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The Fine Line Employers Walk:
Is It a Justified Business Practice, or Discrimination?

By Michelle Y. DiMaria*

I. INTRODUCTION

The focus on equal protection in employment and labor matters has steadily evolved in the United States in recent decades. This evolution has involved the Equal Employment Opportunity Commission (EEOC) increasing in power and authority to enforce employee protections, which has resulted in increased challenges to employers. Additionally, the aftermath of the 2008 economic recession has also presented employers with many financial challenges which have led to increased pressure on business leaders to reduce costs. As a result, many employers have reduced their workforce, demanded increased productivity and efficiency from their existing workforce, and reduced their budgets for legal support. The combined effect of all of the above listed factors has led to a workplace climate where many employers practice a careful balance of managing business staffing needs through employment terminations while attempting to avoid EEOC scrutiny and reduce the legal risks associated with their personnel changes. This article will explore some of the history that has led to these dynamics, discuss some of the legally and ethically challenged business practices of employers, and discuss proposed considerations in addressing these issues.

A. The Evolution of Employment Law and the EEOC

In 1964, Congress passed the first Civil Rights Act which prohibited employment discrimination on the basis of race, national origin, color, sex, or religion.¹ Through this Act, Congress created the EEOC to serve as the lead agency over workplace discrimination matters.² However, the EEOC lacked the power to enforce the Act because the statute only authorized the EEOC to inform individuals that they could sue employers in cases where the EEOC found evidence of discriminatory practices and allowed the EEOC to refer the matters to the Department of Justice (DOJ) for enforcement and litigation.³ Due to the widespread continuation of employment discrimination, Congress passed the Equal Employment Opportunity Act of 1972 which gave the EEOC authorization and jurisdiction to sue employers in matters where the EEOC

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¹ See *Civil Rights Act of 1964 Explained*, Laws.com, <http://civil.laws.com/civil-rights-act-of-1964> (last visited July 24, 2015).

² See Equal Employment Opportunity Commission, *Pre 1965: Events Leading to the Creation of EEOC*, <http://www.eeoc.gov/eeoc/history/35th/pre1965/index.html> (last visited July 24, 2015).

³ See *id.*

found evidence of discriminatory practices.⁴ This gave the EEOC unlimited power to litigate and greatly expanded the EEOC's aggressive outreach and enforcement efforts which continues today.

As discrimination litigation increased in the 1970's, several landmark cases came out of the U.S. Supreme Court which bolstered the EEOC's position and provided additional framework for courts and employers.⁵ One of the most frequently cited discrimination cases from this time was *McDonnell Douglas Corp. v. Green*, where the Supreme Court held that once a showing of discrimination has been made, an employer may avoid liability by demonstrating a "legitimate, nondiscriminatory reason" for the employer's action.⁶ While this may have given employers a window for a business defense, numerous subsequent Supreme Court cases and legislation followed in the 1970's that established increasingly tougher standards.⁷ As the late 1970's approached, the EEOC's power was expanded even further through the Reorganization Plan No. 1 of 1978 and Executive Order 12067,⁸ which transferred authority to the EEOC for enforcement of equal pay for women⁹ and equal treatment for older workers¹⁰ and disabled workers.¹¹ Additionally, Congress gave the EEOC authority to enforce the Uniform Guidelines on Employee Selection Procedures (UGESP) which established hiring standards for all employers including private sector and federal, state, and local governments.¹² This increased enforcement authority led

⁴ See Equal Employment Opportunity Commission, *The 1970's, The "Toothless Tiger" Gets Its Teeth, A New Era of Enforcement*, <http://www.eeoc.gov/eeoc/history/35th/1970s/index.html> (last visited July 24, 2015).

⁵ See *id.*

⁶ *McDonnell Douglas Corp. v. Green*, 411 U.S. 72, 802 (1973).

⁷ See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (holding that Title VII protection extends to non-citizens); see also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (holding that union and employer cannot bargain away equal employment rights); see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975) (holding that back pay should be provided to employees who were discharged based on discriminatory reasons); see also The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (prohibiting pregnancy-based discrimination); see also *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977) (holding the government could establish racial discrimination through statistic comparison of the racial composition of an employer's workforce against that of the relevant labor market, and that a disparity supports an inference of discriminatory practices); see also *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (requiring employers to accommodate employees' religious needs so long as doing so would not create an undue hardship for employer)).

⁸ See Reorganization Plan No.1 of 1978, 43 Fed. Reg. 19807, 92 Stat. 3781 (Feb. 23, 1978).

⁹ See *The History of the Equal Pay Act and Its Impact on Women*, AMERICA'S JOB EXCHANGE, <http://www.americas-jobexchange.com/career-advice/equal-pay-act-for-women>.

¹⁰ See United States Department of Labor (DOL), Age Discrimination, <http://www.dol.gov/dol/topic/discrimination/agedisc.htm> (last visited July 24, 2015).

¹¹ See 29 U.S.C. §§ 791, 794.

¹² See *Uniform Guidelines on Employee Selection Procedures*, BIDDLE CONSULTING GROUP, <http://www.unifor-mguidelines.com/index.html>.

to an increase in attention that the EEOC gave to individual discrimination claims and remedies for complainants throughout the 1980's.¹³

Then, in the 1990's, the EEOC's power further increased with the enactment of legislation increasing civil rights protections for the disabled,¹⁴ establishing benefits protection for older workers,¹⁵ and furthering civil right protections by increasing penalties and remedies for intentional workplace discrimination.¹⁶ Additionally, during this time the EEOC also began its crusade against sexual harassment in the workplace and successfully litigated several landmark employment cases which established rulings requiring employers to comply with observance of religious holidays and prohibiting sexual harassment against women, men, and same-sex violators.¹⁷ The Supreme Court also ruled on several cases which furthered requirements upon employers by establishing broader definitions of what constitutes discrimination for claims based on age, sex, and disability.¹⁸ Congress also advanced job benefits and protections by enacting the Family and Medical Leave Act of 1993 (FMLA) which required employers to provide job protection to employees in eligible circumstances related to family and medical administrative leaves from work.¹⁹

¹³ See Equal Employment Opportunity Commission, *The 1980's, A Period of Change and Reassessment*, <http://www.eeoc.gov/eeoc/history/35th/1980s/index.html> (last visited July 24, 2015).

¹⁴ See Disabled World, *Americans with Disabilities Act of 1990 (ADA)*, <http://www.disabled-world.com/disability/ada> (last visited July 24, 2015).

¹⁵ See Alexander Hamilton Institute, *Older Worker Benefit Protection Act: Compliance Tips*, BUSINESS MANAGEMENT DAILY (Nov. 18, 2011, 5:00 PM), <http://www.businessmanagementdaily.com/19744/older-workers-benefit-protection-act-compliance-tips>.

¹⁶ See *The Civil Rights Act of 1991*, TEACHINGAMERICANHISTORY.ORG, <http://teachingamericanhistory.org/library/document/civil-rights-act-of-1991> (last visited July 24, 2015).

¹⁷ See Equal Employment Opportunity Commission, *Furthering the Protections Against Workplace Discrimination and Harassment*, <http://www.eeoc.gov/eeoc/history/35th/1990s/furthering.html> (last visited July 24, 2015).

¹⁸ See *Int'l Union, UAW v. Johnson Controls*, 499 U.S. 187, 225 (1991) (ruling that unless an employee's ability to become pregnant is directly related to her ability to perform the job, an employer cannot restrict fertile women employees from working dangerous jobs); see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (holding no requirement to prove a suffering of psychological harm to prevail in a sexual harassment claim); see also *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996) (ruling no requirement of a showing that a discharged plaintiff replaced by an employee under 40 to prevail on age discrimination); see also *Farragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (ruling that employers are liable for sexual harassment conducted by their employees); see also *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) (holding that same-sex harassment is a violation under Title VII); see also *Bragdon v. Abbott*, 524 U.S. 624 (1998) (ruling that having HIV constitutes as a disability under the ADA); see also *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999) (holding that a disability under the ADA is a limitation of any major life activity).

¹⁹ See *Pay & Leave, Leave Administration*, OFFICE OF PERSONNEL MANAGEMENT, <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration> (last visited July 24, 2015).

B. Increased Challenges for Businesses

As employment laws have greatly evolved and the EEOC has strengthened in its aggressive pursuit of employment discrimination, employers have faced increasing challenges in their efforts to keep discrimination claims at bay. One article from the Chicago Bar Record characterizes today's business environment as "economic recession, massive unemployment, rapidly changing technology and general job reduction and in a social and legal atmosphere distinguished by senior citizen activism, over-regulation and excessive litigation," and states that employers must "defend vigorously"²⁰ against discrimination claims and "commit to a prophylactic response to . . . discrimination laws if they wish to minimize the risk of . . . litigation."²¹ It has also been said that employers cannot insure against this risk because the laws and the landscape is "too unsettled"²² and "the populace is too litigious."²³ Some argue that the government has placed inordinate costs on employers in the form of liability for statutory violations.²⁴ Others argue that frequent litigation and monetary settlements serve as incentives for employees to bring complaints because "news of big settlements can inspire workers suffering perceived grievances to come back again and again with monetary demands."²⁵

Given the many economic and legal challenges that employers face, businesses often attempt to mitigate their legal risks by positioning their employment decisions around recognized legal defenses. The purpose of this article is to explore some of the most commonly used employer defenses and discuss the ways in which these employer practices could be masking patterns of discrimination. This article will also explore existing and proposed solutions to this issue and conclude with proposed outcomes.

²⁰ See Nina G. Stillman & Edward C. Jepson, Jr., *Compliance with the Age Discrimination in Employment Act: Special Problems*, 64 Chi. B. Rec. 284 (1982-1983).

²¹ See *id.*

²² See *id.*

²³ See *id.*

²⁴ See Lynn Evans, *Comment: Confusion in the Court: Sexual Harassment Law, Employer Liability, and Statutory Purpose*, 21 LOY. L.A. INT'L & COMP. L.J. 521, 547 (1999) (noting about the costs of sexual harassment that "[c]onsidering how costly the federal government has made the practice, it's amazing that employers still hire women." (quoting Robyn Blumner, *Women Might Price Themselves Out of Jobs*, ST. PETERSBURG TIMES (Oct. 4, 1998)).

²⁵ See Kirstin Downey Grimsley, *Worker Bias Cases Are Rising Steadily: New Laws Boost Hopes for Monetary Awards*, WASHINGTON POST (May 12, 1997) ("Reesman, of the employer group, said news of big settlements can inspire workers suffering perceived grievances to come back again and again with monetary demands. She said these demands are making some companies more combative and more willing to fight cases all the way through the courts." (referring to Ann Reesman, General Counsel of the Equal Employment Advisory Council based in the District of Columbia)).

II. EMPLOYER DEFENSES TO DISCRIMINATION CLAIMS

Under Title VII of The Civil Rights Act, discrimination is defined as any employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.²⁶ As a defense to a claim of a facially neutral discriminatory practice under Title VII, the burden of proof shifts to the employer to demonstrate that the challenged practice is job related for the position in question and consistent with “business necessity.”²⁷ However, neither the statute nor the EEOC specifically defines the business necessity standard, and the courts have varied in their interpretation and application of this standard.²⁸ The Supreme Court has treated business necessity as synonymous with whether the employment practice is related to successful job performance and held that business necessity is met where the employment practice bears a “manifest relationship to the employment in question.”²⁹ The business necessity standard has also been established where “important elements of work behavior” are required to perform the job,³⁰ or where the employment practice accurately ascertains one’s “ability to perform successfully the job in question.”³¹ However, in other cases the business necessity standard has been established only where the employment practice is “necessary to safe and efficient job performance.”³²

Under the Age Discrimination Employment Act (ADEA), age discrimination involves employers treating applicants or employees who are forty or older less favorably because of his/her age.³³ The Supreme Court³⁴ and the EEOC³⁵ both uphold the position that the ADEA prohibits policies and practices that have a discriminatory effect on individuals over forty, even if the harm is not intentional. As a defense to an age discrimination claim, an employer only needs to prove that the challenged employment action is based on “reasonable factors other than age,”

²⁶ See 42 U.S.C. § 2000e-2 (1991).

