Employment Law Update - April 2010

Text and status of all legislation available at www.thomas.loc.gov

- **Immigration Reform Control Act - Employment Eligibility Verification**
  - E-Verify still voluntary
  - FAR (Federal Acquisition Regulation) E-Verify required of federal contractors who can answer 'yes' to all these questions:
    - Awarded a federal contract or been solicited for federal work since 09/08/2009?
    - Period of performance longer than 120 days?
    - Value of contract exceeded $100,000?
    - Any portion of the work performed in U.S.?
  - E-Verify Resources
    - USCIS Home page www.uscis.gov/e-verify
    - E-Verify Enrollment https://e-verify.uscis.gov/enroll/
    - USCIS National Customer Service Center (800)375-5283
    - E-Verify Customer Support (888)464-4218
  - 'No Match' Letters – What should I do with them? http://www.ssa.gov/legislation/nomatch2.htm
    - Have a policy indicating company's compliance with labor laws
    - Refer employee to SSA to resolve discrepancy in reasonable period
    - Follow-up with employee or you may be found to have had 'constructive knowledge' of an illegal working for your company
    - Terminate if employee fails to follow company policy

It began with an I-9 audit, followed by an ICE raid and ended with a poultry processor agreeing to pay $1.5 million to settle criminal charges arising from the hiring of undocumented workers. Taking a peek inside what's involved with such a settlement, the employer has agreed that [1] the criminal case will be continued for two years (allowing the employer to make needed changes to avoid further prosecution); [2] it will adopt a two-year compliance plan, subject to court review; [3] it will begin using E-Verify and SSN verification on all new hires and current employees; [4] Spanish translators will assist with the I-9 process for Spanish-speaking new hires; [5] it will provide regular training to employees on lawful hiring practices; and [6] its I-9's will be audited externally. Two individual managers named as co-defendants in the criminal case will have their cases dismissed upon successful completion of a one-year pretrial diversion program. United States v. Crump (D.S.C. 11-09) You may want to consider if any of these practices could or should be implemented in your organization now, to avoid the problems that led to this costly result.

- **Lilly Ledbetter Fair Pay Act -** The Act essentially says it is unlawful to make compensation decisions based on discriminatory decisions or *other practices*.
  - Remember that to sue for compensation discrimination under some federal laws (Title VII, ADEA, & ADA), employees must first file an EEOC charge within 180 or 300 days (300 days in Texas, where a state agency exists – Texas Commission on Human Rights)
  - Ledbetter Act provides that the 180/300 day deadline to file a charge of 'compensation discrimination' begins anew each time a paycheck or other compensation is issued that is tied to the discrimination (hiring, promotion, demotion, evaluation, training, …)
  - Bottom Line: Greatly increases the statute of limitations & puts new burdens on employer

- **Paycheck Fairness Act of 2009** – part of FLSA – amends the Equal Pay Act

  - Providing Equal Pay for Equivalent Jobs
    Equalizes wage disparities between jobs that are segregated on the basis of sex, race, or national origin, but require equivalent skills, effort, responsibility, and working conditions.
  - Protecting Victims of Wage Discrimination
    Similar to the Paycheck Fairness Act, the Fair Pay Act provides punitive and compensatory damages to victims of wage discrimination. It also prohibits retaliation against individuals who exercise their rights under the law.
  - Requiring Employer Record Keeping
    The Act requires all employers to keep records of the methods they use to set employee wages. Employers must also provide yearly reports to the EEOC that describe their workforce by position and salary as well as gender, race, and ethnicity.

- **ADA Amendments Act**
  - NEW Definition of Disability:
    - A physical or mental impairment that substantially limits one or more of the major life activities of such individual (Definition of 'major life activities' added); OR
      - Caring for oneself
      - Performing manual tasks
      - Seeing
      - Hearing
      - Eating
      - Sleeping
      - Walking
      - Standing
      - Lifting
      - Bending
      - Speaking
      - Breathing
      - Learning
      - Reading
      - Concentrating
      - Thinking
      - Communicating
      - Working
      - "A major life activity also includes 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."
    - A record of such impairment (no change); OR
    - Being regarded as having such as an impairment as described in (new section)
      - If an individual has been subjected to discrimination because of an actual or perceived physical or mental impairment, it does not matter whether the impairment limits or is perceived to limit a major life activity
      - Does not apply to impairments that are transitory & minor
      - A 'transitory impairment' is one with an actual or expected duration of 6 months or less
      - Reasonable accommodation of perceived disability is not required
  - An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active
  - The determination of whether an impairment substantially limits a major life activity 'shall be made without regard to the ameliorative effects of mitigating measures' (exception for eyeglasses & contacts)

- **Employee Free Choice Act**

  - Largely been on hold as Healthcare Reform took precedence. Still likely to see action this year.

  - Employers should be on guard regarding labor issues, even while EFCA is on hold.

