



# **The Good, The Bad, & The Ugly**

## **Federal and State Employment Law Developments 2008**

**Presented to:**

**Delaware Society for Human  
Resource Management**

**2008 Annual State Conference**

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# Scott A. Holt

Scott is a partner at Young Conaway's Employment Law Section and practices in the Firm's Wilmington, Delaware office. He is recognized as one of Delaware's leading labor and employment law attorneys in both *Chambers USA* and *Best Lawyers in America*.

His practice focuses on employer counseling and litigation in areas involving discrimination and harassment; employee terminations; employment and severance agreements; trade secrets and non-competition agreements; hiring practices; wage and hour compliance; and labor negotiations and arbitrations. His clients regularly call on him to provide advice on compliance with various laws affecting the workplace, including the FMLA, ADEA, Title VII, ADA, FLSA, and state wage and hour laws. He has represented employers involved in class action lawsuits involving wage calculation and payment issues, entitlement to overtime and benefits, off-the-clock claims, challenges to exempt status, and claims under the WARN Act.

Scott also works with the Firm's Corporate and Bankruptcy Sections to address labor and employment issues that arise in the context of purchases, sales, mergers, layoffs, and plant shutdowns.

Scott is admitted to practice law in the State of Delaware and routinely handles matters in the United States District Court for the District of Delaware, the Court of Chancery, Superior Court, and Delaware Supreme Court. He is also admitted to practice in the United States Court of Appeals for the Third, Fourth, and Sixth Circuits.

He is past Chair of the Labor and Employment Section of the Delaware State Bar Association and is an active member in the American Bar Association Litigation Section and Labor and Employment Section.

Scott also edits the [\*Delaware Employment Law Letter\*](#), the only monthly newsletter in Delaware written exclusively for Delaware employers.

## Professional Memberships

American Bar Association, Litigation Section  
Labor and Employment Section  
Delaware State Bar Association

## Activities

Board of Trustees, Children's Beach House

## **William Bowser**

Bill Bowser has represented both private and public employers on a full range of labor and employment matters for over 20 years and is ranked as a top employment lawyer in Delaware by Chambers USA and The Best Lawyers in America.

Bill joined Young Conaway in 1993, after over four years as New Castle County Attorney. Bill defends employers in employment discrimination, wrongful termination, and "whistleblower" lawsuits in state and federal courts. Bill has vast experience in representing employers in collective bargaining and administrative proceedings before the NLRB, EEOC, the Delaware Department of Labor, and other government agencies. He assists employers on avoiding litigation by developing effective employee handbooks, policies, and procedures; and he provides training to in-house counsel, human resource professionals, supervisors, and employees. In 2007, Bill was recognized by the Delaware League of Local Governments for his "Excellence in Support and Service on Election Reform."

As an editor of the Delaware Employment Law Letter, Bill has written dozens of articles on labor and employment law. He is a past chair of the Delaware State Bar Association Section on Labor & Employment Law and recently was a guest of Forbes Radio on the topic of outsourcing.

Bill is very active in the community, especially in the areas of lead poisoning and cancer control and prevention. He drafted and helped secure passage of the Delaware Childhood Lead Poisoning Act, which is credited with drastically reducing the incidence of lead poisoning in Delaware. Governor Ruth Ann Minner appointed him as Chair of the Delaware Cancer Consortium. He is a founder of the Candlelighters Childhood Cancer Foundation of Delaware. For his work on behalf of children with cancer and their families, Bill was recognized by the National Governors Association's Distinguished Service Award in 2007. In addition, Bill received the Roxana Arsht Beacon and the Helen F. Graham Cancer Center Community Service Awards in 2002, the Governor's Volunteer of the Year Award in 2000, and the National Governors' Association Distinguished Service Award in 2007.



