

# Employment & Labor Relations Law

A M E R I C A N B A R A S S O C I A T I O N

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## *Burlington Northern v. White*: Just When Is an Employee Engaging in a Protected Activity?

By Anthony M. Rainone

**T**itle VII of the Civil Rights Act of 1964 prohibits discrimination in the terms and conditions of employment based upon a person's race, color, religion, sex, or national origin. It also prohibits employers from retaliating against employees who oppose unlawful employment practices or who make a charge, testify, assist, or participate "in any manner" in an investigation, proceeding, or hearing under Title VII.<sup>1</sup> The anti-retaliation provisions have provided the basis for employment claims with increasing frequency.

According to the Equal Employment

Opportunity Commission (EEOC), of the 26,600 retaliation claims filed in 2007 by employees, 23,300 arose under Title VII—a significant increase in retaliation claims. Indeed, in 1997, retaliation charges under Title VII accounted for just over 20 percent of all charges filed with the EEOC, while in 2007, retaliation charges accounted for over 28 percent of all charges filed. There is no sign that retaliation claims will decrease in the years to come.

In 2006, a unanimous Supreme Court held in *Burlington Northern & Santa Fe Railway Co. v. White*<sup>2</sup> that the anti-retaliation provisions of Title VII are intended

to "prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms . . . by prohibiting employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, or their employers."<sup>3</sup> Title VII provides for two distinct types of claims—participation in a protected activity (participation claims) and opposing unlawful employment practices (opposition claims). An employee who can establish an adverse employment action as a result of either type of protected activity will have a claim for retaliation. Although an

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## Correlations Between FMLA and ADA: A Critical Consideration for Employers

By Kirsten E. Keating

**A**n employer's return-to-work obligations under the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) are distinct, yet understanding the correlation between the two is critical. While the FMLA provides eligible employees with a finite amount of leave, and with the right to return to their jobs at the end of the leave period, the ADA protects disabled employees from discrimination by requiring employers to provide

reasonable accommodations, which will enable the employee to perform the essential functions of his or her job. Employees who are covered under both statutes are entitled to leave under whichever statute provides greater protection.

The FMLA provides eligible employees with a maximum of 12 weeks of unpaid leave for health- and family-related reasons.<sup>1</sup> Employees on FMLA-qualifying leave have the right to return to work at the end of the leave period. The ADA

prohibits employers from discriminating against qualified individuals with a disability and requires employers to provide reasonable accommodations to disabled employees that will allow them to perform the essential functions of the job.<sup>2</sup> While the ADA does not mandate a specific period of time, medical leaves of absence are recognized as reasonable accommodations. The FMLA is not intended to modify or affect the ADA, yet

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# Chairs' Column



Ann Marie Painter



Kimberly G. Stith

Many of you undoubtedly witnessed the inauguration of our 44th president in January and the accompanying pomp and circumstance. It was a historic day and an inspirational moment for millions. It also marked the beginning of a truly new day for the labor and employment law litigator, and more changes are on the way. However, the changes actually started with President George W. Bush, who signed into law an expanded definition of "disability" under the Americans with Disabilities Act amendment and a complex litany of changes to the Family Medical Leave Act regulations. These changes alone would have led, undoubtedly, to an increase in employment litigation; however, the recently passed Lilly Ledbetter Fair Pay Act and additional new legislation should contribute to an increase in the volume of cases filed and the creation of new case law such as we have not seen in the last 10–15 years.

The legislative agenda for President Barack Obama's administration is substantial. The Employee Free Choice Act will be up for debate soon, and it, too, has the potential to impart radical changes to the American workforce by eliminating secret ballot protections in existence since 1935 and requiring interest arbitration for initial collective bargaining agreements.

The act has ardent supporters as well as detractors. The newly appointed secretary of labor, Hilda Solis, is a strong voice for organized labor, and Mr. Obama himself was a cosponsor of the act while he served in the Senate. Congress also will be asked to consider some version of the Paycheck Fairness Act, which would amend the Equal Pay Act and alter the standards for making a claim and the remedies available (the most significant of which would be the ability to bring Equal Pay Act claims in a Rule 23 class action as opposed to a collective action modeled after the Fair Labor Standards Act). The Employment Non-Discrimination Act, which would amend Title VII to include sexual orientation as a protected category, may find greater support in the new Congress, and this Congress may be a more hospitable audience for the Arbitration Fairness Act, which would prohibit the mandatory arbitration of employment claims. All the while, those who practice in the wage and hour arena continue to litigate heavily the issues of misclassification and failure to pay overtime. They may even have additional issues to litigate if Congress takes up and passes some version of the Employee Misclassification Prevention Act, which is designed to require employers to keep records of nonemployees and to penalize employers who misclassify employees as nonemployees.

You have many sources of information to help keep you up-to-date with changes and trends in the law, and we know that many of you will be looking for economical ways to stay abreast of these changes. Your committee leadership will be working hard to bring you helpful and timely articles, updates, teleconferences, and other programming to help you learn about these changes and how to integrate them into the cases you are litigating and plan to litigate. We welcome your suggestions as well as your contributions and look forward to an even more robust exchange of information and ideas than in the past.

We hope you enjoy this issue of the

Employment and Labor Relations Newsletter. It contains several excellent articles from outstanding practitioners in our field, many of whom are our own Committee members. Kim and I hope to see you all at the Section Annual Conference in Atlanta (April 29–May 1), which will be a fantastic opportunity for us to meet, learn, network, and build meaningful relationships that will continue throughout our careers. Please mark your calendars now to attend and become even more involved in the Section and our Committee. You may register online at [www.abanet.org/litigation/sectionannual](http://www.abanet.org/litigation/sectionannual). ■

Ann Marie Painter  
and Kimberly G. Stith

## Message from the Editors



William C. Martucci



Brian Koji

This issue begins with a discussion of retaliation claims in an informative piece by Anthony Rainone entitled, "Burlington Northern v. White: Just When Is an Employee Engaging in a Protected Activity?" In this article, the decisions since the Supreme Court decision in *Burlington Northern* are discussed, with particular focus on the protections

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## Burlington Northern v. White

*continued from front cover*

employer may often overcome allegations of discrimination on summary judgment, it can be more difficult for employers to succeed on dispositive motions on retaliation claims. That is because, at least as to opposition claims, the only requirement is that the employee have a reasonable good-faith belief that the discrimination laws were violated, regardless of whether the employer actually violated the law.

Although this article focuses on Title VII retaliation, practitioners should be aware that the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act also prohibit retaliation. The EEOC's Compliance Manual and other publications on retaliation claims address retaliation in general under the foregoing statutes, even though there are differences in the scope of the retaliation provisions under each statute.

### The EEOC's Interpretation of Retaliation Claims

The EEOC's Compliance Manual addresses both types of retaliation claims at length. About participation claims, the EEOC identifies filing a charge of discrimination, cooperating with an internal investigation, or serving as a witness in an EEOC investigation or litigation as forms of protected activity. An employer is also prohibited from any adverse treatment of an employee that is reasonably likely to deter the employee from engaging in a protected activity under the retaliation clause of Title VII. With the exception of internal investigations, the list of prohibited activities is consistent with the language of Title VII. The inclusion of internal investigations within Title VII's protection, aside from being beyond the scope of the statutory language, would potentially subject employers to suit every time they attempted to investigate

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employee claims. Appellate courts in both New Jersey and New York have recognized that protection for participation in internal investigations is beyond the scope of their state law equivalents to Title VII.<sup>4</sup> But in *Crawford v. Metropolitan Government of Nashville and Davidson County*,<sup>5</sup> the U.S. Supreme Court recently held that the opposition clause includes participation in an internal investigation as a protected activity. Although the Court did not decide whether the participation clause was triggered by participation in the internal investigation, the point seems moot given that the broader opposition clause can be triggered by participation in an internal investigation.

An employee's participation in a Title VII proceeding is protected regardless of whether the charge of discrimination is valid or even objectively reasonable. Further, an employer may not retaliate against an employee who is closely related to the person filing the charge. For example, if a mother and daughter work together, the employer cannot retaliate against the daughter for a charge of discrimination filed by the mother. In addition, an employer cannot refuse to hire a person because he filed a charge against a previous employer.

Regarding opposition claims, the EEOC identifies the following conduct as protected activity: complaints to anyone about alleged discrimination, threatening to file a charge of discrimination, picketing in opposition to discrimination, or refusing to obey an order reasonably believed to be discriminatory.<sup>6</sup> The EEOC's Compliance Manual also includes employee productivity slow-downs as a form of opposition. (The EEOC does not, however, include employee threats of violence or actions that interfere with the employee's job performance as protected activity.) In essence, the EEOC takes the position that complaining or protesting to virtually anyone, whether an employer or not, constitutes opposition. The limit on opposition activities by the EEOC is that the employee must communicate the opposition to someone, either explicitly or implicitly. For example, if a female employee complains about posters at work that are derogatory towards women, the supervisor should reasonably know

(according to the EEOC) that the complaint constitutes opposition to sex discrimination.

Fortunately, the EEOC maintains that the manner of protest or opposition must be reasonable. The commission recognizes that the employee's right to protest must be balanced against the employer's need for a productive workforce. For instance, the EEOC supports the judicial decisions holding that an employee's copying of confidential documents and showing them to coworkers, making

**While the remark was unacceptably racist, the court nonetheless concluded that it was a "far cry" from constituting a hostile work environment.**

numerous complaints based upon unsupported allegations, and intimidating a subordinate into giving a statement in support of an EEOC charge are not forms of opposition protected by Title VII.

Similar to the EEOC's interpretation of participation claims, the EEOC states that an employer can be held liable for retaliating against someone closely related or associated with the person who opposed the discriminatory practice. It is also important to remember that the employee need not establish that the employer actually discriminated against an employee to establish an opposition claim. Instead, to support the opposition claim, the employee need only establish a good-faith belief that the employer committed an unlawful practice.

Since 2006, the federal courts have decided multiple retaliation claims in light of the Supreme Court's decision in

*White*. Several relevant decisions involving both opposition claims and participation claims are discussed below.

### Opposition Claim Decisions Since *White*

In *Crawford*, a 9–0 decision, the U.S. Supreme Court reviewed the retaliation claim of a woman who participated in an employer's internal investigation into claims of sexual harassment by the defendant's employee relations director. The woman had not previously made any complaints, and there was no pending EEOC charge. The employer's human resources director asked the plaintiff if she had witnessed any inappropriate behavior by the director. The woman, together with two other women, described several instances of sexually harassing conduct. The director was not disciplined, but, instead, the employer terminated the women who responded to the questions asked by the employee relations director. The Court reversed the Sixth Circuit's affirmation of summary judgment for the employer, rejecting the argument that the opposition clause requires active opposing activities rather than responding to an internal investigation. The Court described a rule to the contrary as "freakish" and not intended by Title VII.

In *Wilkerson v. New Media Technology Charter School, Inc.*,<sup>7</sup> the Third Circuit reviewed an employee's claim that she was required to attend a dinner where there was ancestor worship in violation of her Christian beliefs. The Third Circuit affirmed the dismissal of the "failure to accommodate" religious discrimination claim, but reversed the dismissal of the retaliation claim. Thus, the employer exposed itself to liability because of potential retaliation, even though it did not otherwise violate Title VII.

The Fourth Circuit in *Jordan v. Alternative Resources Corp.*,<sup>8</sup> affirmed the dismissal of an employee's retaliation claim arising out of his complaint regarding an alleged racially discriminatory remark. This case involved the infamous killing spree by a sniper over several weeks in 2002 in the Washington, D.C., metropolitan area. According to the plaintiff, employees were watching a news broadcast announcing that two African-American

men had been captured in connection with the shootings, when a co-employee shouted, "[t]hey should put those two black monkeys in a cage with a bunch of black apes and let the apes f--- them." The plaintiff, who was African-American, was in the room at the time of the statement, and reported the comment. One month later, the plaintiff was terminated.

