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Five New Year's Resolutions for Employers

Kelly Ann Bird
Carla N. Dorsi

Gibbons P.C.

As we look back on 2014, it is clear that "business as usual" with respect to employment practices cannot continue. But with so many developments, deciding where to start can be overwhelming. Here, we have fleshed out five resolutions that will get any employer, large or small, off to a good start in 2015.

Resolution #1

I will review my company's arbitration agreements.

For companies that utilize arbitration agreements, a few simple revisions to the language will strengthen enforceability. Some recent case law has reshaped what constitutes sufficiently clear and unambiguous language to notify the signer that he or she is waiving specific legal rights. For example, New Jersey's highest court, in *Atalese v. U.S. Legal Servs. Grp., L.P.*, recently held that an arbitration provision must clearly notify the party to be bound that he or she is waiving the right to sue in court.[1] While the subject arbitration agreement in *Atalese* was part of a consumer service agreement and did not arise in the context of an employment relationship, a subsequent decision by a New Jersey appellate court applied the holding in the context of a collective bargaining agreement.[2] There is no reason to believe it would not be applied in the context of a private employment agreement.

In addition, following a decision from the District Court for the District of New Jersey in early 2014, companies that have a disclaimer in their employee handbooks that allows the company unilaterally to revise workplace policies must harmonize that disclaimer with any arbitration agreements.[3] To this end, arbitration agreements should clearly state that they are irrevocable contracts despite any handbook disclaimer reserving the employer's ability to make unilateral changes to workplace policies. Similarly, handbooks should include language that the right of the company to change its policies does not apply to employment contracts, including arbitration agreements.

In short, some minor changes to the company's arbitration agreements and handbook disclaimers are a worthwhile undertaking in 2015.

Kelly Ann Bird *and* ***Carla N. Dorsi*** *are Directors in the Employment and Labor Law Department of Gibbons P.C.*

Kelly Ann Bird

Carla N. Dorsi

Resolution #2

I will examine my company's hiring practices, from job postings through background checks.

With over a dozen states and many more localities enacting a "ban the box" law and a renewed interest by the government and the plaintiff's bar in background checks obtained by employers from third-party consumer reporting agencies, companies should make it a priority in 2015 to review their employment applications, hiring processes and compliance with the Fair Credit Reporting Act (FCRA).

Generally, ban the box laws preclude employers from inquiring about an applicant's criminal history during the initial phase of the employment application process. Accordingly, employers in a ban the box jurisdiction or those that use a multistate employment application form or practice must review their application forms, job postings and interview processes to ensure compliance. Ban the box laws, however, are not the end of the criminal background check issue, and employers must not be lulled into believing that their inquiries into and use of criminal background information is unrestricted following the initial employment application period. After that initial period, ban the box laws may no longer apply, but anti-discrimination laws certainly do, and employers must remain mindful of the 2012 guidance issued by the Equal Employment Opportunity Commission (EEOC) regarding the use of a job applicant's criminal background records.[4] That guidance precludes use of an applicant's criminal record to categorically deny employment and encourages employers instead to perform a targeted screen followed by an indi-

Please email the authors at kbird@gibbonslaw.com or cdorsi@gibbonslaw.com with questions about this article.

vidualized assessment for each applicant. The former requires an employer to evaluate the nature of the crime(s), the nature of the job sought and the time elapsed since the conviction(s). If, after this screen, an employer is considering an adverse decision based on the criminal record, it should proceed to the individualized assessment, which requires notice to the applicant of the criminal background check results and an opportunity to provide additional information about the criminal record and to demonstrate that the adverse decision is not consistent with what the employer believes is business necessity.

Most recently, in 2014, as part of guidance issued jointly by the Federal Trade Commission (FTC) and the EEOC, the FTC provided practical advice regarding technical compliance with FCRA[5] - the federal law governing employers' use of consumer reporting agencies to conduct background checks on applicants and employees. While the requirements for compliance with the FCRA have not changed, the guidance signals the government's renewed interest in this area. Perhaps of greater concern to employers, however, is the increase in class action claims filed pursuant to FCRA. In 2014 alone, several large companies found themselves as defendants in class action lawsuits alleging FCRA violations, sometimes for simple technical violations. For example, Whole Foods is defending against allegations that the notice and authorization forms it provided to job applicants in the online application process – to obtain consent for Whole Foods to engage a credit reporting agency to procure a consumer report – were provided amidst other information and disclosures, rather than as a standalone document.[6]

Amidst the flurry of ban the box laws and guidance offered by government agencies, companies should take time this year to review – and, as necessary, revise – their hiring forms and practices. Compliance with both the spirit and technical aspects of these laws is critical.

Resolution #3

I will ensure my company's paid time off policies and practices are compliant with paid sick leave laws.

Paid sick leave laws are gaining momentum. Three states, the District of Columbia, and over a dozen municipalities have passed laws requiring companies to provide their employees with paid time off from work when, among other things, they or their family members are ill. Legislation and resolutions are pending elsewhere. Companies with operations in a covered jurisdiction should review their paid time off policies to ensure that they meet the relevant requirements – and are not just providing the minimum number of paid sick days. The new laws require accrual of sick time at specific rates, carryover of unused time from year to year, and requirements for tracking or documenting use of the time. Accordingly, reviewing paid sick leave policies and practices should be a priority for companies in 2015.

Resolution #4

I will rethink my company's policies and practices concerning pregnant employees.

In 2014, pregnancy in the workplace became a focus of legislative bodies and the EEOC and was addressed in a case presented to the United States Supreme Court. The concurrence of activity means, in short, that no company can afford to apply outdated policies or practices to pregnant employees.

