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MANAGING WORKFORCE RISKS IN 2016: NEW LAWS, NEW TRENDS, NEW STRATEGIES

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As 2015 comes to a close and preparations begin for 2016, your business should be prepared for the following TOP 10 WORKFORCE RISKS:

1. **WAGE AND HOUR.** These lawsuits and issues continue to predominate. Wage and hour lawsuits are costly. Small mistakes in failing to pay overtime add up quickly, especially when you roll in the potential for paying damages (double the amount due) and attorneys' fees (yours and theirs if the employee wins). Audit your positions. If anyone is classified as exempt from earning overtime, review whether their current work continues to qualify them as exempt from overtime. Remember, it takes more than meeting the proper salary level to qualify as exempt. The job duties must also qualify. In addition, determine if the positions meet the new exemption guidelines expected to become effective toward the end of 2016. The new guidelines are expected to raise the salary basis requirement from $23,660 to $55,440. Beware of simple solutions found in an Internet search to work around this increase. While there are "workarounds" each alternative has complications and potential traps.

2. **INDEPENDENT CONTRACTOR.** Such arrangements are under extreme scrutiny and not just if you are Uber. The federal government as well as state governments are looking closely at all independent contractor arrangements. If the economic reality of the arrangement looks more like continuing employment, businesses are at risk for fines and fees for failing to pay payroll and other state and federal taxes. All independent contractor contracts need to be reviewed and updated, and all relationships re-examined.

3. **HANDBOOKS.** The National Labor Relations Board has flexed its muscle and held that many long-accepted Handbook provisions in non-union workplaces violate workers' basic rights under the National Labor Relations Act. Adverse job actions based on "unlawful" company policies may give rise to unfair labor practice charges with the resulting job reinstatement, back pay, and/or front pay and interest charge potential. Updating company Handbooks should be on each business's "to do" list for 2016.

4. **GENDER IDENTITY AND SEXUAL ORIENTATION**. With the U.S. Supreme Court's decisions striking down state statutes banning same-sex marriage and Section 3 of the Defense of Marriage Act, there has been pressure on Congress to amend the anti-discrimination statutes to clearly include "gender identity" and "sexual orientation" as named protected categories. Congress has not acted, but the Obama Administration has. The Department of Labor issued new rules allowing employees to take Family and Medical Leave Act leave to care for a same-sex spouse, and revised regulations relating to federal contractors to add gender identity and sexual orientation as express categories of protection. Additionally, the EEOC has explicitly held that its position is that "sex" discrimination under Title VII also includes gender identity and sexual orientation discrimination. In light of the trend, employers should consider including gender identity and sexual orientation into their non-discrimination policies.

5. **HOW TO TREAT PREGNANT EMPLOYEES?** While the U.S. Supreme Court ruled this year that pregnant employees have to be granted accommodations that are granted to other workers similar in their ability or inability to work, it did not clearly define how employers should treat pregnant employees. If a company's policy puts a significant burden on pregnant workers, the employer's legitimate non-discriminatory reasons must be strong to justify the burden. If not, an inference of discrimination is created. Some states have granted pregnant women ADA accommodation-like rights based upon pregnancy alone. If you have employees in other states, you need to become familiar with the states that have enacted these protections. The federal law is clear, however, that if a pregnant employee has a pregnancy-related impairment that qualifies as a disability (i.e., a severe but temporary medical condition), ADA accommodations must be considered. In short, employers need to remember to engage in the "interactive process" for employees presenting with any significant health issue in order to avoid disability discrimination claims.

6. **MARIJUANA.** Marijuana remains illegal under federal law, but several states allow personal use and other states allow medical use only, while others continue to ban all use consistent with federal guidelines. If you have employees working in states where marijuana is legal you need to determine whether or not the company will continue to enforce, or change, its drug policies. There are new tests available that focus more on current "impairment" and employers may want to investigate the availability of the newer testing products.

7. **AGING WORKFORCE.** The recession has kept many workers in the workforce longer than traditional "retirement" age, and many remain out of fear for their economic future. More age-based comments are giving rise to age-based claims. Early retirement programs may violate the Age Discrimination in Employment Act. Be sure to pay attention to teasing comments to older workers, and if you decide to institute "early retirement programs" have them checked for legality.

8. **BAN THE BOX.** Banning from employment applications questions about criminal history continues to be the focus of the Obama Administration as well as several state governments. If certain crimes are not statutorily a barrier to employment with your business, you may want to voluntarily consider banning the question(s) from applications in order to remove the risk of challenge on the basis of discrimination. Move the criminal history check from the application process to the post offer process and make sure you are following all of the federal requirements for conducting background checks.

9. **RELIGIOUS ACCOMMODATION.** The U.S. Supreme Court has held that an applicant can bring a Title VII discrimination claim when the employer has sufficient information to be aware of a conflict between the applicant's religious practice and a work policy. Applicants are not required to show that an employer had "actual knowledge" of the need for a Title VII accommodation in order to establish a case for failure to accommodate a religious practice. The case in issue involved the retailer Abercrombie & Fitch which denied a job to a female applicant wearing a Muslim head scarf when the woman never said she was wearing the hijab for religious reasons or requested an accommodation. In light of recent world events, heightened awareness by HR of potential religious discrimination issues is important.

10. **WELLNESS PLANS.** As insurance costs rise, employers continue to implement wellness plans where employers offer limited monetary incentives for employee participation in wellness programs as allowed by the Affordable Care Act. This year, however, it has become clear that the EEOC and the Affordable Care Act are on a collision course as the EEOC has questioned whether or not wellness programs and financial inducements violate the ADA. Efforts are under way to resolve the apparent conflict, but until then, employers are cautioned to craft their wellness plans with the conflict in mind.