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## Inside this issue:





# U.S. Supreme Court Upholds Entire Health Care Reform Law

In a landmark ruling Thursday morning, the Supreme Court of the United States upheld the constitutionality of the Affordable Care Act, commonly known as the Health Care Reform Law, in its entirety. The 5-4 split decision held that the individual mandate, requiring virtually all Americans (subject to limited exceptions) to maintain “minimum essential” health insurance coverage is constitutional as a tax.

Chief Justice John Roberts wrote the opinion for the Court and was joined in the outcome by the court's four liberal justices, Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan and Sonia Sotomayor. Justices Samuel Alito, Anthony Kennedy, Antonin Scalia and Clarence Thomas dissented.

The key issues in front of the Court were the constitutionality of the individual mandate, the constitutionality of the Medicaid expansion provision and whether all or parts of the law were severable from either of these provisions, if one or both was invalidated.

The individual mandate operates by requiring Americans to buy health insurance or pay a penalty—called a “shared responsibility payment”—to the federal government. The government argued (in the following order) that the mandate was constitutional under the Commerce Clause, the Necessary and Proper Clause and/or the Tax Clause of the Constitution.

The Court accepted the government’s third argument that the mandate was constitutional under Congress’s power to “lay and collect taxes,” but rejected the first two arguments. The opinion noted that “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” As a result, the question to the Court was “whether it is ‘fairly possible’ to interpret the mandate as imposing such a tax.” Under that analysis, the five Justices in the majority found that the penalty may be considered a tax for constitutional purposes because the penalty is not so high that there is really no choice but to buy health insurance; the payment is not limited to willful violations, as penalties for unlawful acts often are; and the payment is collected solely by the IRS through the normal means of taxation.

"The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness," Chief Justice John Roberts wrote in the ruling.

There were not enough votes, however, to uphold the mandate under the Commerce Power or the Necessary & Proper Clause. Chief Justice Roberts recognized that Congress has the power to "regulate commerce," but, in his view, the individual mandate does not regulate existing commercial activity, "it instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce." Because Congress has the power only to "regulate commerce, not to compel it," the individual mandate was not a constitutional exercise of the Commerce Power. The Court also relied on precedent to reinforce the notion that the Necessary & Proper Clause is not an individual power, but only an extension of properly exercised powers given to Congress; thus, it could not be used as an independent constitutional means to pass the individual mandate.

Essentially, the ruling with regard to the individual mandate did not sustain it as a command for Americans to buy insurance, but as a tax if they don't. Individuals may still refuse to maintain the "minimum essential" health insurance, but they must (literally) pay the penalty for refusing to do so. The individual mandate is set to take effect January 1, 2014.

Because the mandate was the key part of the health care law, most expected the entire Act to fail, or at least certain provisions, if the mandate was held unconstitutional. With the mandate surviving, however, the Court did not decide whether other parts of the statute were severable from the individual mandate.

Another important issue in front of the Court was the Medicaid expansion provision, which required states to comply with new eligibility requirements that expand the people eligible for Medicaid. If a state refused to follow the increased eligibility requirements, it could lose all federal Medicaid funding—both new and existing. The Court held that the provision is constitutional as long as states would only lose new funds if they didn't comply with the new requirements, rather than all of their funding. To hold otherwise would strip states of a genuine choice of whether or not to participate in the Medicaid expansion.

It is unclear what the political and legislative fallout from the Supreme Court's decision will be. The bottom line for employers, however, is that the entire ACA remains in place. This means that employers must continue complying with the requirements currently in effect and turn their attention to the many obligations contained in the law that go into effect over the next several years.

## "Weeding" Out the Employment Issues Raised by Medical Marijuana Laws

To date, 14 states and the District of Columbia have passed laws to legalize medical marijuana. These laws have forced employers to balance their interest in safety and preventing employee drug use with the ambiguous protections such laws may offer employees using medical marijuana. Thus far, however, courts are making it clear that employers may still take action based upon employees' use of illegal drugs, even if that use is authorized under state law. Recent opinions from federal and state courts, including the Ninth Circuit Court of Appeals and the highest state courts of Washington, Oregon and California, have held that both the ADA and state medical marijuana laws do not provide employment protection to employees using medical marijuana, nor do they require employers to make accommodations for such drug use.

