



EMPLOYMENT & LABOR LAW

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CHANGES IN LAWS THAT MAY AFFECT YOU

Americans With Disabilities Act

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On January 1, 2009, certain amendments went into effect under the ADA. Most significantly, the amendments expand the scope of “what is a disability” under the statute. The amendments protect those who have an actual disability, a record of disability or a perceived disability. An employer may no longer consider “mitigating measures” when assessing whether or not an employee has a disability. Historically, mitigating measures included such things as medications that may control chronic conditions, prosthesis and other medical aid that effectively eliminate the limitations imposed by a given disability.

The amendments also broaden the definition of “substantially limits”. As you may recall, for a condition to be a disability under the ADA, it must substantially limit a major life activity. Under the new law, substantially limit is to be construed “in favor of broad coverage of individuals under this Act to the maximum extent permitted by the terms of the Act.” This is a

dramatic change since courts, particularly the Seventh Circuit Court of Appeals covering Illinois and much of Indiana, would look at the limitations imposed by any medical condition and require significant limitation in major life activities for their to be truly substantial thus qualifying the condition as a disability. I believe that is no longer the law. I believe any impairment, even with modest limitations on major life activities will indeed be classified as a disability under these amendments.

The amendments have also expanded the definition of major life activities by including an extensive list containing many activities which were not previously considered “major life activities”. The new activities include physical tasks such as walking, standing, lifting; mental tasks such as communicating, thinking and reading; and the operation of major bodily functions such as immune system functions, cell growth, digestive, circulatory, respiratory, bowel, bladder, neurological, endocrine and re-

productive functions.

The ADA amendments clarify that disabilities in remission or of an episodic nature are still considered disabilities if they would be such in their active form. Quite frankly, I think that has always been the law; however, the amendments reconfirm this interpretation.

Also, an individual claiming discrimination on the basis of perceived disability must no longer show that the impairment actually did or was perceived to limit a major life activity. Instead the individual must only show that they were “regarded as” disabled.

Special points of interest:

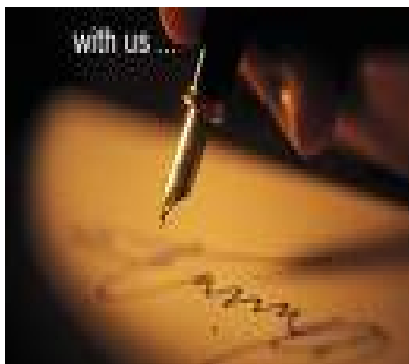
- Welcome to the first issue of Things You Should Know Employment & Labor Law
- Should you wish not to receive this publication, please send me an e-mail with “unsubscribe” in the subject line
- Note the new laws in affect

Family and Medical Leave Act

The new FMLA regulations went into effect January 16, 2009. The most significant changes relate to military family leave entitlements. Essentially, family members (spouse, son, daughter or parent) of a member of the military may now take leave for up to twelve weeks in certain qualifying exigencies arising out of a covered military member's active duty status or their notification of an impending call or order to active duty status, in support of a contingency operation. Family members may take up to 26 weeks in a single twelve month period to care for a covered service member's recovery from a serious injury or illness incurred in the line of duty when engaged in active duty. Eligible employees are entitled to a combined total of 26 weeks of all types of FMLA during a single twelve month period.

Qualifying exigencies include (1) the attendance at military events and related activities, (2) arranging for or addressing child care and school activities, (3) making financial and legal arrangements, (4) attending counseling, (5) rest and recuperation, and (6) attending post-deployment activities. In addition, the new regulations amend the manner in which time of service is calculated. As you recall, for an employee to be eligible for FMLA, they must have been employed with the employer at least twelve months. The new eligibility requirements confirm that it need not be a consecutive twelve months. A break in employment of less than seven years is not counted when calculating the twelve month period; however, prior service over seven years need not be counted unless the break in service was triggered by National Guard or Reserve duty.

More specifics regarding this change are available at <http://www.dol.gov/esa/whd/fmla/finalrule.htm>.



In addition, in calculating the 1,250 hours an employee must work in the preceding twelve months, an employer must count those employee would have worked but for his/her military service.

The "serious health condition" section was also clarified. If an employee is relying upon the provision that three consecutive calendar day plus two visits to a health care provider qualify the condition as a serious health condition, those two health care visits must be within the 30 day period and the first must happen within seven days of the employee's first day off due to incapacitation.

In addition, employees using intermittent leave under the FMLA must make a "reasonable effort" to schedule leave such as not to unduly interrupt the employer's operation.

Under the new FMLA regulations, all forms of paid leave offered by an employer will be treated the same. An employee electing to use paid leave concurrently with FMLA must follow the employer's terms and conditions for use of such leave and the employer can require substitution of any paid leave for unpaid leave.

In addition, employers may now require a "fitness for duty" certification before an employee is allowed to return to work. A fitness for duty certification may also be required if an employee has a reasonable job safety concern for those employees using intermittent leave.

There are also general changes in medical certification forms and the effective light duty on FMLA leave. The medical certification form is available at <http://www.dol.gov>. www.dol.gov/federalregister.

PAYCHECK FAIRNESS ACT

In addition, it is anticipated that the Paycheck Fairness Act may well be passed by Congress and signed by President Obama in 2009. This Act, if passed, is another effort to discourage pay disparity between the sexes. Traditionally, under the Equal Pay Act, an employer could assert and prove an affirmative defense that "any factor other than sex" led to the pay disparity. With the passage of this Act, an employer would be required to establish a "bona fide factor other than sex" that led to the pay disparity. In other words, an alternative reason is no

longer sufficient. The alternative reason must be a good reason.

