

**Preparing for 2012:  
A Look Back at Significant Employment Law Developments  
Over the Past Year and What to Expect in the New Year**

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## Today's Agenda

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- 1) 2011 regional state law developments;
- 2) 2011 with the EEOC, with a preview of 2012;
- 3) The growing impact of the FMLA, and its merger with the ADAAA and other laws governing leaves of absence;
- 4) The NLRB's ongoing agenda;
- 5) A 2012 Preview, including significant cases before the U.S. Supreme Court and pending state and federal legislation;
- 6) Areas to watch

# Alabama State Law Changes in 2011

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- **Alabama – stays focused on immigration**
  - Effective April 1, 2012, Alabama employers **MUST** use the federal E-Verify system to determine applicant eligibility
  - Significant penalties
  - Other provisions of Alabama's controversial immigration laws are in limbo while federal courts hear constitutional challenges
  - Legislation changes
- **Loser pays legislation**



## Other State Law Changes in 2011

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- **Tennessee – juries and whistleblowers:**
  - Attorney General interprets jury service statutes to require employer compensation for actual time served AND travel time
  - Continued judicial focus on statutory and common law whistleblower claims following Supreme Court's decision in *Webb v. Nashville Habitat for Humanity*
- **Mississippi – gunslinger laws in conflict:**
  - Continued struggle over right to bring guns to work. Existing law allows employers to prohibit weapons left in employee vehicles *if* secure lot is available
  - Amendment to separate statute, however, appears to create undefined exception for employees with an "endorsement," which can be obtained following an eight-hour course
  - Alabama's law died in committee

## Other State Law Changes in 2011 - continued

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- **Florida – revolutionary minimum wages:**
  - Major changes to minimum wage laws, which, among other things, now require an annual adjustment based on consumer price index ("CPI")
- **Georgia:**
  - Change to enforcement of restrictive covenants, "blue pencil" can now be used in certain circumstances



## Federal Law & The EEOC

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- From the Commission's website:

### Bass Pro Litigation

The EEOC has sued Bass Pro Outdoor World for employment discrimination claiming that it did not hire people because of their race (African-American or black) or national origin (Hispanic or Latino).

If you applied for a job at any Bass Pro location and think you may not have been hired due to your race or national origin; or if you have any information about the EEOC's lawsuit, please contact the EEOC at this special phone number toll free (855) 857-8747 or by e-mail at [Basspro.lawsuit@eeoc.gov](mailto:Basspro.lawsuit@eeoc.gov).





# Federal Enforcement - EEOC Developments

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
<b>Receipts</b>	80,680	79,591	77,444	79,896	80,840	84,442	81,293	79,432	75,428	75,768	82,792	95,402	93,277	99,922
<b>Resolutions</b>	106,312	101,470	97,846	93,672	90,106	95,222	87,755	85,259	77,352	74,308	72,442	81,081	85,980	104,999
<b>Resolutions By Type</b>														
<b>Settlements</b>	3,992	4,646	6,094	7,937	7,330	8,425	8,401	8,665	8,116	8,500	8,834	8,831	8,634	9,777
	3.8%	4.6%	6.2%	8.5%	8.1%	8.8%	9.6%	10.2%	10.5%	11.4%	12.2%	10.9%	10.0%	9.3%
<b>Withdrawals w/Benefits</b>	3,635	3,219	3,593	3,753	3,654	3,772	3,700	3,827	4,072	4,052	4,122	4,790	4,892	5,391
	3.4%	3.2%	3.7%	4.0%	4.1%	4.0%	4.2%	4.5%	5.3%	5.5%	5.7%	5.9%	5.7%	5.1%
<b>Administrative Closures</b>	30,077	27,118	23,570	19,156	18,636	19,633	15,262	15,416	12,659	12,298	12,865	16,615	16,189	17,330
	28.3%	26.7%	24.1%	20.5%	20.7%	20.6%	17.4%	18.1%	16.4%	16.6%	17.8%	20.5%	18.8%	16.5%
<b>No Reasonable Cause</b>	64,567	61,794	58,174	54,578	51,562	56,514	55,359	53,182	48,079	45,500	42,979	47,152	52,363	67,520
	60.7%	60.9%	59.5%	58.3%	57.2%	59.3%	63.1%	62.4%	62.2%	61.2%	59.3%	58.2%	60.9%	64.3%
<b>Reasonable Cause</b>	4,041	4,693	6,415	8,248	8,924	6,878	5,033	4,169	4,426	3,958	3,642	3,693	3,902	4,981
	3.8%	4.6%	6.6%	8.8%	9.9%	7.2%	5.7%	4.9%	5.7%	5.3%	5.0%	4.6%	4.5%	4.7%
<b>Successful Conciliations</b>	1,041	1,343	1,578	2,040	2,365	1,940	1,432	1,217	1,319	1,141	1,137	1,128	1,240	1,348
	1.0%	1.3%	1.6%	2.2%	2.6%	2.0%	1.6%	1.4%	1.7%	1.5%	1.6%	1.4%	1.4%	1.3%
<b>Unsuccessful Conciliations</b>	3,000	3,350	4,837	6,208	6,559	4,938	3,601	2,952	3,107	2,817	2,505	2,565	2,662	3,633
	2.8%	3.3%	4.9%	6.6%	7.3%	5.2%	4.1%	3.5%	4.0%	3.8%	3.5%	3.2%	3.1%	3.5%
<b>Merit Resolutions</b>	11,668	12,558	16,102	19,938	19,908	19,075	17,134	16,661	16,614	16,510	16,598	17,314	17,428	20,149
	11.0%	12.4%	16.5%	21.3%	22.1%	20.0%	19.5%	19.5%	21.5%	22.2%	22.9%	21.4%	20.3%	19.2%
<b>Monetary Benefits (Millions)*</b>	\$176.7	\$169.2	\$210.5	\$245.7	\$247.8	\$257.7	\$236.2	\$251.7	\$271.6	\$229.9	\$290.6	\$274.4	\$294.2	\$319.4

