Preventing and Responding to Discrimination Complaints Checklist
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Understand the Legal Basics
Prevent Discrimination in Recruiting, Interviewing and Hiring
Prevent Discrimination During the Employment Relationship
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A Checklist to help employers prevent discrimination and minimize the risk of related litigation. It includes information on drafting effective policies, training supervisors and staff, conducting internal investigations and responding to internal discrimination complaints. This Checklist addresses federal law. For information on state law requirements, see the State Q&A Tool under Related Content.

Understand the Legal Basics
• Understand discrimination issues in employment law. In particular, understand employers’ obligations not to discriminate, harass and retaliate against employees under the following federal laws:
  • Title VII of the Civil Rights Act of 1964 (Title VII);
  • Title I and Title V of the Americans with Disabilities Act of 1990 (ADA) (for more information, see Practice Note, Disability Discrimination under the ADA);
  • Age Discrimination in Employment Act of 1967 (ADEA);
  • Genetic Information Nondiscrimination Act of 2008 (GINA);
  • Uniformed Services Employment Reemployment Rights Act of 1994 (USERRA);
  • Section 1981 of the Civil Rights Act of 1866 (42 U.S.C. § 1981); and
  • Equal Pay Act of 1963 (EPA).
• For more information, see Practices Notes, Discrimination: Overview, Harassment and Retaliation.
• Understand state and local employment anti-discrimination laws that may create broader protection for employees. For more information, see Anti-discrimination Laws: State Q&A Tool.
• Understand what employer conduct constitutes discrimination, harassment and retaliation. Legal claims may arise because of, for example:
  • discrimination in interviewing or hiring;
  • discrimination in recruiting or job advertising;
  • discrimination in assignment, duties, transfer or promotion;
  • discrimination in training, apprenticeship or access to employer resources;
  • discrimination in compensation;
  • discrimination in benefits or leave;
  • discrimination in layoff or termination;
  • harassment on the basis of protected class membership; and
  • retaliation for opposing discrimination or harassment, filing a charge of discrimination or harassment, or taking part in related investigations.

• Eliminating discrimination, harassment and retaliation from employment decisions will not completely insulate employers from related Equal Employment Opportunity Commission (EEOC) charges and other litigation. Employers also should avoid the appearance of unlawful practices that could form the basis of a complaint (see Prevent Discrimination in Recruiting, Interviewing and Hiring and Prevent Discrimination During the Employment Relationship).
• Be aware of association claims. Employers should appreciate that:
  • Title VII and the ADA prohibit discrimination against individuals who are associated with protected class members; and
  • an adverse employment action taken against an employee because of protected activity by a related third party (for example, a fiancé) is also considered retaliation.
• Understand the bona fide occupational qualification exception, but use it rarely. As a rule, employers should not make hiring decisions on the basis of protected class status. Title VII and the ADEA recognize a limited bona fide occupational qualification (BFOQ) exception that:
  • authorizes employers to factor sex, religion, national origin or age into an employment decision where an employer can prove that the characteristic is reasonably necessary to the employer’s operations; and
  • can be used only in extraordinary situations (for example, considering the gender of a therapy provider to treat emotionally disturbed and sexually abused children, see Healey v. Southwood Psychiatric Hosp., 78 F.3d 128 (3rd Cir. 1996)).
• Understand the Faragher-Ellerth defense. Under Title VII, employers can defend against hostile work environment claims not involving a tangible adverse employment action under the Faragher-Ellerth defense if they can demonstrate that:
  • they took reasonable care to stop and efficiently remedy the problem; and
  • the employee failed to take advantage of opportunities for recourse.

For more information, see Respond to Internal Complaints Promptly.

• Recognize the EEOC’s role. Filing charges with the EEOC or its state or local equivalent is the first step in adjudicating most employment discrimination claims. That process, referred to as the exhaustion of administrative remedies, generally requires filing a charge and obtaining a right-to-sue letter which authorizes the claimant to proceed in court. Exhaustion of administrative remedies is required under the following federal statutes:
  • Title VII;
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- ADA;
- ADEA; and
- GINA.

For more information, see Preventing and Responding to an EEOC Charge Toolkit.

- **Recognize the role of state and local fair employment practices agencies.** Many state and local governments have their own fair employment practices agencies (FEPAs) that serve as equivalents to the federal EEOC and enforce equivalent state and local laws. Some, but not all, FEPAs require a claimant to exhaust administrative remedies before proceeding in court. Most FEPAs also have work-sharing agreements with the EEOC permitting the agencies to decide which will investigate the charge and issue a determination. In many instances, where there is a FEPA, either:
  - the charge is automatically filed with both agencies; or
  - the charging party may choose to “dual file” the charge.

