Recent Changes in Employment and Labor Law

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Each year brings significant developments in employment and labor law, and 2012 was no exception. Following are summaries of some of the most significant developments in the past year:

1.The National Labor Relations Board ("NLRB") continued to take the position that many standard provisions in employers' social media policies violate Section 7 of the National Labor Relations Act ("NLRA") because they are overbroad and/or vague and therefore infringe on employees' right to engage in "protected concerted activity." Even non-union employers are covered by Section 7 of the NLRA, so the NLRB's statements on this issue are relevant to nearly all employers.

2.The NLRB opined that at-will disclaimers suggesting an iron-clad at-will relationship that cannot be modified violate the NLRA, because such disclaimers purport to nullify employees' right to negotiate collectively to change their at-will status. By contrast, the NLRB has approved at-will language providing that an at-will relationship may be altered under specified circumstances (*e.g.*, through a written document signed by an officer of the company).

3.The NLRB found that an employer violated the NLRA by maintaining a policy requesting that employees maintain confidentiality during all internal investigations. According to the NLRB, before requesting that employees not speak to one another about an ongoing investigation, an employer must make an individualized determination that the circumstances of the matter (such as a need to protect witnesses or prevent a cover-up) warrant a request for confidentiality.4.The Supreme Court's decision upholding the Patient Protection and Affordable Care Act ("PPACA") means that employers with 50 or more employees need to ensure that their health insurance plans and policies are compliantEffective in 2013, employers must:

i) Provide a summary of benefits and coverage upon application, enrollment and re-enrollment in the plan. Employers must also provide a notice of material modifications describing plan changes 60 days before any modifications are effective.

ii) Limit flexible spending account contributions by an employee to $2,500 per year.

iii) Report on the value of health care coverage for 2012 Form W-2s. (There is an exemption for employers with fewer than 250 2011 Form W-2s).

(iv) Provide written notification to employees by late summer or fall of 2013 regarding the existence of health insurance exchanges and the employer's loss-sharing plans. There are additional changes that will become effective in 2014, as well as changes that have uncertain effective dates.

5.December 31, 2012, was the deadline for employers to modify existing severance agreements and other employment documents to bring them into compliance with Internal Revenue Code Section 409A, which governs deferred-compensation arrangements. If an agreement requires an employee to sign a release or other document in order to receive deferred compensation, but does not specify a time period during which that document must be signed, then the agreement may need to be amended to comply with Section 409A. Failing to do so could result in substantial tax penalties for employers and employees.6.Finally, the Equal Employment Opportunity Commission ("EEOC") issued a formal Guidance regarding employers' use of criminal background information in employment decisions. The EEOC's Guidance cautions employers to avoid bright-line prohibitions on hiring applicants with criminal convictions, and to conduct individualized assessments before disqualifying applicants based upon criminal history.

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