

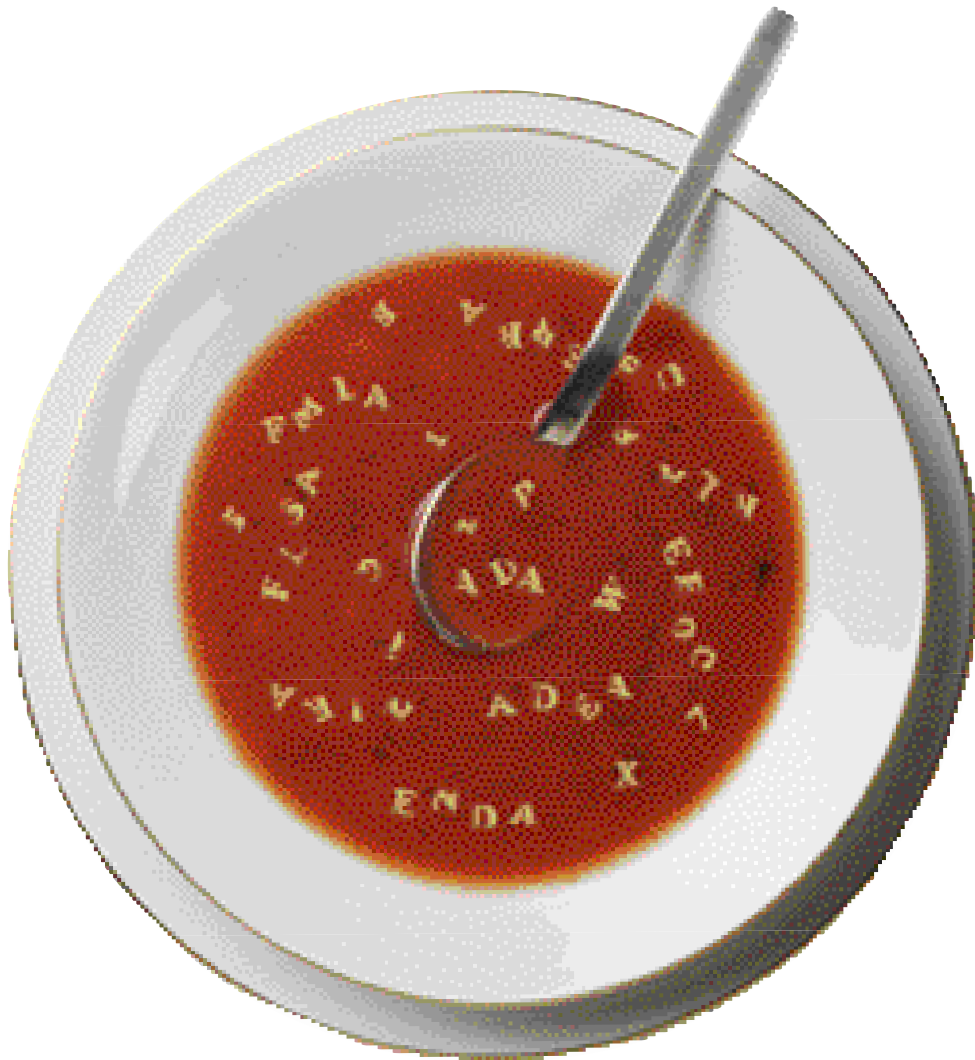
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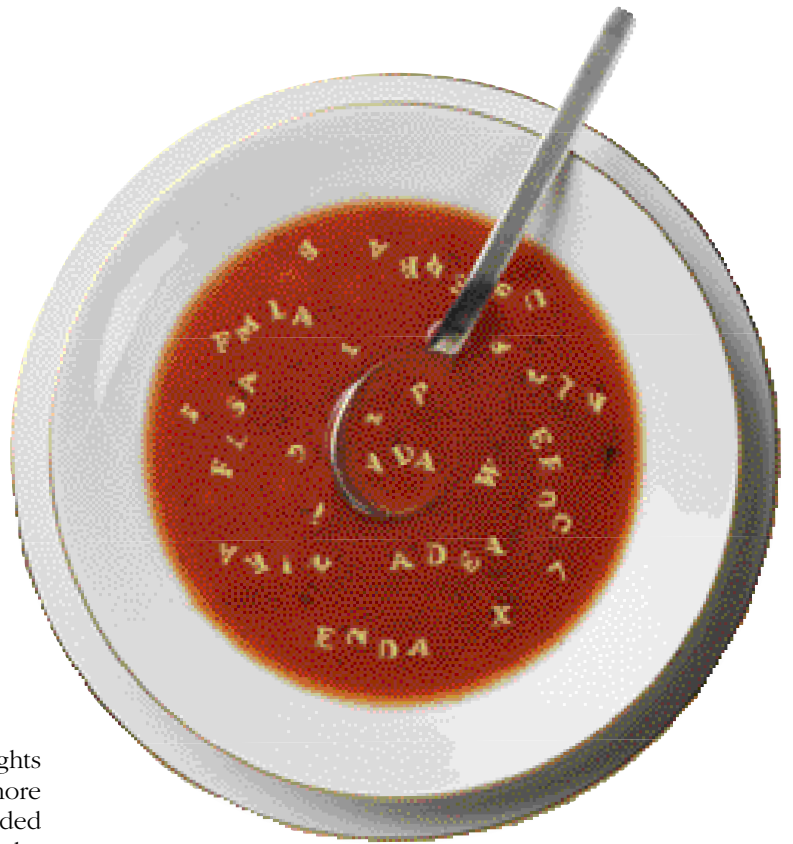


