



# The GSH 60-Second Memo

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## 2009: A Year in Review and A Glimpse Ahead at 2010

By Bethany C. McCurdy, Esq.

As we now have moved into 2010, it is a good time to take one final look back at some of the most important developments in the areas of employment law that occurred last year.

1. On January 1, 2009, the Americans with Disabilities Act Amendments Act ("ADAAA") became effective. The amendments to the ADA modified the way in which disability is defined under the law by expanding its scope and potentially encompassing many more individuals under the law's protections. The most significant changes include easing the formerly narrow analysis of whether an individual was "substantially limited" in a "major life activity." The ADAAA also expands the non-exhaustive list of "major life activities." In addition, with limited exceptions, when analyzing a disability, the effects of mitigating measures will no longer preclude coverage, nor will the fact that an impairment may be episodic or in remission. The ADAAA also directed the Equal Employment Opportunity Commission ("EEOC") to revise the ADA regulations in accordance with the new law. The revised regulations were published, and the public comment period ended on November 23, 2009. Final regulations are expected in 2010.

2. On January 16, 2009, the revised Family and Medical

**Leave Act ("FMLA") regulations became effective.** Among the many changes under the revised regulations is the implementation of the military provisions, which provide leave under the FMLA to care for an injured service member or in response to a qualifying exigency (which generally involved leave to prepare for a family member's imminent deployment, as well as other related issues). The revised regulations also made significant changes to the notice and eligibility requirements for employers. In addition, key terms and definitions were revised or clarified. Along with the revised regulations, the Department of Labor, which enforces the FMLA, also revised the non-mandatory forms employers may use when implementing the FMLA.

**3. On January 29, 2009, the Lilly Ledbetter Fair Pay Act ("the Act") was signed into law.** The Act reverses the Supreme Court case of the same name and provides more time for an individual to file a claim of compensation discrimination. Specifically, in the Lilly Ledbetter case, Ms. Ledbetter discovered that she was paid less than her male co-workers. Because the original decision to pay her less occurred years earlier, the Court held that she was too late to file a claim, even though she only recently discovered the alleged discrimination. Thus, her claim was outside the statute of limitations (180 or 300 days, depending on the jurisdiction). The Act directly reverses this decision and provides that if an individual is paid less due to a protected factor such as age, sex, disability, race, etc., then each time the person receives a paycheck that is premised upon the original discrimination, that conduct is a new act of discrimination, thus allowing the individual to file a timely claim. The Act is retroactive to May 28, 2007, and applies to all claims of discrimination in compensation that are pending on or after that date.

**4. On June 29, 2009, the Wisconsin Family and Medical Leave Act ("WFMLA") was amended to expand coverage to domestic partners.** The WFMLA now provides that an eligible employee may take leave to care for a domestic partner or a parent of a domestic partner who has a serious health condition. WFMLA rights extend to both registered same-sex domestic partners and unregistered same-sex and opposite-sex domestic partners. The change does not, however, include coverage for an employee to take leave to care for a domestic partner's child who is not also the child of the employee requesting leave.

**5. Effective July 2, 2009, the Wisconsin Fair Employment Act ("WFEA") was amended to allow complainants who received a finding of discrimination before an administrative law judge to seek compensatory and punitive damages before the Wisconsin Circuit Court.** Compensatory damages may include future economic loss, pain and suffering, emotional distress, mental anguish, loss of enjoyment of life, and other noneconomic losses. In addition, the court can award reasonable attorney's fees and costs related to the court action. The law applies to cases where the act of discrimination occurred on or after July 2, 2009.

**6. The Genetic Information Nondiscrimination Act of 2008 ("GINA") became effective November 21, 2009.** GINA prohibits employers from discriminating against or harassing an employee or applicant on the basis of genetic information. Subject to certain exceptions, GINA also restricts employers from acquiring genetic information. Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder, or condition of an individual's family members.

**7. On December 21, 2009, the COBRA subsidy was extended.** As noted in the 60-Second Memo Special Alert published December 23, 2009, the COBRA subsidy that was set to expire at the end of the year has been extended. The original subsidy covered employees who were involuntarily terminated between September 1, 2008 and December 31, 2009. The extension now includes employees involuntarily terminated between January 1, 2010 and February 28, 2010. An additional six months of subsidy coverage for currently eligible employees is also provided.

Looking ahead, the following legislation was introduced in 2009 and pending at the year's end. 2010 may see the enactment of the following:

**1. Amendment of the Wisconsin Fair Employment Act to include credit history as a protected class.** Assembly Bill 367, which has been passed by the Assembly Committee on Workforce Development, would amend the Wisconsin Fair Employment Act to add credit history to the list of classes protected under that law. Specifically, an employer would be prohibited from making an employment decision on the basis on an individual's credit history, which is defined as the information included in a consumer report, as well as a person's credit worthiness, credit standing or credit capacity. Exceptions include where an individual would need to be bondable or where credit history is substantially related to the circumstances of a particular job.

**2. The Employee Free Choice Act ("EFCA").** Introduced March 10, 2009, the House and Senate versions of the bill are still in subcommittee. If the EFCA becomes law, it will have a significant impact on both the process for employees to organize and contract negotiation. Specifically, the EFCA provides that the National Labor Relations Board ("NLRB") may certify a union without an election so long as a majority of the employees have signed authorizations cards ("card check"). In addition, and perhaps more significantly, the EFCA provides that once a union is certified and bargaining has begun, if after 90 days the parties reach an impasse, either party may notify the Federal Mediation and Conciliation Service ("Service") of the existence of a dispute and request mediation. If after an additional 30 days the Service is not able to bring the parties to agreement by conciliation, the dispute will be referred to an arbitration board whose decision shall be final and binding for two years, unless otherwise

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amended by written consent of the parties. The EFCA is significant because it potentially not only eliminates the secret election process, but also because it provides that a federal arbitrator will have the authority to decide the terms of a collective bargaining agreement. This would have a great impact on the bargaining process for employers.

**3. The Employment Non-Discrimination Act of 2009 ("ENDA").** Introduced June 19, 2009, ENDA would prohibit discrimination in the workplace on the basis of sexual orientation or gender identity. The ENDA, which is currently before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, is modeled after already-existing employment discrimination laws and would prohibit an employer from making employment decisions, such as hiring, firing and promotion, on the basis of an individual's actual or perceived sexual orientation or gender identity. The ENDA also prohibits retaliation and discrimination against any employee because of his or her association with an individual because of that individual's actual or perceived sexual orientation or gender identity. The proposed legislation generally exempts small businesses with fewer than 15 employees, religious organizations and the military, and does not require employers to extend benefits to unmarried couples, including the same-sex partners of its employees.

**New EEO Poster**

Finally, in late 2009, the EEOC revised its standard EEO poster to encompass the significant changes made in 2009. Employers should ensure they are meeting all new posting requirements. For more information on ordering a new poster or compliance with the requirements, please see: <http://www1.eeoc.gov/employers/poster.cfm>.

Links to previous 60-Second Memos on the topics discussed above are available at the following link: <http://www.gshllp.com/newsletter.shtml>.

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