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Labor and Employment Law Update

FEBRUARY 2009

In This Issue

OCABR Extends Massachusetts Data-Security Law Full Compliance Deadline Until January 1, 2010

By Brian D. Carlson

On February 12, 2009, the Massachusetts Office of Consumer Affairs and Business Regulation ("OCABR") issued new regulations establishing January 1, 2010, as the new deadline by which businesses must fully comply with the new Massachusetts data-security law, Mass. Gen. L. ch. 93H ("Chapter 93H"), and its implementing regulations, 201 CMR 17.00. OCABR extended the prior compliance deadline of May 1, 2009, because of the challenges caused by the current economic climate and businesses needing additional time to better understand what is required to protect customer data.

Significant New Obligations For Employers

Chapter 93H imposes broad information-security and computer-system-security requirements upon businesses of all sizes that maintain personal information concerning Massachusetts residents. Accordingly, even with the additional time that OCABR has provided, employers need to move swiftly to make the operational changes needed to comply.

Chapter 93H imposes broad information-security and computer-system-security requirements upon businesses of all sizes...employers need to move swiftly to make the operational changes needed to comply.

Chapter 93H

Chapter 93H, which became effective October 31, 2007, applies to any business entity or person, whether located inside or outside Massachusetts, that owns, licenses, maintains or stores "personal information" regarding Massachusetts residents in written or electronic form. "Personal information" means a person's first name or initial and last name in combination with his or her (a) social-security number or employer-identification number, (b) driver's license or similar identification-card number, or (c) bank-account, credit-card or debit-card number in conjunction with any access code or password that would permit access to a financial account belonging to the person.

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The Risks Of RIF Alternatives

By G. Michael Palladino

While many employers are implementing layoffs to address their challenges in the current economy, employers are also considering creative alternatives to reduce their costs without laying off employees. This article addresses the legal challenges that await employers that pursue those "RIF alternatives."

Layoffs are occurring at a remarkable rate and the legal challenges to properly implementing layoffs are well-documented. Indeed, the Firm addressed these in a recent article: *"Recession Reality: Reductions In Force And The Accompanying Legal Risks,"* published in the Firm's *Labor and Employment Law Update* in May 2008.

There are also legal challenges to other cost-cutting measures that impact employees' hours, wages, and other terms and conditions of employment. These RIF alternatives can be complicated to implement. If handled properly, and depending upon the circumstances, these RIF alternatives can offer important benefits such as reduced labor costs, enhanced employee morale and loyalty.

Salary Reductions And Reduced Workweeks

Salary reductions and/or a reduction in employee's work hours (the reduced workweek) create several risks under labor and employment laws.

For starters, these RIF alternatives create the risk of a potential wage and hour law violation. Under the Fair Labor Standards Act ("FLSA"), the practice of a salary reduction or a reduced workweek may jeapordize an employee's exempt status (for purposes of overtime eligibility), *unless* the employer can establish that the reduction is *bona fide* and not intended to circumvent the employer's salary basis payment obligation. In this regard,

- Exempt employees generally must receive a salary of at least $455 per week in order to satisfy the salary basis test;
- Employers must announce reductions in advance and implement such reductions *prospectively*, so as not to deprive the employee of any earned wages;

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Start 2009 Off Right: Review And Update Your Employment Policies

By Mary Pat Hagan

Each year at this time, we recommend that employers review their employment policies to ensure that they comply with all applicable changes in the law and accurately reflect current practices. Given that significant changes to numerous employment laws have recently taken place – and that further such changes are expected this year – such a review is especially critical.

In 2008 and early 2009, there were numerous changes in federal and state labor and employment laws that should be reflected immediately in personnel policies. For instance:

- Revised regulations implementing the federal Family and Medical Leave Act became effective January 16, 2009. The revised regulations dramatically alter employers' obligations in many key

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Employer obligations under Chapter 93H are triggered by a "breach of security." This is an unauthorized acquisition or use of personal information regarding a Massachusetts resident that creates a substantial risk of identity theft or fraud. Upon learning of a breach of security, an employer must promptly notify each affected Massachusetts resident, the state Attorney General and OCABR. The notice must contain specific information, including how the employee can request a security freeze with respect to his or her consumer reports, and what steps the employer has taken or plans to take in response to the security breach.

The Implementing Regulations

The implementing regulations are intended to reduce the risks of data-security breaches. They seek to achieve this by imposing a wide range of obligations upon employers and other holders of personal information.

For instance, each employer will be required to implement and maintain a comprehensive written security program regarding the personal information that it holds or transmits. As part of its written security program, an employer must, among other things:

- Designate one or more specific employees to be responsible for maintaining the program;
- Provide for disciplinary measures against employees who violate the information-security program;
- Ensure that former employees are no longer permitted to access personal information maintained by the employer (*e.g.*, by immediately terminating their access to the employer's computer network);
- Take reasonable steps to ensure that third-party service providers who are given access to personal information have appropriate safeguards in place to prevent its unauthorized disclosure;
- Develop a written procedure that sets forth the manner in which physical access to records containing personal information is to be limited (presumably, this encompasses both computer and paper records);
- Regularly monitor and review the scope and effectiveness of its information-security program and policies; and
- Document all steps taken by the employer in response to any incident involving a breach of information security.

