



INDIVIDUALS WANT INFORMATION on EMPLOYEE RELATIONS

the year of the employee

A 2010 GUIDE TO NEW EMPLOYMENT AND LABOR LAWS BY JEANINE CLINGENPEL

When it comes to employment law, 2010 is the year of the employee. From the first bill he signed into law, to leftward shifts in the law of employment law enforcement agencies, President Obama has left little doubt that employment rights are a top priority for his administration.

"The pendulum is definitely swinging to the left in a big way," says Kevin McCormick, an attorney with Whiteford, Taylor, Preston. "It's not uncommon for employment laws to move around a bit, but these are major shifts."

"With the new administration, a lot of the top leaders in agencies such as the Department of Labor and the Equal Employment Opportunity Commission (EEOC) have been replaced with individuals with more aggressive views, and more funding to increase the volume of enforcement actions," says Todd J. Horn, an attorney with Venable LLP. "So we are seeing more vigor in investigating employers for discrimination, which is also increasing lawsuits. And when the federal government sues you, they have a lot of firepower."

So what does this mean for local employers? SmartCEO asked employment law experts to weigh in on new and existing laws that CEOs should watch out for in 2010.

THE LAW: LILLY LEDBETTER FAIR PAY ACT OF 2009

What It Says: An amendment to the Civil Rights Act of 1964, this law states that the 180-day statute of limitations for filing an equal-pay lawsuit resets with each new discriminatory paycheck. Previously, plaintiffs could file suit 180 days after the first instance of discrimination. This was the first piece of legislation that President Obama signed into law on Jan. 29, 2009.

Why You Should Care: "This law will open the door for more employees to sue for pay discrimination," says Kennedy. "We are already starting to see increased activity, and previously used defenses are going to be out the window in light of the Fair Pay Act."

"Now, every paycheck starts the 180-day limitations again," says Horn. "The cases I'm seeing often involve stale decisions -- a promotion denial that was allegedly discriminatory 10 years ago. Since these decisions were made so long ago, documents may not exist, managers may have left the organization, memories fade. It is

really difficult to defend your rationale when the records and supervisors don't remember."

What You Can Do: In addition to enforcing fair-pay standards, document your compensation decisions.

THE LAW: AMERICANS WITH DISABILITIES ACT (ADA) AMENDMENTS ACT OF 2008

What It Says: The ADA, signed into law in 1990, is a wide-ranging law that prohibits discrimination based on disability. The amendments that take effect Jan. 1, 2009, are intended to give broader protections for disabled



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MEET THE EXPERTS

- CONNIE BERTRAM, partner, Employment & Labor, Cooley Godward Kronish LLP
- GREGORY D. GRANT, co-chair, Business and Employment Litigation, Shulman Rogers
- TODD J. HORN, partner, Labor & Employment, Venable LLP
- PAUL KENNEDY, co-chair, Unfair Competition and Trade Secrets, Littler Mendelson
- KEVIN C. MCCORMICK, Labor & Employment, Whiteford, Taylor, Preston, LLP
- JOHN REMY, managing partner, DC Region office, Jackson Lewis
- THOMAS I. SAWYER, group leader, Labor & Employment, Womble Carlyle Sandridge & Rice, PLLC



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broaden the definition of "disabled."

Why You Should Care: "We used to spend a lot of time asking, 'Are they disabled?' Now, we emphasize discovering if what are they asking for is reasonable or does it create a significant undue burden on the company," says Grant. "This is an area where these claims will increase. It will be difficult for employers who will be forced to deal with accommodations when they had not before. Imagine the tensions with the economic circumstances."

"What these changes do in Congress' mind is to move the inquiry into the accommodation field," says Horn. "The focus for employers is exploring if accommodations are available and engaging in an interactive process to find a solution to overcome an impairment."

"If an employee can show they have a stress disorder, for example, that will be sufficient under the ADA," says Sawyer. "One problem is you get an underperformer, the supervisor is getting on them, the employee sees a termination coming, so the employee gets a doctor's note saying, 'John has a stress disorder. It would be helpful if he did not have to work as hard or if he could be placed in a different job.'"

What You Can Do: "If you have not updated your handbook in the past two years, your policies regarding ADA are probably in noncompliance. It is important to keep up to date," says Bertram.

THE LAW: THE EMPLOYEE FREE CHOICE ACT (EFCA OR CARD CHECK)

What It Says: In order for a workplace to organize under current labor law, if at least 30 percent of the workers sign cards, the employer may request that the National Labor Relations Board (NLRB) hold a secret ballot election. As last introduced in Congress, EFCA would change the currently existing procedure to require the NLRB to certify the union without directing an election if a majority of employees signed cards.

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Why You Should Care: "If this law passes, it will be bad," says McCormick. "Card Check is probably the biggest piece involving union-management relations. Under EFCA, the chance to explain their point of view, and more importantly get any information other than what was given to them, convinced it will pass in some form. My real concern is that it doesn't provide what unions want, EFCA might be the best. From a small employer point of view, this bill can put you in a position you can imagine."

What You Can Do: "The old saying is that every ear deserves one. What that means is there is typically a lack of communication on some level, so they feel they need a third party for them," says Remy. "When employees don't feel on the same level, when it's us versus them, when their concerns are not being heard, they seek unionization."

THE LAW: MARYLAND WORKPLACE FRAUD ACT

What It Says: Maryland passed the Workplace Fraud Act to target employers who wrongly classify their employees as independent contractors in an effort to cut payroll costs. Additionally, the Department of Labor renewed focus on the appropriate use of independent contractors. The state has hired more than 200 additional enforcement officers to handle claims.

Why You Should Care: "There was always a certain number of employers who classify a person working for them, and even if they are employers to further misclassify workers," says Grant. "The law puts more money into auditing employers to find misclassification. They have heightened the penalties. This is driven by the fact that its unemployment funds are woefully under-funded, so they want to increase the funding and making it painful if you don't. Unemployment taxes are being tripled, which will create an increasingly difficult issue in the employment market."

What You Can Do: "There are specific rules about who is an independent contractor, and there are many misclassified people. Warning signs include people doing the same job with different titles."

THE LAW: GENETIC INFORMATION NONDISCRIMINATION ACT AND EMPLOYMENT NONDISCRIMINATION ACT AND AMENDMENTS

What It Says: The Genetic Information Nondiscrimination Act (GINA) and the proposed Employee Nondiscrimination Act would add genetic information to the list of protected classes under Title VII of the Civil Rights Act of 1964.

Why You Should Care: "Both these acts will bring attention to what many of the states have done, including DC and NY," says Grant. "What it means for local employers is they will have to be more vigilant about the resources of the federal government."

What You Can Do: "Most companies are vigilant about their employment practices are current," Kennedy says.

"Get yourself some quick advice regarding termination practices. If you are going to do doesn't raise red flags, and then document your practices," says Grant.

"Don't assume you are not a target," says Horn. "Don't assume you have employees who don't think you are fair. It's always ways to sue you and are setting you up for a lawsuit. Encourage others and be proactive with the HR department to avoid being vulnerable to lawsuits. It takes little time and energy to change a policy. If a lawsuit, it is much more difficult."