

EMPLOYMENT AND LABOR LAW UNDER THE NEW ADMINISTRATION: MAKING A LIST, CHECKING IT TWICE

As 2008 winds down, we reach the holiday season and what is traditionally a relatively uneventful time of year for employers and their employment and labor lawyers. However, unlike the past several years, which saw only a handful of significant employment and labor law changes, 2009 promises to bring many changes and challenges for employers and their human resources departments.

Some legislation is highly anticipated and expected: the Employee Free Choice Act, the Fair Pay Restoration Act, and amendments to existing statutes, including an addition to Title VII of the Civil Rights Act of 1964 to prohibit sexual orientation discrimination. However, this legislation will not be considered until the new Congress convenes in 2009. On the other hand, recent major amendments to the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) have already been enacted and take effect in January 2009.

With these upcoming changes, many employers have asked what they can do to get ready and what proactive steps they can take in anticipation of other expected changes in employment and labor laws in 2009. To that end, an employment practices audit and checklist may be a helpful tool in preparing for the future.

Preparing For The Known

Although new legislation is on the horizon, it is equally important to maintain focus on compliance with existing state and federal employment and labor laws including: wage payment laws and overtime and minimum wage compliance; immigration and worker verification; and Title VII anti-discrimination and harassment law.

In addition, employers should take proactive steps to comply with new ADA amendments, which take effect January 1, 2009, and new FMLA regulations, which take effect January 16, 2009. What are some of those steps? Here is a checklist that highlights some key items employers should consider:

- Have you properly classified exempt and non-exempt employees for purposes of overtime compensation?
- Are you complying with the current federal minimum wage mandate of \$6.55/hour?
- For South Carolina employers, does your employee handbook contain the statutory at-will employment disclaimer?

- For North Carolina employers, have you properly notified employees of any company policy or practice that results in a loss or forfeiture of vacation time or pay?
- Are all required federal and state notices and posters properly posted in the workplace, including new FMLA posters?
- Does your employee handbook provide appropriate information regarding recent changes to the FMLA, including those related to armed service members and their families?
- Have you updated your FMLA policies and forms to address and comply with recent and upcoming changes to the FMLA?
- Have you examined and updated forms the company uses for disability accommodation requests to make sure they comply with the changes to the ADA?
- Are your supervisors properly educated and trained regarding the company's anti-discrimination and harassment policies and how to respond to reports of discrimination or harassment?

Our prior newsletters have addressed many of these topics in more detail. To access them, please visit our firm website's "Publications" page at <http://www.nexsenpruet.com/publications.html> or contact us by phone or e-mail.

Preparing For The Unknown

The incoming administration has made it clear that it expects to implement significant changes in the areas of labor law (the Employee Free Choice Act); anti-discrimination, via an amendment to Title VII that would prohibit discrimination based on sexual orientation; the amount of damages an employee can recover in discrimination cases (the Fair Pay Act); and employee leave via legislation that would require employers to provide paid sick leave.

While employers should not panic or take action based on speculation as to the substance of these potential changes, the proposals highlight additional areas in which employers can take proactive steps to avoid future problems. Taking those steps should include finding or acting upon answers to these questions:

- Are you and your supervisors connected with your employees well enough to know if and when union "talk" is present? Stated differently, with questions about the economy on everyone's mind, do you have a finger on the pulse of your employees?
- Do your supervisors know how to respond when employees ask "do we need a union here?"

- Do your supervisors know what they can and cannot say about unions?
- Do your document retention policies and practices comply with applicable law?
- Do your company's policies, procedures, and practices promote and insure equal treatment of all employees in the workplace?

Proactive Action Now Avoids Liability Later

While the future may hold changes in employment and labor laws, there are steps you can take to minimize or eliminate uncertainty and better prepare your company for whatever changes occur. If the answer to any of the above checklist questions is No, you should take immediate steps to address the situation. Checking off each of the identified potential pitfalls will help your company avoid liability under current employment and labor laws -- and give you a head start on complying with whatever may come in 2009.

This Employment Law Update is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation.

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