OREGON
CIVIL RIGHTS
NEWSLETTER

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Change We Can Count On: Civil Rights Developments in the New Administration

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Only weeks into his term of office, President Obama has already implemented substantial changes in legislation and policy related to civil rights, and his administration has signaled that more changes are on the way. Also, several significant changes to civil rights law made during the Bush administration have taken effect or will take effect this year. The 111th Congress looks to be charting an ambitious legislative agenda for the 2009–2010 session that is sure to further affect civil rights law. This article provides an overview of recent developments and some that are on the horizon.

Guantanamo to Close; Torture Banned

Proclaiming that the war on terror could not continue with a "false choice between our safety and our ideals," President Obama signed an executive order on January 22, 2009, the second day of his presidency, ordering the closure of Guantanamo Bay prison within one year and also banning torture. He further ordered that all CIA "secret" prisons abroad be shut down, and he commissioned a task force to determine what to do with 245 remaining Guantanamo detainees. He directed that they be treated, going forward, under the terms of the Geneva Conventions.

Funding Ban Lifted for Abortion Groups Abroad

On January 23, 2009, reversing the prior administration's policy, President Obama signed an executive order that lifted restrictions on U.S. government funding for groups that provide abortion services or counseling abroad. Referred to by some as the "global gag rule," the ban prohibited the government from providing funds for family planning services to clinics or groups in other countries, even if the funds for such activities came from nongovernment sources. The ban was first implemented during the Reagan administration in 1984, rescinded during the Clinton administration in 1993, and reinstated by George W. Bush in 2001.

"Don't Ask, Don't Tell" Policy to End

President Obama's press secretary, Robert Gibbs, confirmed on January 14, 2009, that the new administration will move to repeal the "don't ask, don't tell" policy on gays in the U.S. Armed Forces (Public Law 103-160, 10 U.S.C. § 654). Existing law prohibits any gay or bisexual person from disclosing his or her sexual orientation or speaking about any gay relationships while serving in the U.S. military. In November 2008, Obama advisers announced that the repeal of "don't ask, don't tell" may be delayed until 2010 to allow the president time to confer with the Joint Chiefs of Staff and Pentagon officials to reach a consensus and then present legislation to Congress.

The Ledbetter Fair Pay Act

The first piece of legislation signed by President Obama, The Lilly Ledbetter Fair Pay Act (H.R. 11 and S. 181) overturns a 2007 U.S. Supreme Court decision and resets the statute of limitations clock for pay discrimination claims to run from the date of any discriminatory paycheck.

In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), the Supreme Court held in a 5–4 decision that the 180-day statute of limitations period for filing a claim with the Equal Employment Opportunity Commission begins with the original discriminatory decision about an employee's compensation, rather than at the date of the employee's most recent paycheck. (In "deferral" states like Oregon that have a fair employment agency, the statute of limitations period for filing a claim with the EEOC is 300 days.)

Under the Ledbetter Act, plaintiffs who do not immediately discover discrimination with regard to their pay level are more likely to be able to proceed with their claims, since a new harm is deemed to occur each time wages, benefits, or other forms of compensation are paid, resulting in whole or in part from a discriminatory

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Supreme Court Update

Kyle Busse
Busse & Hunt

Jennifer Nelson
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Decided

***Arizona v. Johnson*, No. 07-1122 (Jan. 26, 2009)**

The U.S. Supreme Court unanimously reversed the Arizona Court of Appeals in this case, holding that an officer may conduct a pat-down search of a passenger during a traffic stop when the officer suspects that the passenger is armed but has no reason to suspect that a crime has been committed. Here, the respondent passenger was asked to step out of a car that had been pulled over for a traffic violation. After questioning the respondent about potential gang activity, the officer conducted a pat-down search and found a handgun, for which the respondent was arrested.

The Arizona Court of Appeals suppressed the gun, finding that the search was not incident to the traffic stop once the officer began questioning the respondent about his gang affiliation. The Supreme Court reversed, holding that the officer's questions did not affect the nature of the stop and that the Constitution does not require an officer to give a passenger an opportunity to depart before ensuring that she is not permitting an armed person to get behind her.

***Bartlett v. Strickland*, No. 07-689 (March 9, 2009)**

In a 5–4 decision, the U.S. Supreme Court affirmed the North Carolina Supreme Court's holding that a minority group must constitute a "controlling majority," or actual majority, in order to trigger the districting requirements of Section 2 of the Voting Rights Act. In 2003, the North Carolina General Assembly split the state's 18th District in order to create one district with a 39% African American population, enabling voters to elect a black representative in the past two elections. Pender County challenged the action, and state officials defended on the ground that the split was required to comply with the Voting Rights Act's mandate that a state not act in a way that impairs or dilutes, on account of race or color, a citizen's opportunity to participate in the political process and elect representatives of his or her choice.

The North Carolina Supreme Court disagreed, finding that the Voting Rights Act does not require a state to protect a racial minority group's voting power if it constitutes less than 50% of the voting population of a proposed district. The U.S. Supreme Court affirmed, noting that "[n]othing in Section 2 grants special protection to a minority group's right to form political coalitions."

***Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, No. 06-1595 (Jan. 26, 2009)**

The Supreme Court unanimously reversed the Sixth Circuit, holding that the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 protects an employee who speaks out against discrimination not on her own initiative, but in answering questions during an employer's internal investigation. The petitioner was questioned by the respondent as part of an internal investigation into rumors of sexual harassment. In response, she noted that the target of the investigation had sexually harassed her. She was terminated shortly thereafter and subsequently filed suit under Title VII.

The Sixth Circuit affirmed the trial court's grant of summary judgment to the respondent, reasoning that the petitioner had not actively opposed the harassment and was, therefore, unprotected under the statute. The Supreme Court reversed, finding that Title VII's protections extend to those who have taken no action at all to advance a position beyond simply disclosing it.

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Recycled/Recyclable

For Employers and Employees: A Guide to Our Economic Downturn

Christina Thacker
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The latest available numbers from the Oregon Employment Department show that Oregon's seasonally adjusted unemployment rate rose to 9.9% as of the end of January, which was 2.3% above the national rate. Although this news is disheartening, attorneys and civil rights advocates can help ensure that workers and employers are complying with the law and accessing available benefits under the law in times of layoffs and downsizing.

One of the least appealing aspects of the employment relationship for both sides—employee and employer—is a termination, even if the termination is not for cause and is necessary only because of a lack of work or difficult economic times. Individual employees are often suspicious about why they were selected for layoff, and employers are often wary of employees raising unfounded claims that they were selected because of their membership in some protected class, because, for example, they recently suffered an on-the-job injury, recently took protected medical leave, or have a disability.

If the workplace is unionized or public, employees will generally have greater protections from terminations, but all employers should nevertheless consider the following guiding principles.

Selecting whom to lay off

After deciding that a layoff is indeed necessary, one of the most difficult decisions for employers is how to select which employees to lay off. Employers must put criteria in writing to guide all the managers who will be applying them and selecting employees to be laid off. Potential criteria could include seniority, performance reviews, versatility (particularly in a smaller workforce and if the remaining employees will have to perform multiple functions), closure of a department or production line, elimination or consolidation of specific jobs, the possibility of subcontracting, and relative ability.

Generally an employer will want to keep its best performers and most versatile employees in order to accomplish the same level of work with fewer people and be in the best position to compete and achieve economic recovery. Offsetting those criteria may be loyalty to long-term employees or employees with particularly important skills.

