

Eleven New Year's Resolutions for 2011

By Karen S. Aframe, Esq. | December 21, 2010

With 2010 wrapping up and 2011 fast approaching, it is time for employers to identify their top human resources' priorities for next year. 2010 brought several legal developments in the employment law area, which have imposed new compliance requirements on employers. In addition, new technology became available in 2010 that was not even imagined in 2009, and this has impacted the workforce. We have assembled a list of eleven New Year's resolutions for HR Professionals in 2011. We hope that this list facilitates your ability to develop your HR budget, goals, and to-do list as you embark on the new year:

- 1. Social Media.** Time magazine named Facebook founder Mark Zuckerberg the Person the Year. This underscores the degree to which social media is changing the way people communicate and the impact that social media has had on society this past year. Employee use of social media at home and at work impacts your business and gives rise to significant issues of legal liability. To make sure that your company is prepared for the impact of employee participation in social media in the workplace, in 2011 your company should:
 - Draft (or revise) its social media policy.
 - Roll-out the policy to employees.
 - Train management on enforcement of the policy.
- 2. GINA Compliance.** 2010 brought the passage of the final EEOC regulations implementing the federal Genetic-Information Non-Discrimination Act (GINA). With these regulations, employers have a new responsibility to guard against harassment, discrimination, and disclosure of genetic information. To this end, we recommend the following actions:
 - Train management to comply with GINA's requirements and prohibitions relating to discrimination and harassment on the basis of genetic information, as well as its prohibition of the acquisition and disclosure of genetic information.
 - Revise (or create) the company social media policy to address GINA's impact on management use of social media.
 - Revise any HR forms (e.g., return-to-duty; health care certification forms) or policies to include GINA safe harbor language to protect against liability arising from acquisition and/or disclosure of genetic information.
- 3. Check Your Posters.** It is time to review the required state and federal posters, including the "EEO is the Law" poster, revised in 2009 to include genetic information. This poster is available at: <http://www1.eeoc.gov/employers/poster.cfm> . For other federal wage and hour posters, consult: <http://www.dol.gov/whd/resources/posters.htm>. In Maine and New Hampshire, employers should consult the following websites for state required posters:

Maine <http://www.maine.gov/labor/posters> ;

New Hampshire: http://www.labor.state.nh.us/mandatory_posters.asp .

4. Comply with Federal Contractor Posting Requirements. As of June 21, 2010, federal contractors are required by Executive Order 13496 to provide employees with information about their rights under National Labor Relations Act (NLRA). First, employers will want to review the law to determine if they are covered by the Executive Order. If covered, to comply with this regulation, federal contractors will want to:

- Post Employee Rights Notice(s) informing their employees about employee rights under the National Labor Relations Act (NLRA).
- Include an Employee Notice Clause in their subcontractor agreements connected with the prime contract.
- The NLRA Employee Rights Notice can be downloaded from:
www.dol.gov/olms/regs/compliance/EmployeeRightsPoster11x17_Final.pdf.

5. Handbooks. It is always advisable to annually review your handbook to ensure it complies with current law, as well as your current practices. In addition to a Social Media policy and all legally-required policies, among the policies that we recommend a 2011 Handbook have are the following:

- **Distracted Driving Policy:** May limit liability that can arise from employee use of mobile devices while operating a car.
- **Electronic Communications and Technology Resources Policy:** Revise your electronic communications and technology resources policy to adequately address technological advancements and changes in your workplace, i.e, remote access, handheld devices.
- Up-to-date **FMLA** policy – see below.
- Up-to-date **Anti-Discrimination** policy, including confirming reporting procedures in anti-harassment and discrimination policies are current.
- Confirm that employer has a **handbook receipt** from each employee.

6. Make Your FMLA Policy and Practice Current. 2010 brought several changes to the FMLA. To make sure that your organization's FMLA policy and practice is current, you will want to do review all aspects of the FMLA process, including but not limited to the following actions:

- Ensure that your FMLA policy complies with the 2010 National Defense Authorization Act (2010 NDAA) amendments to the FMLA. These include: expansion of FMLA leave for a qualifying exigency to employees whose spouse, son, daughter, or parent is on covered duty in the **regular** Armed Forces, and the revision of the definition of "covered active duty" for members of the Reserves.
- Ensure that the FMLA policy complies with 2010 NDAA amendments to military caregiver leave, which extended benefits to employees whose spouse, son, daughter, parent or next of kin was a veteran.

