The dangers of DISCRIMINATION

By Erica Hakimi

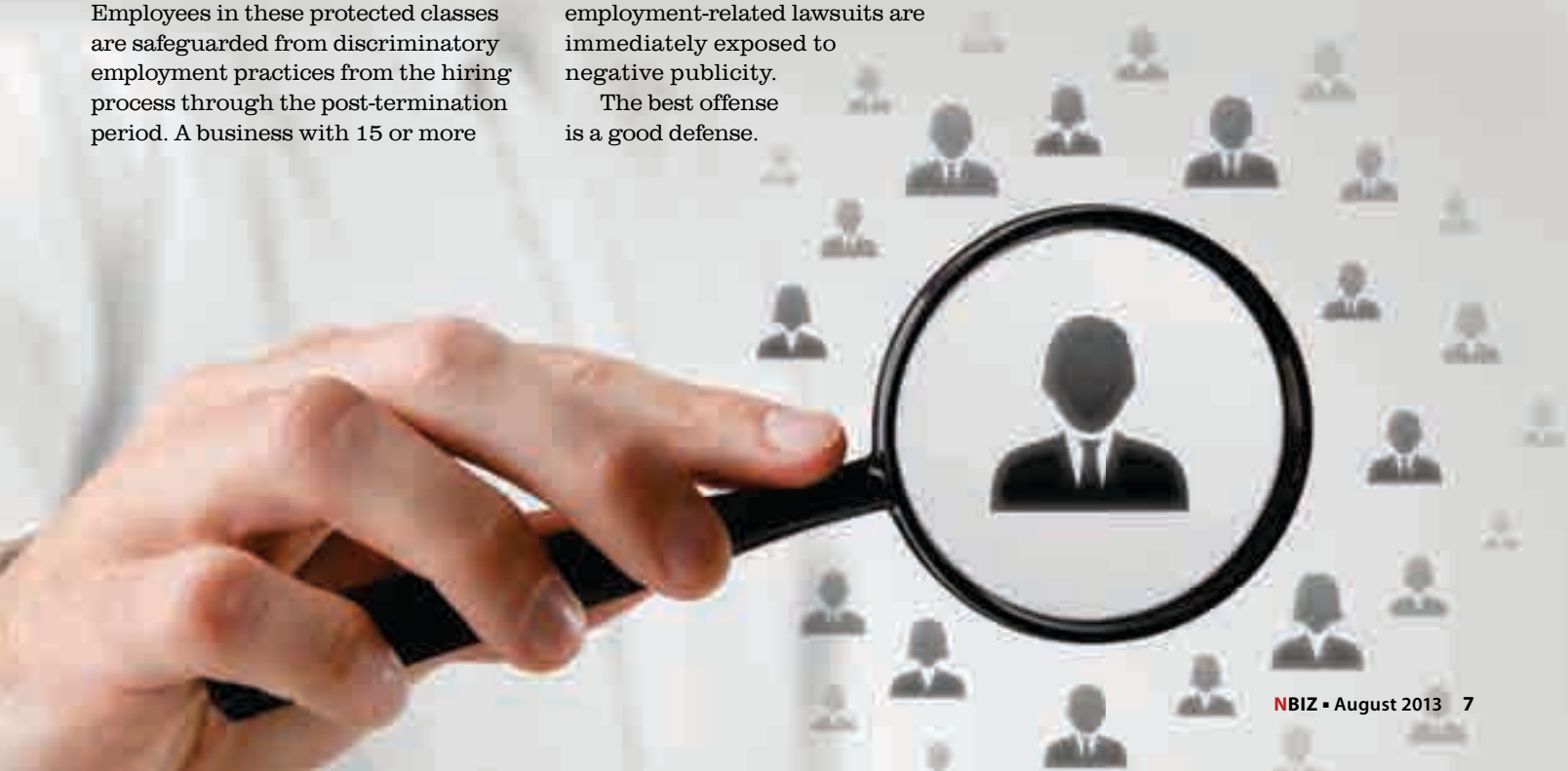
Many people have heard the phrase "Texas is an at-will state" with regard to employment matters. Generally, that means that an employer has the right to terminate an employee for a good reason, a bad reason, or no reason at all. Still, it is important for businesses always to document all aspects of their employees' work history. What some don't know is that certain exceptions exist to the at-will doctrine. Title VII of the Civil Rights Act of 1964 (Title VII) and the Texas Commission on Human Rights Act (TCHRA) protect employees from being terminated based on their race, color, sex (including pregnancy), religion, national origin, age (over 40), or because they suffer from a disability. Employees in these protected classes are safeguarded from discriminatory employment practices from the hiring process through the post-termination period. A business with 15 or more employees is subject to being sued by a current or former employee for discrimination. Regardless of size, all businesses should make their human-resources decisions after careful consideration and with solid documentation.

In the past year alone, employees in the United States filed more than 99,000 charges of employment discrimination against employers with the Equal Employment Opportunity Commission (EEOC), and countless more filed with state agencies and in federal and state courts. Even when employers prevail, they still often incur significant costs in time and money defending lengthy litigation. In addition, given the constantly updated information posted to websites, companies involved in employment-related lawsuits are immediately exposed to negative publicity.

The best offense is a good defense. Therefore, it is important for companies to be knowledgeable about and remain up to date on the current state of employment law.

HARASSMENT IS A FORM OF DISCRIMINATION

One area of discrimination that demands special attention from employers is harassment. Workplace harassment comes in many forms and can be based on any of the protected classes. The standards for what constitutes harassment have changed over time; behavior that once might have been viewed as harmless or "all in good fun" may be inappropriate and unacceptable in the workplace today.