In determining whom to lay off, employers should also consider contractual limitations, such as individual employment agreements; collective bargaining agreements; quasi-contracts in the form of employee handbooks, personnel policy manuals, or bulletins; and any other oral or written promises to employees about the longevity of the employment relationship.

After the criteria discussed above have been determined, employers should select the functions and positions to be eliminated, without putting in the names of the employees holding those positions, to ensure that impermissible criteria (such as, for example, age, sex, race, and occupational injuries) are not being considered. Then insert the names of employees in order to apply the factors selected above (such as, for example, versatility, seniority, and performance).

Performance reviews can certainly play a role in these determinations, but employers are wise to carefully consider existing performance reviews rather than creating new ones to justify selection decisions. Selecting an employee for a layoff based on a newly created performance review might later be evidence of pretext if the employer does not give prior performance reviews adequate consideration.

Employees challenging a layoff on equal employment opportunity (EEO) grounds gain an advantage if the former employer has not kept adequate records. By preparing and retaining documents, however, employers have much more to gain—for later use in legal proceedings. Employers should create documentation throughout the layoff process that is "suitable for framing," including specific reasons why selections were made. Additionally, if there is disagreement between the human resources professionals and the managers making the selections, documents should focus on facts rather than opinions, to decrease the possibility of disagreements within the company.

In addition to the protected classes under EEO law, employees who have taken leaves of absence should be given special consideration in a layoff context. For example, employees who are on military leave may have a right to return to their positions or be entitled to transfer rights. Employees who have suffered on-the-job injuries and have been on leave as a result may have certain reinstatement and reemployment rights. Employees on pregnancy, parental, or family medical leave may have the right to return to their positions or, if a former position has been eliminated, to an alternate position.

Giving employees notice

The Worker Adjustment and Retraining Notification (WARN) Act generally applies to employers with 100 or more employees and imposes certain requirements on those employers when closing a plant or instituting a "mass" layoff. The numbers that determine "mass" are met under the following circumstances, during a 90-day rolling aggregate period: (1) when 50 or more employees are being laid off from an operating unit, department, production line, or facility; (2) when 50 to 499 employees are laid off and they

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constitute 33% or more of a single site; or (3) when 500 or more employees are laid off at a single site. Under these circumstances, employees (and unions and certain government agencies) are entitled to 60 days' advance notice before the layoff.

There are, however, certain exceptions under the WARN Act in which that notice is not required. Employees and employers should both be aware of these exceptions. Generally, the notice is not required for certain transfer offers or certain seasonal and temporary employees, or in labor disputes, limited unforeseeable circumstances, and certain "faltering business" situations.

Bargaining with a union

If a layoff includes unionized employees, the selections and benefits must satisfy the terms of the applicable collective bargaining agreement. Additional obligations are imposed by the National Labor Relations Act. If the layoffs are part of a plant or facility closure, the employer must notify the union at a reasonable time in advance of the closure to have an opportunity for "meaningful" bargaining. Bargaining will always be required over the "effects" of a closure, but an employer will normally not be required to bargain over the decision to close, except in limited circumstances, such as when the work is being transferred based in part on labor costs.

The employer and the union may agree to provide employees with benefits in excess of those provided in the collective bargaining agreement, but they are not required to do so. They are required to bargain in good faith.

Offering employees packages as part of layoff

Employers may be able to offer one or more types of benefits or services to laid off employees, depending on the employer's size and resources. For example, outplacement services, either on a group or individual basis, may help give employees a positive start. Other examples include bridged pension vesting, the option to purchase a company car or computer at a low price, extended health or life insurance coverage, and severance pay.

If the employer provides severance pay, a general release of claims against the employer should be a condition of that payment. From both the employee and employer perspectives, such agreements must meet certain basic requirements, including some payment in addition to all wages and benefits legally owed; a list of which claims the employee is releasing; and if the employee is aged 40 or over, specific language regarding protections provided under the Older Worker Benefits Protection Act.

Severance agreements can be very useful when an employer suspects that a terminated employee may file suit. An employer may find that a severance payment is justified to eliminate the disruption and significant cost of litigation if the employee sues—and the severance amount does not need to be substantial to support the release. Depending on the circumstances, providing an employee with the equivalent of two to four weeks of his or her normal compensation amount is often enough to convince the employee to waive any claims against the employer—and a small price to pay to avoid litigation in a risky situation.

Other elements common to severance agreements and releases include provisions regarding taxes, attorney fees, deductions, reemployment, references, and the handling of disputes.

Paying wages and benefits

Employers must follow strict timelines in providing a terminated employee with his or her final paycheck. When an employee is terminated as part of a layoff, the employee is entitled to receive all wages owed on the business day following the termination. Any outstanding benefits accrued in benefits banks, such as accrued or pro rata vacation pay, sick leave, floating holidays, regular holidays, bonuses, or awards programs, must be included in the final paycheck. But employer policies may affect whether certain benefits are "owed." For example, an employer's written policy that denies pro rata vacation pay to employees upon termination will be enforced.

Any outstanding benefits accrued in benefits banks, such as accrued or pro rata vacation pay, sick leave, floating holidays, regular holidays, bonuses, or awards programs, must be included in the final paycheck.

The penalties against employers for late payment of wages are severe, so documenting timely payment of final wages is crucial. Documentation can include, for example, an employee's written acknowledgement of receipt, or a signed delivery receipt for hand delivery or overnight mail.

New federal legislation also affects layoffs and benefits. The recently passed federal stimulus package contains provisions regarding COBRA benefits that entitle employees to receive (and require employers to pay) subsidies for health insurance premiums for workers laid off between September 1, 2008, and December 31, 2009. Additionally, President Obama signed a bill in February reauthorizing the Children's Health Insurance Program, extending benefits that employees and their dependents may be eligible for, and imposing new notice and disclosure requirements on employers, along with penalties for failure to comply.

Considering alternatives

Lastly, before an employer makes the decision to lay off any employee, alternatives should be considered.

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Recent Decisions

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Ninth Circuit Court of Appeals

Ahlmeyer v. Nevada System of Higher Education, 2009 WL 385875, — F.3d — (9th Cir. 2009)

The Ninth Circuit has joined three other circuits in holding that the ADEA is the exclusive remedy for age discrimination in employment claims brought under federal law. An age claim may not be brought for an alleged violation of § 1983 of the Civil Rights Act of 1871.

Eng v. Cooley, 552 F.3d 1062 (9th Cir. 2009)

This case involved a public employee's First Amendment claim against a municipality and its officers. The plaintiff, a deputy district attorney in Los Angeles, alleged that he was passed over for advancement, suspended from duty on trumped-up sexual harassment charges, and ultimately demoted after he and his privately retained attorney made comments to the *Los Angeles Times* suggesting that an investigation into possible criminal charges relating to a school construction project was without merit. The plaintiff also complained publicly about another deputy district attorney's decision to leak false information about the project to the Internal Revenue Service.

The increasingly complex law governing public employee free speech claims requires the plaintiff to show five discrete elements: (1) his speech was protected because it related to a matter of public concern, (2) he conducted his speech in his capacity as a private citizen, (3) his demotion and the failure to promote were motivated by his speech, (4) his interest in free speech outweighed the district attorney's office's interest in regulating his speech, and (5) the employer would not have taken the same action against him without the protected speech.

The Ninth Circuit held that the plaintiff presented sufficient evidence to proceed with his claim. The speech discussed a matter of public concern because the school construction scandal had been a significant issue in the most recent election. Moreover, although the plaintiff had been assigned to work on the case, the court determined that a jury might conclude that his statements to the *Los Angeles Times* were not part of his job. Finally, there were significant factual issues about whether the plaintiff's public statements precipitated the adverse employment action.

