

A Car Dealer's Guide to Playing By the New Employment Rules

With
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Jed chairs the firm's Labor and Employment Law practice group. He represents employers throughout the United States on all types of employment and labor relations matters. He is well known for his vigorous and successful representation of employers in employment and labor litigation, both in court, and before the National Labor Relations Board, including matters involving employment discrimination, non-competition and trade secret protection, Taft Hartley and ERISA, wage and hour, and class and collective actions. Mr. Marcus regularly counsels employers on employment discrimination, wrongful termination, sexual harassment, NLRB matters, wage and hour, executive compensation, the protection of trade secrets, ERISA and benefits, and Title VII compliance. He conducts investigations into harassment, discrimination, and whistleblower claims, and regularly trains supervisors and employees on labor and employment matters. Mr. Marcus has authored numerous articles on employment and labor law. He is also a frequent speaker and panelist at seminars and workshops.

Civil Rights/Discrimination



ADA Amendments Act

A Little Background

- ADA modeled after the Rehabilitation Act of 1973
- In 1999, Supreme Court started to narrow the definition of disability in unexpected ways
- Resulted in more restrictive view of who was protected under the ADA
- Hence, Congress' belief that the law needed amended

What the ADAAA Does

- Clarifies the definition of disability by rejecting holdings in several Supreme Court decisions and portions of EEOC's ADA regulations
- Clarifies Congressional intent to protect civil rights of individuals with disabilities
- Charges EEOC with revising ADA regulations & revising definition of "substantially limits"

Definition of Disability

The basic definition of the term “disability” remains unchanged. It is, with respect to an individual:

A physical or mental impairment that substantially limits” one or more “major life activities” of such individual; or



A record of such impairment; or

Being regarded as having such an impairment.

Overrules “Demanding Standards”

- In 2002, the U.S. Supreme Court stated that the ADA’s definition of disability needed “to be interpreted strictly to create a demanding standard for qualifying as disabled.”
(Toyota v. Williams)
- The ADAAA explicitly rejects this holding, stating: “The definition of disability shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”

Major Life Activities

- Expands definition by providing non-exhaustive list
 - Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and **working**
 - Operation of major bodily functions (e.g., immune system, digestion, circulation, respiration, reproduction)
- Impairment limiting one activity need not limit other activities to establish disability

Expanding “Major Life Activities”

The new list says that “major life activities” include:

Caring for Oneself	Hearing
Communicating	Working
Concentrating	Thinking
Learning	Reading
Speaking	Breathing
Lifting	Bending
Walking	Standing
Eating	Sleeping
Seeing	

Expanding “Major Life Activities”

It also specifies that “major bodily functions” are a type of “major life activity,” including normal cell growth, the functions of the immune, digestive, respiratory, circulatory, or other bodily systems, and reproductive functions.

Episodic Conditions

- Impairments that are episodic or in remission are considered disabilities
 - If impairment would substantially limit a major life activity when in active state
 - Examples – seizure disorders, cancer, multiple sclerosis

Mitigating Measures

- Effects of mitigating measures not considered in determining impairment
- Examples – medication, medical supplies, mobility devices, prosthetics, hearing aids, oxygen
- Includes use of assistive technology, auxiliary aids and services, learned behavioral or adaptive neurological modifications
- Exception – ordinary eyeglasses or contacts

Substantially Limits

- EEOC & Supreme Court incorrectly interpreted term to establish greater degree of limitation than Congress intended
- Intent to interpret consistently with finding and purposes of the ADAAA
- No definition offered in the statute – look to regulations

Regarded As...

- Coverage if subjected to discrimination based on actual or perceived impairment
 - Regardless if impairment limits major life activity
 - Transitory and minor conditions excluded
- Employers and other covered entities **not** required to provide accommodations

Miscellaneous Provisions

- Employers and other covered entities must allow individuals to complete tests and exams using vision correction devices
- No alteration to state Work Comp laws or eligibility for other Federal disability benefit programs
- No reverse discrimination protection
- Covered entities can still deny reasonable accommodation/modification if it results in a fundamental alteration

Recommendations

- Don't panic!
- Read up on the changes
- Provide training
- Review existing policies and processes
- Update handbooks, policies, and signage

Civil Rights/Discrimination



Lily Ledbetter Fair Pay
Act of 2009

Ledbetter v. Goodyear Tire & Rubber Co.,
550 U.S. ___, 127 S. Ct. 2162 (2007)

- Lilly Ledbetter alleged that her manager gave her a poor performance rating 10 years earlier resulting in lower merit raise.
- Alleged that that pay differences grew larger over time because subsequent merit increases were based on a percentage of base pay.
- Ledbetter argued for a “paycheck accrual rule,” under which each paycheck that carries forward the adverse effects of a prior discriminatory decision is actionable under Title VII.

