

## **HOLDING EMPLOYERS AND EMPLOYEES ACCOUNTABLE**

### **Employment Discrimination Laws**

#### **I. Overview**

In the State of New York, there is a long settled rule that employees are hired “at will” unless they enter into an employment contract. This means that the employer or employee can end the employment relationship for any reason or no reason so long as it is not in violation of New York State or Federal Law. The question is, therefore, when are New York State and/or Federal Laws violated relative to discrimination in the workplace.

Generally, an employer may not discriminate against an employee who is a member of a protected class with regard to its decision to hire, promote or terminate an individual and may not discriminate against such individual in compensation or in terms, conditions or privileges of employment.

In 1945, the New York State Legislature passed the country’s first civil rights law.

Today, the New York State Human Rights Law, Executive Law Sections 290 et seq., is considered to be one of the broadest anti-discrimination statutes in the United States. Thus, it is always important to view both the New York State’s Human Rights Law as well as any federal laws when faced with an issue involving discrimination in the workplace in New York State as they may differ substantially. For example, the New York Human Rights Law protected an employee against disability discrimination many years before the Americans with Disabilities Act was enacted in 1990. Also, the definition of “disability” is broader under the New York Human Rights Law than it is under the Americans with Disabilities Act. With regard to age discrimination, the New York Human Rights Law protects a person eighteen (18) years or over against age discrimination from an employer of four (4) or more employees. In contrast, the Age Discrimination in Employment Act enacted in 1967 protects a person over age forty (40) against age discrimination from an employer of twenty (20) or more employees.

## **II. New York State Human Rights Law**

### **A. Persons protected**

1. Age;
2. Creed;
3. Disability (effective January 19, 2016, a pregnancy-related condition may be covered as disability discrimination as well as sex discrimination);
4. Domestic violence victim status (effective July 7, 2009);
5. Familial Status (effective January 19, 2016);
6. Marital status;
7. Military status;
8. National origin;
9. Predisposing genetic characteristics;
10. Prior arrest or conviction record;
11. Race;
12. Color;
13. Retaliation for opposing unlawful discriminatory practices; and
14. Sex (pregnancy, sexual orientation (added in 2002), gender identity, transgender status, and gender dysphoria (effective January 19, 2016));

Note: There are other New York State laws protecting individuals from discrimination (i.e. New York Workers' Compensation Law Section 120) that are not in this introductory overview.

### **B. Employers affected**

The New York Human Rights Law applies to employers of four (4) or more employees. However, effective January 19, 2016, a complaint of sexual harassment may be made against any employer, even if the employer has fewer than four (4) employees.

**C. How and When to Take Action**

The person discriminated against can proceed in one of two ways:

1. filing an administrative complaint with the New York State Division of Human Rights (Division) within one (1) year (or cross filing with the Equal Employment Opportunity Commission (EEOC) by filing with the EEOC within 300 days); or
2. filing a complaint in a court of competent jurisdiction (New York State Supreme Court) within three (3) years.

**D. The New York State Division of Human Rights Process**

The person, on his/her own or by an attorney, prepares and files a Complaint with the Division. This will begin the investigative process. The Division will notify the person(s) or entity(ies) being accused of discrimination [Respondent(s)]. At this time, the Division will address any jurisdictional issues and cross file the Complaint with the EEOC. Next, the Division will conduct an investigation which could include, but is not limited to, requesting the production of documents, asking for written responses to questions, conducting a field investigation, and one and/or two party investigatory conferences.

