

Employment Law 2009: Trends, Predictions and Surviving the New Workplace

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Did You Know?

- **627,000** people filed for unemployment benefits in the week ending February 14, 2009
- Record **13.2 million workers unemployed** in US at end of March 2009 (8.5% US unemployment rate)
- Worst economy in 30 years . . .
PRICELESS (for lawyers)!

A Sign of the Times

- EEOC Charges Way, Way Up in FY08
 - 95,402 charges (most charges ever), **15% increase**; EEOC collected \$376 million
 - **Age claims up 29%**
 - **Retaliation claims up 23%**; retaliation claims just behind race claims – 33,937 to 32,690 – as 2nd most-alleged charge
 - Disability claims up only 9%; but wait
- Overall decline in federal lawsuits filed (40% drop from 1997 to 2006!)

Problems in Search of a Lawsuit

- Retaliation!!!!
- Generational conflicts affecting age
- Disability discrimination claims, especially mental illness
- Pregnancy discrimination: US birthrate has dropped, but pregnancy claims at record high
- “Family responsibility”/”caregiver” discrimination
- Sexual harassment: The problem that will not die
- “Hidden bias,” e.g, applicant’s name denoting race/ethnicity, credit worthiness
- Religious harassment and ethnic intimidation

Retaliation is Easier to Prove

- Public school district conducting internal harassment investigation of ER Director
- HR investigator approached Vicki Crawford, 30-year employee, to ask if she had ever witnessed “inappropriate behavior” by subject
- Witness disclosed she had observed subject “grabbing his crotch” and other offenses
- Two other witnesses corroborated behaviors; no action against ER Director; Ms. Crawford later fired for embezzlement
- Ms. Crawford sued for retaliation. Who wins?

Post-Investigation Retaliation

- Lower courts ruled for school district; no “opposition to unlawful employment practice” since witness did not initiate complaint, but only answered questions in an already pending internal investigation: No active “opposition.”
- U.S. Supreme Court 9-0 for employee. *Crawford v. Metro. Gov’t of Nashville* (U.S., 1/26/09)
- “Opposition” not defined by statute. Anti-retaliation protections extend to answering questions in an employer’s internal investigation. An “ostensibly disapproving account” of another’s obnoxious behavior could qualify as “resistant” to the subject’s treatment of her sufficient to qualify for protection.

Big Case on Horizon

- May municipal governments decline to certify promotion exam that would advance disproportionately more white applicants than black applicants for fear of race discrimination claims?
- New Haven firefighters allege reverse discrimination in *Ricci v. DeStefano*
- Oral argument to be heard on April 22, 2009
- City believes disparate impact on minorities vs. race-neutral exam

Expansion of Civil Rights

- Paradigm shift away from “protected classes” and toward “characteristics” protected by Title VII
 - E-RACE initiative addressing “new forms” of racial bias, e.g., “cultural distortions” and “reliance on new technologies,” such as video resumes
 - Sexual stereotyping and gender nonconformity theories of discrimination continue to evolve
 - New concept has emerged: “unconscious” or “subtle” bias

E-RACE Cases

- September 2007. EEOC sued food distributor for failing to curb use of “code word,” “Cornelius,” toward Black employee.
- June 2008. Novellus Systems, Silicon Valley manufacturer, settled racial harassment case for \$168,000 after failing to curb Vietnamese employee’s daily “rap singing” of songs containing “n-word” in presence of Black employee

Expansion of Civil Rights

- Family Responsibility Discrimination (FRD)
 - EEOC Guidance on Workers with Caregiving Responsibilities (2007)
 - Potential discrimination suffered by working parents or other caregivers, e.g., eldercare, child care
 - Not “intended” to create new protected category
 - E.g., sex-based stereotyping of working women, denying leave to working fathers, discrimination against persons who “associate with” disabled persons

Expansion of Civil Rights

- Traditional rules still apply, but doesn't mean people won't try to expand these categories
- 10th Circuit dismissed sex discrimination case based on "familial status." *Adamson v. Multi Cmty Diversified Svcs.* (10th Cir. 2008)
- Employees -- husband, wife and daughter -- fired after father hired and directly supervised wife and daughter at non-profit agency in violation of anti-nepotism policy
- Familial status is not a factor based on sex, but is gender neutral.

