



Reminder:

With the new regulations and legislation recently enacted, employers should double-check that their policies and procedures remain in compliance with the multitude of employment-related laws. Congress has already passed new legislation during the last month and additional employment laws will certainly be passed in the coming year.

USE OF NEW I-9 FORMS DELAYED!

Beginning April 3, 2009, employers are to begin using a new I-9 form for new employees. Employers do not need to have employees that begin work prior to that date complete new forms.

The new forms are necessary due to a change in the documents that an employer may accept to complete the I-9. As with previous forms, the documents that may be accepted are identified on the back of the new form. Additionally, the United States Citizenship and Immigration Services (USCIS) has proposed new regulations prohibiting employers from accepting expired documents. The implementation of these new rules was scheduled to occur on February 2, 2009, but the USCIS issued a notice on January 30, 2009 postponing the implementation of the new rules and the new I-9 form. The new form can be obtained at <http://www.uscis.gov>.

THE LILLY LEDBETTER FAIR PAY ACT

The Lilly Ledbetter Fair Pay Act is the first piece of legislation passed by the new Congress and signed by President Obama. This statute extends the time period an employee can file a discrimination claim for unequal pay. Civil rights statutes require an employee to file a Charge of Discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discriminatory act. (The 180-day filing deadline is extended in many states, including Texas, to 300 days.) The United States Supreme Court held in 2007 that an employee asserting a claim of discrimination based on unequal pay must file with the EEOC with 180 (or 300) days of the first act of alleged discrimination. The Lilly Ledbetter Fair Pay Act extends the time period for an employee to file a Charge of Discrimination to 180 (or 300) days after each paycheck affected by the alleged discriminatory pay decision, effectively overturning the previous ruling by the Supreme Court.

This new statute treats each paycheck as an individual act of discrimination, instead of a continuing act of discrimination. This distinction limits any back pay recovery to a two-year period, in addition to any recovery of liquidated damages and attorney's fees. The employee does not benefit by waiting four or five years after the alleged pay discrimination begins to make a claim because he or she will not be able to recover damages for more than two years prior to asserting the claim.

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While the Supreme Court case dealt with sex discrimination, the Lilly Ledbetter Fair Pay Act is not limited to this one type of discrimination. Employees may assert claims of pay discrimination based on sex, race, national origin, religion, disability, or age.

NEW FMLA REGULATIONS

On January 16, 2009, new regulations regarding the Family Medical Leave Act (FMLA) took effect. The new regulations contain numerous substantive changes and provide for new military leave entitlements. If you have not reviewed the requirements and application of the FMLA recently, now is a good time to do so.

The FMLA applies to employers with more than 50 employees within a 75-mile radius of where the affected employee works. Under FMLA, a covered employer is required to notify an employee who may have an absence covered by the FMLA, which includes:

- the birth of a son or daughter;
- the placement of a son or daughter for adoption or foster care;
- to provide care for the employee's son, daughter, spouse, or parent who has a serious health condition;
- due to a serious health condition of the employee that prevents him or her from working;
- to care for an injured service member; or,
- due to a qualifying exigency associated with a service member being called to active duty. (This last basis for leave is limited to situations involving a service member that is a member of the National Guard, a Reservist or a retired member of the Regular Armed Forces or Reserve. It does not apply to active duty members of the Regular Armed Forces.)

The amount of leave time now allowed under the FMLA depends on the basis for the leave. Leaves associated with service members add new wrinkles to leave requirements. The following are identified as qualifying exigencies for leave when service members are called to active duty :

- Short-notice deployment of seven or less calendar days (limited to seven calendar days from the date notification of the call to duty);
- Military events and related activities;
- Childcare and school activities when the call to duty necessitates alternative arrangements or immediate childcare is needed;
- Financial and legal arrangements to address the service member's affairs while on duty;
- Counseling;
- Rest and recuperation (limited to 5 days to spend with a covered military member on a short-term leave during deployment); or,
- Post-deployment activities.

Be mindful that an employee does not have to be related to the service member as a parent, spouse, or child in order to be eligible for leave. The regulations provide that a service member may designate in writing another blood relative for purposes of military caregiver leave under the FMLA.

It is not necessary for an employee to specifically ask for leave under FMLA or use any magic words when requesting leave time. An employer has a duty to notify the employee whether he or she is eligible for FMLA leave if they have reasonable notice that FMLA may apply. (The U.S. Department of Labor has created a form for employers to use to notify the employee.)

