The Schroeder Group, S.C., Attorneys at Law

2009 Employment Legislative Update

September, 2009
Volume 2, Issue 10

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Bravo! Entrepreneur Award (Attorney Stuart Schroeder) *by BizTimes Milwaukee*

Most human resources professionals know there have been major changes to the laws affecting employment in the last year or so. However, there are many pending legislative efforts to make even more changes to the landscape of employment law. This issue will summarize the changes you should already be aware of and more that are pending.

FEDERAL LAW CHANGES:

Family & Medical Leave Act Amendments

The Department of Labor released new regulations which were effective in January 2009. The major changes include the following:

- Military leave provisions.
- Employee eligibility – 12 months employment need not be consecutive.
- "Continuing treatment" definition clarified – employee or family member must be incapacitated for more than 3 consecutive full calendar days and must receive treatment twice within 30 days of the first day of incapacity, must see health care provider within 7 days of incapacity and must visit health care provider in person.
- "Chronic serious health condition" requires visit to health care provider at least twice per year.
- New sections for leave relating to pregnancy, adoption, foster care – expectant mother may take FMLA before birth for prenatal care if condition makes her unable to work; husband may take leave to provide psychological comfort and reassurance; both parents may take up to 12 weeks of leave to care for newborn with a serious health condition even if both are employed by the same employer.
- Physician's Assistants are now recognized health care providers.

Employee Leave Entitlements

- The method in which leave during a holiday week is computed has been clarified.
- Employees must make reasonable effort to schedule treatment so that it does not unduly disrupt the employer's operations.
- Narrow new exception to allow employer to charge employee with more FMLA than needed where the employee is physically unable to access the worksite after a shift begins (e.g., flight attendant).
- Employees unable to work mandatory overtime can be charged with FMLA leave for the unworked overtime.
- Employees taking paid leave must follow employer's paid leave policies; employers must notify employees of procedural requirements for obtaining leave.
- Where an employer's disability or worker's compensation benefits only partially replace an employee's income, employer and employee can agree to have paid leave supplement these benefits.

- Employer can disqualify employee for a bonus based on perfect attendance, achieving certain hour or production goals *provided* employees on equivalent non-FMLA leave are treated the same.
- Employee cannot be forced to accept light duty. If employee accepts light duty, this does not count against the employee's leave entitlement, and is not a waiver of the right to reinstatement to the same/equivalent position. Employee's right to restoration must be held in abeyance while on light duty up to the end of the applicable 12-month FMLA year.

Employer and Employee Rights & Responsibilities

- New poster replacing 1995 version - Must be posted and distributed to all employees and updated in Employee Handbook.
- New Notice of Eligibility and Rights and Responsibilities form - Must be given to employee within 5 business days of being advised of need for FMLA or after employer learns of employee's need for leave.
- New Designation of Notice form - Employer has 5 business days to notify employee whether leave is designated as FMLA leave or that additional information is necessary and must explain what information is necessary. Employer can retroactively designate leave unless employee can demonstrate harm from not being notified earlier.

Employee Notice Requirements

- If leave is unforeseen, notice must be given as soon as practicable (same day or next business day).
- Employees must comply with employer policies; failure to comply can be grounds for denial of leave.

Medical Certifications

- New forms available – be careful using DOL forms/tailor to Wisconsin requirements.
- If certification is incomplete, employer must give written notice to employee and give at least 7 calendar days to respond.
- If leave lasts longer than a leave year, employer can request annual medical certifications.
- Employer can directly contact employee's health care provider to authenticate information on certification (no supervisor).
- New procedures for 2nd & 3rd opinion process.
- If certification is not in English, employee must provide translation upon request of employer.
- Employee cannot be required to submit to Fitness for Duty certification prior to reinstatement *unless* employee was advised of this requirement at the time the employer designated the leave as FMLA.

