Employment Law @ manatt

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Employment Law Update 2010

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It's that time of year again. In this newsletter edition, Manatt summarizes the new legislation enacted in 2009 that will impact employers in the coming year.

Manatt will be hosting a webinar on January 14, 2010, for a more detailed discussion of these laws, as well as a summary of the cutting-edge employment cases decided in 2009 and a look at what important cases and legislation we see on the horizon in 2010 and beyond. We welcome your participation in this complimentary event, and, until then, we wish you a happy, healthy, and prosperous new year! Click here for more information on the webinar.

Genetic Information Nondisclosure Act ("GINA")

On November 21, 2009, the federal Genetic Information Nondisclosure Act ("GINA") went into effect for employers. GINA elevates "genetic information" to a protected status under Title VII, the federal law that prohibits discrimination in the workplace. GINA creates a remedy for employees who have suffered discrimination on the basis of their genetic information and/or retaliation for asserting their rights under GINA. GINA was passed to ensure that employers would not deny costly employment and fringe benefits on the basis of the employee's remote risk of illness.

California law already prohibits employers from discriminating on the basis of a person's medical condition, including genetic characteristics. GINA broadens the protection to employees by prohibiting employers from requesting, requiring, or purchasing genetic information about an employee or his/her family members, except under certain limited circumstances. As a result, employer-sponsored wellness programs that seek family medical history information in the course of risk assessments may implicate GINA. GINA also requires a modification of the Equal Employment Opportunity Commission ("EEOC") employer posting requirement. Click here to view the current posters.

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Our Practice

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Employers should update their policies and make sure that their employees' rights notices and postings are up to date. To comply with the substantive requirements of GINA, employers should train supervisors to avoid discussing medical issues with employees that may implicate GINA. Moreover, employers should review their wellness programs to ensure that they comply with GINA.

Family and Medical Leave Act Amendments

Employees who have family members serving in the armed forces now have expanded rights under the federal Family and Medical Leave Act ("FMLA"). In October 2009, federal legislation changed the definition of which service members are covered under the qualifying exigency category. Qualifying exigency leave allows an employee who is an active duty service member to take up to 12 weeks of leave per year to deal with specified issues related to overseas military service by a family member (defined as a spouse, son, daughter, or parent). Examples include arranging for child care, making financial and legal arrangements, and counseling.

Effective October 28, 2009, employees are now entitled to qualifying exigency leave when a family member who is in the regular armed forces is deployed to a foreign country. Previously, such leave was only available when a family member was called to active duty in the National Guard or military reserves. Similarly, qualifying exigency leave is now available when the employee's family member is a member of the National Guard or military reserves and called to active duty in a foreign country. The requirement that service members be called to active duty "in a foreign country" replaces the former requirement that they be called to active duty "in support of a contingency operation."

In addition, federal legislation has also expanded the right of employees to take up to 26 weeks of leave per year to care for a family member with a serious injury or illness incurred as a result of military service. Under the new amendments, employees who have a family member (defined as a spouse, son, daughter, parent, or next of kin) that is a veteran may now take such leave, as the veteran will be considered a "covered service member" so long as he or she was in active service during the five years previous to the date on which he or she needs care.

Employers that are covered by the FMLA should (1) notify employees of the changes, and (2) revise their policies and procedures to ensure that they are in compliance with these new requirements.

Alternative Workweek Schedules

On February 20, 2009, legislation was enacted to amend California Labor Code section 511 and provide slightly more flexibility surrounding alternative workweek schedules. The new law, Assembly Bill 5, recognizes that if an employer offers employees a "menu of options" for alternative workweek schedules, the options may include a regular eight-hour per day/five-day per week work schedule among the menu of options. The new law, which became effective on May 21, 2009, also provides that employees can move from one alternative workweek schedule option to another from week to week, with the employer's consent.

