This issue of *Take 5*, "An Employer's 'Top 5' Action Items for 2014," was written by **Frank C. Morris, Jr**., a Member of the Firm in Epstein Becker Green's Washington, DC office.

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It's December, and human resources professionals and law departments are reflecting on the issues addressed in 2013 and giving thanks for incident-free holiday parties. But the big question is this: What issues should get priority attention for 2014 as part of a proactive approach to workplace issues and limiting potential employment and labor law claims? This month's *Take 5* provides a "Top 5" list of action items to maximize the use of your time and resources for optimum results in 2014.

1. Consider Whether Your Organization Should Adopt Mandatory Arbitration Agreements and Seek to Bar Class/Collective Actions in 2014

Over recent years, employer use of mandatory arbitration clauses coupled with class action waivers has been a recurring topic in the courts, before the National Labor Relations Board ("NLRB"), and in Congress. In a series of decisions, including *CompuCredit Corp. v. Greenwood*, *Nitro Lift v. Howard*, *American Express v. Italian Colors Restaurants,* and *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court generally endorsed agreements in various contexts that require the use of arbitration, versus resorting to the courts, as the exclusive forum for the resolution of disputes (including statutory claims) under an agreement. And, in *American Express,* the Supreme Court enforced an arbitration agreement that included a class action waiver, relying on the Federal Arbitration Act ("FAA") despite the fact that the costs of an individual arbitration would likely exceed any potential individual recovery.

On the other side of the fence, in 2012, the NLRB ruled in *D.R. Horton* that employer mandatory arbitration agreements with class action waivers allegedly chill employees'

right to engage in protected concerted activity under Section 7 of the National Labor Relations Act ("NLRA") and thus are impermissible. D.R. Horton appealed that decision to the U.S. Court of Appeals for the Fifth Circuit. In a 2-1 decision issued on December 3, 2013, the Fifth Circuit reversed the NLRB's ruling and found that the NLRB had failed to give proper weight to the FAA, which generally sanctions the use of arbitration. The Fifth Circuit did, however, agree with the NLRB on a technical but important point, namely that arbitration agreements cannot bar employees from filing charges with the NLRB. The NLRB has not yet indicated whether it will seek Supreme Court review of *D.R. Horton* or choose to litigate the issue in other circuits and hope for a different result.

While the legal landscape is not completely free of doubt in other circuits as to whether mandatory arbitration agreements with class action waivers are permissible, employers may now choose to consider carefully whether such agreements make sense for their particular situations. Note, however, that certain employers may not require mandatory pre-dispute arbitration agreements because of legislation affecting particular businesses. Thus, certain financial services firms are barred under the Dodd-Frank Wall Street Reform and Consumer Protection Act from requiring employees to sign such agreements. Similarly, the Franken Amendment to the Fiscal Year 2010 Department of Defense Appropriations Act bars certain defense contractors from requiring such agreements as to Title VII of the Civil Rights Act of 1964 and certain tort claims.

For the majority of employers that are not barred from requiring employees to execute mandatory pre-dispute arbitration clauses and class/collective action waivers, here are some key pros and cons to consider:

Potential Pros

- Potential barring of class actions for wage hour, discrimination, and other labor and employment claims, thereby significantly reducing potential exposure
- Generally a more expeditious resolution of employment claims
- Likely reduced costs for litigation, including discovery
- Less adverse publicity due to a lack of public record court filings and generally private arbitral hearings with decisions only published by consent
- Reduced claims as plaintiffs' attorneys have less incentive to file when class/collective claims are not available
- Ability to couple a mandatory arbitration procedure with a prior mediation requirement
- Lesser risks of a runaway jury verdict
- Limited grounds for judicial review (a pro or a con depending on the arbitrator's ruling)

