

Quarterly

HR

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New FMLA Regulations— Effective January 16, 2009

On November 17, 2008, the United States Department of Labor (“DOL”) published its long-awaited revised and updated final rules interpreting the Family and Medical Leave Act (“FMLA”). These new regulations go into effect on **January 16, 2009**.

Among other things, these new rules update the existing FMLA regulations and implement the military family leave provisions enacted in the National Defense Authorization Act.

NOTE: The new regs provide an important clarification regarding your relationship with CoAdvantage:

One of the new regulations has clarified the joint employment relationship as it pertains to “primary” and “secondary” employers. Despite our on-going relationship, CoAdvantage is no longer considered the primary employer for FMLA purposes. **Therefore, only clients who are by definition a “covered employer” will be required to provide leave time in accordance with the FMLA regulations. A covered employer is one who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.**

For “non-covered” clients (less than 50 employees)

- These changes will provide your organization with added flexibility and you will no longer be required to provide leave time in accordance with FMLA.
- Employees who will begin a leave of absence (FMLA) before January 16, 2009 should be allowed to continue their leave till the end under the current provisions of the FMLA.

- Leaves of absence (FMLA) beginning after January 16, 2009 are not subject to the FMLA regulations and can be honored at the client’s discretion. Please contact Human Resources for best practice guidance.

For “covered” clients (50 or more employees):

- You will continue to need to provide leave time in accordance with FMLA, and CoAdvantage will continue to provide FMLA leave administration (employee notices, tracking of leave time) for your company in the same way it does today.
- A separate client notice will be sent to you providing all of the FMLA changes. You may also go to www.dol.gov/fmla for this information.

CoAdvantage is currently updating the FMLA administration process and employee handbooks to be in compliance with the updated regulations.

A client notice will be sent out containing additional information regarding the FMLA amendment for covered employers. Please look for that notice. You may also visit www.dol.gov/fmla to access a full list of the changes.

If you have any questions as to whether you are a covered employer or about non-FMLA leaves of absence, please contact a representative from our Human Resources Department.

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Be Aware of EFCA— Employee Free Choice Act

EFCA is not the law . . . yet, but employers need to be aware of what EFCA is and how it may impact their business and workforce. EFCA is a proposed amendment to the National Labor Relations Act (NLRA). After being introduced in early February, 2007, the bill passed the House of Representatives by a vote of 241 to 185. EFCA was stopped in the Senate in June 2007. However, the battle is far from over, Democrats in Congress have promised to pass EFCA and, President-Elect Obama has promised to sign it. EFCA will be introduced again in January 2009 and could become law later that year.

If passed, EFCA would amend the NLRA as follows:

- A union would have the right to be recognized as the exclusive bargaining representative of your employees if a majority of those employees sign authorization cards. (“Card Check System”)
- If a majority of employees sign cards, an employer must begin bargaining within 10 days after the union is certified.
- If the union and the employer cannot agree upon the terms of a first collective-bargaining contract within 90 days, a federal mediator steps in.
- If, after 30 days of mediation, the union and employer still have not agreed on a contract, a federal arbitrator would be empowered to determine the terms of the agreement, and your employees would lose their current right to ratify the terms of the agreement.
- If an employer is found to have unlawfully terminated pro-union employees, the law would provide for liquidated damages of three times back pay. In addition, employers would be hit with a \$20,000 penalty per occurrence if the National Labor Relations Board or a court finds against you.

Card check systems are designed to make it easier for unions to organize employees. Currently, unions in the U.S. may have 80 percent of cards signed going into a secret ballot election, yet they still lose half of the elections because employees sign cards and then vote the way they want. EFCA would eliminate the employee’s right to vote.

How can employers proactively prepare for EFCA?

- Assess Employee Satisfaction
- Provide Management Education and Training
- Publish a Union-Free Philosophy
- Build a Pro-Employee Work Environment
- Promote Open Communication with Employees
- Establish an Environment that Fosters Fair Employment Decisions
- Evaluate Potential Safety and Health Concerns
- Review Pay and Benefits to Ensure They Remain Competitive
- Improve Organization Image within the Facility and the Surrounding Community

All employers should understand that EFCA will affect labor relations for all private sector workplaces, not just those already unionized or those vulnerable to organizing under the current rules. For more information on EFCA, please contact Human Resources.