²⁷ *Id.*

²⁸ See James O. Pearson, Jr., *What Constitutes “Business Necessity” Justifying Employment Practice Prima Facie Discriminatory Under Title VII of Civil Rights Act of 1964*, 36 A.L.R. Fed. 9 (1978).

²⁹ See *Griggs v Duke Power Co.*, 401 US 424, 431 (1971).

³⁰ See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 405, 431 (1975).

³¹ See *El v. Se. Pa. Trans. Auth.*, 479 F.3d 232, 242, 244 (3d Cir. 2007).

³² See *Robinson v Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); see also *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977).

³³ Age Discrimination in Employment Act, 29 U.S.C. § 623 (2008).

³⁴ See *Smith v. City of Jackson*, 544 U.S. 228 (2005); see also *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008).

³⁵ See 29 C.F.R. § 1625 (2014).

and is not required to prove business necessity.³⁶ The EEOC has determined that a reasonable factor other than age (RFOA) is a “non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances.”³⁷ To establish a RFOA as an affirmative defense, an employer must show that the employment practice aims to reasonably further a “legitimate business purpose,” and that the practice was administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances.³⁸ The RFOA standard is lower than the business necessity standard of Title VII.³⁹

As in the case of the business necessity standard, the “legitimate business purpose” standard has also not been clearly defined and has been interpreted and applied in various ways.⁴⁰ Some courts have held that a legitimate business purpose is concerned with more than merely the employer’s motives for the challenged practice,⁴¹ or that to establish a legitimate business purpose the employment practice must be related to “the safe and efficient operation of the business.”⁴² However, employers have also frequently used this defense to justify employment terminations driven by budget cuts.

Another commonly asserted defense to challenged employment practices is the defense that the employment actions taken were based on factors related to the employee’s job performance.⁴³ The standards for job performance can vary greatly, ranging from objective productivity measures such as work output per hour,⁴⁴ to more subjective measures such as the desirability of the person as an employee relating to factors including attendance, conduct, quality of work contribution, or personality.⁴⁵ Courts commonly rule in favor of employers where the defense of

³⁶ *See id.*

³⁷ *See* 29 C.F.R. § 1627.7 (2007).

³⁸ *See id.*

³⁹ *See id.*

⁴⁰ *See* Pearson, *supra* note 28.

⁴¹ *See* United States v. N. L. Indus., Inc. 479 F.2d 354, 354 (8th Cir. 1973).

⁴² *See* United States v. Chesapeake & O. R. Co., 471 F.2d 582 (4th Cir. 1972) (holding that the test of business necessity is not whether a business purpose existed for adhering to a challenged practice, but whether an overriding legitimate business purpose existed such that the challenged practice was necessary to the safe and efficient operation).

⁴³ *See* Bill Barclay, *On The Job Performance*, 18 L. NOW 28 (1993-1994).

⁴⁴ *See* Jerome A. Mark, *The Older Worker, Measurement of Job Performance and Age*, 79 MONTHLY LAB. REV. 1410 (1956).

⁴⁵ *See* Russell G. Donaldson, *Consideration of Work Performance or Production Records as Pretext for Unlawful Employment Practice Violative of Title VII of Civil Rights Act of 1964*, 32 A.L.R. Fed. 7, (1977).

poor performance is established as the reason for the employment action, and there is no showing of discrimination as a pretext for the employer's action.⁴⁶

In addition to job performance, employers also commonly base their defense of employment actions on the employment-at-will doctrine in termination cases.⁴⁷ The employment-at-will doctrine is widely recognized in all states and holds that employers or employees may end the employment relationship at any time, for any reason, so long as it is not based on discriminatory reasons that violate established employment laws.⁴⁸ Under at-will employment, employers can terminate employees without warning and without having to establish "just cause" for the termination.⁴⁹ The rule is justified in common law on the basis that at-will employees are equally entitled to leave their job at any time without reason or notice.⁵⁰ However, others argue that the practice implicates public policy concerns due to the inequality of bargaining power between the employer and the employee.⁵¹ The rule has also been heavily criticized for the harsh liberty employers have to exercise by terminating employees as they choose to.⁵² In fact, some say that employers are so reliant on the practice of at-will employment that they are reluctant to hire any employees unless they are certain of their ability to immediately fire them.⁵³ This implicates discrimination in the hiring of people in protected classes because employers may fear that it would be more difficult to fire them.

III. COMMON BUSINESS PRACTICES POSITIONED AS JUSTIFIED DEFENSES

Because the above listed defenses are often used to defend employment actions that are facially neutral but allegedly discriminatory, many of these defenses may appear lawfully justified with no known objective basis for the belief that the actions were based on discriminatory pretexts. However, in practice, as employers make initial decisions regarding many of their common employment practices, some of the factors they consider in their decision-making could

⁴⁶ See, e.g., *Blizard v. Fielding*, 454 F. Supp 318 (D. Mass. 1978) (holding that where employee did not perform her job effectively, employer could lawfully change her work responsibilities so long as the change was not pretext to cover decision based on employee's sex); see also *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263 (10th Cir. 1975) (ruling that so long as employer's failure to provide on-the-job training is not based on discriminatory reasons, the employee's substandard work provides a legitimate basis for employer's action to discharge employee).

⁴⁷ See "At Will" *Employment not an Excuse for Wrongful Termination*, ARIZONA STING (Nov. 27, 2014), <http://www.arizonastinging.org/at-will-employment-not-an-excuse-for-wrongful-termination>.

⁴⁸ See *id.*

⁴⁹ See Jay Shepherd, *Firing At Will: A Manager's Guide* 3-4 (Apress Media 2011).

⁵⁰ See Richard Epstein, *In Defense of the Contract at Will*, 57 U. CHI. L. REV. 947 (1984).

⁵¹ See *Coppage v. Kansas*, 236 U.S. 1, 18 (1915).

⁵² See JOHN W. BUDD, *EMPLOYMENT WITH A HUMAN FACE: BALANCING EFFICIENCY, EQUITY, AND VOICE*, 86-88 (2006).

⁵³ See TYLER COWEN & ALEX TABARROK, *MODERN PRINCIPLES: MACROECONOMICS* (2d ed. 2010).

be challenged as pretext to discrimination, retaliation, or a violation of public policy. This article will explore examples of some of these common business practices and the ways in which employers often walk this fine line.

A. The Careful Do's and Don'ts of Employer Actions

An “employment action” is any act that an employer takes to address an employee issue. The employment action is considered “adverse” when it constitutes a materially disruptive change to the employee.⁵⁴ Employers may take some form of employment action in the effort to correct or address any number of employment issues that could be presented, including but not limited to performance, conduct, or attendance. For this reason, standard employment actions could range widely and include anything from an informal discussion with the employee to employment termination. Due to the potential legal risk involved in taking virtually any employment action, employers commonly follow very careful business practices and guidelines when executing employment actions; employers also regularly receive guidance from consulting firms, legal firms, and Human Resource (HR) professionals to help them deliver employment actions while mitigating legal risk.⁵⁵ These practices include careful strategic considerations such as what to say, what not to say, how to say it, how to document, etc., with the objective to keep the employee from assuming or believing that the employment action may have been based on discriminatory or retaliatory factors.⁵⁶ For example, some business experts advise employers to refrain from or exercise extreme caution about saying anything to an older worker regarding his/her “energy level” in performance reviews, even if the employee’s low energy level directly hinders his/her work productivity, to avoid the risk of an age discrimination claim. Another example includes the widely held⁵⁷ but unlawful⁵⁸ employer practice of discouraging or prohibiting employees from discussing their salaries with others to avoid discrimination claims of unequal pay.

Other examples involve the practice of careful hiring selections of workers based on their age. Older workers who are declined for hire are commonly documented as being “overquali-

⁵⁴ See *Reyes v. City of Bridgeport*, 2009 U.S. Dist. LEXIS 99913 (D. Conn. Oct. 26, 2009) (“[a]n adverse employment action is defined as ‘a materially adverse change in working conditions that is more disruptive than a mere inconvenience or an alteration of job responsibilities.’”).

⁵⁵ See, e.g., *How to Fire Someone*, KEYGROUP, <http://howtofiresomeone.com> (last visited July 24, 2015).

⁵⁶ See, e.g., Mindy Chapman, *Case in Point: Real Life Employment Law Lessons, Don't Trip On Your PIP, The Risk of Performance Improvement Plans*, BUSINESS MANAGEMENT DAILY (Aug. 9, 2012, 11:30 AM), <http://www.businessmanagementdaily.com/32603/dont-trip-on-your-pip-the-risk-of-performance-improvement-plans>.

⁵⁷ See Alison Green, *Can An Employer Require You To Keep Your Salary Confidential?*, ASK A MANAGER (Jan. 14, 2012), <http://www.askamanager.org/2012/01/can-an-employer-require-you-to-keep-your-salary-confidential.html>; see also *Comply with Confidence: Salary Confidentiality and Employee Handbooks & Policies*, HR LAWS (Aug. 29, 2002), <http://www.hrlaws.com/forum>.

⁵⁸ See 29 U.S.C. §§ 151-169 (1947).

fied” for the position to avoid their age being implicated as the reason for the decline.⁵⁹ However, employers are often advised to document a justification for the over-qualification to cover their bases in the event that the hiring practice is later challenged on the basis of age discrimination.⁶⁰ Employers also tend to decline older workers on the basis of the position requiring “long hours” and are careful to document this in such a way to avoid the implication that the older worker may not be as suited to perform the long work hours as a younger worker.⁶¹ Another common employer practice is to decline older workers for hire but still hire other workers who are much younger, but still over forty years old, in the effort to appeal to the EEOC’s statistical hiring requirements,⁶² avoid the perception of age discrimination, and provide employers with a defense for age-based hiring claims. Employers may argue that this practice is still a lawful one where they can demonstrate that they still hired someone over forty for the job, and the candidate they selected was believed to be the best candidate for the job. However, courts have held that this practice still has a disparate impact upon the candidates who were substantially older than the ones selected.⁶³

Business leaders would argue that these practices are merely a fundamental means of doing business and making reasonable efforts to mitigate any unnecessary legal risks associated with their regular business practices.⁶⁴ Given the highly litigious environment of discrimination claims that employers face and the effort to reduce legal costs in tough economic times, one could argue that employers must do all they can to reduce the perception of discrimination.⁶⁵ However, these practices may create an inquiry of whether employers may actually be merely masking discriminatory practices. In fact, courts have found that a standard employer practice of attempting to reduce the risk of a claim, such as by strategically adjusting the verbiage used in performance reviews or corrective action documents, could be viewed by a court as a pretext for discriminatory practice or could be viewed by a jury as a shady employer practice to try to cover

⁵⁹ See Fay Hansen, *Avoiding Age Discrimination Claims in Hiring*, WORKFORCE.COM (Aug. 13, 2007), <http://www.workforce.com/articles/avoiding-age-discrimination-claims-in-hiring>.

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² See Equal Employment Opportunity Commission, *EEO Reports/Surveys 2015*, www.eeoc.gov (requiring that employers with 100 or more employees to submit self-reported statistical data to the EEOC consisting of the age and race of their employees which the EEOC uses to identify any potential disparate impact in the employer’s employment and hiring practices).

⁶³ See Ming W. Chin, et al., *Age Discrimination, in CAL. PRACTICE GUIDE: EMPLOYMENT LITIGATION 8-A* (2014) (noting *Whittington v. Nordam Grp., Inc.*, 429 F. 3d 986, 996 (10th Cir. 2005) (upholding employer liability for age discrimination where employer terminated a 62-year-old employee and hired a 57-year-old in his place; also noting *D’Cunha v. Genovese/Eckerd Corp.*, 479 F.3d 193, 195 (2d Cir. 2007) (upholding that an 8-year difference in age between the declined worker and the selected worker is adequate to support inference of age discrimination)).

