

# Putting Your Business In A Strong Position To Defend Against Employment Discrimination Claims

## Labor & Employment Law Update

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Many—if not most—employment discrimination and retaliation lawsuits involve a company's decision (a) to terminate or otherwise discipline an employee or (b) not to hire a particular applicant. And the reason **why** the company made its decision is quite possibly the most important fact in the majority—if not all—of these cases.

With that in mind, it is massively important for companies to consider the following two things long before being hit with a lawsuit.

The first is having a clear reason why the termination/discipline/non-hire decision is being made. While this may sound basic and remedial, many employers faced with litigation find themselves unable to articulate clear, well-supported reasons for their employment decisions. Another point that should go without saying: the company's reason must not be illegal. That is, the company must not make a hiring/discipline/firing decision because of an individual's race, gender, national origin, or any other characteristic or conduct protected by law.

Many companies get that first part right.

But problems arise with the second part, which is documentation. Contemporaneous documentation of the reasons behind a company's decisions is a critical component in the defense of employment discrimination claims. The documentation does not need to be particularly formal. Instead, it generally should have three things—and little else: (1) the date the document was made; (2) the name of the person who made the document; and (3) a brief, objective-as-possible description of the reason for the decision. This sort of documentation can be extremely valuable in the event that an employee or applicant later complains that an employment decision was the result of unlawful discrimination or retaliation.

The documentation should not include extraneous comments, doodles, micro-aggressions (which, if you don't know what those are, we recommend that you seek training for your management and supervisory employees—immediately—

on how to recognize and eliminate micro-aggressions in the workplace), or anything else irrelevant to the decision at hand.

Again, a company's employment decision documentation does not have to be anything fancy—but it should generally be consistent from situation to situation going forward. The documentation can be as simple as sending yourself a "For the File" e-mail that documents when and why you made the employment decision at issue. And once you've sent that email—or written whatever other form of documentation you choose—you should make sure it gets into a computer or physical file (whatever works best for you) where you will be able to find the documentation when the time arises.

As always, we recommend consulting with experienced counsel when making difficult employment decisions.

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