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THE JOB DESCRIPTION

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Tips to Avoid FMLA Pitfalls

Although the FMLA has been in effect for over 18 years, tricky situations present themselves constantly for employers. Not only it is challenging to administer the FMLA correctly when it intersects with other laws, such as the ADA and worker's compensation, but it is especially tricky when employees' specific medical restrictions continue to interfere with their essential job functions. In fact, the FMLA is usually the biggest headache of HR departments.

Most HR professionals know the basics of the FMLA, but there are details behind those basics and also pitfalls when applying the basics to specific situations. Failing to administer the FMLA properly can lead to lawsuits. Here are some common pitfalls and tips on avoiding them:

Develop FMLA Policies and Training on them: As with most personnel policies, the best way for employers to administer policies efficiency is to communicate those policies. The U.S. Department of Labor requires employers to post a notice of FMLA rights and to include an FMLA policy in their employee handbooks. Employers are not allowed to pick and choose what portions of the FMLA they want to adopt, but there are some issues that are left up to the employer. For instance, what 12-month period will be considered a benefit year (calendar, anniversary, fiscal, rolling forward, rolling

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The Cavanaugh Law Firm, LLC is committed to your company's success. We are available to provide you knowledgeable advice on the full range of labor and employment law issues and to defend your company and its managers in lawsuits and agency proceedings. If you have any questions about the contents of this newsletter or about any issue affecting your company, please contact us.

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$10 Minimum Wage Bill Introduced in Congress

Rep. Jesse L. Jackson, Jr. (D-Ill.) recently introduced the Catching Up To 1968 Act of 2012, which would raise the minimum wage to $10 per hour. In 2007, Congress raised the federal minimum wage by $2.10 per hour (from $5.15 to $7.25 per hour), where it has stayed since. A $2.75 per hour increase would be hefty, but according to Rep. Jackson, it still would not equal the purchasing power of the minimum wage in 1968 - which he said would be closer to $11 per hour in today's dollars.

As of last year, 5.2% of hourly workers in the United States, or about 3.8 million people, were compensated at or below the federal minimum wage, according to the Bureau of Labor Statistics. Though Congress is unlikely to pass this bill, the issue of raising the minimum wage has been reinvigorated.

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backwards)? Will employees be required to use sick time and vacation time along with FMLA leave? How frequently will the employer ask an employee for recertification of the need for leave for chronic serious health conditions? Will the employer require employees to obtain a healthcare provider certification form for pregnancy, the most common serious health condition?

Train Supervisors and Managers on Handling FMLA Issues: Training supervisors and managers is crucial for FMLA compliance. Supervisors and managers should be trained when to advise an employee to request FMLA leave from HR and when to involve HR in an employee's potential FMLA situation. This training should outline employee rights under the FMLA, teach supervisors to respect the confidentiality of the medical information of employees and their family members, and prepare them for the frustration and inconvenience caused by employees' FMLA leave, especially intermittent leave, so as to avoid being accused of retaliation.

Adjust performance standards: The FMLA does not limit employers from disciplining employees for poor performance, unless the performance problems are somehow related to that medical leave. For example, employers may want to be cautious and reduce quarterly or annual sale quotas for those employees who have taken an approved FMLA leave. Remember, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, nor can FMLA leave be counted under a "no fault" attendance policies. There should be no penalties imposed on employees for taking approved FMLA leave.

Ensure employees on FMLA leave do not work: An employee on FMLA leave should not be required or permitted to work. Otherwise, the employer risks being sued for interference with FMLA rights and also for violating wage & hour laws. It is lawful to ask an employee to field a few brief telephone calls or respond to infrequent short e-mails about the status of the employee's work assignments. However, the employee should not be performing productive work while on FMLA leave.

The FMLA is one of the more complex rules with which employers must deal. But with some upfront planning, strong communications, and internal education, the risk of costly litigation can be minimized.

Top 10 Guidelines for Social Media Background Checks

Many employers conduct social media background checks on job candidates. On one hand, this may reveal useful information about a candidate and his or her background that hiring managers would not otherwise know from job application and interview. On the other hand, this may reveal protected information (such as the candidate's religious beliefs, marital status, and national origin) that could expose the hiring manager and organization to an unlawful discrimination claim if the candidate does not receive a job offer.

