

Sally A. Piefer, Esq., The Schroeder Group S.C., Attorneys at Law, sap@tsqlaw.com © The Schroeder Group, S.C. 2008



2008: Year in Review

This year, the courts and legislature have been very active in deciding cases and issuing legislation which affects the Human Resources function in your business. Below are the highlights from 2008. This document should not be construed as legal advice or an opinion on a specific topic. *For further information or to address a specific situation, please contact Sally A. Piefer sap@tsqlaw.com or (262) 754-1325.*

FMLA: New DOL Regulations Released - Employers Must Update Policies & Practices

The DOL just released new regulations to implement the military leave provisions signed into law earlier this year. The military leave provisions provide important new leave rights:

(1) Eligible employees are entitled to up to 12 weeks of leave because of "any qualifying exigency" arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty, or has been notified of an impending call to active duty status, in support of a contingency operation.

(2) An eligible employee who is the spouse, son, daughter, parent or next of kin of a covered service member who is recovering from a serious illness or injury sustained in the line of duty on active duty is entitled to up to 26 weeks of leave in a single year.

The new regulations also revise other requirements of the FMLA, including certification requirements, and require employers to implement new forms.

We are encouraging employers to update their forms, policies and FMLA-processing procedures to ensure FMLA compliance.

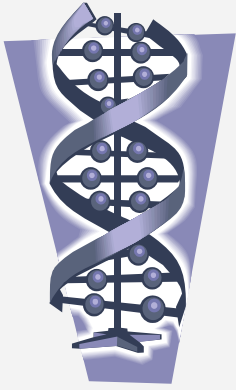
Fines for Violations of the Immigration and Nationality Act Increase

The Immigration and Nationality Act outline the conditions for the temporary and permanent employment of aliens in the United States and includes provisions that address employment eligibility and employment verification.

Beginning March 27, 2008, employers who violate the INA will face increased penalties. The maximum fine for multiple violations will increase from \$11,000 to \$16,000.

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"Beginning on May 21, 2009, genetic information is considered to be protected health information (PHI) subject to the HIPAA privacy rule."

Employers Must Comply with Genetic Information Nondiscrimination Act by November 21, 2009

The federal Genetic Information Nondiscrimination Act (GINA) prohibits employers from discriminating against applicants and employees based on genetic tests or genetic information. GINA also prohibits health insurers from restricting enrollment and premium adjustments for health insurance on the basis of genetic information or genetic services.

Although GINA prohibits the collection of genetic information and its use in the workplace, there are a number of exceptions:

1. Acquisition of information which is inadvertently disclosed or received by the employer (e.g., during "water cooler" conversations);
2. Acquisition of information where health or genetic services are offered by an employer (i.e., "wellness" programs),
3. Acquisition of information which is "commercially and publicly available" (e.g., obituaries of family members in newspapers, magazines, periodicals and books).
4. Acquisition of information which an employer receives pursuant to an individual's prior, knowing, voluntary and written authorization; and
5. Acquisition of information where it is received in compliance for medical certifications under the federal Family and Medical Leave Act (FMLA) or similar state laws.

Beginning on **May 21, 2009**, genetic information is considered to be protected health information (PHI) subject to the HIPAA privacy rule. Employers that violate the HIPAA privacy rule can be fined \$100 for each violation (and up to \$25,000 for all identical violations in a calendar year).

Effective November 21, 2009, Title II of GINA applies to all employers and prohibits:

1. Discrimination on the basis of genetic information with respect to hiring, termination, compensation, promotions and assignments;
2. Requiring genetic testing and from purchasing or collecting genetic information, except in several limited exceptions;
3. Disclosure of genetic information, except: (a) upon the employee's request, (b) to an occupational or other health researcher, (c) pursuant to court order, (d) to a government official investigating compliance with GINA, (e) in connection with the employee's compliance with the FMLA or state family and medical leave laws, or (f) to a public health agency; and
4. Genetic information received by the employer must be maintained confidentially and disclosed to the employee only.

