

March 2010 News Bulletin

You are receiving this newsletter as a courtesy from our office because you expressed interest in hearing from us about employment and/or immigration issues. Karp, Neu, Hanlon anticipates that this newsletter will be published regularly. The newsletter will also be available on our website, www.mountainlawfirm.com. As with any information you receive from this office, we hope that it is helpful to you. If, however, you do not wish to receive any future newsletters from our office, please send an email to our Office Manager, Robin Mueller, at rm@mountainlawfirm.com and you will be removed from our mailing list. Should you have any questions about information in the newsletter please feel free to contact our office and ask for Anna Itenberg, for employment related questions, or Jennifer Smith, for immigration and naturalization questions. If you think of others who would be interested in receiving this, please feel free to contact Robin Mueller and she will add them to the mailing list.

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Employment Updates:

New State and Federal Laws

The Lilly Ledbetter Fair Pay Act of 2009

- Before an employee can bring a federal discrimination claim against an employer, the employee must file a charge of discrimination with the Equal Employment Opportunities Commission (EEOC). Typically, such a charge must be filed within 300 days of the discriminatory act. The Ledbetter Fair Pay Act (LFPA) applies to claims of compensation discrimination. Pursuant to the LFPA, each paycheck that delivers discriminatory compensation creates a new wrong and restarts the 300 day filing deadline. If an employee timely files an EEOC charge as to at least one instance of pay discrimination, the employee can recover back pay for similar discrimination that occurred during the two years preceding the filing of the charge.

Parental Involvement in K-12 Education Act, C.R.S. §§ 8-13.3-101 et seq.

- This Colorado statute allows employees to take leave, not to exceed six hours in any one month period and not to exceed eighteen hours in any academic year, for the purpose of attending an academic activity for or with their children. However, the employer may limit the employee's ability to take leave in cases of emergency or other situations that may endanger a person's health or safety or in a situation where the absence would result in a halt of service or production. The leave does not have to be paid, although the employer must allow the employee to use accrued paid leave for this purpose if the employee chooses.

*Colorado Employment Security Act,
C.R.S. § 8-72-114*

- This statute penalizes employers who willfully misclassify employees as independent contractors. The Colorado Department of Labor can order the employer to pay back unemployment taxes and interest and can also impose a fine of \$5,000 per misclassified employee for the first offense and \$25,000 per misclassified employee for subsequent offenses. Repeated offenders are also barred from benefitting from any state contract for up to two years.

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Employment Updates:

Revisions to Existing Laws

Colorado Minimum Wage Order Number 26 and Federal Minimum Wage

- Effective January 1, 2010, the Colorado minimum wage for an hourly employee decreased to \$7.24, and the minimum wage for a tipped employee decreased to \$4.22. However, the federal minimum wage remains at \$7.25 per hour. Employers covered by both federal and state minimum wage laws are required to pay the higher minimum wage.

Americans with Disabilities Act (“ADA”)

- Congress made several significant changes to the ADA with the purpose of expanding the definition of “disability” and other terms used throughout the ADA. Although not specified in the Act and not yet addressed by the Tenth Circuit. Other jurisdictions have held that the amendments apply only to employment decisions and actions taken on or after January 1, 2009. In general, it will be easier now for an employee to establish that he or she is disabled and subject to the ADA. Examples of the some other significant changes are that (1) mitigating measures, such as equipment, medication, prosthetics, and hearing aids, will not be considered when evaluating whether an individual has a disability; and (2) an impairment that is episodic or in remission may be considered a disability.

- Another interesting ADA development pertains to employers who have a policy of automatically terminating employees who fail to return to work after exhausting workers’ compensation leave. An Illinois federal court approved a class action settlement in excess of \$6 million filed on behalf of former employees who were automatically terminated pursuant to such a policy. The employees alleged their former employer violated the ADA by failing to explore reasonable accommodations that would allow them to return to work once their leave period expired. As part of the settlement, the company was required to revise its policy to notify injured employees at least 45 days before expiration of their leave period so they can request an accommodation to enable their return to work. Employers should consider implementing similar policy revisions to ensure ADA compliance and avoid litigation.

Employment Updates:

<p>Other Legal Developments</p>
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Medical Marijuana in the Workplace

•Amendment 20, approved by Colorado voters in November 2000, authorizes patients with certain medical conditions to receive a medical marijuana card allowing them to lawfully obtain and use marijuana. This law raises issues concerning the rights and responsibilities of employers and employees who hold medical marijuana cards.

First, Amendment 20 expressly states that employers are not required to accommodate the medical use of marijuana in the workplace. Amendment 20 and Colorado courts have not yet addressed whether an employer can prohibit a marijuana card-carrying employee from having medical marijuana in their system during work hours due to smoking off-duty. However, recent decisions from other jurisdictions with similar amendments have held that the federal Controlled Substances Act prohibits the possession of marijuana and therefore prevents an interpretation of a state discrimination law that would require an employer to accommodate an employee's off-duty and off-site medical marijuana use. Similarly, since marijuana use remains illegal under federal law, employers can most likely terminate a card-carrying employee for using medical marijuana without being liable to the employee for wrongful discharge.

