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Employment Law Trends For Financial Cos. In 2012

Law360, New York (January 03, 2012, 2:41 PM ET) -- It seems likely that the struggling economy will continue to be a primary driver of labor and employment law issues in 2012, particularly in the financial services industry. While there are many important legal issues that will arise in this environment, employers in the financial sector should consider the following five issues as potential hot-button topics for the coming year.

First, and unfortunately, banks and other financial institutions will likely continue to downsize. Rather than major, across-the-board layoffs where each manager is asked to cut a certain percentage of staff, however, smaller and more targeted reductions are likely.

The elimination of specific departments seems to be more common, while others remain untouched, as companies decide to withdraw from certain unprofitable products or lines of business.

This can be helpful in avoiding employment discrimination claims because all employees in the department are typically discharged; on the other hand, it can be problematic if, for example, the targeted department is comprised of a higher number of older employees than other departments.

Employers should also be aware of the demographic makeup of those employees who are transferred to other departments in lieu of discharge, as that could also serve as the basis for a discrimination claim by those who are not similarly spared.

Second, the pressure on managers to maintain or decrease headcount sometimes induces them to retain “consultants” or “freelancers” when hiring new employees is out of the question.

In the current atmosphere of increased legislative attention to the issue of misclassification of employees as independent contractors, it will be more important than ever to make sure that workers are correctly classified.

In addition, individuals who have been classified as independent contractors and are let go — for example, in connection with the elimination of a department — often seek, among other things, the same severance package that is offered to employees on the grounds that they, too, were employees all along, with the threat of litigation over the alleged misclassification as leverage.

It is worth delving into the factual circumstances before terminating the relationship with a consultant or freelancer.

Third, the pressure on managers to maintain or decrease headcount can also lead to longer working hours for the employees who remain. If such employees have been misclassified as exempt from overtime pay requirements under federal and state law, the employer is essentially increasing its own potential liability for unpaid overtime wages — and double damages — by increasing the workload of existing employees.

Thus, ensuring that all employees classified as exempt from overtime pay are correctly classified is vitally important. Just as important is making sure that these employees understand from the outset that they will receive the same weekly salary regardless of the number of hours they actually work from week to week, and that this in fact happens, so that the “half-time,” or "fluctuating work-week," method of calculating overtime, instead of the better known time-and-one-half rate, may possibly be used if it turns out that the employees were incorrectly classified and litigation or threatened litigation results.

Fourth, to the extent that financial services companies can hire new employees or replace those who resign, many seem to be looking increasingly at hiring current government employees who have specifically relevant experience and expertise with financial and regulatory issues, and in some cases, valuable connections and access to government contacts.

Employers must be cognizant of the numerous limitations and restrictions on negotiating employment with and hiring employees of federal, state and local governments, as well as the post-employment ethical restrictions on such individuals after they leave government service.

These restrictions — sometimes referred to as the “revolving door” rules — can be found in statutes such as the federal Ethics Reform Act, the Procurement Integrity Act and regulations promulgated by the U.S. Office of Government Ethics, as well as state and local laws. For example, the New York State Public Officers Law and the New York City Charter both contain provisions regarding post-employment restrictions on former state and city employees, respectively.

Finally, another trend that will likely continue that is directly related to the difficult economic times is the increasing number of states enacting statutes that prohibit or limit employers from obtaining and using credit reports in making hiring decisions.

Seven states have now passed such legislation, with similar legislation pending in many other states and at the federal level. Financial services employers are sometimes, but not always, exempt under these restrictive statutes, at least with respect to certain positions. Thus, an awareness of these restrictions and their variations from state to state will be essential.

Predicting what the new year holds in store will never be an exact science, but keeping a weather eye on these likely employment issues can serve a company well in the long run.

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