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Issues Facing Employers in 2013

Some employment law "hot topics" are continuations of long-term trends while others have gained significance recently as the result of changing governmental priorities or evolution in relevant case law. Here, in no particular order, is our list of the top ten developments that employers are facing in 2013:

1 The Employee Misclassification Initiative.

The IRS and the Department of Labor ("DOL") have engaged in a joint initiative to seek out and correct employers' misclassification of employees as independent contractors. Notably, both agencies have increased the level of funding and manpower devoted to this initiative, which the government is estimating can bring in over $7 billion in additional revenues. Given this heightened scrutiny and the far-reaching implications of misclassification (including, without limitation, liability for back payroll taxes and penalties, wage and hour concerns, and civil penalties under state law), employers should make sure their workers are properly classified.

2 Limitations on the Use of Criminal Background Checks for Employment Purposes.

Last year, the Equal Employment Opportunity Commission ("EEOC") issued a guidance regarding the use of criminal background checks for recruiting and other employment purposes. The guidance can be found at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. In sum, the EEOC believes that the use of criminal background checks has a disparate impact on certain protected classes and, therefore, the use of such checks should be narrowly tailored to match the nature and requirements of the position in question. The EEOC has engaged in an increased level of enforcement against employers that, in its estimation, improperly utilize background checks for employment purposes.

3 Increased Scrutiny of Social Media Policies.

Over the past few years, most employers have implemented policies to regulate their employees' use of social media. Considering the explosion of social networking sites, such policies are important as a means of protecting their business. Employers should be aware, however, that the National Labor Relations Board ("NLRB") has been actively scrutinizing such policies to ensure that they do not impede employees' right to engage in protected concerted activity under the National Labor Relations Act. Employers should examine their social media policies to ensure that they are consistent with the latest developments in the law.

4 New Restrictions on Accessing Candidates' Social Networking Information.

Polls show that employers increasingly are requiring job candidates to allow the employer to access the applicants' personal social media accounts, such as Facebook or Twitter. As a result, many states, including California, Delaware, Illinois, Maryland, Michigan and New Jersey, have recently enacted laws prohibiting employers from requesting social media user names or passwords from employees or job candidates. Other states, including Georgia, are considering similar legislation. Employers should check their relevant state laws before requiring potential employees to hand over the keys to their social media accounts.

5 Potentially Greater Coverage Under Title VII for Discrimination "Because of Sex".

In *Macy v. Holder*, decided in April 2012, the EEOC ruled, in an agency action brought against the Bureau of Alcohol, Tobacco, Firearms and Explosives, that Title VII prohibits discrimination against transgender workers, deeming it to be discrimination "because of . . . sex." It remains to be seen whether other courts will accept the EEOC's interpretation, but in the meantime it is clear that the EEOC will view discrimination against transgendered workers as a violation of Title VII. In addition, President Obama has indicated that protection for LGBT individuals will be a priority of his second term. Accordingly, employers – even those in states that do not currently prohibit discrimination against LGBT workers -- should monitor any developments in the law to understand any expansion of coverage and ensure that their policies and procedures are drafted appropriately.

6 Increased Use of Arbitration Agreements in the Workplace.

In June 2013, the Supreme Court issued its decision in *American Express Co. v. Italian Colors Restaurant*, reinforcing that, in most circumstances, courts must enforce arbitration agreements that contain class action waivers, even if the plaintiff's potential recovery in an action would be less than the costs of pursuing an individual arbitration proceeding. Although *Amex* was not an employment case, it has sparked renewed interest among employers in implementing workplace alternative dispute resolution ("ADR") programs. While such programs can have many benefits, employers considering the use of mandatory ADR should ensure that any arbitration agreements with their employees are carefully drafted to comply with applicable legal requirements.

7 More . . . and More . . . and More Wage and Hour Actions.

Driven by increased enforcement action by the DOL as well as private claims by employees, employers are finding their pay practices under heightened scrutiny. There are many different types of allegations in wage and hour claims, with some of the most common being misclassification of nonexempt workers as exempt, failing to pay for time worked "after hours" (such as returning email), and improperly docking employees for meal periods and breaks that the employees are not able to take. Given the high cost of these disputes – which are often brought as collective actions – employers should periodically audit their pay practices to determine whether they are consistent with the Fair Labor Standards Act and applicable state law, and seek counsel as to the most effective way to mitigate any risks in this area.

8 Ever Increasing Employee Migration.

Numerous studies indicate that today's workers change jobs more than ever before, a phenomenon that can be extremely detrimental for employers who invest time and money in training and allow these employees access to the business' customers and proprietary information. Therefore, it is vitally important that employers examine their policies, procedures and restrictive covenant agreements to ensure that they are adequately protected, recognizing that the laws in this area are highly state-specific. As many employers are aware, Georgia enacted a new law governing noncompete agreements and other restrictive covenants, making it easier for employers to enforce covenants against former employees. While there has been much confusion surrounding the effective date of the new law, one federal court has reasoned that the new statute applies only to covenants executed on or after *May 11, 2011*. Employers whose workforce executed agreements prior to that date should consider obtaining new covenants with their employees to take advantage of the new law.

9 Proliferation of Alternative Work Arrangements.

Most employers in today's environment have workers utilizing some form of alternative work arrangement, whether it be job sharing, flextime, a compressed workweek, telecommuting or another arrangement. These arrangements can be extremely useful for securing the best talent and increasing employee morale, but they also bring numerous risks, including many of the wage and hour, misclassification and employee migration concerns discussed above. Before entering into any alternative work arrangement, employers should ensure that the arrangement is carefully defined and that they understand fully the potential pitfalls associated with nontraditional forms of employment.

10 Implementation of the Employer Mandate of the Affordable Care Act.

Finally, and perhaps most significantly, the employer mandate of the Affordable Care Act ("ACA") goes into effect for most employers on January 1, 2015. In very general terms, the ACA requires employers with 50 or more full-time equivalent employees to provide affordable health coverage for their employees or risk paying penalties. Although the effective date of the mandate has been delayed until 2015, it is still critically important that employers begin to prepare for the implementation now.

If you have questions or would like additional information about any of these topics and how they may affect your business, please contact a member of the AGG Employment Law Team.

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About Arnall Golden Gregory

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