

# What's New In Employment Law For 2009?



---

FREEMAN  
MATHIS  
& GARY, LLP

---

ATTORNEYS AT LAW

100 Galleria Parkway, 16th Floor  
Atlanta, Georgia 30339-5959  
Telephone (770) 818-0000  
Facsimile (770) 937-9960

---

[www.fmglaw.com](http://www.fmglaw.com)

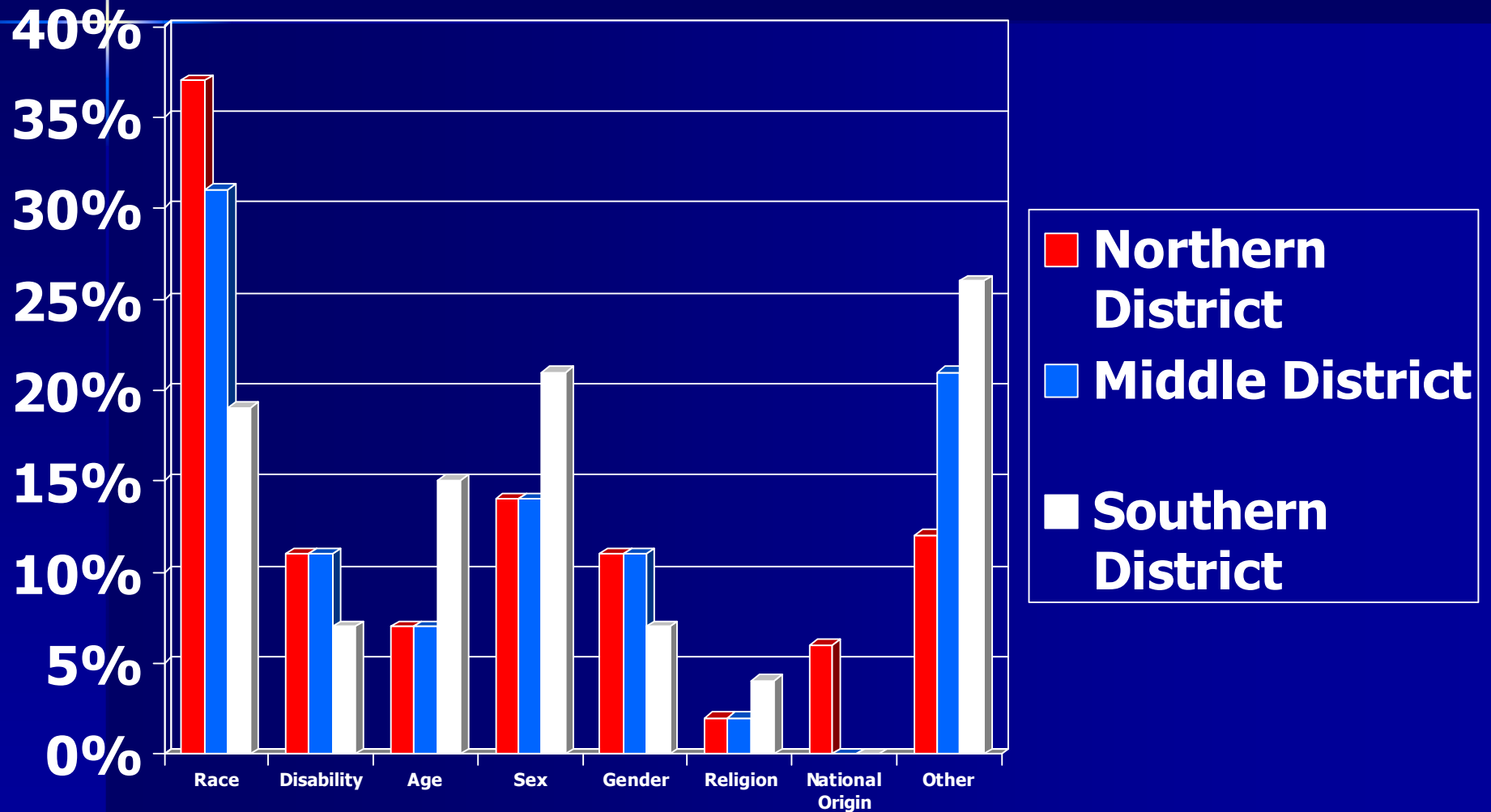
# EEOC Charges Are Increasing

- 2006      75,768
- 2007      82,792
- 2008      95,402

# Types of EEOC Charges--

| TYPE            | NATIONAL |
|-----------------|----------|
| RACE            | 37%      |
| RELIGION        | 3.5%     |
| NATIONAL ORIGIN | 11.4%    |
| SEX             | 30.1%    |
| EQUAL PAY       | 1.0%     |
| AGE             | 23.2%    |
| DISABILITY      | 21.4%    |
| RETALIATION     | 32.3%    |

