MAYER·BROWN

ACC Association of Corporate Counsel
The in-house bar association.℠

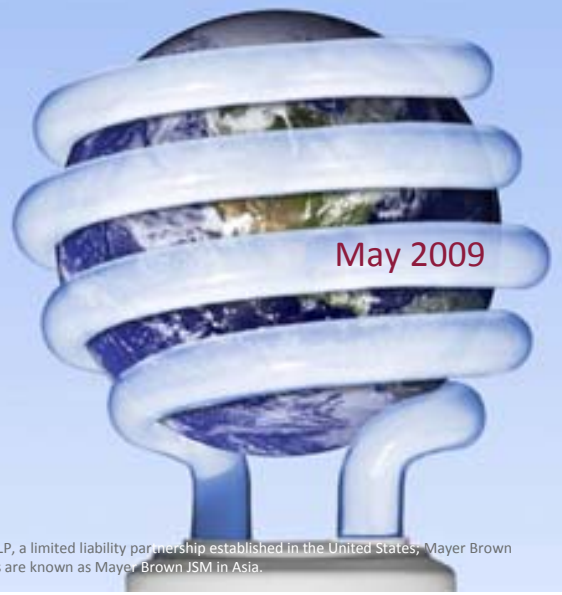
Employment Law Update

Employment Law Issues Facing Businesses in 2009

May 2009

Diana Hoover
Partner
713-238-2628
dhoover@mayerbrown.com

Gayle Hanz
Associate
713-238-2625
gchanz@mayerbrown.com



Overview of Presentation

- Lilly Ledbetter Fair Pay Act
- Paycheck Fairness Act
- Changes to the FMLA
- Changes to the ADA
- Employee Free Choice Act 2009
- Reductions in Force
  - Structuring RIFs to Reduce Risk
  - FLSA Pitfalls and Compliance
- Q&A

Lilly Ledbetter Fair Pay Act

Lilly Ledbetter Fair Pay Act of 2009

- Signed into law by President Obama on January 29, 2009
- Act reverses *Ledbetter v. Goodyear Tire & Rubber Co*., 550 U.S. 618 (2007)
- Changes the way the statute of limitations is calculated for discrimination claims
- Individuals alleging discrimination may now bring claim within 180 days of last discriminatory paycheck instead of from 180 days from when first paid in discriminatory matter

Lilly Ledbetter Fair Pay Act of 2009

- Act defines an unlawful employment practice as:
  - 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 the application of a discriminatory compensation decision or other practice.

Practical Considerations for Employers

- Although Act was promulgated to address pay disparities in the context of gender discrimination, it will apply to other forms of discrimination--age, race, national origin and disability discrimination.
  - Will extend statute of limitations for all of these discrimination claims involving compensation
- As a result, if a causal link is established between an employment decision and compensation, a decision may be challenged years from the date of the original decision.

Practical Considerations for Employers

- Original decision maker may not recall basis for decision or may no longer be employed with the company
- Possible methods to reduce risk:
  - Ensure compensation decisions are well-documented and based upon non-discriminatory criteria
  - Periodic statistical audit of compensation for disparate impact
  - Pay scales may be an option
  - Review/update internal complaint procedure
  - Document retention policy—an effective one will allow company to respond and defend itself against complaints raised in the future

Paycheck Fairness Act

Paycheck Fairness Act ("PFA")

- The Paycheck Fairness Act, introduced in the House (H.R. 12) and the Senate (S.182) and passed by the House on January 9, 2009, seeks to modify the Equal Pay Act of 1963 ("EPA") in several ways:
  - By amending the FLSA "to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex"
  - By amending the EPA to allow an affirmative defense based on a bona fide factor other than sex (i.e., "bona fide factor defense") only if the employer can show that such factor: "(i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity."
    - Bona fide factor defense would not be available if the employee demonstrates that there is an "alternative employment practice" that would serve the same purpose but not result in a pay differential.

