



Developing Issues in Labor and Employment Law

Eric J. Johnson

***Labor and Employment Seminar
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What Do They Have in Common?



AGENDA

- ***What We've Seen in 2010***
- ***Where to Now?***

What We've Seen in 2010 ...



State of the Workforce

- Projected wage increases for next year – 2.7% (Towers Watson survey)
 - 2010 – 2.3%; 2009 – 1.6%
- Wage freeze for 2011 – 5%
 - 2010 – 12%; 2009 – 32%
- Projected bonus funding at 92% for 2010 (up over 12% from 2009)

State of the Workforce

- Workers in 2010 are paying an average of \$4,000 for health care
 - Reflects a 14% increase from 2009
 - Largest annual increase since 1999
 - Kaiser Foundation survey
- Overall costs expected to rise by at least 9% for 2011
 - PwC Health Research Institute

Litigation Trends

- ADA – record number of EEOC charges filed
- Number of sex discrimination claims filed by men doubled from 8% in 1990 to 16% in 2009
- GINA – EEOC charges and start of lawsuits based on genetic info discrimination

- EEOC – second highest charge total of all-time
 - Race (36%) and sex (30%) consistent
 - Age claims decreased (-1.5%)
 - **BUT, new record highs in religion (3.6%), disability (23%) and retaliation (36%)**
- Disability (ADA) 27% of “merit suits” in 2009; in 2008, just 12.7%
- EEOC resolved 85,980 charges for \$294.2M total
 - **Increase of \$20M from 2008**

ADA Litigation

- Effect of amendments being felt
- EEOC announced lawsuits in three states based upon arthritis, diabetes/hypertension and cancer
- *Hoffman* case (N.D. Ind. 8/31/10) – employee with cancer is disabled even if condition is in remission at time of adverse action
 - Had been back to work for a year without limitation following surgery to remove kidney

ADA Litigation

- “Inflexible” medical leave policies
- Sears litigation - \$6.2M to settle ADA claims stemming from automatic terminations at the leave “cap”
- JP Morgan Chase - \$2.2M
- EEOC sued UPS in August
- Need to assess on an individual basis
- Interactive process
- Need to revise auto-term policies!

Pregnancy Litigation

- Increase in pregnancy-based claims over 30%
- Statistics reflect number of women in the workplace is over 50% and more men are leaving the workforce than women
- FMLA expands protection
- Even altruistic efforts can lead to litigation

Pregnancy Litigation

- *Spees v. JamesBuilt – 6th Cir.*
 - Company transferred a pregnant employee out of a welding job and into a light duty position without first undertaking an objective evaluation
 - Same pay and benefits
 - Company eventually terminated because she needed to go on bed-rest and did not have sufficient service time to cover her absence
- Transfer could be seen as an adverse job action – fewer qualifications, “more boring” and night shift work interfered with childcare
- Court emphasized no assessment undertaken
- Termination upheld (see *Pataskala Oaks* case)

Focus on FLSA Issues

- Huge surge in FLSA/wage-hour litigation
 - Top 10 settlement values in 2009 equaled \$363.6M – a 44% increase from 2008
 - Increase in state court filings as well

Focus on FLSA Issues

- Employee versus independent contractor
- Internships
- Misclassification of exempt status
- Donning/Doffing



Challenges of the Virtual Workplace

- Litigation related to after-hours technology use
 - City of Chicago police officers seeking class action
- *Quon and Stengart*
- Employers must re-visit policy/handbook statements!

“Social Work”

- Social media and its broad reach
 - Employee misconduct
 - Use as a background search
 - Discovery matters in litigation
 - LinkedIn references
 - Facebook pages (personal or company)

“Social Work”

- Social media
 - Impact in the courtroom
 - The “Facebook Five” – continued to post about service in the corruption trial of Baltimore mayor
 - Juror in Michigan fined for posting on her Facebook page that she thought the defendant was guilty – prior to defense case
 - Juror in New York tried to “friend” a witness

Status of Health Care Reform

- Grandfather status/other mandates
- Will it withstand challenge?
 - Missouri has already passed a state law to reject mandated health care
 - Arizona, Florida and Oklahoma to vote in November
- Projections of reform adding another 2%-5% to overall costs (Aon Consulting)



Dodd-Frank Wall Street Reform and Consumer Protection Act

- Signed July 21, 2010
- Publicly-traded companies
- Designed to facilitate identification of excessive compensation and potential material financial losses

