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LABOR & EMPLOYMENT LAW WATCH

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2008 amendments to the Family and Medical Leave Act (“FMLA”) and the Americans with Disabilities Act (“ADA”) were the only significant changes to federal employment laws during the Bush Administration’s eight-year tenure. If President Obama’s first thirty days in office are any indication, the next several years will bring far more legislative activity. With Democrats controlling both the House and Senate, it is quite likely that most of the new bills introduced will be “pro-employee” or “pro-union.” It is impossible at this point to determine whether President Obama will sign legislation that radically changes existing laws; however, he is on record as supporting several such bills and he has already signed a number of laws that impact employers. The following is a review of the changes President Obama has already made and a summary of additional changes that employers should be prepared for.

American Recovery and Reinvestment Tax Act of 2009 (COBRA Assistance)

“Assistance Eligible Individuals.” President Obama’s much-publicized stimulus package, also known as the American Recovery and Reinvestment Tax Act of 2009, will dramatically impact COBRA benefits for “assistance eligible individuals.” This term is defined as any individual who is involuntarily terminated between September 1, 2008 and December 31, 2009 and who is eligible for COBRA coverage during this period and elects such coverage.

COBRA Premium Assistance. Title III of the Act provides that any assistance eligible individual will be deemed to have paid the full premium for COBRA continuation coverage if the individual (or someone on his or her behalf) pays 35% of the applicable premium. An assistance eligible individual who pays more than 35% of the applicable premium for any period during which the premium assistance applies must either be reimbursed for the overpayment or credited the same amount against future premium payments, provided it is reasonable to believe that this credit will be used within 180 days. Premium assistance amounts are generally not treated as gross income

EMPLOYMENT LAW UPDATE:

The Obama Administration’s Labor and Employment Law Agenda: What’s New and What’s Coming

The past eight years have been relatively quiet in terms of new federal labor and employment legislation. Indeed, some would argue that the



to the recipient; however, individuals with adjusted gross income in excess of \$125,000 (or \$250,000 in the case of a joint return) must repay some or all of the premium assistance, depending on income level. High income individuals may elect to waive COBRA premium assistance.

Payroll Tax Credit for Premium Assistance. The remaining 65% of the premium which is not paid by an assistance eligible individual is deemed “reimbursable” as a credit against the employer’s payroll taxes (i.e., FICA). The IRS has published a revised Form 941 to enable employers to claim the credit. If the credit exceeds the employer’s payroll tax liability, it will be treated in the same manner as an overpayment of taxes. Similarly, an employer who is deemed to have overstated the allowable credit shall be treated as having underpaid its payroll taxes. Regulations and additional guidance will be issued for employers seeking reimbursement.

Duration of Assistance. The Act provides that premium assistance will cease upon the earlier of (a) nine months after the individual qualified for the assistance; (b) the date following expiration of COBRA coverage; or (c) the date on which the individual becomes eligible for coverage under any other group health plan, excluding flexible spending arrangements, on-site first aid and wellness facilities or plans providing only dental vision, counseling or referral services. Individuals who become eligible for other coverage while receiving premium assistance are required to provide written notice to the plan providing COBRA coverage. Individuals who fail to do so may be charged 110% of the premium reduction, unless the failure was due to “reasonable cause” and not “willful neglect.”

The Right to Change Coverage. Title III further allows assistance eligible individuals to enroll in any plan being offered by their former employer; even if the chosen plan is different than the plan the individual was enrolled in when he or she lost coverage. This enrollment option must be exercised within ninety (90) days after the employer provides a required written notice

(discussed below). The plan that is chosen must then be treated as COBRA continuation coverage. However, an individual will only be permitted to enroll in a different plan if:

(1) the employer has determined that it will permit assistance eligible individuals to enroll in different coverage;

(2) the premium for the different coverage does not exceed the premium for coverage in which the individual was enrolled when he or she lost coverage;

(3) the different coverage continues to be offered to active employees at the time the election is made; and

(4) the different coverage is not (a) coverage that provides only dental, vision, counseling or referral services; (b) a flexible spending arrangement; or (c) services and treatments provided through an on-site medical facility maintained by the employer consisting primarily of first-aid services and wellness care.

