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February 28, 2014

Re: Young Clement Rivers, LLP: **2014 Update in Employment and Labor Law, Looking Ahead**

Dear Corporate Clients and Friends of YCRLAW:

As we get our feet on the ground in 2014, I want to inform you of certain recent developments in employment and labor law affecting corporate compliance and to assist you in planning and putting in place appropriate policies and protections. As you know, the employment and labor law has evolved at a rapid pace over the past few years, so it's more critical than ever to be proactive. Here are some of the more important areas for our focus. (Of course, necessity of compliance, in some cases, depends on the size of your workforce, so double check to see if your workforce has either increased or decreased.)

NLRB

The federal National Labor Relations Board (NLRB) has flexed its muscles in several areas, including its increased scrutiny of non-union organizations' at-will employment disclaimers, off-duty access rules, non-disparagement rules, confidentiality policies, and social media policies, all to the extent such rules or policies may be interpreted to hamper employees' right to take concerted action. Specifically, the NLRB has recently targeted at-will disclaimers which state the disclaimer "cannot be amended, modified or altered in any way," as well as undefined or overly broad confidentiality policies. The other major areas targeted by the NLRB relate to broadly stated social media policies and use of social media to gain background information about job applicants. When drafting policies, employers should avoid vague and non-specific language prohibiting discussion of wages, benefits, and other terms and conditions of employment, or the sharing of "confidential" information. Similarly, employers should avoid broad wording prohibiting "disparagement," using words of "negative impact" or having "inappropriate" conversations. Because the NLRB has consistently intensified its enforcement with non-unionized businesses since 2012, we recommend a standard practice of periodic review and update of handbooks and related policies as these developments unfold. While the NLRB's regulatory requirement of a workplace posting has been overturned by the courts, workplace postings should be reviewed for update periodically as well.

DOL, IRS

The federal Department of Labor (DOL) has partnered with the Internal Revenue Service (IRS) to continue its increased allocation of force and focus on the "misclassification" of workers, i.e., classifying employees as "independent contractors." Specifically, the DOL and IRS are targeting employers for: (1) misclassifying workers as independent contractors, (2) failing to pay overtime compensation for hours worked beyond 40 in a work week, and (3) failing to maintain accurate records of hours worked and wages paid to "misclassified" employees. Organizations are well advised to review and update actual job functions and job descriptions and to assure appropriate documentation is kept to prepare for DOL and IRS audits.

ACA

Health insurance and the Affordable Care Act (ACA) remain developing issues. Although some provisions have been and are being delayed, the ACA provides a new whistleblower protection section and impacts procedures for handling retaliation complaints by employees engaging in protected activities under the ACA. The ACA "pay or play" requirement is delayed until 2015, giving affected companies through 2014 to address benefit options.

DOMA

In its 2013 precedent-setting decision overturning the definition of marriage in the Defense of Marriage Act (DOMA), the Supreme Court did not address DOMA's provision allowing states not to recognize same-sex marriages legally entered into in other states. This is a developing area and more guidance on this issue is expected soon. In the meantime, it is helpful in South Carolina to remember, for purposes of benefits, that common law marriage principles may enter into appropriate decisions.

EEO

The Equal Employment Opportunity Commission (EEOC) has shifted focus from a complaint-driven enforcement system to priority-driven enforcement. The EEOC has stepped-up enforcement in several priority areas, including systemic investigations, disparate treatment and disparate impact cases, retaliation, equal pay laws, and protection of immigrants, migrant workers and other vulnerable workers.

In continuing its campaign to eliminate systemic barriers in recruitment and hiring, the EEOC is focusing on background check policies, including criminal background checks and credit checks. In the context of criminal background checks, the EEOC is targeting practices that exclude applicants based on the mere fact of a criminal record. The EEOC encourages policies and practices which (1) identify essential job requirements and the specific criminal offenses which may demonstrate unfitness for such jobs; (2) determine an appropriate time frame for exclusion based on a criminal record; (3) foster an individual assessment of each employee and

the employee's responsibilities; and (4) record the justification for all policies and practices. As to credit checks, the EEOC and Federal Trade Commission are ramping up enforcement of the Fair Credit Reporting Act (FCRA), and thus, employers are encouraged to assure they follow specific procedures to comply with the FCRA and to ensure the accuracy of the information they receive. Our recommendation to restrict use of background checks for legitimate business necessity applies to credit reports as well. Finally, in conducting a fair interview process, employers should ask all job candidates the same questions, avoid writing subjective thoughts about applications, and limit notes to relevant issues including whether the candidate is able to perform essential functions of the job. Recent sources indicate the employer's best practice is to keep all employment applications for two years.

On a positive note for employers, the United States Supreme Court recently clarified that vicarious liability for the employer under Title VII arises only if the employee is a "supervisor" authorized by the employer to take such *tangible* employment actions as hiring, firing and disciplining, on behalf of employer. Additionally, in a recent opinion, the Court held that retaliation claims under Title VII must be established using a "but-for" causation standard rather than a mere "motivating factor" standard. Thus, employers may better defend against Title VII retaliation claims.

ADAAA, FMLA and Other Leave Issues

The EEOC has also increased enforcement of the Americans with Disabilities Act as Amended (ADAAA), with a focus on maximum leave policies (often seen in FMLA policies) and "no restriction" policies (often arising in the workers' compensation setting). Specifically, the EEOC is using more aggressive tactics to encourage the employer's use of leave as a reasonable accommodation under the ADAAA. Under the amendments, Congress indicated its intent that the definition of "disability" be construed broadly.

Importantly to this issue, a recent U.S. Court of Appeals case for our federal circuit determined that a severe temporary injury (rather than permanent or chronic disability) may be considered a disability for purposes of the ADAAA. This would require an employer to consider and possibly make reasonable accommodations on a temporary basis. Although a short-term impairment still has to be sufficiently severe and substantially limit a major life activity to warrant coverage under the Act, an impairment is not categorically excluded from being a disability simply because it is temporary. The Court noted, in such cases, the impact of any reasonable accommodation on the employer would also be temporary.

The topic of pregnancy and related disability leave remains a present leave issue. Businesses may wish to consider pregnancy disability policies in situations in which the disability leave is exhausted prior to the birth of the employee's child. In such situations, the employer likely should consider a reasonable accommodation before termination.

Arbitration

Arbitration provisions in employment agreements and related contracts have been a prevalent issue on the Courts' dockets. Courts will enforce arbitration agreements, but the basic limitations of structural and substantive unconscionability still apply—employees must receive a copy of the arbitration agreement and the agreement may neither be one-sided nor cost prohibitive. The interrelationship between arbitration contracts and at-will protections must be carefully constructed.

Immigration

Finally, immigration remains a developing issue, especially in light of focused enforcement of immigration and related laws. In particular, the Form I-9 obligations (typically through the Department of Labor) have been an area of regulatory attention. E-verify utilization continues to develop, and the US Citizenship and Immigration Services office is acting to combat identity fraud by identifying and determining fraudulent use of Social Security numbers for employment eligibility verification.

As you can see by this brief year in review and forward projection, government agencies regulating business organizations are taking a strong hand in enforcing strict compliance. We appreciate the trusting relationship we at Young Clement Rivers have with our clients and look forward to helping navigate the legal landmines through a productive and prosperous 2014 together. As always, please let us know how we can assist with any employment-related proactive protections such as policies, procedures, contracts, compliance audits, hiring plans, job descriptions and record keeping so you and your organization may better avoid defending against ever more costly lawsuits and claims.

With thanks and kindest personal regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

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