EMPLOYMENT LAW BULLETIN

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TO OUR CLIENTS AND FRIENDS:

In a move to tap into the millions of retired union members, the AFL-CIO on May 4 announced it was creating a retiree organization called the Alliance for Retired Americans ("ARA"). It will be funded by the AFL-CIO and its member unions.

The objective of the ARA is to encourage continued participation in the labor movement by retirees, who can mentor new union members and help unions in their organizing efforts. Membership in the ARA will not be limited to former union members. Every union member retiree will automatically become a member.

The ARA will focus on retiree issues such as social security, Medicare, and prescription drugs. Initial funding will be raised through an AFL-CIO union assessment and a portion of the fees the AFL-CIO receives from the use of the union affinity credit card. Approximately 10% of those credit card users are retirees.

This organization is part of the AFL-CIO effort to address employee and employee family concerns from cradle to grave. This furthers the union objective to project itself to employees as an organization that protects the employee and his or her family 24 hours a day, every day.

WAGE AND HOUR COMPLIANCE

WAGE AND HOUR TIP: LIMIT YOUR LIABILITIES FOR RECORD-KEEPING VIOLATIONS.

Because the Fair Labor Standards Act of 1938 is more than 60 years old, nearly everyone is aware of the statute and the fact that it requires most employers to pay employees at least the minimum wage (currently $5.15 per hour) and to pay overtime at time and one-half the employee's regular rate of pay when the employee works more than 40 hours in

a workweek. However, there is another critical part of the FLSA that is often overlooked by employers — the requirement to maintain an *accurate* record of the hours worked by all employees that are subject to the Act.

While the Act and its implementing regulations require documentation of hours worked by the employees, it does not prescribe the method in which those records must be kept. It leaves the form and method of maintaining the information up to the employer. Consequently, you may use any method you believe is best for your firm as long as you keep the records accurately. One of the pitfalls many employers encounter is the recording of *scheduled* hours rather than *actual* hours worked by the employees. One of the "red flags" to Wage Hour is a record showing an employee working the same hours every day and every week over an extended period of time. There will almost always be some variation of the time worked by the employee due to business needs and the employee's personal requirements.

Failure to maintain these records can be a very costly mistake. Because the statute places the burden of maintaining them on the employer, the Courts have held that when the employer does not keep these records, the burden of proof shifts to the employer to disprove an employee's allegations. Thus, if you have not maintained the records, as required by the statute, when an employee alleges he or she worked a larger number of hours, you must be able to disprove the allegations, and, although you may be successful in disproving, it can be a frustrating and costly process. Therefore, it is much better to maintain the records initially than try to defend yourself from an employee's allegations.

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COURTS DISAGREE ABOUT EMPLOYER FMLA NOTICE REQUIREMENT

The Eleventh Circuit Court of Appeals in 1999 stated that an employer is not required to notify the employee that his or her absence is covered under the FMLA provided the employer complies with the FMLA in all other respects. A

different conclusion was reached by the Sixth Circuit Court of Appeals on May 12, 2000 in the case of *Plant v. Morton International, Inc.*, increasing the likelihood that the issue will eventually be decided by the United States Supreme Court.

Phillip Plant began working for Morton International in 1989. By 1995, he had been promoted to a salaried exempt position that required travel. He was involved in a serious automobile accident that resulted in paid medical leave for seven consecutive months. When he returned from the leave, the company accommodated his medical needs by assigning him to other jobs. Plant then aggravated his back at work, and began another leave of absence. As with his initial leave of absence, Plant did not fill out any forms, and remained absent from work while continuing to receive his regular pay. Approximately two months after he began his second medical leave of absence, the company terminated Plant for poor performance. He then sued under the ADA and FMLA.

The lower court granted the employer's motion for summary judgment on the FMLA claim, ruling that Plant's seven-month absence used up his 12 weeks under FMLA, so that no FMLA remained for the two-month absence due to the back injury. The Court of Appeals, however, reversed on this point. According to the Court, although the FMLA does not require the employer to notify the employee that a leave of absence is covered under FMLA, the Court upheld the Department of Labor regulations requiring such notice.