⁶⁴ See, e.g., *Phillips v. StellarOne Bank*, No. 7:11cv00440, 2012 WL 3762448 (W.D. Va., July 16, 2012).

⁶⁵ See Susan M. Heathfield, *Prevent Employment Discrimination and Lawsuits*, ABOUTMONEY (Dec. 16, 2014), <http://humanresources.about.com/od/discrimination/qt/prevent-employment-discrimination.htm>.

up a discriminatory intent or unfair practice. For example, in one case a company revised the performance review before delivering it to the employee “to ensure it is appropriate since the document will be highly sensitive and could end up being used in a file defending our actions.”⁶⁶ The court held that the company’s actions demonstrated an effort to cover up an unfair practice and implicated a pretext of discriminatory intent.⁶⁷

B. Other Employer Actions That May Implicate Discrimination

Despite the careful efforts that employers take to ensure that employment actions do not appear to be based on discriminatory factors, the underlying reasons for the issues leading to the employment actions may still implicate discriminatory factors.

i. Age-Related Employment Decisions

A broad perception exists that older workers may be less desirable as employees due to the belief that they may be less productive, less educated, less up-to-date in their work knowledge, less flexible, and/or less healthy than younger workers.⁶⁸ In addition, research has shown that in tough economic times there tends to be an even higher rate of disparate impact to older workers.⁶⁹ It is a common business practice, especially in a challenging economy, for employers to have individual employees take on as much work volume as reasonably possible in order to have fewer employees and reduce unnecessary payroll expenses. For this reason, employers tend to favor workers who they think are most likely to deliver the highest amount of work productivity and efficiency. This includes the importance of strong computer skills. Feedback collected from employers has shown that employers may favor younger workers due to their tech savvy skills.⁷⁰ Other employers have admitted to favoring younger workers because they may be al-

⁶⁶ See *Phillips*, 2012 WL 3762448, at *3.

⁶⁷ See *id.*

⁶⁸ See Gary Burtless, *Is an Aging Workforce Less Productive?*, BROOKINGS (June 10, 2013, 2:52 PM), <http://www.brookings.edu/blogs/up-front/posts/2013/06/10-aging-workforce-less-productive-burtless>.

⁶⁹ See Carole Fleck, *Work Matters: Why Older Workers Can't Get a Break*, AARP THE MAGAZINE, July 22, 2013 (referencing results from a study published by the National Bureau of Economic Research).

⁷⁰ See The Editors, *Older Workers: Readers' Views*, NEW YORK TIMES BLOG (Apr. 13, 2009), http://roomfordebate.blogs.nytimes.com/2009/04/13/older-workers-readers-views/?_r=0 (quoting anonymous feedback from hiring managers that “[o]lder workers have trouble with computers. A lack of general skills makes it harder for them to learn new software, and many seem to resent having to learn. They’re more likely to call the IT department, and to lean on younger workers for help. Some have specific skills and suggest that they can use different applications, but can’t really maximize the utility of these applications and are much less efficient. There’s no easy way to gain general tech skills that young people have but to be young — play video games, update your Facebook daily, text-message your friends”).

most equally as productive at nearly half the salary.⁷¹ These kinds of work demands may create an inquiry as to whether employment action taken on an older worker for his/her inability to meet the job performance expectations constitutes age-based disparate treatment. While employers are likely to defend employment actions based on job performance issues, some courts have found that taking employment action based on factors that could be related to age may in fact constitute pretext to age discrimination.⁷²

One case that exemplifies this is the case of a fifty-one-year-old bank facilities manager who suddenly became responsible for the management of twenty-three additional branch banks due to the company's merger with another bank.⁷³ Prior to the merger, the employee was recognized on his annual performance review as having "outstanding" job performance and "tremendous knowledge" of the job.⁷⁴ However, a year after the merger the employee received a negative review for his performance being far below expectations.⁷⁵ The employer took employment action by issuing the employee a Written Warning, and later terminated the employee due to poor performance.⁷⁶ The employee filed an age discrimination lawsuit, and the employer defended the claim by asserting that the termination was due to performance, not age. Employer emails were introduced where the Human Resources Director made comments indicating that the employee may have been set up for failure, and acknowledging the need to "scrub" the negative performance review before having it delivered to the employee to reduce the legal risk of the action. The court held that this demonstrated pretextual discriminatory factors related to the termination.⁷⁷

Another example of employer actions that may implicate discrimination can be seen in the manner in which employers justify an employee's job performance as a legitimate reason to take employment action. At times, employers may implement practices to manage performance and productivity which can appear unfair or inconsistent, which courts could hold as pretext for discrimination. Furthermore, courts have also held that any evidence, either direct or circumstantial, which could raise an inference of discrimination may lead a fact-finder to justifiably

⁷¹ *See id.* (quoting a hiring manager that "a 55-year-old chemist is probably no less productive than a 29-year-old chemist. But, is s/he twice as productive? Almost certainly not. Yet the cumulative effect . . . may mean that the senior person earns nearly double what the almost equally productive junior person does").

⁷² *See* BUDD, *supra* note 52.

⁷³ *See* Phillips v. StellarOne Bank, No. 7:11cv00440, 2012 WL 3762448 (W.D. Va., July 16, 2012).

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ *See id.*

⁷⁷ *See id.*

conclude that the employer's action could logically be considered unlawful discrimination.⁷⁸ One case that exemplifies this is a West Virginia Supreme Court case involving an employer who used performance evaluation scores as criteria to determine which employees were given opportunities to transfer to other positions rather than being laid off in lieu of the closure of the job site. The employees who had higher performance evaluations were offered transfers to other sites, while the employees who had lower performance evaluations were laid off. The plaintiff offered circumstantial evidence which suggested that the employer lowered the performance evaluation scores of the older workers in order to position them as the ones who would subsequently be laid off. The Court held that the inference was sufficient to support a determination of pretext for discrimination.⁷⁹

ii. Appearance-Related Racial, Religious, and Gender Employment Decisions

Often times racial, religious, or gender-based factors may play a role in an employee being viewed as lacking some of the qualities that employers tend to find desirable in employees. One example of this relates to dress code and appearance. Employers commonly deem an employee's failure to comply with the employer's expectations or policies regarding appearance as a conduct or performance-related concern for which employers may take some level of employment action to address. Employers may defend this with the justification of having a reasonable and legitimate business purpose where certain business environments or jobs may require a specific standard of professional appearance.⁸⁰ However, if the employee's appearance is a natural reflection of his/her ethnicity, religion, or gender, this could raise the question of whether the dress code policies and/or employment action could constitute discrimination.⁸¹ Problems usually arise when the policies implicate sexism,⁸² when employers require rigid compliance with

⁷⁸ See *Moore v. Consol. Coal Co.*, 567 S.E.2d 661, 667 (W. Va. 2002) (holding that "if the plaintiff raised an inference of discrimination through his or her prima facie case and the fact-finder disbelieves the defendant's explanation for the adverse action taken against the plaintiff, the factfinder justifiably may conclude that the logical explanation for the action was the unlawful discrimination"); see also *Skaggs v. Elk Run Coal Co., Inc.*, 479 S.E.2d 561, 569 (1996) ("In disparate treatment discrimination cases under the West Virginia Human Rights Act, W. Va.Code, 5-11-9 (1992), a plaintiff can create a triable issue of discrimination animus through direct or circumstantial evidence. Thus, a plaintiff who can offer sufficient circumstantial evidence on intentional discrimination may prevail, just as in any other civil case where the plaintiff meets his or her burden of proof. The question should not be whether the evidence was circumstantial or direct, but whether the evidence in its entirety was strong enough to meet the plaintiff's burden of proof.").

⁷⁹ See *id.*

⁸⁰ See, e.g., 4 DC Mun. Regs. tit. 4 ADC § 506 (2016) (providing that "[a]ny restriction or limitation on dress or appearance shall be a result of a reasonable business purpose. In the absence of a reasonable business purpose, an employer shall not refuse to allow an employee to wear a hair or dress style symbolic of national origin, religion, or race.").

⁸¹ See 5 Emp. Coord. Employment Practices § 31:15 (2015).

⁸² See 6 No. 4 Kan. Emp. L. Letter 2, Kansas Employment Law Letter (1999).

their stated dress code policy,⁸³ are stricter with women dress code violators than men,⁸⁴ or fail to recognize where some physical characteristics may be associated with racial, religious, or gender-based factors.⁸⁵ For example, employers commonly base their hiring decisions on a worker's appearance, especially when the position requires the worker to interface with clients, customers, or other external business sources. Common examples include an employer refusing to hire a black female for a greeter or receptionist position in a professional office environment who dresses in a traditional ethnic fashion, such as a colorful hair turban or very long, curved, heavily decorated or brightly-colored fingernails, out of fear that she may offend clients or fail to represent the business in a professional manner. A similar example would apply in the case of an employer refusing to hire a man as a store manager who wears a traditional Sikh turban, or a woman who fully covers herself in traditional Muslim attire, out of fear that their image may make the customers uncomfortable.⁸⁶ Because the reasons for the refusal to hire are based on preferences about ethnic or religious attire, this could constitute a refusal to hire because of that person's race or religion, which necessarily equates to unlawful discrimination.⁸⁷

Although courts have ruled that such practices constitute discrimination under Title VII,⁸⁸ in general there are few cases that have prevailed to the level of raising public attention about appearance-related *racial* discrimination.⁸⁹ Regardless, it is likely that the EEOC will pursue any claim of racial discrimination arising out of one's appearance. One example of this is in a case where an employer prohibited an employee from wearing dreadlocks.⁹⁰ Here, a black woman submitted a job application and was selected for an interview.⁹¹ She was subsequently offered employment, but the employer did not see her physical appearance until the employee arrived to discuss her training schedule with the Human Resources staff.⁹² When the employer

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ *See Race Discrimination and Racial Harassment*, HRHERO, <http://topics.hrhero.com/race-discrimination-and-racial-harassment/#> (last visited May 28, 2016).

⁸⁶ *See Must An Employer Hire Someone Whose Religious Attire Would Make Customers Uncomfortable?*, CCH-HRCL P 46,537, 2012 WL 5934132 (2015).

⁸⁷ *See id.*

⁸⁸ *See, e.g.*, *Lloyd v. Commonwealth of Massachusetts Dep't of Revenue*, No. SUCV2012-04557, 2012 WL 6826401 (Mass. Super. Dec. 19, 2012); *see also* *Brown v. Stargate Night Club*, No. 41202, 2003 WL 24856844, (Minn. Dep't Hum. Rts. Dec. 9, 2003).

⁸⁹ *See, e.g.*, Lucille M. Ponte & Jennifer L. Gillan, *Gender Performance Over Job Performance: Body Art Work Rules and the Continuing Subordination of the Feminine*, 14 DUKE J. GENDER L. & POL'Y 319, 333 (2007).

⁹⁰ *See E.E.O.C. v. Catastrophe Mgmt. Sols*, 11 F. Supp. 3d 1139, 1140 (S.D. Ala. 2014).

