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## Suits and armor

By: [Bernadette Starzee](#) August 12, 2016 Comments Off on Suits and armor

The news is full of stories about companies shelling out millions for employment-related lawsuits. Within the last month, for instance, manufacturer United Plastics and staffing agency ASI Group were ordered to pay \$1.4 million in back wages and damages to 566 employees in Massachusetts and Mississippi that were illegally denied overtime. Z Foods, a national dried fruit processor, had to cough up \$1.5 million in damages in a sexual harassment and retaliation lawsuit.

While major companies make the biggest payouts and garner the banner headlines, smaller, less-sophisticated companies are perhaps the most vulnerable to lawsuits brought by current and former employees.

Not all claims against employers are baseless. We asked Long Island employment lawyers for the most common reasons employers are sued, and what companies can do to lower their risks. Here's what they had to say.

### 1. Retaliation

In FY 2015, the Equal Employment Opportunity Commission resolved more than 92,000 charges of discrimination in the workplace, securing more than \$525 million for discrimination victims. Of all the reasons given for filing a claim with the EEOC, retaliation is the most prevalent.

"And it's by far the claim that is the most difficult to defend," said Ana Shields, a principal in the Melville office of employment law firm Jackson Lewis.

Attorney Tom Wassel refers to the retaliation claim as "snatching defeat from the jaws of victory."

A retaliation claim commonly occurs after an employee files a complaint – whether internally, in court or through a government agency – that he is being harassed or discriminated against.

"Naturally, employers aren't happy about the complaint," said Wassel, a partner in the employment law practice at Cullen and Dykman in Garden City. "The employer may turn around and retaliate, whether by firing the individual or by making him so miserable that he is forced to quit. It's a natural reaction – people don't like to be sued – but it's 100 percent illegal to retaliate, even if the original claim was baseless."

One way to avoid getting into a retaliatory situation is to address performance problems and document them as they occur, Shields said.

"What tends to happen is, you have employees with poor performance, and the manager is getting increasingly frustrated but not saying anything," Shields said. "Then the employee makes some kind of complaint, and the manager is incensed, thinking, 'This employee has been terrible, and I haven't written him up, and now he complains about me.' After the complaint, the manager writes the employee up, and it looks terrible because of the timing."

It's vital, whether to prevent retaliation or any other employment-related claim, that employers train their front-line supervisors and managers on employment-related issues, said attorney Howard Miller.

"The liability typically comes up in the trenches," said Miller, an employment and labor law attorney who is a member at Bond, Schoeneck & King in Garden City. "Front-line supervisors may not be aware of the nuances of wage-and-hour laws and are not professionally trained in drafting employee evaluations and documenting performance complaints, and they're the ones who are most likely to wind up in a retaliatory situation."

Retaliation claims, which more than doubled in the last 20 years, should continue to increase as new guidance from the EEOC, which is currently in draft form, calls for a more expansive view of what constitutes retaliation, Miller said.

Rather than concrete evidence, "a convincing mosaic of circumstantial evidence" would be enough to support the inference of retaliation under the new guidance, Miller said.

## **2. Misclassification as exempt from overtime**

In attorney John Bauer's experience, the No. 1 reason employers are sued is for misclassifying employees as exempt from overtime. Further confounding the issue, lawsuits for misclassification are most often brought as a class action. With a "look-back period" in New York State of six years, these can be very costly for employers who have to shell out back overtime pay and penalties.

Often, the misclassification is not intentional.

"If it's not a sophisticated company – one that's not large enough to have a human resources department – they may not know the rules," said Bauer, the Melville office managing shareholder for employment law firm Littler.

And the rules are not cut and dried.

"There are certain jobs where it's clear," Bauer said. "Someone who works on a production line is clearly nonexempt. Jobs like a CFO or other high-level managers are clearly exempt. But for the people in-between, it's not so simple to classify them properly."

There are three elements of determining whether employees are exempt, Wassel said. First, they have to be paid on salary, rather than hourly. Second, their salary must be over a certain minimum, which is rising significantly later this year.

"As of Dec. 1, in order for employees to be exempt, they have to earn a minimum salary of \$913 per week (\$47,476 annually)," Wassel said. "It's been in the news, but some employers don't get it. A lot think if you're paid on a salary, you don't get overtime. It's not true – it's only one part of the test."

The third piece is the duties test, to determine if a worker is executive, administrative or professional. Unlike salary, it's not a black-and-white answer. There is a checklist; to be considered administrative, for instance, one requirement is that the employee's "primary duty must include the exercise of discretion and independent judgment with respect to matters of significance."

"Many employers think all their employees exercise independent judgment over matters of significance, but what the Department of Labor thinks is independent is not always the same as what the employer thinks," said Bauer, who recommends employers perform an audit of their employee classifications with an attorney who is familiar with the regulations and the DOL's guidance.

In claims regarding overtime and other wage-and-hour issues, the Wage and Hour Division of the DOL secured \$246 million in back wages for more than 240,000 workers in FY 2015. Nearly half of all settlement dollars were paid to employees in the retail and financial services/insurance industries.

