

EMPLOYMENT LAW UPDATE

February 8, 2010

TOP 9 IN '09

Employment and Labor Law Happenings in 2009 (And a Sneak Peek at 2010)

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By all accounts, 2009 was a big year. A new President, the first Latino United States Supreme Court Justice, the death of Michael Jackson, the struggling economy – the list goes on. Employers were forced to make tough decisions about their business and their workforce, and those decisions were further complicated by an active year of legislation affecting employment and labor laws. As a recap, let's take a moment to reminisce about the year that was, and take a peek at what may lie ahead in 2010.

Genetic Information Nondiscrimination Act

Signed into law by then-President George W. Bush in May 2008, the Genetic Information Nondiscrimination Act of 2008 ("GINA") generally prohibits discrimination by health insurers (Title I) and employers (Title II) based on individuals' genetic information. GINA's prohibitions against employment discrimination apply to private employers with 15 or more employees and its protections extend to both federal and state employees. Title II of GINA prohibits the use of genetic information in employment decisions, restricts acquisition of genetic information by employers, and strictly limits the disclosure of genetic information. Title II of GINA went into effect on November 21, 2009.

Americans with Disabilities Act Amendments Act (ADAAA)

The ADAAA, effective as of January 1, 2009, significantly expanded the scope of the Americans with Disabilities Act of 1990 (ADA). In September 2009, the Equal Employment Opportunity Commission (EEOC) issued proposed regulations aimed at implementing the ADAAA.

Specifically, the ADAAA:

- debuts a new, non-exhaustive list of "major life activities,"
- prohibits consideration of mitigating measures (except ordinary eyeglasses and contact lenses) to determine whether an individual possesses a disability,
- provides that an individual is "regarded as" possessing a disability if it is established that they have been discriminated against because of an actual or perceived physical or mental impairment,
- requires a broad view of the definition of "disability" and provides that impairments which are episodic or in remission are disabilities if they would substantially limit a major life activity when active.

Michigan Smoking Ban

Michigan became the 38th state to ban smoking in public places. Effective May 1, 2010, the new law bans smoking in all public places, including workplaces, restaurants and bars, with limited exceptions for casino gaming floors, cigar bars, tobacco specialty shops, home offices, commercial trucks and motor vehicles. In addition to banning smoking, the law places an obligation on business owners to enforce the smoking ban, and subjects them to prosecution if they fail to do so. The statute requires business owners/operators to post no smoking signs, to confront someone who is smoking in their establishment, and to refuse to serve anyone who refuses to stop smoking after they have been asked. The law also prevents employers from retaliating against employees who exercise their right to work in a smoke free environment. While opponents of the law indicated a preference to allow individual businesses to decide whether to go smoke-free, concerns for workers exposed to second-hand smoke prevailed.

Family and Medical Leave Act (FMLA) Amendments Related to Military Service

The Department of Labor issued a final rule effective January 16, 2009 which updated the FMLA regulations to implement new military family leave entitlements enacted under the National Defense Authorization Act for fiscal year 2008. Eligible employees are allowed up to 12 weeks of unpaid leave for qualified exigencies arising out of a covered military member's active duty status, or notification of an impending call or order to active duty status. In addition, eligible employees are allowed up to 26 weeks of unpaid leave in a single 12-month period to care for a covered service member recovering from a serious injury or illness incurred in the line of duty while on active duty or that existed before the beginning of the service member's active duty and was aggravated by service in the line of duty while on active duty.

Lilly Ledbetter Fair Pay Act of 2009

The first piece of legislation signed by President Obama was prompted by the United State

Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.* The Act amends Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act of 1967 (ADEA), and modifies the operation of the ADA and the Rehabilitation Act of 1973. It ensures that pay discrimination claims on the basis of sex, race, national origin, age, religion and disability "accrue" whenever an employee receives a discriminatory paycheck, as well as when a discriminatory pay decision or practice is adopted, when a person becomes subject to the decision or practice, or when a person is otherwise affected by the decision or practice.

E-Verify

As of September 8, 2009, federal contractors and subcontractors are required to use E-Verify, an Internet-based system that allows employers to use the information reported on an employee's Form I-9 to determine the eligibility of all employees (new hires and current employees) working on any federal contract to work in the United States.

COBRA Subsidy Pursuant to the American Recovery and Reinvestment Act

On February 13, 2009, Congress passed the American Recovery and Reinvestment Act of 2009. Among a host of other programs and provisions, the Act provides a subsidy of 65% of the COBRA or state continuation coverage premiums for certain involuntarily terminated employees (the subsidy was extended by Congress in December 2009). The subsidy is available to an employee (and his or her covered spouse and dependent children) if the following requirements are met:

- (1) group health coverage is lost due to an involuntary termination of employment;
- (2) the termination of employment occurs on or after September 1, 2008 and before March 1, 2010; and
- (3) if the individual's modified adjusted gross income does not exceed \$145,000 for an

individual filer or \$290,000 for a joint filer (the subsidy is gradually phased out for individuals with modified adjusted gross income between \$125,000 and \$145,000 for single filers and \$250,000 and \$290,000 for joint filers).

