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LABOR & EMPLOYMENT

ALERT

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15 LABOR & EMPLOYMENT RESOLUTIONS FOR 2015

By Alizah Z. Diamond

U.S. voters handed the keys to the Republican Party in this past election. And so, while we wait to see if the "system" will improve or implode, it is that time of year again — the time to review and reflect on all that has happened this past year and to look ahead to new possibilities in the upcoming year. What resolutions will we make for 2015? Will we be more circumspect in our use of Facebook, Instagram and other social networking sites and applications? Volunteer some of our time to charitable causes? Start saving for retirement?

While the looming deadline to comply with the federal Affordable Care Act's (ACA) employer mandate may be causing sleepless nights for many an employer, employers should be mindful of the flurry of activity occurring in the labor and employment arena on issues that will impact their operations in the New Year. In 2014 we saw an ambitious, pro-employee federal regulatory agenda that originated during the first Obama administration come to fruition, and growing initiatives by state and local governments tackling many "hot button" employment issues.

Among the subjects of new state and local activity were discrimination against LGBT employees and unpaid interns in the workplace, paid sick leave, social media privacy, rights of pregnant employees, revisions to overtime exemptions and expanding rights of employees in same-sex marriages. To help employers navigate successfully through a number of these issues, we encourage employers to consider making the following resolutions:

1. **Prepare for minimum wage increases that will go into effect on January 1, 2015, if you employ federal contract workers or are an employer in one of the following states: Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Hawaii, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Jersey, New York (eff. Dec. 31, 2014), Ohio, Oregon, Rhode Island, South Dakota, Vermont, Washington and West Virginia (eff. Dec. 31, 2014).** Other states have increases that are set to go into effect in the summer of 2015, including Delaware, Minnesota and Washington, D.C.

2. **Review and update employee sick leave policies, practices and procedures to ensure compliance with new or expanded paid sick leave laws that will go into effect in 2015 if you are an employer in one of the following states or municipalities: California, Connecticut, District of Columbia, Massachusetts, New York City (effective summer of 2014), San Francisco, Seattle and Trenton.** These laws generally apply to full-time, part-time and seasonal employees who work a certain minimum number of hours per year. Employers will also be required to satisfy specified posting and notice and recordkeeping requirements

3. **Prepare for the January 1, 2015 compliance deadline under the Affordable Care Act to either offer health insurance to eligible employees or be subject to "pay or play" penalties**. Employers with 50-99 full-time employees (FTEs) may be eligible for temporary relief from penalties if they satisfy *each* of the following three conditions: (i) show that for any consecutive 6-month period in 2014 they had fewer than 100 FTEs; (ii) show that between February and December 2014, any reduction in hours or workforce was based on a legitimate business reason; and (iii) show that since February 2014, they kept the same coverage and employer contributions toward the cost of any self-only coverage that was in place. Larger employees that have more than 100 FTEs, including seasonal workers who work more than 120 days in the calendar year, are not eligible for such relief and must start complying with the ACA mandate or face penalties. Employers that offer coverage to at least 70% of their eligible employees in 2015 may avoid penalties for failing to offer health coverage ($2,000/FTE) but may still face other penalties if they have one or more FTE who goes to and receives a premium tax credit for participation in an exchange ($3,000/FTE).

4. **For employers in California, Illinois and New York (state and city), review and update anti-discrimination policies, procedures and practices to ensure compliance with recently enacted prohibitions against discrimination and harassment of unpaid interns and volunteers, based on any legally protected classification.** These laws, which amend existing civil rights codes, were passed in the wake of a New York federal court decision holding that the New York state and city civil rights laws did not apply to a university student serving in a media company internship who was sexually harassed and inappropriately touched by a supervisor and then retaliated against after she refused his sexual advances. These jurisdictions join the District of Columbia and Oregon, which previously passed such laws. Legislation advocating for similar protections has also been proposed in Michigan, New Jersey and in several municipalities.

