Have You Implemented Changes Required By 2010 HR Developments?

We're off and running in 2011. While the Republican majority in the House of Representatives will likely slow expansion of HR legislation on a federal level, we can continue to expect changes coming from regulatory agencies, the courts, and the states. But before we get too excited about what's to come, have you addressed and implemented changes required by 2010 developments? A *few* of these federal changes are discussed below. Be sure to check your state laws as well.

Increased Scrutiny of Independent Contractors.
The federal government and many states are more aggressively addressing the misclassification of employees as independent contractors. Misclassification is a common and sometimes costly workplace problem. It's more important than ever for employers to closely review their classifications.

Breaks for Breastfeeding.
Under last year's federal *Patient Protection and Affordable Care Act,* nearly all employers are required to provide "reasonable" breaks for mothers to express milk. Employers must provide mothers a private location, other than a bathroom. Organizations of fewer than 50 employees may be excluded if an "undue hardship" would otherwise result. Note, that an "undue hardship" is a difficult case to make. Such break time can be unpaid. If you haven't addressed this issue or updated your HR policies to reflect its requirements, do so now.

Electronic Monitoring.
In *City of Ontario v. Quon*, the U.S. Supreme Court addressed a key issue that could affect most employers: **Can organizations legally monitor an employee's electronic communications at work?** The Court unanimously ruled that the City didn't violate Fourth Amendment protections against unreasonable searches when it reviewed an employee's text messages sent on a city provided pager. While this decision applies to public sector employers, the case provides useful guidance to all employers. The case underscores the need for solid and well communicated policies regarding emails, texting, cell phones, and other electronic communications. Do you know what your communication policies say? When was the last time you communicated them to your employees?

Employers' Ability to Defend Disparate Impact Cases Weakened.
The U.S. Supreme Court, in *Lewis v.Chicago,* made it more difficult for employers to defend disparate impact discrimination claims. The Court ruled that employees or job applicants could challenge the **application** of an alleged discriminatory practice (a discriminatory test) even if they hadn't contested its initial **adoption** on a timely basis. In the case, the plaintiffs had not filed their case within the required 300 days of the alleged discriminatory act (the test). So the question was: must they file their case within 300 days of the test or within 300 days of the application of the practice (i.e., when hiring began to take place.)? The Court, ruled for the applicants, finding that the case must be filed within 300 days of the **application** of the process, in other words after each round of hiring. The *Lewis* case makes it more important than ever that you continually review your employment practices and that your managers are well trained in the basics of employment law. Otherwise you may be liable for unintentional discrimination that occurs well after a practice or policy is implemented.

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FMLA Definition of "Son or Daughter" Expanded to Include Nontraditional Parents.
The U.S. Department of Labor, in Administrative Interpretation No. 2010-3, expanded the definition of son/daughter for the purposes of childcare leave under the Family and Medical Leave Act. Under the FMLA, eligible employees are entitled to take up to 12 weeks of leave for the birth, adoption, or placement of a child or to care for a child with a "serious health condition." FMLA regulations state that "son or daughter" includes a "biological, adopted or foster child, stepchild, legal ward, or a child of a person standing *"in loco parentis*" (in place of a parent). "In loco parentis" includes those with no biological or legal relationship with a child. According to the Administrative Interpretation, an employee qualifies under the "in loco parentis" test if: s/he provides day to day care or is financially responsible for the child. The interpretation expressly mentions same sex couples as qualifying for this leave. It could also include grandparents, siblings, aunts, uncles and other family members or friends. If you haven't already updated your FMLA policy, you have something to do.

Employer Liability for Employees' After Hours Social Networking?
Revised Federal Trade Commission Guidelines, found at 16 C.F.R. § 255, that are intended to protect consumers from deceptive advertising or endorsements, could create new liability for employers whose employees use blogs, Facebook, Twitter or other social media to comment on company products or services. Liability could exist even if an employee is blogging on his own time or using his own equipment, as it's presumed that the blogging benefits the company. Liability can be imposed where an employee fails to disclose his or her employment relationship. These Guidelines make it even more important for employers to develop social media policies that clarify expected employee conduct at work, and even after work.

Potentially Groundbreaking Facebook Case.
A Connecticut company has been accused of violating the National Labor Relations Act by firing an employee for posting negative comments about her manager on her Facebook page. Coworkers also posted comments on her page, criticizing the manager. The company's social networking policy prohibited employees (on or off duty) from making demeaning and critical remarks about the organization or its employees on social networking sites. This type of policy is quite common. The issue is: does the company's policy violate employees' Section 7 NLRA rights by interfering with the right to engage in "concerted, protected activity?" Essentially, employers may not prohibit employees from communicating with each other about the terms and conditions of employment. Section 7 applies to both union and nonunion workplaces. It could take years for the case to be finally resolved. For now review your policies and be cautious when disciplining employees in these situations. Stay tuned.

