

# EPL

## A SOFT MARKET IN HARD TIMES

- **EPL claims rise following layoffs - claims reported to Willis HRH are up 74% over last year.**
- **Employers will face new legal exposures in 2009.**
- **For insureds in low-risk EPL industries, rates will be flat or slightly down in 2009.**

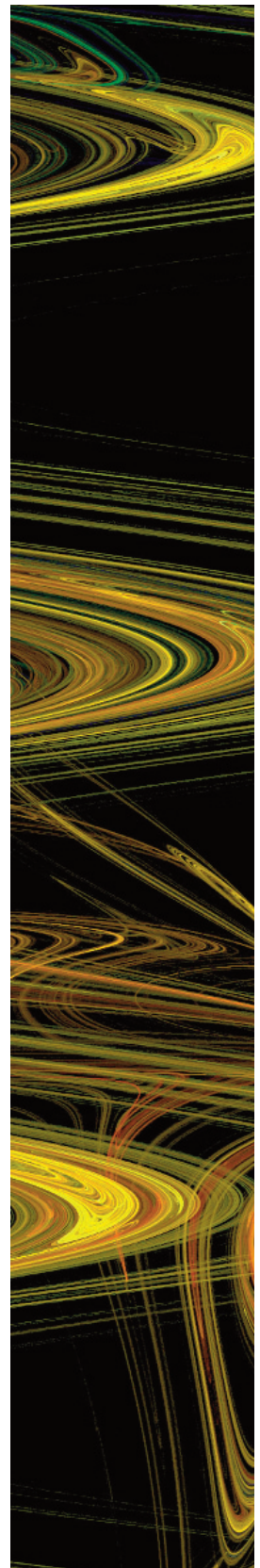
The credit crisis may not have a direct impact on Employment Practices Liability (EPL) activity, but the resulting economic downturn almost certainly will. Layoff announcements continue, and with reductions in force (RIFs) come increased allegations that the company and its executives discriminated against a protected class in passing out the pink slips. As one plaintiff's counsel phrased it, "The reality is that employment law is anti-cyclical. If times are bad, it's good for us."<sup>1</sup> The use of smart risk management and litigation avoidance techniques (such as severance payments and releases) are helpful, but not always a completely effective remedy.

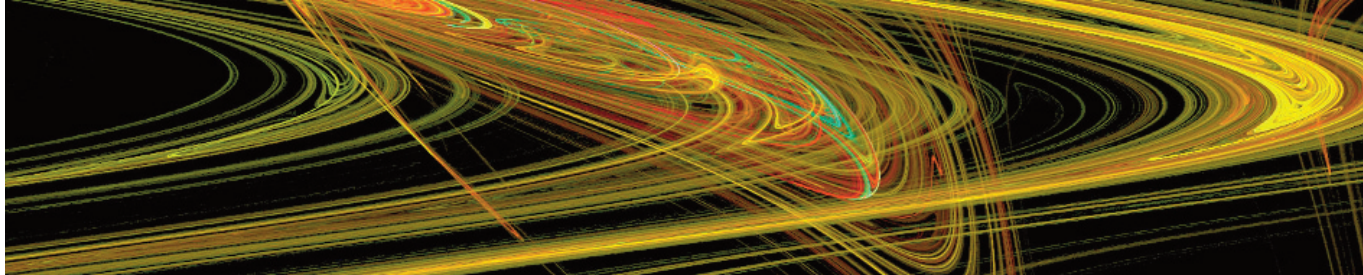
Another potential sign of things to come in 2009 was the choice of Lily Ledbetter to address the Democratic National Convention. Her name is well known in EPL circles as the plaintiff in the 2007 Supreme Court case *Ledbetter v. Goodyear Tire & Rubber Co.* A five-justice majority held that employers are protected from lawsuits over pay discrimination where the claims are based on decisions made by the employer more than 180 days prior to the claim or suit. As Ms.

Ledbetter had alleged discrimination over a span of years, this decision effectively extinguished the greater part of her claim for disparate pay. In 2008, Congress considered legislation to circumvent this ruling, but the proposal failed to pass.<sup>2</sup> Ms. Ledbetter's speaking role at the convention may be a signal that the new administration is going to make this EPL issue a priority.