Potential Cons

- There is litigation uncertainty as *D.R. Horton* is binding only in the Fifth Circuit (although several other courts including the Second Circuit in *Sutherland v. Ernst & Young LLP*, also have rejected the NLRB's *D.R. Horton* decision)
- Arbitration can be costly as arbitrators are paid by the employer, and there may be forum fees
- Arbitrators may be less likely to grant a dispositive legal motion or to enforce procedural rules
- Arbitrators will generally permit more hearsay and not limit cases as a judge might
- Arbitrators may have a tendency to try to "split the baby"
- Employees may pursue some claims because employers generally cannot require employees to pay more for an arbitration than the equivalent of court filing fees
- There are limited grounds for court review, as the Supreme Court held in June 2013 in *Oxford Health Plans v. Sutter*
- Drafting and implementing an arbitration and/or dispute resolution program and class action waivers must be carefully done to avoid various potential pitfalls (including barring the filing of NLRB charges)

In short, the New Year and new legal developments may make this an apt time to consider whether a mandatory arbitration/mediation program and class/collective action waivers would make sense for your organization.

2. Enhance the Accessibility of Your Organization's Website to Individuals with Disabilities

Virtually all for-profit and not-for-profit entities rely on their website as a key adjunct for their business activities and customer or client transactions. It is therefore not surprising that litigation may result if such websites are not accessible to individuals with disabilities, such as vision or hearing impairments. This point was forcefully driven home on November 25, 2013, when the Civil Rights Division of the U.S. Department of Justice ("DOJ") intervened in a lawsuit against H&R Block's Tax Preparation website that was originally filed by the National Federation of the Blind and other plaintiffs.

Title III of the Americans with Disabilities Act ("ADA") provides that a public accommodation—which would include most businesses and nonprofits—may not prevent individuals with disabilities from "the opportunity . . . to participate in or benefit from the goods, services, facilities, privileges, advantages or accommodations" of a covered entity. Discrimination includes a "failure to make reasonable modifications in

policies, practices or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities."

The DOJ's press release in the H&R Block website case notes that "many individuals with disabilities," including individuals "who are blind, deaf or have physical disabilities with an impact on manual dexterity, use computers and the Internet with the help of assistive technologies." DOJ points to such technologies as screen reader software, which makes audible information otherwise presented on a computer screen; captioning, which translates video narration and sound into text; and keyboard navigation rather than mouse-based navigation for individuals with visual, hearing, or manual dexterity disabilities. Such technologies are reflected in guidelines called the Web Content Accessibility Guidelines ("WCAG") 2.0 for making website content accessible to individuals with disabilities.

DOJ says that its participation in this lawsuit, like others, is warranted because, as noted in the press release, inaccessible websites "deny persons with disabilities access to basic goods and services that people without disabilities take advantage of every day." Vigorous advocacy groups for the disabled have also pursued lawsuits challenging allegedly inaccessible websites for appointment scheduling, health care records, treatment follow-up, the purchase of goods and services, and other purposes. DOJ has also promulgated an Advance Notice of Proposed Rulemaking to implement Titles II and III of the ADA to establish requirements for making goods and services "offered by public accommodations via the Internet, specifically at sites on the World Wide Web (Web) accessible to individuals with disabilities."

Thus, prudent businesses should consider taking steps in 2014 to enhance the accessibility of their websites to individuals with disabilities to avoid both litigation and adverse publicity.

3. Ensure That Proper Exempt/Nonexempt and Independent Contractor/Employee Determinations and Updated Job Descriptions Are in Place in 2014

Never has the potential peril for misclassification of individuals as independent contractors or employees as exempt been greater. As each level of government tries to ferret out every possible dollar of potential tax revenue, a target of choice has become the alleged employer misclassification of individuals as independent contractors because of the reduced payroll taxes from independent contractors versus employees. Employer problems in this area are compounded by differences between the Internal Revenue Service ("IRS"), U.S. Department of Labor ("DOL"), and Equal Employment Opportunity Commission tests for independent contractors' status. The plaintiffs' bar in recent years has pursued class and collective misclassification claims under the Fair Labor Standards Act ("FLSA") and state and local wage hour laws as proverbial pots of gold. The potential stakes will rise in 2014 as many jurisdictions raise their minimum wages well above the federal FLSA $7.25 per hour level. For example, Montgomery

and Prince George's counties in Maryland are going to $11.50 per hour, and Washington, D.C., and California have or are significantly raising their levels. Voters in a referendum raised the minimum wage in an area around the Seattle-Tacoma International Airport to $15 per hour. And, of course, there is a national campaign focused on fast food restaurants to raise the minimum wage to $15 per hour.

