

employment REPORT

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New Federal and State Employment Legislation at Work in 2009

As the New Year begins, New York employers need to be familiar with federal and state legislation scheduled to take effect in 2009. Many of these laws provide greater protections for employees and some will require employers to revise employee handbooks and train supervisors and human resource personnel with regard to new regulations.

For your convenience, we present here a two-part report regarding legislation that will become effective this year. Part 1 outlines key federal employment legislation, and Part 2 outlines key state employment legislation.

PART 1: New Federal Workplace Legislation for 2009

Americans with Disabilities Act Amendment Expands Coverage of Law

On September 25, 2008, President Bush signed the ADA Amendment Act of 2008 into law, and it became effective on January 1, 2009. Congress passed the new measure in response to several judicial rulings that narrowed the scope and protections of the Americans with Disabilities Act (ADA), a law passed in the early 1990s to protect and accommodate disabled workers.

The amendment makes two important changes that employers need to be aware of. First, the number of employees who have a disability covered by the Act will be expanded. The definition of a disabled person has been broadened to include one who has difficulty "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." A disability will also include problems related to "major bodily functions," including, but not limited to "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

Second, impairments now must be evaluated without regard to the effects of mitigating measures, such as prescription drugs, hearing aids, and artificial limbs. This change was made in response to Supreme Court decisions holding that people with conditions such as epilepsy, diabetes, mental illness, cancer, and even multiple sclerosis were not protected by the ADA because their conditions could be treated.

While the new changes expand the scope of individuals covered by the ADA, they do not limit an employer's ability to raise defenses to claimed violations of the Act, including the defense that an employee's request for accommodation is unreasonable. Because of the expanded scope of coverage, however, the new law may result in the defense of ADA cases becoming more frequent, more difficult and, therefore, more expensive.

New Family and Medical Leave Act Regulations Take Effect in 2009

In November 2008, the U.S. Department of Justice published the final version of the Family and Medical Leave Act (FMLA) regulations, which became effective on January 16, 2009.



The changes include new military family leave entitlements and updates to general regulations under FMLA. Two new types of military FMLA leave are provided. First, an employee can take leave for “any qualifying exigency” arising out of the fact that a family member is on active duty. Second, a family member is entitled to up to 26 weeks of leave in a single 12-month period in order to care for family members who are seriously injured in the line of duty.

In addition to the military leave provisions, the new regulations increase employer notice requirements to employees regarding their FMLA rights, increase employee notice obligations to the employer regarding timing and method of FMLA requests, re-define certain health conditions for FMLA leave qualifications and explain how and when employers can authenticate medical certification forms. Further, if a covered employer has no handbook or written policy, it must provide a written general FMLA notice to new employees when they are hired. Employers should review these FMLA regulations and update FMLA handbook provisions and/or policies.

New Genetic Information Non-Discrimination Act Protects Employees Pre-Disposed to Genetic Diseases

On May 21, 2008, President Bush signed into law the Genetic Information Nondiscrimination Act of 2008, also referred to as GINA. The law prevents employers from using genetic information when making employment decisions. It also prevents health insurers from charging higher insurance rates or denying coverage to an otherwise healthy individual based on that individual’s genetic information or genetic predisposition towards a disease. Those portions of the law relating to health insurers will take effect in May 2009, and those relating to employers will take effect in November 2009. *Note: A 1996 amendment to the New York State Human Rights Law parallels the protections set forth in GINA.*

Changes to the I-9 Employment Verification Form Will Affect Immigrant Employees and Their Employers

On February 2, 2009, the U.S. Citizenship and Immigration Services will require employers to comply with the new I-9 verification system. The I-9 Form verifies the identity and employment authorization of every employee in the U.S. The new Form I-9 will come with instructions

to employers regarding recent changes. Three important changes are: (1) the federal government will no longer accept expired documents for I-9 verification purposes; (2) certain older versions of immigration documents will no longer be acceptable for I-9 verification; and (3) employers may now sign and retain Forms I-9 electronically.

Employers who hire immigrant workers must become familiar with the new I-9 Form and instructions.

PART 2: New York Legislation for 2009

NY WARN Act Soon Will Take Effect

Governor David Paterson recently signed into law the New York State Worker Adjustment and Retraining Notification Act (NY WARN Act), which is scheduled to take effect in February 2009. While the NY WARN Act is modeled after the federal WARN Act, there are key differences that employers must be aware of before instituting a mass layoff, relocation, or plant closing in New York State.

