

Morgan Lewis

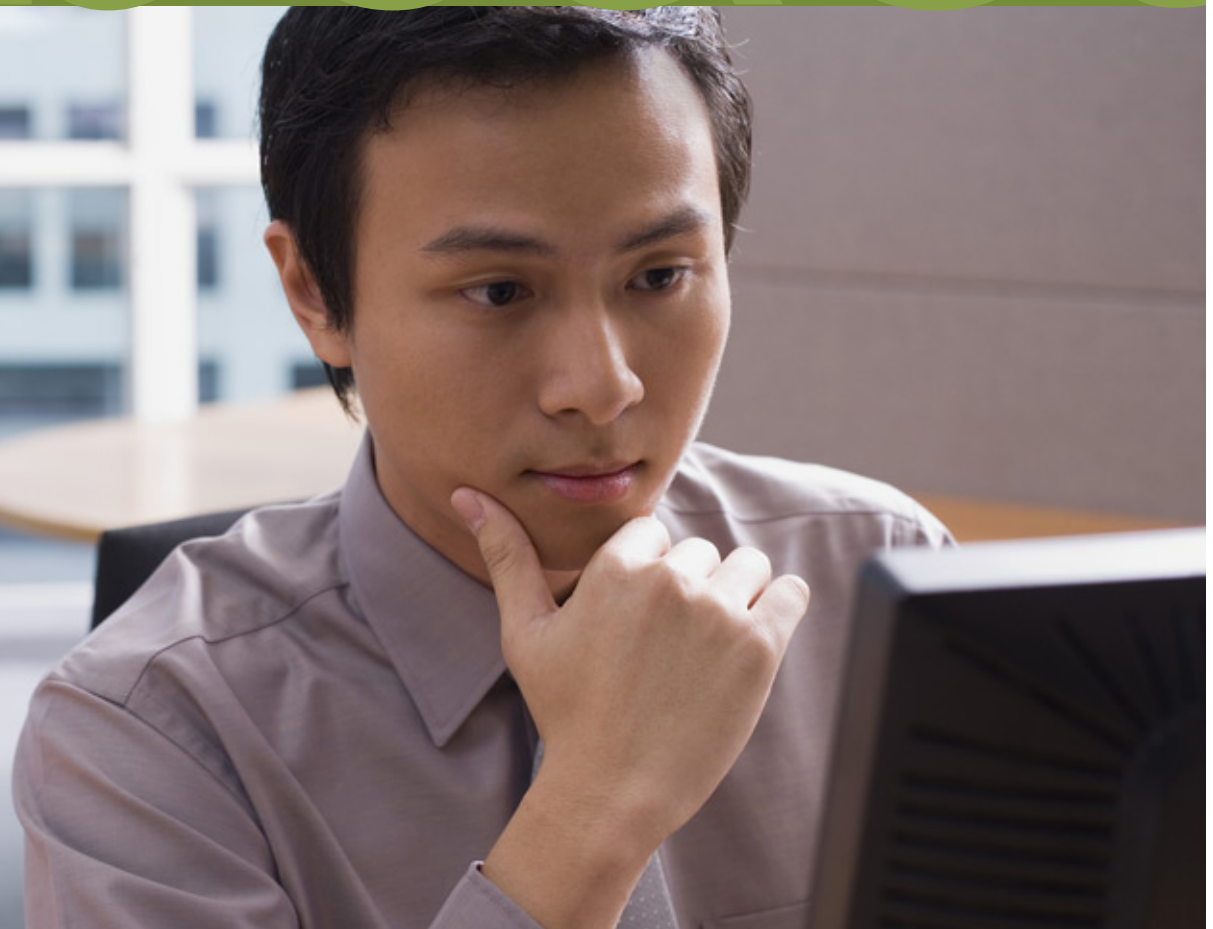
Wow What a Year!: An Overview of Labor and
Employment Legislation and Its Impact on Employers

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Anne Brafford

Paul Evans

www.morganlewis.com



Topics: New Requirements

- FMLA
- ADAAA
- Ledbetter
- Stimulus Bill Changes to COBRA

Topics: On the Horizon

- ENDA
- Paycheck Fairness Act
- Arbitration Fairness Act
- Others
 - Employee Free Choice Act
 - Patriot Employers Act
 - Honest Leadership and Accountability in Contracting Act
 - Employee Misclassification Prevention Act

New Requirements

Family and Medical Leave Act

- On January 28, 2008, President Bush signed the National Defense Authorization Act for Fiscal Year 2008.
 - Law amends the Family and Medical Leave Act of 1993 (FMLA) to provide broader leave protections to families of members of the armed services.
- On November 17, 2008, DOL issued final regulations under the FMLA, significantly altering notice and certification requirements associated with FMLA.
 - Regulations do not significantly alter what constitutes a serious health condition or the ability of an employee to take unforeseeable intermittent leave — two of the major issues employers have struggled with over the years.

