FEDERAL COMPLIANCE UPDATES

NLRB ISSUES REPORT ON EMPLOYEE HANDBOOKS

The NLRB’s (National Labor Relations Board) Office of General Counsel recently published a 30-page Report of the General Counsel Concerning Employer Rules, which provides new NLRB guidance on employee handbooks. The report contains recent developments on employee handbook rules arising in the context of NLRB cases that address whether particular rules violate section 7 of the NLRA (National Labor Relations Act). Section 7 gives workers the right to form unions and engage in other types of concerted activity.

In the report, NLRB General Counsel Richard Griffin states, “Although I believe that most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the National Labor Relations Act, the law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act.” Even if a rule does not explicitly prohibit Section 7 activity, it could still be found unlawful if employees would reasonably construe a rule’s language to prohibit Section 7 activity.

Examples of lawful and unlawful handbook rules cited in the report include:

- **Rules about confidentiality.** Any rule against discussing terms and conditions of employment (e.g., wages, hours, or workplace complaints) with both fellow employees and nonemployees, or a rule that employees would reasonably understand to prohibit such discussions, violates Section 7.

- **Rules about conduct toward the company and supervisors.** According to the NLRA, employees have a right to criticize or protest their employer's labor policies or treatment of employees. The report states that a rule which prohibits employees from engaging in “disrespectful, negative, inappropriate, or rude conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful.”

- **Rules about conduct toward fellow employees.** Under the NLRA, employees also have a right to argue and debate with each other about unions, management, and their terms-and-conditions of employment, even though these discussions can become contentious. As a result, the report states that an employer cannot ban “negative" or "inappropriate” discussions among its employees, without further clarification.

- **Rules about interaction with third parties.** According to the report, employees have a right to communicate with the news media, government agencies, and other third parties about wages, benefits, and other terms-and-conditions of employment. Rules that reasonably would be read to restrict such communications are unlawful. However, employers may lawfully have media policies about who can make official statements for the company, as long as these rules would not reasonably be read to ban employees from speaking to the media or other third parties on their own or their fellow employees’ behalf.

- **Rules restricting use of company logos, copyrights, and trademarks.** A company's name and logo will usually be protected by intellectual property laws, but employees have a right to use the name and logo on picket signs, leaflets, and other protest material.

- **Rules restricting photography and recording.** Employees have a right to photograph and make recordings in furtherance of their protected concerted activity. Rules placing a
total ban on such photography or recordings, or banning the use or possession of personal cameras or recording devices, are considered by the NLRB to be overbroad where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time.

- **Rules about restrictions on leaving work.** Rules regulating when employees can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts. However, the report states, “If such a rule makes no mention of ‘strikes,’ ‘walkouts,’ ‘disruptions,’ or the like, employees will reasonably understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity, and the rule will be found lawful.”

- **Conflict-of-interest rules:** Conflict-of-interest rules are considered impermissible under the NLRA if they reasonably can be read to prohibit protesting in front of the company, organizing boycotts, or soliciting support for a union while on non-work time.

If you have concerns about the compliance of your handbook, contact HR Service, Inc. regarding our handbook review services.

**NEW RULING IN PREGNANCY DISCRIMINATION CLAIMS**
The U.S. Supreme Court issued a decision on March 25, 2015 regarding failure-to-accommodate claims under the PDA (Pregnancy Discrimination Act). The Court found that a plaintiff in a failure-to-accommodate PDA claim must prove that she requested accommodations and the employer denied her request, but that the employer did accommodate others “similar in their ability or inability to work.”

In order to ensure compliance with the PDA, employers should:

- Review all light duty and accommodation policies.
- Train supervisors and HR personnel to ensure that pregnancy and childbirth-related requests for light duty or accommodations are adequately reviewed with particular consideration for consistency between pregnant and similarly situated, non-pregnant workers.
- Determine whether legitimate reasons, other than cost and convenience, justify denial of any light duty or accommodation requests before denying the request.
- Ensure that all requests and responses for light duty or accommodations from both pregnant and non-pregnant workers are documented.

