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Editor, Matthew H. Wimberley

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Inside ....This Issue

Your Suggested Summer Reading *by Laura A. Steel*

I remember getting my required summer reading list each of my years in high school. While I don't recall ever looking at it and thinking, "WOW! I can't wait to dive into these 4 books that are at least 300 pages each!", I do remember feeling a sense of accomplishment once the final page of the final book was read—even it if was the night before the first day of school. So, I offer you the labor/employment lawyer version, in condensed form (you're welcome), of your suggested summer reading: highlights of a few areas that we see as being potential hotspots once the summer heat has passed.

New Initiative From the EEOC

The Equal Employment Opportunity Commission ("EEOC") began an initiative entitled "E-RACE" in February of this year. The purpose of the initiative (which stands for "Eradicating Racism and Colorism in Employment" is to take a fresh, different look at how racial and color discrimination may be taking place in the work environment. In other words, the EEOC is looking at the more subtle, less direct forms of race and color discrimination, such as in resume discrimination. I know what you're thinking, and no, resumes are not a new protected class. Rather, the EEOC is focusing on whether items on a resume may result in discrimination (regardless of whether it's intended).

An example would be a first name which might be associated with a particular race of people, or a last name which might indicate ethnicity. This initiative is important for you, the employer, in that it underscores the importance of relying upon racially and ethnically-neutral bases for refusing to interview and/or hire someone, and documenting reasons when you select one candidate over another.

continued on page 2

Your Suggested Summer Reading *cont'd.*

Social Security No-Match Letters

Last summer, the Department of Homeland Security ("DHS") issued a proposed rule that would address an employer and employee's obligations when a Social Security no-match letter is received. The comment period for the proposed rule closed last August, but no final rule has made an appearance. The proposed rule created obligations on the employer upon receipt of a no-match letter to inspect its records and determine whether the mismatch was the result of a clerical error. If so, the employer must correct its records and follow up with the appropriate agency (either DHS or SSA) within 14 days of receipt of the no-match letter. If the mismatch was the result of something other than a clerical error, then the employer must request that the employee clear up the discrepancy. If this is not handled within sixty days, the employer has the ability to re-verify the employee's eligibility to work, and that eligibility must be proven through documents other than something containing the Social Security number (and include at least one document with a photo). If the matter remains unresolved, then the employer must terminate the employee or be faced with being charged with constructive knowledge that it was employing an ineligible worker.

Many of you are probably thinking that it would be nice to have some definitive guidance on how to deal with these letters; so the rule, on its face, sounds like a good idea. Just as important, though, is the fact that it would appear the rule gives the Social Security Administration, who, up to this point, is the only agency authorized to issue the no-match letters, the ability to share its no-match information with the DHS. If that is in fact the case, then receipt of no-match letters (in sufficient number) would most likely put an employer on the DHS radar screen, something that is less likely to occur with the present system.

Requiring Paid Family and Medical Leave

It's just about to happen in Washington state, and California has been doing it for 3 years. The legislatures of those states passed bills requiring paid time off for circumstances including the birth or adoption of a child. California currently uses an "insurance program" to provide the paid benefit (55% of a worker's pay—up to $882 per week—for six weeks). Washington's new law applies to all employers, regardless of the size, and allows for up to five weeks of paid leave of up to $250 per week. The benefits will be available beginning October 1, 2009, although the method of funding such a program has yet to be decided. Opponents of the bill in Washington fear that since the $250 payment is below the minimum wage, a push to raise the benefit will occur before any progress is made on how to fund it.

Non-profit organizations in other states, including Georgia, Illinois and Wisconsin, are busy at work to create similar legislation in those states. The concern, other than the obvious cost and impact on business, is that Congress will see the activity and take initiative to create some similar arrangement under the Family and Medical Leave Act. Many of you recall that it was the states which first started grumbling about and taking action to raise the minimum wage before U.S. Congressional activity made it a reality in 2007.

Whether any of these items pan out to create a significant impact on your business remains to be seen. And if they do, you can bet that we will be ready to provide you with the unabridged versions. Look on the bright side—no book report required!

