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New Year's Resolutions

While many of us make our personal New Year's Resolutions each January, this is also the perfect time for employers to make their own "business resolutions", focusing on their internal policies and practices. Such "resolutions" serve several purposes; first, and most critical, to confirm compliance with the ever-changing laws and judicial decisions affecting employers; and second, to ensure the ability to meet challenges posed by employees, as well as investigative agencies, especially in the increasingly litigious environment in which employers are currently operating.

As we discussed during our recent HR Circles entitled "New Year's Resolutions: Conducting a Voluntary Review of Internal Policies and Procedures", the following are some of the areas which we recommend employers review going into 2010.

EMPLOYEE HANDBOOKS AND POLICIES

1. Equal Employment

Opportunities/Anti-Discrimination and Harassment Policies and Complaint

Procedure: It is critical for employers to ensure that they not only distribute a written policy regarding equal employment opportunities in the workplace, as well as a policy which strictly prohibits discrimination, harassment based on all protected categories, and retaliation for participation in the complaint procedure, but also a clear and useful complaint procedure. Even for employers who do not currently distribute an employee handbook, these policies are critical. All

employees should sign acknowledgments of their receipt of these policies as well.

2. Policies Addressing Use of E-mail and Company Owned Equipment

E-Mail Policies

E-mail communications have clearly taken over nearly every workplace, large, small and in between. Some would assert with confidence that the prevalence of e-mail has made business communications easier and much more efficient. However, as with all "great things", there are traps which can be avoided with careful drafting of written policies.

Specifically, employers should distribute a written policy concerning employees' use of email that, at a minimum, provides that the e-mail system belongs to the company; that email for personal use is prohibited; that the employee should harbor no expectation of privacy in the company email systems, including where the employee accesses his/her personal email accounts using workplace system; and that the company has the right to monitor e-mail within its discretion.

Note: Conn. Gen. Stat. § 31-48d prohibits employers from engaging in electronic monitoring of employees activities and communications other than by direct observation, unless a prior, written notice is provided to those employees of the type(s) of monitoring that may occur. Further, the written notice must be posted in a conspicuous place that is readily available for viewing by employees.

Company Owned Equipment

This policy should include employee use of company telephone systems; laptop

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computers; blackberry's and other company issued devices, such as beepers, pagers, and cell phones.

Employee Blogging Policies

Employee blogging and/or use of social networking sites can lead to repercussions for employers and could cause employers to run afoul of FTC guidelines designed to protect consumers from deceptive endorsements and advertising. For example, if the company sells a product or service, and an employee blogs about the product, the assumption is that the employee is doing so on behalf of the company which, in turn, can result if liability to the company for misrepresentations. Furthermore, the company should notify employees that they can be disciplined, or even terminated, for improper disparagement of the company and/or disclosure of confidential information on any of these sites. While indeed the right to free speech enters into the analysis, such a right can be outweighed where the "speech" crosses the line into defamation and the like. Conn. Gen. Stat. § 31-51q prohibits disciplining or discharging an employee for exercising constitutional rights of free speech, but the employee's activities must not substantially or materially interfere with employee's bona fide job performance or the working relationship between the employee and employer.

Note also that employers may not take any action or deter employees from using their personal blogs or social networking sites to encourage, organize or support union activity. Anti-blogging policies must not interfere with, restrain, or coerce employees in the exercise of their rights under the National Labor Relations Act, including the right to engage in activities, such as blogging, for the purpose of

collective bargaining or other mutual aid or protection. However, if the speech attacking an employer is detrimentally "insubordinate, disobedient or disloyal", it may nevertheless not be protected.

In sum, such a policy:

- Sets standards of conduct for employees' online communications regarding intellectual property, defamation and privacy issues;
- Notifies employees of the possibility their sites will be monitored to ensure compliance; and
- If the company permits employees to post comments about its products or services it should require that such comments to be vetted by authorized company personnel before they are posted.

FMLA Policies/ Changes to FMLA

While most employers realize there have been recent changes to the Family and Medical Leave Act, many still have not revised their FMLA policies.

Specifically, revised FMLA regulations went into effect on January 16, 2009. Employers must post a general FMLA notice even if there are currently no FMLA eligible employees. Further, there are changes to the type of notice required to be provided by employees, changes to the rules governing medical certifications, fitness for duty certifications, and the rules on intermittent leaves. Most notably, the FMLA has been expanded to include leave entitlement for family members taking care of members of the military (Allowing for 26 weeks of leave in a 12 month period to care for family member in the military or injured in the line of duty).

The Connecticut FMLA has been similarly revised.

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Other PTO Policies

Given the changes in the FMLA, this is a good time for employers to also review their other policies governing leaves of absence or paid time off, such as:

- Short Term Disability policy
- Long Term Disability policy
- Vacation entitlement
- Sick time or general Paid Time Off banks
- Interplay between STD and FMLA

Document Retention Practices and Policy

Given the wealth of judicial decisions regarding the importance of retention of electronic communications, it has become critical for employees to develop and issue a written document retention practice and policy, providing, among other things, for standardized guidelines, as well as notice of the need to immediately suspend the standard practices in the event of litigation.