Lilly Ledbetter Fair Pay Act of 2009

- Signed by President Obama on January 29, 2009
- Designed to legislatively overturn *Ledbetter*
- Amends Title VII and ADEA; applies to ADA and Rehabilitation Act

Lilly Ledbetter Fair Pay Act

- For discrimination in compensation, an unlawful employment practice occurs:
 - when a discriminatory compensation decision or other practice is adopted;
 - when an individual becomes subject to a discriminatory compensation decision or other practice; or
 - when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

Lilly Ledbetter Fair Pay Act

- Plaintiff may seek “recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.”

“Other Practices”

- Performance ratings in performance-based pay system
- Pay grade assignments
- Location assignment under geographic pay structure
- Department assignments

Not “Other Practices”

- Discrete employment actions:
 - Hiring
 - Promotion
 - Termination

Consequences of Lilly Ledbetter Fair Pay Act of 2009

- More pay discrimination claims
 - Easier to bring pay discrimination claims and harder to defend them
 - Publicity around the legislation, such as President Obama's signing ceremony
 - Removes defenses that had proven effective against class action claims
- Greater exposure as plaintiffs can reach back to challenge essentially any decision affecting current paychecks

FAMILY MEDICAL LEAVE ACT

FMLA Provides:

- 12 workweeks of unpaid leave
- Continued health benefit coverage
- Reinstatement to same or equivalent position
- No retaliation

Eligible Employees

- Work at site where 50 or more employees are employed by employer within 75 miles
- Employed by employer for at least 12 months
 - Need not be consecutive
- Worked 1,250 hours during 12-month period immediately prior to leave

How Much FMLA Leave?

- 12 weeks within a 12-month period
 - If only work 3 days/week, entitlement of 12 3-day workweeks
 - Concurrent with any state leave entitlement
 - May need to extend to reasonably accommodate disabled employees

Employee Notice

- Advance Notice Required
 - 15/30 days for foreseeable leaves
 - Employer may delay not deny leave for lack of notice
 - “As soon as practicable” for unforeseeable leaves
 - 1 or 2 business days
- Notice may be verbal
- Notice may be by spokesperson for employee
- Notice does not specifically have to refer to “FMLA” or “NJFLA”

Pay/Benefit Issues

- Employee may request or Company may require use of accrued paid time off (vacation, sick, etc.) *during* leave
- Cannot require employee to take paid time off while on WC or STD and count as FMLA
- Pre-existing health benefits must be maintained during FMLA leave as if employee had continued to work
- Other benefits (e.g., life insurance and LTD) do not have to continue during leave

The New FMLA & MFLA Regulations

Introduction

- Final rule issued on November 17, 2008
- Overall attempt to clarify communication process
- Q&A format gone
- New forms
- Changes effective January 16, 2009
- DOL website:
www.dol.gov/esa/whd/fmla/finalrule.htm

Four categories of changes:

1. Substantive Standards
2. Notice/Timing Rights and Requirements
3. Medical Certification Process
4. Military Family Leave

Substantive Standards

ELIGIBILITY

Old Regulations

- Did not specify how a break in service would affect 12 month employment requirement
- Did not address employees on leave at 12 month anniversary

New Regulations

- Previous periods of employment count if break in service is less than 7 years
- Employees on leave at 12 month anniversary become eligible as long as benefits/compensation provided on leave

Substantive Standards

WAIVERS

Old Regulatory/Case Law

- Employees may not waive FMLA rights

New Regulation

- Employees may waive FMLA rights retroactively

Substantive Standards

PERFECT ATTENDANCE AWARDS

Old Regulations

- Cannot disqualify employee from awards/bonuses based on attendance on basis of FMLA leave

New Regulations

- Can be disqualified based on FMLA as long as non-FMLA leave is treated the same

Substantive Standards

SERIOUS HEALTH CONDITION

Old Regulations

- Period of incapacity for (a) more than 3 consecutive calendar days and (b) treatments by health care provider (either (i) one treatment plus regimen of treatment or (ii) two treatments). No guidance on when treatment must occur.

