

EMPLOYMENT,
LABOR &
WORKERS'
COMPENSATION

ADVICE
SOLUTIONS
LITIGATION

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A L A W C O R P O R A T I O N

BE PREPARED FOR 2010

What to Expect and What Not to Neglect

Employment Law Workshop

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EMPLOYMENT, WORKERS' COMPENSATION AND LABOR LAW
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What to Expect & What Not to Neglect

Presented By
Michael S. Lavenant

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- Healthcare Reform - the impact on employers
- EFCA-Card Check - how a change in how unions campaign could mean more employers will soon be unionized
- FMLA Amendments - there are several proposed amendments to the FMLA that will expand the types of situations that will entitle employees to a protected-leave of absence - and in some situations - a paid leave of absence
- Update on Meal and Rest Period regulations and how class actions are being spurred by these difficult rules
- New Rules & Decisions

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Obama at the Congress Hotel.flv

The Election is Over!!

- White House
 - President Obama's Priorities
 - Health Care Reform
 - Card Check
 - Immigration
- Senate
 - *Can the Democrats break a filibuster?*
 - 60 votes needed
 - 41 Republicans (2 pro-EFCA)
 - 57 Democrats
 - 2 Independents (members of Democratic Caucus)

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- Health Care Reform
 - Updates
 - Where are we?

BE PREPARED FOR 2010

- Health Care Reform
 - Updates
 - On December 22, 2009 - Governor Schwarzenegger, in a letter to Nancy Pelosi, touted that he was one of the few Republican elected officials that supports the Democrats' plan.
 - State of the State Address. On January 6, 2010, the Governor made the following statement: "You've heard of the bridge to nowhere? This is health care to nowhere."
 - More and more Governors (Republican and Democrat) are now expressing concern that their state budgets will be raided for this bill.

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- Health Care Reform

- Where are we?

- WHO'S COVERED
 - COST
 - HOW IT'S PAID FOR
 - REQUIREMENTS FOR INDIVIDUALS
 - REQUIREMENTS FOR EMPLOYERS
 - HOW YOU CHOOSE YOUR HEALTH INSURANCE
 - CHANGES TO MEDICAID
 - ANTI-TRUST
 - ILLEGAL IMMIGRANTS

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- Health Care Reform

- Where are we?

- A comparison of key provisions of the Senate (Patient Protection and Affordable Care Act) vs House (Affordable Health Care for America Act) bills:
 - WHO'S COVERED: About 94 percent of legal residents under age 65 — compared with 83 percent now. Government subsidies to help buy coverage start in 2014.
 - WHO'S COVERED: About 96 percent of legal residents under age 65. Government subsidies to help buy coverage start in 2013.

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- Health Care Reform

- Where are we?

- COST: Coverage provisions cost \$871 billion over 10 years.
 - COST: The Congressional Budget Office says the bill's cost of expanding insurance coverage over 10 years is \$1.055 trillion. The net cost is \$894 billion, factoring in penalties on individuals and employers who don't comply with new requirements.

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- **Health Care Reform**
 - Where are we?
- **HOW IT'S PAID FOR:** Fees on insurance companies, drugmakers, medical device manufacturers. Medicare payroll tax increased to 2.35 percent on income over \$200,000 a year for individuals; \$250,000 for couples. A 10 percent sales tax on tanning salons, to be paid by the person soaking up the rays. Cuts to Medicare and Medicaid. Forty percent excise tax on insurance companies, keyed to premiums paid on health care plans costing more than \$8,500 annually for individuals and \$23,000 for families. Fees for employers whose workers receive government subsidies to help them pay premiums. Fines on people who fail to purchase coverage.

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- **Health Care Reform**
 - Where are we?
- **HOW IT'S PAID FOR:** \$460 billion over the next decade from new income taxes on single people making more than \$500,000 a year and couples making more than \$1 million. The original House bill taxed individuals making \$280,000 a year and couples making more than \$350,000, but the threshold was increased in response to lawmakers' concerns that the taxes would hit too many people and small businesses.
- There are also more than \$400 billion in cuts to Medicare and Medicaid; a new \$20 billion fee on medical device makers; \$13 billion from limiting contributions to flexible spending accounts; sizable penalties paid by individuals and employers who don't obtain coverage; and a mix of other corporate taxes and fees.

