



ALPHABET SOUP: Update on Recent Amendments To Federal laws in the Employment Context

The alphabet soup of employment legislation has thickened over the last year with amendments to old statutes and enactments of new ones. The Supreme Court has added to the mix by making new law about the meaning of Title VII and limiting what employers can do to protect themselves from disparate impact lawsuits. To help you track where things are now and where things may be going, here is a brief rundown on some of what is mixing in the national employment law soup bowl.

The ADAAA

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) became law this year on January 1, 2009. These amendments to the ADA do not directly change the definition of the term "disability," but they do provide "interpretive guidance" expressly calculated to overturn Supreme Court precedent that had interpreted the term narrowly.

Under the new law, a physical or mental "impairment" must, as before, substantially limit a "major life activity" in order to be considered a "disability" under the ADA. While the definition of "disability" remains unchanged, the amendments now require courts to interpret the statutory definition broadly "to the maximum extent permitted" under the ADA. The new statutory guidance expressly rejects the approach taken in *Toyota Motor Manufacturing v. Williams*, where the Supreme Court asserted its view that the term "substantially limits" meant "prevents or severely restricts."

The amendments also forbid consideration of mitigating measures when determining whether an "impairment" qualifies as a disability under the ADA. The effect of medication, prosthetics, assistive devices, auxiliary aids and other similar measures now do not mitigate the legal fact of an employee's "disability". This new approach reverses *Sutton v. United Airlines*, a case in which the Supreme Court held that disabilities should be evaluated in light of any mitigating medical devices. The amendments provide for an exception to this new approach, however, as courts may continue to consider the mitigating effects of eyeglasses and contact lenses to determine whether a person's visual impairment constitutes a disability under the ADA.

The amendments further list examples of "major life activities" for courts to use when considering whether an "impairment" constitutes a "disability." The list itemizes an expansive set of activities such as, for example, reading, learning, and concentrating. The amendments also clarify that episodic impairments, such as epilepsy or post traumatic stress syndrome, constitute disabilities even when inactive, so long as such conditions would be disabling when in an active state.

Employers may fret that the ADAAA expands the scope of those covered under the definition of "disabled." Yet, the employer's duties and burdens under the ADA have not otherwise expanded, as employers must still engage in the same "interactive process," make "reasonable accommodations," and still be allowed to avoid an "undue burden" when doing so. Moreover, the same standards apply to determine whether an employee constitutes a "qualified person with a disability." Thus, while the burden may have broadened, it really has not grown heavier. The trigger as to when the burden arises has, however, become much easier to pull.

The FMLA Amendments

The burden of war on American families led to several amendments to the Family and Medical Leave Act (FMLA) that were enacted on January 28, 2008. Generally, the amendments provide employees more time off from work to adjust to the absence of family members on active duty or to care for an injured family member.

Under the new law, employers must now provide an employee, whose spouse, child, or parent is on active duty in the armed forces, with twelve weeks of unpaid leave over a twelve month period. This requirement only applies to employees whose family member supports a "contingency operation," which the military defines as an action or operation against an opposing military force. In addition, employees may only apply their twelve weeks of unpaid leave towards specific "qualifying exigencies," such as short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and other activities that the employer and employee may agree to include as qualifying exigencies.

The new law also more than doubles the available time off for all military families to care for injured service members. Employees with family members undergoing medical treatment, recuperation, therapy, or temporary disability for injuries or illness arising out of their military service may now take twenty-six weeks of unpaid leave during a single twelve-month period, as opposed to the twelve weeks previously available. This legislation applies to the "next of kin," or nearest blood relative, of a service member as well.

Lilly Ledbetter Fair Pay Act of 2009

Congress continued its campaign to undo Supreme Court precedent with the Lilly Ledbetter Fair Pay Act, which became law on January 29, 2009. The Act overturns the U.S. Supreme Court's 2007 decision, *Ledbetter v. Goodyear Tire & Rubber*, and expands the statute of limitations for the filing of complaints alleging discrimination in pay.

