

# Employment Law Update

## Legislative Review

Spring 2009

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The recent downturn in the economy has forced many unwelcome changes on most organizations, including layoffs, salary freezes, increases to employee benefits cost, etc. The ramifications of these changes can be far reaching, including increases in employment related litigation, decreases in employee morale and other negative influences on the workforce. As a result, there is much more to do and fewer resources with which to do them. In addition, a flood of recently enacted legislation – and significant new initiatives on the horizon – will result in even more change at an ever faster rate, and place a far greater burden on HR.

2009 is likely to bring more employment-related legislation along with increased enforcement efforts by many federal regulatory agencies. To keep you informed and help you develop a proactive strategy, EP Counsel has compiled the following overview of recent and pending legislation impacting you, as an HR professional, and your organization. Some of the legislation is fairly straightforward and will require policy revisions along with communication to employees. Others, however, such as the *Lilly Ledbetter Fair Pay Act*, will have far-reaching and, as yet, unknown ramifications.

We believe you will find this overview helpful. We will continue to keep you abreast of significant developments in HR-related legislation to come

In the interim, please feel free to contact me if you have any questions or would like to discuss the communication implications of this legislation.

Visit our website at  
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## Immigration Compliance in 2009

### *New Form I-9*

Employers will be required to begin using a new Employment Verification Form (Form I-9) on April 3, 2009. The new Form I-9 will be the only version employers will be permitted to use to comply with the Employment Eligibility Verification process.

Some of the most important changes to the Form I-9 include the following:

- Expired documents will no longer be considered acceptable for proof of identification or work authorization.
- Forms I-688, I-688A, and I-688B (Temporary Resident Card, and older versions of the Employment Authorization Card / Document) have been removed as acceptable documents from List A. These documents are no longer issued and any that were previously issued have expired.
- New documents have been added to List A including passports and certain other documents for citizens of the Federated States of Micronesia and the Republic of the Marshall Islands, and revises references to the temporary I-551 stamps on foreign passports by including preprinted temporary permanent residence notations printed on special machine-readable immigrant visas.
- The new form revises the employee attestation section of the form. Specifically, the current Form I-9 requires the worker to choose one of three categories asserting his or her

- immigration status. The first category is, "A Citizen or National of the United States." The new Form I-9 will separate this into two categories, resulting in four options. Thus, in the revised Form I-9, the worker must indicate that he or she is a (i) U.S. citizen; (ii) U.S. National; (iii) U.S. permanent resident; and (iv) or alien otherwise authorized to work.

A copy of the new form and instructions can be found at [www.uscis.gov/i-9](http://www.uscis.gov/i-9).

### *E-Verify*

Mandatory use of E-Verify by government contractors has been delayed again to May 2009. In late December, several business groups, including the U.S. Chamber of Commerce, filed a lawsuit that challenged the legality of new federal regulations, which would require federal government contractors to begin using the E-Verify computer system to verify the work authorized and identity of workers on government projects.

The parties to the lawsuit agreed to postponement of the implementation of the new E-Verify regulations as a result of the Obama Administration's decision to review all regulations that had been issued but had not yet become effective. Consequently, implementation of the regulation has been delayed until May 21, 2009. At this time E-Verify remains a voluntary system, and those companies who do enroll and use E-Verify may only use the system for newly hired employees, not existing employees.

### *New Mandated Employer COBRA Subsidies*

As part of the American Recovery and Reinvestment Act of 2009 (ARRA), commonly referred to as the Stimulus Legislation and

enacted on February 17, 2009, Congress created a new COBRA subsidy requirement applicable to all group health plans which were previously subject to the COBRA requirements, including self-insured plans.

Employees who experience an involuntary termination of employment between September 1, 2008 and December 31, 2009 and are eligible for COBRA coverage due to their termination during such period (referred to as "assistance eligible individuals" or "**AEIs**") are eligible for this new subsidy equal to 65% of the COBRA premium. Even those individuals who previously declined COBRA coverage or elected coverage but failed to pay premiums are eligible to make a new election and receive the 65% subsidy. The benefit of this subsidy phases out for higher paid employees. The employee is still required to pay his/her 35% portion of the premium.

Employers must make the subsidy available for periods of coverage beginning after the date of the enactment of ARRA. If a plan provides and charges for COBRA continuation coverage on a monthly basis, the subsidy will be effective starting on March 1, 2009. Eligible employees who are currently paying 100% of COBRA premiums may end up paying the full premium amount in March and April 2009 because of the short period in which the plan administrators have to respond and send notices. If an employee pays the full premium for a period of coverage for March or April, the employer will be required to credit the subsidized portion of the premium against future COBRA premiums or refund the subsidized portion within 60 days.

The subsidy is available for a maximum of nine months, but it will end sooner if the individual becomes eligible for coverage under another group health plan or Medicare, or if the individual's maximum COBRA coverage period ends.

## RECENTLY ENACTED LEGISLATION

Part of the planning process for 2009 should be steps to address some significant changes in the law that occurred in 2008.

### *Revised FMLA Regulations*

Employers are now required to comply with the Department of Labor (DOL)'s significant revisions to the regulations interpreting the Family and Medical Leave Act (FMLA), including providing four different types of FMLA notice at various times during the leave process and complying with the DOL's new certification form requirements.

### **Military Leave Act Amendment to the FMLA:**

Employers are also now required to comply with the Military Leave Act Amendment to the FMLA. Among other things, this amendment provides that FMLA leave is available for "qualifying exigencies" arising from a family member's military deployment and gives qualified employees 26 weeks of military caregiver leave.