Dodd-Frank Wall Street Reform and Consumer Protection Act

- Shareholder approval of executive compensation/golden parachute
- Executive compensation disclosure requirements
- Must disclose CEO's annual total compensation
- Must develop and implement policies providing for disclosure of incentive-based compensation and ability to "claw-back" erroneous overpayments

Small Business Jobs Act

- Passed 9/27/10
- \$12B in tax cuts for small businesses
- \$30B in lending credit
- Beginning in 2011, an in-plan Roth conversion available
- Deductions for health care of self-employed
- Easier to deduct cell phone use

Nationwide Subpoena Power

- *EEOC v. UPS* and *EEOC v. Yellow Transportation*
- Neither case began with “pattern or practice” allegations

Background Checks/Criminal Records

- U.S. Dept. of Commerce sued for “illegally screening” applicants with decades old convictions for minor offenses and arrest (with no conviction) records
 - Related to the hiring of Census Bureau workers
 - Disparately impacts black, Hispanic and Native American applicants
- EEOC letter advising Commerce that they should not disqualify on an arrest unless there is a conviction
- EEOC – even with conviction situation, it should not be an “absolute measure” as to whether an applicant should be hired

Background Checks/Criminal Records

- In considering criminal history in connection with hiring decision:
 - Nature and gravity of the offense
 - Time that has passed since conviction/completion of sentence
 - Nature of the job sought
- Need to also consider whether a credit history is “substantially job-related” to the duties of the position

Where To Now?



Equal Employment for All Act

- Would amend Fair Credit Reporting Act
- Prohibit use of consumer credit checks to hire, transfer, promote or terminate
 - Some exceptions for high-level positions
- 60% of employers use credit checks

Paycheck Fairness Act

- Sen. Reid re-introduced on 9/14/10
 - “I am going to do my utmost to see if we can find a way to have a vote ...”
- First introduced in Senate by then Sen. Clinton in 1/09 (passed in House in 2009)
- Increase in potential exposure for employers
 - Would allow for unlimited compensatory and punitive damages in Equal Pay Act cases
 - Would weaken procedural hurdles to class actions

Paycheck Fairness Act

- Under PFA, employers need to defend pay differential based on a “bona fide factor other than sex, such as education, training or experience”
 - EPA – “any other factor other than sex”
- Under PFA, employer bears burden to establish:
(1) not based upon a sex-differential; (2) job-related to position; (3) consistent with business necessity
- Prohibit retaliation for salary-sharing
- Increased litigation and costs of litigation would be likely result

ADA Regulations to Clarify ADAAA

- Proposed ETA – end of 2010?
- Clarify the proposed regulations that set out expanded definitions
- May clarify the interplay of ADA, HIPAA and GINA for wellness plans and permissible incentives

Will “Bullying” Soon Be Regulated?

