by Jaclyn L. West and Donald R. Lee

Changes to labor and employment laws and how they affect hoteliers

With a new administration in the White House and a new justice on the Supreme Court, Washington, D.C. has been working overtime for the past year – and many things have changed as a result. And as 2009 gives way to 2010, we can expect even more tinkering with the employment laws from Congress and the courts.

What's changed in 2009?

The **ADA Amendments Act (ADAAA)** took effect on January 1, 2009. The law expands the protections available to disabled employees by stating that an individual is still disabled under the Act even if he or she is able to mitigate the disability, adding certain bodily functions to the list of "major life activities" a disability may impede, and expanding the interpretations of "regarded as disabled" and "substantially limits" language. Congress also stated that the question of who is disabled must be given the broadest interpretation possible. This expanded interpretation of disability and its effects means that hoteliers must be even more vigilant against any discrimination based on an employee's disability, whether that disability is real or perceived.

In early 2009, Congress's amendments to the **Family and Medical Leave Act** took effect. The new provisions allowed family members of a covered servicemember to take family and medical leave for certain qualifying exigencies related to the servicemember's call to active duty. Family members were also permitted to take up to 26 weeks under the Family and Medical Leave Act to care for a servicemember with a "serious injury or illness" incurred during active duty. With military activities going on overseas on several fronts, hoteliers must be aware of the FMLA's provisions, as many staff members may be eligible to take family and medical leave under the military leave provisions.

In January of 2009, Congress passed the **Lilly Ledbetter Fair Pay Act**, which expanded the amou of time an employee has to bring a discrimination claim based on disparate pay. Under the Ledbetter Act, a new cause of action accrues when a "discriminatory" pay decision is made, when an "individual" – employee or retiree – becomes subject to the discriminatory pay decision, or when an individual is "affected" by a discriminatory pay decision. The law applies to payments of wages, benefits, and any other compensation. Thus, if a court finds that a pay decision was discriminatory, the statute of limitations will start anew each time a payment is made under the discriminatory pay structure! In response to the Ledbetter Act, hoteliers will want to examine, and perhaps expand, the length of time for which they retain compensation and other employment records, to respond to claims that may have been deemed untimely pre-Ledbetter.

Title II of the **Genetic Information Nondiscrimination Act (GINA)** became effective on November 21, 2009. GINA prohibits harassment or discrimination against employees or applicants based on genetic information, and it also prohibits retaliation against employees for filing a charge or complaint under GINA. Genetic information includes results of genetic tests for both the employee and his or her family members, and the employee's family medical history. Hoteliers must be cautious to avoid acquiring genetic information except through a few narrow exceptions defined by the EEOC, and must take pains to keep confidential any genetic information they do acquire about an employee.

The U.S. Citizenship and Immigration Service is conducting **audits of H-1B employers** through its Office of Fraud Detection and National Security. OFDNS officials are conducting surprise Administrative Site Visits to collect information about the employer's business and the representations made in its H-1B petitions. Hoteliers who employ H-1B workers – as many in the hospitality industry do – should prepare for the possibility of an audit by collecting and carefully maintaining accurate information to support all H-1B petitions they file.

What could change in 2010?

The **Employee Free Choice Act (EFCA)** was introduced in the U.S. Senate on March 10, 2009. Although the Act has not yet passed, unions and pro-labor legislators continue their push to enact this radical legislation, and the chance that we will see some form of EFCA passed in 2010 remains good. If passed, EFCA in its current form would all but eliminate secret-ballot union elections, allowing employees to vote unions in via card check. EFCA would also set a deadline of 120 days for parties to reach a first contract, after which an arbitrator would set all terms of the collective bargaining agreement. In a heavily unionized industry such as the hospitality industry, EFCA would have important ramifications. Hoteliers should continue to prepare for the likelihood that EFCA will eventually pass in some form by training their supervisors in legal actions and lawful campaign techniques during a union organizing drive, by ensuring that they have appropriate policies and open-door complaint procedures in place so that staff members will not feel they need a union, and by responding appropriately to employee concerns.

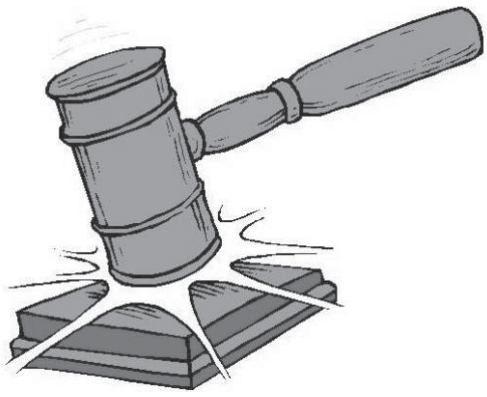
The **Arbitration Fairness Act**, currently pending in committee in the House of Representatives, would make pre-dispute arbitration agreements in employment, as well as some other contexts, unenforceable. The bill seeks to change the trend of law from the Supreme Court that has increasingly recognized the convenience and validity of arbitration. Although arbitration agreements have become mainstream within the past few decades, and although a similar bill was introduced in 2007 with no results, hoteliers should keep a close eye on this bill because if it passes, hotels may need to revisit their dispute resolution procedures for managers and staff.

The **Healthy Families Act** would provide for up to 56 hours (seven days) of paid sick leave for employees to recover from routine illnesses or care for a sick family member, attend doctor's appointments or other preventative care appointments, or spend time seeking treatment or help for stalking, domestic violence, or sexual assault. If the Healthy Families Act is passed, hoteliers may need to revisit their sick leave policies to ensure that they are in compliance with the new law.

The **Family and Medical Leave Enhancement Act** would extend family and medical leave requirements to companies with 25 or more employees, instead of the larger employers – with 50 or more employees – currently covered by the Act. As a result, some smaller hotels may encounter federal family and medical leave requirements for the first time. Of course, some small hotels may already be familiar with family and medical leave laws, as certain states extend their requirements to smaller employers. The Family and Medical Leave Enhancement Act would also expand the types of leave allowable, to include parent-teacher conferences or possibly other school activities and routine medical appointments for an employee's child, grandchild or other family member.

Conclusion

With the inauguration earlier this year of a new president, supported by a razor-thin supermajority in the Senate and an 81 seat majority in the House of Representatives, hoteliers can expect to see increased legislative efforts pertaining to workplace laws and benefits over previous years. As Democrats control both Congressional houses and the Presidency, and in an effort to remain the majority party through the 2010 mid-term elections, it is likely that they will introduce legislation in the coming year that favors rank and file employees and labor unions. Undoubtedly, such legislation will emplace additional mandates upon employers, subject them to greater scrutiny from federal regulatory agencies, and potentially deprive them of some existing protections and benefits. 2010 should get very interesting. ✧



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