Extended Enrollment Rights for Eligible Individuals. Some individuals who were involuntarily terminated since September 1, 2008, but before enactment of Title III, may have declined COBRA coverage due to cost constraints. The new law affords such individuals an “extended” opportunity to enroll in COBRA, provided they do so during the period beginning February 17, 2009 and ending 60 days after the employer provides a written notice of enrollment rights (discussed below). Individuals who elect COBRA coverage under this provision must be covered upon the first period of coverage beginning on or after February 17, 2009.

Notice Requirements. Title III requires employers to provide a written notice of the Act’s premium reduction and enrollment provisions to individuals who become eligible to elect COBRA between September 1, 2008 and December 31, 2009. This notice requirement may be met by revising existing COBRA notices or by including



a separate document which sets forth the required information. The Secretary of Labor is required under the Act to issue model notices by March 19, 2009 and to provide related outreach services for employers.

Lilly Ledbetter Fair Pay Act

On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act. The Act effectively nullifies the U.S. Supreme Court's 2007 decision in Ledbetter v. Goodyear Tire & Rubber, Co. and establishes a new standard governing statute of limitations in pay discrimination cases. In its Ledbetter decision, the Supreme Court had held that an employee who wishes to challenge a discriminatory decision pertaining to his or her pay must do so within the applicable statute of limitations (usually 180 to 300 days), which begins to run when the decision is made.

The Fair Pay Act liberalizes this standard by stating that a discriminatory compensation decision is deemed to occur, not only when the decision is made or implemented, but also "when a person is affected by...[the] decision...including each time wages, benefits, or other compensation is paid..." In other words, an affected employee may challenge a discriminatory compensation decision every time he or she receives a paycheck (or receives benefits) which is in some way impacted by the earlier act of alleged discrimination.

On its face, the Fair Pay Act may seem entirely reasonable. However, it allows for claims which may be extremely difficult for employers to defend. An employee who receives no pay increase due to a poor performance evaluation which was given ten or twenty years ago, and who continues to be paid a lower wage than his or her peers for this reason, may now challenge the current wage impact of that evaluation by arguing that it was discriminatory. How does an employer defend the fairness of a twenty year old evaluation? What if the supervisor who gave the evaluation has retired or is deceased? What if

productivity records and notes connected to the evaluation have been destroyed? These are problems that the Act does not address – and they will certainly arise.

For now, employers need to be more careful than ever to document the reasoning for compensation and benefit decisions which could be challenged as discriminatory and to retain these documents for several years beyond the term of an employee's employment. Such documentation should include not only the summary document which records the decision (e.g., a written evaluation which communicates a pay increase), but also any key source documents or notes upon which the decision was based (e.g., records concerning productivity, attendance and discipline). Policies or union agreements which require employers to destroy such records after a period of time will need to be carefully reviewed, since these records may be the only line of defense against future pay discrimination claims under the Fair Pay Act.

Employers may respond to the Fair Pay Act in a variety of ways. Some may do away with performance-based pay and merely address poor performance through discipline or temporary wage reductions. Other employers may try to condition each wage increase upon the employee's signing a waiver and release (an approach which would likely be challenged). As employers and the courts sort out the implications of the Fair Pay Act, one conclusion is clear: creation and retention of records which support compensation and benefit decisions is now more important than ever.

Executive Orders Affecting Employees of Government Contractors

On January 30, 2009, President Obama signed three "pro-labor" Executive Orders which undo various Bush-era policies involving employees of federal contractors. The first Order, entitled "Notification of Employee Rights Under Federal Labor Laws," requires that all federal contracting agencies include a provision in every federal



contract (excluding contracts involving purchases of less than \$100,000) which requires the contractor to post a notice informing workers of their rights under federal labor laws, including the National Labor Relations Act (i.e., which assures the rights of employees to organize unions). The contractor must also include these provisions in subcontracts connected with the federal contract. Failure to comply may result in termination of the contract or debarment from future federal contracts. Regulations governing the content of the required notice will be issued. The new Order also revokes a 2001 Executive Order issued by President Bush which required contractors to inform employees of their rights *not* to join a union and to object to certain uses of their union dues or fee payments.

The second order signed on January 30 is entitled "Nondisplacement of Qualified Workers Under Service Contracts" and requires that certain federal contracts and solicitations for contracts include a provision requiring contractors and subcontractors to offer their existing non-supervisory employees the right of first refusal to take positions for which they are qualified under any new covered federal contract. Contractors may not advertise for job openings in connection with a new contract until the right of first refusal has been exercised by current employees. This Order reinstates a policy initiated by the Clinton Administration which was rescinded in an Executive Order issued by President Bush in 2001.

