

Labor and Employment Law **Notes**

PROPOSED LABOR AND EMPLOYMENT LAW-RELATED BILLS TO KEEP AN EYE ON IN 2010

1. **Employment Non-Discrimination Act (ENDA)**: ENDA essentially deems gay, bisexual or transgender as a protected class. This would create a new form of protected class on a national level.
2. **Healthy Families Act**: Provides employees with seven days of paid sick leave per year.
3. **Family Medical Leave Enhancement Act and Family Fairness Act (FMLA Amendment)**: Extends FMLA coverage to employers of 25 or more employees, and expands FMLA leave to include a child's education or extracurricular activities, as well as a relative's medical appointments. The latter expands coverage to include part-time employees.
4. **Paycheck Fairness Act**: Shifts the burden on equal pay cases to employers who must prove that differences in pay are not gender related but rather related to job performance.
5. **Protecting Older Workers Against Discrimination Act**: Effectively reverses the U.S. Supreme Court's decision in Gross v. FDL Financial Services holding that a "mixed motive" case is not proper under the Age Discrimination in Employment Act.
6. **Arbitration Fairness Act**: Essentially prevents arbitration of employment disputes unless provided for under a collective bargaining agreement.
7. **Employee Free Choice Act (EFCA)**: Eliminates the secret ballot election for union representation and requires binding arbitration for first contract collective bargaining agreements.

Should any of these bills pass, especially the ENDA, Paycheck Fairness Act and Protecting Older Workers Against Discrimination Act, the employment law landscape may change dramatically. This will also likely result in an increase in discrimination cases being filed against employers. Moreover, passage of the Arbitration Fairness Act would result in an increase in litigation of employment disputes that would previously be disposed of through the arbitration

process, rather than the courts. Arbitration will only be an option for employers whose employees are operating under a collective bargaining agreement.

YOU DO NOT HAVE TO QUALIFY AS DISABLED TO SUE UNDER THE ADA

The Seventh Circuit and many other circuits that have considered this issue have ruled that the Americans With Disabilities Act's (ADA) section prohibiting pre-offer medical inquiries created a private cause of action regardless of whether the plaintiff actually suffered from a disability as that phrase is defined under the ADA. In order to avoid this pitfall, hiring personnel should avoid seeking any information about an applicant's medical or disability information. The ADA does permit a potential employer to determine if an applicant is engaged in the illegal use of drugs. Employers may test for illegal drug use and may ask follow-up questions about a positive drug test. If follow-up questions are required, the employer should only ask questions to determine if the drug test is a result of a lawful prescription. The ADA does not permit the follow-up questions to be disability related or likely to elicit information about a disability.

THE EEOC HAS INCREASED ITS SCRUTINY OF EMPLOYERS THAT AUTOMATICALLY TERMINATE EMPLOYEES AFTER THEIR LEAVE EXPIRES

A recent press release by the Equal Employment Opportunity Commission touted its settlement in its case against Sears, Roebuck & Company. They settled the matter for \$6.2 million. The lawsuit was filed in Federal Court in Chicago alleging that Sears "maintained an inflexible workers' compensation leave exhaustion policy and terminated employees instead of providing them with reasonable accommodations for their disabilities, in violation of the ADA. The EEOC regional attorney handling the case stated:

"The era of employers being able to inflexibly and universally apply a leave limits policy without seriously considering the reasonable accommodation requirements of the ADA are over. Just as it is a truism that never having to come to work is manifestly not a reasonable accommodation, it is also true that inflexible leave policies which ignore reasonable accommodations making it possible to get employees back on the job cannot survive under federal law. Today's consent decree is a bright line marker of that reality."

The EEOC has pursued many high-profile employers on this issue, including UPS and JP Morgan Chase & Co. Larger corporations with leave policies, no matter how generous, that specify automatic termination upon exhaustion of available time off, will be targeted by the EEOC. Courts have upheld claims by employees that former employers violated the ADA by automatically terminating them after exhaustion of leave time. The employees allege that the former employers violated the ADA by failing to consider the extension of the leave time or other forms of reasonable accommodation. It is imperative that employers re-evaluate their disability and medical leave policies to determine if those policies will cause them to become a target of the EEOC. Rather than having a blanket policy on the issue, employers may want to consider dealing with issues of an employee's disability or medical leave on a case-by-case basis

to determine if it can accommodate an employee's disability prior to termination. Employers need to consult with their in-house employment lawyer or an otherwise qualified employment lawyer to ensure compliance with the ADA in situations where an employer is considering termination of an employee returning from leave or whose leave time is about to expire.