Best Practices For Multistate Employers

Law360, New York (March 17, 2009) -- More and more employers today have opened — or are considering opening — offices or facilities in multiple states across the country. These facilities range in size from large production plants with hundreds of employees, to small satellite offices with only a handful of employees, to individuals working out of their homes.

In each situation, however, employers need to navigate different state employment laws and determine how best to draft employment agreements and employee handbooks so as to ensure compliance across the country and minimize administrative headache.

"Hot Spots" for Multistate Employers

Not surprisingly, there are many employment issues that arise when a company does business in multiple states. Those areas of law that should be routinely considered by multistate employers are discussed below.

Noncompetition Agreements

States differ widely in the approach they take to noncompetition agreements. Many states enforce noncompetition agreements, so long as they are reasonable in terms of duration, geographic scope and activities prohibited. However, states differ in terms of what restrictions are viewed as reasonable.

For example, a two-year restriction on competition might be reasonable in one state, but viewed as excessive in another. And, while a restrictive covenant that is nationwide in scope might be upheld in one state, it could be struck down as overreaching in another.

In addition, some states (like California) simply will not enforce noncompetes, regardless of how reasonable they might appear on their face. So, what does this mean for multistate employers? First, it means that there is no such thing as a "one size fits all" noncompete.

Second, it is not necessarily safe to assume that a noncompete can be salvaged by stating that it is governed by the law of a particular state or that a court has the power to revise overbroad terms.

Some courts faced with a strong state public policy disfavoring noncompetes will simply ignore such provisions and apply their own state's law, invalidating the agreement.

With such vast differences in state laws governing noncompetes, a "best practices" approach dictates that noncompetition agreements be reviewed for compliance with the laws of each state in which a company does business.

Leaves of Absence

State leave of absence laws present yet another challenge for multistate employers. The federal Family and Medical Leave Act of 1993 ("FMLA") provides a baseline for family and medical leaves of absence.

Broadly speaking, the FMLA (which applies to employers with 50 or more employees) provides employees with up to 12 weeks of unpaid leave for certain qualifying reasons (or up to 26 weeks of unpaid military caregiver leave).

The FMLA does not preclude states from enacting laws providing for more generous family and medical leave for employees, and many have done so.

These more employee-friendly state laws must be recognized and understood by employers because they often provide employees with additional benefits and place additional burdens on employers above and beyond the familiar FMLA.

There are several ways in which state laws can be more expansive and employee-friendly than the FMLA. For example:

- They can apply to employers with fewer than 50 employees;

- They can extend benefits to employees who have worked for an employer for less than twelve months and/or less than 1250 hours in the preceding 12-month period;

- They can provide for more than twelve weeks of leave; and

- They can mandate that some portion of the leave be paid.

In addition, some states provide leaves of absence for reasons extending beyond those covered by the FMLA.

Some of these reasons include substance abuse rehabilitation, blood or organ donation, caring for a domestic partner, status as a victim of a crime or domestic violence, participation in school or daycare activities, and voting.

Thus, it is crucial that multistate employers become familiar with the various leave of absence laws in the states in which they operate.

Drug and Alcohol Testing

Many employers are used to doing business in states that do not have any laws prohibiting the drug testing of private sector employees. In such states, the issue of drug testing is left to an employer's discretion and is typically addressed in an employee handbook or collective bargaining agreement.

In other states, however, employers are far more restricted in terms of when and under what circumstances they can drug test private sector employees. For example:

- Some states only allow drug testing of employees in certain safety-sensitive positions;

- Some states only allow drug testing upon "reasonable suspicion" or after a workplace accident;

- Some states only allow drug testing if the employer has an Employee Assistance Program (EAP) in place; and

- Some states prohibit drug testing altogether.

Again, then, it is important to be aware of differences in state laws on drug testing and to incorporate such differences into company policies.

Employee Benefits and Payroll Considerations

In the areas of employee benefits and payroll practices, there also are considerable differences in state laws. There are several areas to which multi-state employers should pay particular attention:

- Breaks and meals: Many states do not require employers to provide break and meal periods; however, some states require that these rest periods be provided every few hours.

- Benefits for unmarried partners: The majority of states do not require employers to provide health or other benefits to unmarried domestic partners. However, some states mandate that benefits be provided to a same-sex partner and/or common law spouse.

- Smoking in the workplace: While most states do not have “no-smoking” laws in place that apply to private employers, more and more states are enacting statutes prohibiting smoking in the workplace.