The third Executive Order, entitled "Economy in Government Contracting," prohibits contracting agencies from reimbursing contractors for expenses arising from the contractors' efforts to influence employees regarding the decision to form a union or engage in collective bargaining. The Order lists examples of non-reimbursable expenses (e.g., legal and consulting fees associated with a union campaign) and expenses for which reimbursement may be permitted (e.g., general employee relations expenses). Federal contractors involved in defending a union

organizing campaign will need to be particularly mindful of this new Order.

HIPAA Privacy and Security Requirements Expanded

The ARRTA (a.k.a. "Stimulus Package") also includes provisions that dramatically expand HIPAA's privacy and security provisions. Among other things, the Act extends many of these requirements to "business associates" of covered entities. Although business associates are already required to have certain HIPAA safeguards in place under contracts with covered entities, they are now directly covered under the privacy and security standards. Business associates that discover a breach of protected health information must now notify covered entities, which must in turn notify affected individuals. Notice of any breach must also be given to the Department of Health and Human Services (HHS), and in some cases, to the media.

The Act increases civil penalties for violations of the privacy and security standards from \$100 to \$1,000 or more per violation and states that criminal penalties can apply to employees who wrongfully obtain or disclose protected health information maintained by a covered entity. In addition, the Act requires HHS to conduct periodic audits to ensure that covered entities and business associates are complying with the applicable HIPAA standards.

Children's Health Insurance Program Reauthorization Act

On February 4, 2009, President Obama signed the Children's Health Insurance Program Reauthorization Act of 2009, expanding the state children's health insurance program (CHIP). The Act allows states to offer premium assistance subsidies to eligible children and their families for "qualified employer-sponsored coverage" as defined in the Act. The subsidy may be provided as a reimbursement to the employee or as a direct payment to participating employers.



Group health plans must now permit eligible low income employees and dependents who are not enrolled for coverage the opportunity to enroll when: (1) the employee's or dependent's Medicaid or CHIP coverage is terminated as a result of loss of eligibility; or (2) the employee or dependent becomes eligible for a premium assistance subsidy under Medicaid or CHIP. These new special enrollment rights are effective April 1, 2009 and must be exercised by eligible individuals within 60 days of the qualifying contingency.

Employers in states that provide Medicaid or CHIP assistance in the form of premium assistance subsidies are required to provide written notices to their employees regarding premium assistance. The Department of Health and Human Services will develop model notices by February 4, 2010 to enable employers to comply with this requirement. The notice requirement is effective for plan years beginning after the date HHS issues model notices.

Plans will also be required to disclose information about plan benefits to states upon request when a plan participant or beneficiary is covered under Medicaid or CHIP. A disclosure form will be developed by HHS and the U.S. Department of Labor for plan administrators to use for this purpose. Disclosures may not be required until the plan year following issuance of the model disclosure notice.

Employee Free Choice Act

The most controversial item on President Obama's labor law agenda has not yet been signed into law. However, both President Obama and his new Secretary of Labor (Hilda Solis) have expressed their support for the Employee Free Choice Act (EFCA) and the law seems destined to pass in some form at some point during the Obama presidency. The EFCA contains three basic provisions: (1) union representation through card checks; (2) arbitration of initial contracts; and (3) treble damages for unlawful terminations during an organizing campaign.

Union Representation Through Card Checks. Under current law, in most industries, a union typically gains representative status for a group of employees by winning a majority of employee votes in a secret ballot election held by the National Labor Relations Board. In order to request an election, a union must first obtain the signatures of at least 30% of the employees in a defined bargaining unit. Upon presenting the signatures to the Board, the NLRB schedules a representation election - which may not take place for six weeks or more after the union's request. During this period, employers often go into "campaign mode" to ensure that employees understand the potential down sides of unionizing. Not surprisingly, many unions see their base of support erode once employers present their side of the story in a campaign.

The card check provision of the EFCA would effectively prevent employers from campaigning against a union by eliminating the need for a secret ballot election. Under the EFCA, a union could gain representative status by merely obtaining signed authorization cards from a majority of employees in the bargaining unit. Hence, a union could cement its status as representative before an employer even knows that an organizing campaign is underway - and before the employer can launch its own counter-campaign. Union supporters claim this measure is necessary to eliminate employer intimidation. Groups such as the U.S. Chamber of Commerce maintain that a secret ballot vote is necessary to help prevent union intimidation and to ensure that voters are well-informed.

