



## 2007 Employment Law Update

By Liz Tascio  
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Each February, the federal Equal Employment Opportunity Commission releases its statistics from the year before. That means March is a flurry of presentations for Andrew J. Lauer and Steven K. Weiss, two labor and employment attorneys with Thelen, Reid, Brown, Raysman, & Steiner.

At the HR Roundtable in March, Lauer and Weiss presented last year's updates to employment law and explained the cases that decided those changes. They pointed out that while there's been a nearly 10 percent drop in claims since 2002 – 75,000 were filed in 2006 – there's more to the story than numbers.

“Our work went up probably 300 percent,” Lauer said. “The activity in labor employment has not decreased at all.”

Part of the reason for the drop in claims filed to the federal commission could be that employers are dealing more directly with complaints, Lauer said, or that employees are reporting instead to state bodies, which have become more sophisticated.

Whatever the reason, employment law is as active as ever. Courts made important changes last year to discrimination law, e-discovery, the Family Leave Medical Act, the Fair Labor Standards Act, and more.

FLSA, which governs wage and hour issues, is one to watch, Lauer said. The Department of Labor and plaintiffs' attorneys have zoomed in on this complex area of law, and employees have become savvier about their rights. No company should assume it is in total compliance with FLSA.

“In the past year alone, I haven't gone into a single company where there wasn't something that should have been fixed,” Lauer said.

### **Stay ahead of FLSA**

One way to protect the company is to audit your staff, making sure everyone is classified correctly. Ensure employees sign time sheets every day, and keep those records for six years.

But it gets more complicated. Take the issue of compensable time, Weiss said. Employers don't have to pay employees for their commute time, but what if they drive from their house to a client's site, or to a parking lot to pick up a company car? In *Burton vs. County of Hillsborough*, the court found that employers have to pay for time beyond the employee's normal commute.

An HR representative at the meeting asked about sending an employee on a flight to China.

“They’re working the whole time,” Weiss said. If the person travels for the company on a weekend, “you’re extending their workweek, and you’ll pay overtime, too.”

While you’re resurveying your employees for wage and hour issues, resurvey for the new EE01 form, too. The form now has additional categories for ethnicity and management responsibilities.

“One of the reasons why they say they’re asking for this is they want to see how the glass ceiling effect is being impacted,” Lauer said. “They’re specifically looking at how high up people are getting and what the mix of the company is.”

Any employer with more than 100 employees, or 50 employees and a federal contract, has to file an EE01.

### **Broader definition of retaliation**

Complaints based on race, age, gender, disability, and sexual harassment fluctuated only slightly in 2006, but retaliation claims have doubled since 1992. Last year a court widened the definition of retaliation to include anything that might dissuade a reasonable person from filing a complaint.

“It doesn’t have to be, like, the person was fired,” Lauer said. It could be as simple as giving the cold shoulder to a co-worker who has complained about her treatment.

The case in point, Burlington Northern & Santa Fe Railway Co. v. White, involved a forklift operator. After she complained about discrimination, she was reassigned as a track laborer – essentially, to a dirtier job – and alleged the company was retaliating against her. The court agreed.

For HR departments, this means HR employees should be sensitive to even subtle changes in an employee’s status after they’ve filed a claim or charge.

“You had somebody who’s involved in a complaint, and then a supervisor just submits a change in job form,” Lauer said. “Maybe now your antennae should be up.”

### **Updates to Title VII**

Case law dealing with Title VII, which protects employees against discrimination, saw changes in 2006.

“Nothing earth-shattering, but some amusing decisions, some interesting,” Lauer said.

A court found, for example, that policies for drink servers at Harrah’s casino didn’t discriminate against women, although the code required a more elaborate and time-consuming make-up, hair, and dress regimen for women than it did for men.

“They said, ‘The men had to do stuff also, so it’s balanced,’” Weiss said. “The dissent here said, ‘If this isn’t sexual stereotyping, what is?’”

An HR representative at the roundtable asked whether she could insist a new employee remove her facial piercings, which she hadn’t worn to her interview. Lauer recommended simply amending dress code policy.

In a sexual harassment case in which an employee who was flirting with her boss was fired after his wife found out, the court found that there was no harassment violation, because the firing wasn't based on gender.

In a similar case, a California court determined that a boss who was sleeping with multiple women on staff and excluding one *was* committing sexual harassment, because in that case, you had to have sex with the boss or you wouldn't get ahead, Lauer said.

California and Connecticut each instituted sexual harassment training requirements last year for supervisors. California requires two hours every two years by a lawyer, HR professional, professor, or others with three or more years experience on the topic. Connecticut requires two hours of training within six months of becoming a supervisor, and recommends updates every three years.

New York State Legislature revisited last year the issue of discrimination based on criminal convictions. Currently, state law limits discrimination against applicants, but not employees. The law may be amended to protect employees too.

### **Reasonable accommodations for religious beliefs**

In *Baker vs. Home Depot*, an employee had been taking Sundays off to observe the Sabbath, but a new supervisor told him he could no longer take the whole day, just a few hours to attend religious services.

