



**WHAT'S NEW AND WHAT'S
NEXT IN EMPLOYMENT LAW
FOR 2010**

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Think differently
about work.



Manpower®

What We'll Cover

- What's New?
- What's Next?
- \$497 Billion Worth of Tips
- New & Improved Employment Law Sing Along Song
- Official "Smartest Person in Our Audience" Contest



Official Disclaimer

The material presented herein should not be relied upon or construed as legal advice. For specific information on recent developments, particular factual situations or the effect of a particular law, the opinion of qualified legal counsel should be sought.

Please consult with your own Legal and HR Departments before making any changes.

What's

NEW?

Latest

Stats &

TRENDS

Is the U.S. Workforce Maxed Out?

- Average workweek: up 32% over past 25 years
- Time spent in traffic: up 157%
- 40% are sleep-deprived
- 33% of employees are “chronically overworked”
- 80% of medical expenses are now stress-related

(Sources: Harris Interactive, Sage Software Survey, Urban Mobility Report, Business Week, Families and Work Institute, Centers for Disease Control and Prevention)

Is the U.S. Workforce Maxed Out?

- 465 million vacation days were squandered in 2009
- 83% check e-mail at least daily while on vacation
- 1 in 6 employees has exhibited “desk rage”
- The average employee is interrupted 7 times an hour and switches tasks every 3 minutes
- Your IQ drops dramatically when “multi-tasking”

(Sources: Expedia.com, AOL, Caravan Opinion Research, TIME Magazine, University of London)

More Stress = More Lawsuits

- **The Bottom Line:** U.S. companies lose between \$200-\$300 billion a year due to absenteeism, tardiness, burnout, decreased productivity, worker's compensation claims, increased employee turnover and medical insurance costs resulting from employee work-related stress.
- **The Lesson:** Be nice to your employees.

(Source: National Safety Council)

WOMEN: 50.3%

MEN: 49.7%

The “Mancession”

- For the first time in recorded history, **women outnumber men** in the U.S. workforce
- Lost jobs
 - Men 7.4 million
 - Women 3.9 million
- However, only 3% of CEOs and 13.5% of executive officers are women

(Sources: Bureau of Labor Statistics, New York Times, Catalyst Inc.)

Enforcement, Enforcement, Enforcement

- Chao (“compliance assistance”) to Solis (“new sheriff in town”)
- 200 new Wage & Hour Compliance Officers
- \$25 million and 100 DOL enforcers to target independent contractor misclassifications
- 50 new lawyers to enforce Title VII, ADA and IRCA
- ICE targeting 1,000 employers
- OFCCP auditing stimulus recipients
- OSHA’s National Emphasis Program

EEOC Record Highs

- Record **\$376 million** in settlements and suits
- Second-highest number of claims ever filed
- Record number of retaliation, religion, disability and national origin claims
- “Systemic” cases more than doubled
- Ordered to pay more than \$4 million in fees

Employers in Court

- **More Litigation:** Up for third straight year
- **Employment Disputes #1:** Employment litigation is top increased legal cost
- **Litigation Costs Up:** Companies spending \$1+ million on litigation increased by 18%
- **Odds of Winning:** 38% (worst in the past decade)
- **Median Verdict:** \$326,640 (up 60%)



(Sources: Jury Verdict Research, Fulbright & Jaworski, Seyfarth Shaw)

Employers in Court



- **Most Common:** Sex (35%), Race (26%), Disability (16%), Age (13%)
- **Biggest Verdicts:** Age, disability, sex, race
- **Average Cost:** edging closer to \$100,000 to litigate a single-plaintiff case
- **Litigation or Arbitration?** Litigation is strongly favored over arbitration (55% to 32%)
- **Federal or State?** Employers win more in federal court (43% versus 37%) and federal verdicts are 39% lower

(Sources: Jury Verdict Research, Fulbright & Jaworski, Seyfarth Shaw)

Tech @ Work



- 90% of employees surf the 'Net
- 61% of employees use Facebook
- 60% of policies are out-of-date
- 50% “e-mail forward” sex-related material
- 47% spend more than 30 minutes on-line
- 45% use social media to screen candidates
- 40% block access to social networking sites
- 25% of male employees have viewed pornography

