Simply put, employers rely on their workforce to perform and succeed. While this is nothing new, employers today face unique and dynamic issues in the employment relationship and from regulators. Employment practices litigation and EEOC complaints have been on the rise for the past decade. It appears that this momentum continues as we enter the 2nd quarter of 2014. Here are a few of the top employment-related issues trending to date:

- Social Media in the Workplace
- “Ban the Box”
- Wage and Hour Claims
- Whistle-blower / Retaliation claims

Social Media in the Workplace

Thanks to social media sites like Facebook, Twitter, Instagram and You Tube, it’s easy to learn a lot about a person’s background, “likes” and dislikes, plus circles of influence. However an employer’s use of information obtained from such social media sites opens them up to potential liability.

In a November 2013 study, researchers at North Carolina State University found that when job applicants realized a prospective employer viewed their social media profile, they were less likely to perceive the hiring process as fair, regardless of whether they were offered the position.

This feeling of inequity and possible invasion of privacy can be grounds for employment discrimination claims, based upon religion, race, gender, sexual orientation, health and disabilities.

The National Labor Relations Board (NLRB) is also focused on social media. Historically, the NLRB has protected employees and their ability to join or form labor organizations, or to bargain collectively for the purpose of mutual aid or protection under the Wagner Act in 1935. However in a ground-breaking case in 2010, the NLRB filed a complaint against American Medical Response of Connecticut, for firing an employee based upon grievances expressed about company management on her Facebook page. While a settlement was reached before trial, some say this precedent led the NLRB to go “viral” – issuing over 100 complaints against employers for allegedly restricting the use of an employee’s social media or the employer’s subsequent disciplinary actions for said social media usage. Why just last month, Valero Services, Inc. reached a settlement with the NLRB on April 7th to withdraw its “unlawful social media policy” which restricted employees’ rights to discuss their employment and working conditions on social media.
Employers should be aware that the NLRB issued three reports from August, 2011 to May, 2012 which has become their baseline for acceptable social media policies in a workplace. These guidelines can be found on the NLRB Social Media Fact Sheet.

"Ban the Box"

Ban the Box refers to the recent movement, and legislation in some cities and states, to remove the question asking job applicants if they’ve ever been convicted of a crime. In April 2012, the EEOC issued guidance that the “use of an individual’s criminal history in making employment decisions may, in some instances, violate employment discrimination under Title VII of Civil Rights Act of 1964.” Subsequently ten states, including Maryland, have held that this question is illegal. Furthermore, there are over 50 major cities and counties – such as Baltimore, Philadelphia, New York, Boston, Chicago, San Francisco and Washington, DC – which have also enacted this legislation for private sector employers. This speaks to the trend of municipalities having greater involvement in employment law while also re-emphasizing that employers must adhere to local as well as federal and state laws and regulations. In addition to the legal implications, ensuring compliance of “ban the box” can also impact an employer’s success when bidding on city, state or federal contracts.

“Ban the Box” legislation doesn’t stop with the removal of criminal background questions though. Many other local laws further complicate matters by stipulating that a criminal background check may only be conducted after an applicant has completed the interview process and has been offered a position. This of course seems counterintuitive to the hiring process…whereby an employer is only able to obtain information about a prospective employee’s criminal record once the employment relationship is well underway?

Companies need not only be cautious, but also prudent that collaboration among a firm’s HR, executive management and business development departments become routine so all parties are clearly informed about employment law updates prior to conducting business in new territory.

Wage & Hour Claims

Communication among key departments within a company is also critical in light of the predictions that Wage and Hour litigation will continue to rise and remain at the forefront of employment litigation this year. In 2013 there were a reported 7,882 Wage and Hour class action suits, which were up from 7,672 in 2012. Leading this systemic issue is the use of mobile devices in the workplace. The lines are often blurred surrounding paid time when considering the use of mobile devices. In other words, how do you discern when an employee is “off the clock”? Many leading employment law firms suggest that employers be prepared for suits from employees alleging they were not paid for work performed or underpaid due to misclassification.

Again, internal corporate communication is essential considering how mobile devices enable an employee to conduct business in variety of states, counties and cities.

Whistle-blower / Retaliation Claims

What do Sarbanes-Oxley and the Affordable Care Act (ACA/“ObamaCare”) have in common? Perhaps surprisingly, both laws prohibit whistle-blower retaliation claims.

On March 4th, a divided Supreme Court ruled (6-3) in Jackie Hosang Lawson, et al. v. FMR LLC, et al., that the whistleblower protections under the Sarbanes-Oxley Act of 2002 (SOX) also extends to employees of private contractors and subcontractors who perform services for publicly traded companies.
Justice Ruth Bader Ginsburg delivered the opinion of the court stating how this ruling “fits” the goal of whistle-blower protection in the Sarbanes-Oxley Act to “aim to ward off another Enron debacle.” Therefore whether your firm is publicly traded or privately-held, it now should ensure its employment practices and procedures address the reporting of fraud plus contain anti-retaliation policies against employees for reporting incidents of fraud.

Another new development applicable to public and private companies is whistle-blower protection under the Affordable Care Act (ACA). Section 1558 of Title 1 of the Act stipulates that “an employer may not discharge or in any manner retaliate against an employee because he or she provided information relating to any violation of Title I of the ACA or any act that he or she reasonably believed to be a violation of Title I of the ACA to:

1. the Federal Government;
2. attorney general of a state or
3. to the employer.”

Not only is it prudent for employers to realize they are now susceptible to such retaliation claims, but this speaks to the growing trend that federal laws are increasingly triggered when such violations are reported by the employee to the employer…not just to a formal government agency or board.

As a result, many anticipate that retaliation claims will increasingly continue to be included along with other employment practices claims (i.e. demotion or wrongful termination in retaliation for making a whistle-blower allegation). Employers need to be diligent in their documentation and employment records.
These are just a few of the hot employment topics in 2014, so don’t get burned… keep the lines of communication among departments open, ensure employee files are current, well-documented and seek advice from reputable employment counsel when needed. In addition, many employment practices liability insurers provide complimentary risk management services, such as confidential employment legal advice, HR best practices, and a host of employment-related services for their policyholders.