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EMPLOYMENT POLICIES

February is a good time for employers to check on their progress regarding New Year's resolutions for revising policies, training supervisors, and implementing other changes to ensure compliance with recent developments in the law, attorneys James H. Kizziar, Jr., Amber K. Dodds and Jayde Ashford say in this BNA Insights article.

The changes in employment laws during 2014 provide strong incentives for employers to update their practices, the authors say. They set out 10 employment law developments that employers should make a part of their 2015 ''resolutions'' and employment practices.

Ten Employer Resolutions for 2015: Implementing Lessons Learned From Last Year

By James H. Kizziar Jr., Amber K. Dodds, and Jayde Ashford

The new year is a time when many individuals set goals to better themselves. With many employment law developments occurring in 2014, it also is a good time for employers to consider revising policies, training supervisors, and implementing other changes to ensure compliance with recent developments in the law. Set out below are ten employment law developments that employers should make a part of their 2015 ''resolutions'' and employment practices.

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1. Social Media and Electronic Communications Policies

In 2014 the National Labor Relations Board and administrative law judges had a busy year declaring many employer social media policies unlawful. For example, requirements that employees who identify themselves as company employees post disclaimers that they are not speaking on behalf of their employer; prohibitions on employee use of employer logos, trademarks, insignia, or other intellectual property in posts without employer approval; and prohibitions on employees' recording of pictures, audio, or video at the employer premises without employer approval were found unlawful restrictions of employee Section 7 rights under the National Labor Relations Act.[1] In addition, on December 11, 2014, the board reversed its previous rulings and held that employees have a statutory right to use em-

[1] *Kroger Co. of Michigan*, Case No. 07-CA-098566, (2014 ALJ Goldman Decision) (currently before the Board) (78 DLR A-1, 4/23/14); *The Boeing Company v. Society of Profession Engineering Employees*, Case Nos. 19-CA-090932, 19-CA-090948, 19-CA-095926 (2014 ALJ Etchingham Decision) (currently being considered by the Board.

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ployer e-mail systems to communicate regarding union organizing and other protected communications (such as discussion of the terms and conditions of their employment) during their non-working time.[2]

Based on this trend, employers should review their social media, electronic communications, and solicitation and distribution policies to ensure that overly broad, vague, or otherwise unlawful previsions are not included. Employers should evaluate the business risk of a challenge to their policies against the benefits obtained by maintaining the policies. Employers also should train supervisors on new policies and obligations, including employee statutory rights under the NLRA, and clarify what employee behaviors may, and may not, be subject to discipline.

2. Accommodations for Religious Clothing and Grooming

In March of 2014, the Equal Employment Opportunity Commission issued guidance on accommodating employees' religious garb and grooming (47 DLR A-2, 3/11/14). *Available at*: http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm. The guidance reinforced Title VII's prohibitions on discrimination, job segregation and harassment of employees based on their religious garb and grooming practices. Further, it emphasized employer obligations to accommodate religious-based practices, dress, and grooming unless the accommodation results in an undue hardship. The EEOC also cautioned that the undue hardship defense to accommodations cannot be based on coworker, customer, or client preferences.

Employers should implement procedures to ensure that requests for accommodations are referred to a member of the human resources department or an accommodation review team to ensure consistent application of accommodation policies. Supervisors should also be reminded to properly inform human resources or the accommodation review team of all dress, grooming and other accommodation requests. Employers should also emphasize the Title VII obligations in terms of employee religious beliefs, in supervisor employment law training.

3. Behavior and Professionalism Policies

The NLRB had an equally active 2014 addressing the kinds of behavior and professionalism policies that violate the NLRA. For example, in *Hills and Dales General Hospital*, 360 N.L.R.B. No. 70, 198 LRRM 1909 (2014) (63 DLR A-1, 4/2/14), the NLRB found a policy prohibiting employees from making negative comments about other employees or engaging in ''negativity and gossip,'' and requiring employees to ''represent [the employer] in the community in a positive and professional manner'' unlawful violations of employee NLRA Section 7 rights.

In another case, *Starbucks Coffee Co.*, 360 N.L.R.B. No. 134, 199 LRRM 1868 (2014), the board found discipline for employees engaging in profane yelling matches to be unlawful, even though the inappropriate employee conduct occurred in front of customers, because the content of the discussion included the terms and conditions of the individual's employment, which fell within Section 7 protections.