A new threat to employers from misclassification arises from the Affordable Care Act ("ACA"). An individual misclassified as an independent contractor could bring a claim against, as well as trigger an ACA penalty for, an employer not offering essential health care coverage if the person was ultimately held to be an employee. The penalty for failure to provide minimum essential health benefits is equal to the number of full-time employees times $166.66 per month for every employee after the first 30 employees. Any termination of the "contractor" after such a claim of misclassification could also trigger a retaliation claim under the ACA's broad retaliation provision, Section 1558. The IRS and DOL have advised that a focus of their audit and enforcement activities will be to identify misclassified workers. Thus, this aspect of the ACA adds to the already broad tax and wage-hour exposure for the misclassification of employees as independent contractors.

In addition, it is also being argued that if an applicable large employer fails to offer coverage to individuals who are held to be employees rather than contractors, they may be liable for the medical claims of those individuals who did not have coverage. If this position is adopted, an employer could face massive bills if such an individual has, for example, a catastrophic accident or serious illness.

The burgeoning number of disability discrimination claims since the enactment of the American with Disabilities Amendments Act is also relevant. Just as a job description may be critical evidence in proving that an employee was properly classified as exempt, it may also be critical evidence in showing the essential functions of a job and helping to establish whether an employee or applicant could perform them.

In light of the potential wage hour, tax, ACA, and ADA exposure, one potential high-priority objective for human resources leadership in 2014 is to undertake a review of current independent contractors and to make sure that such individuals actually fit the multi-factor test to qualify as independent contractors. This process should include a review of key contractual provisions that support independent contractor status as well as those to avoid as inconsistent with independent contractor status.

Similarly, to the extent there are employees classified as exempt, where there may be questions as to the propriety of that classification, a New Year review of whether such employees actually fit within the executive, administrative, professional, outside sales, computer professional, or other FLSA exemptions is well warranted. Part of that review should involve assessing whether a position's job description reflects duties that qualify for an exemption and, when appropriate, revising the description or the classification. In addition, assuring that the essential functions of the position, including items like attendance and ability to communicate, when appropriate, are documented in the job

description is necessary. This effort can mean the difference between success and failure on a disability claim, especially an intellectual disability claim. A strategic point is that performing a review of classification issues and revisions of job descriptions under the direction of counsel for the purpose of seeking and providing legal advice will create the best basis for assertion of the attorney-client privilege to documents created in the review process.

4. Update Confidentiality and Non-Compete Agreements to Better Protect Intellectual Property and Human Capital Assets in a High-Technology, BYOD, Mobile World

As we approach 2014, employers increasingly face employees who seek to go to work for competitors or to start their own similar business. Given the proliferation of employers utilizing BYOD (Bring Your Own Device) policies, the ubiquitous presence of high-resolution cameras on smart phones and flash drives and other small memory devices, questions abound as to how to protect an organization's commercially valuable information and prevent unfair competition in this ever-evolving high-tech world. Conceptually, the answers are the same as before: confidentiality, non-compete, and non-solicitation agreements. But, to be effective in 2014, these can't be the agreements of your grandparents or even your parents. They must be adapted to both evolving legal standards and changing technology to provide enforceable protections.

Non-compete and confidentiality agreements are employment agreements that will be governed by the vagaries of state laws. This means the first principle is that a multistate employer needs to draft agreements that will be enforceable in the states where the employer operates, recognizing that one-size agreements really fit no one and offer little protection.