Similarly, with respect to its computer system, an employer must:

- Maintain secure user-authentication protocols (*i.e.*, user ID and password procedures);
- Restrict access to records and files containing personal information to individuals whose job duties require such access;
- Encrypt, to the extent technically feasible, all files and records containing personal information that are transmitted across public networks or wirelessly;
- Monitor its computer system for unauthorized use of, or access to, personal information; and
- Encrypt all personal information stored on laptops or other portable devices, such as memory sticks, DVDs and PDAs.

The extent to which OCABR may relax these requirements for small employers is not clear. While the requirements are the same for small and large employers alike, compliance is to be evaluated with reference to the employer's size, scope and financial resources.

A practical suggestion for employers is to accord personal information the same status as trade secrets and other confidential information. Employers should already have policies and procedures in place for ensuring the confidentiality of business plans, nonpublic financial data and the like. Similar policies and procedures must now be instituted for personal information under Chapter 93H. (Employers should, of course, review both the statute and the implementing regulations in detail, as some of their specific requirements will likely differ from employers' current protocols for handling sensitive information.)

Given the breadth and complexity of the new requirements, outside data-management companies may begin offering services intended to bring businesses into compliance with Chapter 93H. Such services may be especially valuable for smaller employers that might find it difficult, given their personnel limitations, to carry out these tasks on their own.

Violations Of Chapter 93H

Failure to comply with the new regulations may have serious consequences. Chapter 93H authorizes the Massachusetts Attorney General to remedy a violation of the statute by bringing an action under Mass. Gen. L. ch. 93A ("Chapter 93A"), which prohibits unfair and deceptive business acts and practices. Chapter 93A provides for civil penalties, awards of multiple damages and attorneys' fees.

Further, although Chapter 93H does not refer to a private right of action, Massachusetts courts might interpret the statute to confer such a right, either by allowing an employee to sue directly under Chapter 93H or by allowing a private lawsuit under Chapter 93A based on an employer's failure to comply with Chapter 93H. Lawsuits alleging negligence or other common-law claims by employees notified of a data breach are also anticipated.

Practical Suggestions For Employers

It will take a significant amount of work to be compliant with this new law by January 1, 2010. Employers should act now to, among other things, develop a Personal Information Security Program ("Program") that includes the required elements of a written security program detailed above. Employers should also identify and train one or more employees to implement and manage the Program. In addition, employers must consider whether any related policies and procedures must be revised in order to comply with the Program. Finally, employers must determine whether any information technology systems require modification in order to comply with the technical requirements of the implementing regulations. Given the detailed requirements of the new data-security law, as well as the upcoming compliance deadline, employers should take such measures immediately.

* * *

Please feel free to contact us if you would like assistance in developing a Personal Information Security Program for your company, or if you have questions about Chapter 93H or its implementing regulations.

The Firm will schedule breakfast seminars in the Spring of 2009 on compliance with the data security law. Please let us know if you are interested in attending. ◆

Advanced Employment Law Boot Camp

May 28, 2009
8:30 a.m. to 4:30 p.m.

Schwartz Hannum PC has developed a one-day advanced human resources program specifically designed for experienced human resources specialists and/or graduates of Schwartz Hannum's Employment Law Boot Camp.

Presented in an interactive seminar format, knowledgeable and lively attorney instructors will discuss complex human resources issues.

Topics will include:

- Conducting a Wage and Hour Self-Audit (Before the Government Audits You)
- Steps An Employer Should Take During The Planning And Implementation Of A RIF To Avoid Lawsuits
- MA Health Care Law Compliance: Tips, Traps and Quagmires
- Religious Discrimination: Defining and Preventing

Tuition is $500. Registration is limited to 12 participants.

To register, please contact Kathie Duffy at (978) 623-0900 or kduffy@shpclaw.com.

Massachusetts *WorkSharing* Program: A Way To Cut Payroll Without Cutting Jobs

Massachusetts employers facing a temporary need to reduce payroll costs should be aware of an alternative to lay-offs available through the Massachusetts *WorkSharing* Program developed by the Commonwealth's Division of Unemployment Assistance ("DUA"). Implementation of a *WorkSharing* Program requires cooperation between DUA and an employer, but once approved, it can provide some unemployment assistance to employees whose hours have been reduced. This may help the employees survive the cut in pay, while also helping the employer avoid layoffs and preserve its trained, skilled workforce.

Under an approved *WorkSharing* Program, the employer reduces the hours of its entire workforce, or of everyone working in a particular department or unit, while DUA pays a proportionate share of the unemployment insurance benefits the employees would have received if they had been laid off.

DUA must approve an employer's *WorkSharing* Program before it can be implemented. Some of the specific requirements for approval include the following:

- To qualify for DUA's *WorkSharing* Program, the cut in hours must either be shared equally by all employees in the company, or it must be shared equally by all the workers in a defined or definable unit (*e.g.* facility, department, shift, job function).
  - As long as the *WorkSharing* Program is in place, each employee in the affected unit must be scheduled for and work the same number of hours.
  - "If anyone in the unit is scheduled to work or does work more than the hours stated in the plan, the whole unit may be disqualified from receiving benefits for that week."
- The hours reduction can range from 10 percent to 60 percent and still qualify for DUA approval.
- The employer must continue to provide the same health and retirement benefits to the affected employees that it provided before the reduction in hours. In other words, eligibility for health insurance benefits cannot be changed as a result of the cut in hours, and any resulting reduction in retirement benefits must be explained to the affected employees.