- Watch for Executive Orders promoting Unionization among federal contractors.
- More labor friendly NLRB - - could overturn prior employer-friendly rulings, and engage in rule making.

– Even without EFCA, unions won more than **73%** of elections in the first half of 2009, according to BNA PLUS. This is up from the 66% win rate for the same time period in 2008.

– Press Release from White House, 3/27/2010:

President Barack Obama today announced the recess appointments of attorneys Craig Becker and Mark Gaston Pearce to fill two vacancies on the National Labor Relations Board. NLRB Chairman Wilma Liebman, who has served on the Board for 12 years, welcomed the new members saying, "I look forward to beginning work with them, and especially to addressing cases that have been pending for a long time." Three of the Board's five seats have been vacant since January 2008. The two remaining members – Chairman Liebman and Member Peter Schaumber – have issued decisions in nearly 600 cases in which they have been able to agree. Last week, the Supreme Court heard argument in a case challenging the Board's authority to have issued decisions with two members.

- **COBRA**

– ARRA (American Reinvestment & Recovery Act) COBRA subsidy extension

- COBRA Subsidy Extension and Enhancement Act of 2009 - Amends the American Recovery and Reinvestment Act of 2009 to: (1) increase the subsidy under COBRA (health insurance continuation benefits under the Consolidated Omnibus Budget Reconciliation Act of 1985) to 75% of a worker's health care insurance premium; (2) extend such subsidy from 9 to 15 months after termination from employment; (3) extend coverage under COBRA to employees whose work hours are involuntarily reduced; and (4) extend until June 30, 2010, the period of eligibility for COBRA premium assistance.

– Model notice available here: http://www.dol.gov/ebsa/COBRAmodelnotice.html

– As of March 2, extensions to COBRA premium subsidies and federal emergency unemployment compensation (EUC) benefits took effect, via the Temporary Extension Act of 2010 (H.R. 4691). EUC is extended through April 5 and the involuntary termination period which triggers 15 months of a 65% subsidy on COBRA premiums has been extended through March 31, 2010. H.R. 4691 also beefs up the penalties for employers who get it wrong.

- **GINA** - Genetic Information Nondiscrimination Act

– The U.S. Dept's of Treasury, Labor and Health and Human Services published the 135-page Interim Final Rules Prohibiting Discrimination Based on Genetic Information in Health Insurance Coverage and Group Health Plans about a month ago, and they apply to the first plan year of health plans beginning on or after Dec. 7, 2009.

– Title I affects health plans and health insurers by prohibiting the requirement of genetic tests, solicitation of genetic info or the use of genetic info for underwriting.

– Title II prohibits discrimination in employment based on genetic info, for employers of 15+ employees, and took effect Nov. 21, 2009.

– As always, the devil's in the details and there are many. Don't make the understandable but completely wrong decision that GINA has no impact on your workplace simply because you do not require or ask for the results of genetic testing. Simple inquires about family health history can cross the line, so make sure you are up to speed on GINA's requirements.

- **FMLA - http://www.dol.gov/whd/fmla/index.htm**

Rewrite Your FMLA Policy (Again) - The ink is barely dry from adding two new types of FMLA leave, for family members of military personnel who are providing care or helping with an exigent circumstance, and now those provisions are out-of-date. The National Defense Authorization Act of 2010 (H.R. 2647) expanded the scope of exigency leave to include time off

to assist a member of the regular Armed Forces who is deployed to a foreign country. The former version gave up to 12 weeks off to the spouse, son, daughter or parent of a service member who was in the Guard or Reserve who had been called up. The caregiver leave had provided up to 26 weeks of time off to various family members to care for a Guard/Reserve/Armed Forces member who whose illness or injury was incurred while on active duty. Now, the scope is expanded to include veterans undergoing treatment, recuperation or therapy for an illness or injury that occurred any time during the five years prior to the date of medical treatment. The leave now also covers a service member who has aggravation of a pre-existing injury.

- **Required Postings**

Changes to the ADA and the addition of GINA mean that your current "EEO is the Law" poster is probably no longer compliant. There are two ways the fix the problem . . . either print off the new supplement poster and add alongside your EEOC version (Sept. 2002) or OFCCP version (Aug. 2008) of "EEO is the Law" poster, or take down the old version and post the new version (Nov. 2009). Both the supplement and the new version can be printed off at www.eeoc.gov/posterform.html or you can go to that same site and act on the directions for ordering multiple copies for each of your establishments, which will be sent via snail mail.

- **Earned Income Tax Credit – required notice**

In accordance with Texas Labor Code 104.004 (a) and HB 2360 passed during the 81st Texas Legislative Regular Session, employers (a person who employs 1 or more employees) must notify all of their employees (an individual who is employed by an employer for compensation) of the federal earned income tax credit (EITC) general eligibility requirements, no later than March 1 of each year. The EITC is a refundable federal income tax credit for low to moderate income working individuals and families.

