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A LOOK BACK AT 2009 AND WHAT 2010 MAY HOLD FOR EMPLOYERS

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As anticipated, 2009 was a year filled with change for employers. This article highlights some of the more significant changes and takes a look at what 2010 may hold for employers.

FAMILY AND MEDICAL LEAVE ACT (FMLA)

DOL Regulations Take Effect

The Department of Labor's (DOL)'s significant revisions to the FMLA Regulations took effect in 2009. Some of the important changes included implementation of the provisions for exigency leave and military caregiver leave that were enacted as part of the military family leave amendments to the FMLA in 2008. The new regulations also revised the FMLA notice provisions and modified the regulations relating to serious health condition, medical certification and fitness for duty requirements. In late 2009, the President signed legislation that expanded the military family leave provisions of the FMLA to permit family members of active duty service members to take exigency leave and to permit families of certain veterans to take military caregiver leave. It also revised the military caregiver leave provision to include serious injuries or illnesses that are the result of pre-existing conditions that were aggravated by service while on active duty.

What May Happen in 2010?

The new regulations have been criticized by groups representing employers and employees alike. Employers may be faced with further revised regulations in 2010. In its Regulatory Plan, available at http://www.reginfo.gov, the DOL stated that it plans to review the regulations implementing the military family leave amendments as well as those implemented in January 2009. According to the DOL, after the agency completes its review of these regulations, "regulatory alternatives will be developed for notice-and-comment rulemaking." Additionally, legislation (the Family and Medical Leave Restoration Act (H.R. 2161)) has been introduced in Congress that would repeal certain of these regulations and reinstate the earlier regulations.

Numerous other bills that would revise the FMLA were introduced in Congress in 2009. These bills, which are still pending, include:

- **The Family and Medical Leave Inclusion Act (H.R. 2132),** which would amend the FMLA to permit leave to care for a same-sex spouse, domestic partner, parent-in-law, adult child, sibling, or grandparent who has a serious health condition.
- **The Family and Medical Leave Enhancement Act (H.R. 824),** which would add "parental involvement leave" to the types of leave allowed under the FMLA.

This type of leave is intended to allow, among other things, employees to attend their children's and grandchildren's educational and extracurricular activities, take care of routine family medical needs, and assist elderly relatives.

- **The Military Family Leave Act of 2009 (S. 1441, H.R. 3257),** which would amend the FMLA to give two weeks of unpaid leave to employees whose family members have received notification of impending active military duty. Employees would be entitled to take the leave before and after deployment without regard to whether they have experienced a qualifying exigency.
- **The Domestic Violence Leave Act (H.R. 2515),** which would amend the FMLA to allow employees to take leave to address issues arising out of domestic violence and sexual assault.

Other legislation relating to employee leaves, but not specifically amending the FMLA, was introduced in 2009 and remains pending, including:

- **The Family-Friendly Workplace Act (HR 933),** which would provide employees with compensatory time off. It was referred to the Subcommittee on Workforce Protections on March 23, 2009.
- **The Security and Financial Empowerment (SAFE) Act (S 1740),** which would, among other things, permit victims of domestic violence, dating violence, sexual assault, or stalking to take up to 30 days of unpaid leave in a 12-month period to for issues relating to the violence. It would also prohibit employers from discriminating against actual or perceived victims of domestic violence, dating violence, sexual assault, or stalking. The Act was referred to the Senate Committee on Health, Education, Labor and Pensions on October 2, 2009. A similar bill (HR 739) was introduced in the House on January 28, 2009 and was referred to the Committees on Education and Labor, Ways and Means, and Financial Services.
- **The Healthy Families Act (S 1152; HR 2460),** which would require certain employers to permit each employee to earn at least one hour of paid sick time for every 30 hours worked. Both the House and Senate bills have been referred to committees.
- **The Working Families Flexibility Act (HR 1274),** which would permit employees to request, once every 12 months, that their employers modify their work hours, schedule or location. The Act was referred to the House Subcommittee on Courts and Competition Policy on August 19, 2009.

