Manage Your Risk

Five Critical Employment Issues

by Jill Turner Lever and Grace A. Byrd

It has become increasingly complicated to manage employment issues. Employers of all sizes are challenged to keep up and respond to the ever-changing legal landscape. While large employers may have a team of dedicated professionals and greater resources, smaller employers who are subject to many of the same requirements, often find themselves in a reactive instead of a proactive role. This article will highlight five key areas all employers should evaluate within their organizations, which may help reduce legal risk.

Policies, Handbooks and Training

It is a common misconception that employee handbooks are for large employers only. To the contrary, it is beneficial for all employers, regardless of size, to adopt an employee handbook. There are several key policies that should be addressed in the document, including, but not limited to, those set forth below.

An employment at-will disclaimer establishes that both the employer and the employee may terminate the employment relationship at any time, with or without cause or notice,[1] and must be prominently displayed. The employment at-will concept also can be referenced in an employee acknowledgment, and within other policies, such as those relating to discipline or termination of employment. It is equally important that these policies do not contradict the principle of employment at-will.

A handbook also should contain a company's policy against harassment, as well as the complaint procedure if an employee believes he or she is the victim of harassment or discrimination.[2] It is likewise important for an employer to conduct periodic anti-harassment training for its staff, especially for managers. Training not only demonstrates the employer's commitment to these principles, but it may also contribute to establishing an affirmative defense to a hostile work environment claim under certain circumstances.[3] Harassment training is, in fact, required by the laws of certain states, including Connecticut and California.[4]

On May 24, 2011, the Equal Employment Opportunity Commission's (EEOC's) final regulations implementing the Americans with Disabilities Act Amendments Act (ADAAA) of 2008 took effect.[5] These regulations apply to all private employers with 15 or more employees.[6] Due to the EEOC's expansive interpretation of the term "disability," it recommends that small employers review any policies that may address disabilities or otherwise impact individuals with disabilities, such as leave policies and policies for providing reasonable accommodations.[7]

The EEOC's regulations and guidance also emphasize a shift in focus from whether an employee qualifies as disabled to whether there is an accommodation that can be provided. For example, the EEOC advises that although the general process for providing a reasonable accommodation has not changed and an employer may still ask for documentation evidencing a disability, given the broadened definition of the term, that documentation may focus less on whether the employee has a disability and more on the need for an accommodation.[8]

In today's digital age, it is imperative for an employer to implement an information technology policy that addresses permissible and impermissible uses of company equipment. Among other key provisions, the policy should place employees on notice that they do not have any privacy rights with regard to their use of company equipment, subject to a limited potential exception relating to attorney-client communications between the employee and his or her attorney on a personal password-protected account.[9]

Another high-profile technological issue is employee use of social media, such as Facebook, as a forum to post comments about the workplace, including office, coworker or manager complaints. The National Labor Relations Board (NLRB) has publicly taken the position that online employee complaints about the workplace can constitute "protected concerted activity," even in a non-union setting.[10] Implementing a properly drafted social media policy will be a helpful first step to place employees on notice of the company's expectations and parameters for use. A well-drafted social media policy also should address protection of the company's confidential information, as well as set forth guidelines regarding employee comments about the employer's products and services, which are regulated by the Federal Trade Commission.[11]

Given this evolving area, it is prudent to consult with counsel prior to disciplining an employee who appears to have engaged in questionable online conduct.

Wage and Hour Issues

Employers of all sizes should classify their employees as either exempt or non-exempt from applicable federal and state requirements to pay overtime. Exempt employees are not required to be paid overtime. In contrast, non-exempt employees must be paid overtime for all work performed beyond 40 hours in a given workweek. Many employers incorrectly assume that if an employee is paid a salary, the employee is not required to receive overtime, even when he or she works more than 40 hours per week. Misclassification of non-exempt employees as exempt, and failure to pay overtime when due, are fertile grounds for class action activity, and can result in substantial employer liability.

