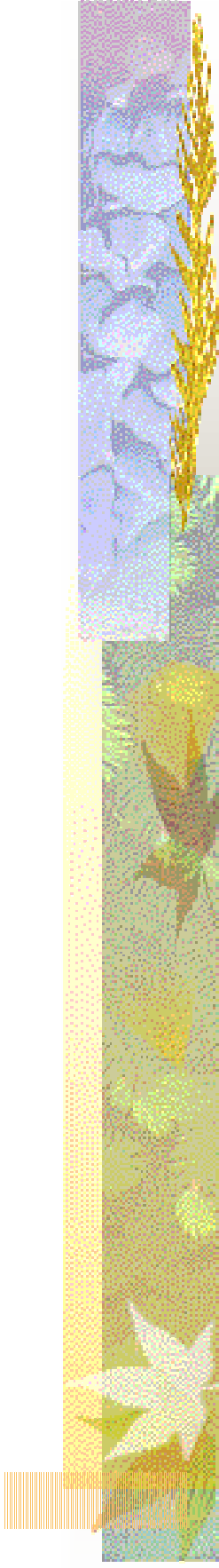


Employment Law Update



Ricci, GINA, ADA/AAA, FMLA, EFCA, and more

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Changes in Existing Laws

- FMLA Amendments (1/08)
 - Completely new process & forms
 - Everything must be in writing
- ADA Amendments (9/08 for 1/09)
 - All changes re: Step 2 - “Q.I.D.”
 - Goal = more qualify as “disabled”
 - No change to Step 1 - Notice
 - or Step 3 - Reasonable Accommodation
- Michigan Military Leave Act (4/08)



FMLA

- 1) Employee gives notice
- 2) Employer verifies employee eligibility and sends “Notice of Eligibility, Rights & Responsibilities” and gives appropriate certification form [4 choices]
- 3) Employer “obtains information” to determine if one of 5 protected situations and sends “FMLA Designation Notice”
- 4) Monitor FMLA use & return to work.



ADAAA

- Biggest change → removed the “mitigating measures” exception (although exception for eyeglasses/contacts remains). No longer consider use of insulin or hearing aid, cane, etc.
- Effective 1-1-09
- Action Plan →
 - Update job descriptions and
 - Training – recognize & report
(team leaders/coordinators/supervisors)



MI Military Leave Act (4/08)

- Almost mirrors USERRA
- Advance notice of deployment/service
- Reemployment rights
 - within 45 days after service < 180 days
 - within 90 days for service > 180 days
- ~ more time to assimilate into civilian life

MI Military Leave Act (4/08)

- Job rights:
 - After service 1-90 days → RTP would have held if continuous employment had not been interrupted.
 - After service 1-90 days → RTP held when service began only if:
 - person not qualified for promoted position &
 - employer made reasonable effort to train for promoted position.
 - After service 91+ days → RTP with nearest approximation in status/pay to promoted or same position (as above).



Sarbanes-Oxley Act

- SOX → Executive leadership honesty and accountability
- Impact/Implication → Companies should update whistleblower & related retaliation policies to be consistent with SOX intent

Ledbetter Fair Pay Act (1/09)

- Changed the statute of limitations for filing pay discrimination claims.
 - Before: S/L began with first violation; Had 3 years from first discriminatory pay.
(why Ledbetter lost her lawsuit)
 - Now: Each unfair pay is its own violation; Have 3 years from each violation to file lawsuit.



Ledbetter Fair Pay Act

- Action Plan → Review employee pay for unfairness & discrimination and remedy immediately.
 - May not be present discrimination, but present effect of past discrimination.



Ricci v DeStefano FACTS

- New Haven, Connecticut fire department administered civil service tests for applicants for positions as captain and lieutenant.
- Examination resulted in disproportionately higher scores for white applicants than for minority applicants.
- Department decided not to implement the exam results for fear that doing so would put them in violation of Title VII.
- Therefore, positions remained unfilled.
- Group of white and Hispanic applicants sued claiming a violation of Title VII and of the equal protection clause.



***Ricci* – Additional Facts**

- When the results showed that white candidates had outperformed minority candidates, a rancorous public debate ensued.
- Confronted with arguments both for and against certifying the test results — and threats of a lawsuit either way — the City threw out the results based on the statistical racial disparity.



Ricci ISSUE

- Issue: New Haven effectively discriminated against the white firefighters in order to prevent discrimination against the African-American applicants.
- The former, “disparate treatment,” and the latter, “disparate impact,” are both prohibited by federal discrimination laws.



Ricci DECISION

- Analysis:
 - Tests were objective; identified most qualified applicants for positions.
 - In order to protect minorities against disparate impact, the city had to demonstrate that there was something wrong with the test, which it failed to do.
- Held: the City's action in discarding the tests violated Title VII .



Ricci IMPACT & ACTION PLAN

- Have documented evidence of business necessity for any employment test. Must be job-related.
- Ensure objectivity of test (no disparate impact). If invalid, use equally-valid, less discriminatory alternative test.
- Don't cave to fear of litigation or public pressure; consult legal counsel re: potential liability.



Genetic Information Nondiscrimination Act

“GINA” (5/08)

- Protects Americans against discrimination based on their genetic information re: health insurance & employment.
- Had been debated in Congress for 13 years.
- Seeks to eliminate fear insurance and employment discrimination as a result of personalized medicine (health care utilizing genetic info).