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- **Health Care Reform**
 - Where are we?
- **REQUIREMENTS FOR INDIVIDUALS:** Almost everyone must get coverage through an employer, on their own or through a government plan. Exemptions for economic hardship. Those who are obligated to buy coverage and refuse to do so would pay a fine starting at \$95 in 2014 and rising to \$750.
- **REQUIREMENTS FOR INDIVIDUALS:** Individuals must have insurance, enforced through a tax penalty of 2.5 percent of income. People can apply for hardship waivers if coverage is unaffordable.

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• Health Care Reform

- Where are we?
- REQUIREMENTS FOR EMPLOYERS: Not required to offer coverage, but companies with more than 50 employees would pay a fee of \$750 per employee if the government ends up subsidizing employees' coverage.
- REQUIREMENTS FOR EMPLOYERS: Employers must provide insurance to their employees or pay a penalty of 8 percent of payroll. Companies with payrolls under \$500,000 annually are exempt — a change from the original \$250,000 level to accommodate concerns of moderate Democrats — and the penalty is phased in for companies with payrolls between \$500,000 and \$750,000.
- Small businesses — those with 10 or fewer workers — get tax credits to help them provide coverage.

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• Health Care Reform

- Where are we?
- HOW YOU CHOOSE YOUR HEALTH INSURANCE: Self-employed people, uninsured individuals and small businesses could pick a plan offered through new state-based purchasing pools. Would generally encourage employees to keep work-provided coverage.
- HOW YOU CHOOSE YOUR HEALTH INSURANCE: Beginning in 2013, through a new Health Insurance Exchange open to individuals and, initially, small employers. It could be expanded to large employers over time. States could opt to operate their own exchanges in place of the national exchange if they follow federal rules.

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• Health Care Reform

- Where are we?
- CHANGES TO MEDICAID: Income eligibility levels likely to be standardized to 133 percent of poverty — \$29,327 a year for a family of four — for parents, children and pregnant women. Federal government would pick up the full cost of the expansion during the first three years. States could negotiate with insurers to arrange coverage for people with incomes slightly higher than the cutoff for Medicaid.
- CHANGES TO MEDICAID: The federal-state insurance program for the poor would be expanded to cover all individuals under age 65 with incomes up to 150 percent of the federal poverty level, which is \$33,075 per year for a family of four. The federal government would pick up the full cost of the expansion in 2013 and 2014; thereafter the federal government would pay 91 percent and states would pay 9 percent.

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- **Health Care Reform**
 - Where are we?
- **ANTITRUST:** Maintains the industry's decades-old antitrust exemption.
- **ANTITRUST:** Would strip the health insurance industry of a long-standing exemption from antitrust laws covering market allocation, price-fixing and bid rigging. The bill also would give the Federal Trade Commission authority to look into the health insurance industry at its own initiative.

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- **Health Care Reform**
 - Where are we?
- **ILLEGAL IMMIGRANTS:** Would be barred from receiving government subsidies or using their own money to buy coverage offered by private companies in the exchanges.
- **ILLEGAL IMMIGRANTS:** Would be barred from receiving government subsidies but permitted to use their own money to buy coverage offered by private companies in the exchange.

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- **"Employee Free Choice Act"**
(EFCA) aka **"CARD CHECK"**
- **PROPOSED Amendments to the National Labor Relations Act**
- **The current legislation is embodied in HR 1409, introduced by Congressman George Miller (D-CA7)**

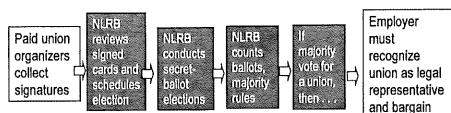
Dueling EFCA Videos



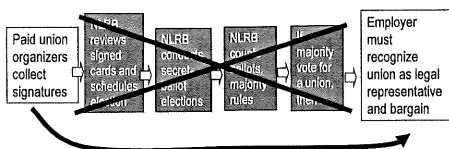
What is EFCA?