Paycheck Fairness Act (continued)

- Toughens the remedy provisions of the EPA by allowing prevailing plaintiffs to recover compensatory and punitive damages (instead of just liquidated damages and back pay)
- Seeks to change class certification scheme for pay-discrimination claims from an "opt-in" class to "opt-out" (FRCP 23), thereby enlarging the class of employees that may participate in the litigation
- PFA would protect employees' rights to compare pay information if they suspect discrimination
- Would require EEOC to collect pay information

Family & Medical Leave Act

"FMLA"

Family & Medical Leave Act ("FMLA")

- Under the original FMLA, eligible employees were entitled to take up to 12 weeks of leave over a 12 month period due to:
  - Birth, adoption, or foster-care placement of a child; or
  - Care of a child, spouse or parent with a serious medical condition; or
  - Employee's own serious health condition.

New Types of Leave Covered by FMLA

- Qualifying Exigency Leave
  - During a "qualifying exigency," an eligible employee can take up to 12 weeks of FMLA leave during a 12-month period while spouse, son, daughter, or parent is in the National Guard or Reserves or is a military retiree who is called to active duty in support of a contingency operation.
  - "Qualifying exigencies" include: (i) Short-Notice Deployment; (ii) Military Events and Related Activities; (iii) Childcare and School Activities; (iv) Financial and Legal Arrangements; (v) Counseling; (vi) Rest and Recuperation; (vii) Post-Deployment Activities; and (viii) Additional Activities Not Encompassed in the Other Categories.
  - Does not apply to active duty members of the regular Armed Forces
- Employer may require certification for this type of leave: *see* Certification of Qualifying Exigency for Military Family Leave (DOL WH-384)

New Types of Leave Covered by FMLA

- Military Caregiver Leave
  - Eligible employees may take up to 26 weeks of leave over a "single 12-month period" to care for a family member who incurs a serious illness or injury in the line of active military duty.
  - Employer may require certification for this type of leave: *see* Certification for Serious Injury or Illness of Covered Servicemember (DOL WH-385)

FMLA and the Employee Handbook

- Employee Handbook Requirements
  - New regulations require employee handbook (or other written materials relating to leave and benefits) to contain the information covered by the new "Notice to Employees of Rights under FMLA." (DOL WH-1420)
  - Covered employer must conspicuously display a poster of WH-1420 on employer's premises

FMLA Notice Provisions

- Notice of Eligibility
  - Employers now have 5 business days (instead of 2) from time employee informs employer (or employer otherwise has reason to know) that an employee needs to take leave for an FMLA qualifying reason to provide employee with notice whether they meet basic FMLA eligibility standards.
    - DOL's optional "Notice of Eligibility Rights and Responsibilities" (new form WH-381), Part A

FMLA Notice Provisions

- Written Notice of Rights and Responsibilities
  - When notice is given regarding eligibility, employer must also provide the employee with a written notice of rights and responsibilities under the FMLA, including, among other things, any requirement of medical certification.
    - DOL's optional "Notice of Eligibility Rights and Responsibilities" (new form WH-381), Part B

FMLA Notice Provisions

- Final Notice of Designation
  - Employer must provide written notice whether leave will be counted as FMLA leave within 5 days from when employer has sufficient information to determine whether the leave qualifies for an FMLA purpose
    - DOL's optional "Designation Notice" (new form WH-382)

Medical Certification

- Employee must provide sufficient information to allow employer to determine if leave is qualified.
- Content of certification form has changed
  - DOL's optional forms WH-380E (employee) and WH-380F (employee's family member)
- Employer may now request an expanded amount of information (health care provider's specialization, medical facts related to patient's condition, etc.)
  - Employer may now communicate directly with health care provider through an HR professional or manager (but not the employee's direct supervisor)
  - When contacting health care provider directly to verify eligibility, may not ask questions beyond those on DOL certification form
- If employee provides certification which is incomplete or too vague, employer must give employee time to cure within certain time limits (generally 7 days).
- Note that additional certifications may be required for "recertification" purposes and for "fitness-for-duty" when employee returns to work.

