Workplace Issues: Predictions and Resolutions for the New Year

In our judgment, 2016 will be one of the most dynamic we can recall concerning workplace issues. Combining a tumultuous election cycle with regulatory agencies on steroids as President Obama’s term comes to an end, employers may expect the following:

1. Aggressive OSHA enforcement. Fines have increased. Notorious workplace violence incidents raise questions about employer actions and plans to identify potential workplace violence risks and training employees on how to handle such risks. Be sure your training recognizes and addresses the four main categories of workplace violence:
   (1) Criminal—where the perpetrator has no business relationship with the employer or victim (e.g., a robbery of a retail store);
   (2) Customer—where the perpetrator is a customer who becomes threatening in the course of the business relationship;
   (3) Co-worker—where the perpetrator is a current or former employee;
   (4) Domestic Violence—where the perpetrator has no business relationship with the employer and is motivated to harm or threaten the victim based on their personal or familial relationship.

2. The National Labor Relations Board will issue a decision expanding the union organizing rights of temporary employees. Temporary employees are temporary for a reason, and may find that their inability to secure regular employment status makes unionization an attractive alternative.

3. The U.S. Department of Labor will substantially increase the salary threshold for exempt status, but is likely to permit employers to include non-discretionary bonuses in that calculation. The attention focused on Wage and Hour issues—exemptions, the “fight for $15”—has increased employees’ overall awareness regarding Wage and Hour compliance. Wage and Hour litigation will continue to increase; other employment
related litigation has declined. Conduct your own Wage and Hour audit, with particular focus on exemptions and proper compensation for meal and break time.

4. The EEOC will become more aggressive, as it was roundly criticized for finding reasonable cause in only 2.9% of all charges filed last year. Expect more aggressive and more thorough investigations.

5. Pregnancy discrimination will be a prime area of EEOC focus. This includes adverse actions taken at any time during an employee’s pregnancy or after an employee’s return from pregnancy, leave for pregnancy related reasons if an employee does not qualify for FMLA leave and adverse compensation or promotion decisions which allegedly relate to pregnancy.

6. Unions will increase their organizing efforts at micro bargaining units. For example, rather than trying to organize 1,800 employees at Volkswagen’s facility in Chattanooga, Tennessee, the UAW organized 170 employees who were classified as maintenance. The smaller the proposed bargaining unit, the greater the likelihood for union success. Union petitions for elections have increased by about 20% compared to last year at this time. We expect more union organizing to be directed toward factual units—to use a baseball analogy, unions will try to hit singles rather than homeruns and thus strike out less. A higher percentage of employment lawsuits go to trial than any other civil litigation.

This trend will increase, particularly at the federal court level, as we are about to begin the eighth year of President Obama’s authority to appoint federal district and appellate court judges. The transition of the Judiciary endures well beyond the end of any President’s term.

We will, of course, remain vigilant and not only share with you “what's happening,” but also provide our assessment of what we think will happen so that we can work with you to develop a strategy to avoid the storm cells and end up with a smooth landing.

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