EMPLOYMENT

Advising Employers to Take Preventative Measures to Avoid Costly and Disruptive Litigation

By Mordy Yankovich

With New York State enacting new protections for employees at a feverish pace, it is more imperative than ever to advise employers of preventative measures they can take to avoid potential violations of the many federal, state and local employment laws. These laws include but are not limited to Title VII of the Civil Rights Act, the Fair Labor Standards Act, the Americans with Disabilities Act, the New York State Human Rights Law, the New York Labor Law, and the Suffolk County Human Rights Law.

Employers often fail to ensure they are compliant with applicable wage and hour laws or take practical steps to avoid discrimination law suits until they are served with a Summons and Complaint. However, litigation can often be avoided, or at the least viable defenses can be established if employers take preventative measures such as implementing uniform policies and practices, providing employees with legally required forms and notices and maintaining thorough and contemporaneous records. Employers can and should begin taking these measures as soon as the company decides to hire employees. The following are several practices employers should implement to minimize potential exposure to costly and disruptive litigation.

Implementing uniform hiring practices

The entire hiring process, from issuing an employment application to selecting a candidate, should focus solely on the applicants' occupational qualifications for the position. Employers should have a standard application which solicits information such as employment history, education, technical qualifications if applicable and a list of references. Employers should not ask questions, whether in the application or during the interview process, which directly or indirectly require applicants to disclose their race, age, disability, gender or any other protected characteristics. For example, an employer should not ask a female applicant whether she is comfortable working in a department that is predominantly male, or a pregnant applicant how she plans to balance motherhood with her career. *See Barbano v. Madison County*, 922 F.2d 139 (2d Cir. 1990) (court found questions during interview such as whether applicant plans to get pregnant and quit and whether her husband would mind if she had to "run around the country with men" to be discriminatory).

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It is prudent practice for employers to maintain a standard form to take notes during interviews which can then be referenced during the evaluation process. Maintaining uniform hiring practices that focus solely on the applicants' qualifications relevant to the position will mitigate exposure to claims of discriminatory hiring or termination. If the employer is nevertheless compelled to defend against a claim, the employer's hiring practices and related documents can serve as evidence that the employer only considered bona fide occupational qualifications, as opposed to protected characteristics, when making its employment decisions.

Avoiding common pitfalls in offer/welcome letters

Absent an expressed or implied agreement between the parties, employment relationships in New York State are presumed to be "at will," meaning that either the employer or employee can terminate the relationship at any time for any reason. Employers should not place any language in an offer letter, welcome letter or employee handbook that creates an unintended contract. The offer letter should only provide details such as start date, position title and starting salary. Promising a pay raise or other benefits or including language stating the employer's intention to employ the employee for a certain period or for "a long time" may create an unintended contractual relationship. *See TSR Consulting Services Inc., v. Steinhouse*, 267 A.D.2d 25 (1st Dept. 1999) (language guaranteeing employee compensation for second year of employment created issue of fact that offer letter constituted a two-year employment agreement). Inserting disclaimer language that the employment relationship is "at will" or that the offer letter does "not constitute a contract" can further strengthen the "at-will" relationship between the parties.

Providing required forms to new hires

Employers are legally obligated to provide certain forms to employees upon commencement of employment. Employers must provide applicable federal and state tax forms, I-9 Forms to confirm eligibility to work in the United States and Notice of Pay forms pursuant to the *Wage Theft Prevention Act*. Failure to provide employees with these required forms can lead to fines and/or unnecessary litigation.

Distributing anti-discrimination/harassment policies

Employers should create an employee handbook outlining the employer's policies. It is imperative that the handbook contain an anti-discrimination/harassment policy emphasizing that the employer prohibits discrimination and harassment and detailing a complaint procedure. Effective Oct. 9, 2018, the NYSHRL requires employers to distribute written anti-harassment policies and conduct annual anti-harassment training. In addition, having such a policy and complaint procedure can constitute an affirmative defense to a claim of harassment. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

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REAL ESTATE

Graffiti Artists Awarded $6.75 Million for Destroyed Murals

By Jane Chen

Who owns the artwork painted on a building when it is to be demolished? Can those rights to the painting be waived? How much is it worth? The federal court has shed some light on this issue.

On November 12, 2013, the court denied a group of graffiti artists' motion for a preliminary injunction to prevent the owner, Jerry Wolkoff, from demolishing the Long Island City building that adorned the artists' murals. Even though the court denied plaintiffs' motion, the court opined that the plaintiffs may nevertheless be entitled to monetary compensation if they meet the requisite elements provided under the Visual Artists Rights Act of 1990 ("VARA law").

As a way of background, Cohen, one of the plaintiffs approached Wolkoff in 2002 to become the curator of the artworks to be painted on the exterior of the building. Wolkoff orally agreed and allowed him to do so, creating an oral agreement. This site, also known as 5Pointz, evolved into an attraction point for high-end works by internationally recognized aerosol artists.

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Wolkoff did not, however, require the execution of a written VARA waiver from the artists. Under the VARA law, the author of any work of visual art shall have the right to "prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right." For VARA protection to apply to the artwork, the artist must not have provided a written waiver.

As a gatekeeping mechanism, the court needs to determine whether the protected work is of "recognized stature." The federal court in *Cartier v, Helmsley-Spear, Inc.*, developed a two-part test to determine whether the work of art was considered a "Recognized Stature." Plaintiff must show (1) that the visual art in question has "stature," in other words, viewed as meritorious, and (2) that the stature is recognized by art experts, other members of the artistic community, or by some cross section of society.

Upon evaluating expert testimonies and arguments from both sides, the federal court filed a decision on February 12, 2018, stating among others, that 45 of the 49 works achieved recognized stature and thus the artists were entitled to a collective monetary compensation of $6.75 million under the protection of VARA law.

Since the original decision, the defendants filed a notice of appeal and subsequently, a motion to set aside findings of fact and conclusions of law and for a new trial. Judge Block denied defendants' motion in its entirety on June 13. Nevertheless, Judge Block acknowledged in his decision that this case has generated a considerable amount of public interest and is bound for the circuit court of appeals.

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