

## **A perfect storm for employment lawsuits?**

by Boyd A. Byers

Writer Sebastian Junger coined the phrase “perfect storm” to describe the simultaneous occurrence of different weather phenomena that combine to create a powerful nor’easter (a storm blowing from the northeast). Is a confluence of cultural, economic, and political events whipping up a perfect storm for employment law claims? Many employment lawyers and pundits think so.

### ***It’s the economy, stupid***

The national economic downturn has created an environment ripe for producing employment lawsuits. Many Americans have already lost their jobs, and economists foresee massive layoffs on the horizon. Unemployment is expected to rise to its highest level in more than 25 years.

To make matters worse, employees have seen their 401(k) or other retirement account balances plummet. As a result, a number of older workers will have to delay their retirement plans. That disruption in the normal employee turnover rate will result in even more layoffs than otherwise would be needed. It could also lead to more age discrimination claims.

Job losses are always likely to spawn employment lawsuits. But now, with laid-off workers less likely to find new work and their retirement savings wiped out, the flood of claims could be more like a tidal wave. In addition to the typical discrimination and wrongful discharge claims, employees who participate in employer-sponsored retirement plans may pursue claims under the Employee Retirement Income Security Act (ERISA). A U.S. Supreme Court ruling last year makes it easier for 401(k) plan participants to sue plan sponsors for breach of their fiduciary duties under ERISA.

### ***Politics not as usual***

Apart from economic issues, American workers may be more aware than ever about their rights and how to file discrimination complaints. The historic 2008 presidential campaign and election energized both the African-American community and the women’s rights movement, which should focus even more attention on workplace discrimination issues.

Changes in the law could also trigger more employment lawsuits. The ADA Amendments Act, which expanded the definition of “disability” to make more employees subject to the Americans with Disabilities Act’s (ADA) protections, becomes effective on January 1, 2009. We could see dramatic employment-related legislation in the year or two ahead. As a senator, President-elect Barack Obama cosponsored several employee- and labor-friendly bills that are expected to be on the new Congress’ agenda, including the following:

- The Lilly Ledbetter Fair Pay Act would amend the ADA, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act of 1964 to allow employees to use a continuing violation theory to file claims based on pay or benefits decisions made many years — or even decades — ago as long as the most recent paycheck or retirement benefit check was issued within the statute of limitations period.
- The Equal Remedies Act and a new Civil Rights Act would remove Title VII's caps on damages, make arbitration clauses in employment contracts unenforceable, and allow class actions under the Fair Labor Standards Act and the Equal Pay Act.
- The Employee Free Choice Act would allow unions to represent workers if 51 percent of employees sign a card saying they want a union; no election would be necessary.

At the executive level, the Obama administration is expected to increase funding for the Equal Employment Opportunity Commission (EEOC) and create a more employee-friendly environment at the EEOC, U.S. Department of Labor, and National Labor Relations Board.

So will 2009 usher in a new era of employment lawsuits and increased employment law compliance costs? Hey, if I could see the future, I would have moved all my retirement assets into money market funds in September 2007.

***He said it***

*Historic trends and events are converging into a perfect storm that could place anti-discrimination at the center of corporate policy with an intensity unseen since passage of the Civil Rights Act of 1964.*

— James F. Fadigan, an author of the 1964 Civil Rights Act