Highlights of Other Substantive Changes

- Serious Health Condition: The amendments clarified the standard for a "serious health condition" involving "incapacity:"
  - The "incapacity" must be for more than three full consecutive calendar days and either
    - include two in-person visits with a healthcare provider, or
    - one in-person visit with a healthcare provide combined with a regimen of continuing treatment.
      - In-person visits to the healthcare provider must be within 7 days of the onset of the leave.
- Clarifies that employee taking leave under the "chronic condition" provision must visit health care provider at least 2 times per year for treatment.

Highlights of Other Substantive Changes

- Permits disqualification of employees from perfect attendance awards or other bonuses because of absence on FMLA leave (if such awards are not paid to employees on leave for non-FMLA reasons)
  - Under prior regs, DOL distinguished between performance bonuses (which employer could prorate based upon FMLA leave) and perfect attendance bonuses (for which employer could not count FMLA leave)
  - Now all bonuses are treated equally

Highlights of Other Substantive Changes

- Confirms that employee can settle, waive or release FMLA claims based on past employer practices (not prospectively) as part of a privately negotiated release
- Clarifies that employer may require compliance with the employer's normal vacation or other paid leave policies when substituting paid leave for any type of unpaid FMLA leave

Practical Considerations for Employers

- Update employee handbook and/or FMLA policy with standards for granting FMLA leave.
- Add new military leave certification notice forms.
- Update medical certification notice forms, and modify both certification and recertification procedures.
- Consider updating rules on return-to-work certification to take advantage of the new employer rights.
- Consider whether to change rules about the use of paid leave to take advantage of the new flexibility.
- Consider whether to begin tighter enforcement of abuse notification rules and procedures.
- Consider whether to modify various bonus programs to take advantage of the new flexibility.
- Fact sheets on the regulations, a revised FMLA poster and new and revised forms are available at http://www.dol.gov/es/whd/fmla/finalrule.htm.

Americans with Disabilities Act "ADA"

Americans with Disabilities Act ("ADA")

- Prohibits discrimination against a "qualified individual with a disability"
- Disability means:
  - physical or mental impairment that substantially limits a major life activity of an individual; or
  - having a record of such an impairment or being regarded as having such an impairment
- Qualified means being able to:
  - satisfy the job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job-related; and
  - perform the "essential functions" of the job with or without "reasonable accommodation"

The ADA Amendments Act

- Effective date: January 1, 2009
- Overturned two U.S. Supreme Court decisions that narrowly defined "disability" and expanded what conditions are considered disabilities under the ADA
- States that the ADA's protections are to be construed broadly
- Prior to the 2008 Act, an impairment was not necessarily an ADA-covered disability unless it "substantially limited" a "major life activity."
- The 2008 Act "rejects the standards" required by the U.S. Supreme Court and "conveys congressional intent" that these standards have "created an inappropriately high level of limitation necessary to obtain coverage under the ADA."
- Provides a broad and inclusive description of "major life activities"

Major Life Activities

- Expands the definition of "major life activities" by including two non-exhaustive lists:
  - the first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
  - the second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions").
    - *See* Notice Concerning The Americans With Disabilities Act (ADA) Amendments Act of 2008, available at http://www.eeoc.gov/ada/amendments_notice.html.

ADA Amendments Act (continued)

- Rejects consideration of "mitigating measures" when determining whether an impairment "substantially limits major life activities" (except for "ordinary eyeglasses or contact lenses")
- Allows impairments that are in remission or are "episodic" to qualify under the ADA if it would substantially limit a major life activity when active
- Lessens the burden to obtain ADA coverage under "regarded as disabled" claims:
  - A "regarded as" claim can prevail if discrimination occurred "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."
  - Claimants need only show they were perceived as being impaired and not that the impairment was perceived as being substantially limiting to a major life activity.
  - Impairments that are transitory and minor cannot support a "regarded as" claim. Impairments are "transitory" if they last or are expected to last six months or less.
- Provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation

