



NEW YEAR BRINGS NEW RULES TO EMPLOYERS, AND ALSO PROSPECTS FOR MORE SEVERE EMPLOYMENT RESTRICTIONS



Gerard Jabaley

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Employers need to be alerted to new laws that are now in effect or going into effect in the Obama Administration which were passed during the Bush Administration. Two in particular merit attention: amendments to the Americans With Disabilities Act (ADA) that took effect on January 1, and new regulations under the Family and Medical Leave Act (FMLA) that went into effect January 16.

First, the new FMLA rules can actually be viewed by employers as a positive change, inasmuch as they support the policies many employers have in place for leaves of absence and they also require employees to give clear notice to the employer to initiate FMLA leave. The new rules provide guidance to employers on the FMLA information they must provide their employees, including a general notice, an eligibility notice, a designation notice, and a notice of rights and responsibilities. Provisions in the rules also allow up to 12 weeks of active duty leave and allow family members caring for injured military personnel to take up to 26 weeks of unpaid leave in a single 12-month period. The new rules result in a number of required changes in all FMLA leave forms, which employers should already have implemented.

The ADA Amendments, on the other hand, could be read to radically expand the definition of individuals with a “disability” under the ADA, inasmuch as nearly half of the U.S. workforce could meet the definition. This broadening of protection under the ADA will result in more employers having an obligation to consider and act on requests by employees for accommodations, if the requests are reasonable and do not create an undue hardship to the employer. In general, the amendments instruct courts

and employers to provide coverage to the “maximum extent permitted by the ADA,” and state that employers can no longer consider “mitigating measures” (e.g., medication, prosthetics, mobility devices, etc.) when determining if an employee has a disability. Employers would be wise to have posted ADA policies indicating to whom a request for an accommodation should be made, and internal written protocols as to how such requests for accommodation should be handled. The existence of such policies and procedures should greatly reduce the risk of claims and liabilities, inasmuch as otherwise employees may claim that certain requests were made to persons who really did not have the authority or knowledge to act on their requests. Further, if an employer offers an opportunity to an employee to take advantage of a conference to review the situation, and the employee does not cooperate, in most cases the employer has established a legal defense.

In addition to the ADA and FMLA changes, another new law applies to employers this year that was passed in the Bush Administration, the employment provisions of the Genetic Information Non-Discrimination Act which go into

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Howard B. Jackson



HOWARD B. JACKSON is a Member of the firm, which he joined in 2001. Located in the Knoxville office, his practice includes substantial experience with labor law, employment litigation, including both discrimination cases of all kinds and employee restrictive agreements, frequent training and counseling of employers on a wide variety of employment law issues, and commercial litigation. Howard graduated from Georgia Tech in 1983, with a B.S. in Industrial Management, from Duke University in 1987, with a Masters of Divinity, and from Georgia State University in 1994, with a Juris Doctor. He graduated summa cum laude from Georgia State University, where he was Lead Articles Editor of the Law Review and First Honor Graduate. He is a member of the bar in Georgia and Tennessee. Howard lives in Maryville, where he is active in the Blount Chamber Partnership. He enjoys running and serves as Director of the Wimberly Lawson Townsend 10K, a road race benefitting Second Harvest Food Bank.

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COBRA CHANGES IN STIMULUS BILL



Jerry Pinn

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.....

plan administrator should provide a notice of their eligibility to elect COBRA and to receive a premium reduction.

The premium reduction provisions relate only to premiums for coverage periods beginning after the new law was enacted on February 17, 2009. The law does not allow reimbursement of premiums for coverage periods beginning before February 17, 2009. Qualified individuals can, however, receive the premium subsidy going forward, for up to nine (9) months.

The provisions of the Act are in effect now. Employers who are plan administrators need to revise their notices to make employees and former employees who are eligible aware of the premium reduction. The Department of Labor published model notices on March 19, 2009, which are available on the DOL's website.

