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2009 Employment Policies and Procedures Update

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The upcoming year promises to be a year of change for employers, particularly due to legislation enacted in 2008 and legislation that will almost certainly move forward with the election of Barack Obama as president and widening Democratic majorities in Congress. Moreover, for the first time in 14 years, Democrats will hold the majority in the Ohio House of Representatives. Thus, the recently enacted laws and pending legislation will require employers to review and possibly revise their existing HR policies and employment practices. These laws add new protected classes for purposes of anti-discrimination laws and place new requirements upon employers regarding proper classification of workers as either employees or independent contractors for purposes of the Fair Labor Standards Act.

MILITARY STATUS IS NOW A PROTECTED CLASS

In March 2008, Ohio enacted the "Ohio Veterans Package" (Sub. H. B. 372), which amended Ohio's Anti-Discrimination Law to include military status as a protected class for purposes of employment in addition to the already protected classes of race, color, sex, disability, national origin, age (40 and older), ancestry and religion. The law defines "military status" a person's status in "service in the uniformed services," meaning the armed forces, the Ohio organized militia when engaged in active duty for training, or full-time national guard duty, the commissioned corps of the public health service, and any other category of persons designated by the President of the United States in time of war or emergency.

Although federal law already protects employees in military service, this new addition to Ohio law broadens this protection at the state level and makes remedies more accessible through investigation by the Ohio Civil

Rights Commission. Thus, employers should update all EEO and discrimination policies and posters to include military status as a protected class.

SEXUAL ORIENTATION LIKELY TO BECOME PROTECTED CLASS

It is also likely that in 2009 federal and Ohio legislation will be passed to prohibit discrimination against individuals on the basis of sexual orientation. On the federal level, in November 2007, the U.S. House of Representatives passed the Employment Non-Discrimination Act (ENDA) which prohibits discrimination against individuals on the basis of actual or perceived sexual orientation. The Act was sent to the Senate but has since been stalled. With the upcoming widening Democratic majorities in both the U.S. House and Senate, as well as the election of Barack Obama, it is very likely this legislation will be passed into law sometime in 2009.

On the state level, Governor Strickland issued Executive Order 2007-10S establishing "the policy of the State of Ohio" that no State of Ohio employee be discriminated against regarding terms or conditions of employment on the basis of sexual orientation or gender identity. The Ohio General Assembly followed Governor Strickland's lead and proposed legislation prohibiting employment-related discrimination on the basis of sexual orientation in the private sector. House Bill 502 and its companion Senate legislation (Senate Bill 305) were introduced on March 11, 2008; however, the bills stalled. It is widely expected that legislation will move forward with a new Democratic majority in the upcoming 128th Ohio General Assembly which convenes in January 2009.

The Ohio legislation would include sexual orientation as a protected class under Ohio Revised Code Section 4112.02 et seq. and apply to Ohio employers with four or more employees. Currently, 17 other states and the District of Columbia prohibit discrimination on the basis of sexual orientation. Other states have bills similar to Ohio's pending. Also, many local municipalities prohibit discrimination byemployers on the basis of sexual orientation or gender identity. For instance, Cleveland, Cincinnati, Columbus, Dayton and Toledo have local ordinances prohibiting such discrimination.

Given the likelihood that sexual orientation will become a protected class in 2009 on both the federal and state levels, employers should review and revise existing policies to prohibit discrimination and harassment on the basis of sexual orientation.

NEW LAW PROHIBITS GENETIC DISCRIMINATION

Another recent law that will require revision of HR policies is the Genetic Information Nondiscrimination Act (GINA), which was enacted to protect employees against discrimination based on their genetic information. GINA will apply to all private, state and local employers employing 15 or more employees, and as it pertains to employment nondiscrimination, will take effect in November 2009. In May 2009, however, the EEOC is expected to propose implementing regulations which will provide more guidance to employers.

The new law specifically prohibits employers from discriminating on the basis of genetic information with respect to hiring and firing, compensation, terms of employment and other employment opportunities. GINA also prohibits employers from acquiring genetic information on employees or their family members with limited exceptions. Exceptions include where employers acquire the information through FMLA certification, health services offered by employers, such as a wellness program, or an inadvertent request. In these

instances, employers will not be penalized unless the information is used to discriminate against an employee. GINA requires employers that possess any genetic information about employees to maintain the information in separate files and treat it as a confidential medical record. Employers are prohibited from disclosure to anyone except the employee, health researchers or comply with federal or state law.

Under the new law, "genetic information" is defined broadly. It includes an individual's genetic tests, the genetic tests of family members, the manifestation of a disease or disorder in family members, and other genetic services such as genetic counseling or genetic education. A genetic test is an analysis of DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations or chromosomal changes.

GINA does not limit federal or state laws that provide equal or greater protection to employees. In fact, the EEOC has taken the position that employment decisions made on the basis of genetic tests violate the Americans with Disabilities Act of 1990 (ADA). Under ADA, employers only may require employees to submit to a medical examination if the examination is job related and consistent with business necessity. Therefore, any medical examination which purports to predict future disabilities, whether or not it is accurate, is irrelevant in considering the employee's present ability to perform his or her job. In addition, genetic information is protected under the Health Insurance Portability and Accountability Act (HIPAA). Under HIPAA, group health plans and insurers may not provide health information to employers unless the employer specifically assures the insurer that it will not use the information in employment decisions. It also requires employers possessing genetic information regarding an employee must treat the record confidentially and maintain in it separate medical files. The genetic information may not be disclosed unless authorized by the employee or court order.

Although it is likely employers may already comply with the requirements of GINA, they still should become familiar with the new law as well as ensure that no employment decisions are made on the basis of genetic information. Now would be an ideal time for employers to review their nondiscrimination policies and employment forms, particularly requests for medical records, to ensure that forms do not solicit genetic information. Also, if employers have adopted wellness programs, it is important they be reviewed for GINA compliance.

EMPLOYEE MISCLASSIFICATION: "EMPLOYEE" OR "INDEPENDENT CONTRACTOR"?

Employers also should review employment practices regarding the use of independent contractors to ensure compliance with the Fair Labor Standards Act (FLSA). The Employee Misclassification Prevention Act (EMPA) is a proposed law that would amend the FLSA to prevent employers from improperly classifying

employees as independent contractors in order to avoid paying overtime and benefits. Proponents of the Act argue that when employees are misclassified as independent contractors, they may be excluded from coverage under key anti-discrimination, leave and labor standards laws designed to protect workers and may not have access to employer provided health insurance coverage and pension plans. They also argue misclassification can affect the administration of many federal and state programs, such as payment of taxes and payments into state workers' compensation and unemployment insurance programs.

Aside from clarifying that misclassifications are a prohibited act under FLSA, the proposed bill also would increase penalties under appropriate circumstances and require the U.S. Department of Labor and the states to work together to better detect misclassification. In addition, the bill would require employers to designate on their employees' records whether they are an employee or independent contractor. Employers would need to notify workers of that classification and their right to challenge it. Finally, the law increases the abilities of various government agencies to investigate employers to ensure compliance with the law.

The EMPA was introduced in the Senate, sponsored by President-elect Obama, on September 29, 2008, and may very well be enacted within the first 100 days of the new administration. In the meantime, employers should review employment practices and be prepared to amend these practices, if necessary, to comply with the law.

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