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Briefly

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EEOC UPDATE

G. Gerard Jabaley

"Focusing on the essentials of how to appropriately hire, onboard, coach/ counsel, discipline, terminate, and accommodate are your best defenses"

The Equal Employment Opportunity Commission ("EEOC") recently released its 2022 Annual Performance Report. A few statistics are attention worthy, as employers of all varieties grapple with how to recruit, onboard, and retain talent in a fluid and unpredictable economy (in which there are roughly 11 million unfilled jobs).

From Fiscal Year 2016 through 2021, the total number of charges filed has steadily decreased from 91,503 (2016) to 61,331 (2021). However, in FY 2022, the total number of charges filed increased to 73,485 – almost a 20% increase. Additionally, the EEOC collected more than $513 million in monetary benefits for "victims of discrimination," as compared to roughly $484 million in FY 2021 – almost a $30 million increase. Employers should take note of these two upward trends, as it indicates both that more applicants, employees, and former employees are pursuing charges against employers and that the EEOC is vigorously pursuing monetary resolutions (in addition to other non-monetary compliance). Employers should anticipate this upward trend to continue for the duration of the Biden Administration.

In its March 23, 2023, press release, the EEOC states that during FY 2022 it focused on several issues, including "systemic discrimination, advancing racial justice in the workplace, enforcing pay equity, and addressing the use of artificial intelligence in employment decisions." For those who work with and monitor the EEOC, systemic discrimination claims have been an enforcement focus point for at least the last decade. The relevant issue is the vigor with which the EEOC pursues same. It is no surprise that with President Biden at the helm, the EEOC is empowered and motivated to use systemic discrimination investigations to make examples of employers who intentionally discriminate against groups of employees based on their protected status.

The second focus point (advancing racial justice) uses terminology that has recently become popular in America, and which aligns with the EEOC's corresponding focus on "diversity, equity, inclusion, and accessibility". While the EEOC does not specifically define their interpretation of "advancing racial justice", the examples provided in the Annual Report reflect the type of race harassment and discrimination matters that human resources professionals and employment law practitioners have seen and contended with for decades. The unresolved issue is to what extent and how the EEOC intends to pursue "racial justice" and DEI narratives in its outreach and enforcement initiatives. It will be very interesting to see whether the EEOC intends to focus on its long-standing pursuit of "equality of opportunity" or shift to a path geared toward "equality of outcome", which is one that can result in discrimination as well.

The third focus point, pay equity, is another longstanding enforcement initiative. While most public discussion focuses on big picture pay data points, those that have studied the issue in detail know that it is far more complicated and less obvious than the narrative that is generally conveyed to the public. Nonetheless, employers are well advised to ensure that they periodically audit their pay practices and pay ranges to ensure they are not inadvertently discriminating against any group of employees in the process. This is especially true given the recent pay rate increases caused by the significant increase in inflation in the past 12-18 months, which in many situations has distorted pay ranges between new

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Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Cookeville, and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., in Atlanta GA; and M. Lee Daniels Jr., P.C., in Greeneville SC.

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WORKERS' COMP: HOW TO DENY A CLAIM AND MAKE IT STICK

T. Joseph Lynch

"Sometimes emotions can be high with regard to an employee's behavior and the decision to deny a case should be based not on emotions but on logic, facts and applicable laws and regulations"

The Workers' Compensation system in the state of Tennessee is often frustrating and difficult to navigate for Tennessee employers. Often employers are confronted with situations in which an employee's claim is either fraudulent or at least exaggerated with regard to its severity. In general the Tennessee Workers' Compensation system and the Court tend to favor employees with regard to compensability determinations. That being said the 2014 legislative changes mitigated this somewhat. Prior to 2014, Courts gave deference to the employees in close questions of law or fact. This was done away with with the establishment of the new Bureaus of Workers' Compensation Claims and the Court of Workers' Compensation Claims in 2014. Nevertheless, the fact remains that employers are usually fighting an uphill battle when contesting medical causation and issues of whether an injury occurred in the course and scope of employment.

The denial of a claim can have significant repercussions. An employer or insurance carrier can utilize a Form C23 to deny a claim. This effectively stops both medical and indemnity benefits. However, if it is determined that a claim is wrongfully denied, the consequences can be somewhat severe. These consequences can include penalties from the Bureau of Workers' Compensation Claims as well as the requirement that an attorney for the employee be reimbursed. Furthermore, if a claim is denied early, typically the medical treatment will be in the hands of the employee instead of the employer and the state of Tennessee has the right to provide a panel of physicians from which an employee can choose to treat. An early denial of a case can result in the employee having the freedom to choose their own physicians and the employer will essentially lose the right to control the medical treatment. This is important due to the fact that an authorized treating physician selected from a panel is presumed correct on a number of legal issues. This presumption applies to medical causation and impairment.