5. **Review and update employee handbooks, policies and procedures to ensure compliance with expanding workplace rights for pregnant workers in light of recent EEOC enforcement guidance and increasing state and municipal protections**. In 2014, the EEOC released updated enforcement guidance on pregnancy discrimination, which indicate increased protection for pregnant workers and are highly suggestive of the determinations the EEOC would reach in discrimination charges filed with the agency by pregnant workers. Among other things, the EEOC's new guidance posits that:

   - Protections afforded under the federal Pregnancy Discrimination Act (PDA) extend beyond currently pregnant workers to workers suffering adverse action because of a past pregnancy or because of their potential or intention to become pregnant.

   - An employer cannot compel pregnant workers to "take leave," unilaterally re-assign them or take adverse employment action against one of them, even if the employer believes such changes are in the best interest of the employee.

   - Lactation is a medical condition related to pregnancy, and thus, "less favorable treatment of a lactating employee may raise an inference of unlawful discrimination."

   - Even in healthy, uncomplicated pregnancies, employers must provide accommodations to pregnant workers who experience certain limitations as a result of pregnancy, childbirth and related conditions, equivalent to those provided to non-pregnant employees who are similarly unable to perform their jobs, even if those other accommodations are provided to comply with the Americans with Disabilities Act, workers' compensation, or work-related injuries.

The last issue, whether employers must provide special accommodations to pregnant workers under the PDA and under what circumstances, is currently before the United States Supreme Court in *Young v. United Parcel Service,* a highly-publicized case. Regardless of the outcome of the *Young* decision, which is expected by July 2015, a growing number of states and municipalities are independently passing laws providing enhanced rights for pregnant workers and new mothers, including, among other things, accommodations and maternity leave. Such laws have already passed in Alaska, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Michigan, New Hampshire, New Jersey and Texas, as well as in New York City and Philadelphia, and are pending in a number of other states and cities.

6. **Prepare for compliance with new regulations from the U.S. Department of Labor (DOL) revising the "companionship" and "live-in" exemptions for domestic service workers under the Fair Labor Standards Act's (FLSA) minimum wage, overtime and recordkeeping requirements.** If you are a home care agency or other third-party provider of domestic service workers, effective January 1, 2015, you will no longer be able to claim either exemption and will be obligated to pay at least the federal minimum wage and overtime pay to any direct care worker you solely or jointly employ, regardless of that worker's duties, unless you can demonstrate that the worker is an independent contractor under the FLSA's "economic realities" test. You will also be required to keep basic time and pay records, including records of hours worked. "Direct care workers" include workers who provide home care services, such as certified nursing assistants, home health aides, personal care aides, caregivers, and companions. The individual recipients of the services (and their families) may still be able to claim the exemptions but live-in domestic service workers, defined in the new regulations as those who reside in the employer's home, while exempt from overtime pay must still be paid at least federal minimum wage for all hours worked. While the DOL has announced that it is delaying enforcement of the new regulations until June 2015, the delay does not change the implementation date of the regulations. We note that the new regulations are being challenged in a federal lawsuit pending in the District of Columbia. On December 22 the U.S. District Court in D.C. issued a decision vacating the portion of the regulations denying the exemptions to third party providers on the grounds that they exceeded the DOL's statutory authority. The effect of the decision is unclear at this time given that the DOL may seek to appeal and stay the decision.

7. **Review and update employee hiring, social networking and media, confidentiality, and termination policies, procedures and practices in light of new state laws restricting employer access to employees' social media accounts.** In 2014, at least six states passed social media privacy laws barring employers from requesting access to and/or using the personal social media account of a prospective employee. To date, nearly 20 states have passed such laws, including Maryland, Massachusetts and New Jersey, and similar legislation has either been introduced or is pending in at least 28 other states. Some states have taken the issue a step further by banning employers from even "friending" or adding employees or applicants to their list of contacts. All such laws prohibit employers from retaliating against employees or applicants who refuse to give the employer access to their personal social media accounts.

