

THE NEWS **IN** EMPLOYMENT LAW

The Way We See it

With the campaign for the White House in high gear, and the war in Iraq and homeland security hot topics, this issue highlights important changes regarding employment verification, and military servicemembers and their families. Inside are brief summaries of important legal updates and new laws of note. And as the newsletter's title suggests, our summaries include commentary on the way we see it.

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NEW I-9 FORM REQUIRED BY USCIS

The United States Citizenship and Immigration Services (USCIS) has updated its Form I-9 for verifying the identity and employment authorization of newly hired employees. The list of acceptable documents for use with the form has changed. The Department of Homeland Security has reported that it may begin seeking penalties against employers for using an earlier version of the form as of December 26, 2007. The new form can be found at <http://www.uscis.gov/files/form/i-9.pdf>.

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All employers should begin using this new form immediately. In addition, now is a good time to review your new-hire procedures to ensure that Form I-9s are completed for all new hires and that all Form I-9s are maintained together and not in employees' individual personnel files.

FMLA LEAVE FOR SERVICEMEMBERS AND THEIR FAMILIES

On January 28, 2008, President Bush signed into law a defense spending bill that expands the Family and Medical Leave Act by providing up to 12 weeks of unpaid leave for an eligible employee whose immediate family member is on, or called to, active military duty because of a qualifying exigency (as determined by the Secretary of Labor). The amendment also provides eligible employees with up to 26 weeks leave (within a 52-week period) to care for wounded family members who have returned from active military service.

For leave due to a family member on or called to active duty, employers may request a certification from the employee, and the employee requesting leave is required to provide such notice to the employer as soon as is reasonable and practicable. For leave to care for a wounded family member, an employer may request a certification from the health care provider of the servicemember being cared for by the employee, and the employee requesting leave must provide 30 days notice (if possible) or notice as soon as is practicable. As with other FMLA leaves, these new leaves may be unpaid, and the employer may require the employee to substitute accrued paid time off for unpaid leave.

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The Department of Labor will likely issue regulations in the future further explaining these FMLA amendments. Of particular concern is the phrase "qualifying exigency," which is not defined. Until such clarifications are provided, employers may want to take a conservative approach and err on the side of granting leave in situations involving servicemembers and their families. In addition, companies will have to amend their FMLA policies to comply with the amendments to the statute.

MARRIED TO THE MILITARY (REPRISE)

Last issue, we reported that New York State enacted a law providing leave rights to spouses of members of the Armed Forces, and we noted that Illinois, Nebraska, Indiana, Maine, and Minnesota also have similar laws. On October 9, 2007, with immediate effect, the California legislature enacted its own spousal military leave law, which requires a qualified employer to allow a qualified employee who is a spouse of a qualified member of the Armed Forces, National Guard, or Reserves to take up to 10 days of unpaid leave while their spouse is on leave from deployment during a period of military conflict.

Qualified employers are those that employ 25 or more employees. Qualified employees must (1) be the spouse of a servicemember, (2) work an average of at least 20 hours per week, (3) provide their employer with notice of leave within two business days of receiving notice that their spouse will be on leave from deployment, and (4) submit written documentation certifying that their spouse will be on leave from deployment during the requested employment leave.

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Due to the rapid changes in, and complexity of, the laws regarding military-related leave, employers are well-advised to contact an employment attorney whenever an employee requests leave due to their own, or a family member's, military service.

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NEW CALIFORNIA W2-RELATED REQUIREMENT

California recently passed the Earned Income Tax Credit Information Act, which requires all covered employers to notify their employees that they may be eligible for the federal Earned Income Tax Credit within one week before or after, or at the same time, that the employer provides an annual wage summary, including, but not limited to, a Form W-2 or a Form 1099, to any employee. Employers are covered by the new law if they are subject to, and are required to provide, unemployment insurance to their employees, which includes most California employers. Employers must provide the required notification by either handing it directly to the employee or mailing it to the employee's last known address. Companies may not satisfy the requirement by posting a notice on an employee bulletin board or sending it through office mail.

The notice must state, in substantially similar form:

Based on your annual earnings, you may be eligible to receive the Earned Income Tax Credit from the federal government. The Earned Income Tax Credit is a refundable federal income tax credit for low-income working individuals and families. The Earned Income Tax Credit has no effect on certain welfare benefits. In most cases, Earned Income Tax Credit payments will not be used to determine eligibility for Medicaid, supplemental security income, food stamps, low-income housing or most temporary assistance for needy families payments. Even if you do not owe federal taxes, you must file a tax return to receive the Earned Income Tax Credit. Be sure to fill out the Earned Income Tax Credit form in the federal income tax return booklet. For information regarding your eligibility to receive the Earned Income Tax Credit, including information on how to obtain the IRS notice 797 or form W-5, or any other necessary forms and instructions, contact the Internal Revenue Service by calling 1-800-829-3676 or through its web site at www.irs.gov.