Employers who violate the law are subject to lawsuits. Regulations will be developed and issued by the EEOC by May 21, 2009.

Federal Contractors: Use E-Verify to Ensure Employees are Authorized to Work in the U.S.

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

As of June 6, 2008, federal contractors must use the electronic system for checking the employment eligibility of new hires as well as existing personnel who are assigned to perform work on future contracts. Several states already have laws that address alien employment, some of which mandate the use of the E-Verify employment eligibility verification program.

E-Verify is voluntary for employers who are not federal contractors. You can register for E-Verify by visiting the E-Verify Web site. www.uscis.gov

Federal Contractors: Electronic Application Systems Subject to Review by OFCCP

The Office of Federal Contract Compliance Programs announced that effective July 24, 2008, **all** federal contractor compliance evaluations will include a review of the employer's electronic application systems to ensure that contractors provide equal opportunity to applicants with disabilities, including veterans with disabilities.

Federal contractors must ensure that electronic application systems are accessible to applicants with disabilities -- even if an applicant can apply without using the electronic system. Federal contractors must also provide applicants with disabilities reasonable accommodations throughout the hiring process, unless it creates undue hardship.

We recommend that federal contractors post information on requesting accommodations at the beginning of the electronic application process.

Federal Minimum Wage Increase

On July 24, 2008, the federal minimum wage rose from \$5.85 to \$6.55 per hour. Many states also have minimum wage laws. If you are covered by both the federal and state minimum wage law, you must apply whichever law requires you to pay the employee **more**. If you are not covered by FLSA, then only your state's minimum wage applies -- even if it's lower than the federal rate.

The current minimum wage in Wisconsin is \$6.50 per hour.





"Under the law, a retaliation claim must be filed with the Occupational Health and Safety Administration ("OSHA") within 180 days of the employee first becoming aware of the retaliatory action."

Federal Whistleblower Protection Law to Affect Manufacturing & Retail Industries

Congress enacted a new whistleblower law which protects public and private sector employees in the manufacturing and retail industries who disclose information to an employer, a regulatory agency, or a State Attorney General of a reasonably perceived violation of the Consumer Product Safety Commission Act (CPSCA) or any act enforced by the CPSCA. The law also protects an employee's good faith refusal to violate the CPSCA.

Under the law, a retaliation claim must be filed with the Occupational Health and Safety Administration ("OSHA") within 180 days of the employee first becoming aware of the retaliatory action. After OSHA investigates, either party can request a hearing and the employee may have a right to file suit in federal court. A prevailing employee is entitled to reinstatement, back pay, compensatory damages, and litigation costs including reasonable attorney fees and expert witness fees.

Practical FMLA Advice: Failure to Define "Year" is Costly

Employers covered by the federal FMLA are required to provide eligible employees with 12 work weeks of leave during any 12-month period. However, the 12-month period was not defined by Congress. The Department of Labor (DOL) regulations provide four alternatives from which employers could choose how to calculate the 12-month period:

1. A calendar year;
2. Any fixed 12-month "leave year," such as a fiscal year, or on the employee's anniversary date;
3. The 12-month period measured forward from the date the employee's first FMLA leave begins; or
4. A "rolling" 12-month period measured backward from the date

an employee uses any FMLA.

DOL regulations require the employer to choose which method it will use, and to inform employees of the applicable method.

One employer discovered the hard way what can happen if the "year" is not identified and communicated. The FMLA policy of Detroit's Marygrove College provided that employees had the right to take up to 12 weeks of FMLA leave "per year." The College did not define whether "per year" referred to its fiscal year or its calendar year.

A Federal Court found that the College violated the FMLA by firing an employee for a medical absence

because its employee handbook failed to define the term "leave year." The court found that the college's failure to make an "open" announcement of its method of accounting for leave entitled the employee to opt for a calendar year calculation that showed she was fired before her annual maximum FMLA leave was exhausted.

