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11 Scariest Issues Employers Face in 2014

This guide explores the following 2014 issues and what an employer should do about each:

1. Handling Medical (and, Yes, Recreational) Marijuana Use
2. Same-Sex Marriage
3. Technology in the Workplace
4. Healthcare Reform
5. Immigration and Form I-9 Compliance
6. Misclassification of Independent Contractors
7. Minimum Wage and Overtime Violations
8. Curtailing Background Checks
9. Emerging Protected Classes and Curbing Workplace Discrimination
10. Employee Leaves and Reasonable Accommodations
11. Expansion of "Protected Concerted Activity"

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There are a number of employment trends that can cause real problems for employers in 2014. From changes in federal, state and municipal law that have created new obligations and requirements to government enforcement that can lead to significant civil fines and criminal penalties, employers confront substantial risks this year. Further, now more than ever, employers are facing class action lawsuits for discrimination, immigration violations and wage and hour mistakes. Employers also need to be aware of emerging trends with regard to privacy and technology that have vast implications for the workplace.

Following are 11 of the scariest issues employers face this year. We've offered guidance on how an employer can best protect themselves and minimize liability:

1. Handling Medical (and, Yes, Recreational) Marijuana Use

The Issue: Conflicting messages about state and federal marijuana laws raise real concerns for employers and their authority to restrict medical marijuana use during working and non-working hours as well as the ability of employers to drug test employees and applicants. As of January 2014, more than one-third of the states have legalized the use of medical marijuana. Too, Colorado and Washington now permit citizens to use marijuana for recreational purposes. To complicate matters, marijuana remains an illegal drug under federal law and use and possession constitute a crime. Because medical use of marijuana is authorized under some state laws, employers in such states can expect to face legal challenges as to whether medical marijuana users should be granted reasonable accommodations.

What an Employer Should Do: Employers should be familiar with their **state law and whether or not it permits use of marijuana for medical purposes**. If it does, an employer needs to clarify that it will prohibit marijuana during working time and on the employer's premises because it has clear effects on workplace safety and worker productivity and can impair judgment. An employer also needs to take state law into account when administering any drug test. In addition, an employer with government contracts may be subject to drug-free workplace laws.

Appendix 1 lists states that permit medical and/or recreational marijuana and indicates those states where the requirement is new for 2014.

2. Same-Sex Marriage

The Issue: 2013 was a watershed year for proponents of same-sex marriage and, in 2014, employers can expect big changes. Currently nearly a third of the states (and the District of Columbia) recognize same-sex marriage and afford same-sex couples the same treatment. Further, in *United States v. Windsor*, the US Supreme Court declared Section 3 of the Defense of Marriage Act, which defined marriage as only between a man and a woman and limited the term "spouse" to an individual of the opposite sex, unconstitutional. Following this landmark decision, both the Internal Revenue Service (IRS) and Department of Labor (DOL) adopted a state of celebration rule, meaning that a valid same-sex marriage from another state must be recognized for federal tax purposes in *all* states. Thus, even if an employee resides in a state that does not recognize same-sex marriage, that employer must comply with IRS regulations regarding the tax treatment of employee benefits. The DOL has pronounced that in the wake of *Windsor*, same-sex spouses are now eligible for the same benefits and protections as opposite-sex spouses under employer health plans, retirement plans and other benefits covered under the Employee Retirement Income Security Act (ERISA). Same-sex spouses are also entitled to leave under the Family and Medical Leave Act (FMLA) if living in a state recognizing same-sex marriages.

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What an Employer Should Do: Accordingly, employers should review their employee handbooks, policies and procedures – particularly pertaining to discrimination, benefits, and leaves – and make any necessary revisions regarding the treatment of same-sex spouses. Further, employers should know what types of same-sex relationship their states recognize, the **tax benefits provided to an employee's same-sex spouse or partner**, and whether the state follows or departs from federal law under Windsor.

Appendix 1 lists states that recognize same-sex relationships and indicates those states where the requirement is new for 2014.

3. Technology in the Workplace

The Issue: While the expansion of technology into the workplace has proved to be beneficial in the workplace for improved efficiencies, communications, and reporting, it also presents real issues with respect to privacy and security. In today's workplace, it is not only necessary to effectively address the internet, email and social media, but an employer must also focus on new and emerging technologies such as the rise of the smart phone and Bring Your Own Device (BYOD) policies as well as Google Glass.

