Top 10 for 2013

EMPLOYMENT, EMPLOYEE BENEFITS AND IMMIGRATION TEAMS ISSUE TOP "TO DOS" FOR THE NEW YEAR

01.2013

2012 was an active year for employment and labor legislation, litigation, and enforcement actions. 2013 promises to be just as busy. To start the new year off on the right foot, here are our Top 10 "To Do" items for 2013:

1. **Review Policies and Procedures to Prepare for the EEOC's Strategic Enforcement Plan.** The Equal Employment Opportunity Commission ("EEOC") has approved a Strategic Enforcement Plan ("SEP") establishing nationwide enforcement priorities for 2013-2016. Those priorities include: (1) eliminating discrimination in recruitment and hiring; (2) protecting immigrants, migrants, and other "vulnerable workers"; (3) addressing developing issues, such as coverage of lesbian, gay, bisexual, and transgendered individuals under current sex discrimination laws; (4) enforcing equal pay laws; (5) targeting policies or practices discouraging individuals from exercising their rights, employers engaging in retaliatory actions, and employers demanding overly broad waivers of legal rights; (6) preventing harassment through systemic enforcement and targeted educational outreach. Employers can get a head start on the EEOC by auditing their HR policies and practices now with an eye toward these priorities, including ensuring that advertisements, interviews and pre-employment examinations are conducted in a nondiscriminatory manner and implementing clear policies prohibiting retaliation. Employers should be extra sensitive to claims by LGBT individuals and audit pay practices to ensure compliance with the Equal Pay Act.
2. **Review Hiring Practices and Policies Relating to Criminal Records.** If employers focus on just one area in their hiring practices, it should be use of criminal records to make employment decisions. The EEOC issued special guidance on this issue in 2012, and it promises to continue to be an area of special focus in 2013. According to the EEOC guidance, an employer must show that an employment decision based on a criminal record is "job-related and consistent with business necessity." This requires considering the nature and gravity of the criminal offense, how dated the offense, and the nature of the job. Get rid of blanket policies prohibiting the hiring of any applicant with a criminal record. Instead, issue policies that weigh whether such conduct makes an individual unfit for a specific job or ineligible for the position under applicable law.
3. **Update Fair Credit Reporting Act Materials.** Speaking of background checks, all employers conducting background checks on employees or applicants must update their Fair Credit Reporting Act ("FCRA") materials effective January 1, 2013 to reflect a change in the enforcement agency from the Federal Trade Commission to the newly created Consumer Financial Protection Bureau ("CFPB"). The new Summary of Rights must be provided to applicants and employees before any adverse action is taken based in whole or in part on information obtained from the background report. In anticipation of the CFPB's increased attention to FCRA violations, employers should ensure that their background check procedures are compliant with the law.

4. **Implement a Compliant Social Media Policy.** Employees are increasingly using social media to talk about the workplace. Employers should implement sound social media policies to protect confidential information, prevent harassment or discrimination of employees by co-workers, prevent harmful or false rumors, prevent unauthorized employees to speak on behalf of the company, and protect the company's reputation and goodwill. But be wary: the National Labor Relations Board (the "NLRB") limits what employers can say in social media policies. For example, the NLRB has held that policies prohibiting employees from making disparaging comments or disclosing confidential information are unlawful if they are not carefully drafted to inform employees that nothing in policy is intended to infringe upon their right to discuss terms and conditions of employment, including their compensation, co-workers, and managers. The NLRB's position applies to all employers, even if the employer has no union employees. To stay ahead of the NLRB, employers should draft a social media policy that protects important interests while making clear that nothing in the policy is intended to discourage employees from discussing the terms and conditions of their employment. Employers should avoid generalities, such as prohibiting "disparaging" comments or disclosing "confidential information." Instead, provide specific examples, such as prohibiting harassing or threatening comments in violation of the company anti-harassment policy or prohibiting the disclosure of patient health information.
5. **Update Handbooks and Forms for GINA Compliance.** The Genetic Information Nondiscrimination Act ("GINA") went into effect in 2009. GINA was enacted to prohibit discrimination on the basis of genetic information, such as an employee's susceptibility to illness or disease based on family health history or the results of genetic tests. GINA also broadly prohibits an employer from requesting or obtaining genetic information with limited exceptions. Although GINA and the EEOC regulations are now a few years old, many employers have not updated their handbook policies and FMLA and other medical leave forms to adequately protect themselves. This includes updating discrimination and harassment policies to state that discrimination based on genetic information is prohibited, and adding a "safe-harbor" in FMLA and medical leave policies and forms specifically informing employees and their health care providers not to provide any genetic information when completing medical forms.
6. **Review Your "At-Will" Disclaimers.** While reviewing and updating other handbook language, employers should be sure to take another look at their "at-will" employment disclaimer. These disclaimers should be in every employee handbook, and should make clear that nothing in the handbook establishes a contract of employment for any fixed term. However, at-will disclaimers must be drafted properly to be effective and not run afoul of the law. For example, South Carolina law requires that a disclaimer be "conspicuous" and set forth in "underlined capital letters on the first page of the document and signed by the employee." Recently, the NLRB has weighed in on at-will disclaimers. According to the NLRB, an at-will statement that says "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way" implies that the employee could not alter the at-will employment status even through union representation and, therefore, is unlawful. The NLRB's position applies to all employers, even if the employer has no union employees. Instead of such broad language, employers should draft at-will disclaimers to state that the at-will employment status may only be changed by certain company officers, such as the president or CEO.
7. **Enroll in E-verify and Start Using it to Verify Your New Hires' Employment Authorization.** North Carolina's E-verify law made the use of the federal E-verify program mandatory for all companies with 500 or more employees in North Carolina as of this past October. Companies with 100 or more employees in North

