

May 2007

This Update
is brought to you by the
SPvG Employment Law Team.

For further information contact:

Thomas E. Berry, Jr.
tberry@spvg.com

Bryan P. Cavanaugh
bcavanaugh@spvg.com

Stacie A. Owens
sowens@spvg.com

800-225-5529
www.spvg.com

©2007

A Guarantee of “Free Choice” or “No Choice”?

Since 1935, the National Labor Relations Act (“NLRA”) has regulated the ability of employees to select a union to collectively represent their interests in bargaining. While the NLRA has always permitted an employer to voluntarily recognize a labor union as a collective bargaining representative of its employees, historically, the National Labor Relations Board (“NLRB”) typically conducts a secret ballot election and certifies the union if it receives a majority of the votes cast during the election.

Rather, than continue to use a secret ballot election, unions have long sought to require recognition simply based on obtaining signed authorization cards from a majority of the present employees in the proposed bargaining unit. After the November 2006 elections, labor made the amendment of the NLRA to authorize the use of authorization cards as a means of certification its primary legislative goal. The Employee Free Choice Act (“EFCA”) was introduced in the House in February and was passed on March 1, 2007 by a vote of 241-185. In turn, Senator Kennedy has introduced similar legislation in the Senate. While requiring certification of a union in the event it obtains signed authorization cards from a majority of the employees, this process would not apply in the event the employees later wish to de-certify the union. In that instance, a secret election still must be conducted by the NLRB.

So why eliminate a basic hallmark of democracy --- the right to vote? The percentage of private sector employees represented by labor organizations has declined significantly over the last several decades. While the reasons for such decline vary, and are subject to great debate, unions have long argued that the present NLRB election process inherently favors employers. Notwithstanding this belief, union’s won 58.1% of all NLRB-conducted elections during the period of October 2006 – March 2007 and the actual success rate has been increasing each fiscal year this decade.

Not surprisingly, employers strongly oppose EFCA. Further, the Bush Administration has announced its opposition to amending the NLRA in order to eliminate secret elections. The Secretary of the Department of Labor, Elaine Chao, has stressed that a “worker’s right to a secret ballot election is an intrinsic right in our democracy that should not be legislated away at the behest of special interest groups.” Finally, President Bush has pledged to veto the EFCA in the event it passes the Senate.

Congress Seeks to Require Interest Arbitration

While much of the focus of the EFCA debate centers around the elimination of the secret election requirements, this act would affect employers in other significant respects. Presently, the NLRB does not regulate the terms of any collective bargaining agreement which is left to the inherent powers of both employees, collectively, and employers to reach agreement. If enacted, the EFCA would mandate that government appointed arbitrators would determine the actual terms and conditions of the collective bargaining agreement in the event neither the employer nor the union are able to achieve agreement within four months after certification of the union.

In turn, the “agreement” imposed by an arbitrator would be binding for at least two (2) years thereafter unless the parties subsequently agreed to change this agreement. Essentially, this process would be similar to the use of arbitration by Major League Baseball where an arbitrator chooses either a player’s proposal or the team’s proposal.

*SPvG’s attorneys
are available to speak
on a wide range of
law-related subjects.*

*For more information, call the
“SPvG Speakers Bureau”
(Mary Jennings) at
314-446-4215*

Does a Union Have a Right to Use an Employer E-Mail System?

The National Labor Relations Board has always sought to balance the interest of employees in communicating with each other regarding union representation against an employer's right to maintain reasonable workplace restrictions on non-work related activities. Historically the NLRB has concluded that broad policies prohibiting all solicitation activities by employees are unlawful if it prohibits solicitation that occurs on non-work time. Further, an employer may prohibit distribution activities to non-work time and non-work areas. However, selective enforcement of solicitation and distribution policies may be problematic when employers permit some activities for charitable organizations, such as United Way campaigns or the sale of Girl Scout cookies.

Historically, it was not difficult to differentiate between activities which were solicitation or distribution in nature. However, e-mails are easy vehicles for both soliciting and distributing information regarding any number of matters including whether or not Union representation is advisable. Given the advent of e-mail in today's workplace, the NLRB recently conducted oral argument in The Register-Guard, NLRB Case No. 36-CA-8743-1 in which to delineate the proper balance of the rights of employees and employers.