Once the Division has completed its investigation, the Division renders a determination as to whether or not there is probable cause that an act of discrimination has occurred. The Division will then advise the parties of its determination. If there is a finding of no probable cause, or lack of jurisdiction, the matter is dismissed. A Complainant may appeal to the New York State Supreme Court within sixty (60) days. If the Division determines that there is probable cause, the parties will be notified that the case will proceed to a Public Hearing before an Administrative Law Judge who will issue a Recommended Order to the Commissioner either dismissing the Complaint or finding discrimination. If the Commissioner finds discrimination,

the Respondent(s) may be ordered to pay actual damages (i.e., back pay, compensation for lost employment benefits such as health insurance, pension and profit sharing); front pay (if reinstatement is not appropriate); compensatory damages (i.e., mental anguish, pain and suffering); equitable relief (i.e., reinstatement to employment, cease and desist order, adoption of anti-discrimination policies); and attorney's fees (only in sex cases filed on or after January 19, 2016). In addition, the Commissioner may award civil fines and penalties payable to New York State for conduct occurring on or after July 6, 2009 in an amount of up to \$50,000 for an employer engaging unlawful discriminatory practices and up to \$100,000, if the discrimination is determined to be willful, wanton or malicious. The Commissioner's Order may be appealed by either party to the New York State Supreme Court within sixty (60) days.

### **III. Federal employment discrimination laws**

#### **A. Persons protected**

Federal laws prohibit discrimination in the workplace on the following basis:

1. Age (Age Discrimination in Employment Act of 1967 (ADEA));
2. Disability (American with Disabilities Act of 1990 (ADA));
3. Equal Pay/Compensation (Equal Pay Act of 1963 (EPA));
4. Genetic Information (Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA));
5. National Origin (Title VII of the Civil Rights Act of 1964);
6. Race (Title VII of the Civil Rights Act of 1964);
7. Color (Title VII of the Civil Rights Act of 1964);
8. Religion (Title VII of the Civil Rights Act of 1964);

9. Sex (includes pregnancy, sexual orientation, gender identity, transgender status,) (Title VII of the Civil Rights Act of 1964/Pregnancy Discrimination Act);
10. Harassment (Title VII; ADEA; ADA);
11. Retaliation (Title VII; ADEA; ADA)

Note: There are other federal laws protecting individuals from discrimination (i.e., Civil Rights Act, 42 U.S.C. Sections 1981 and 1983) that are not included in this introductory overview.

### **B. Employers affected**

Generally, if an employer has or had least fifteen (15) employees for at least twenty (20) calendar weeks in the year the claim is filed or the prior year, the business is covered for discrimination claims that involve race, color, religion, sex, national origin, age, disability or genetic information. If the complaint involves age discrimination, the employer must have or had at least twenty (20) employees who worked for the company for at least twenty (20) calendar weeks in the year the claim is filed or the prior year. Almost all employers are covered by the Equal Pay Act (EPA). Employees are defined to include people who work full-time, part-time, seasonally or on a temporary basis.

### **C. How and When to Take Action**

Before a person can file a job discrimination lawsuit against his/her employer, the person discriminated against must file an administrative complaint with the Equal Employment Opportunity Commission (EEOC) within three hundred (300) days (or cross file with the New York State Division of Human Rights within three hundred (300) days) except for claims under the EPA. If it involves a federal employer, there is a different complaint process.

### **D. The Equal Employment Opportunity Commission Process**

The person, on his/her own or by an attorney, prepares and files a Charge of Discrimination with the EEOC. This will begin the investigative process. Within ten (10) days of the filing date of the Charge of Discrimination the EEOC will send a notice of the Charge of Discrimination to the person(s) or entity(ies) being accused of discrimination [Respondent(s)]. The EEOC will address any jurisdictional issues and cross file the Charge of Discrimination with the New York State Division of Human Rights (Division).

In some cases, the EEOC will ask the Complainant and Employer to take part in its Mediation Program. If both parties agree a Mediation will occur. If there is no Mediation or resolution at Mediation, an investigation will be conducted which could include, but is not limited to, requesting the production of documents, asking for written responses to questions, a field investigation and a one or two party investigatory conference.

