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Spring Is in the Air: Time for Spring Cleaning and Taking Stock of What Is in Store for 2014

By Aaron J. Graf

Springtime. The smell of sizzling barbeque, the sound of a home run being cracked out of the stadium, the feel of the warm air as you roll those car windows down. This is truly a wonderful time of the year, especially for those of us that live north of 40 degrees latitude and have endured a rather lengthy and harsh winter. With the onset of spring, and in the spirit of spring cleaning, it is a good time to take stock of recent changes in the law that affect employers and the changes that may be in store for the remainder of 2014.

The EEOC is expected to embrace some expanded definitions of what constitutes a "mental disorder" under the Americans with Disabilities Act ("ADA"). The change is important because the ADA defines "mental impairment" to include "mental disorders." The new fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (or DSM-5), released by the American Psychiatric Association in May 2013, added new diagnoses that encompass difficulties in verbal and nonverbal communications, forgetfulness and decline in attention, excessive eating, and other conditions that could be used by plaintiff's lawyers in an effort to expand the reach of the ADA. If the EEOC embraces this further expanded definition as expected, we should expect to see increased enforcement efforts by the EEOC to expand the pool of those eligible for coverage under the ADA.

There are also important changes occurring with the Office of Federal Contract Compliance Programs ("OFCCP") for federal government contractors. Not only are there new regulations taking effect for affirmative action plan obligations for disabled individuals and covered veterans, but the OFCCP also looks primed to update and expand the regulations concerning sex discrimination.

On March 24, 2014, the new Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA") Rule and the 503 Rule (disabled individuals) took effect. As a helpful reminder on these new OFCCP rules, the VEVRAA Rule requires contractors to establish an annual hiring benchmark either based on the national percentage of veterans in the workforce (currently 8%) or based on the best available data and factors unique to their establishments. As to the 503 Rule, it establishes an aspirational 7% utilization goal for the employment of individuals with disabilities. Each law also creates specific reporting requirements and requires covered employers to measure compliance with these established standards.

Federal contractors and subcontractors were required to comply with most of the requirements of the new rules by March 24, 2014. However, for those employers with affirmative action plans already in place on March 24, 2014, they are permitted to maintain those plans until the end of their current plan year, allowing them to delay compliance with the affirmative action requirements of the new rules until the start of their next plan year. Thus, while your company may not be required to comply with the new affirmative action requirements just yet, your company should be complying with all other requirements at this time, including data collection, and other requirements.

As to the new regulations on sex discrimination, the OFCCP recently noted it has been 30 years since these regulations were drafted, making them due for an update. Undoubtedly, when the regulations are updated, they will include additional protections and requirements.

Another item to keep an eye on are new laws coming down the pike as The Affordable Care Act settles in and before the next election kicks into full swing. For example, the Healthy Families Act is a bill that has been pending in Congress for some time. The most recent version requires employers who employ 15 or more employees to permit each employee to earn at least one hour of paid sick time for every 30 hours worked. In other words, it seeks to supplement FMLA coverage by also requiring that in addition to federally mandated unpaid leave, that employees will also have federally mandated paid leave available to them. While it is true that a majority of employers already permit employees to earn paid sick leave, federally mandating the same would be a significant change in the law.

In that same vein, there appears to be a trend of more family-friendly employment laws concerning flexible working schedules being enacted at the state and local level. For example, the State of Vermont and the City of San Francisco recently passed laws requiring that employers consider and act upon employees' requests to be given a more flexible or predictable working arrangement. Covered employers are generally required to engage in an interactive process, similar to the process for considering reasonable accommodations for disabled individuals, when such a request is made. While there are nuanced issues with each law, this may signal a trend towards expanding legal protections for employees in this regard.

These are just some of the issues on the horizon for the remainder of 2014. For the time being, go enjoy the beautiful weather, catch a ball game, or go for a drive with the windows down. But on a rainy day in the near future, it would serve your company well to keep these issues in mind, determine whether they affect your company, and, if so, consider how to address them.

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