⁹¹ *See id.*

⁹² *See id.*

observed the employee's blonde dreadlocks, the employer informed the employee that dreadlocks were not supported by their grooming policies and that the employer could not employ her unless she cut off her dreadlocks.⁹³ When the employee refused, her employment offer was immediately rescinded.⁹⁴ The EEOC filed suit against the employer stating the following:

“Generally, there are racial distinctions in the natural texture of black and non-black hair. The EEOC will not tolerate employment discrimination against African-American employees because they choose to wear and display the natural texture of their hair, manage and style their hair in a manner amenable to it, or manage and style their hair in a manner differently from non-blacks. Hair grooming decisions and policies (and their implementation) have to take into consideration differing racial traits, and cannot penalize blacks for grooming their hair in a manner that does not meet normative standards for other races.”⁹⁵

In this case, the district court dismissed the EEOC's claim that the employer's policy violated Title VII and confirmed that “employers' grooming policies are outside the purview of Title VII.”⁹⁶ The court also rejected the EEOC's argument that, under Title VII, the definition of race should be broadly interpreted to encompass “more than immutable physical characteristics unique to a particular group.”⁹⁷ This holding may encourage some employers to continue to practice many similar actions that could imply racially-driven discrimination. However, it is equally likely that the EEOC will continue to pursue claims of appearance-based racial discrimination.

In addition to racially driven discriminatory implications, many employer practices may also implicate discriminatory pretext based on one's *religious* appearance. The EEOC has recently litigated one case regarding appearance-related religious discrimination that has been ruled upon by the U.S. Supreme Court. In this case, a retail clothing store refused to hire an employee who wore a hijab because her appearance did not conform with their “Look Policy.”⁹⁸ On June 1, 2015, the U.S. Supreme Court held in an 8-1 decision that “[a]n employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstan-

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ *See* Press Release, Equal Employment Opportunity Commission, Mobile Catastrophic Insurance Claims Company Sued by EEOC for Race Discrimination over Hair Policy (Sept. 30, 2013), *available at* <https://www.eeoc.gov/eeoc/newsroom/release/9-30-13j.cfm>.

⁹⁶ *See* Kathryn Palamountain & Gerald L. Maatman, Jr., *Alabama Court Dismisses EEOC Dreadlocks Policy Challenge*, RISK MANAGEMENT MONITOR (Apr. 7, 2014), <http://www.riskmanagementmonitor.com/ala-court-dismisses-eeoc-dreadlocks-policy-challenge/>.

⁹⁷ *See id.*

⁹⁸ *See* E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2030-31 (2015).

tiated suspicion that accommodation would be needed."⁹⁹ The Court further held that "[a]n employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."¹⁰⁰

While some religious practices may involve traditions that many people may be generally familiar with, such as Jewish head coverings and Muslim beards, other religious practices involve appearances with which many people may not be familiar. An employer's lack of knowledge about a particular religious practice will not serve as a defense for the employer's failure to accommodate the religious practice.¹⁰¹ An example of this is demonstrated in a case involving a restaurant waiter who exhibited tattoos on his wrist while working on the job.¹⁰² The employee was informed that the restaurant chain's uniform and appearance policy required for tattoos to not be visible.¹⁰³ The employee explained that the tattoos were a religious symbol, and, in his ancient Egyptian religion of Kemetecism, it is considered a sin to cover his tattoos.¹⁰⁴ The manager allowed the employee to display the tattoos, but a few months later the employee was directed by upper level management to either cover the tattoos in conformance with the policy or go home.¹⁰⁵ The employee went home and was subsequently terminated.¹⁰⁶ The restaurant chain characterized the employee's beliefs as merely a "personal preference" and asserted that it did not think it was his actual religion.¹⁰⁷ It further asserted that accommodating his request to keep the tattoos uncovered created an "undue hardship"¹⁰⁸ for the employer because it had a business interest in portraying a particular image to its customers.¹⁰⁹ The court rejected both of these arguments and upheld the religious discrimination claim. This case represents the general unlikelihood that employers will prevail on an undue hardship claim where it relates to a religious accommodation. It also demonstrates that where employers rigidly uphold their practices around

⁹⁹ *See id.*

¹⁰⁰ *See id.*

¹⁰¹ See Jennifer K. Wyatt & Lane Powell PC, *Worshipping At the Altar of Ink: Tattoos and Religious Discrimination in the Workplace*, 5 Coast River Bus. J. (2010).

¹⁰² See *E.E.O.C. v. Red Robin Gourmet Burgers, Inc.*, No. C04-1291JLR, 2005 WL 2090677, *1 (W.D. Wash. Aug. 29, 2005).

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See id.* at *3-4.

¹⁰⁶ *See id.* at *4.

¹⁰⁷ *See id.* at *10.

¹⁰⁸ *See id.* at *14.

¹⁰⁹ *See id.*

preferring certain appearances of people, they may be at risk of their actions being perceived to implicate discriminatory practices.

Lastly, employers also commonly have several practices that could seem to be appearance-related *gender* discrimination as well. This has been a frequently litigated issue where employers commonly tend to uphold policies and practices which adhere to the traditional notions of male or female appearances,¹¹⁰ including practices such as requiring women to wear dresses or skirts, prohibiting men from wearing earrings, or failing to accommodate transgender individuals in their attire choices. Today, the traditional notions of appearances have changed and are also said to be continually “shifting.”¹¹¹ Based on this change, as well as the generally litigious environment that employers are in, it has been said that this is another reason why employers “are being forced to relax their workplace dress and grooming standards.”¹¹² But not only must employers adjust their workplace dress code practices to avoid gender-based discriminatory implications with *current* employees, they must also adjust their hiring practices related to gender appearances of job applicants as well. One example of where employer practices regarding gender-related appearances could imply discrimination is in their hiring practices of visibly pregnant women. There may be many lawful reasons for declining employment to a pregnant woman over another job candidate. However, in practice, it is commonly known among employers and the general public that it is unlikely that a pregnant woman will be selected for hire over other job candidates. If challenged, employers commonly justify and defend this practice by showing that they (1) interviewed and considered other women for the position as well as men; and (2) hired a candidate who either equally met or exceeded the qualifications for the position in comparison to the claimant who was declined. However, this justification may not be upheld in courts. An example of this can be seen in a case involving a six-month pregnant woman who filed suit claiming that she was declined employment because she was pregnant. The employer defended the claim by arguing that “because only women applied for the position no discrimination occurred in the hiring process.”¹¹³

Another example where employer practices around gender-related appearances could appear discriminatory is where it relates to gender identity. In general, employers and the EEOC have only very recently identified gender identity discrimination as a Title VII violation.¹¹⁴ Today, discrimination on the basis of gender identity constitutes sex discrimination under Title VII and EEOC regulations, which makes it unlawful for employers to “fail or refuse to hire or to dis-

¹¹⁰ See 12 No. 10 N.M. Emp. L. Letter 3, New Mexico Employment Law Letter, Question Corner: Can I Make Him Take The Earring Off? Tinnin Law Firm, October 2006.

¹¹¹ See Joanne Deschenaux, *Workplace Dress, Grooming Codes May Raise Legal Issues*, Society for Human Resource Management (Sept. 4, 2012), <https://www.shrm.org/legalissues/employmentlawareas/pages/workplace-dress-grooming-codes.aspx>.

¹¹² See *id.*

¹¹³ See *Tranquilli v. Irshad*, 454 N.E.2d 377, 378 (Ill. App. 1983).

¹¹⁴ See *Lusardi v. McHugh*, EEOC Appeal No. 0120133395 (Apr. 1, 2015) (holding that bathroom restrictions for a transgender employee constitutes discrimination).

charge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment” or to “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex.”¹¹⁵ In light of the recent and highly sensationalized public attention around the gender transition of Olympic Gold Medalist and reality television celebrity Bruce Jenner,¹¹⁶ the issue of gender identity, gender appearances, gender changes, and gender rights have raised awareness to the employment sector as well.¹¹⁷ It is estimated that more than 700,000 people in the United States are transgender,¹¹⁸ and it is believed that the popularized media attention that Jenner’s transition has received may result in many more transgender matters becoming present in the workplace.¹¹⁹ Some have advised employers “to evaluate, and consider eliminating, gender-specific dress and appearance rules”¹²⁰ and that “[d]ress codes should not be used to prevent a transgender employee from living full-time in the role consistent with his or her gender identity.”¹²¹ For the first time, in 2012, the EEOC held that transgender individuals could state a claim for sex discrimination under Title VII.¹²² Then in 2014, the EEOC acknowledged its first case of sex discrimination of a transgender person.¹²³ In this case, a physician in an eye clinic was hired as a man but later began his transition to become a woman. The transgender employee informed management of his intentions to transition his gender and change his name and began coming to work dressed in female attire. The employer was unprepared in the appropriate and lawful manner to accommodate this change in the office and, as a result, others in the office snickered about and ostracized the transgender individual from typical office operations. The transgender employee filed suit for discrimination - the first case in which the EEOC acknowledged gender discrimination against a transgender person. Given the very recent laws and awareness on this is-

¹¹⁵ 42 U.S.C. § 2000e-2.

¹¹⁶ See Aili Nahas, *Bruce Jenner is “Transitioning into a Woman,” Source Confirms to People*, PEOPLE MAGAZINE, Jan. 30, 2015.

¹¹⁷ See *Caitlyn Jenner Raises Awareness, Questions About Transgender People*, LAW OFFICE MANAGER BULLETIN, https://www.alanet.org/diversity/Transgender_Issues_Law_Office_Manager.pdf.

¹¹⁸ See *id.*

¹¹⁹ See George Ports, *Restricting Transgender’s Use of Restroom Found in Violation of Title VII*, WORKPLACE INSIGHTS: A NORTH CAROLINA EMPLOYER’S HANDBOOK (July 9, 2015 8:42 AM), <http://blog.capital.org/restricting-transgenders-use-of-restroom-found-in-violation-of-title-vii/>.

¹²⁰ See *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, OFFICE OF PERSONNEL MANAGEMENT, <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/>.

¹²¹ See *id.*

¹²² See *Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, EEOC Appeal No. 0120120821 (Apr. 23, 2012).

¹²³ See *E.E.O.C. v. Lakeland Eye Clinic P.A.*, 8:14CV02421, 2015 WL 3452556, *1 (M.D. Fla. Apr. 9, 2015).

sue, it is very likely that many employers may not be adequately suited to address similarly suited transgender-related workplace issues. However, regardless of whether employers are currently prepared with the necessary knowledge and workplace training or fully understand the kinds of actions that could constitute Title VII discrimination against transgenders, employers can expect the EEOC to fully pursue future cases where any evidence or implication of transgender discrimination may exist.¹²⁴

C. Employer Practices Using Severance Packages

There is no federal legal requirement for employers to offer employees any amount of severance pay when they leave their place of employment.¹²⁵ However, there are circumstances under which employers often choose to offer severance agreements to employees when the employment relationship is coming to an end. In some cases, employers may do this as a good faith offering, such as in cases of tenured employees, who are in good standing, whose jobs are ending due to budgetary cuts. However, there are other circumstances under which employers offer severance agreements to selected individuals who the employer wishes to terminate while attempting to mitigate any legal risk that could be associated with doing so. Under these circumstances, employers may choose to position the severance offer as a “mutual agreement to part ways.”¹²⁶ Common reasons for employers to want to end employment relationships include poor job performance that has gone undocumented,¹²⁷ and employee relations disputes where the employee has filed legal claims of discrimination or harassment. In these cases, the employer may want to terminate the employee to avoid any continued distress in the workplace that the employee’s presence may cause. However, if the employee is in a protected class as designated by Title VII,¹²⁸ the employer may have a strong reason to attempt to mitigate the legal risk of terminating the employee by obtaining the employee’s agreement to sever the employment relationship. One reason employers could want to exercise this option might include the employer believing the employee was a bad hire or “not a good fit”¹²⁹ for the position or the company. Another reason often involves circumstances in which the employer makes efforts to correct the employee’s poor performance by means of coaching or disciplinary action, but the employee responds with hostile-

¹²⁴ See Amanda B. Stubblefield, *A Title VII Transition?: Protections for Transgender Persons in the Workplace*, NATIONAL LAW REVIEW (May 11, 2015), <http://www.natlawreview.com/article/title-vii-transition-protections-transgender-persons-workplace>

¹²⁵ See U.S. Department of Labor, Wage and Hour Division, <https://www.dol.gov/whd/reg-library.htm>.