High income individuals (modified adjusted gross income of \$125,000 for the taxable year (\$250,000 in the case of a joint return) will be taxed if they benefit from the premium reduction. High income individuals have the option of waiving premium reduction assistance if they want to avoid additional taxes.

The Act also provides employers, group health plans and insurers with COBRA premium assistance by giving employers an offset against payroll taxes (income tax withholding, withholding of the employees' portion of FICA taxes, and the employer's share of FICA taxes) if the employer and the COBRA participant pay their shares of the premium. Of course, there will be reports to file to demonstrate entitlement to the premium assistance.

The Employee Benefits Security Administration's has a dedicated Web page at www.dol.gov/COBRA. This Web page will contain helpful information and will be updated regularly to include FAQs and new information related to the process employees should follow to apply for COBRA and/or the premium reduction.

The American Recovery and Reinvestment Act of 2009 (“Act”) not only increased government spending, but also increased the cost of doing business for many employers.

Under the Act, individuals who were involuntarily terminated by their employer on or after September 1, 2008 through December 31, 2009 who are eligible for COBRA and elect COBRA may be eligible to pay a reduced premium amount that is only 35% of the premium costs for their COBRA coverage.

For employees who are or were terminated during that period and were covered by the employer's plan on their last day of employment, the

plan administrator should provide a notice of their eligibility to elect COBRA and to receive a premium reduction.

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effect this coming November, and impose new requirements on employers and health plans or health insurers. Group health plans are prohibited from adjusting premiums on the basis of genetic information, and are not allowed to require genetic testing or allow the collection of genetic information for underwriting purposes. For employers, effective this November, Title VII of the Civil Rights Act is amended to prohibit employers from refusing to hire, from discharging, or from otherwise discriminating against employees on the basis of genetic information. According to published reports, some 14% of major U.S. companies conduct tests for susceptibility to workplace hazards, and 20% collect information about family medical history. These type tests and inquiries would apparently be prohibited by the new legislation going into effect this November.

The Bush Administration, as had the Clinton Administration before it, issued a number of regulatory rules near the end of its term. The new Obama Administration promptly put a hold on all rules that were not yet final, in order to further review the proposed new rules to see that they fit the philosophy of the new Administration. Several new rules are being reviewed pertaining to worksite immigration issues, including the new Social Security number mismatch regulation, and the E-Verify requirement for government contractors. The latter is now scheduled to take effect on April 3, 2009, and at this point it is unknown when the new Social Security number mismatch regulation will take effect. The E-Verify requirement for government contractors is more significant than it first appears, inasmuch as it would require government contractors to E-Verify all new hires of the contractor who are working in the United States, whether or not assigned to the contract. For existing employees assigned to the contract, the federal government contractor must initiate verification within 90 calendar days after the day of enrollment or within 30 calendar days of the employee's assignment to the contract, whichever date is later.

It is estimated that labor unions spent some \$400 million to support pro-labor candidates during the most recent election. While the prime goal of organized labor is the so-called card check law, the Employee Free Choice Act, a number of pro-labor steps have already been taken by the new Administration. New pro-labor executive orders have been issued by President Obama, including one designed to encourage “union-only” construction project agreements. In addition, the Obama Administration has issued executive orders covering federal contracts for goods and services that require the contractor to post a notice at the workplace informing employees of their right to unionize under the National Labor Relations Act, as well as another executive order disallowing fees/costs related to contractor efforts to oppose unionization, including the cost of the attorneys, materials and paying employees for time spent in meetings to discuss remaining union-free. This executive order does not prohibit employer actions against unionization but states that the cost of such activities solely rests on the employer and is not reimbursable by the government. This executive order will apply to contracts issued after June 29, 2009, but certain things remain allowable such as costs incurred to maintain satisfactory relations between the contractor and its employees, which includes costs of labor-management committees, employee publications (not related to persuasive matters) and other related activities. On one point, the new Administration may actually try to “deregulate,” an issue pertaining to the regulatory requirements of annual financial reports on pensions and trusts for labor unions.