# 2008 Georgia Employment Statistics



# Recent Statutory, Legislative & Court Changes

- Amendments to ADA
- Increased Veterans Protection
- FMLA Regulations
- Ledbetter Equal Pay Act
- E-Verify for Contractors
- New I-9 Form
- *Crawford v Nashville*- Increased Retaliation Protection

# Other Changes Coming

- Employee Free Choice Act
- Employee Non-Discrimination Act
- Equal Remedies Act
- Paycheck Fairness Act
- Cobra Amendments

# Employee Free Choice Act

- No election if Union gets 50% of employees to sign a card
- Bargaining Must Begin w/in 10 days after certification
- Mediation w/in 90 days
- Arbitration if no agreement
- Arbitration Board can order 2 year contract with Union
- \$20,000 fine for each violation (applicable only to employers)

# EFCA- What You Can Do

- Oppose It
- Train Management/Supervisors
- Review Policies
  - Update union-free statement
  - Problem solving/Grievance
  - EEOC/No-harassment statement
  - No solicitation/no distribution
  - Bulletin Board and Electronic Communications
- Orientation Program
- Review job descriptions
- Train Internal Corporate Campaign/Communications Team

# ADA Amendments

- Expands Definition of who is “Disabled”
- Strikes finding that “43 million Americans are disabled”
- Strikes Congressional Finding that disabled are “discrete and insular minority”

# ADA Amendments

- Overrules Two Major Supreme Court decisions – Williams v Toyota & Sutton v United Airlines
- Williams – “Substantially Limits” now means impairment of a single life activity
- Even impairment that is episodic qualifies if it limits any major life activity when active
- Sutton – Mitigating Measures now irrelevant

# ADA Amendments

- “Regarded as” claims now don’t require you regard employee as being limited in a major life activity
- Disabilities are not:
  - “transitory and temporary”
  - Actual or expected duration of six months or less

# ADA Amendments

## ■ Major Life Activities Codified

- Caring for self
- Working
- Manual tasks
- Working
- Walking
- Hearing
- Seeing
- Reproduction
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Bending
- Lifting
- Standing
- Walking
- Breathing
- Sleeping

# ADA Amendments

- New Category of Major Life Activity
  - “Major Bodily Functions”
    - “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive function
- Employee Disabled if disease or malady affects only one organ group

# ADA Amendments

- Reasonable Accommodation Will Now Be Primary Focus
- Don't forget the Interactive Meeting
- Use Accommodation Checklist
  - Job restructuring/Modified Schedules
  - Breaks
  - Job reassignment
  - Acquisition or modification of equipment
  - Some absenteeism/Unpaid Leave
  - Different shift
  - Moving Non-essential functions

# ADA Amendments

- No Claims for Reverse Discrimination by the “non-disabled”
- No accommodation for “Regarded As”
- Most other provisions remain unchanged

# Ledbetter Fair Pay Act

- Overturns *Ledbetter v Goodyear Tire*
- *Goodyear* Held Statute Limitations Period Started When Original Pay Decision Implemented (Paycheck Rule)

# Provisions of the Ledbetter-FPA

- Covers Title VII, ADA, ADEA and Rehab Act
- Each new paycheck or Retirement Benefit is “Unlawful Employment Practice”
- Employee then has 180/300 days to file charge
- Law is Retroactive to May 28,2007

# Possible Implications of Ledbetter-FPA

- “Unlawful Employment Practice” affects a “Person”
- “Person” could allow charges by “non-employees”
- Non-employees could be spouses, children, relatives and survivors

# What You Can Do To Avoid/Minimize Exposure

- Buy EPLI Insurance
- Understand that RIFs Can Lead To Lawsuits
- Use Severance Agreements
- Arbitration Agreements
- Review Handbook and EEOC Policies
- Review Terminations Before they happen
- Use Exit Interviews

