What you don’t know CAN hurt you!

Hot Issues in Labor and Employment Law

Alphabet Soup!

- PPACA
- HIRE Act
- COBRA
- GINA
- FMLA
- ADAAA
- ENDA
- And more!

PPACA
(Patient Protection and Affordable Care Act a/k/a The Health Care Bill)

- Thousands of pages
- A lot of information applicable to long-term care facilities
- Some information applicable to you as an employer
- Some hidden provisions
The Health Care Bill: Hidden Provisions Employers Should Know

• Nursing Mothers Break:
  - Amendment to FLSA
  - “Reasonable break time”
  - 1 year after the birth of the child
  - When the “employee has need to express the milk”
  - Unpaid
  - Must provide a location, not a bathroom

The Health Care Bill: Hidden Provisions Employers Should Know

• Reporting Criminal Activity:
  - Notify everyone of requirement to report reasonable suspicion of criminal violations to law enforcement
  - Potential penalties: Up to $200,000

The Health Care Bill: Hidden Provisions Employers Should Know

• Whistleblower Protections
  - No retaliation against employees who:
    • Provide the employer, the federal government or a state attorney general with information the employee reasonably believes violates the health care provisions of the PPACA
    • Testify or participate in a proceeding under the PPACA
    • Object or refuse to participate in any activity an employee reasonably believes violates the health care provisions of the PPACA

Employees file complaints with OSHA
The Health Care Bill: Hidden Provisions Employers Should Know

• Background checks:
  - HHS developing a nationwide program for national and state background checks on direct patient access employees of long-term care facilities and providers
  - Not yet in place; will likely be months before it is set up

Hiring Incentives to Restore Employment Act (a/k/a the HIRE Act or the Jobs Bill)

• Hiring incentives for employers
• Exemption from Social Security Component of FICA taxes
  Trying to encourage employers to fill open positions now, rather than later

HIRE Act

Applies to:
- Individuals unemployed for at least 60 days
- Those hired after February 3, 2010 and before January 1, 2011
- No limit on the number of tax exemptions

Tax credit for employees you retain for at least one year
COBRA Subsidy
- Extended, extended, extended
- Currently extended through May 31, 2010
- 15 months of benefits
- Employee pays 35%, employer pays 65%
- Applies to those who are involuntarily terminated

GINA
- Genetic Information Nondiscrimination Act
- Employers cannot act on the basis of employee or applicant’s genetic information
- Genetic information includes family medical history
- New protected class

The Family and Medical Leave Act of 1993
Who is eligible for FMLA Leave?

“Covered” Employers
- 50 or more employees during each of 20 or more calendar workweeks in the current or preceding calendar year
- Proposed Amendments: Expand coverage to employers with 25 or more employees

“Eligible” Employees
- Must have worked for a covered employer at least 12 non-consecutive months
- Must have worked at least 1,250 hours during the 12 months preceding the requested leave
- Must be employed at a worksite where at least 50 employees work within 75 miles
FMLA Reasons for Leave
Prior to the 2008 amendments, the FMLA provided leave for employees in three scenarios:
- Birth or placement of a child
- Spouse, child or parent with a “serious health condition”
- Employee’s own “serious health condition”

What is a “Serious Health Condition”? Illness, injury, impairment, or condition involving:
- Inpatient Care
- Continuing Treatment by a Healthcare Provider

“Continuing Treatment by a Healthcare Provider” Five qualifying medical circumstances:
- Period of incapacity of 3+ days and subsequent treatment
- Pregnancy or prenatal care
- Treatment of a “chronic serious health condition”
- Permanent or long-term condition
- Multiple treatments for restorative surgery after accident or injury
Expanded Reasons for Leave

The amendments to the FMLA provide leave to employees in two more situations:

• Qualifying Exigency Leave
• Military Caregiver Leave

What is a “Qualifying Exigency”?

The amended Regulations provide 8 categories for “qualifying exigency” leave:

1. short-notice deployment
2. military events
3. childcare and school activities
4. Financial/legal arrangements
5. counseling
6. rest and recuperation
7. post-deployment activities
8. additional activities

How Much Leave Can an Eligible Employee Take?

Military Caregiver Leave: 26 weeks in a single 12-month period

All other types of Leave: 12 weeks in a single 12-month period
Types of Leave

• Consecutive Weeks
• Reduced Schedule Leave
  - FMLA Leave schedule that reduces an employee’s usual number of working hours per workweek, or hours per workday
• Intermittent Leave
  - FMLA Leave taken in separate blocks of time due to a single qualifying reason

ADAAA

- ADA Amendments Act
- Signed by President Bush in September 2008
- Effective January 1, 2009

• Designed to reverse case law that had made it difficult to establish a “disability”
• Likely to result in an increase of disability EEOC charges and lawsuits

ADAAA Warning!

