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Employment Law Update 2008 Year In Review

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Purpose

- Look back at the development of employment law in 2008 to see the big picture
 - Some statutes; mainly court decisions
- Assess impact on current practices
 - Maybe too risky; maybe too risk averse
- Anticipate where the law is going
 - Be proactive, not just reactive

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Caveat (what did you expect?)

- This is an overview, not a set of rules that apply in every case
- Employment law cases are highly fact-specific
 - That's why employment lawyers add value 😊
- Judges try to do justice, so unfairness often loses (bad facts make bad law)
 - Determine “fairness” by how that facts would sound to the jury when explained by a skilled advocate

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What is “the law”?

- Starts with statutes
 - Title VII, ADA, ADEA, FMLA, FLSA, ERISA, NLRA, WFEA and other WI statutes
 - Administrative regulations
- Develops with court decisions that interpret and apply the statutes
 - Arise in fact-specific cases, but provide guidance and interpretation
 - Establish precedent that guides claims and defenses in future cases

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What is “the law”?

- Court decisions, usually on appeal from trial judge rulings:
 - Sometimes after trial
 - But very often before trial
- “Summary Judgment” = pretrial challenge to the legal sufficiency of plaintiff’s claim and evidence
- If successful, avoids trial, but still after much cost, effort and “pain”
 - Appealed very often (*de novo* review at marginal cost)

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The Big Picture: 2008 was a successful year for ee rights

- Congress busy expanding employee rights with new laws
- Supreme Court busy expanding employee rights
 - Pundits score this term 7 decisions advancing ee rights v. 2 Er-friendly decisions
- Wis. Legislature and Wis. Supreme Court quiet; but...
- The City of Milwaukee also expanded ee rights with mandatory paid leave

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The Big Picture: Key Points

- ADA expanded by Congress
- Retaliation claims flourish
- Plaintiffs can prove discrimination claims in part by using evidence of other persons discriminated against (“me too” evidence)
 - Makes litigation more costly due to greater discovery
- Age claims harder to defend
- 7th Circuit decisions on ADA and FMLA generally favorable for employers

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Discrimination Claims Data

- EEOC reports private sector charges increased 15.2% in FY 2008 to 95,402 (after a decrease in FY 2007)
 - Retaliation charges have increased 100% since 1992
 - Retaliation now second highest category, behind race claims
- EEOC reports merit finding rate of 21.4% (down slightly from historical high of 23%)
 - EEOC recoveries down to \$274.4M (from \$290)

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Claims Projections

- EEOC and others predict continued increase in charges
 - Employees' greater awareness of laws
 - Worsening economic conditions
 - Increased diversity
 - Aging workforce
 - Increased benefits costs

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Litigation Data (Federal)

Total employment cases filed in federal court in 2008 = 31,990

- Up from 30,207 in 2007
- 14,236 discrimination cases (fourth annual decrease in a row since 18,845 in 2004)
- ERISA -- 8,785 cases
- FLSA -- 5,200 cases
- Miscellaneous other

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Federal Legislation

- Americans With Disabilities Act Amendment Act of 2008
 - Emphasizes broader ADA coverage
 - Includes impairments that are episodic or in remission
 - Determine if substantially limits major life activity without regard to mitigating measures like medication or devices
 - Nullifies various Supreme Court decisions

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Federal Legislation

- ADAAA impact:
 - Broader ADA coverage means more cases in which employers must:
 - Engage in the interactive process
 - Provide reasonable accommodations
 - Therefore:
 - Perhaps review, update and reinvigorate your accommodation process
 - Re-educate critical managers

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Federal Legislation

- Genetic Information Nondiscrimination Act (GINA)
 - Prohibits discrimination on basis of genetic information with respect to health insurance and employment
 - Creates a new “protected category”
 - Essentially, treat genetic information like race/national origin/gender/etc. when making employment decisions
 - Becomes effective Nov. 2009