Americans with Disabilities Act Amendments

The ADA Amendments Act (ADA-AA) took effect on January 1, 2009. The Amendments were the result of negotiations between employer groups and employee groups. The ADA-AA significantly changes the current law by:

- Mitigating measures (e.g., glasses, assistive devices) may not be considered to determine whether an individual has a disability;

- Broadly construing the phrase "substantially limits" in assessing whether a condition affects a major life activity and declaring that prior court interpretations were too restrictive;

- Defining "major life activity" to include "operation of a major bodily function" such as the neurological, circulatory, and reproductive systems;

- Eliminating the requirement that an individual asserting a "regarded as" claim show that s/he has an impairment that substantially limits a major life activity; and

- Clarifying that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

Congress made it clear that the EEOC and the courts should focus not on whether the individual has a disability, but instead whether discrimination occurred, whether a reasonable accommodation was provided and whether proposed accommodations would cause “undue hardship” to the employer.

The EEOC recently drafted proposed regulations implementing the amendments, but they have not yet been published for comment. Stay tuned for further updates.

Ledbetter Fair Pay Act

This legislation was signed into law by President Obama in January 2009, and its title comes from a 2007 U.S. Supreme Court decision in which the Court found that an employee’s equal pay lawsuit was untimely. The Court said that the time period for bringing suit begins on the date the pay was agreed upon, not at the date of the most recent paycheck.

The Ledbetter Fair Pay Act changes the timeliness of bringing a lawsuit. Now the statute of limitations for filing an equal-pay lawsuit begins anew with each new discriminatory paycheck. In addition, the Act is *retroactive* to May 28, 2007.

To avoid potential claims, employers should justify and document all compensation and promotion decisions.

HIPAA and COBRA Obligations Under the ARRA

In February 2009, President Obama signed the American Reinvestment and Recovery Act. This legislation included provisions which affect employee benefits and require employers to do the following:

- Temporarily subsidize COBRA premiums for certain employees;
- Offer “second chance” COBRA elections to certain employees who have left employment;
- Update COBRA and HIPAA documents;
- Notify plan participants of their new COBRA rights; and
- File new reports with the government.

At present, the COBRA subsidy will end on December 31, 2009. Stay tuned as the third and fourth quarters unfold to see whether these subsidies will continue into 2010.

Fair Minimum Wage Act of 2007

The third and final minimum wage increase under this Act became effective July 24, 2009, making the minimum wage $7.25 per hour, which is now consistent with Wisconsin's minimum wage rates. Be aware, however, that legislation is pending in Wisconsin to increase the minimum wage.

E-Verify

E-Verify is an Internet based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment eligibility of their newly hired employees.

Effective September 8, 2009, federal contractors and subcontractors are required to use the E-Verify system to verify their employees' eligibility to work in the United States. Employers should review all existing and pending government contracts now to determine whether E-Verify will apply to the contract. It is still unknown whether banking institutions who sell savings bonds need to use E-Verify. Additional guidance is expected to be released on this issue soon.

HIPAA Security Measures

The ARRA also implemented new HIPAA security provisions. A health care provider, a health plan and other entities covered by HIPAA that accesses, maintains, retains, modifies, records, stores, destroys or otherwise holds, uses or discloses unsecured protected health information (PHI) must, following the discovery of a breach of such information, notify each affected individual using prescribed procedures.

On August 19, 2009, the U.S. Department of Health and Human Services (HHS) issued Final Interim Rules requiring health care providers, health plans, and other entities covered by HIPAA to notify individuals when their health information is breached.

The HHS Interim Final Rule is effective 30 days after publication in the Federal Register and includes a 60-day public comment period. The regulations were published in the Federal Register on Monday, August 24, 2009, making the effective date Wednesday, September 23, 2009. Comments on the Interim Final Rule are due on or before October 23, 2009.

If you are a "covered entity," you must take necessary steps to ensure compliance with the Final Interim Rules:

- Develop and document policies implementing the requirements outlined above;
- Train workforce members on the requirements;
- Outline sanctions for failure to comply with the policies and procedures;
- Allow individuals to file complaints about the policies and procedures or the failure to comply with them; and
- Refrain from intimidating employees for exercising rights or from retaliating against them for exercising rights.

NEW WISCONSIN LEGISLATON:

Statewide Smoking Ban

2009 Wisconsin Act 12 imposes a statewide smoking ban to a variety of locations, including a "place of employment." The Act defines a "place of employment" broadly, and includes any indoor place that employees normally frequent during the course of employment. An office, a work area, an employee lounge, a restroom, a conference room, a meeting room, a classroom, a hallway, an employee cafeteria, a common area and a vehicle are all considered a "place of employment" under the Act.

