

FACING THE CHALLENGES OF A CHANGING REGULATORY ENVIRONMENT

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2008 is shaping up to be a busy year for employers as they struggle to stay compliant with existing employment law requirements and plan for new developments. Human resources professionals are a company's key resource for staying ahead of the curve by monitoring new federal and state laws that affect employment and helping a company integrate compliance into the business in a way that does not unduly disrupt operations or productivity.

A number of key employment issues continue to challenge employers, including immigration and hiring, Family and Medical Leave Act requirements, benefit plan compliance, anti-discrimination laws, diversity efforts, and wage and hour issues.

Immigration and Hiring

As the national debate continues on immigration and the presence of illegal immigrants in the workplace, employers have the dual challenges of assuring they do not hire illegal immigrants while making sure their employment procedures do not discriminate against legal workers. Failure can be expensive.

In fiscal year 2007, the Department of Homeland Security's Immigration and Customs Enforcement secured over \$30 million in criminal fines, restitutions, and civil judgments in worksite enforcement. For 2008, ICE announced that enforcement plans are expanding: in an effort to ensure that employers are generally complying with immigration law, more employers will be subject to I-9 audits. This is because of the estimated 12 million illegal immigrants in the nation, between 7 million and 8 million are part of the workforce.

On another immigration front, DHS is pushing forward with its efforts to turbo-charge the Social Security Administration's "no-match" letters sent to employers with at least a 10 percent rate of mismatch between their I-9 employee records and the SSA's database. Presently the letters are for tax reconciliation purposes only, but DHS is hoping to turn receipt of the letters into evidence against employers that fail to take action upon receiving them.

To that end, the agency recently issued a proposed supplemental rule to overcome a court injunction against its no-match final rule. Some 138,000 employers received no-match letters in 2006—the last year they were sent. Letters set to go in September were halted by the injunction. While the lawsuit against DHS is still pending, employers should anticipate DHS's final rule will go into effect later this year.

Meanwhile, fines have increased. As of March 27, immigration violations, which can include "paperwork violations," such as not having an up-to-date, accurate I-9 for an employee, are subject to an across-the-board 25 percent "inflation adjustment" increase, with the maximum penalty for multiple violations up from \$11,000 to \$16,000. Some of the higher penalties for a first violation will increase by \$1,000. *Employment lawyers are strongly urging companies to institute and scrupulously maintain an I-9 system they can trust, and to perform regular audits.*

Verification of employment eligibility also remains a concern for employers. Although E-Verify, the federal government's Internet-based system for screening new hires against SSA and DHS databases, is currently voluntary on the federal level, DHS Secretary Michael Chertoff is promising to propose a rule to make it mandatory for some 200,000 government contractors. A House bill would require all employers to use the system. Impatient with the pending federal actions, a number of states, including Arizona and Mississippi, are already requiring some or all private employers to use the electronic system, while Colorado, Georgia, Minnesota, Oklahoma, Rhode Island, and Utah require government agencies and government contractors to use the system. Similar bills are pending in a dozen states. Oklahoma, meanwhile, has passed a sweeping immigration measure that, among other provisions, sets criminal penalties for knowingly harboring or transporting illegal immigrants.

Family and Medical Leave Act

On February 11, the Labor Department published proposed rules suggesting a number of wide-ranging changes to the FMLA regulations including revisions to rules on the definition of what is a serious health condition and the medical certification process. Also included: more employer notice requirements regarding employee qualification for leave and designation of leave, and a clarification of rules about substitution of paid leave. The DOL is now reviewing public comments that were submitted by individuals and groups; employers should anticipate final regulations later this year.

Missing from the proposal is any change in the period of time when an employee can take incremental leave of less than a day, but the department has included a change requiring employees to comply with the company's call-in procedures before taking unscheduled, intermittent leave.

Business groups consistently identify intermittent leave as the most burdensome part of the FMLA and have suggested that the smallest increment of FMLA leave allowed should be an hour, a half-day, or even a full day. But the DOL says the statute clearly provides for the smallest increment and that a change through the regulatory process is not reasonable.

At the state level, New Jersey recently became the third state – after California and Washington – to enact a paid family leave program. The law allows workers to take up to six weeks of paid leave in any 12-month period to care for a sick child, spouse, parent, or domestic or civil union partner; or a newborn or newly adopted child.