Expansion of Civil Rights

- Mother of triplets alleged she was denied promotion based on stereotype against working mothers. *Chadwick v. Wellpoint, Inc.* (1st Cir. 2009)
 - Two months before promotion, decisionmaker discovered plaintiff was mother of 6-year old triplets and sent e-mail, “Oh my – I didn’t know you had triplets. Bless you!”
 - During interview, interviewer said, “Laurie, you are a mother. Would you let your kids off the hook that easy if they made a mess in their room?”
 - In the interview, plaintiff was told “if [the three interviewers] were in your position, they would feel overwhelmed.”
- **Fact person selected for promotion was female, mother of two was not sufficient to rebut claim of gender bias**

George W. Bush: Civil Rights' Advocate

- Genetic Information Nondiscrimination Act (GINA)
- ADA Amendments Act of 2008 (ADAAA)
- FMLA Expansion (Military Caregiver Leave)

GINA

- The Genetic Information Nondiscrimination Act of 2008 (**GINA**) signed into law by President Bush on May 21, 2008.
 - **Prohibits workplace and health insurance discrimination based on use of “genetic information”**
 - Includes genetic composition or person’s “family history” of inherited traits or disorders
 - No genetic testing
 - Must preserve confidentiality of genetic information

ADAAA

- ADA Amendments Act (ADAAA) signed by President Bush on 9/25/08; effective Jan. 1, 2009
 - Restores intent of original ADA
 - Overturns several court rulings that limited the ADA
 - **Expands definition of “major life activities” the impairment of which may constitute a disability**
 - Lowers standard for proof of “regarded as” disabled; but no duty to accommodate person solely regarded as disabled
 - No consideration of mitigating measures
- ADA Coordinator? Reasonable accommodation policy?

FMLA Expansion

- FMLA expanded for military families
 - Spouse, son, daughter, parent or *next of kin* entitled to total of *26 workweeks* of leave during a single 12-month to care for servicemember injured or made ill in the line of duty
 - 12 weeks' leave for qualifying family exigencies of mobilized Reserve or Guard member
- New FMLA Regulations, January 16, 2009
- Revise FMLA policy? Adopt new FMLA forms?

Colorado Civil Rights Expansion

- New workplace accommodation for nursing mothers, C.R.S. 8-13.5-101 et seq. (eff. 8/05/08)
 - Covers all employers including state and local governments
 - Provide reasonable break time, accrued paid or unpaid, to express breast milk up to two years after child's birth
 - Provide private, secure location to express breast milk (not a toilet stall)
 - Accommodation required; must mediate before suit

Change Will Happen!

- American Recovery and Reinvestment Act
- \$787 billion stimulus bill; signed Feb. 17, 2009
 - COBRA subsidy for involuntarily terminated employees
COBRA-eligible 9/1/08 to 12/31/09; 65% reimbursed by payroll tax credit up to 9 months; income limits; special election period after February 17, 2009
 - Tax breaks for individuals and businesses
 - Limits on H1-B visas for TARP recipients
 - More stringent HIPAA requirements
 - Increased whistleblower protections
 - Commuter assistance tax break up to \$230/month

I Am King of the World

- Change business models. NJ Law Against Discrimination, protecting sexual orientation, used to force on-line dating service to advertise same-sex matches
- Change management duties. New York passed Article 23-A of its Correction Law requiring employers to conduct a “balancing test” before refusing to hire/terminating a person with a criminal record
- Create a moral duty. Illinois enacted law requiring employers to report any child pornography discovered on electronic or information equipment to local law enforcement or national Cyber Tipline
- Be good. CA passed “no texting and driving” law

Top 2008 Cases

- *Zisumbo v. Mcleod USA Telecom* (10th Cir. 2008)
- Your words may be used against you in a court of law!
 - At awards lunch, boss asked top female performer, “you’re not gonna get pregnant now, are you?”
 - Next month, female employee announces she’s pregnant
 - Boss then constantly refers to employee as “prego” and frequently yells at her
 - Case sent to trial; “prego” can support a hostile work environment based on gender/pregnancy