The law also requires "persons in charge" of places where smoking is prohibited to take certain steps to ensure compliance, including but not limited to, posting a sign describing the smoking ban and providing other appropriate information about the smoking ban. In addition a "person in charge" may not provide matches, ashtrays or other equipment for smoking at a location where smoking is prohibited.

The Act imposes forfeitures on persons who fail to take preventative measures. A "person in charge" is defined broadly. The penalty ranges from $50 to $500 – and each day is considered a separate violation. This legislation will take effect July 5, 2010. Employers should ensure their policies are modified to reflect this change.

New Damages/Remedies Available in WFEA Claims

2009 Wisconsin Act 20 amends the Wisconsin Fair Employment Act (WFEA) to allow the recovery of compensatory and punitive damages in state employment discrimination claims. This Act became law on July 1, 2009.

Damages are subject to the following caps:

- $50,000 for employers with 15 and 100 employees (the damages are not applicable to employers with fewer than 15 employees)
- $100,000 for employers with 101-200 employees
- $200,000 for employers with 201-500 employees
- $300,000 for employers with more than 500 employees

The Act also allows a court to impose a "surcharge" equal to 10% of the amount of compensatory and punitive damages on the employer. In addition, Complainants can pursue their claims in circuit court rather than only through the State's administrative process.

Employers must keep in mind that the WFEA provides protections to employers *beyond* those which are provided for under federal law. For example, the WFEA also protects employees from being discriminated against based on marital status, sexual orientation, arrest/conviction record, and for the use of lawful products during non-work time. The Act will not apply retroactively.

PENDING FEDERAL LEGISLATION:

Healthy Families Act

(H.R. 2460) This bill requires employers with 15 or more employees to provide paid sick leave, similar to the Milwaukee Sick Leave Ordinance which was struck down in June. The legislation proposes 1 hour of sick leave for every 30 hours of work, to a maximum of 56 hours. It allows employees to use earned paid sick time on the 60th calendar day following commencement of employment. After the 60th calendar day, the employee may use the paid sick time as the time is earned. The bill allows employees to carryover up to 56 hours from year to year. If the employee is separated and rehired within 12 months after separation, the employer must reinstate the previously earned paid sick time.

Last Action: May 18, 2009 – referred to the House Administration Committee.

Employee Free Choice Act (EFCA)

(H.R. 1409) (S. 560) If passed in its present form, EFCA will change the rules governing the formation of unions, the way first contracts between unions and employers are negotiated, and how employees' rights are enforced, through the following:

- Employees could decide whether to hold a secret ballot vote on union formation after a majority of employees have signed union authorization cards, or to have the union certified based on the cards alone.

- The bill also designates a time line for first contracts to be drawn up between unions and employees – if agreement is not reached within 120 days, an arbitration panel will render a decision that will be binding for 2 years.

- Increase the fines employers must pay if found guilty of violating employees' right to unionize.

Labor rights groups are calling for more action from lawmakers on this bill now that summer has passed. The labor coalition *American Rights at Work* launched a national cable television ad campaign over Labor Day weekend making the case for the EFCA.

What is the practical impact of EFCA? It poses a risk on employers to be on the lookout for card-signing activity. Employers must assess whether the workforce is easy prey for solicitation by union and should consider whether any of the following initiatives should be employed now to avoid being the target of unionization efforts:

- Enhance positive labor relations.
- Educate Company officers, directors and leaders of what is/is not acceptable if your organization is targeted.
- Support and rely on lobbying efforts of trade groups, chambers of commerce, etc.
- Educate employees on “union free” philosophy.
- Educate employees on how EFCA will affect them.
- Identify and train supervisory employees.
- Review your current policies and modify if necessary.

- Conduct a vulnerability audit to assess what a union could capitalize on – are your wages and benefits competitive; are performance reviews conducted fairly; do you have unclean or unsafe work environments.

Last Action: March 10, 2009 – Senate version referred to the Committee on Health, Education, Labor, and Pensions. April 29, 2009 – House version referred to the Subcommittee on Health, Employment, Labor, and Pensions.

