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**TO: MCBB Employment Law Clients**

**FROM: Manning Curtis Bradshaw & Bednar, LLC**

**DATE: June 4, 2009**

**RE: State and Federal Employment Law Legislation Update**

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The following provides a summary of recent developments in state and federal employment law. The first table summarizes *recently enacted* changes in Utah employment law. The second table outlines the important features of *recently enacted* federal legislation. The third table provides a summary of previously proposed and *pending* federal legislation, indicating the status of each bill, its likelihood of becoming law, and the changes the legislation would make to existing employment law.

Please do not hesitate to contact us if you have questions regarding this information.

## RECENTLY ENACTED UTAH LEGISLATION

Law	Effective Date	Statute Amended	Key Provisions
<p><b>Gun Law</b> SB 78</p>	<p><b>May 12, 2009</b></p>	<p>Utah Criminal Code</p>	<ul style="list-style-type: none"> <li>• The law requires private businesses to allow customers and employees to keep a gun in their cars provided the firearm is secured in a lockbox or with a trigger lock.</li> <li>• Employers may ban guns in their parking lots only if they create a fenced-off area or monitored storage lockers which may be used for those who carry a weapon in their vehicle. The only exception is for businesses that fall under Department of Homeland Security rules that prevent weapons on premises.</li> </ul>
<p><b>Utah Employment Selection Procedures Act</b> (HB 206)</p>	<p><b>May 12, 2009</b></p>	<p>Utah Labor Code</p>	<ul style="list-style-type: none"> <li>• The law prohibits employers within the state from requesting an applicant's Social Security Number, date of birth, and driver license number <b>before</b> the applicant is offered a job or <b>before</b> the time in the selection process when a criminal background check, credit history, or driving record is obtained.</li> <li>• Applicant information obtained through the normal selection process may only be used for hiring and employment purposes. It may not be provided to third parties for marketing or similar uses, but may be provided to a government official at the request of the official.</li> <li>• Employers must maintain a policy regarding the retention, disposition, access, and confidentiality of applicant information.</li> <li>• Applicant information may not be retained for longer than 2 years if the applicant is not hired.</li> <li>• A violation may result in a cease-and-desist order, or a fine of up to \$500.</li> <li>• Covered employers are employers who have 15 or more employees within the state for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.</li> </ul>

## RECENTLY ENACTED FEDERAL LEGISLATION

Law	Effective Date	Statute(s) Amended	Key Provisions
<b>Lilly Ledbetter Fair Pay Act</b> (H.R. 11, S. 181)	Signed into law in <b>January 2009</b> , and takes effect as if enacted on May 28, 2007	Title VII of The Civil Rights Act	<ul style="list-style-type: none"> <li>The Act provides that the 180-day statute of limitations for filing an equal-pay lawsuit regarding pay discrimination <b>resets with each new discriminatory paycheck.</b></li> </ul>
<b>ADA Amendments Act</b> (H.R. 3195 S. 3406)	The Act was signed into law on September 25, 2008, and became <b>effective on January 1, 2009.</b>	The Americans with Disabilities Act	<ul style="list-style-type: none"> <li>The Act retains the definition of a disability as an impairment that substantially limited one or more “major life activities.” However, it <b>expands the list of “major life activities”</b> to include activities such as “concentrating,” “thinking,” “communicating,” and the operation of major bodily functions.</li> <li>An impairment that is <b>episodic or in remission</b> is also considered a disability if it would substantially limit a major life activity when active.</li> <li><b>Mitigating measures (such as hearing aids and prosthetic devices) shall not be a factor when determining whether an impairment substantially limits a major life activity.</b> The only mitigating measures that can be considered are ordinary eyeglasses or contact lenses that fully correct visual acuity or eliminate refractive error.</li> <li>While the previous law protected workers who were regarded by their employers as “disabled,” the ADAAA requires that employers <b>regard them as “impaired,”</b> whether or not the impairment limits or is perceived to limit a major life activity.</li> </ul>
<b>Genetic Information Nondiscrimination Act</b> (GINA)	The Act was signed into law on May 21, 2008 and <b>takes effect on November 21, 2009.</b>	ERISA, Public Health Service Act, Internal Revenue Code and Title XVIII of the Social Security Act	<ul style="list-style-type: none"> <li>The law protects employees from discrimination by employers, employment agencies, labor unions, and insurers based on the employees’ genetic information.</li> <li>On March 2, 2009, the EEOC officially released its proposed regulations for GINA. <b>Generally, the employer may not acquire genetic information from employees</b> unless: (1) the information is acquired from casual, or overheard conversations; (2) health or genetic services are offered by the employer as part of a <i>voluntary</i> wellness program; (3) the employee provides the information pursuant to an FMLA leave request, or an ADA accommodation request; (4) the information is available from commercially and publicly available sources such as newspapers, magazines, periodicals, books, etc; (5) the information is obtained via genetic monitoring of the biological effects of toxic substances provide the employer complies with additional requirements; and (6) the information is obtained through law enforcement or for human remains identification purposes.</li> </ul>
<b>Mental Health Parity and Addiction Equity Act</b>	The Act becomes effective on <b>January 1, 2010.</b>	ERISA	<ul style="list-style-type: none"> <li>The law <b>requires group health insurance plans to cover mental illness and substance abuse disorders on the same terms and conditions as other illnesses.</b></li> <li>The law is only applicable to employers with more than 50 employees.</li> <li>The law does not preempt stronger state laws.</li> </ul>

