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Top 10 Employer Resolutions For 2016

Law360, New York (January 12, 2016, 10:44 AM ET) --


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As we bid adieu to 2015, we welcome a new year already bustling with changes. Issues ranging from the overtime exemptions to changes to the Affordable Care Act will keep employers on their toes in the next 12 months. Here are some resolutions for employers to make and keep in 2016.

1. Anticipate and Prepare for the DOL Changes to the Overtime Exemption Rules

On July 6, 2015, the U.S. Department of Labor published the much-anticipated notice of proposed rulemaking, updating the overtime exemption regulations in the Fair Labor Standards Act. The comments period generated an enormous response, dashing any expectations that a final rule would be released before the year-end. The final rule is expected to be released later in 2016.

Employers should already be making plans to adjust to the proposed increase in the minimum salary levels for both the "white collar" exemptions and highly compensated employees. Adjustments may include converting exempt employees to nonexempt status. The biggest adjustment, however, may come from a job duties test, if one is implemented. The notice of proposed rulemaking suggested that the DOL was looking to the California model, which requires that 50 percent of an employee's time must be spent performing exempt duties to qualify for exempt status. A lesser percentage may ultimately be implemented or phased-in. To prepare, employers should consider developing a program to examine the job duties of its exempt employees and ascertain what percentage of time is spent on exempt duties.

2. Be Aware of Minimum Wage Increases

Minimum wage rates across the country will continue to climb in 2016. Increased minimum wage rates went into effect in 14 states this month and additional increases take effect this summer in Washington,

D.C., Maryland and Minnesota. Staged increases will continue the trend until 2018 in some states.

Employers should examine whether an increase in the minimum wage will affect the income level of employees and require a classification change. Employers should also update payroll and policies related to pay.

3. Review and Update Policies and Practices Related to Equal Pay

In addition to the federal Equal Pay Act, laws governing equal pay for equal work between the genders exist in 44 states. Following President Obama's push this past spring to close the pay gap between genders and races, California passed a tough equal pay law that may spur tougher standards across the country.

The new California law, which went into effect on Jan. 1, 2016, allows job comparisons for "substantially similar" work (regardless of job title) to be made among employees working at different locations. The change expands the previous law that allowed comparisons to be made only within the same establishment. Employers in California may still have a valid disparity in pay if the employer has a seniority system; merit system; system that measures quantity or quality or production; or if education, training or experience factor into the pay level. The law confers upon employees, among other rights, a private right of action for discrimination, retaliation or discharge resulting from an employee's exercise of their rights under the law.

Employers, particularly those with employees in California, should review pay practices to ensure that impermissible differences among similarly situated employees are eliminated. Be sure that where a merit, seniority or other system justifies pay differences among similarly situated employees, policies are clearly explained and procedures are followed and documented. Finally, employers should be aware of similar laws in other jurisdictions where they do business.

4. Review and Update Policies Related to Hiring Barriers and Background Checks

The fair-chance employment movement, also known as "Ban the Box," continued to gain traction in 2015. Ordinances at local and state levels in at least 19 states now prevent public and/or private employers from asking about a job applicant's past convictions on the initial job application form. Some large, nationwide companies have joined the movement of their own accord, removing the question from applications in all states where they do business.

The movement to limit hiring barriers does not stop with criminal background inquiries, however. Employers may also be limited or restricted in reviewing or considering a job applicant's consumer credit history. New York City recently passed a law barring employers from requesting or considering such information. The Fair Credit Reporting Act requires employers who intend to run a background check on a job applicant or a current employee to disclose that fact in a separate document, alerting the employee and seeking his or her consent.

Employers should be aware that drug testing and cognitive testing may run afoul of the Americans with Disabilities Act or lead to other allegations of discrimination. The Equal Employment Opportunity Commission has released fact sheets related to both issues.

Employers should examine their vetting processes and determine whether any steps may create unnecessary barriers to hiring employees, following the trend of eliminating any steps that are

unnecessary for the particular position and its duties. Employers should be aware of local and state laws that may prevent them from seeking criminal or consumer credit background information on an initial job application and revise their documents as necessary.

5. Be Aware of Recent Changes to PPACA and Adjust the Company's Compliance Strategy

Employer obligations under the Patient Protection and Affordable Care Act increase in 2016. All employers with 50 or more employees must offer health insurance that is affordable and provides minimum value to 95 percent of its workforce and dependents. Failure to do so can trigger a penalty of $2,000 per full-time employee (minus the first 80).

Further, with the passage of the Consolidated Appropriations Act of 2016, on Dec. 18, 2015, implementation of the excise tax on high-cost, employer-sponsored health plans (also known as the "Cadillac Tax") was delayed two years, until 2020. The "Cadillac Tax" is a 40 percent excise tax that, until the passage of the act, was nondeductible for employers offering such plans. The act included a provision that the "Cadillac Tax" become a tax-deductible expense for employers. Finally, the act called for a study on suitable benchmarks for age and gender adjustments used for the "Cadillac Tax." The report on these benchmarks is due before June 2017.

