



PHCC Educational Foundation

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How Do the New Employment Law Updates Affect Your Company?

From the PHCC Educational Foundation via third party

We may want to put the year 2008 behind us—with all of the economic woes and debates over which remedies will stimulate the economy. However, there was much activity in Congress and the Oval Office during 2008 -- and again recently in 2009 by the new President -- that has virtually no direct correlation to the nation's economy but may well affect the economies of millions of employers.

There are five landmark changes in federal employment law that have significant impact on the majority of U.S. employers. In this article are summaries of those changes along with tips on how to best prepare for and cope with them.

The New Laws at a Glance

The Department of Homeland Security has made significant changes to the Federal "I-9 Form" that all employers are required to complete when hiring employees. This form documents and certifies the citizenship of employees.

Just one week after President Obama took office, on January 29, 2009, the President signed into law the "Fair Pay Act" also known as the Lily Ledbetter Act.

Additionally, before he left office, President George Bush signed into law significant amendments to three (3) key employment laws that take effect in 2009:

- The Americans with Disabilities Act Amendments Act (ADAAA) that covers employers with 15 or more employees has been expanded to include more individuals with disabilities.
- E-Verify Program covers federal contractors with over \$100,000 in contracts and for a period of performance longer than 120 days. It also only applies to subcontracts if the prime contract includes the new FAR E-Verify clause, and only for services or for construction with a value over \$3,000. **NOTE: The effective date of the final rule requiring the use of E-verify has been delayed until May 21, 2009.** Originally, the E-verify requirement was to begin on February 20, 2009. More information on this program will be included in a future issue.
- The Family Medical Leave Act (FMLA) that covers employers with 50 or more employees now has important inclusions for military service members and their families and is more specific with notice and reporting.

What Does All this Mean?

Changes with the U.S. Citizenship and Immigration Services' I-9 Form

On February 2, 2009, the U.S. Citizenship and Immigration Services ("USCIS") announced that it has **delayed the implementation of the new I-9 Form** section of "Documents Acceptable for Employment Eligibility Verification" **until April 3, 2009**. Until then, you should continue to use

the current version of the Form I-9 with the annotation “Form I-9 (Rev. 06/05/07) N” on the bottom right-hand corner and the expiration date of June 30, 2009. This form can be downloaded from the Department of Homeland Security website at <http://www.uscis.gov/files/form/I-9.pdf>

Employers must refrain from requiring specific documents from employees. Under federal law, the employee selects which document(s) he or she wishes to present as part of the I-9 verification process. Violation of this and other Form I-9 requirements may lead to civil rights and criminal penalties.

Lilly Ledbetter Fair Pay Act of 2009 Becomes Law

President Barack Obama has signed into law the “Lilly Ledbetter Fair Pay Restoration Act of 2009,” the first piece of legislation signed by the new President. The new law that was signed on January 29, 2009, states that the filing deadline on compensation discrimination claims begins to run on the date of the first discriminatory pay decision.

What the New Law Does

The charge-filing periods (300 days in most states and 180 days in states that do not have a fair employment agency) would begin when:

- (1) A discriminatory compensation decision or other practice is adopted;
- (2) An individual becomes subject to the decision or practice; or
- (3) An individual is affected by a discriminatory compensation decision or practice when wages, benefits, or other compensation is paid.

This means that the statute of limitations restarts each time an employee receives a paycheck based upon a discriminatory compensation decision.

The new law also states that an unlawful employment practice occurs when “a person” is affected by a discriminatory pay decision or other practice. This broad language could allow pay discrimination charges filed by non-employees, such as the spouses of deceased workers, so long as those individuals claim they have been affected by the discriminatory practice. It remains to be seen how this language will be interpreted by the courts.

The law is retroactive to May 28, 2007 and applies to all pay discrimination claims pending on or after that date. The implications of the retroactive effective date are uncertain but it could cause individuals who have refrained from filing compensation discrimination claims in the 20-month period since the May 28, 2007 date to proceed with a complaint.

The new law could also increase potential liability for damages and may permit plaintiffs whose cases were dismissed on grounds that the statute of limitations had expired after the Supreme Court’s decision in Ledbetter to reassert their claims.

What Employers Should Do Now

After reading this, it should be no surprise that the broadened statute of limitations for wage disparity claims is expected to prompt increased litigation. In order to minimize risks, review carefully your current pay documentation practices to determine whether there is sufficient documentation supporting compensation decisions. Performance-based specifics underlying such decisions will be critical to defending a wage disparity claim.