In order to file a lawsuit in Federal Court if the Charge of Discrimination is based upon a violation of Title VII (discrimination based on race, color, religion, sex and national origin), or the ADA (based on disability), the Complainant must receive a Notice of Right to Sue from the EEOC. Generally, the Complainant must wait one hundred eighty (180) days to allow the EEOC an opportunity to resolve the Charge of Discrimination before a Notice of Right to Sue can be given upon request. If the Charge of Discrimination is based upon a violation of the ADEA, a lawsuit may be filed in Federal Court sixty (60) days after the Charge of Discrimination was filed with the EEOC. If the Charge of Discrimination is based upon a violation of the EPA, a lawsuit may be filed in federal court within two (2) years from receipt of the last discriminatory paycheck.

Once the investigation is complete, there are a number of actions that may be taken by the EEOC. If the EEOC cannot determine if the law was violated, a Notice of Right to Sue is sent to the Complainant. If the EEOC determines the law may have been violated, it will attempt to reach a settlement with the Respondent. If no settlement is reached, the EEOC legal staff

determines whether the agency will file a lawsuit. If the EEOC decides not to file a lawsuit, it will issue a Notice of Right to Sue to the Complainant.

If successful, damages awarded in cases involving intentional discrimination based on a person's race, color, national origin, sex, religion, disability, or genetic information, may include actual damages (i.e., back pay, compensation for lost employment benefits such as health insurance, pension and profit sharing), equitable relief (i.e. reinstatement to employment, cease and desist order, adoption of anti-discrimination policies); front pay (if reinstatement is not appropriate); compensatory and punitive damages; attorney's fees and costs. Note that there are limits on the amount of compensatory and punitive damages a person can recover which vary based upon the size of the employer: 15-100 employees \$50,000; 101-200 employees \$100,000; 201-500 employees \$200,000; greater than 500 employees \$300,000. In cases under the ADA or EPA, neither compensatory nor punitive damages can be recovered, but liquidated damages can be awarded to punish a malicious or reckless act of discrimination. The amount of liquidated damages is equal to the amount of back pay awarded.

**What an employee and employer should do before an employee files a complaint of discrimination with an outside administrative agency or directly in court**

- I. **Know the New York State and Federal Law relative to discrimination**
- II. **Know the policies of the employer regarding discrimination**
- III. **Keep a record of the discriminatory conduct**
  - A. Make sure to specifically describe the discriminatory conduct that occurred; who engaged in the discriminatory conduct; when the discriminatory conduct occurred; where the discriminatory conduct occurred; and who was present to witness the discriminatory conduct.
- IV. **Know if there is an Internal Complaint Process**

- A. Is there a written policy regarding discrimination? Is there a specific procedure for making a complaint of discrimination? If so, the employee and employer should follow it. If not, a written complaint of discrimination should be made by the employee to his/her manager and copied to the highest level human resources employee of the employer (i.e., Human Resources Director).
- B. Always make sure that the complaint of discrimination is in writing and a copy of it is retained by the employee and employer. Further, note in writing who the complaint was submitted to and when it was submitted.

V. **Do a full and fair investigation**

- A. Interviews should be done of relevant witnesses and evidence.
- B. A determination should be made setting forth the basis for the determination. If discrimination occurred, action should be taken by the employer. Inaction becomes action. If discrimination did not occur, the employee who complained should be advised and should not be retaliated against for making the complaint of discrimination.

VI. **Limit/Mitigate Damages**

- A. An employee who is terminated by his/her employer is required by law to make reasonable attempts to find other employment to limit his/her damages.
- B. If you are the employer, and the employee who has complained of discrimination continues to work for your company, you do not want to be faced with a retaliation claim. You must treat the employee no different than employees who have not filed a claim of discrimination. You cannot transfer his/her job to California without a legitimate business reason, take away job duties so his/her position is eliminated, ignore or refuse to speak directly to the employee, etc. This type of conduct could be retaliatory and also



possibly lead to a constructive discharge where the employee will leave work claiming that he/she was constructively discharged and be entitled to be paid for not being at work until he/she finds equivalent employment.