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Spring 2008 Employment Law Update

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New Federal Statutes and Regulations

- FMLA Amendments
- Proposed New FMLA Regulations
- Genetic Information Nondiscrimination Act

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FMLA Amendments

- Signed into law January 28, 2008
- Two new types
  - Service Member Family Leave
  - Military Exigency Family Leave

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Service Member Family Leave

- Available to employee who is spouse, son, daughter, parent, or next of kin of someone ill or injured in the line of duty in the military
- Up to 26 weeks of leave
- For any period when the family member in the military is undergoing medical treatment, recuperation or therapy

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Military Exigency Leave

- Limited to 12 weeks
- Available to employee with qualifying exigency arising out of spouse, son, daughter or parent on active duty in the military
- Statute does not define "qualifying exigency", and DOL has not yet issued regulations
- Presumably intended to cover non-medical situations of an urgent nature that may arise when employee has family in the military

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New Leaves Similar to Existing FMLA Leaves

- Employed for 12 months and worked 1250 hours
- Located at a worksite with at least 50 employees within a 75-mile radius
- Can be taken intermittently or on a reduced-schedule basis

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Proposed New FMLA Regulations

- First revision since rules were new 13 years ago
- Proposed in January, plan is to issue final rules by end of year

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Fairly Subtle Changes

- At least two doctor visits per year for chronic condition
- Follow generally applicable reporting standards when using intermittent leave
- Direct contact from employer to health care provider to get clarifications
- Can require fitness for duty exam after intermittent leave

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Genetic Information Nondiscrimination Act (GINA)

- Passed House last year, passed Senate on April 24, 2008
- President has indicated he will sign
- Bars employers from making hiring or other employment decisions based on genetic information
- Bars insurers from increasing premiums or denying coverage based on genetic info

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New Washington Developments

- Family Military Leave
- Domestic Violence Sexual Assault Leave

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Family Military Leave

- Only for an employee who has a spouse in the military
- 15 days per deployment
- Before deployment or during R&R
- Give notice within 5 business days of deployment order
- Must work at least 20 hours per week

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Domestic Violence/Sexual Assault Leave

- For employee to seek law enforcement or legal assistance, health care treatment, counseling, safety planning, relocating, related to domestic violence, sexual assault, or stalking
- Also to help family member (child, spouse, parent, parent-in-law, grandparent, dating relationship) with the above

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Different from Most Other Mandated Leaves

- No specific limit on amount of leave
- Notice no later than end of first day of leave
- Verification by police report, court documents, employee's own written statement
- Block of time or intermittently

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Immigration Developments

- New Form I-9
- Federal No-Match Rules

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New I-9 Form

- Must be used for all new hires after December 26, 2007
- Five document removed from List A of acceptable documents
- Employee does not have to provide SSN on form unless employer is using E-Verify

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Federal No-Match Regulations

- Final rules issued August 2007
- No-match letters not new, but rules would have required employers to resolve discrepancies or face liability
- Federal court enjoined implementation
- DHS has appealed to Ninth Circuit

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Supplemental Rules

- Comment period from March 21 to April 25
- More explanation than substantive change
- No timetable for next steps
- Broad opposition from immigration, labor, and business groups
- 2% of workforce would face termination?

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Case Law Developments

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Case Law Developments

- Thresholds for statutory applicability
- Minimal evidence sufficient
- Pretext analysis

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Fichman v. Media Center

- ADA: 15 or more employees
- ADEA: 20 or more employees
- The Media Center: fewer than 15 paid employees
- What about Board of Directors and volunteer producers?

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Six Factors to Determine If An Individual Is an "Employee"

- Hire/fire or set regulations of work
- Supervision
- Reporting relationship
- Influence in the organization
- Intent for individual to be an employee
- Share in profits/losses/liabilities

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- "A recurring television comedy sketch later adapted into a motion picture, in which a high school student offered weekly sardonic observations on life from the basement of his parent's home in Aurora Illinois."

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The Takeaway

- Small employers: know the statutory thresholds and assess your actual number of "employees"
- But, don't assume you are immune from suit even if you do not meet the threshold

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Wahl v. Dash Point Family Dental Clinic

- "Bad facts"
- Employer argues on appeal:
  - WLAD applies to employers with eight or more employees
  - Dentist office had fewer than eight employees
  - Clinic owner free to harass employees!
- Court holds common law claim actionable; upheld

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The Takeaway

- Sexual harassment is illegal regardless of number of employees
- Key language for all employers:
  - When the person you are to report a sexual harassment claim to is the harasser and there is no higher person, there is no requirement to complain.

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Davis v. Team Electric Co.

- Only female electrician assigned to construction site
- Complains that her male coworkers isolated her and made sexist remarks
- Laid off in R.I.F.
- Files discrimination and retaliation claims
- Trial court finds for employer

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Ninth Circuit Reverses; Finds Sufficient Evidence to Put Case Before the Jury

- Anecdotal evidence enough
- Incidents fell short of "physical abuse or aggressive sexual advances," but they "repeatedly occurred" and
- "We believe that a reasonable woman could have a reaction similar to Davis's"

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The Takeaway

- Take special care when traditional barriers are broken in the workplace
- Davis was the first woman to enter a predominantly male environment—courts are often sympathetic in these situations

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Beck v. United Food & Comm'l Workers Union

- Member of union at Fry's Food Store
- CBA policy against use of "profane, abusive or threatening language"
- Final warning – no grievance
- Termination – grievance dropped

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The Claims

- Two claims against union:
  - Breach of duty of fair representation
  - Disparate treatment based on gender
- Beck's evidence of disparate treatment is enough:
  - Union aggressively pursued claims of two males, but not Beck and another woman
  - $200,000 award upheld

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The Takeaway

- Opinion does not suggest that Beck offered any evidence of discriminatory motive, just different experiences of two men and one other woman.
- Carefully consider any contemplated discipline to be sure you are treating comparable situations similarly.

