EPSTEIN BECKER GREEN | TAKE 5 VIEWS YOU CAN USE

LABOR AND EMPLOYMENT

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As September rolls around and everyone gets back to business, you may wish to review the following company documents, policies, and procedures…

1. Employee Handbooks – Are Your Policies Up to Date?

Have you reviewed your employee handbook this year? Employee handbooks are living, breathing documents, which must be updated from time to time to comply with changing laws. Some of the policies our clients have been adding or modifying in the recent past involve:

a. ***Blogging/Social Media*** – You may wish to add (or update) a blogging/social media policy to your employee handbook. Such a policy would address various issues, including the use of social media during working time, the type of confidential company information an employee may not disclose on his or her Facebook page, and how employees must disclaim their statements on blogs if such statements could appear to be made on behalf of the company. Employers should be aware, however, that certain prohibitions included in such a policy could be deemed to be in violation of the National Labor Relations Act's rules protecting employees' rights to engage in concerted activity. The National Labor Relations Board ("NLRB") has reviewed more than 100 cases involving social media, and the results of those cases are a mixed bag. The NLRB's General Counsel published a summary of some of these recent cases, and provided guidance on how the NLRB has ruled, and will rule, on some of these tricky issues.

b. ***Cellular Phone Use*** – Does your handbook include a policy on cellular phone use? Several employers now include policies that address issues such as cellular phone use during the workday or while driving on company business.

c. ***Time Worked*** – Does your policy regarding recording working time reference

time worked remotely? If you maintain a handbook policy that addresses how employees are to record, or what is considered, "working time," does it specifically state that logging in from home and responding to e-mails via BlackBerry may be considered "working time" under applicable federal and state wage/hour laws when the time spent on such tasks is more than *de minimis*?

d. ***FMLA*** – The Family and Medical Leave Act of 1993 ("FMLA") was amended in 2008-09. Does your policy reflect these changes? For example, does it include the various types of leave available to employees for their family members' service in the military, such as caring for family members who were injured in the line of duty? (This type of leave is available for up to 26 weeks, not 12.) As a result of these amendments, as well as revised regulations interpreting the law, several definitions in the FMLA also changed, including the definition of "serious health condition." Guidance was also provided regarding what rules and restrictions are placed on employers in granting or denying FMLA leave to employees, or whether employees can or must use paid time off prior to taking unpaid leave. You should also confirm that your FMLA policy addresses all applicable state and local family/medical leave laws wherever your company does business.

e. ***GINA*** – Do all of your applicable handbook policies (and other employment-related documents) reflect the Genetic Information Nondiscrimination Act of 2008 ("GINA")(which generally prohibits discrimination on the basis of genetic information with respect to both health insurance and employment), as well as all applicable state/local anti-discrimination laws?

2. Employment Applications and Background Checks – Are You Compliant with Ever-Changing Laws?

Changing laws mean changing employment applications and background checking processes and procedures. From inclusion of "genetic information" in the application's EEO statement, to ensuring the convictions section does not run afoul of various "ban the box" rules (which prohibit employers from asking about convictions at certain points during the hiring process), employers must be careful that their employment applications do not get them into trouble.

Many employment applications ask about an applicant's criminal history. A few states and cities around the country have enacted "ban the box" laws that prohibit employers from inquiring about criminal history (including asking if the applicant has ever been convicted of any crime) during the application process. Some, such as Massachusetts, simply restrict employers from making such an inquiry at the pre-interview stage (*i.e.,* on the application). Others, such as Philadelphia, Pennsylvania, have enacted laws banning such inquiries during the entire "application process," which ends only when the employer has "accepted [the applicant's] employment application." "Ban the box" legislation has also been introduced in New York State. While many existing "ban the box" laws apply only to public employment, some apply to private employers as well.

Finally, even in states that have not "banned the box," pursuant to applicable law, employers are limited in the type of information that can be inquired about, or reviewed in connection with, an application for employment. For example, many

states prohibit employers from inquiring about (or from taking action based on) arrests; convictions that have been expunged, annulled, or erased; or even actual convictions if they do not specifically relate to the job being applied for. In any event, you should check the applicable law on these points in all jurisdictions where you hire employees to ensure that your employment applications and hiring practices are up to date.