U.S. District Court for the District of Oregon

Distad v. Marion County School District 24J, 2008 WL 4838845 (D. Or. 2008)

The school district hired the plaintiff, a devout Christian, as an instructional assistant in August 2005. Because of his religious beliefs, the plaintiff became highly offended when a group of female co-workers (including the classroom teacher) began a practice of telling sexually explicit jokes in his presence. The co-workers also left sexually explicit email messages and cartoons in areas where they knew that the plaintiff commonly read his Bible.

On several occasions the plaintiff requested that they refrain from such behavior. Despite these requests, and despite instructions from the plaintiff's supervisor, the problem continued. The plaintiff ultimately left the school district when he became convinced that the situation would not improve, then brought statutory claims for hostile work environment and discrimination (religion and sex), as well as an emotional distress claim.

The court granted summary judgment for the school district on all claims. The court concluded that the conduct the plaintiff alleged, while perhaps offensive, was not sufficiently severe or pervasive to support a hostile work environment claim or an emotional distress claim. Likewise, the co-worker's conduct was not so "intolerable" that the plaintiff was constructively discharged. Consequently, the plaintiff could not show that he was subject to adverse employment action based on his religion or sex, as is required of a discrimination plaintiff.

Oregon Court of Appeals

Rushing v. SAIF Corp., 223 Or. App. 665 (2008)

This case involved the State Accident Insurance Fund (SAIF), Oregon's state-sponsored workers' compensation insurance program. SAIF offered the plaintiff, a longtime state employee, a position as a loss control consultant in its Roseburg office. SAIF, however, rescinded the offer six weeks later, after the plaintiff failed to respond to numerous requests for information about his starting date. Although the plaintiff had, in fact, submitted a letter of resignation the same day that SAIF rescinded its offer, he nonetheless sued for breach of employment contract and, because SAIF is a government agency subject to federal constitutional restrictions, for denial of due process under the Fourteenth Amendment.

Affirming the circuit court, the Oregon Court of Appeals dismissed the plaintiff's claims on summary judgment after determining that he was an employee at-will. Although SAIF's employment policies made clear that employees who achieve "regular status" could be terminated only with notice and a proper hearing, the plaintiff had not worked long enough to be included in "regular status." Because his employment was at-will, plaintiff had neither a contractual right to his job nor a property interest protected under the due process clause.

Funkhouser v. Wells Fargo Corp., 224 Or. App. 308 (2008)

At the time of a 1998 merger between Wells Fargo and Norwest

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Corporation, the plaintiffs were employees of Wells Fargo with more than 20 years of service and approximately 150 days of accumulated sick leave. After the merger, however, Wells Fargo announced that it would implement an entirely new benefits policy that replaced the previous policy and eliminated their accumulated leave.

The plaintiffs sued Wells Fargo for breach of contract. The Oregon Court of Appeals awarded summary judgment to Wells Fargo. Under Oregon law, an employee has a contractual right to benefits if the employer offers them and the employee commences or continues employment. The employer may modify the benefits prospectively, but may not revoke benefits in which the employee has a vested right. The court found that the plaintiffs did not have a vested right to the accumulated sick leave because their entitlement to it terminated when the original Wells Fargo benefit plan ended.

***Schoen v. Freightliner LLC*, 224 Or. App. 613 (2008)**

The plaintiff suffered a workplace shoulder injury and was placed on light duty with Freightliner's occupational health nurse for four months. The plaintiff alleged that during that time the nursing staff repeatedly called her names, including "lazy bitch," "Ms. Thing," and "worthless." In addition, nursing staff assigned the plaintiff to tasks that involved moving heavy boxes, despite her medical restrictions. The staff also sent plaintiff off premises to purchase lunch for them, which violated company rules, and then did not reimburse the plaintiff for her expenses. The plaintiff, who ultimately sought a transfer to a different light-duty job, alleged that the treatment was so severe that she required psychiatric counseling.

The plaintiff sued Freightliner for worker's compensation discrimination and emotional distress. The jury found for Freightliner on the discrimination claim, but awarded plaintiff $250,000 in damages for her emotional distress claim. The Oregon Court of Appeals upheld the jury's verdict. To prove an emotional distress claim, a plaintiff must show that the defendant engaged in outrageous conduct that it knew or should have known would cause severe emotional distress. The court concluded that, given the plaintiff's status as an injured worker and the repetitive nature of the nursing staff's attacks, Freightliner's conduct was sufficiently outrageous to prove an emotional distress claim.

***Handam v. Wilsonville Holiday Partners LLC*, 2009 WL 188148, —Or. App.— (2009)**

The plaintiff, a hotel banquet hall employee, sued Wilsonville Holiday for wrongful discharge in violation of public policy, alleging that it terminated him for reporting to his supervisors that his co-workers violated Oregon Liquor Control Commission (OLCC) rules. Although Oregon follows the usual at-will employment rule, there is an exception when an at-will employee is discharged for fulfilling an important societal obligation. In most instances, the public policy exception protects only conduct that a statute or rule clearly describes as socially important. Reversing the circuit court and overturning a jury verdict in the plaintiff's favor, the Oregon Court of Appeals awarded a directed verdict to Wilsonville Holiday. The court reasoned that while OLCC rules reflect a public policy supporting the responsible consumption of alcoholic beverages, they say nothing about reporting co-workers' alleged violations. Accordingly, they cannot support a wrongful discharge claim. ✦

Amy Angel and Rick Liebman, of Barran Liebman LLP, represent employers in labor and employment law.

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A GUIDE TO OUR ECONOMIC DOWNTURN

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Layoffs, particularly in current economic conditions, may be necessary for a business to survive, but layoffs also affect the remaining workers, so consideration of other alternatives should not be overlooked. Employers today are using creative solutions to prevent laying off employees, including the following:

- Imposing a brief shutdown, which might include requiring employees to use accrued vacation or personal time off
- Reducing all employees' hours across-the-board so that no jobs are eliminated
- Reducing pay, freezing pay increases, or putting a freeze on all overtime hours
- Offering "early retirement"
- Instituting a hiring freeze
- Allowing employees to share jobs

Whatever options are considered, employers and employees should carefully examine the consequences of implementing those options, including, for employers, wage and hour requirements and benefits administration and, for employees, the option's practical and financial effects.

Additionally, the Oregon Employment Department offers a work share program that seeks to help employers avoid layoffs and provides employees working reduced hours with some unemployment insurance benefits.

The best way for employers and employees to alleviate the stress of layoffs is to know each party's rights and obligations, and to work proactively and cooperatively to ensure that those rights are honored and those obligations are met. ✦

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The Overhauled Family and Medical Leave Act

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After nearly 15 years, countless lawsuits, and many frustrated employees and employers, the long-awaited changes to the regulations governing the Family and Medical Leave Act (FMLA) were finally implemented. Effective January 16, 2009, the new regulations (1) put "meat on the bones" of a recently created form of leave for employees to care for family members injured or ill as a result of military service; (2) implement a newly created form of leave for employees to handle non-medical exigencies arising out of a family member's military service; and (3) make minor tweaks, major adjustments, and wholesale changes to the original FMLA regulations.

While the new FMLA regulations require significant study for employers, employees, and their attorneys nationwide, Oregonians dealing with the law have additional homework. The Oregon Family Leave Act (OFLA) applies to virtually every employer and employee covered by FMLA. And while FMLA and OFLA are similar in that they generally provide 12 weeks of unpaid leave for certain health conditions, the two laws have always differed in the scope of their protections and procedural requirements. As a result of the new FMLA regulations, the similarities between the laws are fewer and the differences greater.

