

Insights, News & Events

THE YEAR IN LABOR & EMPLOYMENT LAW, FROM A TO Z

Publication
Jan 1, 2010

(Labor Letter, January 2010)

AThe American Recovery and Reinvestment Act, or ARRA, was a comprehensive piece of legislation designed to stimulate the economy during our "Great Recession." For employers, the most significant aspect of the new law involved the continuation of health care coverage through COBRA for those involuntarily terminated since September 1, 2008, with employees paying 35% of their premiums and employers on the hook for the remaining 65%. Although set to expire on December 31, 2009, Congress is considering extending the benefit and raising the employer contribution to 75%. Stay tuned for developments in the early part of 2010.

BPresident Barack Obama wasted no time making federal appointments that will impact labor and employment law for years to come. He selected Rep. Hilda Solis, a long-time advocate of progressive labor policies, as the head of the Department of Labor. The President also selected Judge Sonia Sotomayor as a Justice for the U.S. Supreme Court, providing relative youth and a shot of liberal energy to an aging and conservative Court. He also nominated candidates for over 30 federal judgeships in district and appellate courts across the country, with close to 100 vacancies that need to be filled, and an additional 22 vacancies to open up in 2010. These appointments will no doubt lead to more worker-friendly decisions from federal courts for years to come.

CAfter President Obama was elected, most predicted that "card check" legislation was not far behind. The Employee

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Free Choice Act (EFCA) was the crown jewel of Big Labor's legislative agenda. Fortunately for employers, partisan bickering and a faltering economy has distracted Congress and EFCA remains in a holding pattern as we end 2009. Employers shouldn't celebrate yet – EFCA will no doubt reemerge in 2010, although many predict that a watered-down version will now pass (perhaps involving "quickie elections").

DSeveral states passed laws prohibiting cell phone use or texting while driving in 2009, believing that these **driving distractions** unnecessarily cause accidents. Seven states and the District of Columbia now ban hand-held cell phone usage while driving, while text messaging is now banned for drivers in 19 states. It's a good bet that these numbers will increase in 2010.

E, FThe **EEOC** had a busy year in 2009, proposing new regulations for the Americans with Disabilities Act (ADA) that promise to expand the reach of the law even further. It hopes to finalize the new rules by January 2010. Another federal agency, the Department of Labor, published new **FMLA** regulations that went into effect this year, leading to an ever-increasing administrative burden on employers. In 2010, we expect to see proponents of paid family leave continue to push for California-style FMLA benefits.

GEmployers will need to familiarize themselves with yet another acronym this year: **GINA**, or the Genetic Information Nondiscrimination Act, which went into effect in November and prohibits employers from acquiring or using genetic information about its employees. And employers need to add yet another poster to the crowded bulletin board in the break room, this time about employees' genetic privacy rights.

H**Health care reform** will continue to be the main focus for Congress into 2010, with most analysts predicting some form of legislation passing by the end of 2009 or early in 2010. It will likely lead to big changes to the way that Americans are insured, and most likely will impact employers. Some versions of proposed legislation include requirements that employers provide health insurance to all employees, others would create a tax on employer-sponsored high-end insurance plans. This will no doubt be a hot topic in the coming year.

IAnother area of law that had a roller coaster 2009 is **immigration** – after several years of waiting for the social

security no-match rule to take effect, the Obama administration dropped the initiative altogether in September. Instead, the federal government has decided to step up audits and raids as a means to control illegal immigration in the workplace. The other big news was the requirement that all federal contractors use E-Verify, the online employment eligibility verification system.

J, K When **Johnny (and Jane) came marching home** in 2009, what should his (or her) employer have done? The federal government expanded the leave rights of military servicemembers and their families this past year by implementing new regulations that provide qualifying exigency leave and additional leave for those needing to care for injured military personnel. Most recently, in October 2009, Congress created somewhat of a **knotty situation** for employers by enacting additional changes to the leave provisions, further expanding the circumstances under which employees may take both qualifying exigency and military caregiver leave, and producing a thicket of confusing and complicated requirements.