**FMLA RULE ON SPOUSES TEMPORARILY ON HOLD**
On March 26, 2015, a federal district judge in Texas granted a preliminary injunction, temporarily delaying the DOL’s (Department of Labor) new Final Rule regarding the definition of spouse. The new rule, which was scheduled to go into effect March 27, provides that same-sex spouses who are married in jurisdictions that recognize same-sex marriage are entitled to federal FMLA (Family and Medical Leave Act) benefits, regardless of the jurisdiction in which they currently reside.

**OSHA RELEASES FINAL RULE ON WHISTLEBLOWER CLAIMS**
OSHA (Occupational Safety and Health Administration) published a Final Rule regarding procedures and time frames for handling employee retaliation or whistleblower claims under the
SOX (Sarbanes-Oxley) Act of 2002. SOX protects employees who report fraudulent activities and violations of Securities Exchange Commission rules that can harm investors in publicly-traded companies. For additional information, read the Final Rule here.

FMLA FORMS EXPIRATION DATES EXTENDED
The DOL’s FMLA administration forms, which previously had a March 31, 2015 expiration date, have been extended for use through April 30, 2015. The forms can be accessed at the links below:

- WH-380-E Certification of Health Care Provider for Employee’s Serious Health Condition.
- WH-380-F Certification of Health Care Provider for Family Member’s Serious Health Condition.
- WH-381 Notice of Eligibility and Rights & Responsibilities.
- WH-382 Designation Notice.
- WH-384 Certification of Qualifying Exigency for Military Family Leave.
- WH-385 Certification for Serious Injury or Illness of Current Service Member — for Military Family Leave.
- WH-385-V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave.

AFFORDABLE CARE ACT UPDATES
NEW FINAL RULE ON “EXCEPTED BENEFITS"
The U.S. Departments of Labor, Health and Human Services, and Treasury released a Final Rule on March 16, 2015 that amends the regulations regarding “excepted benefits.” Excepted benefits are generally exempt from the requirements that were added to those laws by the Health Insurance Portability and Accountability Act and the ACA (Affordable Care Act).

The new Final Rule amended the definition of “excepted benefits” to include certain limited-coverage that wraps around individual health insurance. Such coverage would have to be specifically designed to provide meaningful benefits such as: coverage for expanded in-network medical clinics or providers, reimbursement for the full cost of primary care, or coverage of the cost of prescription drugs not on the formulary of the primary plan.

The Final Rules give employees who otherwise may not be able to get employer-based benefits access to high-level benefits. Group health plan sponsors can, in limited circumstances, offer wraparound coverage to employees who are purchasing individual health insurance in the private market, including the Health Insurance Marketplace. The rule sets forth two pilot programs for limited wraparound coverage. One pilot allows wraparound benefits only for multi-state plans in the Health Insurance Marketplace. The other allows wraparound benefits for part-time workers who enroll in an individual health insurance policy or in Basic Health Plan coverage for low-income individuals established under the ACA. These workers could, under existing excepted benefit rules, qualify for a flexible spending arrangement alternative to this wraparound coverage.

STATE-BY-STATE COMPLIANCE
ARKANSAS

Uniform Nondiscrimination Laws
On February 23, 2015, S.B. 202, designed to improve intrastate commerce by ensuring that businesses, organizations, and employers doing business in the state are subject to uniform nondiscrimination laws and obligations, was signed. The new law prohibits a county, municipality, or other political subdivision of the state from adopting or enforcing an ordinance or policy that creates a protected classification, or prohibits discrimination on a basis not contained in state law. For more details, read 2015 AR S.B. 202.

CALIFORNIA

Updated California Family Rights Act Regulations
The California Family Rights Act regulations have been amended effective July 1, 2015. The new regulations clarify certain definitions (i.e., how to determine joint employer status), changes the mandatory posting requirement, and changes required information employers must include on certification forms. For additional details, read the revised regulations here.

Revised Paid Sick Leave FAQs
The California Division of Labor Standards Enforcement recently revised its paid sick leave FAQs to clarify that employers must provide each employee hired on or after January 1, 2015, with notice about the provisions at the time of hire. Employees hired before January 1, 2015, must receive this notice during the period January 1, 2015 – July 8, 2015. Read the revised FAQs here.

