Quarterly

Your Keys to Compliance

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Supervisor Training key to Compliance

"Leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an "extraordinary mistake" for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference."

This statement was recently made by the Seventh Circuit Court of Appeals in the case of Mathis v. Phillips Chevrolet. Although the decision is currently limited to states within the Seventh Circuit (Illinois, Indiana and Wisconsin), the decision will most likely be applied broadly to all areas of discrimination and harassment law.

In this case, a 59 year old man with 24 years of car sales experience left applications on two different occasions at Phillips Chevrolet. The applications contained standard anti-discrimination language. The application also asked for date of military discharge which was 1959. The court concluded that the hiring managers knew that the applicant was over 40. He was never interviewed and seven younger salespeople were hired.

Testimony showed that the general manager often noted the ages of applicants on application forms. He also stated that he did not know that it was illegal to consider age in making employment decisions. A second manager testified that he felt that the ideal applicant should be "bright, young and aggressive."

The jury found that the dealership violated ADEA and awarded the plaintiff $50,000 in compensatory damages. They also found the violation to be willful and awarded an additional $50,000 in liquidated damages.

On appeal, the Seventh Circuit affirmed the trial court decision. The dealership challenged the award of liquidated damages claiming that there was no evidence of willfulness. They claimed that the EEO statement contained on the application showed a good faith effort to prevent discrimination.

The court disagreed. Instead, the court reasoned the statement "was more harmful to Phillips than helpful." This was "because the jury could easily have concluded that printing this statement on the application but then making no effort to train hiring managers about the ADEA shows that Phillips knew what the law required but was indifferent to whether its managers followed that law."

Employers do have the opportunity to provide an affirmative defense and avoid these penalties. They must show that they took reasonable steps to prevent discrimination and harassment and that the employee bringing the claim unreasonably failed to complain.

Training both employees and managers on preventing unlawful discrimination and harassment is a critical part of the process. With the recent decision, the court has shown the importance of a training program and the expense associated with not having one.

New I-9 Law In Force

On October 30, 2004, President Bush signed a law (H.R. 4306) which allows for electronic completion and storage of Employment Eligibility Forms (I-9). This law is effective on April 28, 2005.

The new law allows employers to maintain I-9s in PDF or other electronic formats. Currently, the law only allows records to be retained in paper form or on microfilm or microfiche. Employers may also convert and maintain existing paper I-9s into electronic formats

Electronic signatures may be used by both the employer and the employee in completing I-9 forms. However, the employer must still personally verify original employment eligibility documents.

Immigration and Custom officials may impose large fines for violations. This recent change in law is an excellent opportunity for employers to evaluate their current I-9 practices as well as streamline processes for great efficiency.

I-9's and PEO's

Some business entities contract with professional employer organizations (PEOs) to handle the personnel and benefits aspects of the business. This may include completion and retention of Forms I-9.

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Supervisor Training Continued...

The EEOC takes this concept even further in its publication "Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors," (http://www.eeoc.gov/policy/docs/harassment-facts.html). This is designed to help understand their responsibilities under the law. The practical guidance includes:

Employers should establish, distribute to all employees, and enforce a policy prohibiting harassment and setting out a procedure for making complaints. In most cases, the policy and procedure should be in writing.

An employer should correct harassment that is clearly unwelcome regardless of whether a complaint is filed. For example, if there is graffiti in the workplace containing racial or sexual epithets, management should not wait for a complaint to erase it.

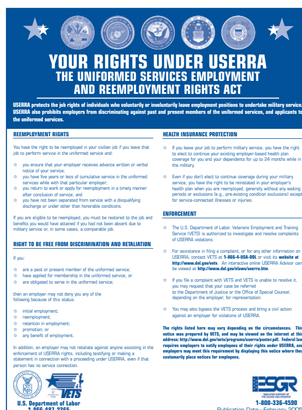
An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedures.

For more information on these or other Compliance Issues, contact your Morton Insurance Compliance Check Specialist at 720-488-4915.

USERRA Posting Requirement

Employers are required to provide to persons entitled to the rights and benefits under the Uniformed Services Employment and Reemployment Rights Act (USERRA) a notice of the rights, benefits and obligations of such persons and such employers under USERRA. Employers may provide the notice, "Your Rights Under USERRA", by posting it where employee notices are customarily placed. However, employers are free to provide the notice to employees in other ways that will minimize costs while ensuring that the full text of the notice is provided (e.g., by handing or mailing out the notice, or distributing the notice via electronic mail). The posters are available in both English and Spanish at http://www.dol.gov/vets/programs/userra/poster.pdf (English) and

http://www.dol.gov/vets/programs/userra/userra-s.pdf (Spanish.)



New I-9 Law Continued...

Where the business entity and the PEO are "co employers," one Form I-9 need be completed between the co-employers for each employee who was simultaneously hired by the co-employers.

A business entity and PEO will be deemed a "co-employer" if, among other things, an employer/employee relationship is said to exist between the business entity and PEO on the one hand, and the individual on the other, even though the employee is only performing one set of services for both co-employers. Therefore, the authority to hire or terminate employment would have to be in the hands of both the business entity and the PEO. Since both entities are employing the individual, however, both entities remain equally responsible for meeting the Form I-9 requirements and equally liable for any failures to meet those requirements. Accordingly, the employer is fully responsible for errors, omissions, and deficiencies in the PEO's processing.