Practical Considerations for Employers

- Review handbooks and any other policies relating to disability or requests for accommodation to ensure they comply with the amendments.
- Review and revise job descriptions and other documents describing the essential job functions as necessary.
- Carefully analyze proposed adverse employment actions and/or requested accommodations at the time they arise.
  - Remember: claims require an examination of the accommodation offered or denied, and/or whether the employee was actually discriminated against.
  - Ensure that any adverse action (including discipline, demotion, transfer to a different, less desirable position) against employees with medical conditions is based on non-discriminatory reasons.
- Document the requested accommodations, the analysis performed, and decision reached.
- Once again, training is KEY.
  - Train supervisors and management to avoid commenting an employee's potential impairments.
  - Comments on an employee's impairment – regardless of the severity of the impairment – may support a "regarded as" disabled claim under the ADA.

Employee Free Choice Act 2009

Employee Free Choice Act 2009

- Introduced in Congress on March 10, 2009
- If becomes a law, will have significant impact upon employers:
  - Permits unions to forgo a secret ballot election and instead petition the NLRB for certification as the bargaining agent for a group of employees once it obtains a majority of such employees' signatures on union authorization cards
  - Eliminates current requirement that a majority of employees must vote in favor of unionization by private ballot
  - May open doors to possible intimidation and coercion—since authorization cards are usually solicited without employer's knowledge, no "campaign" period before employees are asked whether they want to unionize

Employee Free Choice Act 2009

- Imposition of First Labor Contract
  - Requires companies and newly certified unions to enter binding arbitration of initial collective bargaining agreements after 120 days if employer and union are unable to reach an agreement
  - Federally appointed arbitrator will enter binding decision effective for 2 years
  - Decision cannot be appealed by either party

Employee Free Choice Act 2009

- Dramatically increased penalties
  - EFCA will increases penalties against employers who commit unfair labor practices during an organizing campaign or while negotiating a first time labor contract.
  - EFCA would provide treble backpay if company is found to have terminated employees in connection with organizing drives or first contract negotiations plus civil penalties in an amount up to $20,000.00 for each unfair labor practice the employer "willfully or repeatedly" committed during union organizing or other union-related activity.

Practical Considerations for Employers

- Educate managers and supervisors on union organization and outline acceptable communication with employees and unlawful organizing tactics (i.e., fraud, threats, coercion)
- If planning any restructuring, document personnel decisions carefully to avoid claims that such changes were discriminatory and made in reaction to organizational efforts
- Analyze potential of different business units as targets of aggressive union organizing efforts

Practical Considerations (continued)

- Be prepared with a response to union organizing strategies:
  - Educate employees on the pros and cons of unionization and unlawful union practices
  - Implement policies which manage the impact of organizing activities
  - Assemble a small management team to be the "first responders" in the event of organizing activities (not likely to have much notice that a campaign is underway)
- Create a workplace where employees are more likely to reject organizing efforts because they feel fairly treated

Reductions in Force
"RIFs"

Reductions in Force ("RIFs")

- Key areas of risk to employers during economic downtown
  - Structuring RIFs to Reduce Risk
  - FLSA Pitfalls and Compliance

Reductions in Force ("RIFS")

- Key Areas of Legal Risk in RIFs (or Restructuring)
  - Advance notice obligations under WARN and similar state laws
  - Discrimination laws and class actions—limiting risk in selecting employees for reduction
  - Releases—making them enforceable
  - Obligation to reinstate employees on leave of absence

WARN Act & Similar State Laws

- WARN = Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq*.
  - For employers with 100 or more full-time employees, **WARN** generally requires 60 days notice of a "plant closing" affecting 50 or more employees, or a "mass layoff" of 500 employees (or 50 employees if that is 33 percent of the workforce) at a single site of employment.
  - Less notice may be permitted where the employer can prove that the shutdown or layoff was not reasonably foreseeable 60 days in advance, or that full notice would have interfered with efforts to obtain business or capital needed to avoid or postpone that event.

