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Shumaker, Loop & Kendrick, LLP

Employment Law Checkup 2014

Business Information for Clients and Friends of Shumaker, Loop & Kendrick, LLP

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The secret to getting ahead is getting started. The secret of getting started is breaking your complex overwhelming tasks into small manageable tasks and then starting on the first one.

-Mark Twain

Each year usually starts with a lot of resolutions and good intentions that fall by the wayside, mostly for lack of a plan. One resolution of all employers should be to update their policies and practices to comply with the new employment law issues and trends which took effect over the prior year. This sounds like a complex and insurmountable task unless one follows Mr. Twain's excellent advice. To assist Shumaker, Loop & Kendrick's clients, I have broken down this task into eight manageable topics that address the most important and common employment law issues I encounter in assisting clients. Now it is just up to you to start on the first one.

If you have questions about these issues or any other employment law matter, Shumaker, Loop & Kendrick's Labor and Employment Law Group is here to assist you. You can contact Jan Pietruszka at (813) 227-2245 or jpietruszka@slk-law.com.

1. Fair Labor Standards Act

The FLSA requires the payment of minimum wage and/or overtime to non-exempt employees. The number of FLSA lawsuits filed each year continues to rise and Florida accounts for over one-third of all such lawsuits filed in the United States. As the barrage of radio ads and billboards indicate, our state is ground zero for such claims. It is vital that employers conduct a FLSA audit to ensure that they do not become a target. To help avoid liability, employers should take the following steps:

- Review your Employee Handbook to ensure that you have clearly defined policies as to timekeeping procedures, explicitly prohibiting off the clock work, addressing working during lunch breaks and providing a mechanism for reporting and correcting timekeeping and payroll errors.
- Review each employee you believe to be exempt and not entitled to overtime to ensure that you can prove that they meet the FLSA exemption requirements. Remember, just because you pay an employee a salary, does not necessarily mean they are not entitled to overtime.
- If you have tipped employees, have you provided the required notice as to the use of a tip credit and/or tip pool to such employees. Just recently, a sports bar chain settled with the Department of Labor for $8.5 million dollars because of tip pool and tip credit mistakes.

- If you utilize "unpaid" interns, review the Department of Labor's six factor test to determine if you are required to pay minimum wage and/or overtime. See the Department of Labor's publication, Fact Sheet No. 71: Internship Programs Under the Fair Labor Standards Act at www.dol.gov/whd/regs/compliance/whdfs71.pdf.
- Finally, pay attention to the news in regards to the White House's plan to increase the minimum weekly salary required for an employee to be considered exempt.

2. **Background Checks**

Many employers use background checks in conjunction with hiring. The Equal Employment Opportunity Commission, the federal agency responsible for administrating federal anti-discrimination laws, has identified the use of criminal background checks as one of its main focuses of investigation in the near future. Further, if an employer obtains a "consumer report," which may include criminal background checks, driving records, credit information and reference checks, from an outside third party, it is subject to the Fair Credit Reporting Act. If an employer utilizes background checks, it should:

- Review the EEOC's publication, Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act No. 915.002 (2012), to gain a better understanding of what the EEOC believes is required in utilizing criminal background checks and hiring. This publication can be found at www.eeoc.gov/laws/guidance/arrest_conviction.cfm.
- Establish a written policy as to the use of criminal background checks that details which applicants will be subject to criminal background checks, the methods for performing such background checks, establishing the confidentiality of any such records and incorporating the EEOC's mandated "individualized assessment" of such background checks.
- If an employer obtains background information from a third party, it should review the Federal Trade Commission's publication, Background Checks: What Employers Need to Know, to gain a better understanding of what is required to comply with the FCRA. This publication can be found at www.business.ftc.gov/documents/0487-background-checks-what-employers-need-know.
- Employers should review their background check notice and consent forms to ensure that they comply with the FCRA. For example, the FCRA requires that the notice and consent be a separate document and cannot be included on your job application form.
- Employers should review the FCRA to ensure that they are providing proper pre-adverse and post-adverse decision notices to applicants or employees who experience an adverse action because of a background check.

3. **Family Medical Leave Act**

The FMLA requires that employers with 50 or more employees provide up to 12 weeks of unpaid leave to eligible employees because of their own or their family members' medical issues, military service related issues and the birth or adoption of a child. In March 2013, the Department of Labor issued new regulations amending the FMLA. Additionally, the Department of Labor announced that it will be increasing the frequency of onsite investigations as to employers' compliance with the FMLA. If you have 50 or more employees, you should:

- Review your FMLA policies to ensure that they: define a "serious health condition;" identify the reasons an employee can take FMLA leave and the requirements to be eligible for such leave; detail an employee's notice and certification requirements; and provide the contact information for the Department of Labor.
- If you have not done so already, download and begin using the updated notice and certification forms issued by the Department of Labor in 2013. You can find these forms at www.dol.gov/whd/forms/index.htm.

