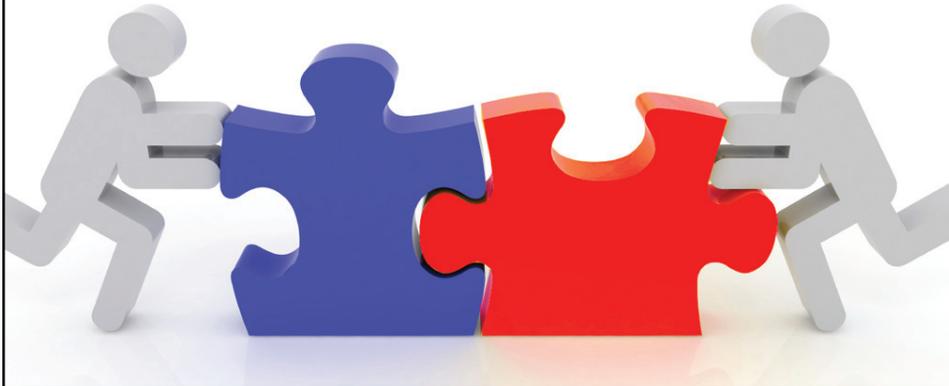


Puzzling It Out:

Labor and Employment Issues Post-Election



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Current Developments

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Current Developments in Employment Law

Topics addressed

- ADA Amendments Act
- FMLA (amendment and regulations)
- L&E cases before Supreme Court
- Other L & E trends and issues



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ADA Amendments Act of 2008

- Signed into law by President Bush September 25, 2008—(changes take effect on January 1, 2009)
- Expanding scope of protection under the ADA
 - Studies indicated that employers prevailed in about 90% of all ADA cases
 - Supreme Court decisions narrowed coverage of ADA



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Overturms Landmark Supreme Court decisions

- Sutton v. United Air Lines, Inc. (1999) (holding determination of whether an impairment substantially limits a major life activity shall be made taking into account ameliorative effects of mitigating measures, such as eyeglasses or medications)
- Toyota Manufacturing, Kentucky, Inc. v. Williams (2002) (holding to be a substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's lives, and the impairment must be permanent or long-term)



Closer Look at ADA Amendments

- Sets forth rules of construction regarding the definition of “disability” and “regarded as”
 - Favors broad coverage
 - An impairment that substantially limits one major life activity need not limit other major life activities
 - An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active
 - The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of specified measures



Likely Impact of ADA Amendments Act

- More people will qualify as disabled (for example a person with controlled diabetes will now likely qualify)
- Increase in litigation until courts provide limits to new definitions to “disability” and “regarded as”
- Focus in ADA litigation will likely change from whether an individual is “disabled” to what is a “reasonable accommodation,” undue hardship” and “essential job functions”



What Employers Should Do

- Review existing procedures for compliance
- Be prepared to inject flexibility into policies regarding reasonable accommodations
- Review job descriptions



FMLA (Amendment and proposed regulations)



FMLA Amendment

- National Defense Authorization Act for Fiscal Year 2008
 - Military related amendments to the FMLA signed by President Bush on January 28, 2008
 - Two main provisions
 - o Caregiver leave
 - o Active duty leave



Caregiver Leave

- Became effective upon signature
- 26 weeks of FMLA leave to care for a family member seriously injured or becoming ill while on active duty



Caregiver Leave

- Eligible employee who is a:
 - (a) the spouse, son, daughter, parent or “next of kin”;
 - (b) seriously injured or ill member of the Armed Forces
- 26 workweeks of FMLA leave during a single 12 month period to care for the service member



Active Duty Leave

- Not effective until final regulations issued
- 12 weeks of FMLA leave in a 12 month period for “qualifying exigency”



Active Duty Leave

- “Qualifying Exigency” (as will be determined by Secretary of Labor by regulation) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation”
- “Qualifying Exigency” is not currently defined
- “Contingency Operation” is a military operation designated by the Secretary of Defense



Proposed FMLA Revisions

- Final rule expected soon (November 2008) with effective date likely within 30 to 60 days of issue date



Proposed FMLA Revisions

- Advance Notice
 - The current “two day rule” would be eliminated
 - In all but “most extraordinary circumstances,” notice of need for unforeseeable leave must be given before the shift starts
 - Proposed rule would require notice to be given on the same or next business day as when the need for leave becomes known
 - Employers can enforce usual and customary call-in procedure