For more information, see EEOC: Fair Employment Practices Agencies (FEPAs) and Dual Filing.

Prevent Discrimination in Recruiting, Interviewing and Hiring

- **Recruit broadly.** Publicize job openings in a variety of venues and locations to maximize potential for a more diverse applicant pool and ultimately a diverse workforce. Limited recruitment efforts result in limited applicant pools and increase the risk of discrimination claims.

- **Avoid discriminatory job postings.** Eliminate discriminatory selection criteria (such as age, sex or national origin) from job advertisements.

- **Draft thoughtful and accurate job descriptions.** Citing job descriptions that contain objective written standards when evaluating applicants and employees can help defend against discrimination claims. For example, accurate job descriptions help support decisions to:
  - reject applicants who are not qualified for the job;
  - reject unqualified candidates for promotion;
  - impose discipline on employees for failure to meet expectations; and
  - terminate employees for failure to meet expectations.

- **Avoid questions about protected class status in the hiring process.** Avoiding discriminatory questions in the interview or written employment application will reduce the risk of discrimination claims. For more information, see Practice Note, Recruiting and Interviewing: Minimizing Legal Risk, Standard Document, Application for Employment and Avoiding Discriminatory Questions in Interviews Checklist.

- **Ensure that hiring managers and human resources professionals understand employment discrimination law.** Train all hiring managers and human resources professionals in basic employment law best practices. Training may be costly, but it is much less expensive than litigation. Employees who are not trained or who do not appreciate the legal risks of discrimination should not be involved in hiring, promotions, firing or other significant employment decisions (see Train Employees). In addition, sexual harassment training is required in some jurisdictions (for more information see, Sexual Harassment Prevention Training Checklist).

- **Document the basis for recruiting, interviewing and hiring decisions.** Accurate, clear and complete records help employers defend discrimination claims by:
  - demonstrating that employment decisions were based on legitimate, non-discriminatory business reasons; and
  - when applicable, helping the employer use the same actor inference defense, in which the employer can argue that the adverse employment decision was not discriminatory if the person who made the hiring decision also made the termination or other adverse employment decision. In other words, if person X hired an employee regardless
of their protected class status, it may be assumed that person X did not fire that employee because of their protected class status.

- **Recognize the potential need to provide accommodation to applicants.** Accommodation obligations for disability (under the ADA) and religion (under Title VII) extend to the hiring process. Employers should be mindful of a potential need to accommodate candidates by, for example, providing a sign language interpreter or permitting a candidate to wear religious garments during an interview. For more information, see *Practice Notes, Disability Accommodation under the ADA* and *Religious Discrimination and Accommodation under Title VII*.

- **Use objective criteria when making hiring decisions.** While declining to hire a candidate because he is rude, unreliable or exhibits other non-protected characteristics is not unlawful, employers that can point to objective criteria for making employment decisions generally have a better defense against charges of discrimination. Objective criteria include, for example:
  - level of education (for example, high school, college or graduate school);
  - academic achievement (for example, academic honors or awards); and
  - years of relevant work experience.

- **Create a standardized hiring protocol.** Develop and regularly update a hiring protocol that promotes fairness and eliminates unlawful considerations. For example, use the same questions in interviews and use the same forms for employment applications. By using the same procedure for all applicants, employers bolster their defense against claims that they treated members of protected classes differently than other candidates.

- **Maintain diversity among employees.** Employers that can demonstrate that their hiring and other decisions reveal a true commitment to diversity may have a stronger defense against discrimination claims. However, employers may face reverse discrimination claims if they favor less qualified traditionally disadvantaged individuals (members of protected classes) over more qualified traditionally advantaged individuals (non-members of protected classes).

- **Maintain diversity among decision makers.** By obtaining input from a diverse group of decision makers in the hiring process, employers increase the odds that:
  - one or more of the decision makers is in the same protected class as the applicant; and
  - unlawful bias will not play a role in the hiring decision.

- **Exercise caution when responding to questions from unsuccessful candidates.** Do not be dismissive of or joke about follow-up questions from unsuccessful candidates. Applicants often do not know the basis for the rejection and a tactless comment may push a dejected applicant to take legal action. Proactive efforts to avoid the appearance of unlawful considerations and a little kindness often help deter litigation.

