



Employers' New Years Resolutions

By Adam S. Belzberg

During this past year, there were significant changes to employment laws. As we begin the New Year, a good resolution for employers is to review and update their employee handbooks and employment policies to address these new legal obligations and rights.

Among the policies that employers should review and update are:

Family and Medical Leave Act ("FMLA") policy, to incorporate the new military family leave definitions, rights, and obligations established by the 2010 National Defense Authorization Act's amendments to the FMLA. By way of background, the 2008 National Defense Authorization Act created a new leave right under the FMLA for families of service members. The 2010 Act further expands FMLA coverage and available leave for military families in the following ways:

- Leave for a "Qualifying Exigency." Previously, leave for a qualifying exigency in connection with deployment for a contingency operation was not available to members of the regular Armed Forces, but only members of the Reserves and National Guard units. The new amendments permit families of regular Armed Forces personnel who are deployed to foreign countries to qualify for such leave.
- Leave to Care for a Covered Service Member With a Serious Illness. So-called "military caregiver leave" provides up to 26 weeks of leave to employees caring for a current member of the Armed Forces, National Guard, or Reserves. The new legislation permits leave to be taken to care for retired military service members as well, so long as the veteran was a member of the Armed Forces, National Guard, or Reserves within five years of requiring care.
- Leave for Aggravation of Preexisting Injuries. The new legislation expands the definition of a "serious illness or injury" for which leave may be taken to include not only those injuries and illnesses incurred in the line of active duty, but also those that preexisted but were aggravated by service in the line of duty.

COBRA policy and notices, to address the extension of the federal subsidy for COBRA benefits, which provide recently unemployed workers with rights to insurance coverage under their former employer's health plans. Under the American Recovery and Reinvestment Act of 2009 ("ARRA"), involuntarily terminated employees receive a 65% subsidy on their COBRA premiums for up to nine months. Employers must collect 35% of the COBRA premium from the employee (thereby "fronting" the 65% subsidy). Employers will receive a reimbursement of the 65% subsidy in the form of a credit against FICA taxes and income tax withholding on their quarterly federal tax returns. This subsidy program was scheduled to end on December 31, 2009. The new law expands the COBRA benefits provided under ARRA by doing the following:

- Extends the COBRA premium subsidy period by six months (from nine months to fifteen months)
- Extends the eligibility cut-off date for two months (from December 31, 2009 to February 28, 2010)
- Provides a 60-day retroactive period for payment of premiums for those whose subsidy period expired prior to this extension
- Clarifies that eligibility for the COBRA subsidy program is based on the timing of the qualifying event, that is, termination of employment
- Requires notice of the subsidy extension be provided by employers to those who, on or after October 31, 2009, are "assistance eligible individuals" or experience a qualifying event. This notice must be provided within 60 days of enactment of the new law (by February 17, 2010) or, if the qualifying event occurs after the date of enactment (December 19, 2009), in compliance with the timing requirements set forth in the COBRA regulations.

- Requires notice be provided by employers: (1) to those who ceased paying their COBRA premiums during the original nine-month subsidy period, that they may retroactively reinstate their coverage by paying the subsidized premiums; and (2) to those who paid the full, not subsidized, premiums following the original expiration of their subsidy period, that they may receive a credit or refund for the overpayment

Anti-discrimination and harassment policies, to include genetic information as a protected characteristic in accordance with the Genetic Information Nondiscrimination Act ("GINA").

To comply with GINA, employers should:

- Add non-discrimination on the basis of genetic information to all equal employment opportunity statements
- Discontinue any practice of requesting applicants and/or employees to provide a family medical history, including in the context of employee wellness programs and employer-provided health reimbursement arrangements
- Discontinue any practice of requesting information about the manifested disorders or diseases of an employee's family members for non-FMLA leave requests
- Ensure that employee medical information that falls within the broad definition of "genetic information" is treated confidentially and maintained in a medical file separate from the employee's personnel file
- Establish a policy and procedure to prevent the inadvertent disclosure of genetic information in response to a subpoena or civil discovery request that is unaccompanied by a court order compelling disclosure of such information

This list is by no means exhaustive, but should provide a start to help you fulfill your New Year's resolutions.

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