



## ***Legal Landmines:***

*2009 Law Changes Could Impact Your Business*

Mary Gorski & Denise Tataryn

Employee lawsuits are distracting, expensive, and mostly avoidable. *Jury Verdicts Research* 2007 edition of "Employment Practices Liability, Jury Award Trends, and Statistics" highlights some employment statistics and trends that you should know:

- Employee lawsuits have risen 400% in the past 20 years to the currently level of 6.5 claims per 1,000 employees annually
- The most common targets for Federal discrimination claims are private employers with between 15 and 100 employees (41.5%); second are private companies with an excess of 500 employees (23.9%); and third are private companies with between 100 and 500 employees (18%)
- In any employment case filed in federal court, there is a 16% chance the award will exceed \$1 million and a 67% chance that the award will exceed \$100,000; attorney fees are not included
- The average compensatory award in all federal court employment cases was \$493,534 and reflects a 45% increase since 2000; a compensatory award does not include punitive damages or attorney fees
- In State courts, compensatory awards are up 39% while wrongful termination claims are up 260%
- If an employment lawsuit goes to trial, plaintiffs are more likely to win 67% of cases in State court and 63% in federal court
- The cost to settle an employment lawsuit has grown significantly over the last 5 years, from an average of \$130,476 in 2001 to \$310,845 in 2006



These general statistics are sobering and are cause for concern to ALL organizations. Compounding these are recent changes in Federal and State laws that affect almost all organizations.

**These general statistics are sobering and are cause for concern for all organizations.**

In a litigious employment environment that seems to increasingly favor employees, risk-minimizing organizations MUST understand the recent changes to the Americans with Disabilities Act (ADA) and Family and Medical Leave Act (FMLA) regulations. Employers should take immediate steps to assure they are in compliance with new laws to protect themselves from future liability.

Mary Gorski • MG Assessments, LLC • 4771 144th Street West • Apple Valley, MN 55124

Denise Tataryn • Mansfield, Tanick & Cohen, PA • 1700 U.S. Bank Plaza South • 220 S. 6th Street Minneapolis, MN 55402

## What Americans with Disabilities Act (ADA) 2009 Changes do I Need to Understand?

The ADA requires employers with 15 or more employees to provide qualified individuals with disabilities an equal opportunity to benefit from employment-related opportunities. It prohibits discrimination in recruitment, hiring, promotions, training, pay, social activities, and other privileges of employment. It further requires employers to make *reasonable accommodation* to the known physical or mental limitations of otherwise qualified individuals with disabilities, unless it results in undue hardship to the employer.

The ADA Amendments, effective January 1, 2009, overturns prior Supreme Court decisions and makes clear that the ADA is intended to provide a broad scope of protection for employees. In general, it expands existing definitions to more employees. For many employers, existing policies and procedures may no longer be valid or useful in determining HR practices.

### Specific 2009 ADA changes:

- Organizations cannot consider mitigating measures such as medications or other measures that treat a disease when determining if an individual has a disability.
- Broadens the definition of disability by adding to what may affect a *major life activity*, and now includes *major bodily functions*, such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
- Clarifies that an impairment that is *episodic* or in *remission* is a disability if it substantially limits a *major life activity* when active.
- Clarifies that one of the definitions of disability – “being regarded as having impairment” – doesn’t require the impairment to actually limit a *major life activity*.
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## What Family Medical Leave Act (FMLA) 2009 Changes do I Need to Understand?

The FMLA provides leave entitlement to eligible employees up to 12 weeks of unpaid, job protected leave, per 12-month period for employers who employ 50 or more employees. Leave may be taken for birth or placement for adoption or foster care of a child; the serious health condition of the employee’s spouse, son, daughter, or parent; or the serious health condition of the employee that makes the employee unable to perform the functions of the employee’s job.

The new regulations, effective January 16, 2009, have created new categories of leave—*military caregiver leave* and *qualifying exigency leave*, and has revised and clarified existing regulations. Especially for organizations with active duty or reserve duty military personnel, or with families of active duty or reserve duty military, these changes require modifications to leave procedures/forms, training/communications, and policies, current HR practices related to employee leave.

## Specific 2009 FMLA changes:

- Provides *military caregiver leave*, which permits an employee who is a spouse, son, daughter, parent, or next of kin of a service member with a serious injury or illness to take a combined total of 26 workweeks of unpaid leave during a single 12-month period.

- Provides *qualifying exigency leave*, which permits an eligible employee to take protected, unpaid leave for a period up to 12 workweeks for the employee's spouse, child, or parent who is on active duty or called to active duty in support of a contingency operation. This leave includes short notice deployment, military events and related activities, childcare and school activities for those incapable of self-care, making or updating financial and legal arrangements, spending time with covered military member of short-term, temporary rest and recuperation leave during deployment, post-deployment activities and other activities that arise out of a covered military member's active duty or call to active duty.



- Gives employers 5 days to provide an *Eligibility Notice* following employee's request for FMLA leave or knowledge that an employee's leave may be FMLA qualifying.
- Changes time requirements and procedures for medical certifications.
- Specifies that light duty work does not count against FMLA leave allotment.
- Clarifies that the employee is required to explain the reasons for requesting leave if the employee cannot give 30-day advance notice of need for leave.
- Clarifies when an employer may require a fitness-for-duty certification.
- Allows employers to delay or deny FMLA leave to an employee who unjustifiably fails to comply with employer's notice and procedural requirements for requesting leave.
- Requires the employee to provide notice of need for qualifying exigency leave as soon as practicable, regardless of how far in advance such leave is foreseeable.
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## What Other Changes do I Need to Understand?