The employer policy in question at issue in Register-Guard prohibited employees from using any employer owned communication systems, including telephones, fax machines, copiers and computers, if such use was intended "to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." While the employer in Register-Guard disciplined an employee for sending out union related e-mails to other employees, the ALJ concluded that the work rule was administered in a discriminatory manner because the employer had not disciplined other employees for sending other personal e-mails on a variety of topics. In appealing this decision, the employer argued to the NLRB that its email system constitutes "its property" and neither the Union nor employees acting on its behalf have a right to use its property for non-business purposes.

Conversely, the Union argued to the NLRB that an employer may only prohibit non-business email activity by employees to work time. However, in this particular instance, the employer could not discipline the employee in question for sending any email on work time because it had permitted the use of its e-mail system for other non-business matters without discipline to those employees. Finally, the General Counsel for the NLRB urged the Board to balance the rights of employees with the rights of employers. Essentially, the General Counsel urged the Board to view the e-mail system as "modern-day water cooler" which serves as a national gathering place for employees to communicate regarding any number of topics.

During the oral argument, the various members of the NLRB raised a number of related questions which clearly indicates that the Board may view this issue as potentially broader than simply a basic solicitation and distribution question. The attorneys were questioned regarding the ability of the union to communicate with employees by alternative means together with potential ramification arising from employer monitoring activities by its employees. Further, other Board members appeared to view this more as the union demanding access to use the employer's property and equipment rather than simply a vehicle for communication. Historically, the NLRB has given greater latitude to employer property rights in balancing the respective rights of both employers and employees.

Until such time as the NLRB provides firm guidance, employers should be careful to avoid selective enforcement of any discipline of employees for using the employer e-mail system for addressing collective work concerns.

Supreme Court to Clarify Home Healthcare Overtime Exemption

The Fair Labor Standards Act specifically exempts any employee that provides "domestic service" or "companionship services" to individuals who are incapable of care due to either age or infirmities from any overtime entitlement. Since 1975, the Department of Labor has maintained a regulation which exempts home healthcare workers from any entitlement to overtime compensation. Specifically, the Department of Labor has included nurses within the type of employees who may be employed to provide domestic services at an individual's home consistent with the Fair Labor Standards Act overtime exemption. Further, the Department of Labor clarified that the exemption would include individuals employed by a third-party employer or agency rather than simply by the family directly.

While acknowledging that the Department of Labor regulation exempts from overtime employees that work for employers who provide home healthcare services, the Second Circuit Court of Appeals in New York concluded that this regulation was not entitled to deference and, as such the employees were entitled to overtime compensation for all hours worked over 40 during the workweek. On April 16, 2007, the U. S. Supreme Court held oral arguments in the matter of Long Island Care at Home, Ltd., et al. v. Coke, Case No. 06-593. Additionally, the Solicitor General for the United States urged the Supreme Court to reverse this decision and enforce the Department of Labor regulation which exempts such workers from overtime.

During oral argument, the Court recognized that the decision by the Second Circuit was at odds with other appellate decisions. Further, a number of the Supreme Court Justices appeared concerned that rejecting the Department of Labor regulation would expose both family members and employers to significant monetary damages for overtime. The Supreme Court should issue a decision before the end of June.

Perhaps anticipating a favorable approval by the Supreme Court, a class action lawsuit was recently filed against Personal Touch Home Care, Inc. in Federal Court in St. Louis. In this action, the Plaintiff has requested to represent a nationwide class of license practice nurses (“LPN’s) who provide “in-home care, physical therapy, pediatric care, and early intervention.” In the event the Supreme Court affirms opinions of the Second Circuit, and rejects the 1975 DOL regulations, employers in the home health care industry will likely experience a substantial increase in wages which, in turn, will financially affect those requiring such home healthcare services.

Court Rejects Employer Release Agreement

The Older Workers Benefit Protection Act (“OWBPA”) amended the Age Discrimination in Employment Act (“ADEA”) in order to specifically require certain safeguards applicable to any release agreement which purports to waive or release any claim of age discrimination under Federal law in return for receipt of severance pay or other benefits. In the event a release agreement is requested in conjunction with a reduction in force, there are additional requirements over and above the standard OWBPA requirements. In Pagliolo v. Guidant Corp., ___ F.Supp.2d ___, 2007WL1040869 (D. Minn. 2007), the Court concluded that the release agreement in that instance did not comply with the OWBPA requirements and, as such, was unenforceable.