For more information on any of these topics, please contact Laura A. Steel, a member of the Labor and Employment Group, at lsteel@hsdlaw.com or (423) 378-8814.

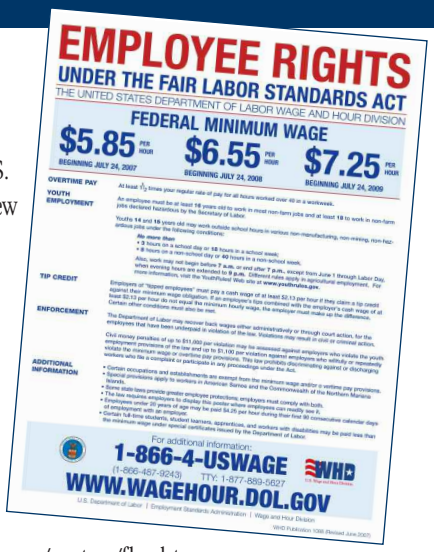
Recent Legislation of Interest

Tennessee:

Physician restrictive covenants have new life, thanks to an amendment to Tenn. Code Ann. § 63-1-148. This amendment addresses the Tennessee Supreme Court's ruling several years ago that invalidated physician non-competes. Passed on June 7, the amendment goes into effect January 1, 2008, and deems a physician non-compete as reasonable where it is in writing and signed by the physician and the employing/contracting entity, is two years or less in duration, and abides by geographic restrictions provided in the amendment or restricts practice at a facility where the employing/contracting entity provides services when the physician was employed. To view the amendment in full, please go to http://tennessee.gov/sos/acts/105/pub/pc0487.pdf.

Federal:

The passage of a new federal minimum wage also means the U.S. Department of Labor is issuing a new Fair Labor Standards Act (minimum wage) poster for the workplace. Employers will need to have this new poster displayed no later than July 24, 2007, when the new minimum wage goes into effect. You can download the poster free of charge from the Department of Labor's website: http://www.dol.gov/esa/regs/compliance/posters/flsa.htm



Does Pro-Union Legislation Promote — or Curtail Free Choice by Employees?

by Stephen M. Darden

Fundamental changes are proposed to the laws that govern the process through which employees determine whether or not they will be represented by a union at work. The "Employee Free Choice Act of 2007" is currently pending in Congress. In February, the bill was approved by the United States House of Representatives by a 241-185 majority. On June 19, 2007, the U.S. Senate began debating the bill as thousands of pro-labor attendees of the Take Back America conference rallied in Washington D.C. to show their support.

The centerpiece of the Act is the elimination of the secret-ballot election from the process through which unions became authorized to represent employees. Since the National Labor Relations Act became law as part of the Depression-era legislative package known as Franklin D. Roosevelt's "New Deal", the right of employees to vote in a secret-ballot format has been a core component of the election procedure. The National Labor Relations Board ("NLRB") was created to oversee such elections, and has done so ever since. In lieu of an actual vote, the centerpiece of the Employee Free Choice Act is a card-check, or petition process, through which a union would be recognized solely on the basis of employee signatures instead of holding an actual confidential election.

The secret-ballot election, through which employees vote confidentially in the workplace environment and in which votes are generally counted in plain view once the polls close, is not only a familiar method of determining the issue of unionization but is central to American governance in general. Currently, in order for an election to occur, a union must demonstrate that 30% or more of the employees affected support having a union. Usually, but not always, the 30% threshold is demonstrated by employee signatures on union authorization cards. Once the 30% threshold ? called a "question concerning representation" or "QCR" ? is established, a petition for election can be filed and the NLRB will schedule the vote. Usually, the election will be held within 42 days of the petition's filing.

Employers are usually skeptical of authorization cards. Much evidence exists that employees will often sign an authorization card even though they have no true interest in being represented by a union. In other words, employees might sign a card to avoid saying "no" to a friend, to avoid being ostracized because they feel coerced, or simply to keep from being pestered repeatedly about signing a card. Indeed, the author's personal experience includes many, many elections where a union boasts of having secured authorization cards from 60-70% of the employees in the voting group, yet on election day the union does not receive a majority of the votes actually cast. Thus, while employers usually put little faith in the legitimacy of authorization cards, the secret-ballot election is more likely to reflect true employee choice.

