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## Overview of Significant Workplace Law Developments in 2008 And What's Ahead for 2009

Prepared for the  
**INSTITUTE OF MANAGEMENT  
ACCOUNTANTS**  
TAMPA BAY CHAPTER

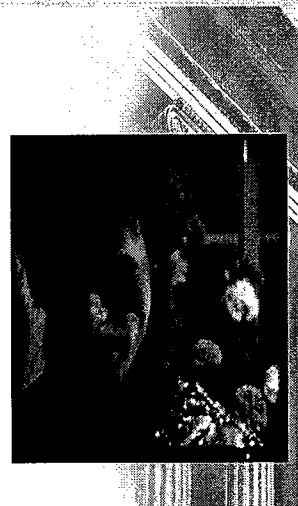
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## Introduction – Change is on the Way

- The most dramatic changes we've seen in traditional labor, fair employment and leave laws have either just happened or are on the verge of becoming law in 2009.
- Long-awaited changes to the Family and Medical Leave Act and ADA became effective this month.
- Increase in Democratic votes in Congress and a Democratic White House virtually ensures more changes are ahead.



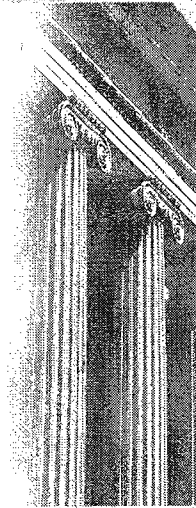
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# OVERVIEW OF WORKPLACE LAW DEVELOPMENTS IN 2008

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## What Was New In 2008?

- Increased EEO filings
  - Florida gun law
  - Genetic information restrictions
  - More wage hour litigation and aggressive enforcement of wage hour laws by the Dep't of Labor
- 

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## Increased EEO Filings

- Overall, charges up 27%
- EEOC collected \$274 Million
- Focusing on class actions & systemic violations
- Sexual harassment remains largest category of harassment claims
- EEOC considers retaliation “more egregious” than discrimination
- Last two years we saw decrease in single plaintiff discrimination litigation, now we anticipate at least some percentage of increase again.



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## New Florida Gun Law

- Passed in April, took effect July 1st
- Those in legal possession of firearms may keep them on work premises, so long as out of sight in locked vehicle
- No guns in company vehicle w/o permission
- Applies to visitors and “invitees” parking in business lot AND even to independent contractors and interns!
- Firearms not allowed at schools, jails, or at facilities housing explosive materials



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## New Florida Gun Law

- Prohibits employers from asking employees whether they own firearms or have them in vehicles; conditioning employment on whether applicant has a concealed weapon
- Restricts auto searches to law enforcement
- Employers should not implement blanket prohibitions on possession of firearms
- Employers should revise policies allowing vehicle searches

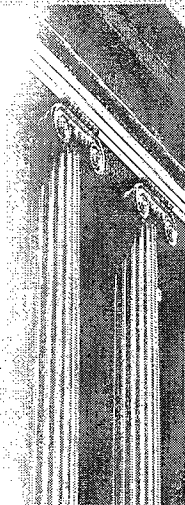
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## Genetic Information Non-Discrimination Act

- Bars employers and insurers from discrimination based on their genetics
- Employers can't use genetic info. in making any employment decisions
- Includes child labor provisions with increased fines and criminal penalties
- Signed into law on May 21<sup>st</sup>
- Takes effect with the plan year that begins one year after enactment (for calendar year plans, January 1, 2010)

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## GINA Prohibits:

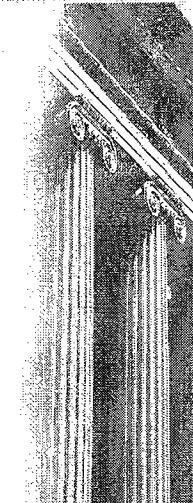
- Adjustment of premium or contribution rates on the basis of genetic information
- Requiring or requesting genetic testing of individual or family member
- Request or purchase of genetic information for underwriting purposes
- Using or disclosing protected health information



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## Increased Wage & Hour Actions

- DOL collected \$220 Million last year
- Collections up 3.8%
- 341,000 individuals benefited
- Tampa DOL is extremely aggressive
- Sharp increase in private collective actions
- Increase in break time claims
- Florida is ground zero



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## What's On The Horizon Right Now?

- Continued barrage of FLSA lawsuits and Dep't of Labor enforcement activity
- Layoffs, reductions in force, employer efforts to cut payroll costs - will increase litigation and complaints to the DOL
- ADA Amendments Act
- New and "Improved" FMLA regulations
- Employee Free Choice Act (terribly misleading name)
- Ledbetter Fair Pay Act
- Employment Non-Discrimination Act
- And more ...