- Previous EFCA bills attempt to Amend the National Labor Relations Act (NLRA) in the following manner:
 - Would eliminate (limit) Secret Ballot Union Elections.
 - Union Certification would be based on 50% + 1 signing of union authorization cards – No Election!
 - Also requires Mandatory Arbitration of first union contract if negotiations are unsuccessful after 90 days of bargaining and 30 days with FMCS mediator.
 - Arbitrator would settle outstanding contract disputes.
 - Impose binding contract on parties for 2 years.
- Would “gut” the National Labor Relations Act election procedures after 70 years of guiding American Labor Laws.

Union Organizing: Current Law



"Employee Free Choice Act"



What is the Danger?

- Unions could represent employees without allowing employees the free choice in a secret ballot election.
- Unions can promote themselves and make promises without the employer having an opportunity to respond or rebut issues or "Union Promises."
- Unions could be free to use peer pressure and intimidation tactics in organizing a workplace without the opportunity for all employees to voice their real choice in a secret, government supervised election.
- Mandatory Arbitration of first contracts removes equal bargaining and puts contract terms in the hands of government agents who may not understand our industry or our competition.

What Labor Law "Reform" in 2010 Will Really Mean

- No luxury of time with card check or short election cycles to respond to "wake up" calls or election demands – must have your house in order.
- Severe penalties for violations – must educate and train management team
 - Bargaining Order
 - Fines
 - Treble Damages

BE PREPARED FOR 2010

- FMLA Amendments for 2009
- FMLA Amendments for 2010

FMLA Amendments

- Regulations re-organized with many minor updates/changes
- Implemented Military FMLA
- Significant changes to notice and certification forms and process
- Did not address intermittent and reduced schedule leave issues
- Left basic SHC definition in tact.

FMLA Amendments

- **Eligibility**
- Previous Rule: 12 months of employment need not be consecutive (no limit).
- New rule: Count unless gap of seven years
- Exceptions
 - Military service - fulfillment of National Guard or Reserve military service obligations
 - Written agreement to rehire employee after a break in service.

FMLA Amendments

- **Military Leave**
- 26 weeks per 12-month period
- Additional 26-week leaves in other 12-month periods are allowed for
 - Serious injury or illness of a different covered servicemember
 - Subsequent injury or illness of same covered servicemember

FMLA Amendments

- **Serious Health Condition**
- **Minor Tune-up**
 - Illness, injury or impairment or physical or mental impairment that involves:
 - Inpatient Care
 - Continuing Treatment by a HCP

FMLA Amendments

- **Notice Requirements**
- Step 1: Employer Notice
 - Poster (language)
 - Poster in handbook or distributed once/year distribution (electronic allowed)
 - FMLA Policy (recommended)
 - Substitution of Paid Benefits
 - FMLA Call-in Number
 - Notice and Request Procedure

FMLA Amendments

• Notice Requirements

- Step 2 – Employee Notice
 - Foreseeable
 - 30 days in advance; As soon as possible and practical (dropped 2-day rule)
 - Need not specifically request by name but must provide “At least verbal notice sufficient to make employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave.”
 - Examples: info that employee cannot perform job; employee is pregnant or has been hospitalized, continuing care being provided, qualifying exigency
 - 2nd time for same condition – must ask for FMLA
 - Must follow usual and customary notice and procedural requirements for requesting leave (e.g. written notice)
 - Allows employer opportunity to engage with employee in “reasonable efforts” to schedule treatments

FMLA Amendments

• Notice Requirements

- Step 2 – Employee Notice
 - Unforeseeable
 - As soon as possible and practical (dropped 2-day rule)
 - Need not specifically request by name but must provide “At least verbal notice sufficient to make employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave.”
 - 2nd time for same condition – must ask for FMLA
 - Must follow usual and customary notice and procedural requirements for requesting leave (e.g. written notice)
 - Calling in “sick” insufficient.

FMLA Amendments

• Notice Requirements

- Step Three: Eligibility/Rights & Responsibilities (form)
 - W/in 5 days of employee notice
 - Like I-9 – need to complete form fully (e.g. reason not eligible)
 - Only one notice per year/event needed
 - Once eligible – remain eligible for event for leave year
- Step Four: Designation (form)
 - W/in 5 days of getting info from Employee (e.g. certification)
 - Like I-9 – need to complete form fully
 - Must notify if fitness for duty and include essential functions
 - Retro OK if either no harm to employee or both parties agree event was covered.
 - Ragsdale penalty: employer liable if harm suffered by failure

FMLA Amendments

- 2010 Requirements
- The National Defense Authorization Act of 2010 was signed into law by President Obama on October 28, 2009.
- Although the law deals mainly with defense appropriations, it also includes amendments to the FMLA which affect the obligations of employers to provide leave for the families of military members.
- The amendments in this law are effective immediately upon passage.

