Guard Against Litigation in 2012

Ronnie Reese

The employment landscape is vast, legal claims are rising and conflict will occur. How conflicts are managed is the true indicator of talent management success.

Americans are either way overworked and overstressed, or bored and not working at all, according to Daniel Bowling, senior lecturing fellow at the Duke University School of Law. Because of this, employment law is at a crossroads, said Bowling, a 30-year veteran of employment law and former senior vice president of human resources for Coca-Cola Enterprises Inc.

In many ways the workplace is changing faster than the law can react. The economic crisis that began in 2008 has led to rising unemployment and increased litigation, and emergent technologies quickly have changed the way employees approach their work.

Rising Claim Numbers

In turn, talent leaders are constantly adjusting leadership methods and strategies. The results can be contentious, evident in the number of U.S. Equal Employment Opportunity Commission (EEOC) claims reaching a 14-year high of 99,922 for fiscal year 2010.

"The plaintiff's bar has become increasingly optimistic and aggressive," said Halima Horton, partner at McGuireWoods LLP. Horton said in addition to economic trouble and more litigation, there are decisions being made at the National Labor Relations Board (NLRB) that will deprive employees of their federal rights to join unions.

A June decision by the U.S. Supreme Court to dismiss a class-action Title VII discrimination lawsuit filed by more than 1 million female Wal-Mart employees may have a major impact on leveling the field in employment litigation. In what some are considering the largest class-action case in U.S. history, the court ruled 5-4 the plaintiffs could not sue as a class due to the disparate nature of individual instances of alleged discrimination.

ON THE WEB

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"Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once," said Justice Antonin Scalia when delivering the court's majority opinion. "Their claims must depend upon a common contention — for example, the assertion of discriminatory bias on the part of the same supervisor."

In the Wal-Mart case, the respondents filed suit "about literally millions of employment decisions at once," Scalia said. Without a common rationale for those decisions, "it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question, 'why was I disfavored?'"

The ruling in the Wal-Mart case set a precedent, as the plaintiff will be required to prove unlawful employer action with respect to the individual employee, and a case can no longer lump all employees regardless of their work location.

This decision is just one of many issues facing talent managers and HR administrators in 2012. Questions about disability rights, retaliation claims, online communication and unemployment discrimination all came to the forefront in the past year and need to be addressed.

Devil in the Details

Last September, NLRB Administrative Law Judge Arthur J. Amchan ruled that Hispanics United of Buffalo

Inc., a Buffalo, N.Y., nonprofit, unlawfully terminated five employees for posting comments on the social networking site Facebook that were critical of the organization and of a staff member who had complained about their job performance.

The basis for Amchan's decision — the first of its kind, according to the NLRB — was that the comments were a conversation about the terms and conditions of employment, and protected under the National Labor Relations Act. Further, the employees were defending themselves against accusations they believed their co-worker was going to make to management, Amchan said.

"Workplace rules regarding the use of personal electronics at work, like tweeting about work while at work, will be a rising issue," said Deborah Giannoni-Jackson, vice president of employee resource management for the U.S. Postal Service. Giannoni-Jackson said employee privacy and employer use of information from Facebook and other social sites will continue to be concerns for employers and employee privacy advocates.

"My advice to companies is to embrace this culture," said Bowling. "Don't fight it, but create sound rules."

According to Andrew Gould, partner at Wick Phillips Gould & Martin LLP in Texas, a retaliation claim is one in which an employee engages in protected activity of some kind, and then suffers adverse action from an employer because of that activity. In fiscal year 1997, there were 18,198 retaliation claims filed for all statutes of labor discrimination enforced by the EEOC, according to agency statistics.

By fiscal year 2010, this number had nearly doubled to 36,258, the largest increase for any subset of total claims over 10,000. Of those 36,258 claims, 85 percent

were Title VII charges for employer discrimination on the basis of race, color, religion, sex or national origin.

The number of lawsuits the EEOC pursues for all claims is less than 1 percent, which shows there is no barrier in filing, Gould said. He said this presents challenges for companies with regard to time and money spent dealing with claims.

"The law is constantly changing regarding retaliation claims," said Gould, who heads his firm's labor and employment practice. He cited self-preservation from employees facing discipline or termination and an increase in the EEOC budget allowing the organization to hire more investigators as possible reasons for the increase in retaliation claims, but another cause may be the nature of how individuals act when faced with adversity.

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"It reflects the reality that the concept of retaliation is one people can relate to," Gould said.

Change, Change, Change

Last March, the EEOC issued the final regulations of the Americans with Disabilities Act Amendments Act (ADAAA), which expanded the definition of the term "disability" and made the law more inclusive of who could be covered. The law also amended the Rehabilitation Act, which is the federal employee version of the Americans with Disabilities Act.

"As a result companies are having to deal with many more reasonable accommodation situations for individuals that, prior to the law, were not qualified for accommodation because they were not considered a 'person with disability' under the law," Gould said.