Arbitration of Initial Contracts. Under current law, a union that wins a secret ballot election merely wins the right to be the exclusive bargaining representative of employees for purposes of negotiating a collective bargaining agreement covering those employees. An employer has a legal duty to bargain in good faith in attempting to negotiate an agreement; however, the law does not compel employers to agree to any particular contract provision. It is not



uncommon for employers and unions to reach a stalemate during these initial negotiations. In some cases, a union can lose its support when an agreement is not forthcoming, leading to an eventual decertification. The EFCA aims to prevent this scenario by authorizing the Federal Mediation and Conciliation Service (FMCS) to arbitrate the parties' initial collective bargaining agreement if they are unable to reach an agreement within 120 days after the union is certified as representative of the employees. In other words, if the employer and union cannot reach agreement on terms and conditions of employment, a government agency will dictate what the terms of the agreement will be. Unions strongly favor this provision because it ensures them a lasting foothold with an employer (i.e., a contract) soon after they win an election. On the other hand, employers are alarmed by the notion of a government agency or arbitrator dictating terms of employment that could conceivably put them at a significant disadvantage relative to their competitors.

Treble Damages. Finally, the EFCA seeks to prevent unlawful discrimination or interference by employers against employees during the course of a union organizing campaign by requiring employers to pay triple backpay to any victim of such discrimination. In addition, repeat offenders may be charged a civil penalty of up to \$20,000 per violation. Once again, unions contend that these protections are necessary to curb discrimination that is already unlawful under current law. On the other hand, employers have significant concerns that the treble damage provision will only invite union abuse. For instance, it is not uncommon for certain union organizers (also known as "salts") to purposefully attempt to get fired once they determine that their organizing efforts won't be successful. This allows them an avenue to charge the terminating company with discrimination, while simultaneously moving on to other employers. The proposed damage provisions would create a windfall for unsuccessful organizers who seek to cash in when they are terminated as planned.

Preparing for the EFCA. The card check provisions of the EFCA are perhaps the most daunting aspect of the Act for employers. How can an employer ensure that its employees have the necessary information to make an informed choice before signing a union authorization card? Is it a good idea to address the issue of unions with employees on a proactive basis before the EFCA has even passed - and before a union has launched a card signing campaign? These are tough questions and the right answer will vary by employer. However, a few general observations may be helpful:

- *Who is at Risk?* Non-union employers that have recently defended union organizing campaigns or which operate in industries or geographic areas in which unionization rates are high will likely be the highest priority targets for union organizers in a post-EFCA world. Such employers should be carefully planning their EFCA strategy now.

- *Campaign Preparation.* EFCA's card-check provisions will reduce, and possibly eliminate, an employer's window of opportunity to respond to a union organizing campaign. Wise employers will have a counter-campaign developed which can be implemented at a moment's notice to help ensure that employees don't sign authorization cards until they have heard the employer's campaign message.

- *Proactive Research.* Effective counter-campaigns will require some advance research. How does the employer's pay and benefits compare to its unionized counterparts? What unique benefits does the employer offer? What is the union's dues structure? Which employees are likely to lose the most if a union insists on a seniority-based pay system? Based on this research, an employer could develop campaign literature to be used when needed.

- *Going on the Offensive.* Of course, in a post-EFCA world, campaign literature is only beneficial if the employer has any time to respond to union propaganda. If an employer has reason



to believe that it won't have an opportunity to respond to an organizing campaign, it may choose to launch an informational campaign before a union organizer shows up. Such a proactive campaign might include distribution of material outlining the advantages of remaining non-union and the downsides of unionizing. Employees should also be informed of the legal significance of signing a union card and the importance of knowing "both sides of the story" before doing so.

- *Supervisory Training.* Since EFCA makes it imperative for employers to immediately respond to organizing activity, supervisors and managers should be trained on how to identify such activity and how to report it. In addition, supervisory training might also be provided on the "dos and don'ts" of how to treat employees during an organizing campaign. Given the proposed treble damages for unlawful discrimination under EFCA, it will be more important than ever for supervisors to understand the guidelines that apply during an organizing campaign.

