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LABOR & EMPLOYMENT ALERT

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Schnader Harrison Segal & Lewis LLP Presents Your 14 Labor & Employment Resolutions For 2014

By Alizah Z. Diamond

Our government managed to reach a deal to avoid another government shutdown. And so, while our tax refunds will continue to be processed and parks remain open, it is that time of year again — the time to review and reflect on all that has happened this past year and to look ahead to new possibilities in the upcoming year. What resolutions will we make for 2014? Will we learn to sit at the dinner table with our families and not look at our smart phones? Resolve not to bring cookies into the house (for, at least, most of the week)? Take mass transit, however unpredictable, instead of spending too much money on tolls and gas? Clean out the garage?

While ambiguity in the application and implementation of the federal Affordable Care Act (Obamacare) has dominated the labor and employment arena for many employers this year, employers should not be caught unaware of the other significant labor and employment issues that arose in 2013 and that will impact them in the New Year. To help employers gain an understanding of, and a solid foundation to navigate successfully through, a number of these issues, we encourage employers to consider making the following resolutions:

1. **For employers with 50 or more employees that offer company-sponsored health insurance plans, prepare to provide, beginning January 1, 2014, health care coverage to eligible workers within 90 days of employment, and also to make sure the plan(s) meets the requirements set forth under the ACA.** For employers that presently do not offer such plans, the mandate to provide ACA-compatible health insurance to employees has been postponed until 2015. All employers should watch for the U.S. Supreme Court's decision, expected before July 2014, regarding the legality of the ACA's requirement that all companies cover certain reproductive health services without co-pays.
2. **Prepare for minimum wage increases that will go into effect on January 1, 2014** if you are an employer in the one of the following states: Arizona, California, Colorado, Connecticut, Florida, Missouri, Montana, New Jersey, New York, Ohio, Oregon, Rhode Island, Vermont and Washington. The minimum wage in Massachusetts is also set to increase on July 1, 2014. Be aware that several states have already approved additional increases that will go into effect in 2015 and/or 2016.
3. **Develop a "Bring Your Own Device" (BYOD) policy, or enhance your existing policy, to address issues relating to employees' increasing use of their own electronic devices, such as smart phones and tablets, to connect to company networks and to store and process company information.** Among other things, a BYOD policy should identify the employees eligible to use their own devices and permitted devices, and set parameters regarding access to company information and mandatory authorization, password protection, data ownership, risky applications, third-party storage, employee privacy, confidentiality and required safety precautions.
4. **Review and update employee and applicant criminal background check policies and practices to ensure that they are directly job-related and conducted on an individualized basis in consideration of the Equal Employment Opportunity Commission's (EEOC)**

(continued on page 2)

(continued from page 1)

significant push this year to enforce its 2012 enforcement guidelines. Despite recent federal court decisions criticizing the EEOC's approach and permitting "careful and appropriate use" of criminal history and credit information, the EEOC is expected to continue imposing its pressure on employers and file more disparate impact lawsuits challenging background check practices. Employers also should be more alert to the EEOC's new aggressive investigative tactics, including the use of work and office e-mail addresses of employees to collect information during work hours to use against employers being investigated. Also, be aware of state and local laws, including "ban the box" enactments that restrict or prohibit the use of criminal background checks.

5. **For employers that are federal contractors or subcontractors, prepare to comply, as of March 2014, with new regulations from the Office of Federal Contract Compliance Programs.** These regulations require federal contractors and subcontractors to, among other things, demonstrate that they are satisfying the government-recommended hiring goals of 7 percent for disabled workers and 8 percent for veterans, or otherwise establish that they have made good faith efforts to meet these hiring goals. Federal agency employers must also comply with U.S. Department of Labor's (DOL) final rules, effective March 2014, updating the Vietnam Era Veteran's Readjustment Assistance Act (VEVRAA) and Section 503 of the Rehabilitation Act to improve hiring and employment of veterans and people with disabilities.

6. **Review and update employee handbooks, policies, procedures and practices to ensure compliance with the many new state and local laws, regulations and judicial decisions issued this year regulating key employment issues, including:**

   - criminal background and credit checks;
   - immigration documentation and retaliation;
   - discrimination against employees based on sexual orientation and/or transgender;
   - mandatory arbitration agreements;
   - accommodating pregnant employees and employees who suffer from medical conditions related to pregnancy and childbirth;
   - permissible wage deductions;
   - employee leaves;
   - employee access to personnel records;
   - providing meal periods and rest and lactation breaks;
   - employer monitoring and disciplining related to social media;
   - employee privacy; and
   - retaliation against whistleblowers.

