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EMPLOYMENT ALERT

2009 FEDERAL EMPLOYMENT LEGISLATION UPDATE

At HARRANG LONG, our Labor and Employment Practice Group makes a point of identifying new legislation that may affect our clients and their businesses. This alert describes selected changes in federal labor and employment laws enacted during 2009 that will impact Oregon employers.

We will soon be sending out registration information for breakfast meetings in Eugene and Portland to discuss these new laws. In the interim, if you have immediate questions about how these new laws might impact your business, please contact us and we will be happy to assist you.

"GINA" Update:

The Genetic Information Nondiscrimination Act is Now In Effect

The Genetic Information Nondiscrimination Act of 2008 ("GINA"), signed into law by President Bush on May 21, 2008, prohibits discrimination on the basis of genetic information with respect to health insurance and employment. Congress enacted GINA to address public concerns about the risk of losing access to health coverage or employment if insurers or employers possess an individual's "genetic information." Title II, which went into effect on November 21, 2009, prohibits genetic discrimination in employment.

What is "Genetic Information"?

GINA defines genetic information to include any information about the genetic testing of an individual or the individual's family members, or the results of that testing. The definition is broad enough to include responses to family medical history inquiries. Genetic information does not include information about the sex or age of individuals or their family members, information that an individual currently has a disease or disorder or tests for alcohol or drug use.

Does GINA apply to my business?

Title II of GINA applies to all employers, both private and public, of 15 or more employees, including employment agencies, labor unions and joint labor-management training programs.

What practices are prohibited by GINA?

1. The use of genetic information in making decisions related to any terms, conditions or privileges of employment (such as hiring, firing, pay, promotion, layoff, and benefits).

2. Harassment of an applicant or employee because of his/her genetic information.

3. Retaliation against employees who have complained about genetic discrimination, filed a charge of discrimination or participated in an employment discrimination inquiry, investigation or lawsuit.

4. The intentional acquisition of genetic information about applicants, employees or their family members. This general prohibition is subject to certain exceptions. The acquisition of genetic information is not prohibited where it is:

- Inadvertently obtained (the so-called "water cooler" exception, such as where a coworker overhears an employee discussing his father's illness);
- Received from an employee in support of a request for reasonable accommodation;
- Received as part of the certification process for FMLA leave; or
- Received in connection with a voluntary wellness program.

Confidentiality of Genetic Information

Employers subject to GINA that possess "genetic information" regarding an applicant or employee must treat it the same way as other medical information. Genetic information may not be disclosed to third parties, should be kept confidential and documents containing such information should be kept separate from other personnel information in a secure medical file. There are some exceptions to these confidentiality provisions which are described in detail on the EEOC's website.

Remedies for Employer Violations of GINA

GINA provides the same remedies as Title VII of the Civil Rights Act of 1964. An applicant or employee who succeeds on a GINA claim may be awarded reinstatement, promotion or hiring, back pay, compensatory and punitive damages, and attorney's fees

and costs. The caps imposed on compensatory and punitive damages under Title VII also apply to GINA. Punitive damages are not available against public employers.

Further Guidance

The EEOC is developing proposed regulations for Title II of GINA.

Employers should post the revised "EEO is the Law" poster which includes information about GINA. It is available without charge from the EEOC's website (http://www1.eeoc.gov/employers/poster.cfm).

FMLA Update:

New FMLA Regulations Effective January, 2009

The final version of the new Family and Medical Leave Act (FMLA) regulations went into effect on January 16, 2009. The final regulations interpret and implement two new military family leave entitlements for eligible family members, as well as update the regulations under the FMLA.

Our February 9, 2008 Employment Alert first addressed FMLA changes made by the National Defense Authorization Act, which amended the FMLA by adding the following two categories of unpaid leave for employees with family members serving in the military:

(1) Qualifying Exigency Leave: Eligible employees may take up to 12 weeks of FMLA leave to handle exigencies related to a family member's active duty military service or call to active duty; and

(2) Covered Service Member Family Leave: Eligible employees may take up to 26 weeks of FMLA leave to care for a spouse, son, daughter, parent or next of kin who has a serious injury or illness incurred in the line of active duty.

You can view our 2008 Employment Alert on this topic at http://www.harrang.com/Newsroom/client_alerts.htm

While the Covered Service Member Family Leave provisions went into effect in 2008, the Qualifying Exigency Leave requirements became effective on January 16, 2009. Under the new regulations, an eligible employee may take leave for one or more of the following "qualifying exigencies": (1) short notice deployment, (2) military events and related activities, (3) childcare and school activities, (4) financial and legal

arrangements, (5) counseling, (6) rest and recuperations, (7) post-deployment activities and (8) additional activities to address other events that arise out of the covered service member's active duty or call to active duty status. The DOL has also provided a new optional form that employers may use for employees to self-certify that they have a qualifying exigency requiring them to take leave.