Further, as you are likely aware, pursuant to the federal Fair Credit Reporting Act ("FCRA"), prior to using a third party to perform a background check, employers must obtain authorization from applicants. This authorization form must be a separate document, and not simply part of the employment application. Various states also have their own fair credit laws, which may include other requirements, sometimes with respect to the wording on the authorization form, whether the applicant must be given the option to obtain a copy of any background check information received by the employer, or whether additional information must be provided to the employee when the company decides to take action against the applicant (*i.e.,* a decision not to hire).

Further, as Epstein Becker Green attorney Frank Morris reported last month, the FCRA was amended to include certain rules about the use of credit information in hiring decisions. In addition, several states, such as Hawaii, Illinois, Oregon, and Washington, have enacted legislation limiting the right of employers to use an applicant's credit history in hiring decisions. Several other states have similar legislation pending, as does the United States, in the form of the Equal Employment for All Act, which was introduced in 2010, and again in 2011.

3. **Worker Classifications – Are You Properly Classifying Your Employees and Independent Contractors?**

In light of a number of aggressive tactics being pursued by the federal and many state governments to challenge companies' designations of workers as "independent contractors" rather than "employees," you should ensure that you are making such designations properly. State governments have been using various methods for enforcing proper classification of workers. For example, several states (particularly New York, which has created a multi-regulatory agency joint task force) have initiated both random and targeted audits of apparent worker misclassification. We have seen unemployment insurance claims brought not only by contractors arguing that they should have been classified as employees (and are, therefore, eligible for unemployment insurance), but also by the State of New York on behalf of "all those similarly situated" to the contractor. In other words, New York employers may find themselves faced not with one unemployment insurance proceeding based on an allegedly misclassified contractor, but two – the second being brought by the New York State Department of Labor ("NYSDOL") on behalf of other workers who are allegedly "similarly situated" to the worker claiming he/she has been misclassified.

Whichever way you may be targeted, you should be aware that both the federal and state governments have been focusing on worker misclassification – many state governments have established task forces to address the issue, as noted above with respect to New York State. The federal government has also proposed

several new laws and rules pertaining to this issue. Governments generally have a dual purpose: (i) to "protect" workers, and (ii) to recoup employment taxes and unemployment insurance premiums to increase government coffers.

So what should you do? As you may be aware, several legal standards and tests are used by the courts and applicable administrative bodies to determine whether a worker is actually an "employee" (and not a contractor). However, the level of control that a company has over the worker regarding the means and manner of the work, rather than just an interest in the finished product, will generally be the best predictor of whether he or she will be deemed an employee, if challenged.

For example:

- Is the worker required to work on the company's premises?
- Must the worker perform services during the company's business hours?
- Does the worker use the company's equipment and have a company e-mail address, phone extension, or business card?
- Can the term of the relationship be terminated immediately for poor performance or other reasons?

If the answers to the questions above are "yes," then the worker may be deemed an employee, if challenged. On the other hand, if many of the answers to the questions below are "yes," the worker probably has been properly classified as a contractor:

- Is the worker free to perform services for other companies during the term of the relationship with the company?
- Does he/she use his/her own equipment (laptop, computer software, tools, etc.)?
- Does the contractor work on his/her own schedule?
- Is the work performed off the company's premises?
- Does he/she advertise his/her services to others (whether on the Internet, in the phone book, or otherwise)?

Misclassification can be costly, so companies are urged to review their worker classifications at regular intervals.

4. **Employee Benefits – Have You Reviewed Your Employee Benefit Plans?**

The regulatory landscape for employee benefit plans is changing quickly, with new guidance being issued nearly every month. Indeed, it is becoming more and more difficult for employers to keep up with all of these regulatory changes. Below is a list of some of the items employers may wish to review in light of such changes:

a. ***Group Health Plans*** –

I. Many employers are reviewing the terms and operation of their group health plans to determine whether the plan continues to be a

"grandfathered plan" within the meaning of health care reform.