STATE OF DELAWARE DEPARTMENT OF LABOR  
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## **Julie K. Cutler**

**Julie Klein Cutler, a 1990 Honors graduate of the University of Maryland Law School and active member of the Maryland Bar, joined the Delaware Department of Labor in 1999. She manages the Office of Anti-Discrimination, which investigates, mediates and conciliates approximately 650 charges of employment discrimination each year. During Ms. Cutler's tenure, the Office of Anti-Discrimination has received national recognition from the U.S. Equal Employment Opportunity Commission for its mediation program and its youth outreach program.**

**Ms. Cutler co-drafted the revised Delaware Discrimination in Employment Act (19 *Del. C.* Chapter 7, Subchapter II), which took effect September 10, 2004, and accompanying regulations (currently under review). She also overhauled and streamlined the agency's case management system. Her efforts have significantly reduced the agency's case processing times while maintaining the quality and integrity of investigations and other processes.**

**Before joining the Delaware Department of Labor Ms. Cutler enjoyed an active career as a trial attorney in the Maryland Public Defender's Office and in private practice. She began her legal career serving as law clerk to the Honorable Kathleen O'Ferrall Friedman (retired), Circuit Court for Maryland, Baltimore City.**



STATE OF DELAWARE DEPARTMENT OF LABOR  
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Trina R. Gumbs joined the Delaware Department of Labor in 1993, and was one of the first staff members to serve in the Kent/Sussex office for the Division of Industrial Affairs. She was the sole representative for the Office of Anti-Discrimination in Kent and Sussex counties until 2003. She has been a key player in the Kent/Sussex office expansion, which has tripled in size during recent years. Mrs. Gumbs became a certified mediator in 2005. Since then, she has been instrumental in developing and managing the Office of Anti-Discrimination Mediation Program. Currently, Mrs. Gumbs serves as acting mediation director in addition to her role as supervisor of the Kent/Sussex Anti-Discrimination Office. Mrs. Gumbs is a University of Delaware alumna. She resides in Milford with her husband and children and is active in many community organizations.

## THE GOOD, THE BAD & THE UGLY

Labor & Employment Law Developments  
2008

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William Bowser & Scott Holt  
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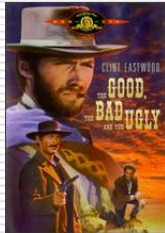
## Agenda

### Federal Developments

- ADA Amendments
- New FMLA Regulations
- Supreme Court Update
- 2008/2009 Preview

### State Developments

- Legislative Update
- DDOL Update



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## The Good, The Bad, & The Ugly

ADA Amendment Act of 2008

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## ADA Amendments Act of 2008

### History of the ADA

- Passed in 1990
- Product of political compromise
- Key terms undefined
- Unclear who is covered by ADA
- Supreme Court and courts narrowed scope

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## ADA Amendments Act of 2008

### What does the AAA change?

- Mitigating measures are not to be considered when determining whether someone is disabled.
- Overturns Sutton which held that a person was to be assessed in present condition.
- Expands scope of ADA coverage
  - Ex. Insulin controlled diabetes

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## ADA Amendments Act of 2008

### What does the AAA change?

- Lowers the standard for what when person is "substantially limited" in a major life activity.
  - Overturns Toyota ruling requiring that impairment must "prevent or severely restrict" individual from doing "activities of central importance to daily life."
  - Determination whether impairment is a disability "should not demand extensive analysis."

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## ADA Amendments Act of 2008

### □ What does the AAA change?

- Creates non-exhaustive list of Major Life Activities
  - Caring for oneself; bending; performing manual tasks; speaking; seeing; breathing; hearing; learning; eating; reading; sleeping; concentrating; walking; thinking; standing; lifting; communicating; and **working**.

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## ADA Amendments Act of 2008

### □ What does the AAA change?

- Congress also created a subset of major life activities called "major bodily functions."
  - These functions include: immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
  - Note that any ailment that would be a disability if it were to manifest is still considered a disability if it is in remission or is currently non-episodic.

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## ADA Amendments Act of 2008

### □ What does the AAA change?

- Employee can state "regarded as" claim under the ADA if he established discrimination based on an actual or perceived impairment "whether or not the impairment limits or is perceived to limit a major life activity."
- No reasonable accommodation required for "regarded as" individuals
- No transitory impairment (less than six months) can form basis of "regarded as" claim.