WARN Act & Similar State Laws (continued)

- Violations of WARN can result in liability for back pay and benefits for up to 60 days for each affected employee.
  - Civil penalties and attorney fees and costs in civil cases
- State laws, or "Baby-WARN Laws" may be more restrictive or impose greater penalties.
  - Examples of states which do not have own Baby-WARNS and have adopted federal WARN Act instead--FL, OH, PA, TX
  - CA, IL, NY—have more restrictive Baby-WARNs

Practical Considerations for Employers

- Communication is KEY
  - Understand the business message before the selection process is put in place
  - Business message and selection process must match
- Neutral business-related criteria for selection
- Process and documentation must be carefully planned
- Consider "proactive" adverse impact analysis, conducted in advance of workforce readjustment
- Consider obtaining releases
  - Must comply and be guided by the Older Workers Benefits Protection Act ("OWBPA"), FMLA, EEOC Enforcement Guidance, and DOL eLaws Advisory
- Comply with any obligations of reinstatement

FLSA Compliance

FLSA Compliance

- More than 130 million workers in more than 7 million workplaces are protected or “covered” by the Fair Labor Standards Act (FLSA), which is enforced by the Wage and Hour Division of the U.S. Department of Labor.
- FLSA was enacted to establish the national minimum wage, create the time and a half pay scale for overtime work, and regulate the employment of minors.

FLSA Exemptions

- Not all employees are covered by the FLSA
  - Examples of employees who may not be covered
    - Employees working for small construction companies
    - Employees working for small independently owned retail or service businesses
    - Enterprises with the only regular employees being the immediate members of the owner's family are excluded from coverage ("Mom and Pop" exemption)
      - 29 U.S.C. § 203(s)(2)
- FLSA's overtime and minimum wage provisions do not apply to "any employee employed in a bona fide executive, administrative, or professional capacity."
  - exemptions are based on an analysis of the employee's actual duties
- Important to know if employees are covered because the FLSA requires all non-exempt workers to be paid "time and a half" the regular rate for every hour worked over 40 in a week.

FLSA and Furloughs/Schedule Reductions

- Furloughs are more complicated in cases where employers are furloughing exempt employees because of risk of losing exemption.
- To be "exempt" from the overtime requirements of the FLSA, employees must normally receive their full weekly salary for any week in which they work any hours.
- Docking an exempt employee's pay due to lack of work, in increments of less than a full week, risks losing the exemption for that employee and all other employees in the employee's classification.

Practical Considerations for Reducing Risk

- Three opinion letters by the Wage and Hour Division of the U.S. Department of Labor demonstrate that furloughs or schedule reductions for exempt employees can lead to violations of the FLSA and state wage and hour laws.
- Ways to avoid such violations:
  - Send employees home to take a mandatory week off without pay.
  - Make sure employees receive a full paycheck by sending them home without pay for any increment of time but requiring them to use available paid leave to make up for the missed compensation.
  - Let employees voluntarily take unpaid time off for personal reasons (or any reason not based upon the company's operating requirements) so long as the decision is truly voluntary.
  - Make a permanent change to exempt employees' schedules with a corresponding change in their salary if it is not merely an attempt to pay them like hourly employees.
    - *See* Wage and Hour Opinion Letters, FLSA 2009-2 (1/14/09); FLSA 2009-14 (1/15/09); FSLA 2009-18 (1/16/09) (all released on 3/6/09).

Watch "Off the Clock" Work During Furloughs

- Furloughs and schedule reductions raise the possibility of employees working off-the-clock from home.
- Non-exempt employees who work from home are entitled to pay for the hours worked, including overtime if they work more than 40 hours in a workweek.
- A "*de minimis*" rule under the FLSA provides some protection from claims based on very small amounts of time that are sporadic, unpredictable, and impractical to record. 29 C.F.R. § 785.47.
- General rule: always strongly caution all employees not to work while furloughed or scheduled off. If they do work, employers must pay them.

