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## Monumental Changes to ADA Begin January 1



By Lisa A. Kainec

On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008 (“ADAA”). The amendments take effect January 1, 2009 and represent a wholesale revamping of the ADA with the intended purpose of reversing the current state of federal disability law.

The ADAA provides that its purpose is to “restore the intent and protections of the ADA” and by its explicit terms rejects two major decisions issued by the U.S. Supreme Court – *Sutton v. United Airlines, Inc.* and *Toyota Mfg. Ky. Inc. v. Williams*. Importantly, the new law provides that mitigating measures shall not be considered in the determination of whether or not someone is substantially limited in a major life activity and thus “disabled” under the law.

Such “mitigating measures” include medication, medical supplies, equipment or appliances, low-vision devices (not including ordinary glasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants and other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies.

The ADAA also for the first time provides a list of specifically identified “major life activities.” Under the new law, an individual will be considered “disabled” if they are substantially limited in one of the following major life activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing,

lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. “Major life activity” also is expanded to include “the operation of a major bodily function” such as the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Another important expansion is the definition of what it means to be “substantially limited.” A disability still must be an impairment that substantially limits a major life activity, but the ADAA provides that “an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.” The new disability definition also will include “an impairment that is episodic or in remission... if it would substantially limit a major life activity when active.”

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Further expanding the scope of those persons covered by the law, those individuals who claim that they are “regarded as disabled” no longer will need to show that they were regarded by the employer as being substantially limited in a major life activity. Instead, the new law will only require a showing that the employer perceived the employee as having a physical or

mental impairment. The ADAA does specifically limit “regarded as disabled” claims by providing that such individuals are not entitled to a reasonable accommodation. Such “regarded as disabled” claims also cannot be brought based on a “transitory or minor” impairment, defined as “an impairment with an actual or expected duration of 6 months or less.”

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The EEOC, the Attorney General, and the Secretary of Transportation each are authorized through the ADA to issue regulations implementing these new provisions. This is the first time that express authority has been granted for the issuance of such regulations, even though the EEOC had done so in the past. It is clear that even without new regulations, more people will be covered as “disabled” under the new law. Given the expansion of major life activities and broadly worded “regarded as disabled” standard, fewer ADA issues will revolve around whether or not someone is a covered individual. This certainly will be a major shift in the risks faced by employers, who very often prevailed on summary judgment motions focused on an individual’s non-disabled status.

With more individuals deemed “disabled” and protected, the focus of legal claims will be the employer’s proper handling of its accommodation obligations, including its good faith efforts to engage in a meaningful interactive process with the disabled individual in order to identify reasonable accommodations. More cases will turn on whether or not accommodation obligations were fulfilled, with many more facing the reality of trial rather than summary dismissal. Employers are well advised to seek counsel in dealing with any potentially disabled employee now and into the foreseeable future as their risks in this area escalate exponentially come January 1.

### **The Employee Free Choice Act: What It Could Mean to Employers**



*By James P. Wilkins*

The percentage of the private sector workforce that is unionized has steadily declined in America since World War II. However, in the last several years, organized labor has been pushing back on several fronts. In 2005, a schism occurred within the AFL-CIO. A number of unions, led by the Service Employees International Union, broke away with the avowed intention of more aggressively recruiting new members, especially in the service sector of the economy.

In addition, while labor unions always have been politically active, they are more savvy than ever in the political arena. Labor unions are flexing new muscles in getting out the vote in favor of pro-labor political candidates. In Ohio we’ve seen several union-led ballot initiatives to enact or amend “pro-employee” laws that affect the workplace. The results of the November 4 elections underscore that organized labor remains a formidable political force on both the state and national level.

Under the EFCA, if a union filed a petition with the NLRB alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wished to be represented by a labor organization, then, following an investigation, the NLRB would no longer direct a secret ballot election as it currently does. Rather, the NLRB would simply certify the union as the exclusive bargaining representative for that unit without employees having the benefit of deciding the issue by the secret-ballot process.

