December 2012

2013 EMPLOYMENT LAW CHECKLIST FOR THE NEW YEAR

The beginning of a new year is always an opportune time for employers to review employment policies and practices. There were many important employment law changes in 2012, especially new direction coming from the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB).

The EEOC had another record breaking year in 2012 resulting in more than $365 million in monetary benefits for charging parties, which is the highest level of monetary relief ever obtained by the Commission. The EEOC also issued guidelines for employers on using criminal information for employment purposes. As protected categories are added and court cases expand retaliation protection, these record setting EEOC trends are expected to continue.

The Acting General Counsel for the NLRB issued its third report on social media giving specific examples and guidance to employers. Social media policies that directly or indirectly interfere, or interfere when applied in employment decisions, with the rights of employees under the National Labor Relations Act, such as the right to discuss wages and working conditions with co-workers, are unlawful.

The following is a brief checklist of specific issues you may want to pay special attention to in 2013.

- ✓ Background Checks for Employment Purposes
- ✓ Use of Criminal Background Checks
- ✓ Federal and State Wage and Hour Laws
- ✓ Update Social Media Policies
- ✓ Update "Employment-at-Will" Policies
- ✓ Properly Classify Non-Employees and Employees

1. Background Checks for Employment Purposes.

Employers that use consumer reports to make employment decisions, such as hiring, promotion and termination, must comply with the Fair Credit Reporting Act (FCRA). The term "consumer report" is defined broadly by the FCRA and includes criminal background reports, credit history reports and other background checks obtained by consumer agencies. Beginning January 1, 2013, employers will be required to use updated forms as part of their background check.

Employers should use the new FCRA notices for their background check programs, which reflect modest changes to the mandatory agency-drafted FCRA summary of rights form (the "FCRA Summary of Rights"). The FCRA Summary of Rights form must be included: (1) as an enclosure with the first of the two "adverse action" notices – the "pre-adverse action" notice; and (2) with the disclosures for "investigative consumer reports" (i.e., consumer reports based on personal interviews conducted by a consumer reporting agency (CRA), such as in-depth reference checks). The new forms can be obtained at US Government Printing Office Website (Appendices F, G, and H).

For more information, please read "Employers Will Need to Use New Fair Credit Reporting Act Forms by January 1, 2013."

2. Use of Criminal Background Checks.

While no law clearly prohibits a private employer from asking applicants or employees about arrest or conviction records, the EEOC has long espoused the dangers of criminal background check policies that rely on such records in making selection decisions, and both the EEOC and the Oregon Bureau of Labor and Industries have issued cautionary statements and suggested guidance on how to deal with criminal background information. In the EEOC's guidelines, "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964," when an employer uses an arrest or conviction record (or both) as an absolute measure, as a determinative bar, to prevent an applicant (or current employee) from being hired or promoted, thereby limiting employment opportunities to a protected group, that practice will likely be deemed discriminatory. The guidance identifies best practices for employers and cites the most important considerations to be the nature and gravity of the offense, the time that has lapsed since the offense, and the nature of the job.

For some positions, it is wise, prudent and consistent with the job position, to screen out employees who have certain criminal backgrounds – namely when working with children, elderly, and when working with a company's finances. However, a broad use of arrest or conviction records can lead to a pattern of discrimination based on race or national origin. For more information, read "Criminal and Arrest Records in Employment Background Checks."

3. Federal and State Wage and Hour Laws.

The U.S. Department of Labor and Oregon Wage and Hour Division have increased their wage and hour audits. Attorneys for employees continue to aggressively pursue wage and hour claims because the penalties are steep.

- Off the Clock and Paid Rest Breaks: Ensure that supervisors have at least a basic understanding of the requirements of the federal and state wage and hour laws. At a minimum, supervisors should understand 1) the prohibition of employees working off the clock and not reporting their time for pay purposes, particularly overtime pay, and

2) the state law requirement to provide paid rest breaks and an uninterrupted 30-minute meal period for non-exempt employees.

- 2013 Minimum Wage: Beginning January 1, 2013, Oregon's minimum wage increases to $8.95/hr. The 15-cent increase takes effect on January 1, tracking a 1.7% increase in the Consumer Price Index, a nationally utilized measure of inflation in the economy. The federal minimum wage remains at $7.25/hr.

- Review payroll practices: Make sure that all forms of employee pay are properly included in the employee's base rate for overtime calculations, including any non-discretionary bonuses or incentive pay.

4. Update Social Media Policies.

Between the summer of 2011 and the summer of 2012, the Acting General Counsel of the National Labor Relations Board (NLRB) issued reports on the legality of handbook policies within the context of employee Section 7 NLRA rights. The first two reports discussed NLRB cases arising in the context of employee communications via social media, and in its last report addressed social media policies that violate Section 7 of the NLRA which protects the right of union and non-union employees to engage in "concerted activities" with each other for the purpose improve working conditions and terms of employment.

Social media policies should be carefully reviewed and drafted to comply as closely as possible to the NLRB's guidance and rulings. For more information, please read "Elements of an Acceptable Social Media Policy - Post NLRB Guidance Reports."

5. Update "Employment-at-Will" Policies.

In the fall of 2012, the National Labor Relations Board began to chip away at the employment at-will doctrine. *In the Matter of Hyatt Hotels Corp.*, Case No. 28-CA0061114, the NLRB found that Hyatt's at-will acknowledgments in the employment handbook violate an employee's Section 7 rights under the National Labor Relations Act. As part of its settlement, the company agreed to rescind and revise existing acknowledgments.

On October 31, 2012, the Acting General Counsel of the NLRB issued two memoranda, each on the topic of whether or not to pursue allegations that an employer violated the NLRA by maintaining statements in employee handbooks regarding the at-will nature of the employment relationship. Each policy was viewed under the standard that the policy or statement would be unlawful only if employees "would reasonably construe" the policy to restrict Section 7 activities.

Arising from this latest NLRB decision, employers are well advised to review their employment at-will policies and acknowledgments and ensure that they are carefully drafted so that employees cannot reasonably construe the at-will language to prohibit Section 7 activity. For more information read "At-Will" Employment Policies under NLRB Scrutiny."

6. Properly Classify Non-Employees and Employees.

The U.S. Department of Labor (DOL) estimates that one in three employers misclassifies workers. The misclassification of employees as something other than employees, such as independent contractors, presents a serious problem for employers.

Whether employers intentionally or mistakenly misclassify employees, those employees may be entitled to back-wages and other benefits under the law. State and federal legislation and agencies continue to target misclassification of workers in three categories: (1) independent contractors, (2) unpaid interns and trainees, and (3) volunteers. Misclassification of workers provides one of the biggest bases for wage claim litigation. Employers are encouraged to review workers providing services as non-employees and evaluate whether those workers are properly classified under state and federal laws.

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