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EMPLOYER NEWSLETTER
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DON'T GET BURNED BY CHANGES TO FEDERAL AND STATE EMPLOYMENT LAWS

"October. This is one of the peculiarly dangerous months to speculate in stocks. The others are July, January, September, April, November, May, March, June, December, August, and February."
-- Mark Twain

For employers, January is usually full of legal changes. This year was no exception. In January 2009, the following laws were amended or changed: (1) The Family & Medical Leave Act; (2) the Americans with Disabilities Act; (3) federal equal pay laws; (4) the Department of Homeland Security authorized a new I-9 form, and clarified what documents an employer may accept to verify an employee's work eligibility; and (5) the minimum wage increased to $7.25 per hour under Arizona state law.

These changes are summarized below.

I. Changes to the Family and Medical Leave Act

On January 16, 2009, new Department of Labor regulations concerning the Family and Medical Leave Act of 1993[1] ("FMLA") became effective. Generally, the new regulations benefit employers more than employees because they require health care providers to provide more information to employers about employees' reasons for requesting a leave of absence. Highlights of the new FMLA regulations include:

- Employees must now certify that they visited a physician at least twice a year in order to establish a "chronic condition" that qualifies for FMLA leave.
- Employees must follow the company's attendance policies when they plan to miss work unless there are "unusual circumstances." Previously, employees had up to two days after an absence to notify their employer of the need for FMLA leave.
- Employers may provide retroactive notice that leave is designated as FMLA leave if the delay doesn't cause the employee harm or injury. Employers and employees may mutually agree that leave be retroactively designated as FMLA leave.
- New medical certification forms for employees and family members were created under the regulations. The new form allows employers to obtain more information about why an employee cannot perform his or her essential job functions when the need for leave is caused by the employee's own health condition. The new form also allows employers to obtain more information about the type of care an employee's family member needs -- if that is why the employee has requested leave time.

[1] An employer is covered by the FMLA if it employs 50 or more employees within a 75-mile radius. The FMLA provides an "eligible employee" up to 12 weeks of unpaid leave annually. An employee is eligible for leave if s/he has been employed for at least 12 months and worked 1,250 or more hours.

- Employers are required to account for intermittent FMLA leave in increments no greater than the shortest period of time that the employer uses to account for other forms of leave (however one hour is the smallest permissible measure).
- Time spent by employees performing light duty does not count towards FMLA entitlement. Thus, if an employee returns from FMLA on light duty, at the conclusion of the light duty assignment, the employee must be restored to his or her original position or use the remainder of his or her FMLA leave.
- Employers have enhanced "notification" requirements. Specifically, employers must provide their employees with a general FMLA notice *even when they have no FMLA-eligible employees*. They must also provide an "eligibility notice" to an employee within five (5) business days if (i) the employee requests FMLA leave; or (ii) the employer acquires knowledge that an employee's leave may be for FMLA-qualifying reasons. When an employee receives an eligibility notice he or she must also receive a written notice of "Rights and Responsibilities", detailing specific expectations and obligations and the consequences for failure to satisfy the obligations.
- Eligible employees may to take up to 12 weeks of FMLA leave to handle exigencies related to a family member's active duty military service or call to active duty.[2]

This list is not exhaustive, and covers only some of the major changes to the FMLA.

Employers must ensure that they provide accurate information about the FMLA to their employees and that they follow the law when an eligible employee requests a leave of absence for family or medical reasons. If you would like assistance in updating your FMLA policy and related forms, please contact us for details.

II. Amendments to the Americans with Disabilities Act

On January 1, 2009, the Americans with Disabilities Amendments Act of 2008 ("ADAAA") went into effect. The amendments were intended to broaden the definition of "disability."[3]

- "Major life activities" now include eating, sleeping, standing, lifting, bending, concentrating, thinking, reading, communicating, and the operation of "major bodily functions", such as reproductive, endocrine, respiratory, circulator, neurological, digestive, bowel and bladder. The addition of "concentrating" and "thinking" is likely to lead to new claims as the successful performance of virtually any job requires these activities.
- The ADAAA overturns a line of U.S. Supreme Court decisions holding that a proper analysis of whether an employee is "disabled" must include whether "mitigating measures" available to the employee offset, or mitigate, his disabled status (e.g., prosthetic devices, medication, etc.).