While employers and worker advocates debate the Labor Department's recently proposed changes to the FMLA, HR professionals are beginning to deal with a new law that expands the act's leave provisions to cover employees with family serving in the military. The fiscal year 2008 Defense Department authorization bill, signed January 29, extends FMLA protections to family members of wounded service members and provides additional whistleblower protections to employees of defense contractors. It allows employees to take up to 26 weeks of unpaid time off during a 12-month time frame to take care of relatives who are injured or become ill while they are on active duty military service. *For employers with 50 or more employees, this means revising FMLA policies, developing strategies to comply with the new requirements, and communicating the changes to make sure workers understand their new FMLA rights.*

ERISA – Benefit Plan Considerations

The Pension Protection Act (PPA) of 2006 includes provisions on automatic enrollment of workers in 401(k) plans, pension plan fee disclosures, and investment advice. How to legally set up auto-enroll plans as well as how much information and education employers need to give 401(k) participants are issues high on employers' agendas.

Currently, the Labor Department's Employee Benefits Security Administration (EBSA) is focusing on regulatory initiatives on pension plan fee disclosures, as it looks forward to the expected positive impact automatic enrollment and investment advice will have on employee participation rates in defined contribution plans. The disclosure of specific fee and other plan information to participants is a "high priority" for the Department of Labor, Louis J. Campagna, chief of EBSA's Division of Fiduciary Interpretations, told participants at an American Bar Association Webinar March 26. In December, the agency proposed rules for assessing civil penalties against plan administrators who fail to disclose certain documents to participants as required by ERISA.

Meanwhile, a spate of 401(k) plan fee litigation highlights the need for pension plan sponsors and fiduciaries to have processes in place to track and monitor fees. EBSA provides a checklist on its Web site to help employers assess and monitor fees.

Employers also are grappling with decisions regarding the selection and monitoring of 401(k) investment options, as well as whether to include company stock as an offering. The stakes are high. A number of class action cases have been filed claiming company officials breached their fiduciary duties by offering company stock as a retirement plan investment option while the company faced serious financial challenges and there have also been a number of class actions challenging the methods by which fees are paid in connection with plan investments. A February ruling by the U.S. Supreme Court is widely viewed as making it easier for workers to sue over losses in their 401(k) accounts (*LaRue v. DeWolff Boberg & Associates Inc.*, U.S., No. 06-856, 2/20/08).

Enforcement of Nondiscrimination Laws

At an American Bar Association conference on March 26, 2008, federal government agency officials listed a number of priorities the agencies are focusing on to enforce employment nondiscrimination laws, including a new focus on testing and compensation issues, and protecting the statutory rights of returning military veterans, including those with service-connected disabilities.

Meanwhile, enforcement of the range of nondiscrimination laws continues apace.

Discrimination charges filed by workers with the Equal Employment Opportunity Commission increased substantially in 2007. The commission received 82,792 private sector discrimination charges in fiscal 2007, a 9 percent jump over the previous year.

In a statement released on March 5, 2008, EEOC said the high volume of charges may be the result of a combination of factors, including greater awareness of federal anti-discrimination laws, changing economic conditions, and increased diversity and demographic shifts in the U.S. workforce.

Race discrimination, retaliation, and sex discrimination were the most frequently alleged violations by individuals submitting charges, with retaliation charges reaching a record-high of 26,663. For the first time, retaliation charges accounted for the second-highest number of charges, double the number in 1992. Race discrimination remains the most common claim made. In fiscal 2007, EEOC received 30,510 such charges, up 12 percent from fiscal 2006 and at the highest level since fiscal 1994.

The agency also received a record-high 5,587 pregnancy discrimination charges in fiscal 2007; 19,103 age discrimination charges, reflecting a 15 percent increase; and 17,734 disability discrimination charges, showing a 14 percent increase over fiscal 2006 and the highest level since fiscal 1998.

EEOC reports that it recovered \$345 million in monetary relief for charging parties in fiscal 2007, up 26 percent from the previous year. About \$55 million was obtained through EEOC litigation, and more than \$290 million was collected through administrative enforcement.

In FY 2007, EEOC received 12,510 charges of sexual harassment. Sixteen percent of those charges were filed by males. EEOC resolved 11,592 sexual harassment charges and recovered \$49.9 million in monetary benefits for charging parties and other aggrieved individuals (not including monetary benefits obtained through litigation).

Any complaint of discrimination requires immediate response from employers. No complaint can be brushed off as “minor.” In the event of a lawsuit, an employer’s quick investigation and remedy of a worker’s discrimination or harassment complaint might provide an affirmative defense for the employer.