Although the changes are too great in number and detail to address in full, this article touches on some of the more significant changes, as well as certain distinctions between the new FMLA and current OFLA regulations.

Two New Forms of FMLA Military Leave

On January 28, 2008, former President Bush signed into law the National Defense Authorization Act for FY 2008 (NDAA), which created two new categories of FMLA leave for employees with family members serving in the military: (1) "Military Caregiver Leave" and (2) "Qualifying Exigency Leave." The Military Caregiver Leave provisions went into effect in 2008, but certain terms remained undefined until the enactment of the new FMLA regulations. Qualifying Exigency Leave, although established by the NDAA, did not take effect until the regulations were enacted in January 2009.

General Eligibility

To be eligible for either form of FMLA military leave, an employee must initially satisfy the basic FMLA eligibility criteria: the employee must (1) have been employed by the employer for at least 12 months; (2) work at least 1,250 hours in the 12 months preceding the leave; and (3) work at a facility where at least 50 employees are employed by the employer within 75 miles.

No OFLA Coverage

Notably, neither form of military leave is available under OFLA. Accordingly, an employee's annual 12 weeks of OFLA leave will not be affected by the use of either form of FMLA military leave. The lone exception is when the family member's condition also qualifies as a serious health condition under OFLA and the employee is needed to care for the family member.

Military Caregiver Leave

Purpose

Military Caregiver Leave provides an eligible employee up to 26 workweeks of leave to care for a "covered servicemember" with a "serious injury or illness." 29 U.S.C. § 2612(a)(3)–(4); 29 C.F.R. § 825.100(b).

Eligibility

In addition to satisfying general FMLA eligibility requirements, an employee must be the spouse, son or daughter, parent, or next of kin of a "covered servicemember." 29 C.F.R. § 825.127(a). Unlike the definition of "son or daughter" for traditional forms of FMLA leave—a child who either is under 18 years old or is "18 years of age or older and incapable of self-care because of a mental or physical disability" (29 U.S.C. § 2611(12))—no age limit is placed on a "son or daughter" for purposes of either form of military leave. 29 C.F.R. § 825.122(g)–(h).

The term "next of kin" is new to the FMLA and applies solely to Military Caregiver Leave. "Next of kin" generally means the nearest blood relative of the servicemember, other than the servicemember's spouse, parent, son, or daughter, and the regulations provide an order of priority. 29 C.F.R. § 825.122(d).

Notably, if the servicemember has not designated a next of kin and there are multiple family members with the same level of relationship (e.g., siblings), all are considered to be the next of kin and may take FMLA leave to provide care, either consecutively or simultaneously. For example, if a brother and sister ask their common employer for leave simultaneously to care for their sibling who is a covered servicemember, their employer would be required to provide the leave to both the brother and the sister. 29 C.F.R. § 825.122(d).

A "covered servicemember" is a current member of the Armed Forces, including a member of the National Guard or Reserves, undergoing certain medical treatments for a "serious injury or illness" suffered in the line of duty. 29 U.S.C. § 2611(16); 29 C.F.R. § 825.127(a). Notably, employees are not entitled to take this type of leave to care for former members of the Armed Forces, National Guard, or Reserves, or for servicemembers on the permanent disability retired list. 29 C.F.R. § 825.127(a).

The term "serious injury or illness" means an injury or illness incurred in the line of duty that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating. 29 U.S.C. § 2611(19).

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An eligible employee is entitled to 26 workweeks of leave to care for a covered servicemember in a "single 12-month period."

Amount of Leave

An eligible employee is entitled to 26 workweeks of leave to care for a covered servicemember in a "single 12-month period." Regardless of the method used by an employer to track other forms of FMLA leave (calendar year, rolling year, etc.), this "single 12-month period" begins on the first day the eligible employee takes covered leave and ends 12 months after that date. 29 C.F.R. § 825.127(c)(1).

If an employee does not use the full 26 weeks, the remaining portion is forfeited. *Id*. However, this leave entitlement is applied on a per-covered-servicemember, per-injury basis, so an eligible employee may take more than one period of 26 weeks to care for a *different* servicemember or to care for the same servicemember with a *subsequent* injury or illness. 29 C.F.R. § 825.127(c)(2). However, no more than 26 workweeks of leave may be taken within any "single 12-month period." *Id*.

Importantly, an employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reasons during the "single 12-month period" described above. This total includes not only military leave, but also any other form of FMLA-covered leave (e.g., the employee's own serious health condition). 29 C.F.R. § 825.127(c)(3). For example, during the "single 12-month period" an employee could take 16 weeks of Military Caregiver Leave and 10 weeks of FMLA leave to care for a newborn child, but would not be allowed the two additional weeks generally allowed to care for a newborn.

Finally, if leave qualifies as both Military Caregiver Leave and leave to care for a family member with a serious health condition, the employer must designate the leave as Military Caregiver Leave and may only count it as such. 29 C.F.R. § 825.127(c)(4). In Oregon, however, leave qualifying as a serious health condition under OFLA would reduce the employee's available OFLA leave. As a result, employers will need to carefully certify and track the use of Military Caregiver Leave independently of traditional FMLA and OFLA leave.

Certification

Employers may require employees seeking Military Caregiver Leave to provide a certification completed by a health care provider. The U.S. Department of Labor (DOL) has developed a form for this purpose (Form WH-385), which may be found at its website, www.dol.gov/esa/whd/fmla. Employers may use their own forms, but may not require information beyond that specified in the regulations.

Qualifying Exigency Leave

Purpose

An eligible employee is entitled to up to 12 weeks of unpaid leave for "qualifying exigencies" arising out of a "covered military member's" active duty status (or call to active duty) in the Armed Forces in support of a contingency operation. 29 U.S.C. § 2612(a)(1)(E); 29 C.F.R. § 825.126(a).

Eligibility

In addition to satisfying basic FMLA eligibility requirements, an eligible employee must be the spouse, son, daughter, or parent of a "covered military member" on active duty or call to active duty status. 29 C.F.R. § 825.112(5). "Covered military member" for the purposes of this provision includes only members of the National Guard or Reserves or certain retired members of the Regular Armed Forces or Reserves. 29 C.F.R. § 825.126(b). By definition, leave due to a qualifying exigency does not extend to family members of the Regular Armed Forces on active duty status. Additionally, the call to duty must generally be a federal, not a state, call to duty. 29 C.F.R. § 825.126(b)(2)(ii).

Qualified Exigencies

The NDAA includes no definition of "qualified exigency," but the regulations delineate eight categories (29 C.F.R. § 825.126(a)(1)–(8)):

1. Short-notice deployment: Up to seven days of leave to address issues that arise from the fact that a covered military member is notified of an impending call or order to active duty "seven or less calendar days prior to the date of deployment."
2. Military events and related activities: Leave to attend official military ceremonies, programs, or events related to active duty or call to active duty, or to attend certain family support or assistance programs and informational briefings.
3. Childcare and school activities: Leave to arrange for alternative childcare, to provide childcare on an urgent basis, to enroll in or transfer to a new school or daycare facility when necessary, or to attend meetings with staff at a school or daycare facility when necessary. Notably, this regulation does not allow for leave to provide day-to-day childcare, but only to arrange for such care or to provide care on an urgent basis.
4. Financial and legal arrangements: Leave to make or update various financial or legal arrangements, or to act as the covered military member's representative before a federal, state, or local agency in connection with military service benefits.
5. Counseling: Leave to attend counseling (by someone other than a health care provider) for the employee, for the covered military member, or for a child or dependent when necessary as a result of the active duty or call to active duty status.

