

The Year In Labor & Employment Law, from A to Z

By Rich Meneghello (Portland, OR)

A

The **American Recovery and Reinvestment Act**, or **ARRA**, was a comprehensive piece of legislation designed to stimulate the economy during our “Great Recession.” For employers, the most significant aspect of the new law involved the continuation of health care coverage through COBRA for those involuntarily terminated since September 1, 2008, with employees paying 35% of their premiums and employers on the hook for the remaining 65%. Although set to expire on December 31, 2009, Congress is considering extending the benefit and raising the employer contribution to 75%. Stay tuned for developments in the early part of 2010.

B

President **Barack Obama** wasted no time making federal appointments that will impact labor and employment law for years to come. He selected Rep. Hilda Solis, a long-time advocate of progressive labor policies, as the head of the Department of Labor. The President also selected Judge Sonia Sotomayor as a Justice for the U.S. Supreme Court, providing relative youth and a shot of liberal energy to an aging and conservative Court. He also nominated candidates for over 30 federal judgeships in district and appellate courts across the country, with close to 100 vacancies that need to be filled, and an additional 22 vacancies to open up in 2010. These appointments will no doubt lead to more worker-friendly decisions from federal courts for years to come.

C

After President Obama was elected, most predicted that “**card check**” legislation was not far behind. The Employee Free Choice Act (EFCA) was the crown jewel of Big Labor’s legislative agenda. Fortunately for employers, partisan bickering and a faltering economy has distracted Congress and EFCA remains in a holding pattern as we end 2009. Employers shouldn’t celebrate yet – EFCA will no doubt reemerge in 2010, although many predict that a watered-down version will now pass (perhaps involving “quickie elections”).

D

Several states passed laws prohibiting cell phone use or texting while driving in 2009, believing that these **driving distractions** unnecessarily cause accidents. Seven states and the District of Columbia now ban hand-held cell phone usage while driving, while text messaging is now banned for drivers in 19 states. It’s a good bet that these numbers will increase in 2010.

E, F

The **EEOC** had a busy year in 2009, proposing new regulations for the Americans with Disabilities Act (ADA) that promise to expand the reach of the law even further. It hopes to finalize the new rules by January 2010. Another federal agency, the Department of Labor, published new



FMLA regulations that went into effect this year, leading to an ever-increasing administrative burden on employers. In 2010, we expect to see proponents of paid family leave continue to push for California-style FMLA benefits.

G

Employers will need to familiarize themselves with yet another acronym this year: **GINA**, or the Genetic Information Nondiscrimination Act, which went into effect in November and prohibits employers from acquiring or using genetic information about its employees. And employers need to add yet another poster to the crowded bulletin board in the break room, this time about employees’ genetic privacy rights.

H

Health care reform will continue to be the main focus for Congress into 2010, with most analysts predicting some form of legislation passing by the end of 2009 or early in 2010. It will likely lead to big changes to the way that Americans are insured, and most likely will impact employers. Some versions of proposed legislation include requirements that employers provide health insurance to all employees, others would create a tax on employer-sponsored high-end insurance plans. This will no doubt be a hot topic in the coming year.

I

Another area of law that had a roller coaster 2009 is **immigration** – after several years of waiting for the social security no-match rule to take effect, the Obama administration dropped the initiative altogether in September. Instead, the federal government has decided to step up audits and raids as a means to control illegal immigration in the workplace. The other big news was the requirement that all federal contractors use E-Verify, the online employment eligibility verification system.

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J, K

When **Johnny (and Jane) came marching home** in 2009, what should his (or her) employer have done? The federal government expanded the leave rights of military servicemembers and their families this past year by implementing new regulations that provide qualifying exigency leave and additional leave for those needing to care for injured military personnel. Most recently, in October 2009, Congress created somewhat of a **knotty situation** for employers by enacting additional changes to the leave provisions, further expanding the circumstances under which employees may take both qualifying exigency and military caregiver leave, and producing a thicket of confusing and complicated requirements.

L, M, N

Besides EFCA, there are plenty of other **labor initiatives** that could emerge from Congress this year: the expansion of FMLA, the Working Families Flexibility Act (the “Union of One” bill that would allow non-unionized employees to file grievances against employers), the Employment Non-Discrimination Act (ENDA) (expanding Title VII protections based on sexual orientation), the RESPECT Act (allowing managers to be part of a union), and the Patriot Employer Act (offering tax breaks to those companies that agree to union neutrality). Many predict there will be a scramble to push through many of these and other bills before the **midterm elections**, where some are already predicting a 1994-like reversal of fortunes for the GOP, which could stall out many Democratic initiatives.

Meanwhile, as the **NLRB** is reconstituted under President Obama’s direction, the agency seems poised to administratively accomplish many labor-friendly goals that might be more appropriate for lawmakers, stepping into the void left by a distracted Congress. Expect to see a very active year on the labor front in 2010.

