



As both our State and Federal Legislators gear up and with a new administration in the White House, 2009 continues to be all about change.

Here are the latest highlights for employers and the new Federal mandates:

1. Lilly Ledbetter Fair Pay Restoration Act of 2009

This legislation was a congressional response to the U.S. Supreme Court's 2007 decision in the Ledbetter v. Goodyear Tire & Rubber. Lilly's equal pay claim went to the Supreme Court where The Supreme Court ruling held that the 300 day time limit for filing a Title VII charge started after the alleged unlawful action, and did not re-start upon receipt of each new paycheck. Now under Ledbetter every new pay period establishes a new time clock.

Signed 1/29/2009

Applies to employers covered under Title VII, ADEA & ADA

Key Changes:

- Each new paycheck is no longer considered an effect of past discrimination but a new act of discrimination.
- Also applies to retirees under certain funding plans.
- Each new act of discrimination restarts the "shot clock" for filing pay discrimination claims.

What's it all mean?

Ledbetter essentially eliminates "time barring" on pay discrimination claims. Courts may reconsider previously time barred claims.

Business Impact:

- Review your pay policies and practices and ensure they are not discriminatory – A No-brainer, right? You can certainly pay employees different rates but it can not be based on a protected class or characteristic.
- Document retention – You'll have to be prepared to respond to pay discrimination allegations where the initial pay action may have occurred 5, 10, 15 or 20 years previously, and such claim can be filed even after the employee has retired. Consider keeping pay records indefinitely for now.

2. COBRA Subsidy Provisions

Signed 2/17/2009 – retroactive back to September 1st 2008

Applies to employers with 20 or more employees

Key Changes:

- 65% COBRA assistance for eligible individuals – involuntary terminations from 9/1/2008 to 12/31/2009
- Eligible individuals can utilize subsidy for up to 9 months.
- New notice obligations
- Second chance elections
- Payroll tax reimbursement for employer

What's it all mean?

Both future (up to 12/31/2009) and previously (back to 9/1/2008) involuntarily termed employees may be eligible for 65% of their COBRA cost to be subsidized – ultimately by the Federal Government but employers bare the front end and admin cost. Subsidized rate can last up to 9 months.

Business Impact:

- Review severance or other separation agreements – this act does NOT recognize any voluntary employer COBRA subsidy.
- This is likely to increase an employer's COBRA population and COBRA claims and cost.
- Employers (ER) need to communicate with their COBRA administrator, Payroll service, accountant/CPA or any other outside services and ensure all bases are covered. Do not assume that your COBRA Administrator is the do all – end all!
- New Notices for all COBRA qualified former employees. ERs can expect additional charges for this from their COBRA administrators.
- ERs will use government form "941" to report cost to the IRS/Treasury. The ER must be very cautious that this is done correctly and accurately. If the ER misclassifies and takes money out of payroll deposits for an improper reimbursement it could be a big problem for the ER. BTW, no clarification yet on whether mutual partings will qualify.
- Additionally ERs claiming the tax credit must maintain several documents (i.e. info on receipt of the Assistance Eligible Individual's 35% share of the premium, statements or invoices from the insurance carrier and proof of timely payment of the full premium to the carrier, Attestation of involuntary termination for the Assistance Eligible Individual, etc.) in case the IRS wishes to view.

3. The On, Off, & On again I-9s?

As you may recall all employers were directed to begin using a new I-9 form on February 2nd. At literally the last minute the USCIS announced that employers should continue using the current form (dated 06/05/2007) until April 3rd. Seems the new administration wanted to have their look before moving forward.