The new regulations clarify several points related to Covered Service Member Family Leave. The regulations define "next of kin" as the nearest blood relative other than the covered service member's spouse, parent, son or daughter in the following order of priority: blood relatives who have been granted legal custody of the covered service member by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles and first cousins, unless the covered service member has specifically designated in writing another blood relative as his/her nearest blood relative for purposes of covered service member leave.

Notably, the new regulations provide that eligible employees can take *more than one* 26-week leave if the leave is to care for a different covered service member or if the same covered service member has a subsequent injury or illness. However, an eligible employee cannot take more than 26 weeks of leave in any single 12-month period.

The new regulations also include *many updates and changes to the prior FMLA regulations*. Highlights of the changes include:

Releases of FMLA Claims: The final regulations settle a dispute among courts regarding the employees' ability to waive rights under the FMLA, stating that employees may voluntarily release their past FMLA claims without court or DOL approval. As a result, employers can safely include releases of past FMLA claims in severance and settlement agreements.

Employer Notice Obligations: The regulations clarify and increase employer notice obligations in order to better inform employees regarding their FMLA rights and responsibilities. For example, the new regulations require employers to provide employees with a general notice about the FMLA upon hire (which can be done through a handbook), an eligibility notice, a rights and responsibilities notice and a designation notice.

Employee Notice Requirements: Under the new regulations, an employee needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence, unless there are unusual circumstances. This is a change from the prior regulations, which allowed some employees to provide notice to an

employer of the need for FMLA leave up to two business days after an absence, even if they could have provided notice more quickly.

New Medical Certification Forms: The DOL has created several new medical certification forms, one for use in considering an employee's own serious health condition, another for use when an employee requests leave to care for a family member with a serious health condition, and a new medical certification form for use in obtaining certification of covered service member leave.

Notification of Certification Deficiencies: The final regulations require employers to notify employees *in writing* if the employer determines that a medical certification is incomplete or insufficient. The employer must indicate what additional information is necessary and give the employee seven days to cure the deficiency. If an employee does not cure the deficiency, the employer may deny FMLA leave.

Clarification and Authentication of Medical Certification Forms: An employer may contact an employee's health care provider for purposes of clarification and/or authentication of the medical certification after the employer has given the employee an opportunity to cure any deficiencies. An employer must use a health care provider, human resources professional, leave administrator or management official to make such contact and *may not allow the employee's direct supervisor to contact the health care provider*. Employers may not ask health care providers for additional information beyond that required by the certification form. In addition, where the health care provider is covered by HIPAA, the employer must obtain a HIPAA authorization from the employee. However, if the employee refuses to provide the employer with authorization and does not otherwise clarify the certification, the employer may deny the FMLA leave if the certification form is unclear.

Prior Employment Counts for Eligibility: Employers must now count an employee's non-consecutive prior service with the employer unless the break in service was for *seven years or more*.

Light Duty: Under the new regulations, time spent performing light duty work does not count against an employee's FMLA leave entitlement. Also, the employee's right to job restoration is on hold during the period of time the employee performs light duty. Further, if an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave. Note, however, that because most employees on FMLA leave concurrently take Oregon Family Leave (OFLA), and OFLA rules treat "light duty" more favorably for employees, these FMLA regulations may not necessarily apply to every light duty situation. You should contact legal counsel if you have questions

about how FMLA and OFLA would apply in a specific light duty situation, as the employer must apply the regulation that is most beneficial to the employee.

Given the many changes under the new FMLA regulations, employers should take a close look at their FMLA policies and procedures to ensure compliance with the provisions of the new FMLA regulations and review other policies (e.g. call-in; attendance) that may be implicated by these changes. Employers should also review their FMLA forms to ensure that they comply with the new notice provisions.

ADA Update:

Final ADAAA Regulations Expected Mid-2010

The ADA Amendments Act (ADAAA) Notice of Proposed Rulemaking (NPRM) was published in the Federal Register on September 23, 2009 for a 60-day notice and comment period.

To view the NPRM, see http://edocket.access.gpo.gov/2009/E9-22840.htm, and for more information, go to http://www.eeoc.gov/ada/amendments_notice.html.