New California Law Clarifies Exemption for Salaried Computer Software Professionals

On September 30, 2008, Governor Schwarzenegger signed into law a bill clarifying that salaried computer software professional employees who earn at least \$75,000 a year are exempt from overtime compensation requirements.

The new law clarifies an ambiguity in the overtime pay exemption for professionals in the computer software field in California. The previous law exempted employees paid at least \$36 an hour, "or the annualized full-time salary equivalent of that rate." This statutory language caused an ambiguity in calculation of the "annualized

equivalent," and resulted in employers having to track overtime hours for their highly paid salaried computer professionals. Under the new law, hourly employees earning at least \$36 an hour and salaried employees earning at least \$75,000 a year are exempted from overtime compensation requirements, thus defining clear amounts for both hourly and salaried employees. This new requirement takes immediate effect.

The new law does not change the other criteria for exemption from overtime pay

for computer software professionals. This exemption continues to apply only to employees who are primarily engaged in intellectual or creative work that requires the exercise of discretion and independent judgment. It applies to individuals performing the duties of systems analysts, programmers, and software or hardware engineers. Job titles, however, are not determinative of the applicability of the exemption created by this law.

Florida Employers Face Two Increases in Minimum Wage in 2009

On January 1, 2009, the minimum wage in Florida increased to **\$7.21** per hour. This represents an hourly increase of \$0.42 over the current Florida minimum wage of \$6.79. The rise in the Florida minimum wage is a result of the Florida Minimum Wage Amendment passed by Florida voters in November 2004 which initially set the minimum wage at \$6.15 per hour and calls for annual increases tied to the rate of inflation. This minimum wage applies to all employees eligible to receive the federal minimum wage.

Florida vs. Federal minimum wage...

Employers must comply with the **higher** of the federal minimum wage or the state minimum wage. The federal minimum wage is currently \$6.55 per hour. Because the Florida minimum wage in 2009 will be higher than its current federal counterpart, employers in Florida must comply with the higher Florida minimum wage. But the federal minimum wage will be rising to \$7.25 per hour on July 24, 2009. At that point, it will be higher than the Florida minimum wage and employers will need to raise wages again to comply with the higher federal minimum wage of \$7.25 per hour.

Tipped employees...

Also effective on January 1, 2009, "tipped employees" in Florida meeting eligibility requirements for the tip credit under the federal Fair Labor Standards Act (FLSA) will have to be paid a direct cash wage of at least \$4.19 per hour. This is an amount equal to the new Florida minimum wage, \$7.21, minus the tip credit allowable under Florida law, \$3.02 (assuming that these employees receive enough in tips to generate this credit).

Remember - many **states** also have minimum wage laws. Where an employee is subject to both the state and federal minimum wage laws, the employee is entitled to the higher of the two minimum wages.

The link to the Department of Labor's State Minimum Wage Chart (and information regarding proposed state increases) is <http://www.dol.gov/esa/minwage/america.htm>.

And a new Posting Requirement

The State of Florida Agency for Workforce Innovation has issued a new 2009 "Notice to Employees" poster that Florida employers will be required to post, as of January 1, 2009, in a conspicuous and accessible place in each establishment where employees are employed. This poster is available for downloading in English and Spanish from the Agency for Workforce Innovation's webpage at: <http://www.floridajobs.org/minimumwage/index.htm>.

This Florida poster is in addition to the federal minimum wage poster, not a substitute for it. The federal poster can be downloaded from the U.S. Department of Labor website at: <http://www.dol.gov/esa/whd/regs/compliance/posters/flsa.htm>.

If you are an employer with employees working in Florida, now is a good time to review your pay practices and ensure compliance with the Florida minimum wage and the federal Fair Labor Standards Act. In Florida, lawsuits alleging wage and hour violations are frequent and ever-increasing in popularity. This will be even more true with rates rising on January 1 and again on July 24. Compliance is an important measure in preventing probable and expensive

litigation.

Avoiding Problems

Wage and hour cases can be very costly due to the remedies available. An employer found liable can expect to pay employees all of the back wages calculated to be due, liquidated damages in an amount equal to the back wages, plus costs and attorneys' fees to the employees' attorneys. And you will have to pay your own attorney as well.

