



**Uncertain Times Call for Certain
Action:
Top 10 Employment Mistakes to
Avoid Based on Changing
Employment Laws**

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NEW WAGE & COMPENSATION TRAPS

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- **LILLY LEDBETTER FAIR PAY ACT**
- **TRENDS IN WAGE AND HOUR LITIGATION**

Amends Title VII of the Civil Rights Act of 1964, the ADA, the Rehabilitation Act of 1973, and the ADEA .

The charge-filing periods (300 days in most states and 180 days in states that do not have a fair employment agency) now commences when:

- a discriminatory compensation decision or other practice is adopted;
- an individual becomes subject to the decision or practice;
OR
- an individual is affected by an application of a discriminatory compensation decision or practice (including each time wages, benefits, or other compensation is paid). Thus, the statute of limitations restarts each time an employee receives a paycheck based on a discriminatory compensation decision.

- RETROACTIVE to May 28, 2007, and applies to all pay discrimination claims pending on or after that date.
- What this could mean:
 - Individuals who had refrained from filing compensation discrimination claims in the 20-month period since *Ledbetter* may initiate litigation.
 - Plaintiffs whose cases were dismissed on statute of limitations grounds after the Supreme Court's decision in *Ledbetter* can reassert their claims.

WHAT EMPLOYERS SHOULD DO NOW:

- Audit Current Pay Documentation Practices
- Review Compensation Decisions
- Develop Specific Criteria for Compensation Decisions
- Revise Document Retention Practices
- Train Supervisors and Managers (evaluation decisions and raises)
- Conduct Periodic Statistical Analysis of Compensation Data

NEW TRAPS TO FOCUS ON IN WAGE & HOUR LAW

- Overtime lawsuits have increased by 41% in the last 3 years
- There are now more wage class-actions filed than discrimination class-actions
- Federal FLSA Collective Actions – 29 U.S.C. § 216(b)
- Minnesota Rule 23 Class Actions – On the Rise
- One mistake can be replicated many times over, leading to great exposure – *Milner v. State Farm and Braum v. Wal-Mart*
- The law contains many “traps” that do not comport with “common sense”
- Employees do not have to prove ill intent; only non-compliance

NEW TRAPS TO FOCUS ON IN WAGE & HOUR LAW

- Update policies on overtime and unauthorized work
- Manager Training is Key
 - Meal and Rest Breaks
 - “Acquiescent” Work
 - On-Call Violations
 - “Start Early – State Late” Unwritten Rules
 - Booting Up – Shutting Down
- Limit communication to non-exempts during off-hours



TRAPS WITH NEW MEDICAL LEAVE AND DISABILITY LAWS

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- **ADA AMENDMENTS ACT (ADAAA)**
- **REVISIONS TO THE FMLA**

- Signed September 25, 2008 - Effective January 1, 2009
- Overturns Supreme Court decisions limiting coverage
- Broadens Interpretation of the Act
 - Expands coverage of definition for “Disability”
 - Expands definition of “Regarded As” prong
 - Excludes consideration of “Mitigating Measures”
 - Expands List of “Major Life Activities”
- Directs EEOC to Issue New Regulations

- Expands Coverage of “Disability” Definition
 - Existing interpretation of “substantially limits” sets too high a standard
 - Expectation is that regulations will be revised to define “substantially limits” as “significantly restricts”
- Expands the Definition of “Regarded As” Prong
 - Employer liable if individual can prove discrimination because of an actual or perceived physical or mental impairment whether or not such impairment limits or is perceived to limit any major life activity

- Excludes Consideration of Mitigating Measures (*e.g.*, medication or prosthesis)
 - ADAAA rejects the Supreme Court’s decision in *Sutton* that a determination of disability requires consideration of the mitigating measures
 - The determination “shall be made **without regard to the ameliorative effects** of mitigating measure”
 - Exception made for eyeglasses or contact lenses
- Broadens Definition of “Major Life Activities”

Steps Employers Should Take

- Review handbook policies to ensure compliance with ADAAA
- Review job descriptions and job function analysis for “essential functions”
- Review accommodation procedures – assume most serious medical conditions are covered
- Develop or revise forms and templates
- Training

FAMILY AND MEDICAL LEAVE ACT REVISIONS

Counting Employees' Prior Service Break and New Coverage

- To be eligible for FMLA leave, employee must have 12 months of service with employer
- 12 months now measured over 7 years
- Still 1,250 hours in past 12 months standard
- New regulations also allow for military service member and family member leave

- General notice Obligations and Notification Requirements Enhanced
- New Rules Governing All Medical Certifications
- Changes: Initial Medical Certification
- Intermittent Leave Issues

Steps Employers Should Take Now

- Update FMLA policies
- Update FMLA posters and notices
- Develop FMLA guidelines and procedures
 - May need three different guidelines for HR, supervisors and employees
- Update/develop certification forms and template letter
- Train (HR, supervisors, and potentially employees)



TRAPS TO AVOID WITH RIFS AND TERMINATIONS

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- **REDUCTIONS IN FORCE**
- **COBRA DEVELOPMENTS**

Considerations:

- WARN Act obligations triggered?
- Are the layoff decisions defensible?
 - Objective criteria?
 - How do the numbers look as a whole?
 - Is each individual decision defensible?
- Should we offer severance in return for releases?
- Obligations under Minnesota law?
- Forced furloughs and time off

American Recovery & Reinvestment Act

- Provides assistance eligible individuals will only be required to pay 35% of their COBRA premium.
- Employers will pay 65% of the premium subsidy and receive a credit against their quarterly federal payroll tax.

Assistance Eligible Individuals (AEIs)

- Terminated between September 1, 2008 - December 31, 2009;
- Lost coverage due to an involuntary termination (exception of gross misconduct); *AND*
- Elected COBRA continuation (same 60-day decision period and 45-day payment requirements).

How Does COBRA Subsidy Work?

- April 18, 2009 was the deadline to give AEIs notice
- Subsidy effective as of February 17, 2009
- May require reimbursement or credit
- Employers apply for credit to quarterly payroll taxes

What the Subsidy Doesn't Do

- Does not extend the 18-month period
- Subsidy not retroactive to September 1, 2008
- Does not apply to small employers (under 20)
- Does not cover entire 18-month period, ends after 9 months or less



NEW LEGISLATION AND EXECUTIVE ORDERS FROM OBAMA ADMINISTRATION – POTENTIAL TRAPS FOR UNKNOWLEDGEABLE COMPANIES

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NEW LEGISLATION AND EXECUTIVE ORDERS

- Amendment to Abused and Neglected Child Act
- Beck Rights Repealed
- Nondisplacement of Qualified workers under service contracts
- Project Labor Agreements Mandated



WHAT IS ON THE TABLE IN THE OBAMA ADMINISTRATION? STAY ALERT ... STAY TUNED

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OBAMA ADMINISTRATION – FOCUS ON “ENFORCEMENT” NOT “EDUCATION”

- EEOC budget increases by 15 million to 344 million
- NLRB budget increases to 262 million
- DOL budget increases 13.3 billion from 12.7 billion

- Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers (RESPECT) Act
- Working Families Flexibility Act
- Employment Non-Discrimination Act (ENDA)
- Paycheck Fairness Act (PFA)

QUESTIONS?

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Thank you for attending!