

# Executive Briefing

Employment & Labor Law / Employee Benefits



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## The United States Supreme Court Weighs in on Pregnancy Discrimination Act Pension Benefits Claim

In a 7-2 decision, the United States Supreme Court has ruled that when calculating pension benefits due at retirement, employers are not required to give women credit for pregnancy leaves taken prior to the enactment of the Pregnancy Discrimination Act.

The case, [\*AT&T Corp. v. Hulteen et al.\*](#), was brought by four female employees of AT&T, three of whom have retired from the company. During the 1960s and the early to mid 1970s, AT&T employees who took disability leave received full-service credit for their absences. In contrast, employees who took "personal" leaves of absence received a maximum service credit of 30 days. At that time, leave for pregnancy was treated as personal leave and, as a result, women who took pregnancy leave received a maximum service credit of 30 days, regardless of the length of their absence from work. AT&T altered this practice in 1977 by providing women on pregnancy leave up to six weeks of service credit. However, employees on disability leave continued to receive full-service credit. Each of the four female employees who brought suit against AT&T received less service credit for her pregnancy leave than she would have received if her leave had been taken because of a disability. As a result, because AT&T's pension benefits are tied to length of service, the pension benefits of all four employees were reduced because of their pregnancy leaves.

If followed today, AT&T's practice of treating pregnancy leaves differently from other types of leave would violate the Pregnancy Discrimination Act, which prohibits discrimination in employment based on pregnancy-related conditions. However, until 1978 (when Congress amended Title VII of the Civil Rights Act of 1964 by passing the Pregnancy Discrimination Act), this practice was not prohibited by any law. In fact, the Supreme Court had ruled two years earlier, in *General Electric v. Gilbert*, that differential treatment of pregnancy leaves did not constitute sex discrimination. Although *Gilbert* is no longer good law, the Supreme Court in *Hulteen* declined to apply the Pregnancy Discrimination Act retroactively. Instead, the Court held that because AT&T's pension system "provides future benefits based on past, completed events that were entirely lawful at the time they occurred," AT&T was not required to recalculate benefits to take into account pregnancy leaves that occurred prior to the effective date of the Pregnancy Discrimination Act.

In calculating service credit and benefits due under pension and retirement plans, it is important for employers to recognize that the Pregnancy Discrimination Act requires them to treat pregnancy leaves the same as other types of leaves of absence. However, to the extent that an employer treated pregnancy leaves less favorably than other types of leave prior to 1979, no recalculation is required for that time period. As Justice Souter reasoned, this provides

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"predictable financial consequences, both for the employer who pays the bill and for the employee who gets the benefit."

For more information related to this article, please contact [Sara Welch](#).

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### **DOL Opinion Letter Clarifies When an Employer May Deny FMLA Leave to and Discipline an Employee Who Fails to Properly Call Off Work**

Under the Family and Medical Leave Act (FMLA), an employee is required to provide his/her employer with notice of the need for FMLA leave at least 30 days in advance when the need for such leave is foreseeable that far in advance. When the need is not foreseeable that far in advance, notice to the employer must be provided "as soon as practicable." For more than a decade, employers have largely been unable to discipline or deny FMLA leave to an employee whose leave was not foreseeable 30 days in advance and who failed to comply with established procedures for calling off work, provided the employee gave notice that a tardiness or absence was for an FMLA-qualifying reason within two business days of that absence or tardiness. In early May 2009, the U.S. Department of Labor (DOL) issued an opinion letter clarifying that, under the revised FMLA regulations which took effect January 16, 2009, an employer does not always have to give an employee two business days to provide such notice. Although the opinion letter was finalized during the Bush administration, it was not issued until May 5, 2009, thus signifying the Obama administration's agreement with its contents.

The FMLA is the federal law that applies to employers with 50 or more employees, and grants certain employees the right to take 12 (or in limited circumstances 26) weeks of leave in a 12-month period, and be guaranteed reinstatement to the same or an equivalent position when the leave ends. Under the old FMLA regulations, "as soon as practicable" "ordinarily [meant] at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee." Also, when the need for leave was unforeseeable, an employee was expected to give his/her employer notice of the need for FMLA leave "within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible."

Following the DOL's issuance of an opinion letter in 1999 dealing with these regulations, the regulations were widely interpreted to mean an employee whose need for leave was not foreseeable at least 30 days in advance always had to be given up to two business days from when the employee learned of the need for leave to provide the employer with notice

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that an absence or tardiness was for an FMLA-qualifying reason, even where it was possible and practical for the employee to have given such notice sooner.

The regulations that took effect January 16, 2009, changed, among other provisions, those dealing with employee notice when the need for leave is not foreseeable 30 days in advance or is unforeseeable. The regulations now state that when “an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.” When the DOL issued for public comment this proposed regulation change, it stated it expected it would be practicable for an employee to provide notice of the need for FMLA leave the same day the employee becomes aware of the need for the leave, if the employee becomes aware of the need for leave during work hours, or the next business day if the employee becomes aware of the need for leave after work hours. The current regulations also state that when the need for leave is unforeseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. They further provide, “[i]t generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer’s usual and customary notice requirements applicable to such leave.”

