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12 Finance Employment Issues To Watch In 2012

Law360, New York (March 05, 2012, 1:24 PM ET) -- For employers in the financial services industry, 2012 is already shaping up to be a mixed bag. While showing some signs of life, the economy continues to be a primary driver of employment law issues as it struggles to emerge from the recession.

We have compiled the following list of 12 issues and trends of particular relevance to the financial services industry — involving employment, executive compensation and benefits, and immigration law — for in-house counsel and human resources professionals to consider and steps to take during the remainder of the year.

As restructuring and downsizings continue, employers should keep an eye on certain related legal issues.

1. Older Workers Benefit Protection Act

Employers frequently provide severance to employees who have been terminated as part of a reduction in force. Many of those employers seek a release of claims from employees who receive such severance.

Employers should be aware that in order to validly release federal age discrimination claims, separation and release agreements must strictly satisfy certain requirements. For example, the Age Discrimination in Employment Act (ADEA), as amended by the Older Workers Benefit Protection Act (OWBPA), requires that employees age 40 and older receive at least 21 days — or 45 days if part of a "group" layoff — to review a separation and release agreement.

Further, once they sign, these employees must be afforded the opportunity to revoke the agreement for a period of at least seven days. The OWBPA also requires employers to provide other information, such as an age/title census for the employee's review, and a statement advising the employee to seek legal counsel.

2. Worker Adjustment Retraining and Notification Act

If layoffs are significant in terms of the numbers of employees being let go, the federal Worker Adjustment Retraining and Notification (WARN) Act and applicable state plant closing laws may come into play. Jurisdictional rules vary, depending on the law implicated, but these laws generally require that, in cases of plant closings or mass layoffs, employees must be provided with sufficient notice of termination.

Notice must also be provided to certain government officials and employee representatives, where applicable. Employers are subject to penalties, which, depending on the circumstances, could be substantial, if they fail to comply with these notice rules.

3. Independent Contractor Classification

Managers sometimes retain "consultants" or "freelancers" when headcount constraints prevent the hiring of new employees. Because the U.S.Department of Labor (DOL) has made independent contractor misclassification one of its top enforcement priorities, it is more important than ever to make sure that such workers are correctly classified.

The potential financial liability for misclassification — including the possibility of tax penalties, benefits contributions and back pay for unpaid overtime — could be significant.

In addition, when individuals who have been classified as independent contractors are released from service, they often seek, among other things, the same severance package that is offered to employees on the grounds that they, too, were employees all along. These individuals may also use the threat of litigation over the alleged misclassification as leverage.

4. Overtime Eligibility

One common effect of a reduction in force is longer working hours for the employees who remain. If such employees are incorrectly treated as exempt from overtime pay requirements under federal and/or state law, the employer may be increasing its own potential liability for unpaid overtime wages — and double damages under federal and some state laws — by enlarging the workload of existing employees.

Thus, it is important to ensure that all employees classified as exempt from overtime pay do indeed meet one of the statutory exemptions.

Equally important is ensuring that these employees receive the same weekly salary regardless of the number of hours they actually work each week, other than for certain permissible deductions, not only so that they meet the "salary basis" test but also so that the "half-time," also known as the "fluctuating work-week," method of calculating overtime — instead of the better-known time-and-a-half rate, which generally yields a much higher overtime pay calculation — may possibly be used if litigation or threatened litigation results from an alleged misclassification of the employee under one of the statutory exemptions.

Fortunately, 2012 is not only about the ramifications of reductions in force. There are also developments in the employment, benefits, executive compensation and immigration areas to keep an eye on.

5. Background Credit Checks

An increasing number of states have enacted or are considering statutes that prohibit or restrict employers from obtaining and using credit reports in making hiring decisions. Seven states have now passed such legislation — California, Connecticut, Hawaii, Illinois, Maryland, Oregon and Washington — with similar legislation pending in many other states, including New Jersey and New York, and at the federal level.

Financial services employers are sometimes, but not always, exempt under these restrictive statutes, at least with respect to certain positions. Thus, an awareness of these restrictions and their variations from state to state will be essential this year.

6. Commissions Under New York Law

Many financial services companies have employees who are paid commissions. Under New York Labor Law § 191, commission agreements must be in writing and, among other things, should address how commissions are treated upon termination of employment.

In addition, there is a new requirement under New York Labor Law § 195 to provide annual notices of compensation to employees, which also mandates attaching a commission agreement, where applicable, to such notices, reinforcing the need to memorialize this type of compensation in writing.

Recent case law in New York has confirmed that, once a commission has been earned, it cannot be forfeited, even if the employee who earned a commission is no longer employed on the date that the commission is paid. Even for employees outside New York, we suggest memorializing, in writing, how commissions are to be treated, particularly upon termination of employment.

Indeed, effective Jan. 1, 2013, written commission agreements will also be required under California law.

7. Global Codes of Conduct

Frequently, multinational companies, including financial services companies, implement a global code of conduct. In drafting such policies, one of the challenges is to avoid, where practical, providing U.S. employees with additional rights that they otherwise would not have.

Another challenge is ensuring that the policy complies with the law of each jurisdiction in which the company operates. For example, employers must ensure that any global workplace surveillance and/or privacy policy passes muster in all jurisdictions because privacy laws outside of the United States, particularly in the European Union, are quite strict.

In addition, global policies may also increase the risk that the parent company will be subject to legal exposure locally. For example, there is a trend for locally hired employees in the United States to try to involve overseas parent companies in domestic employment-related litigation.

Even if the parent company is not a party to the dispute, the more involved the parent company is in establishing personnel policies and procedures, particularly with regard to locally hired staff, the greater the likelihood that the parent will be drawn into such an employment dispute.