EMPLOYMENT DISCRIMINATION

New Laws Overruling Supreme Court Decisions Take Effect

On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act, which altered the deadline or "statute of limitations" for pay discrimination claims brought

under Title VII of the Civil Rights Act of 1964, the Age Discrimination Act of 1967, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973. It also overruled the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Company, Inc*., 550 U.S. 618 (2007). Under the Act, an unlawful employment practice occurs (1) when the discriminatory pay decision is made; (2) when an individual becomes subject to the discriminatory pay decision; or (3) when an individual is affected by the discriminatory compensation decision or other practice. Thus, the deadline for filing a claim starts anew each time an employee receives wages, benefits, or other compensation tainted by the discriminatory pay decision, and may go back as far as two years from the date a charge was filed with the EEOC.

Also enacted in response to Supreme Court decisions with which Congress disagreed, the ADA Amendments Act took effect January 1, 2009. Among other things, the ADAAA rejects Supreme Court cases that narrowly interpreted the scope of the ADA and provides that the definition of "disability" should be interpreted broadly. According to the ADAAA, the focus of an ADA case should be on whether discrimination occurred, not whether an individual meets the definition of disabled. In late 2009, the Equal Employment Opportunity Commission issued proposed regulations interpreting the ADAAA.

Supreme Court Issues Decisions Addressing Retaliation, Disparate Impact and Age Discrimination Claims

Significant discrimination-related Supreme Court decisions from 2009 include *Crawford v. Metropolitan Government of Nashville* (1/26/09), in which the Court extended the protection of Title VII's prohibition on retaliation under the "opposition clause" to an employee who discloses information about discriminatory conduct in response to questions that are part of an employer's internal investigation, even though the employee did not instigate or initiate the complaint. Additionally, the Court addressed the interaction between Title VII's disparate treatment (intentional discrimination) and disparate impact (unintentional discrimination) provisions in *Ricci v. DeStefano* (June 29, 2009). In this decision, the Court held that the mere desire to avoid liability under Title VII's disparate impact provision does not automatically justify an employer's race-based decision. The Court adopted a standard requiring a "strong basis in evidence" that an employer's actions might violate Title VII's disparate impact provisions before employers can make race (or other protected category)-based decisions.

In its most controversial decision, the Court in *Gross v. FBL Financial Services, Inc*. (June 18, 2009) held that to prevail on an ADEA claim, the individual claiming discrimination must prove that age was the "but-for" cause of the alleged adverse employment action – i.e., that the employer would not have taken the adverse employment action but for the individual's age. This decision means that individuals suing for disparate treatment under the ADEA can no longer prevail by showing that the employer acted with "mixed motives," one of which was the individual's age. On

October 6, 2009, legislation entitled "Protecting Older Workers against Discrimination Act" (S 1756; HR 3721) was introduced in Congress. The purpose of the legislation is to overturn the Supreme Court's decision in *Gross* and "ensure that the standard for proving unlawful disparate treatment under the Age Discrimination in Employment Act of 1967 [ADEA] and other anti-discrimination and anti-retaliation laws is no different than the standard for making such a proof under Title VII of the Civil Rights Act of 1964."

The effects of Supreme Court's decision in *Gross*, however, have already trickled down to the district courts. Judge William M. Acker in the Northern District of Alabama has stated that "[t]he only logical inference to be drawn from *Gross* is that an employee cannot claim that age is a motive for the employer's adverse conduct and simultaneously claim that there was **any** other proscribed motive involved[,]" and uses this line of reasoning to force employees to choose between their ADEA claims, versus any other discrimination cause of action. *Culver v. Birmingham Board of Education*, 646 F. Supp. 2d 1270, 1272-72 (N.D. Ala. August 17, 2009) (emphasis in original).

What May be Next for 2010?