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[2] The National Defense Authorization Act of 2008 amended the FMLA to provide leave for an employee to attend to the needs of a family member in the armed forces.

[3] Under the ADA, enacted in 1990, an individual with a disability is a person who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

- The ADAAA makes clear that a physical or mental impairment that is episodic or in remission will nonetheless be a disability if it would substantially limit a major life activity when active.

Given these changes, employers will no longer be as successful in arguing in court or to the EEOC that an employee does not fit the legal definition of qualified individual with a disability. Thus, employers should train supervisors to recognize and understand what conditions or impairments may be considered "disabilities" and to seek practical ways to reasonably accommodate employees who are disabled or likely to be considered disabled. Employers should maintain accurate job descriptions and document performance issues in a timely manner in order to show legitimate and non-discriminatory reasons for adverse employment actions.

III. The Lilly Ledbetter Fair Pay Restoration Act signed into Law

President Obama's first piece of legislation, the Lilly Ledbetter Fair Pay Restoration Act, was signed into law on January 29, 2008. Designed to address pay inequity, the Act allows workers to file charges of pay discrimination without regard to when the initial violation occurred.[4] As a result, an aggrieved employee can seek back wages for a much longer time period than was available previously. Thus, the monetary damages that a prevailing employee/plaintiff may recover have increased greatly.

Under the Act, an unlawful employment practice occurs when (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to the decision or practice; and (3) an individual is affected by the application of the decision or practice, including each time there is a payment of compensation.

The Act allows an employee to file a charge of pay discrimination within 180/300 days of the issuance of each paycheck affected by past discrimination. Thus, if an employer has engaged in a discriminatory pay practice, each time it issues a paycheck (or a post-retirement benefits check), the time period for filing a charge of discrimination is extended another 180/300 days. In other words, a new cause of action accrues when each check is issued even though the employer may have made the discriminatory wage determination years or even decades ago.

The new law requires employers to take additional steps to ensure that their pay practices are non-discriminatory and that they properly maintain pay records needed to prove the fairness of pay decisions.

The Act expressly overrules a 2007 U.S. Supreme Court decision that limited the scope of wage discrimination claims. The new Act is retroactive to the date of the Supreme Court's decision – May 28, 2007. The Act may also have an impact on pending pay discrimination claims that might have otherwise been dismissed on a motion. One consequence of the Act is that employees may choose to sit on their claims of pay discrimination for years in an effort to maximize potential damages. While the Act caps compensation damages at two years' back pay, employees can maximize potential punitive damages by "sleeping on their rights" without having to worry that the statute of limitations

[4] The Act allows individuals to file charges of alleged discrimination under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Rehabilitation Act.

will expire. Employers will now be forced to defend claims of pay discrimination based on decades-old wage decisions and policies, long after documents have been destroyed, relevant witnesses are no longer available and memories have faded. Employers should prepare themselves for the expected increase in litigation by taking the following steps:

- Modify your record retention policy to indefinitely keep documents on file relating to pay decisions.
- Audit your past pay records and conduct a thorough audit of wages and job descriptions to ensure that pay differences between men and women (and among other groups in protected classes) can be justified. Be prepared to take appropriate action to correct any discovered problems. Always consult with an attorney to determine if you can protect the results of the audit with a privilege.
- Train management to be mindful of the new law when conducting performance evaluations and considering pay-raise requests.

IV. Changes to Employment Verification Regulations

The Department of Homeland Security's Citizenship and Immigration Services issued new regulations concerning the documentation acceptable for verifying employment eligibility. The biggest change is that employers are no longer able to accept any expired document from a new employee, including a U.S. passport.

Consistent with the changes, all U.S. employers must begin using a new version of the Form I-9 for verifying the employment eligibility of employees hired after February 2, 2009. It is not necessary for employers to replace the old forms with new forms; the new version is only for new hires after February 2, 2009. The new form will be available from the Citizenship and Immigration Services at www.uscis.gov/forms.

V. Minimum Wage

On January 1, 2009, the state minimum wage increased to $7.25. (On July 24, 2009, the federal minimum wage will increase from $6.55 to $7.25 per hour.) Make sure you have your updated and correct posters – which should be displayed in each job location where employees congregate, take breaks, or punch in or out. You can download free posters at:

http://www.dol.gov/esa/whd/regs/compliance/posters/flsa.htm (federal poster)
http://www.ica.state.az.us/minimumWage/index.html (Arizona poster)