**LABOR AND EMPLOYMENT LAW**

# Alphabet Soup

By Kim Koratsky

When employment lawyers list acronyms for the laws with which they work, it resembles alphabet soup: ADEA, ADA, FMLA, EEOC, FLSA, NLRA, USERRA. This article is a primer on employment law that aims to help you understand the major employment laws and who they protect. We have neither the space nor the time to cover every law dealing with employees and employment, but the intention of this article is hit the high spots. The reader should also keep in mind that what follows is based on federal law; state laws may differ in scope and coverage.



## Title VII

The full name of the statute is Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17. During the more than 40 years of its existence, Title VII has been amended by the Equal Employment Opportunity Act of 1972, the Pregnancy Discrimination Act of 1978, and the Civil Rights Act of 1991. The purpose of Title VII is to prohibit employment discrimination that is based on race, color, sex, religion, or national origin. Interestingly enough, the ban on discrimination based on sex was originally added to the act as an effort by some senators to kill the proposed bill. The sexual discrimination aspect of Title VII was expanded to cover pregnancy by the Pregnancy Discrimination Act of 1978, which provides that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.” 42 U.S.C. § 2000e-(k).

Title VII applies to private-sector employers; labor organizations; employment agencies; and federal, state, and local government. In order to be an “employer” as defined by Title VII, private entities must be “engaged in an industry affecting commerce” and have 15 or more employees for each working day for 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. §2000e-(b). Some employers are specifically exempt from Title VII, including bona fide membership clubs, Indian tribes, and religious organizations.

Two basic theories of discrimination are recognized under Title VII: disparate treatment (policies that are discriminatory on their face, such as intentional discrimination against the person) and disparate impact (facially neutral practices that, even if unintentional, by their operation adversely affect employees or appli-

cants). Title VII also prohibits retaliation against an applicant or employee “because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.” 42 U.S.C. § 2000e-3(a). Damages can include reinstatement, front pay, back pay, and compensatory and punitive damages.

## ADA

The Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 122101 et seq., is a unique act that serves both a nondiscrimination and an affirmative action function. The ADA prohibits employers from discriminating against qualified individuals with disabilities in the terms, conditions, and privileges of employment. But the ADA also requires employers to make reasonable accommodations for qualified individuals, unless doing so would pose an undue hardship on the employer. A reasonable accommodation is a modification or adjustment to a job or the work environment that would enable persons with disabilities to enjoy the benefits and privileges of employment that are enjoyed by persons without disabilities. Reasonable accommodations generally do not include creation of a position or “super-seniority” (that is, disregard for seniority rights).

The ADA defines “qualified individual with a disability” as a person who, with or without a reasonable accommodation, can perform the essential functions of the job that is held or sought. 42 U.S.C. § 12111(8). A person is qualified if he or she possesses the necessary skills, education, experience, and other legitimate requirements to perform the job.

Essential functions are those duties performed by persons who currently have the job, but they do not include peripheral or infrequent duties that can be performed by others.