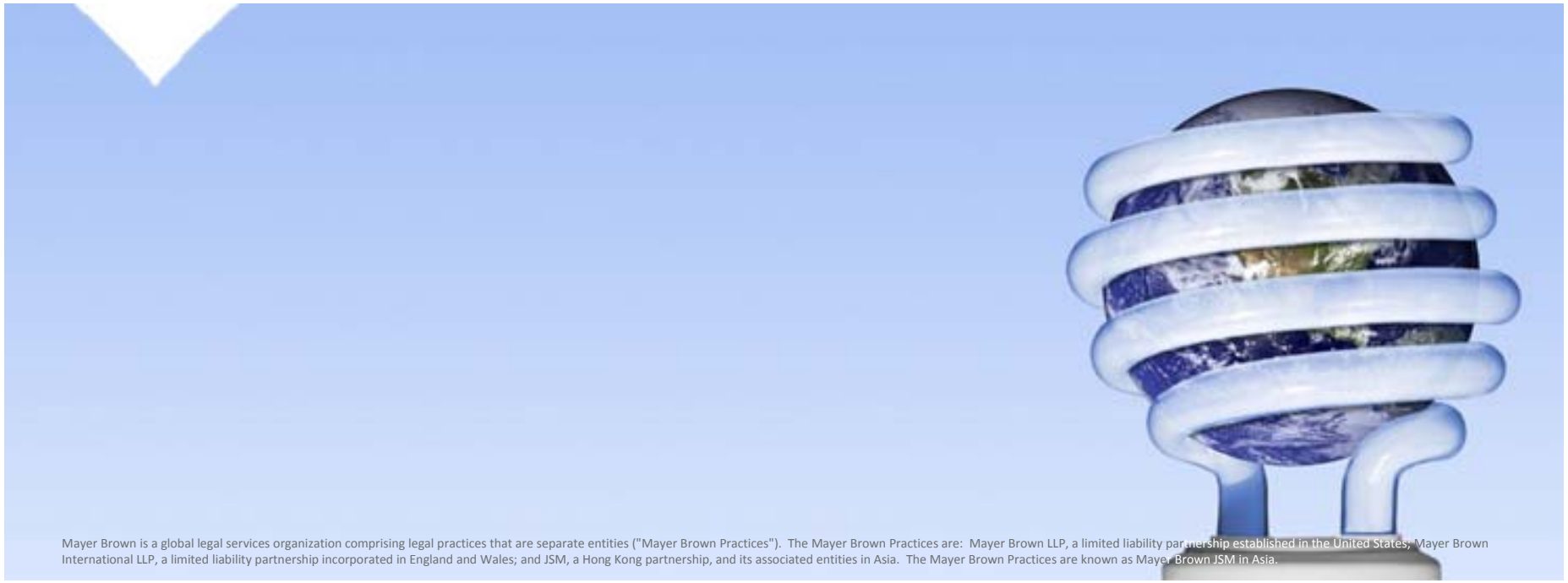
Example of broad enforcement powers of DOL

- The DOL recently entered into a consent injunction with a video game development company which prohibited the company from selling or shipping products until it fully complied with the FLSA, including compensating qualified employees for unpaid overtime. The consent injunction was enforced by a federal district court in Utah, *Chao v. Fooptube, LLC*, No. 2:09-cv-00026 (D.Utah Feb. 18, 2009).
- Underscores the significant impact FLSA violations may have upon employers and their ability to conduct business

MAYER·BROWN

ACC Association of Corporate Counsel
The in-house bar association.℠

Questions



Additional References and Resources

- Jeffrey Campolongo, *Ledbetter Fair Pay Act Restores Protection from Discrimination*, The Legal Intelligencer, Vol. 239, No. 39 (Feb. 27, 2009).
- John P. Furfaro and Risa M. Salins, *Employee Free Choice Act Proposes Dramatic Changes to Labor Law*, 241 N.Y.L.J. 3 (April 3, 2009).
- Barbara E. Hoey, *ADA Amendments Broaden Protections for Employees*, 241 N.Y.B.J. S6 (March 23, 2009).
- Christopher H. Mills, *Top 10 Things Employers Need to Know About the New FMLA Regulations*, 63 Employee Benefit Plan Review 5 (Mar. 1, 2009).
- Theresa G. Van Vuren et al., *The ADA Amendments Act: Practical Suggestions for Complying with Expanded ADA Obligations*, 10 Employment Law Strategist (Feb. 2009).