Employers should review their policies and codes of conduct and delete overly broad, vague, or otherwise unlawful provisions. In making these revisions, employers should focus on enforcing non-harassment and workplace violence policies and providing specific examples of prohibited behavior in the policies.

4. Accommodations for Non-Disabled, Pregnant Employees

In July 2014, the EEOC issued guidance on pregnancy discrimination and related issues (134 DLR AA-1, 7/14/14). *Available at*: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm. The guidance reinforced employer obligations under the Pregnancy Discrimination Act and extended protections under the PDA to employees based on past pregnancy and future pregnancy.

The EEOC also stated in the guidance that the PDA independently requires reasonable accommodation for pregnant employees, even if they are not disabled within the meaning of the Americans with Disabilities Act. Notably, however, a federal circuit court recently disagreed with the EEOC's reasoning in a decision. The U.S. Supreme Court accepted this case, *Young v. United Parcel Service, Inc.*,, U.S., No. 12-1226, *cert. granted* 7/1/14 (126 DLR AA-1, 7/1/14) and heard oral arguments on December 3, 2014 (232 DLR AA-1, 12/3/14). Employers should watch to see whether the *Young* decision brings significant changes to employer obligations with respect to pregnant employees.

Until the Supreme Court reaches a decision, employers should evaluate the cost and hardship of a nondisabled, pregnant employee's requested accommodation. Is denying the accommodation saving the employer significant cost or disruption? What are the potential effects of denying relatively minor, temporary accommodations to pregnant employees on operations and overall employee morale?

Employers should also remember that they cannot require pregnant workers to accept accommodations. For example, employers may not force a pregnant woman who can perform the essential functions of her position onto a leave of absence, regardless of whether it is paid or unpaid. Similarly, employers may be liable for discrimination for changing a pregnant woman's job responsibilities against her wishes (unless there is a legitimate business necessity to do so). Forced accommodations, even if based on concerns about the worker's or her baby's health, can result in discrimination claims.

5. Local Cell Phone Ordinances

Many cities and counties have enacted ordinances limiting driver ability to use cell phones while driving. For example, effective January 1, 2015, San Antonio, Texas, drivers are not allowed to use mobile phones in non-hands-free capacity. The ordinance applies to all parts of the city and prohibits talking, texting, viewing e-mail or pictures, or using smartphone apps.

Under many ordinances, drivers may use hands-free technology, navigation features (if the phone is affixed to the vehicle), or make emergency calls. To comply

[2] *Purple Communications, Inc.*, 361 NLRB No. 126 (Dec. 11, 2014) (238 DLR A-1, 12/11/14).

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with local ordinances and reduce their liability exposure, employers should update or add policies on employee cell phone use while driving or operating company or personal vehicles as part of their job duties. Employers should ensure that they are up-to-date regarding changing local cell phone use restrictions and that they modify their policies based on any restrictions.

6. Proper Wages for Preliminary and Postliminary Work Activities

Employers should review their pay practices to ensure that proper wages are paid to employees for compensable preliminary and postliminary work activities. In December 2014, the U.S. Supreme Court addressed whether time spent by Amazon.com warehouse employees undergoing, and waiting to undergo, security screenings before leaving the warehouse each day was compensable under the Fair Labor Standards Act (*Integrity Staffing, Inc. v. Busk*,, 2014 BL 344253, 190 L. Ed. 2d 410, 23 WH Cases2d 1485 (U.S. 2014); 236 DLR AA-1, 12/9/14).

Ultimately, the court determined that the time was not compensable. In doing so, the court criticized the reasoning of the U.S. Court of Appeals for the Ninth Circuit that post-shift activities (that would ordinarily be classified as noncompensable activities) may be compensable as integral and indispensable to an employee's principal activities if the activities are performed for the employer's benefit.

In an amicus brief filed June 4, 2014, the Department of Labor took a pro-employer position, arguing that the ''integral and indispensable'' test requires a ''closer or more direct relationship'' between a principal activity and the activity in question.[3]

The Supreme Court's unanimous decision clarified that ''an activity is integral and indispensable to the principal activities that an employee is employed to perform—and thus compensable under the FLSA—if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities.''

Accordingly, the court found that the security screenings were neither the principal activities the employees were employed to perform, nor integral and indispensable to the activities that the employees were hired to perform—in this case, to retrieve products from warehouse shelves and package them for shipment. This development is particularly important because it confirms the principle that the compensability test does not focus on whether the particular activity was required by the employer. Rather, the question is whether the activity was tied to the productive work that the employee was hired to perform.

