

# EMPLOYMENT BULLETIN

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## REGULATORY & LEGISLATIVE CHANGES THAT MAY AFFECT YOUR BUSINESS & EMPLOYEES



by Nicki Proulx

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As you may know, employment law is an ever-changing field, and many regulatory and legislative changes have occurred in recent months, including:

- Passage of the Americans with Disabilities Act Amendments Act of 2008
- Extension of FMLA to Armed Forces (New Poster Required)
- New FMLA Regulations
- Employer No-Smoking Policies
- New EEO-1 Report Requirements

I have therefore prepared this bulletin to provide you with a brief overview of these changes, as they may affect your business and your employees.

### Americans with Disabilities Act Amendments Act of 2008

On September 25, 2008, the Americans with Disabilities Act Amendments Act of 2008 was signed into law. The purpose of the Act was to overturn a series of court decisions that had narrowed the criteria for who qualifies as an “individual with a disability.”

While the Americans with Disabilities Act Amendments Act retains the ADA’s basic definition of “disability” as an impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such an impairment, it increases the number people who qualify as an “individual with a disability” by expanding the list of “major life activities” and including a new category of “major bodily func-

tions” which, if affected, can constitute a disability. In addition, the amendments specifically direct the courts and employers that, when deciding cases or issues under the ADA, they must construe the definition of “disability” in favor of broad coverage of individuals to the maximum extent permitted by the terms of the Act.

The expanded, but not exhaustive, illustrative list of “major life activities” in the new amendments includes: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. The illustrative list of “major bodily functions” includes: the operation of a major bodily function, including but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

In addition, the amendments provide that an impairment that is episodic or in remission is to be considered a disability if it would substantially limit a major life activity when active. They also provide that the determination as to whether an impairment substantially limits a major life activity must be made without regard to ameliorative effects of mitigating measures (e.g. medication, low-vision devices other than ordinary eyeglasses or contacts, hearing aids, prosthetics, etc).

The Americans with Disabilities Act Amendments Act of 2008 is effective January 1, 2009.

### Changes to the FMLA

#### Extension to Armed Forces (New Poster Required)

Recent changes to the Family and Medical Leave Act of 1993 (“FMLA”) affect FMLA procedures by cov-

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ered employers. New FMLA posters are also required. On January 28, 2008, President Bush amended the FMLA with the enactment of the National Defense Authorization Act ("NDAA"). The NDAA permits certain relatives of a member of the armed forces to take up to 26 workweeks of leave to care for a member of the armed forces who is undergoing medical treatment, recuperation, therapy, or is otherwise on the temporary disability retired list for a serious injury or illness. Additionally, the NDAA makes the traditional FMLA 12 week leave period available for a qualifying exigency arising out of the fact that a certain relative of an employee is on active duty in the armed forces in support of a contingency operation. With the enactment of the NDAA, covered employers will need to revise current procedures and employee policies/handbooks, as well as update FMLA posters to ensure awareness of the new leave entitlements. Failure to do so may lead to significant fines.

### New Regulations

The Department of Labor ("DOL") has adopted new FMLA regulations which went into effect on January 16, 2009. The new regulations address and modify many of the old regulations that have raised interpretation issues under the FMLA. The following list offers a general summary and provides some highlights of the new regulations. They:

- Clarify that a break-in-service due to military service must be considered for hours worked purposes;
- Clarify and amend how to count FMLA leave;
- Clarify what constitutes serious health conditions to qualify for FMLA protection;
- Require that employees make a reasonable effort not to disrupt operations with intermittent leave;
- Update employers' obligations to provide notice;
- Update what constitutes reasonable notice to employers of leaves;
- Update burdens and requirements of medical certification; and-
- Allow bonuses or awards to be based on specific criteria which would not be met if FMLA leave were taken, so long as FMLA leave and non-FMLA leave are treated the same way for this purpose.

However, please keep in mind that this list is by no means exhaustive. As such, you may wish to con-

tact us if you have any questions regarding how the new regulations impact you and your employees.

### Employer No-Smoking Policies

Employers who have or are thinking about implementing an employee no-smoking policy should carefully consider whether the cost savings associated with such a policy is worth the risk of potential future litigation. On January 30, 2008, the United States District Court for the District of Massachusetts ruled that a lawn-care worker fired for violating a no-smoking policy could pursue (1) a privacy claim under Massachusetts state law for attempting to regulate out-of-work behavior and (2) a federal ERISA claim for failure to allow him to enroll in the company health plan. The policy at issue in this case prohibited "smoking of tobacco products by its employees at any time and at any place, whether or not in the workplace or during work hours". The purpose of this policy "was to save money on medical insurance costs and to promote healthy lifestyles among its employees". *Rodrigues v Scotts Company, LLC*, 2008 WL 251971, \*1 (D Mass). In light of this case, employers or plan sponsors who have a no-smoking policy, or are considering adopting one, are strongly encouraged to seek legal advice.

### New EEO-1 Report Requirements

Private industry employers with 100 or more employees are required to file an EEO-1 report on September 30th of each year. This report provides a breakdown of the work force by race and ethnicity determined by employee self-reporting (rather than employer visual observation). Therefore, it is now necessary for all affected employers to survey their employees so that they can do the self-identification.

If you have any questions about how the above developments may impact your business, or if you have any other employment-related issues, please feel free to contact me at (517) 377-0882, or Ed at (517) 377-0845.