Key points to consider to create enforceable and effective non-competes that will protect your organization from unfair competition in 2014 and beyond, include, among others, the following:

- Length of restriction
    - Different periods depending on type, job, and level of employee
    - Reserving the right to shorten or lengthen within 10 days of the employees' termination
- Scope of restriction
    - Only consistent with legitimate business interests
    - Consistent with the employee's duties for your organization
    - More narrowly tailored, greater likelihood of enforcement
- Geographic Scope

- Only consistent with legitimate business interests
- Again, consistent with the scope of the employee's duties for your organization
- Broader the area, harder to enforce

- State law statutory limitations, e.g.,

  - Florida Statutes Anno. §542.33 (sets forth presumptively reasonable and unreasonable time periods for various types of restrictions)
  - Oregon Revised Statute §653.295 (limits non-competes based on various factors)
  - California Business and Professional Code §16600 *et seq.* (generally, non-competes and non-solicits of customers are impermissible)

- Tolling period of restrictive covenant during actual or threatened breach

- Assignability of agreements with restrictive covenants

  - Such clauses are usually helpful in sale or merger situations
  - Without them, critical human capital may be lost

- Liquidated damage provisions

  - Do liquidated damage provisions preclude injunctive relief to enforce a restrictive covenant?

- Choice of law provisions

  - Can be critical to securing enforcement

- Choice of forum provisions

  - Can be tactically important

- Waiver of need for bonds in connection with injunctive relief

- Blue Penciling

  - Provide that, if a court finds a provision of an agreement overbroad and enforceable, the employer will redraft and the employee is obligated to consent (this may work in states where the court will not blue pencil)
  - Provide that a court is expressly authorized to "blue pencil" or revise an overbroad provision (only effective in some states)

- Is continued employment sufficient consideration for a non-compete?
- Requiring an accounting of and return of confidential information at termination

Careful attention to these items and related issues will provide employers with non-competes and non-solicits with the best prospects for successful enforcement.

Confidentiality and Non-Disclosure Agreements

An employer will have a very hard time justifying a non-compete for low-level employees. But even low-level employees can abscond with an employer's trade secrets or confidential and commercially valuable information, especially given today's technology. The upshot is that potentially all employees may be asked to execute appropriate confidentiality agreements. But as with mandatory arbitration agreements and class action waivers, the NLRB has intruded into this area, even as to union-free employers. In *Flex Frac Logistics* (2012), the NLRB held that an employer may not bar non-manager or supervisory employees from disclosing "company information" if the term can be interpreted to include information regarding employers' wages, discipline, or performance or customer information and "personal information and documents." The NLRB also claims that employer bans on discussing "jobs, company business or work projects" may chill protected concerted activity under the NLRA. An NLRB Administrative Law Judge reached similar conclusions in *Quicken Loans, Inc.* (Jan. 8, 2013). While the courts may well reject the NLRB's holdings in *Flex Frac Logistics* and *Quicken Loans* as the Fifth Circuit did in *D.R. Horton* regarding class action waivers, for now, employers should attempt to draft confidentiality agreements to try and avoid the NLRB problem. Key points to consider in drafting lawful confidentiality agreements include, among others, the following:

- Avoid all-inclusive overbroad language
    - Don't try to bar all discussions of terms and conditions of employment, including wage and benefits and employee contact information
- Use appropriate disclaimers and examples in the policy to demonstrate that it is not intended to restrict the exercise of NLRA Section 7 rights
- Consider including exceptions to clarify what is not covered
    - For example, communications with third parties such as attorneys, union representatives, tax advisors, and accountants are not covered

    - Clarify that activity protected by NLRA Section 7, such as discussions of terms and conditions of employment, is not prohibited

- Be aware that companies may distinguish between supervisors and management and non-management as only the latter is covered by the NLRA

- Avoid blanket policies against employees criticizing or disparaging the employer or management and instead use carefully tailored ones

Issues Arising in Hiring a Competitor's Employee

Finally, remember that practical steps can be taken when hiring from a competitor to avoid or minimize potential liability for contractual, common law, and statutory claims. Ask a potential new hire if he/she is bound by restrictive covenants or confidentiality agreements with prior employers. Such commitments might be hidden in option or incentive compensation agreements as well as in standalone agreements. Have an expert review any restrictive covenant of a prospective hire as to the likelihood that it is enforceable. Assess whether the candidate could adhere to any restrictions and still perform the essential functions of the position you might offer. Consider whether it is appropriate for the candidate to seek a waiver of restrictions but understand that this is his/her choice. Evaluate if you could park the candidate "on the bench" with other duties for the duration of the restricted period. Don't imply that you will indemnify the candidate in the event of a legal challenge by the former employer unless you are prepared to do so. And finally, if the employee is to be given an offer, have him/her certify in writing that he/she has not taken or given to your organization any confidential or proprietary information of any prior employer.

