



Employment Law Update

EMPLOYMENT DISCRIMINATION OVERVIEW

The Civil Rights Movement of the 1960's focused the attention of the nation and the country's legislative bodies on discrimination. As a result the first national and best known, employment anti-discrimination law, Title VII of the Civil rights Act of 1964 (Title VII) was enacted. In addition to this federal law, many states, and some cities, also have enacted laws prohibiting discrimination in employment. The common element in all of these laws is that they bar an employer from taking any type of an adverse employment action against employees, or applicants for employment, on almost any grounds, aside from the quality of the employee's work or the nature of the employee's personality.

Race Religion, National Origin, Gender and Religion

In California the primary law is the Fair Employment and Housing Act (FEHA) contained in the Government Code and enforced by the Department of Fair Employment and Housing (DFEH). Title VII and various other federal laws, and FEHA, protect employees in specified classes (protected classes). It is illegal for an employer to base an employment decision, either in whole or in part, on the employees, race, national origin, gender, religion, sexual orientation or preference, medical condition or disability. Employment actions include hiring, firing and discipline, denial of training or promotional opportunity, demotion and harassment.

In addition, it is illegal for an employer to adopt a policy or practice that has a "disparate impact" on members of a protected class, such as by adopting hiring criteria that tend to screen out women or minorities, or by requiring a test for promotion on which a particular class tends to score badly. Such a policy or test, like a specific policy that only men can hold a certain job, is legal only if it can be shown that the criteria the policy establishes or the test screens is a "Bona Fide Occupational Qualification" or BFOQ. For example, a strength test that tends to screen out women, but is necessary to determine if the applicant has the strength required for the job.

Equal Pay Discrimination

Both State and federal law require employers subject to the Wage-Hour Laws to provide equal pay to men and women who perform "equal work," unless the difference in pay is caused by differences in seniority, merit or some other factor that is not based on gender.

Age Discrimination

FEHA and the federal Age Discrimination in Employment Act (ADEA) bar discrimination against employees over the age of forty. Policies that have a disparate impact on older workers are treated differently under California and federal law.

Disability Discrimination

FEHA and the federal Americans with Disabilities Act (ADA) prohibit discrimination against “disabled” persons who are otherwise able to perform the “essential functions of the job” either with or without a “reasonable accommodation.” Unlike other civil rights laws which protect easily identifiable classes such as race or gender, in order to be protected as disabled an employee or applicant must show that he or she is, in fact “disabled,” has a history of being “disabled,” or was regarded or perceived as “disabled” by the employer. Once the employee demonstrates that he or she is in the protected class the employee must show that he or she can perform the essential job functions with or without a “reasonable accommodation.” If the accommodation is not reasonable or imposes an undue hardship on the employer, the employee is not qualified for the position.

FEHA is similar in many respects to ADA, but there are also substantial differences which provide more protection to employees.

National Origin Discrimination

The federal Immigration Reform and Control Act (IRCA) bars any employer with three or more employees from discrimination against a U.S. citizen, or a person lawfully permitted to work in the United States on the basis of national origin. This is in addition to the protections under Title VII and FEHA.

Enforcement

With the exception of IRCA and the equal pay laws, each of the anti-discrimination laws requires employees to exhaust administrative remedies prior to bringing a lawsuit under the law. In the case of the federal laws the administrative agency is the Equal Employment Opportunity Commission (EEOC) and in California it is the DFEH. These agencies are charged with investigating the allegations that the law has been violated and seeking a resolution through negotiation. If the agency is unable to resolve the complaint the complainant is issued a “right to sue” and can then proceed in court.

However, in California employees can file a lawsuit based on a violation of public policy, as expressed in the statutes, without exhausting the administrative remedies. Under both California and federal anti-discrimination laws the employee who prevails is entitled to recover his or her reasonable attorneys’ fees. In California employees rarely sue under the federal law because the case can be removed to the less plaintiff friendly federal court and because under California law there is no cap on pu-

Ezra | Brutzkus | Gubner LLP offers its clients advice and counsel in all areas of labor and employment law. **Richard L. Mann** has 30 years of experience representing employers around the nation in all aspects of labor and employment law including discrimination, wrongful termination and wage-hour disputes and traditional labor relations. Mr. Mann has represented employers in a variety of industries including apparel, hospitality, manufacturing, transportation, entertainment, packaging and various service industries.

The E|B|G Update is intended to present a brief overview of current legal issues. Nothing contained in this Update should be understood to be legal advice on a specific, individual matter. It is general commentary on the subjects discussed. Your questions and comments are welcome.