

## Spring 2009 Employment Law Update

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Puget Sound Locations  
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### FMLA Update: Final Regulations

- First Significant Revisions in 15 Years
- Effective January 16, 2009
  - Regulations Implementing New Military Family Leave Entitlements
  - Non-Military Revisions to Existing FMLA Regulations

## **Qualifying Exigency Leave**

- 12 Weeks
- Does not apply to active members of the regular armed services
- What is a *qualifying exigency*?

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## ***Qualifying Exigency Defined***

- "Specific and Exclusive" list:
  - Short-Notice Deployment
  - Military Events/Activities
  - Urgent Childcare/School Activities
  - Financial or Legal Tasks
  - Counseling
  - Rest and Recuperation
  - Post-Deployment Military Events
  - Any Other Purposes Arising Out of the Call to Duty  
(*as agreed upon by employer and employee*)

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## Military Caregiver Leave

- 26 Weeks
- Covered service member: Serious illness or injury incurred in the line of duty on active duty
- Regular Armed Forces, National Guard, Reserves (*and certain individuals on temporary disability retired list*)

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## Military Caregiver Leave

- "Next of Kin" Defined
- Separate FMLA Year
  - 26 weeks for **any** FMLA qualifying reason
  - Example
- If Military Caregiver Leave also qualifies as serious health condition leave, employer **must** designate as Military Caregiver Leave

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## Additional FMLA Revisions

- Eligibility Clarifications
  - "12 Months"
  - "Worksite" for Jointly-Employed Workers
- Serious Health Condition
  - "Incapacity" = three *full* calendar days
  - "Continuing Treatment"
    - Two treatments within 30 days of first day of incapacity
    - First visit to HCP must occur within 7 days of the first day of incapacity
  - "Periodic Visits" for Chronic Condition = at least two visits to HCP per year

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## Additional FMLA Revisions

- Employer Notice Obligations
  - 5 business days
  - General Notice, Eligibility Notice, Rights and Responsibilities Notice, Designation Notice
  - **Immediate Changes Required!**
- Employee Notice Obligations
  - "As soon as practicable"
    - Usual and Customary Call In/Notice Procedures

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## Additional FMLA Revisions

- Medical Certification
  - DOL has introduced two separate forms for Serious Health Conditions
  - Incomplete/Insufficient?
    - Must advise employee in writing.
    - Employee has 7 calendar days to cure.
  - Annual certifications: Conditions lasting longer than one year
  - **Clarification and Authentication:** Employers may contact HCP *directly*
    - Who?

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## Additional FMLA Revisions

- Fitness for Duty Certification
  - Only if provide notice of FDC requirement and list of essential job functions with Designation Notice
  - Employees on Intermittent Leave: Reasonable Safety Concerns
- Substitution of Paid Leave
  - All forms of paid leave treated the same
  - Must comply with employer's paid leave policies

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## Additional FMLA Revisions

- Light Duty
  - Voluntary light duty does not count against FMLA entitlement
  - Right to reinstatement held in abeyance until end of FMLA leave year
- Perfect Attendance Awards/Production Bonuses
  - Where payment is dependent upon achieving a particular goal (attendance, hours, products sold), employer may disqualify employee who does not meet goal due to use of FMLA leave
- Waiver
  - Past FMLA claims – permissible
  - Prospective FMLA rights - prohibited

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## Are your forms up to date?

- Revised Forms Available on DOL website at <http://www.dol.gov/esa/whd/fmla/>.

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## Lilly Ledbetter Fair Pay Act of 2009

- Overturns *Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 550 U.S. 618 (2007)
- Amends Title VII, ADEA, ADA, and Rehabilitation Act
  - ***Each allegedly discriminatory paycheck triggers a new 180/300 day filing period***

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## Lilly Ledbetter Fair Pay Act of 2009

- Retroactive to May 28, 2007
- Two-Year Cap on Back Pay Remains Intact
- May Apply to Retirees
  - *AT&T v. Hulteen*
- May Cover Promotions

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## Lilly Ledbetter Fair Pay Act of 2009

- **Next Steps for Employers?**
  - Don't Panic
  - Resist Temptation to Jump Into Rushed Statistical Analysis

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## Federal Labor Law Update

- **Employee Free Choice Act (EFCA)**
  - Key provisions
  - Status?
- **Other "Reforms" Waiting in the Wings**
  - RESPECT Act
- **Union Growth in 2008**

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## Federal Labor Law Update

- Change is coming
- It's never too early for preventive action
- What should you be doing now?

