EMPLOYMENT RELATIONS

# Employment Update

SUMMER 2009

## EEOC Provides Employer Guidance to Deal With H1N1 Flu Virus and Other Pandemic Concerns

*Experts have cautioned that the H1N1 virus, although it has proven mild this spring, may return more vigorously this fall. And, of course, other types of infectious diseases could strike at any time.*

During the height of the flu virus worries earlier this year, the EEOC issued a short technical-assistance document to answer basic questions about work place preparation strategies that comply with the Americans With Disabilities Act.

This information should provide a helpful start for most employers in putting together their own plan for dealing with a return of H1N1 this fall or other possible pandemic situations. The following is a summary of the EEOC's advice.

### Disability-Related Inquiries and Medical Examinations

Title I of the Americans with Disabilities Act (ADA) protects applicants and employees from disability discrimination. Among other things, the ADA regulates when and how employers may require a medical examination or request disability-related information from applicants and employees, regardless of whether the individual has a disability. This requirement affects when and how employers may request health information from applicants and employees regarding H1N1 flu virus.

Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer, and employment.

- At the first stage (prior to an offer of employment), the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job.
- At the second stage (after an applicant is given a conditional job offer, but before s/he starts work), an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.

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If you have any suggestions about topics you'd like to see addressed in future issues, please contact Editor Steve Bers at sbers@wtplaw.com. We look forward to hearing from you.

- At the third stage (after employment begins), an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.
- The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination (including medical information from voluntary health or wellness programs), as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.

## Frequently Asked Questions About Pandemics

### Planning for Absenteeism

1. ***In light of the ADA's requirements, how may employers ask employees about factors, including chronic medical conditions, that may cause them to miss work in the event of a pandemic?***

   An employer may survey its workforce to gather personal information needed for pandemic preparation if the employer asks broad questions that are not limited to disability-related inquiries. An inquiry would not be disability-related if it identified non-medical reasons for absence during a pandemic (e.g., mandatory school closures or curtailed public transportation) on an equal footing with medical reasons (e.g., chronic illnesses that weaken immunity).

2. ***May an employer require entering employees to have a medical test post-offer to determine their exposure to the influenza virus?***

   Yes, in limited circumstances. The ADA permits an employer to require entering employees to undergo a medical examination after making a conditional offer of employment but before the individual starts work, if all entering employees in the same job category must undergo such an examination.

   *Example:* An employer in the international shipping industry implements its pandemic influenza preparedness plan when the WHO and the CDC confirm that a new influenza virus, to which people are not immune, is infecting large numbers of people in multiple countries. Because the employer gives these medical tests post-offer to all entering employees in the same job categories, the examinations are ADA-compliant.

### Infection Control in the Workplace

3. ***During a pandemic, may an employer require its employees to adopt infection control practices?***

   Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and tissue usage and disposal, does not implicate the ADA.

4. ***May an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of a pandemic virus?***

   Yes. An employer may require employees to wear personal protective equipment. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

5. ***May an employer encourage or require employees to telework (i.e., work from an alternative location such as home) as an infection control strategy?***

   Yes. An employer may encourage or require employees to telework as an infection-control strategy, based on timely information from public health authorities about pandemic conditions. Telework also may be a reasonable accommodation.

   Of course, employers must not single out employees either to telework or to continue reporting to the workplace on a basis prohibited by any of the EEO laws.

*For the most up-to-date public health information concerning a pandemic, see: www.pandemicflu.gov.*

*Kevin C. McCormick*

# Imposing Pay Cuts on Your Exempt Employees—

## *Be Very Careful or the Cost-cutting Measure Can Cost You Big Time*

In today's unsettled economic climate, many employers are considering various ways to reduce payroll expenses. One common approach is to simply cut the salaries for your exempt employees.

Although such a practice can work, if it is not done correctly you may wind up losing the exempt status for your salaried employees, resulting in a significant unpaid overtime liability for all of those workers who may have been subject to the salary reduction.

In order to be considered exempt under the Fair Labor Standards Act (FLSA), the employee needs to be paid on a salaried basis of at least $455 per week and perform certain duties. Assuming that the employee meets the duties test, i.e., works as a professional, administrative or executive under Section 13(A)(1) of the FLSA, for example, the employee still needs to be paid on a salaried basis. That means that the employee receives a fixed guaranteed amount (above $455 per week) for all work performed during that work week.

