

2012 enforcement trends in employment law: hiring and safety

We're now well into the first quarter of the year and already a few trends are becoming apparent in the way the federal government will enforce labor and employment laws in 2012. Two significant emphases will be hiring discrimination and workplace safety.

EEOC tackles hiring bias

In the past several months, the EEOC has filed two high-profile lawsuits against employers for alleged discriminatory hiring practices.

The EEOC is suing Bass Pro Shops, alleging that the sporting goods retailer engaged in a pattern or practice of failing to hire black and Hispanic applicants. In the lawsuit, the EEOC alleges that managers made overt racist comments acknowledging the company's discriminatory hiring practices, and stated that black applicants did not fit the chain's corporate profile.

Then the EEOC sued Texas Roadhouse restaurants, alleging that the company systematically failed to hire individuals age 40 or older for "front of the house" positions.

The EEOC's lawsuit alleges that only 1.9% of the front-of-the-house employees are over 40. The EEOC believes that is a statistically significant disparity when compared to the general population, industry statistics and the applicant pool. The suit also alleges that the company instructed managers to hire younger employees by emphasizing youth in its hiring training.

Federal contractor hiring

It's becoming very apparent that both the Office of Federal Contract Compliance Programs (OFCCP) and the EEOC are taking a careful look at the hiring practices of companies that do business with the federal government.

Both agencies are filing complaints against employers they believe are using discriminatory hiring practices.

For example, the OFCCP has filed an administrative complaint against

Cargil Meat Solutions, alleging that the company violated Executive Order 11246 by favoring Asian and Pacific Islander applicants over applicants of other races and by favoring male applicants over female applicants. In the complaint, the OFCCP alleges that more than 4,000 qualified applicants were unlawfully rejected based only on their race or sex.

Significantly, the OFCCP seeks cancellation of the company's government contracts, which are worth more than \$550 million.

Hiring: What employers must do

At this point, these enforcement actions by the OFCCP and EEOC have not resulted in any final determinations or judgments.

Nevertheless, the actions serve as a useful reminder for employers of all sizes to continually monitor their hiring practices and periodically train managers who have hiring responsibilities to ensure compliance with federal, state and local laws.

Note: Just having a federal agency file a lawsuit or complaint generates a great deal of negative publicity—even if it turns out the suit was not well-founded.

OSHA focuses on falls

Although the data for 2011 is not yet final, OSHA expects problems related to employees falling off scaffolds, roofs, ladders and other high places will be the top workplace violations in 2011.

In addition, the most frequently violated standard subsection is expected to be the rule covering residential construction (29 C.F.R. Section 1926.501(b)(13)).

Other top violations are expected to include:

- Hazard communication
- Respiratory protection
- Lockout/tagout procedures
- Electrical and wiring methods and requirements

- Powered industrial trucks
- Machine guarding.

OSHA's data serves as a reminder to employers that falls are the leading cause of death among construction workers. They account for approximately one-third of all construction fatalities.

Generally speaking, OSHA fall-protection standard requires anyone working six feet or more above the ground to have fall protection. OSHA does not necessarily mandate the type of fall protection that must be used in any given situation, but rather offers many methods to achieve compliance.

A combination of different fall-protection measures are often appropriate, including:

- Physical fall-prevention methods, such as guardrails, warning lines, controlled-access zones, hole covers or safety monitoring systems
- Fall-arrest systems, including safety nets or full-body harnesses
- Fall-protection plans, which are administrative controls that rely on special training and specific work practices and protocols
- Employee training, which focuses on identifying hazards and demonstrating proficiency in the use of fall protection systems.

As we head into 2012, we are reminded of the words of Dr. Carl Sagan: "You have to know the past to understand the present." Employers can certainly learn from past OSHA data by reviewing the adequacy of their fall-protection measures, so they can avoid potential OSHA violations in the future.

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