Once approved, the Program works as follows:

- Each eligible employee is entitled to receive a percentage of unemployment benefits equal to the percentage of reduction in his or her wages/hours. If hours are reduced 20%, each is eligible for 20% of the unemployment benefit.
  - Generally, a person's unemployment benefit rate is equal to ½ of the person's average weekly wage, up to a maximum weekly benefit rate of $628.
  - Employees with dependent children are eligible for the same percentage of any dependency allowance ($25/dependent). A 20% reduction in hours will qualify for 20% of the $25 allowance per dependent in additional benefits.
- Because the employee's *WorkSharing* benefits are less than what he or she would receive in regular (unreduced) unemployment benefits, it will take longer to exhaust the standard "benefit credit" of an unemployment claim. That extends the number of weeks each employee can collect benefits. If an employee has used up only a portion of available benefits during a period of reduced hours, he or she would remain eligible for full benefits for a while, if the reduction of hours becomes a full layoff, until the full "benefit credit" is exhausted.

Employees in a *WorkSharing* Program can work, or continue to work, in another part-time job and still be eligible for *WorkSharing* benefits. However, every dollar earned from the second job over $188/week is deducted from the *WorkSharing* benefit, dollar for dollar.

The employer can terminate a *WorkSharing* Program at any time.

Employers should note that a *WorkSharing* Program may create risks of legal liability. In particular, as discussed more fully in the accompanying article about "RIF Alternatives," the salary reduction could cause some employees to lose their exempt status.

We welcome the opportunity to assist your organization in implementing a DUA-approved *WorkSharing* Program, or to answer any questions you might have regarding the *WorkSharing* Program or any other cost-cutting plan. ◆

USCIS Delays Implementation Of New Form I-9

On January 30, 2009, the U.S. Citizenship and Immigration Service ("USCIS") announced that the new Form I-9 that was scheduled to become effective on February 2, 2009, will not become effective until April 3, 2009. Accordingly, employers must continue to use the existing Form I-9 until the new effective date. A copy of the existing Form I-9 bears the footer "Form I-9 (Rev. 06/05/07) N."

The delay results from USCIS's decision to postpone implementation of the final rule requiring use of the new Form I-9. The final rule was promulgated by the Department of Homeland Security on December 17, 2008, for purposes of streamlining the employment eligibility verification process.

Employers must complete a Form I-9 for all employees within the first three days of employment. The completed form must be retained for either one year after termination of employment or three years after completion, whichever is longer.

If you would like a copy of the current Form I-9, or if you need assistance with the Form I-9, an I-9 audit, other employment-eligibility questions, or employment and business-immigration questions in general, please do not hesitate to contact one of the Firm's attorneys. ◆

The Risks Of RIF Alternatives

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- In the case of a reduced workweek, employers must pay a salary that is commensurate with the amount of time subtracted from the regular workweek; and
- Employers must refrain from repeatedly instituting and suspending the salary reduction or reduced workweek, as such an erratic arrangement could suggest that the salary reduction or reduced workweek is a sham.

Salary reductions should be reviewed to ensure that they do not violate other legal and contractual obligations such as: (i) anti-discrimination laws, (ii) collective bargaining agreements, (iii) employment agreements, (iv) employee handbooks, and/or (v) offer letters. For example, to reduce the risk of discrimination claims, employers should carefully review the proposed salary reduction plan to ensure that the reductions will not create evidence that might support a disparate impact discrimination claim. Likewise, salary and workweek reductions should be reviewed to ensure they will not violate any express or implied contractual rights.

Employers implementing a reduced workweek must also determine whether eligibility for participation in employee benefit plans will be impacted, or whether such an impact is intended. Employers should review (and if necessary amend) the relevant plan documents to ensure that the plan documents accurately reflect the employer's obligations and/or goals for benefits eligibility.

Unionized employers must comply with the terms of any applicable collective bargaining agreement, and will often be required to bargain with the applicable union before any types of reductions can be implemented. Employers should review the collective bargaining agreement, side letters, and past practices, to identify any potential obstacles to a reduction.

A voluntary incentive program, such as voluntary early retirement, can be an effective alternative approach to cutting costs, maintaining employee morale and managing the threat of potential litigation.

Potential WARN Act Obligations?

Employers should also be cognizant of potential liability under the federal Worker Adjustment and Retraining Notification Act ("WARN" Act) and similar state laws. Significant salary or pay reductions may constitute "constructive discharge" (which can be defined differently under federal and various state laws), and thus a RIF alternative that triggers a mass resignation could potentially trigger statutory notice requirements.

Practical Tip: Communicate In Writing, In Advance

Employers should prepare a written notice to employees concerning the prospective salary reduction plan or other RIF alternative. Most importantly, this notice should be delivered to employees *before* any reduction is implemented.