There are two important differences between the federal and NY WARN Act. First, while federal WARN applies to employers with 100 or more covered employees, NY WARN applies to New York employers who employ *merely 50 or more* “full time” employees. Second, under the NY WARN Act, employers must provide affected employees with at least 90 days advance written notice of mass layoffs, relocations and plant closings--a significant increase from the federal 60-day requirement.

The law is similar to the federal WARN Act in that it provides for civil penalties of \$500 per day for each violation by employers who fail to give proper notice and makes employers liable for back pay and employee benefits (capped at 60 days). To avoid penalties, employers must plan well in advance for future workforce restructurings and seek the advice of legal counsel when considering a reduction in staff, plant closure, or relocation.

New York Law Adds Further Protections for Job Candidates with Prior Criminal Convictions

Under existing New York law -- Correctional Law Article 23-A -- an employer must consider and balance various factors before rejecting a job applicant who has a prior criminal conviction. The factors include whether the crime relates



directly to the potential job, the individual's age at the time of the offense, and the seriousness of the offense.

Beginning February 1, 2009, employers will be required to provide a copy of Article 23-A to individuals subject to background checks and to post a copy of the Article in a conspicuous area of the workplace. However, as part of the new legislation, New York employers who follow Article 23-A will have increased protection from lawsuits for negligent hiring. That is, if an employer hires someone who has a conviction history but the employer has made a reasonable determination that, due to the factors in Article 23-A, the applicant should still be hired, there is a "rebuttable presumption" that evidence of the employee's past criminal record cannot be admitted into evidence and be used against the employer in an action for negligent hiring.

Overtime for Nurses Soon Will Be Restricted in New York State


Beginning July 1, 2009, a new law signed by Governor Paterson will severely restrict employers in the health care field from imposing mandatory overtime for registered professional nurses and licensed practical nurses in New York State. Nursing unions actively lobbied for this law in order to end the practice of forcing nurses to work double shifts and overly long hours. The law does not prevent nurses from working overtime voluntarily, and there are certain exceptions to the ban, such as permitting the imposition of overtime during a health care disaster/emergency or in the event of an ongoing medical procedure in which the nurse is actively engaged.

New Employment Legislation Likely to Come Before Congress in 2009

With the Presidency and the U.S. Senate and House now in Democratic hands, there likely will be more federal workplace legislation expanding employee rights and imposing additional responsibilities on employers. Congress is expected to move quickly to pass legislation that union and employment advocates have been fighting for for several years. Legislation that already has been proposed, and is now likely to be passed includes: (1) adding compensatory and punitive damages to claims under the Fair Labor Standards Act (FLSA); (2) eliminating caps on punitive and compensatory damage awards under Title VII and the ADA; (3) overturning the Supreme

Court's decision in Ledbetter v. Goodyear Tire, which held that the deadline for filing an equal pay discrimination claim with the Equal Employment Opportunity Commission (EEOC) is measured from the date of the first discriminatory pay decision, even if the employee was unaware of the discrepancy; (4) amending Title VII to prohibit sexual orientation discrimination; (5) adding protections for employees subject to mandatory arbitrations in employment disputes; (6) allowing employees to more easily modify work arrangements, such as hours, schedule or work location; (7) expanding the Family and Medical Leave Act; (8) expanding workplace safety initiatives; and (9) making it easier for unions to organize and negotiate a first collective bargaining agreement under the proposed Employee Free Choice Act.

Additionally, it can be assumed that in 2009, wage and hour class actions will continue to proliferate. The number of wage and hour class actions filed in federal courts has doubled over the last ten years. These actions include claims based on unpaid overtime, missed meal and rest breaks, unpaid donning and doffing time and unpaid travel time. The number of claims brought under FLSA for such violations is expected to continue to grow. It is imperative that every employer adopt and implement policies and procedures that comply with FLSA regulations.

Employers and employees should recognize that each employment situation presents a unique set of facts and circumstances. This report is not intended to provide advice with respect to specific situations. In addition, employees covered by a union contract or an individual employment contract may have job protections that "at-will" employees do not have. 



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