The Impact of Recent Statutory, Regulatory, and Workplace Developments on Employment Policies

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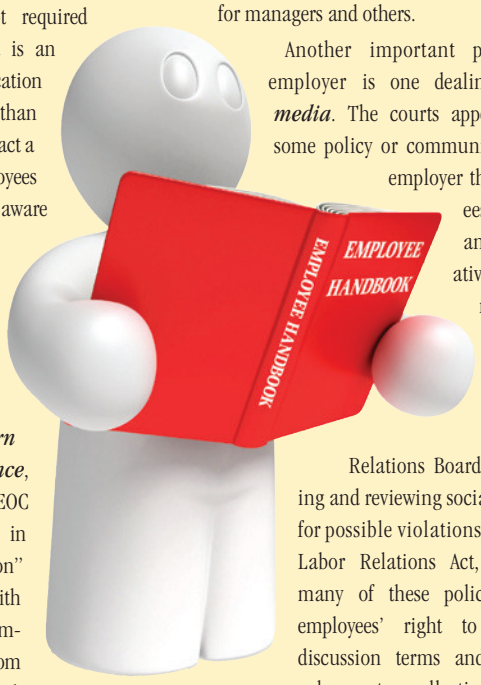
This article will discuss various developments, – statutory, regulatory and cultural – that are impacting the workplace, and ways to address same by either modifying existing, or adopting new, policies. It is not exhaustive, and covers developments over the last two years

Perhaps the most mandatory development would be the requirement that employers that are subject to the Fair Labor Standards Act ***provide a private place for non-exempt nursing mothers to express breast milk***. Employers of 50 or less employees are not required to provide a private place if it is an undue hardship. The location must be someplace other than a bathroom. It is a good idea to enact a Lactation Policy informing employees of this right, and also to simply be aware of it as an employer.



A hot button enforcement issue for the Equal Employment Opportunity Commission has been leave policies that provide for ***automatic termination if an employee fails to return from a medical leave of absence***, typically an FMLA absence. The EEOC expects employers to engage in the "reasonable accommodation" analysis under the Americans with Disabilities Act at the time an employee would be expected back from an FMLA or other disability leave. The EEOC regulations under the ADA view a relatively limited fixed duration additional period of leave that will allow the employee to be able to perform the job as an appropriate accommodation and employers who do not engage in that analysis have been a target of EEOC enforcement and significant penalties.

Another item that is receiving increasing attention is the ***use of criminal background records to disqualify minority employment candidates***. The Pennsylvania Human Relations Commission is developing a Guidance on when an employer may deny employment based on a criminal record. That guidance in its draft form provides a presumption that the employer is discriminating if they reject an African American or Hispanic job candidate unless the employer can establish certain defenses that are available under the guidance. The EEOC has already issued and has in place a policy statement on conviction records under Title 7 that was issued in February of 1987. It is a good idea to review these documents, evaluating applicants and your own policy on criminal background checks. Criteria for application of information on arrests for misdemeanors or felonies that may be found in the background checks should be spelled out for managers and others.

Another important policy for any employer is one dealing with ***social media***. The courts appear to look for some policy or communication from an employer that tells employees what they can and cannot do relative to use of social media in and outside of the workplace. In addition, the National Labor Relations Board has begun citing and reviewing social media policies for possible violations of the National Labor Relations Act, claiming that many of these policies violate the employees' right to socialize and discussion terms and conditions of employment, collective. The NLRB initiative is being applied against non-union and union employers in this regard.

If you have not updated your EEOC policies to include not discriminating on the basis of genetic information, you should do so. The employment portions of the ***Genetic Information Non-Discrimination Act*** went into effect on November 21, 2009, and are a "protected category" as much as age, religion, gender, etc. Employers should also consider policies regarding how genetic information is handled if the employer comes into possession of same.

There have been changes to the ***Family Medical Leave Act***, particularly with regard to those in or dealing with members of the armed services that need to be included in your FMLA policy.

In addition, there have been changes to the ***ADA amendments Act of 2008***, which went into effect on January 1, 2009. There are not a lot of changes that need to make to policies as a result of these amendments enactment, though an employer want to clarify certain items that were clarified by those amendments.

The courts have continued to express support for the use of ***alternate dispute resolution procedures*** for disputes arising in the employment relationship, when the policies are properly enacted, communicated, and applied. This includes mandatory arbitration of various claims including Title 7 claims. If your firm is interested in utilizing this mechanism to avoid the availability of the courts for employee claims, they need to be properly drafted and applied.

More and more employers are ***offering benefit coverages for same-sex spouses, civil unions and domestic partners***. This is sometimes a deciding factor in whether you get employees you desire. There are several aspects of the employment relationship that need to be considered when providing such benefits, including defining a "domestic partner," proof of same, documenting the termination of same, etc. and a well-drafted policy is very useful in doing so.

Finally, OSHA has announced that it views a ***workplace violence policy***, that is one designed to avoid and prevent violence in the workplace, as something required of an employer under the "General Duty" clause of the Occupational Safety and Health Act. These are not complex policies but if you do not have one. You should enact one for several reasons, including becoming a target of an OSHA investigation or audit.

I understand that is it difficult to find the time to amend and keep handbooks current. However, they are an important part of an employers best practices, allow the employer to "Control the playing field" by defining the rules of the relationship, not to mention assisting in minimizing exposure to legal claims in the workplace.