Also, such communications should address a variety of details, including which departments will be affected, the employee's new salary or work schedule, the intended duration of the reduction, the employee's continued status as an at-will employee, a provision expressly superseding any prior contracts, policies and/or offer letters, and potentially an acknowledgement/signature section (particularly, if necessary to expressly amend any applicable contracts).

Voluntary And Mandatory Furloughs

Another RIF alternative is the furlough – which is typically a complete but temporary shut-down of operations and is generally unpaid (although the use of paid time off may be permitted to supplement income during the furlough). The legal issues that typically arise relative to furloughs do so under state law or company policy. For example, if an employer seeks to recognize an immediate financial benefit for the furlough, it may require that employees take the furlough as unpaid time off, in which case both state law and company policies should be reviewed to avoid compliance problems. In this regard, for example, employers should be aware that some states, such as California, may require a certain amount of advance notice prior to prohibiting an employee's use of earned vacation time.

In addition, to avoid an obligation to pay exempt employees during the furlough, employers should notify exempt employees in writing, in advance of the furlough, that they are prohibited from performing any work during the furlough, except with express approval in writing from a member of senior management. Arguably, an exempt employee who checks email and voicemail during a furlough is "working," and therefore could argue that he/she is entitled to payment of his/her salary for the entire week.

In addition, in a union context, the employer would likely be required to bargain over an involuntary furlough, unless a collective bargaining agreement already addressed the issue.

Voluntary Early Retirement And Other Voluntary Incentive Programs

A voluntary incentive program, such as voluntary early retirement, can be an effective alternative approach to cutting costs, maintaining employee morale and managing the threat of potential litigation. Voluntary incentive programs can be planned to target a particular group of employees (*e.g.*, higher-paid professionals who have been with the company for an extended period of time, rather than lower-salaried employees who might be targeted in an involuntary RIF). Generally, if an employee accepts a voluntary package, the employee should be required to sign a release of claims.

Employers planning a voluntary early retirement program are advised to minimize legal exposure (*e.g.*, with respect to discrimination claims or benefits issues), while also maximizing the program's chances of meeting the employer's goals (*e.g.*, how many employees does the company want to accept, and which type/category of employees?).

Work / Job Sharing

Work or job sharing is a program under which one full-time job is split into two part-time jobs, either indefinitely or temporarily. Some employees will view job sharing as akin to a partial layoff, but others may see this as an opportunity to continue to receive compensation, develop skills and maintain employment during tough times. In addition, some state unemployment agencies offer formal job sharing programs under which employers can apply to have lost employee compensation supplemented with unemployment benefits. (In this regard, see the accompanying article about the *WorkSharing* Program available to Massachusetts employers through the Division of Unemployment Assistance.)

Other RIF Alternatives

In addition to the above, employers have other RIF alternatives at their disposal, including: (i) hiring freezes; (ii) phasing out eligibility to work overtime; (iii) eliminating paid holidays and bonus programs; (iv) use of independent contractors and/or temporary staff; (v) telecommuting; and/or (vi) sale of the company. Each of these alternatives raises many of the same legal challenges described above, and thus employers are well-advised to proceed cautiously with regard to these RIF alternatives.

* * *

In tough economic times, employers possess several alternatives to reduce labor costs – but each alternative raises the potential for legal risks and lawsuits. Thus, employers considering these RIF alternatives should consult with experienced labor and employment counsel to ensure that these cost-cutting measures do not trigger preventable legal claims that could later outpace the costs that were cut. ◆

DHCPF Rings In The New Year With A New HIRD Form

By Shannon M. Lynch

The Massachusetts Division of Health Care Policy and Finance ("DHCPF") has issued a new 2009 Employee Health Insurance Responsibility Disclosure Form ("HIRD Form"), which replaces the 2008 version.

Massachusetts employers with 11 or more full-time equivalent employees ("reporting employers") must obtain a completed HIRD Form from each employee who either:

- Declines to enroll in the employer-sponsored health insurance plan; and/or
- Declines to participate in the employer's Section 125 plan.

Reporting employers must obtain a signed HIRD Form from each such employee upon the earliest of (as applicable):

- Thirty days after the close of each open enrollment period for the reporting employer's health insurance plan;
- Thirty days after the close of each open enrollment period for the reporting employer's Section 125 plan; or
- September 30th of the reporting year.

Reporting employers must also collect signed HIRD forms within thirty days of either of the following: (1) the date a new hire waives employer-sponsored health plan participation and/or Section 125 plan participation, or (2) the date an employee waives or terminates health plan participation and/or Section 125 plan participation.

Reporting employers must return a copy of the signed HIRD Form to the employee and retain the original signed HIRD Form for three years. If an employee does not return the signed HIRD Form upon request, then the reporting employer must document its efforts to obtain the signed HIRD Form.

Portuguese and Spanish versions of the 2009 HIRD Form should be available shortly.

Please note that an employer is a "reporting employer" subject to the HIRD requirement if the sum of payroll hours for all employees who have worked at least one month from October 1 through September 30, capped at 2000 hours per employee, divided by 2000, is greater than or equal to 11. Payroll hours include all hours for which an employer paid wages, including regular, vacation, sick, Family and Medical Leave Act, short-term disability, long-term disability, overtime and holiday hours.