The ADA specifically provides that an "individual with a disability" does not include an individual who is currently engaging in illegal drug use. Medical marijuana still qualifies as an illegal drug for purposes of the ADA because the federal Controlled Substances Act prohibits the use of marijuana (medicinal or recreational), even if such use is permitted under the state's medical marijuana law. As a result, an employee currently engaging in medical marijuana use cannot look to the ADA for protection because he or she is not disabled under the ADA and employers have no obligation to accommodate such an employee.

Employees have been equally unsuccessful in claiming protection under state medical marijuana laws when bringing claims for discrimination or wrongful termination under state law. State courts have held that their respective laws do not prohibit an employer from terminating an employee who tests positive for marijuana, even if used for medical purposes. For example, where Michigan's medical marijuana act purported to protect medical marijuana users from being "denied any right or privilege, including …disciplinary action by a business…for marijuana use in compliance with the act," the federal District Court for the Western District of Michigan held that the statute did not affect the employee's status as an at-will employee because it did not regulate private employment, but only provided an affirmative defense to criminal charges brought by the state.

Employers have a legitimate concern in preventing any drug use in or affecting the workplace. These cases show that under current law, employment action based on the use of medical marijuana may not be prohibited. Discrimination based on the underlying disability, however, is still prohibited. Accordingly, employment decisions should be focused on the (medical) marijuana use itself and not the underlying condition. To this end, employers should have drug testing and disciplinary policies in place to address issues with employee drug use.

Given the potential liability that may arise, employers should: (1) be aware of the relevant laws in the state or city in which the facility is located (2) tailor their drug polices to ensure that the focus is on illegal drug use, regardless of the reason for the drug use; (3) keep the focus on safety in the workplace because no state law protects being under the influence of marijuana while working and (4) seek legal counsel before taking employment actions related to the use of medical marijuana.

The states that currently have medical marijuana legislation are Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington, as well as the District of Columbia.

## Public Sector Unions Take Another Hit

Public sector unions continue to take it on the chin. Revisions to state laws permitting public sector bargaining, increased requirements for public sector employees to pay for retirement and medical benefits, layoffs, and failure to recall Governor Scott Walker of Wisconsin have all contributed to an ebb in the numbers and influence of these unions. As if this is not enough, the Supreme Court of the United States added insult to injury in June when the Court held that a public-sector union increase in union dues, fees or assessments, it must give employees an immediate chance to object to the proposed increase and may not exact any funds from nonmembers without their affirmative consent. *Knox v. Service Employees International Union, Local 1000*. As the Court held, a public sector union's failure to give such notice infringed upon employees' First Amendment rights.

California law allows for public-sector employees in a bargaining unit to decide by majority vote whether to create an "agency shop" arrangement. In an agency shop, employees in the unit are not required to join the union; however, they must pay the union an annual fee to cover the cost of union services related to collective bargaining (so-called "chargeable expenses"). In 2005, the State of California was embroiled in a wide-ranging political debate regarding its state budget crisis, and in particular the budget consequences of growing compensation for public employees backed by public-sector unions. In the fall of 2005, California voters considered two ballot propositions that, if passed, would have reduced public-sector funding and provided the governor with more power to limit such funding in the future. The SEIU Local 1000 joined a political campaign opposing these propositions and sought to fund its lobbying/campaign efforts from its agency shop members.

Earlier in 2005, SEIU Local 1000 properly issued its annual "*Hudson notice*" for assessment of 2005 annual fees of member and nonmember employees (from *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) – procedural requirements explaining how the fees were calculated and affording an opportunity to object that a union must meet in order to collect fees from nonmembers without violating their First Amendment rights). Later that year, the union levied a 25% temporary increase in fees without providing a *Hudson* notice, instead providing employees with a bare-bones letter requiring employees to opt-out of the temporary assessment. The increase, amounting to approximately $12 million to SEIU Local 1000, was expressly aimed at defeating the two propositions on the fall 2005 ballot. A class of 28,000 nonunion members sued claiming that they were not provided with the proper *Hudson* notice of the assessment and that the assessment otherwise violated their First Amendment right not to be compelled to subsidize private groups or private speech.

In reversing a divided panel of the Ninth Circuit, in a 7-2 decision, the Supreme Court agreed with the nonunion member plaintiffs, holding that there was no justification for the Union's failure to provide a fresh *Hudson* notice for the temporary increase and that their First Amendment rights were violated. The Court held that when a public-sector union imposes an unexpected fee increase or a special assessment, the union must give employees an immediate chance to object to the proposed increase and may not exact any funds from nonmembers without their affirmative consent.