8. Group Health Plans

Employer sponsors of group health plans have been grappling with bringing plans into compliance with the Patient Protection and Affordable Care Act since its enactment in 2010 and assessing the impact of the law on health care costs. As a result, many employers are redesigning health benefit programs and looking for ways to decrease costs.

One of the hallmarks of health care reform is the focus on wellness and preventive care as a means to control health care costs and improve health of employees. Employers will likely continue to seek ways to implement wellness and preventive care programs in compliance with applicable laws.

9. Retirement Plans

The DOL has undertaken significant initiatives that are part of an ongoing trend toward increased disclosure, fiduciary responsibility and individual responsibility in managing retirement assets.

Two DOL transparency and disclosure initiatives are taking effect this year:

1. The 408(b)(2) disclosures that service providers must provide to responsible plan fiduciaries of pension and 401(k) plans, for example, so that the fiduciaries can evaluate the reasonableness of contracts and any conflicts of interest; effective July 1, 2012; and
2. The 404(a) "participant-level fee disclosures" to eligible participants in individual account plans, such as the 401(k), so that participants and beneficiaries are provided with a greater understanding of their rights under the plan as well as fees and expenses charged. The initial annual disclosure for calendar-year plans are due Aug. 30, 2012, and the first quarterly statement must be furnished no later than Nov. 14, 2012.

Also this year, the DOL will likely re-propose regulations expanding the definition of "fiduciary" under the Employee Retirement Income Security Act, applicable to persons who provide investment advice for a fee. This will have a significant impact on investor groups and financial advisors.

10. Executive Compensation

The U.S. Securities and Exchange Commission has set an aggressive schedule for implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act's provisions by June 2012.

Certain proposed regulations were delayed, including disclosure guidelines for pay for performance, chief executive officer pay ratios, hedging strategies and policies for recovery of executive compensation (clawbacks). The final rules on incentive compensation at financial institutions were also delayed.

We expect those guidelines to be issued by mid-2012. In addition, we have seen that the deferral of bonuses is becoming more and more commonplace. Instead of a high annual discretionary bonus, bonuses are being measured over longer periods of time and requiring not only continued employment but also the satisfaction of additional performance requirements.

Board and compensation committee involvement in the process of designing the program are becoming more standard. We are also seeing legal and risk officers involved at an earlier stage of the process. Long-term performance, discouraging inappropriate risk-taking and clawbacks of compensation, which pose their own set of legal hurdles, are key.

11. Immigration Issues in Corporate Restructuring

When undergoing a corporate restructuring, merger or acquisition, it is imperative that the affected organizations perform a complete due diligence investigation of their foreign national population prior to the closing of the deal. The due diligence process must include a full disclosure of the immigration status of the foreign national population and when that status expires.

With that information, employers can determine what steps need to be undertaken to ensure the proper transfer and integration of these individuals to the new entity. In the absence of performing this due diligence investigation, employers could lose the services of key employees and subject the organizations to various fines and penalties for failing to comply with immigration laws.

12. H-1B Visa Quotas Things Employers Should Do Now

U.S. Citizenship and Immigration Services has an established a cap of 65,000 H-1B visas that are issued to eligible applicants during the government's fiscal year. An additional 20,000 H-1B visas are made available to H-1B visa applicants holding a master's degree or higher from a U.S. university or college, bringing the total H-1B visas issued each year to 85,000.

The government's fiscal year runs from October 1 to September 30. Thus, the availability of H-1B visas has become an important consideration in the recruitment and employment of foreign nationals. Employers must be mindful of the usage of H-1B visa numbers and how that usage affects their decisions on when to hire and file applications.

In addition, the absence of available H-1B visa numbers has forced employers to make alternate plans should the candidate of their choice not make the H-1B cap.

12 Things Employers Should Do Now

- If providing employees with severance in exchange for a release of claims, ensure that federal age discrimination claims are validly waived by complying with the OWBPA.
- Prior to a layoff or plant closing, determine whether the federal WARN Act or any applicable state law may apply, and, if so, be sure to provide sufficient notice of the impending terminations.
- Perform an internal audit of your current consultants and freelancers to ensure that a proper independent contractor relationship exists, and investigate the facts before terminating the relationship with any consultant or freelancer to ensure that he/she has been correctly classified.
- Ensure that salaried employees who are classified as exempt from overtime pay are receiving the same salary, every week, regardless of the number of hours they actually work, without impermissible deductions from pay, so that the half-time or "fluctuating workweek" method of calculating overtime might be available in the event of an alleged misclassification.
- Monitor statutory developments regarding the use of credit reports in making hiring decisions, and ensure that your background check policy takes into account the state-by-state differences in this regard.
- When drafting commission agreements, to avoid paying employees who have left the company, remember to state explicitly that the commission can be earned by the employee only if the transaction is completed during the employee's employment and the employee is employed by the company on the date that the commission is paid.
- Establish a balance between global and local policies, irrespective of the parent's involvement; in other words, balance policies deemed fundamental to corporate philosophies, such as ethics policies, with those policies that are appropriately suited for local implementation, such as, perhaps, compensation policies and/or equal employment opportun/anti-harassment policies.
- Analyze existing health and welfare benefit programs to determine the level of compliance with applicable law, and consider implementing wellness programs to promote health and save on costs.
- Ensure that mechanisms are in place for the timely review and assessment of retirement plan fee disclosures and service provider contracts as well as the dissemination of information to applicable parties.
- Revisit bonus programs and clawback policies to ensure compliance with applicable law.
- Perform a complete and thorough due diligence investigation of the foreign national population prior to the closing of any mergers and acquisitions currently in process.

- Closely monitor available information regarding the usage of H-1B visas to help determine when to hire and file applications and to avoid any problems with the federally imposed cap on such visas.

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