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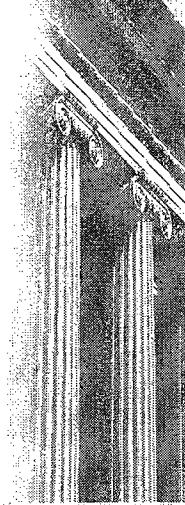
## Wage-Hour Issues

- Computer Employees (across industries, often misclassified and exempt)
- Big box stores continue to be huge targets for costly class actions, usually "managers" or "assistant managers" who are working more than managing
- DOL and plaintiffs' attorneys also targeting small businesses – home improvement, landscaping, painting contractors, drywall installers, ALFs ...
- Congress, states, and DOL considering crackdown on "independent contractor" treatment of workers
- Studies indicate at least 10-55% of an estimated 10 million independent contractors are misclassified.

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## Wage-Hour Issues w/ Nonexempt Employees

- Automatic meal break deductions and challenges from employees alleging they don't receive full meal breaks daily. Frequent targets – electrical, plumbing, other employees on the road throughout workday.
- Ideal – at least 30 mins. uninterrupted time AND employer can prove it. “Understanding” between employer and employee to take full break not adequate.
- Performing work off the clock, whether employee is directed or asked to or volunteers.
- Having poor or nonexistent time records because everyone “knows” no one works more than 40 hours per week.
- Using “comp time” with nonexempt employees – not legal in the private sector.



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## Layoffs and RIFs

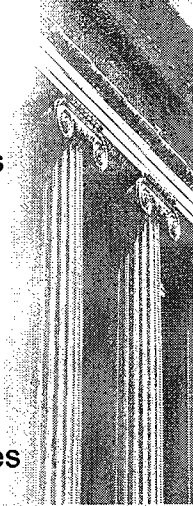
- Even small layoffs should be planned and careful consideration given to those selected as compared to those not selected.
- What selection criteria are used? LIFO easy, but not always desirable.
- For larger layoffs, consider an objective point system to determine layoff candidates.
- If it's not really a layoff or position elimination, DON'T call it that to employee being terminated.
- Severance – does handbook or other doc guarantee severance?
- Consider properly worded severance agreement with release of claims.
- Assist employee with transition – provide info on how to apply for unemployment, outplacement assistance, benefits



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## ADA Amendments Act

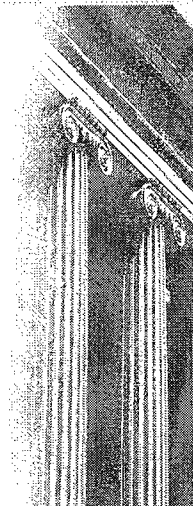
- Took effect January 1<sup>st</sup>
- Wipes out multiple decisions interpreting the ADA by the U.S. Supreme Court and US Courts of Appeals because employers won too many disability discrimination cases in the view of disability rights advocates and the EEOC.
- Expands definition of “disability” to simply “a physical or mental impairment” rather than substantial impairment
- Expands what are considered major life activities



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## “Major Life Activities”

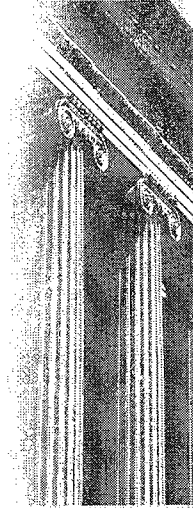
- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Speaking
- Breathing
- Working
- Walking
- Standing
- Lifting



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## “New Major Life Activities”

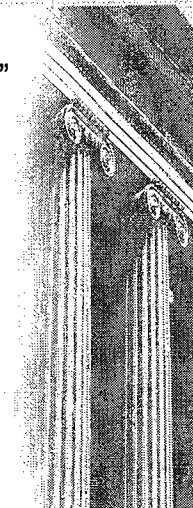
- Digestion
- Cell growth
- Concentrating
- Thinking
- Communicating
- Learning
- ANYTHING is now a major life activity



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## ADA Amendments Act

- Prohibits consideration of “mitigating measures” in determining whether someone is disabled; evaluate employee without regard to hearing aids, medication, prosthetic devices.
- Will lead to proliferation of ADA lawsuits and make it easier for ADA plaintiffs to get past summary judgment to trial.
- Employers need to be wary of these changes and ready to analyze disability issues and accommodation requests more carefully than ever.