II. Federal agencies have issued new guidance that applies to non-grandfathered group health plans. The new guidance includes new claims and appeals procedures that affect non-grandfathered group health plans, particularly self-insured plans, generally effective for plan years on and after January 1, 2012. Significant new guidance was issued expanding the definition of "women's preventive care," which non-grandfathered plans must provide without cost sharing, effective for plan years beginning on or after August 1, 2012; the expanded definition includes, among other things, contraceptives and well women visits.

III. In addition, the federal agencies very recently issued proposed regulations on uniform benefit summaries to be provided to participants, with forms anticipated to be available in 2012.

b. ***Wellness Programs*** – Many employers have been reviewing their wellness programs for compliance with Health Insurance Portability and Accountability Act ("HIPAA"), the Americans with Disabilities Act, and GINA.

c. ***Cafeteria Plans*** – Employers have been continuing to review their cafeteria plan documentation for regulatory compliance, including the limits on reimbursement under flexible spending accounts for over-the-counter drugs and HIPAA disclosures.

d. ***Pension Plans*** – Pension plan sponsors have been preparing for the new requirements on fee disclosures. Service providers are required to provide pension plans with information about the service provider's fees; this requirement has been delayed until April 1, 2012. The new fee disclosure requirements also require pension plans to provide disclosures on fees to participants ("participant level fee disclosures"), which requirement is delayed to correspond to the service provider fee disclosure requirements. Initial annual notices for participant level fee disclosures must be distributed by May 31, 2012, for plan years beginning on or after Nov. 1, 2011, through April 1, 2012. Quarterly notices for participant level fee disclosures must be distributed within 45 days after the end of the quarter in which the initial annual notices were required, *i.e.,* for calendar year plans by August 14, 2012.

e. ***Domestic Partner Rules*** – Effective July 24, 2011, New York legalized same-sex marriages. Many New York plan sponsors are considering whether, and to what extent, employee benefits may be offered to same-sex spouses.

5. 195.1 Notices to All New York Employees – Are You Ready?

If you have employees in New York, will you be in compliance with Labor Law Section 195.1's new notice requirements? Section 195.1 requires all New York employers to provide written notice to new employees of their pay rate and pay dates, among other information. If you have employees in New York, you are likely aware of the revised notice requirements for *new* employees, but are you aware of the requirement that, between January 1 and February 1 of each year (starting in 2012), employers must provide written notices to *all* New York employees?

Importantly, such notices must be provided both in English and in the "primary language" of the employee (if that primary language is one of the languages in which the NYSDOL has prepared such dual-language forms). Currently, the NYSDOL has prepared dual-language forms in Spanish, Chinese, and Korean, and intends to prepare such forms in Russian, Polish, and Haitian-Creole. As such, New York employers will need to discern the "primary language" of all New York employees prior to issuing such notices.

We recommend that any such "primary language" inquiry include statements that it is being made pursuant to New York law, and that the information provided will be used solely for the purpose of providing the required notices (and will not be used for any other purpose in connection with the employee's employment). If possible, employers should utilize human resources or payroll employees without hiring authority to be the repository of this information, so that decision makers will not have access to it.

About Epstein Becker Green

Epstein Becker & Green, P.C., founded in 1973, is a national law firm with approximately 300 lawyers practicing in 10 offices, in Atlanta, Boston, Chicago, Houston, Los Angeles, New York, Newark, San Francisco, Stamford, and Washington, D.C. The Firm is uncompromising in its pursuit of legal excellence and client service in its areas of practice: Health Care and Life Sciences, Labor and Employment, Litigation, Corporate Services, and Employee Benefits. Epstein Becker Green was founded to serve the health care industry and has been at the forefront of health care legal developments since 1973. The Firm is also proud to be a trusted advisor to clients in the financial services and hospitality industries, among others, representing entities from startups to Fortune 100 companies. Our commitment to these practices and industries reflects the founders' belief in focused proficiency paired with seasoned experience.