Top 2008 Cases

- Quon v. Arch Wireless Operating Co. (9th Cir. 2008)
- You can create privacy expectations by word or deed!
 - Ontario, CA, police sergeant Jeff Quon used company-owned pager to send business and personal (e.g., sexually explicit) text messages; Ontario PD asked Arch Wireless for text transcripts believing Quon misusing pager
 - Arch Wireless violated Stored Communications Act by not obtaining consent of addressor/recipient
 - **Employees had reasonable expectation of privacy in text messages – provided by text messaging services and stored on its network – even if sent on company pager.**
 - Fact PD had policy eliminating expectation of privacy was nullified by reality; city supervisor said he would not audit pager usage as long as employee paid overage.
 - Express consent would have been acceptable exception; also, employer could have searched its own pager

Top 2008 Cases

- *McBride v. City of Detroit* (E.D. Mich. 2008)
- Employer must engage in interactive process under the ADA!
 - Employee complained she was sensitive to co-worker's perfume, air freshener, pot pourri in the workplace
 - Supervisor able to convince co-worker to stop using perfume, pot pourri; but employee resumed use
 - Plaintiff requested “no-scent” policy; HR refused; no other action taken
 - Court found employer failed to accommodate reasonably; held HR remark that “[plaintiff] has the problem, not the employer” against the employer

Top 2008 Cases

- *Bacon v. Hennepin County Medical Center* (8th Cir. 2008)
- Daily call-in policy does not violate FMLA!
 - Employee on intermittent FMLA leave for chronic skin irritation
 - Employee terminated for failing to follow employer's call-in policy when she elected to take extended leave to await appointment with allergist
 - No FMLA violation where call-in policy consistently applied for all extended leaves

2008 Top Cases

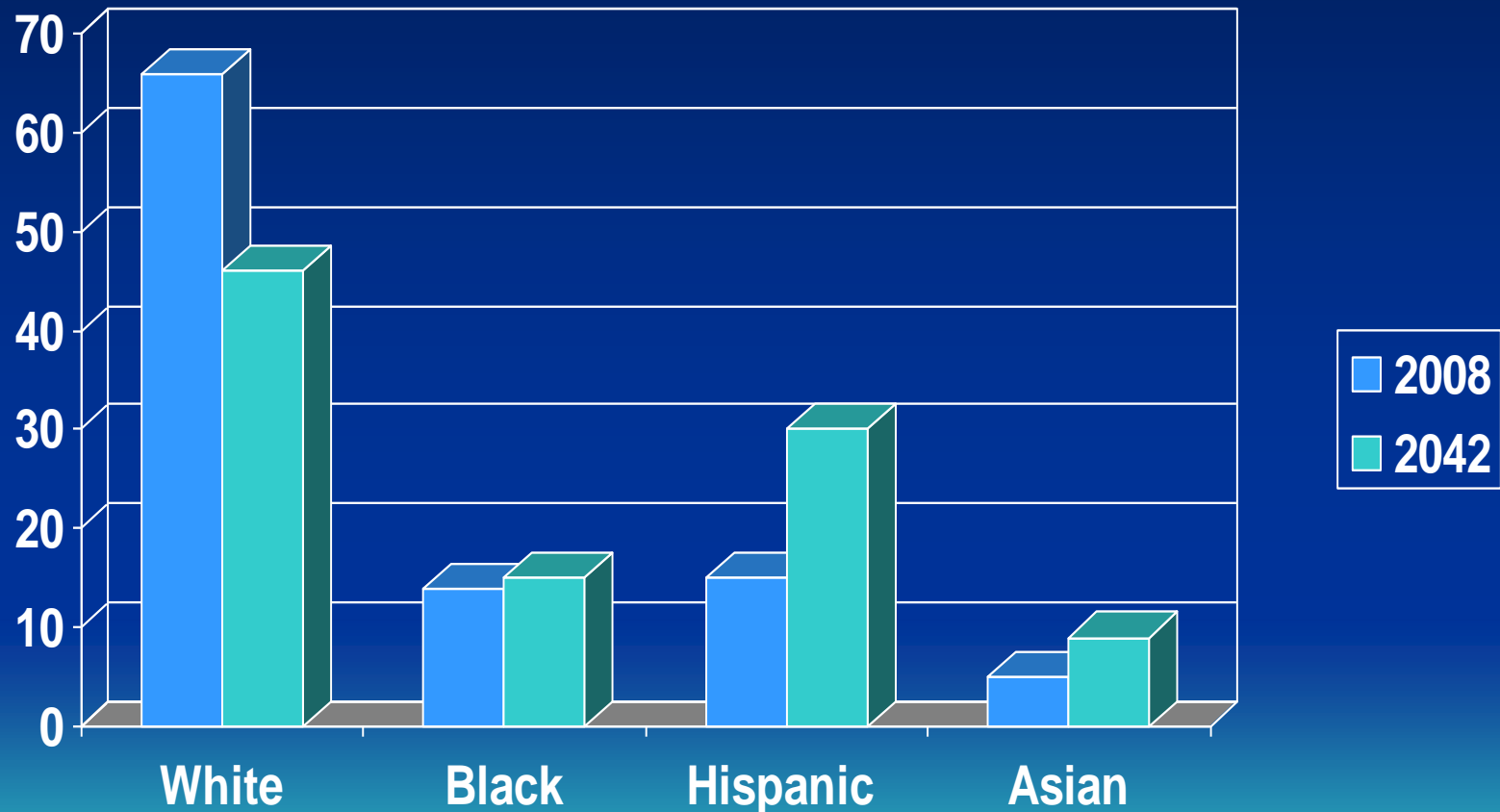
- *Brady v. Wal-Mart Stores, Inc.* (2d Cir. 2008)
- Duty to accommodate under ADA is broad!
 - Employers must accommodate obvious disability (e.g., cerebral palsy) even if employee never requests accommodation.
 - Employee transferred to two other jobs due to performance difficulties, quit, sued under ADA.