The new law also defines the term "work unit," which was previously undefined in the Labor Code. To adopt an alternative workweek, two-thirds of the affected employees in a "readily identifiable work unit" must first vote to adopt the proposed schedule. The new law defines "work unit" to mean a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision thereof. A "work unit" may also consist of an individual employee as long as the criteria for an identifiable work unit are met. In addition, the Division of Labor Standards Enforcement issued an opinion letter stating that under certain circumstances, an alternative workweek schedule may be in place for less than one full year—for example, during the summer months only.

Employers who are considering amending their current schedule or proposing a new alternative workweek schedule should consult with legal counsel before scheduling a vote or implementing any new plan.

Same-Sex, Out-of-State Marriages

California generally recognizes out-of-state marriages to the extent that they are legal in the state where they were performed. In October 2009, Governor Schwarzenegger signed into law Senate Bill 54, which accords valid out-of-state, same-sex marriages the same status as registered domestic partnerships. The new law becomes effective on January 1, 2010. The impact on employers is minimal; employers should continue to provide equal benefits to same-sex couples under California's current domestic partnership law. For couples married out of state, employers should request a copy of the marriage certificate and verify that the same-sex marriage was legal when contracted.

New Form I-9, Employment Eligibility Verification

The federal government issued a new Form I-9, Employment Eligibility Verification, on August 7, 2009. The new Form I-9 contains an updated list of acceptable documents employees must present upon hiring. The new form also bears a note that all documents presented to establish identity and/or ability to work in the U.S. must not be expired. Employers must complete and retain a Form I-9 for each individual they hire for employment in the United States and should immediately stop using all previous versions of the Form I-9. This new edition of the form is approved for use through August 31, 2012, and a copy of the new edition of the form can be found by clicking here.

E-Verify Required for Federal Contractors and Subcontractors

Subject to certain exceptions, employers that are federal contractors or subcontractors will now be required to begin using the U.S. Citizenship and Immigration Services' E-Verify system to verify their employees' eligibility to legally work in the United States. There is no charge to employers to use E-Verify. Federal contracts awarded and solicitations issued after September 8, 2009, will include a clause committing government contractors to use E-Verify. The same clause will also be required in subcontracts over $3,000 for services or construction. Employers who are federal contractors or subcontractors should register for E-Verify by clicking here.

Worker's Compensation for Injuries by Third Persons

California Assembly Bill 1093, which was signed into law earlier this year, effective January 1, 2010, sought to clarify the circumstances under which workers' compensation will be paid where third persons cause the employee's injury. The bill was introduced after a company's insurer denied workers' compensation death benefits to the family of a store clerk who was killed while on duty. The perpetrator had targeted her solely because she was African American; therefore, the insurer argued, the death was caused by her race, not her employment. The new statutory language states that a workers' compensation claim cannot be denied because an attacker's motivation is related to an "immutable personal characteristic."

Safety in Hospitals

California passed Assembly Bill 1083, effective January 1, 2010, a new law designed to help ensure that patients and workers do not become victims of workplace violence. Existing law requires hospitals to conduct a security and safety assessment and, using the assessment, develop a security plan with measures to protect employees, patients, and visitors from aggressive or violent behavior. The new law, however, requires that hospitals review and update their plans annually. Employers who are required to comply with this new law should ensure that they are reviewing and updating the security and safety assessment and plan annually.

Safety in Educational Institutions

California Senate Bill 188, effective January 1, 2010, is a new law that amends the California Code of Civil Procedure to allow postsecondary educational institutions to seek temporary restraining orders and/or injunctions on behalf of a student. Institutions may seek temporary restraining orders and/or injunctions where a student has suffered a credible threat of violence from any individual and only with the written consent of the student.

Civil Air Patrol Leave

Private and public employers in California who employ more than 15 employees will now be required to provide not less than 10 days of leave per year for voluntary members of the California Wing of the Civil Air Patrol in order for such volunteers to respond to an emergency operational mission under Assembly Bill 485, which takes effect on January 1, 2010. The California Wing of the Civil Air Patrol is a civilian auxiliary of the U.S. Air Force. Employers should review their employee handbook policies and revise and republish the employee handbook, if necessary.

back to top

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