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6. Rest and recuperation: Up to five days' leave to spend time with a covered military member who is on short-term R&R during a deployment.
7. Post-deployment activities: Leave to attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following termination of active duty. This also includes leave to address issues that arise from the death of a covered military member.
8. Additional activities: This catch-all category allows for protected leave for any other event that the employer and employee agree is a qualifying exigency.

Amount

Qualifying Exigency Leave is subject to the traditional 12-weeks per leave year, and is not in addition to any other form of leave. 29 C.F.R. § 825.200(a)(5).

Certification

Employers may require employees seeking Qualifying Exigency Leave to provide an appropriate certification each time leave is first taken for one of the qualifying exigencies. 29 C.F.R. § 825.309(b). The DOL has created a model form (Form WH-384), available on its website.

Changes to Traditional Forms of FMLA Leave

The original FMLA regulations were passed without the benefit of the nearly 15 years of experience that employers, employees, and the DOL have now had in dealing with the law. Not surprisingly, the old regulations failed to squarely address some of the more cumbersome and confusing aspects of the law. After a two-year process involving roughly 20,000 comments from interested parties, the new regulations revise or clarify some, but by no means all, of these issues. Some of the more notable changes are highlighted below.

Eligible Employees

The new regulations do not alter the requirement that an employee must have worked at least 12 months and 1,250 hours to be eligible for FMLA leave. They clarify, however, the effect a break in service may have on meeting the 12-month requirement, a determinative issue in several recent lawsuits.

In *Rucker v. Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006), for example, the First Circuit held that a car salesman's five-year break in employment for the same employer did not prevent him from counting his first stint of employment toward the 12-month eligibility requirement. Thus, after working fewer than 12 months during his most recent period of employment, the court held that his employer should have deemed him eligible for FMLA leave.

Based on *Rucker*, the DOL initially proposed to set five years as the absolute longest break in service that could count toward eligibility, but at the urging of the AFL-CIO and others, its final rule extended the length to seven years (or longer if the break resulted from military service).

Oregon Application

This new rule will have no impact on OFLA, as state law requires the employee to have worked 180 days immediately preceding a leave. Nevertheless, the rule must be considered by employers in designing record retention and disposal programs, as well as when determining eligibility for leave. Seemingly new employees may, in some cases, be eligible for FMLA leave as soon they work 1,250 hours as a result of prior terms of employment years earlier. To make this determination, of course, the employer must be able to precisely determine earlier dates of employment, which requires accurate recordkeeping.

Serious Health Condition

Although many had hoped that the DOL would narrow the definition of "serious health condition," the new regulations retain the original six individual definitions, but clarify the requirements applicable to several. First, the regulations clarify that a serious health condition involving "continuing treatment" requires treatment two or more times "within 30 days of the first day of incapacity," and that an "in-person" visit must occur within seven days of the start of the incapacity. 29 C.F.R. § 825.115(a).

Although many had hoped that the DOL would narrow the definition of "serious health condition," the new regulations retain the original six individual definitions, but clarify the requirements applicable to several.

With respect to a qualifying "chronic" serious health condition, the regulations define the requirement of "periodic visits to a health care provider" as requiring visits to a health care provider "at least twice a year." 29 C.F.R. § 825.115(c).

Oregon Application

Unfortunately for employers in Oregon, the OFLA definitions of "serious health condition" have not yet changed. As a result, Oregon employers must determine whether an employee's need for leave qualifies as a "serious health condition" under both FMLA and OFLA, and separately track an employee's leave under each law.

If, for example, an employee's condition rose to the level of a chronic serious health condition under OFLA, but not under FMLA because the employee saw a physician only once per year, an Oregon employer must grant the leave under OFLA, but should deny it under FMLA.

That said, the Oregon Bureau of Labor and Industries (BOLI) is in the midst of reviewing its OFLA regulations and has indicated that it may

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initiate a rulemaking process to resolve these inconsistencies.

Employer Notice Obligations

One of the DOL's stated goals in developing the new regulations was to improve communication between employers and employees. The new rules' notice requirements reflect that goal, setting out no fewer than four mandatory notices that employers must issue. The regulations also include model forms, available on the DOL's website.

General Notice

The regulations retain the prior requirement for a "General Notice" (Form WH-1420) to be posted in every workplace and incorporated into any employee handbook. If a covered employer does not maintain a handbook, the notice must be distributed to each employee upon hire, a change from the prior regulation, which required distribution only upon a request for leave. The regulations now also allow for electronic distribution of the notice. 29 C.F.R. § 825.300(a).

Eligibility Notice

The new regulations also require employers to issue a newly created "Eligibility Notice" (Part A of Form WH-381) within five days either of a request for leave or after learning that a leave may be FMLA-qualifying. This notice addresses an employee's general eligibility in terms of months and hours worked and size of worksite, not whether the reason for the leave constitutes a qualifying "serious health condition." If an employer determines that the employee is not eligible for FMLA leave (e.g., because he has worked fewer than 1,250 hours), it must identify at least one reason. 29 C.F.R. § 825.300(b).

Rights and Responsibilities Notice

At the same time an employer issues an Eligibility Notice to an employee, it must also issue a newly created "Rights and Responsibilities Notice" (Part B of Form WH-381), which must include a host of information, including medical certification obligations, rights to use paid leave, rights to maintain health care benefits, and potential liability for repayment of health insurance premiums, and it may also include employer-specific rules, such as periodic return to work reports. 29 C.F.R. § 825.300(c).

Designation Notice

Within five days after receiving sufficient information to determine whether the need for leave is FMLA-qualifying, the employer must issue the newly required "Designation Notice." The new regulation extends an employer's time to designate leave from two days under the former regulation to five days.

If the leave is qualifying, the Designation Notice must also address the amount of leave that will be counted against the employee's annual allotment, and whether the company will require a fitness-for-duty certification before the employee returns to work. If the fitness-for-duty certification is based on the "essential functions" of the employee's job, those functions must be outlined in the Designation Notice. 29 C.F.R. § 825.300(d).

Penalties

The DOL has overhauled the penalty for failing to provide a required notice. Under the former regulation, an employer could not count any leave against an employee's annual 12-week allotment until after it provided all required notices. The U.S. Supreme Court struck down that regulation in *Ragsdale v. Wolverine World Wide Inc.*, 535 U.S. 81 (2002), finding that it violated FMLA by allowing employees more than 12 weeks of leave.

The DOL's new regulation acknowledges *Ragsdale*, removes this penalty altogether, and provides that an employer is liable for failing to provide notice only to the extent that an employee suffers actual harm, such as lost compensation and benefits, other monetary losses, or loss of employment or a promotion. 29 C.F.R. § 825.300(e).

Oregon Application

These new FMLA notices are not regulated by OFLA, and obviously do not address issues arising solely under OFLA. Provided they are modified to include complete and accurate statements of Oregon law and do not conflict with FMLA, Oregon employers may amend the DOL's model forms for use in processing FMLA and OFLA requests, but should keep in mind that BOLI may amend its own regulations in the near future.

Employee Notice for Unforeseeable Leave

The new FMLA regulations modify a former regulation that allowed some employees to notify their employers of the need for unforeseeable FMLA leave up to two business days after an absence. Under the new regulations, employees must follow their employer's normal and customary notice requirements and call-in procedures, unless there are unusual circumstances. 29 C.F.R. § 825.303(a) and (c).

