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The biggest employment law issues for firms

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The greatest asset of an accounting firm is its people. Unfortunately, this also means that people can be one of its greatest legal risks.

While compliance with employment laws can be daunting, even small efforts can mitigate risk. Following are the six largest areas where accounting firms are most likely to find risk — and the opportunity to minimize it.

1. #MeToo and your firm. With daily headlines reporting allegations of harassment, abuse and retaliation, it is no surprise that businesses are seeing a significant increase in claims. State and local governments are also getting involved, including new, very specific requirements in New York around policies and training.

Especially in this environment, firms need to make certain that policies prohibiting discrimination, harassment and retaliation meet legal standards, are up to date, in place, and easily findable by employees. Additionally, all stakeholders must be trained on how to spot, respond to and report potential violations. It is also critical that firms are prepared to respond to any claims that may be received — including confirming in advance how to receive and investigate them.

2. New pay equity rules raise the stakes in the recruiting process. In an effort to reduce the pay gap, a number of states and municipalities have implemented new laws prohibiting employers from asking about a candidate's current compensation or past compensation (including salary, commissions, bonuses, and other types of pay and benefits). These provisions generally also prohibit companies from relying on this information in deciding whether to make an offer or the terms of that offer. Interestingly, some of these laws offer a defense to employers who do a self-audit and take steps to remedy any pay inequality they find.

These new rules serve as a good reminder to review employment applications to ensure they do not request any information that is prohibited by law or that could open the door to a discrimination claim. It is also critical to train those who are involved in the interview process about what they should and should not be asking. These requirements make it more important than ever to standardize compensation structures and provide the tools available to determine recruits' market value without relying on compensation history.

3. Mobile phones and personal devices. Technology has created substantial efficiencies, but it has also opened the door to a variety of employment claims and risks. These risks generally fall into two categories: ensuring that employees are compensated for time spent working remotely; and protecting confidential information stored on devices. Non-exempt (overtime-eligible) employees need to be paid for time worked, including time spent responding to emails, texts or taking work calls. It is important that policies are clear that even this type of "outside work" needs to be recorded, and that managers understand this time must be paid.

When it comes to the intersection between technology and confidential information, it is important to think not just about how information is protected during employment (where it is stored, passwords, encryption and ability to access systems from devices) but also what happens when an employee or partner leaves. If an employee uses personal mobile devices, an agreement should be in place with instructions on what happens to the phone number and how confidential information will be removed from the device upon separation from employment. Regardless of who owns the device, it is imperative the policies and agreements state how information on devices must be protected and that the right to access firm information ceases when employment or membership ends.

4. Overtime eligibility of non-CPAs. It is widely assumed that just because someone is doing accounting work, they do not have to be paid overtime — but it is not that simple. Federal and state overtime laws take a close look at the work an individual is doing in determining whether they have to be paid for overtime worked. So long as certification is used, CPAs are generally safely classified as "exempt" from overtime requirements. The same cannot be said of more junior accountants, and certainly cannot be said of administrators in the firm. Whether a particular individual must be paid overtime depends both on how they are paid (a salary) and on their job duties. It is critical that firms periodically review their employee classifications to validate that everyone who should be receiving overtime is classified as such.

5. How long has it been since you reviewed your restrictive covenants? Non-competition and non-solicitation agreements continue to be viewed with great scrutiny. In many states, courts are becoming less willing to enforce provisions that they believe to be overbroad or otherwise deficient, and a new law in Massachusetts restricts non-competes in a whole new way — limiting duration and requiring pay during the restricted period. Many states are also taking issue with liquidated damage and client purchase provisions that they view more as a penalty for competing rather than as a reasonable approximation of damages. This is particularly true for income partners and non-partner staff. With these standards in flux, it is important to have non-solicitation and non-interference provisions reviewed every couple of years so it is understood how they are likely to be viewed by a court.

6. Minimizing the risk of age discrimination claims based on mandatory de-equitization requirements. Many firms have requirements that partners de-equitize when they reach a certain age. The issue is that partners who aren't actively engaged in the management of the firm will be deemed to be employees, and thus their de-equitization will be perceived as age discrimination. To put your firm in the best position to defend against these types of claims, make sure that active involvement in the management of the firm is a requirement of all equity partners — and that they actually meet this requirement.