Best Practices to Avoid Nuclear Employment Verdicts

Melisa C. Zwilling and **Alison H. Sausaman** Carr Allison

There has been a significant increase in nuclear verdicts across all industries post-COVID, but some of the most staggering awards have been in employment lawsuits. This can largely be attributed to the same factors driving nuclear verdicts in the general liability context—distrust of corporations, prolific advertising by plaintiffs' attorneys resulting in juror desensitization to large monetary awards, and young jurors. There is also an apparent desire to "send a message" or punish the corporate defendant, especially when there is suspected malfeasance or even perceived inaction and tolerance of "bad behavior." In the employment context, the confluence of these factors is further compounded by the availability of punitive damages, as evidenced by numerous recent discrimination and retaliation verdicts with nine-figure punitive damages awards.

Though many of the recent nuclear employment verdicts come out of California, they are certainly not limited to that state. In July 2024, a North Carolina jury awarded an employee with bladder and colon issues $22 million after his employer refused to let him continue to work from home post-pandemic. In April 2024, a Pennsylvania jury awarded $20.5 million to a woman who had allegedly been harassed by others using racial slurs against her. In December 2023, a Washington state jury awarded $16 million to university officers who claimed to have suffered discrimination, including racist remarks. A deaf truck driver in Nebraska, who was not hired for a driving job because he would not have been able to look away from the road to communicate with his trainer, was awarded $36 million for claimed Americans with Disabilities Act (ADA) violations.

Some of the most staggering recent employment verdicts have come from the South. In November 2022, a Texas jury awarded a saleswoman $366 million after finding she was fired for making complaints about racial discrimination. Also in November 2022, a Tennessee jury awarded $365 million to a plaintiff who was fired after she complained about discrimination. Importantly, the jury found in favor of the defendant on the underlying discrimination claim but found in favor of the plaintiff on the retaliation claim. These are just a few examples of recent employment verdicts that very clearly demonstrate the need for employers to be proactive in trying to prevent situations that could lead to these shockingly high verdicts.

Below are some actions employers can take to help reduce the likelihood of a nuclear employment verdict.

1. Employee Handbooks

Employers should ensure their employee handbooks are up to date and that they have adequate policies in place. All forms of discrimination, harassment and retaliation should be unequivocally prohibited. Employees should be given instructions on how, to whom and when complaints of discrimination or harassment should be reported. Employers should identify at least three individuals in management who will receive those complaints and make sure they know what to do and say in response. The handbook should also let employees know that all complaints will be taken very seriously and appropriate action will be taken.

It is equally important to enforce the

policies in handbooks and apply them consistently and uniformly across the board. Documentation regarding the enforcement of policies is often the best defense an employer has against employment-related lawsuits. As such, the documentation should clearly set out the facts, describe the steps of the investigation, set forth the investigation findings and discuss any discipline that was imposed if a policy violation was found. Finally, it is vital that employers conduct a comprehensive review of their handbook language - at least annually - and revise when necessary to reflect changes in the law. Employers should ensure that they receive and maintain signed acknowledgments of receipt and understanding of updated handbooks from all employees. Within the past year, multiple employment-related laws were passed, including the Pregnant Workers' Fairness Act (PWFA) and the PUMP Act. Employers must include policies concerning those new laws in their handbooks. There has also been an uptick in the number of cases filed under the ADA and Family and Medical Leave Act (FMLA). Handbooks should clearly explain how leave or accommodations should be requested. Outdated provisions, such as prohibitions on employees discussing their salary or complaining about the terms and conditions of the workplace, should be removed.

2. Arbitration Agreements

Depending on the jurisdiction, employers should consider requiring arbitration agreements and waivers of jury trials. While such agreements would not apply to sexual harassment claims, they would limit the availability of jury trials for other employment claims, thereby insulating employers from nuclear jury verdicts.

3. Training

Employers should consider training both employees and managers separately to reduce harassment and discrimination claims. The best practice is often to bring in outside counsel or human resources specialists to provide the training.

