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Top 10 Employer Resolutions For 2017

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If you are still recovering from 2016, you are not alone. Transitioning to 2017 promises to be full of changes for employers — be ready for them. Here is a one-stop resolution list to streamline your 2017.


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1. Continue to Prepare for Overtime Exemption Changes

While a Texas court delayed the implementation of the new overtime regulations related to the "white collar exemptions," that delay is only until further order of the court. Motions by the parties remain pending and the ultimate fate of the regulations has yet to be determined.

The court's order enjoining the U.S. Department of Labor from implementing and enforcing the "Final Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees" took issue with the manner of determining exempt status (salary test versus duties test) as well as the automatic updating mechanism. The DOL has appealed the order. Jan. 20 will bring the new administration and the potential for a roll-back of these regulations. Employers will be well-advised to be attentive to further developments in 2017.

2. Prepare for the New EEO-1 Report

On Sept. 29, 2016, the U.S. Equal Employment Opportunity Commission announced approval of its revised EEO-1 report, which will now gather pay information from private employers and federal contractors and subcontractors with 100 or more employees in an effort to close the gender pay gap.

The new report is due on March 31, 2018, and each March 31 thereafter, to correspond with employers' tax reporting requirements. The March 31, 2018, deadline comes 18 months after the last EEO-1 filing deadline. During this time, employers should review and assess their workforce pay data and prepare their updated reporting. Employers should not, however, dismiss the possibility that the new administration may roll back these reporting changes along with some other regulations for which it has expressed some distaste.

Employers who are still twitching from the analyses they may have undertaken in preparation for the DOL's now-delayed overtime regulation changes may want to consider giving a brief pause until the new administration has a chance to state its position with respect to this particular piece of regulation. Whether to give pause and for how long, of course, depends on the size of your company and the time required to perform the necessary analyses. If the new reporting requirements go forward, employers are encouraged to work with their counsel when analyzing their pay data.

3. Don't Get Scratched by the Cat's Paw

The "cat's paw" theory, endorsed by the U.S. Supreme Court in the 2011 case of Staub v. Proctor Hospital and named after an Aesop's fable, is an employment law theory that proposes that the employer can be held liable if a decision maker acts in accordance with an ill-motivated supervisor's decision to take an adverse action against another employee.

In August, the Second Circuit decided Vasquez v. Empress Ambulance Services Inc., a case addressing the "cat's paw" theory of liability in the context of a Title VII retaliation case and held, for the first time in that circuit and joining the First Circuit, that a lower-level employee — a nonsupervisory employee — could influence a decision maker and render the employer liable for the conduct. In reaching this conclusion, the Second Circuit applied the principles of agency law which "impose liability on employers even where employees commit torts outside the scope of employment." The Second Circuit found these principles apply to an employer when, "through its own negligence, the employer gives effect to the retaliatory intent of one of its — even low-level — employees." Decision makers, therefore, should give careful and independent review of documentation, facts and sources before taking an adverse action against an employee.

Employers should note that retaliation claims were included in 44.5 percent of all EEOC charges in 2015, up from 42 percent in 2014, and are the most frequently alleged basis of discrimination in charges made to the EEOC in the last decade. The EEOC issued its final "Enforcement Guidance on Retaliation and Related Issues" in August 2016, expanding the scope of protected activity. As such, employers should be aware of the types of activities that can be deemed retaliatory, employ best practices for properly documenting employee misconduct and performance issues, and train supervisory employees regularly to ensure compliance with company policies and procedures.

4. Review Workplace Drug Use Policies and Procedures

Recent elections resulted in three more states (California, Massachusetts and Nevada; Maine will likely join this group before the end of January) legalizing the recreational use of marijuana and four more states (Arkansas, Florida, Montana and North Dakota) permitting marijuana use for medical reasons. As more states legalize marijuana, employers are increasingly attentive to their drug and alcohol policies to ensure that the language covers all situations. The recent changes to U.S. Occupational Safety and Health Administration reporting rules, however, give employers another reason to look at their policies.

OSHA's new reporting rules, effective on Aug. 10, 2016, but not enforced until Dec, 1, 2016, require that employers establish "reasonable" procedures for reporting work-related injuries and illnesses without "deter[ring] or discourage[ing]" employee reporting. Post-accident or injury drug tests, however, may be considered a reporting deterrent, according to OSHA, if employee drug use is not "likely to have contributed to the incident" or if testing cannot "accurately identify impairment caused by the drug." Employers should review the new rules and consult with counsel to ensure compliance in reporting as well as with company policies and procedures.

5. Ensure Compliance with the New Disability Claim Procedures Under ERISA

The DOL's Employee Benefits Security Administration released its final rule relating to disability benefits claims under Section 503. The final rule included some changes from the proposed rule, notably, a requirement that notices of adverse benefit determinations must include a description of any applicable time limit for filing a lawsuit.