### NEW RISKS IN 2009

Executives and employers will face a slew of new risks in 2009. The Americans with Disabilities Act was amended (effective January 1, 2009) to offer expanded protections to employees. President Bush also created a new federally protected category when he signed the new Genetic Information Nondiscrimination Act (GINA) into law. The new law bars employers from using information from genetic testing to hire, fire or promote workers, and also prohibits insurance companies from using genetic testing to determine eligibility or set premiums.<sup>3</sup>





The 1993 Family Medical Leave Act (FMLA) seemed to create a small EPL exposure for most companies, with limited financial consequence. Two recent events could change this in 2009. A federal jury awarded a single plaintiff more than \$2.2 million in an FMLA employment discrimination suit. When liquidated damages equal to the amount of the verdict as well as prejudgment interest are added in, as mandated under the FMLA, the recovery could climb to between \$6.2 and \$7.6 million. The plaintiff also plans to seek attorney fees.<sup>4</sup> If this is not enough to furrow brows, lawsuits under the FMLA may soon be brought as class actions – virtually unheard of until now. A federal court has been asked to certify a class of alleged FMLA violations. Litigation of FMLA claims by class actions would substantially raise the ante for employers.<sup>5</sup>

A Supreme Court decision will increase the burden on employers defending disparate impact claims under the Age Discrimination in Employment Act (ADEA).<sup>6</sup> When employers argue that their actions were lawfully based on factors *other than* age, they will now bear both the burden of production and the burden of persuasion to demonstrate that the factors they relied on were reasonable. In contrast, a federal Circuit Court of Appeals had previously placed the burden of persuasion on *employees* to show that the factors used by employers in making a RIF decision were unreasonable.

Employers are also likely to face more racial retaliation claims in 2009 as the result of a Supreme Court decision permitting actions under a Civil War-era federal law. The 7-2 ruling held racial retaliation claims allowable under Section 1981, a federal law based on the Civil Rights Act of 1866. Although racial

retaliation claims are already permitted under Title VII of the Civil Rights Act of 1964, plaintiffs may prefer suing under Section 1981. Unlike Title VII, Section 1981 has no damage cap. Section 1981 also provides for a longer statute of limitations and allows plaintiffs to bypass Title VII's required administrative remedies.<sup>7</sup>

## A KINDER, GENTLER MARKETPLACE - FOR MOST

Despite growing exposures, the marketplace is expected to be kinder and gentler in 2009, thanks to the pressure of competition in many market segments. Some industries, financial institutions foremost among them, will not be as fortunate. Retail and media companies will also face harder conditions as they, like financial institutions, have experienced significant claim activity as a group. For firms in these sectors, risk differentiation will be the chief challenge. For the majority, rates will be flat or down by as much as 10%.

In terms and conditions, at least one leading insurer plans to roll out new enhancements in 2009 that will expand coverage. Some of the enhancements appear to be useful soft-market innovations while others may be viewed as marketing simplification. In either case, the news is good, contributing to the sense that 2009 will present EPL buyers with the opportunity to solidify carrier partnerships, utilize carrier-provided loss control and expand coverage grants. All three are winning strategies in troubling times.

## CONTACT

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<sup>1</sup> “Job bias lawsuits on the increase: Rise may be due to economy and easier online access to EEOC,” *Houston Chronicle* (KRT), August 24, 2008

<sup>2</sup> “Sol Stance,” *The News Dash* from Plansponsor.com, April 25, 2008

<sup>3</sup> “Test Ban?” *The News Dash* from Plansponsor.com, May 22, 2008

<sup>4</sup> “FMLA Verdict Could Cost Chase Manhattan \$7.6 Million,” *Fulton County Daily Report*, April 3, 2008

<sup>5</sup> “Plaintiffs Allege Systemic FMLA Violations, Seek Rare Class Certification,” Legal Updates, [www.jacksonlewis.com](http://www.jacksonlewis.com), September 12, 2008

<sup>6</sup> “More Age Discrimination Cases on the Horizon? Supreme Court Raises Bar on Employers Defense in ADEA Cases,” ASAP - *A Littler Mendelson Time Sensitive Newsletter*, Littler Mendelson, July 15, 2008

<sup>7</sup> “Retaliation ruling may spur bias suits,” *Business Insurance Online*, June 2, 2008