## "Not Fired" Fired Employee's Reinstatement Offer Retaliatory

The case of *Chapter 7 Tr. v. Gate Gourmet, Inc.* (11th Cir. June 11, 2012) contains so much information about what an employer should not do within its own organizational structure, from a training perspective and in handling employee medical issues.

Gate Gourmet is the service that brings us the delicious airline food we enjoy when traveling through Atlanta's Hartsfield-Jackson International Airport. Employee Williams was pregnant and provided her supervisor, Baxter, with restrictions that would occur in the future, but were unnecessary at the present time. Baxter replied that he did not have jobs that fit her restrictions and, therefore, he had no other work for her and she was terminated. The company's policy is to provide light duty for non-work-related injuries or illnesses, when such work is available. Baxter did not check with his supervisor or HR when he terminated Williams.

Williams filed a discrimination charge, alleging that she was terminated due to her race and pregnancy. The company then told Williams that she was not fired but placed on Family and Medical Leave. Baxter, her supervisor, was reprimanded and told that his actions "constituted discrimination in violation of Title VII."

In responding to the EEOC, the company offered Williams light duty provided that she withdraw her charge of employment discrimination.

In reviewing the trial court's decision, the 11th Circuit held that the company was not entitled to summary judgment and the case should go to a jury because the company stated that Baxter did not have the authority to fire Williams and Williams in fact was not fired, but the company conditioned the award of light duty on Williams's withdrawal of her discrimination charge. She did not withdraw the charge, she was not provided light duty and the Court concluded that a jury could reasonably determine that the company retaliated against Williams because she filed a discrimination charge.

The case of *Gate Gourmet* illustrates the following key take-aways:

1. Be sure that first line supervisors understand they do not have the authority to terminate an employee without prior approval from at least their immediate supervisor and/or Human Resources.

2. The front line supervisor is the one who has to manage the potential disruption caused by an employee's medical absence. Be sure your supervisors understand the circumstances permitting such absences and how supervisors should respond to and handle those incidents. In this case, the supervisor's immediate response that light duty was unavailable was not in compliance with company policy and from our perspective was an immediate reaction to the frustration of managing the situation.

3. The company's letter of reprimand to the supervisor stated that he violated Title VII. Such determinations should be left to courts and juries. As a general rule, internal memos or letters of reprimand should not state that the law has been violated. There are nuances that may determine whether there in fact was a violation (though we did not see those nuances in this case), and such a statement may limit an employer's ability to show legitimate business reasons for its actions which would result in a conclusion that the law was not violated. The supervisor's reprimand should focus on his failure to follow company policy, not a declaration that his actions violated a law.

4. Get your acts together. Taking a position that an individual was not terminated, but then not applying a return to work policy unless an individual dropped a discrimination charge are inconsistent positions. We often like the idea of providing a charging party with an "unconditional offer." That is, in this case state to Williams that if she will contact HR, the company will analyze its staffing needs, her skills and any medical restrictions to determine what, if any, position is available for her and for how long. Such an offer should state specifically that the company is not requesting that the employee drop her discrimination charge.

## Confidentiality Clauses and "Termination At Will" Statements a Violation of the National Labor Relations Act?

Readers of the Employment Law Bulletin have heard us say it before: the fact that Congress has not passed legislation helping unions does not stop the NLRB from doing just that. For example, on Thursday, June 14, 2012, the NLRB upheld an administrative law judge's decision that employer confidentiality language violated employee rights under the National Labor Relations Act. The employer's language in a compensation agreement stated that employees "agree not to discuss the compensation stated in this agreement, or the compensation paid to you pursuant to any prior employment agreement, in any manner, with [our] client, [our] client's employees or any contract employee of the client." The cease and desist order from the NLRB requires the employer to cease telling employees that they cannot discuss wages, hours, benefits, and other terms and conditions of employment among themselves, with other employees or with non-employees.

On June 11, 2012, NLRB Acting General Counsel Lafe Solomon opined that an employer's general statement to employees that they are "at will" does not violate the National Labor Relations Act. However, the following statement from Solomon's perspective is problematic under the Act: "I acknowledge that no oral or written statements or representations regarding my employment can alter my at will employment status except from a written statement signed by me and either [the company's] Executive Vice President/Chief Operating Officer or [the company's] President." Solomon stated that such language implies to employees that an effort to unionize would be "futile." Solomon explained that through unionization, exceptions to termination at will may occur. However, when an employer's policy states that the only exception to termination at will is a written agreement signed by an officer, that implies to employees that they have no alternatives.