(Sources: Vault.com, Manpower Employment Blawg, Wall Street Journal, Challenger, Gray & Christmas, Harris Interactive, Fulbright & Jaworski)

Tech @ Court



- Think hard before you hit “delete”
- Think hard before you hit “send”
- Beware the Stored Communications Act (SCA): Don’t steal employee social networking passwords
- Disclose if blogger is hawking your products or services

Tech Action Plan

- Adopt and enforce a reasonable policy
- Get with it or get irrelevant
 - Get social
 - Talk to a teenager
 - Subscribe to *Wired*
- Train employees
 - “Mom Test”: permanent record
 - Harassment is harassment
- “Intelligence”: job-related, job-related, job-related



Union Membership

- Lost 834,000 private sector jobs in 2009
- 7.2% (down from 7.6%) of private sector jobs
- First time: majority of union members are in public sector
- Evidence for EFCA?
- Increase organizing?

(Source: Bureau of Labor Statistics)

NLRB Nervousness

- “The NLRB has the ability to unduly increase union power and leverage without intervention by Congress.”
(U.S. Chamber of Commerce)
- Becker nomination dead – or is it?
- Bush-era decisions still at risk
 - E-mail organizing rules
 - “Salts”
 - “Supervisor” definition

Death of the Billable Hour?

- The billable hour is “a relic of the past” that “perpetuates inefficiency” (Director of Litigation at a prominent law firm)
- Alternative Solutions?
 - Flat fees
 - Offshoring/inshoring
- Blawg Tools: guidelines, budgets, scorecards, RFPs

New

LAWS

HITECH Act

- **Effective February 22**, more employers are subject to PHI requirements
- Requires breach notices to plan participants, HHS and possibly media
- What should employers do?
 - Talk to a benefits specialist
 - Revise HIPAA policies/procedures
 - Implement breach response plan
 - Renegotiate business associate agreements
 - Train employees



GINA (Genetic Information Nondiscrimination Act)

Generally prohibits:

- **Employers** from (1) collecting genetic info and (2) discriminating based on genetic info
- **Health insurers/plans** from (1) requiring genetic testing and (2) discriminating based on genetic info
- **Retaliation**

ADA Amendments Act (ADAAA)

- **Disability Definition:** expanded -- lists “major life activities” and includes conditions in remission
- **Mitigating Measures:** can't be considered (except glasses and contact lenses)
- **Accommodations:** more required

The New FMLA

- **Serious Health Condition:** streamlined and clarified
- **Military Leave:** expanded, guidance and definitions
- **Employer Notice:** extended from 2 to 5 business days
- **Employee Notice:** in line with attendance rules unless unusual circumstances
- **Incomplete Medical Certification:** written notice required -- employees have 7 days to provide additional information

The New FMLA

- **Recertification:** allowed every 12 months for conditions lasting more than a year and every 6 months for ongoing conditions
- **Fitness-for-duty Evaluations:** allowed when employee's return from intermittent leave could pose safety concerns
- **Substitution:** all paid leave treated the same
- **Light-duty Assignments:** don't count toward FMLA leave
- **Settlement:** employees may settle FMLA claims without prior government/court approval

Other New Laws

- **Lilly Ledbetter Act:** Extended pay claim filing period to 180 days after paycheck
- **COBRA Subsidy:** Ends February 28. Will it be extended?
- **Mental Health Parity Act:** Effective April 5, if plan covers mental illness/substance abuse, must treat the same as other conditions
- **Executive Orders:** Federal contractors (1) can no longer deduct certain “union avoidance” expenses, (2) must notify employees of various union rights, (3) must offer predecessor employees right of first refusal and, (4) on large construction projects, must negotiate with unions and recognize union wages/benefits

Other New Stuff

- **E-Verify:** mandatory for federal contractors
- **IRS Mileage Reimbursement:** dropped to 50 cents/mile
- **Haitian Visas:** temporary work visas for Haitian nationals in the U.S. as of January 12 (effective through July 2011)
- **H-1B Visas:** filing season opens April 1
- **New EEOC Guidance:**
 - EEOC Technical Assistance on Age Claim Waivers
 - Best Practices for Workers with Caregiver Responsibilities