2008 Top Cases

- *Hughes v. City of Bethlehem (PA)* (3rd Cir. 2008)
- Bad behavior still gets you fired!
 - Diabetic employee fired for calling in sick two days when she was actually in Las Vegas having lips and eyebrows permanently tattooed
 - Anonymous note sent to Mayor
 - When confronted, employee lied; was terminated for dishonesty
 - FMLA claim dismissed on summary judgment; affirmed by appellate court

Trends: Change Will Happen

US Census Bureau Predictions



Demographics: 2042

- Ethnic minorities in total will outnumber non-Hispanic whites (54%:46%); no other country has had such rapid racial and ethnic change
- US population 300 million in 2006; 400 million by 2039
- By 2030, 1:5 US residents will be ±65 years old
- 1790 Census, 64% white; in 2010, 65% white; 1900, 90% white; 2042, 46% white
- **Organizations must prepare today for tomorrow's workplace**

Diversity Initiatives

- Diversity efforts viewed as critical for future workforce planning
 - 67% of employers conduct diversity training. SHRM 2005 Survey
- Nearly every employer has at least a *de facto* diversity program, e.g., accommodate diverse religious beliefs
- Diversity efforts invite “conscientious objectors”
 - Diversity policy is not, by itself, “reverse discrimination,” *Jones v. Barnhanke* (D.D.C. 2007)
 - Silent protest during diversity training protected under 1st Amendment/Title VII. *Altman v. Minn. Dept. of Corrections* (8th Cir. 2001)
 - Can’t force employees to contravene religious beliefs. *Buonanno v. AT&T Broadband* (D. Colo. 2004)

Trends: Loss of Knowledge Workers

- **Managing the “brain drain”**
 - Layoffs result in “knowledge” loss
 - Large number of retiring knowledge workers is imminent
 - Reduced loyalty leads to transfer of information
- **Few employers have strategies for retaining workers eligible to retire or recruiting older workers**
 - In 2005, one in four workers was over 50; by 2012, one in three workers will be over 50
 - Fastest growing segment of US population is persons age 55-64
 - 40% of US labor force in 2000 will have retired by 2010

Future Workforce Planning

- Examining age has always been taboo in US; but *favoring* older workers is not unlawful under federal ADEA
- Consider phasing retirement through incentives or bringing retirees back to mentor/train successors
- Flex scheduling, part-time work, flex benefits
 - Best Buy's Results-Oriented Work Environment (ROWE)
 - AARP 4-week paid sabbatical after 7 years
- **Ask yourself, how do we retain organizational knowledge?**
 - Identify knowledge at risk
 - Identify knowledge transfer practices
 - Consider capturing, sharing, reusing knowledge through information technology

Trends: Hiring Right

- Use of Internet search engines by hiring managers to screen applicants
 - ExecuNet 2006 survey found that 35% of executive recruiters who used Internet to research candidates eliminated a candidate based on on-line discovery of adverse information!
 - Be careful what you put on MySpace or Facebook: Kevin Colvin was fired after e-mailing his employer, Anglo-Irish Bank of North America, that he needed to miss the day after Halloween “because something came up at home in New York;” the employer checked his Facebook page and discovered pictures of Colvin in a “fairy outfit” holding a beer at a Halloween party in Worcester, Mass. WJZ.com, November 14, 2007.
- Finding “knowledge workers” and retaining “talent” are key for future

Trends: Where Does Work End?