The Department of Labor notification form instructs the employee to obtain specific documents for the employer to evaluate whether the situation falls under the protection of FMLA. The employer must make any request for medical certification within 5 days of notice of the leave. The employee is allowed 15 days to return the requested certification. If the certification is incomplete or insufficient, by being vague, ambiguous or nonresponsive, the employer must notify the employee in writing and state what information is needed to adequately complete the certificate. The employee must then be given 7 days to cure any deficiencies. If the employee fails to provide a complete and sufficient certificate within that time, the employer may deny leave. However, an employer should give consideration to the entirety of the specific situation before denying leave.

Once the employee provides information regarding the qualifying situation, the employer is now permitted 5 business days to review the information and notify the employee whether absences will be designated as FMLA leave. (The Department of Labor has also



created a Designation Notice for employers to use.) The new regulations also allow an employer to retroactively designate leave if appropriate notice is given to the employee, but retroactive notice is only allowed if it does not cause harm or injury to the employee. Therefore, the employer will likely have to establish that no harm or injury resulted. The better practice is to provide notice of the designation within the 5 business days allowed under the regulations.

The new regulations clarify many aspects of how leave time is calculated and how employers may address bonuses for employees that have taken FMLA leave. Additionally, the regulations also address what requirements an employer may place on an employee during the leave, such as reporting to his or her supervisor, and the ability to discipline an employee for not following reporting requirements, which can lead to discharge.

ADA AMENDMENTS ACT OF 2008

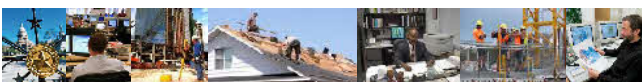
A series of court decisions interpreting the Americans with Disabilities Act (ADA) led to a narrow definition of who qualified as “disabled” to obtain protection under the law. Congress effectively overruled this line of cases when it passed the ADA Amendments Act (ADAAA) of 2008, which became effective January 1, 2009. The change provides for a greater number of employees to potentially qualify as “disabled.” As a result, employers should be careful to consider requests for reasonable accommodation by its employees before simply ruling out the request as a matter of course.

Previous Supreme Court opinions held that a person must be “significantly restricted” in a major life activity to be disabled under the ADA. While Congress found such a requirement to be too narrow, it has left the EEOC to define what constitutes “substantial impairment” under the ADA. There is speculation that the resulting definition may be similar to that of “serious health condition” under the Family Medical Leave Act (FMLA).

While past analysis has allowed a person’s condition to be measured by taking into account corrective measures, the ADAAA does not allow mitigating factors to be considered in determining whether a person is “disabled.” Therefore, a person must be viewed without the use of contacts, hearing aids, or medication in determining whether he or she meets the definition of “disabled.” Likewise, “learned behavioral or adaptive neurological modifications”

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are not to be factored into the analysis. Additionally, the definition of “disabled” includes those persons with medical conditions that are episodic or in remission, as long as the condition when active would qualify the person as being “disabled.”

Given the expansive nature of the ADA, an employer will have to address providing reasonable accommodation for employees protected under the ADA. Therefore, an employer should consult an attorney to fully discuss how this legislation may affect your company.

Chamblee & Ryan advises clients regarding employment matters on a daily basis in a variety of industries. The attorneys draft employment policies and handbooks and advise employers on employment decisions with respect to potential discrimination or claims of wrongful discrimination, ERISA plans, and wage and hour issues. Additionally, the attorneys train managers and supervisors regarding diversity issues and how to avoid or minimize discrimination and harassment claims. **Chamblee & Ryan** also represents clients in litigation regarding age, race, national origin, disability, sex discrimination and sexual harassment claims, retaliation, wrongful discharge, defamation charges, family leave issues, employment benefits, health and safety matters, wage-hour disputes, and claims for unemployment benefits. In addition to representing employers in State and Federal Courts, the attorneys successfully defend employers on a routine basis before the Equal Employment Opportunity Commission (EEOC), the National Labor Relations Board (NLRB), the Department of Labor (DOL), the Texas Workforce Commission (TWC), and various federal and state agencies regarding employment matters across the country.

Chamblee & Ryan has consistently defended employers in the courtroom and in administrative hearings since its inception in 1998. The firm’s attorneys spend a significant amount of time in the courtroom representing the interests of employers. For more information regarding the firm’s recent defense verdicts, please see our website under “Results” at www.chambleeryan.com.



For more information regarding **Chamblee & Ryan's** Employment Law practice, please contact **Brandee L. Todd** at (214) 678-9017.