Employers should not become comfortable with the injunction precluding the NLRB from following through with its notice posting or quick election requirements. Weekly, we see actions by the NLRB to enhance union organizing and promote among employees an awareness of their rights under the National Labor Relations Act. From our perspective, the NLRB is as aggressive in pursuing its agenda as the United States Department of Labor is in elevating employee knowledge of exempt and non-exempt status and other rights under wage and hour laws.

## EEO Tips: Is The Paycheck Fairness Act Really Necessary?

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On June 5, 2012, Senate Bill 3220, known as the *Paycheck Fairness Act* (PFA), was rejected for debate by a 52 to 47 vote, along party lines, with the democrats voting in favor of bringing the bill out for debate and the republicans voting against it. The bill's supporters needed 60 votes to avoid a filibuster. Actually, this was the second time the bill has been rejected; a similar attempt had been made last year with basically the same result. Sponsors of the bill contend with some validity that even today women, overall, make only 77% to 80% of the wages paid to men for basically the same work.

According to proponents of the PFA, in order to help close the wage gap between men and women, the Equal Pay Act (EPA) of 1963 needs to be amended to accomplish the following improvements:

- **A tightening of an employer's affirmative defenses as to the reason for the difference in pay**. Presently wage differentials are permitted based on seniority, merit, quantity or quality of production, or any other factor other than sex. The PFA would add the requirement that employers also prove that any wage gap between men and women doing the same work has a business justification and that it is truly a result of factors other than sex.

- **A broadening of the "Establishment" requirement so as to include jobs within the relevant geographical area, not just the specific plant locale in question.** Presently under the EPA an "Establishment" is considered to be a distinct physical place of business.

- **Deter wage discrimination by prohibiting retaliation against employees who inquire about an employer's wage practices or disclose their own wages to fellow employees.** This was an issue in the now famous *Ledbetter* case and remained unresolved in the Lily Ledbetter Fair Pay Act.

- **Strengthen penalties for equal pay violations by allowing punitive and compensatory damages to claimants.** The EPA currently only allows up to three years of back pay with double that amount if the violation is willful.

- **Provide for additional training, research and education of EEOC employees in developing a meaningful enforcement program, and also require federal contractors doing business with the Department of Labor to submit information as to their hiring practices including data on hiring, promotions, terminations and pay.** There is no such provision in the current EPA.

On the other hand, some of the leading arguments in opposition to the Pay Check Fairness Act can be summarized as follows:

- The PFA would expose employers to unlimited compensatory and/or punitive damages for violations and thus open the door to frivolous lawsuits.

- The PFA would imperil the ability of applicants or employees to demand a better salary based on their previous work and/or salary history and frustrate a company's policy of trying to attract new hires with greater potential.

- The PFA is not needed because virtually all of the same coverage is available under Title VII.

Thus, in answer to the question of whether the Pay Check Fairness Act (PFA) is really necessary would seem to depend on at least two or, maybe, three major factors including: (1) whether the broad remedies available under Title VII would cover any harm that could be alleged under the EPA; and (2) whether the alleged violation would be easier to prove under the EPA or Title VII given basically the same facts in any given case: and/or (3) the fact that under existing law a plaintiff could "hedge his or her bets" in most cases by alleging a violation under both statutes.

As to the first factor, it is clear that because of the "Bennett Amendment," which was intended to reconcile Title VII (passed in 1964) to the Equal Pay Act (which was passed in 1963), any wage discrimination based on sex which would be unlawful under the EPA would also be lawful under Title VII. Thus, under Section 703 of Title

VII, sex discrimination in the payment of wages would be prohibited. Secondly, under Section 704(a) of Title VII, arguably, it would be unlawful to retaliate against any employee who protested any perceived sex discrimination by way of discussing wages with co-workers. And, finally, under the Civil Rights Act of 1991, a plaintiff could be entitled to compensatory and/or punitive damages for a willful violation where there has been a reckless disregard of the federal anti-discrimination laws. Of course, there is one other very significant difference in that Title VII applies to employers with 15 or more employees while the EPA applies to employers with as few as two or more employees. Other than the employer coverage matters, there is nothing in the PFA that is not already covered by Title VII.