# What You Can Do To Avoid/Minimize Exposure

- Control Email Issues
- Establish Email/Record Retention Policy
- Use Severance Agreements
- Review Handbook and EEOC Policies
- Review Terminations Before they happen
- Union Free Training/Audit
- EEO Audit
- FLSA Audit

# **Best and Worst of New Regs - Worst**

- **Don't Reign in Serious Health Conditions**
- **Written Notice + Designation Requirements**
- **Broad Coverage for Service Members + Complicated Regulations**
- **Expanded Eligibility in Some Cases**

# **Best and Worst of New Regs - Best**

- **New Certification Forms + More Detailed Information**
- **May Require Employees to Follow Usual Notice Requirements for Leave**
- **Employees Cannot Just Call in "Sick" for FMLA Protection**

# **Best and Worst of New Regs - Best**

- **Some Direct Contact with Medical Care Provider Allowed**
- **6-Month Certifications Ok**

# **General Notice to Employees of FMLA** § 825.300(a)

- Post
- Distribute in Handbook or New Hire Materials
- Electronics Posting and Distribution Is Ok

# Notice of Eligibility § 825.300(b)

- In 5 Business Days of Need for Leave
  - Commencement of first instance of leave for each FMLA condition
- In writing or oral
- Must Provide Reason Not Eligible

# Rights and Responsibilities

## Notice

§ 825.300(c)

- Written Notice Required
- Within 5 Business Days
  - Leave counted vs. 12 weeks
  - Certification requirements and consequences for non-compliance
  - Substitution of paid leave

# Rights and Responsibilities

## Notice

§ 825.300(c)

- Premium payments and potential liability to pay if fails to return
- Status of key employee
- Benefits and restoration rights
- May Include Other Information

# Designation Notice § 825.300(c)

- Within 5 Business Days of Sufficient Information
  - One for each FMLA qualifying reason in 12-month period
  - Notify of changes
- Designate and Notify

# Designation Notice § 825.300(c)

- Must be in Writing
- Amount of Leave Designated in Writing

# Designation Notice § 825.300(d)

- Right to Request Leave Used
  - One time in 30-day leave period
  - Must confirm in writing by next pay day
- Notify if Substitution of Paid Leave Required

# Designation Notice § 825.300(d)

- Fitness for Duty Requirement + Essential Job Functions
- Failure to Notify May Be FMLA Interference if Harm to EE
- Retroactive Designation Ok if No Harm

# Disputes Regarding Qualifying Leave

- Whether Leave Qualifies
- Should Be Resolved by Discussions with EEs
- Discussions and Decisions Must Be Documented

# Employee Notice Requirements

§ 825.303

- May Require to Follow Usual Requirements for Requesting Leave
  - Absent unusual circumstances
  - Not more than FMLA
- Calling in “Sick” Not Enough for FMLA

# Employee Notice Requirements

- At Least 30 Days for Foreseeable Leave
- “As Soon as Practicable for” Unforeseeable Leave
- If Subsequent Requests for Same FMLA Condition
  - Must Reference the Condition or FMLA

# Medical Certifications § 825.305

- New Forms
- In Writing / Rights and Responsibilities Notice
- May Recertify Every 6 Months or Less
- Statement of Essential Job Functions

# Deficient Medical Certification

§ 825.305(c)

- Incomplete or Insufficient
- Deficiencies in Writing
- 7 Calendar Days Cure Period
  - Unless not practicable
  - Not required for complete failure

# Direct Contact With Provider

§ 825.307(a)

- Authentication or Clarification
- Only Specific Employees NOT Direct Supervisor
  - Health care provider
  - HR
  - Leave Administrator
  - Management
- HIPAA Rules Apply for Clarification

# **Fitness For Duty For Essential Job Functions** § 825.312

- Same New Contact Rules for Provider
- Permissible Up to One Time in 30 Days if Reasonable Safety Concerns Exist

# **Serious Health Condition Continuing Treatment - Incapacity + Treatment**

- More Than 3 Days Incapacity
- First (or Only) Visit in Person
  - w/in 7 days of first incapacity
- Subsequent Treatment or Incapacity Involving:
  - Treatment at least one time and continuing regimen (prescription)

# **Serious Health Condition Continuing Treatment - Incapacity + Treatment**

OR

- Treatment at least 2 or More Times
  - Within 30 days of first incapacity
    - Unless extenuating circumstances
    - At direction of healthcare provider

# Employee Eligibility – 12-Month Requirement

§ 825.110(d)

- At Time of Leave
- Non-FMLA Leave May Ripen to FMLA Leave
- Pre-FMLA Not Protected and Cannot Count Towards 12 Weeks
- Breaks in Service of 7 Years or More Don't Count Generally

# ServiceMember Leave

- National Defense Authorization Act
  - Effective January 28, 2008
- Created two types of ServiceMember leave under the FMLA
  - Leave because of qualifying exigency
  - Leave to care for injured servicemember

# Qualifying Exigency Leave

- What is it?