L, M, N Besides EFCA, there are plenty of other **labor initiatives** that could emerge from Congress this year: the expansion of FMLA, the Working Families Flexibility Act (the "Union of One" bill that would allow non-unionized employees to file grievances against employers), the Employment Non-Discrimination Act (ENDA) (expanding Title VII protections based on sexual orientation), the RESPECT Act (allowing managers to be part of a union), and the Patriot Employer Act (offering tax breaks to those companies that agree to union neutrality). Many predict there will be a scramble to push through many of these and other bills before the **midterm elections**, where some are already predicting a 1994-like reversal of fortunes for the GOP, which could stall out many Democratic initiatives.

Meanwhile, as the **NLRB** is reconstituted under President Obama's direction, the agency seems poised to administratively accomplish many labor-friendly goals that might be more appropriate for lawmakers, stepping into the void left by a distracted Congress. Expect to see a very active year on the labor front in 2010.

O One of the more active and aggressive government agencies in 2009 was **OSHA**, and it figures to remain busy in 2010. The agency has announced that it will step up enforcement actions in the coming months, and also

expects to issue new safety standards for almost all areas of industry. The new administration has placed workplace safety on its priority list. That means you should do the same.

PEmployers across the country were actively addressing **pandemic preparations** for much of the past 6 months, and will continue to remain on high alert in 2010. Although the H1N1 scare did not cripple the workforce as some predicted, it did force all employers to reassess their approach to possible mass absenteeism.

QFor years, most employers only saw **QWERTY** keyboards as a tool to help accomplish work. In 2009, employers began to realize that the computer could be both a beneficial resource and a source of problems with the rise of social networking websites such as MySpace, Facebook and Twitter. Catching up to the evolving legal landscape, employers began to determine when these websites could be mined for background information on applicants and employees, and reacted when they realized that some employees were inappropriately blogging about company matters. If you don't have an effective social media policy in your handbook, you're not ready for 2010.

R2009 also saw the **reemergence of the sexual harassment claim**. When a celebrity like David Letterman is in the news for inappropriate workplace behavior, you can almost certainly predict a resulting spike in such claims across the country. The last year saw an increase in the number of lawsuits and discrimination charges alleging sexual harassment, with "textual harassment" (harassment by text message) being just the latest chapter in this sordid area of law.

S, T, UThe **Supreme Court** had an interesting year, only issuing a few decisions of any import in the area of labor and employment law. The most notable was the *Ricci v. DeStefano* reverse discrimination case involving Connecticut firefighters, which was a mixed bag for employers. One of the gains employers achieved before the Court – increasing the burden on age discrimination plaintiffs (*Gross v. FBL Financial*) – may soon be overturned by Congress in a manner similar to another recent case.

Lawmakers **turned the tables** on employers by taking a victory from last year's term and passing a law reversing the victory, allowing pay discrimination claims to be resurrected

well past the statute of limitations (the Lilly Ledbetter Act). We may also see arbitration victories of the recent past reversed by the Arbitration Fairness Act, which would curtail the use of these alternative agreements. The **upcoming docket** for the Supreme Court includes several traditional labor cases, arbitration cases, and a case dealing with the timeliness of Title VII claims.

VThe EEOC's semiannual regulatory agenda was released in early December, and it offers a **veritable cornucopia** of ambitious new priorities to track in 2010. In this era of layoffs, the agency is increasingly focused on age discrimination claims and intends to issue revised guidance in this area starting in February. It also plans on finalizing ADA regulations in the first quarter of the year, and finalizing new GINA regulations by midyear.

WAs always, **wage and hour issues** impacted millions of employers, especially as some companies tried to cut corners and got burned by FLSA claims. Some employers tried to shave costs by transforming employees into independent contractors without realizing the disastrous legal consequences of doing so incorrectly, while others tried to squeeze off-the-clock work out of their employees.

XAfter a few years of slow growth, 2009 witnessed the **xplosion** [sorry, "x" is tough] of new lawsuits filed against employers. No doubt the slumping economy and increased layoffs led to additional claims, as did the availability of new laws and the expansion of existing ones. Almost all signs point to this trend continuing in 2010, especially as job growth remains stagnant and out-of-work individuals seek rewards through litigation.

Y, ZWe've reached the end of the **year**, and perhaps one of the best things about 2009 is that it's over and we can all start fresh in 2010. Things can't get worse for companies, can they? We look forward to **zealously** tracking labor and employment developments in 2010 and will continue to provide practical solutions to your employment dilemmas.