Employees should be trained on what is appropriate workplace behavior. They should also be informed about the discrimination and harassment policies, reporting policies, and disciplinary policies. Documentation of their attendance at the training should be made a part of employees' personnel files.

Managers and supervisors also need to be trained in recognizing problematic behavior and responding appropriately to complaints about discrimination or harassment. They should be given guidance to help them understand that a casual comment from a production employee that he cannot move as fast as he could when he was younger and before he had knee surgery could provide the basis for a claim of age or disability discrimination. A comment from a Black female employee that her supervisor treats her worse than her coworkers, who are all white males, could provide the basis for a sex and race discrimination case. A comment from an employee about another employee following her around and commenting on her looks could be a sexual harassment claim in the making. Supervisors and managers need to be able to recognize potential claims and respond appropriately. They should refrain from responding with comments encouraging employees to just work harder, try to get along or not pay attention to someone making inappropriate comments. Managers should also be instructed to treat all employees in a fair and consistent manner.

Keep in mind that, in many cases, the underlying "bad behavior" is not nearly as problematic as the employer's response (or lack thereof) to the bad behavior. One of the common issues with some of the recent nuclear verdicts was employers failing to investigate complaints or being complacent and allowing an offensive culture to persist.

4. Social Media and Texting

Employers should think hard about letting employees access and post on social media or send personal, non-work-related text messages from company-owned equipment. Employers can be held liable for actions of employees who use company equipment to send harassing, discriminatory or otherwise unlawful messages to others. Employers should also notify employees that, while the employer respects an employee's right to privacy outside of the workplace, if an employee uses social media or any public platform to harass, discriminate, or retaliate against a coworker, that could result in the termination of employment.

5. Investigations

Prompt investigation of all employee complaints is another important way to avoid nuclear employment verdicts. All complaints should be taken seriously and investigated thoroughly. Interviews should be conducted, and witness statements should be taken by the appropriate officials. In the case of serious accusations, employers should consider placing the alleged bad actors on paid leave pending the results of the investigation.

A common theme in many of the recent nuclear employment verdicts is the claim that the employer did not investigate complaints thoroughly or stuck its head in the sand. Any perception of willful ignorance or blind tolerance of corporate malfeasance poses a potential threat of angering the jury, which can culminate in the jury wanting to send a message by way of a nuclear verdict.

6. Document Just Enough

As important as handbooks, policies, training, uniform implementation of policies, and thorough investigations are, they hold little evidentiary weight if there is no documentary proof of such events. One important way to avoid a nuclear employment verdict, or ideally, to avoid employment lawsuits entirely, is to document important events carefully. Employers need to exercise great caution in not only crafting thoughtful policies and implementing them uniformly but also maintaining documents to show every step of the process: receipt and acknowledgment of the company handbook and policies, receipt of the job description and offer letter, employment agreement (if applicable), training, disciplinary efforts (including documentation memorializing any verbal counseling), and investigations.

Along with the general recommendation to document well comes a word of caution. Employers should resist the urge to ask all employees who were witnesses to potentially inappropriate workplace behavior to draft a written statement before knowing what those employees will say. Sometimes, co-worker statements turn out to be great evidence in a plaintiff's case.

CONCLUSION

The best defense is a good offense. While implementing the above steps will not guarantee an employer will never be sued, the odds of such lawsuits should decrease. If a lawsuit is filed, an employer who has taken all of these steps is likely to have a much more favorable outcome.

Melisa C. Zwilling is a shareholder with Carr Allison in Birmingham, Alabama. In her 26th year of practice, Melisa focuses on labor and employment and professional liability defense. In addition to litigating cases, Melisa frequently provides training to clients to help them avoid lawsuits. She can be reached at mzwilling@carrallison.com.

Alison H. Sausaman is a shareholder in Carr Allison's Jacksonville (FL) office, where she practices in the areas of premises liability, retail and hospitality, transportation, government torts and public liability and labor and employment. She can be reached at asausaman@carrallison.com.