

Employment Summer Update

As summer dwindles into its final month, Ohio employers should take time to refocus themselves, which includes reviewing some of the more common legal issues raised this year. While not an extensive list, the following issues are useful in gauging your awareness of what has happened so far this year, and what is yet to come:

- **OHIO HEALTHY FAMILIES ACT.** On September 4, 2008, the group who lobbied for this proposed legislation asked to withdraw the Ohio Healthy Families Act from the November 4, 2008 ballot.
 - As you may recall, this proposed legislation would have required all employers with 25 or more Ohio employees to provide their full-time Ohio employees (30 hours or more per week) with 7 paid sick days per year, and their part-time Ohio employees (less than 30 hours per week or less than 1,560 hours per year) with a prorated amount of paid sick leave, which can be taken in hourly (or smaller) increments.
 - This employer victory may be short-lived, however, as similar legislation is destined to reappear, both in Ohio and federally.
- **POSTERS.** Merely because your break room is wallpapered with employment posters does not mean you are in the clear. During audits, the Department of Labor not only checks for required postings, but also to make sure you have the most current versions of those postings.
 - ✓ For example: although the new federal minimum wage (i.e. \$6.55), which became effective July 24, 2008, is currently bested by its Ohio counterpart (i.e. \$7.00), which became effective January 1, 2008, both posters still must be conspicuously posted.
 - ✓ Also, do not forget the military leave amendment to the Family and Medical Leave Act poster, which became effective January 28, 2008.
- **EMPLOYEE FREE CHOICE ACT.** Although it has been pending in Congress for over a year, this legislation proposes fundamental changes to the union election system, including:
 - (1) An employer's diminished right to demand a secret ballot election;
 - (2) mediation and binding arbitration if an employer and union are unable to agree upon a first collective bargaining unit within 90 and 120 days, respectively; and
 - (3) an increase in discrimination damages (i.e. two times back pay as liquidated damages, in addition to the back pay actually owed, for a total of three times the back pay).

The threat of a presidential veto has not necessarily encumbered the Employee Free Choice Act, which may find a warmer welcome with a new President.

- **'SAFE HARBOR' RULE.** Despite being currently enjoined, the Department of Homeland Security has not given up on its 'safe harbor' rule, which set forth steps for employers to follow upon receipt of a "No-Match" or "Notice of Suspect Document" letter.
 - In March 2008, DHS modified its rule, which appears to have satisfied the Department of Justice's Office of Special Counsel, which enforces the Immigration and Nationality Act's antidiscrimination provisions.
 - In August 2008, OSC indicated that if an employer uniformly follows the DHS 'safe harbor' steps and terminates an employee because it cannot determine if the employee is authorized to work in the United States, then OSC will not find reasonable cause for a federal discrimination suit.

- **EMPLOYMENT AUTHORIZATION.** In July 2008, the House passed a five-year extension to the E-Verify employment authorization program, which is scheduled to expire in November 2008.
 - There are now three E-verify reauthorization bills pending in the Senate, one of which involves a similar five-year extension and the other of which would make E-verify permanent and mandatory for repeat offenders.
 - At the very least, this proposed five-year extension should give proponents of comprehensive immigration reform more time to develop support for their proposed legislation.
 - One such piece of legislation is the New Employee Verification Act, which proposes eliminating the I-9 in favor of a paperless Electronic Employment Verification System. This system would confirm work authorization for U.S. citizens through the Social Security Administration and for non-citizens through the DHS. At the same time, NEVA supporters claim it has voluntary biometric elements which would curtail identity theft and document fraud, two issues which plague the current paper-based employment authorization system.

- **THE AMERICANS WITH DISABILITIES AMENDMENTS ACT.** In what some proponents have termed the "most significant civil rights bill of the 110th Congress," the ADA Amendments Act seeks to reverse recent judicial trends narrowing the definition of "disability" and restore broad coverage to disabled individuals under the ADA.
 - On June 25, 2008, the House of Representatives overwhelmingly passed a version of this proposed legislation by a vote of 402 to 17. On August 1, 2008, the Senate introduced a less aggressive version of the ADA Amendments Act. However, the Senate version has bipartisan support from, among others, both presidential nominees Barack Obama and John McCain, which means it is unlikely to find much legislative or executive resistance. If passed and signed into law, the ADA Amendments Act will become effective January 1, 2009.
 - One of the United States Supreme Court cases that the ADA Amendments Act aims to overrule is *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), in which the Court ruled that mitigating measures would be considered in determining whether a "disability" exists (i.e. individuals may not be considered "disabled" if they are able to manage the symptoms of their impairments with medication or assistive devices).
 - The ADA Amendments Act also intends to broaden the definition of "disability" by clarifying that an impairment that is episodic or in remission is a disability if, when active, it would substantially limit a major life activity.



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