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## FMLA Military Leave and Proposed Regulations

- FMLA Expanded on January 28, 2008 to add military family leave provisions
- DOL proposed new regulations on February 11, 2008

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## FMLA Military Leave

- Two brand new types of FMLA leave created
  - "Active Duty" Leave
  - "Military Caregiver" Leave

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## Military Caregiver Leave

- Up to 26 weeks of leave in a single 12-month period to care for an ill or injured servicemember

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### Military Caregiver Leave

- Can be taken by son, daughter, spouse, or "next of kin" of covered servicemember
- "Next of kin" is new to FMLA
  - Statute says "nearest" blood relative
  - What happens when nearest can't or won't provide care?
  - Can more than kin provide care?
  - Can service member designate kin?

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### Military Caregiver Leave

- Care must be for a "covered servicemember" -- a member of the U.S. Armed Forces, including a member of the National Guard or Reserves undergoing:
  - Medical treatment,
  - Recuperation,
  - Therapy,
  - Is otherwise in outpatient status, or
  - Is otherwise on the temporary disability retired list due to the injury or illness

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### Military Caregiver Leave

- Service member must be recovering from a serious illness or injury sustained in the line of duty on active duty
- Servicemember unfit to perform the duties of his military office, grade, rank, or rating

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### Military Caregiver Leave

- The 26 week entitlement includes other FMLA time
- If FMLA time is used, it is deducted from the 26 weeks
- Can be taken intermittently

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### Active Duty Leave

- Up to 12 weeks of leave when family member is called to duty
- Note: this is for the family member, not the servicemember

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### Active Duty Leave

- Can be taken by spouse, parent, son or daughter of covered servicemember
- Note: no "next of kin"

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### Active Duty Leave

- Leave is needed because of a “qualifying exigency” arising out of the fact that servicemember is:
  - On active duty, or
  - Has been notified of an impending call to active duty status, in support of a contingency operation

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### Active Duty Leave

- Not effective until DOL defines “qualifying exigency”
- DOL says is going to act promptly

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### Active Duty Leave

- Possible examples of “qualifying exigency”
  - Attending official ceremonies or programs where the participation of the family member is requested by the military
  - Attending to farewell or arrival arrangements for a servicemember
  - Attending to affairs caused by the missing status or death of a servicemember
  - Making arrangements for child care or elder care
  - Making financial and legal arrangements to address the servicemember’s absence

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### Proposed Regulations

- Original final regs became effective on April 6, 1995
- Proposed new regs were published on February 11, 2008
- For section-by-section detailed explanation of proposed changes – see <http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf>

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### Proposed Regulations

- Coverage Issues
- Employee Leave Entitlements
- Employer Notice Obligations
- Employee Notice Obligations
- Medical Certification and Fitness for Duty

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### Proposed Changes: Continuing Treatment

- New** “continuing treatment” definition is the same, except:
  - Two or more treatments by a health care provider within the first 30 days of the beginning of the period of incapacity

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### Proposed Changes: Chronic Conditions

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- ❑ Current rule says that “chronic serious health conditions,” such as asthma, diabetes, epilepsy, etc., are conditions that require “periodic visits” to a health care provider for treatment
  - ❑ **New rule** says that “periodic visits” means **two or more visits a year to a health care provider for treatment**
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### Proposed Changes: Bonuses

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- ❑ Current rule says employees who take FMLA leave are entitled to “equivalent benefits” including bonuses for perfect attendance, safety and job performance
  - ❑ **New rule** says that **employer may disqualify employee for a bonus where the employee’s FMLA leave has prevented achievement of the requisite goal**, unless similarly situated employees who were out on non-FMLA-related leaves are not disqualified
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### Proposed Changes: Light Duty

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- ❑ Current rule says employees on light duty are using their entitlement to take FMLA leave during light duty period
  - ❑ **New rule says that light duty does not count toward FMLA leave**
  - ❑ Employees are still not required to accept light duty in lieu of FMLA leave
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Proposed Changes:  
Employer Notice Requirements

- Eligibility Notice** must be provided within **5 business days** of request for FMLA leave or employer knowledge of basis for FMLA leave
  - **This is up from the current 2 days**

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Proposed Changes:  
Employer Notice Requirements

- If employee is not eligible, notice must say so and explain why
- DOL has published a prototype eligibility notice

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Proposed Changes:  
Employer Notice Requirements

- Designation Notice** must be provided within **5 business days** of receiving information sufficient to determine that leave qualifies as FMLA leave
  - **This is up from the current 2 days**
- If employee is not eligible, notice must say so and explain why