The plaintiff and the defendants agreed that the complaint constituted opposition activity and that the only possible unlawful employment practice that the employee could have opposed was a hostile work environment. The primary issues, therefore, were whether a hostile work environment existed or, if not, whether the plaintiff could have reasonably believed the statement created a hostile work environment. The Fourth Circuit quickly dismissed the plaintiff's argument that the single comment constituted a hostile work environment. Although acknowledging the statement was "crude and racist," the Court described the comment as an "isolated response directed at the snipers through the television set. . . ." The remark was not directed at any employee and was not repeated, nor did it alter the terms and conditions of plaintiff's employment. While the remark was unacceptably racist and should not have been made, the court nonetheless concluded that it was a "far cry" from constituting a hostile work environment.<sup>10</sup>

The court then analyzed whether the plaintiff could have reasonably believed he was opposing a hostile work environment based on race. The court concluded that no objectively reasonable person could have believed that the office was "in the grips of a hostile work environment or that one was taking shape."<sup>11</sup> In short, the court wrote, "the mere fact that one's *coworker* has revealed himself to be racist is not enough to support an objectively reasonable conclusion that the *workplace* has likewise become racist."<sup>12</sup> Therefore, the opposition claim could not survive.

In an unpublished Fifth Circuit decision, *Tureaud v. Grambling State University*,<sup>13</sup> the African-American police chief of Grambling State University alleged he was terminated because of his attempts to hire a white assistant chief of police.

A jury returned a unanimous verdict for the plaintiff awarding several hundred thousand dollars in damages. On appeal, the university argued that the plaintiff had not established that he engaged in a protected activity for purposes of a Title VII retaliation claim. The court affirmed the award.

The plaintiff argued that he opposed an unlawful employment practice, that is, the rejection of a white applicant for the assistant police chief position. The court had no difficulty concluding that opposition claims can be based on opposition to unlawful practices directed at other employees or applicants other than the plaintiff. The court also concluded that the plaintiff's informal complaint to a supervisor regarding the unlawful employment practice satisfied Title VII's opposition requirement. The court, accordingly, affirmed the jury verdict for the plaintiff on the retaliation claim.

In contrast, in two cases arising out of the same allegedly gender-biased comment, the Eighth Circuit affirmed the dismissal of retaliation claims on the grounds that there was no objectively reasonable belief that discrimination occurred. In *Brannum v. Missouri Department of Corrections*<sup>14</sup> and *Barker v. Missouri Department of Corrections*,<sup>15</sup> a female supervisor allegedly told a male employee in a special needs unit that women were by and large better at the job than men because women are more patient and nurturing. The plaintiffs in both cases witnessed the comment and signed a memorandum attesting to it. In the *Barker* case, the plaintiff claimed he received an unfavorable review, had to attend a special appraisal session, and was suspended five days, all in retaliation. In the *Brannum* case, the plaintiff claimed she was permanently removed from her post and reassigned to a lesser position, wrongfully investigated, and reprimanded. Thereafter, both plaintiffs filed retaliation claims. In each case, the court found that no reasonable person could have believed that the single, isolated comment implying that women are better suited for a position constituted sexual harassment. Therefore, the plaintiffs did not have an objectively reasonable belief that they were opposing

an unlawful employment practice, and their retaliation claims were appropriately dismissed.

### Participation Claim Decisions Since *White*

A recent Tenth Circuit decision demonstrates just how far the participation clause reaches to protect aggrieved employees. In *Kelley v. City of Albuquerque*,<sup>16</sup> the court held that an attorney representing the defendant in an EEOC mediation is participating in a Title VII proceeding for purposes of Title VII. The attorney, therefore, was protected against retaliation by his employer. The court rejected the city's numerous arguments against protecting the attorney, focusing on the statutory language, which protects people who participate "in any manner" in a Title VII proceeding in reaching its holding. This decision is similar to a Second Circuit decision from 2003, *Deravin v. Kerik*,<sup>17</sup> where the court held that a defendant in a Title VII proceeding is "participating" for purposes of the anti-retaliation provision of Title VII.

### Disclosure of Confidential Information as a Protected Activity

In a favorable decision for employers seeking to protect confidential information, the Sixth Circuit held that an employee's disclosure of confidential documents does not constitute "participation" for purposes of a Title VII retaliation claim. In *Niswander v. Cincinnati Insurance Co.*,<sup>18</sup> a plaintiff asserted a retaliation claim based on her participation in a class-action lawsuit against the employer for gender discrimination. The plaintiff, a claims adjuster for the employer, alleged several acts of retaliation by her supervisor after she opted into the class action. The plaintiff was eventually terminated after the employer learned that the plaintiff turned confidential company documents over to her attorney in the class-action lawsuit. The employer claimed the termination was the result of a breach of the company's privacy policy, that is, the disclosure of confidential documents, which were unrelated to the class action. That, the employer claimed, was a legitimate ground for dismissal.

The Sixth Circuit addressed for the

first time whether, and under what circumstances, an employee's delivery of confidential documents in violation of a company policy constitutes protected activity for purposes of a participation or an opposition claim. About the participation claim, the court reasoned that had the documents related to the gender discrimination claim, their production would clearly have constituted participation in that lawsuit and, therefore, the plaintiff's conduct would have been protected by Title VII. Because, however, the plaintiff conceded the documents had no relevance to the gender discrimination lawsuit, the production of the documents did not constitute participation in the lawsuit. The court observed that a decision to the contrary "would provide employees with near-immunity for their actions in connection with antidiscrimination lawsuits, protecting them from disciplinary action even when they knowingly provide irrelevant, confidential information solely to jog their memory regarding instances of alleged retaliation."<sup>19</sup>

As for the opposition claim, the court recognized the need to balance the employer's legitimate interest in maintaining an orderly workplace and in protecting confidential business information against the equally legitimate need of employees to be protected from retaliatory actions. The court explained:

Allowing too much protection to employees for disclosing confidential information may perversely incentivize behavior that ought not be tolerated in the workplace—namely, the surreptitious theft of confidential documents as potential future ammunition should the employee eventually feel wronged by her employer. On the other hand, inadequate protection to employees might provide employers with a legally sanctioned reason to terminate an employee in retaliation for engaging in activity that Title VII and related statutes are designed to protect.<sup>20</sup>

The court, discussing Eighth and Ninth Circuit precedent, observed that in all cases applying this balancing test, heavy weight was placed on how the employee

obtained the documents and to whom they were given. The ultimate question for the Sixth Circuit was whether the employee's disclosure was reasonable under the circumstances, a test the court would apply regardless of whether the claim arose under the participation or opposition clause of Title VII. The court then set forth a six-prong test for analyzing the reasonableness of the employee's disclosure. In the end, the court concluded that producing confidential documents for the sole purpose of refreshing one's recollection, when there are readily available alternatives to accomplish the same goal,

**The First Circuit held that the filing of an EEOC complaint cannot be an act of disloyalty that would justify any retaliatory actions as a matter of law.**

does not constitute reasonable opposition that justifies violating a company's confidentiality policy. To hold otherwise, the court concluded, would be to turn the opposition clause into an employee's license to ignore company rules.<sup>21</sup>

The *Niswander* decision is in conflict with the decision in *Vaughn v. Epworth Villa*,<sup>22</sup> where the Tenth Circuit held that an employee's production of unredacted medical records to the EEOC in violation of company policy, and most likely in violation of state and federal law, constituted participation in a Title VII proceeding. Although the *Vaughn* court rejected any application of a reasonableness standard to participation-based claims, it concluded that the employee could not show that the reason for the termination (the wrongful production of the medical records) was pretextual or that the real reason was

retaliation for the plaintiff's filing of an age and race discrimination complaint with the EEOC. In fact, the court explicitly stated that the egregious conduct—disclosing medical records in violation of company policy, and likely in violation of state and federal law—warranted the severe punishment or termination.

#### No Disloyalty Defense under Title VII

In *DeCaire v. Mukasey*,<sup>23</sup> the First Circuit rejected the district court's application of a disloyalty defense—which the defendants did not raise—to bar a retaliation claim after a bench trial. In *DeCaire*, a deputy U.S. marshal filed gender discrimination complaints with the local EEOC office claiming that the U.S. marshal for the District of Massachusetts retaliated against her. The plaintiff alleged that after she filed her complaints with the EEOC, her employer transferred her to lesser positions, refused to transfer her to positions she had requested, denied promotions, denied assignments and appointments, and required her to work at times with limited or no breaks. Not surprisingly, the plaintiff did not have difficulty establishing an adverse employment action.

At trial, the district court found that the U.S. marshal had discriminated against the plaintiff and treated her adversely after she complained. Although the court further found that the proffered reasons for the treatment were not persuasive, it sua sponte held that the treatment was motivated by the marshal's perception that the plaintiff was disloyal to him personally, rather than gender animus or retaliation. The court entered a verdict for the employer, dismissing the retaliation claim. In a harshly worded opinion, the First Circuit reversed the lower court, holding that the filing of an EEOC complaint cannot be an act of disloyalty that would justify any retaliatory actions as a matter of law. The First Circuit thus vacated the verdict for the employer and remanded the matter for a new trial.

#### No "Belief of Bad Faith" Defense

The decision in *Sanders v. Madison Square Garden, L.P.*<sup>24</sup> is notable for its consideration, and ultimate rejection, of an employer's "belief of employee bad faith" defense to employee retaliation

claims. This case involved claims by a former employee against the New York Knicks' owner, James Dolan, and former National Basketball Association player and general manager, Isaiah Thomas. In an unpublished summary judgment decision denying cross-motions for summary judgment, the court indicated that an employer may have a defense to a retaliation claim where an employee acted in good faith if the employer believed the employee acted in bad faith. The court's reasoning was that in such instance, there was no retaliatory motive.<sup>25</sup>

In a published decision on the employee's motion for reconsideration, however, the court concluded that its prior reasoning was flawed. The district court acknowledged that Title VII does require that the employee's complaint be made in good faith with an objectively reasonable belief that the employer's conduct was illegal. The court also agreed that if the complaint is not made in good faith, but instead is fabricated to extort money from an employer, then Title VII does not protect the employee from retaliation. The court included as an example of bad-faith behavior by an employee, attempts by the employee to coerce subordinates under his or her supervision to conform their stories to the employee's, thereby obstructing an employer or administrative agency's investigation, or a court proceeding. The district court stated, "[t]he way in which an employee presses complaints of discrimination can be so disruptive or insubordinate that it strips away protections against retaliation."<sup>26</sup> Nonetheless, the court found no merit to the defendants' argument that an employer who believes an employee acted in bad faith—even though the employee acted in good faith—should be protected from a retaliation claim. The employee only loses Title VII retaliation protections if he or she in fact acted in bad faith.

#### Conclusion

Although the *White* decision established a workable standard for determining whether or not an employee has engaged in a protected activity for purposes of Title VII retaliation claims, gray areas remain. These areas include an employee's disclosure of confidential documents in connection with a Title VII proceeding,

and the EEOC's interpretation of Title VII to include participation in an internal investigation as a protected activity. The Sixth and Tenth Circuits have already applied differing standards to the former. And there will certainly be litigation over the latter given that some state courts have disagreed with the EEOC's interpretation under comparable state laws. The defense of retaliation claims will not be any simpler for employers after *White*. As such, employers should avail themselves of legal counsel prior to making employment decisions to ensure that they do not turn an otherwise baseless discrimination claim into a well-supported retaliation claim. ■

### Endnotes

1. 42 U.S.C. § 2000e-3(a).
2. 548 U.S. 53, 126 S. Ct. 2405 (2006).
3. 548 U.S. at 68, 126 S. Ct. 2405 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346, 117 S. Ct. 843 (1997)).
4. See *Hunts Point Multi-Service Center, Inc. v. Bizardi*, 45 A.D.3d 481 (N.Y.A.D. 1st Dept. 2007); *Spinks v. Township of Clinton*, 402 N.J. Super. 465 (App. Div. 2008).
5. 555 U.S. \_\_\_\_ (2009).
6. See *Retaliation*, [www.eeoc.gov/types/retaliation.html](http://www.eeoc.gov/types/retaliation.html) (last visited on Nov. 7, 2008).
7. 522 F.3d 315 (3d Cir. 2008).
8. 458 F.3d 332 (4th Cir. 2006).
9. *Jordan*, 458 F.3d at 339–40.
10. *Id.* at 340.
11. *Id.* at 341.
12. *Id.*
13. 2008 WL 4411438 (5th Cir. Sept. 30, 2008).
14. 518 F.3d 542 (8th Cir. 2008).
15. 513 F.3d 831 (8th Cir. 2008).
16. 542 F.3d 802 (10th Cir. 2008).
17. 335 F.3d 195 (2d Cir. 2003).
18. 529 F.3d 714 (6th Cir. 2008).
19. 529 F.3d at 722.
20. *Id.*
21. *Id.* at 727.
22. 537 F.3d 1147 (10th Cir. 2008).
23. 530 F.3d 1 (1st Cir. 2008).
24. 525 F. Supp.2d 364 (S.D.N.Y. 2007).
25. 2007 WL 2254698 (S.D.N.Y. Aug. 6, 2007).
26. 525 F. Supp.2d at 366 (quoting *Matima v. Celli*, 228 F.3d 68, 79 (2d Cir. 2000)).