Key Changes: (At least as it was for February 2nd)

- Previous versions of Form I-9 will no longer be acceptable.
- Expired documents are no longer acceptable. Previously, an expired U.S. passport was an acceptable List A document and expired identity documents were permissible under List B.
- Addition of a Non-citizen National of the United States category in Section 1 for persons born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of non-citizen nationals born abroad.
- A preprinted temporary I-551 notation on a machine-readable immigrant visa, reflecting permanent resident status is added as an acceptable List A document.
- Addition of Form I-94A next to each reference to the Form I-94. The Form I-94A is nearly identical to the Form I-94 except that all fields are computer generated rather than annotated by hand.
- Clarifications that Social Security cards with restrictions on employment are not acceptable List C documents.
- The new U.S. Passport Card is added as a List A document.
- Documentation for citizens of the Federated States of Micronesia and the Republic of the Marshall Islands is added to List A.

Business Impact:

- Be prepared to begin using the new Form (dated 02/02/2009) April 3rd (but stay tuned for last minute changes or updates).
- Both the current and new forms are available at www.uscis.gov/i-9

So what's next in 2009?

On the National level -

As I write this update, both the House and Senate have introduced the **Employee Free Choice Act (EFCA)**.

You may also recall my mention of it in my previous update. No question this is Bill #1 for big labor and unions. And after spending millions in the recent elections, organized labor has promoted this legislation as its main priority for the Democratic majorities and President Obama.

National Level con't -**In its current form the EFCA –**

- Eliminates employee opportunities to vote on union representation in secret ballot elections supervised by the National Labor Relations Board;
- Provides instead that unions can demand employer recognition upon presentation of signed authorization cards from a majority of the workforce to be represented;
- Requires binding arbitration of first contracts within 120 days in circumstances where an employer and a newly certified union are unable to reach an agreement;
- Dramatically limits, and in some cases effectively eliminates, advance notice to the employer of a union's organizing efforts, thereby limiting the employer's opportunities to communicate with employees about the workplace issues involved in a union organizing drive; and
- Establishes new fines to be levied against employers (but not unions) for an expanded list of unfair labor practices.

(Senator Obama co-sponsored this bill in 2007).

- ▶ These changes would dramatically affect not only large companies, but all companies. Companies that may have previously been overlooked, because of size or location, likely won't be if they are an easy target for union organizers.
- ▶ While passage of the EFCA remains uncertain (although I would say very likely – at least in some form) employers would be wise to prepare now. A signed authorization card is good for a year. No doubt organizers have already stepped up their activity in anticipation of the EFCA.
- ▶ Companies need to have their “union free” strategies developed and in place now!
- ▶ Our Firm can help you analyze your union organizing vulnerabilities, educate your managers and supervisors on: current labor law, the proposed EFCA and the effects and realities of unionization, develop and implement pro-active communication to your employees, and if necessary provide on site response to an organizing campaign.

On the State level –

- ▶ Employment Bill - **HB 538 (Villarreal)** – Relating to the prohibition of employment discrimination on the basis of sexual orientation or gender identity or expression.
- ▶ New legislation continues to add employment challenges for business, on top of the economic challenges we are all facing. Many businesses are considering, or have made, difficult employment decisions – decisions that can carry a lot of risk exposure.
- ▶ Earlier this month, the EEOC released discrimination and retaliation charge statistics through 2008. In comparing 2008 with 2006 – in just two years, Race discrimination charges increased 24.6% to almost 34,000 charges, Sex discrimination charges increased 22% to over 28,000 charges, Age discrimination charges increased 48.5% to over 24,000 charges, and Retaliation charges increased 44.9% to 32,690 charges. Even more concerning, when you compare 2006 with 1997 you actually see a decrease in overall charges of 6.1% (75,768 v. 80,690). The trend was flat to down but started a major up tick in 2007.
- ▶ So why the spike? – economic conditions, increased diversity in the workforce, employees' greater awareness of the laws, more/new laws? Sure, no doubt these factors all played their role, but almost always the vast majority of these charges can be traced back to that adverse employment decision and/or how it was handled. When faced with these serious decisions employers would be wise to do their research and always utilize their HR support before pulling the trigger.



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“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,