

Labor and Employment

FOX ROTHSCHILD LLP

Jeffrey D. Polsky



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Six Trending Topics in U.S. Employment Law

When you ask the general counsels of U.S. companies which area of law worries them the most, employment law frequently tops the list. The legal requirements placed on employers change rapidly and the cost of a misstep can be devastating. Here are six key trends employers with U.S. operations must watch in 2017.

Wage and Hour

The number of lawsuits claiming employees were paid incorrectly has been growing steadily in U.S. jurisdictions since at least the year 2000. These cases are frequently filed as class or collective actions, making them much more burdensome to defend and costly to resolve. Common allegations include misclassifying employees as exempt from overtime or as independent contractors. Lawsuits claiming hourly employees were required to work "off the clock" are also on the rise. So too are those claiming that a company exerts sufficient control over another company's workers to be deemed a joint employer.

To protect their own trade secrets, companies need legally compliant confidentiality agreements with their employees and non-disclosure agreements with their business partners. The importance of protecting this information leads some companies to overreach in these agreements.

Prevention is key here. An audit of wage and hour practices can identify and address problems at a tiny fraction of what it would cost to defend a lawsuit.

Equal Pay

Laws requiring equal pay for equal work have been on the books in the U.S. for over 50 years. Yet studies show women still make approximately 6% less than similarly situated men. On the federal level, the Equal Opportunity Commission may start requiring employers with 100 or more employees to report pay data by race ethnicity and sex.

Certain states, most notably California and New York, have made it easier for employees to sue. While the law used to require equal pay for equal work, these jurisdictions now require equal pay for "substantially similar work." These laws were created to make it easier for women to bring these lawsuits. California also recently extended the law to prevent wage disparities based on race and ethnicity.

To avoid these claims, employers need to evaluate their compensation systems to make sure they can explain pay disparities using legitimate factors. If they involve attorneys, they can often protect the analysis under the attorney-client privilege. Employers also need to train those making compensation decisions to understand their legal obligations and what factors are permissible.

Disability Discrimination

While most laws regarding discrimination require employers to treat everyone the same, in some respects, disability discrimination laws require employers to treat disabled employees and applicants better. As long as someone can perform the “essential functions” of the job, the employer must provide “reasonable accommodations,” even if doing so is more expensive and less efficient than employing a non-disabled worker. Employers must engage employees in discussions regarding their particular restrictions and possible accommodations before reaching any conclusions. Employers who fail to follow these rules and who don’t carefully document their actions are subject to lawsuits seeking lost income, emotional distress, attorneys’ fees and punitive damages.

Whistleblower Claims

The U.S. Equal Employment Opportunity Commission receives more claims for retaliation than any other type of claim. Other government agencies, notably the Securities and Exchange Commission, are aggressively pursuing any actions by an employer preventing employees from reporting violations. In addition to government enforcement actions, private lawsuits alleging retaliation are also common.

To avoid these claims, companies need policies and practices encouraging employees to raise concerns internally and to protect the employees if they do so. They must also ensure their confidentiality and severance agreements do not contain language that government agencies deem to be restrictive of employees’ rights to report unlawful activity.

Trade Secrets

In 2016, Congress passed the Defend Trade Secrets Act, which created a federal cause of action for misappropriation of trade secrets. The Act allows expedited discovery. It also enables the owners of trade secrets to apply for an order directing the seizure of property “necessary to prevent the dissemination of the trade secret that is the subject of the action.”

To protect their own trade secrets, companies need legally compliant confidentiality agreements with their employees and non-disclosure agreements with their business partners. The importance of protecting this information leads some companies to overreach in these agreements. Doing so can render the agreements unenforceable. In addition, companies hiring workers from competitors need to be careful to ensure those individuals are not bringing confidential information that exposes their new employer to misappropriation claims with them.

Local Regulation

It is no longer enough to only comply with state and federal employment laws. Numerous cities also impose their own requirements. In California, over 20 cities and counties, three ports and various business zones have their own minimum wage/living wage ordinances. Seven cities have their own paid sick leave laws. San Francisco also has laws requiring paid parenting leave and restricting when and how employers ask job applicants about criminal convictions. There is every reason to expect the number of local regulations to continue to increase.

Companies operating in the U.S. face a complicated maze of overlapping federal, state and local regulation. The cost and disruption involved in defending claims for violations of these laws far exceed the cost of working with counsel proactively to ensure compliance.



Fox Rothschild LLP

Jeffrey D. Polsky, Partner

Fox Rothschild LLP is a leading U.S. law firm with 750 attorneys in 22 offices including strategic presences in Los Angeles, New York and Washington, DC. The firm is well-positioned to assist clients with a range of local and international issues that affect their businesses. With over 50 diverse practices, Fox attorneys deliver access to a global network of industry leaders in business, finance, real estate, technology and many others areas.

Attorneys in Fox's Israel practice offer a goal-oriented, client-focused, strategic approach to guide clients in business and personal investment planning. The team includes attorneys who live in Israel as well as fluent Hebrew speakers throughout the United States.

Attorneys work with clients to develop initial business plans and strategies and to structure and negotiate Israeli-related business transactions. Fox also assists with inbound or outbound fundraising and investment opportunities, providing comprehensive representation in national and cross-national litigation and arbitration matters. The firm's Israeli clients range from startups to market leaders.

Jeffrey Polsky is co-chair of the firm's nationwide Labor and Employment department and a member of its Israel practice. His practice focuses on business and employment litigation and counseling. He represents clients in disputes relating to claims of discrimination and harassment, trade secret violations, wage and hour compliance, wrongful discharge and breach of contract.

Jeff also handles commercial litigation matters including claims involving breach of fiduciary duty, restrictive covenants, director and officers liability and statutory violations. Jeff advises and counsels employers on an array of employment law issues, including reorganizations, terminations, corrective actions, developing policies, investigating misconduct and accommodating disabilities.

A frequent author and speaker, Jeff contributes to the firm's California Employment Law blog and has made various presentations on discrimination, harassment and wrongful termination.

CONTACT INFORMATION:

www.foxrothschild.com
office: +1 415 364 5563
jpolsky@foxrothschild.com