Unions desire this change in the law for several reasons. Over the years, unions have typically won less than fifty percent of all NLRB elections. From the time a union files a petition until the NLRB conducts an election, an employer generally has six to eight weeks to counteract a union’s organizing efforts. Proponents of the EFCA allege that employers use this campaign period to restrain and coerce employees.

The truth is that most employers use this period to educate employees so that employees can make an informed choice about whether unionization is in their best interest. Under current law, the NLRB insists on “laboratory conditions” for its elections, meaning that employees are permitted to cast a secret-ballot vote in an environment that is free of threats or coercion by either the employer or the union. During this campaign period, many employees – including some who may have signed union authorization cards – come to the conclusion that representation by a union is not in their best interest. Hence the relatively poor success rate of unions in NLRB-conducted elections.

The unions’ solution to their poor election success rate is to eliminate elections. Under the EFCA, unions will be able to secure signatures on union authorization cards under less than “laboratory conditions.” Employees can be approached repeatedly by the union and its supporters at work or at home until they sign a card. Card signing will often happen surreptitiously, with the employer totally unaware of the activity. As a result, employees may never hear the employer’s side of the story on why unionization may not be in the best interest of the employees who will be affected.

### ***Nothing could have a greater impact on the balance of power between employers and organized labor than the possible enactment of the Employee Free Choice Act (“EFCA”)***

However, nothing could have a greater impact on the balance of power between employers and organized labor than the possible enactment of the Employee Free Choice Act (“EFCA”). The labor federation behind the law already is pressing for its passage within the first 100 days of the new Congress. The EFCA would amend the National Labor Relations Act in several profound ways.

First, the EFCA would make elections conducted by the National Labor Relations Board virtually obsolete.

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# EFCA

*The Employee Free Choice Act*

Once a union is certified as the bargaining representative, the EFCA also radically changes the dynamics for the negotiation of the first contract between the employer and the union. Negotiations must begin within ten days of the employer's receipt of the union's request to begin negotiations. Though negotiation of an initial contract is an important and often time consuming process, the EFCA would compress negotiations into a very tight timeframe.

If negotiations do not result in a contract within 90 days, then either party could request mediation by the Federal Mediation and Conciliation Service. After a mere 30 days of mediation without resolving negotiations, the FMCS would refer the matter to an arbitration board. The arbitration board would be empowered to "render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years..."

Under current law, an employer is always obligated to bargain in good faith, but the law never, ever imposes any particular term or condition on either party to a contract. All of that would change under the EFCA, since the arbitration board *would* have authority to impose terms and conditions on both parties.

The EFCA also imposes stringent new penalties on employers, but not unions, who commit unfair labor practices during the organizing phase or while a first agreement is being negotiated. Instead of awarding backpay to an employee who has been the victim of discrimination, as under current law, the EFCA would award backpay *plus* two times that amount as liquidated damages. It also would authorize a civil penalty of up to \$20,000 per violation against an employer who willfully or repeatedly violates the NLRA.

Five years ago, the prospects for passage of NLRA amendments of this sort were slim. However, the EFCA passed the House of Representatives in 2007, but stalled in the Senate. Barack Obama is on record as supporting the EFCA and gains made by the Democratic Party in both houses of Congress certainly increase the prospects for passage of the EFCA in 2009. Stay tuned for a bruising legislative and political battle over this issue.

If the EFCA becomes law, then employers who place a priority on maintaining a union-free environment will have to re-evaluate the strategies they use. Employers will essentially be denied the opportunity to educate their employees in response to a union organizing effort. By the time an employer becomes aware of card signing activity, it may already be too late.

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Employers will need to be in a constant union prevention mode. Employee relations efforts designed to make unions unnecessary will need to be pursued on a continual basis. A non-union employer will also be well-advised to keep its finger on the pulse of employee loyalty or disaffection, such as through the use of employee opinion surveys, periodic employee meetings, and the like. The silver lining to the EFCA is that it will require non-union employers who wish to stay that way to raise the bar in terms of their communication strategy and employee relations efforts.