\* Does not include monetary benefits obtained through litigation.



## 2011

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- 99,947 new charges
- 37.4% retaliation
- \$455.6 million in relief for employer/applicants/up 45 million
- 36% increase in disability relief

## Federal Enforcement - EEOC Developments

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- Continued scrutiny of employers' use of criminal background checks and arrest records, especially in hiring process
- January 11, 2012 – Pepsi and the EEOC announce \$3.13 million settlement that includes agreement to revise overly broad policies, to provide relevant training, and to provide the EEOC with regular reports on hiring practices under new policy.
  - Julie Schmid, the EEOC's Acting Director of the Minneapolis field office: "Minor offenses might include simple assault or forgery..."
  - Amy Solomon, Senior Attorney at DOJ: "The majority of arrests in a given year are for relatively minor nonviolent crimes."
  - The EEOC will continue to maintain that the majority of arrests and convictions are irrelevant and, therefore, that most employer policies are overly broad and have the potential to have a disparate impact.

## Federal Enforcement - EEOC Developments

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- Additional EEOC highlights from 2011:
  - Sharp increase in number of on-site investigations, employee interviews, and requests for additional documentation and information
  - BUT, 2011 saw an increase in "no cause" findings (60.9% in 2010 to 64.3% in 2011)
    - What does this mean?
      - Is EEOC mediation now a more meaningful alternative?
      - How do these changes impact risk assessment and budgeting?
- Finally, expect an increased focus in 2012 on leave issues and the interplay of these with the ADAAA

## Leaves of Absence after 2011

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- The FMLA's revised regulations grant employers additional recertification and clarification of certification rights.
  - These measures are the best tools for curbing employee abuse and for handling troubling intermittent issues.
  - Noncompliant employees can be terminated based on excessive absenteeism.
    - BUT, would a reasonable accommodation have allowed the employee to keep his or her job?
- Eleventh Circuit allows request made before becoming eligible.
- The Americans with Disabilities Amendments Act (the "ADAAA") must also be considered.
  - Much broader definition of major life activities means most conditions qualify as disabilities.
  - Must consider ADAAA when making decisions about leave issues if employee's condition is implicated.



## The "Interactive Process"

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- ADAAA and regulations shift focus to accommodations
- Interactive process is now mandated, which means the employee's proposals for accommodations that may allow them to perform essential functions of job must now be considered.
- As technology makes telecommuting increasingly possible, the degree to which an accommodation must be made continues to change.
- Regulations and case law still agree that employers may have to spend money to accommodate a disabled employee.
  - What is reasonable continues to hinge on facts



# ADAAA

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- Significant ADAAA cases:
  - Your Health Magazine – employees had to sign "health warranty"
  - Telecommunications Company – 20 million \$\$ over attendance policy
  - SITA Information Networking – refused to hire temporary employee for new employee who needed surgery
- Most common allegations:
  - Back problems
  - Diabetes
  - Depression

## New Posting Requirement – Notice of Employee Rights

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- NLRB announced in 2011 that all 6 million of the private sector employers subject to the jurisdiction of the National Labor Relations Act ("NLRA") must post an 11" by 17" notice of employee rights in their workplaces.
- The Rule had been scheduled to go into effect on November 14th. It will now be effective on **April 30, 2012**, following a second postponement from January 30, 2012.
- The NLRB's stated reason for its postponement was to "allow for enhanced education and outreach to employers, particularly those who operate small and medium sized businesses." The Board also cited public confusion over which businesses were covered by the Rule. In fact, almost all private sector employers are subject to the Rule.
- The Board further added that "[n]o other changes in the rule, or in the form or content of the notice, will be made."
- Two lawsuits are currently attempting to enjoin the posting requirement (one in federal district court in D.C. and the other in South Carolina).
- D.C. case, filed by the Coalition for a Democratic Workplace, among others, challenges President Obama's recess appointments as improper.