8. **Review and update employee anti-discrimination and harassment policies, procedures and practices to ensure compliance with increasing prohibitions against employee discrimination and harassment based on LGBT status at the federal, state and municipal levels**:

    - **For federal contractors and subcontractors:** Executive Order 13672, prohibiting employment discrimination based on sexual orientation or gender identity, goes into effect January 1, 2015, and will affect

companies that have at least ten thousand dollars ($10,000) in federal contracts. The Office of Federal Contract Compliance Programs (OFCCP) is expected to publish final regulations in 2015 implementing the Order without a public notice and comment period, in which case the regulations will likely be effective immediately upon publication.

- **For private employers:** As of the end of 2014, almost two-dozen states and more than 100 municipalities have passed laws prohibiting discrimination in employed based on both sexual orientation and gender identity. This includes California, Connecticut, D.C., Illinois, Maryland, Massachusetts, Nevada, New Jersey, Oregon and Rhode Island, as well as cities such as Atlanta, Detroit, Houston, New Orleans, New York City and Philadelphia. Legislation containing similar prohibitions has been proposed and/or is pending in a number of other states and municipalities. Employers should expect this trend to continue through 2015.

9. **Prepare to comply with final regulations from the DOL's Occupational Safety and Health Administration (OSHA) modifying employer reporting and record-keeping requirements regarding workplace injuries.** Currently, employers are required to notify OSHA of work-related fatalities and all work-related hospitalizations of three or more employees. Effective January 1, 2015, employers must also report (i) all work-related in-patient hospitalizations of one or more employees, (ii) all work-related amputations, and (iii) all work-related losses of an eye. Employers must also report (iv) all work-related fatalities that occur within 30 days of a work-related incident within eight hours of learning of the fatality, and (v) for any in-patient hospitalization, amputation, or eye loss, employers must report the incident within 24 hours of learning of it, providing they occur within 24 hours of the work-related incident.

10. **Review and update Family and Medical Leave Act (FMLA) policies, procedures and practices to ensure compliance with expected final rules from the Department of Labor revising the definitions of "spouse" and "marriage" under the FMLA**. Currently, eligible employees can take FMLA leave to care for a same-sex spouse only if they presently reside in a state that expressly recognizes same-sex marriages. Responding to the U.S. Supreme Court's decision in *U.S. v. Whiting*, in which the Court held that restricting the federal definition of "marriage" and "spouse" to heterosexual couples is unconstitutional, the DOL issued a Notice of Proposed Rulemaking proposing a final rule that would allow eligible employees in legally valid same-sex marriages to take FMLA leave to care for their spouse regardless of whether their state of residence recognizes their marriage. Release of the final rules is expected by March of 2015.

11. **Watch for proposed revisions to the Fair Labor Standard Act's (FLSA) "white-collar" exemptions from overtime and minimum wage requirements**. In March 2014, the White House issued a memorandum directing to the Secretary of the Department of Labor to "modernize and streamline" the existing FLSA regulations governing the so-called "white- collar" exemptions for executive, administrative, professional, outside sales and computer employees. Among other things, the White House instructed the DOL to increase the minimum salary required to satisfy these exemptions and to simplify and update the regulations to address the purported changing nature of the American workplace and ensure that only high-paid, white-collar workers are covered by the exemption. The initiative would be subject to the normal rulemaking process and the Department of Labor has indicated that proposed regulations will be released in 2015.

12. **Review and update employee hiring and criminal background check policies, procedures and practices to ensure compliance with a growing number of "Ban the Box" laws that prevent**

employers from asking about prior criminal history on job applications and require employers to defer inquiry into criminal history until after an interview has been conducted or a provisional job offer has been extended. In 2014, the District of Columbia, Illinois and New Jersey joined 11 other states (California, Colorado, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Minnesota, Nebraska, New Mexico and Rhode Island) and 66 cities and counties in passing such laws, which will become effective in 2015. While some of the state laws are currently limited to public employees, blanket "Ban the Box" laws are on the rise, particularly at the local level, and employers should expect this trend to continue through 2015.