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## Proposed Federal Legislation

- Paycheck Fairness Act of 2009
- Federal Employees Paid Parental Leave Act of 2009
- Family and Medical Leave Enhancement Act
- Family-Friendly Workplace Act

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## Paycheck Fairness Act of 2009

- Amends Equal Pay Act
- Limits "other factor" defense to "bona fide factors" such as education, training, or experience
- Limits application of "bona fide factor" defense
- Other provisions:
  - Prohibits retaliation for "inquiring about, discussing, or disclosing" wages in connection with complaint, charge, or sex discrimination investigation
  - Authorizes compensatory and punitive damages in civil actions
  - Authorizes class actions to enforce Act
- Passed by House, currently pending in Senate

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## Federal Employees Paid Parental Leave Act of 2009

- Four weeks of paid leave for birth or adoption of child
- Would allow substitution of accrued paid leave

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## **Family and Medical Leave Enhancement Act**

- Amends FMLA to allow
  - "Family Wellness" Leave
  - "Parental Involvement" Leave
- Expands Scope of FMLA: Employers with 25 or More Workers (*as opposed to 50*)

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## **Family-Friendly Workplace Act**

- Amends Fair Labor Standards Act
- Authorizes private employers to provide "comp time" at a rate of one and one-half hours per hour of employment, in lieu of cash overtime payment
  - Must be authorized by CBA or written agreement between employer and employee
  - Cannot be condition of employment

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## What's Going on in Washington State?

- Minimum Wage Increased from \$8.07 to \$8.55 (Effective January 1, 2009)
- Governor Gregoire Signed Bills on Prevailing Wages and Worker Licenses
- Governor Gregoire Signed Bill Creating Military Service Exemption for Employers Paying Unemployment Benefits

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## *Independent Contractor Defined*

- **Substitute S.B. 5904** defines an "Independent Contractor" for purposes of prevailing wage requirements applicable to public projects
- A worker is considered an "Independent Contractor" exempt from prevailing wage requirements if:
  - Performs services outside "usual course of business" of contractor for whom he/she works
  - Customarily engaged in independently established trade
  - Responsible for filing paperwork with IRS
  - Registered with the Department of Revenue
  - Not directed or controlled in performance of services
  - Maintains separate books and records from contractor
  - Possesses contractor licenses and registrations for work performed

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## Correct Wages on Public Works Projects

- **S.B. 5903** ensures that Washington State government entities pay the correct minimum wage under prevailing wage requirements applicable to public works projects

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## Licenses and Certifications

- **Substitute H.B. 1055** mandates that construction workers who do electrical, plumbing, and elevator work must have *in their possession* photo identification and their licenses or certifications while on the job.

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## Military Service Exemption for Unemployment Benefits

- **Substitute S.B. 5009:** Creates a *discretionary* military service exemption for unemployment benefits charged to an employer's experience rating account
  - Commissioner has discretion to grant relief to an employer where employee was hired to replace member of military reserves or National Guard, and subsequently laid off when the military employee returned

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## Immigration Law Update

- **New Form I-9 & Revised List of Acceptable Documents**
- **E-Verify Rule Effective Date is Postponed Until June 30, 2009**
- **DOL will Extend Employer Transition Period for H-2A Recruitment Compliance**

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## New Form I-9 & Revised List of Acceptable Documents

- New I-9 mandatory as of April 3, 2009.
  - Revision Date- lower right hand corner (Rev. 2/02/09)
  - <http://www.uscis.gov/files/form/i-9.pdf>
- Not required to re-verify unless it is your policy, or an employee's authorization expires.
- If authorization expires: re-verify with the new Form I-9 no later than the date of expiration.\*

\*Consideration of future expiration date when determining if alien is qualified for position may constitute employment discrimination.

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## Revised List of Acceptable I-9 Documents

- Only **unexpired** documents
- *Eliminated List A:* Temporary Resident Cards & outdated Employment Authorization Cards (Forms I-688, I-688A, and I-688B)
- *Added List A:* foreign passports with machine-readable visas
- *Added List A:* foreign passports from Micronesia & Marshall Islands when accompanied with the applicable Form I-94 or I-94A.