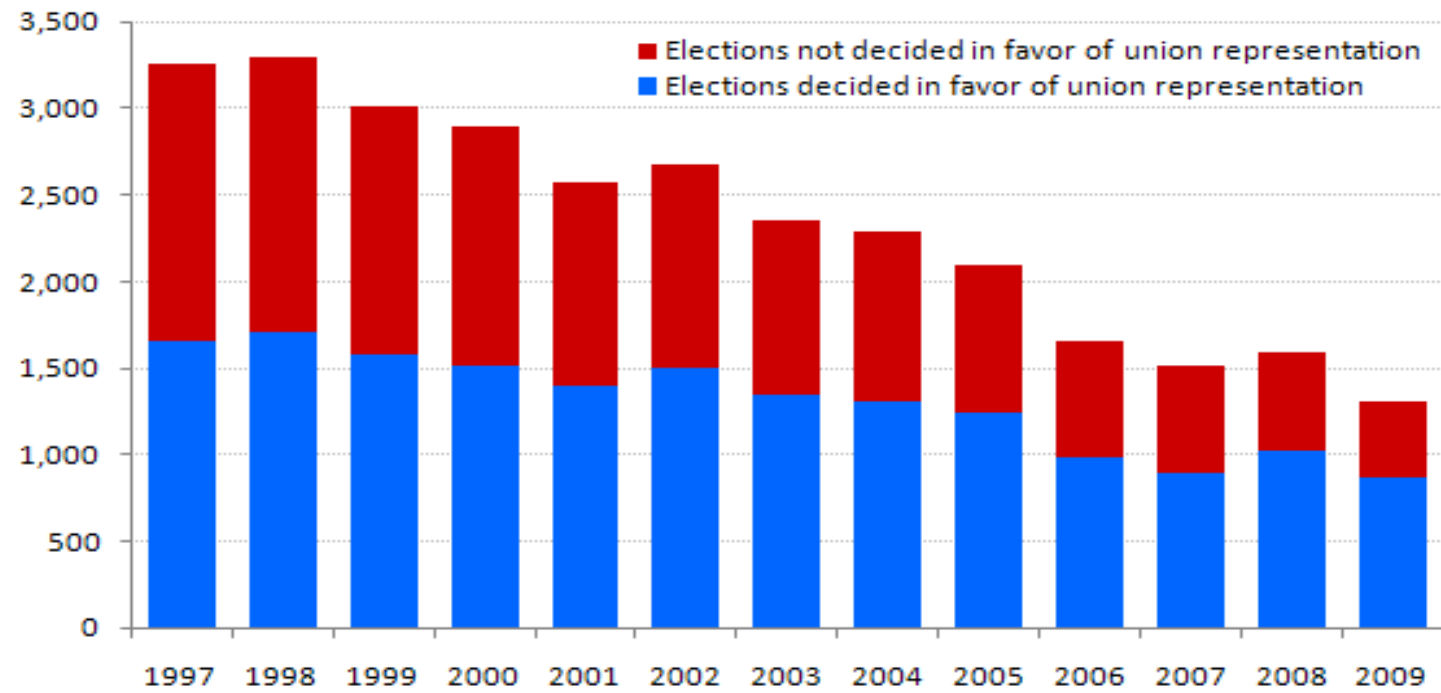
- “Healthy Workplace” legislation proposed in New York, New Jersey and Illinois (17 states total)
- Civil cause of action for an abusive work environment – without regard to protected class status
- “Hostile, offensive and unrelated to the employer’s legitimate business interests”
- Reasonable person standard
- Punitive damages available

Labor-Related Developments

- EFCA still out there
 - Obama: Getting EFCA “*through a Senate is going to be tough...but we’ll keep on pushing*”
 - However, “*frankly, we don’t have 60 votes in the Senate ... so the opportunity is not real high...*”

Status of Union Elections

Results of National Labor Relations Board Union Representation Elections, 1997–2009



Source: National Labor Relations Board

Labor-Related Developments

- *“What we’ve done instead is try to do as much as we can administratively to make sure ... that it’s easier for unions to operate and that they’re not being placed at an unfair disadvantage”*
 - Obama, August 2010
- President has issued Executive Order to require federal contractors to post notice to employees
- Proposed bill to guarantee organizational rights to safety forces
- Multiple job recovery bills
- Appointment of Craig Becker to NLRB

Talking Politics in the Workplace

- **Keep in mind:**
 - **Employers/HR should try to remain neutral**
 - **Enforce policies consistently**
 - **No solicitation of funds**

“Beauty Bias”

- **Citibank employee – “I was fired for being too hot”**



“Beauty Bias”

- **Lawsuit filed**
- **“As a result of the shape of her figure, such clothes were purportedly ‘too distracting’ for her male colleagues and supervisors to bear,” she says.**
- **Male managers gave her a list of clothing items she would not be allowed to wear: turtlenecks, pencil skirts, and fitted suits. And three-inch heels.**

“Beauty Bias”

- **57% of hiring managers stated qualified but unattractive applicants will have a harder time finding a job (*Newsweek*)**
- **More than half advised applicants to invest in “making sure they look attractive” over polishing resume (*Newsweek*)**
- **Laws to regulate personal appearance as a protected class**
 - Michigan – height and weight are protected class
 - City of San Francisco – same

“Lookism”

- **Suing because one is not attractive enough**
 - **Is attractiveness immutable?**
 - **Is it different than intelligence, talent and aptitude?**
- **Will the plaintiff have to argue that they are “ugly” enough to sue?**

Development from DOT

- CDL drivers are prohibited from text messaging while driving under DOT rules
 - Revise handbooks

- Executive barred from taking position with Hostess because he is one of seven people who know the secret to Thomas' English Muffins' "nooks and crannies"

off the mark.com by Mark Parisi





Questions?

Eric Johnson

ejohnson@walterhav.com

216.928.2890