Unions, hungry for new members, argue that the current process is deficient because they are finding it difficult to win elections. Unions believe they could secure many new members if a card check were the only showing necessary, and they are no doubt correct. In fact, most labor and employer advocacy groups alike predict that if the Employee Free Choice Act becomes law, the number of American workers represented by a union would increase dramatically.

The Act is not limited to fundamental change in the process for electing unions. It also contains provisions that provide for mandatory third party dispute resolution in the context of negotiating an initial collective bargaining agreement. This aspect of the Act is significant, because under current law, it is not "mandatory" that a company and a union ever come to terms on a labor contract. The law merely requires that both parties negotiate in good faith. The mandatory arbitration and/or mediation provisions of the Act would result in a neutral party imposing contractual terms on the company and the union in the event they cannot do so on their own.

According to the Bureau of Labor statistics annual report, union membership in this country stands at approximately 12% of employed workers. In Tennessee, the percentage of employees who are represented by a union is even lower. In recent years, organized labor has sought the assistance of the U.S. Congress and State Legislatures in its effort to increase membership and influence. Without question, the Employee Free Choice Act is such a measure. By taking away the right to a secret-ballot election, however, the Act may be more about serving the interests of organized labor than in protecting free employee choice.

For the remainder of the Bush administration, it appears unlikely that the Act will become law. This is so because, according to Vice President Cheney, President Bush will veto the bill if it is presented to him. And while one of the bill's Senate sponsors - Ted Kennedy – claims there are enough votes in the Senate for passage, it does not appear to have enough support to override a presidential veto, or, for that matter, to end a filibuster. [Note: There were insufficient votes to end debate as 51 Senators voted to invoke "cloture" on June 26. Sixty votes are necessary to invoke cloture and end debate]. So, while the act has little chance of becoming law soon, if a Democrat is elected President in the fall of 2008, the bill could become the law of the land in early 2009.

For more information on any of these topics, please contact Stephen M. Darden, a member of the Labor and Employment Group, at sdarden@hsdlaw.com or (423) 283-6303.

Attorneys In The News

Humbert Joins HSD

Meredith Bates Humbert has joined the law firm of Hunter, Smith and Davis, LLP. She will concentrate on health care law and medical malpractice defense. Ms. Humbert received her undergraduate degree from the College of Charleston in Charleston, South Carolina and her JD degree from the University of Memphis. While in Memphis, Ms. Humbert worked at The Hardison Law Firm and Memphis Area Legal Services, Inc. in the Domestic Violence Clinic.

Ms. Humbert, husband Christian and daughter Grace will reside in Kingsport.

Bovender Appointed to Tennessee Board of Professional Responsibility

William C. Bovender, whose practice includes commercial litigation, employment and regulatory law for Hunter, Smith & Davis, LLP's Kingsport, Tennessee office, has been appointed by the Tennessee Supreme Court to serve a three year term on the Tennessee Board of Professional Responsibility.

This Board administers and interprets the Tennessee Rules of Professional Conduct, ethical standards which apply and must be adhered to by all attorneys practicing law in the State of Tennessee. There are twelve members of the Board, four from each Grand Division of the State.

Bovender has also been reappointed Chair of the Tennessee Bar Association's Standing Committee On the Protection of the Public From the Unauthorized Practice of Law by newly-installed TBA President Marcy Eason of Chattanooga. This is Bovender's third year on the Committee and second as its Chair. The Committee serves as a clearing house for complaints relative to the unauthorized practice of law by individuals and companies in the State of Tennessee. The make-up of the Committee includes representatives from the Office of Tennessee Attorney General Robert Cooper, the Tennessee District Attorneys General Conference, the Board of Professional Responsibility of the Supreme Court of Tennessee, and attorneys from across the State.

Bovender has practiced law at Hunter, Smith & Davis, LLP for thirty-two years, and served as Managing Partner in 1990-1991. He received his undergraduate and law degrees from the University of North Carolina at Chapel Hill: A.B., 1972; J.D., 1975.

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