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### Proposed Changes: Penalty for Failure to Notify

- No *per se* penalty (i.e., time not counted against 12 week entitlement) for failing to notify employees of eligibility or designation (per *Ragsdale decision*)
  
- Retroactive leave designation is permitted, but employer risks liability for harm, if employee can prove any

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### Proposed Changes: Employee Notification Responsibilities

- Employee must come forward with qualifying reason "as soon as practicable" after learning of need
  - Same day, if during working hours
  - Next day, if not
- Old Rule allowed 1-2 days after absence

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### Proposed Changes: Employee Responsibilities

- Employees must comply with usual call-in requirements for unforeseen absences except for more stringent timing requirements
  - Includes intermittent FMLA absences
- Failure to comply may result in delay or denial of FMLA leave (i.e., possible counting of absence as "occurrence") and disciplinary action

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### Proposed Changes: Employee Responsibilities

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- Employee must provide “sufficient information” for employer to be able to decide whether FMLA applies
  - “Sufficient information” is:
    - Information showing that employee cannot perform job functions, or that family member needs care, and
    - Duration of absence and whether doctor’s visit is planned or has happened
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### Proposed Changes: Medical Certification

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- Employee must provide completed form within **15 calendar days**
  - If certification form is incomplete or insufficient, employer must state in writing what additional information is needed and give employee **7 calendar days** to provide the requested information
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### Proposed Changes: Medical Certification

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- Employer may contact health care provider directly** (not just through health care provider hired by employer) to obtain clarification of certification, *even* without employee’s consent
  - Note: employer must give employee 7-day chance to obtain clearer certification before contacting provider
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**Proposed Changes: Fitness for Duty**

- Employers may still have a uniformly applied policy that requires a **“fitness-for-duty” certificate**
- Employee must provide complete certification or sufficient authorization to provider to supply sufficient information directly to employer

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**Proposed Changes: Fitness for Duty**

- Employer **may provide list of essential functions and require health care provider to certify that employee can perform them**
- Employees must be informed of this requirement and given the list of essential functions with the eligibility notice

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**U.S. Supreme Court Update**

- Sprint/United Management v. Mendelson
  - “me too” evidence admissible
- West Inc. v. Humphries
  - Retaliation claim under 1981 exists
- Meacham v. Knolls Atomic Power
  - Employer has burden to show “reasonable factors other than age”

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2008 Election: New President, New Congress, New Employment Laws

- Employee Free Choice Act
  
  - Civil Rights Act of 2008
  
  - Fair Pay Restoration Act
  
  - FOREWARN Act
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Employee Free Choice Act

- Eliminate secret ballot election
  - Require recognition of Union based on "card check"
  - Statutory penalties up to \$20,000
  - Binding interest arbitration if bargaining agreement not reached in 90 days
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Civil Rights Act of 2008

- Eliminate damage caps under Title VII
  - Allow compensatory and punitive damages for FLSA claims
  - Prohibit arbitration of federal or constitutional claims
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### Fair Pay Restoration Act

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- Act seeks to reverse Supreme Court Ledbetter decision
  - Ledbetter ruled that pay discrimination could not be challenged more than 180/300 days after original act of discrimination
  - Statute of limitations would run from last discriminatory paycheck
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### FOREWARN Act

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- WARN Act
    - Federal law requires 60 days advance notice of plant closing or mass layoff
    - Employers with less than 100 employees or layoffs involving less than 50 exempt
    - Penalty = 1 day of back pay / benefits for each day of violation
    - Affirmative defenses
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### FOREWARN Act

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- lowers the threshold triggering notice requirement for a plant closing from 50 to 25 employees
  - reduces the minimum employer size from 100 to 50 employees
  - expands the notice period from 60 to 90 days
  - Increases penalty to two days of pay for each day of violation
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**DELAWARE UPDATE**

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- Recent Legislation
  - Delaware Dept. of Labor
    - New DDOL Discrimination Regulations
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**Recent Delaware Legislation**

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- Construction Industry Independent Contractor Bill
  - Sexual Orientation Discrimination Bill
  - Minimum Wage / Tipped Employee Bills
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**DDOL Update**

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- New Regulations For Charges of Discrimination
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