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## E-Verify Rule Effective Date is Postponed Until June 30, 2009

- Internet-based system used to electronically verify a worker's employment eligibility.
- Rule impacts federal contractors awarded a new contract after June 30, 2009 that includes the Federal Acquisition Regulation E-Verify clause.
  - Contract with performance over 120 days at value over \$100k
  - Subcontract at value over \$3k
- Any employer may enroll now and use E-Verify to check new hires.
- Employers may NOT use E-Verify to check current employees.
  - Federal contractors may NOT use E-Verify on to verify current employees until rule is effective & awarded a contract with the E-Verify clause.

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## DOL will Extend Employer Transition Period for H-2A Recruitment Compliance

- New H-2A recruitment regulations will affect employers who need H-2A workers starting after January 1, 2010.
- New rule requires employers to begin recruiting U.S. workers 75 days prior to the date the employer needs the workers.
- Presently employer needs to recruit U.S. workers for 45 days, so that time period stays in effect for workers starting on or before January 1, 2010.

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## **Significant Case Law Developments**

- U.S. Supreme Court Expands Scope of Title VII Anti-Retaliation Provision
- U.S. Supreme Court Upholds Mandatory Arbitration of Discrimination Claims
- Washington Supreme Court Holds New Definition of Disability Applies Retroactively
- Washington Supreme Court Denies Unemployment Benefits to Certain RIF Volunteers

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## **U.S. Supreme Court Expands Scope of Title VII Anti-Retaliation Provision**

- *Crawford v. Metropolitan Gov't of Nashville & Davidson County*, 129 S. Ct. 846 (Jan. 26, 2009)
  - Plaintiff did not initiate investigation or make formal complaint of harassment
  - Participated in internal investigation based on co-worker's complaint
  - In response to employer's questions, told employer about inappropriate conduct

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## ***Crawford cont . . .***

- Legally protected "opposition" ***includes taking no action at all to advance a position beyond mere disclosure***
  
- Full impact of the Court's opinion?
  - *Riscili v. Gibson Guitar Corp.*, 2009 WL 792304 (S.D.N.Y. March 26, 2009)

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## **Lessons from *Crawford*?**

- **Be careful!**
  - Employers should *exercise caution* when terminating or disciplining employees who have recently made comments (even informal comments) about perceived discrimination or harassment.
  - Employers should always have well documented nondiscriminatory reasons for employment decisions.

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## **U.S. Supreme Court Upholds Mandatory Arbitration of Discrimination Claims**

- *14 Penn Plaza v. Pyett*, 129 S. Ct. 1456 (2009)
  - CBA provided that claims under Title VII, ADA, ADEA were subject to binding arbitration
  - Arbitration of statutory discrimination claims was a "condition of employment" subject to mandatory bargaining under the NLRA

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### ***14 Penn Plaza cont . . .***

- "[T]he decision to fashion a CBA to require arbitration of employment-discrimination claims is no different from the many other decisions made by parties in designing grievance machinery. . . "
- Full impact of Court's opinion?

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**Washington Supreme Court Holds New  
Definition of Disability Applies  
Retroactively**

- *Hale v. Wellpinit School District No. 49*,  
165 Wn.2d 494 (2009)
  - No violation of Separation of Powers
  - WLAD definition retroactive to all claims  
occurring before the July 6, 2006 *McClarty*  
decision

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**Washington Supreme Court Denies  
Unemployment Benefits to Certain RIF  
Volunteers**

- *Verizon Northwest, Inc., v. Washington  
Employment Security Dept.*, 164 Wn.2d 909  
(2008)
  - Voluntary separation program to implement RIF
  - More volunteers than anticipated
  - Verizon offered volunteers opportunity to "opt out"
  - Volunteers applied for and received unemployment  
benefits
  - Verizon appealed

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## **Verizon Northwest cont . . .**

- **Held:** Volunteers not entitled to employment benefits
- Good cause for RIF quit exists only where employer takes "**final action**"
  - Employer takes "final action" if it retains the right to pick and choose among the volunteers to determine which ones will actually be laid off
- No Final Action: Verizon did not retain right to reject volunteers

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## **Lessons from *Verizon Northwest*?**

- Be careful how you structure your voluntary RIF programs
- If you reserve right to pick and choose – you take the "final action" and volunteers will likely be entitled to unemployment benefits

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