

EMPLOYMENT ALERT – HEDGE FUND AND PRIVATE EQUITY COMMUNITY

ENFORCEMENT OF DISCRIMINATION AND HARASSMENT LAWS ON THE RISE



Employee claims of workplace discrimination and harassment are on the rise – as are the enforcement efforts of the agencies that administer the federal and state anti-discrimination and harassment laws.

On March 5, 2008, the Equal Employment Opportunity Commission (EEOC) announced a 9 percent increase in charges of discrimination and harassment over the past year, with the total number of charges filed reaching its highest level since the early 1990s. Among the types of claims rising most precipitously were claims of retaliation, age discrimination and pregnancy discrimination (which reached historic highs). The EEOC also had a record year in enforcement, issuing probable cause findings and/or obtaining monetary relief for claimants in 23 percent of all cases and achieving a 26 percent increase in monetary recoveries over the prior year (\$274 million to \$345 million).

The up-tick in enforcement also is being felt at the state level. In New York, the state's Division of Human Rights (NYSDHR) announced a new initiative in which it will more rigorously investigate employee complaints. The initiative includes more detailed requests for information from employers, a quicker resolution of claims and easier procedures for claimants to file charges. Perhaps as a result of some of these changes, the number of charges filed by New York employees rose by almost 25 percent in 2007 (from 5,313 in 2006 to 6,634 in 2007). The NYSDHR also issued probable cause findings at a rate *more than triple* that of the previous year – from 7 percent of all cases in 2006 to 22 percent of all cases in 2007 – despite no material changes in the underlying statute. For the first time in over a decade, the NYSDHR now is also initiating its own investigations, even in the absence of a complaint by an aggrieved employee. New York firms thus now could find themselves enmeshed in NYSDHR proceedings even where none of their own employees have complained of discrimination.

In light of the above developments, the risks of failing to comply with anti-discrimination and harassment laws have never been greater. Employers can expect to see an increase in the number of complaints filed against them, the speed at which such complaints are investigated and the incidences in which complaints result in probable cause findings.

RECOMMENDATIONS

Hedge funds and private equity firms should take immediate steps to protect themselves. Firms should ensure they have adopted appropriate equal employment opportunity (EEO) policies, including rules prohibiting workplace harassment and discrimination, internal complaint procedures for aggrieved employees and rules prohibiting retaliation against employees who file internal complaints. Such policies, if appropriately implemented, can help identify workplace problems before they lead to administrative charges and can form the basis for important affirmative defenses should litigation ensue.

Firms also should redouble their efforts to document appropriately workplace decisions that may lead to complaints of discrimination. Evaluations of employees should appropriately identify problem areas as well as areas where improvement is necessary. Employee misconduct and underperformance should be documented, and the relevant employees should be put on notice of the nature of their shortcomings and the steps they must take to redress such issues.

Hedge funds and private equity firms also should strongly consider implementing mandatory arbitration programs for employees. Such programs cannot prevent an employee from filing a complaint with the EEOC or state agency, but they can channel most litigation away from the costly and time-consuming court system. The confidentiality surrounding arbitration can be particularly valuable in the hedge fund and private equity space, where plaintiffs' lawyers frequently seek to exploit firms' wariness of litigation to leverage windfall settlements for their clients – despite the often meritless nature of the underlying claims.

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CONTACT INFORMATION

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