In the context of workers' compensation, Colorado workers' comp statute provides for a 50% penalty on wage-loss benefits when the injury results from the presence of "not medically prescribed controlled substances." Medical marijuana is not a medical prescribed controlled substance, even after Amendment 20, and an employee will probably not be able to rely on Amendment 20 to avoid the penalty if it can be shown he or she was injured on the job because of medical marijuana use.

Non-competition Agreements:

•The Colorado Court of Appeals recently held that when an existing employee signs a non-compete agreement, the employee must receive additional consideration for the valid formation of the agreement. Continued employment of the employee is not sufficient consideration for the non-compete. The rationale for this is that already employed workers cannot be required to give up something in exchange for merely continuing employment.

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Global Immigration & Naturalization Practice Updates:

Biggest News

A **Comprehensive Immigration Reform** (CIR) bill was introduced to the House December 15, 2009 by U. S. Congressman Luis V. Gutierrez (D-IL). It is an important step in creating momentum for an overhaul of our nation's broken immigration system.

The bill, introduced in the House of Representatives, contains many core principles which immigration advocates consider vital to any comprehensive immigration reform bill, including a pathway to legalization for undocumented workers and students, family unity and labor provisions, smarter and more effective enforcement, and worker verification systems that work. According to the sponsors, CIR for America's Security and Prosperity Act 2009 (CIR ASAP) as it will be known prioritizes the best of what our nation values: family, civil rights, economic opportunity and diversity. It is the product of months of collaboration with human rights advocates, labor organizations, and members of Congress.

Already, the Congressional Progressive Caucus, the Congressional Asian Pacific American Caucus and members of the Congressional Black Caucus have endorsed it as a solution to both stem illegal immigration and promote legal migration that will protect and strengthen our nation's economic and national security.

This topic is sure to be in the media often. For up to date correct information about what is happening on this bill, please feel free to contact our office.

Family News

- On October 20, 2009, the Senate passed a bill that contained a provision ending the widow penalty. President Obama signed the law and it went into effect on October 28, 2009. It allows a **widower of a U.S. citizen** who was married less than two years at the time of the citizen spouse's death to self-petition to obtain lawful resident status. This must be done within two years of the law's enactment (by October 28, 2011). Children may be included in the petition. For more information see, www.ssad.org, or contact our office.

- There is a bill pending in the Senate to give lawful permanent resident status to **immediate family members of active immigrant members of the military and veterans**, even if the soldier has lost his or her life in service. It is called the Military Families Act.

- As of March 2010 there is a new I-485 form and there are new filing locations for many USCIS forms. Please contact our office if you have questions, and also check www.uscis.gov for up to date information.

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Travel News

There was a rumor that Customs and Border Patrol was requiring travelers to present proof of vaccination against the H1N1 virus in order to enter the country. This is not true.

U.S. Customs and Border Protection launched on Tuesday, December 8 a pilot program for exiting **H-2A/B temporary workers**. The program will be tested at San Luis and Douglas land ports of entry in Arizona and it is expected to last approximately one year. The goal is to ensure that temporary workers comply with the requirement to leave the country when their work authorization expires.

To verify final departure from the United States, H-2A/B non-immigrant temporary workers will be required to scan their visa and their fingerprints and return their I-94, Arrival/Departure form, at an exit kiosk located at the port of departure. Under the pilot program, travelers admitted under H-2A/B non-immigrant visa classifications at

San Luis or Douglas ports of entry must also depart through one of the two designated ports. The kiosk will provide instructions in English and Spanish.

Employer News

- The Department of Justice released a video aimed at educating employers about **worker rights and employer responsibilities under the Immigration and Naturalization Act** anti-discrimination provision. The half-hour video, available online and in DVD format, describes the types of discrimination prohibited and how employers can avoid discriminatory practices. See www.justice.gov/crt/osc/. Those interested in ordering the video or seeking assistance from OSC may call its toll-free employer hotline at 800-255-8155 (voice) or 800-237-2515 (TTY) or its worker hotline at 800-235-7688 (voice) or 800-237-2515 (TTY).

- The Department of Labor has issued new procedures for obtaining a **Prevailing Wage Determination**. For more information, go to <http://www.dol.gov/regulations/chat-eta.htm>.

- USCIS issued a new 20 page memo on January 8, 2010 drastically revising the requirements of an employer/employee relationship and the consequences of third-party site placements in the context of **H-IB** adjudications. Not only must a petitioner/employer establish that a valid employer/employee relationship exists and will continue to exist throughout the validation period of the H-IB petition, the petitioner/employer must continue to comply with 8CFR214.2(h)(2)(i)B when a beneficiary/employee is to be placed at more than one work location to perform services.

VISA BULLETIN:

The Department of State has released the March 2010 visa bulletin. Please view it at http://travel.state.gov/visa/frvi/bulletin/bulletin_4597.html
To see what visa numbers are available currently.

