

New Year's Advice for Employers

By Jeffrey W. Larroca, JD

In *INSIGHT Into Diversity*'s December 2012 issue, I offered readers a number of actions they could take to better their work environments and limit their liability in 2013. I recommended the adoption of workplace violence policies; review of state and local ordinances (too often employers focus only on federal law); an evaluation of how to treat employee activity on Facebook or other social media venues; consideration of numerous protections for end-of-year parties where alcohol is served; as well as exploration of an anti-fraternization policy. If you didn't do any of those things, no worries; you can roll them over in 2014.

Meanwhile, following is your list for the New Year.

Rinse, lather, repeat. Review state and local laws that become effective in 2014 and revise your policies and procedures accordingly. For example, a new ordinance in San Francisco is expected to be signed and become effective on Jan. 1. It grants certain employees the right to request a flexible work arrangement to accommodate their caregiving responsibilities for a child; a parent age 65 or older; or a spouse, domestic partner, parent, child, sibling, grandparent, or grandchild with a serious health condition. Also, Oregon is expanding the state Family Leave Act to cover bereavement leave in 2014, and in California, the minimum wage increases to $9 per hour effective July 1. (Ten states increased their minimum wage in 2013.) These are just a few new requirements set to become operable in 2014.

An oldie but goodie. In December 2011, I looked back on the year and noted, "Wage suits are all the rage." They have remained popular. Collect your job descriptions and have them thoroughly analyzed to ensure you are using the proper classification. Misclassification of a position can be calamitous because it represents a failure to pay overtime wages—and the statute of limitation can be as long as three years under federal law. If you doubt it, you can find online the Department of Labor's (DOL) website warning:

> In this case, the Commonwealth of Puerto Rico's Department of Corrections and Rehabilitation failed to pay approximately 4,500 employees the overtime required by the Fair Labor Standards Act (FLSA) for hours worked over 40 in a workweek, and the Department of Corrections regularly allowed employees' comp time "banks" to greatly exceed 480 hours. The back wages found due for the employees in this case are the cash amounts of the unpaid comp time accrued in excess of this limit …. The Commonwealth of Puerto Rico has agreed to pay $35,037,586 in back wages and interest to approximately 4,500 employees of the Department of Corrections and Rehabilitation.

While you may not have such a huge problem in regard to employees and fines, here's another case to consider: in 2013, the DOL also found that the San Francisco Giants failed to properly pay 74 administrative and clubhouse workers and settled a claim against the baseball franchise for $545,000. Punishment can fit all sizes.

Saying goodbye. The economy is, depending on your viewpoint, slowly recovering or lapsing into a new, sluggish phase where job creation is stagnant. No matter your view, employee separations are increasing, whether they are individual terminations or large-scale reductions in force. A percentage of such terminations will either result in administrative charges or lawsuits alleging violations of the law.

Employers should consider the use of severance pay with accompanying releases in an effort to limit such actions by former employees, and under no circumstances should they provide severance pay without requiring such a release. If an employer has a policy that provides severance to employees who are separated through no fault of their own, it should revise that policy to make severance contingent upon execution of a release. Moreover, employers must be cognizant of necessary language and information for releases of age discrimination claims under federal law.

For example, an employee released in a reduction-in-force action must be

provided statistical information and 45 days to consider the release, as well as a seven-day period to revoke and release after execution. Additionally, there are federal and some state laws that require employers to adhere to deadlines in communications with employees regarding large-scale terminations; failure to adhere to them can result in significant liability.

Consider training. California law requires employers to conduct sexual harassment training for supervisors, but an employer should not conduct such training solely because it is a legal requirement, nor, for several reasons, should such training be limited to supervisors. First, training can be critical in fending off harassment suits because employers have an affirmative defense to such claims under federal law.

Specifically, if an employer has an anti-harassment policy and an employee unreasonably fails to take advantage of that policy, an employer can be absolved of any subsequent harassment claim. But as one federal court recently concluded, merely having a policy is not enough. In that case, the court rejected the employer's defense that it had an existing anti-harassment policy and that the employee failed to use it because the employee testified that she did not read or understand it. The court concluded that the employer could not rely on the affirmative defense because "the Court finds no evidence in this record that plaintiff … or any other Woodbury employee received any training regarding the company's anti-harassment policy."

Legal defenses aside, anti-harassment training gives employers a chance to emphasize their vigilance in combating workplace harassment, and it also serves as a venue to redistribute policy and obtain certification from employees that they should always report any alleged harassment.

Moreover, such training has the added benefit of communicating to staff that inappropriate behavior, even if it doesn't rise to the level of actionable harassment, will not be tolerated. Since 2003, workplace bullying legislation that would allow workers to sue for harassment without requiring a showing of discrimination has been introduced in 25 states, according to the Society for Human Resources Management. In an era where anti-bullying efforts are beginning to be formulated into law and offensive behavior persists in all types of work environments, from football locker rooms to trading room floors, such training can set an ameliorating tone.

With these additional recommendations for your "to do" list, have a safe and healthy 2014.

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