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Federal Legislation

- Fair Minimum Wage Act of 2007
 - Increases federal minimum wage to \$6.55/hr. as of July 24, 2008, and
 - \$7.25/hr. as of July 24, 2009.
- Exceeds WI’s minimum wage.
- Employees are always entitled to the highest minimum wage that applies to them, whether under federal, state or local law

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Federal Legislation

- Mental Health Parity and Addiction Equity Act of 2008
 - Part of the economic bailout bill
 - Requires most group health plans to provide equivalent coverage for treatment of mental illnesses comparable to coverage provided for physical illnesses

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Federal Legislation

- E-verify Extension – to March 6, 2009
- Michelle's Law
 - Amends ERISA to ensure that dependent students who take a medical leave do not lose coverage
- Consumer Products Safety Improvement Act of 2008
 - Whistleblower protection for reporters of violations

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Wisconsin Legislation?

- Not so much

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Local Legislation

- Milwaukee Paid Leave Ordinance
 - Requires most employers in Milwaukee to provide paid sick leave up to nine days per year
 - Third such ordinance (S.F. and D.C.)
 - Common denominator: Foley & Lardner offices???
 - Status: being challenged in court action
 - Email me if you need a summary of the ordinance

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Retaliation

- *CBOCS West, Inc. v. Humphries* (S. Ct.)
 - Black associate manager fired 2 months after complaining about co-manager's racist comments
 - Sued for race discrim. and retaliation under Title VII and Section 1981
- Result: Court permits retaliation claim per Section 1981 despite no such language in the statute

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Retaliation

- Upshot:
 - Strong indication of continued development of anti-retaliation rights
 - Supreme Court will protect, or even create, anti-retaliation rights
- Claim per Section 1981 is more problematic (than Title VII)
 - Longer statute of limitations (4 yrs.)
 - No administrative charge filing
 - No cap on compensatory and punitive damages

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Retaliation

- *Gomez-Perez v. Potter*, (S. Ct.)
- 6-3: federal sector provision in ADEA prohibits retaliation despite lack of such language (unlike private employer provision)
- Upshot: more of the same. Courts are protecting and expanding anti-retaliation rights.

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Retaliation

- *Gates v. Caterpillar, Inc.*, (7th Cir.)
 - Ee fired for abusing telephone and computer and poor performance
 - Ee claimed sex discrim. and retaliation
- Claim dismissed because her prior complaints not connected to gender
- But: court confirms that a retaliation case can be proven through a mosaic of circumstantial evidence
 - Provides a tool for retaliation plaintiffs to use to defeat motions for summary judgment

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Retaliation

- Some favorable employer decisions:
- *Tate v. Exec. Mgt. Services, Inc.*, (7th Cir.) – plaintiff must show he had a good faith belief he was opposing unlawful activity to support a claim
- *Amrhein v. Health Care Serv. Corp.*, (7th Cir.) – discharge 3 months after threat to file sex bias charge did not support retaliation claim

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Retaliation - the future

- *Crawford v. Metropolitan Govt. of Nashville*, (S. Ct.)
 - Supreme Court to decide if anti-retaliation provisions of Title VII protect workers who cooperated in internal investigation of sexual harassment

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Age Discrimination

- *Sprint v. Mendelsohn*, (S. Ct.)
 - 51 yr. old ee selected for term in RIF sued for age discrimination
 - Issue was admissibility of evidence of other ees who claimed to be selected (by different managers) based on age
- Sup. Ct. declined to limit such “me too” evidence – (9-0!)
 - Leaves admissibility (relevance) decision to the trial judge

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Age Discrimination

- Upshot:
 - Plaintiffs have a wide open opportunity to seek discovery of evidence of other employees who may have been discriminated against; making litigation more expensive
 - Absence of some guideline plus broad discretion of trial judge adds uncertainty to litigation and projecting chances of success at SJ or trial