The court ruled that reasonable requests must be accommodated and must fit the employee's need.

"If you can't, you have to reach the threshold of undue hardship," Lauer said.

You can ask for a note from a priest or rabbi to prove that the employee sincerely needs the time off, but be consistent in doing so, Lauer said.

Extensive case law says dress codes trump the right to wear a religious headdress or body covering, but accommodate the request if you can, Weiss said.

Be aware that religious discrimination law and collective bargaining agreements sometimes conflict, as in cases of seniority, Lauer said.

A case still in progress asks whether an employer can penalize an employee for being unwilling to fulfill all job duties because of religious beliefs. In *Nead vs. Board of Trustees of Eastern Illinois University*, a nurse was refused a promotion because she would not distribute the morning-after pill.

Questions being considered include whether it is "possible that the other nurses could distribute that pill and she'd still get the promotion," Lauer said.

*Tomassi v. Insignia Financial Group* highlights the importance of stray remarks – comments made in casual conversation – in discrimination cases. In this case, the 63-year-old plaintiff had been fired and replaced by a 25-year-old.

"This supervisor would say things on occasion like, 'You're good with older clients,'" Lauer said. "He'd say, 'In your day and age,' comments like that."

“If a jury hears these comments, clearly they could decide that this person had some bias.”

Training for employees has to be very specific.

“The person who today is your friend is going to use your innocent chats for evidence of discrimination” when he gets fired, Weiss said.

### **Taking leave**

Weiss covered a variety of changes to employment law, starting with what to do with an employee you suspect may be dangerous or who makes threats.

“What do you do with this employee, who you have a reasonable basis to believe is potentially posing a threat to themselves or someone else in the workplace?” Weiss said. “This person might be schizophrenic, paranoid – all of these things are disabilities under the law.”

In *Graham v. Boehringer Ingelheim Pharmaceuticals*, the court held that the company was right to require the employee to be evaluated by a professional, be prescribed a course of treatment, and be fired when he failed to comply.

New case law, determined in *Graves v. Finch Pruyn & Co.*, clarifies long-term FMLA leave for employees. While an employer does not have to provide indefinite leave, companies are required to accommodate reasonable extensions, such as a week or two.

“Send a notice before the FMLA time is about to expire and remind the person, ‘By the way, you’re about to lose your job,’” Weiss said. “We did have a case where the plaintiff admitted that the only reason she hadn’t come back is she thought that she could stay out.”

An employee out on leave can risk having his or her bonus discounted only if the bonus is directly tied to the person’s particular, positive effort.

Employees are eligible for leave if they’ve worked for an employer for 12 months, and new case law says those 12 months don’t have to be recent. In *Rucker v. Lee Holding Co.*, a court held that a new employee who had worked for the company five years earlier should have been granted 13 days leave for a back injury instead of being fired.

Brand new to New York state law is the Military-Spouse Leave Law. An employee who works 20 hours or more a week and whose spouse is deployed must under certain circumstances be granted unpaid leave.

### **The paper trail**

A significant new front for companies is e-discovery, Weiss said. Now that so much data is electronic, it’s no longer enough to save paper records.

“You could have a memo. You could have prior drafts of the memo. You could have meta-data behind the memo. You could have instant messaging, you could have voicemail, you could have text messages,” Weiss said.

“You have the duty to preserve this information when you reasonably anticipate that litigation is in the offing.”

While this can be a costly burden, it's a good idea to develop a records policy now. Train supervisors to report threats of litigation to HR or counsel so they can stop whatever normal destruction process is in place.

Protecting employees' private records, such as those that contain Social Security numbers, has also gained increased attention from the courts.

"You have to have a secure database," Weiss said. "If somebody hacks into your software, and you think that some of this information has gotten out, now there are specific notification requirements."

Set policies and procedures in place, and train all employees with access to sensitive records.

Releases – typically signed to prevent an employee who is leaving the company from suing – can't include any language that prevents them from filing a charge, Weiss said.

"The release can have them waive their right to recover damages," but can't prevent them from bringing a case to the EEOC, Weiss said.

Courts also clarified last year that releases must be clear and easily understood by the employee in order to count as knowing and lawful.

Releases – along with other documents of agreement – should contain an integration clause.

"That says, 'This document, this is it. This is our agreement. There's nothing else,'" Weiss said. "You want this in your document."

Otherwise, an employee can accuse the employer of not doing all it promised, as in the case of *Wall v. CSX Transportation Inc.*, where the court held that the employer should have abided by an earlier oral agreement in addition to the written one.

An amendment pending in Congress, the Employee Free Choice Act, would increase the potential for workforces to unionize. Weiss said he doubts the Bush administration will sign it.

However, companies should be aware that anti-fraternization policies, which forbid employees from discussing company business with others, could be overbroad.

"It may discourage employees from talking to each other about the terms and conditions of employment," including whether to unionize, Weiss said. "If you prohibit that, that's unlawful."

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