Preventive Care for Your Practice: What You Need to Know About Recent Changes in Employment Law

By Elaine R. Turner

How many times a day do you remind your patients about the importance of preventive care for their dental health? With a little "preventive care" of your practice, you can avoid potential financial devastation if a disgruntled employee sues you. In the past, practitioners with fewer than 15 employees worried little about the impact of employment lawsuits because such employers did not fall under the jurisdiction of most anti-discrimination laws. That is no longer true.

Effective November 1, 2011, Oklahoma employers with one or more employees became subject to the provisions of the Oklahoma Anti-Discrimination Act (ODA). The ODA prohibits discrimination against applicants and employees because of race, color, religion, sex, national origin, age, genetic information, or disability. Discrimination takes many forms, including (but not limited to) failure to hire, failure to promote, failure to increase wages, demotion, reduction in pay, termination, or harassment. Pursuant to the ODA, virtually all employers may be reported to and investigated by the Office of Civil Rights Enforcement (OCRE) for such alleged discrimination and retaliation. Following the conclusion of OCRE proceedings, Oklahoma employers may then be sued in state court for alleged employment discrimination and retaliation. Even if an employer successfully defends the OCRE investigation, he/she is still subject to being sued in state court for the same claims.

All practitioners should take heed that defense of administrative proceedings and litigation relating to alleged employment discrimination and retaliation can be very costly. Attorney fees and costs in defending an "average" OCRE investigation typically range from $10,000 to $20,000. Defending the employment lawsuit that almost always follows is even more costly. Attorney fees and costs in defending an "average" employment discrimination or retaliation lawsuit can quickly exceed $100,000; they may even exceed $200,000 if the case proceeds to trial. This does not include other economic costs to the practitioner, who will no doubt spend several hours assisting his/her attorney in the defense of the allegations -- this is time away from patients and a direct hit in the pocketbook.

Additional financial consequences caused by litigation can come in the form of a monetary judgment against the employer (should he/she lose at trial). Successful employees are entitled to recover monetary damages to compensate them for lost wages (both past and future), lost benefits, emotional distress damages, punitive or liquidated damages, and the employees' attorney fees and costs.

What "preventive care" steps can you take to protect your practice from the potentially devastating financial costs of employment litigation? First, you should have written anti-discrimination and anti-harassment policies that are provided to every employee. The policies should clearly state that discrimination and harassment because of race, color, religion, sex, national origin, age, genetic information, and/or disability is strictly prohibited. The policies should also advise employees what they should do if they believe the policies are being violated. It is very important that the policies identify at least two different managerial positions responsible for receiving employee complaints regarding alleged discrimination and harassment. If your practice is large enough to have a designated human resources manager, the policies should definitely identify him/her as someone who is responsible for receiving these complaints. The policies should also expressly state that retaliation against an employee for making or participating in any such complaint is strictly prohibited. You should be prepared to prove that each employee received copies of these written policies; maintain a signed and dated acknowledgement of receipt and understanding from each employee which is kept in their personnel files.

You should also distribute to your employees a written policy that addresses workplace disability issues. The disability policy should state that discrimination against employees with disabilities, as defined by the relevant employment laws, is prohibited. The policy should also advise employees what to do and who to talk to if they are in need of a reasonable accommodation to help them perform the essential functions of their job. Notably, an accommodation need not be provided if you can establish that accommodation of the disability would impose an undue hardship on your business. You are cautioned, however, to seek advice from an employment attorney before making decisions about disability and accommodation. Unwary employers can quickly become ensnared in claims of disability discrimination if they do not
tread carefully when it comes to disability issues in the workplace.

Once the policies are in place, it is imperative that you train staff and management regarding their duties and responsibilities under these policies. The policies will be ineffective otherwise. Employees need to know what to do when they witness or hear of possible discrimination, harassment, or retaliation. Management must also be trained in what to do if they receive discrimination or harassment complaints or if they otherwise become aware of the possibility that policies are being violated. If you take prompt and effective remedial action as soon as you receive notice of the possibility of a violation you will have taken several important steps in either avoiding being accused of violating employment laws or in establishing a defense to such claims. Once again, you are cautioned to consult with your employment counsel if you receive or become aware of allegations of discrimination, harassment, or retaliation.

Finally, you should contact your insurance agent as soon as possible and purchase employment practices liability insurance (EPLI) coverage. There are several insurance companies that provide EPLI coverage and you should explore the different offerings with your agent and choose one that is right for your practice. When you take out EPLI coverage, it is imperative that you secure enough coverage to account for the potential costs of being named in an administrative proceeding or lawsuit. As discussed earlier, these costs can easily run in the hundreds of thousands of dollars.

With a little "preventive care," you can protect your practice from a financial loss that you might not otherwise recover from. If you implement the policies and training described in this article you can protect your practice from possible financial ruin.

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