EPSTEIN BECKER GREEN | TAKE 5 VIEWS YOU CAN USE

LABOR AND EMPLOYMENT

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The first two months of the year are a good time for employers to do a quick "tech check" to make sure that they have a firm grip on some important current issues. Here are five points that you can count off on one hand, as you move forward into the new year:

1. Has Your Company Addressed The Implications Of "BYOD" To Work and "BYOT" To Work?

In the age of the iPad, the iPhone, and their non-Apple competitors, the employees who own and use such devices are increasingly viewing them as their predominant means of communication, both personal and professional. Indeed, for many employees, the distinction between "personal" and "professional" time is evaporating, as they are in constant and seemingly simultaneous communication with business, familial, and personal contacts through all manner of social media, texting, teleconferences, and video chats. This has placed increasing demands on employers to develop policies that appreciate and structure this reality.

The simple solutions of the past, such as banning personal use or personal devices, or having separate work and personal devices, ignore present reality. Companies need policies that address how one should handle the employee that demands, or the employer that wants to adopt, a "bring your own device" or "bring your own technology" to work policy -- devices which employees then use for both personal and business functions. Developing policies and procedures that will allow and govern such use, while still protecting important employer confidential information, requires sensitivity and balance. Additionally, making sure that the company has express agreements in place that will provide the employer with rights of access, inspection, and retrieval of devices post-employment necessitates clear and forward- looking contingency planning that is legally-informed, technologically-astute,

and tactically practical. Experienced counsel who is already addressing these issues with numerous clients can significantly lessen your learning curve and speed your progress.

2. Has Your Company Assessed Whether Its Internet And Intra-Net Platforms Are ADA-Compliant?

Many businesses have resorted to electronic communication through internet and intra-net platforms as an efficient and effective means of communicating with customers, job applicants, and employees. But the ease with which many can use a particular electronic communication platform is not an assurance that it is a barrier-less environment for all. And businesses and employers do have obligations in this area.

The federal Americans With Disabilities Act, as well state and local laws, requires that employees, applicants, and customers with disabilities have reasonable access to work places and places of public accommodation. What you may not realize is that, under these laws, the Department of Justice and state and local authorities require that websites and other electronic communication platforms be accessible to employees, applicants, and customers with disabilities, or that appropriate alternative means to access the information be made available. Viewed from either the employer/employee perspective or from the business/customer perspective, having your websites and electronic communication platforms assessed, and, if necessary, modified and improved, is an important undertaking. This is especially so in cases where proving widespread dissemination of policies may be key to their enforcement or value. It is also especially important for those in regulated industries, such as the pharmaceuticals/medical device and financial securities sectors, where, for example, risk disclosure requirements may mandate that notices to customers be of certain prominence and placement. Simply making available vast amounts of information on a non-ADA-compliant website may be providing an employer or business with a false sense of comfort.

3. Has Your Company Considered The Employee Privacy Implications Of Its Multi-State Or Multi-National Presence?

There is a natural inclination for an employer to wish to have and enforce a uniform set of rules for all employees. But in the area of employee privacy, this can be largely impossible for a company with multi-state or multi-national locations. That is because the data privacy and other protections afforded employees can vary significantly from jurisdiction to jurisdiction.

It is important to be sensitive to these differences as companies address each of the issues noted in this Take 5 piece. For instance, as commentators have recently noted, the European Union's General Data Protection Regulation has been proposed to replace the existing Data Protection Directive and the EU Privacy and Electronic Communications Directive. The proposed regulation, if not altered before passage, contains provisions pertaining to cross-border contacts and transactions with EU residents that can create compliance issues for those outside the EU, in their roles both as employer and as vendor. Likewise, even within the United States, differences from state to state concerning such matters as employee privacy rights, lifestyle discrimination laws, and employee monitoring require that employers think carefully before adopting a "one company/one policy" approach to these important issues.

These are matters that you should address with attorneys who understand the breadth of your business and the multi-faceted legal issues that arise from it.

4. Has Your Company Kept Up To Speed With Regard To Changes In The Law Concerning "Tech" Issues?

As technology changes, so does the law. For example, on January 9, 2012, New Jersey became the 47th state to adopt some version of the Uniform Trade Secrets Act. Similarly, there have been several recent court cases in the U.S. and overseas concerning whether an employer or employee owns LinkedIn contacts, Twitter followers, or blog content. Moreover, over the last year, the National Labor Relations Board has focused considerable attention on employee social media use and employer policies or decisions related to such use. Such developments are of more than passing interest.

Why? Because your company's forms, policies, and agreements may need to be revised to keep up with these changes. An effective way to make sure that your agreements, policies, and forms address these issues and continue to offer you the protection that you require and desire as an employer and business is to have them reviewed as part of an annual "tech check."

5. Has Your Company Ignored Many Of These "Tech" Issues Because Your Employees Do Not Need Email Or The Internet To Perform Their Jobs; Or Because Your Systems Do Not Allow For Internet Access And Your Employees Are Not Provided Devices That Allow Such Access?

While internet access may not be possible or necessary, that does not mean that such "tech" issues can be ignored. Employees can still bring smart phones or tablets to work and put them to a host of uses. For example, they can be used to record and document prohibited forms of harassment by fellow employees, or to carry it out. They can also be used to collect confidential information and transmit it beyond your workplace, or to invade the privacy of employees in washrooms or locker rooms. Or they can simply be used to goof off when one should be working. Each of these examples can present challenges for an employer that is not itself using, or providing employees with the means to use, electronic communication.

This is why it is important to remember that "not having a policy is having a policy." There may in fact be nothing wrong with a company coming to a decision not to have a separate policy on, say, social media or on, for example, camera phones in the workplace. But if that decision is the result of inattention or non-examination of relevant implications, then it is a policy choice fraught with peril. Talking through the relevant issues with competent counsel who can help you address the pros and cons of your policy choices is essential.

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