

Legislative Committee Newsletter

The first quarter of 2009 has seen an impressive number of new and revisited employment legislation. I have tried to give you a summary of the HR changes that are included in those that are effective this quarter.

FMLA: Revised FMLA regulations are effective January 16, 2009

- A. Covered Service-Member Leave – 26 weeks leave in a single 12 month period to care for a military service-member with a serious injury or illness incurred in the line of duty.
- B. Qualifying Exigency Activities Leave – Makes 12 workweeks of leave available to eligible employees with a covered military member serving in the National Guard or Reserves, to use for any of the following: (i.e.) non-medical activities such as short-notice deployment; post-deployment activities; military events; temporary childcare arrangements and school activities; financial and legal arrangements; non-medical counseling; and rest and recuperation.
- C. The “Ragsdale Decision/Penalties – The final rule clarifies that where the employee suffers individualized harm because the employer failed to follow the notification rules, the employer may be held liable.
- D. Light Duty – does not count against an employee’s FMLA leave entitlement.
- E. Waiver of Rights – Employees may voluntarily settle or release their FMLA claims.
- F. Serious Health Condition – Clarified definition: More than 3 consecutive days of incapacity and 2 health care provider visits must occur within 30 days of the beginning of the period of incapacity and the first health care visit must occur within 7 days of the first day of incapacity. “Periodic Visits” for chronic health conditions are defined as at least 2 visits to a health care provider per year.
- G. Substitution of Paid Leave – Employers may require that employees use any accrued paid leave concurrently with FMLA and all forms of paid leave are treated the same.
- H. Perfect Attendance Award – Now allows employers to deny “perfect attendance” to employees who use FMLA as long as it treats non-FMLA leave the same way.
- I. Employee Notice – Requires that employees follow the employer’s customary call-in procedures for reporting absences, absent “unusual circumstances”.
- J. Medical Certification Process – Employer’s representative must be a health care provider, human resources professional, leave administrator or management official but in no case can it be the employee’s direct supervisor.
- K. Medical Certification Process Timing – The employer may request re-certification of an ongoing condition every six months.
- L. Fitness for Duty Certifications – The employer may require that the certification specifically address the employee’s ability to perform the essential functions of the job and if safety concerns exist, may require a fitness

for duty certification before an employee returns to work after intermittent leave.

The Lilly Ledbetter Fair Pay Act – Is the first law signed by the new president. The Act restores the pre-“Ledbetter” position of the Equal Employment Opportunity Commission that each paycheck that delivers discriminatory compensation is a wrong actionable under the federal EEO statutes, regardless of when the discrimination began.

- A. Employers should keep records longer as a result of the Ledbetter Act not only for “pay decisions but performance appraisals that affect pay and job classification decisions.”
- B. Taking a closer look at Comp System – Under the new law (for example) an annual pay increase based on merit has a life until the employ no longer receives a paycheck.
- C. Pay Discretion – Employers should not give a single person discretion to make decisions regarding compensation. The Ledbetter Act applies to “a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice.” Sen. Barbara Mikulski (D-Md) stated that “other practice” is not meant to include hiring or promotion decisions.

For more information see:

<http://www.SHRM.org/LegalIssues/FederalResources/Pages/LedbetterActoDOListforHR.aspx>

Children’s Health Insurance Program Reauthorization Act of 2009 – The Act expands “CHIP”, the state children’s health insurance program, by providing additional special enrollment rights related to group health plan coverage. The new law also permits state subsidies of employer-provided group health premiums for eligible children and families and imposes new notice and disclosure obligations for employers that maintain group health plans.

- A. Special Enrollment Rights: The Act extends special enrollment rights to employees and dependents who lose eligibility under a Medicaid plan or CHIP and employees and dependents who become eligible for a premium assistance subsidy under Medicaid or CHIP. These individuals must be given 60 days after the loss of coverage or determination of eligibility for assistance to request coverage under the group health plan. The effective date for these new special enrollment rights is April 1, 2009.
- B. Premium Assistance Subsidy: The Act allows states to offer eligible low income children and their families a premium assistance subsidy to help pay for qualified employer-sponsored coverage. States that provide a premium assistance subsidy may choose to pay the subsidy as a reimbursement to an employee for out-of-pocket expenses or directly to the employer.
- C. Notice Requirements: The Act requires employers that maintain group health plans in states that provide medical assistance under a Medicaid plan or child health assistance under a CHIP in the form of a premium assistance subsidy to notify their employees in writing of the potential opportunities available for premium assistance. The department of Health and Human Services (HHS)

must develop national and state-specific model notices for use by employers by February 4, 2010. Employers may provide the notice along with plan materials notifying the employee of health plan eligibility, open enrollment materials or the summary plan description. The effective date of the notice requirement is the first day of the plan year beginning after the date on which model notices are first issued.

- D. Disclosure to States: Under the Act, administrators for group health plans must disclose to the state, upon request, information about the benefits available under the plan if the plans' participants and beneficiaries are also covered by Medicaid or CHIP. This information is required so that the state may determine the cost-effectiveness of providing premium assistance subsidies and may provide supplemental coverage. The effective date is the same as stated in paragraph "C".
- E. Penalty for Noncompliance with Notice and Disclosure Requirements: The Act provides for civil penalties of up to \$100 a day.

COBRA – New COBRA changes require prompt employer action with little Government Guidance. Under the American Recovery and Reinvestment Act of 2009 (ARRA), workers who are involuntarily terminate from employment between September 1, 2008 and December 31, 2009 (and their qualified beneficiaries) may pay reduced COBRA premiums for a period of up to 9 months. The federal government will subsidize 65% of the premium, and individuals are responsible for the remaining 35%.