# NLRB Drama: New Rules for Union Campaigns

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- On November 30, 2011, the NLRB voted 2-1 to advance proposed rules to expedite the current union election process.
  - The proposed rules will be drafted in final form for eventual publication in the Federal Register and re-voted on by the board.
- Prior to the November 30 vote, NLRB member Brian Hayes publicly contemplated resigning from his position, which would have prevented a quorum from voting on the proposals.
- The previously proposed rules had the following effects:
  - Requiring that any pre-election hearing be held within seven days after service of the notice of hearing;
  - Requiring an employer to file a written position statement prior to the hearing, waiving any substantive arguments not included in that statement; and
  - Requiring that voter lists provided to the union include employee e-mail addresses and telephone numbers, as well as expediting delivery of those lists to the union.



## 2012 and Beyond – What to Expect

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- Military service members will continue to return from active duty, many without jobs. As hiring continues, ex-military and baby boomers will populate hiring pools – what will be the impact?
  - Expect an increase in age discrimination and USERRA claims
  - Document reasons for selection of candidates hired or promoted



## 2012 and Beyond – What to Expect (continued)

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- Expect EEOC trends to continue as retaliation, disability and age discrimination claims rise, while harassment claims decline.



## 2012 and Beyond – What to Expect (continued)

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- Wage Hour Suits
  - Sales Representatives (Leo Pharma)
  - Banking
    - Personal bankers (Citibank)
    - Financial analyst (Citicorp)
    - Loan officers (Bank of America and Citizens Financial Group)
  - Accountants (Ernst & Young)
  - Working-off-Clock Cases
    - Lane Bryant
    - H&M Hennes & Mauritz
    - Darden Restaurants
  - Unpaid Interns
    - Hearst Corporation (hundreds of interns)

## 2012 and Beyond – What to Expect (continued)

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- Bullying legislation – how will these anticipated local laws impact the workplace?



## 2012 and Beyond – What to Expect (continued)

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- Worker misclassification scrutiny will continue from DOL as state and federal administrations look to increase number of employed Americans with benefits and job security.
- Plaintiffs' lawyers also love these claims, thus they are likely to stick around at present levels or increase in 2012.
- Twelve states have agreed to partner with the DOL on this.



## 2012 and Beyond – What to Expect (continued)

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- Federal contractors may also have to deal with proposed new OFCCP rules that seek to radically change the manner in which disabled persons and entities owned by disabled persons are recruited and hired.
- ERISA suits – changes to or elimination of retirees' benefits (CUNA Mutual Insurance Society)

## 2012 and Beyond – What to Expect (continued)

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- Trade Secrets/Non-Compete/Confidentiality Agreement
  - Motorola, Raytheon, Apple, Google, Oracle, HP, and Groupon
  - Inevitable Disclosure Doctrine
  - Significant Decision for Employers in Texas and Georgia
  - Inappropriate Use of Twitter (Phonedog, LLC)

## 2012 and Beyond – What to Expect (continued)

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- Social Media Issues
  - NLRB
  - Concerted activity for two or more employees to complain about management on Facebook
  - Overbroad policies are violation of NLRA
- Class Actions
  - In 2011, in *Dukes, et al. v. Wal-Mart Stores, Inc.*, the Supreme Court refused to allow a sex discrimination case to proceed as a class action
  - 150 cases since *Dukes* have rejected class action
  - Result: Smaller class actions filed
- Class Action Waiver
  - NLRB says can't force employee to sign an arbitration agreement that waives class actions
  - Contrasts with a U.S. Supreme Court decision



## 2012 and Beyond – What to Expect (continued)

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- 2012 U.S. Supreme Court cases to watch include case testing "outside sales" exemption under FLSA for pharmaceutical sales reps. DOL disagrees that these employees are exempt from overtime requirements.
- May make new law for testing independent contractor status that consolidates IRS and DOL positions and factors.



## 2012 and Beyond – What to Expect (continued)

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- Healthcare reform. Court will consider the constitutionality of the Patient Protection and Affordable Care Act.
  - Act's mandate that must purchase health insurance or pay a penalty
  - Relates to a major cost of doing business
  - Eleventh Circuit struck down the law



## 2012 and Beyond – What to Expect (continued)

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- Look for Supreme Court to also accept cases addressing:
  - Ongoing questions regarding enforceability of overbroad agreements to arbitrate employment claims, and
  - Applicability and parameters of the FLSA's donning and doffing and overtime pay requirements
- New legislation affecting employers is unlikely in election year.
  - Many bills may be introduced, but few, if any at all, will make it to enactment.
- Job creation incentive grants will continue to become available in record-setting amounts.

## 2012 and Beyond – What to Expect (continued)

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- Continued focus on Dodd-Frank whistleblowing, especially as it relates to claims of corporate waste
  - Focus on metrics underlying corporate cash incentives will increase
  - Focus on change-in-control and double trigger vesting devices will also increase
- More age claim lawsuits
  - Baby boomers not retiring
  - Slow pace of EEOC

