



LABOR & EMPLOYMENT LAW ADVISER

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Message from the Firm

The first quarter of 2009 has been very active for human resources professionals. On the legal front, a flurry of new laws, regulations and executive orders is quickly transforming the landscape of employee and labor relations. Perhaps most significantly, the Employee Free Choice Act was introduced in Congress on March 10, 2009. If signed into law, EFCA represents the most significant change in the National Labor Relations Act since its enactment in 1935. The Firm continues to prepare employers to address EFCA as well as to navigate the many new laws and regulations that have emerged over the past months.

On the litigation front, claims brought by former employees are rising. Employers increasingly face costly wage & hour lawsuits, including class actions. Further, according to the EEOC, employment discrimination charges in 2008 jumped 15%, to the highest level in the agency's history.

We are reminding clients and friends of the Firm to take all preventative measures practicable to ensure compliance with labor & employment laws – always good advice, but even more so given the current legal and economic climate.

Scorecard for HR in 2009

By Scott M. Wich, Partner

In addition to dealing with the difficult personnel issues brought about by current economic conditions, human resources professionals are grappling with a significant number of new laws, regulations and requirements in 2009 governing all aspects of employment. To assist you in managing the rapidly changing field and ensuring that your policies and practices are up-to-date, we have outlined many of the new rules 2009 has brought and the changes yet on the horizon. We encourage you to continue to monitor our website and e-alerts to stay updated on new laws and emerging developments.

What 2009 Has Brought So Far...

ADA Amendments Act. The ADAAA, effective January 1, 2009, expanded the coverage of the ADA and increased the reasonable accommodation requirements of employers.

New FMLA Regulations. Effective January 16, 2009, the new FMLA regulations represented the first major overhaul of the federal leave law in over a decade. Among other things, the new regulations set new notice requirements for employers.

The Lilly Ledbetter Act. In the first pro-employee legislation signed by President Obama, the ability of employees to assert discrimination claims was greatly increased. Responding to a decision of the U.S. Supreme Court, the Act makes each paycheck that is the result of a discriminatory pay decision to be an unlawful act and, under a continuing violation theory, allows employees to bring claims that would otherwise be barred by the statute of limitations.

Executive Orders. In the first pro-labor efforts of the new White House, President Obama has signed four executive orders affecting federal contractors. The executive orders seek to strengthen the role of labor unions in government contracts.

COBRA Subsidies. The recently enacted American Recovery and Reinvestment Act provides certain employees with government subsidies for COBRA continuation coverage premiums.

Immigration Delays. The new I-9 forms and e-verify system have been delayed. New I-9 forms are now due to take effect on April 3, 2009; mandatory use of the DHS e-verify system has been delayed until at least May 21, 2009.

At the State Level. New York has seen the introduction of a new law governing the use of criminal records, a WARN act that is in certain respects more restrictive than its federal

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Scorecard for HR in 2009

counterpart, and a privacy law that protects certain employee identifying information, similar to that enacted in Connecticut in October 2008. In Connecticut, employers saw the minimum wage rise to \$8.00/hour in January 2009.

...and What is Yet to Come

Genetic Information Nondiscrimination Act. Signed by President Bush and effective for health insurers in May

2009 and employers in November 2009, the law prohibits certain forms of genetic discrimination.

New Discrimination & Employment Laws.

A plethora of discrimination laws wait at the footsteps of Congress, including the Paycheck Fairness Act (expanding Equal Pay Act claims), Civil Rights Act of 2008 (expanding damages available for discrimination claims), Employment Non-Discrimination Act (prohibiting

discrimination based on sexual orientation or gender identity), Healthy Families Act (requiring minimum paid sick leave to employees) and FOREWARN Act (increasing the current WARN notice periods).

At the State Level. Effective July 1, 2009, employees in New Jersey will be entitled to paid family leave, administered through the State Temporary Disability Benefit Program.

Dire Funding Status of Union Pension Plans Spells Trouble For Employers

By Howard G. Estock, Partner

The downward spiraling stock market has caused problems for all pension funds. Recent losses in market value for pension funds typically range between 25 to 35%. Those losses are causing extreme concern to unions that operate multi-employer plans as well as to the employers who are contractually required to contribute to such defined benefit plans.