Jason Habinsky, Esq., Partner in the Labor and Employment Group at Haynes Boone, states that:

> Unfortunately, many employers seeking to reap the benefits of a tech-savvy workforce may instead suffer unanticipated pitfalls in the form of lawsuits and liability. For example, employees that are permitted to use their own devices for work or to utilize social media through a company network could subject their employers to discrimination or harassment lawsuits for inappropriate conduct. Likewise, employers that implement security measures to monitor employees' workplace usage of personal devices or social media may also be susceptible to lawsuits for an invasion of privacy. It is crucial that employers institute carefully-drafted employment policies specifically tailored to mitigate these risks and adhere to the quickly-evolving legal landscape.

What an Employer Should Do: Firm guidelines are needed to protect the employer's legitimate business interests and minimize employer liability while respecting employee privacy. As a result, employers should consider adopting and implementing **policies regarding social media** and BYOD. An employer should explain what constitutes acceptable and unacceptable use and when and how such technology may be used and for what type of communications. An employer also should make sure that such workplace policies sufficiently protect their confidential information and trade secrets as well as encourage employee safety and productivity.

4. Healthcare Reform

The Issue: The Affordable Care Act (ACA) created an entirely new set of obligations and issues for employers. The employer mandate generally requires an employer with an average of 50 or more full-time employees to pay a penalty if it does not offer full-time employees health coverage that meets the ACA's affordability and minimum value requirements. To comply with the employer mandate, beginning in 2015, employers with 100 or more employees will be required to offer ACA compliant health coverage to 70% of their full-time employees and to 95% in 2016 and beyond. The employer mandate will not apply to employers with 50 – 99 employees until 2016. An employer that either fails to offer such coverage, or offers coverage that does not provide minimum value or is considered unaffordable, may be subject to a pay or play penalty. As a result, employers should prepare for the implementation of the employer mandate by preparing to offer such coverage or reducing the number of full-time workers and hiring part-time or contingent workers or independent contractors to minimize their workforce. However, such layoffs may lead to wrongful discharge and discrimination claims. Further, as part of the ACA, employers now have increased incentives to offer wellness programs.

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What an Employer Should Do: Employers need to plan for and prepare for the employer mandate requirement, including determining whether they will be considered a **large employer** under the ACA in addition to determining who is a full time employee for the purpose of offering coverage. Also, if implementing a wellness program, an employer should make sure that it complies with the Health Insurance Portability and Accountability Act (HIPAA), the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA) and other applicable federal and state laws.

5. Immigration and Form I-9 Compliance

The Issue: A recent increase in worksite inspections and criminal prosecutions of employers demonstrate that the US Immigration and Customs Enforcement (ICE) and the Department of Justice (DOJ) are committed to curtailing illegal employment. Additionally, the new Form I-9 came into effect May 7, 2013 and compliance is critical as all employers are at risk for government investigations. Failure to maintain proper I-9 Forms can lead to significant criminal and civil penalties. In fact, since 2008, Form I-9 audits and inspections have increased by approximately 600%.

What an Employer Should Do: An employer needs to make sure to **comply with the Form I-9** and maintain proper paperwork for all employees. Further, it is necessary to strike a balance between ensuring an authorized workforce while avoiding discriminating against authorized workers which can expose the employer to significant monetary penalties (ranging from $375 to $16,000 per worker). An employer should also be aware that should it hire unauthorized workers, those workers count as employees under the Fair Labor Standards Act (FLSA) and are therefore entitled to the minimum wage and overtime afforded other authorized workers. Unauthorized workers are also protected under the National Labor Relations Act (NLRA), Occupational Safety and Health Act (OSHA), Title VII, the ADA and state workers' compensation and discrimination statutes.