## Message from the Editors

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provided by the “Opposition Clause” and the “Participation Clause.” Unquestionably, all indications are that retaliation claims are on the rise and will continue to in the years to come. In connection with a discussion of retaliation claims, the article reviews the Equal Employment Opportunity Commission’s (EEOC) interpretation of retaliation claims as set forth in the EEOC’s Compliance Manual, opposition claim decisions since *Burlington Northern*, participation claim decisions since *Burlington Northern*, disclosure of confidential information as a protected activity, and under what circumstances an employee’s delivery of confidential documents constitutes a protected activity, as well as questions concerning a disloyalty defense and belief-of-bad-faith defense.

The next three articles deal with leave and return-to-work-issues. In a discussion concerning the Family Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA) return-to-work issues, Kirsten Keating in an article entitled “Correlations Between FMLA and ADA: A Critical Consideration for Employers,” discusses an employer’s return-to-work obligations under the FMLA and the ADA. As the article highlights, the obligations are distinct, yet an understanding of the correlation between the two is critical to compliance.

In an article titled “When the Troops Come Marching Home,” Leilani Harbeck provides an examination of the Uniformed Services Employment and Reemployment Rights Act (USERRA). In careful review of the language of the act and the provisions promulgated by the Department of Labor, topics discussed include anti-discrimination and anti-retaliation, notice of uniform service, treatment of employee during uniformed service, eligibility for reemployment, reemployment position, and benefits upon reemployment.

Rebecca Luck in an article entitled “Uncle Sam Wants You to Provide Some Comfort to Our Military Families,” discusses the ADA and FMLA amendments of 2008 and the requirements that business

provide significant support for military members and their families. In addition to a historical review of disability legislation and American military involvement as a contributing factor, the article reviews the critical provisions of the 2008 FMLA amendments, which were largely directed toward providing military families with greater leave entitlement. In addition, the 2008 ADA amendments are reviewed and the express provisions overturning the Supreme Court’s decision in *Sutton v. United Airlines*, 527 U.S. 571 (1999), and *Toyota v. Williams*, 534 U.S. 184 (2002), are reviewed.

In yet a third article concerning provisions of the ADA, Adam Phillips reviews the Supreme Court decision in *Kentucky Retirement Systems v. EEOC*, 554 U.S. \_\_\_\_ (2008). In the article titled “*Kentucky Retirement Systems: A Case Analysis of Retirement under the ADEA*,” the key factual background and the Court’s analysis are discussed. In addition, specific citations of the oral argument transcript are provided.

Finally, this issue closes with what may well be on the minds of most labor and employment lawyers in America today: what legislation will be enacted under the new administration. Jonathan Hancock and Whitney Harmon provide their thoughts in an article entitled “Just When You Thought You Had Federal Employment Laws All Figured Out . . .” In addition to the substantial changes already made to the FMLA and the ADA, there is a brief discussion concerning proposed legislation and predictions concerning legislation, including a discussion of the Employee Free Choice Act, the Re-Empowerment of Skilled Professional Employees and Construction Trade Workers (RESPECT) Act, the Federal Oversight, Reform, and Enforcement of the WARN (FOREWARN) Act, and the Employment Non-Discrimination Act (ENDA).

We welcome your contributions to this publication. Your good work continues to reflect the ever-dynamic aspects of the employment and labor relations practice, which are even more apparent now with the articulated vision of the new administration. ■

**Bill Martucci  
and Brian Koji**

# When the Troops Come Marching Home

By Leilani M. Harbeck

As increasing numbers of U.S. troops, including those called up from the reserves or National Guard, return from deployment, both employees and employers are more frequently grappling with the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>1</sup> In broad terms, USERRA protects service members by providing reemployment rights when returning to civilian employment from a period of service in the uniformed services, and prohibiting discrimination based on military service or obligation. USERRA is enforced and administered by the U.S. Department of Labor's Veterans' Employment and Training Service.

## General Provisions

USERRA is broad and applies to all private and public employers, regardless of size.<sup>2</sup> There is no exception for smaller businesses. The category of

individuals recognized as employees and potentially protected by USERRA is similarly expansive and includes civilian employees or applicants for employment (collectively "employee").<sup>3</sup> However, none of the act's protections is extended to independent contractors. In deciding whether an individual is an employee or an independent contractor, standard factors are considered, such as:

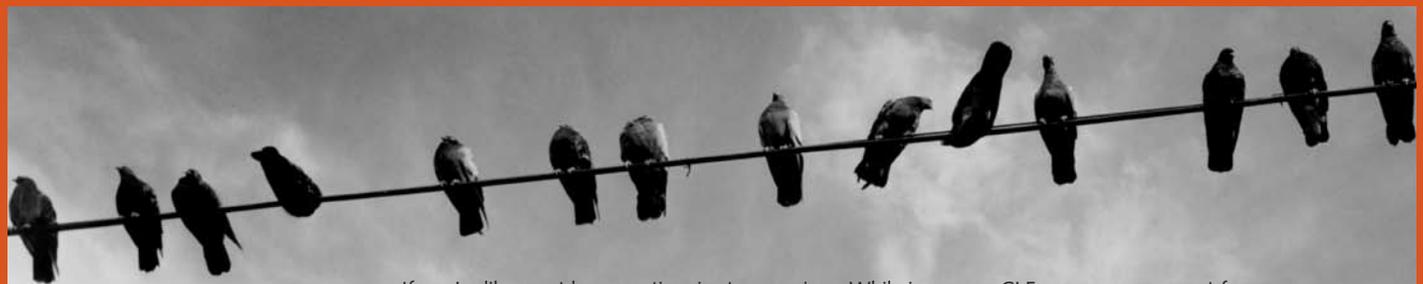
- (a) the extent of the employer's right to control the manner in which the work is to be performed
- (b) the individual's opportunity for profit or loss
- (c) the individual's investment in equipment or materials
- (d) whether the service requires a special skill
- (e) the permanency of the working relationship
- (f) whether the service performed is an integral part of the employer's business.<sup>4</sup>

Although USERRA is most often understood as applying to National Guard and reserve military personnel, it also applies to the Air Force, Army, Marines, Navy, Army National Guard, Air National Guard, commissioned corps of the Public Health Service, certain types of service in the National Disaster Medical System (NDMS), and any other category of persons designated by the president in time of war or national emergency (collectively, the "uniformed services").<sup>5</sup> USERRA protects employees who are absent from work due to voluntary and involuntary service in the uniformed services, including absences caused by active duty, active and inactive duty for training, National Guard duty, fitness examinations, funeral honors duty, and activation of the NDMS or NDMS training.<sup>6</sup> It should be noted, however, that USERRA is a federal statute and, as such, does not apply to state or local guard units.

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### Antidiscrimination and Antiretaliation

Employers are prohibited from discriminating against employees under USERRA. Specifically, USERRA disallows employers from taking any adverse employment action against an employee based on the employee's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.<sup>7</sup> Adverse employment actions have been defined, in part, as an employer refusing or denying initial employment, reemployment, retention of employment, promotion, or any other benefit of employment. Employers are also prohibited from retaliating against employees by taking adverse employment actions against the employee because that employee has (a) taken action to enforce a protection afforded under USERRA, (b) testified or otherwise made a statement in or in connection with a proceeding under USERRA, (c) assisted or participated in an investigation under USERRA, or (d) exercised any other right provided by USERRA.<sup>8</sup> Should an employer be accused of violating USERRA's antidiscrimination and antiretaliation provisions, the initial burden of proving that a protected status or activity was the cause for any adverse employment action rests on the individual claiming a violation of USERRA. If the employee establishes that such a causal connection exists, the burden shifts to the employer to prove that it would have taken the adverse employment action regardless of the protected status or activity.<sup>9</sup>

### Notice of Uniformed Service

A civilian employer's permission is not required for an employee to take leave to perform services in the uniformed services; rather, the employee only needs to provide the employer with notice of the impending service.<sup>10</sup> Further, the employee has no duty to accommodate the employer's interests or concerns regarding the timing, frequency, or duration of service.<sup>11</sup> No particular format is required for an employee's notice of the need for leave, which may be informal and can be either verbal or written.<sup>12</sup> Notice can be given by the employee or an appropriate officer of the uniformed service in which the

employee's service is to be performed.<sup>13</sup> Employees should, however, provide employers with notice of the need for leave to perform service in the uniformed services as far in advance as is reasonable by the circumstances. While the actual amount of advance notice required is not specified by USERRA, the Department of Defense has commented that it strongly recommends providing notice at least 30 days in advance, when feasible to do so.<sup>14</sup> Only when advance notice is prevented by military necessity or is otherwise impossible or unreasonable under all the circumstances (i.e., a requirement that the employee report for duty immediately or upon short notice, or the unavailability of the employer or the employer's representative) will an employee's failure to provide advance notice be excused.<sup>15</sup>

It should be noted that employees are not required to depart immediately from civilian employment and begin performing service in the uniformed services. As such, an employee's notice may not coincide with his or her reporting date. The employer must, at a minimum, allow the employee sufficient time after ceasing civilian employment to travel safely to the uniformed service site and arrive fit to perform uniformed service. Employees may also be given additional time to rest or to arrange their affairs before reporting for uniformed service based on their specific circumstances, such as the duration of the service, the amount of advance notice of the service received by the employee, and the location of the service.<sup>16</sup>

### Treatment of Employee During Uniformed Service

While the employee is performing service in the uniformed services, a civilian employer should treat the employee as if he or she is on an authorized leave of absence.<sup>17</sup> During this time, the employee remains entitled to all non-seniority rights and benefits, such as those offered through an employment contract or any agreement, policy, practice, or plan in effect at the employer's workplace that the employer provides to other employees with similar seniority, status, and pay that are on a leave of absence. For example, the accrual of vacation leave is considered a non-seniority right or benefit for

USERRA purposes. If the rights and benefits vary according to the type of leave, the employer must treat the employee as favorably as it treats other employees on a comparable form of leave, taking into consideration the duration of the leave, the purpose of the leave, and the ability of the employee to choose when to take the leave when determining whether leaves are comparable.<sup>18</sup>

**A civilian employer's permission is not required for an employee to take leave to act in the uniformed services; the employee need only provide notice.**

USERRA does not require that civilian employers pay employees while on leave to perform service in the uniformed services, although employers may voluntarily elect to pay employees for all or a portion of their absence.<sup>19</sup> If an exempt employee performs services for a civilian employer while on a military leave of absence (i.e., works partial days for the civilian employer), that employee must be paid his or her salary for the workweek in which the services were performed; however, the civilian employer may offset the amount received by the employee as military pay for that particular workweek against the salary due without impacting the exempt status of the employee under the Fair Labor Standards Act.<sup>20</sup> Obviously, nonexempt, hourly employees performing services for civilian employers while on leave must be paid their regular hourly rate for all hours actually worked.

