

You May Think That You Are Too Small To Be Covered By Employment Discrimination Laws, But Are You?

Application of the Title VII 15-Employee Requirement:

Title VII makes it unlawful for any **employer**, "...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The term "employer" includes those with "fifteen or more employees for **each** working day in **each** of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). An "employee" is anyone who maintains an "employment relationship" with an employer. Pay attention to the information below, especially if you employ part-time workers.

So how does an employer determine whether these criteria are met?

- Title VII applies to employers with 15 or more employees, **including** part-time and temporary workers.
- Even an employer with less than 15 employees at the time a lawsuit is filed may meet the criteria if the employer had 15 or more employees for twenty weeks in the preceding calendar year.
- Generally anyone who appears on an employer's payroll is considered to have an employment relationship with that employer. Independent contractors, therefore, are not counted as employees.

What does the "numerosity" requirement mean?

An employer with fewer than 15 employees is not subject to liability under Title VII. The United States Supreme Court held recently that the numerosity requirement of Title VII is a basic element of the plaintiff's case, and not a jurisdictional element. Arbaugh v. Y&H Corp., 126 S.Ct. 1235 (2006). The holding is important because it requires the employer to assert that it does not meet the numerosity requirements early in the litigation and certainly prior to trial. (Previously, the numerosity requirement was considered to be a jurisdictional issue that could be cause for dismissal at any time.)

State law may provide exposure for very small agencies, and don't forget the other Federal statutes.

It is also important to note that some states have separate anti-discrimination statutes with various (or no) numerosity requirements. Additionally, other federal statutes may have different requirements. For example, while the Americans with Disabilities Act ("ADA") also has a fifteen (15) employee requirement, the Age Discrimination in Employment Act ("ADEA") applies to employers with twenty (20) or more employees.

And then there is the common law.

Common law is the law that comes from the decisions of judges, in contrast to statutes which are the products of legislatures.

Plaintiff's attorneys are using the common law to assert state law causes of action such as negligence claims, contract-based claims, or tort claims such as tortious interference or intentional infliction of emotional distress that can provide a "back door" into employment-related claims that might otherwise be barred by the numerosity requirements of the federal statutes.

No employer, therefore, is completely immune from employment-related liability. Employers who believe that they are not subject to Title VII's 15-employee limit should regularly and carefully evaluate their workforce to determine whether they are accurately calculating the number of employees. If an employment-related lawsuit should arise, care should be taken to evaluate the number of employees within the first few days of receiving notice of the lawsuit to determine whether there might be grounds for dismissal.

Please contact Mel Mobley of Lokey, Mobley and Doyle, LLP, if you have questions about these issues.

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