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## LAW & ACCOUNTING

*As workforce shrinks, potential  
for discrimination litigation rises*

BY LINDA HAASE

The economy's downward spiral made an indelible mark on the workforce, leaving business owners grappling with shrinking staffs – and a plethora of legal challenges.



**Pheterson**

“Anytime there is an adverse employee action such as a firing, a layoff, a demotion or pay decrease, there is a potential for litigation. The more people adversely affected, the more chance there is for a claim to be filed,” said Jeff Pheterson, managing partner with West Palm Beach-based

Ward, Damon, Posner, Pheterson and Bleau.

Statistics on the U.S. Equal Employment Opportunity Commission's website corroborate this, he noted, pointing to the increase in the discrimination charges filed with the agency: to 99,922 in 2010 from 75,768 in 2006.

Charges of employer retaliation filed by employees who say their employers discriminated against them dominated in 2010, accounting for 36 percent of discrimination charges filed.

A Supreme Court decision a few years ago made it easier for employees to bring retaliation claims, said Chris Hammon, a shareholder with Ogletree, Deakins, Nash, Smoak & Stewart, P.C. in Miami. Employers need a policy that addresses the proper investigation of complaints, he suggested.

“They must make sure the complaint is reported up the appropriate chain so it gets to the correct person, treat the complaint as confidentially as possible and treat the person who lodged the complaint the same way they would if they hadn't made the complaint,” Hammon said. “And, proceed cautiously and seek advice from the HR and/or legal department.”

## MORE AGE DISCRIMINATION CASES

Age discrimination claims comprise nearly one-fourth of those filed with the EEOC last year.

“As the baby boom generation gets older, we are seeing more of these type of claims,” said Eric Gabrielle, shareholder at Fort Lauderdale-based Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A. “This is a generation that is not adverse to litigation and speaking up. When they lose their job and suspect it is for an unlawful reason, they do something about it.”

Wage and hour disputes are also a concern for employers.

“In fiscal year 2008, the Department of Labor collected more than \$57.5 million in back wages for approximately 77,000 workers in low-wage industries – an increase of more than 77 percent collected during fiscal year 2001 for violations in the same industries,” according to the agency’s website.

“This [wage and hour] is the No. 1 issue employers need to look at. They need to do audits and make sure employees are being paid properly, and have a thorough review of payroll practices so they don’t end up with a federal court lawsuit,” Pheterson said. “There are some very common misconceptions regarding overtime – for example, all salaried people are not automatically exempt from overtime.”

Federal and state government agencies are acting aggressively to curtail the misclassification of workers as independent contractors, rather than employees, Gabrielle noted.

“Employers need to make sure workers are properly classified, and not to assume that, in the absence of a complaint, they are in the clear,” he said. “The message for employers ... is that compliance is a key issue.”

Pheterson agreed. The recent U.S. Supreme Court decision in *Staub v. Proctor Hospital*, which ruled in favor of an employee alleging discrimination, underscores the importance of employers’ diligence, he said. “There should be policies in place that require reporting of all perceived discrimination, of any kind. There should be a thorough investigation of complaints made,” Pheterson noted in a recent blog post on his firm’s website. “The advice and consent of top management should be involved in potential significant cases (with some reporting mechanism), so someone is ‘watching the watchers.’ Staff should be trained as to employees’ rights.”

The stakes are high.

“If the next employment decision you are about to make ended up in the Supreme Court and on the evening news, would it appear that you did enough?” Pheterson asked in the blog post.