Employers cannot require that employees use accrued vacation, annual, or other similar leave while absent performing service in the uniformed services, but may allow employees to voluntarily elect to use this leave.<sup>21</sup>

If the employee is enrolled in a group health plan offered by the civilian employer, the employee must be permitted to continue coverage in that plan for either 24 months from when the employee's leave of absence begins or from the start of the employee's leave absence until the

**An employer is not required to reemploy an employee if the employee's preservice position was for a brief, non-recurrent period.**

employee fails to return from uniformed service or reapply for a position of employment, whichever is less. If, however, the employee was not enrolled in the civilian employer's group health plan or had declined coverage prior to performing uniformed service, the employer is not required to allow the employee to enroll or elect coverage at commencement of leave.<sup>22</sup> The employer and the employee may make arrangements as to how the employee will pay for any continuing coverage. The costs to an employee for continuing coverage vary depending on the length of the employee's uniformed service. If an employee's service is for fewer than 31 days, the employee cannot be required to pay more than the regular employee share, but if the service is for 31 days or more, the employee may be required to pay 102 percent of the full premium under the group health plan.<sup>23</sup>

In certain circumstances, an employer may cancel an employee's group health plan coverage. Whether such a cancellation will be permissible depends on whether the employee is excused from providing advance notice of service and whether the plan has established reasonable rules for election and payment for continuation coverage. If an employee fails to provide advance notice of the need for leave to perform service in the uniformed services, which is not otherwise excused as described above, the employee's group health plan coverage may be canceled upon the employee's departure from employment for uniformed service. If the employee's service is for 30 days or longer and the plan has rules similar to or compliant with the Consolidated Omnibus Budget Reconciliation Act (COBRA) for election of continuing coverage and payment for continuing coverage in the event of USERRA leave, the employee's health plan coverage may be canceled if the employee has not timely elected to continue coverage or paid the required amounts.<sup>24</sup> If group health plan coverage for an employee or an employee's dependents is canceled, coverage must be reinstated upon reemployment or the employee's cure of any deficiencies associated with election or payment for continuing coverage. Once coverage is reinstated, no preexisting condition exclusion or waiting period can be imposed, unless it would have been imposed had coverage not been terminated because of such service. USERRA will, however, permit a plan's imposition of an exclusion or waiting period for illnesses or injuries that were incurred or aggravated during the performance of uniformed service.<sup>25</sup>

#### Eligibility for Reemployment

At the conclusion of uniformed service, USERRA grants employees certain reemployment rights with civilian employers. These rights are available even if employees do not indicate an intent to seek reemployment prior to leaving for uniformed service or even if employees specifically state that they do not intend to return.<sup>26</sup> To be eligible for reemployment, the employee must:

- (a) have provided advance notice of the need for leave to perform

- uniformed service to the employer
- (b) have five years or less of cumulative uniformed service during the employee's employment with the employer
- (c) have timely returned to work or applied for reemployment following conclusion of uniformed service
- (d) not have ended his or her uniformed service due to a disqualifying discharge or under less than honorable conditions.<sup>27</sup>

If an employee intends to return to employment with his or her civilian employer upon completion of uniformed service and is eligible for reemployment, the employee must either report to work or reapply for employment. Which action the employee must take is governed by the length of service as follows: If the service lasted 30 days or less, or was of any length for a fitness examination, the employee must report back to work no later than the first full regularly scheduled workday after completing the service and the expiration of eight hours after the employee returns home. If the service lasted between 31 and 180 days, the employee must submit an application for reemployment within 14 days of concluding uniformed service. If service lasted 181 days or longer, the employee must submit an application for reemployment within 90 days after concluding uniformed service.<sup>28</sup> If an employee is hospitalized or recovering from an injury or illness incurred in or aggravated during the employee's uniformed service, the time limits for submitting an application for reemployment may be extended by up to two years.<sup>29</sup>

Should an employee's length of uniformed service require that the employee reapply for his or her position with a civilian employer, the employee's application may be oral or written, but should indicate that it is submitted by an employee who is seeking reemployment following service in the uniformed services.<sup>30</sup> Upon receipt of the employee's application for reemployment, the employer may request documentation to establish that: (a) the reemployment application is timely, (b) the employee has not exceeded the five-year cumulative service limit, and (c) the

employee's dismissal from service was not disqualifying.<sup>31</sup> Thereafter, the eligible employee must be promptly reemployed, meaning being returned to employment as soon as possible, but no later than two weeks after the employee's application for reemployment unless unusual circumstances are present.<sup>32</sup> An employer may decline reemployment to an employee if its circumstances have changed so much that reemployment is impossible or unreasonable, for example, an intervening reduction in force would have included the employee.<sup>33</sup> The fact that an employer has hired another individual to fill the employee's position while the employee was performing services in the uniformed service is insufficient to deny reemployment, even if this means that the employer must fire the replacement.<sup>34</sup> An employer is also not required to reemploy an employee if the employee's preservice position was for a brief, non-recurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period, such as where the employee was a temporary employee or the employee was hired for a particular project that has been completed.<sup>35</sup>

In calculating an employee's cumulative amount of uniformed service during a five-year period, USERRA places limits on what time away from work is included. Only the time the employee actually spent performing service in the uniformed services is included. Any absences before or after performing uniformed service are excluded from this calculation and from determinations of the employee's reemployment rights.<sup>36</sup> In addition, certain types of uniformed service are excluded, such as involuntary active duty and service to fulfill specified training requirements, among others.<sup>37</sup>

An employee is not eligible for reemployment if he or she was:

- (a) discharged dishonorably or for bad conduct
- (b) separated from uniformed service under other than honorable conditions
- (c) dismissed as a commissioned officer by sentence of a general court-martial, in commutation

of a sentence of a general court-martial, or, in time of war, by order of the president

- (d) dropped as a commissioned officer from the rolls due to absence without authority for at least three months, separated by reason of a sentence to confinement adjudged by court-martial, or sentenced to confinement in a federal or state penitentiary or correctional institution.<sup>38</sup>

### Reemployment Position

The determination of what position an eligible employee should be reemployed in is one of the most difficult aspects of USERRA for civilian employers. The starting point in determining the reemployment position for any employee returning from uniformed service is determining the position the employee would have attained with reasonable certainty had the employee's employment not been interrupted by uniformed service.<sup>39</sup> This position is called the "escalator position." There is no requirement that the escalator position be beneficial to the employee; depending on the circumstances, the escalator position may result in the employee being reemployed in a lower position, laid off, or even terminated.<sup>40</sup>

Once the escalator position is determined, an employer may consider several other factors before deciding the appropriate reemployment position, such as the employee's length of service in the uniformed services, qualifications, and disability (if any).<sup>41</sup> If the service lasted 90 days or fewer, the employee's reemployment position is determined in the following priority based on the employee's qualification for the position after the employer has made reasonable efforts to assist the employee in becoming qualified:

- (1) the escalator position
- (2) the employee's pre-service position, if the employee is not qualified for the escalator position
- (3) any other position for which the employee is qualified that is the nearest approximation first to the escalator position and then to the preservice position, if he or she is not qualified for either

the escalator position or the preservice position.<sup>42</sup>

If the service was for more than 90 days, the employee's reemployment position is determined in the following priority based on the employee's qualification for the position after the employer has made reasonable efforts to assist the employee in becoming qualified:

**The determination of what position an eligible employee should be reemployed in is one of the most difficult aspects of USERRA for civilian employers.**

- (1) the escalator position or a position of like seniority, status, and pay
- (2) the employee's preservice position or a position of like seniority, status, and pay, if the employee is not qualified for the escalator position or a comparable position
- (3) any other position for which the employee is qualified that is the nearest approximation first to the escalator position and then to the preservice position, if the employee is not qualified for the escalator position, the preservice position, or comparable positions.<sup>43</sup>

### Benefits upon Reemployment

After an employee has been reemployed by a civilian employer, the employee's rate of pay must also be adjusted. The

employee's rate of pay must be that associated with the reemployment position and must also take into account any pay increases, differentials, step increases, merit increases, or periodic increases the employee would have received with reasonable certainty had the employee been continuously employed.<sup>44</sup>

The employee is also entitled to the same seniority and seniority-based rights and benefits upon reemployment that the employee had when uniformed service began, in addition to any seniority-based rights or benefits that the employee would have earned had his or her employment not been interrupted by uniformed service.<sup>45</sup> Whether a right or benefit is seniority-based depends on:

- (a) whether it is a reward for length of service rather than a form of short-term compensation for work performed
- (b) whether it is reasonably certain the employee would have received the right or benefit absent the interruption for uniformed service
- (c) whether the employer's actual custom or practice is to withhold the right or benefit as a reward for length of service.<sup>46</sup>

USERRA also has special rules that apply, upon reemployment, to any pension benefits to which an employee is entitled from an employer. If the pension benefit is a defined benefit plan, the employee's accrued benefit will be increased for the period of service after the employee has been reemployed and, if applicable, has repaid any amounts owed to the plan and made any required employee contributions to the plan. If the pension benefit is a defined contribution plan, the employee may make up the employee's contributions and elective deferrals (if any) and the employer must allocate the amount of its make-up contribution for the employee (if any) in the same manner and to the same extent that it allocates the amounts for other employees during the period of service.<sup>47</sup> If the employer's contribution is to a plan that the employee was not required or permitted to contribute to, the employer must make its contribution within 90 days of the employee's reemployment

date or when contributions are normally due for the year in which the employee was serving in the uniformed services, whichever is later. If the employee is making up contributions or elective deferrals to the plan, then the employee has up to three times the length of the employee's immediate past period of uniformed service to make the contributions, but not longer than five years. Any employer contributions that are contingent on the employee making elective contributions must be made during the same time period that the returning employee uses to make up his or her deferral.<sup>48</sup> The returning employee may determine the amount of any make-up contributions; however, the amount may not be greater than what the employee would have been permitted or required to contribute during the period of uniformed service.<sup>49</sup>

Reemployed employees are also provided with protection from discharge under USERRA if their uniformed service was for more than 30 days. If the period of service was for more than 30 days, but fewer than 180 days, the employee cannot be terminated, except for cause, for 180 days after the employee's date of reemployment. If the period of service was for 180 days or longer, the employee cannot be terminated, except for cause, for one year from the date of reemployment.<sup>50</sup> Cause is not specifically defined in USERRA, but includes reasons for termination based on the employee's conduct that would presumably be based on the common law concept of "cause." In addition, however, it should be noted that USERRA expands the concept of cause and includes other legitimate, nondiscriminatory reasons for termination, including a layoff or position elimination.

As the regulations under USERRA explain, "USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects."<sup>51</sup> Therefore, employers may voluntarily provide greater protections to employees than those discussed above. Additionally, employers may be required to provide greater protections to employees performing military service under state law and should confirm the same. ■

## Endnotes

1. 38 U.S.C. § 4301, *et seq.*
2. 20 C.F.R. §§ 1002.5(d)(1) and 1002.34(a).
3. 20 C.F.R. § 1002.5(c).
4. 20 C.F.R. § 1002.44.
5. 20 C.F.R. §§ 1002.5(o) and 1002.6.
6. 20 C.F.R. § 1002.5(l).
7. 20 C.F.R. § 1002.18.
8. 20 C.F.R. § 1002.19.
9. 20 C.F.R. § 1002.22.
10. 20 C.F.R. § 1002.87.
11. 20 C.F.R. § 1002.104.
12. 20 C.F.R. § 1002.85(d).
13. 20 C.F.R. § 1002.85(a).
14. 20 C.F.R. § 1002.85(e).
15. 20 C.F.R. § 1002.86.
16. 20 C.F.R. § 1002.74.
17. 20 C.F.R. § 1002.149.
18. 20 C.F.R. § 1002.150.
19. 20 C.F.R. § 1002.151.
20. 29 C.F.R. § 541.602(b)(3).
21. 20 C.F.R. § 1002.153.
22. 20 C.F.R. § 1002.164.
23. 20 C.F.R. § 1002.166.
24. 20 C.F.R. § 1002.167.
25. 20 C.F.R. § 1002.168.
26. 20 C.F.R. § 1002.88.
27. 20 C.F.R. § 1002.32(a).
28. 20 C.F.R. § 1002.115.
29. 20 C.F.R. § 1002.116.
30. 20 C.F.R. § 1002.118.
31. 20 C.F.R. § 1002.121.
32. 20 C.F.R. §§ 1002.180 and 1002.181.
33. 20 C.F.R. § 1002.139(a).
34. *Id.*
35. 20 C.F.R. § 1002.139(c).
36. 20 C.F.R. § 1002.100.
37. 20 C.F.R. § 1002.103.
38. 20 C.F.R. §§ 1002.134 and 1002.135.
39. 20 C.F.R. § 1002.192.
40. 20 C.F.R. § 1002.194.
41. 20 C.F.R. § 1002.192.
42. 20 C.F.R. § 1002.196.
43. 20 C.F.R. § 1002.197.
44. 20 C.F.R. § 1002.246.
45. 20 C.F.R. §§ 1002.210 and 1002.212.
46. 20 C.F.R. § 1002.212.
47. 20 C.F.R. § 1002.261.
48. 20 C.F.R. § 1002.262.
49. 20 C.F.R. § 1002.262(d).
50. 20 C.F.R. § 1002.247.
51. 20 C.F.R. § 1002.7(a).

