

The New Year Brings Lots of Legal Changes and Challenges for Employers -- Are You Prepared?

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Much of the attention in the New Year has been focused on the economy and looming unemployment; however, there are many employment law issues on the horizon in 2009 that also deserve the focus of every employer out there. Here is a brief discussion of some of the key changes employers need to know and be prepared to address in 2009:

- **Minimum Wage Increases.** Effective January 1, 2009, Colorado minimum wage increases to \$ 7.28; federal minimum wage remains at \$ 6.55 until July 24, 2009, when it increases to \$7.25. However, Colorado employers must pay the higher rate to covered employees.

- **Americans with Disabilities Act Amendments Act (ADAAA).** Effective January 1, 2009, the ADAAA significantly expands the scope of the Americans with Disabilities Act ("ADA"), which applies to employers with 15 or more employees. Specifically, the ADAAA sets forth an illustrative list of what constitutes a "major life activity"; overturns U.S. Supreme Court precedent that strictly defined "substantially limits" as an impairment that "prevents" or "severely restricts" a major life activity, and requires this term to be defined more inclusively and in light of the purposes of the ADA; and overturns U.S. Supreme Court precedent that required corrective or mitigating measures and devices to be considered in assessing whether an individual is "disabled". As a result of the changes implemented by the ADAAA, many more employees are likely to meet the definition of a "qualified individual with a disability" under the ADA and employers must be prepared to address any discrimination or reasonable accommodation issues that may arise.

- **Family and Medical Leave Act (FMLA).** The revised FMLA regulations, effective January 16, 2009, clarify, among other things, new rights under the FMLA for military members and their families (that took effect in February 2008); clarify timelines for reporting and designating FMLA leave and an employee's use of intermittent leave; and make clear that past FMLA claims may be released in a settlement agreement without Court or Department of Labor approval, but not prospective claims. The regulations also explain that FMLA covered employers (generally those with 50 or more employees) must post a general FMLA notice even when they have no FMLA-eligible employees.

- **Revised Form I-9.** The U.S. Citizenship and Immigration Service (USCIS) has once again proposed revisions to the Form I-9, which employers must complete for all newly hired employees to verify their identity and authorization to work in the United States. The proposed revisions narrow the list of acceptable "identity" documents and specify that expired documents are not acceptable forms of identification. The revised Form I-9 includes additional changes, such as revisions to the employee attestation section, and the addition of the new U.S.

Passport Card to List A. Employers must use the revised Form I-9 for all new hires and to reverify any employee with an expiring employment authorization effective February 2, 2009.

- **Federal Acquisition Regulations.** Effective January 15, 2009, these new regulations require businesses that have contracts with the federal government to use E-verify to verify the employment eligibility for all new employees, as well as all current employees assigned to work on the federal contract. Exempt contracts include those that are for less than \$100,000 and those that are for commercially available, off-the-shelf items.

- **Fair Labor Standards Act (FLSA).** The Department of Labor estimates that 70% of employers get it wrong when it comes to the FLSA and misclassification of non-exempt employees as exempt employees and/or independent contractors. Yes, you read that right – 70%! Court records also demonstrate that FLSA collective actions now outnumber all other employment class actions combined, and individual claims have tripled over the past 2 years. The Department of Labor is expected to issue revisions to the FLSA regulations in 2009. In the meantime, you should consider conducting an audit of your wage and overtime policies, position descriptions, and independent contractor agreements to make sure you are in compliance with current FLSA regulations.

- **Genetic Information Non-Discrimination Act (GINA).** GINA, which was passed in May 2008, prohibits employers from discriminating against employees on the basis of their genetic information or the genetic information of their family members. GINA's employment law provisions take effect November 21, 2009. GINA also bars health insurers and group health plans from using genetic information to discriminate against individuals with respect to participant eligibility or premiums; these provisions take effect in May 2009. GINA applies to any employer with more than 15 employees, and to all health insurance plans.

As with medicine, an ounce of prevention can go a long way in keeping your business out of the cross-hairs of the Department of Labor, the U.S. Equal Employment Commission, the U.S. Citizenship and Immigration Services, and other federal and state agencies. If you have questions regarding your employment practices or policies, seek legal advice early so that you will not have to pay attorneys' fees to defend an issue that could have been prevented or easily resolved.

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