually control. Absent such a policy, inconsistent treatment of vacation pay upon termination is likely to be claimed, which may lead to claims for failure to pay accrued wages seeking double and triple damages and attorneys' fees in some cases.

In short, an employee handbook, if properly prepared and presented to the employees, is vital to prepare for and defend against employee claims and to provide a guideline for consistent and fair enforcement of company rules.