“Overtime and other wage-and-hour cases are all the rage among the plaintiff’s bar,” Miller said.

### **3. Discrimination**

It’s unlawful for employers to discriminate on the basis of race, sex, creed, age, disability and other protected characteristics. Of discrimination cases filed with the EEOC in FY 2015, 34.7 percent listed race, 29.5 percent listed sex and 22.5 percent listed age as the reason for the claim (there can be more than one reason for each claim).

Discrimination claims cross Wassel’s desk more than any other type of employment-related lawsuit.

“Employees who feel wronged and fall into one of those protected classes often will claim it’s the reason why an employer did or didn’t do something for them,” Wassel said. “I represent management, and most claims are groundless, but that doesn’t mean employers don’t get claims against them.”

An important defense against discrimination claims is having written performance reviews and a system to document misconduct.

“If someone is terminated and they fall into a protected class – and there are so many protected classes that most people fall into at least one – and they go to a lawyer, a lawyer is going to ask about performance reviews and documented problems that occurred,” Bauer said. “If the employee did not receive notice that there were any problems, the lawyer will more likely take the case.” If the person says, ‘I was written up,’ the lawyer is likely to shy away.

Many employers are too small to have an HR department or “are doing 10 things at once and don’t get around to doing written reviews,” Bauer said. “They might talk to the employee verbally, but the employee denies it after the fact and has a very different version of that conversation.”

The EEOC asks for a personnel file for any disciplinary hearing, Farrell said.

“You don’t want to have to say, ‘He was so bad, but we have nothing,’” Farrell said.

Bauer has seen all too many employers be dishonest with employees about their reason for termination.

“Countless times, an employee gets terminated because he’s a bad employee, but the company tries to let him down easily and doesn’t necessarily want to get in his face at the time of termination,” Bauer said. “They say this is a layoff for lack of work, as opposed to saying, ‘You’re being terminated because you’re just an awful employee.’”

A month later, the company hires someone else, and the fired employee finds out about it and says to himself, “They told me it was for lack of work – they lied.” If the employee is in a protected class, he may sue, believing his race, age or another characteristic is the reason for the firing. And since the company lied once, “you can’t believe anything they’re saying,” Bauer said.

### **4. Failure to Accommodate a Worker’s Disability or Religious Beliefs**

Employers are required to make reasonable accommodations for individuals' disabilities and religious beliefs.

"You can't say, 'We have this rule and everyone has to follow it,'" Wassel said.

For instance, "if someone can do every other part of the job except lift heavy boxes – and it's not a main part of their job; they're not a Teamster whose job is to lift heavy boxes – the employer should make an accommodation," Wassel said. "You might have a policy that everyone must work on Saturday, but if someone is observant, you have to attempt to accommodate them if it's reasonable to do so."

Whether an accommodation is deemed reasonable is "fact-specific and has to do with the operation and the costs involved," Wassel said. "If there's a physical cost involved with altering the workplace, if you're Microsoft, what's reasonable is a lot more than what it would be for a mom-and-pop shop."

Employers get into trouble with regard to disability claims when they don't have an employee handbook and supervisors aren't trained in situational awareness, said Jonathan Farrell, partner and co-chair of the employment law practice group at Meltzer, Lippe, Goldstein & Breitstone in Mineola.

"Joe might be continuously taking sick days, and you terminate him, and he comes back and says, 'I was out so much because I have these issues with my kidneys.'"

When the employee was missing so many days, the supervisor should have gone to HR, who can send the employee a letter: "Dear Joe, our Family Medical Leave Act policy is in the employee handbook, here is your statement of rights, here are forms to request leave."

As Farrell noted, the law is protective of uninformed workers.

"Someone making \$14 an hour sweeping floors might not know to ask you to exercise their rights under the FMLA," he said.

## **5. Harassment**

Harassment refers to unwelcome conduct that is based on race, religion, sex (including pregnancy), disability, age and other characteristics. It rises to the level of illegality when the offensive conduct is continuous and pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive.

In FY 2015, 27,893 harassment charges were filed with the EEOC, including 6,822 sexual harassment charges and 9,286 for harassment based on race.

Whether from claims of harassment or discrimination, employers can protect themselves by having a system in place in which employees can file a complaint.

"If someone is subject to a hostile environment, one of the defenses an employer has is (to have) a complaint policy in your handbook and the employee failed to use it," Farrell said. "It's an important arrow in your quiver."

In fact, the existence of such a policy and an employee's failure to use it is "potentially a complete defense in a lawsuit," Bauer said. Being able to show the court that the company also has an internal anti-harassment training program also helps, as it shows how seriously the company takes such matters, Bauer added.

Employers should instruct employees that they must read the handbook and that they will be bound by it.

The handbook has to be updated regularly as laws change, and employers must have accompanying forms – about 20 or 30 of them – for employees to use for filing complaints, requests for accommodations and other matters.