Rules regarding exempt classifications are set forth under the federal Fair Labor Standards Act (FLSA) and applicable state law.[12] The federal and state statutory schemes are not always consistent. Where an employee is covered by both federal and state wage laws, the employee is entitled to the greater benefit provided under the different parts of each law.[13] In order to qualify for an exemption under the FLSA, workers must meet certain tests regarding their job duties, and be paid on a salary basis of not less than $455 per week, which is not subject to reduction because of variations in the quality or quantity of the work performed. The primary categories of federal exemptions are executive, administrative, professional, computer professional, outside sales, and highly compensated employees.[14]

Generally, to qualify for the executive exemption the employee's primary duty must be to manage an enterprise, department or subdivision; the employee must direct the work of at least two or more employees; and the employee must have the authority to either hire or fire or make suggestions and recommendations regarding these types of decisions.[15]

To qualify for the administrative exemption, the employee's primary duty must be performing office or non-manual work related to management or general business operations, and he or she must exercise discretion and independent judgment regarding matters of significance.[16]

The professional exemption includes both the learned professional exemption and the creative professional exemption.[17] To be classified as a learned professional, the worker's duties must: 1) require advanced learning in a field of science or learning, and 2) be customarily acquired by a prolonged course of specialized intellectual instruction.[18] To be classified as a creative professional, the employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.[19]

On March 21, 2011, the New Jersey Department of Labor and Workforce Development proposed repealing New Jersey's existing regulations regarding overtime exemptions for executive, administrative, professional and outside sales employees and replacing them with regulations that are analogous with federal regulations.[20] The comment period for this proposal ended on May 20, 2011.

Currently, there are important differences between the New Jersey regulations and federal regulations, with the New Jersey regulations being more restrictive in several key respects. For instance, in order to qualify for an exemption in New Jersey, the employee must dedicate 80 percent of his or her workweek to the performance of exempt tasks,[21] whereas the federal statutes generally look to the "primary duty" of the employee to determine eligibility for an exemption.[22] If the proposed changes become effective, classification decisions in New Jersey are likely to be simplified because there will be only one set of guidelines to consider.

A related hot issue is employer liability for wages and overtime for employee work 'off the clock,' including either before or after a scheduled shift or at home via BlackBerry® or similar device. Non-exempt employees must be compensated for this time worked, which could even constitute overtime if they have already worked 40 hours in that week.[23] The best approach is for employers to implement a policy prohibiting non-exempt employees from working off the

clock without authorization, requiring employees to report all time worked, and lastly, paying for this time either at the regular rate or the overtime rate, as may be applicable.

Independent Contractor Issues

Employer misclassification of employees as independent contractors is another important area that is currently the subject of extensive government enforcement activity at both federal and state levels. Many employers find it tempting to classify employees as independent contractors because this could represent a cost savings on benefits and employment taxes. Many individuals, for their own reasons, also prefer to be classified as independent contractors. Even if an employer treats an individual as an independent contractor (with compensation reported on a 1099 form), and the parties have a written agreement acknowledging that their relationship is that of an independent contractor, these factors are not dispositive.

There have been various standards utilized to determine the classification of workers; however, most are based on the employer's right to control the worker. For instance, the widely used guidelines published by the Internal Revenue Service to determine whether an individual is an employee or an independent contractor for purposes of the federal tax laws (the IRS test) focuses on the degree of control by the party for whom the services are performed and the independence the individual providing the services exercises.

The IRS test consists of three categories: 1) behavioral control; 2) financial control, and 3) the type of relationship of the parties.[24] The test used in New Jersey to determine employee status for several purposes, including liability for unemployment taxes and Wage and Hour Law compliance, is called the ABC test. Employers have the burden of establishing that a worker meets all three prongs[25] before he or she can be classified as an independent contractor. The very rigid ABC test often leads to a different conclusion than any analysis under tests employed by other laws, such as the IRS test.

Recently proposed legislation would amend the FLSA by increasing penalties and requirements on employers. The Payroll Fraud Prevention Act, introduced in April 2011 as Senate bill 770, would render the misclassification of "employees" as "non-employees" a new federal labor law violation, and expose businesses to fines of up to $5,000 per worker for each violation of this law.

Among the additional regulations, the proposed law would require all businesses to provide written notice to workers performing labor or services, advising whether they have been classified as either an employee or a non-employee. This notice would also direct workers to the Department of Labor (DOL) website for additional information about the rights of employees under the law, and advise workers to contact the DOL if they suspect they have been misclassified. If enacted, failure to provide this notice would result in a rebuttable presumption that a non-employee is an employee.

