



**Arizona Association
For Home Care**

Annual Education Conference
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Employment Law Update





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What laws apply to my
business or organization?





What laws apply to my staff?

Learning Objectives

- What federal laws and regulations have changed
- What new federal laws have been enacted
- What future federal legislation may be
- Recognizing independent contractor issues
- Recognizing AZ and federal wage and hour issues
- Recognizing reference check issues






Changes to Federal Employment Laws

FMLA Amendments
New FMLA Regulations
ADA Amendments

NEWS FLASH: USDOL gets \$600M and is hiring hundreds


Family Medical Leave Act Amended 2008


- Entitlement to leave - provides eligible employees with up to 12 weeks of job protected, generally unpaid, time off for certain family and medical reasons
- Provides up to 26 weeks of job protected unpaid leave, during a single 12 month period, for certain family and medical reasons related to Covered Servicemembers (Military Leave)
- Maintenance of health benefits coverage - in the same manner as before taking leave
- Job restoration - upon return from leave
- Protection from adverse action for taking leave



Employees eligible for FMLA leave


- Must work for a covered employer
- Employer must employ at least 50 employees within 75 miles (*surface road miles*) of employee's work site
- Employee must have worked for employer for at least 12 months - the 12 months need not be consecutive (*the period prior to breaks in service of 7 years or more need not be counted - except for military service*)
- Employee must have worked at least 1250 hours for the employer over the 12 months preceding the leave (*USERRA requires that returning National Guard and Reserve members will be credited with hours of service for military service when computing 1250 hours*)





New Qualifying reasons for FMLA leave


- Because of any “qualifying exigency” arising out of the fact that the employee’s spouse, son, daughter or parent is a covered military member on active duty or has been notified of an impending call to active duty in the Armed Forces in support of a “contingency operation”
- When an employee is needed to care for a Covered Servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or “next of kin” of the service member
 - Can include both physical and psychological care, such remaining with a Covered Servicemember who is an inpatient
 - Includes situations where employee needs time to fill in for regular care givers, such as other family members or professionals
 - Recognizes situations where the family member is a Covered Servicemember whose condition is intermittent, as well as those situations where the need for care is intermittent



FMLA Leave Entitlement - Military

- Any qualifying exigency arising from an impending call or order to active duty – 12 work weeks during any 12 month period
- Covered Servicemember Family Leave – eligible employee is entitled to a total of **26 weeks** during a single 12 month period
- Spouses employed by the same employer are limited to a combined total of 26 workweeks of leave to care for a spouse, son, daughter, or parent who is a Covered Servicemember with a serious injury or illness
- An eligible employee is entitled to a combined total of military and non-military related leave of 26 workweeks of leave for any FMLA qualifying reason during a single 12 month period

2009 FMLA Regulations



- Effective January 16, 2009
- More employer-friendly though complicated
- Calling in sick not enough for employee to get FMLA
- Must include Fitness for Duty requirement in initial notice to require FFD upon return to work
- Technical violations interfere with employee rights so need training

Who Is a Qualified Individual Protected by ADA?

A *disabled* employee or job applicant who possesses the requisite education, training, licenses or certificates (if any are required) and skills to perform the *essential functions* of the job *with* or *without* reasonable accommodation.

Major Life Activities ADA Amendments Act

- Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working
- Operation of major bodily function: immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, reproductive
- Broad coverage – overrules U.S. Supreme Court precedent

Disability Defined (1) ADA Amendments Act

- Physical or mental impairment
- Substantially limits – await EEOC definition
- One or more major life activities (one is enough)
- Impairment can be episodic or in remission
- Mitigating measures ignored
 - Regular eyeglasses/contact lenses exception

Disability Defined (2) ADA Amendments Act

- Record of impairment (e.g. history of cancer)
- Regarded as having impairment
 - Usually behavioral problem
 - Need not limit major life activity
 - Does not apply to transitory (less than 6 months) and minor impairment
 - Easier to prove – careful of what you say!
 - No requirement to provide accommodation

Interactive Process

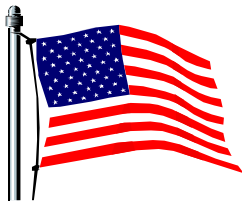
- When the employer knows of a condition or can see that the employee's condition interferes with performing some job functions, the employer must engage in the "interactive process."
- Employee can commence this process by asking for help, with or without using the word "accommodation."

The Quandary

- Employers trying to avoid asking impermissible questions about disabilities or afraid of being sued for treating someone as if disabled may be reluctant to ask questions at all.
- Employees reluctant to be labeled as disabled or to draw attention to themselves may not speak up.

Solution

- The interactive process can be workable:
 - Ask the employee what is the problem with performing the work (not the diagnosis),
 - what it is s/he cannot do AND
 - what s/he thinks would help.
- HOW MAY I HELP YOU?



New Federal Employment Laws

GINA
Lily Ledbetter Fair Pay Act
ARRA



Genetic Information Nondiscrimination Act

- Effective November 2009
- Genetic information includes medical history
- Similar protection in Arizona Civil Rights Act

Lily Ledbetter Fair Pay Act

- First law signed by President Obama
- Overrules US Supreme Court case
- Statute of limitations
- Two-year damage limit
- Need to review pay practices
- Recordkeeping concerns



American Recovery and Reinvestment Act


- Second law signed by President Obama
- COBRA changes – 65% subsidy for 9 months
- Tax breaks for employers and employees
- Unemployment insurance changes – 72 weeks



Anticipated Federal Employment Laws:



- ENDA
- EFCA
- EMPA
- Mandated Sick Leave



Recognizing independent contractor issues

Avoid Misclassification

- Taxing authorities: all workers are employees
- Change to IRS rules
- Right to control
- Economic realities
- Protect business with written contract
- Burden is on business to show 1099 status

Recognizing Wage/Hour Issues



Proper Payment of Employees

- Registered Nurses are professional exempts IF
 - Paid a salary or fee of at least \$455 per week
 - OK to pay on fee per visit per 2000 6th Cir. Case
 - Fee payable notwithstanding time spent with client
 - Not paid by the hour
- LPNs and CNAs entitled to overtime
- Arizona minimum wage issues
 - Under 24 hour and 24+ hour shifts

Companionship Services


Exempt from Overtime

- Section 13(a)(15) and USDOL regs
- *Long Island Care at Home v. Coke*
U.S. Supreme Court (2007)
- Exceptions
 - Trained personnel
 - Over 20% general household work

Companionship Care

Definition

- Fellowship, care and protection
- For an aged or infirm person who cannot care for his/her own needs
- Not for a young child or baby unless they are physically or mentally infirm
- Not performing these services generally for other persons
- Performing household work related to the care of the aged/infirm person including meal preparation, bed making and washing clothes
- May perform general household work BUT not over 20 % of the hours worked in the workweek
- Not performing work which requires the training of a registered or practical nurse
- The companion can go to more than one household throughout the workweek.



Recognizing
Reference
Check
Issues

Background Checks

- What do you want to know?
- Why do you want to know it?
- What will you do with the information once you have it?
- Is it required by your payor?

Background Checks

- EEO issues
 - Criminal checks – job related
 - Credit checks – job related
 - Driving record – job related
- FCRA issues
 - Do it yourself?
 - Are you a CRA?
- Arizona fingerprint clearance card

Resources

- www.azlaborlaw.com
- www.dol.gov
- www.eeoc.gov
- www.ftc.gov
- www.ica.state.az.us
- **Arizona Employment Law Handbook**
–State Bar of Arizona at www.azbar.org



Questions?



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