¹²⁶ See Susan M. Heathfield, *Severance Pay: Why an Employer Might Want to Provide Severance Pay*, ABOUT-MONEY (Apr. 15, 2016), http://humanresources.about.com/od/glossarys/a/severance_pay.htm.

¹²⁷ See Alan K. Sklover, *Refusing to Resign: Can HR Change Severance Offer?*, SKLOVERWORKINGWISDOM (Apr. 27, 2008), <http://skloverworkingwisdom.com/blog/refusing-to-resign-can-hr-change-severance-offer/>.

¹²⁸ See 29 C.F.R. § 1625.

¹²⁹ See Suzanne Lucas, *Your Employer Wants You to "Resign": How to Fight Back*, CBS MONEYWATCH (Dec. 2, 2010, 4:08 PM), <http://www.cbsnews.com/news/your-employer-wants-you-to-resign-how-to-fight-back/>.

ity and makes formal or implied claims of discrimination, harassment, or hostile work environment. If the employee's circumstances are muddled with any other sensitive or protected circumstance, such as an FMLA leave, a disability, or the employee being in a protected class, this elevates the legal risk of any employment action the employer may consider because it leaves a window open for the employee to claim that the termination was based on discriminatory reasons. While employers may legally terminate employees who *have* these circumstances, employers may *not* terminate employees *because* of any of these factors.¹³⁰ This can be a fine line since often times the reasons an employer may want to terminate an employee may partially be related to one or more of these protected factors. An example would be in the case of an FMLA-eligible¹³¹ pregnant employee who is planning on taking twelve weeks of FMLA leave. This prompts employers to carefully determine the most efficient and effective blend of staffing options in order to determine the best way to cover for the leave.¹³² However, in doing so it is not uncommon that employers may find that the temporary staffing modifications they identified may actually be a more efficient and effective staffing option for the long term. This could lead employers to determine that they have a legitimate business reason to eliminate the pregnant woman's position before she goes out on leave and proceed with the identified staffing changes. While the employer's intention may not have been discriminatory, this practice could be considered to have a discriminatory effect.

Employers can reasonably expect many disgruntled employees to respond to a termination by filing lawsuits and claims against the employer, publicly disparaging the company, and/or revealing confidential work-related information in the effort to sabotage the company after their departure. Therefore, in the effort to end the employment relationship while mitigating these commonly foreseeable risks, most employers have historically followed the common practice of using standardized language in their severance agreements with common provisions. These provisions usually entail clauses including a "release of claims" provision in which an employee releases his/her right to later file a claim against the employer;¹³³ a "non-disparagement" provision, which states that if the employee disparages the company he/she is in breach of contract and may be required to pay back the severance pay; and a confidentiality provision requiring the employee to maintain confidence or employment-related information (for which failure to comply may also subject the employee to breach of contract consequences). Many severance agreements have no rehire provisions which state that the employee releases his/her right to ever work within the company or any of its subsidiaries again. It is also very common for these standardized severance agreements to also have non-compete provisions which state that the employee is prohibited from, or limited, in accepting future employment with a competitor company.

¹³⁰ See Suzanne Lucas, *My Company Fires Pregnant Women: Is it Legal?*, CBS MONEYWATCH (June 6, 2012, 9:28 AM), <http://www.cbsnews.com/news/my-company-fires-pregnant-women-is-it-legal/>.

¹³¹ See 29 U.S.C. § 2612 (2009).

¹³² See Thomas P. Bechet, *Developing Staffing Strategies That Work: Implementing Pragmatic, Nontraditional Approaches*, 29 J. PUB. PERSONNEL MGMT. 465 (2000).

¹³³ See Heathfield, *supra* note 126.

Some say that severance is “a contractual obligation due to involuntary termination without cause” which is “just labeled ‘resignation,’” but that a more applicable label would be “termination by mutual consent.”¹³⁴ Others refer to the practice as “buying a resignation.”¹³⁵ Employers will often assert many reasons as to why this is a justified and lawful business practice, including their Tenth Amendment right of freedom to contract with their employees, the employment-at-will doctrine, and legitimate business purposes. While these arguments may appear justified, they have recently been strongly challenged in many ways. Among the arguments opposing the practice of using severance agreements to incite employees to agree to leave the company are the viewpoints that the practice violates public policy, infringes on people’s rights to file claims under Title VII, violates the NLRA regarding employees’ rights to discuss certain employer practices, constitutes economic duress where the bargaining power may be unequal between the parties, and constitutes retaliation under Title VII by prohibiting rehire eligibility. Each of these arguments will be discussed.

The practice of offering a severance to an employee to buy his/her agreement to leave and release all future claims against the company is very common and often includes enticing reasons the employee should take the offer. Moreover, the employer often offers compelling financial incentive when he/she is faced with the decision to either accept the agreement and be fired with pay, or not accept the agreement and be fired with no pay.¹³⁶ Often times employers will give employees little to no time in making this decision, and employees may be asked to make a decision on the spot or forgo the offer.¹³⁷ Employees may also be informed that they can still be eligible to collect unemployment benefits by signing the agreement,¹³⁸ and that the pay will help the employee in the transition period until he/she finds another job.

Some argue that these types of practices may violate public policy for several reasons.¹³⁹ Some argue that this practice could constitute inducement by duress or undue influence,¹⁴⁰ which also encompasses the element of whether the employee released his rights “knowingly and voluntarily”¹⁴¹ when he/she signed the agreement. This argument could be asserted in cases where

¹³⁴ See David Bjork, *Severance on “Voluntary” Termination*, INTEGRATED HEALTHCARE STRATEGIES, <http://www.integratedhealthcarestrategies.com/documents/articles/485.pdf>.

¹³⁵ Interview with Anonymous Source, Employment Litigation General Counsel, Fortune 500 Company, in Phoenix, Az. (June 7, 2015).

¹³⁶ See Heathfield, *supra* note 126.

¹³⁷ See Heathfield, *supra* note 126.

¹³⁸ See Allison Doyle, *What to Do When You Are Forced to Resign or Get Fired*, ABOUTCAREERS (Mar. 15, 2016), <http://jobsearch.about.com/od/resignation/a/forced-to-resign.htm>.

¹³⁹ See *Understanding Waivers of Discrimination Claims in Employee Severance Agreements*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (July 15, 2009), https://www.eeoc.gov/policy/docs/qanda_severance-agreements.html.

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

it can be shown directly or circumstantially that the employer may have leveraged its bargaining power and positioned the severance agreement in such a way as to compel the employee to accept it.¹⁴² Factors that could strengthen this argument could include whether the employer may have had external knowledge about the employee (such as whether the employee may have had financial issues, was a single parent, or was unlikely to find an equal paying job elsewhere) that the employer may have used to determine the amount of severance to offer.

An example of this is demonstrated in a Connecticut case involving an employee who was offered a severance agreement in lieu of termination.¹⁴³ In this case, the employer had received sexual harassment complaints about the employee and subsequently offered the employee a settlement agreement that called for the employee's resignation in return for "\$7,500, full payment of accrued vacation and sick pay, two months additional medical coverage and a promise by the city not to oppose any claim by the plaintiff for unemployment compensation."¹⁴⁴ The agreement also prohibited the employee from publicly discussing the terms of the agreement or disparaging the employer. The employee alleged that he was told that "if he did not sign the agreement his employment would be terminated and he would not receive any of the benefits negotiated in the agreement." The employee signed the agreement but later filed suit on the grounds of undue influence by alleging that at the time he received the "ultimatum" to sign the agreement he had serious financial difficulties, medical problems and medical bills, and that when he signed the agreement he believed that he had "no reasonable alternative but to acquiesce to the [city's] ultimatum and accept the settlement agreement."¹⁴⁵ The appellate court affirmed the district court's ruling in favor of the employer holding that undue influence was not established because the employee acknowledged he was advised to consult with an attorney before signing the agreement, he was given at least twenty-one days to consider the agreement before signing, and he could revoke the agreement within seven days after signing it.¹⁴⁶ The court also held that the mere act of telling an employee that he would face termination if he did not sign the agreement does not amount to undue influence and that to support a finding of undue influence the facts would need to show that the employer had "such control over the situation [the plaintiff] was faced with that his 'free agency' was destroyed and he was 'constrained' to do what he would not otherwise have done."¹⁴⁷ The practices that the employer did in this case are demonstrative of common practices of many employers. The only exception lies with the timeframe the employee is given to sign the agreement. In this case the employee was over forty years old, which triggers the ADEA re-

¹⁴² See *What Constitutes Undue Influence When it Comes to Employee Settlement Agreements?*, BACON/WILSON ATTORNEYS AT LAW (Apr. 28, 2010), http://bwlaw.blogs.com/employment_law_bits/2010/04/what-constitutes-undue-influence-when-it-comes-to-employee-settlement-agreements.html.

¹⁴³ See *Gengaro v. City of New Haven*, 984 A.2d 1133, 1135 (Conn. App. Ct. 2009).

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

quirement for employers to offer time to make an informed choice and an option to waive the agreement after it is signed.¹⁴⁸ However, if the employee is under forty this ADEA requirement does not apply, and employers are under no legal obligation to provide any specific timeframe to consider the agreement or waiver after it is signed. Employers will likely continue to defend these practices by having the appropriate waivers in place and asserting their rights as legitimate business practices under at-will employment, and courts will likely continue to uphold these defenses. However, it is equally likely that the EEOC will continue to pursue claims of duress and undue influence associated with the practice of severance agreements.

Other opposing arguments to the practice of using severance agreements to terminate people is that the release of claims provision is a violation of Title VII.¹⁴⁹ The EEOC has recently revised its guidance on this matter which states that having employees agree not to file a claim against the employer infringes on the employee's Title VII right to file a claim against the employer in the future. Additionally, the EEOC states that having a no-rehire provision constitutes retaliation under Title VII.¹⁵⁰ But many employers would disagree with this position and may not be quick to uptake this new guidance and change their well-established severance practices for several reasons. The viewpoint from one experienced corporate employment litigator is that the no-rehire provision practice "is not retaliation at all,"¹⁵¹ it is merely a means to put a halt to the reoccurring claims that often occur with the same employees.¹⁵² To provide an employer's insight to this argument, this litigator described one case of an eighteen-year tenured employee who had filed claims against the company sixteen times.¹⁵³ Every time the employee's manager tried to coach the employee about performance or other concerns, the employee filed a claim against the company and asked to change managers.¹⁵⁴ And with each claim the employee filed, the company gave the employee another settlement and changed her manager.¹⁵⁵ On the sixteenth incident, the company finally refused to allow this pattern to continue.¹⁵⁶ This litigator says that often times the employee will "go right back to the table and try to get more money every time something happens at work."¹⁵⁷ This litigator also says that "the only time an em-

¹⁴⁸ See Heathfield, *supra* note 126.

¹⁴⁹ See Bjork, *supra* note 134.

¹⁵⁰ See Bjork, *supra* note 134.

¹⁵¹ See Interview with Anonymous Source, *supra* note 135.

¹⁵² See Interview with Anonymous Source, *supra* note 135.

¹⁵³ See Interview with Anonymous Source, *supra* note 135.

¹⁵⁴ See Interview with Anonymous Source, *supra* note 135.

¹⁵⁵ See Interview with Anonymous Source, *supra* note 135.

¹⁵⁶ See Interview with Anonymous Source, *supra* note 135.