Harassment includes conduct that has the effect of creating an intimidating, hostile, or offensive work environment; unreasonably interfering with an individual's work performance; or otherwise adversely affecting an individual's employment opportunities.

Inappropriate behavior can come from supervisors, coworkers, clients and vendors. A common form of harassment is sexual harassment, including unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature. Inappropriate behavior can also take many other forms, however, including comments, insults, jokes, physical contact, e-mails, Internet postings, and social media. It is important to understand that harassment need not take place on the employer's property or during work hours to be actionable.

THE EXPANSION OF "SEX" DISCRIMINATION

Since last year, the EEOC has begun expanding the definition of "sex" discrimination. In a 2012 opinion, the EEOC took the position that discrimination against an individual because that person is transgender (also known as "gender identity discrimination") is discrimination because of sex.

There has also been an increase in sex-discrimination and sexual-harassment claims made by lesbian, gay, and bisexual individuals over the past few years. The EEOC has held that an ongoing pattern of comments and rumors referring to a complainant as being gay can constitute a problem severe or pervasive enough to rise to the level of sexual harassment. These comments can take various forms, including verbally mocking a male employee about his sexuality using "very feminine voices." Sex discrimination can also be based on gender stereotypes—for example, stating that men should only marry women or that women should only have sexual relationships with men.

In a recent case favorable to female employees decided in May 2013, the United States Court of Appeals for the Fifth Circuit held unanimously that firing a woman because she is lactating or expressing milk is unlawful sex discrimination under Title VII. The EEOC brought that particular case on behalf of the employee, Donnica Venters. In December 2008, Ms. Venters took a leave of absence for an undetermined amount of time to have her baby. Her employer, Houston Funding, had no maternity-leave policy in place. Ms. Venters remained in contact with her supervisor every week throughout her leave of absence. During one conversation with her supervisor, Ms. Venters requested that she be able to use a breast pump at work. A limited partner in the organization responded with a strong "no" and said she should stay home longer.

On February 17, 2009 Ms. Venters' supervisor informed her that her position at the company had been filled. The company sent her a back-dated termination letter shortly thereafter, stating that she had been fired for job abandonment.

In examining this case on appeal, the issue was "whether discharging a female employee because she is lactating or expressing breast milk constitute[d] sex discrimination in violation of Title VII." The Court of Appeals found that it did. The Fifth Circuit noted the biological fact that lactation is a physiological condition distinct to women who have undergone a pregnancy. Accordingly, under Title VII and the Pregnancy Discrimination Act, firing a woman because she is lactating or expressing milk is unlawful sex discrimination, since men as a matter of biology cannot be fired for such a reason.

Given the recent trend toward expansion in the definition of sex discrimination, it is increasingly important for companies to remain informed of the ever-changing state and federal laws so they can ensure compliance. The only thing worse than having no policies is having policies that inadvertently violate the law.

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PROMULGATE POSITIVE PREVENTIVE POLICIES AND PROCEDURES

Employers can take certain steps to ensure compliance with antidiscrimination statutes. The old adage "An ounce of prevention is worth a pound of cure" is particularly applicable in employment law. The value of a clear and concise employee handbook cannot be overstated for a business. Well-defined employee policies setting forth detailed expectations can

settle disputes before they start—and protect both your business and your employees from confusion and potential litigation.

Policies and procedures provide guidance for the uniform and consistent treatment of employees. Employee handbooks should be a staple for any business, regardless of size or the number of employees. Some small businesses see no need for an employee handbook, but there are many reasons to have a handbook, particularly if a small-business owner has future expansion plans.

Employee handbooks set forth expectations between the employer and the employee. A well-written handbook provides clear boundaries for the employee and informs the employee of the company's policies and expectations. In their handbooks, employers can clearly convey to employees how the employees should behave, what they should wear, and how the employer will discipline and reward employees. Employees will understand their day-to-day responsibilities and have guidelines indicating how to perform their jobs. Relying on codes of conduct that are not properly documented can lead to violations that are open to explanation. This can result in employers treating employees inconsistently, which can in turn lead to costly litigation.

A comprehensive employee handbook can protect employers in many ways. Most importantly, handbooks help employers maintain consistency in the implementation of workplace policies and discipline. For a company to get the most out of an employee handbook, it should be tailored to each individual business, taking into account the company's specific business goals and workforce. It is important to make sure that employee handbooks are clear and concise, updated on a regular basis to account for changes in the law, and provided to all employees. An employee handbook is also the best tool for supervisors to utilize when dealing with personnel issues; it will provide guidance to the decision-making process.

Though handbooks should be written specifically for each business, there are certain messages that every business needs to convey to its workforce. Companies should be clear that they are committed to providing a workplace free of harassment and discrimination. It is important to make employees feel safe at work. Employers should let employees know that they are encouraged to report complaints, affording the company an opportunity to investigate problems and take prompt corrective action.

Given the frequent changes and updates in the area of employment law, it is important to keep apprised of the state of the law so that a company can update its policies accordingly. Always keep in mind that just as you expect your employees to abide by the rules and regulations set forth for them in the handbook, employees will also hold their employer accountable for the representations made in the handbook.

Employees enjoy a wide array of protections under federal and state employment laws that allow them to seek redress for legitimate wrongs. Employers who have up-to-date employment policies and who document their actions with respect to their employees often fare better in avoiding litigation or shortening the duration and cost of litigation brought by a former employee. **N**

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