

Reviewing and Updating Your Employer Compliance Checklists

By Thomas R. Bundy III

Given the plethora of recent changes in the employment law landscape, employers probably made reviewing compliance checklists a New Year's resolution for 2013. From hiring employees, to training them, to auditing existing employment practices, the old adage, "An ounce of prevention is worth a pound of cure," certainly applies to updating your compliance checklists. Below, we identify a few (but certainly not all) reasons employers may wish to focus on this task.

The Employment Hiring Process:

Reference and Background Checks

Employers must be mindful to comply with federal laws, like the Fair Credit Reporting Act and state counterparts, when trying to find employees who are free from financial problems. These statutes typically allow for civil relief in certain circumstances and liability for noncompliance. With respect to criminal records, the Department of Labor (DOL) issued new rules for the use of background checks in the hiring process, including certain prohibitions against using arrest information. Reviewing current pre-hiring policies for compliance with these new rules can help ensure a successful year.

Employee Benefits

While many employers mistakenly believe the Patient Protection and Affordable Care Act (Affordable Care Act) is not a concern until 2014, employers should know that certain provisions of that law are already in effect and that other provisions will go into effect this year. Make sure your policies comply with the ever-changing area of benefits law, like new requirements for summaries

of benefits and coverage, changes to flexible spending accounts and increased Medicare withholdings. You should also review the Internal Revenue Service's (IRS's) recently announced cost-of-living adjustments (COLA) to the dollar limit for certain employer-sponsored retirement and welfare plans.

Employment Contracts

Employers may want to reexamine key provisions of employment contracts in light of recent court decisions and new laws. In the wake of *AT&T Mobility v. Concepcion*, which found that the Federal Arbitration Act (FAA) preempts state law rendering an arbitration agreement unenforceable because it contains a class action waiver, employers may want to consider adding class waiver language back into their arbitration provisions. On the other hand, employers should be mindful that Dodd-Frank's whistleblower provisions limit arbitration in whistleblower



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cases. Employers subject to Dodd-Frank may want to consider tweaking arbitration clauses to avoid creative arguments that overly-broad clauses failing to address Dodd-Frank's limitations are void *ab initio* in all instances. Finally, employers should consider how to best utilize the Supreme Court's recent decision in *Nitro-Lift Technologies, L.L.C. v. Howard*, which held that if a non-compete agreement contains an arbitration clause that is subject to the FAA, "it is for the arbitrator to decide in the first instance whether the covenants not to compete are valid as a matter of applicable state law."

Employment Handbooks

Employers subject to Dodd-Frank might be well-served by revisiting whistleblower policies to ensure those policies are robust and encourage reporting and compliance. But, a change in whistleblower law is not the sole concern for you to examine your policies. Over the past year, several states have passed laws limiting employers' right to employees' social media information. This area of employment law will likely explode over the next few years given the prominence of social media in day-to-day business operations. Like the states, the National Labor Relations Board (NLRB) is concerned about social media policies; but the NLRB is also focusing on the "at-will" language in employee handbooks that might be interpreted as overly-broad and a ban on organizing activities, which is improper.

Compensation and Payroll

Employers beware: wage and hour cases remain the number one litigated claim in the country. Yet, employers routinely ignore the concerns and exposure associated with poor wage and hour time and recordkeeping practices. DOL's 2011 Fair Labor Standards Act (FLSA) rule amendments could prompt you to revisit procedures for classifying workers as exempt or non-exempt altogether. Employers must make certain that policies reflect an adherence not only to the FLSA, but also to state wage and hour laws. Remember: some states, like California, have very robust wage and hour laws—much more stringent than and different from the FLSA's requirements—which provide additional benefits for those state employees. If employers ignore this issue, plaintiffs' attorneys can paint a target on them, and the exposure could be significant.

Annual Audits and Training:

Wage and Hour Compliance

Because wage and hour remains the single largest and most frequent area of exposure to employers, it is prudent to audit wage and hour practices and procedures early. Examine whether or not you need to implement best practices for protecting against off-the-clock work, time disputes, donning and doffing, and unapproved overtime work. Training manager-level employees how to address worker classification and to ensure internal reporting can be helpful in this regard.

Traditional Training (Discrimination, Harassment, Retaliation)

Traditional employment issues—like discrimination, harassment and retaliation—may not receive the same level of attention as they have in years past, but that does not mean employers should ignore the issues. Continued training on these issues can help to defuse situations before they occur or even bolster defenses when problems do arise.

The above list is not intended to be a complete summary of everything affecting compliance checklists. However, if employers address the issues above, 2013 will be a successful year for compliance! **SI**

Employer Compliance Checklist

The Employment Hiring Process:

- Reference and Background Checks
- Employee Benefits
- Employment Contracts
- Employment Handbooks
- Compensation and Payroll

Annual Audits and Training:

- Wage and Hour Compliance
- Traditional Training (Discrimination, Harassment, Retaliation)