Family and Medical Leave Act New Regulations

- Regulations and discussion amount to 200 pages in federal register.
- The full text of the new rule—including full-text versions of DOL’s prototype notices and certification forms—is available through the DOL website at:
- <http://www.dol.gov/esa/whd/fmla/finalrule.htm>

Family and Medical Leave Act

“Serious Health Condition”

- DOL failed to address in any substantive way the definition of “serious health condition.” DOL adopted, instead, modest clarifications:
 - Two visits must occur within a 30-day period from when the initial incapacity occurs. The final rules also provide that the first visit must occur in person (i.e., not via phone call or other means) within 7 days of the first day of incapacity.

Family and Medical Leave Act

“Serious Health Condition” (con’t)

- The healthcare provider, not the employee or patient, must make the determination as to whether a second visit during the 30-day period is needed.
- “Periodic” means visiting a physician twice or more per year for the same condition. (The current regulations define a chronic, serious health condition as one that requires “periodic visits for treatment,” but fail to define what “periodic” means.)

Family and Medical Leave Act Intermittent Leave

- The final rule will not require that employers account for FMLA leave in small increments simply because their payroll systems are capable of doing so.
- Employers need only use the smallest increment of time used to account for other forms of leave, provided that increment is no more than one hour.
- Employers may maintain policies that require that leave be taken in different increments at different times as long as the increment is no more than one hour.

Family and Medical Leave Act Intermittent Leave

- An employer cannot deduct against an employee's FMLA entitlement time during which the employee is working.
- The final rule includes a narrow exception to the minimum increment rule for "physical impossibility."

Family and Medical Leave Act Substitution of Paid Leave

- Employees must follow employer's paid leave policies in order to substitute any form of accrued paid leave.
 - If an employer's policy requires vacation leave to be taken in full-day increments, an employee substituting vacation for FMLA leave would have no right to use less than a full day of vacation leave.
- FMLA substitution provisions are not applicable when an employee receives disability benefits while taking FMLA leave, but the employer and employee may agree to have paid leave run concurrently with FMLA leave to supplement disability benefits.

Family and Medical Leave Act Substitution of Paid Leave (con't)

- An employer can require an employee to provide more or different medical information pursuant to a disability benefit plan or workers' compensation benefits
 - Must make clear only applies to receipt of disability benefits, not FMLA leave.
 - An employer may use this additional information to determine whether the need for leave qualifies under the FMLA.

Family and Medical Leave Act Eligibility Requirements

- Employers are required to count for eligibility purposes any breaks in service of up to seven years.
- If the employee is not eligible for FMLA leave at the commencement of a leave because the employee has not met the 12-month length of service requirement, the employee may meet this requirement while on FMLA leave, since leave time counts toward length of service.

Family and Medical Leave Act Employer Notice Requirements

- **General Notice:** An employer must provide a “general” notice of the FMLA provisions by posting a notice in a location available to both employees and applicants.
 - Employers can satisfy the posting requirement through an electronic posting of notice provided requirements are met.
 - Employers who do not maintain employee handbooks will need to distribute a copy of the general notice to each employee at the time of the employee’s hire, either in paper or electronic form.
 - It will no longer be sufficient to distribute this general notice only in connection with a specific FMLA leave request.

Family and Medical Leave Act Employer Notice Requirements

- **Eligibility Notice:** An employer must provide “notice of whether the employee meets the statutory eligibility criteria within 5 business days of request for FMLA leave.
- **Rights and Responsibilities Notice:** An employer must provide a “rights and responsibilities” notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations.
 - Within five business days of request for FMLA leave
- **Designation Notice:** An employer must provide a “designation” notice of whether the particular leave requested will be designated as FMLA leave.