Concluding that pregnant women are vulnerable to discrimination in the workplace and have been removed, fired or placed on leave from their positions,[7] numerous states and municipalities have enacted protective legislation. In general, the various acts and ordinances explicitly prohibit discrimination based on pregnancy, and some also impose new and significant accommodation requirements.

By way of example, New Jersey's January 2014 Pregnant Worker's Fairness Act (NJPWFA) amended the New Jersey Law Against Discrimination (LAD) to add pregnancy (defined as "pregnancy, childbirth, or medical conditions related to pregnancy or childbirth, including recovery from childbirth") to the list of protected characteristics. The amendment mandates that employers who know, or even "should know," that an employee is "affected by pregnancy" must treat that employee no less favorably than employees who are not pregnant but are similarly situated "in their ability or inability to work." Finally, the NJPWFA requires employers to provide reasonable accommodations to pregnant employees who request them "based on the advice of [a] physician." The statute even provides a list of examples of reasonable accommodations in the workplace, such as bathroom breaks and "temporary transfers to less strenuous or hazardous work." Notably, the goal of the NJPWFA is to maintain pregnant women in the workplace; it explicitly does not increase or decrease a pregnant employee's right to paid or unpaid leave under any applicable law or company policy.[8] (But be wary of differences in legislation: some laws that impose accommodation obligations do include leave among the statutorily enumerated possible accommodations.)[9]

The status of federal pregnancy protections is less clear in light of recent case law and EEOC guidance on point.[10] The Pregnancy Discrimination Act (PDA), while prohibiting discrimination on the basis of pregnancy, does not impose upon employers an affirmative obligation to provide accommodations to pregnant employees; rather, it requires only that employers treat women affected by pregnancy the same as others "not so affected but similar in their ability or inability to work."[11] This law is the subject of a case argued before the United States Supreme Court just weeks ago, on December 3, 2014. In *Young v. United Parcel Service (UPS)*, the United States Court of Appeals for the 4th Circuit held that the PDA did not require UPS to afford a pregnant employee an accommodation relative to an essential job function.[12] Young appealed, and now it remains to be seen what the Supreme Court will rule.

In the meanwhile, however, the EEOC has issued enforcement guidance that appears to add to the PDA a reasonable accommodation requirement. For example, the guidance states that employers must provide light duty to pregnant employees and must allow leave.[13] The guidance does not have the weight of law or a Supreme Court decision, but does give employers insight into the EEOC's potential enforcement activity.

In light of all this activity, what should employers be doing? First, assess what laws apply to your company. Then, draft policies and implement practices in accordance with those that offer the greatest benefit to your employees. In short, your policies must at a minimum contemplate maintaining pregnant employees in the workplace, and furthermore leave open the potential for leave.[14]

Resolution #5

I will equip my employees with the knowledge and ability to comply with and enforce my company's policies and our legal obligations.

In order to be able to even attempt to stick to resolutions 1-4 (and any others you may add to your list), it is imperative that you help your employees understand your policies.

As a starting point, your frontline managers and supervisors simply cannot enforce policies without understanding what the policies mean, why they exist, and what their roles are in implementation and enforcement. An interactive training

program provides the opportunity for a dialog and questions. Training non-managers makes good business sense too. An understanding of policies increases compliance and can reduce the costs associated with inappropriate conduct and policy violations.

If training the entire workforce on all company policies is not feasible, at a minimum employers should train all employees on the company's anti-harassment and discrimination policies. The judiciary has made clear the advantages of such policies and training in avoiding liability for allegations of harassment or discrimination.[15] New Jersey's Appellate Division just endorsed – yet again – this premise, providing a helpful reminder to employers that clear policies, regular training, and immediate attention to allegations are important steps in protecting your company.[16]

Best wishes in implementing your resolutions!

1. *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430 (2014).

2. *Kelly v. Beverage Works NY Inc.*, Docket No. A-3851-13T4, 2014 N.J. Super. Unpub. LEXIS 2792 (N.J. App. Div. Nov. 26, 2014).

3. *Raymours Furniture Co., Inc. v. Rossi*, Civil Action No. 13-4440 (JBS), 2014 U.S. Dist. LEXIS 1006 (D.N.J. Jan. 2, 2014).

4. EEOC Enforcement Guidance No. 915.002 "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" (4/25/12).

5. "Background Checks: What Employers Need to Know," A joint publication of the Equal Employment Opportunity Commission and the Federal Trade Commission.

6. *Gezahegne v. Whole Foods Market California, Inc.,* Civil Action No. 3:14-cv-00592.

7. *See, e.g.,* S. 2995, 215th Leg. (N.J. 2013), relative to New Jersey's Pregnant Worker's Fairness Act.

8. *See* N.J.S.A. §10:5-12(s).

9. *See, e.g.*, Maryland Fair Employment Practices Act, Md. Code Ann. State Gov't §§20-601.

10. Although a federal version of the Pregnant Worker's Fairness Act has been proposed in the Senate and House of Representatives. *See* Pregnant Worker's Fairness Act, H.R. 1975, S. 942, 113th Cong. (2013-2014).

11. *See* 42 U.S.C.S. § 2000e(k).

12. *Young v. United Parcel System*, 707 F.3d 437 (4th Cir. 2013), U.S. No. 12-1226. Notably, the claim was filed prior to the ADA Amendments Act of 2008, and thus the ADA analysis was decided under the pre-Amendments definition of disability.

13. EEOC Notice 915.003: *Enforcement Guidance: Pregnancy Discrimination and Related Issues*, July 14, 2014.

14. And do not forget the Family and Medical Leave Act, state or local leave requirements, and the Fair Labor Standards Act, all of which potentially provide benefits to your pregnant employees or new mothers.

15. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

16. *Dunkley v. Coraluzzo Petroleum Transporters*, 437 N.J. Super. 366 (App. Div. 2014).