Big

SUITS

Ricci v. DeStefano

- Supremes ruled in favor of white firefighters denied promotion because of race
- Test thrown out because of fear of disparate impact
- Court: discrimination is discrimination
- No clear standard: “good-faith basis” versus “strong basis”
- Validate tests, use assessment experts or skip ‘em
- **The Sequel?** Chicago firefighter case

More from the Supremes

- **Crawford:** Extended Title VII's anti-retaliation protection to employees who answer questions during internal investigations
- **Gross:** ADEA plaintiffs must prove that age was *the* cause of the adverse employment decision – “mixed motive” cases no longer permissible
- **14 Penn Plaza:** upheld clause in collective bargaining agreement that required arbitration of ADEA claims

Big Verdicts

- **\$4.0 million** to pathologist for alleged retaliation after opposing new blood test that could give false results
- **\$4.1 million** to male cop who claimed retaliation after testifying in harassment case of department's first female cop
- **\$4.7 million** to black salesman who alleged retaliation after he claimed race discrimination and harassment
- **\$5 million** to white police officer who alleged retaliation after complaining of discrimination against black police officers
- **\$6.2 million** for allegedly inflexible WC leave exhaustion policy resulting in termination instead of accommodation

Big Verdicts

- **\$10.7 million** for alleged repeated firing of older employees and replacing them with younger employees
- **\$19 million** to thousands of female employees of national restaurant chain in “glass ceiling” case
- **\$35 million** to 88,000 employees allegedly forced to skip breaks and meal periods
- **\$68 million** to whistle-blower who alleged pharma kickbacks, illegal marketing techniques and meetings in exotic locales
- **\$4 billion** to exec for breach of contract

How to Get Sued by the EEOC

- Don't address harassment/discrimination aggressively
- Don't adequately investigate complaints against execs
- Don't follow your own policies
- Don't accommodate
- Retaliate
- Act in bad faith

Celebs
and the
LAW

Law on TV

- \$70 million
 - “No” for Dan Rather
 - “Yes” for TV writers
- Lessons from Letterman, Barker and O’Reilly
 - Workplace romance is rarely a good idea
 - Come clean: cover-ups only make things worse
 - Even if allegations are against a superstar, investigate
 - Communicate carefully

Lessons from Conan and Jay

- Employment agreements can come back to haunt you
- Think carefully about non-competes
- You can't always control employee communications
- How does Conan's severance package compare?
 - 15 lifetimes of work for the average college grad
 - Mere pittance compared to recent Wall Street payments
 - Bank of America CEO Ken Lewis (3.5 Conans)
 - Merrill Lynch CEO Stan O'Neal (4 Conans)

Strange

but

TRUE

Strange but True

- Beware bogus backgrounds
- How to lose \$6 million
- \$80,000 to stay away
- Beep . . . you're fired
- Don't SEND ***ANGRY E-MAILS!!!!!!!!!!!!!!!!!!!!***

What's

NEXT?

Hot Spots

- More enforcement, enforcement, enforcement
- Class actions (especially wage and hour)
- Big \$\$\$ states: CA, FL, IL, MS, NJ, NY, PA and TX
- “Reverse discrimination” and testing
- Retaliation
- Employee privacy

(Sources: Seyfarth Shaw, Fulbright & Jaworski, Jury Verdict Research, Washington Post, Business Week)

THE BROWN EFFECT

Health Care

- President's latest proposal released February 22
 - Ups the annual employer fee from \$750 to \$2,000
 - Penalty-free wait period up to 90 days before employees have to be enrolled
- Health care “summit” **today**

EFCA: Dead or Alive?

- “Card check” appears dead, but . . .
 - Faster elections
 - Union access to company property
 - Ban on “captive audience” meetings
 - Binding fast-track arbitration
- Compromise bill?
- NLRB circumvention?

OSHA 300 Log Change: Ergo Regs Next?

