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Employment Law

Help Clients Gear Up for Renewed Hiring

By Michael Homans

After nearly three years of hiring freezes and reductions in force, and 2.6 million lost jobs, most employers — and their former employees — are hoping that the spring and summer of 2004 brings growth in employment opportunities.

Indeed, the Bush Administration optimistically projects more hiring over the next nine months than in the last three years combined. Employers who do embark on hiring campaigns will need the assistance of their attorneys to ensure that they are up to speed on state and federal laws and regulations — including several that have come along since the last substantial growth in employment, back in early 2000.

Outside counsel can provide better service to their clients by being informed and prepared in advance of this expected hiring wave, thus helping them anticipate issues and avoid problems. While not an exhaustive description of all hiring issues that counsel and their clients need to be aware of, the key issues to review prior to implementing any significant new hiring this year include:

• *New overtime regulations*.

At the end of March 2004, the U.S. Department of Labor is scheduled to issue final regulations revising the "white collar" exemptions for overtime pay under the Fair Labor Standards Act. The regulations, once issued, can be found at the DOL's Web site at www.dol.gov. The DOL projects that 1.3 million employees will be re-classified, entitling them to overtime pay under the new regulations. At the same time, nearly 600,000 employees will suddenly lose their statutory right to overtime pay.

Employee advocates estimate the numbers differently, projecting that as many as 8 million workers could lose overtime rights under the proposed revisions. Employees such as paralegals, insurance adjusters, inside salespeople and computer technicians also could see their status change, depending on their duties, under the proposed regulations.

In any event, employment counsel will be needed to help their clients sort out the consequences for new hires as well as the existing workforce under the new regulations, if they are finalized and approved — an issue that is still under debate, given this election year and organized opposition to the changes.

• *The USA Patriot Act*.

Lawyers who represent clients in pharmaceutical, biotechnology or chemical industries need to ensure that their clients are up to date on the USA Patriot Act of 2001, 18 U.S.C. 175b, with regard to limitations on which employees can handle select biological agents and toxins.

The law requires that all persons who have access to restricted biological agents and toxins — including 13 viruses, seven bacteria and 12 different toxins — must provide background information that includes criminal records, use of controlled substances and other personal information. Criminal penalties may be imposed for noncompliance.

• *Criminal and credit background checks*.

Many employers have saved themselves thousands of dollars, and hours of aggravation, by requiring all new hires to submit to a criminal background check and credit check. These reviews are especially appropriate if the person being hired will be responsible for company funds or property. State and federal laws mandate certain criminal, child abuse and background checks for employees who work in schools, in childcare, in nursing homes, in law enforcement and in other limited situations.

Counsel should advise their clients-employers that they must obtain written authorization from the employee before conducting such background checks, under the federal law known as the Fair Credit Reporting Act, 15 U.S.C. 1681 et seq. (FCRA), which Congress amended in December to provide greater protections to consumers.

In addition, FCRA requires employers in many situations to provide copies of "consumer reports" to each employee investigated. Employers also should be advised that an employee cannot be terminated or denied a job solely because he or she has been arrested, or has a criminal record that does

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not bear substantially on his or her ability to do the job in question. However, an employee may be terminated or denied a job if the criminal conviction bears on the employee's ability to perform the job at issue.

New Jersey's Division of Civil Rights also has taken the position that employers who inquire about the number and kinds of arrests of an applicant engage in wrongful discrimination in violation of the Law Against Discrimination, because an arrest is not an indication of guilt or ability to perform a job and screening out applicants on that basis may have a disparate impact on minorities. In Pennsylvania, the Criminal History Record Information Act, 24 P.S. §1-111, and relevant case law, require that employers limit consideration of such records to convictions that relate to the employee's suitability for employment in the position at issue; terminations based solely on the fact of arrest are prohibited. See *Cisco v. United Parcel Services, Inc*., 328 Pa. Super. 300, 476 A.2d 1340 (1984).

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• *Update the employee handbook*.

Every human resources professional and employer has had the experience of wishing his or her company's employee handbook had an explicit provision to cover a recurring situation in the workplace. Employment counsel best serve their clients and their clients' employees by recommending and overseeing periodic updates of employee handbooks to include such situations before or after they occur, as well as provisions for new changes in the law. This is an inexpensive and cost-effective way to serve your clients by helping them avoid future headaches, and has the added benefit of cementing your bond as their proactive employment counsel.

Many employers have yet to catch up with the requirements of the 1993 Family and Medical Leave Act, 29 U.S.C. 2601 et seq., and the duty to accommodate and avoid questions about pre-employment disabilities under the Americans with Disabilities Act, 42 U.S.C. 12101 et seq.

• *Consider a binding arbitration clause*.