In the opinion letter issued in early May 2009, the DOL expressly rescinded the 1999 opinion letter to the extent the 1999 letter had been interpreted to create a flat, two-day notice rule. The DOL further stated that if an employer’s policy requires employees to call in one hour prior to their shift to report absences, and an employee who is absent on Tuesday and Wednesday does not call in on either day but waits to provide notice of the need for FMLA leave until returning to work on Thursday, “it is our opinion that unless unusual circumstances prevented the employee from providing notice consistent with the employer’s policy, the employer may deny FMLA leave for the absence.”

In sum, the new FMLA regulations and the recent DOL opinion letter make clear that when the need for FMLA leave is not foreseeable at least 30 days in advance, if an employee fails to comply with the employer’s usual and customary procedures for calling off work and later notifies the employer that the reason for the tardiness or absence was an FMLA-qualifying reason, the employer may evaluate the employee’s particular circumstance to determine whether it was possible and practical for the employee to have provided the employer with earlier notice of the need for FMLA leave. If such notice could reasonably have been provided under the employee’s particular facts and circumstances, the employer may deny FMLA leave status to the work time missed. Accordingly, an employer may also, consistent with its standard practices, discipline the employee for failing properly to call off work.

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Employers wishing to take advantage of this change should make certain that they have a clear, written policy that addresses calling off work, of which all employees are aware. Such a policy should specify whom an employee should notify when unable to report to work as scheduled, when such notice must be given, and what information the employee must provide, such as the reason for and expected duration of the absence.

For more information related to this article, please contact [Laura Kipnis](#).

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### **Employers Suffering Substantial Business Hardships May Reduce or Suspend 401(k) Safe Harbor Nonelective Contributions**

An employer who had committed to make safe harbor nonelective contributions to its 401(k) plan but has encountered a substantial business hardship may now amend the plan during the plan year to eliminate or reduce that contribution. This is the effect of a [proposed Treasury Regulation](#) issued in May 2009, which may be relied upon until final regulations are promulgated. For background information, safe harbor nonelective contributions of 3 percent of compensation to a 401(k) plan enable highly compensated employees to make 401(k) deferral contributions without being limited by the average of 401(k) deferral contributions made by employees who are not highly compensated. Prior to the proposed regulation, it was uncertain if an employer could amend the plan midyear to reduce or suspend safe harbor nonelective contributions because the IRS's regulations required the safe harbor nonelective contributions to continue the entire plan year.

An amendment to reduce or suspend safe harbor nonelective contributions during the plan year because of substantial business hardship must satisfy various requirements. A substantial business hardship may be shown by several possible factors, such as the employer's operations at a net loss, substantial unemployment in the industry or business, or the employer's declining sales or profits. Other requirements are:

- The safe harbor nonelective contributions cannot be reduced or suspended earlier than 30 days after a special notice is given to employees;
- Eligible employees must be given the opportunity prior to the effective date of the reduction or suspension of contributions to change their 401(k) deferral elections;

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- The plan must be amended to provide that the 401(k) annual deferral percentage test for discrimination will apply to the plan for the entire plan year using the current year non-highly compensated employees' deferral experience in the test; and
- The annual compensation limitation for employee benefit plan purposes must be prorated for the portion of the plan year through the effective date of the amendment.

The required special notice to participants must advise of the effective date of the amendment, the procedures to change 401(k) deferral elections and the consequences of a reduction or suspension of safe harbor nonelective contributions. The regulations are proposed to be effective for amendments adopted after May 18, 2009.

For more information related to this article, please contact [Terry Ahern](#).

\* \* \* \* \*

## Online Posting of Form 5500 Actuarial Information of Defined Benefit Plans Now Required

The Pension Protection Act of 2006 (PPA) has amended ERISA to require the Department of Labor to post a defined benefit plan's actuarial information on the Internet and, if applicable, for the plan sponsor to post the same information on its internal Web site (intranet). **This change will require action of plan sponsors of defined benefit plans that maintain an intranet site for participant communications.**

### Internet Posting by the Department of Labor

Plan sponsors need to be aware that all actuarial pension funding information (including Schedules SB, MB or any other actuarial information schedules) filed as part of a defined benefit plan's Form 5500 annual return/report with the Department of Labor will be posted on a [public disclosure Web site](#) within 90 days of receipt of the filing. On this Web site, the information may be searched by plan name, employer identification number, plan number, plan year, and type of actuarial schedule. This requirement starts with the 2008 Form 5500.

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### Intranet Posting by Plan Sponsor

In addition, plan sponsors need to be aware that similar *intranet* posting is required, **but only if** the plan sponsor maintains an intranet site for employee communications. Such intranet posting is only intended for communication with plan participants and not the public. This requirement is effective for the 2008 plan year, even though e-filings of Form 5500s are not required until the 2009 plan year. The statute, however, does not specify a 90-day timeframe for intranet posting and there has not been any guidance from the Department of Labor in this regard. **Therefore, pending further guidance, we recommend that such plan sponsors post the required actuarial information on their intranet within 90 days of the date the Form 5500 is filed.** Plan sponsors should further note that only the actuarial schedule (Schedule SB or MB) is required to be posted.