The ADA also restricts an employer's ability to ask applicants and employees questions related to disabilities. Before offering a job, an employer can ask applicants about their ability to perform job functions but cannot ask about their disabilities. Although the ADA allows pre-employment drug tests, it prohibits pre-employment medical and psychological examinations. Medical examinations may be required after a job offer has been made, and the employer may condition an offer of employment on the results of a medical examination. If an employer requires a new employee to undergo a medical examination, the examination must be required of all entering employees in the same class or category of jobs.

The ADA was recently amended by the Americans with Disabilities Act Amendments Act (ADAAA). Among other things, these amendments, which became effective Jan. 1, 2009, abrogate previous U.S. Supreme Court precedent that limited the definition of "disabled." The ADAAA provides that the definition of "disabled" shall be construed broadly and rejects the previously recognized case law, stating that "substantially limits" means "materially limits" or "materially restricts." The ADAAA also rejects the idea that such a disability has to materially limit other life activities as well. The ADAAA provides that a person who has an episodic disability is always considered disabled, not just when the disability is active or not in remission, so long as the disability limits one or more major life activities when active. Further, the ADAAA also prohibits courts from considering mitigating measures, except for common devices such as glasses or contact lenses, in determining if a plaintiff is disabled. Finally, the ADAAA expands the concept of "regarded as" claims.

#### **ADEA**

The Age Discrimination in Employment Act (ADEA) of 1967, which is codified at 29 U.S.C. §§ 621, et seq, protects persons who are 40 years of age or older against discrimination in hiring, promotion, assignment, compensation, discharge, and other terms and conditions of employment. Unlike Title VII and the ADA, the ADEA applies to employers who employ at least 20 employees. It is important to remember that the ADEA does not protect employees who are under 40. Indeed, the case law is quite clear that the person must be 40 years old or older, not just close (for example, 39 years old). Thus, an employer can say that an applicant is too young for the job (under 21, for example) but generally cannot say that an applicant is too old for the job (as long as the applicant is more than 40 years old). We say "generally" because there are exceptions for bona fide occupational qualifications, such as airline pilots.

The ADEA was amended in 1990 with the passage of the Older Workers Benefit Protection Act (OWBPA), which lists parameters that must be included in a waiver or release of a claim under the ADEA in order for the release to be enforceable. Some OWBPA provisions require that the

release must be written in understandable terms and must specifically refer to rights under the ADEA. The release cannot require a waiver of rights or claims arising after the release has been signed and must be done in exchange for consideration to which the employee is not otherwise entitled. The OWBPA also demands that employees be given 21 days to review or consider the release (45 days for group terminations) and a seven-day revocation period after execution of the release.

#### **EEOC**

In order to file a lawsuit under Title VII, the ADA, or the ADEA, an employee must first exhaust all administrative remedies by filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). The EEOC has the responsibility to investigate the charge and to seek conciliation between the charging party and the employer. If, after investigation, the EEOC finds that there is reasonable cause to believe a statute has been violated, the commission attempts to resolve the matter through "conference, conciliation, and persuasion." In recent years, the EEOC has begun to use its mediation program, which offers mediation of the dispute prior to the start of the actual investigation, aggressively. If mediation and conciliation efforts are unsuccessful (or the EEOC finds evidence of violation of the statutes), the EEOC will issue a Notice of Right to Sue that permits the charging party to file a lawsuit within 90 days of receipt of the notice. If the suit is not filed within the 90-day period, the right to sue is lost. In some situations, the EEOC will file suit itself.

#### **FMLA**

The Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601, et seq., provides for medical leave so that an employee can care for certain family members as well as for the employee's own illness. Eligible employees of covered employers may take up to 12 weeks of leave in a 12-month period. The leave required by the FMLA is unpaid, although the employer may grant paid leave.

The FMLA covers private employers that employ 50 or more employees within a 75-mile radius of the employee's worksite. Like the other acts, this act counts the number of employees as those who work each working day for 20 or more work weeks during the current or previous year. Public-sector employers—such as the U.S. government, the U.S. Postal Service, state agencies, and political subdivisions—must also comply with the FMLA, although the 50-employee requirement does not apply. To be eligible for leave under the FMLA, an employee must have been employed for at least 12 months and must have worked at least 1,250 hours during the 12-month period immediately preceding the start of the leave. Leave is allowed under the FMLA for a variety of situations, including birth of a child and/or care of a newborn; placement of a child with the employee for the purpose of adoption or foster care; care for a spouse, child, or parent with a serious health condition; and time needed for the employee's own serious health condition.