- Train benefits persons on the impact of GINA on FMLA administration and revise documentation.
 - Train management that an employee may be eligible for FMLA leave to care for a child, regardless of the legal or biological relationship.
 - Ensure your policy includes an anti-retaliation provision.
 - Confirm that you are using current DOL certification forms.
7. **SAFE Act.** In October 2010, the Secure and Fair Enforcement for Mortgage Licensing Act (SAFE Act) became effective, which affects financial institutions regulated by any of the following agencies: Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, and the Farm Credit Administration. If you are an HR professional of a regulated institution, to ensure compliance with the SAFE Act, you will want to make sure that your organization takes actions, including but not limited to the following:
- Require employees who are mortgage loan originators to comply with federal registration requirements.
 - Adopt and follow written policies and procedures to ensure compliance with the registration requirements.
 - Implement policies to provide consumers with the mortgage loan originator's unique identifier.
8. **Health Reform Compliance.** The passage of health care reform in 2010 resulted in several new obligations for employers. Many of these obligations became effective in 2010 or will become effective January 1, 2011. These include but are not limited to the following:
- Effective March 23, 2010, employers with 200 or more full-time employees that offer one or more health plans must automatically enroll new employees in one of the health plans, as well as provide the employee with notice and an opportunity to opt out.
 - Effective September 23, 2010, unless the health plan has been grandfathered, it must include several new provisions, including, no lifetime benefit limits, coverage of dependents up to age 26, and provide new required benefit summaries.
 - The Health Care Reform Act initially required employers to report the value of the health insurance coverage they provide to employees on each employee's annual W-2 statement, beginning with the 2011 W-2 to be distributed in 2012. However, the IRS has deferred this reporting requirement for one year. Thus, beginning with the the 2012 W-2 to be distributed to employees in 2013, employers are required to report the value of employer-provided health insurance.

As a result of this change, W-2 reporting for the 2011 tax year is now voluntary. The IRS has issued new W-2 forms that include boxes for reporting the value of employer-provided health insurance. We recommend that employer begin using the new W-2 forms and begin reporting in 2011 the value of the health

coverage they provide. This early start will allow employers to work out any changes to their payroll and other administrative systems before reporting is required for 2012.

- Effective January 1, 2011, Health Reimbursement Accounts, Medical Savings Accounts and Flexible Savings Accounts are subject to new rules, which includes limiting reimbursement for over-the counter medications.
- For additional description of several of the important provisions becoming effective in 2010-2011 see our previous Health Care Newsletter by clicking this link: <http://www.bernsteinshur.com/wp-content/uploads/2010/10/HealthCareReformNewsletter21.pdf>.

9. Job Descriptions. Conduct a self-audit of your organization's job descriptions to make sure that they are up to date. Among the questions you will want to ask:

- Does the job description adequately identify essential functions?
- Does the job description reflect the criteria upon which job performance is evaluated?
- Are employees properly classified as exempt and/non-exempt?

10. Compliance with FLSA and State Wage & Hour Laws

- In 2010, the federal government stepped-up enforcement of the Fair Labor Standards Act ("FLSA") overtime and minimum wage provisions, specifically targeting employees who are improperly classified as "exempt" employees or as independent contractors. This increased enforcement effort is expected to continue into 2011. Similarly, the Maine and New Hampshire Task Forces designated to study employee misclassification have made the enforcement of worker misclassification laws a top priority. In New Hampshire, the NH DOL lists it among its top 10 violations. Because of the increased regulatory fervor, we recommend that HR revisit this issue and take appropriate steps to ensure compliance or risk substantial fines and penalties:

- ✓ Re-familiarize yourself with the state and federal wage and hour laws and the other worker classification laws applicable to your company.
- ✓ Analyze your company's potential exposure by compiling an employee and contractor census and reviewing classifications for compliance issues.
- ✓ Review and where appropriate, update (or enter) into independent contractor agreements and/or arrangements.
- ✓ Develop and implement a plan to address misclassified workers.

- Effective March 23, 2010, the Health Care Reform Act revised the FLSA to mandate that employers provide "reasonable" unpaid breaks to nursing mothers to express milk for their infants in a private space, other than a bathroom. As a result of this law, you must:

- ✓ Ensure management is aware of this requirement.
- ✓ Create a plan to comply with the breastfeeding requirement.
- ✓ Modify time-keeping mechanisms, if necessary, to permit recording of such break times.

11. Training. Revision of policies is important, but without training these policies may not be effective. We recommend making sure that with respect to training your current workforce and management, you take the following steps:

- Roll-out your handbook; identify and explain new policies.
- Identify person(s) to investigate complaints and provide them training to investigate and document matters.
- Train managers on GINA's implications on social etiquette and social media.
- Train managers on anti-harassment policy and responsibilities.
- Train managers on ADA and FMLA compliance, including but not limited to notice triggers, interactive dialogue, and administrative obligations.

While this list may look daunting, tackling some or all of these resolutions before issues arise will save time and money for your organization in the long run by limiting the potential for risk and by implementing good practices. Consultation and assistance from legal counsel may facilitate your ability to meet your New Year's resolutions. For questions about or assistance with achieving your HR New Year's resolutions, please contact Karen Aframe (kaframe@bernsteinshur.com) in Manchester (603 623-8700) or Glenn Israel (gisrael@bernsteinshur.com) in Portland (207 774-1200).