As employers rely more on written tests, criminal background checks, and sometimes credit checks to screen job applicants and make hiring decisions, EEOC and DOL’s Office of Federal Contract Compliance Programs are more inclined to scrutinize such practices for discriminatory impact, employment experts say. EEOC held a public meeting last May on the issues of potential discrimination raised by testing and background checks. Chair Naomi Earp subsequently said that some additional commission guidance on testing may be developed, but nothing has been issued yet.

On another front, EEO data retention requirements – particularly retention of information on job applicants – remains a thorny issue for employers. The Uniform Guidelines for Employee Selection Procedures (UGESP) require employers to collect and retain data on race, ethnicity, and gender of job applicants. However, the 30-year-old guidelines do not address how to treat Internet job applications.

In March 2004, EEOC, OFCCP, the Justice Department’s Civil Rights Division, and the Office of Personnel Management jointly issued a proposal to revise the 1978 guidelines to address the Internet’s rise as a major job searching tool. However, the agencies have been unable to agree on a final version of revised guidelines. OFCCP issued its own proposed guidance on Internet job applicants in March 2004, which took effect in 2006. But OFCCP’s guidance covers only federal contractors subject to Executive Order 11246 and does not apply under Title VII.

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Enforcement of Nondiscrimination Laws (cont.)

In a notice published March 25, 2008, EEOC asked for OMB approval to renew the UGESP information collection requirements for three years in order to avoid a situation in which employers' recordkeeping obligations lapsed while EEOC and the federal agencies debated how to treat Internet job applications.

Expansion of laws to prohibit discrimination in employment based on sexual orientation, gender identity, or genetics is on the agenda at both the federal and state levels.

On the federal level, the House last fall passed the Employment Non-Discrimination Act (ENDA) (HR 3685), which would prohibit employers, employment agencies, and labor organizations from discriminating against workers based on their sexual orientation. The measure now awaits Senate action. In 2007, Colorado, Iowa, and Oregon joined a number of other states in passing laws prohibiting discrimination based on sexual orientation. Some states have broadened their laws to include gender identity. Transgender-inclusive nondiscrimination laws have been enacted in Washington, D.C., and nine states—California, Hawaii, Illinois, Maine, Minnesota, New Jersey, New Mexico, Rhode Island, and Washington.

Federal legislation to prohibit discrimination by group health plans and health insurance issuers against individuals based on genetic information as well as prohibit insurers from requiring genetic tests was passed by the House last year and awaits action in the Senate.

Wage & Hour Laws

Among the most active wage and hour compliance areas has been determining which employees are exempt or nonexempt for purposes of overtime pay under the Federal Labor Standards Act. DOL has developed criteria employers must apply when determining whether an employee is exempt or nonexempt, but these criteria can be ambiguous and subjective, which has resulted in a steady stream of lawsuits, a situation not much improved, perhaps even made worse, by DOL's issuance in August 2004 of updated and "clarified" regulations. There has been a substantial increase in wage and hour litigation in worker classification areas. It is not just individual employers that fall victim to the

regulations' ambiguity. Entire industries have been found to be noncompliant and entire classes of employees – including retail managers and insurance claims adjusters – have been found in administrative rulings and court decisions to have been misclassified, resulting in enormous back pay liability for these industries.

DOL has made FLSA enforcement a top priority – and overtime violations have been at the top of the list. In fiscal 2007, the department's Wage and Hour Division collected more than \$163 million for overtime violations and assessed \$3.9 million in civil penalties under the FLSA. Lawsuits under federal and state laws have resulted in huge hits on employers. *Recent settlements of misclassification cases in the financial services industry alone have included a \$98 million settlement with Smith Barney, a \$37 million settlement with Merrill Lynch, an \$89 million agreement with UBS, and a \$42.5 million agreement with Morgan Stanley.*

In addition to complying with federal wage laws, employers face a multitude of state wage and hour laws. For example, employers in California are also governed by state labor laws that are more stringent than the FLSA in determining who is exempt. California law dictates that employers must pay overtime to managerial employees who do not spend at least half of their total time on managerial duties. In addition, California employers must pay overtime to managers and assistant managers who do not receive a salary of at least twice the monthly California minimum wage.

Conclusion

Planning, implementing, and maintaining the best workplace policies and procedures to stay compliant with these changing laws and regulations (as well as a host of other employment requirements not discussed in this paper) is a business necessity for all employers, regardless of company size or industry. In a competitive business environment, the price of noncompliance – penalties, lawsuits, and lost productivity – can be enormous.

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