We are available to assist you in complying with the HIRD requirement, and to address any questions that you may have regarding this requirement or the Massachusetts Health Care Reform Law in general. ◆

New State Minimum Wages As Of January 1, 2009

Arizona:	$7.25	New Mexico:	$7.50
Colorado:	$7.28	Ohio:	$7.30
Connecticut:	$8.00	Oregon:	$8.40
Florida:	$7.21	Vermont:	$8.06
Missouri:	$7.05	Washington:	$8.55
Montana:	$6.90		

Labor Relations Boot Camp

April 29, 2009

8:30 a.m. to 4:30 p.m.

Schwartz Hannum PC has developed a one-day program for human resources professionals, labor relations professionals, in-house counsel, and managers at both unionized and non-unionized employers, who want to better understand and manage the big-picture and day-to-day operations of their business' labor-management relationships.

Presented in an interactive seminar, lively and knowledgeable attorney instructors will discuss complex human resources issues.

- Strategies For Avoiding Unionization (And Deterring Additional Unionization)
- Effectively Preparing For Collective Bargaining
- Hot Topics In Negotiations
- Good Faith Negotiations And Impasse
- Job Actions, Strikes And Lockouts
- Drafting Collective Bargaining Agreements, Side Letters, And Last Chance Agreements
- How To Successfully Handle Grievances And Arbitrations
- Decertification: What Is It And When Is It Possible?

Tuition is $500. Registration is limited to 12 participants. To register, please contact Kathie Duffy at (978) 623-0900 or kduffy@shpclaw.com.

The Race Is On – Plan Now for Fiscal Year 2010 H-1B Visas

Beginning April 1, 2009, employers may file petitions for H-1B visas on behalf of foreign nationals who are employed in specialty occupations that require the application of highly specialized knowledge and completion of a bachelor's degree or higher in the specialty occupation, for starting work dates of October 1, 2009 (the beginning of fiscal year 2010) ("FY2010"), or later. The annual cap on H-1B visas is 58,200 (6,800 additional H-1B visas are reserved for citizens of Chile and Singapore pursuant to treaty obligations, for a total cap of 65,000 visas annually). Notably, the annual visa cap does not apply to H-1B visa transfers or extensions, or to foreign nationals working for educational or non-profit research organizations that are exempt from the cap.

In FY2010, 20,000 additional visas will be available to foreign nationals who hold an advanced degree from a U.S. academic institution (commonly referred to as "advanced degree" H-1B visas). Employers should consider using this category of H-1B visa for candidates who meet the educational requirements of the advanced degree.

We strongly encourage employers to prepare new H-1B petitions promptly because the annual allotment of visas will likely be exhausted within the first day of filing eligibility. Last year, the annual allotment was effectively exhausted the first day! We intend to file all of our clients' H-1B petitions for FY2010 on April 1, 2009. We also suggest that all applications be filed "Premium Processing" to increase the likelihood of capturing an available visa.

We understand that this is an issue of significant and immediate concern to employers, and we encourage you to contact us if you have any questions or require any assistance. The Firm regularly assists employers with preparing and processing employment-based non-immigrant and immigrant visa applications. We welcome the opportunity to assist you or to answer any questions that you may have. ◆

New FMLA Regulations Contain Significant Additions And Amendments

By G. Michael Palladino

BACKGROUND

The United States Department of Labor ("DOL") issued new Family and Medical Leave Act ("FMLA") regulations (the "Regulations") on November 17, 2008, establishing January 16, 2009, as the compliance deadline. These much-anticipated Regulations are significant, having engendered nearly 20,000 public comments from employer and employee representatives during the past two years. The new Regulations provide important clarification of employer and employee rights and obligations under the FMLA, including under the new family military leave entitlements signed into law in January 2008.

KEY PROVISIONS

Family Military Leave

The new Regulations provide detailed guidance on the two types of family military leave now permitted by the FMLA. First, under *Military Caregiver Leave*, eligible employees may take up to 26 weeks of leave in a single 12-month period to care for family members who incurred serious injury or illness during military duty. Significantly, employees who are "next of kin" may take Military Caregiver Leave. "Next of kin" means the nearest blood relative other than a spouse, parent, or child to the servicemember. Alternatively, the servicemember may designate the next of kin that he or she wishes to provide care. Next of kin are not eligible for other types of FMLA leave.

Second, under *Qualifying Exigency Leave*, eligible employees may take up to 12 weeks of unpaid leave to tend to certain "exigencies" that may arise when a family member is called or ordered to active duty by the National Guard or Reserves. The new Regulations provide a list of eight qualifying exigencies: (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; and (8) any additional activities agreed upon by the employer and employee.

Definition Of Serious Health Condition

The new Regulations provide important clarification regarding the six definitions of "serious health condition." For example, one of the definitions requires more than three consecutive days of incapacity plus two visits to a healthcare provider for treatment. Under the new Regulations, the two visits to a healthcare provider must occur within 30 days of the start of the period of incapacity, and the first visit must occur within seven days of the first day of incapacity. Understanding these clarifications will help employers ensure that FMLA leave is being taken only when the employee is truly eligible for it.

