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LEGAL ALERT



Legal Alert: Top 10 Costly Workplace Mistakes To Avoid This Year

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More changes in workplace law will occur this year than in the last ten years combined. Between What's Already Become Law and What's On the Horizon we can help you prepare and save your company from making costly mistakes.

What's Already Become Law

- 1. New employer costs for COBRA.** Requires every employer to advance 65% of COBRA premiums (for 9 months) for employees who are involuntarily terminated without cause from September 1, 2008 through December 31, 2009. Employers eventually reimbursed through payroll tax offsets. **Avoid This Mistake:** Failing to give terminated eligible employees (and qualified beneficiaries) the new COBRA notices. **Adverse Consequences:** Potential liability for medical expenses incurred by eligible employee; expedited Department of Labor review of claim if subsidy is denied; federal lawsuit.
- 2. New layoff costs under New York WARN Act.** Requires 90 days notice of mass layoff, business closing, or reduction in employees' work hours. Applies to employers with 50 plus employees. **Avoid This Mistake:** Failing to give timely written notice to employees. **Adverse Consequences:** \$500 per day civil penalties; back pay and benefits to affected employees.
- 3. New leave of absence obligations under Family and Medical Leave Act.** Requires employers administering FMLA leave to give employees new additional written notices. Applies to employers with 50 plus employees in a 75 mile radius. **Avoid This Mistake:** Failing to revise employee handbook and leave policies to comply with the new FMLA regulations; failing to provide special notices to employees requesting FMLA leave. **Adverse Consequences:** Liability for lost compensation and benefits and additional leave; failure to give new written notices opens employer to federal lawsuit.
- 4. New disabled employee obligations under Americans With Disabilities Act.** Redefines "disabled" to include conditions that can be relieved by drugs or medical devices. **Avoid This Mistake:** Assuming that employee taking medication for physical or mental condition is not disabled; assuming that relatively minor ailments fall outside the protections of federal law. **Adverse Consequences:** Refusal to make reasonable accommodations for new conditions qualifying as disabilities opens employer to federal lawsuit.
- 5. More lawsuits challenging employee pay and/or terminations.** A recent decision by the U.S. Supreme Court makes it easier for employees to claim their employer retaliated against them in violation of federal civil rights laws. Additionally, a recently enacted law gives employees more time to file a lawsuit claiming pay discrimination. **Avoid This Mistake:** Failing to have written legitimate, nondiscriminatory business reasons justifying adverse actions taken against employees (such as demotion, discharge, etc.) and any pay discrepancies between male and

female employees performing the same jobs. **Adverse Consequences:** Employers may be sued in federal court. A successful plaintiff's recovery may be significant and can include lost back pay and benefits, front pay or reinstatement, compensatory and punitive damages and the plaintiff's attorney fees.

What's On the Horizon . . .

- 1. Easier for employees to unionize?** The federal Employee Free Choice Act will virtually eliminate secret ballot elections, allow signed union authorization cards to determine whether an employer has to accept a union, and compel employers to arbitrate their terms and conditions of employment if an agreement with the union is not reached within a certain amount of time. **Avoid This Mistake:** Failing to educate employees and prepare for union organizing campaigns long before authorization cards are signed. **Adverse Consequences:** Employers never get a chance to counter misinformation or tell employees why a union is not in their interest; employment terms and conditions are imposed on all parties by an arbitrator.
- 2. Supervisors able to unionize?** The federal RESPECT Act will dilute the prohibition against supervisors joining union bargaining units with non-supervisors. **Avoid This Mistake:** Allowing supervisors to perform too much hands-on front line work; failing to maintain written job descriptions clearly delineating supervisors' work from that of their subordinates. **Adverse Consequences:** Many supervisors traditionally aligned with management could be deemed bargaining union members.
- 3. Fewer independent contractors and more IRS scrutiny?** The federal Independent Contractor Proper Classification Act will enable workers to request an IRS determination on their independent contractor status and open employers to tax and other liabilities, penalties, and interest. **Avoid This Mistake:** Failing to audit your independent contractor relationships for compliance with the IRS test. **Adverse Consequences:** Retroactive liability on employers for taxes, employee benefits and statutory insurance.
- 4. Employee work schedules become negotiable?** The federal Working Families Flexibility Act will require employers to negotiate with employees over working hours, schedules, and work locations. **Avoid This Mistake:** Failing to prepare business-related reasons to justify employee work schedules. **Adverse Consequences:** Federal administrative penalties and lawsuits by employees.
- 5. More "labor-friendly" executive orders?** More Executive Orders favoring unions in government contracts and subcontracts. **Avoid This Mistake:** Failing to give a previous contractor's employees the "right of first refusal" of jobs; or characterizing management meetings where union activity is discussed as involving "union avoidance." **Adverse Consequences:** Federal administrative penalties and the loss of government contracts. If you have any questions regarding the issues discussed in this Alert, please contact the author, Stephen Zweig, a partner in our New York City office at szweig@fordharrison.com, 212-453-5906, or the Ford & Harrison attorney with whom you usually work.