# Uncle Sam Wants You to Provide Some Comfort to Our Military Families

By Rebecca J. Luck

When Congress was seated following the November 2006 election, previously entrenched majority Republican power was ceded to the Democrats. Despite many years of highly charged partisan behavior, in 2008, significant numbers of both major parties of Congress voted with uncommon unified support to amend the Family and Medical Leave Act of 1993 (FMLA 2008),<sup>1</sup> and, shortly thereafter, the Americans with Disabilities Act of 1990 (ADAAA 2008).<sup>2</sup> Together, these amendments clarified and extended the expansion of qualified employees' entitlements to protected leave, accommodations for disabled workers, and a discrimination-free workplace for disabled workers.

The FMLA amendment provided significant and needed support for military families assisting service members who have been called to active duty or who have an acknowledged, significant, and treated military injury or illness. The ADA amendment angrily demanded a more inclusive construction that would reflect legislative intent with application to a more expansive group than had been found by pre-amendment courts. Both bills swept through Congress by impressive majorities.

Many have argued that our twenty-first century wars have raged on in the Middle East without affecting the day-to-day life of ordinary nonmilitary Americans and that military personnel and their families have borne the weight of the war. For most, the wars have been distant and impersonal, requiring little nonmilitary citizen participation. The ADA and FMLA amendments of 2008 will require businesses to provide significant support for military members and their families. The ADAAA provides increased entitlements for nonmilitary individuals as well.

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## History of Legislation and Military Involvement as a Contributing Factor

The first public rehabilitation program for persons with disabilities was the Smith-Fess Act of 1920 (also known as the Civilian Vocational Rehabilitation Act),<sup>3</sup> which provided government assistance for vocational guidance, training, occupational adjustment, prosthetics, and placement services following America's involvement in World War I during 1917–1918. The Vocational Rehabilitation Amendments of 1943,<sup>4</sup> enacted during America's involvement in World War II (1941–1945), further expanded services, which included physical rehabilitation and restoration.

America's involvement in another military conflict, this time the Korean War from 1950 to 1953, again laid the foundation that led to further expansion of disability rights. Specifically, in 1954, the Vocational Rehabilitation Act amendments<sup>5</sup> greatly expanded funding for rehabilitation. Thereafter, in 1965, the year that American troops were sent to fight in the Vietnam War, the Vocational Rehabilitation Act amendments of 1965<sup>6</sup> eliminated requirements of economic need to receive services. The 1965 act also offered services to a broader population, including those with substance abuse and other social adjustment difficulties.

By 1973, the Vocational Rehabilitation Act was amended to change its name to the Rehabilitation Act of 1973,<sup>7</sup> and to prioritize serving persons with severe disabilities and affirmative action issues. Most important to therapists, the Individualized Written Rehabilitation Program was developed and mandated. In 1975, America left Vietnam after the fall of Hanoi. The Rehabilitation Act was amended in 1974, 1976, 1978, and 1986<sup>8</sup> to provide further services to severely disabled individuals, funding for independent living programs, and state-supported employment. Thereafter, the 1992 amendments<sup>9</sup> emphasized empowering clients to participate in

rehabilitation planning through councils and agencies.

American troops were again deployed to war in 1991 in Desert Storm (and 1998 in Desert Fox) and 1999 to the Kosovo War. During this same time period, the Workforce Investment Act and Rehabilitation Act amendments of 1998<sup>10</sup> helped disabled individuals find employment.

**For most, the wars have been distant and impersonal, requiring little nonmilitary citizen participation.**

## The Impact of the Rehabilitation Act and Enactment of the ADA

The Rehabilitation Act of 1973 provided a model for portions of the Americans with Disabilities Act of 1990.<sup>11</sup> It mandated that federal and federally funded entities provide more appropriate physical access for disabled individuals. Before 1973, wheelchair-assisted persons and visually impaired persons had little opportunity for independent access to governmental buildings and, consequently, were more limited than other individuals in accessing governmental services. The increased access provided under the Rehabilitation Act also increased individuals' opportunities in employment and education as a result of the improved access. President George H.W. Bush, upon signing the ADA in 1990, commented:

Existing laws and regulations under the Rehabilitation Act of 1973 have been effective with respect to the federal government, its contractors, and the recipients of federal funds. However, they have left broad areas of American life untouched or inadequately addressed. Many of our young people, who have benefited from the equal educational opportunity guaranteed under the Rehabilitation Act and the Education of the Handicapped Act, have found themselves on graduation day still shut out of the mainstream of American life. They have faced persistent discrimination in the workplace and barriers posed by inaccessible public transportation, public accommodations, and telecommunications. . . .

The Americans with Disabilities Act presents us all with an historic opportunity. It signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life. As the Declaration of Independence has been a beacon for people all over the world seeking freedom, it is my hope that the Americans with Disabilities Act will likewise come to be a model for the choices and opportunities of future generations around the world.<sup>12</sup>

Likewise, President Bill Clinton celebrated the effectiveness of the ADA, stating:

[t]he ADA has meant more opportunity for 49 million Americans with disabilities to do their part to make us a stronger and better country. . . . It has meant that more people can go to work and participate in community life and do things that most Americans take for granted, like helping to take care of their families or getting a good education or registering and voting. . . .<sup>13</sup>

### Enactment of the 2008 FMLA Amendments

Now, as American soldiers return in need of services, Congress again stepped up to

provide increased support. To this end, in early 2008, Congress passed amendments to the Family and Medical Leave Act. The FMLA<sup>14</sup> was signed into law by President Clinton in 1993, after having been returned without signing in 1990 and again in 1992. Despite its difficult history, the FMLA was eventually passed with overwhelming bipartisan support.

On passage and signing, President Clinton expressed his reasons for support and approval of the FMLA, including the rising number of working mothers with children under the age of 18, the increasing number of single-parent families, America's aging population, and the insufficient availability of leave for maternity and paternity leave on birth or adoption. President Clinton also noted:

Family medical leave has always had the support of a majority of Americans, from every part of the country, from every walk of life, from both political parties. But some people opposed it. And they were powerful, and it took eight years and two vetoes to make this legislation the law of the land. Now millions of our people will no longer have to choose between their jobs and their families.

The law guarantees the right of up to 12 weeks of unpaid leave per year when it's urgently needed at home to care for a newborn child or an ill family member. This bill will strengthen our families, and I believe it will strengthen our businesses and our economy as well.<sup>15</sup>

The 2008 FMLA amendments were largely directed toward providing military families greater leave entitlements. The amendment added 12 weeks of protected leave for qualifying exigencies for the spouse, parent, or child of a covered service member called up to service. These exigencies have been defined to apply only to service members who are not in the regular armed forces. Exigencies include short-notice deployments of no more than seven days' notice; attendance at military ceremonies; provision of urgent childcare needs or childcare arrangements; financial arrangements;

or to spend time with a military member who is on rest leave, attending ceremonies, or for death-related activities.

The amendments also provided specified family members or the next of kin with up to 26 weeks of leave to care for a covered seriously ill or injured military member.

Additionally, newly enacted FMLA regulations clarify and strengthen the standards governing an employer's proper requests for medical certifications. Other regulatory changes include a more specific definition of a serious health condition; clarity on proper scheduling and accounting for intermittent leave; recognition that light duty will no longer be taken as FMLA leave; confirmation that the employer's normal policies and procedures will be followed where substituted paid leave is used; and elimination of the former FMLA rule penalizing the employer where there has been a failure to designate leave as FMLA. New forms are also available from the Department of Labor to assist in implementing these changes.

### Enactment of the 2008 ADA Amendments

The 2008 ADA amendments, which became effective January 1, 2009, expressly overturned the Supreme Court's decision in *Sutton v. United Airlines*<sup>16</sup> and *Toyota v. Williams*.<sup>17</sup> In particular, the amendments established that mitigating measures will not eliminate designation as disability, and widened the parameters of what will be considered a substantial limitation under the act.

*Sutton* had narrowed the scope of protection afforded by the ADA by dictating that the ameliorative effects of mitigating measures were to be considered when determining whether the impairment substantially limited a major life activity. In that case, severely myopic job applicants did not qualify for ADA protection because of the ameliorative effects of eyeglasses.

Likewise, finding that court opinions had created an inappropriately high level of limitation to qualify for ADA coverage, the 2008 amendments rejected *Toyota's* interpretation of the terms "substantially" and "major." In *Toyota*, the court held that an employee's carpal tunnel syndrome did not sufficiently limit her ability to work because it did not prevent her

from working at a large class of jobs. In rejecting this narrow interpretation, the amendment stated, “the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis[.]” President George W. Bush expressed his support for the amendments, stating:

The Americans with Disabilities Act of 1990 is instrumental in allowing individuals with disabilities to fully participate in our economy and society, and the Administration supports efforts to enhance its protections. The Administration believes that the ADA Amendments Act of 2008, which has just passed Congress, is a step in that direction, and is encouraged by the improvements made to the bill during the legislative process.<sup>18</sup>

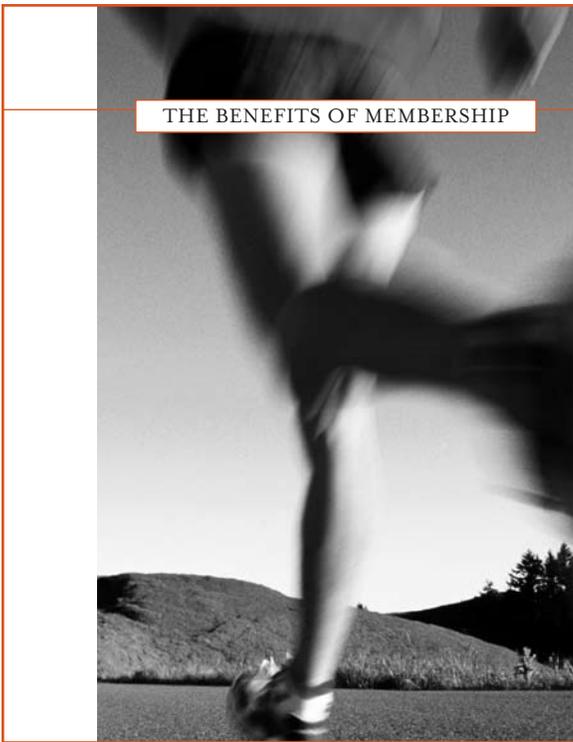
As aptly demonstrated by the 2008 FMLA and ADA amendments, it seems, there is at least one thing that most can agree on. Our military members must

be protected in the workplace and upon return to life in our communities, and that the family members of ill and injured military members must be given the flexibility to provide care and attention without fear of job loss. ■

**Endnotes**

1. The FMLA was amended by virtue of H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181. It passed the House on January 16, 2008 by a vote of 369–46 and passed the Senate on January 22, 2008 by a vote of 91–3. President George W. Bush signed the bill on January 28, 2008.
2. The ADA was amended by virtue of S. 3406, the ADA Amendments Act of 2008, Pub. L. 110-325. It passed the House on September 17, 2008 by voice vote and passed the Senate on September 11, 2008 by unanimous consent. President George W. Bush signed the bill on September 25, 2008.
3. Pub. L. 66-236 (June 2, 1920).
4. Pub. L. 78-113 (July 6, 1943).
5. Pub. L. 83-565 (August 3, 1954).
6. Pub. L. 89-333 (Nov. 8, 1965).
7. Pub. L. 93-112 (Sept. 26, 1973).
8. Pub. L. 93-516 (Dec. 7, 1974);

- Pub. L. 94-230 (Mar. 15, 1976); Pub. L. 95-602 (Nov. 6, 1978); Pub. L. 99-506 (Oct. 21, 1986).
9. Pub. L. 102-569 (Oct. 29, 1992).
10. Pub. L. 105-220 (Aug. 7, 1998).
11. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*
12. George H.W. Bush, President of the United States of America, Statement on Signing the Americans with Disabilities Act of 1990 (July 26, 1990).
13. William J. Clinton, President of the United States of America, Remarks to the Americans with Disabilities Act Roundtable (July 26, 1995).
14. 29 U.S.C. § 2601 *et seq.*
15. William J. Clinton, President of the United States of America, Remarks on Signing the Family and Medical Leave Act of 1993 (February 5, 1993).
16. 527 U.S. 571 (1999).
17. 534 U.S. 184 (2002).
18. George W. Bush, President of the United States of America, Statement on the ADA Amendments Act of 2008, Office of the Press Secretary (September 17, 2008).