## Nearly Every Retirement Plan Needs Attention Soon



By **Kenneth M. Haneline**

There are a host of tax law changes that require every pension and retirement plan to consider amendments soon. The plans affected include 401(k) plans, defined contribution plans, defined benefit plans, 403(b) plans, and non-qualified retirement plans. This article highlights some of the changes being made to these plans and their required amendment dates.

### Final 415 Regulations Make Significant Changes to Definition of Compensation:

Last year, the Internal Revenue Service (IRS) released final regulations to Internal Revenue Code §415 making changes to the definition of compensation, effective for plan years beginning after June 30, 2007. For calendar year plans, this means that the new rules are effective in 2008. There is a delayed effective date for governmental plans. Nearly all calendar year 401(k), defined contribution and defined benefit plans should adopt an amendment in compliance with the IRS' final §415 regulations by December 31, 2008. In addition, most defined benefit plans need to adopt an amendment by December 31, 2008, for changes arising from the Pension Funding Equity Act of 2004.

***The most significant change provided by the §415 final regulations involves a qualified plan's recognition of post-severance compensation. The new rules limit a plan's ability to recognize compensation after a participant terminates employment.***

The most significant change provided by the §415 final regulations involves a qualified plan's recognition of post-severance compensation. The new rules limit a plan's ability to recognize compensation after a participant terminates employment. Under the new rules, compensation does not include compensation paid after an employee severs employment. However, there are two exceptions:

- (a) A plan can count compensation paid to former employees who are in the military or permanently disabled.
- (b) A plan can count compensation paid by the later of 2½ months after severance of employment or the last day of the plan year in which the employee terminates employment if:
  - (i) The payment is for services rendered (e.g., salary, commissions, overtime, bonus, etc.) which the employee would have received if employment had continued;

- (ii) The payment is for unused accrued sick leave, vacation pay, or other leave which the employee could have taken if employment had continued; or
- (iii) The payment is from an unfunded nonqualified deferred compensation plan, to the extent includible in income, if the employee would have received the payments at the same time if employment had continued.

Compensation does not include any of the following amounts paid after employment termination: severance pay, parachute payments, or payments from unfunded deferred compensation plans which are "triggered" by severance.

Although we strongly recommended that calendar year plans adopt the final §415 regulation changes by December 31, 2008, plans can be updated for the §415 regulation changes by the due date of the employer's 2008 tax return (including extensions).

### New 403(b) Regulations Require Written Plan Requirements:

The IRS' new rules affecting §403(b) retirement arrangements are effective January 1, 2009, and will require that nearly all tax-exempt employers' §403(b) retirement arrangements require a written plan. There is a delayed effective date for some church plans and for plans maintained pursuant to a collective bargaining agreement. The written plan document needs to include provisions to keep the §403(b) contributions tax deferred. For example, a written plan document should identify the annuity contracts and custodial agreements available under the plan, it should allow for transfers, permit plan termination, and coordinate a host of plan administration issues.

The adoption of a written plan document will cause most of the §403(b) retirement arrangements to become subject to ERISA requirements. However, some tax-exempt employers may be able to satisfy a "safe harbor" provision announced by the U. S. Department of Labor (DOL) for an employee "deferral-only" plan. These deferral-only plans will not be considered ERISA plans. The DOL's field assistance bulletin 2007-02 provides guidance under which an employer can comply with the written plan requirement without compromising its ERISA exemption. Under the field bulletin, a tax-exempt employer can perform certain limited administrative activities without the DOL considering the employer to have established or to be maintaining an ERISA plan. However, the tax-exempt employer cannot retain or make any discretionary determinations in administering the plan. For example, a tax-exempt employer cannot authorize plan transfers, process distributions, satisfy joint and survivor annuity requirements, make hardship or qualified domestic relations order determinations, or administer loans.