- Proposed rule to revise OSHA 300 Log to include column dedicated to musculoskeletal disorders (MSDs)
- Public hearing **March 9**
- If finalized, effective January 1, 2011
- Would allow OSHA to gather info on MSDs and could signal another run at ergonomics regulation

Proposed ADEA Rule Change

- Proposed rule addressing the meaning of “reasonable factors other than age” (RFOA) under the ADEA
- Lists factors to determine whether truly “reasonable” and “other than age”
- Comments deadline: **April 19**

Potential Legislation

- **Employment Non-discrimination Act (ENDA):** bars discrimination based on sexual orientation or gender identity
- **Protecting Older Workers Against Discrimination Act:** reverses *Gross* – age *a* (versus *the*) factor
- **Healthy Families Act:** employers with 15 or more employees must provide seven days paid sick leave a year

Potential Legislation

More FMLA Amendments

- Broader coverage: extend to employers with 25 or more employees plus allow part-time employees to take leave
- More leave:
 - child's or grandchild's school activities
 - child's or elderly relative's medical appointments
 - care for same-sex spouse, domestic partner, parent-in-law, adult child, sibling or grandparent
 - address issues from domestic violence and sexual assault
 - employees whose family members have received notice of impending active military duty

Potential Legislation

- **Arbitration Fairness Act:** bars arbitration of employment disputes (except in collective bargaining agreements)
- **Paycheck Fairness Act:** shifts burden to employers to prove that pay differences are not gender-based
- **Fair Pay Act:** prohibits employers from discriminating based on sex, race or national origin if jobs are “equivalent”

Potential Legislation

- **Security and Financial Empowerment (SAFE) Act:** bans discrimination against victims of domestic violence, sexual assault and stalking
- **Family-friendly Workplace Act:** provides employees with compensatory time off
- **Working Families Flexibility Act:** permits employees to make an annual request to modify work schedule and location
- **Breastfeeding Promotion Act:** amends the Pregnancy Discrimination Act to include lactation

Potential Legislation

- **Equal Employment Act for All:** prohibits employers from using consumer reports to make employment decisions
- **Forewarn Act:** expands WARN to include employers of 75 or more and requires 90 days' notice
- **Alert Laid Off Employees in a Reasonable Time (ALERT) Act:** expands definition of “mass layoff” under WARN
- **Rewarding Achievement and Incentivizing Successful Employees (RAISE) Act:** permits employers to pay union employees more than collective bargaining agreement provides

\$497

Billion

Worth of

TIPS

(on one slide)

STAY OUT OF JAIL “TO DO” LIST

- Stay on top of the law – it changes every 3.2 seconds
- Assess legal vulnerabilities (especially wage and hour) and take action
- Comply with the new ADAAA, FMLA, GINA, HITECH (and everything else)
- Continuously update your handbook, forms, posters and training
- Don't fear technology – follow our “TECH ACTION PLAN”
- Investigate, investigate, investigate
- Document, document, document
- Communicate, communicate, communicate
- Never retaliate
- Beware “reverse discrimination” in the name of diversity
- Manage litigation and outside counsel aggressively
- Always, always, always treat employees with dignity and respect

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Free Tools

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Official
“Smartest
Person in
Our Audience”
CONTEST

New &
Improved
SING
ALONG
SONG

**The times they sure are a-changin'
But if you listen you surely won't fail
We wrote you this song
So please sing along
If you don't
You could end up in jail**



**There's plenty of new legislation
With new acronyms every day
But if you visit our Blawg
You won't be in the fog
And big verdicts you
Won't have to pay**



**Remember this song
And you'll never go wrong
Yes we wish you the best
On your journeys
You'll stay out of court
And you won't have to
Pay no attorneys**



**Enforcement action's expanding
And so is the FMLA
And the ADAAA
Isn't going away
Get to know them now
Don't delay**



**Remember this song
And you'll never go wrong
Yes we wish you the best
On your journeys
You'll stay out of court
And you won't have to
Pay no attorneys**



**EFCA it still could be coming
And class actions headed your way
But if you prepare
Be consistent and fair
Everything will be OK**



**If you want the very best employees
I'll tell you just what you should do**

Call MANPOWER today

**Yeah, there's no better way
Without us you'll always be blue**



**Remember this song
And you'll never go wrong
Yes we wish you the best
On your journeys
You'll stay out of court
And you won't have to
Pay no attorneys**



THANK
YOU!