

Employment Law Update

The end of the Bush administration and the beginning of the Obama administration has combined to create significant new challenges for employers. New legislation has been enacted and new regulations promulgated that affect many existing employment policies and practices and potentially create new liability issues. Anyone needing additional information about these changes and how they will affect your business should promptly contact this firm or other employment law practitioners.

Changes to COBRA. The American Recovery and Reinvestment Tax Act of 2009 (commonly referred to as the stimulus package) dramatically affects all employers whose group health plans are subject to COBRA. For practical purposes this refers to all employers who have twenty (20) or more employees. Under the Act, the federal government will provide a 65% government subsidy toward the COBRA premium to employees who were involuntarily terminated between September 1, 2008 and December 31, 2009 for reasons other than gross misconduct.

The law establishes that the employer must initially provide this subsidy if the former employee has paid 35% of the COBRA premium. The employer can then either apply for reimbursement from the federal government or may take a credit against its liability to deposit payroll taxes and federal income taxes withheld from the employee's compensation.

This subsidy begins on March 1, 2009 but retroactively covers any employees who were eligible for COBRA on or after September 1, 2008. A special election period exists for individuals involuntarily terminated on or after September 1, 2008 who had not previously elected COBRA.

The Lilly Ledbetter Fair Pay Act of 2009. This Act, which was signed into law on January 29, 2009, states that the 180-day statute of limitations period for bringing a claim for unequal pay re-sets with each pay period that a person receives unequal wages. This Act applies to wage claims brought under Title VII of the 1964 Civil Rights Act, the federal Age Discrimination in Employment Act, the Americans with Disabilities Act and the 1973 federal Rehabilitation Act and allows employees to sue based upon discriminatory wage-based decisions that happened at any time during the person's employment as long as the discriminatory pay practice has continued to affect an employee's compensation.

Amendments to the Americans with Disabilities Act. These provisions, which took effect January 1, 2009, broaden the definition of "disability" in the Americans with Disabilities Act in a number of ways: They (a) expand the definition of "major life activities;" (b) provide that use of mitigating measures (other than ordinary eye glasses or contact lenses) shall not be considered in determining whether an individual has a disability; (c) clarify that an impairment that is episodic or in

remission is a disability if it would meet the definition if it was active; (d) emphasize that the term “disability” is to be broadly interpreted by the courts; and (e) generally direct the Equal Employment Opportunity Commission to revise its regulations and guidance to come into compliance with these new criteria. The EEOC is working on new guidance which is likely to be issued sometime in the fall of 2009.

The Family and Medical Leave Act was amended in January 2008 and new regulations for enforcement of the law came into effect on January 16, 2009. Those regulations substantially change how employers are to implement FMLA leave. Among other things they (a) include a revised definition of serious health condition; (b) provide new procedures for medical certification; (c) create new rules on attendance bonuses; (d) require employers to provide up to 12-weeks leave because of a qualifying exigency resulting from the military deployment of a son, daughter, spouse or parent; (e) require employers to permit a son, daughter, spouse or next of kin to take up to twenty-six (26) weeks of leave to care for a member of the Armed Forces who is undergoing medical treatment, recuperation or therapy for a serious medical condition; and (f) create six (6) new notices that employers are required to use.

In addition, the new administration has promised increased enforcement of the Fair Labor Standards Act and the Family and Medical Leave Act under new Secretary of Labor Hilda Solis. Employers should anticipate increased numbers of audits and investigations into compliance with both of these laws, as well as the Uniformed Services and Reemployment Act.

Other legislation that is pending before Congress right now includes:

The Employee Free Choice Act which will make it easier for unions to organize the workplace.

The Paycheck Fairness Act, that makes it harder for employers to prove that any pay differences between men and women are not discriminatory.

The Healthy Families Act. This is intended to require all employers with fifteen (15) or more employees to provide at least seven (7) days of paid sick leave each year.

The Employment Non-Discrimination Act. The pending bill prohibits employers with fifteen (15) or more employees from discriminating against individuals because of their sexual orientation.

Amendments to the Family and Medical Leave Act are designed to make employers with twenty-five (25) or more employees subject to the law’s leave requirements. Currently the law only covers employers with fifty (50) or more employees.

