

Employment Liability

The key to avoiding civil rights liability in general is as follows: the consistent and equitable application of constitutional policies, rules and procedures. Sounds simple enough, but is it easy? The successful risk management team knows that it takes much thought and planning. In short... it takes work.

As simple as it may sound, there is a right way and a wrong way to discipline or terminate an employee. Unfortunately, increasing numbers of employment claims, court awards, and settlements all seem to indicate that the “wrong way” may be gaining ground. Within the past several years, two Tennessee cities were found liable for their improper handling of employment related claims and the court awards, along with attorneys’ fees, were in excess of one million dollars in each city. When reviewing TML Pool claim data for the period of 7/1/2000 through 6/30/2010, the data shows that employment related claims occur less frequently when compared to all other combined liability claims. These claims account for about 2% (721 total claims) of the 31,663 combined liability claims submitted to the TML Risk Management Pool for the outlined time period. However, with respect to severity, these numbers change significantly. For the same time period, employment related claims are the second most severe claim cause. Employment related claims accounted for a net incurred of \$17,227,893. Moreover, the claims data indicates that employment related claims have the highest average severity amount per claim. Combined liability has a per claim average of \$4,962, whereas employment liability has a per claim average of \$23,894. In summary, although these types of claims may not occur often, the data suggests that when they do occur it is rather costly for the governmental employer.

THE CHANGING WORKPLACE

The workplace has changed in multiple ways during the last few decades, and the laws governing the workplace have changed also. These changes have increased the number of exposures that governmental employers face regarding employment practices. For instance forty, thirty or even twenty years ago, governmental employers didn’t to have to worry as much about claims of hostile work environment, age or disability discrimination, whistleblower protections, let alone even know about the Public Employee Political Freedom Act. Still more, the Equal Employment Opportunity Commission (EEOC), which was created by the federal government (46 years ago) to enforce the provisions of Title VII of the Civil Rights Act of 1964, may not have been around or possibly in its infancy when many governmental employees started in the work force. Yet, the Wall Street Journal reported last year that discrimination complaints to the EEOC were on the rise and had increased more than 60% during the same period the previous year. Although there were a number of reasons offered for this increase, governmental employers should take note. Today, government employers who are unaware of these prevailing employment trends and laws, or who ignore them, are increasing their chances of making poor employment decisions.

There are multiple reasons as to why employers make poor employment decisions. First, current employment laws and court decisions are not static. More to the point, not only are new state and federal employment laws being passed by our legislators, but also case law has expanded the interpretation of these laws, and how they apply in the workplace. Unfortunately, even the “best and brightest” of Human Resource professionals are hard pressed to keep up with these changes. Moreover, these changes aren’t always reflected in the employer’s personnel policies and practices.

What's worse is that employment decisions may often be made with little consideration of these new, amended, or reinterpreted laws.

Second, there are increasing numbers of employees today who fall within one, if not more, of the seven protected classes as outlined in Title VII of the Civil Rights Act. It is important to note that as the workforce ages, it is not outside of the realm of possibility that every employee can be in at least one of the seven federally protected classes. When employers seek to discipline or terminate an employee, they often don't take into consideration the fact that their actions, which may appear to be legal, might create a disparate impact on a group of legally protected employees. A disparate impact occurs when an employer uses a facially neutral employment practice that has an unjustified adverse impact on members of a protected class. A facially neutral employment practice is one that does not appear to be discriminatory on its face, but rather it is one that is discriminatory in its application or effect. Without a system of reviewing how employment decisions could adversely affect members of this growing class of legally protected individuals, unprepared governmental employers may be setting the stage for costly litigation.

Third, smaller employers, who don't have professional human resources staff, may provide little if any training to their management staff on the employer's personnel policies, and current employment laws. Unfortunately, these managers may not always understand what actions are legal, or even permissible under their own personnel policies. However, it must be noted that this exposure is not limited to small employers or management staff. Unfortunately, this same exposure applies to newly elected officials of any sized organization who may be responsible for employment decisions. Often these individuals are not provided the requisite training on prevailing employment laws, as well as the governmental entity's own personnel policies and procedures. This, too, can lead to costly litigation.

Fourth, many employers make "high risk" employment decisions without the guidance of legal counsel, which is perhaps the biggest mistake that most governmental employers make as it relates to employment liability. Often, legal counsel is not engaged until after the poor employment decision is made and the employee has suffered some sort of adverse employment action. Under this scenario, it is difficult, at best, for legal counsel to develop a defense for the poor employment decision because they are often consulted after the fact. Failure to engage legal counsel early in the process can prove costly in the long run.

Although this, by no means, is an exhaustive list of reasons as to why governmental entities sometimes make poor employment decisions, it does, however, provide evidence as to why it is vitally important for governmental entities to seek legal advice from their staff attorney or a TML Pool defense attorney before making "high risk" employment decisions. High risk employment decisions are those actions that may violate the civil rights of an employee or run contrary to the governmental entity's personnel policy. It must be noted that lawsuits against governmental entities, and their officials, in the employment liability area usually involve the alleged violation of an employee's civil rights. Typically, this means that someone believes, and/or wants the court to believe, that his/her employer has violated the employee's constitutional right to due process, the right to equal protection of the law, and/or the right to be free from discriminatory actions. Although these cases can be heard in State Court, they are largely heard in Federal Court, where the awards can be much greater.

EMPLOYMENT LIABILITY CHECKLIST

The TML Pool understands that employment issues can be overwhelming and poor decisions can be costly. Thus, the Loss Control Department of the TML Risk Management Pool, in conjunction with its lead defense attorneys, has developed the "Employment Liability Checklist" to assist Pool members in identifying potential high risk employment actions. This checklist is a tool designed to outline several current high risk employment liability areas of which governmental employers should be aware. If used properly, it can reduce employment liability exposures by providing a decision making framework to assist public administrators in identifying potential high risk employment situations and when to get legal assistance. To obtain your copy of this checklist, please contact your local loss control consultant:

East Tennessee

Judy Housley, ARM-P
Loss Control Consultant
1-865-693-6745
JHousley@tmlrmp.org

Middle Tennessee

Chester Darden
Loss Control Consultant
1-615-371-0049
CDarden@tmlrmp.org

West Tennessee

Paul Chambliss, JD
Loss Control Consultant
1-731-660-8592
PChambliss@tmlrmp.org

FINAL THOUGHTS

It is important to note, before making a final decision on a high risk employment action, or if there is any doubt or questions regarding an employment action being considered, governmental employers should always first contact their staff attorney or the TML Risk Management Pool. Further, the TML Pool Claims Department can offer access to defense attorneys who can assist your entity in managing complex employment decisions. This service is available to all TML Pool members **(who have Errors and Omissions liability coverage with the TML Pool)** free of charge at 1-800-288-0829. More importantly, never terminate an employee without first seeking legal advice.