In *Ledbetter*, the plaintiff earned as much as male employees with similar responsibilities when she was hired in 1979, but she no longer earned an equal rate by the time of her retirement in 1998. The Supreme Court ruled that she could only recover for two denied raises that had occurred within 180 days of her filing with the Equal Employment Opportunity Commission but not for older denials. The Court ruled that the older denials had occurred beyond the statute of limitations and were outside the reach of a civil action even though the effects of such decisions had continued well within the statute of limitations period. The Court held that it must start counting the days under the statute of limitations from when the employer first took action to implement the discriminatory pay rate.

The Act reverses the holding by allowing plaintiffs to file within 180 days of the application of a discriminatory decision, including each time the individual receives a paycheck based on that inequality, regardless of how long ago the discriminatory decision first occurred. Thus, as long as an employee continues to receive discriminatory compensation, the statute of limitations on pay discrimination lawsuits begins to run on each unfair paycheck, as each such paycheck constitutes a fresh incident of discrimination under the law. Congress made the Act effective retroactively to May 28, 2007, the day before the Supreme Court issued its *Ledbetter* decision. Because the Act will significantly impact pending claims, revive old claims, and encourage future claims, employers should brace for a potential wave of discrimination lawsuits alleging discrimination in pay. More importantly, employers should carefully review their compensation systems to ensure that they do not discriminate.

GINA

Living in a Brave New World requires some protections we never thought we would have years ago. To that end, President Bush signed the Genetic Information Nondiscrimination Act ("GINA") into law on May 21, 2008. The law encourages individuals to obtain genetic tests and related health information by preventing employers from using the information against them.

GINA prohibits employers from firing, refusing to hire, or otherwise discriminating with respect to compensation, terms, conditions, or privileges of employment because of "genetic information." GINA does not include presently manifested diseases, instead only including an individual's future predisposition for a disease. GINA does, however, protect employees from discrimination because a family member has manifested a disease, however.

GINA also prohibits employers from even requesting the medical history of an employee, unless they do so "inadvertently" or the information is "commercially and publicly available." If an employer acquires an employee's genetic information, they cannot release such information to third-parties with the exception of government authorities and occupational health researchers.

In addition, the law requires employers to separate any genetic information that they acquire from an employee's personnel files. Employers may store the information with other health records. GINA becomes effective on November 21, 2009.

Conclusion

Employees can expect more changes from Congress this session, as the Employee Free Choice Act (the "EFCA") continues to circulate in the Capitol while unions and business lobby their positions to members of Congress. The recent decision in *Ricci, et.al. v. DeStefano, et.al.* (the New Haven fire fighters case about "reverse discrimination") may also result in a Congressional Act to reverse what has become a politicized ruling from the United States Supreme Court. While Congress and the courts stir the pot, casting their spells of "toil and trouble," the rest of us need to be aware of the ingredients in the legal soup dished to employers and employees alike. As always, more to come.

About the Author:



[Robert B. Smith](#)

Bob leads the Non-Profit Organizations and [College & University](#) practice groups. He specializes in the defense of claims against nonprofits and charitable institutions and organizations and provides counsel concerning complex issues including governance; regulatory compliance, employment, business affairs and ethics issues. Comments welcome at RSmith@nkms.com.



[Christopher T. Vrontas](#)

Chris leads the [Employment Practice Group](#) at *Nelson Kinder Mosseau & Saturley, P.C.* Mr. Vrontas represents a number of local companies as well as national and international businesses in matters involving employment discrimination and wage claims, covenants not to compete, intellectual property matters, and other business disputes. Comments welcome at CVrontas@nkms.com.



Nelson Kinder Mosseau & Saturley PC
ATTORNEYS AT LAW

Boston Office - Two Oliver Street - Boston, MA 02109 - 617.778.7500 - Fax 617.778.7501
Manchester Office - 99 Middle Street - Manchester, NH 03101 - 603.647.1800 - Fax 603.647.1900
Portland Office - Two Monument Square - Portland, ME 04101 - 207.347.6901 - Fax 207.347.6902