6. Review Wellness Policies

Employers should continue to monitor issues related to wellness programs in 2016. The EEOC issued its notice of proposed rulemaking to amend Title II of the Genetic Information Nondiscrimination Act in October 2015. The proposed rule would allow companies to offer incentives to obtain information related to an employee's spouse's health, if the spouse is covered by the company's health plan. The comments period closed on Dec. 29, 2015, and a final rule may be issued in 2016.

Additionally, the safe-harbor provision of the ADA continues to be a hot litigation issue. Employers who offer a wellness program should resolve to examine their program in light of current litigation issues and monitor court decisions and EEOC activity closely.

7. Review Your Policies With an Eye Toward Sexual Orientation Issues

LGBT issues received significant attention in the past year, with particular focus on transgender issues and same-sex marriage. The EEOC, having filed its first Title VII suit on a transgender issue, maintains the position that Title VII protections include transgender bias (gender identity) under gender discrimination. The EEOC also issued its administrative opinion that sexual orientation is protected under Title VII as well.

The EEOC issued a fact sheet addressing LGBT issues in August. Employers should resolve to review policies, procedures and spousal benefit options to ensure compliance with Title VII in light of the recent court decisions and developments.

8. Review and Update Policies Related to "Bring-Your-Own-Device" and Company-Issued Devices

Data breaches and security issues continued to be a hot topic in 2015 and show no signs of retreating in 2016. The continual addition of new devices and apps makes securing company information and access thereto an ongoing challenge. Further, the September decision of a federal court in Pennsylvania called into question the amount of control an employer has over its own devices issued to employees. In SEC v.

Huang, the court noted the employer's failure to issue pass codes to the smartphones in question or to collect pass codes from its employees, which may have contributed to the court's denial of company access to the phones and content thereon.

Employers should carefully assess whether the presence of certain apps on employee- or company-owned devices may compromise company information. If so, employers may want to restrict the amount or types of company information accessible on, or downloaded to, the devices. If the company issues its own devices to employees, it may want to consider issuing its own pass codes or requiring employees to report pass codes to avoid situations such as those presented in the Huang matter. In the alternative, companies may want to consider installing software that allows them to remotely access and wipe a device. This software such may be considered for "bring-your-own-device" policies as well, and may be useful in a number of situations including loss or theft of the device or termination of employment.

9. Review and Update Agreements That Include Arbitration Clauses

If your company has been uncertain about binding arbitration provisions with a class-arbitration waiver, and uncertain whether such provisions will be enforceable, take heart. Recently, the U.S. Supreme Court reiterated its support for the Federal Arbitration Act (FAA) and the authority of its decision in AT&T Mobility LLC v. Concepcion. Reversing and remanding a decision of a California court of appeal, the Supreme Court held that the FAA preempts California law, the chosen jurisdiction in the choice of law provision in the contract at issue in the matter. The Supreme Court found that, where interpretation of a state law places arbitration contracts on unequal footing with all other contracts, the state law is inconsistent and must yield to federal law.

Employers, particularly those who do business in states that are typically hostile to arbitration agreements, should be aware of the continuing support of FAA preemption. Speak with counsel to ensure that the language in your company's agreements is compliant with FAA standards.

10. Review Policies and Training Related to Whistleblower Retaliation Issues

Litigation related to whistleblower retaliation is on the rise. The emerging trend in these cases is a more expansive interpretation of the circumstances under which a whistleblower is protected by whistleblower protection statutes, such as the Sarbanes-Oxley Act and Dodd-Frank Wall Street Reform and Consumer Protection Act. For example, a recent decision found that, under Sarbanes-Oxley, a whistleblower is protected under the statute even if he or she had only a reasonable belief that one of the six laws provided for in the statute was violated. Previously, a whistleblower had to plead "definitively and specifically" which law he or she believed the company violated.

Courts hearing these matters have established some key factors that employers should note and track in their own policies and training programs. When an adverse employment action must be taken against an employee who has engaged in whistleblowing activity, employers should consider using a panel of management-level decision makers since the panel is less likely to be found to have, or act upon, a retaliatory motive. Further, companies should be sure to follow their own policies and procedures and carefully document the actions leading to the adverse employment action against the whistleblower. The company will want to demonstrate that it followed all procedures in taking the adverse action. Finally, companies should be aware of the temporal proximity of an employee's whistleblowing activity to any adverse employment action, as a short passage of time is likely to be an indicator that the adverse action may have been motivated by retaliation.

Conclusion

With so many changes on the horizon, employers should be vigilant. Preparation is key for timely compliance with many of the anticipated changes. Employers should resolve to keep their policies and procedures on point and be sure to keep employee training at the forefront of their compliance strategies.

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