



# NEWS

DEAN & FULKERSON



*Items of interest for our clients and friends*

SPRING 2009

## IMPORTANT LABOR LAW UPDATES

Since January 1, 2009, there have been substantial changes to the federal labor laws affecting both employers and employees. Employers in particular should understand the potential impact of the changes, which impact several areas of federal labor law.

### THE AMERICANS WITH DISABILITIES ACT AMENDMENT ACT OF 2008

These amendments were adopted to address four U.S. Supreme Court decisions which Congress believed limited the scope and coverage of the ADA. In each of these cases, the court held that when determining whether an individual was “substantially limited” in one or more major life activities, the employers could take into account mitigating measures such as medications (i.e., insulin) or assisted devices like walking canes. The amendments state that these mitigating measures are not to be taken into account when deciding whether someone is disabled under the ADA. A significant exception is the use of ordinary eyeglasses or contact lenses.

In addition, the amendments specifically state that the Supreme Court had imposed too high a standard for determining whether a person was disabled under the ADA and therefore substantially lowered the bar regarding this determination. The new law, among other things:

- Directs the EEOC to revise the portion of its regulations defining the term “substantially limits.”
- Expands the definition of “major life activities” by including two non-exhaustive lists, one of which included many activities that the EEOC had recognized as major life activities and the second including major bodily functions.
- States that mitigating measures shall not be considered in assessing whether an individual has a disability.
- Clarifies that an impairment that is episodic or in remission is a disability if it would otherwise substantially limit a major life activity when active.
- Emphasizes that the definition of “disability” should be interpreted broadly.

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Nothing has changed regarding the ADA’s requirement that a covered employer (15 or more employees) provide

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## THE AMERICANS WITH DISABILITIES ACT (CONTINUED)

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reasonable accommodation for employees with covered disabilities unless in doing so it would create an undue hardship or pose a direct threat to the coworkers' safety or health. Nonetheless, the ADA amendments greatly limit an employer's ability to defeat a claim of handicap discrimination by arguing that the employee's condition does not constitute a disability as defined in the ADA.

Further, in considering a request by an employee or applicant for accommodation of a disability, an employer should consider the changes made by the ADA amendments before deciding the nature and extent of an individual's disability as this determination will likely control the employer's response to a request to engage in an interactive process with the individual as to possible reasonable accommodation of the disability.

## LILLY LEDBETTER FAIR PAY ACT

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The Fair Pay Act is viewed by many as the legislative "fix" to the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber*, which limited the time in which an employee could file a pay discrimination claim under Title VII of the Civil Rights Act.

The Fair Pay Act amends Title VII, the Age Discrimination and Employment Act, the ADA and Rehabilitation Act to state that a discriminatory pay practice occurs when: (1) a discriminatory compensation decision or other practice is adopted; (2) the individual becomes subject to a discriminatory compensation decision or other practice; or (3) when an individual is affected by application of a discriminatory compensation decision or other practice including each time wages, benefits

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or other compensation are paid resulting from the unlawful decision or practice. In short, each new wage payment is considered a "new" act of discrimination regardless of how long a wage practice or policy has been in place. Therefore, as long as an employee files a charge of discrimination within 180 days (300 days in Michigan) of the "decision or practice", including the issuance of a single paycheck, the charges will be considered timely.

In light of the changes made by the Fair Pay Act, employers should review their compensation policies and practices to assure that they can demonstrate that those policies and practices do not discriminate based on protected class, particularly sex, age and disability.

# **ARRA COBRA PREMIUM SUBSIDY REQUIRES PROMPT EMPLOYER ACTION**

The American Recovery and Reinvestment Act of 2009 (ARRA) permits certain employees who were involuntarily terminated between Sep. 1, 2008 and Dec. 31, 2009 to receive a federal subsidy of up to 65% of their COBRA premiums for up to 9 months. To implement the subsidy, the ARRA made changes to COBRA and the Public Service Health Act which require employers to provide new notices to certain former employees and their dependents and to “front” the subsidy payments for involuntarily terminated employees and dependents who elect to receive the COBRA subsidy.