Oregon Application

Unlike FMLA's focus on an employer's normal and customary notice requirements and call-in procedures, OFLA provides a specific timetable—oral notice within 24 hours of the start of the leave and written notice within three days after returning to work. ORS 659A.165(3).

This statutory requirement cannot be amended by BOLI, and so Oregon employers must apply whichever standard is most beneficial to the employee to avoid running afoul of either law. Adoption of the Oregon timing standard as an employer policy will generally ensure compliance, provided it allows an exception for unusual circumstances as required by FMLA.

Questioning an Employee's Medical Certification

One troubling task for employers has been determining whether the

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reason for a particular absence constitutes a qualifying "serious health condition." While the law has always allowed an employer to require an employee to provide a medical certification from a health care provider, the old FMLA regulations prohibited an employer from following up directly with the employee's physician to authenticate or clarify the certification. Instead, even for these simple tasks, an employer was required to retain its own health care provider to interact with that of the employee.

The new regulations streamline this process, allowing an employer to directly contact an employee's health care provider to authenticate or to obtain a clarification of information required by a certification form (but not to obtain additional information). Because of privacy concerns, however, the new rule prohibits an employee's "direct supervisor" from making these inquiries, limiting this right to a "health care provider, a human resources professional, a leave administrator (including third-party administrators), or a management official." 29 C.F.R. § 825.307(a).

If an employer believes that a medical certification is incomplete or insufficient to enable it to make a "serious health condition" determination (as opposed to simply needing authentication or clarification), the new regulations require the employer to notify the employee in writing, and to specifically identify what additional information is needed to make the certification "complete and sufficient." The employer must then allow the employee seven calendar days to cure those deficiencies. 29 C.F.R. § 825.305(c).

Oregon Application

OFLA does *not* allow an employer to contact a health care provider directly. OAR 839-009-0260(5). Like the former FMLA regulation, OFLA allows an employer to directly contact the employee's physician solely through its own health care provider. Thus, unlike sections of FMLA and OFLA relating to qualification for leave, which may both be followed without running afoul of either law by tracking FMLA and OFLA leaves separately, use of this FMLA provision will necessarily violate OFLA, and the provision should not be used unless and until BOLI amends its OFLA regulations to comport with federal law.

With respect to notifying an employee about an incomplete or insufficient certification, OFLA is far less detailed than FMLA. OFLA requires a written notice of any requirement to provide medical verification and the failure to do so, but does not specifically regulate the cure of flawed certifications. BOLI is aware of these issues, and we will have to wait and see whether the agency adopts the federal law.

Denial of Perfect Attendance Bonuses

The DOL's former regulations prohibited an employer from denying a perfect attendance bonus to an employee whose only absences were protected by FMLA, although the regulations generally allowed the denial of bonuses predicated on meeting certain production goals. In response to comments from employers and employer organizations that the rule gave preferential treatment to employees taking FMLA-covered absences, the DOL revised the regulation.

The new 29 C.F.R. § 825.215(c)(2) provides that bonuses predicated on the achievement of specific goals, including "hours worked, products sold or perfect attendance," that are not met due to FMLA leave may be denied "unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave."

For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the bonus, then the employee who used paid vacation leave for a FMLA-protected purpose also must receive the payment. Similarly, if the employer denied a bonus to an employee who took unpaid leave for a non-FMLA purpose, it could deny the bonus to an employee who took unpaid FMLA leave.

Oregon Application

OFLA uses the former FMLA regulation. OAR 839-009-0320(4). Accordingly, unless and until BOLI amends this regulation, Oregon employers may *not* deny a perfect attendance bonus when the failure results from OFLA-protected leave.

Bottom Line: The Rules Just Got More Complicated

The good news: Both FMLA and OFLA are rule-driven laws, and provided someone does the proper homework, compliance with both can be achieved with limited risk. The bad news: FMLA and OFLA rules are complicated and continue to grow apart, and depending on what BOLI does with OFLA's regulations over the next year, that divide may or may not be closed by much.

Understanding the new FMLA regulations and their interaction with OFLA (both in its present and, most likely, future form) is essential to running a business in Oregon. As always, employers need to train their management and HR personnel in implementing these laws and quickly and properly responding to leave requests. And while the new FMLA regulations "settle in" and OFLA remains in a state of flux, Oregon's employers will be well served to carefully assess every request for leave, both substantively and procedurally, to avoid violating one or both laws. ✦

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decision or practice. The Ledbetter Act similarly restarts the clock when a retiree receives a retirement annuity. Because the legislation also allows any "person" to sue if affected by pay discrimination, an employee's family member or beneficiary of a pension or employer-provided life insurance plan may be able to bring claims, even after the employee's death.

President Obama signed the legislation on January 29, 2009. It amends Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, and modifies the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, to clarify that each discriminatory paycheck constitutes a separate compensation decision and practice under those laws. The Ledbetter Act takes effect as if enacted on May 28, 2007, and applies to all claims of pay discrimination under the laws mentioned above that are pending on or after that date.

The ADA Amendments Act

The ADA Amendments Act (S. 3406, Public Law 110-325), signed into law by President Bush on September 25, 2008, is the first legislative change to the Americans with Disabilities Act of 1990. The ADAAA took effect on January 1, 2009, overturning several U.S. Supreme Court decisions and substantially broadening the ADA's coverage. For details, see "Meet the New ADA: Massive Changes Ahead for Employment Lawyers," by Rich Meneghello, in the December 2008 issue of this newsletter.

FMLA Statutory Expansions, New Regulations, and Legislative Proposals

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for FY 2008, which amended the federal Family and Medical Leave Act for the first time since its enactment in 1993. Under the NDAA provisions, FMLA now allows eligible employees to take protected leave to care for a family member or next of kin wounded in military service, or for a "qualifying exigency" related to a family member's call to active duty.

The U.S. Department of Labor overhauled FMLA by adopting extensive final regulations that took effect on January 16, 2009. See "The Overhauled Family and Medical Leave Act," by Sean Driscoll, on page 7. The Oregon Bureau of Labor and Industries is now considering certain conforming changes to the Oregon Family Leave Act regulations to make administration of OFLA and FMLA less onerous for employers covered by both laws.

Further expansions to FMLA's coverage have been proposed in recent years, and Congress continues to consider them. One proposal (H.R. 7233) introduced in the House on September 29, 2008, would expand FMLA's provisions to cover employers of 25 or more employees, as opposed to the current 50-employee threshold. The same legislation, the Family and Medical Leave Enhancement Act, would further expand FMLA by allowing eligible employees of covered employers to take up to 24 hours of unpaid leave during any 12-month period to care for ill parents and grandparents, attend parent-teacher conferences, or take children, grandchildren, or other family members to medical appointments.

Another bill introduced last year, the Family Leave Insurance Act (H.R. 5873), would provide workers with 12 weeks of partially paid family and medical leave that would be funded by employer and employee contributions.

In recent legislative sessions, Senator Edward Kennedy has introduced the Healthy Families Act (S. 910, H.R. 1542), which would amend FMLA to require employers of 15 or more employees to provide seven days of paid sick leave annually that could be used by employees to care for themselves or ill family members, including a child, parent, spouse, or any other individual related by blood or a "close association" equivalent to a family relationship. Mandatory paid sick leave remains high on the agenda for the current Congress.

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Another bill introduced in the House on January 22, 2009, the Federal Employees Paid Parental Leave Act (H.R. 626), would allow federal workers four weeks of paid parental leave and would allow them to use any accumulated paid sick leave during their FMLA leave, regardless of their agency's sick-leave policy language or usual practice.

