OUT WITH THE OLD, IN WITH THE NEW:  
FOUR NEW YEAR’S RESOLUTIONS FOR EVERY EMPLOYER

Volunteer to help others. Get fit. Plan a trip. Lose weight. Almost everyone has made at least one resolution for 2010.

You may have set personal goals for yourself in the New Year, but what about for your company? With the numerous changes to the employment and labor law landscape in 2009, now is the time to make some new resolutions for your business – and, perhaps, to revisit some old ones as well.

Although any company’s list could encompass a broad range of possible resolutions, here are four that every employer should consider for the year ahead:

1. Ensure Your Policy Manual and Forms Are Up-To-Date

Substantial changes in the legal and technological climate over the past several years have impacted the workplace in many ways. As a result, employers should review their policy manual to ensure that it accounts for these changes. If you do not have a policy manual, now is the time to prepare one.

From a legal standpoint, new laws affect a number of policies that are included in most employee handbooks. For example, the 2010 National Defense Authorization Act expanded both the military exigency and caregiver leave entitlements under the Family and Medical Leave Act (FMLA). These changes, which took effect October 28, 2009, substantially increase the number of individuals potentially eligible for such leave. Every FMLA policy should be revised in accordance with the new law.

Additionally, the Genetic Information Nondiscrimination Act of 2008 (GINA) took effect in 2009. GINA imposes broad restrictions on the collection, storage and disclosure of an employee’s genetic information. Discrimination on the basis of such genetic information is prohibited. So each affected employer’s equal employment opportunity and harassment policies, among others, should be revised to account for GINA’s mandates. Likewise, any employment forms, such as fitness-for-duty certifications and leave requests, should be reviewed to ensure that prohibited information is not requested inadvertently.

The exploding popularity of social networking websites such as Facebook and Twitter has imposed additional challenges on maintaining workplace productivity. Moreover, on-the-job blogging has increased the risks associated with the unauthorized dissemination of commercially sensitive information. These and other concerns have led many employers to adopt social networking policies and to modify their technology, communications and confidentiality policies as well. For more information regarding some of the legal implications associated with social networking, see the December 2009 edition of Nexsen Pruet’s Employment Law Update (http://www.nexsenpruet.com/assets/attachments/582.pdf).
2. Conduct “Refresher” Training on Workplace Harassment and Violence Concerns

The past year was marked by several high-profile incidents of workplace violence, many with tragic results. High-dollar verdicts and settlements resulting from allegations of workplace harassment also underscore the need for employers to be mindful of the potential liability that may arise from inappropriate employee behavior. However, risks in both of these volatile areas may be mitigated through proactive “refresher” training of company management and employees. The beginning of a new year presents a timely opportunity for all employers to remind their employees of the many concerns associated with harassment and workplace violence.

While some companies conduct training internally, others may engage trained professionals to educate their workforces. Regardless of the training format, employers should not limit discussions to sexual harassment alone. While sex and gender are common bases of harassment, disability is an equally prohibited – and often overlooked – reason. With passage of the Americans With Disabilities Act Amendments Act of 2008, and the resulting expansion in the base of individuals legally classified as “disabled,” employers should address this and other areas when implementing a comprehensive harassment training plan.

3. Examine Confidentiality Policies and Restrictive Covenants

A company’s proprietary information represents one of its most valuable assets. In addition to providing an advantage over competitors, it is often the product of hard work and determination. Although a portion of this information may be protected by statute, prudent employers should consider confidentiality agreements as another safeguard.

When preparing a new confidentiality agreement or revising an existing one, employers are encouraged to plan for a number of potential circumstances. For example, a comprehensive policy may include not only a prohibition on the use of proprietary information by employees, but may also set forth procedures for the return of such information upon the cessation of employment. To the extent that employees may store such information on electronic devices, employers should consider implementing procedures for its deletion or removal.

Similarly, employers using non-compete and non-solicitation agreements are encouraged to review those documents. The law surrounding restrictive covenants evolves constantly, and an agreement that may have been enforceable several years ago may no longer be effective. Given the potentially negative consequences associated with an unenforceable restrictive covenant, vigilant employers should resolve to plan such a review in the coming year.

4. Audit Employment Eligibility Compliance and Wage Payment Practices

Employment eligibility and wage payment are areas that are fraught with pitfalls for the unwary employer. A careful proactive audit of an employer’s practices associated with these issues may mitigate or eliminate potential problems before they arise.

As part of any employment eligibility audit, an employer should ensure that it has a properly completed Form I-9 for each worker. South Carolina employers must also
be aware of the additional requirements imposed by the South Carolina Illegal Immigration Reform Act. Federal contractors may have additional employment eligibility mandates as well, such as the use of the E-Verify system.

Wage payment practices are another complex area in which a conscientious audit may benefit employers. State law (such as the South Carolina Payment of Wages Act and the North Carolina Wage and Hour Act) and federal law (including the Fair Labor Standards Act) impose a number of specific requirements on employers.

Recently, the U.S. Department of Labor reported that the Wage and Hour Division, which enforces the FLSA, has hired 250 new investigators. With the potential for an increase in governmental oversight, employers are encouraged to audit their wage payment practices in the coming year.

Happy New Year!

The Employment and Labor Law Practice Group at Nexsen Pruet wishes our clients and friends a happy and prosperous year in 2010. In an effort to assist employers to implement the resolutions outlined above, we will be discussing them at greater length during our next Quarterly Breakfast Briefing, which will be scheduled in the next few weeks. We will contact you shortly with details.

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.