



Legal developments of 2009: A year in review

This past year ushered in many developments on the labor and employment law front. A new administration and the changing economy led to several new laws and regulations and modifications to some existing ones.

Here are the highlights that captured the legal department's attention:

- 1. Lilly Ledbetter Fair Pay Act.** On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act into law. Prior to its enactment, the US Supreme Court had held in *Ledbetter v. Goodyear Tire & Rubber Co.*, that the charge-filing deadline (statute of limitations) on Title VII compensation claims began to run on the date of the first discriminatory pay decision.

The new law amends Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act of 1967 and provides that the charge-filing periods will begin to run when: 1) a discriminatory compensation decision or other practice is adopted; 2) an individual becomes subject to the discriminatory decision or practice; or, 3) an individual is affected by an application of a discriminatory compensation decision or practice (including each time wages, benefits, or other compensation is paid).

As a result of the Act, the statute of limitations on an employee's claim restarts each time the employee receives a paycheck based on a discriminatory compensation decision. Although not signed into law until January 29, 2009, the law is retroactive to May 28, 2007 (the day before the *Ledbetter* decision) and applies to all pay discrimination cases pending on or after that date.

- 2. American Recovery and Reinvestment Act (ARRA).** The ARRA, as amended on December 19, 2009 by the Department of Defense Appropriations Act, 2010 (2010 DOD Act), provides for premium reductions for health benefits under COBRA.

Under the Act, eligible individuals involuntarily terminated from their employment between September 1, 2008 and February 28, 2010 pay only 35% of their COBRA premiums. The remaining 65% of the premium is reimbursed to the coverage provider through a tax credit. The premium reduction applies to period of health coverage that began on or after February 17, 2009 and lasts for up to 15 months.

The 2010 DOD Act, mentioned above, extended the COBRA premium reduction eligibility for an additional two months until February 28, 2010, and increased the maximum period for receiving the subsidy for an additional six months (from nine to 15 months).

- 3. Genetic Information Non-Disclosure Act (GINA).** GINA became effective on November 21, 2009, making it illegal for employers to discriminate against employees on the basis of "genetic information", as that term is broadly defined under EEOC regulations.

Title I of the Act applies to group health plans and insurers for both the group and individual markets and prohibits the collection of genetic information and/or discrimination against individuals based on their genetic information. Title II prohibits employers from deliberately acquiring genetic information and using it in employment decisions, and establishes requirements for the maintenance and disclosure of an employee's genetic information. GINA applies to employers having 15 or more workers, employment agencies, labor unions, apprenticeship programs, and joint labor-management training programs.

The EEOC also issued a new "EEO is the Law" poster to incorporate the GINA information, which employers are required to post.

- 4. Washington State Domestic Partnership Act.** Following the voter approval of Referendum 71 in November 2009, the Washington State Domestic Partnership Act, also known as the "Everything but Marriage" Act took effect on December 3, 2009.

The new law provides registered domestic partners with all of the rights and responsibilities of married couples, including the right to use sick leave and/or vacation leave to care for a domestic partner; the right to wages and benefits when a domestic partner is injured; the right to unpaid wages upon the death of a domestic partner; the right to unemployment, disability and worker's compensation benefits as similarly provided under certain circumstances to a spouse; and insurance rights, including rights under group insurance policies.

In order to register as a domestic partnership, the individuals must reside in the same household and be of the same sex or of the opposite sex with one of the individuals being over the age of 62. Employers should review their benefit programs, policies and practices to ensure that registered domestic partners are treated the same as spouses under state law.

- 5. Extensive Changes to Family Medical Leave Act (FMLA) Regulations.** On November 17, 2008 the Department of Labor issued its final rules updating the regulations implementing the terms of the FMLA. These revisions represent the first changes to the regulations since they were originally issued in 1995.

The regulations also included the new provisions implementing the National Defense Authorization Act (NDAA). The new regulations are effective January 16, 2010. Here are some of the highlights of the many regulatory changes in the final rule:

- **Military Family Leave:** Section 585(a) of the NDAA amended the FMLA to provide two new leave entitlements: Military Caregiver Leave (also known as Covered Service Member Leave), and Qualifying Exigency Leave.

Under the Military Caregiver Leave entitlement, eligible employees who are family members of covered service members will be able to take up to 26 workweeks of leave in a "single 12-month period" to care for a covered service member with a serious illness or injury incurred in the line of duty on active duty. This 26 workweek entitlement is a special provision that extends FMLA job-protected leave beyond the normal 12 weeks. The provision also extends FMLA protection to additional family members (such as next of kin) beyond those who may take FMLA leave for other qualifying reasons.

The 2010 NDAA , effective October 28, 2009, also expanded the potential period during which FMLA caregiver leave might be provided, allowing eligible employees to take such leave for up to five years after the veteran ends active duty. The Qualifying Exigency leave provision, in conjunction with the 2010 NDAA, helps families of the National Guard and Reserves and family members of active duty members of the Armed Forces manage their affairs while the member is on active duty in support of a contingency leave operation.