Several bills impacting the employer/employee relationship were introduced in 2009 and remain pending, including:

- **The Employment Non-Discrimination Act of 2009 (HR 2981; HR 3017; S 1584),** which would amend Title VII to prohibit employment discrimination on the basis of sexual orientation or gender identity. The Senate bill was introduced on August 5, 2009 and is currently pending before the Committee on Health, Education, Labor, and Pensions.
- **The Breastfeeding Promotion Act of 2009 (S 1244; HR 2819),** introduced on June 11, 2009, would, among other things, amend the Pregnancy Discrimination Act provisions of Title VII to include lactation. The Act would also require employers with 50 or more employees to provide a reasonable, unpaid break time for an employee to express breast milk for her nursing child for one year after the child's birth each time the employee needs to express milk and would also require employers to provide a private place other than a bathroom to express milk.
- **The Title VII Fairness Act (S 166),** would amend the Americans with Disabilities Act and Title VII to delay the start of the time period for filing charges of employment discrimination until the complaining person has or should have enough information to support a reasonable suspicion of the discrimination, as long as the person can demonstrate that he or she did not have and should not have been expected to have, enough information to support a reasonable suspicion of such discrimination on the date on which the alleged discrimination occurred.

EMPLOYMENT RELATED ARBITRATION

U.S. Supreme Court Upholds CBA's Arbitration Provision

In *14 Penn Plaza LLC v. Pyett*, the Court held that an arbitration provision in a CBA, which clearly and unmistakably required union members to arbitrate ADEA claims, is enforceable as a matter of federal law. The Court's 5 to 4 decision reiterates its prior holding in *Gilmer v. Interstate/Johnson Lane Corp*. that nothing in the ADEA precludes arbitration of age discrimination claims. The Court rejected arguments that *Gilmer* does not apply in the collective bargaining context, holding that nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative. "This Court has required only that an agreement to arbitrate statutory antidiscrimination claims be 'explicitly stated' in the collective-bargaining agreement."

New Laws Limit the Use of Mandatory Arbitration Agreements in Some Situations

Despite the Supreme Court's apparent support of mandatory arbitration in the employment context, Congress has enacted laws that limit the ability of certain employers to implement such clauses. For example, the Department of Defense Appropriations Act of 2010, enacted on December 19, 2009, restricts DOD contractors with qualifying contracts from requiring their employees, as a condition of employment, to arbitrate claims brought under Title VII of the Civil Rights Act of 1964 and torts "related to or arising out of sexual assault or harassment." Additionally, the American Recovery and Reinvestment Act (ARRA), signed in February 2009, provides that employers cannot require employees to enter into an agreement to waive (including through a pre-dispute arbitration agreement) the rights and remedies of the ARRA's whistleblower provision.

What May Be Next?

Legislation is currently pending that would essentially eliminate the ability of employers to require mandatory arbitration of employment related disputes. The Arbitration Fairness Act of 2009 (S. 931), introduced in the Senate on April 29, 2009, would make invalid and unenforceable pre-dispute arbitration agreements that require arbitration of an employment, consumer, franchise or civil rights dispute. The legislation would not apply to arbitration provisions in collective bargaining agreements. The Act was referred to the Senate Committee on the Judiciary on April 29, 2009. Similar legislation, HR 1020, was introduced in the House on February 12, 2009. It was referred to the House Subcommittee on Commercial and Administrative Law on March 16, 2009.

LABOR LAW DEVELOPMENTS

Supreme Court to Determine Authority of Two-Member Board Panel

Since January 1, 2008, the National Labor Relations Board has acted with only two members due to the expiration of the appointments of two other members. In *New Process Steel, L.P. v. NLRB*, the U.S. Supreme Court granted certiorari to determine whether the two-member panel has been acting within the power delegated to it by the National Labor Relations Act. The Court should issue a decision in this case sometime in 2010.

President Signs Executive Orders Relating to Federal Contractors

On Friday, January 30, 2009, President Obama signed three executive orders affecting the rights of federal contractors and their employees. Intended to "level the playing field" for labor unions, the new executive orders reverse several Bush Administration policies that organized labor claims favored employers over unions.