**Prevent Discrimination During the Employment Relationship**

- **Post required notices on-site.** Comply with notice posting requirements to inform employees about their rights, including the right to be free from discrimination (see *Federal Notice Posting Requirements Checklist*). State or local law may require additional postings.

- **Create an environment that encourages diversity.** Create initiatives that recognize diversity as an asset. For example, employers might:
  - support a workplace women’s group;
  - celebrate Black History Month with a special event; or
  - ensure there are food options for members of religious groups with dietary restrictions at work events.

- **Proactively eliminate discrimination, harassment and retaliation.** Eliminate unlawful or inappropriate behavior immediately, even if no employee has complained. This best practice applies equally to behavior by:
  - supervisors;
  - managers;
  - employees;
• vendors;
• clients; and
• other third parties.

• Avoid the appearance of discrimination. Jokes and inadvertent comments about age, race, sex or other protected classes may be regarded by courts as “stray remarks” that fall short of the legal standard for discrimination. However, employees may argue that such jokes or comments contribute to a hostile work environment, causing employers to expend time and money defending a harassment claim. Best practice is to avoid inappropriate comments and stop them immediately if they occur.

• Treat employees with respect. Employees who feel treated with respect are less likely to file claims against their employers.

• Provide accommodations as needed. Individuals with disabilities and those affiliated with a particular religion may be entitled to a reasonable accommodation. Do not rush to deny a request for accommodation, but instead engage in the interactive process and consider potential accommodations. For more information, see Practice Notes, Disability Accommodation under the ADA and Religious Discrimination and Accommodation under Title VII.

• Encourage employees to use the internal complaint mechanism. Encourage employees to raise concerns internally before they escalate to an EEOC charge or litigation. Resolving complaints internally allows employees to feel their concerns are taken seriously and, in the context of hostile work environment claims, employers may be able to take advantage of the Faragher-Ellerth defense.

• Review compensation practices. Compensation that is or appears to be statistically unfair along age, race, sex or other protected class lines makes an employer vulnerable to claims of discrimination.

• Recognize that any adverse employment action, including demoting or failing to promote, may prompt litigation. Understand that current employees can complain of discrimination, even though they have not been terminated. Employers can reduce the risk of litigation by documenting the legitimate business reasons for all adverse employment decisions, including decisions about compensation and employee advancement or demotion.

• Maintain diversity among decision makers for significant employment decisions. Generally, it is harder for an employee to prove discrimination when one or more individuals involved in the allegedly discriminatory decision are members of the same protected class as the employee.

• Exercise caution when responding to questions about why an employee was demoted, not promoted, or subject to other negative action. As with rejected applicants, do not be dismissive of or joke about follow-up questions from employees subject to adverse employment decisions. Treating employees respectfully promotes a happier workforce that is less prone to litigation.

Implement and Enforce Discrimination, Harassment and Retaliation Policies and Procedures

Create and Maintain Appropriate Policies and Procedures

• Maintain policies prohibiting discrimination, harassment and retaliation. Clearly articulate an equal employment opportunity policy and specifically prohibit discrimination, harassment and retaliation. These policies should:
  • provide employees with a convenient and reliable mechanism for reporting discrimination, harassment and retaliation (for a sample complaint form, see Standard Document, Discrimination/Harassment Complaint Form);
  • include the name, work location and telephone number of employer representatives to whom employees can make complaints (every employee should have access to an employer representative who is not their supervisor or the alleged offender);
  • encourage employees to report incidents promptly either verbally or in writing (or through use of an employee hotline);
  • provide general guidelines about how long an investigation and response is likely to take;
  • explain why employees must use the internal procedures; and
• inform employees (supervisors and non-supervisors alike) that disciplinary action may be taken against them if they have violated the policy.

• For sample policies, see *Standard Documents, Equal Employment Opportunity Policy, Anti-harassment Policy* and *Anti-retaliation Policy*.

• **Enforce the policy consistently for all employees.** Failure to consistently enforce the policy may result in allegations of *disparate treatment* discrimination. Employees at all levels should be encouraged to adhere to the policy’s requirements and be held accountable if they fail to do so.

• **Designate at least two points of contact for intake of complaints.** Ensure that at least one employer representative designated to field complaints is physically available at the employer’s facility when it is in operation.

• **Refer all complaints to a designated human resources representative for investigation.** That individual should:
  • coordinate or remain involved with the investigator in coordinating the investigation of the internal complaint (for more information, see *Practice Note, Handling Employment-Related Internal Investigations*); and
  • be knowledgeable about the entire process and capable of testifying about it should the need arise.

