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## Five New Year's Resolutions for the Human Resources Professional

Labor & Employment Practice Group

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Typically, a New Year's resolution is a promise to do something (or stop doing something) on the first day of the New Year. Just as individuals can have a better year if they make and keep a New Year's resolution, so too can a company. Taking on one or all of the following five New Year's HR resolutions will aid compliance, as well as offer greater protection for your company in the event of litigation or a government audit.

### Resolution No. 1: Your Application Form

Review, and if necessary, revise your application form. Make sure your form includes strong at-will language, and a statement letting prospective applicants know the importance of being honest and accurate on the application form. Applicants should be informed that any inaccurate information on the application will be grounds for not being hired and/or for being terminated if the inaccuracy is discovered later. If your company drug tests new employees, consider including a statement on the application that all new employees are subject to drug testing after they receive a conditional offer of employment. Such a statement will often dissuade illicit drug users from applying. The application form should not include questions asking employees about their medical conditions, disabilities or prior workers' compensation claims, and should only ask about criminal arrests and/or convictions if additional language is added to clarify that a past arrest or conviction will not automatically result in a denial of employment. Along with your application form, you may want to review your personnel manual, FMLA policy, drug testing policy, and job descriptions as these items often need to be updated periodically to reflect changes in law, changes in your procedures, and changes to employees' duties.

### Resolution No. 2: Immigration Compliance

Evaluate your immigration compliance. Make sure that all new hires are required to fill out an I-9 and show appropriate identification. Employees who aid new hires with paperwork should be trained on the documents they can and cannot require, and the importance of not insisting on one particular form of identification. Employers should ensure that I-9's are being stored either in a location by themselves, or with personnel files, and that copies of accompanying identification (if made) are stored with the I-9's to which they relate.

### Resolution No. 3: Paying the Proper Rate To Non-Exempt Employees For All Hours Worked

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Evaluate your pay policies to make sure that you are properly calculating the regular rate for non-exempt employees. The “regular rate” is used to calculate proper payment of overtime (which is calculated at 1.5 times the “regular rate”). However, the “regular rate” includes many items in addition to the hourly wage an employee earns, such as many types of bonuses, commissions, shift differentials, production/incentive pay, etc. These additional forms of compensation have to be apportioned back over the period in which they were earned, and the regular rate has to be recalculated based on the additional pay. Failure to do so causes the overtime calculation to be incorrect, and is a current focus of the Department of Labor in audits.

In addition, make sure your policies and practices require non-exempt employees to record all hours actually worked, whether at your facility, on the road, or from home. The Fair Labor Standards Act requires that non-exempt employees be paid for all hours worked, regardless of whether they are on your premises while doing the work. Make sure supervisors are trained not to allow employees to work before clocking in, or after clocking out, and make sure you have a policy supporting this. If non-exempt employees work during their lunch time, make sure there is a mechanism for them to record those hours so that they are compensated for their work time. Have employees sign off on their time records, verifying that the hours submitted are accurate.

#### **Resolution No. 4: Proper Classification of Independent Contractors and/or Exempt Employees**

Evaluate your independent contractor relationships to make sure that they are properly classified as independent contractors. The fact that your company and an individual have agreed for the individual to work as an independent contractor does not mean they are properly classified as such. In a news release issued November 18, 2013, the Department of Labor claimed to have recovered over \$18 million on behalf of workers misclassified as independent contractors over the past two years. This recovery came in the form of back wages for individuals who had not been properly paid the minimum wage or overtime because they had been misclassified as independent contractors, or who were not given benefits that were offered to company employees. Individuals are more likely to be considered employees rather than independent contractors if they perform services that are an integral part of an employer’s business, have a long-term relationship with the company, are provided tools by the company or are reimbursed for their tools, are told what hours to work, and/or perform routine tasks requiring little training.

#### **Resolution No. 5: ADA Compliance**

Make sure your ADA policies and practices are up to date. Your anti-discrimination policy should list individuals with a physical or mental disability among the protected classes. But your policies should not stop there. You should also have a written policy regarding ADA accommodations. This policy should include information about how to make a request for a reasonable accommodation. Supervisors should be trained to recognize a request for reasonable accommodation, and HR staff that handles these requests should receive training regarding

engaging in the interactive process, and reasonable accommodations under the ADA.

As with any New Year's resolution, the key is having the willpower and dedication to keep it. Sticking to one or more of these resolutions will help your company have a more successful 2014 and avoid many of the common pitfalls that are the current focus of the Department of Labor and the plaintiffs' bar.

Attorneys with Crowe & Dunlevy's Labor & Employment practice group can help you review your employment policies and procedures to help you get off to a great start in 2014.

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Crowe & Dunlevy, which has been providing effective legal counsel for over 100 years, is one of the most prominent law firms in Oklahoma, with offices in Oklahoma City, Tulsa and Norman. The firm and its attorneys are annually ranked among the top professionals in the

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