

# LABOR AND EMPLOYMENT LAW UPDATE



## DISCRIMINATION CLAIMS JUMP TO RECORD LEVELS!

According to a report released this Spring by the Equal Employment Opportunity Commission (“EEOC”), the number of complaints of employment discrimination filed with the agency jumped by more than 15% from 82,792 in FY 2007 to 95,402 in FY 2008. The agency had not seen an increase of this magnitude for many years. The 95,402 complaints smashed the previous record of complaints for FY 2003 by 13%.

Every category of employment discrimination for which the EEOC accepts complaints experienced a double-digit increase in FY 2008 over FY 2007:

- AGE: 29% increase
- RETALIATION: 23% increase
- SEX: 14% increase
- RELIGION: 14% increase
- NATIONAL ORIGIN: 13% increase
- RACE: 11% increase
- DISABILITY: 10% increase

Even sub-categories of complaints tracked by the agency experienced a double-digit increase:

- HARASSMENT (ALL FORMS): 20% increase
- PREGNANCY: 13% increase
- SEXUAL HARASSMENT: 11% increase

These staggering numbers have raised several questions regarding their meaning for employers.

## LOOKING BACKWARD

The EEOC report said the “surge in charge filings may be due to multiple factors, including economic conditions, increased diversity and demographic shifts in the labor force, employees’ greater awareness of the law, EEOC’s focus on systemic litigation, and changes to EEOC’s intake practices.” Two of these factors warrant further mention.

**ECONOMIC CONDITIONS:** Circumstances unique to a faltering economy may indeed be a reason for the sharp rise in discrimination claims.

**ADVERSE EMPLOYMENT DECISIONS:** Decisions which have an adverse economic impact on an employee, such as terminations, demotions, denials of promotion, etc., always create risks of discrimination claims. Adverse employment decisions have been plentiful in the current economy.

**PROLONGED UNEMPLOYMENT:** A short hiatus between jobs provides less of an economic incentive than a long hiatus for a terminated employee to file a discrimination claim against a former employer. Longer hiatuses are more common in the current economy.

**PROSPECT OF UNEMPLOYMENT:** Just as the prospect of continued employment may discourage an employee from claiming discrimination, the prospect of unemployment may encourage an employee to claim discrimination as a shield to termination.

**EMPLOYEES’ GREATER AWARENESS OF THE LAW:** As set forth in previous Labor and Employment Law updates, recent decisions of the U.S. Supreme Court have consistently confirmed the broad availability of certain types of discrimination claims. The decisions addressing anti-retaliation laws are a prime example. While greater awareness of the law may be a factor in the spike in complaints, it may be more accurate to say that employees, or their legal counsel, are aware of the broad reach dictated by recent Supreme Court decisions.

## LOOKING FORWARD

So, what will EEOC complaint statistics look like in future fiscal years? The following factors indicate that the number of discrimination complaints will only continue to soar.

**ECONOMIC CONDITIONS:** The EEOC statistics encompass the agency's fiscal year, which ended on September 30, 2008. The statistics thus do not include persons affected by the economic downturn since September 30, 2008 and those persons who waited until after that date to file a complaint. For these reasons, EEOC spokesperson David Grinberg said that the FY 2008 statistics may not reflect the "full impact of the recession." Indeed, he predicted that job bias claims may swell to more than 100,000 in FY 2009 due to "ongoing mass layoffs and scant hiring, amongst other factors."

**AMENDMENTS EFFECTIVE IN THE PAST YEAR:** The statistics for FY 2008 do not include complaints filed under amendments to employment discrimination laws passed in the last year:

**ADA AMENDMENTS ACT OF 2008:** These amendments, which became effective on January 1, 2009, expand the scope of persons protected from discrimination by the Americans With Disabilities Act.

**LILLY LEDBETTER ACT OF 2009:** On January 29, 2009, President Barack Obama signed a law amending several federal laws outlawing discrimination in employment to extend the deadlines for filing wage discrimination claims.

**LAWS AND AMENDMENTS WHICH WILL/MAY BECOME EFFECTIVE:** The EEOC statistics do not include complaints which may be filed with the agency under laws which have yet to take effect:

**GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008:** This Act, which becomes effective on November 9, 2009, prohibits employers from discriminating on the basis of genetic information.

**CONGRESSIONAL BILLS:** Bills have been introduced in the past which would (1) extend employment discrimination protection to sexual preference; and (2) strengthen the remedies available to discrimination claimants.

## TAKEAWAYS

To be sure, not all complaints of employment discrimination filed with the EEOC have merit. Still, employers should anticipate that their employment decisions may be reviewed by the agency; they should be especially vigilant with respect to termination decisions. Other risk management options should also be explored, such as (1) severance agreements, and (2) employment practices liability insurance.

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