

Labor/Employment Law – 2009 – The Year of “Change”

The motto of President Obama’s campaign was “Change,” and that is a theme that follows through into 2009, particularly for employers. With the start of 2009, a number of new “employee-friendly” statutes and regulations are either proposed, or have gone into effect, which have the potential to significantly alter the employer-employee relationship. There are also a number of significant employment cases on the Supreme Court’s docket. These new developments, coupled with the distressed economy, layoffs and nervous employees are bound to spawn more complaints and lawsuits.

Employers need to stay “ahead of the curve” and be well-informed as to their legal obligations, in order to prevent errors that result in costly and avoidable litigation.

Below is a brief overview of changes you should be aware of and trends we are watching:

STATUTES

Federal Laws

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 Ledbetter Act reversed that Supreme Court decision, and extends the time limits for a worker to file a claim of salary or pay discrimination. Under the Ledbetter Act, workers may file a claim for salary discrimination within 180 days of the most recent or last alleged unlawful paycheck, regardless of when the initial salary decision was made. Given today’s economic climate, this Act is sure to incite many more wage discrimina-

tion lawsuits. Employers should document carefully and be prepared to defend salary decisions, even those made many years into the past.

ADA Amendments Act

The American with Disabilities Act Amendments Act of 2008 (“ADA AA”) took effect January 1, 2009. The ADA AA broadens the scope of the ADA’s definition of a disability by expanding the term “substantially limits” and expanding the definition of “major life activities.” The definition of “major life activities” now includes two non-exhaustive lists. The first list includes a number of activities that were not previously recognized, such as reading, bending and “communicating”. The second is a broad list of “major bodily functions,” including such things as normal cell growth, and functions of the digestive, bowel, endocrine and reproductive systems. The ADA AA states that mitigating measures other than eyeglasses or contact lenses are *not to be considered* in determining whether an individual has a disability. The Act also clarifies that an impairment that is episodic or in remission is a disability, if it would substantially limit a major life activity “when active”. It also makes clear that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation.

The ADA AA significantly expands the scope of potentially “disabled” plaintiffs, and will likely also increase the number of accommodation claims, discrimination claims, and lawsuits.

FMLA Expansions

The U.S. Department of Labor issued final regulations implementing the expanded Family and Medical Leave Act (FMLA), effective January 16, 2009. The revised FMLA created two categories of new benefits for serv-

ice members: a 12-week “exigency” leave, which extends 12 weeks of FMLA leave benefits to spouses, children, or parents of service members who are called to active duty; and a **26 week** leave to care for a service member with a serious illness or injury incurred in the line of duty. Among other highlights of the new FMLA regulations, the regulations also clarify and increase employer and employee notice requirements, requiring employers to provide employees with a “general notice” about the FMLA, an eligibility notice, a rights and responsibilities notice, and a designation notice. In addition, if the employer deems the employee’s medical certification to be incomplete or insufficient, the employer is required to specify in writing what information is lacking and to give the employee seven calendar days to cure any deficiencies. The regulations also state that an employee must follow the employer’s usual and customary call-in procedures for reporting an FMLA absence, unless there are unusual circumstances preventing the employee from doing so. This revision modifies the former provision, which was interpreted to allow some employees to provide notice up to two full days *after* an absence.

New I-9

The U.S. Citizenship and Immigration Services (USCIS) has once again revised the I-9 Form. Employers are required to use the new I-9 Form for all new hires and re-verifications effective February 2, 2009. The interim final rule narrows the list of acceptable documents and further specifies that expired documents are not acceptable forms of identification. Employers may no longer accept temporary resident cards or older versions of the employment authorization card. The revised form includes revisions to the employee attestation section and adds the new U.S. Passport Card to List A.

State Laws

New York WARN Act

New York now has its own Worker Adjustment and Retraining Notification Act (“the NY WARN Act”), which became effective February 1, 2009. The NY

WARN Act covers employers with **50** or more employees (as opposed to the federal WARN, which had a 100-employee threshold) and requires at least **90 days** (versus 60 days) advance notice before any mass layoff. The NY WARN Act will also apply to more layoffs than the Federal WARN Act, because the Act has a lower threshold. The Act defines a mass layoff as a reduction in force resulting in employment losses at a “single employment site” within a 30-day period of (1) at least 33% of the workforce and at least **25** full-time employees, or (2) at least **250** full-time employees, regardless of percentage of workforce.

New Jersey Requires Paid Family Leave

In April 2008, New Jersey became the third state in the nation to enact paid family leave legislation. New Jersey’s Family Temporary Leave Law requires all employers that are subject to the New Jersey Unemployment Compensation Law to enroll in either a state or private plan that offers paid leave to employees while out on leave to care for a new born, newly adopted child, or family member with a serious health condition. The law entitles employees to six weeks paid leave, during which the employee will receive 2/3 of his or her average weekly wage up to \$524 per week. The law requires payroll deductions beginning January 1, 2009. Benefits will be available starting July 1, 2009. Employers must conspicuously post notice of Paid Family Leave Rights and provide written notice to each employee.