6. Misclassification of Independent Contractors

The Issue: The federal government (the DOL and IRS) as well as state governments have been avidly pursuing the misclassification of independent contractors. It is the government's opinion that too many workers are improperly classified as independent contractors thereby denying the worker the overtime and other protections afforded employees. A number of states have increased the civil penalties for improper classification and now require businesses to publicize violations on their company websites. Further, the new US Secretary of Labor has announced that combating misclassification will be one of his top priorities. Additionally, employers may find themselves subject to class action lawsuits alleging misclassification of employees which often lead to costly monetary settlements. James P. Anelli, Esq., a Partner with LeClairRyan states:

> Claims by employees and state and federal governments continue to increase in the area of misclassification of independent contractors even though this category of "consultants" is expanding rapidly, particularly given the perception that benefit costs, including healthcare costs, are likely to skyrocket in the near future. At the same time, wage and hour matters, including class actions, show no sign of abating. When you combine these factors, employers of all sizes should expect significant legal exposure exists if workers are improperly classified.

What an Employer Should Do: An employer needs to make sure that all workers are properly classified. Having proper documentation to establish whether indeed the individual is an employee or independent contractor is also of paramount importance. An employer should realize that improper classification can lead to a variety of liabilities including the payment of back taxes plus interest, unpaid overtime and state workers' compensation premiums, plus the provision of health and welfare benefits. An employer should also ensure that any independent contractor operates with a business license as an independent business. Additionally, if an employer chooses to hire independent contractors, it is important to make sure **that supervisors manage them properly**.

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7. Minimum Wage and Overtime Violations

The Issue: Minimum wage rates are in constant flux, with annual inflation adjustments and frequent ballot resolutions and legislation. In 2014, a number of states have raised their minimum wage and Congress is considering raising it on the federal level. An employer that makes mistakes when it comes to wage and overtime payments faces substantial risk as a record number of class action lawsuits are being filed. Additionally, both the DOL and state counterparts have increased their investigation and enforcement of employer pay practices. Employers that violate wage and hour laws may be exposed to significant back wages and civil penalties as well as criminal prosecution and even imprisonment.

What an Employer Should Do: In order to respond to these changes, employers should be up to date with their **state requirements regarding minimum wage** and overtime. Employers should know how to properly calculate how much overtime an employee is owed. Further, in order to better protect itself, an employer should make sure to audit its pay practices as well as track all employee hours and time accurately and pay all workers the wages they are due.

Appendix 1 lists 2014 minimum wages by state and indicates those states where the rate is new for 2014.

8. Curtailing Background Checks

The Issue: Due to recent changes in federal and state law as well as Equal Employment Opportunity Commission (EEOC) enforcement, employers need to be much more careful when conducting background checks. Often times, employer requests for credit history and criminal history tend to have a disparate impact and discriminate against individuals in protected classes. In recent years, the EEOC has been avidly pursuing employers who unlawfully use an individual's criminal history to make employment decision and blanketly deny employment based on an arrest record. The EEOC is encouraging employers to perform individualized assessments and consider the nature and gravity of the offense, the amount of time since the conviction and the nature of the job. Further, in the past few years, a number of states and municipalities have passed ban the box legislation which restricts employers from asking about criminal history or convictions in an employment application and seeks to deter employers from automatically discounting job applicants based on their criminal history. Also, a number of state laws now prohibit employers from inquiring about criminal convictions that were dismissed or sealed or using credit information regarding employees and applicants unless that information is "substantially job related". Major corporations such as Kmart, Dominos Pizza and the Walt Disney Company have faced significant class action lawsuits claiming that they violated the Fair Credit Reporting Act in conducting criminal background checks. Such lawsuits often result in significant settlements and proved to be very costly for employers.

What an Employer Should Do: An employer should be very cautious when conducting any criminal or credit background check. An employer should ensure that new state and local laws are followed and that the background check being conducted is consistently applied and specific to the job requirements. In **states and cities that have adopted ban the box legislation**, employers should make sure to eliminate the criminal history box from job applications. If an employer obtains information about a candidate's criminal record, it should evaluate each individual and their criminal record on a case-by-case basis and take into account the nature and seriousness of any discovered crimes, how much time has passed since an offense was committed, whether an arrest resulted in a conviction or guilty plea, and the nature of the position sought in relation to the need for a background check. Employers should make sure that all hiring managers and those who conduct interviews are aware of any new laws regarding background checks and proceed carefully during the hiring process.

Appendix 1 lists states that have ban the box requirements and indicates those states where the requirement is new for 2014.