On February 9, 2009, the U.S. House of Representatives passed the Airline Flight Crew Family and Medical Leave Act (H.R. 912). If it becomes law, this legislation will make it easier for airline employees to qualify for FMLA leave in terms of hours-of-service requirements. A similar bill is expected to be introduced shortly in the Senate.

During his campaign, President Obama indicated his desire to encourage employers, through tax incentives and direct regulation, to assist working families with workplace flexibility programs such as telecommuting. He also advocated for expansion of FMLA, including coverage of employers with 25 or more workers, allowing paid FMLA leave, and regulating discriminatory practices against caregivers in the workplace.

The Stimulus Package—Health Coverage and Unemployment Expansions

On February 17, 2009, President Obama signed the American Recovery

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The ARRA subsidizes health insurance continuation and extends unemployment benefits for employees who have lost their jobs.

and Reinvestment Act of 2009 (H.R. 1), a $789 billion economic stimulus package that includes several provisions affecting employee rights. Most notably, the ARRA subsidizes health insurance continuation and extends unemployment benefits for employees who have lost their jobs.

The ARRA dedicates almost $20 billion to expanding rights for continuation of health insurance coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA). The new law provides eligible workers (certain employees involuntarily terminated between September 1, 2008, and December 31, 2009) a 65% subsidy toward their health care premium for up to nine months. Qualified employees who initially declined COBRA coverage have an additional 60 days after receiving notice to elect the subsidy and benefits continuation.

The ARRA expands unemployment compensation rights in a number of ways, including by dedicating funds to maintain for an additional nine-month period the previously enacted seven-week extension of unemployment benefits for eligible employees. The ARRA also increases by $25 the weekly benefit available to all individuals who receive regular unemployment benefits.

Mental Health and Substance Abuse Parity

On October 3, 2008, President Bush signed the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (S. 558, H.R. 1424). The legislation, which takes effect January 1, 2010, applies to all group health plans with 51 or more employees and broadly prohibits discrimination in mental health coverage. Although the law imposes no requirement as to what conditions must be covered, health insurance providers that offer mental health benefits are required to do so on the same terms as their medical coverage for physical conditions. The law prohibits group health plans from imposing higher copayments or deductibles for mental health conditions than for physical health problems.

Genetic Information Nondiscrimination Act

President Bush signed the Genetic Information Nondiscrimination Act of 2008 (H.R. 493) into law on May 21, 2008. GINA prohibits employers and health insurance companies from improperly using genetic information. The law specifically bans genetic discrimination in hiring, firing, job placement, and promotion, and prohibits denying coverage or charging higher premiums solely based on genetic testing results or predisposition to developing a disease. Under this law, "genetic information" is broadly defined to include not only genetic testing results but also information on an individual's family history of illnesses.

The Department of Labor will enforce GINA's provisions that govern health insurers, which take effect for plan years beginning after May 21, 2009. The EEOC will enforce the employment provisions of the law, which take effect in November 2009. Both agencies are required to issue regulations by May 2009. The EEOC published its proposed regulations in the *Federal Register* on March 2, 2009.

Labor-Friendly Executive Orders Relating to Federal Contractors

President Obama signed three executive orders on January 30, 2009, that reverse workforce policies established under the Bush administration, in an effort to strengthen rights of employees who work for federal contractors. One order revokes Executive Order 13201, which required federal contractors to post a "Beck Poster" that describes nonunion employee rights as to payment of union dues. Instead of the Beck Poster, federal contractors will be required to post a Department of Labor notice, to be developed by May 2009, advising employees of their rights under the NLRA.

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The second executive order revokes Executive Order 13204 and orders that businesses that enter into new federal government contracts must offer jobs to qualified employees of companies that held the same or similar government contracts. The third executive order prohibits federal contractors from using taxpayer money to influence their employees' choices on union representation.

President Obama signed a fourth order related to federal contractors on February 6, 2009, enabling the federal government to require project labor agreements for federal construction projects. Unions generally favor project labor agreements because they simplify bargaining and tend to result in higher wages and benefits so that union contractors are more likely to win the work.

The Employee Free Choice Act

President Obama was an original cosponsor of the Employee Free Choice Act (H.R. 800, S. 1041), also known as "Card Check." He pledged during his presidential campaign to make EFCA "the law of the land."

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CHANGE WE CAN COUNT ON CONTINUED FROM PAGE 13

Potentially the biggest change to labor law in over 70 years, EFCA would amend the National Labor Relations Act to facilitate workers' ability to organize unions. The law would eliminate the requirement for a secret ballot election monitored by the National Labor Relations Board.

The U.S. House of Representatives passed EFCA in 2007 by a vote of 241–185, but the legislation stalled in the Senate. It is very likely that Congress will vote on EFCA again during this legislative session.

Under existing labor law, if more than 30% of bargaining unit employees sign statements requesting union representation, a secret ballot election is held. Under EFCA's provisions, the NLRB must certify a union if a majority of bargaining unit employees sign cards indicating their selection of the union. The employer is then obligated to begin bargaining with the union. EFCA would also substantially increase penalties on employers for retaliating against employees based on union activity.

Employment Non-Discrimination Act

The Employment Non-Discrimination Act would amend Title VII of the Civil Rights Act of 1964 to make it unlawful under federal law to discriminate against employees on the basis of sexual orientation. In the last Congress, two versions of ENDA were introduced—H.R. 2015, which includes "gender identity" as a protected category, and H.R. 3685, which does not. The House of Representatives passed the latter version of the bill on November 7, 2007, by a 235–184 vote. President Obama pledged during his campaign and continues to assert on the official White House website that he will pass ENDA with protections for sexual orientation and gender identity and expression.

Additional Civil Rights Protections Related to Sexual Orientation

The Obama agenda includes expansion of federal "hate crimes" legislation (H.R. 256 and H.R. 262). The White House website pledges that "President Obama and Vice President Biden will strengthen federal hate crimes legislation, expand hate crimes protection by passing the Matthew Shepard Act, and reinvigorate enforcement at the Department of Justice's Criminal Section."

President Obama also supports full civil unions that provide same-sex couples rights and privileges equal to those of married couples. He supports repeal of the Defense of Marriage Act and enactment of legislation to extend federal legal rights and benefits currently provided on the basis of marital status to same-sex couples, including the right to assist a loved one in time of emergency, the right to equal health insurance and other employment benefits, and property rights.

The Obama administration also pledges to ensure adoption rights for all couples and individuals, regardless of sexual orientation.

Ending Racial Profiling

The Obama administration pledges to ban racial profiling by federal law enforcement agencies and to provide federal incentives to state and local police departments to prohibit the practice.

Easing Restrictions on Stem Cell Research

On March 9, 2009, President Obama signed an executive order that lifts restrictions on federal funds for embryonic stem cell research. President Bush signed an executive order in August 2001 barring federal research funds except on a very limited number of then-existing stem cell lines. President Obama's new order reverses the eight-year-old ban, allows funding for research on newer, healthier stem cell lines, and gives the National Institutes of Health 120 days to develop ethical guidelines for the research. ✦

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***Fitzgerald v. Barnstable School Committee*, No. 07-1125 (Jan. 21, 2009)**

The Supreme Court unanimously reversed the First Circuit in this case, holding that Title IX of the Education Amendments of 1972 does not preclude a 42 U.S.C. § 1983 action alleging unconstitutional gender discrimination. Here, petitioners, a kindergarten student and her parents, filed suit under Title IX and § 1983, alleging that the district's response to the student's complaints of sexual harassment by an older student was inadequate. The First Circuit affirmed the district court's dismissal of the § 1983 claim, holding that the remedy provided by Title IX precluded the use of § 1983 to advance constitutional claims. The Supreme Court reversed, finding that Congress did not intend Title IX to be the exclusive mechanism for addressing gender discrimination in schools, or to be a substitute for § 1983 claims as a means of enforcing students' constitutional rights.