Employee Certification Process

The new Regulations give employers greater latitude to determine if a medical certification actually supports the employee's leave request, provided that specific safeguards are followed.

In particular, under the new Regulations, certain employer representatives (*e.g.*, human-resources representatives, leave administrators and management officials) may contact the employee's healthcare provider directly to authenticate a certification form or obtain additional information needed to determine whether the employee has a "serious health condition." Importantly, under no circumstances may this person be the employee's direct supervisor.

As additional safeguards, the employer (a) must first notify the employee in writing if the medical certification is insufficient or incomplete and give the employee seven days to provide the information requested; and (b) must not ask the healthcare provider to offer information outside of what is requested on the certification form. The new Regulations also update the optional certification form by separating it into employee and family-member forms.

In determining an employee's eligibility for FMLA leave, employers may now consider other medical information. This change should enable employers to consider, for example, information provided to establish eligibility for ADA accommodations or workers' compensation benefits.

Employer Notice Requirements

The new Regulations overhaul the prior employer notice obligations by requiring that employers provide a general notice of employee FMLA rights, a notice of eligibility, a rights and responsibilities notice, and a designation notice. The notice of FMLA rights must be posted in the workplace and added to the employer's employee handbook. If the employer does not have an employee handbook, then a written notice of FMLA rights must be provided at the time of hire.

The other notices reflect a new procedure for responding to requests for FMLA leave. Specifically, two of the new notices—the eligibility notice and the rights and responsibilities notice—replace the "Employer Response to Employee Request for FMLA Leave" form required by the prior Regulations. These new notices must be provided within five business days after the employee requests FMLA leave or the employer learns of the FMLA-qualifying event. In this respect, the time to respond to an FMLA leave request has been extended from two to five business days. Similarly, the employer must provide the designation notice within five business days after receiving sufficient information to determine that a requested leave qualifies for FMLA coverage.

Substitution Of Paid Leave For Unpaid Leave

Under the new Regulations, when an employee substitutes accrued paid leave (*e.g.*, vacation time) for unpaid FMLA leave, the employee must follow the terms and conditions of the applicable leave policy. So, for example, if an employer's vacation policy prevents vacation from being taken in half-day increments, then an employee may not substitute accrued vacation time for unpaid FMLA leave in half-day increments. The employer, though, may voluntarily waive any such requirements so as to permit employees to substitute paid leave more liberally. Additionally, the new Regulations treat all forms of accrued paid leave the same for purposes of substitution. This departs from the prior Regulations, which had special rules regarding the substitution of paid sick leave.

Light Duty Work

Under the new Regulations, returning an employee to light-duty work suspends the 12-week FMLA leave entitlement period and preserves the employee's right to be restored to his or her previous position. This significantly changes the prior Regulations, which counted light-duty work toward the 12-week FMLA leave period and, correspondingly, did not hold an employee's job in abeyance while he or she performed light-duty work.

Settlement Of FMLA Claims

Under the new Regulations, employers may obtain a release from current or former employees settling past, but not prospective, FMLA claims without approval of the DOL or a court. While the DOL had taken the position that employees may release FMLA claims in separation agreements, various courts ruled that such releases are unenforceable. The new Regulations codify the DOL's position, marking a significant positive development for employers.

Penalties/Damages For Noncompliance

The new Regulations clarify that an employer can be liable for failing to provide required FMLA notices only if the employee suffers individualized, actual harm, such as lost compensation or benefits, as a result. This codifies the United States Supreme Court's decision in *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002). *Ragsdale* invalidated the prior Regulations insofar as they penalized employers for failing to provide required FMLA notices, regardless of whether this harmed the employee.

COMPLIANCE TIPS

As employers take steps to achieve full compliance with the new Regulations, they should immediately:

- Update their FMLA compliance packages to include new notices and forms;
- Update their employee handbooks and related policies to comply with the new Regulations (*e.g.*, by including the required notice of FMLA rights, specifying the criteria for family military leave eligibility, and reflecting the required certification obligations);
- Post all new posters in the workplace; and
- Train managers and human-resources staff about the new requirements and their compliance obligations.

The Firm routinely provides seminars and individualized training on compliance with the FMLA and its new Regulations. In addition, the Firm has updated its FMLA Compliance Package, a tool created to assist employers in becoming fully compliant with the FMLA and applicable cognate state laws. We would be happy to address any inquiries that you may have about federal and/or state family and medical leave obligations. ◆

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respects and require employers to modify existing leave policies and related documentation.