Erosion of Personal Privacy

- Increased workplace use of biometrics and location awareness technology raises privacy concerns, i.e., “geoslavery”
 - Illinois Biometric Information Privacy Act enacted 10/08
- Employers blocking access to porn sites
 - Survey: 85% of adult/sex web blocks occur during day!
- Outside Activities More Closely Scrutinized
 - Are obese persons protected? Is use of tobacco products protected?
 - Do you have a blogging policy? Affects corporate image, reputation and access to business information.
 - Cell phone policy, e.g., no camera function at work, no use while driving

Blogging Thoughts

- Estimated 20 million blogs on Internet
- Fall 2004. Delta Airlines employee, Ellen Simonetti, fired for posting suggestive pictures of herself in uniform
- January 2005. Google employee Mark Jen fired for speculating online about his employer's finances
- “Dooiced” is new word for losing one's job due to one's Web site
- **Microsoft and Sun encourage employee blogs**
- Tons of HR issues and potential hurdles
 - NLRA §7 protected concerted activity
 - No right of privacy, but **1st Amendment considerations in public sector and off-duty, off premises protection in CO**

Where Does Work End?

- November 2008. Two employees fired by UNM Hospital for using cell phone cameras to take pictures of patients and posting on MySpace
- Twitter. Up to 140-character microblog.
 - 475,000 visitors in Feb 2008; 7 million in Feb 2009
 - **“Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work.”**
 - Cisco monitors Twitter and other posts about the company. Oops! Twitter can get you fired.
- SHRM used Twitter in March 2009 to announce Jack Welch speaking at SHRM Conference in June 2009. Training, marketing, benefits

A Tweet: World's Shortest Employee Handbook

Be at work on time unless authorized to miss work. Use good judgment in all situations. Respect others/be nice. Ask for help if you need it!

TWOOSH!!!

Trends: The Leave Explosion

- US vs. The World: Mandated Paid Leave
 - US is one of few countries in world that does not guarantee paid sick days for illness; 127 countries provide a week or more annually
 - 168 of 173 countries provide paid maternity leave; 98 countries off 14 or more weeks of paid maternity leave; U.S. and 4 small African nations do not.
- San Francisco became first locality in US mandating paid sick leave (up to 72 hours per year) to employees effective 2/5/07; CA and DC passed measures in 2008
- Expect more paid leave efforts in 2009

Trends: Fear Factor

- Guns at work!
 - Georgia, Florida and Louisiana passed laws in 2008 giving employees a right to store a gun in their vehicle while parked on employers' premises
 - 10th Circuit upheld OK law allowing employees to store firearms in locked vehicle. *Ramsey Winch v. Henry* (10th Cir., February 18, 2009)
 - Texas poised to pass similar bill in 2009
- “Desk Rage:” Increased anger in workplace
 - 2008 national survey: Nearly half of US workers report yelling and verbal abuse on the job; 25% driven to tears; 1/6 reported property damage

Trends: How mad?

- Plainville, CT, police arrested a woman in June 2008, accusing her of trying to retaliate against her former boss by having the **electricity cut off to his home**. After being fired from an insurance agency, the 33-year old former employee, used a co-workers computer password to make a request to cut off the power to her former boss' house. Discovered only when power company checked back with homeowner.
- Nearly half of French workers surveyed now believe it is acceptable to “lock up” bosses. Recent “**boss-nappings**” at Sony, 3M and Caterpillar to negotiate better terms of layoffs. Reuters, April 7, 2009

Trends: Even More Fear

- Too much work can kill you; call for more work life balance
 - Japanese labor bureau ruled June 30, 2008 that 45-year old Toyota car engineer, lead engineer on new Camry hybrid, died of *karoshi* (“death from overwork”). 20 OT hours each week. Work-related death benefits payable to his widow.
- “Extreme work” is the new term of art
 - 62% of high wage earners work > 50 hours/week
 - 35% work > 60 hours/week. *Harvard Business Review* (Dec. 2006)
- Overwork, and its consequences, one of the least discussed issues in most workplaces

Trends: Coffee Anyone?

