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News & Types: Employment, Labor & Benefits Update

# The Top 6 Employment Challenges of 2014

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Practices: Employment, Labor & Benefits

Are companies ready for 2014? Last year, we saw several significant changes and reminders to lessen the risks of suit. Here is our list of the Top 6 challenges human resource professionals should address:

**1. The Unenforceable Non-Compete Agreement**

Many companies require new employees to sign a non-compete/non-solicitation agreement on their first day of employment. The legal consideration for the agreement is often the employee's employment. Many companies typically give no money, bonus or guarantees as consideration for the employee to sign the agreement. However, in *Fifield v. Premier Dealer Services, Inc.,* the First District Appellate Court in Illinois ruled that merely working for the company for less than two years is not adequate consideration to enforce such an agreement. The Illinois Supreme Court will not hear the appeal and, therefore, companies need to take action to ensure that their non-compete agreements are enforceable.

Action Plan: Audit the company's non-compete and non-solicitation agreements to determine when they were signed and if the company gave adequate consideration to the employees at the time the employees signed the agreement. If there was not adequate consideration, consider having the employees re-sign the agreements with adequate consideration.

**2. The Employees Who May Now Carry Concealed Firearms**

Illinois is the last state to allow the concealed carry of firearms. Starting in January, individuals may apply for a permit to carry a concealed firearm. The statute prohibits the carrying of concealed firearms in a number of buildings and venues, such as schools, hospitals, trains and at public events. Owners of buildings may prohibit concealed firearms in their buildings, but only if they post a sign. However, employees and visitors are allowed to conceal firearms in their vehicles under certain restrictions. Open questions remain about the rights of employees to carry concealed firearms into customers' facilities and in company-owned or leased automobiles used for business purposes.

Action Plan: Post the proper sign or contact the owner of the leased premises that your company occupies to have the owner post the proper sign. Understand which firearms individuals are permitted and not permitted to carry in a concealed manner. Review or draft a violence in the workplace policy to ensure that it complies with the new law and addresses the company's concerns.

**3. The Employees Who May Now Use Medical Marijuana**

Medical marijuana became legal in Illinois in January. Employees may become a "registered qualifying patient" entitled to use marijuana for certain types of illnesses and conditions. Companies must comply with the Americans With Disabilities Act and the Family and Medical Leave Act, if an employee has a disability or a serious health condition, respectively. Is the use of medical marijuana a reasonable accommodation? Under the medical marijuna statute, employees may not be impaired, defined as showing "specific, articulable symptoms…that decrease or lessen…performance of the duties or tasks." And, marijuana is still a controlled substance under federal law. Companies are entitled to create and maintain drug free workplace policies and address in those policies employee use of prescription drugs. These policies can prohibit and/or limit the use of alcohol, drugs and controlled substances and require testing on a random basis or if there is reasonable suspicion or other circumstances, such as an accident.

Action Plan: Companies should review their personnel policies regarding drugs, alcohol, use of prescription drugs and alcohol/drug testing. The policies should address the use of medical marijuana and include the statutory language. In addition, companies need to train their supervisors to implement these policies, including determining when any employee is impaired due to his use of drugs, alcohol and medical marijuana.

**4. The Policies That Unknowingly Violate The National Labor Relations Act**

Most companies care little about the National Labor Relations Act and even think that it does not apply to them. After all, most believe that the Act only applies to companies with unions. However, the Act applies to all non-retailers who ship or receive products or services over $50,000 in a year either directly or indirectly across state lines. The Act also applies to all retailers with gross revenues of different amounts, depending upon the type of company. The Act protects non-unionized employees who engage in concerted, protected activities. These are activities involving the employee's wages, hours and working conditions and apply when two or more employees act jointly. All actions and written policies that interfere with, coerce or restrain – or have the tendency to chill employee actions – violate the employees' rights to engage in concerted, protected activities. A company unlawfully terminates employees if the decision to terminate is based upon a policy that violates the Act. For example, a company will need to reinstate and give back pay to an employee who is discharged for making a "disparaging, negative or disrespectful comment about the company or its employees." Such a policy is unlawfully broad and ambiguous and, therefore, chills the employees' rights. A termination based upon the policy also violates the Act. If a union loses an election when such a policy is in effect and has not even been implemented, the union has the right to a second election after the federal government has told the employees that the company has violated federal law.

Action Plan: Policies are not automatically lawful. Masuda Funai's Employment Group has reviewed policies issued by nationally recognized franchisors, payroll services and PEO's that violate federal law. Human resource professionals must examine every policy for compliance with the National Labor Relations Act. More importantly, every due diligence analysis of a termination must include whether the company is terminating the employee in violation of this federal law.

**5. The Social Media Policies and Terminations That Violate Federal Law**

Twitter, Facebook, blogs and e-mails are the water coolers of the modern office. In one case, Lydia texted Mariana that she would complain to their supervisor about Mariana. Mariana posted Lydia's text on her Facebook page and her co-workers contacted Lydia, who complained to their supervisor. The company terminated Mariana and her co-workers for "harassing" Lydia. Were Mariana and her co-workers engaged in concerted, protected activity? Did the company have the right to discipline Mariana and her co-workers for harassment? Was the company's reliance upon the harassment policy a pretext to interfere with the employees' right to discuss their working conditions? The National Labor Relations Board ordered Mariana's and her co-workers' reinstatement.

Action Plan: Review the company's policies on the use of electronic communications and whether that policy is limited to company-owned systems or applies to employees' own electronic communications. Determine if the company needs a social media policy to control the company's Twitter and Facebook sites as well as the employees' own use of their social media websites. Audit the use of social media by the employees to determine if there are issues that need to be addressed. Then, draft a policy in compliance with the National Labor Relations Act but that gives the company the right to monitor employees' use of social media and discipline employees for postings that are not protected by federal and state laws.

**6. The Salaried Employees Who Are Entitled To Overtime**

Companies continue to misunderstand how to classify employees as those entitled to receive overtime pay and those who are exempt from overtime pay. Companies wrongly classify employees as "salaried" and "hourly." Instead, companies need to classify employees as "exempt" and "non-exempt" from the requirement to receive overtime pay when working more than 40 hours in a work week and/or more than 8 hours in one work day in certain states. By paying employees a salary, companies fail to keep track of the hours worked by those employees. When the employees sue for unpaid overtime, the court will determine if the employee is exempt or non-exempt and, if non-exempt, examine the records to calculate the number of overtime hours and the amount of overtime wages due to those employees. In the absence of records, the court will credit the testimony of the employees, because they worked the hours for the benefit of the company. The company may be liable for back wages for the past three years, liquidated damages and attorneys' fees. Many times, the attorneys' fees are larger than the amount of back wages.

Action Plan: Understand that the analysis begins with the idea that all employees are non-exempt and, therefore, they are entitled to overtime wages. The analysis continues with determinng whether the employees are exempt because of their duties and not because they are paid a salary. Exempt status is a two-part test – the salary basis test and the duties test. Employees who are exempt are executive, administrative, professional, outside salesperson and certain computer professionals. Draft an organizational chart, showing the supervisory hierarchy. Examine the job descriptions to list the authorities and duties of the employee and then compare those listed duties and authorities to the actual duties and authorities exercised by the employees. Compare the analysis to the tests and decisions issued by the courts. If the employees have been wrongly classified and back pay is owed, make the payments, using all of the communication skills necessary to prevent lawsuits for the liquidated damges and attorneys' fees.

We hope that all executives responsible for the human resource function at a company take stock at the beginning of the year, analyze the company's risks and act to lessen those risks.