EEOC Receives Record Amount Of Charges/Damages In 2010.
The Equal Employment Opportunity Commission (EEOC) received a record number of discrimination and retaliation charges- and obtained a record amount of damages during its most recent fiscal year. For the fiscal year 2010 (ending September 30, 2010), almost 100,000 charges were filed with the EEOC, the most in its 45 year history. As evidence of this there were several huge settlements:

1) **Largest ADA Settlement Ever.**
   The EEOC reached the largest ever ADA settlement with Sears, Roebuck & Co. ($6,200,000). In its lawsuit against Sears, the EEOC had alleged that Sears had an inflexible workers' compensation leave exhaustion policy and terminated employees instead of providing them with reasonable accommodations for their disabilities, violating the ADA.

2) **One of the Largest Gender Discrimination Cases…Ever.**
In one of the largest gender discrimination verdicts, a jury awarded $3.4 million in compensatory damages and $250 million in punitive damages against Novartis, a huge pharmaceutical company. Additionally, $152 million was awarded for back pay and benefits damages. The case involved female sales representatives who worked for the company from 2002 to 2007. They alleged that there was a continuing, "pattern and practice of discrimination," that women were subjected to a sexually hostile work environment and that discrimination existed surrounding pregnancy leave, promotion of women, and compensation.

You're probably sick of reading this, but have your supervisors and managers received any employment law training lately? Could they explain and apply the basics of Title VII, the ADA and ADEA, or the concept of retaliation?

Genetic Discrimination: Final GINA Regulations Issued.
GINA, the federal Genetic Information and Nondiscrimination Act, became effective over a year ago. After numerous delays, the EEOC published final regulations that provide guidance in implementing the employment provisions of the Act. GINA prohibits use of genetic information to make decisions about health insurance and employment, and restricts the acquisition and disclosure of genetic information. The final regulations provide examples of genetic tests; more fully explain GINA's prohibition against requesting, requiring, or purchasing genetic information; provide model language employers can use when requesting medical information from employees to avoid acquiring genetic information; and describe how GINA applies to genetic information obtained via electronic media, including websites and social networking sites. Have you updated your related policies and your employment law training for managers?

Health Reform Legislation.
After much wrangling and painful debate, the *Patient Protection and Affordable Care Act* was passed in 2010. Many provisions won't take effect for a few years, but a number became effective in 2010 including:

- Elimination of preexisting conditions exclusions for children;
- Children up to age 26 can continue to be covered on their parents' insurance;
- Insurance companies cannot drop coverage for people when they get sick (rescission);
- Insurers can't impose lifetime caps on coverage;
- Adults with preexisting conditions will be able to get coverage in a temporary high-risk pool;
- A new, independent process to appeal decisions by insurance companies will be available;
- Certain small businesses may receive tax credit for premiums paid;
- Private plans must provide free preventive care for certain services (no copays & no deductibles);
- The Medicare Part D drug "donut hole" starts to close as seniors will receive $250 checks if they fall into the hole; and
- New group health plans cannot discriminate in favor of more highly compensated employees. *Recent Development*: The IRS announced (Notice 2001-11) on December 22, that it is delaying enforcement for the new nondiscrimination provisions applicable to insured group health plans. Stayed tuned as there likely will be other implementation delays or changes.

IRS Issues Guidance Regarding Changes to Flexible Spending Accounts.

Effective Jan. 1, 2011, employees cannot use flexible spending and health reimbursement accounts to pay for over-the-counter medicine or drugs, unless a prescription is obtained. The change does not affect insulin, or other expenses for such things as medical devices or equipment (e.g., crutches, eyeglass, or contact lenses), supplies such as bandages, diagnostic devices such as blood sugar test kits, or co-pays and deductibles. The new standard applies only to purchases made on or after Jan. 1, 2011. A similar rule goes into effect on Jan. 1, 2011 for Health Savings Accounts (HSAs), and Archer Medical Savings Accounts. On December 23 the IRS issued guidance (Notice 2011-5) regarding the use of FSA and HRA debit cards for purchase of over-the-counter medicine.

The States Have Also Been Busy.

The states and local governments addressed numerous issues in 2010. This focus will also likely continue in 2011. A few of these included:

- Further expansion of discrimination protections involving: sexual orientation, appearance, and family responsibility discrimination.
- More requirements for harassment training.
- More attention to ensuring that employers appropriately classify independent contractors.
- Requiring expansion of paid leave, including requiring sick leave and paid family leave.
- Solutions to deal with the health insurance and immigration crises.
- Continued attention to privacy issues, including protection of Social Security numbers and other sensitive data.
- More legislation restricting use of cell phones and texting while driving.
- More attention given to the issue of employees' guns in the workplace and on company property (e.g., parking lots)
- Restricting the ability of employers to use credit checks
- More states have passed and or are considering medical marijuana laws.