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Nonprofits in Lean Times: Employment and Labor Challenges for Nonprofits in the Economic Downturn

David Warner, Esq.
Grace Lee, Esq.

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Auditing HR Practices – What's on the Table

- Recruitment & outreach
- Selection – hiring & promotion
- Compensation
- Evaluation
- Discipline & discharge – complaint resolution
- Training
- Documentation standards & compliance



Key Issues in Today's Market

- Performance review and counseling
 - Regularity and content of reviews
 - Documentation of counseling
 - Consistency of disciplinary action (adverse impact)

- Terminations
 - Use and consistency of progressive discipline
 - Centralized review process prior to termination
 - Formal or informal grievance/appeal process
 - Exit interviews



Key Issues in Today's Market

- Wage & Hour compliance (FLSA)
 - Classifications
 - Time-keeping
- Written policies (sexual harassment, EEO disclaimers, etc.)
- FMLA policies and practices
- Employee privacy/monitoring
- Drug testing
- Labor relations (EFCA)



Goal of HR Audit

- Ensuring that efficient processes are in place to meet operational needs
- Ensuring validity and compliance of policies and processes with equal employment opportunity and affirmative action laws if applicable
- Ensuring effectiveness of implementation – avoiding the “disconnect” between policy and practice



DC Accrued Sick and Safe Leave Act of 2008

Effective November 13, 2008



DC Accrued Sick and Safe Leave Act

- ASSLA provides paid leave to eligible employees for:
 - Absence resulting from physical or mental illness, injury, or medical condition of the employee;
 - Absence resulting from obtaining professional medical diagnosis or care, or preventative medical care;
 - Absence for purpose of caring for a child, parent, spouse, domestic partner, or any other family member who has any of the conditions or needs for diagnosis or care described above; and
 - Absence if the employee or employee's family member is a victim of stalking, domestic violence, or sexual abuse.



Amount of Leave

- Depends on the number of employees (full-time equivalent)
 - 100 or more employees: At least one hour of paid leave for every 37 hours worked, up to seven days per calendar year
 - 25-99 employees: At least one hour of paid leave for every 43 hours worked, up to five days per calendar year
 - 24 or fewer employees: At least one hour of paid leave for every 87 hours worked, up to three days per calendar year



Employee Eligibility

- Employee who has worked 1,000 hours in the previous 12 months, or
- 90 days after the start of employment, whichever is later



Interaction with Existing Leave Policies

- No additional leave or modification to existing policy is required if:
 - Employee can access and accrue paid leave at least at the same rate or greater than hours of paid leave required under the Act
 - Employee can use paid leave for the covered reasons under the Act



Carry Over and Pay Out

- Act requires unlimited carry over of unused and accrued paid leave
- However, the Act only allows maximum hours allowed to be used in one year, unless the employer chooses to provide greater benefits
- Unused and accrued paid leave is not paid out upon employee's resignation or termination



Employee's Obligations

- Employee must provide written request upon notice of need for leave
 - Notice must include reason for absence and expected duration of paid leave
- If leave is foreseeable, request shall be made at least 10 days in advance, or as early as possible
- If leave is unforeseeable, an oral request must be made prior to the day for which the paid leave is requested
- In an emergency, employer must be notified prior to the start of the next work day or within 24 hours of the onset of the emergency (whichever is earlier)



Certification

- Employer may require reasonable certification for paid leave for three or more consecutive days
 - Signed document from health care provider
 - Police report indicating that employee was victim of stalking, domestic violence, or sexual abuse
 - Signed statement from victim and wellness advocate or domestic violence counselor
- Requested certification must be provided upon employee's return to work
- Information must remain confidential (unless employee consents, ordered by court, or required by law)
- May require more frequent certification if abuse is suspected



DC ASSLA - Next Steps

- Review leave policies and revise to comply with the Act
- Train supervisors about covered reasons for leave
- Ensure proper tracking of ASSLA leave



The Americans With Disabilities Act Amendments Act of 2008 (“ADAAA”)

Effective January 1, 2009



Why ADA AAA?

