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Employment Law Newsletter

New Year, New Administration, New Challenges

By Philip M. Keating and Arianna S. Gleckel

Welcome to our *Employment Law Newsletter*. We hope you find the articles interesting and useful to your business operations. Labor and employment law is a dynamic area of the law, and the coming months will be particularly busy and challenging. As you will read in this issue, the start of 2009 brings significant changes to well established laws such as the Family and Medical Leave Act and the Americans with Disabilities Act. We also have the start of a new Presidential administration, which is likely to pursue far reaching changes in labor and employment laws and dramatically increase the enforcement activities of government agencies such as the EEOC and the Department of Labor. Future issues of the *Employment Law Newsletter* will provide updates on these developments.

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The Obama Administration and Changes in Labor and Employment Laws

By: Philip M. Keating

President-Elect Obama campaigned on a platform of change and an area where we expect there to be dramatic change from the new administration is that of labor and employment law. The most immediate change will come from the focus of government agencies regulating private sector employment. These agencies and departments include the Equal Employment Opportunity Commission ("EEOC"), the U.S. Department of Labor ("DOL"), the National Labor Relations Board ("NLRB"), and the Civil Rights Division of the U.S. Department of Justice.

As a general matter, the past eight years have seen little enforcement activity from government agencies and departments. This will change quickly and is likely to include the following matters:

- Enforcement of civil rights laws, including Title VII employment discrimination cases by the U.S. Department of Justice.
- Increases in staff and funding for the EEOC, and implementation of an aggressive initiative to combat what is labeled systemic discrimination.
- Increase in compliance evaluations by the Office of Federal Contract Compliance Programs ("OFCCP") of the DOL, and more aggressive enforcement of equal employment and affirmative action requirements against federal contractors.
- Renewed emphasis on pay discrimination matters, including support for new laws that would overturn a U.S. Supreme Court decision in a case called *Ledbetter v. Goodyear Tire & Rubber Co.* (involved the appropriate statute of limitations for pay claims).
- Introduction of an ergonomics regulation through OSHA, and increased OSHA enforcement.

There also are legislative proposals forthcoming, the most notable of which is called the Employee Free Choice Act ("EFCA"). The EFCA is the number one priority of organized labor but its scope goes well beyond what would traditionally be considered "union" industries. Specifically, the EFCA will amend the National Labor Relations Act and certify a union as the representative of groups of workers simply if a majority of those workers sign a union authorization card. This law would eliminate the secret ballot procedure, which has been utilized for approximately 70 years and guarantees

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that individual employees can vote as they please on the question of whether they wish to be represented by a union. There is no provision to assess or counter-act pressure or improper tactics utilized by union organizers in obtaining signatures on the union authorization cards.

The provisions of the EFCA go further than just the so called card check and require employers to start bargaining with the union within 10 days of the union's certification as the bargaining representative. Furthermore, the EFCA provides that if the employer and union do not reach agreement on a contract within a short period of time, an arbitrator would be appointed who would impose the terms of the first contract between the employer and the union. Finally, the EFCA increases the penalties on employers for unfair labor practices committed during an organizing campaign or negotiation of the first contract, but does nothing to address unfair labor practices committed by unions or others.

Obviously the EFCA makes it much easier for unions to organize, become certified and obtain the first contract. The EFCA eliminates virtually all rights of employers in this process and actually does the same for individual employees by eliminating their right to a secret ballot. Certainly employers in labor intensive industries such as hotels, restaurants, construction, and landscaping are primary targets of the EFCA and the unions. However, this proposed law impacts all businesses and should be cause for great concern.

Other legislative proposals likely to be forthcoming from the Obama Administration include the following:

- Amendment of the Worker Adjustment and Retraining Notification Act ("WARN Act") to increase the required notice from 60 to 90 days, reduce the minimum size of employers covered from 100 to 50, and increase the penalties for violations.

- Amend the Family and Medical Leave Act to expand coverage to start with employers who have 25 employees instead of the current threshold of 50 employees.

- Amend Title VII of the Civil Rights Act to remove the caps on punitive damages and damages for other losses.

In sum, now is the time for employers to invest the time and effort to make certain that your employment policies and human resources practices are up to date, effective and in compliance with applicable federal, state and local laws.

New FMLA Policies and Procedures For Employers

By: Arianna S. Gleckel

The U.S. Department of Labor has published new regulations interpreting the Family and Medical Leave Act of 1993 (FMLA) that take effect on January 16, 2009. These new regulations will impact every employer who is currently subject to the FMLA. Employers need to make changes to their FMLA policies, handbooks, and other written materials in order to comply with the new regulations.

The new regulations attempt to clarify some of the confusing aspects of the FMLA, which had been interpreted differently by different courts. These new regulations give employers more control over when employees can take FMLA leave. Here are a few highlights of the new changes.

A "General Notice" still must be posted in every workplace and included in any employee handbook, as was previously required of employers. However, the new regulations require employers to issue a personalized "Eligibility Notice" within five days of a request for leave by the employee or after the employer learns that the leave may qualify under FMLA. Employers must also issue new employees a written "Rights and Responsibilities Notice" at the same time as the Eligibility Notice. And within five days after receiving sufficient information to determine whether the need for leave qualifies under FMLA, employers must issue a written "Designation Notice" to the employee.

The consequences of a failure to comply with these regulations includes not counting any of the leave against the employee's annual 12-weeks of FMLA leave until after the employer provides all required notices. If the employee is able to demonstrate harm as a result of the employer's failure to provide a required notice, the employer could be liable for the harm suffered as a result of the violation, such as lost compensation and benefits, other monetary losses, and appropriate equitable or other relief, including employment, reinstatement, or promotion.