Miscellaneous Handbook Policies

- Do you have an up to date “employment at will” statement?
- Do your progressive discipline policies provide for managerial discretion and provide examples of situations where immediate termination is warranted?
- Does your performance review policy/process provide for managerial discretion in timing and frequency?
- Are managers aware of the importance of honest performance reviews, as well as interim documentation of poor performance?
- Do your termination procedures comply with applicable law?
- Do you follow a neutral reference policy, meaning that the company only provides verification of dates of employment, last title, and last salary?

PERSONNEL PRACTICES

Going hand in hand with a review of the company’s written policies, this is the time to review the following practices as well:

Recruitment/Hiring Processes: Are applications up to date, meaning that they do not contain questions of applicants now prohibited or even problematic? Are interviewers trained regarding what “not” to say during the interview process, and how to document the decision making process for new hires?

Background checks—

Fair Credit Reporting Act

Are the required authorizations and other forms—including all required disclosures—up to date and compliant with all aspects of federal and state law? Are the authorizations separate from the application for employment?

Required Postings

Are all required postings placed in a area where employees frequent? A complete list of and sample forms for many of these notices can be found at [Connecticut and Federal Labor Posters](#).

Job Descriptions

Many employers do not maintain written job descriptions, or maintain job descriptions that are wholly outdated. Job descriptions serve a multitude of purposes, not just to describe the job to applicants and incumbents. For example, they can assist in defending a particular job classification during a Department of Labor audit; in determining whether a disabled applicant or employee can perform the material aspects of the job with or without reasonable accommodations; and in overall managing of applicant and employee expectations about the material aspects of the job.

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Offer Letters

Connecticut: Conn. Gen. Stat. § 31-71f now requires that every employer, at the time of hiring, advise employees in writing of the rate of pay; what hours the employee will be expected to work; and how often the employee will be paid (weekly, bi-weekly, etc.)

New York: As of October 26, 2009, every employer is to provide new employees, at the time of hire, with a written notice of the rate of pay; the regular pay day; if entitled to overtime, the overtime rate of pay; and if considered an exempt position, the basis for the exemption. This notice must be provided before any work is performed, and the employer must obtain a signed acknowledgment of the employee's receipt of this notice. Model notices are available at the New York Department of Labor website. (There are additional requirements for commissioned sales people.)

The above information is, of course, in addition to other recommended information to be set out in offer letters, including an "employment at will" statement.

Personnel Files

Employers must ensure compliance with the access and privacy aspects of the law. For example, Conn. Gen. Stat. § 31-128b, g and h, provide for employee access to their personnel file, and specify the parameters of that access. *What is new about this statute* is the inclusion of a civil penalty of \$300 per violation for employers who refuse employees access to their personnel files upon request as required by law.

Employers must further ensure that personnel file information be kept

confidential, so that no individually identifiable information contained in the personnel file or medical records of any employee shall be disclosed by an employer to any person or entity not employed by or affiliated with the employer without the written authorization of such employee, except where the information is limited to the verification of dates of employment and the employee's title or position and wage or salary.

Medical records, which should not be part of the "personnel file", enjoy heightened confidentiality protection.

Employers must also take steps to safeguard the social security number of an employee. Failure to protect this information subjects employer to civil penalties of \$500 for each violation for a maximum of \$500,000 per event. Additionally, if the employer collects social security information, that employer must implement and post a privacy protection policy which: (a) ensures the confidentiality of social security numbers; (b) prohibits their unlawful disclosure; and (c) limits access to them.

Severance Policies

If the employer has a "severance policy" applicable to terminations other than those connection with a reduction in force, and intends to maintain such a policy, the employer should ensure that the entitlement to any severance is expressly conditioned on the employee's execution of a general release of claims in favor of the employer.

Management Training

Conn. Gen. Stat. §46a-54 requires employers with 50 or more employees to provide 2 hours of sexual harassment

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training to all supervisory employees. The DOL recommends, but does not require that employers provide an updated training once every three years to all supervisory employees.

Given the extensive changes in other areas of the law affecting employers, 2010 might be the perfect time for employers to consider requirement management training in a number of other areas, such as interviews, performance appraisals, and administering discipline.

WAGE/HOUR ISSUES

The area of wage and hour law has been the dominant subject of employee litigation, as well as for agency reviews. In 2010, it is critical that employees conduct internal reviews in the following areas.

Exempt/non-exempt classifications

We cannot emphasize enough the importance of ensuring that positions within the company are properly classified as either exempt from the overtime provisions of the law, or non-exempt. The ramifications of misclassification can be almost unmanageable. Among other things, improper classification can subject the employer to liability for unpaid overtime wages, going back 2, or if deemed intentional, 3 years. Employers who treat non-exempt employees as exempt are probably not keeping time records, and in the event of an involuntary audit, the DOL will defer to the employee's records of the amount of overtime worked (not to mention the failure to require and maintain time records for non-exempt employees is a violation in itself).

Independent Contractors

Equally critical, employers must undertake a review of all individuals currently

classified as independent contractors. Misclassification in this regard can expose the company for liability for, among other things, unpaid wages, including overtime; failure to provide benefits; and unpaid unemployment and FICA taxes.

