



RECENT EMPLOYMENT LAW CHANGES AND WHAT'S AHEAD IN 2009

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FAMILY AND MEDICAL LEAVE ACT. Effective January 16, 2009, the Department of Labor (DOL) issued revised regulations interpreting the Family and Medical Leave Act of 1993. These are the first revisions to the regulations since 1995. The new regulations change and clarify some of the former interpretations of the law. They reorganize certain provisions and add brand new regulations addressing leave for Military Caregiver Leave and Military Qualifying Exigency Leave. Highlights include:

- Clarification of “serious health condition”
- New treatment of Holidays (holidays count towards FMLA entitlement when they occur during a week of leave);
- Clarification of the rules on substitution of paid leave;
- Change in rules related to bonus and attendance awards (employers now allowed to deny perfect attendance awards for employees on FMLA leave, provided FMLA and non-FMLA leave are treated the same);
- Consolidation of notice requirements under one section; and
- Provision of new Notice, Eligibility and Medical Certification forms.

The bottom line is that many of the new regulations clarify that the policies an employer has in place regarding other types of leave (vacation, PTO, paid or unpaid sick leave) will impact the application of FMLA leave. Therefore it is important for employers to: review its FMLA policy and all related documents, including the handbooks, FMLA posters, notice forms, and other related documents; review the treatment of other types of leave; conduct management and supervisory training on the new rules and how the leave benefits will be administered; review and revise the employer’s attendance and safety bonus program to take full advantage of the new FMLA rules; update job descriptions to reflect essential functions of the job in conjunction with the medical certification and fitness for duty certification forms.

THE ADA AMENDMENT ACT OF 2008. Signed into law last fall, the ADA amendments expand the definition of “disability” and “major life activities” to be considered in determining disability. The Act explicitly overrules court cases that narrowly interpreted the ADA and requires the ADA to be construed “in favor of broad coverage of individuals under the act, to the maximum extent of the terms of this Act”. This new mandate, along with the expanded definition of “disability”, will create a period of uncertainty until courts construe the new language.

FAIR PAY ACT. In President Obama’s last presidential debate, he mentioned the case of Lilly Ledbetter and promised to undo the Supreme Court decision in her case. In Ledbetter v.

Goodyear Tire and Rubber, a female employee sued her employer when she discovered, after 19 years, that she had been paid much less than her fellow male colleagues. The Supreme Court, in a 5 to 4 decision, ruled against Ledbetter, holding that employees must file a discrimination claim within 180 days of the company's *initial* decision to pay a worker less money, regardless of when the pay discrepancy is discovered. The legislation declares that each paycheck a worker receives can constitute a new violation, thereby renewing the statute of limitations with each pay period. The passage of this legislation reflects the stance of the Obama administration to encourage changes in labor and employment law to benefit labor unions, employees alleging discrimination and employees seeking time off from work.

MILWAUKEE SICK LEAVE ACT. Scheduled to go into effect on February 10, 2009, this law is currently being challenged in court by the Metropolitan Milwaukee Association of Commerce. However, a hearing scheduled on February 6th has been cancelled because the presiding judge, Judge John DiMotto, recused himself from the case and no new hearing is scheduled.

If the law does go into effect, starting on the effective date of February 10th companies will be required to log the number of hours employees work in Milwaukee. Within 90 days, employees will be able to use and be paid for the sick days they have accrued.

Employees would receive up to one hour of paid sick leave for every 30 hours worked in the city. Employees of companies with fewer than 10 workers would get up to five sick days, and those working for larger companies would accrue up to nine days. Stay tuned!

EMPLOYEE FREE CHOICE ACT. As a senator, President Obama co-sponsored the Employee Free Choice Act ("EFCA") and this is a top priority for enactment in 2009. The EFCA would make it far easier for unions to organize new members. Currently, an employer can refuse to organize a union based on signed union authorization cards from over 50% of its employees, and can require a secret-ballot election in which employees can vote, in private, whether to endorse or prohibit a union. Under the EFCA, an employer would be legally required to recognize a union on the basis of signed union authorization cards from more than 50% of the employees without any secret-ballot election. Opponents of this legislation claim that it is much easier for a union to get an employee to sign a union authorization card than it is to get them to vote for a union via secret-ballot election because employees feel pressured to sign the authorization card presented by co-workers or union organizers. The EFCA also makes it easier for unions to organize new members because, once more than 50% of the employees have signed the cards (which typically occurs without an employer's knowledge), the employer is required to recognize the union on the basis of the signed cards. Thus, the employer's opportunity to educate its employees about unionization and its consequences for business and jobs is eliminated.

RE-EMPOWERMENT OF SKILLED AND PROFESSIONAL EMPLOYEES AND CONSTRUCTION TRADE WORKERS' ACT (RESPECT ACT). The RESPECT Act is a proposal that would narrow the legal definition of a "supervisor" for the purpose of increasing the number of frontline supervisors who can join a union. As a senator, Obama supported the RESPECT Act.

The RESPECT Act would permit unions to organize supervisors in the same group as their subordinates. The unionization of supervisors could potentially create divided loyalties to the employer and to the union among supervisors who assign work and direct employees. The Act would also enable supervisors to strike against the employer.

PATRIOT EMPLOYERS ACT. The Patriot Employers Act is a proposal that would make use of the federal tax laws to influence employers' labor and employment practices. President Obama was a co-sponsor of this bill. Under the Patriot Employers Act, an employer would receive a tax credit of 1% of its taxable income if the employer satisfies certain requirements such as: (1) has its headquarters in the U.S.; (2) pays at least 60% of its employees' healthcare premiums; (3) is neutral in union organizing campaigns; (4) pays each employee not less than the amount equal to the federal poverty level; (5) provides a retirement plan with at least a 5% contribution or 100% match that is not less than 5% of an employee's compensation.