Family & Medical Leave Enhancement Act

(H.R. 824) This bill expands the FMLA by lowering the threshold for covered employers from 50 or more employees to 25 or more employees. In addition, the legislation would expand coverage by allowing employees to take time off of work to participate in children's or grandchildren's school or community organization activities (e.g., parent-teacher conferences, scouting or sporting events, medical appointments). Eligible employees would be entitled to 4 hours of leave in any 30-day period, not to exceed 24 hours during any 12-month period.

Last Action: May 4, 2009 – House Oversight and Government Reform Committee referred the bill to the Subcommittee on Federal Workforce, Post Office, and the District of Columbia.

Family – Friendly Workplace Act

(H.R. 933) This bill enables private employers to offer employees an option between compensatory time off and time and a half pay for overtime work. At present, only government employers may offer this option to employees.

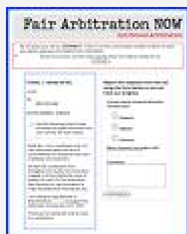
As written, employees could bank up to 240 hours of compensatory time, can withdraw from a comp-time agreement at any time, and can ask for payment (at any time) of the unused compensatory time in the employee's bank.

Last Action: March 23, 2009 – referred to the Subcommittee on Workforce Protections.

Working Families Flexibility Act

(H.R. 1274) This bill provides a mechanism in which employees can modify their work schedules. Employers would be required to meet with each employee to discuss requested modifications within 14 days. Employees would be entitled to a written decision from the employer and if the request is denied, a right to an explanation for the denial. Upon an employee's request, a reconsideration meeting is mandatory and employees are permitted to have a representative of the employee's choosing at all meetings.

Last Action: August 19, 2009 – the House Judiciary referred the bill to the Subcommittee on Courts and Competition Policy.


Fair Arbitration NOW

Arbitration Fairness Act of 2009

(S. 931) (H.R. 1020) These bills declare that pre-dispute arbitration agreements are not valid or enforceable if it requires arbitration of an employment, consumer, franchise, or civil rights dispute. In addition, the validity or enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

Last Action: March 16, 2009 – the House version was referred to the Subcommittee on Commercial and Administrative Law. April 29, 2009 – the Senate version was referred to the Committee on the Judiciary.

FORWARN

(H.R. 3042) (S. 1374) These bills expand the notice requirements under the WARN Act by requiring employers to give employees 90-days advance written notice of a plant closing or mass layoff, instead of the present 60-day notice. In addition, employers would have to notify the Secretary of Labor at least 60 days in advance of a plant closing or mass layoff. Finally, the bill doubles the penalty for employers who fail to provide the requisite notices.

Last Action: June 25, 2009 – the House version was referred to the House Committee on Education and Labor. On the same day, the Senate version was referred to the Committee on Health, Education, Labor and Pensions.

Employee Misclassification Prevention Act

(S. 3648) Senator Kennedy introduced this bill in September 2008 to amend the Fair Labor Standards Act to require employers to keep records of non-employees who perform labor or services for remuneration. In addition, the bill would provide a special penalty for employers who misclassify employees as non-employees, and would give independent contractors the right to seek a status determination from the Secretary of the Treasury.

Last Action: This bill was proposed in a previous session of Congress. Sessions of Congress last two years, and at the end of each session all proposed bills and resolutions that haven't passed are cleared from the books. This bill has not, to date, been reintroduced in the current congressional session.

WAGES Act

(H.R. 2570) This bill amends the Fair Labor Standards Act to establish a base minimum wage for tipped employees of at least:

- $3.75 an hour beginning 90 days after enactment;
- $5.00 an hour beginning July 1, 2011; and
- Beginning on July 1, 2012, and adjusted as necessary thereafter, 70% of the wage in effect under FLSA but in no case less than $5.50 an hour.

Last Action: May 21, 2009 – referred to the House Committee on Education and Labor.

Volunteer Firefighter and EMS Personnel Job Protection Act

(S. 1025) This bill prohibits any employee from being terminated, demoted, or discriminated against in the terms or conditions of employment because the employee is absent or late as a result of serving as a volunteer firefighter or providing volunteer emergency medical services as part of a response to an emergency or major disaster. Employees have a private cause of action for discrimination which violates the Act.

The bill excludes absences for which the employee: (1) is absent for more than 14 days per calendar year; (2) responds to an emergency or major disaster without being officially deployed in accordance with a coordinator national deployment system; or (3) fails to provide written verification within a reasonable period of time.