After the comment period expired on November 23, 2009, the EEOC began the process of finalizing and publishing the revised regulations and interpretive guidance. The EEOC received more than 600 comments in response to its proposed regulations. According to the latest regulatory agenda, the EEOC anticipates the review will be complete - and final ADAAA regulations will be implemented - in July, 2010.

The regulations interpret the requirements of the ADAAA, which Congress passed in late 2008 to make it easier for employees and applicants who allege disability discrimination to establish that they are disabled as defined by the Americans with Disabilities Act (ADA).

The most significant changes in the proposed regulations include:

- Broadening of the term "disability": The proposed regulations state that "disability" should be interpreted broadly and that the focus of an ADA case should be on whether discrimination occurred, not whether the individual is in fact "disabled" under the statute.

  Specific types of physical and mental impairments would "consistently" qualify as disabilities under the ADA, such as deafness, blindness, missing limbs, cancer, cerebral palsy, epilepsy, HIV/AIDS, and severe mental disorders such as bipolar

disorder or schizophrenia. Prior law and regulations required an individualized assessment of the impact of the impairment on the individual on a case by case basis.

- "Major life activities": The proposed regulations provide two non-exhaustive lists of "major life activities." The first list of activities includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others and working. The second list includes the major bodily functions listed in the ADAAA (functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions), and adds special sense organs, and skin, genitourinary, cardiovascular, hemic, lymphatic and musculoskeletal.

- Mitigating measures: The ameliorate effects of mitigating measures (other than ordinary eyeglasses or contact lenses) may not be considered in determining whether a person is "substantially limited in a major life activity."

  Thus, for example, the person with diabetes whose condition is completely controlled by insulin or the person with epilepsy whose condition is completely controlled by seizure medication will be considered disabled if the condition, if untreated, would substantially limit a major life activity. Similarly, an individual who can hear normally with a hearing aid would also be considered disabled.

- Episodic Illnesses: Proposed regulations state that an impairment that is episodic or in remission is a "disability" if it would substantially limit a major life activity when active.

- Reasonable Accommodation: Proposed regulations clarify that *both* the positive and negative effects of mitigating measures can be considered when evaluating whether a reasonable accommodation is needed. If a disabled person uses a mitigating measure which eliminates the need for reasonable accommodation, then an employer will have no obligation to provide one.

- Major Life Activity of Working: Proposed regulations relax the standard for when an individual is substantially limited in the major life activity of "working." Prior regulations used the concept of "a class or broad range of jobs." Under the proposed regulations, an impairment substantially limits the major life activity of working when it substantially limits an individual's ability to perform, or to meet

the qualifications for a "type of work" (e.g., commercial truck driving, assembly line jobs, clerical jobs or law enforcement jobs).

- Regarded as Disabled: The proposed regulations also make a major change in who is disabled because they are "regarded as disabled." It is no longer required that the employer perceive the individual to be substantially limited in a major life activity. Rather, it is enough if he or she is subject to an adverse employment action (e.g., failure to hire or termination) based on the employer's belief that the employee suffers from an impairment that is not transitory (lasting less than 6 months) and minor.

  Good news for employers - individuals covered only because they are "regarded as disabled" *are not entitled to reasonable accommodation*.

Employers' Bottom Line:

Like the ADAAA, proposed regulations emphasize that the determination of whether an individual is disabled should not be the primary focus of ADA cases. Instead, the focus should be on whether prohibited discrimination has occurred. Thus, from a practical standpoint, employers in most situations will be better able to defend an ADA lawsuit by *showing that they made a good faith effort to accommodate the employee*, rather than by challenging the employee's disability.

COBRA Update:

COBRA Premium Reduction Extended

The American Recovery and Reinvestment Act of 2009 as amended on December 19, 2009 provides for premium reductions for health benefits under COBRA. Eligible individuals pay only 35 percent of their COBRA premiums and the remaining 65 percent is reimbursed to the employer through a tax credit. To qualify, individuals must be involuntarily terminated from employment. The 2009 amendment extended the premium reduction eligibility period for two months - the benefit now applies to terminations that occur between September 1, 2008 and February 28, 2010. The amendment also increased the maximum period for receiving the subsidy for an additional two months - from 9 to 15 months.

Other Updates for 2009:

Lilly Ledbetter Pay Act of 2009

On January 29, 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act into law. This legislation will have a significant effect on pay discrimination claims based on all protected categories, including race, gender, age, ethnicity, disability, national origin and religion.

For more information on the Act, see our March 19, 2009 Employment Alert at http://www.harrang.com/Newsroom/client_alerts.htm.

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