However, as to the second factor, the burdens of proof, there is a significant difference between the two statutes which the 8th Circuit recently pointed out in the case of *Bauer v. Curators of the University of Missouri*, Case No. 11-2758 (June 6, 2012). In that case, the plaintiff, Bauer, a practical nurse at the University of Missouri Hospital, sued the hospital under the EPA alleging that she had been paid less than a male who performed substantially equal work under similar working conditions. At the conclusion of trial, the district court included a "business-judgment" instruction to the jury as to which Bauer objected and moved for a new trial. That was denied. Upon appeal, while acknowledging that the business judgment instruction was improper, the 8th Circuit stated that the district court had also given compensating proper instructions to offset the improper instruction. The 8th Circuit further clarified the law as follows:

> Gender discrimination claims may be brought under both Title VII and the Equal Pay Act, but the laws differ. The EPA, a strict liability statute, does not require plaintiffs to prove that an employer acted with discriminatory intent; plaintiffs need show only that an employer pays males more than females. (Cites omitted) To avoid liability, an employer must show that any pay disparity is justified by (1) a seniority system; (2) a merit system; (3) a pay system based on quantity or quality of output; or (4) a disparity based on any other factor other than sex. (Cites omitted)
>
> Under Title VII, the burden of persuading the trier of fact that an employer <u>intentionally</u> discriminated against the plaintiff <u>always remains with the plaintiff</u>. (Cites omitted) <u>An employer under the EPA carries the burden of persuasion and must prove an affirmative defense; a Title VII defendant need only articulate a defense.</u>" (Underlining added)

Under these circumstances, if the PFA were enacted with all of the proposed modifications and remedies discussed above, the EPA in my judgment would, first of all, look like Title VII on steroids and, secondly, it would give plaintiffs a decided advantage filing under the EPA rather than Title VII because the burden of proof at all times would remain with the employer. Moreover, the potential remedies of the two statutes would be the same.

**<u>EEO Tip:</u>** Apparently, the underlying assumption of the proponents of the PFA is that the quickest way to close the proven gap between the wages paid to men and women for performing the same jobs is to attack employers through the Equal Pay Act. Actually, the disparity in wages is simply sex discrimination, and Title VII clearly outlaws sex discrimination and provides a comprehensive approach to remedying violations. The major difference as shown above being the burdens of proof of the plaintiff and the employer under the EPA as compared to Title VII. However, employers should not get too comfortable because the PFA failed. It is quite probable that this bill will be resurrected sometime in the future. Moreover, employers should always be vigilant to make sure that their employment practices are not vulnerable to a charge of sex discrimination.

If you have any questions, please feel free to call this office at 205.323.9267 for assistance.

## OSHA Tips: OSHA and Heat Hazard

*This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at 205.226.7129.*

In a news release on the 7th of May, OSHA announced that the agency has kicked off its efforts to focus on the hazards of working outdoors in the summer heat. It notes that "every year, thousands of workers across the country suffer from serious heat-related illnesses. If not quickly addressed, heat exhaustion can become heat stroke, which has killed – on average – more than 30 workers annually since 2003. Labor-intensive activities in hot weather can raise body temperatures beyond the level that normally can be cooled by sweating. Heat illness may initially manifest as heat rash or heat cramps, but quickly can become heat exhaustion and then heat stroke if simple prevention steps are not followed." Some categories of workers commonly at risk include agriculture workers, building, road and other construction workers, utility workers, baggage handlers, roofers, landscapers, and others who work outside.

OSHA has partnered with the National Oceanic and Atmospheric Administration (NOAA) in focusing on this issue. NOAA indicates the magnitude of the issue by stating that, "heat is the number one weather-related killer in the United States, resulting in hundreds of fatalities each year. In fact, on average, excessive heat claims more lives each year than floods, lightning, tornadoes, and hurricanes combined."

Extensive information about heat exposures and protective measures may be found on OSHA's website at www.osha.gov. OSHA suggests that three simple words be remembered in order to prevent heat-related illnesses. Those words are: **water, rest, and shade.**

OSHA has no specific rule or standard bearing on work in very high temperatures. However, the agency has not been reluctant to use the general duty clause of the OSH Act to address such hazards. These citations typically have resulted where the employer allowed employees to work in dangerous heat without having a heat stress management program. Such a program would include an acclimatization period for new employees, training of employees on the effects of heat stress and the recognition of symptoms, effective hydration, and work/rest regimens.