Deductions to that salary cannot be made based on the operating requirements of the business. That means that if there is insufficient work to be done during the work week, the employer cannot send the exempt employee home and then deduct the time not worked from the employee's salary. To do so would defeat the salaried basis exemption, and the employee would thus be considered nonexempt and entitled to overtime for all work in excess of 40 hours per work week, going back two, or possibly three, years.

Recognizing these restrictions, many employers today are looking for creative ways to reduce salaries but not run afoul of the FLSA. One common method is for the employer to simply reduce an employee's salary, but require the employee to continue to work on a full-time basis. While many employees find this to be a very bitter pill to swallow, in light of the tough economic times, it may ultimately be good medicine for the overall success of the company.

Other companies link the reduction in salary with a corresponding reduction in the number of hours that the employee is expected to work in the work week. For example, an employee may have a 20 percent salary reduction and then have a 20 percent reduction in the scheduled hours for that work week. Again, the salary level must exceed $455 per week for this practice to work.

Some employers have proposed cutting the employee's salary in half and at the same time reducing the work schedule by half, as well. That may work, provided that the reduced salary still exceeds $455 per week. Simply because the employee's standard work schedule has been reduced by half does not mean that the $455 salary minimum can likewise be reduced.

Yet another option that some employers have considered is to allow exempt employees to take time off on an hourly basis due to short-term business needs, i.e., low-patient census, shortened store hours, or other reasons related to the business downturn.

In one such case, the employer developed a system of allowing its exempt employees to take "voluntary time off" (VTO), where employees could, at their option, use paid, annual personal or vacation leave, but continue to accrue employment benefits. If there were insufficient volunteers for VTO, the employer then proposed requiring "mandatory time off" (MTO) under a seniority-based rotational method. If the employee elected not to use accrued paid leave or did not have sufficient accrued paid leave to cover the VTO or the MTO, the employer would then deduct the amount equal to the VTO or MTO from the employee's salary, if it was shorter than one work week.

For unpaid VTO or MTO lasting an entire work week, the employer would not pay any salary for that period. Salaried exempt employees could also take VTO or be assigned MTO in one-day increments.

According to the DOL, such a practice of allowing or requiring exempt employees to reduce their hours based on the needs of the business, resulting in a loss of pay for those hours not worked, would be a violation of the FLSA. In a recent opinion letter, the DOL stated that salary reductions due to a reduction of hours worked for short-term business needs do not comply with the FLSA regulations. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

Deductions from the fixed salary based on short-term business needs are different from a reduction in salary corresponding to a reduction in hours in the normal schedule work week, which is permissible if it is a bona fide reduction not designed to circumvent the salaried-basis requirement and does not bring the salary below the applicable minimum salary of $455 per week.

Deductions from the salary due to day-to-day or week-to-week determinations of the operating requirements of the business are precisely the circumstances the salary-basis requirement is intended to preclude.

Therefore, salary reductions due to MTO lasting less than a work week violate the salaried-basis requirement and may cause the loss of exempt status for those employees in that classification. The employer is not, however, required to pay the salary for MTO for a full work week.

Thus, if the employer were to impose MTO for a five-day work week, there would be no violation; however, if it is done on a day-to-day basis within the work week, then there would probably be a violation under the FLSA. (DOL Opinion Letter, FLSA-2009-14, January 15, 2009.)

### Bottom Line

In these challenging economic times, employers are continually looking for creative ways to reduce expenses. However, when it comes to tinkering with the salaries of exempt employees, you need to be particularly careful because a mistake can be very costly and require you to pay overtime to your otherwise exempt employees. Such an award could significantly exceed the savings you were trying to achieve with the salary reduction. Indeed, before you take any action in this regard, you should discuss it first with your labor counsel. As they say, that would be money well-spent.

*Kevin C. McCormick*

# Legislative Update

### Annapolis Roundup

Whenever the Maryland Legislature is in session, you need to pay close attention to what our elected representatives are doing in Annapolis.

Well, the 2009 Legislative Session ended on April 13, 2009, and there are a few new pieces of legislation that you should note.

