



Risk Control Update

July 2009

The new Administration has been all about change and more is promised to come. The US Department of Labor commits to workplace health and safety enforcement while pending legislation could significantly impact businesses, small and large.

DOL signals a renewed focus on enforcement

U.S Secretary of Labor, Hilda Solis, emphasizes, "Let me be clear: Under my watch, enforcement of our labor laws will be intensified so we can provide an effective deterrent to employers who may unnecessarily put their worker's lives and employment at risk"

Key Actions:

- More resources will be added to the Wage and Hour Division to drive enforcement.
- Occupational Safety and Health Administration will hire more compliance safety and health officers.
- The development of the National Emphasis Programs (NEPs) focus on industries, hazards and occupational injuries and illnesses that need additional targeted enforcement.
- Employee Benefits Security Administration will increase its enforcement staff.
- Hilda Solis commits to adding an additional 670 employees to the Dept of Labor.

What's it all mean?

- Employers can expect additional audits from the Wage and Hour Division as well as inspections from OSHA. The new administration claims that more than 70% of employers are estimated to continue to violate wage and hour laws.
- OSHA recordkeeping will be increasingly scrutinized, as the development of a recordkeeping NEP is underway

Business Impact:

- Consider a Wage and Hour audit to ensure compliance with FLSA - proper classifications on exempt/non-exempt and employee/independent contractor.
- Take steps to ensure employee's safety and health practices and training are in compliance with OSHA requirements.
- Review recordkeeping process and practices and logs to ensure they are accurate and current. Address any known hazards in the workplace.

Uniformed Services Employment and Reemployment Rights Act (USERRA)

While USERRA, enacted back in 1994, is certainly not new, two recent court decisions and two active war fronts make for a good time to review.

This act requires employers to place employees returning from military duty into the position they were in prior to their leave. The decisions of *Reed v. Honeywell Int'l, Inc.* and *Middleton v. City of Sherwood*, recent U.S. District Court cases, provide employers with a more clear understanding of reemployment obligations.

Key Notes:

- The cases focus on the treatment of employees in managerial positions upon their return from military leave.
- Reed and Honeywell had positive evaluations before going on military leave and returned to the same positions they held before going on military leave.
- The employees claimed their performance was criticized for the upon their return. The employees also claimed their employers had suggested their military service was interfering with their civilian positions.

- In Reed's case she was required to attend a group "reassimilation meeting" with all of her direct reports to answer anonymous complaints about her, complaints allegedly lodged while she was on military duty.
- Reed later met with HR to discuss the issue and was told she might need to think about a change because she had too much going on in her personal life - including her National Guard commitments.
- In Middleton's case he met with the city manager upon returning from leave. The manager allegedly asked Middleton to accept a demotion and sign a document stating, "Middleton's reemployment rights are in conflict with its need to have a qualified and experienced law enforcement professional in that position at all times..."
- In Middleton's case a new position was created (Director of Public Safety) and filled by the person who had been the Acting Chief. That position became the top law enforcement position in the city. Accordingly the court concluded there was sufficient evidence that Middleton had been constructively demoted.
- In both cases, the trial courts denied the employer's motion for summary judgment and set the case for trial.

What's it all mean?

- Military service is protected even where the employee-service member volunteered for duty.
- Top management should be aware of adverse changes to an employee's job responsibilities, counseling, schedules, and the like, upon return from military duty. Federal courts have held that discriminatory motivation on the part of the employer can be inferred from the circumstances - employers should avoid the appearance of impropriety.
- USERRA's coverage extends beyond reemployment rights and touches upon matters such as constructive discharge, an employee's at-will employment status, and even health and pension benefits.

Business Impact:

With increased enforcement of compliance, employers should have a basic understanding of USERRA's coverage and the employer's obligations.

Federal Minimum Wage Increase

On May 25, 2007 the Fair Labor Standards Act (FLSA) was amended to increase minimum wage in three steps. **MARK YOUR CALENDAR** effective July 24, 2009 minimum wage will increase to \$7.25 per hour; third and final step of this amendment. Make sure your Federal Minimum Wage Posting has the updated, correct information. If you have questions about what is required or if you need a new updated all in one labor poster please contact us. We have the posters available for \$29.95 + tax.

By the way - have you checked the expiration date on the new I-9 Form?

That's right - it has an expiration date of June 30, 2009. For now the USCIS says don't worry about the form, it will remain valid. They've promised a new updated form soon. Kind of makes you wonder - since we just started using the current form in April.

The Supreme weigh in:

In a recent employment law ruling involving the fire department in New Haven, Connecticut, the Court overturned a decision made by High Court nominee Sonia Sotomayor.

Case Summary:

- Department used a standard test to promote firefighters
- In a testing round 19 white employees and 1 Hispanic employee passed - 0 black firefighters passed.
- Fearing a lawsuit mgmt scrapped the results and promotes on other factors.
- Lawsuit filed by the 20 who passed.

The Supreme Court stressed two points -

- (1) be careful about using selection procedures that have a disparate impact, but
- (2) if a test is job-related and consistent with business necessity, there's no reason to suddenly change a selection procedure based on how many people of a certain protected class pass.

Fear of being sued by members of a protected class is NOT a defense for discriminating against another.

Work Comp Coordinator Joins TCOR Insurance Management Team

San Marcos, TX -"We are very pleased that Lucas Wright has joined the TCOR Insurance Management Team", announced Ross Dudney, Human Resources Manager of TCOR's Human Resource Solutions Division. "Lucas brings his experience as a commercial adjuster handling both property and injury claims to our clients. His knowledge and expertise in the areas of safety and workers compensation brings value to our CompControl® division."