7. **Review and update your employee benefit plans, policies, administration and operations to ensure compliance with guidance issued by the IRS and DOL following the U.S. Supreme Court's decision in *U.S. v. Windsor*, holding that Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional because its definitions of "marriage" and "spouse" violate principles of equal protection under the law.** Among other things, the agency guidance, IRS Revenue Ruling 2013-17 and DOL Technical Release No. 2013-04, provide that, for federal tax purposes and for all purposes under the Internal Revenue Code and ERISA, the terms "spouse" and "marriage" should be read to include same-sex marriages that are legally recognized under any state law. Employers should also consider the recently issued IRS Notice 2014-1 which addresses specific issues for same-sex spouses arising under cafeteria plans, flexible spending arrangements and health savings accounts.

8. **Review payroll card and direct deposit compensation procedures and practices to ensure compliance with the Consumer Financial Protection Bureau's (CFPB) Octo-**

(continued on page 3)

(continued from page 2)

ber 2013 Bulletin regarding application of the Electronic Fund Transfer Act and its implementing Regulation E to distribution of wages through payroll cards. According to the Bulletin, while employers may offer employees the option of receiving their wages on a payroll card or by some other means, they may not require employees to receive wages only on a payroll card of the employer's choosing. Other conditions on the use of payroll cards include, without limitation, disclosure of fees charged by financial institutions in connection with the card, limitation on liability and the type of transfers, periodic account statements and prompt error resolution. Federal law also permits employers, in the alternative, to require direct deposit of wages by electronic means, but only if the employee can choose the institution that will receive the deposit. Employers must also comply with their state's laws governing permissible alternative wage payment method(s), many of which still require employers to offer employees paper checks or make printers available to make hard copies of electronic paystubs.

9. **Prepare for final regulations from the DOL's Occupational Safety and Health Administration (OSHA) modifying recordkeeping requirements to improve tracking of workplace injuries and illnesses.** Among other things, OSHA's proposed rule would require certain employers to submit data about workplace injuries and illnesses to OSHA for publication on a publicly available electronic database.

10. **Review worker Employee and Independent Contractor classifications to ensure that workers are properly classified under the varying standards applied by the IRS, the DOL and the at least 16 state agencies that have now joined the IRS and DOL worker misclassification initiative** through which federal and state agencies partner on communications, training and coordination of investigations and enforcement.

11. **Review and update social networking and media policies and practices to consider the National Labor Relations Board's (NLRB) 2012 advice memorandum and subsequent increasingly intrusive decisions severely limiting employers' ability to fire employees for complaining about employers on social media, such as blogs, Facebook and Twitter, etc.** According to the NLRB, such terminations may violate employees' rights, even in non-union workplaces, to discuss their working conditions and other terms of employment with other employees and to engage in "concerted activity" under Section 7 of the National Labor Relations Act (NLRA). While employers technically still have the right to create and enforce policies prohibiting their employees from disparaging the employer or its customers, the rights of the employees under the NLRA must be considered.

12. **Review existing employee restrictive covenant provisions or agreements to ensure that the post-employment restrictions are legally enforceable in your state(s).** While fewer than half of the states have laws on the books expressly governing non-competition agreements, courts in other states may nonetheless choose not to enforce such agreements where the employer cannot demonstrate that the agreements protect the employers' legitimate business interests and are reasonable in time or scope.

13. **Prepare for the U.S. Supreme Court's consideration of the Administrative Review Board's (ARB) attempt to expand coverage of the anti-retaliation provision of the Sarbanes-Oxley Act to whistleblowers who are employees of private contractors doing work for public companies.** This issue was recently debated before the Supreme Court in the case *Lawson v. FMR LLC* (Docket No. 12-3). Among other things, the justices grappled with the possible limits of the statute's reach, including whether expanding the protection in

(continued on page 4)

(continued from page 3)

the manner advocated by the petitioners would go so far as to cover domestic employees, such as gardeners and housekeepers, of public company officers. A decision is expected in the first half of 2014.

14. **Schedule an internal compliance audit of your labor and employment law policies and procedures with counsel,** being careful to maximize the protection of the audit-results by the attorney-client privilege.

The failure to comply with the new and existing legal requirements referred to above could cost your organization monetary penalties and other sanctions on top of back pay liability to employees, where applicable, and negative publicity.

Schnader attorneys can assist you and your organization to implement these resolutions — to identify risks and take important preventive steps — to help you avoid sanctions, penalties and litigation in the New Year. Have a happy and proactive 2014! ◆

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