13. **Prepare for the National Labor Relations Board's (NLRB) increasingly union- and employee-friendly regulatory agenda, including**:

    - **"Ambush Elections":** On December 15, 2014, the day before the expiration of Nancy Schiffer's term, the NLRB issued new controversial "representation case procedures" rules that will, starting April 14, 2015, significantly speed up the union election process. Sometimes called the "ambush election" rules, the new rules, among other things, (i) eliminate the current 25-day minimum period to hold a union-certifying election and permit elections to be held at the earliest practical date; (ii) defer almost all disputes over voter eligibility and the scope of a bargaining unit until after the election; (iii) require employers to submit a detailed position statement on the day before the pre-election hearing, which may be held within eight (8) days after a petition is filed; (iv) require employers to provide a list of employees allowed to vote to union organizers electronically and within a truncated period of time; (v) after a petition is filed, require employers to post and distribute a detailed NLRB notice about the petition and the potential for an election to follow; and (vi) limit the time for parties to file objections and offers of proof after an election.

    - **Expanding Employee Access to Employer Email Systems:** On December 11, 2014, the Board published a controversial decision in the contentious *Purple Communications* case, holding that employees are presumptively permitted to use their employer's email systems during non-work time for collective "Section 7" activities if the employer gives employees access to their email systems. The decision overrules the Board's prior 2007 decision in *Register Guard* "to the extent it holds that employees can have no statutory right to use their employer's email systems for Section 7 purposes." The new decision applies only to employees who have already been granted access to their employer's email system in the course of their work, and does not require employers to provide such access. Further, an employer may still justify a total ban on all non-work-related use of email by demonstrating that special circumstances make the ban necessary to maintain production or discipline. Absent justification for a total ban, the employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline.

    - **Protecting Employee Social Media Use:** The NLRB continues its intensified scrutiny of employer policies and practices limiting employee use of social media, striking down those it determines are too restrictive and thus interfere with employees' rights to raise collective issues concerning the terms and conditions of employment, or otherwise engage in "concerted activity" under Section 7 of the National Labor Relations Act (NLRA). Many of these decisions apply an exceedingly broad view of a policy's potential for interference or "chilling effect," on workers' rights. In 2014, the Board issued decisions invalidating a broad range of employer

policies on such grounds, including policies on confidentiality, non-disparagement, codes of conduct and social networking. Employers should be mindful that the Board's rulings and scrutiny extends to non-unionized employers, not only unionized ones, and is expected to continue through 2015.

14. **Continue to review and update worker "Employee" and "Independent Contractor" classifications to ensure that workers are properly classified under the varying standards applied by the DOL, the Internal Revenue Service and the at least 19 state agencies that have now joined the DOL's collaborative initiative to improve misclassification detection and enforcement**. In 2014, the DOL, for the first time, awarded more than $10.2 million in grants to state agencies participating in the initiative (including California, Florida, Massachusetts, New Jersey, New York, Texas and Wisconsin), signaling that the DOL and state governments' interest in purported worker misclassification (and loss of tax revenues) will likely only increase through 2015.

15. **Schedule an internal compliance audit of your labor and employment law policies and procedures with counsel**, being careful to maximize the protection of the audit results by the attorney-client privilege.

The failure to comply with the new and existing legal requirements referred to above could cost your organization monetary penalties and other sanctions on top of back pay liability to employees, where applicable, and negative publicity.

Schnader attorneys can assist you and your organization to implement these resolutions – to identify risks and take important preventive steps – to help you avoid sanctions, penalties and litigation in the New Year. Have a happy and proactive 2015! ◆

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