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DOL Issues Long-Anticipated Report on FMLA

After reviewing more than 15,000 public comments regarding the effectiveness of the Family and Medical Leave Act (FMLA), the U.S. Department of Labor (DOL) just issued its Report detailing its findings, and apparently employees' use of intermittent, unscheduled leave for chronic health conditions under the FMLA has become the biggest sticking point for employers. The Report includes no proposals for regulatory changes. Rather, the DOL hopes it will stimulate a comprehensive discussion of how key FMLA regulatory provisions and their interpretations have played out in the workplace.

Key findings include:

- The use of unscheduled, intermittent FMLA leave has created friction between employees and employers, especially in time-sensitive industries
- The use of unscheduled, intermittent FMLA leave appears to have caused a backlash among employers intent on reducing absenteeism
- Employees, employers, and health care providers agree the FMLA medical certification process needs improvement
- Employees are concerned about their privacy and the time it can take to obtain certification; employers receive little meaningful guidance from the certifications; health care providers cannot predict how often a recurring problem will return
- More work is needed to educate employers and employees about FMLA

We will report on any relevant developments in a future issue of this newsletter.

Compliance Tips for New EEO-1 Report

The EEO-1 Report, the principal reporting form by which employers provide the federal government with a count of their workforces by ethnicity, race, and gender divided into job categories, has changed, and covered employers must use the revised format in 2007. The Equal Employment Opportunity Commission (EEOC) requires the EEO-1 Report annually from private employers with 100(+) employees and federal contractors with federal government contracts of \$50,000(+) and 50(+) employees.

While employers must use the new reporting format for the report due this September, employers need not resurvey their workforce. Consequently, employers will need to use the new EEO-1 Form in 2007, but will not need to resurvey and report on new race/ethnic categories for their workforce until they begin to prepare for the September 2008 EEO-1.

The new form:

- Adds a new category for "Two or more races"
- Divides "Asian or Pacific Islander" category into two separate categories: "Asian" and "Native Hawaiian or other Pacific Islander"
- Renames the "Hispanic" category as "Hispanic or Latino"
- Splits the job category of "officials and managers" into two categories of "Executive/Senior Level Officials and Managers" and "First/Mid-Level Officials and Managers"
- Moves "business and financial occupations" from the Officials and Managers category to the Professionals category

The EEOC prefers employees' self-identification of race and ethnic categories, as opposed to employers' visual identification, and has this self-identification statement employers may use:

"[Company] is subject to certain governmental record keeping and reporting requirements for the administration of civil rights laws and regulations. In order to comply with these laws, the employer invites employees to voluntarily self-identify their race and ethnicity. Submission of this information is voluntary. Refusal to provide it will not subject you to any adverse treatment. The information will be kept confidential and will be used only in accordance with the provisions of applicable laws, executive orders and regulations, including those that require the information to be summarized and reported to the federal government for civil rights enforcement. When reported, data will not identify any specific individual."

Although the EEOC has changed the way employers and government contractors must complete the EEO-1, the Office of Federal Contract Compliance Programs (OFCCP) has not changed its rules regarding employee classification for affirmative action purposes. Therefore, contractors need not change the way they gather data for affirmative action purposes. This creates a dual system for soliciting self-identification and counting employees – one for EEO-1 compliance and one for affirmative action reporting and compliance.

Minimum Wage Increase & Required Poster

Effective July 24, 2007, the federal minimum wage for non-exempt employees covered under the Fair Labor Standards Act (FLSA) will increase from \$5.15 per hour to \$5.85, the first increase since 1997. On July 24, 2008, the rate will increase to \$6.55 per hour, followed by an increase to \$7.25 on July 24, 2009.

Every covered employer must post a notice explaining the Act in a conspicuous place in each establishment that permits employees to readily read it. A revised Federal Minimum Wage Poster is available at no charge at: <http://www.dol.gov/esa/regs/compliance/posters/flsa.htm>.

Note that because the FLSA does not supersede any state law more favorable to employees, if state minimum wage is higher than the federal minimum, employers must pay the higher rate. The minimum wages for states of particular interest to Moreton & Company clients are:

- Arizona – \$6.75 to be adjusted annually based on a cost of living index
- Colorado – \$6.85 with an annual adjustment for inflation
- Idaho – adopts the federal minimum wage
- Utah – adopts the federal minimum wage

US Senate's Immigration Bill Defeated

The U.S. Senate recently decided not to continue debate on the Comprehensive Immigration Reform Act, S. 1639. This was the second failed attempt in less than a month to get the necessary votes to move to a final vote. The bill required all employers to verify employees' legal work eligibility using an electronic employment verification system. However, the system's fairness and effectiveness failed to satisfy employers, the undocumented population and conservatives.

As a comprehensive immigration reform bill is not expected to be reintroduced until after 2008's presidential election, the bill's Senate defeat will mean continued status quo for employers. Accordingly, the current process for obtaining immigrant workers will remain unchanged.

This publication was written by Laura Wilkins, V.P., In-House Employment Counsel, and will be provided on a monthly basis. For additional questions, please contact Laura at 801-715-7052 or lwilkins@moreton.com.

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