The final rule becomes effective on Jan. 18, 2017, and applies to claims for disability benefits under Employee Retirement Income Security Act plans made on or after Jan. 1, 2018. Employers should ensure that plan documents, summary plan descriptions (SPD) and benefits policies comply with the new procedural requirements.

6. Review and Update Policies and Practices Related to Equal Pay

Equal pay initiatives in 2016 — ranging from the White House pay pledge, to state equal pay amendments, to corporate collectives aimed at increasing the number of women in C-suite positions and shrinking pay disparities based on other traits — mean employers need to be aware of the changing landscape in 2017.

California's equal pay law, which went into effect in January 2016, is already reported to have shown success in closing the pay gap between genders. It has spurred two additional bills aimed at abolishing pay discrimination based on race and ethnicity. Maryland's equal pay amendment went into effect on Oct. 1, 2016, and bills are pending in several other states as well.

Employers should review their pay practices to ensure that impermissible differences among similarly situated employees — regardless of gender, race, ethnicity, gender identity and the like — are eliminated. Employers should also be aware of the possibility of increased state and local activity.

7. Ensure All Employees Are Properly Classified

You spent the summer and fall knee-deep in your company's organizational chart, job descriptions, pay rates, budgets and a myriad of other financial documents, ensuring compliance with the new wage and hour thresholds for overtime exemptions (that didn't happen), but you're not finished yet. The EEOC's strategic enforcement plan for fiscal years 2017 to 2021 promised increased focus on complex employment relationships, specifically temporary workers, staffing agencies and independent contractor relationships. The recurring theme across the employment law landscape is that, while the federal government is likely to reduce its focus on regulating employers, some state and local governments may react by increasing their efforts.

Employers should take the information gleaned from overtime preparations and new EEO-1 reporting obligations and make changes to ensure employees are classified in accordance with federal, state and local laws.

8. Review Your Noncompete Agreements

Nongovernmental employers doing business in Illinois should be aware that the new Illinois Freedom to Work Act prohibits entering into noncompete agreements with low-wage employees on or after Jan. 1, 2017. The act defines "low-wage employee" as an employee who earns the greater of the applicable

federal, state or local minimum wage or $13.00 per hour.

The measure is one of many enacted in states across the country attempting to limit the dissemination of noncompete agreements by employers. The White House published a report in May 2016 discussing the impact noncompete agreements may have on employee job mobility, employee bargaining power and consumer choice. It stated that the DOL, the U.S. Department of the Treasury and the White House will confer with experts to further understand how noncompete agreements may negatively impact employees, particularly those earning under $40,000 annually.

While the new administration may halt such discussions, especially pertaining to any federal legislative action, states may decide to take on the task themselves. Many states already have addressed the issue. Oregon law currently bans agreements lasting longer than 18 months, while Utah restricts agreements lasting more than 12 months. Hawaii does not allow noncompete agreements for technology jobs, while at least five other states will not enforce noncompete agreements against health care workers or others employed in the interests of the public. Still other states are examining whether the agreement is enforceable if the employer presents the noncompete agreement to job applicants only after making a job offer, or offers some additional consideration to current employees who enter noncompetes.

Employers should carefully craft noncompete agreements to protect their legitimate business interests and be aware of the trend away from requiring low-wage employees to enter into noncompetes. Employers with employees in more than one jurisdiction should be aware of new laws addressing the enforceability of these agreements.

9. Review Policies Related to Whistleblower Investigations

OSHA not only ensures workplace health and safety conditions but has also been delegated the responsibility of investigating whistleblower claims made under more than 20 federal statutes. In January 2016, OSHA released its updated "Whistleblower Investigation Manual," which guides the agency in its determination as to whether whistleblower retaliation claims should be pursued. The manual reduced the investigation stage evidentiary standard from a preponderance of the evidence to reasonable cause. An employer may avoid a merit finding, however, if it can show, by clear and convincing evidence, that it would have taken the same action even in the absence of the protected activity.

Given the reduced standard necessary to trigger an OSHA investigation, employers should be sure to maintain well-documented personnel files and investigation records to facilitate a strong defense to whistleblower retaliation claims. Employers can review the manual online and should consult with counsel when undertaking an internal investigation as well as an agency investigation.

10. Pay Attention to Increasing Minimum Wages

Finally, don’t forget to check the minimum wage rates in the states where your company has employees. Effective Dec. 31, 2016, and Jan. 1, 2017, rates increased in 15 states. Additional increases take effect this summer in Washington, D.C., Maryland and Oregon. A number of states have implemented staged increases that should also be monitored. Employers should update payroll, policies related to pay, and any benefits or reporting requirements for each state in which it does business.

Conclusion

Preparedness is the key to a successful transition from 2016 to 2017. Employers may not know how the new administration or court decisions will impact employment laws and regulations, but you can resolve to be ready for the changes.

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