Another executive order covers Service Contract Act employers, and essentially makes sure that a union is not displaced when a different employer is awarded a contract whose employees are union-represented. The Nondisplacement of Qualified Workers Under Service Contracts Executive Order requires that when a service contract expires and a new contractor is awarded the contract for the performance of the same or similar services at the same location, that successor contractor or subcontractor must offer any covered employees of the predecessor contractor whose employment will be terminated as a result of the award of the successor contract (other than managerial and supervisory employees) a minimum ten-day right of first refusal of employment in positions for which they are qualified before the successor contractor can make offers of employment to other potential employees. The requirement of first refusal does not apply to any former employee whom the successor contractor “reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job.” In addition, this executive order permits the successor contractor or subcontractor to hire fewer employees than were hired by the predecessor in connection with performance of the work and allows the successor contractor to employ any individual who has worked for the successor

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contractor for three months immediately before the commencement of the covered contract and who would otherwise face lay-off or discharge.

Another positive development for organized labor is the nomination of Representative Hilda Solis (D. Cal.) as Secretary of Labor, although as of this writing her nomination has not yet been confirmed, partially due to tax issues pertaining to her husband. She has a union background and is considered very pro-union. In Congressional hearings on her nomination, Solis refused to offer opinions on issues including the card check legislation, state right-to-work laws, and the right of both union and non-union companies to bid on federal contracts. Her general response was that she was not able to speak on these matters now, and would respond at a later date in writing.

Interestingly, Solis, while a member of the California legislature, led a fight on behalf of organized labor to retain overtime for more than 8 hours of work a day. As part of that legislation, she wrote into the legislation that companies and employees could agree to “alternative work week schedules” in some circumstances, but emphasized in her proposed legislation that “only secret ballots” would be a fair method of determining these procedures. Later, in a dispute among the Congressional Hispanic caucus, she wrote a complaining letter because the caucus had determined such issues without including secret ballot votes.

The Obama Administration moved very quickly in Congress and signaled its interest in employment matters by signing into effect as its first law, the Ledbetter Fair Pay Act, designed to extend the statute of limitations for discriminatory compensation decisions. At the same time, however, the new Administration seems to be moving slowly concerning the card check law, perhaps trying to avoid the problems incurred by the Clinton Administration emphasizing too controversial legislative issues early in the term, as opposed to issues for which there was a broad consensus.

A possible concern for business is the lack of a single business executive in the Obama cabinet. While President Obama is generally praised for selecting a competent group of cabinet members, every one of them is a veteran of government, and not a single business executive is represented in the cabinet, or anyone from the south. In contrast, Presidents Bush and Clinton had broad representation among private industry in their cabinets. On the other hand, and potentially working in the other direction, a number of the new Democrats elected to Congress are so-called “blue-dog” Democrats, considered more moderate than their more liberal Democratic leaders in Congress.

Another relevant factor is that during the current session, government leaders may be more receptive to concerns about legislation that would hurt economic recovery or growth. Surveys among small employers estimate that small business already spend almost \$8,000 per employee complying with regulations, considerably more than the cost for companies with more than 500 workers.

APRIL 2009 SEMINARS

April 8 - Employment Law Update - *Springbrook Country Club, Niota, TN*

April 9 - The Employee Free Choice Act - *Morristown, TN*

April 14 - HR Jeopardy - *Northeast State, Blountville, TN*

April 21 - Pitfalls, Paychecks, and Problem Children -
Motlow State Community College, Tullahoma, TN

April 22 - The Employee Free Choice Act - *Rogersville, TN*

Please contact Bernice Houle at bhoule@wimberlylawson.com
or (865) 546-1000 for more information on these seminars.



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- Records Retention and Destruction
- Amendments to Americans with Disabilities Act
- COBRA Regulations
- Genetic Information Non-Discrimination Act
- Wage/Hour Compliance under New Administration
- Lilly Ledbetter Fair Pay Act
- Employee Free Choice Act
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