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The GSH 60-Second Memo

June 10, 2009

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Mid-year Review: A Quick Reference to New Employment Laws

By Kathleen Paustian, Esq.

Sometimes new laws seem to "run together". It is easy to get new provisions confused, especially when there have been multiple changes, as has been the case in the past few months. So, here is a "handy reference" to new federal laws and regulations impacting the workplace:

The Lilly Ledbetter Fair Pay Act makes it easier for all protected classes to pursue claims of unequal salary. The Supreme Court opinion that triggered Congress to change the law addressed only Title VII of the Civil Rights Act of 1964, but the amendments apply to many civil rights acts. The primary component of Ledbetter exposes employers to pay discrimination liability for decisions made years ago, re-triggering the limitations period with each unfair paycheck. Of course, the current or former employee still has to prove s/he was paid less than those in the same job, but not in the protected class.

COBRA changes, which are part of the American Recovery and Reinvestment Act of 2009 (the ARRA or "stimulus package"), extend coverage for employees terminated between September 1, 2008

and December 31, 2009. Employers must subsidize 65% of the COBRA premium for covered dependents and employees who lose health coverage due to "involuntary termination", starting with the first period of coverage after the effective date of ARRA, which is February 17, 2009. While the Act does not define "involuntary termination", it is aimed at assisting people hurt by the current economy, so it is not believed this subsidy will be extended to those terminated for gross misconduct. In exchange for paying 65% of the COBRA premium for up to nine months, the employer can claim a quarterly payroll tax credit for the amount spent for the subsidy. If the employer's tax credits exceed obligations in any quarter, the U.S. Treasury will refund the employer the excess. Employers terminating employees after September 1, 2008 were required to send to each terminated employee a revised COBRA election form by April 18, 2009. Employers are required to do the same for any new terminations up through December 31, 2009.

Changes to the Americans with Disabilities Act, effective January 1, 2009 reverse U.S. Supreme Court decisions narrowing the definition of disability. The ADA 2008, signed into law by President Bush last September, expands "major life activities" to include major bodily functions, including neurological, brain, respiratory, circulatory, endocrine and reproductive. It also clarified "mitigating measures" by requiring employers to determine the existence of a disability without considering mitigating aids, such as medication, prosthetics and assistive devices. For example, a hearing aid cannot be considered when determining whether an applicant or employee comes under the protection of the ADA. However, eyeglasses can still be considered in determining whether vision impairments fall under the Act. These expanded definitions may extend ADA coverage to individuals with fertility issues, learning impairments, eating and sleeping disorders and hearing problems (even if correctable by hearing aids).

New regulations for the Family and Medical Leave Act took effect on January 16, 2009. Now it is clear that joint employers (usually placement agencies and their clients) have FMLA responsibilities. The primary employer (the client) is responsible for giving FMLA notice, maintaining health insurance benefits and restoring the FMLA recipient to the "same or equivalent" job. The secondary employer (the placement agency) must ensure there is no discrimination or interference with the employee's FMLA rights. The worksite of the primary employer will be used in determining whether both employers meet the test of having 50 employees within 75 miles. On another topic, the old rules allowed for an undefined gap in the qualifying 12 months of employment, while the new regulations set the maximum gap at seven years. If, seven years ago, an employee worked for the same employer for ten months and then returned this year and worked just two months, that employee will be eligible for benefits under the FMLA. The new regulations also include changes mandated by the National Defense Authorization Act of 2008 by requiring employers provide up to 26 weeks of leave for an employee to care for a spouse, son, daughter or parent who became ill or was injured while on active military duty.

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As a follow up to our June 3, 2009 article titled *"Proposed Changes in Wisconsin Comparative Negligence Law and What This Could Mean to Companies Doing Business in Wisconsin,"* new developments have occurred since its publication. Executive action was taken last week wherein the contributory negligence provisions in Assembly Bill 75 were amended. The Joint Committee on Finance raised the threshold regarding joint and several liability from 1% to 20%. There were no changes made to the provisions regarding jury enlightenment in this most recent executive action; however, the Committee drafted additional significant amendments. For further information regarding the recent proposed amendments, please do not hesitate to contact Attorney David Carr at david_carr@gshllp.com.