FMLA Amendments

- 2010 Requirements
- "Exigency" Leave
- Previously, the FMLA provided up to 12 weeks of job-protected leave made necessary by any "qualifying exigency" arising out of the fact that an employee's spouse, child, or parent is on active duty or has been called to active duty "in support of a contingency operation." Although there is no change or additional guidance as to what constitutes a "qualifying exigency," the amendment removes the requirement that military duty be in support of a "contingency operation," and replaces the phrase "active duty" with the phrase "covered active duty."
- Essentially, the amendment clarifies that FMLA's requirement to provide exigency leave applies only to nondomestic military service and applies equally to the families of active duty military and reservists (when called to active duty).

FMLA Amendments

- 2010 Requirements
- Injured Servicemember Leave
- The FMLA also provides up to 26 weeks of job-protected leave to care for a military servicemember who requires care as a result of an injury or illness incurred in the line of duty.
- The amendment expands the definition of "covered servicemember" to include, in addition to current members of the armed forces, veterans who are undergoing medical treatment for a serious injury or illness sustained in the line of duty and who were members of the armed forces within five years preceding the need for such medical treatment.

FMLA Amendments

- **Action Items**
- Obtain and Post New Poster
- Update Handbook
 - New Leave Entitlements
 - Paid Time Coordination
 - WC/STD Coordination
- Update Leave Request Procedures
 - Notice (handbook)
 - Leave Notice and Request Call-in/Forms
- Obtain New Forms and Plan Your Procedure
 - Eligibility/Responsibility Form
 - Designation Form
 - Certification (4 forms)
- Study new Medical Certification Form and Decide Who Will Decide if a SCH Exists Based On Returned Forms

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- **NEW STATUTES AND REGULATIONS**
- Alternative workweek schedules.
- Labor Code §511 has been amended to make it easier for employers to create alternative workweek schedules, such as four-day/10-hour schedule without having to pay overtime. The amendments provide better definitions of work units, allow a work unit with only one employee where appropriate, allow a traditional 5/40 workweek to be one of the menu options and allow employees to move from one schedule to another on a weekly basis. A secret ballot election and other procedural requirements remain intact.

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- Genetic Information Nondiscrimination Act.
- Effective Nov. 21, 2009, employers must begin to comply with the Genetic Information Nondiscrimination Act (GINA). Under GINA, it is illegal to discriminate against employees or applicants because of genetic information. GINA prohibits the use of genetic information in making employment decisions, restricts acquisition of genetic information by employers and other entities covered by Title II and strictly limits the disclosure of genetic information.
- The new poster is available at www.Leoc.gov/employers/poster.cfm

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- Lily Ledbetter Fair Pay Act. The Fair Pay Act extends the time for filing an unfair pay claim. Under the new law, the time begins to run each time an employee receives a paycheck that violates the act, instead of running from the time the initial discriminatory pay decision was made.

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- Workers' compensation.
- The law allowing employees to pre-designate their personal physician of choice as the first medical provider in case of a workplace injury has been extended permanently. If a worker does not pre-designate in writing, the employer may direct the worker to its designated medical provider network. In addition, the penalty for failing to carry workers' compensation insurance has increased by at least 50 percent.

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- Increased tax withholding.
- As of Nov. 1, 2009, employers were required to start using a new state income tax withholding table, increasing by 10 percent the amount of income taxes withheld based on existing claimed exemptions.
- In addition, as of Jan. 1, 2010, there is a 7 percent backup withholding for certain payments to independent contractors, where back-up withholding is otherwise generally required under the Internal Revenue Code.

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- COBRA subsidy.
- In early 2009, as part of the stimulus package, employees who were involuntarily terminated between Sept. 1, 2008, and Dec. 31, 2009 [NOW February 28, 2010], could continue health care coverage through COBRA by paying only 35 percent of their premiums for up to nine months. The remaining 65 percent is paid by employers, who may deduct the cost from federal payroll taxes.
- Work with your benefits provider to supply your terminated employees with the correct information on this COBRA subsidy.