Plan sponsors should be aware there is no Schedule B (Form 5500) for filing 2008 plan year actuarial information. Instead, file the 2008 Schedule MB (Form 5500), Multiemployer Defined Benefit Plan and Certain Money Purchase Plan Actuarial Information, or the Schedule SB (Form 5500), Single-Employer Defined Benefit Plan Actuarial Information, as applicable. For only plan year 2008 filings, paper Schedules MB and SB are provided in the format presented for completion by pen or typewriter.

For more information related to this article, please contact [Michael Gilley](#).

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### Inside Washington

#### *New Laws, Regulations and Agency Guidance*

**ADA . . .** Keeping a job open indefinitely is not a reasonable accommodation under the ADA according to a recent decision by the U.S. Court of Appeals for the Eighth Circuit in April 2009. In [Peyton v. Fred's Stores of Ark. Inc.](#), the court found that an employer who terminated an employee recovering from cancer treatment after the employee had been absent for six months and at the time of termination did not know when or whether she would be able to return to work did not violate the ADA because no reasonable accommodation was available to allow her to perform her job.

**DOL . . .** The first 100 days in review. Department of Labor Secretary Hilda Solis issued a [report](#) of the DOL's efforts during President Obama's first 100 days. The report highlights a summary of accomplishments, policy initiatives and budget initiatives for 2009.

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**EEOC** . . . On May 11, 2009, the EEOC issued a [guidance](#) regarding discrimination in connection with the H1N1 flu virus (swine flu), stating that Title VII "prohibits employment discrimination on the basis of national origin, for example, discrimination against Mexicans." The guidance also reminded employers about the scope of medical inquiries under the ADA. The EEOC issued a separate, more detailed [guidance](#) titled "ADA-Compliant Employer Preparedness for the H1N1 Flu Virus."

**OFCCP** . . . The Office of Federal Contract Compliance Programs' (OFCCP) Web site now has a link to a [presentation](#) aimed at helping contractors comply with accessibility requirements in the hiring process. The presentation is titled "Accessible Online Application Systems and Tools for Achieving Them" and highlights contractors' obligations to ensure an equal opportunity to apply and compete for jobs, including reasonable accommodation requirements . . . On March 30, 2009 the Office of Labor-Management Standards (OLMS) published in the *Federal Register* a final rule that rescinds the regulations that implemented and enforced the now-revoked Executive Order (E.O.) 13201 (the Beck posting requirement). E.O. 13201 required that government contracts and subcontracts must include an employee notice clause (Beck Poster) requiring non-exempt federal contractors and subcontractors to post notices informing their employees that they have certain rights related to union membership and use of union dues and fees under federal law. OLMS took this action pursuant to E.O. 13496, which President Obama signed on January 30, 2009.

**OSHA** . . . On May 27, 2009, the U.S. Department of Labor's Occupational Safety and Health Administration's (OSHA) Wichita area office [announced](#) it had launched a local special emphasis program in Kansas aimed at reducing workplace hazards on construction projects funded by the American Recovery and Reinvestment Act of 2009 (Recovery Act). . . On April 29, 2009, OSHA [announced](#) it is initiating a comprehensive rulemaking on combustible dust. OSHA announced it will issue "an Advanced Notice of Proposed Rulemaking and convene related stakeholder meetings to evaluate possible regulatory methods, and request data and comments on issues related to combustible dust such as hazard recognition, assessment, communication, defining combustible dust and other concerns. Combustible dusts are solids finely ground into fine particles, fibers, chips, chunks or flakes that can cause a fire or explosion when suspended in air under certain conditions. Types of dusts include metal (aluminum and magnesium), wood, plastic or rubber, coal, flour, sugar and paper, among others."

On April 28, 2009 the Kansas Department of Labor issued its second annual [Workplace Safety Report](#). The report indicates that "while the number of injuries and illnesses occurring on Kansas worksites in 2008 continued an upward trend, there has been a decline in the rate of increase."

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## Supreme Court Watch

On May 26, 2009, President Obama announced Judge Sonia Sotomayor as his pick to be the next United States Supreme Court Justice. Since 1998, Judge Sotomayor has been a judge of the United States Court of Appeals for the Second Circuit. From 1992 until her recent appointment, she served as a United States District Court Judge for the Southern District of New York. Judge Sotomayor began her legal career in 1979 as an Assistant District Attorney in New York County. In 1984, and until her first judicial appointment, she practiced with the law firm of Pavia & Harcourt. Her focus at the firm was on intellectual property issues and international litigation and arbitration of commercial and commodity export trading cases. After graduating from Princeton University *summa cum laude* in 1976, Judge Sotomayor attended Yale Law School. At Yale, she served as an editor of the *Yale Law Journal* and managing editor of the *Yale Studies in World Public Order*. Judge Sotomayor is a native of the Bronx and is fluent in both English and Spanish. Source: [Circuit Judges' Biographical Information](#).

For more information regarding "Inside Washington," please contact [Stephanie Scheck](#).