O

One of the more active and aggressive government agencies in 2009 was **OSHA**, and it figures to remain busy in 2010. The agency has announced that it will step up enforcement actions in the coming months, and also expects to issue new safety standards for almost all areas of industry. The new administration has placed workplace safety on its priority list. That means you should do the same.

P

Employers across the country were actively addressing **pandemic preparations** for much of the past 6 months, and will continue to remain on high alert in 2010. Although the H1N1 scare did not cripple the workforce as some predicted, it did force all employers to reassess their approach to possible mass absenteeism.

Q

For years, most employers only saw **QWERTY** keyboards as a tool to help accomplish work. In 2009, employers began to realize that the computer could be both a beneficial resource and a source of problems with the rise of social networking websites such as MySpace, Facebook and Twitter. Catching up to the evolving legal landscape, employers began to determine when these websites could be mined for background information on applicants and employees, and reacted when they realized that some employees were inappropriately blogging about company matters. If you don’t have an effective social media policy in your handbook, you’re not ready for 2010.



R

2009 also saw the **reemergence of the sexual harassment claim**. When a celebrity like David Letterman is in the news for inappropriate workplace behavior, you can almost certainly predict a resulting spike in such claims across the country. The last year saw an increase in the number of lawsuits and discrimination charges alleging sexual harassment, with “textual harassment” (harassment by text message) being just the latest chapter in this sordid area of law.

S, T, U

The **Supreme Court** had an interesting year, only issuing a few decisions of any import in the area of labor and employment law. The most notable was the *Ricci v. DeStefano* reverse discrimination case involving Connecticut firefighters, which was a mixed bag for employers. One of the gains employers achieved before the Court – increasing the burden on age discrimination plaintiffs (*Gross v. FBL Financial*) – may soon be overturned by Congress in a manner similar to another recent case.

Lawmakers **turned the tables** on employers by taking a victory from last year’s term and passing a law reversing the victory, allowing pay discrimination claims to be resurrected well past the statute of limitations (the Lilly Ledbetter Act). We may also see arbitration victories of the recent past reversed by the Arbitration Fairness Act, which would curtail the use of these alternative agreements. The **upcoming docket** for the Supreme Court includes several traditional labor cases, arbitration cases, and a case dealing with the timeliness of Title VII claims.

V

The EEOC’s semiannual regulatory agenda was released in early December, and it offers a **veritable cornucopia** of ambitious new priorities to track in 2010. In this era of layoffs, the agency is increasingly focused on age discrimination claims and intends to issue revised guidance in this area starting in February. It also plans on finalizing ADA regulations in the first quarter of the year, and finalizing new GINA regulations by midyear.

W

As always, **wage and hour issues** impacted millions of employers, especially as some companies tried to cut corners and got burned by FLSA claims. Some employers tried to shave costs by transforming employees into independent contractors without realizing the disastrous legal consequences of doing so incorrectly, while others tried to squeeze off-the-clock work out of their employees.

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“It’s So Hard Admittin’ When It’s Quittin’ Time.”

By John McLachlan (San Francisco)

Mary Chapin Carpenter’s song sums up a lot of wisdom about life and it also conveys some important truths in the employee relations area.

One of the precepts everyone learned in Employee Relations 101 is that employee performance discussions should be documented because if they are not, memories of discussions can be blurred by the passage of time or by the quest for riches . . . or revenge. If it’s written down, it’s easier to prove what was really said. That is true, as far as it goes. But just writing something down usually isn’t enough – and how do you know when you need to write something down in the first place?

Why It Matters

99.5% of supervisors (this is our unofficial estimate) want to establish a positive and proactive relationship with their employees. Also, supervisors correctly believe that every performance problem does not need the sledge hammer treatment. Often an informal discussion is enough to let the employee know about a certain area of performance that needs improvement. “The Talk” with the employee corrects the problem and everyone is happy and none the worse for wear. We heartily approve of that approach. But what if the nudges aren’t working? What happens if the problem continues or gets worse?

While there is no bright line test to tell supervisors when to escalate counseling, supervisors seem to know instinctively that it is time to go to the next level. It’s about that tight feeling in the stomach and the slight feeling of dread when supervisors see that their verbal pointers are not having the intended effect. And it’s this Next Level that we’ll discuss in this article.

All too often as lawyers we’re faced with a situation where an employer wants to terminate an employee for sustained unacceptable performance which at first blush sounds pretty bad. But when we ask to see what warnings the employee has received, we hear about all the second, third, and fourth chances the employee has been given, and how the employee isn’t going to change so it’s time for termination. Now! All the second, third and fourth chances are not likely to be convincing to a jury who will learn from a plaintiff’s lawyer about how this hard-working employee with a clean record was let go for no reason.