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# Kentucky Retirement Systems: A Case Analysis of Retirement under the ADEA

By Adam Phillips

On June 19, 2008, a closely divided Supreme Court decided that the Kentucky Retirement Systems' (KRS) retirement plan was not discriminatory on its face in violation of the Age Discrimination in Employment Act (ADEA) because differences in treatment were not "actually motivated" by age.

## Key Factual Background

Charles Lickteig is a deputy sheriff in the Jefferson County Sheriff's Office in Kentucky. Lickteig is considered a "hazardous duty worker" and therefore is eligible to retire at age 55 or upon attaining 20 years of service under the KRS. The KRS provides for a two-tier calculation of disability retirement benefits for hazardous duty workers like Lickteig who retire near the age of 55. If they decide to keep working past 55, and then become disabled, they receive scheduled retirement benefits. On the other hand, workers who become disabled before the age of 55 would receive payments that reflect their actual years of service, and the number of years remaining until they reach the age of 55. This means that if there were otherwise similarly situated workers, the one that retired on disability before the age of 55 would always receive as much or more than the worker that retired on disability after the age of 55.

Lickteig decided to work until the age of 61, at which time he became disabled because of a "deteriorating vertebra, arthritis, nerve damage, and Parkinson's disease." Lickteig was informed he only qualified for standard retirement, and he filed an age discrimination complaint with the Equal Employment Opportunity Commission (EEOC). The EEOC filed suit against KRS in the U.S. district court on the grounds that KRS failed to impute years to Lickteig solely because he became disabled after the age of 55, in violation

of the ADEA. The district court granted summary judgment for KRS, and that was affirmed on appeal to the U.S. Court of Appeals for the Sixth Circuit. Ultimately, however, the Sixth Circuit reheard the case en banc, and reversed holding that the act of treating younger disabled retirees better than older ones was enough to make a prima facie ADEA violation.

## The Court's Analysis

The 5-4 decision written by Justice Stephen Breyer relied on the Court's 1993 decision in *Hazen Paper Co. v. Biggin*,<sup>1</sup> in which they found that a plaintiff claiming age-related disparate treatment (i.e., intentional discrimination) must prove that age "actually motivated" the employer's decision.<sup>2</sup> In *Hazen Paper*, the Court found that even though pension status and age often go hand in hand, there needed to be evidence of intent to consider a dismissal based on pension status to be a dismissal based on age.<sup>3</sup> The Court did note, however, that a dismissal based on pension status could violate the ADEA if pension status was a "proxy for age."<sup>4</sup> In addition, *Hazen Paper* left open "the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service."<sup>5</sup>

In the instant case, the Court considered a variation on this "special case." Kentucky's plan turns normal pension eligibility either upon the employee's having attained 20 years of service alone or upon the employees having attained five years of service and reached the age of 55. Because the ADEA permits an employer to condition pension eligibility upon age,<sup>6</sup> the Court had to "decide whether a plan that (1) lawfully makes age in part a condition of pension eligibility, and (2) treats workers differently in light of their pension status, (3) automatically discriminates because of age."<sup>7</sup>

Applying the *Hazen Paper* standard, the Court showed the KRS plan's differential treatment of workers was not actually

motivated by age for a number of reasons. Robert D. Klausner started out with oral argument for the petitioner KRS, and the justices immediately brought him to the heart of their concerns. Justice Breyer asked early on, "You give [a worker] six extra years when he retired after 14 years (of service) and though he was only 49 years old, and you don't give [a worker] one extra year when everything else was the same but he retired after he was 55. Now, explain to me what the reason is for that." This led to a good synopsis of the KRS plan and its rationale for using a blend of age and pension status to make determinations on who received "imputed years" and who didn't. Mr. Klausner said:

The [worker] who starts out younger, particularly in a public safety retirement plan, spends more time in the line of fire than the person who starts older. The person who starts older takes advantage of the fact that in this retirement plan you can retire with as little as five years of service. Actually a person who is 55 is eligible for a benefit after only a month. In fact, Kentucky may be the only plan in the country that does that.

The Court went on to find six main things that convinced them that differences in treatment here were not "actually motivated" by age. First, age and pension status are "analytically distinct" under Kentucky's retirement system. While the two concepts are intertwined, they are not logically interchangeable, and are not so within the Kentucky plan.

Secondly, the Court found that some of the details surrounding the retirement plan eliminated the possibility that pension status was simply a "proxy" for age. The plan wasn't applicable to individual employment decisions, rather it applied to system-wide rules dealing with pensions. Also, the Court noted the ADEA treats

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pensions with more flexibility when it comes to age, and Congress has approved similar programs like Social Disability Insurance that expressly take account of age.

Third, the Court found the age-related discrepancy had a clear non-age-related rationale. The disability rules' purpose is to treat disabled workers as if they had worked until the point at which they would be eligible for a normal pension. Age becomes a factor in the disability calculation because it is a factor under the normal retirement rules, so the disparity is due to pension status and does not "turn" on age.

Fourth, Lickteig's situation resulted in an older worker being at a disadvantage, but under other circumstances, an older worker could get a benefit by way of a bigger boost of imputed years than younger workers. For example, a 45-year-old worker with 10 years of experience who becomes disabled would get a 10-year "boost" to make the worker eligible for "retirement at 55." In contrast, a 40-year-old worker with 15 years of experience who becomes disabled would get a five-year "boost" to make the worker eligible for "retirement after 20 years of service" even though it is before they reach the age of 55.

Fifth, there was no evidence the retirement system was put in place in reliance on any sort of stereotypical assumption about older workers relative to younger workers that the ADEA sought to remedy. Justice Ginsburg made the ADEA's purpose clear during oral argument when she said:

I think Congress recognized that what they were protecting (by enacting the ADEA) was not age as such, but old age . . . the Age Discrimination Act doesn't apply to younger workers. It doesn't say that you can't discriminate on the basis of age, so you can't prefer the older person over the younger person.

Finally, the Court found it would be difficult for Kentucky to find a way to correct the disparity that led to Lickteig's situation and to achieve the plan's legitimate objective. This further suggested that achieving the plan's objective of treating disabled workers as if they had

worked until the point at which they would be eligible for retirement, and not a desire to discriminate based on age, was the motivation behind the plan.

The Court's opinion made it clear that it was not undoing the rule that a facially age-discriminatory statute or policy was enough to show disparate treatment for the ADEA, but this was a special case. Here, the discrimination was based on pension status. The Court held that when an employer adopts a pension plan that treats employees differently based on pension status, and includes age as a factor, a plaintiff must produce sufficient evidence to show the differential treatment was "actually motivated" by age and not pension status.

### The Dissent

The dissent, authored by Justice Kennedy and joined by Justices Scalia, Ginsburg, and Alito, found Kentucky's plan to be facially discriminatory. The dissenters said the majority "undercut" the basic framework of the ADEA, which prohibits disparate treatment unless some specific exemption or defense in the act applies. The dissent wrote that the majority had ignored "established rules for interpreting and enforcing one of the most important statutes Congress has enacted to protect the Nation's workforce from age discrimination." ■

### Endnotes

1. 507 U.S. 604 (1993)
2. *Hazen Paper*, 507 U.S. at 610.
3. *Id.* at 611–612.
4. *Id.* at 613.
5. *Id.*
6. See 29 U.S.C.A. § 623(l)(1)(A)(i) (Supp. 2007).
7. *Kentucky Retirement Systems v. EEOC*, 554 U.S. \_\_\_\_ (2008) (slip opinion at 6).



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# Just When You Thought You Had Federal Employment Laws All Figured Out . . .

By Jonathan C. Hancock and Whitney M. Harmon

It's still early in the year and 2009 is already shaping up to be a pivotal one for employment lawyers and our clients. New laws and revised requirements have employers and their counsel scrambling to revise policies and reevaluate workforce needs. While compliance issues are routinely encountered, many of the recent changes and additions to

and seminars across the country are quickly filling their agendas with reports on various aspects of this legislation.

## The FMLA

On January 16, 2009, substantial changes to the Family Medical Leave Act (FMLA) became effective.<sup>1</sup> While the majority of these changes relate to the National Defense Authorization Act of 2008 (NDAA) (H.R. 4986), there are also changes to the rules regarding notice and certification of family or medical leave. Specifically, the new regulations introduce two new optional medical certification forms, which replace the previous WH-380 form. The new forms clarify communications and data collection between the employer and employee. One form is used if an employee is seeking leave for his or her own serious health condition, while the other is for the serious health condition of a family member.

The FMLA revisions are significant, and the biggest change is encompassed by the NDAA, which allows a spouse, son, daughter, parent, or next of kin to take up to 26 workweeks of unpaid leave to care for a member of the armed forces with a serious injury or illness (including a member of the National Guard or Reserves), who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list. The NDAA amendments also allow the additional medical leave for a "qualifying exigency."

In addition to these changes, already in effect, President Obama has expressed his support for legislation that would further revise the FMLA by expanding it to cover businesses with 25 or more employees, rather than the 50 employees currently required.

## The ADAAA

As with the FMLA, changes to the Americans with Disabilities Act (ADA) are already effective. As of January 1, 2009, the ADA was revised by the ADA

Amendments Act of 2008 (ADAAA).<sup>2</sup> This major revision of the ADA expands the definition of the term "disability," thus significantly increasing the number of employees protected by the new law. The goal of the ADAAA is simple: It seeks to change the focus from which employees are protected, to whether employers are complying with their obligations under the law.

These changes mean many things to employers. Among the most important is the obligation of employers to train managers and supervisors regarding the necessity that a disabled employee be accommodated if required, the nuances of determining who has to be accommodated, and the penalty for failing to satisfy these requirements. In addition, employers similarly need to remain focused on the need to interact with workers in an effort to determine what reasonable accommodations are needed to allow the employees to perform their essential job functions. As always, employers should also continue to make sure they have effective policies and procedures in place for addressing requests for accommodations.

## Proposed Legislation and Predictions

In addition to the legislation already enacted that is already affecting employees and employers, there are several key pieces of legislation that the Obama administration will likely focus on as soon as possible, many of which could significantly impact employer's operations.

## The EFCA

Possibly one of the most contentious pieces of currently discussed proposed legislation, and the most likely to be enacted quickly, is the Employee Free Choice Act (EFCA)(H.R. 800, S. 1041). President Obama has promised to sign it into law if passed.

Among other things, the EFCA seeks to amend the National Labor Relations Act (NLRA) by eliminating secret-ballot

**Employers need to focus on interacting with workers to determine what reasonable accommodations are needed.**

federal employment laws are occurring in an economic environment that, on its own, is potentially disastrous for employers. Added to these factors is the reality that proposed and pending legislation looms, and as employers wait eagerly to see what additional changes the Obama administration will make, their counsel are gearing up to address the effect of these potential changes on their clients and the steps that the clients need to take to be prepared.