The burden of administering and, to some extent, paying for this subsidy fall on employers that sponsor group health plans. Further, employers (and in some cases, COBRA third party administrators) must respond immediately, to these new requirements without the benefit of IRS and DoL guidance on many issues.

The new rules are effective immediately and premium subsidies become available for periods of coverage beginning on and after the date of enactment, for most plans, March 1, 2009.

- A. Nearly all employers are covered: Virtually all employers providing group health plans must comply with the following changes. This includes private and governmental employers that are subject to the federal COBRA rules and small employers that are subject to any of the 40+ state mini-COBRA laws currently in effect.
- B. Eligibility limited to involuntary termination qualifying event: "Assistance eligible individuals" (AEIs) are qualified beneficiaries who become eligible for COBRA continuation coverage between September 1, 2008 and December 31, 2009 resulting from their involuntary termination of employment. Therefore, individuals who have another COBRA qualifying event, such as reduction in hours, divorce or attainment of a certain age or who voluntarily resign from their employment are NOT eligible for the subsidy. Also the subsidy phases out for AEIs whose federal modified adjusted gross income exceeds \$125,000 (\$250,000 for joint filers).
- C. AEI payments will quickly change: Under ARRA, AEIs are subject to the same timing and procedures for paying their portion of the COBRA premium.

AEIs may pay the reduced COBRA premiums for periods of coverage beginning March 1st for most plans.

- D. COBRA subsidy amount changes if the employer already subsidizes premium: ARRA provides that the subsidized premium amount is determined based on the COBRA premium that the AEI is actually required to pay.
- E. Subsidy duration up to 9 months: AEIs may receive subsidy payments for a maximum period of nine months, effective as of the first period of coverage beginning on or after the date of enactment. Subsidy eligibility for an AEI ends on the earliest of: (1) nine months after the subsidy first becomes available to the individual, (2) expiration of the AEI's maximum coverage period expires under current COBRA continuation coverage provisions, (3) expiration of the AEI's maximum coverage period under the extended election period, as discussed in the next paragraph, or (4) the date on which the AEI becomes **eligible** for coverage under another group health plan or Medicare. Note that this last date differs from normal COBRA rules which require the qualifying beneficiary to actually obtain coverage under a subsequent employer's plan. Penalty provisions apply to AEIs who fail to timely provide notice of new coverage eligibility, as provided in future Department of Labor guidance.
- F. Extended election period for AEIs not currently enrolled: AEIs not enrolled in COBRA continuation coverage prior to the enactment of ARRA may enroll during an extended election period. This provision includes AEIs who never enrolled in COBRA and AEIs who enrolled, but terminated coverage prior to the enactment of ARRA. The extended election period opens the date of enactment and ends 60 days after the plan administrator provides the individual notice of the extended election period. COBRA continuation coverage, if elected under this extended election period, is effective as of the first period of coverage beginning on or after the date of enactment. For example, if the group health plan coverage period begins on the first day of the calendar month, the effective date would be March 1, 2009. However, the maximum length of coverage is determined as if the individual had timely elected continuation coverage after the qualifying event and without regard to the actual enrollment date during the extended election period.
- G. Optional plan changes: Employers may allow all AEIs, not just AEIs enrolled during the extended election period, to elect a different benefit coverage option within 90 days of the notice date, as described below. This provision is not required and is similar to the election among existing coverage options that employers may provide to qualified individuals after a qualifying event.
- H. New notice requirements: In addition to providing notice of COBRA continuation coverage following a qualifying event under ERISA, during the subsidy period plan administrators must also provide notice of the: (1) availability of premium reductions and (2) option to enroll in different plan coverage, if the employer permits such option for AEIs. For AEIs who elected COBRA continuation coverage between September 1, 2008 and the date of enactment or who are eligible to do so during the extended election period,

plan administrators must issue the additional notice requirement within the next 60 days. The IRS will provide model notices within 30 days.

- I. Employer reimbursement procedures: After receiving reduced COBRA premiums from AEIs, employers may offset periodic payroll tax deposits (wage withholding and FICA) by the remaining subsidy amounts. If an employer is entitled to subsidy amounts greater than payroll tax liability, the IRS will credit or refund the excess amount to the employer as if an overpayment occurred. Additionally, the IRS will treat an overstatement of reimbursements as an underpayment of payroll taxes, allowing for collection and assessment.
- J. Employer reporting requirements: Employers seeking subsidy reimbursements must submit reports to the IRS with information that includes: (a) an attestation that involuntary termination of covered employees triggered the basis for AEIs' eligibility; (b) the amount of payroll taxes offset by subsidy reimbursements for the current reporting period and estimated offsets for the following reporting period; (c) Taxpayer Identification Numbers for all covered employees; (d) the subsidy amount reimbursed for each covered employee and qualified beneficiary; and (e) a designation for each covered employee indicating whether the subsidy reimbursement covers one individual or two or more individuals. Forthcoming IRS guidance and regulations will set the exact time and manner for the reporting requirements.

For additional information and action steps to take go to: SHRM.org: COBRA Coverage Expansion: HR Action Steps to Take Now. You can view it by clicking on the following link: <http://www.shrm.org/hrdisciplines/benefits/Articles/Pages/COBRAssteps.aspx>

Information contained in this summary is not intended as legal advice. Always consult your lawyer for advice relating to any federal or state employment legislation.

Thank you to the following for their contribution to this information:

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