

In This Issue:

May 2009

With the increase in claims filed with the EEOC, and the downturn in the economy, it is not the time for companies to abandon their training efforts. This article offers practical and proactive steps that organizations can take in order to set up their first - and best - line of defense.

EEOC Charges Soar as Economy Sours: What Can Employers Do?

By Cindy-Ann L. Thomas

It is certainly no secret that, during turbulent economic times, the number of discrimination claims tends to swell. Not only are more people out of work, but they are also financially motivated to explore their legal options.

Well, the Equal Employment Opportunity Commission's (EEOC) Charge Statistics for 2008 are in, and the news - as predicted - is grim. Private sector discrimination filings with the EEOC for 2008 (95,402) surpassed 2007 (82,792) by a staggering 15% - the biggest jump in the federal agency's entire 44-year history.

Charges increased between 2007 and 2008 in every major protected category. Age discrimination claims vaulted by 28.7% to a record 24,582 - the largest increase in any category. Retaliation claims - at 32,690 - experienced the second largest increase.

What's more, charge filings for the current year are likely to increase as the 2008 numbers do not reflect the further deterioration in the economy during 2009. Typical legal fees associated with defending such claims can very easily exceed the quarter million dollar mark.

So how do you stem the potential for discrimination and harassment charges against your organization? The following practical, proactive steps can be an organization's first - and best - line of defense.

Initiatives During a Recession: With EEO Training, You May Get Blood from a Stone

Given that budgets for training during economic downturns are limited, the concept of additional training may strike many as counter-intuitive or even unimaginable. Yet, focusing on compliance training can often stave off claims, which can actually save organizations money.

By now, there is a body of credible data to support a direct link between effective compliance training and a decline in claims. Sex-based claims used to be 65% of all harassment charges. Now they are only 43% of all harassment charges. More

particularly, sexual *harassment* claims were 20% of the total charges in 1999 - one year after the Supreme Court created the affirmative defense for employers who were suddenly buoyed by the incentives associated with making sexual harassment training *de rigueur*. Sexual harassment claims now represent only 15% of all charges. Many scholars continue to regard sexual harassment training as a partial basis for the decline in claims in this area.¹

If employers would expand the scope of training beyond sexual harassment and not view increasingly “popular” areas like age and retaliation as a mere “post script” in training programs, might we be able to look forward to a decline in charges in these areas as well? It is certainly a hypothesis worthy of consideration, especially if, in so doing, employers could minimize or even eliminate the costs associated with addressing harassment and discrimination claims. Beyond reducing claims, effective EEO training can help to defend against punitive damages claims, in accordance with the U.S. Supreme Court’s decision in *Kolstad*.²

Accordingly, some level of commitment to EEO compliance training may prove to be an invaluable return on the investment. Even - and particularly - *during* a recession.

Desperate Times Call for Desperate Measures

Just as disgruntled employees or frustrated applicants are resorting to filing EEOC charges as a “last resort” of sorts, employers would do well to protect themselves proactively from such trends by engaging in compliance training as a *first* resort. This is not to suggest that training should be devised as some sort of “counter-guerrilla” tactic in economic warfare. Recessionary times and constrained budgets aside, training simply makes good business sense. Consider a few of the reasons:

- 1. Dramatic changes in employment law landscape.** In addition to the uptick in EEOC filings, employment law has had some other dramatic changes in the past year:
 - Recent amendments to the Americans with Disabilities Act and the Family and Medical Leave Act expand employee protections and potentially increase the possibility of claims under each Act.
 - The U.S. Supreme Court has recently been active regarding retaliation claims and has expanded the scope of “protected activity.” As a result, these secondary claims are becoming easier to prove for plaintiffs who may not even have a merit-worthy underlying claim of harassment or discrimination.
 - The possibility of the passage of the Employee Free Choice Act (EFCA) (which would allow a union to be recognized without the customary secret-ballot elections) is real. The economic environment is ripe for movements to “safeguard” employee interests. An employer who is responsive and proactive enjoys the best prospects of remaining union-free.
 - It is imperative for companies to know how to prevent, correct, and respond to issues pertaining to the above. With recent significant legal developments in all of these areas, it is more critical than ever that companies know how to avoid becoming a target through proper training. What’s more, in the event of an adverse job action that occurs following a harassment claim, effective training can provide companies with a critical affirmative defense.
- 2. Public scrutiny does not disappear during down times.** Your people - both internal and external - are watching you. If current or future employees and/or customers see that you value [fill in the blank - compliance, diversity, or performance management, for instance] in a down market, you will be better positioned to retain their loyalty in the upswing.
- 3. Speaking of public scrutiny, juries are watching you too.** Making a hasty decision to trim compliance training costs, for instance, may communicate to a jury in a subsequent discrimination trial that these matters were unimportant. Such an allegation will resonate particularly harshly if, notwithstanding our troubled economy, company revenues were indeed scraped up to fund lavish holiday parties, executive boondoggles, and management bonuses.
- 4. You may have been forced to lay off employees.** With the valued employees that you have remaining, now is the time to hone their skills. They are likely to be eager learners. Training sends one of the most powerful messages to your employees - that they

are valued. When your employees are anxious about job security, it is more important than ever to demonstrate a commitment to them. They will be responsive to your willingness to invest in them during challenging times.