- The Americans With Disabilities Act was amended for the first time since it was passed in 1992. The amendment, which greatly expanded the definition of disability and therefore the statute's coverage, became effective January 1, 2009.
- The federal Genetic Information Nondiscrimination Act becomes effective November 21, 2009. While many states already prohibited discrimination based on genetic information, this federal law established a new baseline across the country.
- The EEOC issued a new Compliance Manual on Religious Discrimination. Shortly thereafter, the Supreme Judicial Court of Massachusetts held that an employer was required to modify its grooming policy to accommodate a Rastafarian whose religious beliefs prevented him from shaving or cutting his hair. The court ruled that it was a reasonable accommodation to excuse the employee from the employer's grooming policy.
- States continue to grapple with same-sex marriage and civil-union laws. California voters repealed that state's same-sex marriage law, while Connecticut's highest court ruled that limiting marriage to opposite-sex couples violated the Connecticut constitution. Employers should review their policies against the laws of each state in which they have employees to ensure compliance with these variations in state law.
- Massachusetts has established January 1, 2010, as the deadline for complying with its new Data-Security Law. By this date, covered Massachusetts employers must have written security programs in place and ensure that their data-security technology complies with the new law. Massachusetts joins 38 other states that have some form of data-breach law.
- Massachusetts employers should review their maternity and paternity leave policies to ensure that such policies do not give rise to gender or disability claims. While on its face the Massachusetts Maternity Leave Act only applies to female employees, the Massachusetts Commission Against Discrimination announced recently that it will accept claims alleging discrimination based upon employment policies that treat men and women differently with respect to maternity and paternity benefits.
- As of July 13, 2008, Massachusetts employers became liable for mandatory treble damages for any violation of the Commonwealth's payment-of-wages laws. This change in the law means that treble damages will be awarded once a violation is demonstrated, regardless of the employer's good-faith efforts to comply with the law.
- Small Massachusetts employers (those with fewer than six employees) must be mindful of a recent Supreme Judicial Court decision holding that employees may sue for employment discrimination under the Massachusetts Equal Rights Act, even if the employer has too few employees to be covered by the Massachusetts anti-discrimination law, known as Chapter 151B. This decision represents a potentially significant expansion of the Commonwealth's employment-discrimination laws.
- Lawsuits alleging wage violations continue to rise across the country. Employers should ensure that wage practices (such as exempt and non-exempt status, overtime pay, minimum wage, wage deductions, and meal and rest breaks) comply with both the federal Fair Labor Standards Act and the laws of each state in which the employer operates.
- State variations in the enforceability of noncompetition agreements continue. California recently held that an employer cannot prevent a former employee from soliciting the former employer's clients on behalf of a new employer. Texas and Oregon also issued decisions regarding noncompetition agreements that modified the law in each of those states.

In addition to reviewing these changes in the law, employers should review their policies to consider the laws of any states into which they have recently expanded and to ensure that written policies comport with actual practices.

- Smaller localities, including the District of Columbia and San Francisco, now require employers to provide paid sick leave. San Francisco also enacted a new commuter benefit law.
- California joined Connecticut, New Jersey, New York, Washington and the District of Columbia in banning the use of handheld cell phones while driving.
- Employees' online activities continue to impact the workplace. Employers should review their electronic-communications monitoring policies to ensure that they address employees' blogs and online profiles, while not violating employees' privacy rights and the right to engage in collective action.
- Finally, it is time to review compliance with the Massachusetts health-care law and all affected policies to ensure compliance with the recent amendments to that law.

In addition to reviewing these changes in the law, employers should review their policies to consider the laws of any states into which they have recently expanded and to ensure that written policies comport with actual practices. Moreover, given the current economic climate, employers should review any severance policies, including less formal severance practices and guidelines, to determine if they need to be modified or replaced altogether.

The Firm has extensive experience in drafting employment policies, including multi-state employee handbooks and managers' guides, across a wide range of industries and for employers of all sizes.

Please feel free to contact us for assistance in updating your organization's employee handbook and/or managers' guide, drafting your first employee handbook and/or managers' guide, drafting or revising discrete policies, or developing training in regard to your organization's employment policies. ◆

If you prefer to receive a copy of the Firm's Labor and Employment Law Update by e-mail in pdf (portable document format), please contact Kathie Duffy at kduffy@shpclaw.com or (978) 623-0900 to let us know and to provide us with your correct e-mail address. (As you may know, you must have Adobe Acrobat Reader to view the Update in pdf.)

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President Obama Signs The Ledbetter Fair Pay Act Reversing The U.S. Supreme Court

By G. Michael Palladino

On January 29, 2009, President Barack Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009 (S. 181) (the "Fair Pay Act"), the first enacted legislation of the President's new administration. The Fair Pay Act expands the time within which employees may file pay discrimination claims against employers, thus creating the potential that employers will see a significant increase in the number of pay discrimination claims filed in the future. The Fair Pay Act applies to employers retroactively to May 28, 2007, and any pay discrimination claims filed as of that date would be subject to the new statute of limitations parameters set forth in the new law. President Obama openly campaigned in support of this legislation, having co-sponsored the original Senate bill in 2007. President Bush's administration had opposed the legislation, but Congress quickly passed the bill at the beginning of the new Congressional term in January.

The Fair Pay Act overturns the United States Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). In *Ledbetter*, the plaintiff Lilly Ledbetter, a former employee of Goodyear, alleged that several supervisors in the past had given her poor evaluations based on her gender, that the unfair evaluations caused a decrease in her pay throughout the duration of her employment (nearly twenty years), and that at the end of her employment she was earning significantly less than her male counterparts.

The plaintiff conceded that the discriminatory activity that had initially resulted in the lower pay occurred prior to the 180-day statute of limitations based on the date of her filing of an EEOC questionnaire. However, the plaintiff's primary argument was that the discriminatory acts that occurred *prior to* the statute of limitations period had continuing effects (*i.e.*, lower pay increases) *during* the statutory period. As a result, the plaintiff argued, each paycheck issued by the employer during the EEOC charging period constituted a separate act of discrimination.