DISTRICT OF COLUMBIA

Reproductive Health Non-Discrimination Clarification Emergency Amendment Act of 2015
On March 27, 2015, District of Columbia Mayor Muriel Bowser signed emergency legislation B21-0102, clarifying that the prohibition of discrimination on the basis of sex will not be construed to require an employer to provide insurance coverage related to a reproductive health decision. The law went into effect upon signing.

INDIANA

Religious Freedom Restoration Act
The Religious Freedom Restoration Act, S.B. 101, goes into effect July 1, 2015. The new law prohibits a governmental entity from substantially burdening a person’s exercise of religion, unless the governmental entity can demonstrate that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering the compelling governmental interest.

The law also prohibits an applicant, employee, or former employee from pursuing certain causes of action against a private employer.

For additional details, read S.B. 101 here.

MISSOURI
New Unemployment Insurance Benefits Poster
The Missouri Division of Employment Security has released an updated Unemployment Insurance Benefits poster. The updated poster contains new methods to obtain information on unemployment claims that have already been filed as well as new contact information. Download the poster at no charge here.

Pennsylvania
New Workers’ Compensation Poster
The Pennsylvania Department of Labor and Industry’s Bureau of Workers’ Compensation has released an updated workers’ compensation poster. The updated poster contains new information about filing misleading or incomplete information with the intent to defraud, and contains new contact information. Download the poster at no charge here.

Philadelphia Paid Sick Leave Ordinance
The Promoting Healthy Families and Workplaces Ordinance (Ordinance 141026) goes into effect May 13, 2015. The new ordinance requires employers with 10 or more employees to provide up to one hour of paid sick time for every 40 hours worked by an employee, up to a maximum of 40 hours. Employers with fewer than 10 employees must provide unpaid sick leave at the same rate.

The law applies to employers in Philadelphia and to all employees who work within Philadelphia for at least 40 hours each year. Independent contractors, seasonal workers, temporary workers hired for less than six months, adjunct professors, interns, state and federal employees, and employees covered under a bona fide collective-bargaining agreement are exceptions and not covered under the ordinance.

Employees must be employed for at least 90 days before they are eligible to use any accrued paid sick leave. Employees can accrue a maximum of 40 hours of sick time in a calendar year, unless the employer permits more. Employers have the discretion to advance sick time to an employee in lieu of accrual.

Employers must allow employees to carry over all accrued, but unused, sick time, but the employer may limit the use of sick leave in any single calendar year to 40 hours. Employers are not required to pay employees for unused sick time at the time of termination.

Employees are entitled to use leave for their own qualifying need, or that of a family member, for any of the following:
- Diagnosis, care, or treatment of an existing health condition.
- Preventative care.
- Issues related to the employee being a victim of domestic violence, sexual assault, or stalking.

A family member is defined as a:
- Biological, adopted or foster child, stepchild, legal ward or a child to whom the employee stands in loco parentis.
• Biological, foster, stepparent, or adoptive parent or legal guardian of an employee or an employee’s spouse, or a person who stood in loco parentis when the employee was a minor child.
• Person to whom the employee is legally married under state law.
• Grandparent or spouse of a grandparent.
• Grandchild.
• Biological, foster, or adopted sibling, or spouse of a biological, foster, or adopted sibling.
• Life partner.

Employers may require that paid sick leave be used in “reasonable minimum” increments of an hour, or any smaller increment used by the employer, to account for absences.

Sick time must be provided upon an employee’s oral or written request. Employees must provide “reasonable advance notification” if the need to use sick leave is foreseeable. If an employee takes two or more sick days, the employer may require documentation to verify that the sick time is covered by the ordinance.

Covered employers must distribute individual written notices to all eligible employees regarding their rights under the ordinance or display a poster regarding the ordinance in a conspicuous and accessible location in the workplace.

For additional details, read the Philadelphia Paid Sick Leave Ordinance here.

**SOUTH DAKOTA**

*Youth Minimum Wage*

Effective July 1, 2015, S.B. 177 allows employers to pay minors a reduced minimum wage. Youth minimum wage for workers under the age of 18 in South Dakota will be $7.50 per hour. The law prohibits employers from displacing any employee, including reduction of hours, wages, or employment benefits, in order to hire an employee at the reduced youth rate.

**UTAH**

Several significant bills were passed during the most recent Utah Legislative session.

