Attorneys In The News

And the Award Goes to…

Two lawyers from Hunter, Smith and Davis were recently selected by their peers for inclusion in The Best Lawyers in America, 2009. William C. Argabrite was included in the field of Banking Law. Mr. Argabrite has practiced law for over 30 years and is currently the Managing Partner of Hunter, Smith and Davis. Jimmie C. Miller was recognized in the field of Personal Injury Litigation. Ms. Miller is a senior partner in the firm with over 25 years experience.

Since its inception in 1983, Best Lawyers has become universally regarded as the definitive guide to legal excellence in the United States. Because Best Lawyers is based on an exhaustive peer-review survey in which 24,000 leading attorneys through the country cast almost two million votes on the legal abilities of other lawyers in their specialties, and because lawyers are not required or allowed to pay a fee to be listed, inclusion in Best Lawyers is considered a singular honor.

Two attorneys have been named to the Mid-South Super Lawyers List for 2008. Only 5 percent of the lawyers in the state are named by Super Lawyers. S. Morris Hadden, senior partner with Hunter, Smith and Davis, is recognized in the field of business litigation. This is the third year he has been recognized by Super Lawyers. For the second consecutive year, Mark S. Dessauer has been recognized in the field of business bankruptcy and creditor/debtor rights. Mr. Dessauer is a partner with Hunter, Smith and Davis and has practiced for more than 25 years. The selection to Super Lawyers is an independent multi-phase evaluation process of candidates by Law & Politics, a division of Key Professional Media.

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Certifications from the Tennessee Commission on Continuing Legal Education and Specialization are available to Tennessee lawyers in all areas of practice relating to or included in the areas of Civil Trial, Business Bankruptcy, Consumer Bankruptcy, Creditor's Rights, Medical Malpractice, Elder Law and Estate Planning.
The material included in the attorney profile is not intended as legal advice. Readers should not act upon information contained in this material without professional legal counseling. This is an advertisement. Certification as a specialist in the following areas is not currently available in the state of Tennessee: bond, commercial finance, corporate, securities, employee benefits, environmental, family, business, government relations, health care, information law, intellectual property, international labor and employment, music and entertainment, real estate, taxation and telecommunications.

Mediation Services

Stephen M. Darden was listed as a Rule 31 Mediator in the field of General Civil Mediation in Tennessee on October 28, 2008. Mr. Darden is available for mediation of general disputes, with an emphasis on mediation of employment disputes and employment-related lawsuits, which has been the focus of Mr. Darden's practice for over 20 years. Many employers are including alternative dispute resolution provisions in their internal policies because of the numerous benefits of resolving issues in their early stages, and due to considerable cost savings that can be achieved through mediation of workplace conflicts. *Mr. Darden may be contacted at (423) 283-6303 or sdarden@hsdlaw.com.*

Suzanne S. Cook was listed in Tennessee as a Rule 31 Mediator in the field of General Civil Mediation on January 29, 2008 and as a Rule 31 Family Mediator on April 29, 2008. Mrs. Cook's practice has included the representation of clients in personal injury claims, premises/products liability, arson and fraud claims, insurance coverage interpretation, first/third party insurance claims, transportation defense, general tort litigation, commercial litigation and family law. In addition, she has participated numerous times in the mediation/arbitration process and has served as a mediator for parties in litigation. Many companies and individuals are electing to participate in alternative dispute resolution to reduce costs and to reach an amicable result without proceeding to trial. *Mrs. Cook may be contacted at (423) 283-6302 or scook@hsdlaw.com.*

Hunter Smith & Davis LLP

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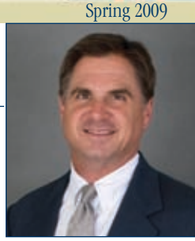
Inside…This Issue

Employee Free Choice Act: What Will Happen?

By Steve Darden



One of the most-talked about — and at least by employers, feared — proposed laws in recent memory is the Employee Free Choice Act ("EFCA"). Our newsletter from the Summer of 2007 appears to have been the first exposure that many of our readers had gotten to this revolutionary law. To recap, the EFCA would change the method through which unions are voted in at America's workplaces and also alters the collective bargaining (negotiation) process in significant ways including the following:

- Whether employees will be represented by a union at work will be decided by signature cards instead of a secret ballot election;
- Substantial monetary penalties for unfair labor practices will be available;
- If a union is certified, it could demand that negotiations for a labor contract begin within ten (10) days;
- Mandatory mediation and arbitration of labor contracts shall apply, thus mandating the agreement by a company and union on an initial labor agreement.

