

New Year, New Policy Challenges

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By Steve Taylor

Revising HR policies and employee handbooks for 2011 is critically important, according to employee relations experts, especially because many issues associated with the interpretation and implementation of key employment law regulations are not always clear.

There are several issues that might challenge human resource managers as they strive to keep employees and managers informed of appropriate policies and procedures during 2011.

Health Care Reform

The Patient Protection and Affordable Care Act (PPACA) of 2010 will have “more impact each year through 2014,” said lawyer L. James Juliano of Nicola, Gudbranson & Cooper in Cleveland. “Employers need to make sure provisions in their policies and manuals comply.”

Manuals might have to be rewritten more than once if congressional Republicans change the PPACA. Moreover, more than 20 state governments have mounted legal challenges to the federal plan and additional states might follow.

In addition, the PPACA’s provisions might create “significant employee relations issues,” warned attorney Cheryl Behymer of Fisher & Phillips in Columbia, S.C. “The savvy employer will be sure it is providing good information to its employees to prevent unions from trying to use this as an issue.”

Wage and Hour Rules

Long-standing laws can be as troublesome as new laws when it comes to informing managers and employees about what can and cannot be done.

“We’re getting lots of requests for Fair Labor Standards Act reviews and state wage and hour standards reviews,” said Mark Krusec, vice president of client services for AlphaStaff, an HR outsourcing firm based in Fort Lauderdale.

One reason for this high level of company concern: The U.S. Department of Labor (DOL) hired hundreds of new compliance officers in 2010 and is stepping up pursuit of alleged Fair Labor Standards Act (FLSA) violations.

Attorney Beth Schroeder of Silver and Freedman in Los Angeles said, “We’re seeing a growing trend for class-action suits, misclassification cases and challenges to off-the-clock work.”

Behymer said that in 2010 the DOL issued a work hours calendar in English and Spanish that explains FLSA rights and encourages employees to record their starting and stopping times, meals, and breaks—topics often covered in employee handbooks. The calendar also “tells the employees the information they should collect to file a complaint,” Behymer added.

HR professionals must be vigilant “not just about what employees are expected to be doing, but what they are actually doing,” Schroeder said.

FMLA and ADA

Behymer predicted that the DOL will propose new coverage for military families and some veterans under the amended Family and Medical Leave Act (FMLA). “Once the new regulations are finalized,” she said, employers’ “FMLA policies will likely need to be amended again to comply with any changes.”

Jacksonville, Fla.-based attorney Heather Owen of Constangy, Brooks & Smith said **amendments to the Americans with Disabilities Act (ADA)**, regulations for which are expected to be unveiled sometime in 2011, have increased the number of employees who might be considered disabled. And she noted that leave time can be a reasonable accommodation. Consequently, she said, employers “must have well-drafted leave policies advising employees of their rights and outlining the required procedures for obtaining leaves of absence.”

Other Issues

Social networking by employees concerns many HR managers—and should—according to experts. “In the handbook, what you say about that is a critical, critical issue,” noted attorney Michael Miller of Eckert Seamans Cherin & Mellott in Harrisburg, Pa. Here’s why: In 2010, the National Labor Relations Board (NLRB) accused a company of firing a worker illegally for criticizing her boss on Facebook. The case “has to do specifically with what the employee manual said about private postings and whether it chilled individual speech,” he explained. Miller advised companies to focus social networking rules on comments that hurt business or community standing, rather than telling employees that they can never be critical of the company.

He advised similar caution with rules about employee text messaging and e-mails.

Hiring procedures, especially those that address the use of the Internet and other tools used for investigating applicants, also must be crafted carefully to minimize legal risk. “There are things that can be found on Facebook that are not necessarily something a recruiter can see because they’re not job-relevant and could have a disparate impact” on members of a protected class, according to Todd Owens, general manager of TalentWise, an employment screening firm in Bothell, Wash. “Religion, sexual orientation, age ... whether the information is gained intentionally or unintentionally ... could be used against” companies in an equal employment opportunity case, he said.

Background checks that cover applicants’ credit ratings are under particular scrutiny. Hawaii, Illinois, Oregon and Washington state have passed laws to restrict employment credit checks. There is speculation that the U.S. Equal Employment Opportunity Commission might impose restrictions on the use of credit reports in hiring. “If you’re going to use background checks, including credit reports, to screen job applicants, you need to be very careful to make sure the information is relevant to the job they’ll be performing,” Owens advised.

Lastly, as **SHRM reported previously**, if a proposed NLRB rule takes effect, employers will have to post notices and otherwise inform employees of their rights under the National Labor Relations Act.

Audit HR Policies and Employee Handbooks

With such complex legal changes in the offing, “Employers right now are nuts if they don’t

go through a self-audit with someone,” said Brooke Duncan of the New Orleans law firm Adams and Reese, to ensure that policies and handbook language are current. “The regulations are not terribly intuitive.”

If a company doesn’t have lawyers in-house, attorney and faculty member Robert Bigelow of the online Capella University School of Business and Technology advised, HR professionals should use outside counsel for help with conducting an audit and implementing strategies and revision of these documents.

Above all, policies and handbooks should be company-specific. “It’s a mistake to use a form handbook they download off the Internet,” Miller said. “I want clients to express what they think they do ... what’s critical for them.”

Steve Taylor is a freelance writer based in Arlington, Va.

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