



## Key Employment Law Issues in 2011, March Update

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### Proposed Federal Legislation

<u>Law</u>	<u>Key Dates</u>	<u>Description</u>
Equal Employment for All Act (H.R. 321)	Introduced 1/19/11	Prohibits the use of credit checks on prospective or current employees except for national security clearance, certain public sector employees, and "supervisor, managerial, professional, or executive position at a financial institution."
The Family Economic Success Act (S. 10)	Introduced 1/25/11	It should be the "sense of the Senate" that Congress should: guarantee pay equity for women, reward companies who promote flexibility for families, guarantee paid family and medical leave, and improve the quality and affordability of child care.
The Veterans Day Off Act (H.R. 319)	Introduced 1/19/11	Guarantees the right to take Veterans Day as an unpaid (or paid if available) day off of work for all veterans who work for at least one year for an employer with 50 or more employees.
The Older Workers Opportunity Act (S.145, S. 150)	Introduced 1/25/11	Provides tax credit to employers that employ workers age 62 and older and provide a "flexible work program" (full and part time flexible work schedule, full pension, and health care benefits and pay at least 60% of the cost). Credit = 25% of the older workers' wages.
Back to Work Extension Act (H.R. 477)	Introduced 1/26/11	Extends part of the HIRE Act to provide a payroll tax break to employers hiring individuals who were previously unemployed more than 60 days.

### Proposed Federal Regulations

<u>Regulation</u>	<u>Key Dates</u>	<u>Description</u>
GINA Regulations	Effective 1/10/11	Broadly defines "genetic information" and "family member" as included in the Genetic Information Nondiscrimination Act.
Notification of Employee Rights (NLRB)	Published for comment 12/22/10	Requires mandatory posting by all NLRB covered employers notifying employees of their rights under the NLRA. Also requires electronic notification if the employer customarily communicates with employees electronically.

### Proposed Ohio Legislation

<u>Law</u>	<u>Key Dates</u>	<u>Description</u>
Ohio S.B. 5	Passed Senate 3/2/11 Introduced in House 3/3/11	Dramatically changes and restricts public sector collective bargaining. Further revisions to the Bill expected by the House.
Ohio H.B. 137	Introduced 3/2/11	Makes a uniform definition of "employee" and standards to determine whether an individual is an employee or an independent contractor.
Ohio H.B. 131 Ohio S.B. 30	Introduced 3/1/11 Introduced 2/1/11	Makes it unlawful for an employer to use a person's credit score or history as a factor when making employment decisions.
Common Sense Regulation Act (Ohio S.B.11)	Introduced 2/1/11	Requires state agencies to develop customer service training programs and improve state regulatory agency processes, especially with regard to small businesses.
Ohio S.B. 13	Introduced 2/1/11	Allows an individual to receive unemployment for unemployment related to domestic violence or "compelling family circumstances" including having to move to another state because of a spouse or job loss due to a family members' illness or to care for someone with a disability.
Ohio H.B. 85	Introduced 2/2/11	Prohibits requiring an individual to obtain or maintain health insurance (a response to Health Care Reform).

## HR Managers – Don't Be A "Cat's Paw!"

In Staub v. Proctor Hospital, decided on March 1, 2011, the United States Supreme Court found that discriminatory acts committed by supervisors that are intended to cause, and are ultimately a proximate cause of, an adverse employment action will subject an employer to liability under anti-discrimination statutes – **regardless of who made the ultimate employment decision.**

### The Supervisors' Conduct

Mr. Staub was an employee with Proctor Hospital and also a member of the United States Army Reserves. Staub's supervisors allegedly gave Staub warnings intending to get him fired, at least in part, because the supervisors disliked his reserve schedule and the impact on Staub's department. In a classic example of how **not** to be a good supervisor, one of Staub's supervisor stated to a co-worker that his "military duty had been a strain on the department" and asked the co-worker to help "get rid of him." Another supervisor referred to Staub's military duties as "a bunch of smoking and joking and a waste of taxpayer's money." The Company's Human Resources Vice President relied on the biased supervisor's discipline and terminated Staub and it was **not** alleged that she, the ultimate decision maker, was motivated by discrimination.

### What Does This All Mean?

Front line supervisors can create liability for the Company in discrimination cases regardless of their ultimate authority if their discriminatory actions (i.e., discipline) are ultimately a factor which results in an adverse employment action (i.e., termination) decision by the HR Department. The Court specifically **rejected** the argument that an employer should, as a matter of law, be insulated from liability when the HR Department conducts an independent investigation before taking an adverse employment action.

This decision emphasizes the point of which HR Managers are already painfully aware – untrained and unchecked front line supervisors represent a significant financial risk to all organizations and will continue to create headaches for HR Managers.

### What The Heck Is A Cat's Paw Anyway?

In a "cat's paw" case, a plaintiff seeks to hold the employer liable for the discriminatory conduct by a supervisor who is **not** the ultimate decision maker. "Cat's paw" comes from an Aesop fable where a monkey coaxes a cat to retrieve roasting chestnuts from a fire. The cat burns its paws while getting the chestnuts which the monkey takes – leaving the cat with nothing (other than burnt paws). The "cat" in an employment case would be the decision maker (here, the HR Vice President) who takes action on behalf of the biased agents (supervisors) – or the "monkey."

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