5. **This may come as a surprise to many but, alas, gratitude for having a job during a recession is apparently not enough to keep your brightest and your best on board.** A recent study reported by SHRM suggests that, despite the fact that unemployment is at a 15-year high, a surprising one-fourth of *employed* Americans will look for a new job this year.³ There is also sufficient research that indicates that, amongst other factors, training and professional development opportunities - and not just pay - drive employee satisfaction. Recessions put a premium on good people; the best will stay if they are receiving development. Fortify your retention efforts.
6. **Now that business is slow, your employees have the time.** By the time business gets back on track, they will be able to boast refreshed skill sets. Training will be good for morale now and a spike in capabilities and productivity both immediately and later on.

Train *Inside* the Budget; Think *Outside* the Box

Recession notwithstanding, it behooves the vigilant employer to consider doing the following:

- Examine and, if necessary, align EEO policies to make sure they have the same specificity as your anti-harassment policies;
- Get beyond sex. Make sure that supervisors receive proper training in areas where charges are increasing;
- Make compliance with and modeling of equal employment opportunity policies part of supervisory evaluations.
- Make sure to leverage technology. Different types of distance learning, such as e-learning, webinars, and satellite can be an effective cost saving device, particularly when the learners are geographically dispersed. Distance learning may be most helpful when teaching subjects that do not require “back and forth” interchange to learn the subject or for repeat trainings when the primary focus of the training is to refresh employees’ knowledge of the subject matter.

What is required to overcome the budget hurdles in order to carry out minimal initiatives like the above? In many cases, fiscal and logistical creativity. So, while companies possibly cannot afford to hire top legal guns to execute training outright, perhaps the following are among the alternatives to consider:

- Retain employment counsel or your favorite training partners simply to audit current training programs of interest and partner with them on updating and “revamping” them - just enough to get you through the next year or two.
- Scale back the breadth of training. In the event that company-wide training is simply not feasible for the short term, consider focusing on supervisory training - the people with the most influence on the front lines.
- You’ve heard of time-shares and ride-shares. You guessed it - consider *train*-shares! Depending on the nature of the program and whether or not confidentiality issues are at stake, perhaps it would make economic sense to join forces (and budgets) with a like-minded organization, or like-minded organizations. Training costs could be significantly reduced.
- Bulk train. If there are several programs that need overhauling (*i.e.*, conducting internal investigations, the ADAAA and reasonable accommodations, performance management, immigration compliance, diversity, wage & hour issues, anti-harassment and discrimination, etc.), enquire about a “volume discount.” If you don’t ask, you will never know.
- Do not overlook the prophets within your own house. In other words, look internally for your expertise. Executives and managers, and those of your employees who are MBAs, CPAs, and attorneys, may be able to execute programs on leadership, accounting, business development, ethics and compliance issues, and finance, as well as job-specific courses. During a downturn, a review of the fundamentals helps to focus both the business and employees.
- In the event that your potential prophets are not where they should be in developing or immediately rolling out such programs,

consider a modest long-term investment strategy to bring them up to speed - Train the Trainer programs. These custom-designed programs are aimed to make companies as self-sufficient as possible on the subject in question.

The downturn is current and deep, true. However - and as distant as it may feel - an upturn *is* en route. And, when it arrives, will *you* be ready to respond to it?

Now is the time to prepare your workforce so that you can boldly confront the challenges and opportunities that lie ahead.

.....
Cindy-Ann L. Thomas is Senior Counsel and Manager of Learning and Content Development with Littler’s Learning Group. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Ms. Thomas at cathomas@littler.com.

¹ “Sexual Harassment Training May Be Paying Off” San Francisco Chronicle, September 5, 2006.

² *Kolstad v. American Dental Association*, 352 U.S. 598 (2001) (holding that where an employer has undertaken good faith efforts to comply with Title VII (e.g. preparing and implementing written anti-harassment and discrimination policies, and educating employees on harassment and discrimination issues) the employer will not be liable for punitive damages based on the discriminatory employment decision of its managers when those decisions are contrary to the employer’s policies).

³ “Despite Recession, Some Workers Seek New Jobs” HR Magazine, March 2009 at p. 20.