

SCHNADER HARRISON SEGAL & LEWIS LLP PRESENTS YOUR 13 LABOR & EMPLOYMENT RESOLUTIONS FOR 2013

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The world did not end last week, and so it is that time again to reflect on the year behind us and to consider what is on the horizon for the upcoming year. What resolutions will we make for 2013? Will we train for an Iron Man race or marathon? Not wait until the last minute to do our taxes? Attend more of our kids' little league games or dance recitals? Go visit grandma at least once a month?

As an employer, your resolutions undoubtedly will be influenced by the unpredictable economic and regulatory climate. Indeed, you may decide that 2013 is the year to implement more systematic measures to ensure your business or organization is in compliance with ever-changing federal and state employment laws and regulations. Schnader's Labor & Employment Practices Group encourages employers to make the following 13 resolutions that will provide a firm foundation for navigating successfully through the legal and regulatory world of 2013:

- 1. Develop a natural disaster plan (or enhance your existing plan)** to address issues such as employee pay, leave, benefits, safety and collective bargaining as well as communication with and among employees in the event of another major natural disaster like Hurricane Sandy or an earthquake.
- 2. For employers with 50 or more employees, prepare for upcoming reporting and recordkeeping deadlines and significant tax changes under the Affordable Care Act (Obamacare).** This includes providing employees with a summary of benefits and coverage and plain plan language for plan years commencing after September 22, 2012; incorporating the value of employer provided health

care coverage in employees' 2012 W-2 forms due by January 31, 2013; and providing employees by March 1, 2013 with written notice of the availability of health insurance through state exchanges and of tax credits to offset employee premium costs where employer-sponsored insurance is not provided. Other major changes under Obamacare effective January 2013 include an additional 0.9 percent payroll tax for Medicare for certain high income workers, a new \$2,500 cap on employee flexible spending accounts and the termination of an employer tax subsidy that helps pay for retirees' drug benefits. Such changes are a precursor to more significant changes expected by the fall of 2013, by which time insurance companies, states and the federal government are required to establish a system allowing individuals to purchase insurance through exchanges.

- 3. Review and update employee and applicant criminal background check policies and practices** to consider the Equal Employment Opportunity Commission's (EEOC) 2012 enforcement guidelines and to ensure compliance with new notification and reporting requirements under the Fair Credit Reporting Act, including providing employees with modified Summary of Rights forms in January 2013.
- 4. Review and update employee whistleblower and anti-retaliation policies and procedures** in view of the reported receipt by the Securities & Exchange Commission (SEC) of 3,000 formal "tips" of securities laws violations in 2012 from

(continued on page 2)

(continued from page 1)

persons in the U.S. and in nearly 50 foreign nations hoping to receive large financial bounties should the SEC successfully prosecute the companies they reported. ([See SEC's 2012 Annual Report on Dodd-Frank Whistleblower Program](#)) Moreover, at least 20 other federal laws, including the Internal Revenue Code, that regulate both public and private companies in a wide variety of businesses, plus laws of most states, also protect whistleblowers from adverse employment action and have contributed to a pronounced increase in whistleblower lawsuits brought by increasingly aggressive and specialized plaintiff advocates.

- 5. Review and update electronic communications, social networking and media policies and practices in view of significant activity by Obama appointees**, including advice memoranda and decisions published by the National Labor Relations Board in 2012 proscribing social media policies that restrict employee communication of matters of interest to coworkers and overturning discipline of both union and non-union employees for complaining on social media about working conditions, pay or other terms of employment, on grounds that they unlawfully interfere with the employees' right to "concerted activity" under Section 7 of the National Labor Relations Act.
- 6. Review compensation policies and practices for female employees to ensure compliance with the Equal Pay Act and Title VII** in view of the White House Equal Pay Task Force Report in April 2012 and EEOC initiatives signaling greater Administration focus on and increased administrative investigation and enforcement activity to address perceived violations of the act in 2013.
- 7. For employers that are federal contractors or subcontractors, prepare for final regulations concerning disabled workers and veterans from the Office of Federal Contract Compliance Programs** expected before mid-2013 that, among other things, would require federal contractors to set a 7 percent hiring goal for workers with disabilities and to establish annual hiring benchmarks

for protected veterans, both of which would impose a substantial increase in data collection, recordkeeping, recruitment, training, and policy dissemination requirements.

- 8. Review and update workplace posters to ensure compliance with existing and new state law posting requirements**, such as New Jersey's new gender equality notice.
- 9. Review worker Employee and Independent Contractor classifications to ensure that workers are classified properly under the varying standards applied by the IRS, the U.S. Department of Labor (DOL) and the agencies in your state**, in view of the DOL's continued compliance initiatives and joint efforts with state and other federal agencies, and the increasing wave of audits initiated by the IRS.
- 10. Review and update employee attendance policies and practices to ensure compliance with the Americans with Disabilities Act (ADA)** in view of the EEOC's enforcement position that policies and practices that require employees to disclose specific medical reasons for health-related absences violate the ADA.
- 11. Review worker volunteer designations and employee exempt and non-exempt classifications to ensure compliance with the Fair Labor Standards Act** in view of increased enforcement activity from the DOL on these issues and the potential impact of the "fiscal cliff" on employees' schedules, responsibilities and hours.
- 12. Review your organization's California policies and practices to ensure that they comply with a slate of new state laws that will affect both public and private employees beginning January 1, 2013**, including the mandatory preparation of written contracts for commission earning employees, expanded employee rights to inspect their personnel records within stringent time limits, strict limitations on employer inquiries into employee or applicant personal social media and obligations to provide complete and

(continued on page 3)

(continued from page 2)

accurate wage information to temporary service employees.

13. Schedule a compliance audit of your labor and employment law policies and procedures, 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 and adverse publicity.

Schnader attorneys can assist you and your organization to implement these resolutions — to identify risks and take important preventive measures — to help avoid sanctions, penalties and litigation in the New Year. We wish you a happy and proactive New Year! ♦

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