Proposed FMLA Revisions

- Medical Certification for Chronic Conditions
 - Proposed rule codifies 2005 Wage and Hour Division Opinion Letter stating that employers can request a new medical certification at the first absence in a new leave year
 - Clarifies applicable time periods for recertification of chronic serious health conditions of “lifetime” or “unknown” duration
 - Recertification can be required every 6 months



Proposed FMLA Revisions

- Five Day period to notify of Eligibility and Designate (presently is 2 days)
- If medical certification is incomplete or insufficient, certification must be returned to the employee with the problems specified in writing
 - Employee is then given 7 days to cure



Proposed FMLA Revisions

- Direct contact with Health Care Providers
 - Employers can communicate directly with health care providers so long as HIPAA requirements are met
 - BUT cannot ask for additional information beyond that allowed in updated certification form (WH-380)



Proposed FMLA Revisions

- Fitness for Duty
 - Employers permitted to require employees to furnish fitness for duty certifications every 30 days if employee has used intermittent leave and reasonable safety concerns exists
- Waivers of past rights made enforceable
- New notice posting and distribution requirements



Supreme Court Cases

- Issues addressed
 - First Amendment rights (2 cases)
 - Pension Benefits
 - Retaliation
 - Arbitration
 - Pregnancy Discrimination



Supreme Court Cases

- First Amendment Cases
 - Locke v. Karass: whether public employee union may charge nonmembers who are required to pay agency fees for representational costs for litigation expenses incurred by the international union on behalf of other bargaining units but funded by pooling arrangement.



Supreme Court Cases

- First Amendment Cases
 - *Ysursa v. Pocatello Education Assoc.*: whether an Idaho statute prohibiting local government employers from allowing employee payroll deductions for political activities violates First Amendment free speech rights of unions and their members.



Supreme Court Cases

- Pension Benefits Case
 - *Kennedy v. Plan Admin. For DuPont Savings & Investment Plan*: whether a qualified domestic relations order (QDRO) is the only valid way under ERISA for a divorcing spouse to waive his/her right to the other spouse's pension benefits.



Supreme Court Cases

- Retaliation Case
 - Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn.: whether Title VII protects an employee who is fired after she cooperated with her employer's internal investigation by reporting sexual harassment by a supervisor



Supreme Court Cases

- Arbitration Case
 - 14 Penn Plaza LLC v. Pyett: whether employees covered by a collective bargaining agreement providing that statutory employment discrimination claims must be pursued through contractual grievance/arbitration procedures have a right for a court to decide that age discrimination claims.



Supreme Court Cases

- Pregnancy Discrimination Case
 - AT&T Corp. v. Hulteen: whether an employer must give full service credit for purposes of calculating retirement benefits for pregnancy leaves taken before the Pregnancy Discrimination Act of 1978 amended Title VII if the plan gave full credit for other types of temporary disability leaves.



Other L & E Issues

- Civil Rights Act of 2008
 - Sponsors cite need to restore worker's rights that have been limited by Supreme Court Decisions
 - Introduced in January 2008 —H.R. 5129 (currently in Subcommittee)
 - Would eliminate damages cap in Title VII and ADA claims of intentional discrimination
 - Would make void pre-dispute arbitration clauses in employment agreements
 - Would allow state employees to sue under USERRA, ADEA and FLSA
 - Would expand remedies for women under EPA



Other L & E Issues

- Employment Non-Discrimination Act
 - Would make actual and perceived sexual orientation protected category
 - Passed House on November 7, 2007
 - Currently in the Senate
 - o Senator Kennedy (D. Conn.) promises to move the legislation forward



Other L & E Issues

- Arbitration Fairness Act of 2007
 - Would ban pre-dispute arbitration agreements in many employment contexts
 - Supported by Senators Dodd (D. Conn.) and Kennedy (D. Mass.)
 - Presently in both House and Senate
 - o House and Senate: in subcommittees



Other L & E Issues

- Genetic Information Non-Discrimination Act
 - Signed by President Bush on May 21, 2008 (overwhelming support in both House and Senate)
 - Prohibits the improper use of genetic information by insurance companies and employers.



Other L & E Issues

- FLSA lawsuits continue to be substantial
 - Especially collective actions based on alleged unpaid overtime
- Workforce reductions
- Religious Discrimination
- Florida Law
 - Worker's comp
 - Pregnancy