The subsidy is equal to 65% of the applicable premium and is available for a maximum of 15 months. The employer (or the insurer with respect to state continuation coverage) recoups the remaining 65% of the applicable premium by claiming a credit on its payroll tax return.

United States Supreme Court Decisions

The Supreme Court issued several important employment- and labor-related decisions this past year.

- In *14 Penn Plaza LLC v Pyett*, the Court held that an employer could enforce a provision in a collective-bargaining agreement that requires union members to arbitrate claims arising under the ADEA and prevent union members from filing suit.
- In *Ricci v DeStefano*, the City of New Haven, Connecticut refused to certify firefighter test results that showed that white candidates outperformed minority candidates. White and Hispanic firefighters who passed the examinations but were denied a chance at promotions by the City's refusal to certify the test results sued, alleging that discarding the test results discriminated against them based on their race, in violation of Title VII. The Supreme Court held that the City's actions did violate Title VII.
- In *Gross v FBL Financial Services, Inc.*, the Court addressed the question of whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case. In mixed motive cases, so long as an unlawful factor is one of several motives for the adverse employment action, the

plaintiff has a viable claim. The statute at issue in *Gross* was the ADEA. The Court held in a 5-4 decision that a plaintiff bringing an ADEA disparate-treatment claim must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. Producing evidence that age was one motivating factor for the action is not enough for an ADEA claim. The Court explained that the burden-shifting framework applied to cases brought pursuant to Title VII, where the burden of persuasion shifts to the employer to show that it would have taken the action regardless of a protected characteristic, does not apply to ADEA claims.

President Obama's Pro-Union Executive Orders

President Obama issued four pro-union executive orders that impact labor issues under government contracts. The Executive Orders provide the following:

- All government service contracts must include a clause that requires successor contractors or subcontractors, under a contract that succeeds a contract for performance of the same or similar services at the same location, to offer the predecessor's employees (other than managerial and supervisory employees), a right of first refusal of employment under the contract in positions for which they are qualified, with certain exceptions.
- Federal government contractors are required to conspicuously post, both physically and electronically, notices designed by the Secretary of Labor to inform employees of their rights under federal labor laws, including the National Labor Relations Act.
- Federal agencies are prohibited from paying a federal contractor for costs related to any actions taken to persuade employees

to exercise or not exercise their right to bargain collectively or unionize.

- Federal agencies are authorized to require the use of a project labor agreement in large scale construction projects. A project labor agreement is a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project. All contractors involved in such a project would be required to become a party to the agreement without the benefit of bargaining.

A Sneak Peak at 2010

Not to be outdone, 2010 promises to be an active year in employment and labor law as well. On the horizon:

- The Supreme Court has quite a number of cases on its docket that will impact employment and labor law jurisprudence. The Court will tackle topics such as privacy of text messages sent on employer-subsidized devices, the legality of National Labor Relations Board decisions made with only two board members instead of a full five member board, federal employee health benefits, when the statute of limitations for discrimination claims technically begins, whether a federal court has jurisdiction to determine collective bargaining agreement formation and whether certain remedies are available for collective bargaining agreement violations.
- Congress has a handful of employment law bills in the pipeline for 2010 that could significantly expand the scope of the FMLA. Some notable bills include the Family Leave Insurance Act of 2009, the Healthy Families Act, the Family and Medical Leave Enhancement Act of 2009 and the Pandemic Protection for Workers, Families and Businesses Act. Most of these bills were introduced in years past and have a decent chance of resurfacing in 2010 including the Family and Medical

Leave Inclusion Act (HR 2132) which would amend the FMLA to permit leave to care for a domestic partner, child of a domestic partner, same-sex spouse, parent-in-law, adult child, sibling, or grandparent if that person has a serious health condition.

- The Employee Free Choice Act of 2009, which was a hot topic in 2009, would amend the National Labor Relations Act to require the National Labor Relations Board (NLRB) to certify a bargaining representative without directing an election if a majority of the bargaining unit employees have authorized designation of the representative (card-check) and there is no other individual or labor organization currently certified or recognized as the exclusive representative of any of the employees in the unit.
- The Paycheck Fairness Act (PFA) would amend the Fair Labor Standards Act to revise remedies for, enforcement of, and exceptions to prohibitions against sex discrimination in the payment of wages. The PFA would provide a broader range of available remedies and limit the affirmative defenses available to employers.

We predict that employment and labor will remain active areas of interest for legislators and courts. Employers, now more than ever, need to keep abreast of the latest developments to ensure timely compliance and anticipate future business needs. The dawn of a new year is a great time to review employment policies, streamline human resources processes, and openly communicate with employees regarding the challenges and opportunities that lie ahead for your business.

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