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Labor and Employment Law Notes

BEWARE: EEOC'S BROAD POWER-ONE CLAIM MAY LEAD TO ANOTHER

Something to keep in mind should an employee file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), the EEOC has broad investigatory powers and the right to request and obtain "any evidence or any person being investigated or proceeded against that relates to unlawful employment practices and is relevant to the charge under investigation." While the EEOC has broad investigatory power, the information being sought must be reasonably relevant to the matter and not too indefinite or unreasonably broad or burdensome. Seventh Circuit case law has determined that the "requirement of relevance, like the charge itself, is designed to cabin the EEOC's authority and prevent 'fishing expeditions.'" The Seventh Circuit has held that the EEOC is entitled to have access only to evidence that is relevant and material to the charge of discrimination. The notion of relevancy and the EEOC investigation is a broad one. Courts routinely give the EEOC access to information which cast a light on the allegations against the employer. The courts have found that most, but not all, information the EEOC seeks is considered to be relevant for the purposes of the investigation.

Even information that may not seem relevant to the employer may be relevant to the EEOC. By congressional mandate the EEOC is required to work to prevent any person from engaging in any unlawful employment practice. As a result, the EEOC Compliance Manual instructs its investigators to be on the lookout for possible unrelated violation of the law which can be considered later as a basis for new charges. What this means is that employers need to be aware that one charge may ultimately lead another. The employer should have a thorough employee handbook in place, as well as implementation procedures in place to ensure that they are in compliance with anti-discrimination laws. Moreover, when employers are responding to charges of discrimination they need to be very judicious in making objections to or refusing to comply with requests for information that they deem irrelevant. In the eyes of the EEOC, cooperation equates to transparency. Rarely does an employer have a legitimate objection to the EEOC's request for additional information.

THE EEOC TARGETS RANDOM ALCOHOL TESTS

The EEOC views alcohol tests similar to medical exams, making them illegal under the Americans with Disabilities Act. The EEOC recently filed a lawsuit against an employer in Pennsylvania after the company fired an employee based on a positive alcohol test result. The employer required the random test for all probationary employees. The Obama administration, as well as the EEOC, views these random drug tests as examples of systemic discrimination. In

general, the EEOC is especially interested in cases of discrimination against multiple employees, which include these random drug tests. Keep in mind that illegal drug testing can be performed at random because it is not considered a medical examination. On the other hand, random alcohol testing is considered a medical examination. Alcohol tests fall under the category of medical exams because they are “invasive” and normally require blood, urine, or breath to be drawn. These exams are permitted only when the outcome is “job-related” and “consistent with business necessity.” Medical exams are only permitted when employers have “a reasonable belief, based on objective evidence, that a particular employee will be unable to perform the job or will pose a direct threat due to a medical condition.” Employers engaging in testing without any observed, objective evidence of a problem are inviting a fight with the EEOC. The employer and his employment lawyer should have knowledge of or a copy of the EEOC guidelines on random testing to ensure that the employer knows when it is permitted. Although random alcohol testing has always been considered a medical exam it is now a target of the EEOC’s stepped-up enforcement as it is related to the current administration’s view that it is a systemic form of discrimination and needs to be addressed more vigorously by the EEOC. If an employer has questions regarding its alcohol testing it should work with counsel to ensure that policy is in line with the EEOC position on random testing.

THE EEOC RECEIVED A RECORD NUMBER OF CHARGES IN 2010

The EEOC ended 2010 with 80,338 pending charges. That is an increase of only 570 charges, or less that 1 percent. Between 2008 and 2009, the EEOC’s pending inventory increased 15.9 percent. The EEOC claims it is on a path toward rebuilding and on track to make further progress in the upcoming fiscal year to more efficiently and effectively enforce the federal laws prohibiting employment discrimination. The EEOC received a record 99,922 charges in 2010. That is the highest number of charges in the agency’s 45-year history. The EEOC secured more than $319,000,000 in monetary benefits for individuals. This is the highest level of monetary relief obtained through administrative enforcement in the EEOC’s history. The mediation program ended the year with a record 9,370 resolutions, 10 percent more than 2009. Mediation resulted in more than $142,000,000 in monetary benefits. The EEOC has vowed to attack systemic discrimination and the agency continued its considered effort to build a strong national systemic enforcement program. At the end of the year there were 465 systemic investigations involving more than 2,000 charges. Employers need to be diligent and a system in place to prevent, identify and resolve all forms of discrimination, particularly systemic discrimination should it exist in the workplace.