## Recently Enacted Federal Legislation – Con't

Law	Effective Date	Statute(s) Amended	Key Provisions
<p><b>COBRA changes with the American Recovery and Reinvestment Act</b></p>	<p>Effective <b>February 17, 2009</b>.</p>	<p>Consolidated Omnibus Budget Reconciliation Act (COBRA)</p>	<ul style="list-style-type: none"> <li>• Subject to income limitations, employees who are <b>terminated between September 1, 2008 and December 31, 2009</b>, and their covered dependents, are eligible for a <b>subsidy of 65 percent</b> of the premiums they would be required to pay for up to nine months for any group health plan in which they participated.</li> <li>• Employers do not receive any subsidy payment upfront, but are able to recover the other 65 percent of premiums in the form of a credit against their income tax withholding.</li> <li>• Terminated employees also have <b>90 days</b> to select coverage under a different, lower-cost option than the one they were enrolled in at the time they were terminated.</li> <li>• Employees who were <b>terminated as far back as September 1, 2008</b>, and who did not elect COBRA coverage, have a <b>new election period of 60 days</b> after they receive the notices required by the Act.</li> <li>• Employees terminated involuntarily on or after September 1, 2008, who did elect COBRA when initially eligible, are eligible for the new subsidy, but not retroactive to their termination date.</li> <li>• Certain information about the new subsidy and the option to enroll in different coverage must be added to current COBRA notices or provided in separate documents. Model notices may be found at <a href="http://www.dol.gov/COBRA">www.dol.gov/COBRA</a>.</li> </ul>
<p><b>New FMLA Regulations</b></p>	<p>Effective <b>January 16, 2009</b></p>	<p>Family and Medical Leave Act</p>	<ul style="list-style-type: none"> <li>• <b>Military caregivers</b> may take up to <b>26 weeks</b> a year to care for an injured service member.</li> <li>• An employer’s health care provider, HR professional, leave administrator, or management official (but not an employee’s direct supervisor) <b>may contact an employee’s health care provider directly</b> to authenticate a certification form or obtain clarification. This activity was previously restricted to health care providers only.</li> <li>• If the employee’s certification for leave is incomplete, the employer must give written notice and allow seven calendar days to cure the deficiency.</li> <li>• An employer may require certification before an employee returns to work if job safety concerns exist.</li> <li>• Employers now have <b>five days instead of two</b> to notify employees of their eligibility for leave and provide notice of rights and responsibilities, and to notify employees if the leave qualifies for FMLA once the employer has sufficient information to make that determination.</li> <li>• If an employee fails to respond to inquiries from the employer concerning information necessary to determine whether the leave is qualified under the FMLA, the leave may be denied.</li> <li>• The FMLA certification form must now include the health care provider’s specialization.</li> <li>• <b>Bonuses for employees predicated on specific goals may be denied</b> if the employee fails to meet the goal due to FMLA leave, provided the employer treats employees on non-FMLA leave in the same way.</li> <li>• If the employer does not give notice to the employee that the leave is designated as FMLA leave, the employer may be liable, but is <b>no longer subject to categorical penalties</b> of providing an additional twelve weeks of leave.</li> <li>• Time spent performing a “light duty” at work does not count as FMLA leave.</li> <li>• Employers may now voluntarily settle or release FMLA claims without court or department approval.</li> <li>• If allowed or required by the employer, an employee can choose to substitute paid leave for FMLA leave.</li> </ul>