The new regulations also clarify and interpret leave for employees who qualify for Military Caregiver Leave and Qualifying Exigency Leave. Military Caregiver Leave allows employees who care for family members with serious injuries or illnesses incurred while on military duty up to 26 work weeks of leave in any single 12-month period. In that same single 12-month period, the employee is only entitled to a maximum of 12 weeks of leave for any other type of FMLA leave.

Under Qualifying Exigency Leave, an employee may take a maximum of 12 weeks leave (in one year) to deal with non-medical exigencies arising from the employee's spouse, child, or parent who is on active duty or on call to active duty status. The regulations broadly define qualifying exigencies, and include leave to arrange childcare or school-related activities and leave to make financial or legal arrangements, as well as six additional qualifying exigencies.

Group Wage-Hour Claims are the Fastest Growing Form of Employment Litigation

By: Philip M. Keating

The Fair Labor Standards Act ("FLSA") requires that all employees receive overtime pay at one and one-half times their regular rate of pay for all hours worked over forty in a

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week, unless they fit into one of the designated overtime exempt classifications. The exempt classifications are the Executive Exemption, the Administrative Exemption, the Professional Exemption, the Computer Employee Exemption, and the Outside Sales Exemption. Each of these exemptions have specific requirements that must be satisfied for the employee to be exempt from overtime. In addition, certain highly compensated employees performing office or non-manual work earning $100,000 per year or more may also be exempt from overtime.

Litigation under the FLSA is exploding, in large part because it is very lucrative for plaintiff's attorneys. The reasons for this include the fact that all of the record-keeping and legal burdens under the FLSA rest with the employer and the fact that the FLSA provides that plaintiff's attorneys are entitled to receive their fees from the employer in the event of successful litigation. In addition, the FLSA provides that damages are doubled automatically in the event of violations, and can be tripled if it is proven that the employer acted willfully.

The FLSA also provides for what are called "collective actions." These are similar to class actions in other areas of the law. The standard for a collective action under the FLSA is relatively easy for a plaintiff and plaintiff's attorney to satisfy, as all they need to allege is that they seek to represent similarly situated employees. Given the incentives discussed above and the relative ease of satisfying the "similarly situated" standard, it is understandable why FLSA collective action cases are the fastest growing type of employment law litigation.

The collective action FLSA cases are based on a variety of alleged FLSA violations, including the improper classification of employees as exempt from overtime, non-payment or miss-calculation of meal and rest breaks, and the compensability of time required to change in and out of required workplace gear. FLSA individual and collective actions frequently involve individuals who are working supervisors or assistant managers, where the determination of whether or not the employee satisfies the requirements of one of the exempt classifications is very fact specific. This is a common situation in retail, hotel, and restaurant industries. Furthermore, there is a significant amount of FLSA collective action litigation in what previously were thought to be white collar occupations at banks, mortgage companies, and other financial services entities. The fact specific analysis assesses whether jobs have been transformed over time from positions that required the exercise of independent judgment to positions now involving more call center/working from a script type duties.

Prevention and education are of paramount importance in FLSA matters. It is critically important that employers review their determination of exempt classifications under the existing FLSA standards. Furthermore, strong and consistent record-keeping procedures must be in place. Finally, employers must review their policies on matters such as meal breaks, authorization of overtime, and starting and ending times to prevent the occurrence of situations where employees may be able to bring claims for unpaid compensation. The consequences for violations of the FLSA are significant and the expense rapidly escalates, particularly in cases of collective actions.

Amendments to the Americans with Disabilities Act

By: Arianna S. Gleckel

In September 2008, President Bush signed the Americans With Disabilities Act Amendments Act of 2008 (ADAAA), which is the most expansive amendment to the Americans with Disabilities Act (ADA) in the past decade. The new law became effective on January 1, 2009. Therefore employers must understand these changes and the impact such amendments have on providing accommodations in order to remain in compliance with the ADA.

The ADAAA broadens the definition of who is considered "disabled" under the ADA and reverses two Supreme Court cases that narrowly interpreted the definition of who is considered disabled under the ADA.

The ADAAA makes major amendments to the ADA. First, the ADAAA reverses the Equal Employment Opportunity Commission (EEOC) and the Supreme Court's interpretation of the meaning of "substantially limits" in reference to whether an impairment substantially limits a major life activity. The new requirement requires more than a moderate impairment but less than a severe restriction on a major life activity.

Second, the ADAAA broadened the list of activities that are considered a "major life activity." Prior to the amendments, major life activities included walking, seeing, hearing, speaking, learning, working, breathing, caring for oneself, performing manual tasks, sitting, standing, lifting, and reaching. In addition to these activities, the amendments add eating, sleeping, bending, reading, concentrating, and communicating to the list of major life activities. However this list is not exhaustive of all activities that may be considered major life activities.

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Third, "major life activities" now also includes major bodily functions. The amendment states that major life activities include "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." This amendment significantly expands what impairments are covered under the ADA.

With these changes in the law, employees are more likely to be regarded as disabled and protected under the ADA. Therefore employers should educate human resources, supervisors, and managers about these changes and consult outside counsel whenever an employee requests an accommodation before taking any action. The amendments to the ADA and the steps employers must take to ensure continued ADA compliance will be addressed further in upcoming editions of the Employment Law Newsletter. In the meantime, employers should be sure that they have identified what they consider to be the essential functions of all job categories. The reason for this is that ADA compliance analysis, assuming the employee or applicant has a condition that qualifies as a disability, starts with the question of whether an individual can perform the essential functions of a job with or without a reasonable accommodation. Employers are in a much stronger legal and strategic position if the essential requirements determination was made in advance of any individual situation.

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