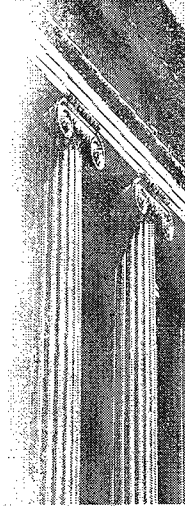


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## FMLA Military Amendments

- Signed into law Jan. 28, 2008
- Regulations issued last month
- Up to 12 weeks of “active duty” leave for “any qualifying exigency” arising out of close family member’s service commitment (applies to those called to duty who are reservists, national guard, etc., not regular full-time military)
- Up to 26 weeks of “caregiver” leave to those caring for an injured service member (someone who was injured in active duty, whether Army, Navy, Marines, Reserves, etc.)

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## Improved FMLA Regulations

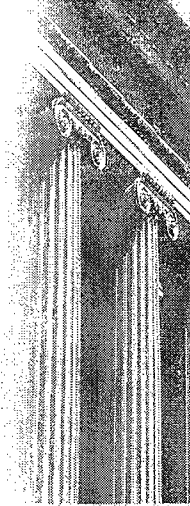
- DOL issued first regulatory changes since 1994
- Slated to take effect on January 16th
- Employers had been calling for a practical overhaul for several years
- Enhanced notice requirements
- Clarify substitution of paid leave

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## Improved FMLA Regulations

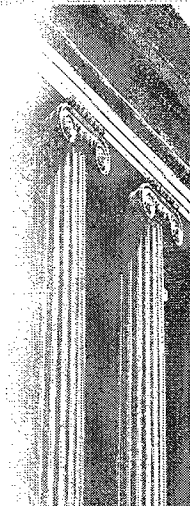
- Allow for enforcement of call-in procedures
- Extend latitude to attendance bonuses
- Permit employers to directly contact physicians
- Allow for more regular recertifications
- Provide for retroactive waiver of FMLA rights but not prospective waiver



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## Action Items

- Establish plan for implementing new forms by mid-January
- Conduct thorough management training
- Audit internal compliance with new requirements
- Look for opportunities to recapture new-found FMLA rights
- Need new FMLA policy and coordinate new aspects with existing leave and attendance policies



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## Employee Free Choice Act

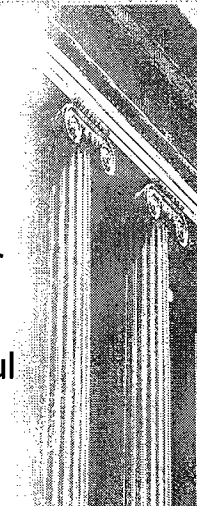
- Card check recognition
- Does away with most secret ballot elections
- Union can be certified before employer has any opportunity to respond.
- High up on legislative agenda for 2009 and President-elect Obama supports EFCA.
- We believe some version of this law is likely to pass – this is VERY bad for employers



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## Ledbetter Fair Pay Act

- Overturns *Goodyear Rubber Co. v. Ledbetter*
- SOL would begin with each paycheck
- Senate vote held in April was only four votes short
- Could lead to frivolous lawsuits harmful to business



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## Employment Non-Discrimination Act

- Would prohibit discrimination based on an individual's sexual orientation
- First bill on sexual orientation introduced in 1974; original ENDA failed in 1996
- Passed in House, not yet introduced in Senate
- Current version excludes transgender individuals, but one proposal includes them
- President-elect Obama has pledged his support for the bill

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## Other Potential Wage-Hour Laws

- President-Elect Obama has written letters to the DOL requesting significant wage-hour changes
- Increase federal minimum wage to \$9.50 by 2011
- Mandatory "living wage" increases to minimum wage each year thereafter that would not require congressional passage
- Amend FMLA to include seven hours of annual paid sick leave to employees who work more than 30 hours per week.

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## Other Potential Leave Laws

- President-elect Obama supports legislation that would reduce employer FMLA coverage to 25 workers.
- Favors creating unemployment insurance fund for those on FMLA leave through payroll tax and employer contribution.
- Other proposals would require employers to provide 12 weeks paid leave for qualifying reasons



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## Final Thoughts

- Some of these proposed bills will pass
- Be proactive, not reactive
- Stay informed – networking, newsletters, etc.
- Monitor first 100 days of Administration to determine legislative priorities
- Regardless of which laws get passed,  
EXPECT CHANGE

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## Conclusion

- Review employment policies
- Audit wage and hour and related compliance
- Act now to “union-proof” your business; build a track record of “pro-employee” actions
- Communicate effectively with employees about the state of the company - help them stay focused on work
- Avoid the temptation to cut back on preventive budget
- Network with others to share info/monitor what’s coming
- “Wait and see” or complacency could be costly
- Maintain proactive stance in a challenging environment

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## Final Questions?

*Thank you*

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