- Minimum wage: Although federal law imposes a nationwide minimum wage, states are free to enact laws providing for a higher minimum wage, and many have done so.

- Direct deposit: Most states require employers to obtain employee consent before direct deposit of a paycheck; a few, however, allow employers to require direct deposit.

- Payments required upon termination: State laws vary in whether they allow “use it or lose it” policies on vacation, sick and personal time. Some states specifically prohibit such policies and, instead, require payment of accrued but unused time upon termination.

Again, the message is clear: state laws vary widely in these areas, and multistate employers must make themselves aware of differences that exist.

Overtime

Most employers are subject to the federal Fair Labor Standards Act (“FLSA”), which requires payment of overtime to nonexempt employees at 1.5 times the employee’s regular rate of pay for all hours worked in excess of 40 per week.

The FLSA, however, specifically reserves to states the right to enact more generous overtime laws, and many states have done so. For example:

- Some states require payment for all hours worked in excess of 8 (or 12) per day, regardless of how many total hours are worked during the work week.

- Some states require payment of “double time” for hours worked in excess of 12 per day (or on the seventh day of a workweek).

- Some states prohibit “mandatory overtime” for certain groups of employees.

In addition, positions that are considered exempt from overtime requirements may vary from state to state, as the tests for exemption differ between the FLSA and state wage and hour laws.

For these reasons, it is not enough for multistate employers to look only to federal law for wage and hour purposes; rather, they need to ensure that the states in which they do business have not enacted more employee-friendly overtime laws.

Discrimination Laws

Most states have laws prohibiting discrimination the basis of race, sex, age, religion, national origin and disability.

However, several states extend protection to individuals on the basis of other characteristics, including height, weight, marital status, sexual orientation, parenthood, immigration status, political affiliation, appearance (hairstyle, beard, etc.), status as a smoker or nonsmoker, gender identity or a positive HIV test.

Thus, multistate employers are well-advised to consult with counsel before making hiring, promotion or termination decisions.

Considerations in Drafting Handbooks and Policies

Given the vast differences in state laws on these and other topics, multistate employers can be expected to have questions about the best ways to deal with these differences in drafting employment handbooks or policies. While there is no single answer to this question, there are a number of options to consider.

Once a multistate employer understands the legal requirements imposed by each state in which it does business, the question becomes whether it wants to treat all employees the same to the extent possible, or if it would prefer to treat employees in different states differently.

Obviously, this question involves consideration of whether the employer is willing to give some employees more than they are otherwise entitled to (so as to ensure compliance with the most employee-friendly of the applicable laws).

In making this decision, however, employers are not in an “all or nothing” position; rather, they can treat employees the same for some purposes (for example, breaks and meal periods) and differently for other purposes (for example, leaves of absence).

Assuming that the employer has decided to treat its employees differently at least in some respects, how, then, does an employer best draft its policies?

First, it is possible that a multi-state employer can make do with a single, comprehensive employee handbook that applies to all of its employees.

Although this option might not be viable for many multi-state employers, it could work in certain situations and — given its relatively low cost and ease of administration — is worth considering.

If this option is selected, a disclaimer should be inserted in the handbook making clear that (1) to the extent any provision is inconsistent with applicable state law, state law controls and (2) to the extent state law provides employees with additional benefits — above and beyond those spelled out in the handbook — state law again controls.

On the other hand, multistate employers also have the option of creating separate employee handbooks for each state in which they have employees. This might present logistical difficulties in some situations, but, in others, it might actually ease the burden of administering policies.

For example, an employer who has employees only in Michigan and California might be best served by putting in place two separate handbooks for its employees in these two states, especially given the significant differences in the applicable employment laws.

In between these two extremes are “middle of the road options.” The first involves drafting a single handbook modeled on one state’s law (for example, where the majority of the employees work) but with exceptions made for employees of other states. This option works best when there are few (or relatively minor) differences between the laws of the states at issue.

A second option — and one that is used with some frequency — is to draft a single, comprehensive handbook, along with a series of state-specific addenda (which are given only to employees in the states at issue). These addenda, which can be incorporated by reference into the handbook, spell out state-specific policies as necessary.

In summary, there are significant differences in state employment laws across the country. Multistate employers need to become aware of differences in applicable state laws and determine how best to proceed to ensure legal compliance and to minimize administrative inconvenience.

--By Claire Harrison, Dykema Gossett PLLC

Claire Harrison is a member of Dykema in the firm’s employment law practice group in the Ann Arbor, Mich., office.