For more information, see *Standard Document, Responding to Employee Concerns: Supervisor Guidelines*.

• **Consider maintaining a 24-hour employee complaint hotline.** Include instructions on how to use it in the written policy. A complaint hotline conveys the message that employers care about employee concerns and reduces the risk that concerns may escalate into litigation.

**Make Policies and Procedures Available**

• **Make anti-discrimination, anti-harassment and anti-retaliation policies accessible to employees.** Policies may be made available through handbooks or stand-alone policies distributed widely in print or online. For more information, see *Employee Handbook Toolkit*.

• **Obtain acknowledgments.** Obtain and retain a signed acknowledgment from each employee to whom the employer distributes a policy prohibiting discrimination, harassment and retaliation, whether the policy is in a larger handbook or stand-alone policy. For more information, see *Standard Documents, Anti-harassment Policy: Drafting Note, Acknowledgment, Anti-retaliation Policy: Drafting Note, Acknowledgment*, and *Stand-alone Policy Acknowledgment*.

• **Redistribute policies regularly.** Redistribute the policy periodically (at least annually) and obtain updated acknowledgments from each employee. Also, distribute the employer’s policy to each new hire.

• **Make specialized policies, procedures and guidance available to employees overseeing investigators or the investigation.** Give written guidance on how to effectively conduct and document investigations to individuals responsible for conducting them (see *Conducting Internal Investigations Toolkit*).

**Train Employees**

• **Train supervisors, managers and other supervisory personnel.** Require employees who oversee the work of others to attend diversity and non-discrimination training, including information on harassment and retaliation. Emphasize the importance of the training by having a senior manager introduce it and require attendance. Training should teach:
  • the types of behaviors prohibited; and
  • how to respond promptly and appropriately to complaints or questions about discrimination, harassment or retaliation by managers, supervisory personnel, support staff, other employees or third parties (for more information, see *Standard Document, Responding to Employee Concerns: Supervisor Guidelines*).

• **Train all other employees.** If feasible, train all other employees on the employer’s policies prohibiting discrimination, harassment and retaliation and the procedures to follow if they experience either. Incorporate that training into new hire orientation and retrain annually if possible.
Promote Compliance

- **Make supervisors accountable for compliance.** Employers should:
  - determine who is and is not a supervisor;
  - include “commitment to equal employment opportunity” as a qualification for every supervisory position (for a sample equal employment opportunity policy, see *Standard Document, Equal Employment Opportunity Policy*); and
  - formally evaluate supervisors on how they handle equal employment opportunity issues and link this evaluation to compensation and career opportunities.

- **Document all compliance activities.** Documents to retain include:
  - all employer prevention efforts, including policies, acknowledgements and training;
  - all employee complaints (for a sample employee complaint form, see *Standard Document, Discrimination/Harassment Complaint Form*);
  - all investigation files; and
  - all employer responses to complaints (for more information, see *Standard Document, Discrimination/Harassment Investigation Determination Form* and *Practice Note, Handling Employment-Related Internal Investigations*).

Respond to Internal Complaints Promptly

- **A prompt response to an internal complaint is essential to a successful legal defense.** A prompt investigation and response can:
  - reduce the risk of litigation;
  - clearly identify both the problem and an appropriate solution; and
  - in hostile work environment cases, help employers take advantage of the Faragher-Ellerth defense.

For more information, see *Practice Note, Handling Employment-Related Internal Investigations: The Investigative Interviews, Standard Document, Model Questions for Investigating a Discrimination Complaint and Conducting Internal Investigations Toolkit*.

- **Interview the complaining employee.** Promptly interview the complaining employee to:
  - confirm the nature of the alleged conduct and the identity of any potential witnesses;
  - make the complaining employee aware that the complaint has been taken seriously; and
  - document the complainant’s accusations in writing and have them confirm their completeness and accuracy at the end of the interview to avoid subsequent changes to their account of events.

For more information, see *Standard Document, Model Questions for Investigating a Discrimination Complaint: Interview the Complaining Employee*.

- **Interview witnesses.** When interviewing potential witnesses to the alleged discrimination:
  - gather information from witnesses that either supports or challenges the complaining employee’s allegations;
  - maintain witness interview materials in an investigation file; and
  - attempt to maintain confidentiality without unnecessarily restricting the scope of the investigation (for more information, see *Practice Note, Handling Employment-related Internal Investigations: Confidentiality*).