As such, it's imperative that if an employer and/or insurance carrier choose to deny a claim, that they assess whether or not a full and sufficient investigation of the facts and circumstances of the claim have been conducted. Furthermore, the Courts frown upon an employer or insurance carrier making a determination to deny a case based upon medical causation when there is an absence of medical proof. The Court would prefer an employer or insurance carrier when in doubt of the compensibility of a claim for medical causation reasons, to provide a panel of physicians and then posit a series of causation questions to the authorized treating physician. Then the employer can make a denial determination based upon that physician's conclusions and determinations regarding medical causation. Employers and insurance carriers are on a firmer footing if instead of a medical causation determination they are making a determination based upon an affirmative defense. Affirmative defenses in Tennessee include things like notice, statute of limitations, willful misconduct, etc. Again the court will scrutinize the facts and circumstances upon which the affirmative defense is based and ultimately there could be consequences in the way of penalties and reimbursement of attorney's fees if a claim is wrongfully denied.

As such, it is always recommended that if an employer is seeking to deny a claim that they consult with a legal expert.

Another frustration that is common to Worker's Compensation cases is the changing landscape of medical causation testimony. Oftentimes doctors will respond to causation letters but later in deposition testimony will change or alter the nature of their medical opinions. Also additional independent physicians can be retained whose opinions can change the landscape of a case. The Courts are placed in an unenviable position of having to choose between which medical professional is more credible or believable. Judges are not medically trained and so it's quite a challenge for the court system to navigate these waters.

Statistically 99% of Workers' Compensation cases in Tennessee, legitimate or otherwise, settle. A valuable tool to resolve cases that are either fraudulent or questionable in nature and extent of disability can be resolved on what is called a "doubtful and disputed bases". This is a resolution in which the parties simply agree to pay money and to refuse to acknowledge whether or not the claim is

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Greetings to all,

All of us at Wimberly Lawson have always looked forward to our Labor and Employment Law Update Conference every fall. We have had several inquiries from clients regarding our 2023 Conference.

We have decided that we will not hold our Fall Conference for 2023. Meanwhile, we are planning a webinar in lieu of the Conference with updates regarding Labor and Employment Law. This will be similar to the webinar that we had last year, which was well received. When more details become available, we will post them on our website at www.wimberlylawson.com as well as our newsletter and various announcements. We hope that you will join us this year for our Fall Webinar.

Sincerely,

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"EEOC UPDATE"

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employees and more tenured employees.

The last focus point, the use of artificial intelligence, is truly an issue on the new frontier. Employers are rapidly leveraging technology to drive efficiency at all levels, including hiring, evaluating employee performance, and many operational metrics. While this article is not intended to provide an in-depth analysis of this issue, suffice it to say that when implementing AI software that is involved in making value-based decisions about applicants and employees, employers need to institute sufficient quality control oversight functions to help mitigate the potential risk such AI platforms bring to the equation.

For those who closely follow EEOC charge statistics, the primary liability exposure issues remain steady. Employers need to appropriately focus on who is an employee, as opposed to an independent contractor, which is unfortunately something of a moving target these days. Employers also need to focus on mitigating liability exposure based on retaliation, disability discrimination, and harassment claims (primarily based on sex and race, but also disability, national origin, and religion). Those three issues easily constitute the most numerous and problematic EEOC charges employers are likely to encounter.

We are experiencing an unpredictable and difficult economic situation, as well as a highly polarized political situation with another presidential election looming, both of which impact our workplaces and inevitably affect recruitment, retention, and liability exposure. Focusing on the essentials of how to appropriately hire, onboard, coach/counsel, discipline, terminate, and accommodate (disability and religion) are your best defenses in today's employment law world.

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"HOW TO DENY A CLAIM"

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in fact compensable. This allows for a dispute resolution and the closure of all future medical treatment without the necessity of going through a long, protracted, and expensive process of litigation.

An employer's relationship with their insurance carrier can be of great value. Typically employers will either be fully insured and employ an insurance company to function as a third-party administrator or they will rely entirely on an insurance carrier to not only handle a claim but also provide medical and indemnity benefits. Typically a successful denial of a claim will depend upon the information that is provided to the insurance carrier or TPA from the employer. As such, cooperation and communication between an employer and an insurance carrier can be invaluable in making a denial stick.

In conclusion, employers are encouraged to work closely and report regularly to their insurance carrier and defense counsel in order to properly navigate the waters of a C23 Notice of Denial. Given the potential consequences, it is important to weigh all the pros and cons prior to denying a claim. Sometimes emotions can be high with regard to an employee's behavior and the decision to deny a case should be based not on emotions but on logic, facts and applicable laws and regulations.