THE HOPKINS GROUP
HUMAN RESOURCES BUSINESS SOLUTIONS

HUMAN RESOURCES UPDATE

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30 SECOND NEWS BITES

- A Wage and Hour panel at a recent Epstein Becker Green Law Firm round-table session foresaw an increasing number of collective actions on the horizon. Betsy Johnson noted that 30% of workers classified as "independent contractors" are actually employees; in California, an independent contractor action is the "lawsuit *du jour*." To avoid penalties for misclassifications, she advised employers to audit contractor classifications, sign an independent contractor agreement, and not treat contractors as employees.
- There is proposed legislation that would amend the Fair Labor Standards Act (FLSA) to allow for "opt-out" collective actions, thus increasing the number of class members in a collective action. The FLSA currently follows an "opt-in" policy, whereby individuals must elect to join a collective action to receive recovery. Under an opt-out policy, an individual automatically becomes a member of a collective action unless he/she elects to opt out. Obviously, if passed, this immediately increases the class size in such actions.
- Laid-off employees will look for ways—including finding immigration violations—to retaliate against employers. Thus, employers should protect themselves by finding out who is in their workforce, including their vendors, and complying with immigration laws. Employers need a good internal compliance system, which includes immigration audits, a compliance checklist, and an efficient document retention policy.
- Those employees left behind post-layoff–watch that when you reassign duties from the laid-off employees that you don't turn an exempt employee into a non-exempt employee.
- On April 1, 2009, a sharply divided Supreme Court ruled 5 - 4 that a labor contract between an employer and a union requiring employees to arbitrate statutory claims was binding on the employees covered by the labor contract. *14 Penn Plaza, LLC v. Pyett*, No. 07-581 (April 1, 2009).
- On the heels of Republican Arlen Specter's announcement that he won't support the Employee Free Choice Act (EFCA) comes another similar announcement—this time from a Democrat. U.S. Sen. Blanche Lincoln, an Arkansas Democrat said she will not back the bill to make it easier for unions to organize workers. However, AFL-CIO spokesman Eddie Vale said you have to read between Lincoln's lines to get the true meaning—that the EFCA will be modified and that senators like Lincoln will support the bill after modification. Your take-home? EFCA will still most likely pass, but it is anyone's guess as to its final form.
- It's midnight. Do you know where your company's confidential data is? If you answer, "Locked up in so and so's office," you might want to think again. A recent report suggests employers may be losing much more sensitive and confidential information than they imagine. The report's conclusion— "[C]ompanies are doing a very poor job at preventing former employees from stealing data. . ." seems amply confirmed by the results of its survey. For instance, of the employees surveyed 59% of those who were terminated or who voluntarily left employment, stole sensitive and confidential company data; of those who took data, 79% said that they were aware that company policies did not permit them to take the data but they took it anyway.
- It's not so rare that an employer might commit a Fair Labor Standards Act violation. But, the Equal Employment Opportunity Commission? The government's watchdog agency got nabbed for giving some of its employees comp time instead of overtime pay for working more than 40 hours in a week. Not only that, but a federal arbitrator in the case ruled that the violation wasn't just some silly mistake by the EEOC. The arbitrator said the violation was "willful negligence." In other words, the folks at EEOC knew they were circumventing the rules, and continued to do so anyway.

Newest I-9 Form (Rev. 02-02-09) to be used effective 4/3/09

Interact with Your Employees

Among other things, the recently-enacted Americans with Disabilities Act Amendments Act ("ADAAA") broadens the definition of "disability." As a result, more employees will now be considered qualified individuals with a disability under the law. Similarly, proposed changes to laws prohibiting religious discrimination (such as the Workplace Religious Freedom Act) would give employees greater rights to accommodation of their religious practices in the workplace (flextime for leaving early on Friday afternoons to observe the Jewish Sabbath).

Therefore, it is more important than ever that employers know what it means to properly engage in the "interactive process" with employees – that is, appropriately assessing whether proposed accommodations will be deemed "reasonable" or if those accommodations proposed by the employee would place an "undue hardship" on the employer. Furthermore, the broadened definition of the term "major life function" – which now includes the mental processes of concentrating and thinking – may require employers to provide accommodations to employees whose disabilities impair their abilities to engage in these functions. The ADAAA also clarifies that an "impairment that is episodic or in remission is a disability *if it would substantially limit a major life activity when active*." This change indicates conditions which were not consistently found to constitute disabilities under the ADA – like cancer, diabetes, and epilepsy – will now be covered.

As a result of these changes, supervisors and human resources personnel should be trained to identify when an employee has taken action that may trigger the employer's obligation to engage in the interactive process (comments about checking insulin levels or needing to recuperate from a migraine). In addition, company job descriptions should be reviewed and potentially revised to ensure "essential functions" of the job are clearly and accurately depicted. This becomes most important when addressing requests for accommodations by employees who are limited in their ability to communicate, remember, think or concentrate.

Lilly Ledbetter Fair Pay Act

The Lilly Ledbetter Fair Pay Act, signed into law on January 29, 2009, amends Title VII, the ADEA, the ADA and the Rehabilitation Act to "clarify" that an unlawful employment practice not only occurs when a discriminatory compensation decision or other practice is adopted, but also "when an individual is affected by application of a discriminatory compensation decision or other practice." This includes each and every paycheck, so long as the compensation paid in that paycheck resulted (in whole or in part) from the alleged discriminatory decision or practice.

Thus, the Act would allow pay discrimination claims to be filed within 180 days (or 300 days, as applicable, depending on the forum) of the issuance of any allegedly discriminatory paycheck – regardless of how long ago the actual compensation decision was made. The claim also only needs to be filed once. As a result, companies should ensure that their employee compensation practices are fair, and all differences in pay levels are based on legitimate business purposes. Furthermore, records and notes pertaining to decisions regarding pay rates, or any other document that would be relevant to an equal pay claim, should be maintained by companies throughout the entire period of employees' employment, as well as following the employee's final paycheck for a period in excess of the applicable federal, state or local limitations period.

So, what do you need to do now?

- Audit current pay documentation practices
- Conduct periodic statistical analysis of compensation decisions
- Develop specific criteria for compensation decisions
- Train supervisors and management
- Review compensation decisions
- Revise document retention practices

Human resources business solutions

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