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Age Discrimination

- *Federal Express v. Holowecki*, (S.Ct.)
 - (7-2): any document filed with EEOC by individual requesting action is a “charge” within ADEA
 - Court urges flexible application of requirements, making it easier for charging parties by eliminating strict procedural roadblocks

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Age Discrimination

- *Meacham v. Knolls Atomic Power Laboratory*, (S. Ct.)
 - In 2005, S. Ct. for first time confirmed that plaintiffs can prove age discrimination claim based on disparate impact (*Smith v. City of Jackson*)
 - This case confirms that “reasonable factors other than age” is a defense, and burden of proof is on the employer
 - Another ee-favorable decision making age claims easier for plaintiffs to win

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Age Discrimination

- Beware:
 - *Meacham*, and *City of Jackson* before it, put disparate impact theory on radar of plaintiffs' counsel
 - RIFs are fertile ground for these claims
 - Take extra care in assessing preliminary results of RIF decisions to assess disparate impact

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Age Discrimination – 7th Cir.

- *Tubergen v. St. Vincent Hospital*
 - Remark in a RIF that Er was “getting rid of the old guard” was not enough to prove age bias because remark was not about the plaintiff
 - “Old guard” can refer to persons who are neither guards, nor old

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Age Discrimination – 7th Cir.

- *Filar v. Board of Educ. of City of Chicago*
 - Appellate court reinstates age claim of fired teacher, urging more flexible analysis of who can be considered “similarly-situated” for discrimination analysis
 - Continues the very recent trend of the 7th Cir. retreating from holdings that made it very difficult for plaintiffs to show that another is similarly-situated

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ADA – 7th Cir.

- *DeWitt v. Proctor Hospital, (7th Cir.)*
 - Nurse manager rated “outstanding” confronted by supervisor about large cost of health care benefits for husband
 - 3 months later, Hospital announces need for creative cost cuts and fired DeWitt
 - App. Ct. reversed ruling for employer, saying there was enough evidence of “association discrimination” to merit a trial
- Upshot: take care not to target employees based on their dependents’ health care costs

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ADA Discrimination – 7th Cir.

- *Balino v. Peters*
 - Er offered as accommodation transfer to a sit-down job, but with lower bonus potential
 - Court confirmed that once employer provided a reasonable accommodation (even if not one preferred by ee), then Er cannot be liable on claim of “failure to engage in interactive process”
 - Court confirms that the employer does not have endless exposure to liability for interactive process

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FMLA – 7th Cir.

- *Darst v. Interstate Brands Corp.*
 - Ee fired under attendance policy that counted points for absences (not FMLA)
 - Ee relapsed and drank self into a 3-day blackout; sought treatment but had to wait 2 months for in-patient admission
 - Court confirmed Er position that pre-admission absences were not FMLA-protected

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FMLA – 7th Cir.

- *Breneisen v. Motorola, Inc.*
 - Reversed SJ for employer
 - Court concluded job to which Er returned ee after FMLA leave was not substantially equivalent even though it had same pay and benefits
 - Ee was a receiving clerk; but moved to technician assistant upon return from leave
 - Job had different duties and viewed by others as a demotion due to less prestige and visibility; manual tasks v. prior administrative functions
 - Take care when moving returning ee to different job and don't assume equal pay will satisfy FMLA

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FMLA – 7th Cir.

- *Dotson v. BRP US, Inc.*
 - Confirms that, with notice, Er can run FMLA time concurrent with ee's worker's comp leave
- *Vale v. Raybestos Products Co.*
 - Er fired ee for suspected abuse of medical leave (intermittent leave for unpredictable migraine headaches)
 - No FMLA violation because Er had an honest belief that ee was lying
 - Although risky, Ers can fire abusers and do not necessarily have to prove the abuse, just the honest belief of it based on credible evidence

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FMLA – 7th Cir.

