Retail Industry Update

2011, No. 2

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW
Solutions at Work®
www.laborlawyers.com

Men Are From Mars, Women Are From Venus, And Equal Pay Act Claims Are Everywhere

By Ed Harold (New Orleans) and Michael S. Mitchell (New Orleans)

Because of recent high-profile cases claiming gender-based pay discrimination, the Equal Pay Act has taken on a new life. Newspapers continue to tout the controversial statistic that women earn only 77 cents for each dollar men earn. That statistic does not distinguish among jobs and is actually a comparison of apples to oranges, argue critics. Nevertheless, there are certainly situations where women on average are paid less than similarly-situated men. The fact that retail giant Wal-Mart is the defendant in the first major case of this kind in many years has placed all retailers in the crosshairs of the wage and hour plaintiffs' bar.

What Makes These Claims Different?

Unlike run-of-the-mill discrimination claims, Equal Pay Act claims rely heavily on the use of statistical analysis of disparities in pay as evidence of discrimination. Statistical analyses can reveal abnormalities among pay in various groups. But statistics are not arithmetic where there is only one correct answer to the problem. The inclusion or exclusion of factors other than the challenged one can reveal that nondiscriminatory characteristics, such as education and experience, have more bearing on the disparity than gender.

One of the most important, but hardest to test for characteristics, is the willingness to negotiate. In general, women are more likely than men to accept the employer's first offer. For this reason, pending legislation designed to address the pay gap includes provisions for training women in negotiating skills. Social scientists have numerous other theories about other gender differences that play a role.

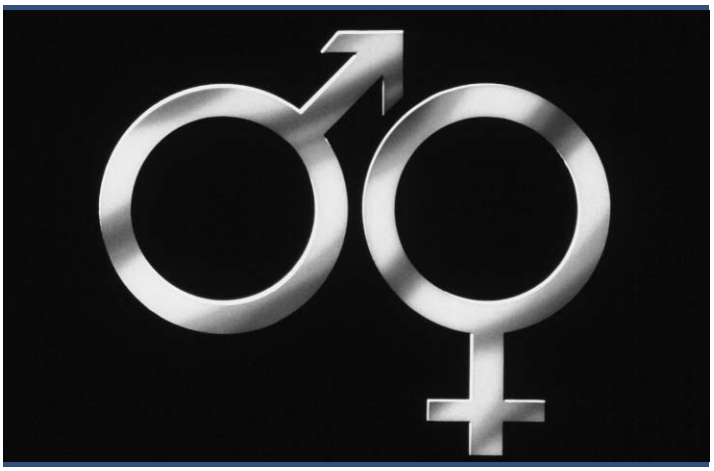
Men's greater willingness to relocate, to seek physically demanding or dangerous jobs, and to sacrifice home life and quality time with their children, are all additional reasons men on average appear to earn more. But regardless of the strength or weakness of these factors, the possibility that a statistical analysis will reveal a significant pay gap between genders in any job is serious enough that retailers need to perform some self-analysis.

The problem in performing such a self-analysis is that there is no predicting what it will reveal; no company wants to create Exhibit A for the plaintiffs in an equal pay case. In a majority of jurisdictions, there is no "self-critical-analysis" privilege to protect this type of report against disclosure in discovery.

If performed with no threat of litigation on the horizon, the attorney work-product doctrine will not apply. Since the underlying data will never be protected, the possibility of being forced to turn over a statistical analysis that cost tens of thousands of dollars and countless hours of time is not pleasant.

Our Advice

In light of this, here are some steps that employers can take to provide the greatest amount of protection against their statistical analysis being discoverable. First, it is better if the analysis is performed in response to some claim of pay discrimination. Even if it is only a demand letter or an EEOC charge, the existence of a legal concern creates the ability to claim that the analysis is protected work-product.



The company should also hire outside counsel to provide it with a legal analysis of potential liability. That firm should then engage the statistical experts on behalf of the employer. The employer should not receive the actual underlying report of the statistician. This provides far too much of an opportunity for the report to be widely disseminated and lose the aura of attorney-client-privilege that helps protect documents from disclosure. While the statistician's report can be some evidence regarding the impact of gender on pay, the report standing alone is not in and of itself the answer to the question. Instead, outside counsel should draft a legal analysis presented to the in-house counsel or senior human resources professional. These steps provide the best protection against being ordered to disclose the report in litigation.

The Man In The Mirror

Before setting out on an analysis of pay disparities, the most important decision an employer must make is a commitment to address the findings. If you are not committed to correcting gender-based disparities revealed by the testing, then it is better not to do the testing at all. In the words of the Michael Jackson song, "make that change." Knowing about possible discrimination and not addressing it is the type of conduct that opens employers to claims for punitive damages.

Pay disparities, while often small in the individual case, can quickly become significant in the aggregate. The fix can be millions of dollars.

For more information contact the authors at eharold@laborlawyers.com, mmitchell@laborlawyers.com or 504.522.3303.

Terminating Employees For Theft, Part 2

By Ed Harold (New Orleans)

In our last issue (*Retail Update,* March 2011) we looked at some ideas about how to investigate, catch, and terminate employees who are stealing from the company. In this conclusion, we'll talk about some ways to avoid – or at least lessen the possibility of – getting sued.