Family and Medical Leave Act Exigency Leave

- There are eight different circumstances that will qualify as an “exigency,” including:
 - *Short-term notice deployment*, when a covered military member is notified of an impending call to duty seven or fewer calendar days prior to the date of deployment. In such circumstances, an employee is entitled to up to seven days of leave for this purpose;
 - *Military events and related activities*, including official ceremonies, programs, or events sponsored by the military, related and family support, or assistance programs sponsored or promoted by the military, military service organizations or the American Red Cross;
 - *Childcare and school activities*, including the arrangement of alternative childcare and attendance at school meetings

Family and Medical Leave Act Exigency Leave

- *Financial and legal arrangements*, to make or update legal arrangements for the covered military member or act as his or her representative before a government agency;
- *Counseling*, for oneself, for the covered military member, or for a child of the military member;
- *Rest and recuperation*, to spend time with a covered military member who is on short-term leave during the period of deployment (up to five days for each leave);
- *Postdeployment activities*, including arrival ceremonies and funeral arrangements; and
- *Additional activities*, provided that the employer and employee agree that such activities shall qualify as an exigency.

Family and Medical Leave Act Leave to Care for Service Member

- An employee who is the spouse, son, daughter, parent, or next of kin of a covered service member is entitled to up to 26 weeks of unpaid leave in a single 12-month period to care for that service member.
- An employee may utilize the 26-week entitlement for *each* service member and for *each* illness or injury incurred.

ADAAA

- The Americans With Disabilities Act Amendments Act (ADAAA)
- Effective January 1, 2009
- Minimizes focus on whether impairment is a “disability”:
Question “should not demand an extensive analysis.”

ADAAA Major Provisions

- “Substantially limited” loosened
 - Congress reversed several U.S. Supreme Court holdings, including that an impairment must severely restrict a major life activity to qualify as a “disability”
- “Major life activities” expanded
 - Term is broadly defined; includes a list of examples and now includes “major bodily functions”
- Episodic impairments or those in remission can qualify as “disabilities” (e.g., epilepsy, cancer)

ADAAA Major Provisions

- Mitigating measures no longer considered
 - Can't consider measures that reduce effects of impairment when deciding "disability," except glasses and contacts. ADA now will cover epilepsy, diabetes, depression, cancer, and other conditions that can be managed through medication or treatment
- Changes to "regarded as" provision
 - Minor or transitory conditions lasting six months or less are excluded from "regarded as" claims
 - Need not accommodate employees "regarded as" disabled
 - Employee relying on "regarded as" provision need not prove that she is "regarded as" having an impairment that limits or is perceived to limit a major life activity

ADAAA: Issues on the Horizon

- ADAAA not likely to be applied retroactively
 - *Burkhardt v. Intuit, Inc.* (D. Az. Mar. 2, 2009)
 - *Lekich v. Mun. Police Officers, Educ.* (E.D. Pa. Feb. 26, 2009)
 - *Schmitz v. Louisiana* (M.D. La. Jan. 27, 2009)
- Still no regulations interpreting ADAAA
 - EEOC required to create regulations, but no deadline
 - In December 2008, EEOC split (2-2 vote) on whether to move regulations forward to notice/comment. Deadlock likely to continue until Obama appoints fifth commissioner
 - Given current priorities of Obama administration, unlikely to occur until summer, at the earliest

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 127 S. Ct. 2162 (2007)

- Lilly Ledbetter alleged that her manager gave her a poor performance rating 10 years earlier resulting in lower merit raise.
- Alleged that pay differences grew larger over time because subsequent merit increases were based on a percentage of base pay.
- Ledbetter argued for a “paycheck accrual rule,” under which each paycheck is actionable under Title VII.

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 127 S. Ct. 2162 (2007)

- *Ledbetter* Court held that a plaintiff must challenge a pay decision within the statutory period, i.e. 180 or 300 days for Title VII.
- Current effects of past discrimination were not actionable, i.e., each paycheck does not cause a new claim to accrue.
- Focus on decisions affecting pay within the charge-filing period.

Lilly Ledbetter Fair Pay Act

- Signed by President Obama on January 29, 2009.
- Designed to legislatively overturn *Ledbetter*.
 - “[T]ake[s] effect as if enacted on May 28, 2007 and appl[ies] to all claims of discrimination in compensation under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) . . . that are pending on or after that date.”
- Amends Title VII and ADEA; applies to ADA and Rehabilitation Act.