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9. Emerging Protected Classes and Curbing Workplace Discrimination

The Issue: A number of states and municipalities have passed legislation expanding protections to lesbians, gays, bisexual and transgender individuals (LGBT) as well as pregnant women, the homeless and the unemployed, unpaid interns and victims of domestic violence, sexual assault and stalking. According to the EEOC's latest Strategic Enforcement Plan, the EEOC is focused on discrimination against LGBT individuals, pregnant women and immigrant populations. 2013 was a record year for the EEOC in securing monetary relief for employees as the EEOC recovered over $372 million through administrative enforcement of discrimination laws (including mediation and conciliation activities), and $39 million secured through litigation filed against private employers.

What an Employer Should Do: An employer needs to be diligent about prohibiting discrimination and harassment and develop and enforce strict policies against discrimination and harassment which include a multichannel complaint procedure. In particular, an employer should review the **lists of protected classes in your state(s) and municipalities** and ensure policies and procedures are written and enforced to ensure compliance. Discrimination and harassment training should be provided to all employees and supervisors. Any complaints should be followed through with a thorough investigation in order to avoid employer liability. Further, an employer should make sure that it does not retaliate against employees who complain of discrimination or harassment. Lastly, even if an employer's state does not yet specifically prohibit discrimination against a particular group such as LGBTs or pregnant women, it is advisable for an employer to be proactive and prohibit such discrimination.

10. Employee Leaves and Reasonable Accommodations

The Issue: A particularly challenging area for employers is the granting of leaves and reasonable accommodations. In several states and municipalities, legislation has been enacted to provide various leaves to employees such as paid sick leave, bereavement leave, military leave, volunteer emergency responder leave, family leave and domestic violence leave. Further, disability leave and family and medical leave continue to present unique challenges for employers as the EEOC is pursuing employers who fail to provide additional leave as a reasonable accommodation.

What an Employer Should Do: An employer should make sure that it is aware of the latest leave laws that apply to it and make sure that employee handbooks reflect them. An employer needs to consider both state and federal law when presented with a leave request. Further, employers should recognize **how the federal FMLA interacts with other leave laws** and other employer-provided leaves. It is also important for employers to make sure that their leave policies do not require automatic termination of employees who are on leave and demonstrate that the employer is willing to make reasonable accommodations for an employee if necessary. Employers should make every attempt to engage in the interactive process with the employees and consider providing more leave as a reasonable accommodation before making any termination decisions. An employer should not unlawfully discriminate against an employee based on his or her taking leave.

11. Expansion of "Protected Concerted Activity"

The Issue: In response to declining union membership, the National Labor Relations Board (NLRB) has been using its authority to control non-union workplaces under Section 7 of the NLRA which guarantees all employees the right to engage in "protected concerted activity" and collectively discuss wages, hours and working conditions. As a result, the NLRB has been striking down a significant number of seemingly neutral employee handbook provisions and workplace policies (for non-union workplaces) regarding employee speech, communications, dress codes, at-will employment, confidentiality, investigations, arbitration, nondisparagement and handbook disclaimers.

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What an Employer Should Do: This expansion of enforcement activity has vast implications for both union and nonunion workplaces. Employers need to adjust their employment policies and employee handbooks and workplace procedures accordingly. Specifically, employers need review their policies regarding such topics as social media, contact with the media and **at-will employment** to make sure that their policy provisions do not unreasonably restrict employees from exercising their Section 7 rights.

Conclusion

Every year brings new changes in the law and trends that can have far-reaching ramifications for the workplace. As a result, employers need to reexamine their workplace and see how their workforce will be affected. Employers who anticipate changes and prepare themselves adequately will be able to efficiently and effectively address those changes and reduce the potential for employer liability.

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APPENDIX I

Challenging Trends for Employers in 2014

Evolving State Requirements

	Legalized Medical Marijuana	Same-Sex Marriage Recognized	Minimum Wage 2014	Ban the Box Adopted
Alabama			N/A	
Alaska	✓		$7.75	
Arizona	✓		$7.90*	
Arkansas			$6.25	
California	✓	✓*	$8.00*	✓ (state and local government employers)*
Colorado	✓ (and recreational*)		$8.00*	✓ (state employers and licensing agencies)
Connecticut	✓	✓	$8.70*	✓ (state employers)
Delaware	✓	✓*	$7.25	
District of Columbia	✓	✓	$8.25*	
Florida			$7.93*	
Georgia			$5.15	
Hawaii	✓	✓*	$7.25	✓ (public and private employers)
Idaho			$7.25	
Illinois	✓*	✓*	$8.25	✓ (state employers)*
Indiana			$7.25	
Iowa		✓	$7.25	
Kansas			$7.25	
Kentucky			$7.25	
Louisiana			N/A	
Maine	✓	✓	$7.50	
Maryland		✓*	$7.25	✓ (state employers)*