New Regulations

- Period of incapacity for 3 **FULL** consecutive calendar days
- In person treatment within 7 days of first day of incapacity plus (a) regimen of treatment or (b) second in-person treatment within 30 days of first day of incapacity

Substantive Standards

CHRONIC CONDITIONS

Old Regulations

- “Periodic visits” to health care provider. No guidance on how many visits or how often.

New Regulations

- At least 2 visits to health care provider per year

Substantive Standards

Old Regulations

- Employees may substitute PTO for unpaid FMLA leave

New Regulations

- The right to substitute PTO depends on the employer's policies
- The employer may enforce all normal rules for PTO

Examples:

Vacation: Minimum increments of 8 hours

Sick Time: Limited to employee's illness

NOTE: Employees may opt to take unpaid FMLA leave in smaller increments.

Substantive Standards

LIGHT DUTY

Old Regulations

- Light duty assignments count as FMLA leave

New Regulations

- Light duty assignments do not count as FMLA leave
- Reinstatement rights exist for up to the full 12-month leave year while on light duty

Notice/Timing Rights

POSTER

Old Regulations

- Must have poster posted

New Regulations

- New poster (General Notice)
- Posted hard copy or electronically
- Must be included in Employee Handbooks
- Must be distributed to all current employees, all new hires and provided to applicants

Notice/Timing Rights

ELIGIBILITY NOTICE

Old Regulations

- 2 Business days

New Regulations

- 5 business days from date of request
- Notice of Eligibility and Rights and Responsibilities (Form WH-381)
- Part A – Notice of Eligibility
- Part B – Rights and Responsibilities
- Explain 12 month leave year
- Written confirmation required
- PTO included

Notice/Timing Rights

FAILURE TO DESIGNATE FMLA LEAVE

Old Regulations

- Employee's leave does not count as FMLA leave unless and until employer designates leave as FMLA

(RAGSDALE V. WOLVERINE WORLD WIDE,
INC. (535 U.S. 81 (2002)))

New Regulations

- Adopts RAGSDALE
- Employer may retroactively designate leave as FMLA leave unless employee can show harm from failure to timely designate

Medical Certifications

2 NEW FORMS

- Employee's Serious Health Condition (Form WH-380-E)
- Family Member's Serious Health Condition (Form WH-380-F)
- Must provide form with Rights and Responsibilities Notice
- Can request a diagnosis, symptoms, treatment, etc.
- Explain why care is medically necessary
- Probable duration
 - "unknown," "indeterminate," and "lifetime" are not acceptable
- 15 calendar days to provide completed certifications

Medical Certifications

INCOMPLETE OR INSUFFICIENT

- Employer must provide written notice to employee as to specific information still needed
- Employee has 7 calendar days to cure

AUTHENTICATION/CLARIFICATION

- HR, Management, company doctor may contact employee's doctor
- Employee's supervisor **MAY NOT**

Medical Certifications

- Certifications will request sensitive health information about employees or family members
- HIPAA consents will be required
- If employee refuses consent, leave can be denied
- Limits on who can contact employee's doctor
 - Employers should designate their employees
- Certifications must be maintained in confidential medical files
 - Separate from general personnel file
- Genetic information concerns
 - Restrictions on disclosure

Medical Certifications

RECERTIFICATIONS

Old Regulations

- Every 30 days

New Regulations

- Every 30 days is out!
- More than 30 days, when duration of leave expires
- Every 6 months
- Less than 30 days – not permitted
 - Requests for extensions
 - Significant changed circumstances

MFLA Leave

MFLA Leave

QUALIFYING EXIGENCY

1. Short-notice deployment activities;
2. Military events and related activities;
3. Childcare and school activities;
4. Financial and legal arrangements;
5. Counseling activities;
6. Rest and recuperation activities;
7. Post-deployment activities; and/or
8. Additional activities

MFLA Leave

MILITARY CAREGIVER

- All employees who are spouse, son, daughter, parent or next of kin to care for “covered service member” who incurs serious illness or injury in line of active duty
- Covers both National Guard or Reserves and Regular Armed Forces
- 26 weeks in any single 12-month period
- Per covered service member/per injury

Union Organizing



THE EMPLOYEE FREE CHOICE ACT



The Law and Employers

Rights

- To express their views concerning union organization.
- To set forth the union's record concerning violence and corruption, if appropriate.

