

2011: Hot Topics in Labor and Employment Law [and how to avoid the burn]

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What might the coming year hold for employers and the human resources pros who manage their most valuable assets? I don't have a crystal ball, but here are my 2011 predictions for the hot topics in labor and employment—plus tips to help you avoid the burn:

New Regulations

The Equal Employment Opportunity Commission will pull the 2009 proposed regulations issued as a result of the Americans with Disabilities Act Amendment of 2008. Word from EEOC Commissioner Constance S. Barker is the EEOC is starting over.

Avoid the burn: Stay informed. Be prepared to revise your ADA policy as soon as the new regulations are published.

Social Media

1. The National Labor Relations Board issued an opinion that a discussion between coworkers on Facebook that resulted in a derogatory post about a supervisor was protected concerted activity under the National Labor Relations Act¹.
2. Invasion of privacy claims: filed by applicants for failure to hire based on information obtained from social media; filed by employees for decisions (e.g. discipline and termination) based on information gathered from social media sites.
3. Claims made by employees under the Stored Communications Act, Wiretap Act

and Electronic Monitoring Statutes.

4. Claims made by employees and applicants under off-duty conduct laws. These are state laws that say that an employer cannot take employment action against an employee for lawful off-duty behavior, such as lawful drinking or lawful political activity.
5. Discrimination, retaliation and whistle-blowing claims under Title VII, Sarbanes-Oxley and state laws, alleging the social media conduct is just a pretext to fire an employee.

Avoid the burn: Review your company's use of social media carefully. Use information gathered from social media judicially – and only when it has a direct impact on work performance. Stay informed on federal laws regarding access to and privacy of electronic information. Ensure your policy is not overly broad as to be seen as preventing or prohibiting concerted activity.

Credit Checks and Background Checks

Look for the EEOC to limit use of credit checks and background checks in employment decisions. The premise is they are pretexts to discriminate against protected classes. The EEOC does not see a nexus between bad credit/criminal record and on-the-job performance. (I guess the EEOC hasn't seen the embezzlement/criminal activity problem that I have seen during the last few years – everything from embezzling from the employer and

the employer's clients, to using company computers to commit federal felonies.)

Avoid the burn: Make sure that you comply with all federal and state laws when obtaining credit checks and background checks – including having all of the needed releases signed by the applicant/employee. Again, use the information gathered judicially – does it really reflect on the person's employment, and always, apply the same standards to everyone similarly situated, without regard to the person's protected status.

Collection of Wage Information

The EEOC is exploring whether it has the statutory authority to make regulations requiring employers to provide wage information on all employees². The Paycheck Fairness Act, now dead in the water, would have authorized the EEOC to issue regulations providing for the collection of pay information data by sex, race and national origin of employees.

Avoid the burn: Make pay decisions based on experience,

education and skills. Consider creating a pay policy that gives guidance to decision makers as to how to determine an employee's initial salary and subsequent raises, such as pay grades and evaluations. Regularly review the salaries of similarly situated employees for disparate impact based on the protected classes.

Stay tuned to see if my predictions ring true in the coming year.

¹American Medical Response of Connecticut, Inc. v. International Brotherhood of Teamsters, Local 443, Case No. 34-CA-12576 (Oct. 27, 2010 NIL Region 34)

²My money is on the Equal Pay Act, 29 USC § 211.

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