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Massachusetts	✓	✓	$8.00	✓ (public and private employers)
Michigan	✓		$7.40	
Minnesota		✓*	$6.15	✓ (public and private employers)*
Mississippi			N/A	
Missouri			$7.50*	
Montana	✓		$7.90*	
Nebraska			$7.25	
Nevada	✓		$8.25*	
New Hampshire	✓*		$7.25	
New Jersey	✓	✓*	$8.25*	
New Mexico	✓	✓*	$7.50	✓ (public employers)
New York		✓	$8.00*	
North Carolina			$7.25	
North Dakota			$7.25	
Ohio			$7.95*	
Oklahoma			$7.25	
Oregon	✓		$9.10*	
Pennsylvania			$7.25	
Rhode Island	✓	✓*	$8.00*	✓ (public and private employers)*
South Carolina			N/A	
South Dakota			$7.25	
Tennessee			N/A	
Texas			$7.25	
Utah		✓*	$7.25	
Vermont	✓	✓	$8.73*	
Virginia			$7.25	

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Washington	**✓ (and recreational*)**	**✓**	**$9.32***	
West Virginia			**$7.25**	
Wisconsin			**$7.25**	
Wyoming			**$5.15**	

* Denotes a change that took effect in 2013 or will take effect in 2014 and will affect policies and procedures for 2014.

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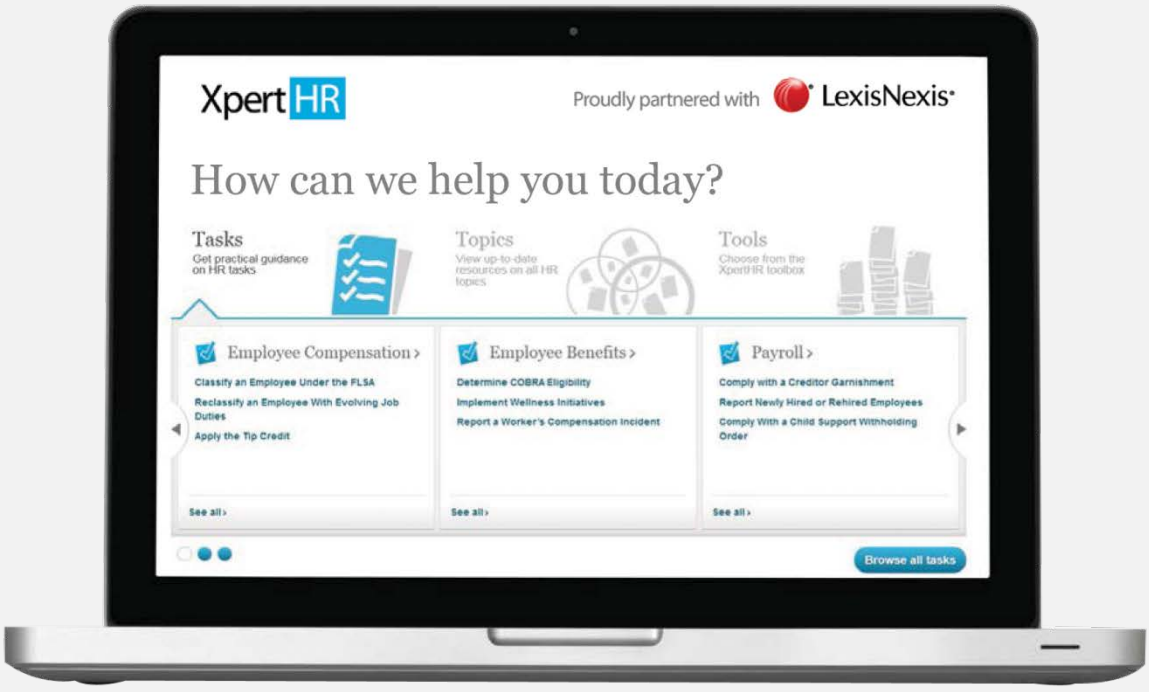

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