- **Act of getting coffee, itself, not a gender specific act.** *Klopfenstein v. National Sales and Supply* (E.D. Pa. 2008)
 - Part-time receptionist, fired for refusing requests to bring coffee to two VPs at National Sales & Supply, brought sexual harassment claim. Claimed behavior reinforced “out-dated gender stereotypes.”
 - Trial court rejected claim. No evidence of gender-based mistreatment other than asking employee, in her capacity as receptionist, to bring coffee to employees and guests.
- **Too much coffee is a bad thing!**
 - The City of Daytona Beach, FL, fired a police lieutenant – 15-year employee -- for demanding free coffee from Starbucks, threatening employees with slower police response time if they refused. AP, July 21, 2008. (Employee visited same Starbucks six times a day).

Trends for 2009?

- **The “4-day” or “flex” workweek or telework**
 - SHRM Survey May 2008, 26% of employers offering flex schedule in part due to rising gas prices; Utah became first state to institute mandatory 4-day workweek in 2008
- **Revisiting cost-cutting measures**
 - Teleconferencing to avoid costly business travel
 - US organizations waste \$2.8 billion/year powering unused office PCs overnight. USA Today, March 25, 2009
- **Social networking sites as a recruiting tool**
- **Decline of employer-sponsored health benefits**
- **Mandated wellness programs**
 - Beware ADA, ERISA and privacy considerations
- **Internal corporate degree/education programs to mold potential future workers**

Trends for 2009?

- Succession planning
- Death of the cubicle for more open work areas and common areas
- Review of existing staff competencies
 - Mediocre performers less tolerated in bad economy
- Increase in project workers
 - EPIC-MRA survey found that “free agents” expected to be 40% of workforce by 2012
- Ethics, ethics, ethics!
- Demographics, multigenerational workforce and diversity awareness

The Obama Administration

- **Biggest impact on employers? President Obama supports universal health care; large employers must offer coverage or contribute % of payroll to government plan**
- **Would expand FMLA; cover employers with 25+ employees; cover time off for domestic violence and 24 hours for a child's school activities; require seven paid sick leave days (D platform)**
- **Would ban the permanent replacement of striking workers**
- **Would index minimum wage rate to inflation**

Legislative Predictions

- ✓ Lily Ledbetter Fair Pay Restoration Act
 - ✓ Each paycheck would restart the statute of limitations for purposes of wage claim; overturns 2007 Supreme Court opinion; Ms. Ledbetter appeared in campaign ad for Obama; **passed and signed into law 01/29/09**, retroactive to May 28, 2007
- Employee Non-Discrimination Act (ENDA)
 - Would add “sexual orientation” to Title VII
 - Likely, only real question is whether gender identity will be included
- Immigration reform? Political hot potato!
 - Voted for the fence along the Mexican border
 - Supports mandatory E-verify
 - Supports temporary worker program with a “path to citizenship” for illegal workers that includes learning English, paying fines, not break the law

Legislative Predictions

- **FMLA expansion.** Healthy Families Act adds seven paid days; expand employer coverage; rights to victims of domestic violence and/or parental school involvement
- Expansion of labor rights by the **Employee Free Choice Act (EFCA)**; passed US House, failed in Senate; expect renewed effort – Obama sponsored EFCA in US Senate
 - No secret ballot; relies on majority of signed “union recognition cards,” i.e., card check (D platform item). **Political hot potato!**
- **FOREWARN Act**
 - Amends WARN Act from 60 days’ notice to 90 days
- Civil Rights Act of 2008 intended to overturn seven Supreme Court decisions to make litigation more employee-friendly, e.g., eliminates caps on damages under Title VII and ADA

Legislative Predictions

- Arbitration Fairness Act would ban mandatory arbitration as a condition of employment
- Protecting America's Workers Act would toughen OSHA's whistleblower protections, increase civil and criminal penalties and expand coverage to the public sector

What To Do?

- Can I gain any insights into proposed Federal and/or state health care legislation?
- Does our organization comprehend the complexity of legal compliance for employers or is that “just HRs job”?
- Are we prepared to address the aging workforce and potential tidal wave of retirees?
- Are we living, or dying, by electronic media in our workplaces?