1. Provides FMLA leave for

2. employee whose parent, spouse, son or daughter ("covered military member")

2. has a "qualifying exigency"

# Qualifying Exigency Leave

- What is a “qualifying exigency?”
  1. Short-Notice Deployment Issues
    - Call to active duty to occur within 7 days
    - Leave time starts on date notice is received until deployment
  
  2. Military Events and Related Activities
    - Attend official ceremony or event
    - Attend family support/assistance program

# Qualifying Exigency Leave

- What is a “qualifying exigency?”
  3. Childcare and school activities
    - Arrange for alternative childcare when call to active duty leads to change in arrangement
    - Provide childcare on an *urgent, immediate* need basis for child of covered military member
    - Enroll or transfer to new school or daycare
    - Attend meetings with staff at school or daycare

# Qualifying Exigency Leave

- What is a “qualifying exigency?”
  4. Financial and legal arrangements
    - Make or update financial or legal arrangements (e.g. wills, power of attorney)
    - Act as representative for military benefits
  5. Counseling sessions for covered military member or for child of member arising from active duty or call to active duty

# Qualifying Exigency Leave

- What is a “qualifying exigency?”

- 6. Rest and recuperation

- Spend time with a covered military member on short-term, temporary rest and recuperation leave during deployment
    - Five day time limit per R&R period

- 7. Post-Deployment Activities

- Arrival/integration events w/in 90 of arrival
    - Issues arising from death of member on active duty

# Qualifying Exigency Leave

- What is a “qualifying exigency?”

- 8. Additional activities

- “Catch all” – other events which arise out of the covered military member’s active duty or call to active duty
    - Act as representative for military benefits

# Qualifying Exigency Leave

- Applies to
  - Active and reserve military members
  - State and federal military members
- But only for “Federal” call to active duty
- Unless President orders “State” call

# Member Caregiver Leave

- Eligible employee gets 26 weeks of leave during a “single 12 month period” to care for current servicemember:
  - On temporary disability retired list; **or**
  - With serious injury or illness incurred in line of duty
- Eligible employee = spouse, child, parent or *next of kin* of member

# Member Caregiver Leave

- Serious injury or illness = injury or illness that may render the member medically unfit to perform duties
- Single 12 month period = one time entitlement that begins on the first day that leave begins
- Applies per member and per injury
- Total leave under FMLA for all reasons is 26 weeks (e.g. 12 weeks for birth and 14 weeks to care for servicemember) - MUST TRACK LEAVE TYPE
- Intermittent leave/reduced schedule available

# Miscellaneous Issues

- Workers Compensation/Disability Plans – Can't force "paid leave"
- Light Duty – Employees can decline light duty offer, but may lose w/c benefits --- then may force paid leave
- Bonuses – if bonus based on achievement of goal, then payment be denied based on failure to achieve goal (e.g., sales quota, perfect attendance)
  - Must be treated same as employees on other types of leave

# I-9 Requirements Modified

- I-9 still required to verify new hires' identity and authorization to work
- Changes to list of documents that can be used to verify identity and employment authorization

# I-9 Modifications

- New "List A" documents:
- Form I-94A (computer-generated "Arrival-Departure Record")
- Passport from Federated States of Micronesia or Republic of the Marshall Islands with valid I-94

# I-9 Modifications

- New "List A" documents (cont.):
- New U.S. Passport Card
- Foreign passport notation on machine-readable immigrant visa with pre-printed temporary I-551 notation (legal permanent residence status confirmation)

# I-9 Modifications

- Documents removed from List A:
- Form I-688, Temporary Resident Card
- Form I-688A, Employment Authorization Card
- Form I-688B, Employment Authorization Card

# I-9 Modifications

- Other expired documents (including U.S. Passports) no longer acceptable
- Documents without expiration dates (e.g., Social Security cards) still acceptable

# I-9 Modifications

- Change to Section 1 of Form I-9: separate box now appears for U.S. nationals (U.S. citizens and U.S. nationals used to check the same box)
- Copy of new Form can be accessed at [www.uscis.gov/i-9](http://www.uscis.gov/i-9)

# I-9 Modifications

- U.S. noncitizen national category includes persons born in American Samoa, certain children of non-citizens born abroad, and certain former citizens of the former Trust Territory of the Pacific Islands.