- In addition to the ADA and FMLA changes, other laws and changes may require modifications to existing policies, procedures, and HR practices.
- Effective January 1, 2009, in order to have independent contractor status, one must obtain an Independent Contractor Exemption Certificate from the Minnesota Department of Labor and Industry. Employers in some industries will be required to pay workers' compensation, unemployment insurance and other benefits to anyone without a Certificate.

- Effective February 2, 2009, all employers will be required to use a new I-9 form;
- Effective November 2009, the Genetic Information Nondiscrimination Act of 2008 will protect Americans from being treated unfairly by employers and health insurers because of differences in their DNA that may affect their health.
- Effective January 1, 2008 employers are required to give employees notice of their rights and remedies available under the *Personnel Records Statute*.
- The Minnesota Supreme Court in 2008 clarified that Minnesota's wage statute requires employers to pay vacation pay to departing employees only if there is a promise to pay. There is no longer an automatic right to accrued vacation pay when employment terminates.

*Are your documented policies, procedures, and practices aligned with all of the 2009 changes?*

### What Should Employers do?

Given the many changes, employers must act quickly to align policies, procedures, and practices with these changes. At a minimum, all Minnesota employers should conduct a thorough review of recruitment, selection, training, promotion, performance evaluation, and HRIS systems to ensure compliance. All employee and managers handbooks, forms, website information and more must be aligned with these changes.

### What Policy Changes Should We Implement?

- Review and revise all policies to reflect changes in the ADA, FMLA, and other laws.

### What Procedures/Forms Changes Should We Implement?

- Ensure your organization's procedures and forms reflect the recent changes
- Establish procedures for responding to requests for ADA accommodations
- Revise FMLA Notice forms. Notice forms are available on Department of Labor's website: <http://www.wagehour.dol.gov>.
- Revise medical certification forms to remove the request for type of leave and to allow for additional information needed
- Revise employee handbook and policies regarding FMLA leave; set forth specific procedures for employees to report leave

**Train managers how to determine when reasonable accommodations may be necessary.**

### What Practice Changes Should We Implement?

- Train managers how to determine when reasonable accommodations may be necessary

- Document all interactive discussions and decisions on ADA accommodations
- Train managers to handle situations that might be related to a disability, in particular, where employees believe they are regarded as disabled
- Prepare job descriptions for each position which provide *essential job functions* including the minimum physical requirements to perform each EJF including fitness-for-duty certifications
- Train managers on new military leaves and other changes to regulations
- Keep track of the dates of notice and FMLA leave use
- Ensure your managers have the right training to recognize problem situations and follow existing procedures
- Vigorously investigate all notices of concern
- Document each step of the FMLA process AND all employee interactions that may fall under ADA or FMLA laws



## What Else Can We Do?

For many organizations, the next step is to seek professional assistance. We can help identify how to cut your overall program costs while dramatically improving outcomes.

**Option 1: Let's Talk!** We offer a no obligation consultation to informally assess your current policies, procedures, and practices against the new laws. This may help determine your current legal exposure.

**Option 2: Let's Evaluate Them!** We can formally review your organization's current policies, procedures, and practices against the new laws and provide an action plan to revise each.

**Option 3: Let's Modify Them!** We can assist you in modifying your current policies, procedures, and practices to ensure legal compliance. This will ensure legal and statutory compliance and provide an extra layer of protection in the case of a lawsuit or legal action.

**Option 4: Let's Deploy Them!** We have additional resources that can assist your organization with best practice HR solutions. Whether it is on classification systems, position profiles, recruitment, selection, manager and leadership training, and more, our preferred partner network has the capabilities that you need to thrive in today's HR environment.



**Get started today ensuring your continued compliance and risk minimization of employee lawsuits!**

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# About The Authors

## **MG Assessments:**

Mary Gorski has more than 15 years of corporate human resource management and assessment experience. She has worked with many levels of leadership and understands the needs of a well-run, efficient business. At the same time she understands the human factor and what motivates people to maximum performance and efficiency.

Using her experience and tools from Profiles International, Mary works with business owners to identify their people talent and help them understand how their workers drive results. She begins with diagnosis, and then designs a plan for improving workforce effectiveness. As a result of her assistance, businesses profit from a more motivated, engaged and productive workforce. Visit her Web site at [www.mgassessments.com](http://www.mgassessments.com)

## **Mary Gorski**

MG Assessments LLC

4771 144th Street West

Apple Valley, MN 55124

Tel: 952-322-3330

Fax: 952-322-3335

Email: [mgorski@mgassessments.com](mailto:mgorski@mgassessments.com)

## **Mansfield Tanick & Cohen P.A.:**

Mansfield Tanick & Cohen is an established, respected law firm, representing businesses, organizations and individuals throughout the U.S. and globally in a diverse array of practice areas. The firm provides strategic representation and ongoing advice to businesses in the full spectrum of business, corporate and commercial matters, as well as representing clients in all business-related legal actions, employment litigation, initiating or defending complex commercial litigation, shareholder disputes, and breach of contract claims.

Denise Tataryn is a shareholder of the firm and has been practicing in the law area for most of her 20 years plus legal career. She regularly counsels clients in all aspects of the employment relationship, including employment contracts, non-compete agreements, wrongful termination, sexual harassment and discrimination, wage disputes and management training.

## **Denise Yegge Tataryn**

Mansfield Tanick & Cohen P.A.

1700 U.S. Bank Plaza South

220 South Sixth Street

Minneapolis, MN 55402-4511

Tel: (612) 339-4295

Fax: ( 612) 339-3161

E-mail: [dtataryn@mansfieldtanick.com](mailto:dtataryn@mansfieldtanick.com)