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### Non-Qualified Deferred Compensation Plans Must Be In Compliance with IRC 409A Requirements:

All non-qualified deferred compensation arrangements must be amended by December 31, 2008 to be compliant with Internal Revenue Code §409A. The types of deferred compensation

arrangements covered by §409A include unfunded programs that benefit certain highly compensated management executives. Other non-qualified deferred compensation arrangements can include certain severance programs, some stock option plans, and stock appreciation rights plans. A failure to timely amend a non-qualified deferred compensation arrangement will result in a violation of §409A and the imposition of tax penalties upon the executive.

Code §409A added a set of specific restrictions on elections and distributions for compensation amounts deferred on or after January 1, 2005. Deferred amounts earned and vested prior to January 1, 2005, together with any earnings thereon, are grandfathered and not subject to the requirements of §409A, assuming that they have not been materially modified after October 2, 2004.



Each non-qualified deferred compensation arrangement that is subject to Code §409A and its final regulations should be considering such new provisions as the addition of a six-month delay in any distribution for executives in public companies, removal of any

haircut acceleration withdrawal provisions, and changes to the definitions of both disability and change-in-control. The penalties imposed upon an executive because of a §409A failure require that all deferred amounts will be immediately includible in the executive's current taxable income if the compensation is no longer subject to a substantial risk of forfeiture. In addition, the executive will have to pay a tax that is calculated as interest on all amounts that would have been included in income in a prior year, plus an additional 20 percent tax on amounts being

included in income. The employer will be faced with additional payroll reporting and withholding obligations upon deferred amounts includible in gross income as a result of a §409A failure.

If you have questions or need any assistance, please call us.

### Mental Health Parity on Horizon



By Thomas Evan Green

One of the lesser known components of the so-called "economic bail out" that was signed into law by President George W. Bush in early October is a provision mandating that certain employer health plans' mental health benefits be on par with other medical benefits offered by the plan. The effective date for this new federal law, which applies only to employers with 50 or more employees that already offer mental health coverage, is January 1, 2010.

By wide margins, both houses of Congress approved separate "mental health parity" legislation in late September, but it was unclear until the bail out how they

would be reconciled. The White House also supported these measures.

***Estimates are that this new law will improve mental health coverage for 113 million people.***

The new law amends ERISA and a lesser known federal statute, the Public Health Service Act, to prohibit employer group health plans from establishing mental health treatment limitations, financial requirements, or out-of-network coverage limitations unless comparable limitations and requirements are instituted for medical and/or surgical benefits.

Estimates are that this new law will improve mental health coverage for 113 million people. The Congressional Budget office estimates premium increases of approximately .2% as a result of the new law.



## Federal Healthy Families Act Legislation

By Dean E. Westman



**A**lthough Ohio employers dodged the potential adverse effects of the “Ohio Healthy Families Act” ballot initiative, we aren’t out of the woods yet.

The outcome of the November 4 Presidential and Congressional elections may breathe new life into the nearly identical legislation pending at the federal level. It is not clear, at this point, how

come about when the powers that be in Washington decide to support such changes. With significant Democratic majorities in both houses of Congress, and a Democratic President, the same quick action could be taken on paid sick leave legislation.

By way of background, two identical “Healthy Families Act” bills were introduced during the 110th (the current) Congress, one in the Senate sponsored by Senator Edward Kennedy (S. 910), and the other in the House of Representatives sponsored by Representative Rosa DeLauro (H.R. 1542). Both bills were introduced on March 15, 2007, and both call for seven paid sick leave days to be provided to employees who work 30 hours or more per week by employers who employ 15 or more employees. There has been no formal action on either bill since June 27, 2007, when the House bill was referred to the Subcommittee on Health, Employment, Labor and Pensions.

All employers, not just those in Ohio, should remain keenly aware of any future developments that may take place on this front, as it may not be possible to change existing vacation and/or paid leave policies after the enactment of a new federal mandate for paid sick days.