7. Classification of Interns

Many employers participate in internship programs in which students get first-hand knowledge of a business while employers obtain cost-effective help. Internships provide employers the opportunity to train students in their trade and to identify prospective hires.

Students often gain valuable experience and academic credit. In the past, employers considered internship programs to be low-risk in terms of legal implications and a win-win for the employer and the intern. However, there has been a recent rise in class action internship lawsuits alleging that employers are classifying employees as ''interns'' to avoid paying wages under federal and state laws. Employers should be mindful of the legal risks of misclassifying interns and carefully review their internship programs for FLSA compliance.

There are a number of pending lawsuits challenging the legal propriety of internships. WMG subsidiary Warner Bros. Records is currently facing a misclassification lawsuit, *Grant v. Warner Music Group Corp*., 22 WH Cases2d 952 (S.D.N.Y. May 13, 2014) (94 DLR A-1, 5/15/14), brought by ex-interns. The lead plaintiff, student Kyle Grant, interned from August 2012 to April 2013 and typically worked five days a week from 9:30 a.m. until 8:00 p.m.

Grant was responsible for routine office tasks similar to those that might have been assigned to paid employees. Grant claimed that he (and more than 3,000 other similarly situated ex-interns) are due wages under the FLSA.

The plaintiffs submitted documentary evidence to support their claims, including internship position postings that uniformly state ''[e]very Intern is assigned a special project that will both assist them in increasing their understanding of how each department operates, and aid the department in addressing a business need.'' The court found that the plaintiffs met their initial burden by offering sufficient evidence of an unlawful policy directed at a class of similarly situated persons and granted a motion for court-authorized notice.

Other companies have settled claims of misclassification rather than face the risk of trial. On May 13, 2014, a prestigious modeling agency settled a class action filed by former unpaid interns.[4]

Improperly designating an employee as an intern or independent contractor can have significant consequences, including tax liability and administrative penalties as well as potential lawsuits by workers for future and/or retroactive employee benefits. Employers should follow the Six Factor Test for Internships issued by the Department of Labor in 2010 to determine when workers may properly be classified as interns.[5]

8. Minimum Wage Changes

President Barack Obama's administration is undertaking broad efforts to increase the federal minimum wage under the FLSA. On February 12, 2014, Obama issued Executive Order No. 13,658 (29 DLR A-10, 2/12/14), which increases the minimum wage for employees of federal contractors and subcontractors to $10.10 an hour.

[3] Available at: http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-433_pet_amcu_usa.authcheckdam.pdf.

[4] *Davenport v. Elite Model Management Corp*., 2014 BL 142522, No. 13-cv-0106 (S.D.N.Y. 2013) (98 DLR A-16, 5/21/14).

[5] U.S. Department of Labor Wage and Hour Division, Fact Sheet #71: Internships Under The Fair Labor Standards Act, April 2010.

The Executive Order provides that ''[r]aising the pay of low-wage workers increases their morale and the productivity and quality of their work, lowers turnover and accompanying costs, and reduces supervisory costs.''

On June 17, 2014, the DOL published a proposed rule to implement the executive order for all new and replacement federal contracts signed on or after January 1, 2015. According to the DOL proposal, the new minimum wage provisions will cover (1) procurement contracts for services or construction covered by the Davis-Bacon Act; (2) contracts covered by the Service Contract Act; (3) concession contracts; and (4) contracts that are (a) entered into with the federal government in connection with federal property or lands, and (b) contracts covered by the FLSA, Service Contract Act, or Davis-Bacon Act.

Executive Order No. 13,658 also expressly applies to tipped workers. Beginning in January 2015, covered employers must pay tipped workers a minimum hourly wage of $4.90—a sharp increase from the current federal tipped employee minimum wage rate of $2.13 an hour. If a worker's combined tips and hourly wages do not total at least $10.10 an hour, the employer will be responsible for contributing the balance.

The proposed rule calls for federal agencies to add a minimum wage clause in all covered contracts, and for covered contractors and subcontractors to include the clause in all lower-tier subcontracts. On October 7, 2014, the DOL published a regulation implementing the executive order (190 DLR AA-1, 10/1/14). The regulation took effect December 8, 2014.