GINA

- Provisions re: health coverage effective between 5/22/09 & 5/21/10
- Provisions re: employment effective 11/21/09
- Prohibits health insurers or health plan administrators from requesting or requiring genetic information of an individual or the individual's family members, or using it for decisions regarding coverage, rates, or preexisting conditions.
- Also prohibits most employers from using genetic information for hiring, firing, or promotion decisions, and for any decisions regarding terms of employment.



GINA

- Protects against adverse use of information generated from use of genetic services – i.e., genetic tests, results, tests/results of family members (family histories) and prohibits requesting genetic tests.
- Does not extend to life insurance, disability insurance and long-term care insurance.
- GINA does not mandate coverage for any particular test or treatment.
- Generally does not apply to employers with fewer than 15 employees.
- Manifestation of disease/disorder may still impact coverage/rates.
- Exception for research (requires informed consent)



MI Medical Marijuana Law

- Protects a “qualifying patient” from arrest or criminal conviction for possession/use of stated amounts of marijuana for medical purposes.
- To be protected, must carry “registry identification card” issued by MDCH.
- Explicitly excludes from protection → person or qualifying patient “under the influence” of marijuana at work.
- Employers not required to accommodate employee’s ingestion of marijuana at work or allow to be employee to be under the influence.



MI Medical Marijuana Law

Clearly-Defined Issues →

- Employers have right to insist on drug-free workplace;
- Right to prohibit possession/use at work or on premises;
- Remove from environment/premises employees who pose health/safety risk;
- Employer still controls the work environment.

MI Medical Marijuana Law

Gray Areas – Yet to be defined →

- What card looks like; How to verify validity of card / not counterfeit;
- Random drug testing → Effects of marijuana stay in system for weeks after use. Legal at-home use could result in positive test thus drug-free violation.
 - Tip → Prefer reasonable suspicion testing; document suspicious conduct and behaviors.



MI Medical Marijuana Law

- Gray Areas – Yet to be defined** →
- What is “under the influence”?
 - Not defined in MMML; no test to determine exactly when marijuana ingested.
 - Stick to observable/documentated behaviors and note risks.
 - ELCRA & ADA & MPDCRA conflicts → laws require disability accommodation
 - BUT MMML specifically excludes accommodation for use of marijuana in workplace.



MI Medical Marijuana Law

FYI: Other states [# qualified very small] →

- Oregon: courts favor employees
- California: courts favor employers

Guideline → Treat card-carrying patient (only) as treat other employees taking prescription medication; but cannot allow use or possession on company premises.

Unsafe/risky conduct never acceptable

Employee Free Choice Act

- Eliminate secret ballot vote. Simple majority of signed authorization cards requires union recognition.
- First Contract Mediation
 - Negotiation required to begin within 10 days of recognition/union demand.
 - Removes employer's "last best offer." Under EFCA:
 - If no contract within 90 days, parties mediate.
 - If no contract within next 30 days, arbitrator decides first contract terms, binding for 2 years.
- Harsher penalties on employers for wrongful acts against employee organizers – injunction if only "reasonable cause for belief of wrongdoing", 3x back pay & \$20K per violation.



Pending Legislation

- **Paycheck Fairness Act** → Amend FLSA to provide new remedies, including class actions, for victims of gender-based wage discrimination.
- **Employment Non-Discrimination Act (ENDA)** → protection from discrimination based on actual/perceived sexual orientation or association
- **Healthy Families Act** → E'r with 15+ e'ees required to give up to 7 days paid sick time.



Pending Legislation

- **Alert Laid Off Employees In Reasonable Time Act** → Amends WARN by increasing penalties
- **Family Friendly Workplace Act** → Would allow comp time for private sector employees; Employee's choice of receiving pay or comp time off for working overtime.



Hot Topics: Email Liability

- Union solicitations & campaigns
 - Policy → commercial solicitations prohibited; non-commercial OK
- Means to harass, discriminate, & defame
- May evidence employer's tolerance of hostile work environment
- “Smoking gun” evidence of wrong-doing
- Evidence of modification of at-will employment relationship



Best Practice Tip

- **Policy language** → All conduct and communication shall be professional and respectful when:
 - On company time
 - On company premises
 - Using company equipment
- **Applies to:** electronic communications / use of internet, etc.



Hot Topics

“Blackberry Ruling” fear re: FLSA

- Fear: employees claiming overtime for the hours they've spent clicking away on their Blackberrys.
- Why it's possible: If the employee says, 'Lets take a look at my Blackberry,' you now have a record. If it's a text message, or a Wi-Fi at Starbucks--if they're nonexempt and they're off the clock, that's a problem for employers.
- Prevention tip: Policy re: use of electronic devices off-work



Hot Topics

- Religious Discrimination/Accommodation resources available to employers from EEOC (website)
- “Workplace Bullying” legal claims – subtle, persistent, and often non-discriminatory harassment of co-workers



Hot Topics

- Recruiting from Linked In, Twitter
 - Disparate Impact discrimination liability
 - Populations are limited and homogenous
 - OFCCP record-keeping issues
- Reference checking on social networking sites
 - Facebook, My Space
 - Discrimination liability for applicants' protected traits
 - Business necessity to know that info?



Hot Topics

- Can employee lose job for posting on Twitter, Facebook, etc.?
 - Yes (should have policy prohibiting)
 - Exceptions: 1) union activities;
2) pre-existing policies/contracts;
3) whistleblowing/protected activities
 - 1st Amendment rights only if government employer.



Hot Topics

- “Fit” interviews – using workplace values to measure “fit” with a company
 - Be careful to distinguish between non-discriminatory workplace values and “just like me” protected traits.
 - Identify company values; translate to written interview questions



Q & A

and

Thank You!

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