Many employers, wanting to avoid the unpredictability of lawsuits and jury trials, require their new hires or job applicants to sign agreements to arbitrate any dispute that arises out of the employment relationship. These can be incorporated in job application forms, employee handbooks and employment agreements — but lawyers must review such clauses to ensure the courts will enforce them.

Under both state and federal law, the arbitration clause must allow for a fair and impartial process that is not unduly burdensome to the employee. New Jersey employers also are required to ensure that the arbitration clause is unambiguous in obligating the employee to arbitrate the claim at issue. The N.J. Supreme Court has held that an arbitration clause or agreement, to be enforceable, should put the employee on notice that he or she is agreeing to arbitrate "all statutory claims arising out of the employment relationship or its termination," as well as any other types of claims the employer intends to cover.

The employee also should be made aware, via the arbitration clause, that other options exist, such as federal and state courts and administrative remedies, and that the employee is waiving such remedies by agreeing to arbitrate his or her matter. See *Garfinkel v. Morristown Obstetrics & Gynecology Assocs*., 168 N.J. 124 (2001).

• *Noncompete agreements 1 — get yours*.

Counsel who advise employers hiring new sales and marketing personnel, executives, researchers or others to whom trade secrets or client relationships may be entrusted, should remind their clients that the best time to impose, negotiate and obtain restrictive covenants is during the hiring process.

In drafting noncompete agreements, however, counsel need to be careful not to "overreach." The Supreme Court of New Jersey is expected to decide this year the case of *Maw v. Advanced Clinical Communications, Inc*., which could rewrite the law of noncompete agreements in New Jersey. Under the Appellate Division's 2003 decision in the case, an employee could have a claim of wrongful discharge in violation of the Conscientious Employee Protection Act if he or she was terminated for refusing to sign an overly broad and unenforceable noncompete agreement.

Employers are hopeful that the Supreme Court will reverse or narrow the Appellate Division's *Maw* ruling. In the meantime, counsel should ensure that each restrictive covenant imposed on an employee is appropriately tailored to protect the employer's legitimate business interests.

In Pennsylvania, state law provides that the time of hire provides adequate consideration for noncompete agreements, but that an employer cannot impose such a covenant midway through the employment relationship, unless substantial "additional consideration" is given to the employee. Such new consideration can include a pay raise, a promotion or a substantial increase in benefits.

• *Noncompete agreements 2 — check theirs*.

The flip side of this issue is that counsel advising on employment issues need to warn their clients to take steps to ensure that new hires will not be violating restrictive covenants with former employees. The best way to check this is to discuss the issue with candidates ahead of time, and include in the offer letter or employment agreement a state-

ment that the employee must disclose any such agreements to the employer, and must comply with the terms of the agreement, or else face immediate termination.

If the employee contends that the restrictive covenant with the former employer is not enforceable, the new employer should have its own counsel review the agreement and reach an independent conclusion. A new employer that fails to be diligent and careful in screening new hires about their restrictive covenants can quickly and surprisingly find itself thrown into a storm of heated litigation, spending tens of thousands of dollars in fees in a matter of weeks to defend itself and its new hire against motions for preliminary injunctive relief — usually involving hyped claims of misconduct and unfair competition.

• *Anti-harassment training*.

The time of hire also provides one of the best opportunities to train and indoctrinate new employees as to the employer's culture and employment policies, including prohibitions against sexual and other unlawful harassment. New Jersey courts, as well as their federal counterparts, have repeatedly admonished employers that if they do not want to be vicariously liable for unlawful harassment by co-workers and low-level managers, then they must implement an anti-harassment policy, train managers and employees in the policy, enforce it when complaints do surface and support the policy from the top.

Counsel should encourage all of their clients to require that all new employees (1) read and acknowledge receipt of the anti-harassment policy, and (2) undergo training about the policy, which may include live training by counsel, if there is a substantial number of new hires, or the review of a video of prior employee training sessions.

• *Check the collective bargaining agreement*.

It may be obvious to labor counsel, but employers with labor unions need to ensure that any hire of new employees is consistent with the provisions of the collective bargaining agreement.

Many of these agreements have specific rules for recalling laid-off employees, and any violation of these rules can lead to charges of unfair labor practices, as well as the difficulty of having to fire a new employee who was hired in violation of the CBA.

• *Make yourself available as part of client's team*.

Finally, perhaps the best service any lawyer can do for his or her client with regard to hiring issues is to make sure the client knows he or she is available for advice, should any legal issue or delicate situation arise, day or night.

Clients will greatly appreciate knowing they have an advocate and counselor who is there not just to put out the fires and rack up fees on contentious litigation, but also who supports the business as part of the day-to-day operational team. In the end, it is both satisfying and rewarding work to help clients avoid losses and problems, and therefore maximize employee satisfaction and performance — and profits. ■