Restraints

- Must avoid threats, promises, coercion, and direct interference with workers who are trying to reach an organizing decision.
- Cannot meet with employees on company time within 24 hours of an election.
- Cannot suggest to employees that they vote against the union (in private, while they are out of their work area).

The Union Drive

1. Initial contact
2. Authorization Cards
3. The Hearing
4. The Campaign
5. The Election



Authorization Cards

- Designate the union as a bargaining representative in all employment matters.
- State that the employee has applied for membership in the union and will be subject to union rules and bylaws.
- 30% of eligible employees in an appropriate bargaining unit must sign cards authorizing the Union to petition the NLRB for an election.

What is an Authorization Card?

Employees sign Union Authorization cards because they want to exercise their federally guaranteed right to form a union and negotiate fairly with the employer for a contract that covers wages, hours, benefits and other conditions of employment.

The GCCIBT will never show this card to the company. This card may be shown, in confidence, to a neutral observer to prove the union's right to be recognized by the company. Or it may be submitted to the National Labor Relations Board to get a secret ballot election to gain bargaining rights with the company. The National Labor Relations Board treats the cards submitted to it with the utmost confidentiality and will disclose them at a hearing, only if the company has been charged with the most serious violations of Federal Labor Laws, to demonstrate the workers' majority support of the union.

It is not an application for membership. It does not require you to pay dues. It does not require you to pay an initiation fee (there is no initiation fee for newly organized members). And, it does not imply any other legal obligation. It can only be used for the purposes spelled out above. Anyone who tells you otherwise is just plain wrong!

PLEASE TEAR THIS SECTION OF THE CARD OFF AND RETAIN IT FOR YOUR RECORDS.

Authorization for Representation

I, the undersigned employee of _____ (NAME OF COMPANY)
authorize the Graphic Communications Conference of the International Brotherhood of Teamsters or Local _____ thereof to represent me in negotiations with my employer for better wages, hours and working conditions. My signature below and the authority it confers was given by me free from any coercion or intimidation from any source and with full knowledge and understanding of its significance.

SIGNATURE

PRINT NAME

DATE

TELEPHONE

JOB TITLE

SHIFT

STREET ADDRESS

CITY

STATE

ZIP

GMAIL

WITNESS SIGNATURE

DATE

The Campaign

The Employer Responds

- **Can** attack the union on ethical and moral grounds and cite the cost of union membership.
- **Cannot** make promises of benefits.
- **Cannot** make unilateral changes in terms and conditions of employment that were not planned to be implemented prior to the onset of union organizing activity.



The Election



- Held within 30 to 60 days after the NLRB issues its Decision and Direction of Election.
- The election is by secret ballot; the NLRB provides and counts the ballots.
- The union becomes the employees' representative by getting a majority of the votes cast in the election.

THE EMPLOYEE FREE CHOICE ACT

What is it and
what does it
mean for
employers?



EFCA: UNION CERTIFICATION PROCESS THE END OF THE EMPLOYER CAMPAIGNS

TODAY

- Secret-ballot elections are typically scheduled by the NLRB as long as six weeks after a petition is filed.
- During the period between petition and election, the employer has the right to communicate its views on unionization.
- Employees who have signed authorization cards for the union nevertheless have a right to vote “NO” in the subsequent election if they have changed their mind.

UNDER EFCA

- If the Union files its petition with authorization cards signed by a majority of the employees in the petitioned-for unit, the NLRB simply would count those cards, not schedule an election.
- With no vote to follow, the question of representation is determined by the cards submitted to the NLRB with the petition.
- No opportunity for the employer to communicate with employees.

WHY THE SECRET BALLOT IS SO IMPORTANT

- Employees vote in private
- No coercion or intimidation
- No peer pressure
- No misrepresentation
- Card checks are unreliable indicators



EFCA: MEDIATION

TODAY

The NLRA does not require either party to participate in the mediation of an initial or a renewal contract.