D.C. Accrued Safe and Sick Leave Act

The D.C. Department of Employment Services has issued proposed regulations governing paid sick and safe leave for employees. Under the Act, employees began accruing paid sick leave effective November 13, 2008. Employers with 100 or more eligible employees in D.C. must provide each employee not less than one hour of paid leave for every 37 hours worked, not to exceed seven days of paid leave per calendar year. The accrual rate and maximum accrued days decrease for smaller employers, based on the number of eligible employees employed. An employee may use paid leave to care for a mental illness, injury, or medical condition of the employee or a family member.

Connecticut Social Security Numbers Protection

As of October 1, 2008, Connecticut employers must safeguard personal information in its possession from misuse by a third party and “destroy, erase, or make unreadable” personal information on computer files and documents prior to disposing of those files. Employers who collect social security numbers must have and post a privacy protection policy that protects the confidentiality of social security numbers, prohibits unlawful disclosure of social security numbers, and limits access to social security numbers. Any employer who fails to comply will be subject to a penalty of \$500 per violation.

Illinois Employees have Access to Jury Trial

As of 2008, the Illinois Human Rights Act gives employees the right to sue employers for discrimination or harassment in Illinois state courts. With the signing of House Bill 1509, employees filing charges with the Illinois Department of Human Rights (IDHR) will now be able to file suit against the employer in Illinois circuit court, at several points in the IDHR process. This creates an unfamiliar forum for employers, which makes the outcome of employee discrimination claims even more uncertain.

EXECUTIVE ORDERS

With the inauguration of a new president, new Executive Orders

On January 30, 2009, President Obama signed three pro-union executive orders. The first order requires employers with federal contracts valued over \$100,000 to post a notice in the workplace informing employees of their rights under the National Labor Relations Act. This order also repeals the executive order signed by President Bush requiring employers with federal contracts to inform employees that they could not be required to join the union as a requisite of employment. The second order requires federal contractors who take over a contract to provide services to government buildings to offer jobs to the non-supervisory employees of its predecessor. The final order prevents federal contractors from being reimbursed with federal funds

for money spent opposing union organizing efforts among their employees.

SUPREME COURT DECISIONS

An employee interviewed in an internal investigation is protected from retaliation

In *Crawford v. Metropolitan Government of Nashville and Davidson County*, the Supreme Court unanimously held that an employee who participates in an internal investigation has engaged in protected activity and is protected by the retaliation provisions of Title VII. The employer in *Crawford*, was investigating rumors of sexual harassment by a supervisor. Plaintiff Vicky Crawford was asked whether she'd witnessed any inappropriate behavior. In response, she proceeded to tell the employer about a series of harassing acts by the supervisor toward herself. Crawford was later fired, and alleged that it was in retaliation for her cooperation in the investigation. The Supreme Court unanimously held an employee who participates in an investigation is “opposing” discrimination, even if the employee takes no further action on his or her own to seek to stop or remedy the conduct. In light of this decision, employers should be mindful of the possible consequences of how and when they investigate internal complaints.

ON THE HORIZON

There are a number of significant pieces of legislation on the horizon, which we continue to monitor, such as:

- **The Employee Free Choice Act** – which will eliminate the NLRB secret-ballot election. Unions are lobbying hard to get this legislation passed;
- **The “Respect” Act** – which will allow supervisors and managers to unionize;
- **The “Working Families Flexibility Act”** – which will give employees the right to time off for family obligations, like school meetings.

There are also proposals to bar employers from mandating arbitration of employment discrimination claims, and to remove the cap on damages in Title VII cases.

There are also *eight* cases pending before the Supreme Court this term in the labor/employment areas. Among the issues the high court will address are:

- Can employees who are covered by a collective bargaining agreement be required to litigate discrimination claims through the union grievance arbitration process? (*14 Penn Plaza v. Pyett*, U.S. No. 07-581).
- Are women who were denied “service credit” for purposes of pension, for the time they were out on maternity leave, prior to the enactment of the Pregnancy Discrimination Act, entitled to that credit now? The plaintiffs in this case are now trying to amend their complaint, relying on the Ledbetter Fair Pay Act. Stay tuned to see how the Supreme Court addresses that. (*AT&T v. Hulteen*, No. 07-543).
- What is the burden of proof in an age discrimination action, and may an ADEA plaintiff argue there was a “mixed motive” for his discharge? (*Gross v. FBL Fin. Services*, U.S. No. 08-441).
- In a reverse discrimination case, can an employer (a municipality) lawfully refuse to certify the results of a promotion exam, solely because too few minorities would be promoted? (*Ricci v. DeStefano*, U.S. No. 07-1428).

OTHER TRENDS

We see the epidemic of FLSA litigation continuing, with more claims focused on alleged violations of meal and rest break laws, improper classification of employ-

ees, and similar “time-off” requirements. As overtime budgets shrink, managers may feel more pressure to “cut” OT, and thus run a foul of the FLSA. Train your managers to avoid this pitfall. We also see disability, age and retaliation claims increasing in frequency.

2009 will prove to be an economically challenging year for many employers. The last thing a business needs is to face a lawsuit, class action, government investigation or fine, because you have violated the employment or labor laws in your jurisdiction. For those reasons, it is critical to your business that you stay abreast of these laws and cases.

The Kelley Drye Labor and Employment group has more detailed advisories on a number of the statutes discussed here, which are available on our website.

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