Examples of such cases include the following:

One such citation was issued following the death of an employee at a sawmill worksite in August 2010. The investigation disclosed that employees were exposed to excessive heat levels without the appropriate amount of work and rest cycles and/or proper fluid intake while removing lumber from the green chain. After fainting, the victim was transported to a medical center where his core body temperature was found to be 108 degrees. The employee was subsequently transported by life-flight helicopter to another medical facility where he passed away.

In another case, employees were clearing tree branches on a day when an official heat advisory had been issued. An employee noticed a co-worker was moving slowly and asked if he was feeling okay. He replied that he was feeling tired and sat down under a tree. The co-worker subsequently returned with the supervisor and found the ill employee lying on his side. Upon entry to the hospital the decedent had a core body temperature of 109 degrees. The medical examiner attributed the cause of death to hyperthermia.

In a third example, an employer was cited under the general duty clause for failing to acclimate a new employee for work in extreme heat. The crew was engaged in installing formwork for curbs in temperatures exceeding 97 degrees with a 74% humidity. There was no wind and the temperature index reached 130 degrees Fahrenheit.

## NLRB Tips: Board Changes Standard for Conducting *Spielberg* Review of Arbitration Awards

*This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years. Mr. Rox can be reached at 205.323.8217.*

In GC Memo 11-05, issued on January 20, 2011, the Agency announced a "new approach" in considering whether to defer to arbitral awards. The Acting General Counsel's approach is designed to give greater weight to employees' statutory rights in Section 8(a)(1) and (3) cases and less weight to the contract's "private dispute resolution" mechanism (i.e. - the grievance/arbitration procedure). The General Counsel's new framework is outlined below:

The burden to demonstrate that deferral to the arbitral decision is appropriate is now on the party urging deferral. In the past, the burden was on the moving party to demonstrate that deferral was not appropriate under the standards set forth in Spielberg and Olin.

- In 8(a)(1) and (3) cases, the Board will no longer defer to an arbitral resolution unless it can be shown that the statutory rights of the charging party have been explicitly considered by the arbitrator.

Implication for Employers:

It is no longer a "sure thing" that a winning arbitration award will withstand NLRB scrutiny. It is important that the employer makes sure that the implicated ULP issue is put before the arbitrator, and that he specifically responds to the ULP aspect of the arbitration.

**Agency Curbs Deferral to Arbitration if Matter Takes Longer Than a Year**

In an effort to further limit the use of the grievance process by Employers to resolve labor disputes, the Board will no longer defer cases to the grievance-arbitration process in situations where the matter would likely require, or has already required, NLRB deferral for more than a year. (GC Memo 12-01). This new procedure addresses a long-standing complaint by union organizers and union practitioners, who claim that Employer's delay setting disputes for arbitration in order to deny "justice" to the aggrieved employee.

Employers should expect increased scrutiny from Regional offices before the NLRB will agree to defer, or continue to defer, unfair labor practice charges.

In GC 12-01, the General Counsel is requesting that the Board revise the *Collyer* deferral policy to ensure that the Board's statutory duty to prevent and remedy unfair labor practices is not thwarted by cases bogged down by a significant arbitration backlog:

> Under [the current] system there is no safeguard against a case being held in deferral status indefinitely, even for years, so long as the arbitration procedure remains functional. The current system does not adequately ensure preservation of the evidence necessary to properly prosecute the charge or mitigate the enforcement problems that often arise after a prolonged delay. Consequently, the current *Collyer* deferral procedure does not ensure that statutory rights are effectively protected.

The General Counsel noted that evidentiary and enforcement problems can arise in as little as a year after a charge is filed, and concluded that case-handling procedures need to be modified for cases that have been or are likely to be deterred for over a year. The modifications/instructions to the Regional field offices are summarized below:

- Section 8(a)(1) and (3) charges forecast to be or actually deferred for over a year should not be deferred to arbitration.

- In certain limited circumstances, the General Counsel may also take the position that deferral of Section 8(a)(5) cases for more than a year is inappropriate.

The Regions should take the following steps to implement this new policy.

**Section 8(a)(1) and (3) Cases.**

- Conduct Charging Party investigation, make arguable-merit determination, and determine whether arbitration is likely to be completed in less than a year.

- If arbitration is likely to be completed in less than a year:

  - Defer and conduct quarterly reviews.

  - At the fourth quarterly review (in new and currently pending cases in deferral status), send "show cause" letters to all parties seeking an explanation of why deferral should not be revoked.