How may an Employer provide notice to its employees?

1. In person;
2. Electronically at the employee's last known e-mail address;

1. Through a flyer included, in writing or electronically, as a payroll stuffer; or
2. By mailing the information to the employee at the employee's last known address by United States first class mail.

Employers may use IRS Notice 797, or a written statement with the same wording as IRS Notice 797 when notifying employees. IRS Notice 797 provides employees with the basic information for EITC.

There are several websites created to assist employees with additional information, eligibility requirements, general overview and income guidelines for EITC. For more information, go to:
www.eitc.irs.gov/ptoolkit/employer/employerresources or www.twc.state.tx.us/welref/wrjseek.html.

- **Healthcare Reform**

While most portions of the health care reform law will be implemented over the next four years, the new law includes several provisions set to be implemented in 2010 and will affect existing health care plans.

On Sept. 23, 2010, or six months after being signed by the president, the reform law will prohibit health plans from setting lifetime or annual caps on benefits, and health insurance plans will no longer be able to cancel coverage for plan participants who become ill. The law will allow for exceptions in the cancellation of coverage in cases of fraud or intentional misrepresentation of health conditions by plan participants.

Under the new law and effective on Sept. 23, health care plans cannot deny coverage to dependent children of plan participants because of pre-existing health conditions. The law also will allow children, who are not eligible for coverage under another employer's health plan, to remain on their parents' insurance plans until they reach the age of 26.

By the end of 2010, insurers will be required to report how the money collected for insurance premiums is spent. The report must include the proportion of premiums collected that is spent on clinical services, quality and other related health care costs. The amount spent by the plans will determine a medical/loss ratio. According to the law, large health plans (a group health plan for businesses with 101 or more employees) must maintain a medical/loss ratio of at least 85 percent, and the law requires an 80 percent medical/loss ratio for small plans (businesses with 100 or fewer employees).

In 2010, insurers must report the medical/loss ratios of the plans. Beginning in 2011, health plans that do not meet these medical/loss ratio standards will be required to pay premium rebates (on a prorated scale) to policyholders.

Future …

U.S. employers with more than 200 employees will be required to enroll new full-time employees automatically in their health care option with the lowest employee premium, unless the employee makes an affirmative election to opt out or elects a different option, under the Patient Protection and Affordable Care Act. Automatic enrollment may be subject to a waiting period, to the extent permitted by law.

"While the law is silent regarding an effective date for this provision, the intent appears to be that this provision will become effective in 2014," according to consultancy Hewitt Associates. Other analysts advise that the requirement could be effective once implementing regulations are issued, and it's unclear when that will be.

In addition to amending their plan materials, employers will need to prepare enrollment communications once implementing regulations are issued, notifying new employees of their automatic enrollment in the plan and their ability to opt out.

- **Hiring Incentives to Restore Employment Act - Tax Credit**

On March 18, 2010 President Barack Obama signed into law legislation (**H.R. 2847**) that creates a tax credit for the hiring of employees. Under this new law, an employer who hires an employee after February 3, 2010, and before January 1, 2011, can receive a tax credit equal to the employer's portion of the Social Security tax. All employers, with the exception of government employers, are eligible for this tax credit. Public institutions of higher education are the only government institutions that are eligible for the tax credit.

In order to qualify for this credit, an employer must hire an employee who has not been working for 40 hours per week for the past 60 days. Potential employees are responsible for attesting to their employment status. Taxes already paid by an employer on an eligible employee hired after February 3 but before the bill was signed on March 19 would be allowed to credit the Social Security taxes already paid to second-quarter tax payments. An employer who keeps an employee eligible for this tax credit on his payroll for 52 consecutive weeks will be able to claim an additional tax credit of $1,000 in 2011.

- **Unemployment Benefits**

Congress reconvenes 4/12/2010 and will look at the issue of benefits extensions again. Right now, this is what we have (I think):

  – If the initial benefit period of 26 weeks ran out before 2/20/2010 = +20 weeks

- If the first extended benefit period ran out before 2/27/2010 = +14 weeks
- If the second extended benefit period ran out before 2/27/2010 = +13 weeks
- Maximum benefits possible currently: 99 weeks

Additional Resources

- Webinar from SHRM: February 2010 – Employment Law Trends Watch
  http://www.shrm.org/multimedia/webcasts/pages/0210lawtrends.aspx
- Monthly e-newsletter from Audrey Mross, JD - Link also available at www.rrvshrm.com
  http://www.munckcarter.com/CM/Custom/TOCNewsletters.asp
- Dallas Regional Chamber's 22nd Annual Employment Law Update – 4/29/2010 - $125 -
  http://www.haynesboone.com/dallasregionalchambers22ndannualemploymentlawupdate/

The information provided here is intended to be an overview of current federal employment related issues. The goal of my human resource consulting practice is to extend the ability of the HR function within your organization. If you need legal assistance, please consult an attorney.

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