- **The Taxpayer Responsibility, Accountability, and Consistency Act of 2009 (H.R. 3408) was reintroduced July 30, 2009. This Act, which proposes fines for employers who misclassify employees as independent contractors, remains pending.**

In September, 2007, then Governor Spitzer signed an Executive Order creating an inter-agency strike force to address the problem of such misclassification by New York employers. Fines would be imposed, in addition to the standard liability to the employee, as well as the potential for criminal penalties for willful misclassification.

PAY PRACTICES

Employees should also confirm that pay practices being utilized are compliant in every respect. For example:

- Are workers being properly paid overtime, even if "unauthorized" overtime is being worked?
- Are the proper records being kept of time worked for non-exempt employees?
- Are wages upon termination being paid in compliance with applicable laws?
- Are employees being advised of the proper recording of compensable time, such as for "donning and doffing time"; time spent in required training or orientation sessions, even for exempt employees; rest and meal periods (and does the employer ensure such rest/meal

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breaks are actually taken); travel time; on call time; “show up time”; and for time spent in the “virtual office”, meaning where employees work from home via electronic means despite having called in sick?

Also, with respect to mandatory furloughs or shortened workweeks, while permissible as a general rule for non-exempt employees, employers must tread carefully in connection with exempt employees, as the standard rule is that the salaried, exempt employee must be paid his/her entire salary if any work is done at any time during a workweek. Employers are encouraged to check the most recent Department of Labor Opinion Letters on this topic, generally available at the DOL website.

Finally, employers are strongly encouraged to include wage/hour complaints within their standard complaint procedures. In such a way, the possibility for early intervention and implementation of a remedy is increased.

BENEFIT ADMINISTRATION

Employers should confirm that the employer's practices with respect to administration are consistent with benefit plan language; that ERISA requirements are followed for those benefit plans deemed ERISA plans; that group health benefit plans comply with new laws, such as the Genetic Information Nondiscrimination Act, which prohibits discrimination on the basis of genetic information in employment and health insurance; and that the new legislation regarding COBRA subsidies, as well as the newly enacted extensions to those subsidies, is followed. Regarding the COBRA subsidies, the DOL has extensive information for employers at the United

States Department of Labor.

Bonus Plans:

Employers are encouraged to ensure all plan language fits within the latest judicial rulings to protect against the treatment of bonuses as wages.

REVIEWING STATISTICS

Given the Equal Employment Opportunity Commission's reaffirmation of its commitment to addressing “systemic discrimination”, and the current administration's allocation of a larger budget and increased staff to focus on this subject, employers are encouraged to review their statistics with respect to, among other areas, hiring; promotions; pay scales; and terminations. Such tracking will enable employers to identify any problematic trends—for example, a trend toward terminations of employees over 40; a failure to hire minorities; or to promote women or minorities.

REDUCTIONS IN FORCE

Given the current economic climate, more employees are finding themselves in the unfortunate position of implementing reductions in force. In such cases, the employer should ensure that proper legal advice is obtained with respect to: the initial decision as to whether to offer severance packages; compliance with the law for enforceable releases of claims; compliance with WARN; and ensuring that the RIF does not result in any disparate impact on any particular protected employee group.

REPORTING COMPLIANCE OBLIGATIONS

I-9: All employers are required to verify that each employee hired after 1988 is

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eligible to work in the United States. Fines are administered where employers fail to comply with the law's procedures.

EEO-1: The EEO-1 Report is a government form requiring certain employers to provide a count of their employees by job category and then by ethnicity, race and gender. This report is submitted annually to the EEOC and the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP). Employers are encouraged to confirm whether they are required to submit such a report, and, if so, to confirm the reporting process is in conformance with the law.

E-Verify: Effective September 8, 2009, certain federal contractors must use the E-verify database to confirm the eligibility of employees to work legally in US. This database allows the employer to compare information provided in connection with the employee's completion of an I-9 with information contained in various government databases maintained by the Social Security Administration, and the Department of Homeland Security.

CONFIDENTIALITY/NON-COMPETE AGREEMENTS

More than ever, employers are seeking to protect their good will and customer base. Consequently, many employees are

being required to execute confidentiality and non-compete agreements as a condition of employment and/or continuing employment. At the same time, judicial decisions in this area continue to provide guidance as to when such agreements are enforceable, and the guidelines vary widely from state to state. Accordingly, employees are encouraged to seek out legal advice in drafting these agreements to ensure enforceability to the maximum extent possible (as well as to confirm that they are even permitted in a particular state in the first instance).

WHY THE INTERNAL REVIEW?

Catching and fixing problems before a complaint arrives is important. Employers can head off many complaints, and where complaints are filed in any event, the employer bolsters its ability to defend itself. Regulatory agencies are often more sympathetic, and easier to deal with, where they see a voluntary, internal review resulted in the implementation of remedial actions before the auditor arrives.

Make management training part of the remedy: Management awareness of the consequences of actions which violate the law, including the potential for personal liability in some cases, can make the difference.

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