Employers should develop objective, measurable guidelines for compensation decisions to be applied consistently and uniformly with job classification, work group, department or business unit.

You should create a process to ensure that managers and supervisors do not have the latitude in discretion when making compensation decisions. Rather, consider adopting a review system so that compensation decisions are subjected to the same careful scrutiny that terminations, discipline, or other unfavorable actions typically receive.

Review your current document retention policies to determine how long they maintain documentation regarding compensation decisions. You will likely need to retain such information for much longer than in the past. Consider electronic archiving given the voluminous nature of pay-related records.

Retrain all supervisors and managers regarding any policy modifications to ensure that they understand those policies and, most importantly, the need to support objectively all compensation decisions.

Finally, analyze compensation data to determine if any statistical disparities exist across gender, race and ethnic lines. Once identified, an employer can make appropriate adjustments to eliminate any unexplained disparities.

The Americans with Disabilities Act or ADA is Now the ADAAA

The new provisions of the ADA will significantly expand the number of people who can be considered disabled, but unfortunately will do little to bring clarity to this complicated law. The amendments, known as the ADAAA, became **effective January 1, 2009** and **apply to employers with 15 or more employees**.

Under the changes, an individual can be deemed disabled regardless of the effectiveness of the medical treatment they receive whether by medicine, prosthetics, accommodation, or any other intervention. The only exception is eye glasses/contact lenses.

The new law identifies a series of body or life functions, which if substantially impaired, constitute a disability. Many of these will have no relationship to work, but would require an accommodation. This provision assures that those with HIV and those who have or had cancer will be deemed disabled, without regard for their current state of health.

Any episodic disease or ailment in remission is considered a disability if, when manifested, it was a disability -- regardless of the current state of health of the individual.

A “non-exclusive list” of major life activities is now a part of the law, including “working.” Thus, an inability to perform a single job function may now be the basis for a required accommodation.

An assertion of disability discrimination due to the misperception of the employer is actionable -- even if the employee is not regarded as having a disability under the ADA. No accommodation is required, however, in a “regarded as” situation.

All of this means that employers must be more careful in following the provisions of the Americans with Disabilities Act with their hiring practices. You must also be more thorough preparing and in retaining records, such as interview questions, notes and application materials. Presumably, an employee is still required to make his/her condition known to the employer before asserting discrimination – except in the still confusing “regarded as” situation.

Steps To Take Immediately:

- Provide updated ADA training to managers and supervisors and remind them of their duty to accommodate -- not only employees with disabilities -- but also applicants with disabilities.
- HR leaders in the organization should have formal and informal discussions with all employees or incorporate training sessions into employee meetings about accommodating those with disabilities and to demonstrate the organization's philosophy and understanding of the ADA.
- Reevaluate your policies to make sure that they comply -- especially in the application and interactive processes.
- Review job descriptions to ensure they accurately describe the essential functions of the position.
- Develop internal protocols on how to approach situations regarding those with disabilities or the ADA in general. Internal protocols can help to ensure consistent treatment and avoid perceptions of disparate treatment.
- Develop forms, letters and processes to handle accommodation requests rather than wait until there is a situation requiring them. Doing so will provide more organization and better treatment of those with disabilities when the need arises.

Federal Family Medical Leave Act

On November 17, 2008, the final regulations implementing the changes to the Family Medical Leave Act (FMLA) were published by the US Department of Labor. **Employers with 50 employees or more were required to begin complying with the new regulations on January 16, 2009.**

'Eligible' Employee

The new regulations maintain the requirement that an employee must have worked at least 12 months and 1,250 hours to be eligible for FMLA leave. Although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of 7 years or more need not be counted toward the qualifying 12 months of employment unless the break was required by military service or pursuant to a written agreement.

'Serious Health Condition'

The new regulations retain the six definitions of "serious health condition," and further clarify what is required to satisfy several of those definitions. For example, a "serious health condition" requires 3 consecutive days of incapacity plus "2 visits to a health care provider." The new regulations clarify that these 2 visits must occur within 30 days of the beginning of the period of incapacity and that the first of the 2 visits must occur within 7 days of the first day of incapacity. In addition, the new regulations clarify that "periodic visits" means at least twice a year.