- *Fairness is the Best Deterrent.* Finally, employers should pay attention to implementing and adhering to policies and practices which ensure fairness to employees. Offering competitive pay and benefits are important for purposes of deterring union activity; however, that isn't enough. Internal grievance procedures, employee input committees and mentoring programs are several examples of policies or programs that foster a sense of workplace fairness that can help prevent a union organizer from establishing broad-based support among employees.

Most indicators suggest that the EFCA will be passed in some form at some time during the Obama presidency. Employer groups may be successful in delaying passage and in modifying some of its provisions. However, employers would be well-advised to start planning now. This article provides some ideas for developing a contingency plan. If we may be of assistance in helping your organization develop a plan, please

contact any of the attorneys in our Labor & Employment Group.

Department of Labor Issues Final Revised FMLA Regulations

On November 17, 2008, the U.S. Department of Labor published revised final regulations implementing the Family and Medical Leave Act of 1993 (FMLA). The revisions, which took effect on January 16, 2009, are designed to address interpretive issues that have arisen since the Act was passed in 1993. The revised regulations also provide implementing regulations for the two new FMLA leave-qualifying events created by the National Defense Authorization Act (NDAA) signed into law by President Bush in January 2008. Because the revisions are encompassed in hundreds of pages of regulations and commentary, we have prepared this summary. This summary should be used only as a guide and we strongly advise that you contact a member of our Labor and Employment Law Group should specific questions or concerns arise.

Implementing the National Defense Authorization Act

The passage of the NDAA in early 2008 added two new qualifying events to the FMLA. The revised regulations explain when and under what circumstances leaves for these qualifying events may be taken.

Military Caregiver Leave (MCGL). Eligible employees may take up to 26 work weeks of leave in a single twelve month period to care for a spouse, child, parent or next of kin who is a covered service member who (i) has suffered a serious illness or injury in the line of duty on active duty for which he/she is undergoing medical treatment, recuperation or therapy, (ii) is on outpatient status, or (iii) is on temporary disability retirement as a result of the serious illness or injury. Key terms such as "covered service member," "next of kin," "serious illness or injury" and "needed to care for" are defined in the revised regulations. Under the revised regulations



the “single twelve month period” begins on the first day the eligible employee takes FMLA leave to care for a covered service member, regardless of how the employer otherwise determines an employee’s leave entitlement for other FMLA leaves of absence. Further, the maximum amount of leave any employee may take in any 12-month period for Military Caregiver Leave or any combination of MCGL and any other qualifying event is 26 weeks. In other words, if an employee takes 10 work weeks of FMLA leave for his/her own serious health condition, he or she would have up to 16 work weeks of leave in the same 12-month period of time to care for a covered service member under the Military Caregiver Qualifying event. In no event can an employee take more than 12 work weeks of FMLA leave for any qualifying event other than MCGL. MCGL may be taken on an intermittent or reduced leave schedule basis.

Qualifying Exigency Leave. The revised regulations provide the normal twelve work weeks of job-protected FMLA leave to eligible employees with a child, parent or spouse who is covered military member serving in the National Guard or Reserves to use for any “qualifying exigency” arising out of the fact that a covered military member is on active duty or called to active duty status in support of a U.S. military contingency operation. The final regulations define the term “qualifying exigency” to include the following eight activities:

1. short-notice deployment;
2. military events and related activities;
3. childcare and school activities;
4. financial and legal arrangements;
5. counseling;
6. rest and recuperation;
7. post-deployment activities; and
8. additional activities where the employer and employee agree to the leave.

FMLA leave for qualifying exigencies may be taken on an intermittent or reduced-schedule basis.

New Regulations Pertaining to Traditional FMLA Leave

Medical Certifications. The new regulations contain several revised, detailed Certification of Health Care Provider forms; one for the employee’s own serious health condition and one for a family member’s serious health condition. The revised regulations allow the employer to deem the medical certification “incomplete” if one or more of the pertinent items is left blank or a response is ambiguous. If the employer deems the certification “incomplete,” the employer must notify the employee of the deficiency in writing and allow seven days for the employee to correct or amend the certification. If the employer fails to correct the deficiency, the employer may delay or deny FMLA leave.