The Fundamentals

For starters, when you go to that Next Level, it should be in writing. What you learned in Employee Relations 101 is correct. Writing is (or should be) clearer and less subject to change over time. But writing is only the beginning of the “more” that is required. The

writing needs to start with a clear description of the behavior that needs to be changed, or the rule that needs to be followed. This is an area where we see a number of problems. For one, it is important to remember that this is a performance counseling, not a performance review or appraisal. A performance review will cover a much broader spectrum of issues and should present a balanced view of the employee’s performance over a longer period of time. In it, you should discuss positive performance aspects as well as areas where improvement is needed.

That is not your objective in a counseling. Your objective is to give the employee clear notice that certain behaviors must change. And the counseling should not attempt to do more than that. Getting that said in a clear way is accomplishment enough. Save the good words for the performance appraisal. The counseling should be tightly focused on what needs to be improved. We have seen some intended warnings which, after we have reviewed them, seemed unclear whether the supervisor intended to compliment or warn the employee. Such warnings can be worse than no warnings at all in the hands of a skilled plaintiff’s lawyer who is suing you on behalf of your counseled employee.

There should also be an explanation of *how* the unacceptable behavior is impacting the employee’s job or the department. In other words, what exactly are the problems being caused by what you are trying to change. For example, “Your regular lateness puts an unfair load on your already busy co-workers who have to take care of your customers and still get their work finished on time.” “Your rudeness to and criticism of co-workers makes the department much less comfortable for everyone and impacts on our ability to serve our customers in a friendly and confident manner.”

We aren’t suggesting a sermon but only a brief description of how the behavior is impacting employees’ co-workers, customers, or their own jobs. The point here is that the counseling should be direct and clear about what is not working. Would a jury reading this a year from now be able to tell what you were concerned about and would they be likely to agree with you that this was a legitimate problem for you to raise with the employee?

A further aspect of the clarity necessary to a well-written counseling is a clear description of the “what-if.” This is frequently hard for supervisors but there needs to be an explanation of the next steps to be taken if the problem is not corrected. The purpose of counseling is to improve behavior, and certainly most counselings are given with the expectation that further steps will not be necessary. But we all know that sometimes further steps are necessary; and, when they are, you will be in a better position to demonstrate the basic fairness of your actions if those alternatives are clearly described ahead of time. After all, if performance improves, those further consequences will never matter anyway. And if performance does not improve and further disciplinary action is required, employees cannot say that they had no inkling that this was such a big problem.

Nor do we mean to imply that further discipline must always mean termination. The next steps will depend on the type of problem being addressed. There may be situations where any further behavior really will result in termination. If so, say it clearly. Perhaps the gravity of the situation will convince the employee to correct the behavior; and, if it does come to termination, you have already warned the employee of that outcome. Or there may be situations where something less than termination will be a logical consequence of further behavior shortcomings. One phrase which many find to be useful is the following: “Further violation of this rule (further performance shortcomings) will result in further disciplinary action up to and including termination.”

Realizing that the primary purpose of employee counseling is behavior modification, it’s frequently helpful to schedule follow up or

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X

After a few years of slow growth, 2009 witnessed the **xplosion** [sorry, "x" is tough] of new lawsuits filed against employers. No doubt the slumping economy and increased layoffs led to additional claims, as did the availability of new laws and the expansion of existing ones. Almost all signs point to this trend continuing in 2010, especially as job growth remains stagnant and out-of-work individuals seek rewards through litigation.

Y, Z

We've reached the end of the **year**, and perhaps one of the best things about 2009 is that it's over and we can all start fresh in 2010. Things can't get worse for companies, can they? We look forward to **zealously** tracking labor and employment developments in 2010 and will continue to provide practical solutions to your employment dilemmas.

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Real World HR

"It's So Hard Admittin' When It's Quittin' Time."

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review sessions to discuss an employee's progress in correcting the areas described in the counseling. Schedule these follow-up discussions at the time of the initial counseling. Document your views of employees' behavior in those follow-up sessions which will hopefully show an improving trend in performance.

The Payoff

All of these steps won't guarantee that a terminated employee will never sue your company. But carefully documented performance counselings will provide you with significant defenses and will make your company a less attractive target for a plaintiff's lawyer. Remember that plaintiffs lawyers like the best cases they can find simply because a good case simplifies their job of proving that you should pay them and their client a significant amount of money. On the other hand, if they interview your former employees and see carefully written counselings telling them what they were doing wrong and telling them what would happen if they continued doing it, much of the bloom is off that particular rose from the plaintiff's lawyer's perspective.

Finally, with carefully crafted counselings, if it does come to termination you can be comfortable that you have been fair to the departing employee and that you are doing the right thing for your company and co-workers.

With well-written counselings it won't be so hard admitting that it's quitting time.

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"ON THE LEFT IS THE MANSION OF A PLAINTIFF
IN A 'HOT-COFFEE-IN-THE-LAP' CASE..."