On May 29, 2007, in a narrow 5-4 decision, the Supreme Court held that the later effects of discriminatory conduct that occurred prior to the EEOC's statute of limitations period were not sufficient to revive an unequal pay claim under Title VII of the Civil Rights Act of 1964. This decision spared employers the burden of having to defend against actions for alleged discrimination that were remote in time, but that had resulted in a lasting impact against employees, despite the lack of discriminatory animus.

The Fair Pay Act amends Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 "to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice." Accordingly, under the Fair Pay Act, the applicable statute of limitations period – either 300 days or 180 days, depending on the state – commences each time the employer issues a paycheck or other benefit payment pursuant to an unlawful discrimination practice or policy. As a result, actionable pay discrimination claims may survive for many years.

Proponents of the Fair Pay Act assert that the new law will allow employees who have been unknowing victims of discrimination the ability to file claims upon becoming aware of past pay discrimination based upon an individual's race, color, age, gender, religion or national origin. Critics of the new law, including business groups, argue that employers should be protected from stale claims where witnesses and other evidence may not be attainable, and that the new law conflicts with personnel records retention statutes. Moreover, employers contend that the new law will likely result in a flurry of new individual discrimination charges and class actions that were previously time-barred, and that additional litigation against employers could have dire consequences during a troubled economy.

Employers should carefully audit their payroll and related employment practices, working with experienced counsel, to determine whether there may be any evidence that might suggest past discriminatory elements. It is important to work with outside counsel, to protect this audit to the greatest extent possible under the attorney-client privilege.

The types of practices to be audited are not limited to pay structures, but may also include performance appraisal processes, promotion policies and incentive programs. By curing any non-compliant employment practices now, employers can reduce the risk of future claims that a current employment practice is a discrete unlawful act with the intent to discriminate, and thus is actionable under Title VII or other anti-discrimination laws. Notably, the Fair Pay Act leaves intact the legislative restriction on back-pay awards to two (2) years, but system-wide pay discrimination claims can add up quickly.

Should you have any questions regarding the Fair Pay Act or related matters, or need assistance conducting an audit of your company's pay practices, please do not hesitate to contact us. ◆

Government Agrees To Further Delay E-Verify Requirement For Federal Contractors

By Brian D. Carlson

The federal government has agreed to delay until May 21, 2009, the effective date of a final rule mandating that federal contractors use the E-Verify system to confirm that they do not employ unauthorized persons. This postponement is part of a broad undertaking by the Obama Administration to review (and potentially reconsider) all federal regulations that have been published but have not yet gone into effect.

This is the second time in recent weeks that the government has agreed to delay the effective date of the E-Verify final rule. The government initially agreed to a shorter postponement (until February 20, 2009) of the final rule as part of a pending lawsuit by business groups that are challenging the government's constitutional and statutory authority to promulgate the final rule. Under this most recent agreement, all proceedings in that lawsuit will be suspended in order to provide the Administration with an opportunity to review the rule.

Requirements Of The Final Rule

E-Verify is an electronic system of the U.S. Citizenship and Immigration Service that compares information from employees' I 9 Employment Verification forms with hundreds of millions of records contained in databases maintained by the Social Security Administration and the Department of Homeland Security. E-Verify enables employers to confirm the accuracy of the information provided in employees' I-9 forms, thereby reducing the risk that employers will unwittingly employ individuals who are not eligible to work in the U.S.

Up to this point, participation in the E-Verify program has been voluntary. The final rule, however, requires that federal contractors use the system to confirm the eligibility of (i) persons whom they hire to work within the U.S. during the terms of their federal contracts, and (ii) previously hired employees whom they assign to perform work within the U.S. on federal contracts.

The final rule does not require federal contractors to use E-Verify to confirm the employment eligibility of employees who do not fall within the above two categories (though a contractor may voluntarily choose to do so). Nor does the final rule alter the obligation of a federal contractor, like every other employer, to complete an I-9 form for each new employee.

Employers should also be aware that certain states (including Arizona and Mississippi) already require all employers to participate in the E-Verify program, regardless of an employer's size or whether it is a federal contractor. Additionally, several other states, such as Colorado, Georgia and Rhode Island, require public employers and/or state contractors to use E-Verify.

Future Implementation Of The Final Rule

The likelihood that the final rule ultimately will take effect on May 21, 2009, is difficult to gauge. Conceivably, the Obama Administration, after reviewing the final rule, may decide to revise it substantially, or even withdraw it entirely. If the Administration decides to leave the final rule in place, then the pending lawsuit could still result in a court injunction further delaying its implementation or enjoining it altogether.

Nonetheless, until these questions have been resolved, the prudent course for employers that are federal contractors (or anticipate becoming federal contractors) is to continue to prepare for compliance with the E-Verify final rule. An employer's action steps should include examining its current verification practices to ensure that I-9 forms are correctly completed for new employees, as well as auditing I-9 forms maintained for current employees to ensure that all employees are appropriately documented. ◆

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