- Overturn Supreme Court and other federal court decisions that narrowed the definition of “disability” under the ADA
- Return federal disability law to broad coverage standard that Congress envisioned when ADA originally enacted in 1990



ADAAA Clarifies the Definition of Disability

- Broadens definition of major life activities
 - Clarifies that an impairment only needs to substantially limit one major life activity to be a disability
 - Clarifies that an impairment that is episodic or in remission is a disability if it substantially limits a major life activity when active
- Rejects narrow definitions of “substantially limits” and directs EEOC to revise its regulations



ADAAA Provides New Standard on Use of Mitigating Measures

- Overturns Sutton v. United Airlines and its companion cases
- No consideration of ameliorative effects of mitigating measures in determining whether an individual is substantially limited in a major life activity
- Two exceptions:
 - Contact lenses
 - Common eyeglasses



ADAAA Clarifies and Broadens Scope of “Regarded As” Claims

- “Regarded as” applicable when individual shows he/she has been subject to a prohibited action based on an actual or perceived physical or mental impairment
- No need to establish substantial limitation to a major life activity
- Does not apply to transitory and minor impairments (expected duration of 6 months or less)
- Clarifies that employers do not have to make reasonable accommodations in “regarded as” cases



Impact of ADAAA

- Expanded definition of disability = more employees protected
- Less focus on “disability” inquiry, more focus on interactive process and provision of reasonable accommodations



ADAAA: Recommendations for Employers

- Review and update, if necessary, ADA policies and practices, focusing on interactive process and reasonable accommodation procedures
- Provide refresher training to human resources professionals and managers/supervisors on ADA's requirements
- Maintain records of requests made and accommodations denied and/or provided, as well as evidentiary back-up for each decision



The Ledbetter Fair Pay Act



The Lilly Ledbetter Fair Pay Restoration Act of 2009

- Extends time for individuals to file claims of compensation discrimination
- What federal statutes does this amend?
 - Title VII of the Civil Rights Act of 1964
 - The Americans with Disabilities Act of 1990
 - The Rehabilitation Act of 1973
 - The Age Discrimination in Employment Act of 1967
- What triggers the beginning of a charge-filing period?
 - Adoption of discriminatory decision/practice; or
 - An individual's subjection to the decision/practice; or
 - The decision/practice affects an individual



The Lilly Ledbetter Fair Pay Restoration Act of 2009

- What does "affected by" include?
 - Each time wages, benefits, or other compensation is paid, resulting from the decision/practice, an unlawful practice occurs
- Who can file?
 - Not expressly limited to employees → "a person" or "an individual"
- When does this take effect?
 - Retroactive → May 28, 2007



The Lilly Ledbetter Fair Pay Restoration Act of 2009 – Recommendations for Employers

- Audit pay documentation practices
- Develop objective, measurable guidelines for compensation decisions
- Train supervisors and managers
- Review pay, benefit, seniority, and other policies
- Revise document retention policies



Conducting a RIF



Staff Reductions - Planning

- Consult with counsel BEFORE taking action
- Form Management Committee
 - Defines reason for RIF
 - Considers alternatives
 - Establishes parameters for selection
 - Provides “single voice” for the organization
 - Should be of diverse membership if possible



Staff Reductions - Planning

- Establishing selection standards and procedures
 - Common standards
 - Seniority, past performance appraisals, present employment appraisals, combination of past and present appraisals, quantity of production
 - Troublesome standards
 - Pension or retirement eligibility, level of compensation, future “potential”
- Competitive / Non-competitive selections



Staff Reductions - Implementation

- Who applies the standards?
- Who reviews the application of the standards to ensure they are appropriately and consistently applied?
- Should a company apply the same standards to all areas affected?
- Preliminary results should be examined to identify statistically significant adverse impact
- Collect relevant data points
- Perform analyses
 - <http://www.hr-software.net/EmploymentStatistics/DisparateImpact.htm>
 - Analysis of decision
 - Analysis of data driving decision



Staff Reductions - Analysis

- Perform additional drill-down as needed
 - A significant result does NOT mean that discrimination has occurred
 - Do NOT modify selection to “correct” imbalance
 - Perform “cohort” analyses to explain any significant results
 - Document explanations
 - Management committee review of selections and explanations PRIOR to communication



Staff Reductions - Communication

- Plain language explanation of:
 - Purpose
 - Standards
 - Areas to be affected
 - Severance package if offered
 - Benefits and transition to future employment
 - Consideration of releases – OWBPA obligations
- “Fairness,” or perceived lack thereof, is biggest driver of employment litigation



The Employer's General Checklist

Preventative services we provide include:

- Audits
 - Human resource-related audits, including an assessment of...
 - Wage & Hour Conditions
 - i.e., employee classifications & wage discrepancies
 - I-9 forms & filing
 - Regular audits, as well as pre-hire/fire reviews, help you avoid litigation by ensuring compliance with federal, state and local laws.



The Employer's General Checklist

- Training
 - Sexual harassment
 - Policies & procedures = affirmative defense
 - Cultural sensitivity
 - EFCA/union organizing



Questions???



Contact Information

David Warner, Partner

dwarner@Venable.com

t: 703.760.1652

Grace Lee, Associate

glee@Venable.com

t: 202.344.8043

www.Venable.com