• Technical legal stuff
• BUT, important for you to know
• Increase in disability lawsuits
• Disability lawsuits are becoming more difficult to defend
ADAAA Definition of Disability

- Physical or Mental Impairment that Substantially Limits One or More Major Life Activities
- Record of Such Impairment
- Being Regarded as Having Such an Impairment

New Definition of “Substantially Limits”

- “Consistently with findings and purposes of the ADAAA”
- Not to be “interpreted strictly” and Does Not Have to “Prevent or Severely Restrict”
- Episodic or Impairments in Remission Included
- Only Has to Limit One Major Life Activity

What Does the ADAAA Mean to YOU?

- Need to have an increased awareness of what constitutes a disability
- Make sure to engage in interactive process with potentially disabled employees
- Offer reasonable accommodations
- But . . . How to tell if someone is “disabled”?
“Per Se” Disabilities

- Quick and Easy Assessment
- List is Not Exhaustive
- No Negative Inference from Omission of Particular Impairments

- Deafness
- Blindness
- Intellectual Disability
- Missing Limbs
- Mobility Impairments
- Autism
- Cancer
- Cerebral Palsy
- Diabetes
- Epilepsy
- HIV or AIDS
- Multiple Sclerosis
- Muscular Dystrophy
- Major Depression
- Bipolar Disorder
- PTSD
- OCD
- Schizophrenia

Disabilities for Some

- Asthma
- High Blood Pressure
- Learning Disabilities
- Back or Leg Impairments
- Psychiatric Impairments
- Carpel Tunnel Syndrome
- Hyperthyroidism
Disabilities for Some

- Should be “construed in favor of broad coverage"
- List is Not Exhaustive
- No Negative Inference from Omission of Particular Impairments

Conditions That Are Usually Not Disabilities

- Temporary, Non-Chronic Impairments of Short Duration
  - Common Cold
  - Common Flu
  - Sprained Joint
  - Minor Gastrointestinal Disorders
  - Broken Bones

ADAAA Implications for Employers

- Increase in Claims and Lawsuits
- Fewer Summary Judgment Dismissals
- Shift to Analysis of Qualifications and Reasonable Accommodation
ADAAA Tips for Employers

• Training
• Handbook Revision
• Job Description Review
• Qualification Standards Review
• Ignore Mitigating Measures
• Focus on Interactive Process

FLSA (a/k/a Wage and Hour Law)

- I pay my employees minimum wage, so why should I care?
- Current DOL pet project
- Compliance audits at long-term care facilities
- Get your paperwork in order!

Lilly Ledbetter Fair Pay Act

- Signed into law on January 29, 2009
- President Obama’s first bill
- Originated at Alabama Goodyear Plant
- Statute of limitations legislation
- Impacts your record-keeping responsibilities
FLSA Tips

1. Consider eliminating the automatic deduction, or
2. Put clear policies in place so employees can be paid properly
3. Audit job descriptions to ensure proper classification
4. Train supervisors and HR employees on proper wage and hour recordkeeping
5. Make sure that your compliance poster is up-to-date

What else can they possibly change?

- **Paycheck Fairness Act**
  - Passed by the House
  - Awaiting a Senate vote
  - Would amend the FLSA to provide greater remedies and more restricted defenses under the Equal Pay Act
  - Analyze wages paid to women and men to ensure equality

What else can they possibly change?

- **ENDA: Employment Nondiscrimination Act**
  - Would add sexual orientation and gender identity to the list of protected classes
  - Similar to Title VII (race, religion, sex, national origin), ADEA (age), and ADA (disability) protections
  - Status of the bill
What else can they possibly change?

- **Healthy Families Act**
  - Introduced in May 2009
  - Response to swine flu epidemic
  - Would require 7 days of paid sick leave per year to cover:
    - Illness
    - Doctor's appointments
    - Time seeking help or services for victims of domestic violence, stalking or sexual assault

Other hot issues in employment law

- **Pregnancy discrimination**
  - From anecdotal evidence, there seems to be an increase in the number filed
  - Increase in EEOC attention to these charges

Other hot issues in employment law

- The I-9
- ICE (formerly INS) is focusing on I-9 compliance
- Increased number of ICE agents for audits

In other immigration-related news: E-Verify and attempts to make it mandatory
Other hot issues in employment law

- Social Media
  - Facebook, Twitter, MySpace, LinkedIn, etc.
  - Your employees are using it and you need to address it
  - Policies

Other hot issues in employment law

- Retaliation
  - Often more dangerous than discrimination
  - Makes juries mad
  - Results in high verdicts
  - A common theme running through all employment laws

Other hot issues in employment law

- Uniformed Service Employment and Reemployment Rights Act (USERRA)
  - Enacted in 1994
  - Case law increasing now
  - Reemployment and the escalator principle
Other hot issues in employment law

• Restrictive covenants
  – Covenants not to compete
  – Covenants not to solicit
  – Confidentiality agreements

Thank you!

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