¹⁵⁷ See Interview with Anonymous Source, *supra* note 135.

ployee has to stay employed with the company is when there is a[n] [EEOC] cause finding against [the company].”¹⁵⁸ Otherwise, this litigator “refuse[s] to pay people to stay at a company in a[n] [EEOC] mediation. If they want money, it is a mandatory term that they must resign.” This litigator says that, in her experience, people who file claims against the company tend to be “repeat offenders,”¹⁵⁹ and “buying [their] departure” is a “good practice when used correctly and deliberately.” She says she “see[s] it as arm’s length negotiations. It’s not working out, we’ll make an offer, [the employee] can counter, and we agree [to part ways].”¹⁶⁰

Another experienced in-house employment corporate counsel has offered a different perspective on the practice of using severance packages to terminate people. This counsel says the argument that the practice violates public policy poses the question, “but is it a good public policy?”¹⁶¹ This counsel says from an employer’s perspective that “if I give you money to go away I don’t see it as problematic, even if you are living paycheck to paycheck.”¹⁶² This counsel says that it is a standard practice that in response to an EEOC claim employers will offer the severance pay and in return “request for the employee to dismiss the EEOC charge and waive the right to pursue litigation based on those claims. Then if the employee does not uphold the terms of the agreement, the employee is in breach of contract.”¹⁶³ The litigator also says that the employee “is a party to the terms and conditions of the agreement so he/she cannot claim duress unless the employer is saying ‘you need to take it or leave it.’”¹⁶⁴ This counselor also says it could constitute duress if the employer “plays hardball and says ‘sign it and we’ll give you ‘X.’ Otherwise, if you have a claim against us you can litigate it.”¹⁶⁵

As for the argument that the no-rehire provision constitutes retaliation, this counsel says he has a “mixed” perspective.¹⁶⁶ He says, “from a business side, I can completely understand why [companies] would want to have the [no-rehire] provision. From the public policy perspective, a more democratic view is that companies should not be controlling people by paying them money to never darken the company’s doorstep again.”¹⁶⁷ Other employers defend this practice by asserting that “[a] severance agreement that includes a full release of claims is the only way an

¹⁵⁸ See Interview with Anonymous Source, *supra* note 135.

¹⁵⁹ See Interview with Anonymous Source, *supra* note 135.

¹⁶⁰ See Interview with Anonymous Source, *supra* note 135.

¹⁶¹ Interview with Anonymous Source, *supra* note 135.

¹⁶² See Interview with Anonymous Source, *supra* note 135.

¹⁶³ See Interview with Anonymous Source, *supra* note 135.

¹⁶⁴ See Interview with Anonymous Source, *supra* note 135.

¹⁶⁵ See Interview with Anonymous Source, *supra* note 135.

¹⁶⁶ See Interview with Anonymous Source, *supra* note 135.

¹⁶⁷ See Interview with Anonymous Source, *supra* note 135.

employer can be reasonably sure it won't be dealing with the terminated employee again. Of course, peace of mind has a price."¹⁶⁸

On the subject of "price," this leads to the final element of severance practices that could be viewed as discriminatory which has to do with the amount of severance pay that employees are offered. When employers want an employee to leave badly enough, they will usually offer a higher amount of money to influence the employee to accept the severance agreement. In cases where the employee may have filed a meritorious claim against the company, or where the employee may be in a protected class or have overlapping FMLA, ADA, or worker's compensation issues, employment counsels will say that if employers want that employee to leave, they are going to have to "pay a premium for that, at least a year's salary."¹⁶⁹ Employers commonly may not have a specific policy delineating a calculation for determining severance pay,¹⁷⁰ and instead employers may take severance pay into consideration on a case-by-case basis. Some of the standard elements that employers will consider include the employee's tenure with the company, the position the employee holds within the company, and the employee's annual salary.¹⁷¹ However, there are times when employers may take other factors into consideration as well, such as whether the employee is disabled, on intermittent FMLA, or planning an FMLA leave. Employers will often pay more in these cases, which opens the door for the argument that this constitutes discrimination. On the other hand, employers will commonly defend this by asserting that the reason the severance pay was higher in these cases is to help cover any Consolidated Omnibus Budget Act (COBRA) or other medical costs for those employees who may need it.¹⁷² This rebuts the argument that the practice constitutes duress or a public policy concern. Another argument rebutting the public policy issue lies in the fact that employees are regularly advised by many publicly available sources to negotiate severance pay with employers if offered a severance agreement.¹⁷³ From this, one could argue that since employees commonly negotiate their severance amount and terms when they are presented with termination, they are often willing parties to the agreement and frequently exercise their bargaining power in the situation as well. While this may not be the case in every situation, it is commonplace enough to support the inference that, in many cases, the practice may justifiably be a fair one. That being said, this inference

¹⁶⁸ See *Severance Agreements and Release of Claims*, HRHERO, <http://topics.hrhero.com/severance-agreements-and-release-of-claims/#> (last visited May 29, 2016).

¹⁶⁹ See Interview with Anonymous Source, *supra* note 135.

¹⁷⁰ See Lindsay Olson, *3 Severance Pay Questions Every Employee Should Ask*, U.S. NEWS & WORLD REPORT (May 8, 2012, 10:51 AM), <http://money.usnews.com/money/blogs/outside-voices-careers/2012/05/08/3-severance-pay-questions-every-employee-should-ask>.

¹⁷¹ See *id.*

¹⁷² See Richard J. Birmingham, *What Everyone Needs to Know About the Coordination of Severance Benefits, COBRA, and the ACA*, DAVIS WRIGHT TREMAINE LLP (June 9, 2014), <http://www.dwt.com/What-Everyone-Needs-to-Know-About-the-Coordination-of-Severance-Benefits-COBRA-and-the-ACA-06-09-2014/>.

¹⁷³ See, e.g., *Your Rights When You Leave a Job*, NOLO, <https://www.nolo.com/legal-encyclopedia/rights-when-you-leave-job-29664.html> (last visited May 29, 2016); see also Bjork, *supra* note at 134.

is likely not strong enough to support a sweeping viewpoint that the practice is fair across the board. Because the practice of terminations with severance has such vast potential of being used to support or mask discriminatory practices, it will likely continue to be a controversial and commonly litigated matter that the EEOC may closely follow and pursue.

IV. ANALYSIS OF EXISTING LEGAL SOLUTIONS

Currently there are several avenues where claims of discriminatory practices or concerns can be directed. While they may provide plausible solutions to render the dispute, they may also entail some pitfalls. This section will explore both the pros and cons of each of the major existing legal solutions.

A. EEOC

Non-federal employees and job applicants who believe they have been discriminated against “because of their race, color, religion, sex (including pregnancy), national origin, age (forty or older), disability or genetic information”¹⁷⁴ can file a Charge of Discrimination with the EEOC. This is a required action before any claimant can file a discrimination lawsuit against the employer.¹⁷⁵ Claimants have 180 calendar days to file a charge, or 300 days “if a state or local agency enforces a state or local law that prohibits employment discrimination on the same basis.”¹⁷⁶ However, for an age discrimination charge the filing deadline is only extended to 300 days “if there is a state law prohibiting age discrimination in employment and a state agency or authority enforcing that law.” The EEOC has work-sharing agreements with many state and local agencies that enforce laws prohibiting employment discrimination, which are known as Fair Employment Practices Agencies (FEPAs).¹⁷⁷ Therefore, when a charge is filed it is also automatically filed with the other agency to prevent duplicate filings and help protect the filing party’s rights under the relevant state or local laws.¹⁷⁸ The EEOC also allows a third party to file a charge on behalf of the aggrieved person in order to protect that person’s identity.¹⁷⁹ Federal employees and job applicants have a slightly different complaint process in place but largely the same legal and agency protections.¹⁸⁰

¹⁷⁴ See Equal Employment Opportunity Commission, *Filing a Charge of Discrimination*, <https://www.eeoc.gov/employees/charge.cfm> (last visited May 29, 2016).

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

The EEOC reviews the charges and determines the course of action based on several factors including: the facial merits of the claim, the information or detail provided in the claim, the company, the size of the company, the number of previous discrimination claims filed against the company, and the potential of the claim being a class action.¹⁸¹ The EEOC may either dismiss the charge, investigate the charge, or invite the claimant to try to settle the dispute through mediation.¹⁸² If mediation is unsuccessful, then the charge will be investigated.¹⁸³

If the investigation produces no finding of a violation, the EEOC issues the claimant a Right to Sue letter giving the claimant permission to proceed to sue the employer if he/she chooses to.¹⁸⁴ However if a violation is found, the EEOC attempts to reach a voluntary settlement with the company.¹⁸⁵ If no voluntary settlement can be reached, then the EEOC may choose either to sue the company, or issue the claimant a Right to Sue letter.

While this resolution process may seem fully effective and straightforward, some argue that there are several flaws or gaps that may exist. The first is in regard to the EEOC's response times in responding to charges or concluding investigations. The EEOC is known to have substantial delays in the dispute process, and it is not uncommon for delays to range two to three years or longer.¹⁸⁶

Another concern with the existing EEOC dispute process lies in the perceived bias that the EEOC is believed to have against employers and the potential for the EEOC to compel employers to settle large amounts. Although the EEOC is supposed to handle claims and settlements in good faith, many may not believe the EEOC does so.¹⁸⁷ For example, the EEOC is well known to file lawsuits against employers without first exploring conciliation in good faith,¹⁸⁸ and employers are advised to document any efforts the employers may make to hold the EEOC to its good faith obligations, including any requests the employer may make to meet with the EEOC in

¹⁸¹ Interview with Anonymous Source, *supra* note 135.

¹⁸² See Equal Employment Opportunity Commission, *Filing a Charge of Discrimination*, *supra* note 174.

¹⁸³ See Equal Employment Opportunity Commission, *Filing a Charge of Discrimination*, *supra* note 174.

¹⁸⁴ See Equal Employment Opportunity Commission, *Filing a Charge of Discrimination*, *supra* note 174.

¹⁸⁵ See Equal Employment Opportunity Commission, *Filing a Charge of Discrimination*, *supra* note 174.

¹⁸⁶ See *E.E.O.C. v. Martin Processing, Inc.*, 533 F. Supp. 227, 230 (W.D. Va. 1982) (holding that "action was barred by laches where Equal Employment Opportunity Commission did not file suit until four years and five months after complaint was brought, Commission waited almost 29 months after first charge was filed before beginning its formal investigation, and did not bring suit until 12 months after termination of unsuccessful conciliation proceedings); see also Interview with Anonymous Source, *supra* note 135 (commenting that on the day of the interview he had finally just received an EEOC response on a charge that was initiated 3 years prior).

¹⁸⁷ See Lorene Park, *What to Do When the EEOC Makes an Offer it Thinks You Cannot Refuse*, WOLTERS KLUWER (Feb. 25, 2013), <http://www.employmentlawdaily.com/index.php/2013/02/25/what-to-do-when-the-eeoc-makes-an-offer-it-thinks-you-cannot-refuse/>.

¹⁸⁸ See *id.*

person.¹⁸⁹ However despite the efforts employers may make, the EEOC is known to attempt to compel employers to make large settlement agreements without providing them adequate time to consider the offer.¹⁹⁰ Lastly, the EEOC is also known to commence investigations against employers without first obtaining a sworn charge from the claimant,¹⁹¹ fail to provide employers reasonable notice of charge filings,¹⁹² promulgate cause determination against employers in bad faith,¹⁹³ and file lawsuits against employers without a substantive basis.¹⁹⁴ These EEOC practices have been held by courts to constitute bad faith dealing¹⁹⁵ and have also been publicly criticized and held to, at times, backfire against the Commission.¹⁹⁶ Given these practices on behalf of the EEOC, it is arguable whether the EEOC's dispute process supports a fair and effective resolution for both parties.

B. Mediation

Mediation is by far the most commonly exercised avenue to handle disputes.¹⁹⁷ It is widely held that mediation is often in the best interest of both parties¹⁹⁸ for many reasons. The cost employers face as a result of employment disputes have a noteworthy impact financially, as well as in terms of employee morale and other managerial disruptions; mediation has become a common method to handle disputes and is often listed as a preferred method in employment contract provisions and employee handbooks.¹⁹⁹ Mediation is considered to be a valuable solution

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ *See, e.g.,* Interview with Anonymous Source, *supra* note 135 (noting that “EEOC commenced its investigation of the original discrimination charges prior to obtaining a sworn charge as required by 42 U.S.C. s 2000e-5(b)”).