Lilly Ledbetter Fair Pay Act

- For discrimination in compensation, an unlawful employment practice occurs:
 - when a discriminatory compensation decision or other practice is adopted;
 - when an individual becomes subject to a discriminatory compensation decision or other practice; or
 - when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

Lilly Ledbetter Fair Pay Act “Other Practices”

- Circumstances Likely Qualifying as “Other Practices”
 - Performance ratings in performance-based pay system
 - Pay grade assignments
 - Location assignment under geographic pay structure
 - Department assignments
- Circumstances Likely Not Qualifying as “Other Practices” (i.e., discrete employment actions)
 - Hiring
 - Promotion
 - Termination

Lilly Ledbetter Fair Pay Act Limitations

- Two Year Back Pay Limitation
- Equitable Defense of Laches
 - In most Circuits, the Defendant has burden of showing that (1) there was inexcusable delay on the part of the plaintiff in bringing the claim and (2) there is prejudice to the defendant resulting from the delay.
 - The time for calculating "inexcusable delay" generally starts when the plaintiff had knowledge, notice, or reasonable suspicion that he or she might have a claim.

COBRA

- The recently enacted Stimulus Bill provided for changes to COBRA during 2009.
- Established a nine-month tax-free 65% federal subsidy for individuals who lose group health coverage due to an involuntary termination (subject to income limitations).
 - Dates back to September 1, 2008 and forward to December 31, 2009
- COBRA participants must pay 35% of their COBRA premium.
- There is a retroactive notice requirement for terminations that occurred on or after September 1, 2008.

On the Horizon

Employment Non-Discrimination Act (ENDA)

- Proposes employment protections similar to Title VII for sexual orientation.
- Sexual orientation defined as: homosexuality, heterosexuality, or bisexuality.
- Has a long history:
 - In 1974, first bill was introduced to add “sexual orientation” to Title VII
 - Failed in 1974, 1994, 1995, and 1996
 - In 1996, failed in Senate by only one vote

Employment Non-Discrimination Act (ENDA)

- Had been two competing versions of the bill:
 - H.R. 2015: Includes gender identity
 - H.R. 3685: Does not include gender identity
- In November 2007, House passed H.R. 3685 (235-184 vote)
- H.R. 3685 prohibits
 - Discrimination on the basis of “actual or perceived sexual orientation”
 - Discrimination against an individual based on the “actual or perceived sexual orientation” of someone she/he associates with

Employment Non-Discrimination Act (ENDA)

- H.R. 3685 does not
 - Allow disparate impact claims
 - Allow preferential treatment or quotas to balance workforce
 - Allow claims of discrimination in benefits by unmarried couples
 - Allow the EEOC to collect statistics from employers on actual or perceived sexual orientation of its workforce
 - Prevent discipline of employees accused of sexual harassment so long as policy is applied fairly and regardless of the alleged harasser's sexual orientation
 - Apply to Armed Forces, religious organizations, or small businesses

Employment Non-Discrimination Act (ENDA) Ripe for Passage?

- ENDA has long history and growing support
- Twenty states already prohibit sexual orientation discrimination (five more prohibit such discrimination in state jobs; 13 states include gender identity)
- EEOC estimates that caseload would rise by only 5-7%

Employment Non-Discrimination Act (ENDA) Ripe for Passage? (con't)

- But gay rights currently are a divisive issue—consider LGBT rights referendums in 2008
- Senate has taken no action on ENDA since 2007
- Given economic crisis, unlikely Obama uses political capital to push ENDA through Congress

Paycheck Fairness Act

- Passed House as part of H.R. 11, now pending in Senate.
- No current legislative timetable set.
- Would amend the Equal Pay Act (EPA) to revise remedies for, enforcement of and exceptions to prohibitions against sex discrimination in the payment of wages.

Paycheck Fairness Act

- Converts the “any other factor other than sex” defense to a “bona fide factor other than sex” defense.
- Bona fide factor could include education, training, and experience, but only applies if the employer demonstrates that such factor:
 - is not based upon or derived from a sex-based differential in compensation;
 - is job related with respect to the position in question; and
 - is consistent with business necessity.
- Employer burden requires demonstrable evidence; unsubstantiated opinion will not carry employer’s burden.

Paycheck Fairness Act

- “Establishment” is broadened to include any facility in the same county or political subdivision.
- Prohibits retaliation for:
 - inquiring about, discussing, or disclosing the wages of the employee or another employee
 - making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, hearing, or action under section 6(d) (sex discrimination)
- Makes compensatory and punitive damages available for EPA violations.
- Allows Rule 23 class actions for EPA claims.
- Requires the EEOC to collect pay information.