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Hegwine v. Longview Fibre Co.

- Applicant responds to job advertisement
- Interviewer mentions 25 lbs lifting requirement
- Conditional offer made contingent on physical exam
- Applicant reveals she is pregnant – told to get clearance from personal physician

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Lifting Restrictions

- **1st form**: cleared to lift 20 - 30 lbs.
  - Reports for work; told requirement is 40 lbs.; sent home
- **2nd form**: cleared for 40 lbs.
- **3rd form:** cleared for 20 lbs. freq./40 infreq.
- Essential job functions finally analyzed:
  - Lift boxes up to 60 lbs, carry 15-30 feet and down 3-4 steps to load to back of truck, drive truck, unload boxes to hand truck and pull to another location.
- Conditional job offer rescinded – applicant told her "availability" precluded her from performing the job.

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Failure to Accommodate or Gender Discrimination?

- Trial court analyzed as a failure to accommodate issue
  - Judge rules in favor of employer
- Court of Appeals analyzed as gender discrimination
  - Reversed
  - Applicant never asked for accommodation, no indication she was disabled

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Supreme Court Agrees

- Failure to hire pregnant woman is sex discrimination
  - *unless* refusal is based upon a business necessity or the employer proves a valid bona fide occupational qualification (BFOQ).
- BFOQ standard
  - Excluding pregnant women is "essential to ... the purposes of" the position, or
  - "All or substantially all" pregnant women "would be unable to efficiently perform the duties" of the position, such that hiring them would undermine operations.

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The Takeaway

- *Pre*-employment inquiry about pregnancy is discrimination, unless the inquiry is based upon a valid BFOQ
- Failure to hire an applicant based on their pregnancy is gender discrimination
- An applicant who *does* allege a pregnancy-related disability could claim entitlement to a reasonable accommodation
- Employers *do* have the duty to accommodate pregnancy-related medical conditions

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Surrell v. California Water Service Co.

- Procedural Issue:
  - Title VII requires claimants to timely filing of charge with EEOC and obtain right-to-sue notice
  - Work sharing arrangements with state agencies – counts as if filed with EEOC
  - California agency issued right-to-sue notice, but plaintiff never followed up with EEOC
  - Ninth Circuit holds that claims can go forward once a claimant is *entitled* to receive right-to-sue letter

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Employer Prevails With Strong Legitimate, Nondiscriminatory Reasons

- On the merits:
  - Promotion claim: evidence that promoted employee had superior skills, experience, and education
  - Cross-training claim: other employee already performed part of position, easy to train for five-day need
  - Retaliation claim: drug testing performed only after she appeared impaired at work
  - Hostile work environment: no evidence comments about performance motivated by race; not severe or pervasive

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Takeaway

- Lawyers should assess whether plaintiff was "entitled" to right-to-sue letter
- Employers can successfully defeat claims where they have solid, documented explanations for their decisions

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Labor Law Developments

- Employees versus independent contractor
- Employee use of email

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Employees v. Independent Contractors

- Friendly leases cabs to drivers on a weekly basis, drivers keep all fares
- Policy manual and standard operating procedures for cabs, annual training
- Dress code and personal hygiene requirement
- Road manager checks for compliance
- Respond to dispatchers, accept credit cards

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Why Did It Matter?

- Drivers unhappy with Friendly, want to be represented by union
- Employees, but not independent contractors, have collective bargaining rights under federal labor law

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The Result?

- Drivers were deemed employees under federal labor law
- No opportunity to operate and develop their business independently
- Friendly controlled means and manner of drivers' performance, and disciplined drivers for failure to comply

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Email Policies

- Employer had email policy barring use to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or "other non-job-related solicitations"
- Did it violate right of all employees (whether or not in union) to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection?

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Was the Email Policy Okay?

- No statutory right to use company email system engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection"
- Based on prior rulings that employees have no statutory right to use employer equipment such as bulletin boards, telephones, televisions
- Rejected the notion that email should be viewed similarly to a face-to-face solicitation

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What Kind of Distinctions Are Allowed?

- Cannot specifically discriminate against unions or mutual aid and protection
- But, barring emails soliciting support for all outside groups is okay, even if it includes unions,
- Thus, employer's policy here was okay

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Allegedly Improper Emails

- 1 email clarifying facts of a recent union rally, sent from company computer during break time
- 2 emails soliciting employee support for upcoming union activities, sent from union computer to employees at their company email addresses

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Implications

- All could change after presidential election, but:
- No-solicitation email policies are okay, unless done with antiunion motivation
- Charitable v. non-charitable
- Personal v. commercial
- Business v. nonbusiness
- Consistent enforcement is key

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Alternative Dispute Resolution

- Was the arbitration agreement with employee enforceable?
- Agreement forced employee to arbitrate rather than file suit in court
- Dispute over commission, terminated employee thought he would get full share of commission on house sale, but got none

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Features of Arbitration Agreement

- 3-person panel comprised of agents and employees from other offices
- Panel selected by employer
- Employee could strike one proposed member for cause
- Employee could strike one proposed member without a stated reason

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The Result?

- Court throws out arbitration agreement
- Strong public policy favoring arbitration, but
- Panel selection violates spirit of neutrality
- All panel members selected by one side
- Employee's strikes did not save the process, since panel members all still agents or employees of one side

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