- Executive Order "Notification of Employee Rights Under Federal Labor Law" requires that federal contractors post a notice informing employees they have a right to join or not to join a labor union. In addition, this Executive Order expressly revoked Executive Order 13201 – signed by President Bush on February 17, 2001 – which allowed employers to post a notice advising employees of their right not join a labor union as well as the right of unionized employees to limit their financial support of unions acting as their collective bargaining representative.
- Executive Order "Economy In Government Contracting" denies reimbursement to federal contractors for expenses used to influence workers' decisions regarding whether to form unions or engage in collective bargaining – effectively mandating that federal contractors remain neutral during any attempt by a labor union to organize its employees. Federal contractors that violate this order can be denied reimbursed for such expenses and precluded from being awarded future contracts.
- Executive Order "Nondisplacement of Qualified Workers Under Service Contracts" requires service contractors at federal buildings to offer jobs to qualified current employees when contracts change. In other words, when an administrative contract expires, the successor employer who is awarded the new contract must hire the predecessor's employees upon taking over the service contract.

What May Be Next? Pending Labor-Related Legislation

- **The Employee Free Choice Act (EFCA) (S 560; HR 1409).** Introduced in Congress on March 10, 2009, the so-called Employee Free Choice Act (EFCA)

would effectively eliminate secret ballot elections as the way for employees to decide whether to have union representation by permitting unions to opt for a "card check" procedure that would result in certification of the union if a majority of employees in an appropriate bargaining unit simply sign union cards. This would make it much easier for a union to become the collective bargaining representative of a group of employees at a company. In addition, EFCA would change significantly the process for negotiating a first contract. Changes would include mandatory government-run arbitration to establish the terms and conditions of employment in the initial contract if the parties cannot reach agreement during direct and mediated negotiations. Both the House and Senate versions have been referred to committees.

- **The Truth in Employment Act of 2009 (HR 2808; S 1227)**. This Act, introduced on June 10, 2009, would amend the unfair labor practice prohibitions of the National Labor Relations Act (NLRA) to protect employers who refuse to hire "salts" from being accused of an unfair labor practice. The House bill was referred to the House Committee on Education and Labor and the Senate bill was referred to the Senate Committee on Education, Labor and Pensions on June 10, 2009.
- **The Rewarding Achievement and Incentivizing Successful Employees Act (the RAISE Act) (HR 2732; S 1184).** Introduced on June 4, 2009, this Act would amend the NLRA to provide that an employer can pay an employee in a bargaining unit greater wages, pay or other compensation by reason of his or her services as an employee than provided for in the applicable collective bargaining agreement (CBA), notwithstanding a labor organization's representation of the employee or the terms of the CBA. The House bill was referred to the House Subcommittee on Health, Employment, Labor and Pensions on July 23, 2009. The Senate bill was referred to the Senate Committee on Health, Education, Labor and Pensions on June 4, 2009.

Pending Regulatory Action

In its Regulatory Plan, available at http://www.reginfo.gov, the DOL has indicated it plans to propose a regulatory initiative "to better implement the public disclosure objectives of the LMRDA regarding employer-consultant agreements to persuade employees concerning their rights to organize and bargain collectively." The LMRDA requires unions, employers, labor-relations consultants, and others to file financial disclosure reports, which are publicly available. Under §203 of the LMRDA, an employer must report any agreement or arrangement with a third party consultant to persuade employees as to their collective bargaining rights or to obtain certain information concerning the activities of employees or a labor organization in connection with a labor dispute involving the employer. Similarly, the consultant must report any such agreements with an employer. Section 203(c) of the LMRDA provides for an exception to the reporting requirement where the agreement is for the consultant to provide "advice" to the employer. According to the Regulatory Plan, the DOL believes

that "current policy concerning the scope of the 'advice exemption' is over-broad and that a narrower construction would better allow for the employer and consultant reporting intended by the LMRDA." Accordingly, the DOL plans to publish notice and comment rulemaking seeking consideration of a revised interpretation of the "advice" exemption that would narrow the scope of the exemption. The DOL plans to issue the Notice of Proposed Rulemaking (NPRM) in November 2010.