Admissions

If an employee admits to the theft, ask for a written confession. As with witness statements, this should be in the employee's own handwriting. Managers should also be taught that the "Law and Order" hot-boxing method of extracting confessions could easily backfire. If the circumstances under which the employee gives the confession can be characterized as coerced, a jury may choose to ignore it. To this end, allow an employee to leave the interview and go to another area where the investigators are not hovering around the document that is being prepared.

If the employee refuses to admit theft even where there is indisputable evidence of guilt, you must choose carefully how to characterize the termination. Employees who refuse to admit guilt in the face of overwhelming evidence will continue to fight the assertion of theft at every opportunity. These are the individuals most likely to sue.

Once you submit "theft" as the reason for termination to an unemployment compensation board, the battle will be on. It may well be a battle worth fighting, but that decision must be made in light of all the potential claims an employee may have, not just the unemployment compensation claims.

Police Involvement

For years, many managers and owners have believed that a good theft deterrent is to have the police arrest a suspect at the store and parade him out in handcuffs in front of all the other employees. While this might or might not be true, it is certainly one of the best methods of instigating a lawsuit.

Before calling the police, it is critical to know how seriously they will respond to allegations of theft of a few hundred dollars in merchandise. Some police departments are simply too overwhelmed with violent crimes to do more than write a report of the complaint. Either a lack of interest or sloppy handling of the matter by the police can both be used to undercut the employer's claims against the employee. Ultimately, no police involvement is better than limited or poorly handled police involvement.

If a police department is ready, willing, and able to respond to reports of theft, call them in when you discover missing items or money. In such a situation, it is critical that whoever interfaces with the police does not point the finger at the suspected employee. If a different employee turns out to be involved, this can initiate a claim for malicious prosecution under many states' laws. Should the suspect beat the charges, which sometimes occurs, an employee will be more likely to succeed on a claim for malicious prosecution.

If the police press charges against the employee, you must be willing to provide all the assistance the police require. Witnesses failing to appear for trial will result in charges being dropped and will cast doubt on the employer's good faith.

Follow Through

Another area that often surfaces as a pitfall in employment litigation arising out of employee theft is the failure of the company to recognize that the departure of the employee is not the last that they will hear of it. Organize and store the records of the investigation for future use. Nothing should be allowed to be destroyed. If business records that are ordinarily disposed of are used, they should not be put back where they came from. Video footage of an employee pocketing a twenty is solid gold in a court. Not having the video footage of the employee pocketing the twenty in an employment trial is solid gold for the plaintiff. No explanation will overcome a jury's assumption that if the video is missing, the employer did not want them to see the video

The Unemployment Compensation Hearing

Treating the almost inevitable unemployment compensation claim lightly can wreak havoc on later proceedings related to the termination. If the employee already has counsel, that attorney will likely attend the hearing and question witnesses. Testimony is under oath and in some cases, that testimony can be used against the company in later proceedings. Yet rarely do employers take any time to prepare witnesses for these hearings.

Another problem is that witnesses are often no longer employed by the time of the hearing. While they can be subpoenaed, many employers fail to take this step counting on the statements taken during the investigation to carry the day. The problem is that while the statements are often admissible, the court might not be able to credit hearsay statements over the first hand accounts of the employee.

When an employer loses the unemployment compensation claim, the employee becomes emboldened to assert other claims. Additionally, the loss at the unemployment hearing can create factual issues over whether the qualified privilege applies as a defense to a defamation claim for statements accusing the employee of malfeasance. If you do not want to spend the time, energy, and effort needed to fully prepare for the unemployment compensation claim, it may well be better not contesting the claim at all.

Conclusion

While retailers can take strong efforts to reduce employee theft, eliminating it entirely is likely an impossibility. But employers do have the ability to greatly diminish the opportunity for the insult of an expensive lawsuit being added to the injury of theft.

For more information contact the author at eharold@laborlawyers.com or 504.522.3303.

Office Locations

Atlanta phone 404.231.1400
Charlotte phone 704.334.4565
Chicago phone 312.346.8061
Cleveland phone 440.838.8800
Columbia phone 803.255.0000
Dallas phone 214.220.9100
Denver phone 303.218.3650
Fort Lauderdale phone 954.525.4800
Houston phone 713.292.0150
Irvine phone 949.851.2424
Kansas City phone 816.842.8770
Las Vegas phone 702.252.3131
Los Angeles phone 213.330.4500
Louisville phone 502.561.3990
New England phone 207.774.6001
New Jersey phone 908.516.1050
New Orleans phone 504.522.3303
Orlando phone 407.541.0888
Philadelphia phone 610.230.2150
Phoenix phone 602.281.3400
Portland phone 503.242.4262
San Diego phone 858.597.9600
San Francisco phone 415.490.9000
Tampa phone 813.769.7500
Washington, DC phone 202.429.3707

www.laborlawyers.com

Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters

We're interested in your opinion. If you have any suggestions about how we can improve the *Retail Update*, let us know by contacting your Fisher & Phillips attorney or email the editor at mmitchell@laborlawyers.com.