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HRA-GC LEGAL UPDATE DECEMBER 2013

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Ring in 2014: 'Tis the season for New Year's resolutions

The turn of the year is often a good time to review company policies. We're weighing in with some favorite perennial professional resolutions and perhaps a few new suggestions that might make for a happy 2014.

What's in a policy?

In our 1999 (yes, 1999!) article about New Year's resolutions, we suggested that you review and update or write an e-mail and Internet policy. (See "'Tis the season . . . for New Year's resolutions" on pg. 1 of our January 1999 issue.) The employment world—and issues involving e-mail, the Internet, and social media—has changed dramatically since then.

In 1999, we suggested that you develop a policy that sets standards for appropriate e-mail communications and Internet use, particularly to prevent e-mails from becoming a fertile source of evidence for claims of wrongful termination, discrimination, and harassment and to protect your company's confidential information. In recent years, we've seen what we thought were reasonable expectations and standards for appropriate e-mail, Internet, and social media postings (e.g., prohibitions on disparaging, inappropriate, demeaning, or unprofessional statements or on the disclosure of confidential information like wages and other employment-related information) run afoul of the National Labor Relations Board's (NLRB) views on employer policies that impermissibly chill, or dissuade, employees from communicating or exercising their rights to engage in concerted activity.

To start the new year, take another close look at your *e-mail and social media policies*. Does your policy provide specific guidance so employees will know what they can and cannot do and you don't unintentionally chill their rights to engage in protected concerted activity? Are the prohibitions appropriate, or do they infringe on communications the NLRB considers protected concerted activity?

We wrote articles in March and September 2012 and September 2013 about the NLRB's approach to social media cases and employers' attempts to enforce what they believed were appropriate policies. The beginning of the new year might be a good time to take another

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look at those articles and your policies. (See "Protected posting? NLRB offers more details on social media cases" on pg. 6 of our March 2012 issue, "NLRB general counsel summarizes 3rd social media guidance memo" on pg. 1 of our September 2012 issue, and "Confidentiality and nondisparagement provisions challenged" on pg. 5 of our September 2013 issue.)

While you're at it, what else is in your handbook?

It is not only a good idea to review policies that are currently the subject of scrutiny—such as social media policies and employment-at-will statements—but it's also a prudent measure to review *all* the policies in your handbook on a regular basis. When was the last time you reviewed your handbook and read your policies with a critical eye? Are your policies up to date? Are they still working well for you? Has your company changed size, and do you have different legal obligations as a result? An annual review is still recommended, and you might schedule it for the beginning of each calendar year.

Recent NLRB guidance has given us a reason to look beyond social media policies and examine many other standard policies to see whether they unduly restrict employees' rights to engage in protected concerted activity. Does your handbook's *employment-at-will policy* provide for the possibility that someone in your organization can sign an agreement that recognizes a union or a labor contract, establishes a term of employment, or modifies the employment-at-will standard? (See "Nonunion employers need to be aware of NLRB rulings and guidance, too" on pg. 2 of our January 2013 issue and "NLRB says at-will-employment policies are lawful" on pg. 2 of our July 2013 issue for a look at the NLRB's approach to employment-at-will statements.)

Would your *code of conduct* policy pass NLRB muster? The July 2013 article discussed the Board's concerns that provisions prohibiting employees from engaging in activity that might "raise questions as to the company's honesty, impartiality, reputation or otherwise cause embarrassment" or "create a conflict of interest for [employees] or the company" and a provision requiring employees to "follow all restrictions on use and disclosure of information" might impermissibly chill their rights to discuss the terms and conditions of their employment.

Do you have a blanket prohibition on employees discussing *investigations* during the course of an inquiry? Our June 2013 lead article, "NLRB General Counsel: Loose lips can sink ships, but only sometimes," discusses the Board's concerns about such policies. You may use it as a guide when you review your policies. Finally, see "NLRB deems employers' policies overly broad" on pg. 2 of our October 2013 issue for a discussion of *dress code*, *confidentiality*, and *nondisparagement* policies that the NLRB considered too far-reaching in their restrictions.

If you've been meaning to review and update your handbook, the beginning of the new year could be a great time to read your policies with a critical eye.

What about job descriptions?

We asked that question in a 2003 article about New Year's resolutions. (See "'Tis the season for New Year's resolutions" on pg. 1 of our January 2003 issue.) It may be too big a task to review and update all your job descriptions at once, so you often hear that employers update job descriptions when they're hiring for a particular position. The downside of that approach is that current and accurate job

descriptions can be helpful even when you haven't had any turnover.

Think of the last time you looked at the "essential functions" of a job while considering an accommodation request or another issue involving the Americans with Disabilities Act (ADA) when there had been no reason to look at the job description for a few years. Perhaps 2014 is a good time to schedule a systematic review and update all your job descriptions over the course of the year.

What would you like them to know?

Yes, we're talking about training. Is there any training that could make HR management at your company easier in 2014? For example, would training your managers on the company's expectations about the issues and decisions that should be discussed with HR before an adverse action is taken help you address issues proactively and avoid risky situations later? Would training on the importance of timely, accurate, and well-prepared performance documentation reduce management frustration and the number of times you can't address performance concerns the way you might like to because you don't have the documentation to support your actions?

If you answered yes—or even maybe—to those questions, why not come up with a list of topics you wish your supervisors knew more about and put together a training schedule for 2014? And then, while you're at it, come up with a list of things you would like to know more about and see what you can do to further your own personal training.

It's all in the regs!

When was the last time you read the NH Department of Labor's (NHDOL) wage and hour regulations? You can find the Section 800 regs at www.gencourt.state.nh.us/rules/state_agencies/lab800.html. It's worth the time it takes to read them again.

Bottom line

We wish you luck and success with your New Year's resolutions. Feel free to call us if you have questions about any of the issues mentioned in this article. As always, we wish you a happy, safe, and prosperous 2014.

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