The Court said that the Department of Labor's regulation requiring that the employer designate the leave as paid or unpaid and whether it qualifies as FMLA "evinces a reasonable understanding of the FMLA, reflecting Congress's concern with providing ample notice to employees of their rights under the statute. Moreover, because the FMLA was intended to set out minimum labor standards, we do not believe that the regulation is inconsistent with legislative intent merely because it creates the possibility that employees could end up receiving more than 12 weeks of leave in one 12-month period, due to an employer's failure to notify them that the clock has started to run on their allotted period of leave." The effect of the Court's decision is that none of the initial seven-month medical leave counted toward FMLA because the employer failed to tell the employee that it was treated as FMLA. Therefore, terminating the employee two months into the second medical leave violated the employee's 12-week leave of absence rights under the FMLA.

The Court rejected the Eleventh Circuit's decision, stating that "We conclude that those regulations are valid

and forbid employers from retroactively designating FMLA leave if they have not given proper notice to their employees that their statutory entitlement has begun to run." Based on this conflict among the courts, we suggest that the best preventive approach for employers is to give employees the notice, even if employers are covered by the Eleventh Circuit (Alabama, Georgia and Florida).

UNIONS MAY CHARGE NONMEMBERS FOR PROCESSING GRIEVANCES, RULES COURT

The case of *Cone v. Nevada Service Employees Union Local 1107* (Nev. S.Ct. May 4, 2000) was a jackpot for organized labor in a right to work state. The issue before the Nevada Supreme Court was whether unions may charge fees to nonmembers when nonmembers request the union to provide representation services. In a right to work state, it is illegal for a union and employer to agree to terms in a contract that require employees to join the union or pay union fees or dues, or else be terminated. Unions owe the same legal duty of representation to nonmembers in the bargaining unit as they do to members.

In the instant case, 100 members dropped out of the union. The union then communicated to the nonmembers a fee schedule they adopted to represent them on grievance matters. The union stated it would charge $60 per hour for consulting on filing grievances, it would require the nonmembers pay 50% of any fees for hearing officers or arbitrators, and that nonmembers would have to pay 100% of the fees for union attorneys, which could include hourly rates of up to $200.

The union's pay for representation approach was never enforced, but the union was sued anyway. In upholding the validity of the union's pay for representation policy, the Nevada Supreme Court stated that right to work laws "were enacted for the express purpose of guaranteeing every individual the right to work for a given employer regardless of whether the worker belongs to a union." Requiring that employees pay union service fees if they use union services does not violate right to work laws, according to the Nevada court. The Court noted that "an individual may opt to hire his or her own counsel, and thereby forego giving the union any money at all without fear of losing his or her job." The Nevada decision conflicts with a 1976 National Labor Relations Board decision upholding that a union cannot charge nonunion members for grievance representation. In rejecting the NLRB decision, the Court stated that the NLRB approach "leads to an inequitable result that we cannot condone, by essentially requiring union members to

shoulder the burden of costs associated with nonunion members' individual grievance representation."

DID YOU KNOW . . .

. . . **that a survey recently concluded that 71% of all men ages 20 to 39 would give up some of their pay in order to spend more time with families?** The survey was released on May 3, 2000 by the Radcliffe Public Policy Center. Furthermore, 82% of the men surveyed between ages 20 and 39 considered family time to be their number one value, compared to 85% of all women in the same age group. Seventy-nine percent of those age 40 and higher stated that challenging work was their number one workplace concern, while those 50 and older stated that their number one workplace concern was camaraderie. One-third between age 21 and 29 felt that they would not reach the same level of financial success as their parents.

. . . that an employer's "almost textbook" response to a harassment claim avoided liability? *Hill v. American General Finance*, (7th Cir. May 4, 2000). The employee complained of sexual harassment and retaliation. The employer investigated immediately, warned the harasser, demoted and reassigned the harasser, and cut his pay. The Court noted that the employer provided employees with clear instructions on reporting harassment claims, promptly investigated the claim, and took necessary remedial action. The Court also noted that the employee failed to follow the employer's procedure for reporting subsequent harassment claims.

. . . that a national rent-to-own chain agreed to pay over $3,000,000 in back pay to executive assistants and managers who were not exempt from overtime? *Otero v. Rent-a-Center, Inc.*, Cal. Super. Ct. (May 12, 2000). The plaintiffs worked up to 70 hours per week. They were treated by the employer as exempt from overtime under the "white collar" exemptions (executive, administrative, or professional employees). However, the evidence showed that these individuals performed mainly routine tasks, and did not have the discretion or authority necessary to meet the exemption.

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