Employer Notice and Posting Obligations

There are now 4 mandatory notices an employer must issue to employees regarding FMLA rights and obligations:

1. Employers must continue to post a "General Notice" in the workplace as well as be placed in the employee handbook. If an employer does not have an employee handbook, the notice must be distributed to each employee upon hire. Even if the employer does not have any FMLA-eligible employees, a covered employer must comply with the "General Notice."

2. Employers must now issue a personalized “Eligibility Notice” within 5 business days after either (a) a request for leave or (b) learning that the leave might qualify for protection under the FMLA.
3. Employers are now required to issue a written “Rights and Responsibilities Notice” at the same time as the “Eligibility Notice.”
4. Once an employer has obtained sufficient information to determine whether an employee’s leave will be protected by the FMLA, the employer must provide the employee with a “Designation Notice.” The new regulations extend the deadline for providing the “Designation Notice” from 2 business days to 5 business days after obtaining sufficient information. Employers can provide the “Designation Notice” at the same time it provides the “Eligibility and Rights and Responsibilities Notices” if it has sufficient information.

Employee Notice Obligations

The new regulations require employees to follow the employer’s usual and customary procedures for reporting a leave, except in “unusual circumstances.”

Medical Certification Process

The new regulations increase the time for an employer to request medical certification from 2 to 5 days after the employee gives notice of need for leave or, for unforeseen leaves, the date that the leave begins.

It also provides that when an employer deems a medical certification to be incomplete or insufficient, it must specify to the employee in writing what information is lacking and give the employee 7 calendar days to resolve the deficiency. If the employee fails to do so, the employer may deny the leave.

In addition, the new regulations entitle certain employer representatives to directly contact an employee’s health care provider to authenticate or obtain clarification about information required by a certification form. The employer representative can be a health care provider, a human resource professional, a leave administrator, or a management official, but in no case may be the employee’s direct supervisor.

Fitness for Duty Certifications

The new regulations expand the information that an employer may require a Fitness-For-Duty Certification in two respects.

First, an employer may require that the certification specifically address the employee’s ability to perform the essential functions of his/her job.

Second, where reasonable job safety concerns exist, an employer may require a Fitness-For-Duty Certification before an employee may return to work from an intermittent leave.

Intermittent Leave

Employers must account for intermittent leave using an increment of time that is no greater than the shortest period of time that they normally use to account for use of other forms of leave -- but not greater than one hour.

In addition, the new regulations allow employers in specific circumstances to designate an entire shift as FMLA leave if it is physically impossible for employees to start work midway through the shift.

Light Duty

The new regulations provide that the time spent performing “light duty” work does not count against an employee’s FMLA entitlement and that the employee’s right to job restoration is held in abeyance (suspension) during the time that he/she performs the “light duty.”

Implementation of Military Family Leave Rights

The new regulations implement provisions that provide two new military-related leave entitlements.

1. **Military Caregiver Leave.** This allows eligible employees who are family members of covered service members to take up to 26 workweeks of leave in a single 12-month period to care for a covered service member with a serious illness or injury incurred in the line of duty.
2. **Qualifying Exigency Leave.** This allows an employee to take up to 12 workweeks of FMLA leave to handle certain non-medical exigencies (a situation demanding an immediate response) arising from the fact that the employee’s spouse, son, daughter, or parent in the National Guard or Reserve is on active duty or called to active duty status. The new regulations specify 8 types of “qualifying exigencies” that merit this type of FMLA leave
 - a. Short-notice deployment
 - b. Military events and related activities
 - c. Childcare and school activities
 - d. Financial and legal arrangements
 - e. Counseling
 - f. Rest and recuperation
 - g. Post-deployment activities, and
 - h. Additional activities not encompassed in the previous categories that arise out of the covered military member’s active duty or call to active duty status and to which the employer and employee agree.

What You Should Do:

- Post a military FMLA notice or purchase an updated “all-in-one” poster.
- Include updated FMLA policies and procedures in your employee handbook.
- Create a specific FMLA Notification Sheet
- Have employees acknowledge the receipt of all FMLA notices.
- Be consistent with designating FMLA Leave.

This content was provided by a third party via the [PHCC Educational Foundation](#). Please consult your HR professional or attorney for further advice, as laws differ in each state. Employment laws continue to evolve; the information presented is as of February 2009.

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