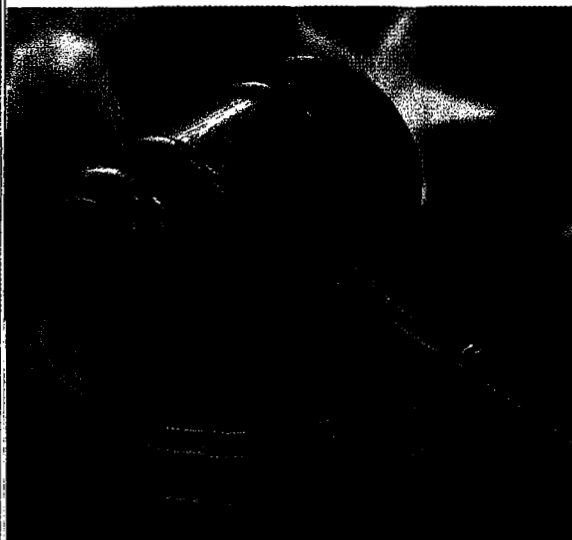


Legislative and Regulatory Update



By John A. Vering III

This article briefly discusses the major legislative and regulatory developments in the labor and employment area in 2008 and presents a preview of some important legislative proposals that may pass in 2009; it does not constitute legal advice.

GENETIC INFORMATION NON-DISCRIMINATION ACT

President Bush signed the Genetic Information Non-Discrimination Act ("GINA") on May 21, 2008. It will prohibit discrimination by employers, employment agencies, and labor unions on the basis of genetic tests. Specifically, it will make it illegal to fire, refuse to hire, or otherwise discriminate with respect to compensation, terms, conditions, or privileges of employment because of genetic information. The EEOC is required to issue regulations within one year of enactment, and the law's effective date with respect to employment to be 18 months

after enactment or in November 2009. GINA's provisions effecting group health plans require the Secretary of the U.S. Department of Health and Human Services ("HHS") to issue final regulation within nine months of enactment, and these provisions of GINA becomes effective in May of 2009.

ADA AMENDMENTS OF 2008

The ADA Amendments Acts of 2008 ("ADAAA") were signed into law by President Bush on September 25, 2008, and became effective January 1, 2009. The chief intent of the ADAAA is to expand the interpretation of the ADA's coverage by legislatively reversing a series of U.S. Supreme Court decisions that had narrowed the scope of ADA's coverage. This new Act specifically overrules two of those decisions – *Sutton v. United Airlines, Inc.*, which limited the ADA's protection for persons whose disabilities could be "mitigated" by measures such as medication, treatment or assistive devices, and *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, which tightened the standard for individuals to be considered "substantially limited" by their disability.

Under the new ADAAA standard, individuals must still be "substantially limited" by their disabilities, but that phrase must be interpreted under a less demanding standard than the one developed by the U.S. Supreme Court. Under the ADAAA, an impairment that

substantially limits one major life activity need not limit other major life activities to be a disability. Further, individuals who suffer from episodic impairments or impairments that are in remission, such as cancer or epilepsy, will still be protected by the ADA so long as the impairment would substantially limit a major life activity when active. Under the ADAAA's rules of construction, ameliorative effects from medication or treatment are not to be considered when determining whether an individual's impairment qualifies as a disability unless the treatment consists of ordinary eyeglasses or contact lenses.

The ADAAA also provides a list of examples of major life activities, i.e., actions that, when substantially impaired, constitute a protected disability. The extensive list of activities now includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating and working, and even the operation of major bodily functions such as immune system functions, cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions. Individuals who cannot perform any one of the listed activities will automatically be qualified as disabled under the ADAAA.

The ADAAA re-defines the requirements of being "regarded as" having an

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impairment to protect individuals from adverse action based on an actual or perceived disability, whether or not the perceived disability limits or is perceived to limit a major life activity. The ADA provides that the EEOC is to revise its regulations that define disability so that "substantially limits" means "significantly restricted" as intended by the ADA. However, to date, the EEOC has failed to issue those regulations.

MISSOURI HB1549

On July 7, 2008 Missouri Governor Matt Blunt signed into law House Bill 1549 which addresses illegal immigration in Missouri. This Bill provides that "no business entity or employer shall knowingly employ, recruit, hire for employment, or continue to employ an unauthorized alien to perform work within the State of Missouri." In addition, the law imposes specific requirements and restrictions on public employers and business entities having contracts with the State exceeding \$5,000 or receiving a State-administered or subsidized tax credit, tax abatement or loan, which entities are required to utilize e-verify with respect to public employees and employees working on the contracts. Enforcement of this new law is through the Missouri Attorney General's office. Penalties for violating the law are quite substantial and can involve suspension or even permanent loss of business permits and applicable licenses and exemptions. The law also requires employers with five or more employees to file Federal 1099-Miscellaneous Forms with the Missouri Department of Revenue with respect to independent contractors in an effort to prevent any employer from misclassifying an illegal alien employee as an independent contractor.