***Herring v. United States*, No. 07-513 (Jan. 14, 2009)**

The Supreme Court affirmed the Eleventh Circuit in a 5–4 decision, holding that the exclusionary rule does not apply when police mistakes leading to an unlawful search are the result of isolated negligence rather than systemic error or reckless disregard of constitutional requirements. The petitioner was arrested based on a warrant from a neighboring county that had, unbeknownst to the arresting officers, been recalled months earlier. A search incident to the arrest yielded drugs and a gun, for which petitioner was later indicted. He moved to suppress the evidence, and his motion was denied.

The Court upheld the denial, reasoning that the exclusionary rule does not apply when good faith error leads to the discovery of evidence in a criminal case. The rule applies, rather, when police misconduct is sufficiently deliberate that exclusion can meaningfully deter it and the possible deterrent effect outweighs the cost to society of letting the defendant go free.

***Oregon v. Ice*, No. 07-901 (Jan. 14, 2009)**

The Supreme Court reversed the Oregon Supreme Court in this 5–4 decision, holding that the Sixth Amendment does not prohibit states from allowing judges, rather than juries, to find facts necessary for the imposition of consecutive sentences for multiple offenses. In so doing, the Court declined to extend the rule from *Apprendi v. New Jersey*, 530 U.S. 466 (2000)—that the Sixth Amendment requires the jury to determine, beyond a reasonable doubt, any fact that increases the maximum punishment for a particular crime—to instances in which a judge is empowered to impose consecutive sentences by state statute. The Court reasoned that juries have not traditionally held the power to impose consecutive sentences and that the states' sovereign authority over administration of their own criminal justice systems should not be eroded.

***Pleasant Grove City v. Summum*, No. 07-665 (Feb. 25, 2009)**

In this unanimous opinion, the Supreme Court reversed the Tenth Circuit and held that a city's placement of a permanent monument in a public park is a form of government speech and is not, therefore, subject to scrutiny under the free speech clause of the First Amendment. The petitioner city rejected the request of the respondent Summum, a religious organization, to erect a monument displaying the Seven Aphorisms of Summum. The respondent sued, asserting that the city had violated the free speech clause because it had accepted a Ten Commandments monument but rejected Summum's proposed monument.

The Court found that although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. It is, instead, a form of government speech to which the free speech clause does not apply. Establishment clause issues were neither raised nor briefed before the Court in this case.

***United States v. Hayes*, No. 07-608 (Feb. 24, 2009)**

In a 7–2 decision, the U.S. Supreme Court ruled that a federal law prohibiting firearm possession by anyone convicted of a "misdemeanor crime of domestic violence" also prohibits firearm possession by anyone convicted of "general battery" against a spouse. Randy Hayes pleaded guilty in 1994 to a misdemeanor battery offense involving his spouse. In 2004, police responded to a domestic violence call at Mr. Hayes's home, at which time they found a rifle. Mr. Hayes was convicted of firearm possession after having previously been convicted of domestic violence in violation of 18 U.S.C. §§ 922 (g)(9) and 924 (a)(2).

The Fourth Circuit reversed on the ground that the West Virginia battery law of which Mr. Hayes was originally convicted did not contain specific wording about a domestic relationship between the offender and the victim. The Supreme Court reversed, finding that while a domestic relationship must be established beyond a reasonable doubt in a § 922(g)(9) prosecution, it is not a necessary element of the predicate offense.

***Vermont v. Brillon*, No. 08-088 (March 9, 2009)**

The Supreme Court ruled 7–2 that delays caused by a defendant or his lawyer, whether court-appointed or not, do not ordinarily violate a defendant's constitutional right to a speedy trial. Assigned counsel, the Court held, is not ordinarily considered a state actor. The Court did leave the door open, however, to a challenge if the delay was caused by "a systemic breakdown in the public defender system."

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SUPREME COURT UPDATE CONTINUED FROM PAGE 15

***Ysursa v. Pocatello Education Association*, No. 07-869 (Feb. 24, 2009)**

The Supreme Court reversed the Ninth Circuit in this 7–2 decision, holding that a state's ban on political payroll deductions for state employees does not violate the First Amendment. The Court found that the Idaho Right to Work Act, which prohibits public employees from authorizing payroll deductions to fund union political activities, is not a violation of the unions' constitutional rights. The Court reasoned that the statute does not restrict the political speech of public employees, it simply bars them from enlisting the state in support of that speech. Idaho's stated justification for the ban, the interest in avoiding the reality or appearance of government favoritism or excessive entanglement with partisan politics, satisfied the rational basis analysis applied by the Court.

Certiorari Granted

***Gross v. FBL Financial Services*, No. 08-441 (Dec. 5, 2008)**

In this case from the Eighth Circuit, the Court will resolve a split among the circuits regarding whether a plaintiff in a non-Title VII suit must adduce direct evidence of discrimination in order to obtain a mixed-motive jury instruction. The petitioner in this ADEA case will argue that the Title VII standard of circumstantial evidence should be the standard for obtaining a mixed-motive instruction in non-Title VII cases as well.

***Maryland v. Shatzer*, No. 08-680 (Jan. 26, 2009)**

The Court agreed to hear this case out of the Court of Appeals of Maryland regarding whether a defendant's invocation of the right to counsel remains effective after the initial investigation is closed and subsequently reopened two years later due to the discovery of new evidence. The court of appeals held that when a defendant remains in custody and the subsequent interrogation involved the same matter as that which led to the original invocation of counsel, no break in custody should be recognized and the defendant's invocation remains valid.

***Ricci v. Destefano*, Nos. 07-1428 & 08-328 (Jan. 9, 2009)**

In this case from the Second Circuit, the Court will decide whether a municipality violated Title VII when it refused to certify a civil service exam after realizing that the exam had a disparate impact on African American and Hispanic examinees. The Second Circuit upheld summary judgment for the respondents, reasoning that their actions were protected because the city was trying to fulfill its obligations under Title VII by refusing to certify test results with a disproportionate racial impact. The petitioners, one Hispanic and 17 white test-takers, argue that the respondents' stated desire to comply with Title VII is a pretext for intentional discrimination against white candidates.

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Certiorari Denied

***Borden v. School District of the Township of East Brunswick*, No. 08-482 (March 2, 2009)**

The Court rejected an appeal from a high school football coach challenging a school policy prohibiting staff members from joining in student-led prayer. The Third Circuit pronounced the policy constitutional over Mr. Borden's protest that his desire to "take a knee" with his football players was a purely secular gesture.

***Brewer v. Nader*, No. 08-648 (March 9, 2009)**

The Supreme Court refused to review the Ninth Circuit's pronouncement that an Arizona law regulating how independent presidential candidates get on state ballots is invalid. Arizona's law provided for residency requirements for petition circulators and a June deadline for petition submission for independent candidates. Ralph Nader challenged the law on the ground that it interferes with free speech rights, and the Ninth Circuit agreed.

***City of New York v. Beretta*, No. 08-530 (March 9, 2009)**

The Court declined to review a decision from the Second Circuit that the Protection of Lawful Commerce in Arms Act protects gun manufacturers from lawsuits arising from accusations that manufacturers flood illicit markets with firearms. The law bans many suits against entities engaged in the firearms industry, with a limited exception when those entities are accused of knowingly violating state or federal statutes with regard to sales and marketing practices. ✦

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