EMPLOYEE FREE CHOICE ACT

Also, it is anticipated that Employee Free Choice Act will be passed by the 2009 Congress and signed by President Obama. This bill was proposed in 2008. While it passed the House, it was defeated in the Senate.

THERE WILL NO LONGER BE A NEED FOR ELECTIONS. SIGNING CARDS WILL BE SUFFICIENT.

Because of the recent election, it is anticipated that it will be reintroduced and undoubtedly signed by the President. This bill will allow for union representation certification following a majority of employees of a unit appropriate for bargaining signing valid authorization cards designating a particular entity as their bargaining representative.

It will be entirely possible for an employer to be unionized without ever having knowledge that a union was conducting a campaign within its workforce. The Illinois State Labor Relations Act, that Act applying to non-educational governmental employees in Illinois, already has such a provision and has impacted and effected governmental employers statewide. From a management perspective, this is not a good law and can have an incredible impact on private employers and their workforce. In addition to the certification without election, the Employee Free Choice Act increases damages available to employees who prove, before the National Labor Relations Board, that they have been discriminated against in violation of the National Labor Relations Act as well as imposing civil monetary penalties.

I strongly recommend that private employers get in touch with their workforces to ensure that no union organization activity goes on without you at least having an idea that it is happening. Remember, it is an unfair labor practice under the National Labor Relations Act to question or interrogate employees about union activity; however, good relationships with employees, including a meaningful open door policy, goes far toward addressing union organization efforts.



COBRA Amendment

As you have probably heard, the American Recovery and Reinvestment Act of 2009 (the stimulus bill) implemented substantial changes to the continuation of group health plan benefits required by the Consolidated Omnibus Budget Reconciliation Act (COBRA). Essentially, the stimulus amendments to COBRA require group health plans to notify eligible individuals of the additional COBRA rights granted under the stimulus bill. The amendment modifies the early allowable cost for COBRA premiums (102% of the premium cost) to 35% of the

otherwise applicable COBRA premium for a period of up to 9 months. The other 65% must be paid by the employer. Employers may recover the COBRA premium payments they make for eligible individuals by filing the necessary claims and reports to qualify for a payroll tax credit equal to the additional amounts paid. This premium assistance is available to all employees who became or become COBRA eligible between September 1, 2008 and December 31, 2009. For those employees who have not previously elected COBRA coverage, an employer is

required to provide a "second chance" with the new group health plan premium contribution of 35%. Employees electing under this provision are to be provided 60 days within to elect said coverage. The Department of Labor has been charged with publishing a model notice to notify employees of the premium assistance; however, it is not anticipated the model will be available until mid-April. I encourage you to work with your health insurance provider to ensure proper notice is sent to COBRA eligible employees.

E-Verify & I-9 Requirement

Effective January 15, 2009, federal contractors are required to use E-Verify to ensure that all new hires and existing employees who perform direct work on a covered federal contract are authorized to work in the United States. A "covered contract" is a contract that is awarded after January 15, 2009; has a value greater than \$100,000.00; is to be performed in the United States and carries a performance term of 120 days or more. The contract also includes a subcontract, including purchase orders and modified purchase orders, having a value of more than \$3,000.00 for services or construction to be performed within the United States. As an alternative to verifying new hires and current employees assigned to a covered contract, federal contractors may elect to use E-Verify for all employees including existing employees hired after November 6, 1986. Federal

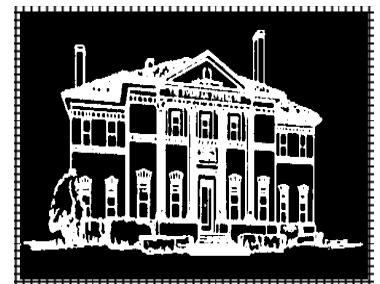
contractors have 30 days from the date of the contract award to enroll in E-Verify and 90 days within which to begin the verification process for new hires. No individual or entity participating in E-Verify is civilly or criminally liable for any action taken in good faith reliance on information provided through the confirmation system. An employer is however subject to civil penalty if it fails to notify the Department of Homeland Security that it is, or it has, continued to employ unconfirmed workers. The E-Verify is an employment verification program administered jointly by the Social Security Administration, the United States Department of Homeland Security and the United States Citizenship and Immigration Services.

There is a revised I-9 form at www.uscis.gov/files/form/I-9.pdf that modifies what documents an employer

may rely on during the verification process. Briefly, the revisions are as follows: (1) all documents relied upon must be unexpired, (2) in the "list A" identity employment documentation, forms I-688, I-688A and I-688B are no longer options, (3) foreign passports containing machine readable immigrant visas are added as list A documents, (4) valid passports for citizens of the Federated States of Micronesia and the Republic of the Marshall Islands as well as forms I-94 or I-94A may be used as list A documentation for Micronesia and the Republic of the Marshall Islands and (5) technical updates that are more fully set forth at www.uscis.gov/files/article/I9_qa_12dec08.pdf, but generally require employers to re-verify employment authorization if documentation is expiring among other technical changes.

Minimum Wage Increase: Do not forget, as of June 30, 2009, every employer shall pay to each of his/her employees who is 18 years of age or older, in every occupation, wages of not less than \$8.00 per hour.

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