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- I-9 Audits To Increase.
- Employers should be using the most recent Form I-9, revised as of August, 2009 (Dated 08/07/09).
- It is important to use the correct form and implement correct completion protocol.
- Under President Obama, in April, ICE announced a new policy to use more audits with more focus on employers and less large scale raids of undocumented workers.
- This past summer, ICE announced that it had begun 650 audits. ICE now reports that it has completed about half, with 61 employers fined a total of \$2.3 million but 267 employers still under consideration. 16 percent of I-9s reviewed have been found "suspect."

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- I-9 Audits (cont.)
- Now ICE is issuing notices that it intends to audit 1,000 more employers, who need to be prepared to act immediately. ICE typically gives 3 days for an employer to produce I-9s, although it can choose to be more flexible.
- Some of the employers have been chosen for audit because tips and ongoing investigations suggest the likelihood of knowing employment of unauthorized workers. Others have been chosen regardless of suspicion but because they manage "critical infrastructure" such as airports and power plants that might be targets for terrorists.

BE PREPARED FOR 2010

- NEW CASE LAW, OPINION LETTERS
- There were several important court cases and legal opinions issued in 2009 that will affect employers in 2010.
- Below is a summary of the cases that may affect your workplace.
- Key *DLSE opinion letters* now allow pay reductions for salaried employees on reduced workweek and also clarify when an exempt employee can have their pay docked for an absence for personal reasons or illness.
- The Labor Commissioner now takes the position that employers can reduce a salaried employee's pay commensurate with a reduction in the workweek. Prior to this opinion, a salaried employee had to be paid full pay, regardless of how many hours they worked in a workweek.
- The other opinion allows an employer to dock an exempt employee's leave bank and in some case the employer may dock pay in most circumstances when the employee is out for personal reasons or illness.

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- *Hernandez v. Hillsides Inc.*
- Workplace privacy. The California Supreme Court ruled that an employer did not violate workplace privacy rules by secretly installing video equipment in employee offices because the employer was legitimately trying to find out who was accessing Internet pornography after hours and took steps to minimize the intrusion.

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- *Amalgamated Transit Union v. Superior Court & Arias v. Superior Court.*
- Class action lawsuits. In addressing issues of class action requirements, the California Supreme Court made three important rulings: 1) unions cannot bring class action claims on behalf of union members; 2) employees must follow class action rules to bring an unfair competition lawsuit for labor violations on behalf of a group of employees; and 3) Labor Code Private Attorney General claims do not have to be filed as a class action, thereby allowing one employee to sue his employer to recover labor code penalties on behalf of a group of employees.

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- *Schachter v. Citigroup.*
- The California Supreme Court ruled that an employer plan that allowed employees to divert up to 5 percent of earnings to purchase company stock below market price but required a two-year vesting period, was not an illegal forfeiture.

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- *14 Penn Plaza LLC v. Pyett.*
- Binding arbitration. The U.S. Supreme Court ruled that a provision in a collective bargaining agreement requiring union members to arbitrate age discrimination claims under the ADEA is enforceable.

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- Mileage reimbursement.
- If your company uses the IRS mileage rate for reimbursing employees, update your forms to reflect the new, reduced rate of 50 cents per mile.
- The Labor Commissioner considers use of the IRS reimbursement rate to be a reasonable rate.

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- KEY CASES FOR 2010
- U.S. Supreme Court to decide key text message case. The United States Supreme Court has agreed to decide an important employee privacy case — *City of Ontario v. Quon* — that is likely to have far-reaching implications for public and private employers alike. The court will determine: (1) whether text messages sent by an employee using employer-owned equipment are private and therefore entitled to legal protection, and (2) whether messages sent to an employee using that same equipment are private.

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- One of the most highly-anticipated and important state cases to be decided in the last 3 years is expected early this year.
- The California Supreme Court will decide important meal and rest period case.
- Last year, the California Supreme Court granted review of *Brinker Restaurant Corp. v. Superior Court*, which involves several interesting issues including: 1) whether an employer must simply “provide” meal periods, as opposed to ensuring they are taken; 2) whether meal and rest periods must be taken near the middle of each shift; and 3) whether employees can bring class action lawsuits for violation of meal and rest period claims of this nature.

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