- *Peters v. Gilead Sciences, Inc.*
 - Er’s handbook mouthed FMLA but did not mention eligibility requirement of Er having >50 ees within 75 miles
 - Court ruled the handbook created an obligation on Er to provide the leave despite not being required by the statute to do so

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FMLA – 7th Cir

- *Townsend-Taylor v. Ameritech Services, Inc.*
 - Husband and wife worked for Er. Both received discipline for absences and were fired for attendance problems
 - Both sued on FMLA claim
 - Court upheld dismissal; proper for Er to reject leave when ee misused a form of his spouse;
 - Law imposes a “duty of diligence” on FMLA applicants regarding proper and timely submissions.

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But the big news:

- New FMLA regulations became effective January 16, 2009
 - (Covered in subsequent session)
- New Military Family Leave regulations
 - 26-week entitlement

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Other Discrimination

- *Lapka v. Chertoff*, (7th Cir)
 - Ee claimed she was raped by co-worker while the two were at a mandatory training program out of town
 - Ee later saw assailant, and his brother, in the work area
 - Court upheld dismissal
 - One heinous event can be a hostile environment
 - Er not liable for co-worker wrongdoing unless Er negligent in response

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Other Discrimination

- *Andonissamy v. Hewlett-Packard* (7th Cir.)
 - He suffered verbal abuse of his supervisor after 9/11
 - Court upheld dismissal because for Employer liability for supervisor harassment, the supervisor must have the power to affect the terms and conditions of employment
 - Here, harasser supervised work, but could not hire, fire, discipline, etc.; Thus, Employer only liable if negligent in response

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Other Discrimination

- EEOC issued Compliance Guidance on religion bias claims under Title VII
 - Responsive to 100% increase in religion discrimination charges from 1992 to 2007
 - Make clear that harassment standards are the same for and apply to religion

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ERISA (employee benefits)

- *LaRue v. DeWolff, Boberg & Assoc.*, (S.Ct.)
 - Holding: 401(k) participant can sue for breach of fiduciary duty and recover losses to his own plan account
 - This expands individual's rights; previously many interpreted ERISA to only allow such claims for overall losses to the plan
 - Now individual account holders have much greater incentive to sue

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ERISA (employee benefits)

- *Metropolitan Life Ins. Co. v. Glenn*, (S. Ct.)
 - Case involved the denial by MetLife of Glenn's claim for LTD benefits
 - Sup Ct said that insurer/administrator's conflict of interest is a factor for court to consider when evaluating denial decision
 - Other factor's include insurer's "history of biased claims administration"
 - This will open discovery in denied claims cases

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Wage Litigation

- *Jonites v. Exelon Corp.*, (7th Cir.)
 - On-call time not compensable because employee only had to be reachable by phone and stay within a 2-hour drive
- Wage litigation still flourishing
 - Exempt status
 - Unpaid preliminary/post-liminary activities
 - Independent contractor status

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Labor Law

- *St. Mary Mercy Health Ctrs. v. NLRB*, (7th Cir.)
 - Employer violated labor law by applying its solicitation/distribution rule discriminatorily (to prohibit some pro-union communications but not to Avon, Girl Scout cookies and other personal items)
 - Good reading before any EFCA becomes law

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Other Discrimination

- *Abdullahi v. Prada USA Corp.*, (7th Cir.)
 - Court allows national origin discrimination claim to proceed under Section 1981; urges a broad application of Section 1981 to apply to claims based on nationalities or ethnicity
 - Thus, as with race claims, Ers must take care with nationality and ethnicity discrimination claims because of Section 1981.

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What to Watch in 2009: Federal Legislation

- Extending opportunities to sue for unequal pay
 - Senate just passed “Fair Pay Restoration Act”
- Changing union organizing and first contract requirements (EFCA)
- Narrowing definition of “supervisor” under NLRA (RESPECT)
- Making sexual orientation a protected class (Employment Nondiscrimination Act)
- Requiring paid sick leave
- Prohibiting mandatory arbitration
- Removing damages caps for Title VII and ADA

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