*Utah Antidiscrimination Act, Fair Housing Act and Religious Freedom Amendments*

Effective May 12, 2015, S.B. 262 amends the Utah Antidiscrimination Act and the Utah Fair Housing Act to address discrimination and religious freedoms.

Employment attorney Mike O’Brien provides the following Quick Review of this significant new legislation.

S.B. 296 bans workplace discrimination based on either sexual orientation and/or gender identity. Sexual orientation is defined as “an individual’s actual or perceived orientation as heterosexual, homosexual or bisexual.” The bill refers to the psychiatric profession’s DSM-5 (Diagnostic and Statistic Manual) for a definition of gender identity. DSM-5 defines gender identity as a “category of social identity and refers to an individual’s identification as male, female or occasionally some category other than male or female.” The bill says that gender identity can be proven by such things as “medical history, care or treatment of the gender
identity, consistent and uniform assertion of the gender identity, or other evidence that the gender identity is sincerely held, part of a person’s core identity, and not being asserted for an improper purpose.”

The bill exempts religious organizations, religious corporations, religious societies, religious leaders, and their affiliates, as well as the Boy Scouts (but not the Girl Scouts), from the definition of an employer covered by the Utah Antidiscrimination Act. The bill states that it cannot be interpreted to “prohibit an employer from adopting reasonable dress and grooming standards not prohibited by other provisions of federal or state law” as long as the employer offers reasonable accommodations for all employees based on gender identity.

The bill takes the same approach regarding restrooms, allowing for reasonable employer policies “that designate sex-specific facilities” provided that reasonable accommodation is made based on gender identity. The important provision here is that an employer’s sex-specific dress code or facility would still have to comply with federal law, which might impose a different result depending on the circumstances.

The bill creates a new cause of action under the Utah Antidiscrimination Act for an employee who believes his/her right to express “religious or moral beliefs” at work has been infringed. Such employee expressions will be allowed at work if done in a manner that is “reasonable, non-disruptive, and non-harassing.” In other words, an employer disciplining an employee for such expression must be ready to prove that the expression was done in an unreasonable, disruptive, and harassing way. The bill also protects an employee’s expression of “religious or moral beliefs” outside of the workplace “unless the expression or expressive activity is in direct conflict with the essential business-related interests of the employer.”

For more details, read S.B. 296.

Religious Beliefs Protections
Second Substitute S.B. 297 provides protections to various government employees based on religious beliefs. Among other things, this bill requires county clerks to have a designee available to perform weddings (e.g. same sex weddings) and says religious officials cannot be required to perform marriages or provide goods or services contrary to their religious beliefs. For more information, go to http://le.utah.gov/~2015/bills/static/S.B.0297.html.

Discrimination Protection for Nursing Mothers
Under Sub H.B. 105, “breastfeeding or medical conditions related to breastfeeding” has been added to categories protected against discrimination. For more information, go to http://le.utah.gov/~2015/bills/static/H.B.0105.html.

Veteran Hiring Preferences Allowed
H.B. 232 allows employers to set up veteran hiring preferences without violating the Utah Antidiscrimination Act. The hiring policy must be in writing and applied uniformly to employment decisions regarding hiring, promotion, or retention, including during a reduction in force. The policy must also be publicly posted by the employer at the place of employment or on
the Internet if the employer has a website or uses the Internet to advertise employment opportunities. For additional details, go to http://le.utah.gov/~2015/bills/static/H.B.0232.html.

**State Nepotism Restrictions Expanded**
Under Second Substitute H.B. 73, grandchildren and grandparents have been added to the list of relatives public officers are prohibited from employing.

**Final Wages Payment**
Effective May 11, 2015, S.B. 272 addresses the methods an employer may use to pay a terminating employee. Utah law states that an employer must pay final wages to a terminating employee within 24 hours of the time of separation at the specified place of payment.

S.B. 272 clarifies that the 24-hour time requirement is met when the employer mails the wages to the employee and the envelope is postmarked no more than one day after the termination date; when the employer initiates a direct deposit of the wages into the employee’s account within 24 hours of the termination date, or when the employer hand delivers the final pay to the employee within 24 hours of the termination date.

