



Attorney Jeff Pheterson says it is always important to make sure that the company's employee handbook or manual is updated.

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## *Employers may now face baby boomers' discrimination claims*

BY JEFF ZBAR

Baby boomers are getting older, and they're bringing with them a spate of age discrimination claims.

Those aged 50 and up claim to have been passed over for promotions and advancement, with younger workers getting the nod. As baby boomers age, they're looking behind them for who might be in line for their jobs – and wondering if they've been discriminated against, said April Boyer, an employment law partner in the Miami office of law firm K&L Gates.

Plaintiffs seem to be getting younger, as Generation Xers in their 40s grow suspicious, she said.

"Everyone turns 40," she said. "If age is part of the motivating factor behind an employment decision, someone can assert a claim."

Discrimination lawsuits are gaining traction among disgruntled employees. Employment attorneys say such claims are increasingly prevalent, especially as layoffs grow, and more attorneys position themselves as "employment discrimination" practitioners.

Recent Supreme Court rulings affecting the Americans with Disabilities Act Amendments Act of 2008 have lowered the bar with respect to questions of someone's disability, said Angelo Filippi, a partner with Kelley Kronenberg in Fort Lauderdale, and a former head of litigation for the Florida division and acting regional counsel of the U.S. Equal Employment Opportunity Commission.

"Expansion of the concept of a disability has pretty much guaranteed that that particular concept that previously had been the graveyard of plaintiffs trying to assert a claim based upon disability ... can now pass muster," he said. "The result is a significant uptick in litigation due to the ADAAA."

Others site a rise in claims of retaliation from employees who reported what they believed to be objectionable or illegal workplace practices. These can include family leave issues, unreasonable pre-employment background checks, a Workman's compensation claim, or an Occupational Safety and Health Administration (OSHA) complaint,

Health Administration (OSHA) complaint, Filippi said. Even the use of social media for background checks – without first establishing a policy about how the company will deploy such research, and obtaining signed releases from job candidates or employees – could result in a claim, he said.

“The perception just has to be reasonable,” he said. “They don’t have to use any magic words.”

How can a company prevent such actions? Attorneys say adherence to the law is a start. Workplace discrimination issues and compliance varies depending on the size of the employer. Title VII of the Civil Rights Act of 1964 protects employees from employment discrimination based on race, color, national origin, gender and pregnancy, and religion. The statute applies to the public sector, and to private employers with 15 or more workers. It also bans the use of such stereotypes about a candidate’s abilities, traits or performance based on protected status when making employment decisions. This also includes the Family Medical Leave Act.

The Fair Labor Standards Act establishes minimum wage, overtime pay, recordkeeping and youth employment standards affecting all employees in the private sector and in government sector. In fact, wage and hour claims remain among the most prevalent workplace issues faced by employers, said Charles Caulkins, managing partner in the Fort Lauderdale office of Fisher & Phillips, a labor and employment defense practice.

“Except, in some instances, for the size of the business, no one’s immune from having to deal with these issues,” Boyer said.

Caulkins warned that effective defense in a civil or government action requires involvement of skilled counsel from the outset, especially when submitting a “statement of position in response to an EEOC action. This can help avoid making statements that could be incriminating, damaging or that “may unknowingly take a position that subjects you to scrutiny from the EEOC,” he said.

Also, update the employee manual or handbook, said Jeff Pheterson, managing partner with Ward Damon in West Palm Beach. Train employees and supervisors about the disciplinary process and corrective actions. Instruct managers to “work your way up the chain of a progressive disciplinary policy.” Document every disciplinary issue – and the organization’s response.

“There’s a tendency sometimes to not document a problem that everyone knows exists,” he said. “If there’s a potential for concern related to discrimination, the first thing [counsel] will ask for is the scan of the documentation. There’s a power in documentation that just doesn’t exist in testimony. With proper documentation, terminations are upheld. Without it, it’s left to wonder, especially if you have a policy that’s been left to gather dust on the shelf.”