Much commentary has been published thus far from both sides addressing the politics involved in the pending and recently enacted federal employment legislation,

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elections for selection of union representation. Rather than continuing NLRB-supervised elections, the EFCA would substitute a “card-check” system to determine whether a majority of employees in the collective bargaining unit have signed cards choosing the union as their collective bargaining agent. A union would automatically be recognized as the bargaining agent for a group of employees if union authorization cards are signed by more than 50 percent of the employees, in effect a monumental change to American labor relations.

### The Fair Pay Act

The Fair Pay (Lilly Ledbetter) Act (H.R. 2831) would effectively overturn the U. S. Supreme Court’s 5–4 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>3</sup> in which the Court held the deadline for filing pay discrimination claims with the Equal Employment Opportunity Commission (EEOC) is generally measured from the date of the first allegedly discriminatory pay decision. This proposed legislation, which recently passed in the House of Representatives, seeks to renew the filing deadline each time an employer issued the claimant a paycheck that is the product of a past discriminatory pay decision.

### The RESPECT Act

The Re-Empowerment of Skilled Professional Employees and Construction Trade Workers (RESPECT) Act (S.969; H.R. 1644) would again significantly alter the NLRA by revising the definition of “supervisor” to exclude employees who “assign” or “responsibly direct” other employees from management, thereby adding many present supervisors to collective bargaining units. The act could also require that an individual spend the majority of his or her work time on supervisory duties to qualify as a supervisor under the NLRA and be immune from union organizing efforts. In effect, these changes would remove front-line, working supervisors from the act’s supervisory exclusion, and could directly impact employers who use these front-line supervisors as management’s voice against union organization.

This act is obviously important to organized labor, but it is likely the EFCA will be labor’s first priority, with this piece of the puzzle being the result of subsequent efforts.

### The FOREWARN Act

The Federal Oversight, Reform, and Enforcement of the WARN (FOREWARN) Act (S.1792; H.R. 3662) would amend the Workers Adjustment and Retraining Notification (WARN) Act to make it applicable to employers with 50 or more employees, thus lowering the threshold from the current requirement of 100 employees. The act would also require a covered employer to provide employees affected by a plant closing or mass layoff 90 days’ notice rather than the 60 days’ notice presently mandated. Finally, the mass layoff threshold could also be reduced to apply to employers with only 100 employees rather than 500, and the amount of back pay owed an employee if the notice requirement is not met could double.

Now, more than ever, layoffs are a realistic part of keeping a business profitable. The proposed changes that accompany the FOREWARN Act would reduce the flexibility employers have in force-reduction situations, and would very likely make plant closings and mass layoffs even more treacherous given the increased penalty provisions.

### The ENDA

The proposed legislation of the Employment Non-Discrimination Act (ENDA) (H.R. 3685) prohibits discrimination against any employee with respect to the terms or conditions of his or her employment based on actual or perceived sexual orientation. This act has received bipartisan support and is likely to be passed this year. Several states and municipalities have similar existing requirements and prohibitions in place.

### The Civil Rights Act of 2008

The Civil Rights Act of 2008 (S.2554; H.R. 5129) is a comprehensive piece of legislation potentially affecting a number of employment discrimination laws. Some of the proposed changes raised in this act include:

- (1) the elimination of the damages cap under Title VII
- (2) amending the Equal Pay Act to make it more difficult for employers to use the “bona fide factor other than sex” defense
- (3) adding compensatory and punitive damages to the Fair Labor Standards Act (FLSA) so an employee can recover those damages in addition to back pay.

Changes to major employment laws like the FMLA and the ADA are afoot, effective, and certainly challenging enough to keep employers and their

**It’s a time for employers to stay abreast of changes in legislation.**

counsel busy. In a number of legislative scenarios, however, these changes will quickly be transcended by newer and more pronounced alterations to the federal employment laws that routinely impact employers. What are the scenarios, and how are plans that were made six months ago impacted today by constantly evolving economic conditions? These questions require employers and their counsel to stay tuned. It’s also a time for employers to stay abreast of changes in legislation and for their counsel to stay a step ahead of the changes that are certainly likely in light of President Obama’s leadership, including his cosponsorship the EFCA, the Lilly Ledbetter Act, and the RESPECT Act, and his unequivocal endorsement of similar bills.

### Endnotes

1. 29 C.F.R. § 825, *et seq.*
2. 29 C.F.R. § 1630, *et seq.*
3. 550 U.S. 618 (2007).

## Correlations Between FMLA and ADA

continued from front cover

both statutes may be implicated when an employee returns to work after a medical leave of absence.

### The Family Medical Leave Act

The FMLA provides that “any eligible employee who takes leave under [the FMLA] shall be entitled, on return from such leave (A) to be restored . . . to the position of employment held by the employee when the leave commenced; or (B) to be restored to an equivalent position with equivalent employment benefits,

**The district court rejected the employer’s argument that equal pay and equal benefits made the positions equivalent.**

pay, and other terms and conditions of employment.”<sup>3</sup> A majority of the time, the employee will be returned to the same position. However, in certain circumstances, it may not be feasible for an employer to return the employee to his prior position. In those cases, an employer seeking to return an employee to an equivalent position must take care to ensure that the position is “virtually identical to the employee’s former position in terms of pay, benefits, and working conditions.”<sup>4</sup>

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### What Is “Equivalent”?

Several factors define the concept of “equivalent position.” One key component is pay. Obviously, returning employees are entitled to their former salary or rate of pay. Returning employees also are entitled to any unconditional pay increases provided by the employer during the leave period.<sup>5</sup> For example, an employee who was on leave when a cost of living increase was provided is entitled to a cost of living increase upon his or her return from leave. Returning employees, however, are not entitled to pay increases conditioned on seniority, length of service, or work performed, unless it is the employer’s practice or policy to provide such increases to other employees on leaves of absence without pay.

Similarly, if a returning employee were eligible for a bonus before taking FMLA leave, the employee would be eligible for the bonus upon returning to work, and FMLA leave may not be counted against the employee in calculating that bonus. For example, if an employer offers a perfect attendance bonus, and the employee did not miss any time prior to taking FMLA leave, the employee still would be eligible for the bonus upon returning from FMLA leave. However, because employees do not accrue benefits or seniority while on leave, an employee who takes 12 weeks of FMLA leave may not qualify for a production bonus. Employers are not required to make special accommodations to enable employees on FMLA leave to qualify for production bonuses provided special accommodations are not made for employees on other types of paid and unpaid leave.

The U.S. Department of Labor released proposed regulations in February of this year that, if accepted, would change this aspect of the FMLA by allowing employers to disqualify an employee from a bonus or an award predicated on the employee’s achievement of a specified goal where the employee fails to achieve that goal as a result of an FMLA-qualifying absence.<sup>6</sup> The proposed regulations provide that specified goals may include hours worked, products sold, or perfect attendance, and the bonus or award may be denied if the employee has not met the goal due to FMLA leave.

Benefits is another area to be considered. Returning employees are entitled to the same benefits they received when leave commenced and cannot be required to re-qualify for any benefits for which they previously qualified.<sup>7</sup> While employees on FMLA leave may not accrue additional benefits during unpaid leave, benefits accrued prior to taking leave must be made available upon their return.

With respect to terms and conditions of employment, an equivalent position is a position with substantially similar duties, conditions, responsibilities, privileges, and status.<sup>8</sup> This means the returning employee must be placed at the same or “a geographically proximate worksite,” provided the same or an equivalent work schedule, and have the same or equivalent opportunity for bonuses and other discretionary and nondiscretionary payments. The duties and responsibilities of the position must require an equivalent level of skill, effort, responsibility, and authority.

As explained in *Donahoo v. Master Data Center*, in addition to equivalent pay and benefits, an equivalent position must have equivalent status. The employer in *Donahoo* returned the plaintiff employee to a data-entry position rather than her previously held computer programmer/analyst position. The U.S. District Court for the Eastern District of Michigan rejected the employer’s argument that equal pay and equal benefits made the positions equivalent, explaining that a data-entry job is not as sophisticated and does not require the same level of training and education as a computer analyst.<sup>9</sup>

### The Timing of an Employer’s Duty to Reinstate

The employer’s job-restoration obligation arises when the employee is capable of performing the essential functions of the position. In *Hoge v. Honda of America Manufacturing, Inc.*, the Sixth Circuit held that an employer has two days at most to return the employee to the same or an equivalent position.<sup>10</sup> The plaintiff employee in *Hoge* claimed that Honda interfered with her FMLA rights when it failed to return her to an equivalent position until more than a month after she attempted to return to work. During the plaintiff’s leave, Honda made some

operational changes that directly affected its assembly department, where the plaintiff worked. There was a dispute involving the date on which the plaintiff was expected to return to work. Honda claimed that the plaintiff reported to work unexpectedly. Honda also argued that its delay in finding the plaintiff an equivalent position was reasonable and caused in part by the plaintiff's unexpected return to work.

Citing the Department of Labor regulation that requires an employee to provide the employer with two business days' notice if the employee is able to return to work earlier than anticipated, the court refused to insert a reasonableness element into the employer's obligation to reinstate returning employees to work. The court found nothing in the statute that would allow an employer to delay reinstatement for a reasonable period of time after the employee returns from leave.<sup>11</sup> Accordingly, the court held that Honda interfered with the plaintiff's rights under the FMLA when it failed to restore the plaintiff to her previous position, or to an equivalent position, within two business days after receiving unambiguous notice of the plaintiff's return to work.

Employers may require that returning employees provide a fitness-for-duty certification, but only if the employer has a uniformly applied practice or policy in place for all employees returning from leave.<sup>12</sup> Moreover, the practice or policy must be explicitly stated in the employer's employee handbook. Additionally, the employer may only request information regarding the medical condition for which the employee took leave. Failure to present a fitness-for-duty certificate when required may be grounds for termination at the end of the employee's leave period.<sup>13</sup>

#### *Are There Limits on an Employee's Right to Reinstatement?*

The FMLA provides reinstatement rights to "any . . . position of employment" to which the employee would have been entitled "had the employee not taken the leave."<sup>14</sup> In *Yashenko v. Harrah's NC Casino Co.*, the Fourth Circuit joined the Eighth, Sixth, Third, Tenth, and Eleventh Circuits in holding that an employee's right to job reinstatement under the FMLA is not absolute.<sup>15</sup> The plaintiff in

*Yashenko* was manager of employee relations and had taken several periods of FMLA leave. After each leave of absence, the plaintiff was returned to his same position with no reduction in pay or benefits. While on FMLA leave related to heart surgery in 2003, the plaintiff's position was eliminated due to a company reorganization. The plaintiff was invited to apply for two newly created positions, as well as any other available position. The plaintiff did not apply for any position and was terminated immediately upon return from leave.<sup>16</sup>

The plaintiff filed suit claiming that his employer violated his FMLA rights when it refused to restore him to his previous position. *Yashenko* argued that the FMLA creates an absolute entitlement to restoration and that any limitation applies only after the employee has been restored to his position.<sup>17</sup> The Fourth Circuit rejected *Yashenko's* argument, finding that the Department of Labor clarified any ambiguity in the statute by explicitly stating that an employer may deny restoration when it can show that it would have discharged the employee regardless of the leave.<sup>18</sup>

Because the FMLA provides no greater rights to a returning employee than the employee would have had if leave had not been taken, an employer may not only deny reinstatement to an employee whose position was eliminated during the FMLA leave period, but also may deny reinstatement to an employee who would have lost his job even if he had not taken FMLA leave.

