

Have You Integrated 2005 Federal Employment Law Developments Into Your HR Practices?

As we start a new year it's probably a good time to review developments in 2005 and make sure that you've integrated applicable ones into your policies and practices. The following information highlights a few selected federal developments. Remember to check developments in your state law as well.

FAIR LABOR STANDARDS ACT (FLSA)

Donning And Doffing Equipment And Clothing

It's been settled for 50 years that time spent putting on essential clothing and equipment necessary to a job and taking it off is considered paid working time. The U.S. Supreme Court provided further clarification and ruled that donning "integral and indispensable" gear starts the workday as it's the first principal work activity, and therefore walking to the work area and walking back to the locker room at the end of the shift are also compensable time. Time waiting to "doff" gear also must be paid.

DOL Opinion Letters

Department of Labor (DOL) Opinion Letters are official rulings and interpretations and provide good faith defenses for organizations relying upon them. A few opinion letters are listed below.

- A. Required gratuities cannot be treated by employers the same way as voluntary tips regarding the special credit toward the minimum wage.
- B. Double Time & Overtime – "Extra compensation (such as double time) may not be credited towards the employer's overtime obligation." However, overtime would only be calculated on the regular pay rate.
- C. Exempt vs. Nonexempt Status - A medical coder, paralegal, legal assistant, and junior level claims position were found to be nonexempt (must be paid overtime). A sales engineer who really didn't sell but needed advanced knowledge to determine a customer's needs regarding auto engineering problems was exempt. One DOL Opinion again stated that an exempt employee's accrued Personal Time Off (PTO) leave may be reduced for partial day absences and that employers may require exempt employees to record and track hours and to work specified schedules. Another addressed payment of exempt employees for absences due to bad weather.

FLSA Non-Development: Federal Minimum Wage Was Not Raised

Lots of talk & no action; Go to www.dol.gov for more information.

Family and Medical Leave Act (FMLA)

DOL Opinion Letters

- A. An employer can require new Family and Medical Leave (FMLA) Certification if employees want to take FMLA leave in a new year for the same medical condition under which they took leave in the previous year.
- B. An employee who took FMLA leave for a foster child placement cannot later take another FMLA for adoption of the child.

Non-Development: No New FMLA Regulations

Still just talk; Go to www.dol.gov for more information.

Military Leave

New Military Leave Requirements

The amended Uniformed Services Employment and Reemployment Rights Act (USERRA) extends the maximum period for which employees can elect employer-sponsored continued health coverage from 18 to 24 months. Employers must provide employees with written notice of their rights under USERRA. This requirement can be met by posting a notice.

A copy of the USERRA poster can be obtained free from the Department of Labor website at www.dol.gov/vets/programs/userra/poster.pdf.

National Labor Relations Board

NLRB Decision Reiterates: Don't Unlawfully Restrict Employees' Rights To Discuss Wages And Conditions Of Employment

A 2005 National Labor Relations Board (NLRB) decision (*Cintas Corp.*) held that an employee handbook confidentiality statement violates the National Labor Relations Act (NLRA) because it illegally restricted employees from discussing their wages and other employment conditions. Remember that NLRA requirements are often applicable to nonunion environments. Go to www.nlrb.gov for more information.

Equal Employment Opportunity

Who Is An Applicant? OFCCP Final Rules Regarding Electronic Job Applications

If you're an Affirmative Action Employer you should be aware that the Office of Contract Compliance Programs (OFCCP) has finalized its rules defining "who is an applicant" and related recordkeeping regarding electronic applicants. The Equal Employment Opportunity Commission (EEOC) has yet to finalize its rules relating to such applications. Go to www.dol.gov/esa for more information.

Age Bias Claims Are Easier

The U.S. Supreme Court made it easier for workers to sue for age discrimination holding that employees can now make "disparate impact" age claims, as well as "disparate treatment" claims. "Treatment" claims require evidence of deliberate or intended bias based on age. "Impact" claimants simply show that an employer's actions disproportionately impacted them because of their protected age status. Go to www.eeoc.gov for more information.

Medical Tests Violated ADA

The EEOC and some federal courts have found that the Americans with Disabilities Act (ADA) is violated if a company conducts medical exams before making "real" job offers. A job offer is not "real" until all nonmedical (including background checks) are conducted.

EEOC Provides Guidance On ADA "Association Protection," Cancer In The Workplace, And Visual Impairments

In 2005 the EEOC released several new publications that address ADA employment rights of people with cancer, visual impairments, and those who associate with people with disabilities. Go to www.eeoc.gov for more information.

Failure To Display EEOC Poster Could Extend Time To File Discrimination Complaint

Generally, an individual has 180 days to file a discrimination complaint with the EEOC (or 300 days in certain deferral states) after the alleged discriminatory action occurs. Recently, several federal appeals courts have found that this time period could be extended if an employer fails to post the required EEOC "Equal Opportunity is the Law" poster. EEOC posters may be downloaded at www.eeoc.gov/posterform.html. Department of Labor posters may be found at <http://www.dol.gov/osbp/sbrefa/poster/main.htm>. Other common federal posting requirements involve OSHA and military leave. Also check the required posters in your state.

Benefits

Flexible Spending Account Rules Liberalized

If employers agree, employees can have an extra 2 ½ months to spend money in their flexible spending accounts. Under Section 125 of the Internal Revenue Code an employee may use pretax payroll dollars to pay for out of pocket medical and dependent care expenses. Go to www.treas.gov for more information.

Immigration

The New Paperless I-9 Process

Effective April 28, 2005, employers could both complete and store I-9s electronically, hopefully eliminating some of the “paper shuffle.” The new law allows: electronic signatures of the employee and employer; employers to store and maintain I-9s in PDF or other electronic format; and employers to convert and maintain existing paper I-9s into electronic formats. Go to www.uscis.gov for more information.

Fair Credit Reporting Act (FCRA)

New Fair Credit Reporting Act Tools And Notices

There are considerable federal (e.g., the Fair Credit Reporting Act—FCRA) and sometimes state legal requirements that must be met when using credit checks and consumer reports. The Federal Trade Commission, which enforces FCRA, updated related tools and model notices, which became effective January 31, 2005.

FACTA Records Disposal

A little known provision of the 2003 Fair and Accurate Credit Transactions Act (FACTA) became effective on June 1, 2005 and requires that covered businesses “take reasonable measures” to dispose of consumer information so that it may not be improperly accessed or used. Go to www.ftc.gov/credit for more information.

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