

Make Your List. Check it Twice. Don't Let the Government Think You've Been Naughty. . . Not Nice.

By Karen Aframe

Employers face ever increasing regulation of their workplaces and employment-related practices. As 2012 draws to an end, it is a good time to take stock of recent changes in employment laws and make sure your organization is prepared for the year ahead.

- **Down with the old. Up with the new:** New Hampshire revised the criteria for independent contractor classification. Effective August 6, 2012, employers are required to post the revised NH Department of Labor (NH DOL) Poster: "Criteria to Establish an Employee or Independent Contractor." This is also a great time to ensure that any independent contractors are properly classified.
- **Dust off your handbook:** Since there will be no change in the federal administration, we can anticipate that the National Labor Relations Board (NLRB) will continue to pursue the protection of employees' rights to engage in activities with their co-workers regarding the terms and conditions of employment. This right applies to union and non-union employees. Recently, the NLRB has found certain workplace policies that affect employee communications about workplace conditions, such as social media and confidentiality policies, to violate this right. To avoid potential unfair labor practice charges in this area, it is time to ensure that your handbook policies are compliant with the evolving law.
- **Update Your Background Search Practices:** In 2012, the EEOC issued new guidelines on how employers may use arrest and conviction records when considering applicants for employment. It is important for employers to review their application processes to ensure that applicants are not eliminated in a manner that may violate Title VII by, for example, the improper use of social media or internet searches. Employers must also implement procedures that allow for an individualized assessment of any applicant for whom criminal conviction information and arrest records are considered, as well as ensure that the background search process complies with the Fair Credit Reporting Act.
- **Review Your Employees' Exempt and Non-Exempt Status:** Now that the election is over, employers have some certainty that changes in federal employment laws and initiatives are here to stay (for at least four more years). In its first term, the Obama administration initiated a full-court press to increase the Department of Labor's enforcement of wage and hour laws. That will surely continue, so it is now time to review the status of employees who are paid on a salary to ensure that they are properly classified.
- **Begin planning for implementation of the Affordable Care Act:** Whether you are a non-profit, small business, or business with over fifty full-time employees, it is time for

your organization to begin to plan to comply with the Affordable Care Act. A great place to start is: <http://answers.healthcare.gov>.

- **Familiarize with Changes to NH's Safety Program and Keep Abreast of Future Changes:** Effective January 1, 2013, employers with fewer than 15 employees are no longer required to establish a Joint Loss Management Committee and/or submit a summary of its written safety program. Based on revisions made to RSA 281-A:64, as of January 1, 2013, New Hampshire employers with 15 or more employees at any time in the year must create a Joint Loss Management Committee and file with the NH Department of Labor a summary of its written safety program. Once the summary is filed, the revised statute only requires employers to review and update the safety program every two years, rather than file the summary on a biennial basis. The NH DOL's regulations have not yet been revised to reflect these changes to the statute, and thus, employers are advised to watch for additional guidance from the NH DOL on its implementation of this change in the filing requirement.
- **Non-Competition Agreements:** If your organization uses non-competition agreements, you must take steps to ensure that the agreement complies with the new New Hampshire law that requires an employer to: (1) provide a copy of the agreement before or at the time an offer of employment is made and (2) provide a copy of the agreement before or at the time an offer of change in job classification is made. Failure to comply with these notice provisions may result in an unenforceable agreement.
- **Non-Discrimination Policies:** In June 2012, the EEOC ruled that transgendered persons are protected by the federal law protecting employees against sex discrimination in the workplace. New Hampshire courts have also held that transexualism is a disability under New Hampshire's anti-discrimination law. As a best practice, employers should learn about workplace issues that may arise when a member of the workforce is transgendered. Such issues include dress code, restroom access, and accessibility to disability benefits.

With the Democrats returning to the White House and controlling the State House, it is a virtual certainty that the next years will be full of changes in employment laws. You do not want to get so far behind in keeping pace with the changes that you can never catch up. Now is the time to make sure that you are current so that you will be better prepared for all that is surely to come.

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