Following the above guidance should provide your organization with confidentiality and non-compete agreements that have the greatest likelihood of being enforced while also providing maximum protection against claims by a new employee's former employer. In today's highly competitive world, it is well worth the effort to maximize protection against unfair competition and disclosure of the proprietary business information that gives your organization a commercial advantage or competitive edge—and carefully tailored agreements can help you do this.

5. Consider Key Employer ACA Issues for 2014

As of January 1, 2014, employers should review their compliance with the ever-evolving requirements of the ACA. The well-publicized delay of the "pay or play" employer mandate, while helpful to employers, did not eliminate many compliance issues for employers. Among key issues for employers to consider:

- Create and distribute to employees SBCs (Summaries of Benefits and Coverage) in 2014 using an updated template from the DOL

- Report minimum value calculations, which are necessary for employer-sponsored health plans for the 2014 plan year, in written notices about the health insurance exchanges (exchanges), which were due by October 1, 2013, as well as in SBCs to be provided during 2014 annual enrollment

- Confirm if your organization is an applicable large employer

    - This will include a determination of whether the employees of "related entities" must be counted to determine applicable large employer status under the test in Section 414 of the Internal Revenue Code

- Reexamine the facts around individuals classified as independent contractors; as noted in *Take 5* item #3 above, both IRS and DOL have made the misclassification issue a focus of their audit and enforcement plans and liabilities for misclassification can be significant

- Review any leased or temporary employee agreements; entities obtaining workers from temporary and leasing agencies could be found to be co-employers with the agencies, and the consequence would be joint and several liability for ACA penalties as of 2015

    - Treasury regulations also provide that an applicable large employer is subject to ACA penalties for workers who are deemed to be "common law" employees under IRS tests

- For insured plans, seek a certification, preferably with an indemnification provision, that a plan your business secures is ACA-compliant for 2014

- Review employer-sponsored plans

    - Eliminate pre-existing condition limitations
    - Eliminate annual caps on essential health benefits
    - Assure that the plan provides essential health benefits
    - Ensure that the plan offers coverage for adult children to age 26
    - Assure that waiting periods don't exceed 90 days
    - Confirm that out-of-pocket limitations applicable to both insured and self-insured non-grandfathered plans do not exceed $6,350 for employee-only coverage and $12,700 for family coverage
    - Assure that 2013 W-2 reporting will provide ACA-required information

- Consider current steps to avoid January 1, 2018, "Cadillac" tax liability

- Remember, on January 1, 2018, a 40-percent non-deductible excise tax will be imposed on plans where the combined employer and employee costs exceed $10,200 for employee-only coverage and $27,500 for family coverage; it is estimated that 60 percent of all large employer plans would already exceed these thresholds even without considering cost increases between now and 2018
  - Consider taking advantage of the more generous incentives available under ACA Wellness Programs regulations and the potential long-term reductions in health care costs that they can provide while improving the health, attendance, and productivity of employees (but pay close attention to complying with the Wellness regulations)
  - Consider value-based purchasing and securing higher-quality but lower-cost benefit plans or providers
  - Consider the use of on-site clinics; perhaps set them up with other employers in the area or through industry groups

- Be cautious not to take adverse action without good justification against any employees who receive a premium subsidy or who complain about implementation of an employer-sponsored plan to avoid claims under the broad retaliation provisions of Section 1558 of the ACA

Employer attention to these issues is essential to avoid liability under the employer mandate commencing in 2015 and to prevent ACA whistleblower claims in 2014 and beyond. The plethora of ACA regulations that will continue to be issued by the Treasury Department, IRS, and DOL will add new challenges to employer compliance with the ACA in 2014. Finally, now is the time to take actions to avoid the Cadillac tax in 2018.

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