**Workplace Abusive Conduct Training for Government Agency Employees**
Effective July 1, 2015, H.B. 216 will require the Department of Human Resource Management to provide training to employees and supervisors of government agencies about how to prevent abusive workplace conduct.

**VIRGINIA**

**Social Media Privacy**
H.B. 2081, regarding social media privacy for employees, goes into effect July 1, 2015. The new law prohibits an employer from requiring a current employee or applicant to disclose the username and password to his or her social media account. In the law’s interpretation, “social media account” does not include an account:

- Opened by an employee at the request of an employer.
- Provided to an employee by an employer such as the employer’s email account or other software program owned or operated exclusively by an employer.
- Set up by an employee on behalf of an employer.
- Set up by an employee to impersonate an employer through the use of the employer’s name, logos, or trademarks.

The law also prohibits an employer from requiring an employee to add an employee, a supervisor, or an administrator to the list of contacts associated with the employee’s social media account.

**Child Labor Law Enforcement Clarification**
S.B. 896, which clarifies agency actions and procedures to prosecute violations of child labor statute, goes into effect July 1, 2015. The new law imposes a 21-day time limit during which an employer charged with a child labor law violation may seek an informal conference or appeal a decision of the Commissioner of Labor and Industry to circuit court. It also states that Department of Labor and Industry employees are not subject to a civil penalty for issuing an
employment certificate and removes a requirement that the Commissioner supply blanks for employment certificates.

**Waiver of Semiweekly Withholding Requirement**
Effective July 1, 2015, H.B. 2307 allows employers with no more than five employees subject to Virginia income tax withholding to request a waiver from the semiweekly personal income tax withholding requirement. The new law allows consideration of requests to file withholding returns and the withholding tax on a monthly basis.

**Workplace Accidents Reporting**
Effective July 1, 2015, H.B. 1681 will require employers to notify the Virginia Department of Labor and Industry of any work-related hospitalization, amputation, or loss of an eye. Current Virginia law requires employers to report hospitalizations involving three or more employees and does not specifically address reporting an amputation or loss of an eye.

**Voluntary Protection Program**
S.B. 881, which codifies the VPP (Voluntary Protection Program) and directs the Safety and Health Codes Board to adopt definitions, rules, regulations, and standards necessary for the operation of the VPP, goes into effect July 1, 2015. Participation in the VPP is limited to workplaces in which an exemplary worker safety and health management system that exceeds basic compliance with occupational safety and health laws and regulations, and that satisfies the standards for the VPP. For more information, read S.B. 881.

**WEST VIRGINIA**

**New Requirements for Final Paychecks**
Effective June 11, 2015, West Virginia’s S.B. 12 amends the state’s wage payment provisions regarding final paychecks.

Under the new law, an employer must pay the final wages to an employee who quits or resigns on or before the next regular payday on which the wages would otherwise be due and payable. Payment may be made through the regular pay channels or, if requested by the employee, by mail. If the employee requests that payment be made by mail, payment will be considered to have been made on the date the mailed payment is postmarked.

**Pay Frequency Amendment**
Effective June 12, 2015, employers in West Virginia must pay employees at least twice per month and no more than 19 days apart. Current West Virginia law states that employees must be paid at least every two weeks.

**Limitations on Front and Back Pay in Employee Claims**
S.B. 344, which sets adequate and reasonable amounts of compensatory damages available to an employee in employment law claims, goes into effect June 8, 2015. The new law puts the responsibility on employees to mitigate damages for past and future losses in all employment law litigation. For additional details, read S.B. 344.
**WISCONSIN**

*Right-to-Work*

Effective March 9, 2015, Wisconsin became the 25th “Right-to-Work” state. Under S.B. 44, employers may not, as a condition of gaining or continuing employment, require an individual to:

- Become or remain a member of a labor organization.
- Continue or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization.
- Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization.
- Pay to any third party an amount that is in place of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of, or employees represented by, a labor organization.

**WYOMING**

*Payment of Final Wages*

On March 5, 2015, Wyoming’s legislature amended state law regarding the timing of the payment of final wages. Employers are now able to pay final wages to a terminated employee “no later than the employer’s usual practice on regularly scheduled payroll dates.” Previous law required final wages to be paid within five days of the date of termination. The amendment was made effective immediately.