- If the Charging Party does not respond, contact the Charging Party and any individual discriminatees before dismissing for failure to prosecute.

- If there is insufficient reason to continue deferral, conduct a full investigation; if the charge is meritorious, submit the case to Advice; if the charge is non-meritorious, dismiss absent withdrawal.

- If there is good reason to continue deferral, contact Advice.

- If arbitration is not likely to be completed in less than a year:

  - Determine, in consultation with all parties, including any individual discriminatees, whether deferral is inappropriate because the delay is likely to frustrate the Board's remedial ability or unduly disadvantage the Charging Party.

  - If deferral is deemed inappropriate, conduct a full investigation and, if the charge is meritorious, submit the case to Advice.

  - If deferral is considered appropriate despite the delay, contact Advice.

**Section 8(a)(5) Cases**

- Make deferral decisions and conduct quarterly reviews, as under existing policy.

- If arbitration is not likely to be or has not been completed within a year, and the case implicates individuals' statutory rights or involves serious economic harm to the Charging Party, the Region may at its discretion conduct a full investigation and submit the case to Advice in the same manner as Section 8(a)(1) and (3) cases.

**Practical Consequences of GC Memos 11-05 and 12-01.**

Employers will have to take extra steps to insure that a winning arbitration award is ultimately upheld. Prior to the changed approaches, arbitration awards that were "susceptible" to an interpretation consistent with the NLRA would not be found "repugnant" to the Act, and therefore upheld under Spielberg. Now, more evidence specifically tailored to the ULP issue under Section 8(a)(3) and (1) of the Act must be developed. I would suggest that the record reflect that the employer has explicitly requested that the arbitrator to consider the ULP issue using the appropriate standard for determining the issue (such as a Wright Line analysis).

Where employers have backlogs in scheduled arbitrations, grievances that contain potential Section 8(a)(3) and (1) issues must be expedited in order that the hearing / arbitrator decision issues within a year of the filing of the grievance.

## Wage and Hour Tips: The Motor Carrier Exemption Under the Fair Labor Standards Act

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I know that many employers operate motor vehicles as a part of their business. As there have been some changes in the criteria for the overtime exemption, I thought I would provide an updated overview to the requirements. Section 13(b)(1) of the FLSA provides an overtime exemption for employees who are within the authority of the Secretary of Transportation to establish qualifications and maximum hours of service pursuant to Section 204 of the Motor Carrier Act of 1935, except those employees covered by the small vehicle exception described below.

Thus, the 13(b)(1) overtime exemption applies to employees who are:

1. Employed by a motor carrier or motor private carrier.

2. Drivers, driver's helpers, loaders, or mechanics whose duties affect the safety of operator of motor vehicles in transportation on public highways in interstate or foreign commerce; and

3. Not covered by the small vehicle exception.

The driver, driver's helper, loader, or mechanic's duties must include the performance of safety-affecting activities on a motor vehicle used in transportation on public highways in interstate or foreign commerce. This includes transporting goods that are on an interstate journey even though the employee may not actually cross a state line. Further safety affecting employees who have not made an actual interstate trip may still meet the duties requirement of the exemption if the employee could, in the regular course of employment, reasonably have been expected to make an interstate journey or could have worked on the motor vehicle in such a way as to be safety-affecting. An employee can also be exempt for a four-month period beginning with the date they could have been called upon to, or actually did, engage in the carrier's interstate activities.

In 2007, Congress inserted a Small Vehicle Exception to the application of the overtime exemption, which severely limits the exemption, especially for small delivery vehicles such as vans and SUVs. This provision covers employees whose work, in whole or in part, is that of a driver, driver's helper, loader or mechanic affecting the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways in interstate or foreign commerce, except vehicles:

(a) Designed or used to transport more than 8 passengers, including the driver, for compensation; or

(b) Designed or used to transport more than 15 passengers, including the driver, and not used to transport passengers for compensation; or

(c) Used in transporting hazardous material, requiring placarding under regulations prescribed by the Secretary of Transportation.

Because of the Small Vehicle Exception, the Section 13(b)(1) exemption does not apply to an employee in work week the employee performs duties related to the safety of small vehicles even though the employee's duties may also affect the safety of operation of motor vehicles weighing greater than 10,000 pounds, or other vehicles listed in subsections (a), (b) and (c) above, in the same work week.