Keep in mind that the amount you may end up paying to the employee's attorney will likely have no relationship to the amount paid to the employee. For example, an employee may only recover a few hundred dollars in back wages while his or her attorney collects several thousand in attorneys' fees.

Fortunately, wage and hour lawsuits are, for the most part, avoidable. Employees have little incentive to seek legal counsel if they are being paid properly. An audit of your payroll practices by a professional knowledgeable in the wage and hour laws may reveal the existence of improper deductions or improperly categorized employees. Once identified, these errors can be corrected and litigation avoided. With Florida leading the nation in this type of litigation, the employer's maxim has become "It's better to be safe than sued."

Computer Product Safety Improvement Act of 2008

The Consumer Product Safety Improvement Act of 2008 (CPSIA) was signed into law on August 14, 2008, by President Bush. CPSIA came about as a result of several large recalls of children's toys in the past year. This law increases the authority of the Consumer Product Safety Commission and includes new responsibilities for the manufacturers and retailers of consumer products. Of particular interest to employers, Section 219 of the CPSIA provides new whistleblower protections to the employees of manufacturers, labelers, distributors, and retailers of consumer products. Employees of covered employers will now have a private right of action and be able to collect back pay and other compensatory damages should their employer take adverse action against them because of their whistle blowing. The CPSIA prohibits discrimination against employees who report safety violations or participate in any proceeding related to alleged safety violations. Further, CPSIA protects workers who refuse to participate in an activity, policy or practice, or who refuse to perform a certain task, because they believe their actions would violate a law or regulation enforced by the Commission. To be protected by the law, an employee need only have a *reasonable* belief that the conduct at issue would violate consumer protection laws. This means that the employee's belief does not necessarily have to be a true or accurate understanding of the law.

Employers should consider the following actions:

1. Revise retaliation and whistleblower policies to include "adverse action will not be taken because of whistle blowing regarding safety of consumer products"
2. Train supervisors and employees about the new safety regulations
3. Establish procedures for handling internal complaints of safety violations.

The ADA Amendments Act of 2008

On January 1, 2009, the ADA Amendments Act of 2008 (ADAAA) became effective. This new law is designed to undo several Supreme Court decisions and thereby broaden the number of individuals who can seek protection under the Americans with Disabilities Act (ADA), which covers employers with 15 or more employees. Many state human rights statutes have lower employee thresholds, and courts in such states often follow federal standards under the ADA as applicable to their state statute. The amendments are intended to focus employers' attention on addressing obligations under the ADA related to the interactive process, without first devoting extensive analysis as to whether an individual has a qualifying disability.

Under the ADA, a person is "disabled" if he or she has (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such impairment; or (3) is regarded as having such an impairment. This definition remains the same. The ADAAA provides the following clarifications:

- The definition of disability must be construed in favor of "broad coverage of individuals . . . to the maximum extent permitted" by the statute.
- Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- Major life activities also include "operation of a major bodily function"

such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

- An impairment that is "episodic or in remission" is a disability even when inactive "if it would substantially limit a major life activity when active." Examples may include cancer, epilepsy and post-traumatic stress disorder.
- The determination of whether an impairment substantially limits a major life activity must be made *without* regard to the use of mitigating measures such as medication, medical equipment, low-vision devices (other than ordinary eyeglasses or contact lenses), prosthetics, hearing aids, mobility devices, oxygen equipment, assistive technology, auxiliary aids or services, learned behavior or adaptive neurological modifications, or reasonable accommodations. The use of ordinary eyeglasses and contact lenses may be considered, however, in determining whether an impairment substantially limits a major life activity.
- An individual meets the requirement of being "regarded as" disabled *whether or not* the actual or perceived impairment actually limits or is perceived to limit a major life activity.
- The "regarded as" prong of the definition of disability does not apply to impairments that are "transitory" ("actual or expected duration of 6 months or less") and "minor."
- While employers may not discriminate against an individual who is "regarded as" disabled, employers need not provide reasonable accommodation to such individuals.
- Employers may not use qualification standards, employment tests, or other selection

criteria based on an individual's uncorrected vision unless the standard, test or other selection criteria is shown to be job-related for the position and consistent with business necessity.

- Employees without disabilities cannot sue for "reverse discrimination" under the ADA.

The ADAAA also instructs the Equal Employment Opportunity Commission to revise its current regulations under the ADA to be consistent with the amendments, and to provide a lowered standard for the definition of "substantially limits."

