New Year's Resolutions to Get Your Employment Practices in Shape

By Karen S. Aframe | January 5, 2012

Now is the time to resolve to get your company's employment practices into shape. Employers face ever-increasing regulation of their workplaces and employment-related practices. To kick-off a great human resources' year, we share a list of ten things that every employer can do to help minimize the risk of legal liability arising from employment practices:

1. **Breathe New Life Into Your Employee Handbook or Manual.** While often viewed as a daunting task, updating your personnel handbook is one of the most effective methods of minimizing legal risk in a wide variety of possible employee suits. Employers should review policies to ensure that they reflect desired practices and comply with ever-changing laws. If your company's handbook hasn't been reviewed in the past two years, do it in 2012. Focus on social networking policies, changes to equal employment opportunity laws, and overbroad confidentiality and rules that could run afoul of your staff's rights to engage in legally protected activity at work.

2. **Tighten up Loose Confidentiality Measures.** Often a company intends to protect confidential information, but fails to take the steps necessary to do so. Now is a good time to conduct a confidentiality audit, in which you identify the information that needs protection and review what rules are in place to protect its confidentiality. Review applicable agreements and policies, including non-competition, non-disclosure and confidentiality agreements, to ensure that they comply with recent case law and are legally enforceable.

3. **Get Your Supervisors Into Top Managing Shape.** Like New Years' resolutions to get into physical shape, it's time to get supervisors up to speed by training managers on best management practices and compliance with state/federal legal obligations. For example, educating managers to recognize when a leave entitlement or right to disability accommodation is at issue is the first line of defense to heading off discrimination and failure to accommodate claims. Since there are no magic words that an employee must use to request an FMLA leave or a disability accommodation, managers and supervisors must be prepared to respond appropriately and involve human resources to avoid costly mistakes.

4. **Increase Awareness of National Labor Relations Act's Impact on Private Sector Employers:** The following recent developments at the NLRB make it more likely that non-union employees will be aware of their NLRA rights and how to enforce them, and simultaneously make it more difficult for employers to fend off union election activity:

    - A fully-staffed National Labor Relations Board, due to the three recess appointments made by President Obama on January 4, 2012, will likely publish more decisions clarifying the extent to which employees' Facebook communications are protected activity.

- By April 30, 2012, virtually all private sector employers, regardless of whether they have a union, must post the NLRB Employee Rights Notice advising employees of their right to form a union and communicate collectively about the terms and conditions of employment. See https://www.nlrb.gov/poster. This date replaces the prior January 31, deadline.
- Streamlined union elections, pursuant to new NLRB rules, due to take effect in April 2012, compress the time an employer has to prepare to respond to organizing activity.

To avoid unfair labor practice charges and be prepared for union organizing, HR professionals must keep pace with these developments, and brush-up their understanding of the NLRA's impact on their workforce.

5. Refresh Your Understanding of Child Labor Laws. Whether you routinely hire employees under age 18 or only do so in the summer, it's important to review regulations relating to youth employment. In addition to significant restrictions on the number of hours a minor may work, there are strict limitations on the type of work a minor may perform depending on their age. In 2010, the federal Department of Labor issued regulations which prohibit minors under 18 from working in any occupation that DOL deems to be hazardous. This includes driving a motor-vehicle and operating power-driven equipment, which even includes meat-slicers. Employers who engage minors, particularly as temporary help during the summer, should familiarize themselves with these rules, as well as state restrictions on youth employment which can differ from their federal counterparts. For additional information on the federal restrictions concerning hazardous occupations, see the Employer Guides under the Compliance Assistance tab at: http://youthrules.dol.gov/.

6. Strengthen Measures to Protect Employee Health Information. The Americans with Disabilities Act and the Genetic Information Non-Disclosure Act strictly limit the lawful purposes for which an employer may request medical information. In 2011, the EEOC provided guidance to employers that once the health information is obtained, the employer must ensure that the information cannot be unlawfully accessed, regardless of whether it is maintained in paper or electronic files. The personal health information must be maintained in separate medical files, kept confidential and only disclosed to the extent permitted by the ADA and GINA. If records are maintained electronically, employers should implement protective measures to ensure confidentiality, such as encryption and password-protection.

   The EEOC acknowledged that because an electronic medical record, lawfully obtained by an employer, may include health information that the employer is not authorized to receive (e.g., genetic information), it's advisable for an employer to include GINA "warning" language on any release/authorization presented to employees. The GINA "warning" language informs employees that the employer isn't seeking genetic information and helps ensure that any receipt of genetic information will be considered inadvertent.

7. Review (and Revise) Classification of Independent Contractors. Misclassifying employees as independent contractors continues to be a matter of significant concern for the federal and state departments of labor, as well as the IRS. The U.S. Department of Labor and the IRS recently announced that they'll be coordinating efforts to crack down on employer misclassification of employees as so-called contractors. As part of this joint

effort, the IRS and DOL will share information with each other to facilitate to enforcement. We recommend that employers take a closer look at who has been classified as an independent contractor to determine whether the designation is compliant.

8. **Step-up Unlawful Harassment Awareness Training.** It's time to calendar sexual and other unlawful harassment training for all employees and for managers. Last year, we saw an increase in harassment claims based on national origin, religion and age. Providing annual training in this area conveys to employees that you take this matter seriously, can minimize the likelihood that issues will arise, and can strengthen a defense against an unlawful harassment claim. (In Maine, employers are required to provide its employees with annual harassment training.)

9. **Sharpen Your Understanding the Right to Reemployment for Returning Military Personnel.** With the return of the U.S. Armed Forces from Iraq and Afghanistan, employers must brush-up on their familiarity with veterans' rights to re-employment. Almost every employer is covered by the Uniformed Services Employment and Reemployment Rights Act and applicable state laws that protect service members' rights to civilian employment. For more information on USERRA, including an employer's guide, see: http://www.dol.gov/vets/programs/userra/main.htm

10. **Listen for Whistles and Take Action!** The number of whistleblower claims continues to increase. Whether an employee complains of a health and safety violation or a suspicious accounting practice, complaints must be handled with great care. Be sure your frontline supervisors are aware of the importance of bringing potential compliance issues to the attention of the responsible member of senior management to ensure that prompt action is taken. These kinds of employee complaints necessitate a careful review and assessment with appropriate response and follow-up. The failure to do so can leave a company unable to adequately defend future claims of wrongful discharge, retaliation and other whistleblower claims, which are difficult to get dismissed on summary judgment and often lead to substantial verdicts. Remember that the employee only need complain internally and "reasonably believe" that a violation exists.

Steadily working toward meeting each of these goals will increase the overall readiness of your organization to avoid unnecessary legal risks. Bernstein Shur's Labor and Employment attorneys can assist you in implementing your organization's resolutions. For consultation and questions, please contact any member of our labor and employment practice.

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