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Time for Small Businesses to Re-Evaluate Your Employee Handbook
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The first half of 2009 brought sweeping changes in employment law. Several new laws and additional interpretations of old laws will require small businesses (and large businesses) to review and modify their employee handbooks. Below are the four most important areas of the employee handbook that every company must now re-examine:

1. Family and Medical Leave Act (“FMLA”) –The Department of Labor issued new, final regulations interpreting FMLA (which applies to employers with 50 or more employees) on November 17, 2008. The regulations became effective on January 16, 2009. In an effort to combat abuse of FMLA leave, the new regulations tightened the requirements for it. The new regulations also addressed the February 2008 amendment to the FMLA which expanded the scope of FMLA leave to military families.

Employers should thoroughly review their FMLA policies to ensure compliance regarding the new notice requirements for employees and employers, medical certification procedures, and attendance and work policies.

In addition, military family leave under FMLA provides longer leave to a wider range of family members. The circumstances that allow family members to use this leave include short-notice deployment, military events, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, and post-deployment activities.

2. Americans with Disabilities Act Amendment Act (“ADAAA”) – The ADAAA went into effect on January 1, 2009. Congress expanded the scope of the original ADA (governing employers with 15 or more employees) by instructing that its definition of a disability “shall be construed in favor of broad coverage of individuals under . . . to the maximum extent permitted.” Under this expanded directive, conditions such as carpal tunnel syndrome, severe back pain, obsessive-compulsive disorder, learning disabilities, and depression, which have not always qualified as disabilities under the ADA, are more likely to be treated as disabilities.

Due to this expanded interpretation of the ADA, employers should review their employment policies on disabilities and reasonable accommodations. Employers that have lengthy, detailed

policies that include definitions of what constitutes a disability should consult with legal counsel about whether any changes are necessary. In addition, employers that have denied reasonable accommodation requests to current employees because it determined that the employee did not satisfy the ADA's definition of "disability" should consider whether the new law changes their analysis.

3. Lily Ledbetter Fair Pay Act –The Lily Ledbetter Fair Pay Act became law on January 29, 2009. It changes the statute of limitations for pay discrimination claims brought under Title VII of the Civil Rights Act, the Age Discrimination Act, the Americans with Disabilities Act, and the Rehabilitation Act. The new law restarts the statute of limitation each time an employee receives wages, benefits, or other compensation, including pension benefits, tainted by a discriminatory pay decision, regardless of when that decision was made. Even a long-retired employee who receives pension benefits that he/she asserts are affected by a discriminatory decision years before could potentially bring a claim under the Fair Pay Act.

As a result of the new law, employers should consider reviewing their compensation and benefits practices to ensure that these practices are implemented in a nondiscriminatory manner. In addition, employers should review the length of time they retain compensation and benefits records.

4. COBRA –The American Recovery and Reinvestment Act of 2009 became law on February 17, 2009. In ARRA, Congress amended the COBRA rules to administer a temporary federal subsidy of COBRA premiums, create additional notice requirements, and alter payroll tax administration. These changes affect every employer that sponsors a group health plan and has or will terminate or lay off an employee between September 1, 2008 and December 31, 2009.

Under ARRA, individuals qualifying for COBRA coverage (which generally applies to health plans with 20 or more employee participants) through involuntary termination will be required to pay only 35% of their COBRA premiums. The Act requires employers to advance the other 65% of the premium as a subsidy until their payments can be recouped through reduced federal payroll taxes.

Employers must immediately amend their COBRA policies and COBRA election notices to include information about the availability of the premium subsidy and, if applicable, the option to enroll in different coverage.

About the Authors

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