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***With significant Democratic majorities in both houses of Congress, and a Democratic President, the same quick action could be taken on paid sick leave legislation.***

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quickly any such bill would become effective, if it were to be passed by Congress and signed by President-elect Obama. However, the recent amendments to the Americans With Disabilities Act provide a good example of how quickly sweeping changes in federal law can

## Recent Expansions in Sex Discrimination Law



By Jaime M. Umerley

Several recent developments have occurred in sex discrimination law. In the past few years, numerous cases have addressed fertility treatments as the basis for sex discrimination claims

under Title VII. Recently, the EEOC filed a complaint that could lead to Title VII protections for women who are “preparing for pregnancy.” The EEOC’s primary assertion is that Title VII’s coverage includes women and *women who are trying to conceive*. This case involves a woman who was demoted shortly after undergoing surgery to prepare her for in vitro fertilization treatments. However, this broad argument could result in the extension of Title VII protection to *all* women who are trying to conceive.

Additionally, a recent decision by the Court of Appeals for the District of Columbia expanded Title VII protections based on gender identity. In *Schroer v. Billington*, the plaintiff’s job offer was revoked only after the Library of Congress learned that the male applicant intended to become legally, culturally and physically a woman. The court held that the action was discriminatory because of sex, notwithstanding the holdings in other circuits that have declined to afford protections based on transsexuality.

Many courts likewise have held that punishing employees whose appearance and mannerisms fail to conform to gender stereotypes constitutes actionable sex discrimination. The approach taken by the D.C. Circuit expressly rejects the rationale adopted by the Sixth Circuit in *Barnes v. City of Cincinnati* and *Smith v. City of Salem*, where it was established that disparate treatment based on a person’s gender non-conforming behavior constitutes impermissible discrimination. Despite the various approaches applied throughout the circuit courts, employers should be aware of this trend toward allowing Title VII discrimination claims based on gender identity, and should avoid basing any employment decisions on such factors.

On October 8, 2008, the U.S. Supreme Court heard oral arguments to decide whether an employee who reports alleged harassment during an employer’s internal investigation is afforded the protection of Title VII’s anti-retaliation provision, even where no formal

harassment charge has been filed. Section 704(a) prohibits an employer from retaliating against any employee who “has opposed any practice made an unlawful employment practice...or who has made a charge, testified, assisted, or participated in any manner in an investigation.” It appears fairly logical that employees’ statements made during the course of an internal employer probing would be covered under this

***Employers should be aware of this trend toward allowing Title VII discrimination claims based on gender identity, and should avoid basing any employment decisions on such factors.***

section. However, the justices were somewhat conflicted between the “opposition” and “participation” aspects of §704(a). The outcome of this case likely will implicate new considerations for employers while investigating workplace harassment allegations.



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## Workers' Compensation Notes



By James W. Ellis

### Proposed Rate Decreases for Public Employers

On November 1, 2008 the Board of Directors of the Ohio Bureau of Workers' Compensation announced that it would decrease rates for many of Ohio's public employers beginning January 1, 2009. Citing shrinking budgets, BWC Administrator Marsha Ryan explained that the decreases would allow public employers to better serve their communities. The Board is expected to have a formal vote on the changes at its November 2008 meeting, but has projected up to a five-percent rate decrease, depending on each employer's claim history.

### Rate Reduction for Out-of-State Employees

In another cost-cutting measure, the Ohio Workers' Compensation Act was amended effective September 11, 2008 to exclude out-of-state employees from workers' compensation premium calculations. Beginning with the January 1, 2009 payroll reporting period, the BWC no

longer will consider payroll for exclusively out-of-state employees when calculating workers' compensation premiums. However, it must be noted that this exclusion only applies if the Ohio employer has workers' compensation coverage for out-of-state employees in the state where the work is performed. With this exclusion, the BWC hopes to eliminate duplicate coverage for approximately 40,000 Ohio employers.

***Beginning with the January 1, 2009 payroll reporting period, the BWC no longer will consider payroll for exclusively out-of-state employees when calculating workers' compensation premiums.***

### Fee Schedule Increases

The Board of Directors of the Ohio Bureau of Workers' Compensation has approved an increase in the fee schedule for medical services provided to Ohio's injured workers. This first change since 2004 will increase the standard fees the BWC pays medical providers for procedures, services and supplies. The changes are expected to take effect on January 1, 2009.



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