This provision makes the normal 12 weeks of FMLA job-protected leave available to eligible employees to use for "any qualifying exigency" arising out of the fact that the covered military member is on active duty or called to active duty status in support of a contingency operation. The Department's final rule defines qualifying exigency by referring to a broad number of categories for which employees can use FMLA leave, including short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, and post-deployment activities.

The final rule also includes two new DOL certification forms that may be used by employees and employers to facilitate the certification requirements for the use of military family leave.

- **Light Duty:** Previously, some courts had held that an employee uses up his or her 12 weeks FMLA leave entitlement while on "light duty" assignment following FMLA leave. Under the final rule, time spent performing "light duty" doesn't count against

the employee's FMLA leave, and the employee's right to job restoration is held in abeyance during that period of time (or until the end of the applicable 12-month FMLA leave year). If an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave.

- **Waiver of Rights:** The final rule codifies the Department's long standing position that employees may voluntarily settle or release their FMLA claims without court or Department approval. Prospective waivers of FMLA rights continue to be prohibited under the final rule.
- **Serious Health Condition:** The final rule retains the six individual definitions of serious health condition while providing additional guidance on three regulatory matters. One of the definitions of serious health condition involves more than three consecutive, full calendar days of incapacity plus "two visits to a health care provider."

Under the final rule, the two visits must occur within 30 days of the beginning of the period of incapacity and the first visit to the health care provider must take place within seven days of the first day of incapacity.

A second way to satisfy the definition of serious health condition under the regulations involves more than three consecutive, full calendar days of incapacity plus a regimen of continuing treatment. The final rule clarifies that the first visit to the health care provider must take place within seven days of the first day of incapacity. Thirdly, the final rule defines "periodic visits for chronic serious health conditions" as at least two visits to a health care provider per year.

- **Substitution of Paid Leave:** FMLA leave is unpaid. Previously, the regulations addressing "substitution of paid leave" applied different procedural requirements for the use of vacation or personal leave versus the use of medical or sick leave. Under the final rule, all forms of paid leave offered by an employer will be treated the same, regardless of the type of leave substituted (including generic "paid time off").

An employee electing to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer's policy that apply to other employees for the use of such leave. As always, the employee is entitled to unpaid FMLA leave if he or she does not meet the employer's conditions for taking paid leave and the employer is free to waive any procedural requirements for the taking of any type of paid leave.

- **Employer Notice Obligations:** The final rule consolidates and clarifies all employer notice requirements into a single section of the regulations and reconciles some conflicting provisions and time periods under the previous regulations. Under the final rule, employers are required to provide employees with a general notice about the FMLA (through posters, handbooks, etc.); an eligibility notice; a rights and responsibilities notice; and a designation notice. The final rule also extends the time for employers to provide various notices from two business days to five business days.
- **Employee Notice Obligations:** The final rule modifies the previous provision that allowed some employees to provide notice to an employer of the need for FMLA leave up to two full business days *after* an absence, even if he or she could have provided notice more quickly. The final rule requires the employee to follow the employer's usual and customary call-in procedure for reporting an absence, absent unusual circumstances. The final rule also highlights (without changing) the existing consequences if an employee does not provide proper notice of his or her need for FMLA leave.
- **Medical Certification (Content):** The final rule takes into account the enactment of HIPAA and addresses concerns about the privacy of an employee's medical information. The final rule now specifies that the employer's representative contacting the health care provider must be a health care provider, human resource professional, a leave administrator, or a management official, but *in no case* may it be the employee's direct supervisor. In addition, employer may *not* ask health care providers for additional information beyond that required by the certification form.

Applicable forms have also been updated to create separate forms for the employee and covered family members and by allowing, but not requiring, the healthcare provider to provide a diagnosis of the patient's health care condition as part of the certification. Finally, the rule specifies that if an employer deems a medical certification to be incomplete or insufficient, the employer must specify in writing what information is lacking and give the employee seven calendar days to cure the deficiency.

- **Medical Certification (Timing):** The final rule codifies that employers may request a new medical certification each leave year for medical conditions that last longer than one year. The rule also restructures and clarifies the regulatory requirements for recertification for continuing health conditions. In all cases, the final rule allows an employer to request recertification of an ongoing condition every six months in conjunction with an absence.

- ***Fitness for Duty Certifications:*** The final rule makes two changes to the fitness-for-duty certification process. First, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. Second, where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.

6. E-Verify Rule Goes into Effect. Effective September 8, 2009, federal contractors / subcontractors were mandated to use the E-verify system to confirm the employment eligibility of their employees if their contract(s) include the Federal Acquisition Regulation (FAR) E-verify clause. The rule applies to federal contracts acquired on or after September 8, 2009, and to existing federal contracts amended or modified on or after September 8th to include the FAR provision.