For model questions, see *Standard Document, Model Questions for Investigating a Discrimination Complaint: Interview All Potential Witnesses*.

- **Interview the accused employee.** When interviewing the accused employee:
• request that the alleged offender respond to the allegations; and
• include a management witness in all discussions with the accused employee.

• For more information, see Standard Document, Model Questions for Investigating a Discrimination Complaint: Interview the Individuals Alleged to be Discriminating.

• Document the investigation. Employers should:
  • document every element of the investigation in a clear, legible and accurate fashion; and
  • maintain all related materials in an investigation file separate from personnel records.

• Process the interview information. Following the witness interviews, employers should:
  • carefully review all the information received from the interviews;
  • if necessary, re-interview the complaining employee and the witnesses;
  • prepare a detailed investigation report summarizing the investigative findings and all relevant dates; and
  • maintain the investigation report in an investigation file separate from personnel records.

• For more information, see Practice Note, Handling Employment-Related Internal Investigations: Post Interview Activities.

Take Appropriate Action After the Investigation

If Allegations Are Not Confirmed

• Follow up with the individuals named in the complaint. Inform them that the allegations have not been confirmed.

• Remind employees in writing that they must comply with employer policies prohibiting discrimination, harassment and retaliation. Remind the employees named in the complaint that allegations of discrimination, harassment and retaliation are taken seriously and provide the employees with a copy of the written policies. Employers also should consider reminding employees that retaliation against the complaining employee is prohibited.

• Consider proactive measures to reduce future risk. When the allegations have been neither confirmed nor disproved, consider taking steps to reduce the risk of future incidents. Any such measures should be voluntary for employees so that they are not mistaken for retaliation against the complaining employee or discipline of the alleged wrongdoer. For example, consider:
  • giving the employees the option to switch their shifts or work locations where practical; or
  • changing the reporting structure if the complaining employee reports directly to the accused wrongdoer, if possible.

If Allegations Are Confirmed

• Assess options. Determine the range of available corrective measures. For information on employee discipline, see Best Practices for Employee Discipline Checklist.

• Impose appropriate discipline. Select a disciplinary response that will:
  • effectively end the wrongful conduct; and
  • provide a reasonable response that takes into consideration both the nature and severity of the conduct and any previous violations (for example, greater penalties for repeat offenses).

• Document employer response. Document all disciplinary and corrective measures.

Follow Up With the Complaining Employee

• Follow up with the complaining employee. Inform the complaining employee that the allegations have been
investigated, a conclusion has been reached and, if appropriate, action has been taken where necessary. Explain to the complaining employee how the action taken has remedied the problem, if applicable.

- Let the complaining employee know that the complaint was welcome. Thank the employee for coming forward and advise that any future incidents of perceived discrimination, harassment or retaliation should be reported immediately.

Reduce the Risk of Litigation at the End of the Employment Relationship

- Ensure that termination and layoff decisions are free from discrimination or the appearance of it. Analyze decisions to ensure that protected characteristics are not part of the decision-making process and the decisions do not appear to have a disproportionate impact on any protected class. Review state and local laws to ensure compliance with additional protected classes recognized in particular jurisdictions (such as marital status or sexual preference). For more information, see Practice Notes, Employee Termination: Best Practices and Conducting Layoffs and Other Reductions in Force, and Anti-discrimination Laws: State Q&A Tool.

- Document the basis for termination and layoff decisions. Document the legitimate business reasons for termination and layoff decisions concerning each affected employee. Employers that can point to objective non-discriminatory reasons for each decision generally have a better defense against discrimination claims. For more information, see Practice Note, Employee Termination: Best Practices: Document Reasons for Termination.

- Maintain diversity among decision makers. Generally, it is harder for an employee to prove discrimination when one or more individuals involved in the decision are members of the same protected class as the employee.

- Exercise caution when responding to questions about why an employee was discharged. Do not be dismissive of or joke about follow-up questions from employees subject to adverse employment decisions.

- Obtain waivers and releases from employees who present a litigation risk. For employees who may bring claims against the employer on grounds of discrimination, harassment or retaliation, employers can insulate themselves against litigation risks by asking departing employees to sign a waiver and release of claims. For more information, see Practice Note, Employee Termination: Best Practices: Waiver and Release Agreements, Standard Document, Separation and Release of Claims Agreement and Departing Employee Checklist: Consider Entering into a Severance Agreement with a Departing Employee.

- Treat departing employees with respect. Employers that treat departing employees with respect reduce the risk of those employees filing legal complaints.