¹⁹² *See* Interview with Anonymous Source, *supra* note 135 (noting that “the EEOC failed to provide defendant with reasonable notice of the filing”).

¹⁹³ *See* Interview with Anonymous Source, *supra* note 135 (noting that “that the EEOC promulgated its reasonable cause determination, conducted conciliation and managed the handling of this litigation in bad faith”).

¹⁹⁴ *See* Interview with Anonymous Source, *supra* note 135 (noting that “the EEOC failed to demonstrate any substantive basis for intentional gender-based discrimination”).

¹⁹⁵ *See* E.E.O.C. v. Evan Fruit Co., Inc., 872 F. Supp. 2d 1107, 1114 (E.D. Wash. 2012).

¹⁹⁶ *See* Charles Plumb, *Equal Employment Opportunity Commission: Bad Faith Conciliation Backfires on Agency*, MCAFEE & TAFT EMPLOYERLINC (June 11, 2012), <http://employerlinc.com/2012/06/equal-employment-opportunity-commission-bad-faith-in-conciliation-backfires-on-agency/>.

¹⁹⁷ *See* Adrienne Krikorian, *Litigate or Mediate?: Mediation as an Alternative to Lawsuits*, MEDIATE.COM (Jan. 2002), <http://www.mediate.com/articles/krikorian.cfm>.

¹⁹⁸ *See* Michael Roberts, *Resolving Disputes Through Employment Mediation*, MEDIATE.COM, <http://www.mediate.com/articles/roberts2.cfm> (last visited May 29, 2016).

¹⁹⁹ *See id.*

for claimants not only from a cost perspective, but also because it allows them a forum to be heard and to address the many legal and emotional issues involved.²⁰⁰

However, there are also some pitfalls to the mediation process as well. One common pitfall lies in the fact that, regardless of the employer's or the mediator's efforts, often the claimant fails to recognize or acknowledge where he/she may have had some accountability in the employment action that was taken, such as in the event where the claimant was terminated due to job performance issues.²⁰¹ In these circumstances, the claimant may only be able to see his/her own belief about why the employment action occurred,²⁰² which can hinder the ability to bring the dispute to a resolution. For this reason, the mediation process can only fully be a successful means to resolve the dispute if both parties are willing to participate in the mediation efforts with a good faith intention to reach a settlement.²⁰³ Therefore, if one or both parties arrives at the mediation with the intention to compel the other party to agree to an unreasonable settlement or is eager to move straight to litigation proceedings, then often times the mediation effort may not be successful.

C. Legal Claims Leading to Settlements

Whether mediation occurs or not, many disputes result in the filing of a lawsuit. More often than not, these lawsuits are settled before the case ever goes to trial.²⁰⁴ There are many benefits to settling a lawsuit that apply to both parties, including avoiding the immense expense, stress, and time investment of a trial, keeping the details of the dispute private, and avoiding the uncertainty of what the jury outcome could be.²⁰⁵ However, a settlement may not always produce the most favorable outcome for the parties. In situations where a party believes that the facts and the circumstances of the case strongly support an inference of a public policy concern, a settlement will not raise the necessary awareness on the issue or create the precedent to change it.²⁰⁶ Other reasons a party may not be best served by settling are when the settlement is unfair or does not fully cover the aggrieved party's damages.²⁰⁷ Under these circumstances, it may be a more likely and a more suited option for the parties to litigate the matter.

²⁰⁰ *See id.*

²⁰¹ *See id.*

²⁰² *See id.*

²⁰³ *See* Interview with Anonymous Source, *supra* note 135.

²⁰⁴ *See* Shulamit Shvartsman, *To Settle or Not to Settle? That is the Question*, LAWYERS.COM, <http://research.lawyers.com/to-settle-or-not-to-settle-that-is-the-question.html> (last visited May 29, 2016).

²⁰⁵ *See id.*

²⁰⁶ *See id.*

²⁰⁷ *See id.*

D. Litigation

Statistics have shown that only approximately one out of every twenty cases goes through a trial and is resolved by a judge or jury,²⁰⁸ and that ninety percent of the time the trial ends in victory for the person who raised the lawsuit.²⁰⁹ However, studies show that out of all the cases that are filed in court, less than .2% actually make it to trial.²¹⁰ One reason why so few cases go to trial is that often times the amount that could be awarded at trial may not be higher than a settlement offer to the extent to make up for the extensive costs of going to trial. Another reason is that jury trials could take years to conclude from the time the lawsuit is filed to the time the trial ends, which often leads the filing party to reconsider whether the risk is worth the reward.²¹¹ Additionally, there is always the chance that the judgment could be less than the initial settlement offer and that the trial costs or other damages would not be covered.²¹² However, even in the face of this risk and uncertainty, litigation may still be the best option in some circumstances and may at times be the only way that a dispute can be resolved.

The pitfall of so many cases settling before trial is that, unless the charges are filed with the EEOC, the general public and all of the relevant regulating federal, state, and local agencies may remain largely unaware of the patterns of employment discrimination claims and public policy concerns that may arise and become more prevalent in the ever-changing workplace environment.

E. Legislative Representatives

The current options that exist to provide avenues to resolve disputes of employment discrimination claims are almost entirely employee-centric. This leave few options for employers to have a forum to exert their rights unless they are merely asserting their defenses to claims. In doing so, employers may be successful in exerting their rights where courts may hold in favor of the employers' arguments. But outside of this forum, there is little opportunity for employers to have their rights heard and defended without legislative intervention. On the other hand, many employees and state agencies may also feel that the common workplace disputes and ongoing public policy issues of controversy may already be addressed with the level of attention or speed that many believe is needed. For these combined reasons, it may be a pertinent option for both to engage their local, state, and federal legislative representatives to hear out the challenging issues that both sides face in these ongoing workplace disputes. Some may feel this is a viable option

²⁰⁸ See James Hirby, *What Percentage of Lawsuits Settle Before Trial? What are Some Statistics on Personal Injury Settlements?*, THE LAW DICTIONARY, <http://thelawdictionary.org/article/what-percentage-of-lawsuits-settle-before-trial-what-are-some-statistics-on-personal-injury-settlements/> (last visited May 29, 2016).

²⁰⁹ See *id.*

²¹⁰ See J. Mason Williams IV, *What are the Odds a Case is Going to Trial?*, CIVIL LAW (Jan. 3, 2013 3:38 PM), <http://legalteamusa.net/civillaw/2013/01/03/what-are-the-odds-a-case-is-going-to-trial/>.

²¹¹ See *id.*

²¹² See *id.*

that may produce helpful legislative intervention, while others may not rise to this level of confidence. A study has shown that 81% of Americans do not trust that their elected governmental officials will do the right thing.²¹³ Many criticize Congress's "do-nothing" stagnation due to the drastically lower number of bills Congress passes today compared to previous decades.²¹⁴ Others say that Congress's inadequacy is "even worse than it looks"²¹⁵ and that it is the most "dysfunctional" that it has been in the past forty years.²¹⁶ Based on these reviews, it appears that many may not have enough faith in their legislative representatives to consider raising the issues to the representatives directly. Instead, another option may be for employers to raise their issues to their respective business associations through which lobbying efforts can ensue in order for their viewpoints to be asserted in the legislature. Additionally, individuals or classes of employees may opt to also reach out to their respective associations that lobby for employee protections against the various classes of discrimination.

V. ANALYSIS OF PROPOSED LEGAL SOLUTIONS

While the existing avenues offer claimants of discrimination solutions to deal with their disputes, they also present gaps demonstrating where these solutions may not be fully effective. For this reason, employers continue to have windows of opportunity to exercise discriminatory practices while potentially masking them to appear to be legitimate. This will continue to brood claims, investigations, and lawsuits from employees and the EEOC. This next section will discuss some proposed solutions that could be considered in addition to solutions that currently exist and will also discuss the potential value these solutions could offer, as well as some of the reasons why these solutions may not work in practice.

A. Expand EEOC Reporting Requirements

Currently the EEOC and the Office of Federal Contract Compliance Programs (OFCCP) collects data from employers which "is used for a variety of purposes including enforcement, self-assessment by employers, and research."²¹⁷ Employers who have 100 or more employees (or federal contractors with fifty or more employees) have a mandatory requirement to submit the reporting data.²¹⁸ If employers fail to submit the reporting data by the required annual dead-

²¹³ See *Trust in Government*, GALLUP, <http://www.gallup.com/poll/5392/trust-government.aspx> (last visited May 29, 2016).

²¹⁴ See Ezra Klein, *14 Reasons Why This is the Worst Congress Ever*, THE WASHINGTON POST (July 13, 2012), <https://www.washingtonpost.com/news/wonk/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever/>.

²¹⁵ See *id.*

²¹⁶ See *id.*

²¹⁷ See Equal Employment Opportunity Commission, EEO Reports/Surveys 2015, *supra* note 62.

²¹⁸ See *id.*

line, the EEOC may compel the employer to submit it.²¹⁹ The submitted employment data must include all employees who were employed during the annual period, counted by sex, race, ethnicity, and occupation.²²⁰ Local unions, state and local governments, and public elementary and secondary school districts are only required to submit the report biennially.²²¹ Employers who submit false reporting data could be subject to fines or imprisonment.²²²

Because there are so many opportunities for employers to exercise at-will employment and terminate employees for reasons that could have discriminatory intent or could result in a discriminatory impact, it appears that there could be some value in expanding the EEO-reporting data requirements to include specific tracking of terminations of employees that occurred during the reporting period. To thoroughly capture this information, the proposed expansion should include both involuntary terminations as well as voluntary terminations that involved severance agreements. Additionally, the terminations data should categorize the terminated employees by age (over forty), sex, race, ethnicity, and whether the employee was an FMLA or ADA employee during the reporting period. By expanding the EEO report to include these data points, this can provide a clearer picture about the employer's termination practices and patterns. With this information, if concerns or questions about employer practices are identified then the EEOC certainly has the authority to request more information from the employer about the terminations, practices, and potential corrections. Additionally, this expanded data would also provide employers with a higher-level and more detailed view of where potential disparate impact concerns may lie within their organizations.

While this proposed solution would provide some of the benefits stated above, it also comes with some major pitfalls. First, many employers already view the mandatory EEO-reporting process to be a very burdensome annual procedure for many reasons. It requires employers to track and maintain the required reporting data for every business location subject to the filing requirements,²²³ have trained and qualified staff on hand to ensure that the data is accurately updated and reported, file the reporting on time as required by the EEOC,²²⁴ and ensure that a request for filing extension is timely submitted in the event that this is necessary.²²⁵ This is a heavy and important burden since employers are aware that errors in their filing could result in

²¹⁹ *See id.*

²²⁰ *See id.*

²²¹ *See id.*

²²² *See* Michigan Employment Law Letter, *EEO-1 Reporting: What Employers Need to Know*, HRHERO (Aug. 28, 2008 10:06 AM), <http://www.hrhero.com/hl/articles/2008/08/28/eo-1-reporting-what-employers-need-to-know/>.

²²³ *See* Equal Employment Opportunity Commission, *EEO Reports/Surveys 2015*, *supra* note 62.

²²⁴ *See* Equal Employment Opportunity Commission, *EEO Reports/Surveys 2015*, *supra* note 62.

²²⁵ *See* Equal Employment Opportunity Commission, *EEO Reports/Surveys 2015*, *supra* note 62.