For example, in *Kohls v. Beverly Enterprises Wisconsin, Inc.*, the Seventh Circuit held that the employer did not violate the FMLA when it terminated Kohls at the conclusion of her maternity leave where the reason for her termination was poor performance, including the mismanagement and mishandling of funds.<sup>19</sup> The court found that the employer presented sufficient evidence to support its assertion that Kohls was terminated for the stated reasons. In fact, with respect to her handling of the checking account (a trust account), Kohls admitted that at least one check was not accounted for, that she did not consistently record check numbers or amounts, that she threw out the bank statements, and that she did not balance

the checkbook.<sup>20</sup> Kohl's mishandling of the checkbook was discovered while she was on leave and not before.<sup>21</sup>

Similarly, in *Pharakhone v. Nissan North America, Inc.*, the court held that an employee who violated a documented company policy while on FMLA leave was not entitled to reinstatement.<sup>22</sup> The plaintiff in *Nissan* took FMLA leave to care for his wife and newborn baby. The defendant employer's employee handbook contained a provision explicitly prohibiting unauthorized work while on leave. During his leave, the plaintiff helped to manage a restaurant that his wife had recently purchased. Upon learning that the plaintiff worked at the restaurant during his entire four-week leave period, Nissan terminated the plaintiff for violating company policy.<sup>23</sup>

**The employer has the burden of establishing that its failure to return an employee to his or her position is justified.**

While there was a dispute as to whether the plaintiff informed Nissan prior to taking FMLA leave that he intended to work at the restaurant, the court found no dispute that Nissan had a documented policy prohibiting unauthorized work while on leave and no dispute that on the first day of leave both the plaintiff's immediate supervisor and the defendant's human resources manager advised the plaintiff that he was not permitted to work at his wife's restaurant. The plaintiff's FMLA claim failed because he was unable to show that he was fired because he took FMLA leave or even that his taking leave was a negative factor in Nissan's termination decision.<sup>24</sup>

Employees who fail to return to work after their 12-week leave period expires or who are unable to perform the essential functions of their positions also lose their reinstatement rights. In *Chapman v. UPMC Health Systems*, the plaintiff employee—a full-time nurse—suffered from a number of medical conditions: throat cancer (recovery), a weakened immune system, chronic obstructive pulmonary disease, asthma, chronic back pain, a bulging disc, hypothyroidism, hepatitis C, possibly sarcoidosis, cirrhosis of the liver, arthritis, depression, and bipolar disorder.<sup>25</sup> The employer approved the plaintiff's request for 12 weeks of intermittent family and medical leave. At the conclusion of her leave, however, the plaintiff was unable to work full time. Because she was unable to perform the essential functions of her position, the plaintiff lost her reinstatement rights under the FMLA.<sup>26</sup>

Likewise, an employee who is hired for a discrete period of time is not entitled to reinstatement if the employment term ends or the project is completed, provided the employer would not otherwise have continued to employ the employee.<sup>27</sup>

As evident, an employee's right to reinstatement is not absolute. However, to avoid liability for failing to restore the employee to the same or an equivalent position, the employer has the burden of establishing that its failure to return an employee to his position is justified. The employer “must be able to show that the employee would not otherwise have been employed at the time reinstatement is requested.”<sup>28</sup>

While under the FMLA, an employer has no obligation to reasonably accommodate an employee who cannot perform the essential functions of the job at the end of the 12-week leave period, but the employer must consider its obligations under the ADA before terminating this employee.<sup>29</sup>

### The Americans with Disabilities Act

The ADA requires that employers provide reasonable accommodations to qualified individuals with disabilities unless doing so would cause the employer undue hardship.<sup>30</sup> A qualified individual with a disability is defined as a person “who, with or without reasonable accommodation, can perform the essential functions of the

employment position that such individual holds or desires.”<sup>31</sup> To determine whether an employee's disability can be reasonably accommodated, the employer must engage in an “interactive process” with the employee.<sup>32</sup> Once an employee requests a change or an adjustment at work for a medical-related reason, the employer and the individual with a disability should work together to clarify what adjustments the employee needs and to identify an appropriate and reasonable accommodation.

### Is Additional Leave a Reasonable Accommodation?

Generally, an accommodation is any change to the work environment or the way in which things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.<sup>33</sup> Some courts have recognized that permitting an employee to take unpaid leave is a form of reasonable accommodation. The rationale is that allowing such accommodation presently will enable the employee to perform the essential functions of the position in the near future. Other courts have taken the position that a leave of absence is not a reasonable accommodation because not working is not a means to perform the job's essential functions.<sup>34</sup> In *Lara v. State Farm Fire & Casualty Co.*, the Tenth Circuit flushed out this distinction, explaining that “without an expected duration of the impairment, an employer cannot determine whether the employee will be able to perform the essential functions of the job in the *near future* and, therefore, whether the leave request is a ‘reasonable’ accommodation.”<sup>35</sup> It is clear, however, that an indefinite leave of absence is not a reasonable accommodation.<sup>36</sup>

### Obligations to Disabled Employees Returning from Leave

In those instances where an employer reasonably accommodates a disabled employee by providing unpaid leave, the question then becomes: What are the employer's obligations to the employee returning from leave? The EEOC Enforcement Guidance provides that an employer is required to return the employee to the same position unless doing so would cause the employer an undue hardship.

Undue hardship is defined as “an action requiring significant difficulty or expense.”<sup>37</sup> To determine whether a particular accommodation is an undue hardship, a number of factors are considered, including the nature and cost of the accommodation and the employer's overall financial resources.<sup>38</sup> As explained in the EEOC's Enforcement Guidance, “undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.”<sup>39</sup> Undue hardship is determined on a case-by-case basis.

Assuming that holding the employee's position open during the entire leave period causes an undue hardship, the employer must reassign the employee to a vacant position with equivalent pay and benefits. If no equivalent vacant position is available, the employer must look for a vacant position at a lower level. If no such position exists, the employer is no longer required to provide leave as a reasonable accommodation.

### Limits on an Employer's Duty to Reasonably Accommodate

While an employer's reasonable accommodation obligations under the ADA are extensive, they are not without limit. As mentioned above, employers are not required to provide accommodations that cause undue hardship. Employers also are not required to create a new position to accommodate an employee with a disability. In *Graves v. Finch Pruyn & Co., Inc.*, the defendant employer allowed the plaintiff to work a sedentary desk job for a month after he elected to take disability retirement.<sup>40</sup> The employer created this position at the plaintiff's request to provide him with an income stream while he arranged for disability retirement.<sup>41</sup> Graves subsequently filed suit claiming that his employer violated the ADA when it failed to reassign him to a new, sedentary position and instead offered such a position only on a temporary basis after he elected disability retirement. The Second Circuit found that the employer created the position for Graves “as a matter of grace” and that because the ADA does not require employers to create new positions for

disabled employees, the employer was not required to provide the position to Graves for any longer than it did.<sup>42</sup>

In addition, employers are not required to eliminate an essential function of the job to accommodate a disabled employee. In *Flory v. Pinnacle Health Hospital*, the plaintiff claimed that her employer violated the ADA when it terminated her employment and refused to accommodate her disability.<sup>43</sup> The plaintiff, a registered nurse, suffered a back injury requiring spinal fusions that resulted in ambulatory dysfunction. Her ambulatory dysfunction made it unsafe for the plaintiff to walk on slippery surfaces.<sup>44</sup> As a result, the plaintiff did not report to work on days during which there was precipitation or precipitation was forecasted during the workday. The plaintiff argued that her employer should have reasonably accommodated her disability by allowing her to be absent on inclement weather days. The U.S. District Court for the Middle District of Pennsylvania held that the defendant hospital was not required to accommodate the plaintiff because she was not a qualified individual with a disability.<sup>45</sup> The plaintiff failed to establish that she could perform the essential function of regularly coming to work.

### The Rights of Employees Must Be Analyzed under Both Frameworks

While an employer's obligations under the ADA and the FMLA are separate and distinct, it is imperative that employers analyze their obligations and employees' rights under both statutory frameworks when faced with an employee returning from medical leave. The FMLA grants employees a specified amount of leave and the right to return to their jobs, while the ADA protects disabled employees from discrimination by compelling employers to establish reasonable accommodations to allow disabled employees to perform their jobs.

As noted above, an employee who is unable to perform the essential functions of his position at the end of the FMLA leave period is not entitled to reinstatement under the FMLA. The employer, however, may be required under the ADA to provide this employee with a reasonable accommodation. As explained

in *Rogers v. New York University*, the FMLA's requirement of 12 weeks of leave does not mean that providing additional leave would not be a reasonable accommodation under the ADA.<sup>46</sup> Similarly, in *Chapman*, the court explained that while the plaintiff employee was not entitled to reinstatement under the FMLA, upon notice that an employee needs an accommodation, the employer is obligated to engage in the interactive process to determine if the plaintiff's disability could be reasonably accommodated.<sup>47</sup> Employees who are covered under both statutes are entitled to leave under whichever statute provides greater protection. Employers must be aware of this fact when dealing with FMLA- and ADA-related return-to-work issues. ■

### Endnotes

1. 29 U.S.C. §§ 2612, *et seq.* (2008).
2. 42 U.S.C. § 12112 (2008).
3. 29 U.S.C. § 2614.
4. 29 C.F.R. § 825.215(a) (2008).
5. 29 C.F.R. § 825.215(c).
6. 73 ER. 7876.
7. 29 C.F.R. § 825.215(d).
8. 29 C.F.R. § 825.215(e).
9. *Donahoo v. Master Data Ctr.*, 282 F. Supp. 2d 540, 552 (E.D. Mich. 2003).
10. *Hoge v. Honda of Am. Mfg., Inc.*, 384 F.3d 238, 248 (6th Cir. 2004).
11. *Id.* at 246–248; 29 C.F.R. § 825.309(c).
12. 29 C.F.R. § 825.310.
13. *Barnes v. Ethan Allen, Inc.*, 356 F. Supp. 2d 1306, 1311 (S.D. Fla. 2005).
14. 29 U.S.C. 2614(a)(3)(B).
15. *Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541, 547 (4th Cir. 2006).
16. *Id.* at 545.
17. *Id.* at 547.
18. *Id.* at 548; 29 C.F.R. § 825.216(a).
19. *Kohls v. Beverly Enters. Wis., Inc.*, 259 F.3d 799, 806 (7th Cir. 2001).
20. *Id.* at 805.
21. *Id.* at 806.
22. *Pharakhone v. Nissan N. Am., Inc.*, 324 F.3d 405, 408 (6th Cir. 2003).
23. *Id.* at 406–407.
24. *Id.* at 408.
25. *Chapman v. UPMC Health Sys.*, 516 F. Supp. 2d 506, 513–514 (W.D. Pa. 2007).
26. *Id.* at 521–522.
27. 29 C.F.R. 825.216(b).
28. 29 C.F.R. 825.216(a).
29. *Conroy v. Twp. of Lower Merion*, 77 Fed. Appx. 556, 559 (3rd Cir. 2003).
30. 42 U.S.C. 12112(b)(5)(A).
31. 42 U.S.C. 12111(8).
32. 29 C.F.R. § 1630.2(o)(3).
33. See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002).
34. *Bankston v. Henderson*, 2000 U.S. App. LEXIS 7514 (4th Cir. 2000).
35. *Lara v. State Farm Fire & Cas. Co.*, 121 Fed. Appx. 796, 802 (10th Cir. 2005), citing *Cisneros v. Wilson*, 226 F.3d 1113, 1130 (10th Cir. 2000).
36. *Fogelman v. Greater Hazelton Health Alliance*, 122 Fed. Appx. 581, 585 (3rd Cir. 2004), citing *Byrne Avon Prods., Inc.* 328 F.2d 379 (7th Cir. 2003).
37. 42 U.S.C. 12111(10)(A).
38. 42 U.S.C. 12111(10)(B).
39. See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002).
40. *Graves v. Finch Pruyn & Co., Inc.*, 457 F.3d 181, 187 (2nd Cir. 2006).
41. *Id.* at 183.
42. *Id.* at 187.
43. *Flory v. Pinnacle Health Hosp.*, 2008 U.S. Dist. LEXIS 54899 (M.D. Pa. 2008).
44. *Id.* at \*3.
45. *Id.* at \*11.
46. *Rogers v. N.Y. Univ.*, 250 F.2d 310, 315 (S.D.N.Y. 2002).
47. *Chapman*, 516 F. Supp. 2d at 530–532.



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