LABOR AND EMPLOYMENT
BLOG

Monday, November 26, 2012

Q&A: Finding Common Ground in Consent Decrees with EEOC

by Lydell C. Bridgeford

Labor mediator Amy L. Lieberman shares her experience with counseling employers in negotiations with the Equal Employment Opportunity Commission over consent decrees, especially provisions on anti-harassment and non-discrimination training for employees and managers.

The majority of settlements in federal lawsuits to which EEOC is a plaintiff will take the form of a consent decree, which is submitted to the court for approval. The decree is a public record that addresses the specific wrongs of the employee or employees, and introduces policies and EEOC reporting requirements aimed at preventing future discrimination within the company.

"No employer wants a consent decree, and the negative publicity that goes with one, but it is unavoidable. The EEOC will not resolve a case privately, without one. It's best to know that going in," Lieberman told Bloomberg BNA in this email Q&A.

Bloomberg BNA: What should employers be mindful of as they negotiate and consider remedies and injunctive relief for a court-approved consent decree with EEOC?

Lieberman: In conducting several EEOC mediations over the years, it has been challenging to ensure employers are not immediately put off by the initial demands the EEOC sets forth in the consent decree, but I would encourage employers not to be too discouraged by the initial demands and keep an open mind with respect to the negotiations.

Typically, the monetary amounts are negotiated first, and the remaining provisions relating to policies, posting, and training are negotiated after the dollar amounts are agreed to. In my experience, virtually all provisions in the consent decree are negotiable.

In addition, I also remind employers that some of what the EEOC asks for is stuff which is already done (or should be done) by employers.

The EEOC will always demand some sort of training. While the specific terms of the training are negotiable, such as who performs the training, who attends it and how long it will last, the employer should be doing or probably already does training anyway.

Presenting this as something they should do or are already doing, makes it easier for an employer to agree to instead of presenting it as something mandated by the EEOC settlement.

The EEOC's role is to work on behalf of the public, to ensure discrimination-free work environments. A consent decree helps the EEOC get the message out to the employers and the employees of various companies that discrimination is not tolerated.

For a company, a consent decree allows them to demonstrate to their employees they are committed to a workplace free from discrimination and are willing to go extra steps to communicate that to its management team, and other employees.

Bloomberg BNA: Have you noticed any trends with court-approved EEOC consent decrees in remedies and relief agreed upon?

Lieberman: Consent decrees will typically involve as specific duration term. The EEOC may initially ask for a 5 year term which can often be negotiated to a 2-3 year term.

The consent decree will also include training. Depending on the employer's current training, sometimes the parties can agree to continue with what the employer already provides.

In cases where the employer does not already do training, I have often seen the EEOC and the company agree that the company's employment counsel or in-house counsel can provide the training, as opposed to forcing the employer to hire a third-party provider.

The EEOC will typically ask for a "positive reference." Most employers are not willing to provide such a reference, but usually the parties agree to a neutral letter of reference, or provide the aggrieved party with the company's "reference hotline" which usually provides neutral references.

The EEOC will often ask that any reference to the aggrieved individual's claim of discrimination be expunged from the personnel file. This is usually not a sticking point, as most employers do not--and should not--keep this type of information in personnel files anyway.

Bloomberg BNA: Can you share with us any unusual remedies or relief that you have heard about in an EEOC consent decree approved by the court?

Lieberman: Although reinstatement is often sought, it is a rare case where that occurs. By the time the EEOC is litigating the case, it typically has been several years since the acts at issue occurred and employees have moved on.

In one case I mediated, the parties agreed that the bad actor would be terminated and could not be rehired by the defendant. That was somewhat unusual because the EEOC does not have the authority to request that type of relief from a court. In that case, the company was planning to terminate the bad actor anyway.

In another situation, the bad actor was already fired and the employer agreed not to rehire him at the company or any sister companies. Again, this is relief the EEOC could not get from the court, but because the employer had no intention of ever rehiring the person they decided not to fight about it.

Bloomberg BNA: Any finals thoughts on EEOC consent decrees?

Lieberman: For parties that have not mediated with the EEOC before, it sometimes comes as a surprise that the actual employees, on whose behalf the EEOC is pursuing the lawsuit, may not be present at the mediation, especially if it is a class case. Other times, the employees may be present, but the EEOC has the final say on any monetary amounts that are agreed to, not the employee(s).

For employers, it is helpful to have experienced employment counsel who has worked with the EEOC in negotiating these types of agreements, as well as an experienced mediator of EEOC cases, so the employer has a realistic assessment of how the negotiations proceed, and the end result is something both parties can live with.