Additionally, many states and local governments have raised the minimum wage in their jurisdiction effective January 1, 2015. Accordingly, all employers—federal contractors or not—should review the minimum wage laws in each state, county and city in which they operate to ensure they are paying the proper minimum wage. Employers should not only confirm that they are paying minimum wage to each employee but also confirm that any pay rates based on the minimum wage are adjusted accordingly.

9. Narrowing of FLSA Exemptions

FLSA section 13(a)(1) provides a minimum wage and overtime exemption for any employee employed in a bona fide executive, administrative or professional capacity or in the capacity of an outside salesperson. On March 13, 2014, President Obama issued a memorandum to the secretary of labor directing the DOL to modernize and streamline existing overtime regulations for executive, administrative and professional employees (49 DLR AA-1, 3/13/14). *Available at*: http://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations.

The memorandum calls for the secretary of labor to consider how the regulations should be revised to keep with the intention of the FLSA, while addressing the changing nature of the American workplace.

Additionally, Senate Democrats proposed legislation in June 2014 to amend the FLSA and extend overtime pay to a larger number of salaried employees. The Restoring Overtime Pay for Working Americans Act (117 DLR A-16, 6/18/14) would increase the salary threshold for executive, administrative and professional exemptions under the FLSA from the current $455 earnings threshold to $1,090 per week.

The threshold for highly compensated employees would increase from $100,000 to $125,000. The bill also proposes to alter the definition of ''primary duty''—a term used in DOL regulations to determine whether a worker's duties are overtime exempt—to require an exempt employee not to ''spend more than 50 percent of his or her work hours in a workweek on duties that are not exempt.'' Employers should be on the lookout for a DOL proposed rule to define and delineate the FLSA exemptions for executive, administrative, professional, outside sales and computer employees, which is expected to be issued in February 2015.

10. Reluctance to Find Highly Compensated Employees Nonexempt Under the FLSA

Employers should be aware of the reluctance of several courts to find highly compensated employees nonexempt. In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 19 WH Cases2d 257 (2012), pharmaceutical sales representatives spent about 40 hours in the field calling on physicians during normal business hours and an additional 10 to 20 hours attending events and performing other work related tasks. The petitioners alleged that their employer violated the FLSA by failing to compensate them for overtime.

The U.S. District Court for the District of Arizona granted summary judgment to the employer based on the ''outside salesman'' exemption of the FLSA. On appeal, the U.S. Court of Appeals for the Ninth Circuit held—and the Supreme Court affirmed—that the petitioners bore all of the external indicia of exempt employees under the FLSA (117 DLR AA-1, 6/18/12).

Specifically, the employees normally earned salaries well above the minimum wage and performed a kind of work that is difficult to standardize to a particular time frame and that cannot easily be spread to other workers. The Supreme Court further stated that ''individuals earning more than $70,000 per year . . . are hardly the kind of employees that the FLSA was intended to protect.''

The *Christopher* decision was cited in a recent case decided by the U.S. District Court for the Southern District of New York, in which the court stated that a plaintiff's qualifications, her job title of ''litigation graphics consultant,'' and her yearly salary of $75,000 made her ''less than an obvious candidate for the protection of the FLSA's maximum hours requirements.''[6]

More recently, in *Meza v. Intelligent Mexican Marketing.*, 720 F.3d 577, 20 WH Cases2d 1399 (5th Cir. 2013) (118 DLR AA-1, 6/19/13), the U.S. Court of Appeals for the Fifth Circuit held that an outside salesman's weekly base salary of $300 plus commission was in accordance with minimum wage laws. The court noted that the traditional FLSA minimum wage requirement at the time was $7.25 per hour, but that outside salespeople work individually and with many fewer restrictions on time and wage and, therefore, are exempt from federal minimum wage and overtime requirements.

The Fifth Circuit found that the *Christopher* holding implies only that earning significantly more than mini-

[6] *Kadden v. VisuaLex, LLC*, 910 F. Supp. 2d 523 (S.D.N.Y. 2012).

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mum wage may preclude relief under the FLSA, but that no aspect of the opinion suggests that earning less than minimum wage is itself sufficient for relief. The court further opined that if outside salesmen earn less the than minimum wage with commissions, it may be due solely to ''poor salesmanship.'' Employers should check for updates as to how their jurisdiction is handling the FLSA status of highly compensated employees.

The changes in employment laws during 2014 provide incentives for employers to review and revise their policies, retrain supervisory employees, and update their practices. Here's to a happy, and compliant, 2015!