- Ensure that your FMLA policy was updated to include the March 2013 amendments.
- Determine if the Supreme Court's decision regarding the Defense of Marriage Act affects the definition of "spouse" under the FMLA in the states in which you operate.
- When requesting medical certification for an employee's own medical condition, make sure to include the Genetic Information Non-Discrimination Act's safe harbor language. For this specific language, see the Miscellaneous section below.

4. **Employee Handbook**

An Employee Handbook is your first line of defense as to all employment law litigation. It also fosters a more harmonious and productive workforce as employees know the ground rules. If you have not updated your handbook in a year, it is probably out of date. Review your existing handbook as to the below issues to determine if it is time to have it updated:

- Have you amended you social media, at-will employment and confidentiality of employer investigations policies to comply with the National Labor Relation Board's recent rulings?
- Have you updated your definition of a "full time employee" and your waiting period for becoming eligible for health insurance benefits to comply with the Affordable Care Act?
- Have you updated your Family Medical Leave Act policy to comply with the March 2013 Department of Labor amended regulations?

5. **Restrictive Covenants and Confidentiality Agreements**

Non-competition, non-solicitation and confidentiality agreements help employers protect their most important assets. Many times I have to inform clients that they have little recourse as to an employee who has left and is now assisting a competitor because the employer did not take precautions beforehand. Some companies simply rely upon a confidentiality policy in their Employee Handbook. While this policy will allow you to terminate employees who breach such confidentiality, it is probably not enforceable in court to recover damages or the stolen information. Employers should:

- Evaluate their business as to the need for a confidentiality, non-solicitation or non-competition agreement.
- Review existing restrictive covenant agreements. Has your company outgrown the geographic scope of any existing non-competition agreement? Has your company expanded to other states which may not be compatible with a Florida restrictive covenant agreement? Does your restrictive covenant agreement provide for tolling during any period the employee is in breach of his/her duties?
- Does your existing confidentiality agreement cover all technology your employees may be utilizing? If employees are utilizing their own phones or computers in providing services to you, do you have a Bring Your Own Device policy (BYOD) which delineates ownership of the information on such devices and identifies what happens with it upon separation?

6. **Document Retention**

Multiple state and federal laws require that employers retain specific employment related documents even well after an employee has left your employment. Employers should establish document retention policies and procedures to comply with these laws and to ensure the documents needed to defend employment law claims are available when needed. For a free copy of an Employer Document Retention Guide, email me at jpietruszka@slk-law.com.

7. **Employment Law Posters**

Florida and federal employment laws require that employers post conspicuous notices regarding employees' rights under these laws. When is the last time that you reviewed and/or updated your employment law posters? If you are subject to an investigation by the EEOC or Department of Labor, the investigator's first request is usually to see your posters. Failure to have the required posters can result in significant fines. To determine what federal employment law posters you are required to display and obtain updated versions of them, visit www.dol.gov/elaws/poster.htm.

8. **Miscellaneous**

- Independent Contractors - Misclassification of employees as independent contractors has been a focus of investigation by federal and state agencies in the recent past. Scrutiny will continue to increase as the Affordable Care Act is implemented. Failing to provide health insurance benefits to an independent contractor because of a misclassification can lead to significant penalties. Employers should review the actual circumstances of their independent contractor relationships to ensure that they meet the requirements to be classified as such. Additionally, employers should, if not already doing so, utilize written independent contractor agreements confirming the contractor's status and detailing issues such as workers' compensation coverage, compensation and the scope of the engagement.
- Genetic Information Non-Discrimination Act – This federal law prohibits employers from making employment decisions based upon an employee's genetic information. Genetic information is defined to include an employee's family medical history. In 2013, an employer settled a lawsuit with the EEOC for $370,000.00 arising out of GINA violations. Employers should update their employee handbook to include reference to GINA in their EEO and anti-harassment policies.

  Additionally, to prevent liability arising out of the accidental receipt of family medical history, employers should include the GINA safe harbor language in their requests for medical information as to post-offer medical exams and FMLA certifications for an employee's own medical condition. The GINA safe harbor language is as follows:

  The Genetic Information Non-Discrimination Act of 2008 prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with the law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA, includes an individual's family medical history, the result of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

- Finally, if your company has grown in the last year to employ more than 15 or 50 employees, it is now subject to additional state and federal employment laws. If you are unfamiliar with these laws and their requirements, please contact me so we can set up a meeting to review your business and its new obligations.