EMPLOYEE BENEFITS

American Recovery and Reinvestment Act of 2009 (ARRA) Provides COBRA Subsidy

Signed by President Obama on February 17, 2009, the ARRA provided "assistance eligible individuals" a 65% subsidy of their required COBRA premiums and an additional enrollment period within which to elect COBRA coverage. An assistance eligible individual is any person who loses health coverage as a result of being involuntarily terminated between September 1, 2008 and December 31, 2009, and the terminated person's dependents, as long as the person's adjusted gross income (with certain modifications) is $125,000 or less ($250,000 or less for joint filers). On December 21, 2009, President Obama signed legislation extending the COBRA subsidy for 6 additional months for a total of 15 months of subsidized coverage. The extension applies to those COBRA beneficiaries whose nine-month premium subsidy under the ARRA had expired. The legislation also extends the qualifying event deadline to February 28, 2010.

OTHER PENDING EMPLOYMENT RELATED LEGISLATION

Protecting America's Workers Act (HR 2067). This legislation would amend the Occupational Safety and Health Act (the OSH Act) to, among other things, expand the OSH Act to cover governmental workers as well as those in the railroad and airline industries. It would also expand the Act's whistleblower provisions and provide procedures for employees to file a complaint of discrimination. This legislation has been referred to the House Committee on Education and Labor.

The Equal Employment for All Act (HR 3149). Introduced on July 9, 2009, this Act would amend the Fair Credit Reporting Act to prohibit a current or prospective employer from using a consumer report or investigative consumer report for employment purposes or for making an adverse employment action. This Act has been referred to the House Financial Services Committee.

The Forewarn Act (HR 3042). Introduced on June 25, 2009, this Act would amend the Worker Adjustment and Retraining Notification Act (WARN Act) to, among other things, apply it to employers of 75 or more employees (currently, the WARN Act applies to employers of 100 employees or more). The Forewarn Act would also require

employers to give 90-day written notice (currently, 60-day) to employees and appropriate state and local governments before ordering a plant closing or mass layoff. This Act has been referred to the House Committee on Education and Labor.

The Alert Laid off Employees in a Reasonable Time (ALERT) Act (HR 2077). Introduced on April 23, 2009, this Act would amend the Worker Adjustment and Retraining Notification (WARN) Act in two ways. It would (1) expand the definition of "mass layoff" under the WARN Act to include an employment loss at more than one of the employer's worksites, and (2) increase the penalty for WARN Act violations. This legislation was referred to the Subcommittee on Workforce Protections on June 4, 2009.

The Fair Pay Act (S 904, HR 2151). Introduced in Congress on April 28, 2009, this Act, would, among other things, amend the Equal Pay Act (EPA) provisions of the FLSA to prohibit employers from discriminating between employees on the basis of sex, race or national origin by paying lower wages for jobs dominated by employees of a particular sex, race or national origin than paid for jobs dominated by employees of the opposite sex or of a different race or national origin, if the jobs are equivalent. The legislation defines the term "equivalent jobs" as "jobs that may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions." The legislation would also prohibit discrimination against an employee or any other person because the employee discussed his or her own wages or the wages of any other employee. Additionally, the legislation would expand the EPA by permitting the recovery of compensatory or punitive damages. The Senate bill was referred to the Senate Committee on Health, Education, Labor and Pensions on April 28, 2009. The House bill was referred to the House Subcommittee on Workforce Protections on June 4, 2009.

The Paycheck Fairness Act (S 182). This Act would amend the Equal Pay Act (EPA) provisions of the FLSA to prohibit retaliation against employees for sharing salary information with co-workers, allow prevailing plaintiffs to recover compensatory and punitive damages in EPA cases, and facilitate the filing of class actions lawsuits under the EPA. It would also place the burden on employers to prove that any disparities in wages are not sex-based but are job-related and consistent with business necessity. The House combined this Act with the Lilly Ledbetter Fair Pay Act and sent it to the Senate; however, it was not included in the final version of that Act. The Paycheck Fairness Act currently is pending in the Senate as separate legislation.