

FORUM

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EMPLOYMENT LAW UPDATE: PLENTY OF CHANGE, AND SOME HOPE

By: GLENN R. DAVIS, ESQ.

As the first two months of the new year drew to a close, 2009 is developing into a landmark year for changes in the employment arena. Both the federal and Pennsylvania governments have already made unprecedented changes to employment laws.

New Form I-9

The U. S. Citizen and Immigration Services (“USCIS”) recently revised the form I-9, which is used to verify employment eligibility. All employers are required to use the new I-9 beginning April 3, 2009. The revised I-9 form makes several important changes. The form requires that all documents presented for verification be current. It also eliminates certain List A documents which are acceptable to establish both identity and employment authorization, and it expands List A documents by adding options. Beginning April 3, 2009, employers can only accept unexpired documents listed on the revised form I-9. Failure to comply exposes an employer to civil monetary penalties.

Ledbetter Fair Pay Act

On January 27, 2009, President Obama signed a compromise version of the *Ledbetter Fair Pay Act* into law. After failed attempts during the Bush administration, the bill won narrow approval in the U.S. Senate on January 22nd. At signing, President Obama stated, “It is not only a measure of fairness, but can be the difference for families struggling to make ends meet during these difficult times.”

This bill reverses the United States Supreme Court’s decision limiting the time in which workers must file pay discrimination claims against employers. The Supreme Court held that the time limit to file a claim starts after the alleged unlawful employment action and does not re-start anew upon receipt of each successive paycheck. The *Ledbetter Fair Pay Act* will effectively eliminate this uniform statute of limitations. Instead, the time for filing such a charge with the EEOC will restart each time an employee receives a paycheck. This change would also apply to a retiree who receives an annuity check from the employer. As a result, employers will be exposed to discrimination claims far into the future as employees will be able to sue for years-old discrimination claims.

The ADA

Congress has amended the *Americans With Disabilities Act* (“ADA”). These amendments became effective January 1, 2009. The amended statute redefines disability in a manner intended to significantly broaden the ADA’s applicability to applicants and employees, which will require employers to address many more requests for reasonable accommodations. By now, employers should have reviewed and revised their ADA policies to ensure compliance with the newly amended law. Employers should also have revisited

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INCORRECT ASSUMPTION:**SUBSIDIARY AUTOMATICALLY INCLUDES LIMITED LIABILITY COMPANY**

By: LORIE A. TAYLOR, ESQ.

Recently, the Fifth Circuit Court of Appeals held that the contractual term “subsidiary corporation” does not include a limited liability company. This development highlights the need to review the contracts of organizations that have a limited liability company subsidiary in order to ensure complete coverage for any losses.

In the Fifth Circuit case, an insured corporation made a claim under an employee dishonesty policy for losses that occurred at a subsidiary limited liability company. The policy at issue extended coverage to “subsidiary corporations.” A dispute arose between the insured corporation and its insurance company as to whether the limited liability company subsidiary was a “subsidiary corporation” covered under an insurance policy. The insured corporation took the position that the term “corporation” included unincorporated entities such as limited liability companies, while the insurance company asserted that the term did not encompass unincorporated entities. In making its decision, the Court relied on statutory definitions of “corporation” and “limited liability company.” The statutory definitions of these terms prohibited limited liability companies from being referred to as “corporations” and defined limited liability companies as “unincorporated associations.” As a result, the Court rejected the insured corporation’s definition of “corporation.”

The Court’s reliance on the statutory definitions of “corporation” and “limited liability company” serves as a cautionary tale. An organization would be well-advised to examine its financing agreements, insurance policies, material contracts and other agreements. If your organizational structure consists of a limited liability company or limited liability companies, the usage of the word “subsidiaries” should include limited liability companies. If the contract language does not specify what constitutes a subsidiary, consider adding after the word “subsidiaries” the phrase “and limited liability companies,” if appropriate. This change will help ensure the organization’s limited liability company subsidiaries are included under contractual arrangements.

If you have any questions regarding subsidiary or limited liability company language in your contracts, please contact Douglas C. Yohe, Esq. or Lorie A. Taylor, Esq. 

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job descriptions to assure that they are written properly and describe accurately what the employer believes to be the essential functions of the positions. As with the FMLA, employers should be providing training to supervisors and managers to notify them of the amendments and the increased duty on their part to accommodate employees and applicants who are now protected under the ADA.

FMLA

The amended regulations of the *Family and Medical Leave Act* (“FMLA”) became effective on January 16, 2009. The regulations contain a new definition for “serious health condition” as it applies to continuing treatment and chronic conditions. The regulatory changes provide employers with a more defined medical certification process as well as a more useful fitness for duty certification process. The new regulations now allow an employer with a bonus or award program to disqualify an employee from the program when the employee does not achieve a goal because

of his/her FMLA leave. The amendments also allow employers to require employees to follow usual and customary call-in/call-off procedures when requesting leave. These changes will provide a welcome relief to many employers.

EFCA

Latsha Davis Yohe & McKenna, P.C. continues to monitor the legislative progress of the *Employee Free Choice Act* (“EFCA”), which will have a critical impact on non-unionized employers. This legislation would end a 75-year old practice of secret-ballot workplace elections and allow union representation to be decided on a “card-check” process. Moreover, the traditional collective bargaining process would be drastically altered by the implementation of a mechanism for binding mediation to generate a collective bargaining agreement. Non-union employers should prepare themselves for the passage of the EFCA. This development emphasizes the importance of engaging in supervisory training on unionization matters, as well as building positive employee relations.



ISSUES IN ASSISTED LIVING

By: TANYA DANIELS HARRIS, ESQ.