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If you send out W-2s yourself, you should make sure to include the new required notice. If an outside payroll administrator sends them, you should contact your administrator to ensure compliance with the new law. Employers may want to add to the notice a statement that they are providing the notice pursuant to California law and that it does not constitute tax advice or an opinion as to whether or not the employee is eligible for the Earned Income Tax Credit.

NEW JERSEY EXPANDS REACH OF ITS LAW AGAINST DISCRIMINATION

On January 13, 2008, New Jersey amended its Law Against Discrimination by enhancing the prohibition against discrimination

because of religious practices. With the amendment, the NJ Law Against Discrimination now provides that it shall be an unlawful employment practice for any employer to impose terms or conditions that would "require a person to violate or forego a sincerely held religious practice or religious observance" unless accommodating such practice or observance would create an undue hardship.

The law also prohibits employers from requiring employees to work during any day that the employee observes a Sabbath or other holy day as a requirement of his or her religion unless such absence would impose an undue hardship. However, the employer may in such case require that the employee make up such absence at a mutually convenient time, charge such time to paid leave (other than sick time), or treat the absence as unpaid leave if not made up and the employee has no paid time off available.

In determining if a leave would constitute an undue hardship, the factors to be considered include (1) the cost, including the cost of loss of productivity and of retaining or hiring employees to cover the absence, in relation to the size of the employer, and (2) the number of individuals who will need the particular accommodation for a sincerely held religious observance or practice. In addition, a religious accommodation will be considered to constitute an undue hardship if it will result in the inability of an employee to perform the essential functions of the position in which he or she is employed.

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Although seemingly similar to requirements for religious accommodation in other states, the requirement of accommodating any "sincerely held religious practice or religious observance" appears to be broader. It remains to be seen how this new law will be interpreted, but it opens the door for employees to request accommodations for religious practices or observances that may not be generally recognized by most companies. Employers should carefully examine any requests for religious accommodations in New Jersey, bearing in mind that the "sincerely held" standard may afford greater protection for employees.

MINNESOTA EMPLOYERS MUST INFORM NEW HIRES OF THEIR PERSONNEL FILE RIGHTS

Effective January 1, 2008, Minnesota employers with 20 or more employees must provide written notice to job applicants upon hire of their rights and remedies under Minnesota law with regard to accessing their personnel records. In general, Minnesota law grants employees the right to review and dispute information in

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their personnel files, prohibits retaliation against employees for exercising their rights with regard to personnel records, and prescribes penalties for employers who fail to comply with the requirements. The statutes specifically permit an employee to bring a civil lawsuit against their employer for violation of these laws.

Personnel records are defined as: any application for employment; wage or salary history; notices of commendation, warning, discipline, or termination; authorization for a deduction or withholding of pay; fringe benefit information; leave records; and employment history with the employer, including salary and compensation history, job titles, dates of promotions, transfers and other changes, attendance records, performance evaluations, and retirement records. The statutes, however, provide a list of exceptions including, but not limited to, written references, results of employer testing (other than a cumulative total score for a selection test), information relating to the employer's salary system and staff planning, written comments or data of a personal and private nature about a person other than the employee, any portion of a written or transcribed statement by a coworker of the employee that discloses the identity of the coworker by name or inference and medical reports and records.

The Minnesota personnel records laws are codified in Chapter 181 of the Minnesota Statutes, sections 960 - 965. The full text may be viewed at:
http://ros.leg.mn/bin/getpub.php?pubtype=STAT_CHAP&year=2007§ion=181.

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Minnesota companies and offices should add a new document to their new-hire package that details employees' rights under the Minnesota personnel records statutes. They should have new hires sign a copy of such document indicating that they have received it.

IN SHORT:

- Effective January 1, 2008, the Smoke-Free Illinois Act not only prohibits smoking in virtually all public places and workplaces, it also prohibits smoking within 15 feet of any entrance to a public place or place of employment. The law further mandates that persons with control over such entrance areas remove ashtrays from the 15 foot no-smoking zone. In addition, "No Smoking" signs or the international "No Smoking" symbol, consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it, must be clearly and conspicuously posted at every entrance to each public place and place of employment.

- A new Florida law requires employers of at least 50 employees to permit an employee who has worked for the company for at least 3 months to request and take up to 3 working days of leave from work in any 12-month period if the employee, or a family or household member of an employee, is the victim of domestic violence. Several other states have similar laws including Colorado, Hawaii, Illinois, and Oregon.
- New Jersey recently enacted the Construction Industry Independent Contractor Act, which makes it a criminal offense to misclassify workers in the construction industry as independent contractors rather than employees. The construction industry is broadly defined to include any services performed in the making of improvements to real property.

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