## **Eligibility Requirements**

An individual is eligible for the COBRA subsidy if he/she is otherwise entitled to COBRA continuation coverage and the individual lost coverage due to involuntary termination for reasons other than gross misconduct at any time between Sep. 1, 2008 and Dec. 31, 2009. Former employees in this category who previously elected COBRA coverage as well as former employees who previously declined such coverage are eligible for the subsidy and may make new elections to receive it. A former employee’s dependents that would otherwise have been entitled to COBRA coverage as the result of the employee’s involuntary termination are also eligible to be covered by the subsidy and to make elections concerning the subsidy. A former employee is not eligible to receive the subsidy if he/she is eligible for coverage under another group health plan (other than a plan that consists solely of dental or vision coverage) or Medicare.

## **Subsidy Facts**

The subsidy is available for any “group health plan” sponsored by the employer which would otherwise be subject to COBRA continuation coverage other than health flexible spending accounts. Thus, for example, the subsidy is available for medical, dental, vision and HRA plans.

The subsidy is available beginning with the first insurance coverage period starting on or after Feb. 17,

2009, which is the effective date of the ARRA. For plans with coverage periods that begin at the start of a calendar month, the subsidy must be made available beginning with the coverage period starting on March 1, 2009. Individuals who were involuntarily terminated between Sep. 1, 2008 and Feb. 17, 2009 are not entitled to retroactive subsidy payments. If a former employee entitled to the COBRA subsidy pays the full COBRA premium for any coverage month starting on or after Feb. 17, 2009, the employer is required to either reimburse the former employee for the subsidy or to count the former employee’s excess payments toward the portion of the COBRA premiums which are otherwise the former employee’s responsibility.

Election of the subsidy does not extend the maximum period of COBRA coverage available to the former employee. The subsidy will end on the earlier of nine months after the subsidy begins, the expiration of the maximum COBRA coverage period under current COBRA rules or the date on which the individual becomes eligible for coverage under another group health plan or Medicare.

## **Notice Requirements**

The ARRA imposes significant changes on an employer’s COBRA notice obligations. First, the employer’s general COBRA notice provided to individuals who have a qualifying event and have not already received

a COBRA notice must be updated to reflect the subsidy provisions of the ARRA. Second, employers are required to send supplemental notices to individuals who lost coverage as the result of a qualifying event since Sep. 1, 2008 and who previously received a general COBRA notice. Finally, employers are required to send a special notice to employees who were involuntarily terminated since Sep. 1, 2008 (and their dependents) who either did not elect COBRA or who elected COBRA and discontinued COBRA coverage. This notice, which must be provided by Apr. 18, 2009, informs such individuals of their right to make a new special election to receive COBRA coverage and the subsidy provided under the ARRA. The special election period begins on Feb. 17, 2009 and ends 60 days after the employer provides the special election notice. Coverage elected under this provision must begin with the first full coverage period starting on or after Feb. 17, 2009. The DOL has published model notices which may be used to satisfy these requirements.

### **Reimbursement of Employer Subsidy Payments**

An employer may receive reimbursement of subsidy amounts paid on behalf of eligible COBRA beneficiaries by deducting the subsidy payments from the employer's quarterly payroll tax deposits. The IRS has revised Form 941 to permit an employer to reflect the subsidy payments deducted from quarterly payroll taxes otherwise due. Employers are also required to maintain specified information to document the amount of subsidies which it paid on behalf of involuntarily terminated employees and their dependents.

### **Employer Action Steps for ARRA COBRA Compliance**

Employers should begin immediately to identify any employees separated from employment since Sep. 1, 2008, and to determine which were involuntarily terminated. Any dependents of those employees who would have been entitled to COBRA should also be identified. Employers should promptly amend their COBRA notices, either using the DOL model notice or an employer-designed document, to comply with the requirements of the ARRA. Former employees and their dependents entitled to notice of the 60 day special election period should be provided written notice of their election rights no later than Apr. 18, 2009. If subsidy-eligible former employees have paid 100% of the COBRA premium for any coverage months after the effective date of the ARRA, the employer will need to reimburse them for the subsidy or provide a credit against future COBRA premiums to offset their excess COBRA premium payments.



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