On August 9, 2008, the Department of Public Welfare (“DPW”) published proposed regulations establishing licensing standards for assisted living residences (“AL Regulations”). In response, DPW received numerous comments from the public, the legislature and the Independent Regulatory Review Committee. DPW expects to publish the final regulations in mid-November of 2009.

Several of the comments raised concern over the cost of becoming licensed as an assisted living residence (“ALR”). Many in the industry believe that the cost of new construction and renovation, in light of the square footage requirements and kitchen capacity requirements, will deter many providers from seeking an ALR license. It is feared that the cost associated with licensure fees will also be a deterrent.

Another area of concern is the requirements for dual licensure. The AL Regulations do not specify how a provider may obtain a dual license, nor do the AL Regulations specify whether dual licensure may be applied to an entire building, individual rooms or a specific wing of the facility. DPW will need to provide clarification regarding this issue to assist providers in determining whether to become licensed as an ALR.

The AL Regulations outline specific standards regarding the initiation of an informed consent process and execution of an informed consent agreement. In order to mitigate liability issues, facilities should engage a resident in a discussion when

his or her decision, behavior or action creates a dangerous situation. The facility must address the identified risks and reasonable alternatives with the resident. This informed consent process may also be commenced by a resident wishing to exercise independence in directing the manner in which they receive care. The resident should have the capacity to understand and appreciate the nature and consequences of the risks associated with his/her own care decision.

As part of the informed consent process, ALR providers will need to balance their responsibilities to the individuals they serve with a resident’s choices and capabilities with the possibility that those choices will place the resident, other residents or staff members at risk of harm. The AL Regulations provide that while a resident may elect to proceed with a decision, behavior or action affecting only his own safety or health, a resident does not have the right to place others at risk. In preparing an informed consent agreement, providers should seek the advice of legal counsel to draft language which releases the ALR from liability for any adverse outcomes resulting from risks assumed by a resident.

As a reminder, once the proposed AL Regulations are finalized, personal care home providers will no longer be able to use the term “assisted living” in any of their agreements or other written materials unless they become licensed as an ALR. If you have any questions regarding the AL Regulations or would like assistance in preparing for the advent of assisted living, please contact Kimber L. Latsha, Esq., or Tanya Daniels Harris, Esq.

Mandatory Overtime

Pennsylvania’s *Prohibition of Excessive Overtime in Health Care Act* will become effective on July 1, 2009. The Act applies to employees of health care facilities, including long-term care providers. The Act does not appear to apply to assisted living employees. Within skilled nursing facilities, the Act applies to those employees “involved in direct patient care activities or clinical care services and who receive an hourly wage or are classified as non-supervisory employees for collective bargaining purposes.” The Act has no applicability to employees in areas such as environmental services, maintenance, laundry, food services or clerical positions.

Under the Act, health care facilities may not require an employee to work “in excess of an agreed to, predetermined and regularly scheduled daily work shift (mandatory overtime).” The Act’s definition of overtime distinctly differs from the definition of overtime under wage and hour laws. This difference may result in confusion between the Act’s use of the word “overtime” and

an employer’s obligation to pay FLSA overtime of time and one-half. This new law prohibits employers from discriminating, dismissing, discharging or taking any adverse employment decision against an employee who refuses to accept overtime work. The Act will require extensive education for nursing supervisors and schedulers, as well as those employees who will be covered by the new law.

Conclusion

This legislation summary shows that 2009 already appears to be a year of the most significant changes in labor and employment laws in decades. Latsha Davis Yohe & McKenna, P.C. anticipates further changes by Congress. Human Resources departments will need to prepare management supervisors and employees for these drastic changes. Comprehensive training will be essential to stay compliant with these sweeping reforms.

If you have questions regarding employment law issues, please contact Glenn R. Davis, Esq., or Angela L. Thomas, Esq.



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SEMINARS

PBI 15 th Annual Health Law Institute	March 13, 2009	"Fitting Assisted Living into the LTC Continuum"	Kimber L. Latsha, Esq.
LDY&M Healthcare Practice Group	March 19, 2009	"HAI Reporting Requirements Under Act 52" and "Compliance with Red Flag Rules"	Kimber L. Latsha, Esq. David C. Marshall, Esq. & Tanya Daniels Harris, Esq.
LDYM 6 th Annual Employment Law Seminar	March 26, 2009 April 7, 2009		Glenn R. Davis, Esq. Angela L. Thomas, Esq. & Andrea E. Dean, Esq.
Juniata Valley Advisory Counsel	March 31, 2009	"Workplace Monitoring"	Angela L. Thomas, Esq.
New Jersey Charter School Public Schools Conference	April 1, 2009		Kevin M. McKenna, Esq.
PSATS 87 th Annual Conference	April 20, 2009	"Are You Paying Your Employees Correctly?"	Angela L. Thomas, Esq. & Glenn R. Davis, Esq.
PACAH Spring Conference	April 23, 2009	"Assisted Living Statutes and Regulations"	Kimber L. Latsha, Esq.
SEPANPHA Board	May 7, 2009	"Employment Law Legal Update"	Glenn R. Davis, Esq. & Angela L. Thomas, Esq.
PA Association of Community Bankers HR Conference	May 7, 2009	"Recent Legislative and Case Developments"	Glenn R. Davis, Esq. & Angela L. Thomas, Esq.
PANPHA Annual Conference	June 24, 2009	"Assisted Living Forum"	Kimber L. Latsha, Esq.
PANPHA Annual Conference	June 25, 2009	"Managing the Risk of Aging in Place in CCRCs"	Kimber L. Latsha, Esq.
PANPHA Annual Conference	June 26, 2009	"Human Resources Development Forum"	Glenn R. Davis, Esq. & Angela L. Thomas, Esq.
PANPHA Annual Conference	June 26, 2009	"Legal Issues Update"	Kimber L. Latsha, Esq. & David C. Marshall, Esq.