

“What keeps you up at night?”

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New labor and employment laws to affect Maryland employers and employees

By Devin J. Doolan, Jr.

During Maryland's 426th Legislative Session, which adjourned on April 13, 2009, the General Assembly passed several labor and employment bills that will impact Maryland employers and employees.

WORKPLACE FRAUD ACT

The General Assembly passed the Workplace Fraud Act of 2009 (SB 909/HB 819), which increases penalties for employers in the construction and landscaping businesses that misclassify employees as independent contractors. Significantly, the Act creates a presumption that work performed by an individual paid by an employer results in an employer-employee relationship. Consequently, employers will now be required to overcome the presumption of employee status through the Department of Maryland Labor, Licensing and Regulation's ("DLLR") "ABC" test, which sets forth criteria used to determine whether a person is an employee or an independent contractor.

The Act also establishes investigative procedures and penalties for noncompliance. Specifically, it authorizes the DLLR to investigate possible violations of the Act in response to written complaints or by referral from other government agencies. During its investigation, the DLLR may enter and observe an employer's place of business or work site, interview individuals, copy documents, and request the production of records relevant to the classification of workers. If an employer fails to produce records within 15 business days of a request, it will be subject to a fine of \$500 each day the records are not produced. The Act also provides for a private right of action, but limits recovery to economic damages. If an employer is found to have knowingly misclassified an employee, the employer is required to pay restitution within 45 days. If a court or administrative unit determines that an employee is entitled to restitution as a result of an employer's misclassification, it may award the individual restitution and up to three times the amount of damages if the employer knowingly failed to properly classify the individual. Individuals who make groundless complaints are subject to penalties of up to \$1,000. The Act will become effective on October 1, 2009.

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FLEXIBLE LEAVE ACT

First enacted in 2008, the Maryland Flexible Leave Act (“FLA”) requires employers with 15 or more employees to allow their employees to use accrued paid leave to care for a child, parent or spouse who is ill. During the 2009 Legislative Session, the General Assembly passed emergency legislation (SB 562) clarifying the scope, meaning and applicability of the FLA. The legislation defines key terms in the FLA, such as “child,” “parent,” “employee,” “employer” and “leave with pay.” The legislation also confirms that an employee may only use leave with pay that has been earned and only under the same conditions and policy requirements that would apply for the employee’s use of leave for the employee’s own illness. The legislation expressly prohibits an employer from discharging, demoting, suspending, disciplining, or threatening to take such actions against an employee who takes leave under the FLA. This emergency legislation was signed into law by Governor O’Malley and became effective on April 14, 2009.

UNEMPLOYMENT INSURANCE BENEFITS

The General Assembly passed several bills concerning unemployment insurance benefits. First, it passed emergency legislation (SB 270/HB 310) extending unemployment insurance benefits to part-time employees. Breaking from precedent, the legislation establishes that an individual whose availability to work is restricted to part-time is eligible for unemployment benefits. In order to qualify for unemployment benefits, however, an individual must have worked predominantly throughout the year on a part-time basis for at least 20 hours per week. This legislation was considered necessary, in part, in light of studies showing that more than 420,000 Marylanders — approximately 15% of Maryland’s employees — work part-time. The O’Malley administration, the General Assembly and the Maryland Chamber of Commerce agreed that costs associated with the implementation of this legislation would be offset by the positive economic impact of the unemployment benefits. Specifically, it was estimated that every \$1 paid in unemployment benefits generates \$2.15 in economic activity. This emergency legislation was signed into law by Governor O’Malley on April 14, 2009, and became effective on the date of its enactment.

The General Assembly also passed legislation (SB 576/HB 740) that will increase the maximum weekly unemployment insurance benefit amount by \$30 as of October 1, 2009, and by \$20 as of October 1, 2010. Lastly, it passed legislation (SB 123/HB 242) providing that severance and dismissal payments are deductible from unemployment insurance benefits, regardless of whether the loss of employment is a result of job abolition.

LILLY LEDBETTER CIVIL RIGHTS RESTORATION ACT

The federal Lilly Ledbetter Fair Pay Act was signed into law by President Obama on January 29, 2009, as a legislative measure to counteract the U.S. Supreme Court decision in *Ledbetter vs. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). In *Ledbetter*, the Supreme Court held that an employer cannot be sued under Title VII of the Civil Rights Act (“Title VII”) for race or gender pay discrimination if the claim is based on decisions made by the employer more than 180 days prior. The federal legislation amended Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act by redefining a discriminatory compensation decision as occurring “each time compensation is paid pursuant to” that decision. The federal law significantly expanded the amount of time an employee has to file a claim of discrimination against an employer. On April 14, 2009, Governor O’Malley signed into law the Lilly Ledbetter Civil Rights Restoration Act (SB 368/HB 288). Similar to its federal counterpart, the Maryland law expands the time period during which an employee may seek relief for an unlawful employment practice and authorizes the recovery of back pay for up to two years preceding the filing of a complaint. The Act will become effective on October 1, 2009.

CONTINUATION OF HEALTH INSURANCE COVERAGE

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act (“ARRA”), which, among other things, provides for reductions and additional election opportunities for health benefits under the Consolidated Omnibus Budget Reconciliation Act (“COBRA”). Under ARRA, eligible

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individuals are required to pay only 35% of their COBRA premiums, while the remaining 65% is reimbursed to the coverage provider through a tax credit. The premium reduction applies to periods of health coverage beginning on or after February 17, 2009 and lasts for up to 9 months for COBRA-eligible individuals who were involuntarily terminated between September 1, 2008 and December 31, 2009. Because COBRA only governs employers with 20 or more employees, Marylanders who work for small employers (2 to 19 employees) did not receive continuation benefits under ARRA. In response to this exclusion, the General Assembly passed emergency legislation (SB 84) requiring carriers that issue health benefit plans to small employers to extend health benefits to people who were involuntarily terminated between September 1, 2008 and February 17, 2009. Small employers should contact their carriers to confirm that notice of this new benefit is provided to applicable individuals. This emergency legislation was signed into law by Governor O'Malley and became effective on April 16, 2009.

DISABILITY RIGHTS

The General Assembly passed legislation (HB 393/SB 670) that modifies Maryland's fair employment practices statute to mirror the recently revised federal Americans with Disabilities Act. The law becomes effective on October 1, 2009.

UNSUCCESSFUL LABOR AND EMPLOYMENT LEGISLATION

In addition to the aforementioned legislation that successfully navigated its way through the General Assembly, several pieces of labor and employment legislation failed, including bills that would

have: (1) required employers of 50 or more employees to provide shift breaks to employees (SB 660/HB 16); (2) obligated employers of 50 or more employees to pay employees overtime for hours worked in excess of eight hours per day (SB 831/HB 1249); (3) expanded the definition of “immediate family members” for whom leave may be taken under the Family and Medical Leave Act (HB 902); (4) increased penalties for violations of certain wage and hour laws (SB 451/HB 1287; SB 452/HB 1288); and (5) abolished at-will employment in contractual employment relationships in Maryland by prohibiting employers from discharging employees without good cause (SB 466).

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