

Pause, Rewind and Fast-forward: Employment Law 2007-2008

The new year provides the opportunity to review some of 2007's notable labor and employment statutes and cases, and to focus our attention on what is on the horizon for 2008.

2007: The Year Behind

- **New EEO-1 Form:** beginning in September 2007, the EEOC and OFCCP required employers to use a new EEO-1 form that contained new racial and ethnic categories, asked employees to self-identify, and added new levels of job categories.
- **“Healthy” Workplace Bills:** the state legislatures of Vermont, New York, Connecticut and Washington all introduced Healthy Workplace Bills in 2007 that would regulate “bullying” behavior in the workplace. In total, thirteen states, including New Jersey, Hawaii, Massachusetts and California have bills pending. None have been enacted so far, but it is a trend worth watching.
- **New Jersey Enacts Transgender Rights Law:** New Jersey became the 9th state to pass legislation making it unlawful for employers and landlords to discriminate against transgendered people. In 2008, similar laws will become effective in Iowa, Vermont, Colorado, and Oregon.
- **New York Requires Accommodation of Nursing Mothers and Leave for Blood Donation:** In August and December, respectively, New York required employers to accommodate nursing mothers and allow employees a three-hour leave in any 12-month period to donate blood. Personnel policies and employee handbooks should reflect these changes.
- **New Jersey Enacts “Mini-WARN” Law:** The Millville Dallas Airmotive Plant Job Loss Notification Act (“NJ Warn”) was signed by Governor Corzine on December 20, 2007. Although it parallels in many respects the federal WARN Act, there are differences, notably the content of the required notice.
- **Connecticut Protects References of Former Employees:** The Connecticut Supreme Court joined the trend in protecting employment references of former employees by holding such comments qualifiedly privileged, even if the statements are untrue, but made in good faith. Employers are not lawsuit free, however, because the Court set forth conditions for the application of the qualified privilege.
- **Washington, DC Prohibits “Personal Appearance” Discrimination:** The District of Columbia amended its Human Rights Law in 2007, adding “personal appearance” to the list of prohibited bases of discrimination.
- **Virginia Allows Crime Victims Time Off From Work:** Effective on March 15, 2007, Virginia employers must permit an employee who was the victim of a crime time off from work to attend any criminal proceedings relating to the crime.

- **Wal-Mart Class Action:** the largest class-action lawsuit ever filed inched forward when the Court of Appeals for the Ninth Circuit affirmed class certification. Though the decision is subject to appeal, it opens the way for as many as 1.6 million women who have worked for Wal-Mart in its U.S. stores since 1998 to join the lawsuit.

2008: The Year Ahead

New Statutes

- **Employee Free Choice Act:** this Act is being closely watched because it would change how unions are chosen and require mandatory arbitration if a newly organized union and employer cannot reach agreement. Another significant piece of labor legislation, the **RESPECT Act**, would change the well-established definition of “supervisor” under the National Labor Relations Act.
- **FMLA:** It is expected that there will be another legislative push to expand the Family and Medical Leave Act. The bill to expand FMLA benefits to spouses, children or parents of service members called to active duty passed both houses of Congress in 2007, but was not approved by the President. In addition, we anticipate legislation seeking to expand FMLA benefits to include paid leave, grant leave for participation in school activities, and narrow exemptions for businesses.
- **New York Has New Social Security Number Protection Law:** Effective January 1, 2008, New York employers must restrict access not only to their employees’ social security numbers, but to “any number derived from [the SS] number.” California, New Jersey, Connecticut and many other states have similar laws.
- **Employment Non-Discrimination Act:** The “ENDA,” which prohibits discrimination

based on sexual orientation, passed the House in November. Although passage of ENDA could lead to more lawsuits, many states already have non-discrimination laws protecting gays and lesbians.

- **Lily Ledbetter Fair Pay Act:** The Act takes its name from the plaintiff in a Title VII case decided by the Supreme Court in May 2007. The Bill – designed to reverse the Court’s decision – would allow workers to seek lost pay if a claim is filed within 180 days of the most recent unlawful paycheck, no matter when the initial discriminatory act occurred.

Supreme Court Watch

The Supreme Court will decide several significant cases in 2008 that will impact the law of the workplace.

- **Sprint/United Management Co. v. Mendelsohn** was argued in the Fall of 2007. It could have wide ramifications, if the Court rules that a trial court must admit “me-too” evidence i.e., testimony from employees who claim they were victims of the same type of discrimination.
- With the economy teetering and layoffs on the horizon for many companies, the Court just granted review of a decision employers will want to watch, **Meacham v. Knolls Atomic Power Laboratory**. The issue there was a RIF, which resulted in the layoff of 31 workers, 30 of whom were over 40. The Second Circuit held that the employees/plaintiffs bore the burden of proving that the company’s methodology for choosing those to be terminated in the RIF was “unreasonable.” The AARP, among other advocacy groups, has challenged that reasoning and wants the burden of proof to be placed on the **employer** to prove that its methodology was reasonable and justified by “business necessity.” The High Court will now decide this important issue.

- In a second case just granted review, *Crawford v. Metropolitan Govt of Nashville*, Court will decide whether an employee who was a witness in or participates in an internal investigation is protected from retaliation under the federal civil rights laws, in the same way as an employee who has filed a formal charge. The Solicitor General is asking the court to extend Title VII's protections to these employees, which will then even further expand the boundaries of potential retaliation claims.

Litigation Trends

- **Class Action Wage and Hour Litigation:** The tsunami of class action wage and hour litigation continues unabated. With most large companies already hit with FLSA suits, what we see now is the targeting of small and mid-sized employers, particularly service businesses that employ many hourly workers. If you have not done a wage and hour audit, it is never too late and is a prudent move in this environment.

- **Religious Accommodation/Discrimination:** Requests for accommodation of religious practices, and claims of religious discrimination/harassment appear to be trending upward. The government is also becoming more proactive in prosecuting these cases. For example, the U.S. Justice Department just reached a litigation settlement with the NY Corrections Department, requiring the agency to adopt a "Religious Accommodation Policy," and detailed procedures for handling religious accommodation requests. Employers need to make certain that all managers are aware of the legal requirements in this area.
- **Age Discrimination:** By 2009, 53% of the U.S. workforce will be over 40. With this "aging" of the workforce, claims of age discrimination and claims from employees suffering from age-related ailments and "disabilities" will inevitably rise. We believe that this will continue. All employers need to be alert to this trend, and aware of signs that an older worker is being unfairly targeted.

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