### Clarification of Flexible Leave Act

One favorable outcome of the recent legislative session was the passage of SB 562, an Emergency Bill that clarifies certain key provisions of Maryland's Flexible Leave Act. The FLA, enacted last year, requires private employers with 15 or more employees to allow workers to use accrued leave to care for an ill family member, and was particularly challenging for Maryland employers because many of its key definitions were overly vague and confusing. This new legislation helps clarify some of those issues, but, unfortunately, others remain.

### Child Defined

For starters, the new legislation clearly defines a "child" as an adopted, biological or foster child, stepchild, or legal ward who is under the age of 18 years or who is at least 18 years old and incapable of self-care due to a mental or physical disability. This clarification is very helpful and is consistent with other employment laws, such as the Family and Medical Leave Act. Now, Maryland employers have a better sense of who would be considered a "child" for purposes of complying with the FMLA.

### Parent Defined

The new law also clarifies who is a "parent" for coverage under the FLA. A parent is now defined as "an adoptive, biological or foster parent, a stepparent, a legal guardian or person standing in loco parentis." Again, this definition tracks the language of other employment laws, like the FMLA, and gives much needed clarity to this issue. Determining who has acted "in loco parentis" for purposes of FLA coverage will still be a tricky, fact-specific endeavor.

### Types of Leave

Another issue under the FLA that caused great concern for Maryland employers concerned what types of leave could be accessed by an employee. In the original legislation, leave with pay was not specifically defined other than referring to "sick leave, vacation time, and compensatory time." Many employers questioned whether other forms of paid leave, such as short- or long-term disability leave, would also be considered leave with pay under the new legislation.

SB 562 provides some needed guidance on this issue. Under the new legislation, the phrase "leave with pay" means paid time away from work that is earned and available to an employee based on hours worked or as an annual grant of a fixed number of hours or days of leave for performance of service. Leave with pay would include sick leave, vacation time, paid time off, and compensatory time.

The new legislation makes clear, however, that leave with pay would not include a benefit provided under an

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employee welfare benefit plan subject to ERISA, an insurance benefit, including benefits from an employer's self-funded plan, Workers' Compensation, Unemployment Compensation, a disability benefit or similar benefit. Under this clarification, it seems clear that an employer's short-term or other disability or salary continuation policy or plan–even those that are self-funded–would not be considered "leave with pay" under the FLA.

Instead, the types of leave that an employee could access would be the more traditional plans–such as vacation, sick leave, paid time off or compensatory time. Again, keep in mind that under the FLA, the employee can only access leave with pay that is earned and available to an employee. If an employee only has accrued three days of paid leave, then that is all the leave the employee may use under the FLA.

In this regard, the new legislation also provides some helpful guidance on how the paid leave can be requested and used. One concern under the prior legislation related to how and when an employee could access the paid leave to care for an ill family member. Many employers have policies that address when an employee should call in when sick, i.e., prior to the start of the shift, or whom they should contact to report an absence. Questions arose concerning an employer's right to require the same practice when an employee requested FLA leave. Under the new legislation, the answer is "yes," as the employee may use FLA leave "under the same conditions and policy rules that would apply if the employee took leave for the employee's own illness."

**Who is Covered?**

Another open question in the original legislation concerned which employers were covered under the Act. The original legislation only referred to employers with 15 or more employees. SB 562 clarifies that to be considered an employer, you need to have 15 or more employees "for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." This definition is the same definition used in other employment laws, such as Title VII. Now, it will be easier for a Maryland employer to determine whether it is covered under the FLA.

**Anti-retaliation Provisions Clearer**

The new legislation also clarifies the anti-retaliation provisions of the former law. Now, under SB 562, an employer may not discharge, demote, suspend, discipline or otherwise discriminate against an employee or threaten to take any of these actions because the employee has taken leave authorized under the section, has opposed a practice made unlawful by the FLA, or has made a charge, testified, assisted or participated in an investigation, proceeding or hearing under the FLA.

Again, this revised language closely resembles the anti-retaliation provisions in many other employment laws and should provide Maryland employers with a better explanation of what types of conduct they should avoid in the future.

