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FALL 2008

Employment and labor law is in an increasing state of flux and uncertainty. Two terms of Republican control at the federal level has resulted in many state legislatures promulgating regulations to provide what they perceive is needed to maintain fairness in the workplace. If the November elections result in a Democrat as President, and/or a substantial increase in the Democratic majority in Congress, even more changes are probable.

Bills pending in Congress include:

- The **ADA Restoration Fairness Act**, which would reverse certain Supreme Court decisions that have narrowed the reach of the Americans with Disabilities Act (ADA). Under the proposed Act, the determination of whether an employee is disabled would be undertaken without regarding whether the employee is using any mitigation measures such as medication, glasses, hearing aids, etc. Presently, the courts take these into account in determining whether an employee is protected under the ADA.
- The **Employee Free Choice Act**, which would make it much easier for unions to organize employers, increase the remedies available for employees who file unfair labor practice charges, and provide for binding arbitration during negotiations under certain circumstances.
- The **Family and Medical Leave Act (FMLA) Expansion Act**, which would extend FMLA coverage to small employers with 25 or more employees (as opposed to 50 employees in the current law), and authorize other types of leave, including school functions and parentteacher conferences.
- The **Ledbetter Fair Pay Act**, which seeks to reverse a Supreme Court ruling and would provide that a cause of action accrues each time an employee receives a paycheck so that a new cause of action would be triggered with each payment, and the statute of limitations would be extended.

These are but a few of the changes proposed in pending bills before Congress. We will discuss these and other pending bills in more detail in a later issue of *Employment Line*.

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Employment & Labor Group

Jerald J. Oppel, Chair
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News

Harold Belkowitz has authored and edited ***Virginia Employment Law: Forms and Practice Manual***, a resource book published by DataTrace Publishing Company and released this past June. The Manual serves as the definitive handbook on employment law and is designed to guide Virginia attorneys through the legal and practical complexities of the employer/employee relationship. Harold has stocked the Manual with topics related to all aspects of the employment relationship - from hiring to termination to dispute resolution matters.

In May, Ober|Kaler received the **2008 Pacesetter Award from the Legal Aid Bureau's Equal Justice Council**. The award was presented in honor of the firm's significant support of Legal Aid's annual campaign. **Neil Duke**, a principal in the Employment & Labor Group and pro bono

In this issue, there are three short articles on changes in Maryland law, the first dealing with the practical effect on discrimination cases filed in Maryland courts since the state's new discrimination law went into effect in October 2007; the next addresses Maryland's new law giving employees the right to take paid leave to care for family members; and the final short article discusses additions to the Maryland record-keeping requirements. Finally, there is an interesting article on potential tort liability for employers in attempting to enforce an unenforceable restrictive covenant.

Members of our group have been busy in conducting educational programs for employers, writing articles (and writing books). Carla Murphy is following up the publication of her book, *Maryland Employment Law - Forms and Practice Manual* with a 2008 supplement. Harold Belkowitz has written ***Virginia Employment Law - Forms and Practice Manual***, which was published this summer.

We hope you enjoy this edition of the *Employment Line*.

***Jerry Oppel**, Employment & Labor Group Chai*

Cases Under 2007 Antidiscrimination Amendment Now Hitting Maryland Courts

*by **Carla N. Murphy***

By this time, most employers are aware that Maryland's anti-discrimination law was substantially amended last fall to create a private cause of action under Article 49B in state court. While the law became effective in October 2007, an aggrieved employee must wait 180 days from the filing of an administrative charge to file an action in court. These cases, therefore, are just beginning to rear their heads in Maryland state courts. Given the increased exposure for employers under Article 49B (state law prohibits discrimination on the basis of familial status, marital status, sexual orientation, and genetic information and testing, and it allows age discrimination suits by people younger than 40), and the fact that it may be more difficult to obtain a victory in state court, employers need to take appropriate steps to minimize the risks. **Click to continue...**

New Law Gives Maryland Employees Right to Use Paid Leave to Care for Family Members

*by **Neil E. Duke***

On May 22, 2008, Governor Martin O'Malley signed the Flexible Leave Act into law, requiring Maryland employers to allow their employees to use earned leave to care for immediate family members. The Act applies to employers with 15 or more employees. It allows such employees to use not only sick leave but also earned vacation time and compensatory time to care for sick family members. Where an employee does so, the Act prohibits employers from discharging, demoting, disciplining or otherwise taking adverse action against the employee. The Act also protects from such sanction employees who file a complaint, testify

counsel for Legal Aid, accepted the award on behalf of the firm.

or otherwise assist in an investigation against an employer that violates its provisions.

The Act, which takes effect October 1, 2008, has faced a storm of criticism. Indeed, several members of the business community had asked the governor to veto the legislation, but to no avail. **Click to continue...**

Potential Tort Liability for Attempting to Enforce An Unenforceable Restrictive Covenant

*by **Sharon A. Snyder***

The situation is this - you want to enforce a restrictive covenant against a former employee who you believe is unlawfully competing and/or soliciting clients. Time is of the essence, and you want your legal counsel to send a cease-and-desist letter to the new employer. In reviewing the restrictive covenant and learning about the underlying facts, the lawyer determines that an argument could be made either way that the covenant does or does not prohibit the former employee's work for his new employer. Or, perhaps the former employee has gone to work for a competitor, and you suspect that the employee is breaching his or her obligations under a restrictive covenant but lack proof that there has been a breach; however, the failure to take action if a breach is ongoing would cause significant harm. In either event, a court could rule against you for one of the many reasons that courts refuse to enforce restrictive covenant agreements. Perhaps the covenant might be deemed to broad in geographic scope, or perhaps it extends for too long a period of time, or perhaps the covenant is written more broadly than is necessary to protect the legitimate interests of the employer, or maybe it is unclear whether the new employer fits within the restrictive covenant's definition of a "competitor."

Employers frequently respond to this situation by having their counsel send a letter to the former employee and his or her new employer, demanding that the new employer terminate its relationship with the former employee, with the expectation that a court ultimately would resolve any dispute over the enforceability of the restrictive covenant. This tactic, however, can potentially create liability for the employer. **Click to continue...**

Maryland's Pay Disparity Data Reporting Act: What Employers Need to Know About Recordkeeping Requirements

*by **Neil E. Duke***

Maryland employers need to know of their new statutory requirement to collect workforce data that previously was not required. Currently, Maryland employers are required under §3-305 of the Labor and Employer Article subtitled "Equal Pay for Equal Work," to maintain records related to the wages of their employees and their employees' job classifications. The maintenance requirement for those records is three years.

However, effective October 1, 2008, (courtesy of Maryland General Assembly

House Bill 1156), employers will also be required by law to maintain records related to their employees' racial classifications and gender. Those records must also be maintained for a period of at least 3 years. The purpose of the bill is to facilitate the Maryland Labor Commissioner's 5-year review and analysis of pay disparities in the State of Maryland. **Click to continue...**