NEW FMLA REGULATIONS

The U.S. Department of Labor's Revised FMLA Regulations take effect January 16, 2009. The regulatory changes are substantial. They spell out rights of employees to take leave because of a qualifying exigency arising out of the fact that the spouse or son, daughter or

parent of the employee is on active duty (or has been notified of an impending call or order to active duty) as a member of the National Guard or Military Reserves. The law also provides up to 26 weeks of FMLA leave in a 12-month period for an employee who is the spouse, son, daughter, parent or next of kin of a current member of the Armed Forces who is injured or recovering from an injury suffered while on active duty. The U.S. Department of Labor has also changed various procedures for medical certification and the notice requirements for both employers and employees. Every employer subject to FMLA will be required to modify its employee handbooks and procedures in order to comply with these new FMLA regulations.

LILLY LEDBETTER FAIR PAY ACT

This new law is designed to reverse the U.S. Supreme Court decision in *Ledbetter v. Goodyear*. The Supreme Court in *Ledbetter* ruled that an employee had 180 days to file a discrimination charge with the EEOC Commission from the date that the employer made the discriminatory pay decision. The intent of this law is to allow an employee to bring a lawsuit for pay discrimination within 180 days of the date an employee is paid pursuant to a discriminatory pay decision and provides that each time an employee receives a paycheck that manifests discrimination, the time limit for filing a discrimination action begins anew. This opens the door for an employee to recover for alleged discriminatory pay decisions going back 20 years or more. In many instances, it would be virtually impossible for an employer to defend a case going back that far with witnesses not being available, memories being stale, and decision-makers having changed. This Bill became law 1-29-09 and is retroactive to May 27, 2007.

THE PAYCHECK FAIRNESS ACT

This proposed law would amend the existing Equal Pay Act by greatly expanding the damages recoverable under the Equal Pay Act which currently allows an employee to recover unpaid wages plus

an equal amount for liquidated damages plus attorney's fees and costs. Under this proposed Act, employees would also be able to recover damages for mental pain and suffering and punitive damages without limitation. This bill passed the U.S. House of Representatives on January 9, 2009 and is expected to be taken up by the U.S. Senate in the coming weeks.

THE EMPLOYEE FREE CHOICE ACT

This proposed law would eliminate the secret-ballot election in union organizing campaigns and replace it with a union card-check process whereby a union would automatically be recognized as the bargaining agent of a group of employees if union authorization cards are signed by more than 50 percent of the employees. This card-check process would allow employees to be pressured into signing union cards without ever having the right to vote on whether or not they wanted a union in a secret ballot election and perhaps before the employer even knew there was union organizing activity.

Once the union obtained authorization cards from more than 50 percent of the employees, the employer would have 90 days to negotiate a collective bargaining agreement with the union. If no agreement was reached within 90 days, there would be a 30-day period allowed for mediation with the Federal Mediation and Conciliation Services. If that mediation was unsuccessful, the matter would be referred to a panel of arbitrators to decide the terms of the collective bargaining agreement which would automatically last for 2 years.

Furthermore, the law would impose stiff penalties on employers for violating the National Labor Relations Act (NLRA) during a union organizing campaign but would impose no corresponding penalties for violation of the NLRA by unions.

EMPLOYMENT NON-DISCRIMINATION ACT ("ENDA")

This proposed law, making sexual orientation a protected class, like race, color, sex or age, stands a good chance of passing in 2009.

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HEALTHY FAMILIES ACT

This proposed law would require employers with 15 or more employees to provide seven paid sick days per year for employees working 30 or more hours a week. This bill is strongly opposed by many employers, especially small businesses.

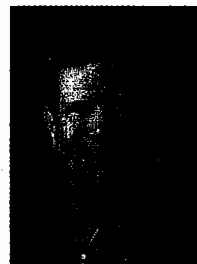
CIVIL RIGHTS ACT OF 2008

Currently, the 1991 Civil Rights Act has damage caps for mental pain and suffering and punitive damages of \$50,000 for an employer with 15-100 employees; \$100,000 for an employer with 101-200 employees; \$200,000 for an employer with 201-500 employees; and \$300,000 for an employer with 501 employees or more. This proposed law would eliminate the damage caps on discrimination claims and would also permit compensatory and punitive damages to be recovered for violations of wage and hour laws. This proposed law would also amend the Federal Arbitration Act to prohibit mandatory arbitration of discrimination claims and would allow the National Labor Relations Board to award back pay to undocumented aliens.

FOREWARN ACT

This proposed law would amend the Worker Adjustment and Retraining Notification Act ("WARN") by making it applicable to employers with 50 or more employees instead of the current 100 or more. In addition, it would lengthen the notice required for plant closings or mass layoffs from 60 days to 90 days.

If you have a position on any of these proposed new laws, now is the time to write your U.S. Congress Representative and Senators.



John A. Vering III practices employment and labor law with the law firm of Armstrong Teasdale LLP and is a member of the Board of Directors of SHRM-KC.