**Still Some Unclear Areas**

While the changes in SB 562 are certainly welcome, unfortunately, they do not eliminate all of the confusion concerning the application of the FLA. One of the major concerns with the FLA is its use of the term "illness," which is not defined anywhere in the statute. The type of "illness" that is sufficient to trigger coverage remains open to debate. Under the FMLA, an employee must suffer from a serious health condition, as certified by a medical professional, in order to be covered under that statute.

Moreover, to be protected under the ADA, an employee must have a covered medical disability. Under the FLA, an employee may use leave with pay to care for an immediate family member, child or parent, who is ill. Does that mean that a parent could take FLA leave for a child who has an upset stomach? A cold? Some other minor medical condition? The FLA does not define what is or is not an illness, and we will have to see how this term is interpreted as claims are made and courts issue decisions on those claims.

SB 562, enacted as an Emergency Bill, became effective on May 19, 2009, when it was approved by the Governor.

**Unemployment Benefits for Part-time Workers**

SB 270, another Emergency Bill, was also approved by the Maryland Legislature. This new legislation would allow someone who is able to work only part-time to recover unemployment benefits if he is actively seeking part-time work. Under prior Maryland law, part-time employees were not eligible for unemployment benefits.

Under the terms of this new legislation, a part-time worker is defined as an individual whose availability for work is restricted to part-time work and who works predominately on a part-time basis throughout the year for at least 20 hours per week.

This new legislation will undoubtedly place additional strains on the Maryland Unemployment Insurance Trust Fund, which is already struggling to meet its obligations to provide unemployment benefits to full-time employees. Although the rates charged to employers vary, in January 2009, the average cost for employers rose from $178.50 to more than $220.50 per employee per year. With the addition of these new benefits for part-time workers, that cost is expected to climb even higher. Moreover, SB 576/HB 740 has authorized an increase in the maximum weekly unemployment benefit by $30 beginning on October 1, 2009, and another $20 beginning October 1, 2010.

**Workplace Fraud Act of 2009 — Stiff penalties for misclassification of employees engaged in construction and landscaping services**

This past term, the Maryland General Assembly passed

SB 909, legislation that creates a presumption that work performed in certain circumstances creates an employer-employee relationship. This legislation applies to employers providing construction and landscaping services.

The new legislation creates new investigatory tools for the Commissioner of Labor and Industry, including the right to issue subpoenas and file suit in Circuit Court under certain circumstances. In addition to actions by the Commission of Labor and Industry, the new legislation also establishes certain civil and administrative penalties and authorizes the recovery of attorneys' fees in appropriate cases.

For those Maryland employers engaged in the construction and/or landscaping business, you will need to carefully evaluate this new legislation to make sure that all of your employment relationships are correct and comply with these new requirements. Complicating the matter even further is that in Maryland and under federal tax code, there are a number of separate statutes that address the distinction between employees and independent contractors. This new legislation adds yet another level of analysis to that question and will undoubtedly require some careful review by each covered employer to avoid potentially significant penalties, fines and awards of attorneys' fees.

Unlike the emergency legislation discussed above, SB 909 does not take effect until October 1, 2009.

### What Legislative Measures Did Not Pass

There was some good news coming out of Annapolis with regard to proposed legislation that did not pass. Included in that group was the legislative attempt to impose mandatory shift breaks for all Maryland employers. These 15 to 30 minute non-working shift breaks would have been required for employees who work between four and six consecutive hours. Failure to provide these mandated breaks could have subjected you to a civil lawsuit. Fortunately for Maryland employers, this legislation, SB 660/HB 16, was not enacted.

Also rejected during this past legislative term was an attempt to require Maryland employers of 50 or more employees to pay employees overtime for hours worked in excess of 8 hours per day. As you know, under federal law, for most Maryland employers, overtime is only required to be paid after 40 hours in a work week.

The legislature also rejected an attempt to have increased criminal penalties for violations of specified wage and hour laws. Under current law, there are penalties, but they are rarely assessed.

### Bottom Line

On balance, Maryland employers did not fare that badly during this last legislative session. In fact, with the passage of SB 562, Maryland employers now have a better understanding of certain key provisions in the FLA to ensure better compliance and avoid any unknowing violations.

One other positive note, since the Maryland legislature generally will not meet again until next January 2010, we can rest easier that no new Maryland laws will be imposed until that date.

*Kevin C. McCormick*

*Upcoming...*

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