In August 2004, Guidant eliminated approximately 700 jobs at 84 different facilities across six corporate subsidiaries. While the reduction in force was corporate wide, the actual selection decisions were made by the local management at each facility. While attempting to comply with the OWBPA requirements, Guidant provided employees with a 184 page spreadsheet that identified the job title and birth dates of all employees at all facilities, including those who were selected for termination during the RIF. In concluding that the spreadsheet failed to comply with the OWBPA requirements, the Court concluded that it was inappropriate to consolidate all six separate corporations into a single “decisional unit.” Rather, the Court concluded that the appropriate decisional unit, for purposes of complying with the OWBPA requirements, was each domestic facility rather than the six separate corporate identities.

Additionally, the Court concluded that the spreadsheet further failed to accurately identify the “eligibility” factors utilized by the employer regarding whether or not an employee was eligible to participate in the severance program. Specifically, the Court concluded that employers are required to identify the individual factors used to determine who was subject to termination program, not factors used to determine who was eligible for severance pay after termination. Most courts have not construed the OWBPA to require an individual statement as to why each individual was selected for layoff and this interpretation is not consistent with the regulations promulgated by the EEOC, 29 CFR 1625.22(f).

While employers are often tempted to “cut and paste” and/or re-use prior separation agreements, this case again illustrates that employers should resist the urge to be pennywise and pound foolish. The OWBPA requirements are strictly construed against employers and care and attention should be made to ensure that all information provided is in strict accordance with the statutory and regulatory requirements. While the decision of the Court is problematic regarding the requirement for individual selection disclosures, the opinion as to the appropriate decisional unit may be more difficult to justify on appeal. From a practical perspective, it is difficult to believe that the final decisions as to whether or not which individual should be included and excluded from the RIF was made at such a high level.

Congress Contemplates Prohibiting Genetic Discrimination

Both the Senate and House have recently introduced legislation which would prohibit employers from discriminating against individuals based on their genetic information. Senate Bill 358 has been introduced this year and is identical to legislation which was approved by the Senate in both 2004 and 2005. Similarly, the companion measure in the House (H.R. 493) was recently approved 420-3.

If enacted into law, the Genetic Information Non-Discrimination Act would amend Title VII to specifically prohibit employers from refusing to hire, discharging or otherwise discriminating against employees on the basis of genetic information. Additionally, this act would amend ERISA to prevent group health plans from adjusting premiums or otherwise acquiring genetic information for purposes of underwriting. While the full Senate has not approved this bill, the Bush administration issued a statement of policy on April 25, 2007, advising that the White House favors enactment of this bill.

Congress Considers Prohibiting Sexual Orientation Discrimination

While many states explicitly prohibit discrimination based on sexual orientation, including Illinois, most courts have rejected any effort to litigate such claims as a form of gender discrimination under Title VII. Congressman Barney Frank (D-Mass.) has again introduced the Employment Non-Discrimination Act (H.R. 2105) which would specifically prohibit employers from making any employment decision, including hiring, firing, promoting or compensating any employee based on the individual's sexual orientation or gender identity. While prohibiting discrimination, this bill would also prohibit preferential treatment of gay, lesbian, bi-sexual and transgender employees. Further, the bill explicitly would not require employers to provide domestic partner benefits.

In the past, the Senate has approved similar legislation. Presently, the Senate has not introduced a comparable bill and the House has not passed HR 2105. Finally, it is unclear whether or not the Bush Administration would support or oppose enactment of the ENDA in the event it passes both the House and Senate this year.

SPvG News . . .

Tom Berry spoke to the Cape Girardeau Human Resources Association regarding the interrelation of Workers Compensation, Americans with Disabilities Act, and the FMLA.

Russ Makepeace participated as moderator, and **Mark Prost** presented *Discovery Skills for Legal Staff in Missouri* for Lorman Education Services.

Tony Soukenik and **Marty Daesch** spoke at Smith Property Management's Association Seminar. Approximately 150 association trustees and all of Smith Management's managers attended. **Keith Price**, **Beth Murphy** and **Tom Addis** also attended and answered questions at the end of the seminar.

Tony Martin will be speaking at National Business Institute's *Insurance Law Update: Understanding Current Coverage Trends*. He will cover two topics: Personal and Advertising Injury Liability and Ethical Issues.

Jon Barton will be participating in National Business Institute's *Litigating to Win through Advanced Trial Advocacy*.

Please visit our web site at www.spvg.com to view all our areas of law, as well as biographical information on the members of each Practice Group.

**The choice of a lawyer is an important decision
and should not be based solely on advertisements.**