## PENDING AND PREVIOUSLY PROPOSED LEGISLATION

Law	Enacted Status	Statute(s) Amended	Key Provisions
<b>Employee Free Choice Act</b> (H.R. 1409, S. 560)	The Act was introduced in Congress on March 10, 2009 and is a top priority for the Obama administration. There is a high likelihood that the Act will become law.	The National Labor Relations Act	<ul style="list-style-type: none"> <li>• Unions will be automatically certified as the employees' bargaining representative by presenting authorization cards from a majority of bargaining unit employees (card-check procedure). <b>Secret-ballot elections would no longer be required.</b></li> <li>• If an employer and a union are engaged in bargaining for their first contract and are unable to reach agreement after 120 days of bargaining and mediation, the dispute will be referred to arbitration and the results of the arbitration will be binding on the parties for two years..</li> <li>• The EFCA imposes new penalties for employer unfair labor practice conduct during union organizing or while bargaining for an initial contract, including: (1) liquidated damages equivalent to triple back pay for employees terminated in violation of the NLRA; (2) fines of \$20,000 for each unfair labor practice; and (3) mandatory injunction proceedings whenever there is reasonable cause to believe that the employer has discharged or discriminated against employees, threatened to discharge or discriminate against employees, or engaged in conduct that significantly interferes with employee rights during an organizing or first contract drive.</li> </ul>
<b>Family-Friendly Workplace Act</b> (H.R. 933)	The Bill was introduced in the 111 <sup>th</sup> Congress and is currently in subcommittee.	The Fair Labor Standards Act	<ul style="list-style-type: none"> <li>• The Act would amend the Fair Labor Standards Act to <b>allow private-sector employers to offer leave time to their employees to compensate for overtime work</b> performed, in lieu of cash overtime pay. Currently, such compensatory time off may only be offered to employees in the public sector.</li> </ul>
<b>Paycheck Fairness Act</b> (H.R. 12, S. 182)	The Act was passed by the House as part of the Lilly Ledbetter Fair Pay Act, but was removed by the Senate. It may be considered by Congress later in 2009.	The Equal Pay Act of the Fair Labor Standards Act.	<ul style="list-style-type: none"> <li>• The Act would <b>allow plaintiffs in a pay discrimination claim to recover compensatory and punitive damages.</b> Currently, the law only provides for liquidated damages and back pay awards.</li> <li>• The Act would facilitate class action suits by automatically considering class members part of the litigation class unless the members "opt-out." Currently, members must "opt-in" to be considered part of the class.</li> <li>• The Act would prohibit employers from punishing employees for sharing salary information.</li> <li>• Currently, when an employer is found to be paying male workers more than female workers, the employer may assert an affirmative defense that the pay disparity is based on a bona fide factor other than sex. The Act makes it harder to use this defense by requiring the employer to show that the pay disparity is <i>truly</i> caused by something other than sex, is job-related to the position in question, and consistent with business necessity.</li> <li>• The Act will also require the EEOC to collect pay information.</li> </ul>
<b>Patriot Employers Act</b> (H.R. 5907, S. 1945)	Dormant but may be reconsidered under Obama Administration	Internal Revenue Code	<ul style="list-style-type: none"> <li>• The Act would amend the Internal Revenue Code to provide a <b>one-percent tax credit on profits for "Patriot Employers,"</b> employers who are: (1) neutral in union organizing drives, (2) maintain headquarters in the United States, (3) pay at least 60 percent of each employee's health care premiums, (4) maintain or increase the number of full-time employees in the United States relative to the number of full-time workers outside the country, (5) pay a salary to each employee not less than the federal poverty level, and (6) provide a pension plan.</li> </ul>

Pending & Previously Proposed Legislation – Con't

Law	Enacted Status	Statute(s) Amended	Key Provisions
<b>RESPECT Act</b> (H.R. 1644, S. 969)	Not under active legislative consideration.	The National Labor Relations Act	<ul style="list-style-type: none"> <li>• The Act makes it <b>more difficult for employers to classify certain employees as supervisors</b>, and thereby expands the number of employees eligible to join a union.</li> <li>• Specifically, the Act changes the NLRB’s definition of “supervisor” by eliminating: (1) “assigning work,” and (2) “responsibly directing work” as supervisory duties; it also requires that an employee spend the majority of working time on supervisory duties to be classified as a supervisor.</li> </ul>
<b>Employment Non-Discrimination Act</b> (H.R. 3685)	Not under active legislative consideration.	Title VII of The Civil Rights Act	<ul style="list-style-type: none"> <li>• The Act would outlaw discrimination on the basis of <b>“actual or perceived sexual orientation”</b> in hiring, firing and other terms and conditions of employment.</li> <li>• Penalties would include compensatory damages and recovery of attorneys’ fees for intentional violations.</li> </ul>
<b>Civil Rights Act of 2008</b> (H.R. 5129, S. 2554)	Not under active legislative consideration	Title VII of The Civil Rights Act	<ul style="list-style-type: none"> <li>• The Act would <b>remove the current \$300,000 cap on compensatory and punitive damages</b> for intentional discrimination under Title VII.</li> <li>• The Act would make arbitration clauses in employment contracts unenforceable, and make back pay available for undocumented workers in NLRB proceedings, explicitly overturning the Supreme Court’s decision in <i>Hoffman Plastic Compounds Inc. v. NLRB</i>, 535 U.S. 137 (2002).</li> </ul>