Lucas graduated from Texas Lutheran University in 2002 with a BA in business marketing. Upon graduation he began working in the financial services industry. He received his MBA from St. Mary's University in 2006. Lucas has spent the last two years with Wausau Insurance as a commercial adjuster before making the move to TCOR. He was recognized as a top 10% performer and selected as a member of the advisory counsel for Wausau Insurance. "I will be an advocate for your business," says Wright. "I realize that in today's market every dollar is important to companies, so I will work to lower your total cost of risk. "

Lucas and his wife, Callie, reside in San Antonio, Texas. Lucas enjoys playing golf, hunting, fishing, cooking, and watching sports. As for his business, Lucas focuses on developing and implementing risk reduction strategies for mid-size commercial businesses, especially those in the contracting and heavy industrial fields. "Our strategies are designed to help business owners develop a proactive plan to keep insurance and risk costs to a minimum," Wright states. "My role is to help businesses identify weaknesses in their workers' compensation program and minimize those risks before they become real problems, costing business owners more money, time, employees, or even the business itself."

So what's next in 2009? The Legislature is considering new proposed bills that could impact employers' existing policies regarding employee leave, benefits and compensation.

On the National level –

Protecting America's Workers Act (PAWA) (if passed)

Would expand the Osh Act – the legislation would:

- Increase penalties for OSHA citations – the maximum penalty for a willful violation would increase to \$120,000 and a willful violation resulting in a death would increase to \$250,000.
- Criminal Penalties – provides for possible felony prosecution as a result of repeated and willful violations which result in fatality **or** serious bodily injury. Up to 10 years for a first offense and up to 20 years for repeat offenses.
- Increased "Whistleblower" protection
- Expand coverage to federal, state and local public employees

Healthy Families Act (if passed)

- Employers with 15+ employees will be required to provide one hour of sick time for every 30 hours worked. The employer may cap an accrual of 56 hours per calendar year per employee. Accrual would begin up on hire, however the employee becomes eligible to use after 60 days of employment.
- Employer would no be required to allow carry-over of unused time or pay out of unused time.
- Under this legislation, employees could use this sick time "to care for themselves and their families, receive preventative or diagnostic treatment or seek help if they are victims of domestic violence."
- Employers could require documentation of illnesses that require 3 or more days of care

Paid Vacation Act of 2009 (if passed)

- Employers with 50+ employees will be required to offer at least one week of paid vacation, Employers with 100+ employees will be required to offer at least two weeks of paid vacation
- Full-time and part-time employees would be eligible after one year of service

New bills to expand the scope of the **Family and Medical Leave Act of 1993**

Rep Shea-Porter explained the intent is to "restore the Family and Medical Leave Act to its original intent and spirit" and reverse the restrictive rules that were implemented during the Bush administration. The bill H.R. 2161 would:

- Restore protections that prevent an employer from forcing an employee to use more incremental FMLA leave than is medically necessary;
- Reverse limitations placed on the use of accrued paid leave while on FMLA;
- Restore the prohibition on denying attendance bonuses as a consequence for taking FMLA leave;
- Restore protections that prohibit the waiving of an employee's FMLA rights without review and approval by the DOL or the courts;
- Restore protections that prohibit an employer from approving or denying FMLA leave based on compliance or non-compliance with employer leave request policies;
- Restore employee privacy by reversing regulations that would allow an employer to directly contact an employee's medical provider;
- Restore previous "fitness-for-duty" certification rules for employees who take intermittent leave;
- Direct the Secretary to revise the Bush regulations to revisit the new, burdensome treatment and recertification timelines imposed by the previous Department of Labor
- Direct the Secretary to revise the provided medical certification template to include the definition of a "serious health condition."

Bill H.R. 2132 would amend FMLA to allow FMLA qualified employees to take leave to care for a domestic partner, child of a domestic partner, same-sex spouse, parent-in-law, adult child, sibling, or grandparent if that person has an FMLA qualifying "serious health condition."

Employee Free Choice Act Update:

The bill has currently stalled due to a lack of support in the Senate (it does not have 60 votes for cloture).

Look for the EFCA to morph into something a little less aggressive – i.e. expedited secret ballot elections (versus card check), extending the proposed negotiation time, on a first contract, before requiring arbitration. Senator Arlen Specter stated that he is confident there can be a compromise version.

On the State level -

- ▶ Some small businesses may not be required to pay any tax and is not considered to owe any tax for a period if:
 - 1) "the amount of tax computed for the taxable entity is less than \$1,000; or
 - 2) "the amount of the taxable entity's total revenue from its entire business is less than or equal to \$1,000,000."

This act is purposed to be effective January 1, 2010.

- ▶ Any persons over the age of 15 can be cited if they are not wearing a safety belt, including back seat passengers. This act is purposed to be effective September 1, 2009.
- ▶ Drivers will be prohibited to use cell phones in active school zones unless they are using hands-free equipment.

Now is the time to review your safe driving policy and consider preventative measures to avoid exposure to risk associated to cell phone usage and driving.

In a court case last year, a company was sued after an employee rear-ended another car. While the employee was not on work duty she was making a work related call on her employer issued cell phone. The final bill to the company \$5.2 million. (Cite: Ford v. McGrogan).

"As a business owner or manager, Human Resource management and compliance can be an overwhelming challenge and a miss-step in this area can be very costly for your business and in some cases you personally. Given all of this it's not surprising that the analysis firm Gartner Group has found that HR ranks number one among outsourced business processes. At TCOR we understand the challenge and continue to seek to serve and support our clients at the highest level. If you need additional information, support or service on the topics of this newsletter or any other HR issue please contact us. Additionally, you can visit our website for more information on TCOR's HR support and services. And - if you would like the latest breaking HR news, Legislation and events follow me on Twitter. You can find me at HRData.

Until our next visit,



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