### *Lilly Ledbetter Fair Pay Act*

This Act alters the deadline or statute of limitations for pay discrimination claims brought under various federal anti-discrimination laws. The Act is retroactive to May 28, 2007.

### *Americans with Disabilities Act Amendments Act (ADAAA):*

The ADAAA broadens the scope of who is protected by the Americans with Disabilities Act (ADA). Among other things, the ADAAA provides that the determination of whether a condition substantially limits an individual's major life activities must be made without regard to the effects of mitigating measures. The ADAAA also expanded the scope of "regarded as disabled" claims and states that

the term disability must be interpreted in favor of broad coverage to the maximum extent permitted under the law.

## PENDING LEGISLATION

While it is not clear which, if any, of this legislation will be passed this year, it is clear that changes are on the horizon for employers.

### *Mental Health Parity Act*

This Act amends ERISA and the Public Health Service Act by prohibiting group health plans (or health insurance coverage offered by such plans) from imposing more burdensome financial requirements for mental health or substance use disorder benefits than required for substantially all medical or surgical benefits covered by the plan.

### *Paycheck Fairness Act*

This Act would amend the Equal Pay Act (EPA) to prohibit retaliation against employees for sharing salary information with co-workers, allow prevailing plaintiffs to recover compensatory and punitive damages in EPA cases, and facilitate the filing of class actions lawsuits under the EPA. It would also place the burden on employers to prove that any disparities in wages are not sex-based but are job-related and consistent with business necessity.

### *Employee Free Choice Act*

This Act includes a card check provision that would, for all intents and purposes, strip employees of the right to a secret ballot election and would require an arbitrator to set all terms (such as pay, benefits, holidays, etc.) of a first contract if the employer and union cannot agree on a first contract within 120 days. The legislation also provides for increased penalties for employers who are

guilty of unfair labor practices; these penalties include treble damages and civil penalties up to \$20,000.

### *Family-Friendly Workplace Act*

This bill would amend the Fair Labor Standards Act (FLSA) to give private sector (that is, nongovernmental) employees the option of swapping paid time off for overtime pay. The bill would permit employees to be compensated at the rate of one and one-half hours of time off for each hour of overtime worked. Employees would have the option of requesting monetary compensation for overtime worked instead of time off.

### *Fair Pay Act of 2007*

This bill would amend the FLSA and, specifically, the Equal Pay Act to require equal pay for **equivalent** work (rather than equal pay for **equal** work, which is currently required). It would extend the Equal Pay Act's protections to prohibit distinctions based on race and national origin, as well as sex. The legislation defines "equivalent jobs" as jobs that "may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions." Essentially, This Act would provide for a "comparable worth" pay system.

### *Civil Rights Act of 2008*

This Act would eliminate the caps on compensatory and punitive damages under Title VII and the Americans with Disabilities Act and would expand the anti-retaliation provisions of the FLSA. Additionally, it would make mandatory arbitration clauses in employee handbooks unenforceable.

### *Family and Medical Leave Enhancement Act*

This Act lowers the threshold of companies subject to the FMLA from 50 or more employees to 25 or more employees. This Act

also provides for unpaid leave (no more than 4 hours in a 30-day period or 24 hours in a 12-month period) for "parental involvement and family wellness leave." Under these provisions, an employee could take leave to attend or participate in their children's or grandchildren's school or extracurricular activities. Additionally, employees could take leave to take family members to doctor or dental appointments or to attend to the care needs of elderly individuals related to the employee. This leave would be in addition to the 12 weeks of leave permitted under the FMLA.

***RESPECT Act (Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers)***

This Act amends the definition of "supervisor" under the National Labor Relations Act (NLRA) by eliminating the words "assign" and "responsibly to direct" from the list of supervisory duties. The legislation adds the words, "and for a majority of the individual's worktime" before the list of supervisory duties. These amendments would make it much more difficult for an employer to demonstrate that an employee is a supervisor. The effect of this law would be that thousands of employees who currently are considered front line supervisors would fall within the definition of employees who are protected by the NLRA.

***Employment Nondiscrimination Act (ENDA)***

This Act prohibits discrimination against any employee based upon actual or perceived sexual orientation.

***Working Families Flexibility Act***

This Act permits employees to request, once every 12 months, that their employers modify their work hours, schedule or location.

***Healthy Families Act***

This Act requires employers with 15 or more employees to provide at least seven days of paid sick leave per year to employees who work more than 30 hours per week.

***Private Sector Whistleblower Protection Streamlining Act of 2007***

This Act expands whistleblower protections for private sector employees and permits the recovery of compensatory and punitive damages.

***Illegal Immigration Enforcement and Social Security Protection Act of 2009***

This Act seeks to amend the Social Security Act to require Social Security cards to be made of plastic and include an encrypted machine-readable electronic identification strip as well as a recent digitized photograph. These strips would enable employers to access the Employment Eligibility Database to verify employment eligibility as required by the Immigration and Nationality Act (INA). The legislation also would amend the INA to require employers to verify that employees have Social Security cards as described above and to verify employment eligibility either by telephone or card reader verification system.

2009 promises to continue to be full of charge for HR. You can reduce the pressure on yourself and your organization by implementing preventative measures, such as revising policies and procedures as necessary and training management and employees on how to address workplace issues that may arise as a result of the numerous changes in the workplace.

Please contact us at EP Counsel, Inc. for any assistance you may need.