Employers can expect more employees to fall within the definition of "disabled," which will trigger the employer's duty to engage in the interactive process and provide reasonable accommodation more often. When claims of disability discrimination result in legal action, employers can expect more employees to be covered by the law and fewer cases to be dismissed by the court early in litigation. This outlook makes it especially important for employers to take requests for accommodation seriously and, when in a position to take adverse action against an employee with a medical condition, to have well drafted documentation of the legitimate, non-discriminatory business reason for the action.

The following steps are good general measures in determining an effective reasonable accommodation:

1. Document the accommodation requested by the employee and why it was requested.
2. Document other possible accommodations that could address the situation, such as job restructuring, reallocation of non-essential functions, assistance with non-essential functions, reassignment of the employee to a vacant position, and unpaid leave.
3. Document an interactive process with the employee in which the pros and cons of all possible accommodations are discussed.
4. Document the reasonable accommodation implemented and why it was chosen among the possible choices. Remember that an employer's duty is to provide a reasonable accommodation, not necessarily the employee's requested accommodation or the "best," most technically sophisticated, accommodation.

Please contact Human Resources if you have any questions, concerns or requests for accommodation.

Reducing Workers' Compensation Costs

How can you reduce the cost of workers' compensation claims and reduce their impact on your daily operations?

1. Be proactive and promote safe work habits before injuries occur.
2. Provide job specific employee training and consider having regular safety meetings
3. If an employee is injured, provide light duty or a transitional job until the employee is back working full duty
4. Review your claim history and look for patterns in the types of injuries your employees are sustaining

Please contact the CoAdvantage Risk Management Department to find out how we can help you meet these goals.

California Overtime Law Applies to Work Performed There by Non-Residents

The case, *Sullivan v. Oracle Corp.*, No. 06-56649 (9th Cir., Nov. 6, 2008), was brought by employees of Oracle Corporation who instructed customers on the use of Oracle software. The claimants resided outside California but occasionally performed work there. The claimants said that they should receive overtime pay for that work under California law, which is more generous than the federal Fair Labor Standards Act and the laws of many other states. Oracle argued that its workers should be subject to the law of the states where they resided. The Ninth Circuit disagreed, overturning the decision of the court below.

The California Labor Code requires overtime pay for work in excess of eight hours in any one day and in excess of 40 hours in any one week. (The Federal Fair Labor Standards Act) requires overtime after 40 hours in a work week, but imposes no requirement based on the number of hours worked in a single day. California also requires that overtime pay—i.e., time-and-a-half the regular rate—be paid for the first eight hours of work on the seventh workday in a week and that double time be paid after 12 hours in any day or after eight hours on the seventh workday in a week.

Impact on employers:

- If an employee performs work in California, the overtime provisions of the California Labor Code apply to that employee, regardless of the employee's state of domicile.
- In light of this decision, it is likely that a non-resident employee who works in California is also subject to the California Labor Code regarding meal periods, rest periods, leave, termination, vacation pay and all other employment matters.

If you have workers who occasionally perform work in California even though they reside in other states, take a close look at this decision. If the workers are non-exempt for overtime purposes, you will need to be sure that you are in compliance with the California Labor Code when you pay them for the work they do in California. (California employers who temporarily bring in workers from other states for jobs in California should do the same.) Compliance with all applicable state laws is especially important in these situations, as California also has penalties for infractions that exceed those in many other states. Please contact Human Resources if you have any questions.

Federal Contractor Requirements— E-Verify

Federal contractors and subcontractors will be required to begin using the U.S. Citizenship and Immigration Services' E-Verify system starting Jan. 15, 2009, to verify their employees' eligibility to legally work in the United States. The new rule implements Executive Order 12989, as amended by President George W. Bush on June 6, 2008, directing federal agencies to require that federal contractors agree to electronically verify the employment eligibility of their employees. The amended Executive Order reinforces the policy, first announced in 1996, that the federal government does business with companies that have a legal workforce.

This new rule requires federal contractors to agree, through language inserted into their federal contracts, to use E-Verify to confirm the employment eligibility of all persons hired during a contract term, and to confirm the employment eligibility of federal contractors' current employees who perform contract services for the federal government within the United States. You can get more detailed information at www.uscis.gov.

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