Acronyms That Can Cost You Money: A Defense Lawyer's Primer on Employment Law

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PART 1

The list of acronyms in the law is long. For employers, some acronyms are more important than others. And in the context of employment litigation, some are crucial. In this and our next two newsletters, we discuss three state statutes that create the potential for expensive lawsuits against employers: The Elliott-Larsen Civil Rights Act; the Persons With Disabilities Civil Rights Act; and the Whistleblower Protection Act. These statutes are identified by the acronyms ELCRA, PDCRA, and WPA.

This article discusses the ELCRA. Next month we review the PDCRA and the following month, the WPA. In each case we will provide an overview of the statute and some suggestions for avoiding liability arising from a breach of each statute.

ELCRA

The Elliott-Larsen Civil Rights Act is meant to protect employees against an employer's discriminatory conduct. This simple statement raises many issues, but only some are addressed here. They include: What characteristics of individuals are protected by ELCRA? What employer conduct is unlawful? What circumstances might justify the employer's conduct? And what red flags could help the employer avoid ELCRA lawsuits? These questions are addressed in order.

Protected characteristics

ELCRA protects against discrimination on the basis of race, color, sex, age, religion, national origin, height, weight, or marital status—collectively referred to here as "protected characteristics." ELCRA requires—as do the other laws we will review—that employment decisions be based on the employer's needs and employee's performance, and not on the employee's protected characteristics.

Race and sex discrimination are, in a sense, straight forward, perhaps because the characteristics seem obvious. But keep in mind that reverse discrimination claims are increasingly common and sex and gender issues are expanding. In this regard, sexual stereotyping, sexual orientation, and transgender issues—although not currently expressly protected by ELCRA—are and will continue to be both more common and troublesome. For example, how do employers address the question of bathroom use by both heterosexual and LGBTQ[1] individuals?

ELCRA also makes it unlawful for an employer to refuse to hire, discharge, or discriminate regarding a term or condition of employment on the basis of *age*. Not surprisingly, as the work force ages, age discrimination claims become more common. Typically these claims are thought of in the context of older employees being discriminated against, but under ELCRA the question is whether individuals of any age are discriminated against on the basis of age. As one court put it: "Just as an older worker may be inaccurately perceived as less energetic and resistant to new ideas, a younger worker may be unfairly viewed as immature and unreliable, without regard for individual merits."[2] Note that an employee need not show that unlawful age discrimination was the only basis for an adverse employment action. Instead, the employee need only show that age was one factor that made a difference in the decision-making process.

Age discrimination claims are sometimes based on comments made, such as a supervisor indicating that a plaintiff was "getting too old" for the work, or an administrator's statement about "getting rid of older employees", or comments to the discharged individual that the company "wanted someone younger". In one case, the court determined that a decision to replace an older worker with a younger worker based on the greater costs associated with employing the older worker constituted age discrimination. In other cases, employees might rely on such things as statistical data showing a company's pattern of laying off older workers and hiring younger workers over a period of time, or comparative analyses of the objective qualifications of the discharged older individual as compared to younger individuals who were not fired.

ELCRA characteristics that are less often at issue are claims of *height, weight, and national origin* discrimination. We should expect that this last category—national origin discrimination—will become more common in our increasingly international workforce; even more so given the current political climate regarding immigration.

Adverse employment actions

Not all job actions that impact employees with protected characteristics are actionable. The courts have found that in order for an employment action to be an "adverse action" that would support an ELCRA claim, the action must be materially adverse in that it is more than mere inconvenience or alteration of job responsibilities. The courts also point out that work places are not idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action. On the other hand, actionable job actions include discharge, demotion, pay-cuts, being over-looked for promotion, and other significant actions. An important question thus is whether the employer took some action that was significant enough to support an ELCRA claim.

Legitimate nondiscriminatory reasons for adverse employment actions

Proof of legitimate non-discriminatory reasons for taking even a significant adverse employment action against an individual with protected characteristics may defeat a discrimination claim. Poor performance heads the list of legitimate reasons and most often is put forth. Market necessities may justify a reduction in workforce. But be prepared to prove your case. For example, if loss of business necessitating layoffs is put forth as a defense, be prepared to make financial data available for scrutiny and to explain why it was necessary to lay off this employee rather than someone else.

Similarly, if poor performance or misconduct is claimed to support the adverse employment action, ask whether people outside of the protected class received the same treatment as the potential plaintiff? If not, why not? Do the employee's evaluations in the personnel file support a claim that the person was doing a poor job? Very often they do not. Be consistent: changing the reasons put forth to justify the discharge (or other adverse employment action) may evidence discrimination. For example, if the initial reason is said to be absenteeism, later relying on insubordination or violations of other work rules may be used to suggest the employer is trying to build a case to conceal discrimination.

Red flags

The goal, of course, is to avoid litigation by doing things right to begin with. Look at your business needs and goals: The need for a fair, productive and amicable workplace, where work is done safely and well and results in profit, however "profit" may be defined. (Differently perhaps for private enterprises than for government.) Look at the employee's conduct and whether it fails in some significant way to serve your needs; perhaps even going a step further and identifying conduct that actively interferes with your needs. It is also important to consider who is making the decision to impose some job action. A coworker? A front-line supervisor? An individual even higher up the decision-making ladder? Red flags should go up when answering these questions. And in the face of red flags, employment decisions should be subject to even more careful review.

RETALIATION

Employers must be careful when taking some adverse employment action against an employee who has previously filed a claim under employment statutes or helped someone else pursue such a claim. These statutes universally make it unlawful for an employer to retaliate against an employee in those circumstances. The conundrum is plain: Must the employer give that employee—who had no sustainable claim to begin with—essentially preferential treatment in order to avoid a retaliation lawsuit?

EXPOSURE

Defense attorneys, insurance adjustors, and business owners must assess the exposure faced by the employer should the plaintiff win. The exposure must be assessed in both economic and noneconomic terms.

The economic damages alone can be staggering. Plaintiffs are usually able to "blackboard" large damages claims by simply advising a jury that, for example, the employee is only 40 years old and but for the employer's violation of the law he would have continued to earn his annual salary of at least $50,000 for the next 20 or 30 years. So a starting point for damages could be $1,000,000- $1,500,000.

Even employees who can blackboard only small amounts, such as a 60 year old part-time building inspector earning only $2,500 per year, can present a costly claim due to a reason that motivates plaintiffs' attorneys in every claim brought under the statutes we are reviewing: The attorney can recover his or her attorney fee from the defendant employer. It is too often the case that the dollar exposure of employment lawsuits is driven more by the potential attorney fee award than by the actual damages at issue.

CONCLUSION

Being a fair-minded and diligent employer, committed to making employment decisions in a nondiscriminatory way, is too often not enough to avoid litigation. Instead, knowing the broad reach of statutes like the ELCRA can help you anticipate and hopefully avoid claims of unlawful discrimination.

Next month we will review another difficult area of employment law identified by its acronym "PDCRA", standing for the Persons With Disabilities Civil Rights Act.

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[1] An acronym shorthand for the Lesbian, Gay, Bisexual, Transgender, and Queer (or Questioning) community.

[2] *Zanni v Medaphis Physicians Srvs Corp*, 240 Mich App 472, 477 (2000).