# E-Verify

- Free, Internet-based service
- Confirm new hires legally authorized to work
- Federal contract employees only
- Only work performed in U.S.

# E-Verify

- Compares information from employee's Form I-9 against information from DHS and SSA databases

# E-Verify

- Implements Executive Order 12989 (federal agencies must require federal contractors to electronically verify workers' employment eligibility)

# E-Verify

- Implementation date pushed from January 15, 2009 to May 21, 2009

# E-Verify

- Applies to persons hired during federal contract term and contractors' current employees performing services

# E-Verify

- Federal contracts (and subs for over \$3,000) and solicitations after February 20, 2009 will include clause committing contractors to use E-Verify

# E-Verify

- Will not apply to all contracts or subs (< \$100K/<\$3K)
- Will not apply to contracts for items commercially available off-the-shelf
- Will not apply to contracts lasting less than 120 days

# E-Verify

- According to DHS, over 100,000 employers enrolled in E-Verify and over 6.6 million verification queries made using system

# Georgia Security and Immigration Compliance Act

- Requires all public employers, contractors and subcontractors providing services to the state to register and participate in E-Verify

# Georgia Security and Immigration Compliance Act

- Obligation part of the Georgia Security and Immigration Compliance Act (GSICA)

# Georgia Security and Immigration Compliance Act

- Implemented according to phased calendar based on number employees

# Georgia Security and Immigration Compliance Act

- Has applied to entities with 100 or more since July 1, 2008; after July 1, 2009, will apply to all public employers and contractors

# Georgia Security and Immigration Compliance Act

- Requires public employers to incorporate specific language in agreements with contractors
- Language must reflect that:
  - compliance with the GSICA is a condition of the contract
  - contractor will secure compliance of any subcontractors engaged; and
  - compliance with the GSICA will be attested to by affidavit (by both the contractor and any subcontractor(s) it engages).

# Georgia Security and Immigration Compliance Act

- GSICA also:

- establishes penalties for human trafficking and sexual servitude,
- authorizes Georgia peace officers to enforce immigration and customs laws,
- requires jails to determine the legal status of some prisoners and notify the Homeland Security if not legally in U.S.
- requires verification of legal U.S. residence before providing public benefits to anyone 18 or over where such residence is benefit requirement

# Georgia Security and Immigration Compliance Act

- Applies only to newly hired employees assigned to work on public contracts.
- Location performing no public contracts need not participate in E-Verify

# Georgia Security and Immigration Compliance Act

- If location participates in E-Verify and performs public and private contracts, must use E-Verify for all new hires at that location

# Georgia Security and Immigration Compliance Act

- Will be enforced by the Georgia Department of Labor (DOL) through Random Audit Program

# Georgia Security and Immigration Compliance Act

- Allows the DOL to perform investigations, but (through August 2008) no funding appropriated by Georgia General Assembly

# **“No-Match” Safe Harbor**

- Federal government contractors must “E-Verify” identity and work authorization of employees assigned to work on future federal contracts

# **“No-Match” Safe Harbor**

- No-match letter sent by SSA when employee's name and SSN do not match information on W-2 form

# **“No-Match” Safe Harbor**

- No-match can occur without employee wrongdoing
- More than 70% of discrepancies in SSA database caused by clerical errors, name changes, use of multiple last names

# **“No-Match” Safe Harbor**

- DHS issued regulations outlining steps employer should take when notified of no-match

# **“No-Match” Safe Harbor**

- Regulations supposed to provide “safe harbor” if employer chooses not to terminate employee who turns out to be unauthorized to work in the U.S.

# “No-Match” Safe Harbor

- If identity and authorization cannot be verified and employee not terminated, employers may be viewed as knowingly employing unauthorized person

# **“No-Match” Safe Harbor**

- Employer who takes action against no-match employee based on faulty SSA information may expose itself to unfair termination claim

# “No-Match” Safe Harbor

- Late last year, federal court rejected government request to dismiss litigation challenging Safe Harbor regulations

# **“No-Match” Safe Harbor**

- Court's actions prevent Safe Harbor regulation from being implemented
- Employers need not address this untenable situation for time being