Multi-employer defined benefit pension plan funding is controlled by the **Pension Protection Act of 2006 ("PPA")**. That law establishes rigid funding requirements for multi-employer plans, including mandatory timelines for curing funding deficiencies. Union plans that a year ago were safely funded now find themselves in the PPA's critical status, or "Red Zone" classification due to market losses. The "Red Zone" means that those plans are critically underfunded under the terms of the PPA.

The implications are significant for employers who contribute to such plans, or who may be in negotiations where a union is demanding that they become a contributing employer to the union's plan. Contributing employers to union plans that are now in the "Red Zone" funding status under the terms of the PPA will be required to pay "excise taxes" of 5% until they agree to the terms of a rehabilitation plan. The tax increases to 10% in the second year the plan is in the

"Red Zone." The Trustees must develop a plan to cure the funding deficit either by reducing benefits, increasing contributions, or a combination of both by the end of 2009. Failure to do so will result in personal fines against the Trustees which are not reimbursable by the Fund.

In December of last year, then-president Bush signed an amendment to the PPA allowing the Plan's Trustees to put off the effects of the PPA for one year only. Many actuaries believe that putting off the funding corrections for a year will make it much more difficult to correct the funding deficits within the 15 year window that the PPA allows. Nevertheless, many union plan trustees will take advantage of the hiatus, hoping that Congress will modify or revoke the PPA to get the union pension plans out of this funding nightmare.

To put the current problem in perspective, If Congress does not act, and the union plan's trustees refuse to reduce benefits and instead choose to "cure" the funding deficit by only raising the contributing employers' contribution rates, that could result in the current contribution rates **doubling** for the next 15 years.

If that were not troubling enough, a contributing employer who tries to avoid the problem by withdrawing from

such underfunded plans (either through negotiations or otherwise) would potentially face **withdrawal liability** based upon a pro-ration of the plan's unfunded vested liabilities. Such withdrawal liability can amount to millions of dollars for each withdrawing employer under the Multiemployer Pension Plan Amendments Act of 1980 ("MEPPAA").

Unless the PPA is significantly changed, an employer who is not now a contributing employer to a union pension plan should avoid becoming a contributing employer to a union's multi-employer pension plan. Even if the PPA is amended, the presence of significant unfunded vested liabilities in almost all such union pension plans and the specter of withdrawal liability under MEPPAA makes agreeing to contribute to a union multi-employer plan a highly dubious proposition.



Managers Indicted for Hiring and Harboring Illegal Aliens

By Seymour Rosenberg, Special Counsel and Stefanie R. Munsky, Associate

While in these uncertain times it may appear economical to hire undocumented workers in an effort to reduce costs, employers should be aware that there are severe consequences for knowingly hiring such workers in violation of the law. The U.S. Immigration and Customs Enforcement ("ICE") has recently enhanced its efforts to put a stop to the employment of illegal aliens. Instead of solely placing the illegal alien workers in custody and beginning the deportation process, ICE has increased its arrests of owners, managers and employees who can face individual liability and criminal charges for knowingly employing illegal aliens.

For instance, seven managers of IFCO Systems North America ("IFCO"), the largest pallet management services company in the United States, were recently indicted in the U.S. District Court for the Northern District of New York with charges related to hiring and harboring illegal aliens. The seven

individuals were accused of conspiring to harbor illegal aliens employed by IFCO and to encourage and induce those illegal aliens to reside in the United States, between 2003 and April 2006. In addition, certain individuals were charged with conspiracy to defraud the Internal Revenue Service and Social Security Administration by submitting false payroll-related information to those agencies and to facilitate the misuse of Social Security numbers by IFCO employees, as well as transportation of particular illegal aliens. Such offenses carry a maximum penalty of up to five years imprisonment and a \$250,000 fine.

In December 2008, IFCO agreed to pay the federal government \$20.7 million to resolve the criminal investigation pending against it, the largest settlement related to the employment of undocumented workers. Included within this settlement was IFCO's agreement to pay \$2.6 million in back pay and penalties related to IFCO's overtime

violations of the Fair Labor Standards Act related to its undocumented workers. Unfortunately for the sixteen managers and employees indicted with criminal charges related to the employment of illegal alien workers, the settlement agreement only addressed the liability of the corporation. If the corporation complies with the terms of the agreement, the U.S. Attorney will not pursue criminal charges against IFCO. However, the agreement does not relieve the managers and employees of any liability.