It is imperative that employers carefully review their FMLA policies to ensure compliance with the requirements of the FMLA.



Americans With Disabilities Act: Amendments to Change Employment Decisions

The ADA Amendments Act (ADA-AA) of 2008 was signed into law on September 25, 2008. **The law's effective date is January 1, 2009.**

The ADA-AA significantly changes the current law by:

- explicitly removing the Supreme Court's requirement that mitigating measures be considered when evaluating whether an individual has a disability within the meaning of the ADA;
- including language to clarify that the courts' previous interpretations of the term "substantially limits" [in the phrase "substantially limits a major life activity"] 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;
- clarifying that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- directing the courts to interpret the ADA as a remedial statute, i.e., liberally; and
- conforming the definition of "disability" under the federal Rehabilitation Act, which covers federal, state, and local government employees, to the ADA-AA.

Many employer organizations have expressed concern that it will be easier for employees or applicants to bring and succeed in disability discrimination claims.

Employers are encouraged to conduct training with personnel who will be involved in employment decisions in this area and should consider designating a single human resource representative to make decisions in this area.

Medical Coverage: Extended for Dependent College Students

For any employer benefit plan year beginning **after October 9, 2009**, employer group health plans must ensure that dependent college students who take medically necessary leaves of absence do not lose their health care coverage. The new provisions, known as *Michelle's Law*, require group health plans to continue coverage for one year after the first day of a leave of absence or until the date on which coverage would otherwise terminate under the plan terms. Employers will need to update their COBRA policies prior to the effective date to ensure compliance with Michelle's Law.

Employers Must Comply with Sick Leave Ordinance

On November 4, 2008, voters in the City of Milwaukee approved the mandatory paid sick leave Referendum. The Metropolitan Milwaukee Association of Commerce (MMAC) has challenged the Ordinance. ***However, at the present time employers who have employees working within the City of Milwaukee have until February 1, 2009, to comply.***

The Ordinance mandates the following sick leave provisions:

- Employers with employees working in the City must provide at least 1 hour of paid sick leave for every 30 hours worked by any employee, to a maximum of 72 hours of sick leave in a calendar year. The leave must accrue in at least 1-hour increments.
- Paid sick leave must carry over from year to year. The only exception is that employees of "small businesses" (less than 10 employees) will not accrue more than 40 hours of sick leave in a calendar year, unless the employer sets a higher limit.
- Sick leave begins to accrue when employment begins, and employees can use the leave beginning on the 90th calendar day following commencement of employment.
- Employers who have a paid leave policy (such as PTO) who make available paid leave time sufficient to meet the accrual requirements are not required to provide additional paid sick leave.
- Employees will be permitted to use the paid sick leave for a variety of reasons, including, but not limited to the following:
 - The employee's mental or physical illness, injury or health condition or need for diagnosis or preventative care;
 - Care for a family member with a mental or physical illness, injury or health condition who needs medical diagnosis, care or treatment of such conditions or who needs preventative medical care;
 - Absences due to domestic abuse, sexual assault or stalking, provided the individual is seeking medical attention or obtains services from a victim services organization, is seeking psychological or other counseling, is seeking relocation due to domestic or sexual violence or stalking, or is taking legal action (including preparation for participation in a criminal or civil legal proceeding).
- Employers may not discriminate or retaliate against employees for using the leave provided. This would also prohibit an employer from treating the use of sick leave as a negative factor in hiring, evaluation, promotion or bonuses.
- Employers must post a notice of the amount of paid leave available to employees.
- Employers must retain records documenting the hours worked by employees and documenting the paid sick leave taken by employees for 5 years.
- Employers may not require disclosure of information relating to domestic abuse, sexual assault or stalking or the details of an employee's medical condition as a condition of providing paid sick leave. If the employer possesses such information, it must be maintained as confidential.

Next Steps?