The bill also allows employers to: (1) reduce the employee's regular pay for time the employee is absent; and (2) requires the employee to provide written verification from the supervising Federal Emergency Management Agency (FEMA), state, or local official that the employee responded in an official capacity at a specified time and date. The employee must make a reasonable effort to notify his or her employer that he or she may be absent or late.

Last Action: May 12, 2009 – referred to the Committee on Health, Education, Labor, and Pensions.

America′s Affordable Health Choices Act

(H.R. 3200) In addition to general health care reform, under this bill, an employer's obligation to extend COBRA health care continuation coverage to former employees and dependents could be expanded dramatically. This bill allow covered beneficiaries to continue COBRA coverage until becoming eligible under a new employer's health care plan or through a federal or state-based health insurance exchange.

The amendment would apply to individuals receiving COBRA on or after the reform legislation is passed, and could permit COBRA beneficiaries to obtain years of additional COBRA coverage from their former employers.

Last Action: July 31, 2009 – House Energy and Commerce Committee ordered the bill amended.

Employment Non-Discrimination Act of 2009

(H.R. 3017) (S. 1584) These bills prohibit employment discrimination based on perceived or actual sexual orientation or gender identity. If passed, the EEOC would be charged with enforcement of the legislation, and the procedures and remedies would be the same as are available for other types of employment discrimination covered by Title VII of the Civil Rights Act. The bill does, however, specifically exempt the U.S. military, veterans' service groups and religious organizations from coverage. The legislation at present also does not require employers offer or provide benefits to domestic partners.

Last Action: June 24, 2009 – House version referred to House Judiciary; August 5, 2009 – Senate version referred to Committee on Health, Education, Labor & Pensions.

PENDING WISCONSIN LEGISLATION:

Veterans Day Leave

(AB 9) (SB 11) This bill requires employers to provide paid leave for veterans on Veterans Day. However, if the employer has a union workforce, then paid leave would be required only if required by the Collective Bargaining Agreement.

Status: SB 11 is pending before the Senate Committee on Labor, Elections and Urban Affairs, hearing held August 18, 2009. AB 9 is pending before the Assembly Committee on Veterans and Military Affairs.

Criminal Penalties for Arrest & Conviction Record Discrimination

(AB 22) Makes it a Class I felony to discriminate against an individual because of an arrest or conviction record. The penalty would not apply if the occupation is regulated or where the circumstances of the arrest/conviction are substantially related to the job. The bill also prohibits discrimination in housing based on an arrest/conviction record that is more than 3 years old.

Status: Pending before the Assembly Committee on Housing.

Employee Electronic Communications

(AB 30) Prohibits an employer from monitoring e-mail messages sent or received by an employee unless the computer is owned by the employer and the employer:

- Provides written notice to the employee of the policy monitoring e-mail usage when the employee is hired and not less than once each year thereafter;
- Provides written notice to the employee of any change in the policy not less than 30 days before the effective date in the policy;
- The Notice must include a statement of the purposes for which messages will be monitored and the frequency with which the monitoring is conducted; and
- Employees must sign an acknowledgement of the Notice.

This bill also prohibits an employer from monitoring e-mails where the employee might have exercised his/her rights to join a union, to bargain collectively and to engage in lawful concerted activities for the purpose of collective bargaining. Employees are assured they have a reasonable expectation of privacy in the content of personal e-mail and the bill prohibits monitoring the content of personal e-mail except to the extent to determine the e-mail is personal or to protect against disclosure of trade secrets or other confidential business information.

Employees who believe a violation has occurred may file a complaint with the DWD, consistent with the WFEA provisions.

Status: Pending before the Assembly Committee on Personal Privacy. Public hearing held April 7, 2009.

Penalties for Employing Illegal Aliens

(AB 53) Under this bill, any company that employs unauthorized aliens in violation of federal law is, for a period of seven years, ineligible to: 1) receive any income or franchise tax credit or property tax exemption; 2) enter into a contract with the state or a local governmental unit for the construction, remodeling, or repair of a public work or building, or for the furnishing of supplies, services, equipment, or material of any kind; and 3) receive any grants or loans from a local governmental unit. Under the bill, any company that employs an unauthorized alien is subject to a $10,000 fine for each unauthorized alien the company employs.