Therefore, employers must consider the risks of acquiring information about a candidate that reveals his or her membership in protected categories, such as religious beliefs, pregnancy, disability or serious health condition, or information about their family's medical history and genetic information. Employers must also consider the risks of accessing information about a candidate's protected activity, including workers' compensation claims or protected concerted activity under the National Labor Relations Act.

We recommend the following guidelines for recruiters and hiring managers:

1. Search only public content about the candidate on the Internet.
2. Separate the social media researcher from the decision-maker.
3. Search public content in a uniform manner.
4. Notify candidates of the company's practice of searching public content on the Internet about the candidate.
5. Comply with the terms of service of each social media site, blog, or other Internet site.
6. Do not coerce a candidate to provide the company with access to their social media sites.
7. Base hiring decisions only on usable information obtained from public online content.
8. Document the legitimate, nondiscriminatory reasons for the hiring decision.
9. Train hiring professionals in the company's social media research practices.
10. Obtain the candidate's written consent under the Fair Credit Reporting Act if you are using an outside company to perform the check.

New Illinois Law Protects Employees' Online Privacy

Illinois Governor Pat Quinn recently announced he will sign legislation that will amend Illinois' Right to Privacy in the Workplace Act, 820 ILCS 55/1 et seq., to prohibit employers from requesting or requiring employees and applicants for employment to disclose their log-in credentials for, or to grant access to, their social media accounts. Illinois will join Maryland as the only two states to prohibit employers from requesting or requiring social networking log-in credentials from employees and applicants.

Notably, the Illinois law contains no express exceptions, including for legitimate workplace investigations. It also does not address the issue of employees who save their personal social media passwords on their employer computers.

Congress is attempting to extend this type of restriction to employers nationwide with two currently pending bills, the Social Networking Online Protection Act (SNOPA) and the Password Protection Act of 2012 (PPA).

Employers with employees in Illinois should review their human resources policies and practices to make sure they conform to this new Illinois law. In addition, employers should advise recruiters and managers who interact with applicants and employees in Illinois of this change.

Supreme Court Upholds Healthcare Reform

What it Means for Employers

The U.S. Supreme Court has issued its long-awaited decision on the Patient Protection and Affordable Care Act (ACA) and upheld the "individual mandate" and the provisions of ACA that impact employers.

While the political impact of this ruling is far from certain, the impact on employers is clearer – it's time to get to work. Many employers had been waiting to see if the Supreme Court would invalidate much or all of ACA. Now it is time to analyze how healthcare reform will impact their businesses.

Here are some ACA issues affecting employers; they will become effective in 2014 or shortly thereafter:

The Employer "Play or Pay" Mandate: While much of the focus recently has been on the individual mandate, the more important mandate for employers is the "play or pay" mandate, which will require large employers (generally, those with 50 or more full-time employees) to provide adequate and subsidized group health plan coverage to all full-time employees and their families beginning in 2014. If an employer fails to satisfy this requirement, it will be subject to a penalty - generally, $2,000 per full-time employee per year.

New Nondiscrimination Requirements: The ACA prohibits most insured group health plans from discriminating in favor of highly-paid employees.

Automatic Enrollment: Most employers with more than 200 employees will have to enroll automatically new employees who are eligible for group health plan coverage. Rather than having to affirmatively elect health coverage, the "default" will be for employers to automatically enroll any eligible employee who fails to opt out.

Reporting the Cost of Coverage on 2012 W-2s: Beginning with the 2012 W-2 forms to be distributed in 2013, many employers will be required to report the total cost of any group health plan coverage that was provided to an employee. This cost is not taxable – it is simply an informational item on the W-2. But ensuring compliance with this new requirement will likely require a lot of coordination between an employer's HR and payroll departments. Ensure that you are adequately planning for this new requirement now, as it will be quite difficult to gather all of the necessary information and program payroll systems after the end of year and still be in a position to distribute W-2s in a timely manner.

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