The potential risks associated with misclassification are high, due to both federal and state penalties, as well as recent governmental undertakings to encourage inter-agency information sharing, such as between state departments of labor and taxation. It is critical for employers to be familiar with the rules governing worker classification, and to review the use of this type of arrangement within their organization.

Protection of Confidential Information

Protection of confidential information and trade secrets is essential for employers of all sizes. An important step for an employer seeking to safeguard confidential information is to properly draft restrictive covenant agreements. The enforceability of restrictive covenants depends upon applicable state law. In New Jersey, non-compete agreements and agreements that prohibit the solicitation of customers and employees are generally enforceable if reasonable and narrowly tailored to protect the employer's legitimate business interest.

Similarly, properly drafted confidentiality agreements are generally valid. Employers should define the term "confidential information" broadly enough to include all applicable proprietary information and trade secrets, but not so broad as to render the provision meaningless. In addition, it is advisable for employers to treat confidential information in a strictly confidential manner, such as by labeling documents and materials, password protecting files, and restricting nonessential access by employees and third parties. Failure to secure information may weaken the position of an employer if it seeks to enforce those covenants.

Likewise, it is necessary for employers to assess what internal and customer information is confidential and then implement clear policies to secure that information.

Cost-Cutting and Reductions in Force

Many employers are still trying to reduce expenses due to the economy. Both reductions-in-force (RIF) and alternative cost-cutting measures require careful advanced planning in order to comply with legal requirements and result in actual cost savings.

Employers considering mass layoffs and/or plant closings must consider whether the advance notice requirements of the federal Worker Adjustment and Retraining Notification Act[26] (WARN) and/or state law equivalents, such as the New Jersey Millville Dallas Airmotive Plant Job Loss Notification Act,[27] are triggered. Failure to provide proper notice

may result in penalties, including liability to each affected employee for back pay and benefits for up to 60 days. Noncompliance with state laws may result in even greater liability.

Employers who want to consider paying severance to terminated employees in exchange for a release are urged to consult with employment counsel to ensure compliance with complex requirements, including those required to obtain a valid release of age discrimination claims under the federal Age Discrimination in Employment Act.[28]

Salary reductions may be a viable alternative to employment termination, and potentially could allow an organization to retain valued employees. Cost cutting may be achieved by a direct reduction in wages/salary or a reduction of salary as a result of reducing working hours or working days.

The FLSA does not preclude employers from cutting salary or the number of hours worked. However, the FLSA still requires non-exempt employees to receive the applicable federal minimum wage for all hours worked and time and a half for all overtime hours. A general rule is that any reduction in pay or wage benefits must be prospective and not retroactive to time worked before the change is made.

Reducing an exempt employee's pay potentially may cause a loss of the exemption, and must be carefully considered. Deductions from pay occasioned by day-to-day or week-to-week determinations of the operating requirements of the business would constitute impermissible deductions from the exempt employee's pay, and would result in the loss of the exemption. In contrast, a prospective reduction of an exempt employee's predetermined pay during a business or economic slowdown may not result in a loss of the exemption if the change is *bona fide*, reflects long-term business needs, and the employee still receives compensation on a salary basis of at least $455 per week.

Limiting overtime is another method to control costs. However, if the employee works overtime hours, he or she still must be compensated for work performed, even if the hours were not authorized, as discussed in more detail above.

Regardless of the cost-cutting method a business decides to pursue, failure to properly plan can create increased and unintended liabilities and other negative impacts on business, such as reduced morale. Advanced preparation is especially critical in the event that the numbers are large enough to implicate state and federal plant closing and mass layoff laws.