EEOC audits.²²⁶ The EEOC also acknowledges this burden and estimates that the “reporting burden for this collection of information is estimated to average three and five tenths (3.5) hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed and completing and reviewing the collection of information.”²²⁷ However, in practice, many employers would say their actual burden is much higher. If employers believe this burden creates an undue hardship, they may apply for a special reporting procedure by submitting to the EEOC “a detailed alternative proposal for compiling and reporting information.”²²⁸ However, this does not release the employer from the reporting requirement, nor is the EEOC obligated to accept the employer’s proposed reporting alternative. Given the level of burden that the existing reporting structure entails, some would say that any increase to this burden would be unreasonable. On the other hand, since the EEOC requires this reporting regardless of burden and it has a compelling governmental interest in enforcing the laws and pursuing discriminatory practices, then it is likely that the EEOC and the legislature would find that the government’s burden would outweigh any reporting burdens on behalf of employers. Therefore, if the EEOC has a substantial basis to support the belief that this proposal to expand the reporting criteria could provide the EEOC and employers with a more effective tool to identify and reduce discriminatory practices, there is a fair probability that the EEOC would be likely to consider it if possible.

The second pitfall of this proposed solution is the potential for this expanded data to result in an increase of litigation with employers. Although employers’ EEO reporting data is kept confidential so not to reveal the individual employers,²²⁹ this data is still readily available upon discovery or by court order and is commonly used against employers by the EEOC and individual litigants to support claims of discriminatory practices in individual and in class action lawsuits.²³⁰ Therefore, if the required EEO reporting data is expanded in such a way that would expose employers to even more litigation than they are already exposed to, this could have the potential to significantly increase the legal burdens on employers. Some legal and economic scholars would argue that employment at-will is a major contributing factor to the strength of the U.S. economy,²³¹ and therefore any factors that could significantly impede on this could result in

²²⁶ See *FAQ on EEO-1 Reports: Will Errors Bring an Audit?*, HR.BLR.COM (Aug. 20, 2012), <http://hr.blr.com/HR-news/Discrimination/Affirmative-Action/zn-FAQ-EEO-1-reports-Will-errors-bring-audit/#>.

²²⁷ See Equal Employment Opportunity Commission, *EEO Reports/Surveys 2015*, *supra* note 62 (Standard Form 100 Instruction Booklet, Estimate of Burden).

²²⁸ See Equal Employment Opportunity Commission, *EEO Reports/Surveys 2015*, *supra* note 62 (Standard Form 100 Instruction Booklet, Requests for Information and Special Procedures).

²²⁹ See Equal Employment Opportunity Commission, *EEO Reports/Surveys 2015*, *supra* note 62 (Standard Form 100 Instruction Booklet, Confidentiality).

²³⁰ See Robert W. Sikkel, *EEO-1 Reports: What Do They Really Tell Us?*, AMERICAN BAR ASSOCIATION (2003), available at <http://apps.americanbar.org/labor/lel-aba-annual/papers/2003/sikkel.pdf>.

²³¹ See ROGER BLANPAIN, ET AL., *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW - CASES AND MATERIALS* 101–02 (2007).

a negative impact on the overall economy. Given the already heavily litigious environment that employers are in and the continuing struggle of improving the U.S. economy, it is likely that many would strongly oppose this proposed action.

The third disadvantage of the proposal to expand the EEO reporting data lies in the fact that the EEOC may not have the resources to review more EEO reporting data, much less respond to it for enforcement or improvement purposes. In recent years the government has substantially slashed back budgets in many federal departments, including the EEOC.²³² This has caused substantial delays in the EEOC's operation.²³³ From 2001 – 2008, the EEOC's staff was drastically reduced by 25%,²³⁴ which started a major backlog in the EEOC's claim processing and overall response times. Then in 2012, the EEOC had another major budgetary cut by \$7 million which led to another 9% reduction in staff.²³⁵ Additionally, the 2008 economic recession resulted in massive layoffs which spiked the number of EEOC discrimination claims to an unprecedented high.²³⁶ The culmination of all these factors has created a difficult situation for the EEOC to manage its workload since it is struggling not only to manage backlogged claims but also to continue to process high numbers of incoming claims. While the EEO reporting data is considered to be an important EEOC tool, it has always been the EEOC's priority to review and address the ongoing, incoming discrimination charges, versus the EEO reporting data which only comes in annually or biennially. For these reasons, although enhancing the EEO reporting data could create an additional deterrence for employers from potentially hidden discriminatory practices and could also produce a more effective enforcement tool for the EEOC, the proposal to enhance the EEO reporting structure may not be a practical proposal given the EEOC's operational limitations.

B. Establish Laws Redefining At-Will Employment

With the doctrine of at-will employment being a major crux for employers to exercise their freedom to end employment relationships, this allows great leeway for employers to terminate employees as they wish. Under at-will employment, “the employer is free to discharge individuals 'for good cause, or bad cause, or no cause at all,'”²³⁷ so long as the reason for the termi-

²³² See Barbara Frankel, *Would Budget Cuts at EEOC Help or Hurt Your Company?*, DIVERSITYINC (Feb. 7, 2013), <http://www.diversityinc.com/legal-issues/would-budget-cuts-at-eeoc-help-or-hurt-your-company/>.

²³³ See *id.*

²³⁴ See *id.*

²³⁵ See *id.*

²³⁶ See Wendi Watts, *EEOC Claims Reach Record Level, What Employers Can Do*, HRHERO (Jan. 13, 2011 12:08 PM), <http://www.hrhero.com/hl/articles/2011/01/13/eeoc-claims-reach-record-level-what-employers-can-do/>.

²³⁷ MARK A. ROTHSTEIN, ET AL., CASES AND MATERIALS ON EMPLOYMENT LAW 738 (1987).

nation is not due to race, color, religion, sex, national origin, retaliation,²³⁸ or age (over forty).²³⁹ However, as discussed, this allows the potential for employers to mask discriminatory practices under the justification of at-will employment. To counter this problem, one proposed solution is to create laws that redefine at-will employment. One way the law could be redefined is by adding a provision which states that where an adverse impact or discriminatory effect has been identified in an employer's practice, in order to correct the adverse impact on that group, the employer is prohibited from further terminations within that same group unless the employer can show that the termination was for just cause²⁴⁰ or until the employer can show that the adverse impact within that group has been corrected. The provision should also add that employers are responsible for keeping accurate adverse impact data on their employment actions by means of performing disparate impact analyses (DIAs) on their terminations. Lastly the provision should hold that if employers are found to execute terminations within an adversely affected group that are not for just cause, the employer may be subject to fines per incident. This law would replace the EEOC's action of separately suing the employers which would significantly reduce the costly and timely frequent litigation of the EEOC and employers, but would still serve as a legislative and financial deterrence for employers and would also serve the government's interest in receiving monetary damages from employers for violations. Replacing this litigious requirement of the EEOC would also free up the EEOC to focus more of its efforts on investigating EEOC charges and other preventative efforts, such as increasing its outreach and training efforts. However, individual claimants may still sue the employer directly by going through the standard claim dispute process. Lastly, this proposed effort would also require employers to be more of an active participant in managing the adverse impacts of their actions.

While this proposal may appear to present several viable solutions and benefits in managing this issue, it also presents several major pitfalls. The first lies in the manner of how employers would conduct a disparate impact analysis. Disparate impact analyses are commonly performed by responsible employers before they conduct a reduction in force (RIF) in the effort to identify and avoid any potential adverse impacts that could occur from the RIF. DIA's may also be performed for investigative purposes to determine where disparate impacts may already exist in an employer's practices. Currently there are several known methods for how this can be calculated, and there is no single industry standard. Additionally, each standard that currently exists has elements to it that have caused it to be criticized as a practice and its applicability and reliability to be questioned.²⁴¹ Therefore, it is clear that if a proposal such as this were ever to be considered, the first plan of action would be for the government to establish a standard for calculating dis-

²³⁸ See 42 U.S.C. § 2000e-2.

²³⁹ See Age Discrimination in Employment Act, 29 U.S.C. § 623.

²⁴⁰ See *Just Cause*, BLACK'S LAW DICTIONARY (10th ed. 2014) (noting that "[j]ust cause means a legally sufficient reason").

²⁴¹ See *EEO: Disparate Impact*, HR-GUIDE.COM, <http://www.hr-guide.com/data/G702.htm> (last visited May 31, 2016); see also David B. Cohen, et al., *Technical Advisory Committee Report on Best Practices in Adverse Impact Analysis*, THE CENTER FOR CORPORATE EQUALITY (2010), <http://www.cceq.org/pdfs/2010tacai.pdf>.

parate impact. Since there are so many standards with so many potential criticisms, this would be a major challenge to overcome in order for this proposal to be considered viable.

The second pitfall to the proposal is the burden that this practice would impose on employers. As discussed previously, employers already face many burdens given the heavily litigious environment they face, the economic challenges they struggle with, and the mandatory EEO reporting with which they are required to comply. If another mandate was imposed requiring employers to take on the increased administrative burden of managing the data and calculations that go into an adverse impact analysis, it is likely that many employers would argue that this creates an unnecessary burden or undue hardship. On the other hand, since there are readily available softwares that can assist employers in managing the data and calculations, and since the government has a compelling interest in enforcing these laws, there is a fair probability that the argument of unnecessary burden or undue hardship would be outweighed by the government's interest.

Not only would this proposal present the issue of burden to employers, it would also present the issue of a burden to the EEOC. Since the EEOC is the designated entity responsible for enforcing federal employment discrimination laws, then the EEOC would likely be responsible for managing the process upon which employers would collect, calculate, submit, and track disparate impact analyses. The EEOC would also be responsible for managing the process by which employers may be required to resubmit the data with the proscribed level of frequency. Additionally, the EEOC would be responsible for reviewing the data and determining where discrepancies or falsifications may exist in the data and managing a process by which employers may be asked for clarification or to provide supplemental data to verify or validate the disparate impact data provided. Not only would the EEOC be responsible for these actions, it would also be responsible for investigating any terminations that would be prohibited under this proposal if they were performed despite the known existence of an adverse impact within that group. Lastly, the EEOC would also be responsible for following up on the investigation processes and taking next actions to report the employers for any known violations that could subject them to legislative fines under this proposal. As discussed earlier, since the EEOC is already substantially overloaded in its work volume and drastically understaffed to be able to handle its current workloads, it is highly unlikely that the EEOC would be equipped to manage the responsibility of taking on these additional processes in its current environment. On the other hand, if the government saw a proposal such as this to be important or beneficial enough to warrant support for it, the government could certainly devote more budget to the EEOC to equip it to manage these additional processes and responsibilities.

Assuming that the government did financially and legislatively support the proposal, and it put all of the necessary elements into place to enact it, this would not necessarily eliminate the potential for employers to continue to mask discriminatory practices in their terminations, specifically in regards to severance terminations. Regardless of whether the government requires employers to track adverse impact for terminations, employers could still defend their severance termination practices by asserting that the termination was supported by a contractual agreement by both parties. Additionally, if the government attempts to manage the process of severance termination agreements, doing so could be argued as an unconstitutional infringement on employers' and employees' mutual right to contract and that attempting to regulate the terms of em-

ployment would constitute an "unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract."²⁴²

VII. CONCLUSION

The issue of employers masking discrimination as justified business practices is a challenging issue due to the many legal, economic, financial, social, and public policy complexities involved. Given these competing interests, every potential solution is likely to be countered by numerous opposing arguments. Thus, the issue will likely continue in many ways. As long as employers have the means and opportunities to mask discriminatory practices as justified business practices, it is highly likely that they will continue to do so. Therefore, there is a fair certainty that the patterns of discrimination, the cycles of employers' actions resulting in EEOC claims, and the heavily litigious employment environment will continue as well. While the EEOC may be facing staffing and budgetary challenges, employers should not mistake the EEOC's delays and staffing cutbacks as weaknesses. The EEOC continues to be a very strong and growing force of federal power with which employers must reckon. For as long as the EEOC will exist, it will continue to combat employer discrimination in every way possible, and employers will likely continue to baffle the EEOC's enforcement efforts as their employment practices continue to walk that fine line.

²⁴² See *Lochner v. New York*, 198 U.S. 45 (1905); see also *Adair v. United States*, 208 U.S. 161 (1908).