Status: Pending before the Assembly Committee on Workforce Development.

FMLA Procedural Conformity

(AB 231) (SB 196) These bills conform the time limit for filing a complaint under the state family and medical leave law to the time limits for filing a complaint under the federal FMLA.

Specifically, the bills extend the time limit for filing a complaint with DWD alleging that an employer has denied any right provided under the state family and medical leave law, retaliated against the employee for opposing a practice prohibited under that law, or retaliated against the employee for initiating, testifying in, or assisting in a proceeding under that law to two years after the date of the last event constituting the alleged violation of the law or, if the violation was willful, three years after that event.

Status: Pending before the Assembly Committee on Workforce Development.

School Conference and Activities Leave

(AB 116) (SB 86) These bills allow *any* employee of an employer employing at least 50 individuals on a permanent basis in this state to take no more than 16 hours of school conference and activities leave in a 12−month period. School conference and activities leave may be taken to attend school conferences or classroom activities relating to the employee's child that cannot be scheduled during nonworking hours.

In addition, school conference and activities leave may be taken to observe and monitor the day care, preschool, or prekindergarten services or programming received by an employee's child, if that observation and monitoring cannot be scheduled during nonworking hours. An employee is not entitled to receive wages or salary while taking school conference and activities leave, but may substitute other types of paid or unpaid leave provided by the employer, except that an employee may not substitute paid leave for school conference and activities leave for attending a school conference or activity for less than one hour. An employee who intends to take leave to attend a school conference or activity must give the employer advance notice of the conference or activity and must make a reasonable effort to schedule the conference or activity so that it does not unduly disrupt the operations of the employer.

Status: AB 116 is pending before the Senate Committee on Children and Families and Workforce Development. Hearing on AB 116 was held before Assembly Committee on Education on May 19, 2009.

CCAP Access

(AB 340) Under this bill, the director of state courts may only provide case information on CCAP after a court does one of the following: 1) makes a finding that a person is guilty of a criminal charge; 2) makes a finding that a person is liable in a civil matter; 3) orders a person to be evicted; or 4) issues a restraining order or an injunction against a person.

The bill allows free access to CCAP to Wisconsin judges or other court officials, law enforcement personnel, attorneys, and accredited journalists. The bill allows access to CCAP information to any other person who pays a $10 annual fee and registers his or her name and address with the director of state courts. The bill requires the director of state courts to keep a registry and log of each user who pays the annual fee that records the searches each user performs.

Under the bill, if a user searches for a person's name on CCAP and subsequently denies the person employment, housing, or another public accommodation, the user must inform the person that he or she searched for the person's record on CCAP. A user who fails to do so may be fined $1,000. Under the bill, upon the written request of a person whose case information is currently available on CCAP, the director of state courts must remove any information relating to a case that did not result in a finding of criminal guilt or civil liability, an order of eviction, or the issuance of a restraining order against the person.

Status: Pending before the Assembly Criminal Justice Committee.

Employment Discrimination Based on Credit History

(AB 36) (SB 275) These bills prohibit employment discrimination based on credit history. It is employment discrimination because of credit history if an employer, labor organization, employment agency, licensing agency, or other person requesting an applicant, employee, member, licensee, or any other individual, on an application form or otherwise, to authorize that person to procure the individual's credit history.

It is not employment discrimination to request the authorization (1) if the circumstances of an individual's credit history are substantially related to the circumstances of a particular job or licensed activity; or (2) if employment, membership, or licensing depends on the bondability of the individual and the individual may not be bondable due to his or her credit rating.

The bill also specifies that it is not employment discrimination because of credit history to refuse to employ, admit, or license, or to bar or terminate from employment, membership, or licensing, any individual if (1) the circumstances of an individual's credit history are substantially related to the circumstances of the particular job; or (2) if the individual is not bondable when bondability is required by state or federal law, administrative regulation, or established business practice of the employer.

Status: AB 367 is pending before the Assembly Workforce Development Committee. A hearing was held August 27, 2009.

The 2009 Employment Legislative Update has been authored by Attorney Sally Piefer. We welcome any questions regarding the topics covered or on any employment-related issue. Sally can be reached by telephone at (262) 754-1325, or by e-mail at sap@tsglaw.com.

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