

2014 High Risks for Employers – Fitness Goals

By Hope Eastman

As the New Year gets underway and we make New Year's resolutions, we thought it would be useful to highlight the top five issues that we see as high risk for employers in 2014 as a result of government scrutiny and enforcement priorities. You should be aware of them as you identify your priority projects for the year.

- Harassment: Long after we thought some of these issues were resolving, the EEOC reports that harassment claims – sex, race, and national origin – continue to flood their dockets. Although many companies have high-level policies, too often the message doesn't get to all levels of supervisors and employees and egregious conduct persists.
- Unfair labor practices: The NLRB continues its attack on non-union businesses, challenging a wide variety of traditional practices as being infringements on the rights of employees to discuss and take concerted action about their wages, benefits, and conditions of employment. Look out for overly broad handbook provisions, steps taken to discipline employees who complain about work-related issues, confidentiality provisions, investigations, and social media policies.
- Disability discrimination: The EEOC is continuing its ratcheted-up interest in hiring and promotion discrimination against individuals with disabilities, in keeping with priorities established by the Obama Administration. Also, a key 4th Circuit decision issued last week greatly clouds the distinction between disabilities and temporary impairments previously excluded from disability. (See *Summers v. Altarum Institute* and blog).
- Overbroad use of criminal records: As attention continues to focus on bringing Americans into the workforce and statistics show that between a quarter and a half of the population of African American men at some point have a criminal record, the EEOC continues to focus its attention on requiring employers to do a job-specific analysis of the relevance of convictions to particular jobs. State statutes are also increasingly imposing various bans on the use of criminal records. Blanket exclusions are the most dangerous.
- Leave as an accommodation under the Americans with Disabilities Act (ADA) and the Americans with Disabilities Amendments Act of 2008 (ADAAA): Employees who are disabled and need leave are not limited to the FMLA's 12-week limit on leave or comparable state and local leave laws. Additional leave must be considered on a case by case basis as an accommodation under the ADAAA. Intermittent leave and extended leave continue to bedevil employers. The EEOC steadfastly refuses to put an outside time limit on what is reasonable (but indeterminate leave is likely unreasonable). Here again, blanket policies are dangerous, but it is important to put in place a process so you do not run afoul.

As always, let us know if we can help and happy new year to all.