Another significant change found in the final regulations deals with an employer’s ability to follow-up with an employee’s health care provider. Under the new regulations, certain employer representatives (HR professional, health care provider, leave administrator or management official) may contact the employee’s health care provider to seek “authentication” or “clarification” of information contained on the employee’s certification. It should be noted that an employee’s direct supervisor is not permitted to contact the health care provider.

Recertification for Extended / Chronic Conditions. If an employee’s serious health condition lasts beyond a single leave year (the relevant twelve month period defined by employer policy), an employer is now permitted to require an employee to provide a new medical certification at the beginning of each new leave year. This recertification may be obtained regardless of whether the serious health condition affects the employee or a member of the employee’s family.



Fitness for Duty Certification. The revised regulations now permit an employer to require that fitness for duty certifications specifically address an employee's ability to perform the essential functions of his/her position. The general prohibition against employers requesting fitness for duty certifications for employees on intermittent or reduced leave schedules remains. The revised regulations have, however, created an exception to this prohibition. An employer may now request a fitness-for-duty certification (for intermittent and reduced leave schedules) if reasonable safety concerns exist regarding the employee's ability to perform his/her duties, based on the serious health condition for which the employee took such leave.

Employer Notice Requirements. The revised regulations have clarified and expanded the notice obligations imposed on employers. Covered employers must provide general notice through an employee handbook (or similar written guidance) or by providing the notice to each employee when hired. The revised regulations expressly permit general notice via electronic posting. Under the revised regulations, the employer also must provide an eligibility notice, a rights and responsibilities notice and a designation notice to the employee. The new regulations provide forms of each type of required notice.

It should be noted that if a significant portion (not defined) of an employer's workforce is not English literate, the required notices must be provided in the language in which the employees are literate.

Employee Notice Requirements. The basic employee notice requirements regarding foreseeable versus unforeseeable leave have been retained. The revised regulations require the employee to utilize the employer's usual and customary notice procedures to advise the employer of the need for leave, including, e.g., the requirement that the employee call a specific person or telephone number.

Although an employee does not need to specifically apply for FMLA leave or even mention FMLA, he/she must provide an employer with enough information to determine whether the leave is FMLA qualifying. The revised regulations clarify this requirement: "simply calling out sick is not sufficient" to trigger an employer's FMLA obligations. Moreover, when an employee is requesting, or giving notice of the need for FMLA leave for a condition for which the employee previously has been granted FMLA leave, the employee **must** specifically reference the "FMLA" or at least identify the specific qualifying condition.

Retroactive Designation of FMLA Leave. The new regulations now permit an employer to retroactively designate an employee's leave of absence as FMLA leave so long as the employee is not harmed by the retroactive designation.

Overtime and Holidays. The new regulations also clarify the effect of overtime and holidays on an employee's FMLA leave allotment. Regarding overtime, if an employee would be required to work overtime hours but for FMLA leave, all missed overtime hours may be counted against the employee's FMLA leave entitlement. Holidays will also count against leave entitlement if the holiday occurs during a full week of FMLA leave. However, if the employee takes leave in an increment of less than a week, the holiday will not count against the employee's entitlement.

Effect of FMLA Leave on Bonuses & Incentives. Employers may now consider FMLA absences when determining bonuses and other incentives. For example, if a bonus is based on a performance goal that an employee did not meet due to the employee's FMLA leave, that employee may be denied the bonus. Employers must be careful, however, that such denials are issued in a non-discriminatory manner.

Perfect Attendance Awards. Before the new regulations became effective, an employee who took an FMLA leave of absence could not be denied a perfect attendance award on the basis of



such leave. The revised regulations, however, make clear that an employer is permitted to deny a perfect attendance award to an employee who does not have perfect attendance because he/she took an FMLA leave of absence so long as employees who took non-FMLA leave are treated in a like manner.

Substitution of Paid Leave. Employers may continue to require that employees substitute paid leave while taking FMLA leave. Under the revised regulations, all types of paid time off are now treated similarly; i.e., the employee may elect, or the employer may require, that the employee substitute all applicable “paid time off” for FMLA leave. Further, when an employee elects to substitute paid leave for unpaid FMLA leave, he or she must comply with the employer’s policy for the use of such leave, including notice requirements and certification requirements, in order to receive pay under the applicable policies.

Light Duty. Time spent performing a light duty assignment does not count against an employee’s FMLA leave allotment. However, the employee’s right to job restoration is held in abeyance while the employee is performing light duty work or until the end of the twelve month period. In other words, if an employee is performing light duty work, he/she is not on FMLA leave. The employee, however, may have FMLA job restoration protection until the end of the twelve month FMLA leave year.