Section 8(d): “. . .but such obligation [to bargain] does not compel either party to agree to a proposal or require the making of a concession.”

UNDER EFCA

Mandatory mediation by the Federal Mediation and Conciliation Services if the parties are unable to reach agreement on the terms of an initial contract after just 90 days of negotiations.



ARBITRATION & THE END OF COLLECTIVE BARGAINING

Today

“Interest Arbitration” is a non-mandatory subject of collective bargaining under the NLRA. Neither party may insist that the other agree to arbitration of contract terms as a substitute for “good faith bargaining.”

The employer and union are required to bargain either to impasse or agreement.

UNDER EFCA

- ✓ A “Board of Arbitration” would be appointed by the FMCS if the parties remain unable to agree on contract terms after 30 days of mandatory mediation.
- ✓ Through binding arbitration, the Board would have the authority to determine contract terms and to require the parties to enter into a two-year agreement embodying those terms.
- ✓ The employer’s right to negotiate to impasse and implement new terms and conditions would be lost.
- ✓ EFCA provides no guidelines regarding the nature of the arbitration or the procedures to be followed.

WHY IS BINDING ARBITRATION A BAD IDEA?



- Undermines collective bargaining
- Unions take unreasonable positions
- Arbitrator's award virtually unreviewable
- Employers can't raise taxes, only prices.

EFCA: UNFAIR LABOR PRACTICE REMEDIES

TODAY

Relief under the NLRA is remedial in nature, not punitive. Remedies include:

- Back pay, benefits and other make-whole relief.
- Reinstatement, in discharge cases
- Cease and desist orders
- Posting of Notice to Employees
- There are no fines, penalties, compensatory damages or attorneys fees, except in extraordinary cases.

UNDER EFCA

EFCA would enhance the NLRB's remedies for employer unfair labor practices (but make no changes in remedies for ULPs by unions):

Mandatory Injunctive Relief for ULPs during organizing/bargaining process.

Liquidated damages in the amount of two times back pay in addition to make-whole relief.

Civil penalties of up to \$20,000 for ULPs occurring during union organizing drives or negotiation of a first contract.

Amount of penalty would depend on seriousness of ULPs and their impact on employees.

EQUAL REMEDIES ACT AND CIVIL RIGHTS ACT OF 2009



- removes Title VII damages cap of \$300,000
- outlaws mandatory arbitration in employment contracts
- stiffen penalties Equal Pay Act violations
- provide for enhanced damages in FLSA cases
- reduced burden for recovery of attorney's fees

Health and Welfare

The American Recovery and Reinvestment Act of 2009

COBRA Amendments

ENACTED

The COBRA Amendments enacted under the Stimulus Bill require that employers sponsoring group health plans and group health plan administrators take immediate steps to comply with a series of special temporary mandates applicable to certain individuals experiencing a loss of group health plan coverage **due to the involuntary termination of an employee** between September 1, 2008 and December 31, 2009 ("assistance-eligible individuals").

COBRA Amendments - Highlights

- Group health plans must notify *assistance eligible individuals* of the special COBRA rights granted under the Stimulus Bill.
- The COBRA premium that a group health plans can charge an *assistance-eligible individual* for COBRA coverage is **limited to 35 percent** of the otherwise applicable COBRA premium for a period of **up to 9 months**.
- Group health plans must offer assistance eligible individuals who previously did not elect COBRA coverage before February 17, 2009 **a second chance to enroll** in COBRA coverage within the 60-day period beginning on the date the group health plan provides the required notice of the Stimulus Bill COBRA rights. COBRA coverage for assistance eligible individuals making these second chance elections must begin with the first period of coverage beginning after February 16, 2009 (March 1, 2009 for most plans) and ends when COBRA coverage.

COBRA Amendments - Highlights(Cont.)

- Group health plans offering participants different coverage options are required to allow assistance eligible individuals the opportunity to change their coverage elections under certain circumstances.
- Employers may seek to recoup COBRA premiums paid by the employer to maintain COBRA coverage for assistance-eligible individuals in excess of reduced COBRA premium amounts paid by assistance-eligible individuals filing the necessary claims and reports to qualify to claim a payroll
- tax credit equal to those additional amounts. This payroll tax credit is the mechanism through which Congress sought under the Stimulus Bill to subsidize temporarily 65% of the COBRA premiums of assistance-eligible individuals.