An employee returning to work after an FMLA leave is entitled to return to either the same position or one that is its equivalent. But an employee has no greater right than if the employee had remained employed during the leave. For example, if the employee would have been laid off because of a reduction in force, that employee is not entitled to a position upon return from leave. The factors used to evaluate an equivalent position include pay (including increases that may have occurred during the employee's leave), benefits, duties, and geographical location.

On Nov. 14, 2008, the U.S. Department of Labor issued new and long-awaited FMLA regulations. The new regulations, which went into effect on Jan. 16, 2009, provide direction and clarification in a number of areas.

### FLSA

The Fair Labor Standards Act (FLSA) sets the minimum wage (currently \$7.25 per hour), maximum hours, and overtime pay (time and one-half for all work in excess of 40 hours per week). Covered, or "nonexempt," employees are those employees who are not specifically exempt from the FLSA. "Exempt" employees include executive, administrative, and professional staff as well as outside salespersons. The FLSA is quite specific in defining those positions actually classified as exempt employees under the act. In August 2004, the Department of Labor promulgated new regulations that clarify these exemptions, which are also known as "white-collar" exemptions. For those hardworking new lawyers who are reading this and thinking, "Hey, with the hours I work, I've never been paid overtime," you need to know that you fall under the professional exemption (so get back to work and stop daydreaming).

### NLRA

The National Labor Relations Act (NLRA) of 1935, 29 U.S.C. §§ 151, et seq., primarily deals with employees who are represented by labor unions. But the NLRA also protects unrepresented employees who engage in protected "concerted" activities. Concerted activities include situations such as where two or more employees address their employer about working conditions, where a single employee speaks to the employer (on behalf of himself and others) regarding the working conditions, and where two or more employees discuss pay and working conditions among themselves. The employees involved do not have to be participating in or members of a union to be protected. Amended twice (by the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959), the NLRA encourages collective bargaining and self-organization. The National Labor Relations Board enforces the provisions of the NLRA.

### USERRA

The Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301, et. seq., prohibits discrimination against persons who serve in the Armed Forces, Reserves, National Guard, or other uniformed services. Employers are prohibited from denying

any benefit of employment because of a person's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. USERRA also allows veterans, National Guard members, and reservists to reclaim their civilian employment after being absent because of military service or training.

### WARN

The Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101, et seq., provides for mandatory notices of plant closings and mass layoffs. The WARN Act generally applies to employers with 100 or more employees and covers most business enterprises. Essentially, the WARN Act provides that employers must give notice to employees, bargaining representatives (for union members), and certain state and local government agencies 60 days before a plant closing or mass layoff. The terms "plant closing" and "mass layoff" are specifically defined in the act; for example, a "mass layoff" is defined as a reduction in force involving either 33 percent of full-time employees and consisting of at least 50 full-time employees or at least 500 employees. 29 U.S.C. § 2101(a)(3).

### The Rest of the Alphabet

The rest of the alphabet is a bit of a lawyer's disclaimer. A complete listing of all federal laws affecting employees and employers would require a book—not a magazine article. The laws discussed here are, in the opinion of the author, the most pertinent today based either on current events (for example, USERRA) or frequency of litigation. In addition, a number of state laws also affect the employment relationship. Forty-five states have laws dealing with minimum wage, overtime, or child labor, some of which call for a wage rate above the federal minimum; 43 states have laws dealing with medical leave; and virtually every state has passed laws protecting workers from some form of discrimination.

### Conclusion

Federal laws governing the workplace give rise to a significant amount of activity. According to the EEOC, a total of 95,402 charges were filed in 2008 (up from 82,792 in 2007). Information from the Administrative Office of the U.S. Courts shows that 31,532 civil rights suits were filed in federal courts in 2008, more than 40 percent of which—12,910—were suits involving employment. And these statistics do not include all the charges or suits filed under state laws.

We hope this serving of alphabet soup gave you a good basic understanding of employment law, which, as you can see, is a very active area of federal practice. **TFL**

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