Seymour Rosenberg, a past president of the American Immigration Lawyers Association with over 50 years of experience in the field, is Special Counsel to the Firm on all aspects of employer-related immigration matters.

In 2008, the New York State Department of Labor collected \$24.6 million in underpaid wages... the highest level ever recovered by the agency.

Supreme Court Expands Title VII Retaliation Claims

By Sheryl Ewart Sorensen, Associate

The U.S. Supreme Court has unanimously ruled that an employer cannot retaliate against employees who report discrimination, such as sexual harassment, during the employer's internal investigations. In *Crawford v. Metro Government of Nashville & Davidson County*, the Supreme Court held that the anti-retaliation provision in Title VII extends protection to employees who speak out about discrimination by answering questions during an employer's internal investigation, even though that employee did not initiate that investigation or file a charge with the EEOC.

The employer in *Crawford*, Metro Government of Nashville & Davidson County, began looking into rumors of sexual harassment by its employee relations director, Gene Hughes. Vicky Crawford, a Metro employee, when asked whether she had witnessed any "inappropriate behavior" by Metro's human resources officer, described several instances of sexually harassing behavior, including one occasion where Hughes had entered her office and "grabbed her head and pulled it to his crotch." Crawford had not initiated Metro's internal investigation. Two other Metro employees also reported being subjected to sexual harassment by Hughes. Not long after Metro finished its investigation, Crawford and the two other employees who reported Hughes' sexual harassing behaviors were fired. Crawford filed a lawsuit under Title VII claiming she had been terminated in retaliation for reporting Hughes' conduct.

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Supreme Court Expands Title VII Retaliation Claims

The Supreme Court held that Title VII's anti-retaliation clause not only protects employees who initiate a complaint of discrimination, but also those employees who report discrimination during an employer's internal investigation. The Court found that Crawford had indeed "opposed" sexual harassment when she responded to her employer's questions in the internal investigations. Therefore, Crawford could not be terminated for what she had reported. As the Court explained, in reiterating the purpose of the anti-retaliation provision in Title VII, "nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question."

While the *Crawford* decision expands anti-retaliation protections in the area of harassment investigations, employers should continue internal investigations into allegations of discriminatory conduct and take necessary measures to eliminate discrimination from the workplace. Such actions remain a defense to certain claims of unlawful harassment. Employers are well-advised, however, to alert managers and supervisors that Title VII's anti-retaliation provisions protect employees who complain about discrimination in the workplace, regardless of whether the employee initiated the employer's internal investigation. An employee who reports discriminatory behavior to management is protected from retaliation. As such, employers should maintain accurate records of internal investigations with respect to the employees interviewed and information they provide.

FedEx Agrees to Pay \$8.12 Million to Resolve State Wage and Hour Claims

By Arthur J. Robb, Counsel and Daniel W. Morris, Counsel

FedEx Ground Package System Inc. recently agreed to pay \$8.12 million to settle two lawsuits alleging that the company failed to provide meal and rest breaks to approximately 42,000 hourly employees in violation of California law. That case is part of a pattern in which employers have found themselves having to settle significant claims for allegedly unpaid wages.

Despite the large size of the award, the recovery to individuals is relatively small; on average, each plaintiff will receive \$200, with some receiving payments in excess of \$1,400. In contrast, the plaintiffs' attorneys were awarded a significant fee for their work on the case – \$2.75 million.

In most cases, the decision to settle is based largely upon the exponential risk that is created

under the wage-and-hour laws, most notably due to fee-shifting and class actions. California law, like the Federal and New York state wage-and-hour laws, provides that a prevailing plaintiff is awarded attorneys' fees. Class actions also permit a large number of employees to combine their claims, bringing significant leverage onto the employer. This is true even if, as here, the individual claims are small. Additionally, the significant amount of plaintiffs'-side attorneys' fees in such cases makes the field fertile ground for litigation.

The best defense to these lawsuits is preventative review of a company's policies and practices. Such a review should insure that the company's pay practices comply with all

the relevant wage-and-hour laws and that it is maintaining all of the required payroll and time records. In the event that a claim is brought, an employer in full compliance can use its records and practices as a defense to both the claim itself and to avoid class certification and the attendant legal fees.



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