Carolina must enroll in and use E-verify by January 1, 2013. Companies with 25-100 employees in North Carolina must enroll and use E-verify by July 1, 2013. Offices in South Carolina? E-verify has been mandatory for all South Carolina employers with five or more employees since last year. Penalties for noncompliance with North and South Carolina E-verify laws range from fines to loss of the ability to transact business in that state for a specific period of time.

8. **Review Your Independent Contractor Relationships.** We've been warning clients about misclassifying employees as independent contractors for years. The independent contractor misclassification issue is not going away, and the Department of Labor has devoted additional resources and manpower to its Misclassification Initiative for 2013. Placing the onus even more squarely on employers, the Department of Labor plans to eliminate compliance assistance for employers and its toll-free call center in 2013. Due to the increased scrutiny and potential liability for back wages, unpaid payroll taxes, civil fines, liquidated damages, and attorneys' fees, employers utilizing independent contractors should review and correct any misclassifications before the Department of Labor finds them.
9. **Train Managers; Communicate with Employees.** Changes in employment law will require changes in employment policies and practices in 2013. It is important that managers and human resources representatives are trained and knowledgeable on these changes. It is also important that the new policies and practices are communicated to employees so that they understand the changing workplace. Hot areas for training include social media use, how to properly consider, or avoid, certain considerations, such as an applicant's social media footprint, criminal background, and medical information, and of course, sexual and discriminatory harassment. Investing in training decision-makers and communicating workplace policies will be repaid by curtailing problems down the line.
10. **Health Care Reform – Comply in 2013 and Prepare for Major Changes in 2014.** Employers should be nearing full implementation of Patient Protection and Affordable Care Act ("PPACA") requirements which become effective in 2013, including:
    1. $2,500 cap on FSA contributions;
    2. Payment of first comparative effectiveness research (CER) fee due July 2013;
    3. Withholding of increased Medicare tax on employees earning more than $200,000 annually;
    4. End of tax deduction for the federal subsidy for prescription drug coverage provided to retirees eligible for Medicare Part D;
    5. Written notice to employees about health insurance exchanges and implications of purchasing coverage through an exchange – such as eligibility for premium tax credits for certain individuals with incomes between 100%-400% of federal poverty level, effect of employer-provided coverage on exchange coverage and vice versa. Under PPACA, this notice is due in March 2013, but insurance exchanges are still being established and guidance on the exact content and format of the notice has yet to be issued. Employers therefore should monitor developments in this area and will have to act quickly once guidance is available.

In addition, employers should be proactively preparing for 2014, when major changes impacting employers become effective. This will require compliance with PPACA's extensive "play or pay" regulations – under which large employers (50 or more full-time or full-time equivalent employees) are required to either provide coverage to their full-time employees that satisfies PPACA mandates, or pay a penalty of $2,000 per

employee (minus the first 30). Employers should start assessing now whether they will be subject to these requirements and, if so, what is required to comply. Other issues for 2014 that need employer attention now include plan amendments to incorporate new benefit requirements – such as the complete elimination of pre-existing condition exclusions, prohibition on waiting period longer than 90 days, automatic enrollment by employers with at least 200 employees, higher incentive limits for wellness programs and others. Finally, employers should review the new "reinsurance fees" that will be assessed on all health plans in 2014-2018 – which are expected to be hefty and have been described as a "sleeper" issue that may surprise many employers unaware of this coming obligation.