HIGHLIGHTS

S-1 Top 8 Legal Issues Affecting HR
With employment litigation on the rise across America, a discussion of eight legal hot spots to bone up on.

S-4 Legal News Briefs

S-6 Background Checks: Five Steps Toward Compliance
A new amendment to the Fair Credit Reporting Act places added pressure on employers. Here's what you need to know to comply.

S-7 Coping With the ADA
The ADA has been in place for seven years now, and employers are still wrestling with several elusive compliance issues.

S-9 Legal Pitfalls of Classifying Workers
There are many benefits of using "temporary" workers—as long as you classify them correctly.

S-11 Reference Checks: A Legal Minefield
Tell the truth or say nothing? It appears to be lose-lose when it comes to reference checking.

S-13 Harassment Update: Same Sex, Same Rules
If an employee is harassed, it doesn't matter if the perpetrator is male or female, same or opposite sex. Courts are finding that the same rules apply.

S-15 Protect Your Assets With Employee Contracts
Securing your company's intellectual capital has become a hot issue in today's competitive business world. Can you get your employees to sign a contract protecting you?

S-16 Legal Tool Box
A listing of legal resources, including organizations, Websites, books and articles, for the busy HR professional.

TRENDS

TOP 8 LEGAL ISSUES Affecting HR

► Texaco agrees to the largest settlement in the history of discrimination law ($172 million) to resolve a race discrimination class action.
► The Home Depot pays $88 million to settle a sex discrimination class action.
► A jury awards $50 million in punitive damages (later reduced significantly by the court) to a former Wal-Mart worker whom it found to have been sexually harassed.
► Mitsubishi Motor Manufacturing Co. is sued by the Equal Employment Opportunity Commission in a large-scale discrimination and sexual harassment case.

Employment litigation is definitely on the rise, and the cases above only surfaced in recent months. Pick up a newspaper on almost any given day, and you are likely to find at least one article about a lawsuit arising from an employment relationship.

A recent report reveals that the median jury award in wrongful termination cases in 1996 was nearly $206,000, a 38 percent rise from the previous year. It is no surprise that in a recent survey of human resources executives, legal compliance was high on the list of priorities for the HR function.

RETRACING OUR STEPS
How did we get to this point? In part, it is simply the nature of our society. The United States is the most litigious nation in the industrialized world, and there is an urge to sue whenever we feel wronged.

The legal crisis also is the result of increased legislation. Twenty-five years ago, companies were concerned about a handful of employment laws. The Fair Labor Standards Act, dealing with wage and hour compliance, and the National Labor Relations Act, governing union-management relations, were on the agenda. Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 were still relatively new and untested. Today, those laws are more than three decades old, and the courts are burdened by the volume of discrimination actions.

In the meantime, Congress has passed more legislation, including the Americans with Disabilities Act, the Employee Retirement Income Security Act, the Pregnancy Discrimination Act, the Family and Medical Leave Act, and the Workers Adjustment and Retraining Notification Act.

State legislatures have been active too, creating new rights and protections in addition to those contained in federal laws. And, the state courts have so eroded the old "employment at will" rule—by expanding employee rights—that the exceptions have overtaken the rule.

What are HR professionals focusing on today? The following top the list of key concerns:

1. THE CONTRACT AND CONTINGENT WORKFORCE. Few court rulings have caused as much concern as the recent decision of the U.S. Court of Appeals for the 9th Circuit in the Microsoft case. Prior to 1990, Microsoft entered into "independent contractor" agreements with hundreds of "temporary" workers. These agreements included the workers' signed acknowledgment that they were not employees of Microsoft, and were not entitled to the various employee fringe benefit programs available to company employees. The workers submitted invoices for their time, and were paid

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through the company's accounts payable department, not through the payroll systems. Yet, they worked side by side with Microsoft employees, performing the same functions, under the same supervision.

According to the court, these so-called independent contractors really were employees as a matter of law, and should have been entitled to company benefits, including valuable stock purchase and savings programs.

Other courts have rendered similar decisions in cases affecting people treated as independent contractors, and those who were employees of temporary agencies, leasing or outsourcing companies.

These decisions in employment cases, together with increased focus by the Internal Revenue Service under federal tax laws, require that companies pay close attention to how all contract and contingent workers are treated. Many companies, concerned about the Microsoft case, now audit themselves to reduce the likelihood that they may face similar litigation and liability.

2 SEXUAL HARASSMENT. It may seem surprising but, prior to 1980, neither the Equal Employment Opportunity Commission nor the courts recognized sexual harassment in the workplace as a form of gender discrimination under Title VII. Since the EEOC changed its view, sexual harassment has been the fastest-growing area of employment litigation. Today, even after millions of dollars and countless hours of training time, companies continue to grapple with this area of compliance.

High-profile cases keep the issue in the forefront of public attention. The confirmation hearings of Clarence Thomas to be a U.S. Supreme Court Justice captivated the nation, with sexual harassment allegations by one of his former employees, Anita Hill, while he was chairman of the EEOC in the early '80s. More recently, the Mitsubishi Motors case and numerous actions against firms in the securities industry have gained headlines.

The issue remains a major focus for HR professionals. Development of effective corporate policies and procedures for handling claims, training and sensitizing managers and supervisors, investigating and resolving internal complaints, and assisting in the defense of agency and court actions, is for many a full-time job.

There are some glimmers of hope on the legal front, however. Some recent court decisions have absolved companies of liability, or significantly limited damages, where there was evidence that the company had a well-publicized policy against sexual harassment, together with an effective procedure for dealing with such complaints internally. Other decisions portend an expansion of rights under the law. This term, the Supreme Court will decide whether sexual harassment by an employee of another worker of the same gender violates Title VII.

The HR role is critical, as is support at the top levels of management.

3 AGE DISCRIMINATION. Like sexual harassment cases, age discrimination suits continue unabated. With the large number of corporate reorganizations and downsizing of recent years, age discrimination claims have risen. Not surprisingly, juries have a high degree of sympathy for older workers who have been let go after many years of service, and jury verdicts reflect the difficulties encountered by companies in defending such claims.

Many companies have resorted to elaborate severance arrangements with departing employees, containing releases and waivers of the right to sue. How effective are these releases when the individual takes the money and, instead of walking away quietly, sues?

Watch the Supreme Court, which soon will address this issue. The high court is reviewing a case involving Holiday Inns, in which an appellate court allowed an individual to sue, without returning severance money given by the company in return for signing a release that did not meet the technical requirements under Older Workers Benefit Protection Act. The lower federal courts are split on this issue, and the outcome may provide valuable guidance on the enforceability of releases of discrimination claims.

4 WAGE AND HOUR. The Fair Labor Standards Act is among the oldest of all labor laws, enacted in 1938, and mandating companies to pay a minimum wage and time-and-a-half overtime to nonexempt workers. As the United States Labor Department has noted, companies routinely violate the FLSA, often inadvertently, by misclassifying workers as exempt from overtime requirements. In recent years, audits by the Wage and...