Conclusion

Human resources issues are diverse and constantly evolving. It is advisable for practitioners in this field to review and update their organization's policies and practices on a proactive basis to comply with applicable laws. Reviewing the five critical categories identified above is a good place to start. ⚖

Endnotes

1. *See Woolley v. Hoffman-LaRoche, Inc.*, 99 N.J. 284, 297-98, *mod. on other grounds*, 101 N.J. 10 (1985) (holding written employment manual distributed company-wide may create an enforceable unilateral contract unless a properly written disclaimer is included in the manual).
2. *See Lehmann v. Toys R Us, Inc.*, 132 N.J. 587, 624 (1993) (finding employer can be vicariously liable for supervisor harassment if the employer negligently or recklessly failed to have an explicit policy that bans sexual harassment).
3. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of the plaintiff); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (holding that the affirmative defense recognized in *Faragher* "comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise").
4. *See* Conn. Gen. Stat. Ann. § 46a-54(15)(B); Cal Gov Code § 12950.1. Unlike California and Connecticut, New Jersey does not statutorily require anti-harassment training.
5. *See* Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as amended, *Federal Register*, www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as#h-4.
6. *See* Questions and Answers for Small Businesses: The First Rule Implementing the ADA Amendments Act of 2008, U.S. Equal Employment Opportunity Commission, www1.eeoc.gov//laws/regulations/adaaa_qa_small_business.cfm?renderforprint=1.
7. *Id.*
8. *See* Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008, U.S. Equal Employment Opportunity Commission, www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm.
9. *See Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300 (2010) (holding that "[b]ecause of the important public policy concerns underlying the attorney-client privilege, even a

clearly written company manual—that is, a policy that bans all personal computer use and provides unambiguous notice that an employer can retrieve and read an employee's attorney-client communications, if accessed on a personal, password-protected e-mail account using the company's computer system—would not be enforceable").

10. *See, e.g., American Medical Response of Connecticut, Inc. and International Brotherhood of Teamsters, Local 443*, Case No. 34-CA-12576 (NLRB 2010) and complaint issued against New York nonprofit for unlawfully discharging employees following Facebook posts, NLRB, May, 18, 2011, www.nlrb.gov/news/complaint-issued-against-new-york-nonprofit-unlawfully-discharging-employees-following-facebook.
11. *See* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. §255.0, Federal Trade Commission www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf.
12. *See* 29 U.S.C. § 201 *et seq.; see e.g.*, N.J.S.A. § 34:11-56a *et seq.*
13. See FLSA Overtime Calculator Advisor: Introduction, Department of Labor, www.dol.gov/elaws/otcalculator.htm.
14. 29 C.F.R. §§541.100, 200 & 300.
15. 29 C.F.R. §541.100(a)(2),(3) & (4).
16. 29 C.F.R. §541.200(a)(2) & (3).
17. 29 C.F.R. §541.300(a)(2)(i) & (ii).
18. 29 C.F.R. §541.301.
19. 29 C.F.R. §541.302.
20. 43 N.J.R. 725(a) (2011).
21. *See, e.g.*, N.J.A.C. 12:56-7.1.
22. *See, e.g.*, 29 C.F.R. §541.100(a)(2).
23. *See, e.g., Castagna v. Madison Square Garden, L.P.*, 2011 U.S. Dist. LEXIS 64218 (S.D.N.Y. June 7, 2011) (granting final approval of $1.3 million settlement in a class action lawsuit to security guards for unpaid overtime compensation in violation of the FLSA and New York state labor laws); *Bredbenner v. Liberty Travel, Inc.*, 2011 U.S. Dist. LEXIS 38663 (D.N.J. April 8, 2011)(granting final approval of a settlement establishing a $3 million fund to compensate class members, a group of former travel agents, for unpaid overtime).
24. *See* Independent Contractor (Self-Employed) or Employee?, *IRS* (Feb. 18, 2011) www.irs.gov/businesses/small/article/0,,id=99921,00.html.
25. *See Philadelphia Newspapers, Inc. v. Board of Review*, 397 N.J. Super. 309, 319-320 (App. Div. 2007) (*citing* N.J.S.A. 43:21-19(i)(6)(A), (B) & (C)) (stating that the "ABC Test," as established in the New Jersey Unemployment Compensation Law provides: "Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter ([N.J.S.A. 43:21-1 to -71]) unless and until it is shown to the satisfaction of the division that: (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business"), *certif. denied,* 195 N.J. 420 (2008).
26. 29 U.S.C. §2100 *et seq.*
27. N.J.S.A. 34:21-1 *et seq.*
28. 29 U.S.C. §621 *et seq.*

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