The Section 13(b)(1) overtime exemption also does not apply to employees not engaged in "safety affecting activities," such as dispatchers, office personnel, those who unload vehicles, or those who load but are not responsible for the proper loading of the vehicle. Only drivers, drivers' helpers, loaders who are responsible for proper loading, and mechanics working directly on motor vehicles that are to be used in transportation of passengers or property in interstate commerce can be exempt from the overtime provisions of the FLSA under Section 13(b)(1). Further, the Section 13(b)(1) overtime exemption does not apply to employees of non-carriers such as commercial garages, firms engaged in the business of maintaining and repairing motor vehicles owned and operated by carriers, or firms engaged in the leasing and renting of motor vehicles to carriers.

Employers that operate motor vehicles should carefully review how they are paying drivers, driver's helpers, loaders and mechanics to make sure they are being paid in compliance with the FLSA. Failure to do so can result in a very large liability. I recently saw where a trucking company was ordered to pay its drivers over $375,000 in back overtime compensation. If I can be of assistance, please give me a call.

In a ruling in favor of employers on June 18th, the Supreme Court, in a 5-4 decision, found that Pharmaceutical Representatives for GlaxoSmithKline were salesmen and thus exempt from both minimum wage and overtime under the outside sales exemption. This ruling may have an effect on the status of some 90,000 employees working in the industry and potentially saved the manufacturers millions of dollars. One firm, Norvatis, recently paid $99 million in back wages to its reps that had been determined to be non-exempt by a lower court.

## 2012 Upcoming Events

EFFECTIVE SUPERVISOR®

Birmingham – September 18, 2012
Bruno's Conference Center, St. Vincent's

Huntsville – September 26, 2012
U.S. Space & Rocket Center

## Did You Know…?

…that larger raises for younger, inexperienced employees compared to older employees did not violate the ADEA? *Blandford v. ExxonMobil Corp.* (6th Cir. June 5, 2012). This case involved a compensation system for territorial managers of independent distributors of ExxonMobil's petroleum products. Those managers have far more experience overall than managers who handle company retail stores. Statistically, often those who handle the retail stores are younger and more recent hires. Based upon recommendations from a consulting firm, the company provided lower increases to the territory managers of products compared to the territory managers of its retail stores. Alleged direct evidence of age discrimination was a human resources executive's comment that "intuitively…we all know that the value of experience goes down with age." The court concluded that that statement was not discriminatory and only reflects the executive's opinion that "experience is subject to diminishing returns." The court concluded that the difference in compensation structure through the consulting firm was based upon experience, not age.

…that a new global federation of unions, IndustriAll, was recently formed in Copenhagen? According to the federation, "markets are global, therefore, workers must go global." The federation will focus internationally on efforts to organize, push for trade union rights in countries such as China, seek to limit workforce reductions, act to prevent discrimination in all forms, support safety and health campaigns and "promote democratic, transparent and inclusive practices in unions." International Transport Workers General Secretary David Cockroft stated that, "We live today in a global world where industrial goods depend on sea, land and air transport to reach their customers and where transport of raw materials, energy and components are vital to the jobs of all your members. If we are to succeed in organizing[sic] along the entire global supply chain, IndustriAll and the ITF have to work much more closely together than ever before…The global supply chain is vulnerable to effective coordinated industrial action. The risk of supply chain disruption is at the top of today's corporate agenda."

…that union members support President Obama over Mitt Romney by 57% to 35%? This report is according to a Gallup poll based upon surveys from April 11, 2012 through June 5, 2012. Among those who are not union members, 44% support President Obama and 48% support Mitt Romney. The President's support is even stronger among public sector union members, by a 59% to 34% margin. Public sector non-union members, according to Gallup, support the President by a 56% to 36% margin. The highest support of all for President Obama is among unionized state government workers, by a 63% to 29% margin. Non-union state government workers support the President by 51% to 42% margin.

…that more discrimination charges have been filed in the retail sector compared to any other during EEOC's FY 2012? According to the EEOC, between October 1, 2011 and May 31, 2012, a total of 66,300 charges were filed. The EEOC did not classify 30,686 of those charges. Of the remaining charges that were classified, 5,669 were filed against retail employers, followed by 5,374 against those in healthcare and social assistance, and 4,112 in manufacturing. The highest number of ADA charges was filed against those in healthcare and social assistance (1,614), Title VII charges in retail (4,353), and ADEA charges in healthcare and social assistance (1,184).

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