For 2009, the Only Sure Thing is Change - And More Change

Insights
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Before most of us even had time to put up our 2009 calendars, huge changes in employment laws were on the way, courtesy of Congress and the new administration. By the end of January, major amendments to the Americans With Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) went into effect. The following month, the economic stimulus package, formally known as the American Recovery and Reinvestment Act of 2009 (ARRA), was signed into law. Among other things, ARRA substantially changed employers' COBRA obligations, allowing eligible involuntarily terminated employees to pass on 65 percent of the cost of COBRA premium payments to their employers.

Other legislation has already been introduced in Congress this year that would continue to dramatically change employers' responsibilities under employment laws. Several, such as the Employee Free Choice Act (EFCA), stand a good chance of passing. Given the recent flood of changes and the strong possibility that more are ahead, we urge schools to take action immediately to comply with applicable revisions to the ADA, FMLA and COBRA, and keep an ear to the ground for what is ahead.

The ADA And The Meaning Of "Disabled"
In perhaps the most sweeping change in employment law in over 10 years, the recent passage of the "ADA Amendments Act" will mean major changes in employment practices for many schools throughout the country. The new provisions, which became effective January 1, 2009, will not only have a tremendous impact on employers' ability to successfully defend against disability discrimination claims, they will require most schools to adopt new policies and procedures for dealing with accommodation requests.

The first – and perhaps most significant – change is that the new ADA mandates that courts (and employers) must adopt a broad standard when determining whether an individual is considered disabled. In the past, employees have had an uphill battle to prove the existence of a disability within the narrow meaning of "disabled" ascribed to by the majority of courts. The new ADA obliterates years of courts' rulings interpreting "disability," including several U.S. Supreme Court decisions. The new law's stated intent is to provide "a broad scope of protection" for employees, and that courts examining ADA cases need to provide coverage for plaintiffs "to the maximum extent permitted" by the statute.

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Employers who are faced with making employment decisions involving individuals who might have a disability must now consider that the employee is now significantly more likely to be considered disabled under the new, broadened scope of coverage. Because of that, we anticipate that the focus of the ADA in the workplace (and disability discrimination litigation) will shift to the accommodation process. Schools should err on the side of caution when determining whether to engage in the interactive process with an employee, and will need to more thoughtfully react to requests for accommodation. When it comes to day-to-day employee relations, schools need to immediately adapt interactive processes and policies and be prepared to offer accommodations to a wider percentage of their workforces.

Additionally, the changes to the ADA make it a virtual necessity for schools to ensure that their job descriptions are accurate and realistic. Out-of-date or inaccurate job descriptions will be a bigger problem than ever in the event a school is sued for disability discrimination. When revising job descriptions, however, be aware that one important aspect of the ADA did not change. Employers are not required to delegate away or eliminate essential job functions to accommodate an employee with a disability, although they may be required to do so with respect to nonessential functions. So, to the extent a school's job descriptions distinguish between essential and nonessential functions, such distinctions should be drawn as accurately as possible to afford the best defense possible in the event of litigation over accommodation issues.

FMLA – Some Pluses And Some Minuses

Changes to the FMLA became effective on January 16, 2009. The new regulations involve a large number of significant changes, including the need for covered employers to incorporate new forms to comply with military service-related leaves and changes to medical certification and designation forms. Among other new requirements, the regulations also include revised time frames for employers to give notice to employees that leave requests are or are not FMLA-qualifying.

While some employers felt the changes did not go far enough to help curtail FMLA abuse, employers did gain some ground. For example, the new regulations allow employers to make more detailed inquiries of an employee's health care provider as a condition of the employee's return to work if the employee took leave for his or her own serious health condition. Another "win" for employers is that they may now contact an employee's health care provider *directly*, subject to some restrictions, for information about an employee's serious health condition. We recommend that schools familiarize themselves with the changes now, especially in order to begin taking advantage of the changes that benefit employers.

More detailed information regarding FMLA is found in the companion article "A Refresher Course On FMLA Leaves," in this issue.

COBRA: Retroactive Changes Necessary

The new law, which becomes effective with the first monthly period of COBRA coverage beginning on or after February 17, 2009 (for most plans, this means March 1, 2009) subjects employers and

insurers to new administrative, notice and reporting requirements. The Act's COBRA provisions apply to group health plans subject to federal COBRA as well as small employer plans exempt from COBRA but subject to state law coverage continuation rules.

The ARRA provides a 65% tax subsidy for the cost of health benefits for the unemployed, meaning that certain employees who elect COBRA coverage will be responsible for 35% of the premium payment, while the employer pays the other 65 per cent. To be eligible, an employee must have been involuntarily terminated between September 1, 2009 and December 31, 2009, and must be eligible for COBRA and timely elect coverage. Other COBRA-qualifying events, such as resignations or reductions in hours, do not allow employees to take advantage of the premium payment reduction.

The Employee "Free Choice" Act

Perhaps the number one discussion topic in labor law circles today is the Employee Free Choice Act, a bill currently being debated in Congress that President Obama has already agreed to sign. If enacted, the EFCA would make it easier and faster for union organizers to unionize a workforce by virtually eliminating secret-ballot union elections. If passed, it would be the most significant legislative change to the National Labor Relations Act (NLRA) in decades. If the EFCA passes, more employers can expect to become targets for union organization activity and employers who do become targets will find it substantially more difficult to avoid unionization.

Whether the EFCA will open the door to unionization in private educational institutions is unlikely, but not impossible. Since religious institutions are exempt from the NLRA, schools affiliated with a particular church or religion are probably the least likely to be targeted. But there have been cases where unions have argued successfully that an educational institution is affiliated with the church (rather than "church-controlled" with a primary objective of providing secular education) are therefore covered by the NLRA. Even religiously-affiliated schools and organizations should oppose the passage of the EFCA. As a preventive measure, such entities should audit their educational institutional practices to determine whether they have a sound basis for taking the position that their primary objective is providing secular education. Religiously-affiliated schools should be prepared to position themselves to the fullest extent possible to claim exemption from the NLRA if the EFCA passes.