Compliance Plan. In implementing these new regulations, employers must ensure the following:

- (i) HR staff and supervisors have received training on the recent changes. Under the new regulations, HR staff and supervisors must be aware of their additional responsibilities and prohibitions in dealing with an employee’s request for FMLA leave;
- (ii) FMLA policies must be updated to ensure strategic compliance with the new regulations;

- (iii) Other personnel policies should be reviewed (paid and unpaid leave policies, attendance policies, overtime policies, perfect attendance award policies, military leave policies, etc.);
- (iv) New certification and notice forms must be adopted;
- (v) Job descriptions should be updated to ensure each accurately reflects the essential duties and physical requirements of each position; and
- (vi) Light duty work practices should be reviewed in light of the revised regulations.

If you have any questions regarding the final regulations or would like to discuss implementation of the same, please do not hesitate to contact any member of the Labor and Employment Law Group.

WORKERS’ COMPENSATION UPDATE:

Flurry of Recent Workers’ Compensation Cases

The last several months of the year always seem to produce a number of interesting appellate court decisions. The 2008 calendar year has been no exception. A summary of the holding in each of the most important cases follows.

Miegoc v. WCAB (Commonwealth Court, December 3, 2008) - - Act 57, which became effective on June 24, 1996, introduced the requirement that a Notice of Ability to Return to Work form (LIBC 757) must be filed in advance of any petition to terminate, suspend or modify benefits. Subsequent cases have found the prompt filing of this form to be a “threshold requirement” to obtain a termination, suspension or modification of benefits. The Miegoc case extends these holdings to pre-Act 57 cases, where



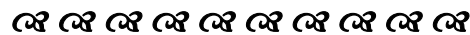
the date of injury preceded June 1996, on the basis that this provision of Act 57 is “procedural” rather than “substantive.”

Weney v. WCAB (Commonwealth Court, November 26, 2008) - - In a rare decision favoring employers, the Court held that a claimant may not add additional injuries to the NCP injury description, where the parties had entered into a prior stipulation of facts, approved by a WCJ, limiting the nature and extent of the work injury. In the Weney case, the parties had previously agreed to amend the NCP from a left shoulder “strain,” to a “tear of the anterior labrum.” Several months later, claimant attempted to add “cervical disc herniations at C2-3, C3-4, C4-5 and C5-6 levels.” The employer prevailed in its argument that the new injury allegations were precluded by the doctrine of “collateral estoppel.” Central to the Court’s decision was proof that claimant was aware of the cervical problems during the initial round of litigation. The result would likely be different, however, in a scenario where after-discovered medical evidence demonstrated that the shoulder pain was emanating from the neck.

Community Empowerment v. WCAB (Commonwealth Court, November 25, 2008) - - Confirms that “abnormal working conditions” will be found to exist, in certain cases involving sexual or religious harassment, or discrimination. Claimant, a female Christian, was repeatedly

subjected to sexual advances and commentary by her male supervisor. She was also pressured to conform to Muslim traditions and practices while at work, including burning incense, engaging in religious chants and splashing water. Claimant developed a major depressive disorder. Benefits were awarded. This decision leaves no doubt that the workers’ comp forum is open to employees who allege virtually any type of prohibited harassment or discrimination. Further, the case will exacerbate the trend which has been developing over the past several years - - the cross-filing of claims for workers’ comp, with PHRC and EEOC claims. A coordinated approach to defending such cases is therefore essential.

Bingnear v. WCAB (Commonwealth Court, November 19, 2008) - - In Bingnear, the Court allowed a WCJ to decide whether a police pension fund, administered under a collective bargaining agreement, could reduce pension payments for service-connected disabilities, by an amount equal to 100% of workers’ compensation benefits. Rejecting the employer’s jurisdictional arguments - - that the interpretation of the CBA is an issue reserved for a grievance arbitrator and that claimant should have pursued his claim by filing a grievance - - the Court remanded the matter to the WCJ for additional testimony and evidence as to whether the pension-offset provision was valid. We will continue to monitor developments in this important case.



If you have any questions regarding any labor or employment law matter, including the issues discussed in this newsletter, please do not hesitate to contact us at (717) 392-1100, or e-mail us at the following addresses:

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