According to the EEOC, Congress passed the ADAAA to eliminate "mini-trials" determining whether a person had a disability, and to focus attention on the merits of a case. "The question of whether an individual meets the definition of disability under this part should not demand extensive analysis," the agency said in an August report.

"This has caused us to review our analysis so that it focused less on whether the employee's condition was, in fact, a disability — to whether the company could reasonably accommodate the employee's specific limitations," said Giannoni-Jackson of the U.S. Postal Service.

Logic would seemingly indicate that the unemployed are those most in need of employment, but some companies are adding a discouraging caveat to their job postings, requiring that applicants must be currently employed.

"That, to me, seems like a little bit of a knee-jerk reaction to what we're seeing," Gould said. "And I'm not sure how that's supposed to spur further hiring."

In March, the New Jersey Legislature approved a bill that prohibits employers from advertising job postings that suggest unemployed individuals need not apply, and a federal law — the Fair Employment Opportunity Act — has been introduced in the U.S. Senate and House of Representatives.

The American Jobs Act, the $447 billion employment initiative proposed by President Barack Obama, also would prohibit employers from discriminating against unemployed workers, protecting millions of jobless Americans.

"If anyone is going to hire, let's not put road blocks out there to make them not hire those who are currently unemployed," Gould said.

Down the Road

"Employment law is constantly evolving," said Michael Walker, associate general counsel for electronics distributor Avnet Inc. Walker said employers must vigilantly evaluate policies and procedures to ensure legal compliance, and take a holistic approach to manage an increasingly vast regulatory landscape.

Politics and economics are always a factor in navigating employment law, but employers must be able to adapt to an ever-changing and complex legal environment. "With the upcoming U.S. elections in 2012, there's the potential for dramatic changes to employment-related legislative policy," he said. "Or, perhaps none at all."

Walker said there are three key areas HR administrators and talent leaders must focus on to reduce litigation: solid hiring and promotion best practices, training and performance management. He said talent managers can avoid employment-related legal claims by putting the right person into the right job upfront, and should look beyond training and performance management as solely developmental tools.

"From a legal standpoint, training serves an additional purpose and can help employers defend against certain claims," Walker said. "Numerous claims could be avoided with solid and consistent performance management."

For Giannoni-Jackson, the biggest pitfalls talent managers need to avoid are not informing supervisors, administrators or other employees of changes in employment law and regulation, and not keeping company policies and processes up to date. The employment landscape is vast, claims are on the rise and conflict will occur. How conflicts are managed is the true indicator of success.

"Every dispute can be a learning experience," she said. "The key is when you learn the lesson." TM

Preparation, Communication Help Avoid Costly Legal Action

Andrew Gould, a partner at Wick Phillips Gould & Martin LLP, said from one year to the next, employment law can be used to either help business grow in the good times, or help with layoffs and severance concerns when times are bad.

"This year is more about keeping the talent you have," Gould said of employers, and for the employees who are not contributing to the bottom line, "making those decisions that you've just been putting off for whatever reason [and] not wanting to make."

Much has been made of the economic woes and rising unemployment in the U.S., but Gould, who heads the labor and employment practice of the Texas-based law firm, said he did not receive as many calls about plant closings and mass layoffs in 2011 as in years past. Nor has he seen seismic changes in the type of employment questions and counseling issues corporations have regarding their employees.

This does not mean talent leaders have completely turned a corner. U.S. Equal Employment Opportunity Commission claims are at an all-time high, and on the verge of reaching the 100,000 mark for the first time in the agency's 46-year history.

"Companies each year, they learn how not to violate the law and what the law requires," Gould said. "They're getting better at that, and one would think that number should get smaller."

Gould said he has found many EEOC claims do not have much merit and are filed by individuals representing themselves who may have been let go under legitimate circumstances, but are seeking a quick financial return. He referred to the 90,000-plus claims filed in financial year 2010 as "an amazing claim statistic," but said the commission only pursues about 700 of those claims — less than 1 percent.

"That just shows how taxed the EEOC is, and a lot [of it] does have to do with the fact there are no barriers to putting in a claim," Gould said. This presents challenges for companies in terms of lost time and money.

There are a number of resources to help employers and employees stay up-to-date on various protections. A good place to start is with a regular update of policies and handbooks, but Gould said the best protection comes from other team members.

"Just about any decision or any adverse decision that is going to impact an employee [should] be bounced off someone else at the company, or at least thought through so that someone might be able to spot an issue that might not entirely be obvious," he said.

Few decisions need to be made immediately, Gould said. From an administrative standpoint, businesses want things done quickly, and they may not be aware of some of the legal protections employees have. Human resource administrators and talent leaders must make sure management has all of the facts and that a situation has been thoroughly examined before a decision is made.

In an uncertain economic climate, when companies are constantly tightening their belts, taking a little extra time upfront may save money in the end.

"The cost of having to respond to an EEOC charge and deal with a federal investigator or the department of labor on a wage-hour matter is going to far exceed the cost associated with taking to time to at least try and make the most reasonable decision," Gould said. TM

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