Employers should determine whether the Ordinance will apply to its business, and if so, determine whether its current policies comply with the Ordinance. You should ensure that the method for accrual, the reasons for leave and the carryover provisions are outlined in your policies.



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USERRA Poster Updated

On **October 27, 2008**, the Department of Labor updated its "*Notice of Your Rights Under USERRA*" poster that employers can use to notify employees of their rights and benefits under the federal Uniformed Services Employment and Reemployment Rights Act of 1994. USERRA prohibits employers from discriminating or retaliating against employees and applicants based on military status and requires that employers reemploy employees who return from service in the uniformed services.

Employers are required to display a notice of the rights, benefits, and obligations of employees and employers under USERRA in areas that are customarily used for placing notices to employees. While you are not required to update your poster if you are posting the December 19, 2005 version, older versions should be replaced with the 2008 version.

On The Horizon:

1. House and Senate Favor Mental Health Parity Bills

On September 23, 2008, the House and Senate approved legislation that would require health plans offering mental health coverage to provide the same benefits for mental illness as they do for other medical conditions.

The bills would amend the Employee Retirement Income Security Act (ERISA) and the Public Health Service Act (PHSA) to prohibit employer group health plans from adopting mental health treatment limitations, financial requirements, or out-of-network coverage limitations unless comparable limitations and requirements are adopted for medical and surgical benefits. Employers with fewer than 50 employees would be exempt from the parity requirements.

We will continue to keep you posted on how this bill progresses.

2. Proposal to Expand FMLA Coverage to Small Businesses

On September 29, 2008, Rep. Carol Maloney (D-N.Y.) introduced the ***Family and Medical Leave Enhancement Act*** (H.R. 7233), which proposes extending some of the protections of the FMLA to employers who have 25 or more employees. At present, federal and Wisconsin FMLA extends to companies with 50 or more employees.

This proposed legislation would provide up to 24 hours of unpaid leave during any 12-month period for parents and grandparents to go to parent-teacher

conferences or take their children, grandchildren, or other family members to the doctor for regular medical or dental appointments. Eligible employees would be allowed up to 4 hours of leave during any 30-day period. The bill has been referred to the House Education and Labor Committee, the House Oversight and Government Reform Committee, and the House Administration Committee.

In April 2008, Representative Maloney also co-sponsored the ***Family Leave Insurance Act*** (H.R. 5873), which would provide

workers with 12 weeks of paid family and medical leave to care for themselves or close relatives. This bill proposes establishing a trust, funded by contributions from employers and employees, to pay workers a percentage of their salary for up to 12 weeks while they care for a new child or sick family member, recover from an illness, or deal with an emergency caused by a military deployment.

We will continue to monitor the progress of these pieces of legislation.

**The Schroeder Group, S.C.,
Attorneys at Law**
Crossroads Corporate Center
20800 Swenson Drive
Suite 475
Waukesha, WI 53186

Main Phone
(262) 798-8220
(800) 372-3020

Fax
(262) 798-8232

Direct Phone
(262) 754-1325

E-mail
sap@tsglaw.com

www.tsglaw.com

About Our Firm

The Schroeder Group, S.C., Attorneys at Law provides comprehensive services covering all aspects of employment, employee benefits and labor relations law to closely-held businesses and companies. Through aggressive representation and sound advice, we help our clients achieve their business objectives. We are regularly in direct and ongoing communication with labor relations, human resources and employee benefits managers, as well as business owners and senior executives, and are also sensitive to their business, cost management and relationship needs. Our priority is counseling and problem avoidance.



Sally A. Piefer

Entrepreneurs Providing Legal Advice to Entrepreneurs SM

Individuals should consult with legal counsel before taking any action based on the above articles to ensure appropriate applicability to a given situation.

**THE SCHROEDER GROUP S.C.,
ATTORNEYS AT LAW**
20800 SWENSON DRIVE
SUITE 475
WAUKESHA, WI 53186