Arbitration Fairness Act of 2007

Ban on employer-imposed pre-dispute clauses

- H.R. 3010 & S. 1782: proposed to amend Federal Arbitration Act to invalidate predispute arbitration agreements in employment context
- Civil Rights Act of 2008 (H.R. 2159 & S. 2554) also proposes ban on predispute arbitration clauses covering claims under the U.S. Constitution or federal statutes

Arbitration Fairness Act of 2007

Ban on employer-imposed predispute clauses

- Why so much attention on arbitration?
 - Employer-imposed arbitration has increased
 - 1995 GAO Report: Less than 10% of employers using arbitration for nonunion employees (24-50% of employers made arbitration mandatory for all covered employees)
 - 1997 GAO Report: Increased to 19% of employers
 - 1996 ABA Study: Three million employees subject to arbitration using AAA rules (140 million total employees in United States)

Arbitration Fairness Act of 2007

Ban on employer-imposed predispute clauses

- Pending in House and Senate:
 - “No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of...[a]n employment...dispute; or [a] dispute arising under any statute intended to protect civil rights or to regulate contracts...between parties of unequal bargaining power.”
- Reverses case law so that courts (not arbitrators) determine validity of arbitration provisions
- Applies to disputes arising after AFA’s enactment, regardless of the date of arbitration agreement
- Does not apply to collective bargaining agreements

Arbitration Fairness Act of 2007

Pros & Cons

- Proponents of AFA argue:
 - Arbitrators become “captive” to companies who are repeat players, which leads to arbitrator bias and more favorable results for employers
 - Inherently unfair to make an employee with unequal bargaining power give up right to a jury to get a job
 - Less fair because no meaningful judicial review
 - Employees are forced to split arbitration fees, which are much higher than court costs
 - Arbitrators aren’t required to follow the law
 - Discovery restricted and remedies more limited
 - Keeping bad acts out of public record allows employers to run amok

Arbitration Fairness Act of 2007

Pros & Cons

- Opponents of the AFA argue:
 - Cost of employment litigation has exploded since Civil Rights Act of 1991 and studies show that arbitration is quicker and less expensive
 - Arbitration not biased against employees: Studies show that outcomes for employees are nearly identical in court vs. arbitration
 - Postdispute arbitration agreements won't work
 - If there are abuses, correct them; don't ban altogether

Arbitration Fairness Act of 2007

Ripe for Passage?

- Obama was not a cosponsor, but will likely support if reintroduced in the new Congress.
- Legislation has some traction with moderate Republicans, with some Republican cosponsorship in the House.
- Not likely an early step for administration, but need to watch moving forward.

What's Next?

- Employee Free Choice Act (proposed)
 - *Amends the National Labor Relations Act to establish an easier system to enable employees to form, join, or assist labor organizations*
- Patriot Employers Act (proposed)
 - *Tax credits for employers who don't decrease employees in United States, comply with wage and benefits minimums, and pledge neutrality during organizing drives*
- Honest Leadership and Accountability in Contracting Act (proposed)
 - *Federal government debarment ("blacklisting") for pattern of failing to comply with labor and employment laws*
- Employee Misclassification Prevention Act (proposed)
 - *Amends FLSA and mandates procedures designed to ensure proper classification of employees and independent contractors*

What's Next?

- Obama administration will shift regulatory policy
 - Rulemaking to reverse Bush-led regulatory changes at end of his term
 - Stronger, more aggressive EEOC
 - In 2005, EEOC established Systemic Task Force. In 2006 and 2007, EEOC announced that systemic initiative is “top priority.” Likely to see increase in systemic cases.
 - In 2007, EEOC launched the “E-RACE Initiative” (Eradicating Racism and Colorism from Employment). Likely to see increase in race cases.

What's Next?

- Legislative momentum likely to occur.
 - But, Democrats did not reach 60 votes needed for cloture, so initiatives will need bipartisan support.
- Look for movement on more moderate measures—*i.e.*, ENDA and the Civil Rights Act are unlikely in the near term.

Contact Information



Anne Brafford
Partner
Irvine
949.399.7117
abrafford@morganlewis.com



Paul Evans
Partner
Philadelphia
215.963.5431
pevans@morganlewis.com