America's unions were very active in the successful election of President Barack Obama. President Obama plainly indicated prior to his election that if Congress passed the EFCA, he would sign it into law. And with the Democratic party now holding clear majorities in both the U.S. House of Representatives and Senate, it appears he may have that opportunity. Indeed, the EFCA was passed by the House of Representatives on March 1, 2007 by a vote of 241 to 185. It became bogged down in the Senate, however, because of a successful Republican-led filibuster. There is no reason to believe the EFCA will not again be easily passed in the House, as Democrats now hold more seats in the House of Representatives than they held when the law was previously passed.

Once again, the Senate seems to hold the key to whether the EFCA will become law in its present form. In order for a bill to be passed, it must be approved by a majority of the Senators present and voting. To reach the point where a vote is taken, however, the Senate's "cloture" rules require that 60 members vote to end debate and schedule the pending bill for a vote. As a result of the November 2008 elections, 59 of 100 Senators are Democrats.

Theoretically, then, if all Democrats vote to invoke cloture and end debate, only 59 members will have voted to invoke cloture. If the remaining 41 members vote not to end debate, then the filibuster could continue. But, it is unclear at the present time whether all 41 non-Democrats in the Senate would vote to allow debate to continue. Speculation tends to focus on Arlen Specter (R-Pa.) and John McCain (R-Ariz.) because it is not known with certainty how those gentlemen will react to an attempt to invoke cloture and end debate. If cloture is invoked, and the bill is put to a vote in the Senate, it seems certain to pass.

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This is an advertisement.

Employee Free Choice Act: What Will Happen?

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For awhile after the November election, because of the attention being given the economy, there was hope the EFCA would be delayed or changed. This now appears to be wishful thinking. More likely, the EFCA will be passed this year in the House of Representatives, and then considered by the Senate. If it passes in the Senate, it will become law by virtue of President Obama's signature. If the EFCA does not pass the Senate due to filibuster, then it appears likely that an effort will then occur to modify the EFCA so it can gain passage in both the House and Senate. The most likely compromise being discussed involves modifying the EFCA to restore the secret ballot election, perhaps coupled with a much shorter pre-election campaign period than the current 42 days.

Unfortunately, the legislators and others who may broker a compromise do not seem to recognize that while the elimination of the secret ballot seems un-American, the most troublesome aspect of the EFCA may be its mandatory mediation and arbitration provisions. After all, under current law, if an employer finds a union's demands excessive at the bargaining table, it can say "no" and still satisfy its legal obligation to bargain in good faith. Even during an era where the free enterprise system seems to be a relic of the past, allowing an arbitrator to impose a labor agreement on an employer that it cannot afford would lead to terrible long-term results for employers and employees alike.

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

A New Year! And New Laws!

By Laura Steel

Many may wish to forget 2008 and the economic woes that came with it. In the human resource world, 2008 will also be remembered for several significant laws and amendments that impact the workplace.

Of particular note is the Americans With Disabilities Act Amendment Act of 2008-the ADAAA. This Act will require employers to change a mindset ingrained from working for the last 15 years under the Americans With Disabilities Act. Under the ADA, the focus was on whether someone was disabled. That focus will shift under the ADAAA—the question now is whether the employer lived up to its obligations under the ADAAA.

The ADAAA includes a list of major life activities and functions which will likely corral individuals into the "qualified individual with a disability" category. Thus, take time to train your managers on the ADAAA and your obligations, revisit your reasonable accommodation policy (or develop one if you do not currently have such a policy), and be ready for a new round of accommodation requests.

For more information on the ADAAA, please visit our blog at http://laboremploymenthsd.blogspot.com, or contact a member of the Labor & Employment Team.

Roadmap for an OSHA Citation

By R. Lee McVey

The Tennessee Code and regulations from the Occupational Safety and Health Administration Commission (OSHA) govern OSHA citations. This article attempts to briefly outline the procedures and requirements once a citation is received.

Post the Citation

Citations must be posted "at or near each location referred to in the citation" or, if that is not practical, "where it will be readily observable by all affected employees." Tennessee DOL Rule 0800-1-4-17.

- Requires notice to be posted for three days or until the violation is abated, whichever is later.
- Employer may also post that citation is being contested and why.
- Citation becomes final 20 days after its receipt.

Informal Conference

Within the 20 days, the employer or affected employee has several options. One of the most efficient is to request an "informal conference." No matter who requests the conference (employer/employee) the other party must have an opportunity to be present at the conference.

- Requesting of an informal conference does not lengthen the 20 days that the employer has to file an intent to contest. (See below)
- Regulations imply a preference that employer wait before filing a formal notice.
- Without formal notice, resolutions from the informal conference can be achieved through amended citation.
- If formal notice is filed, resolutions from the informal conference are more difficult to achieve.

Practical Tips Regarding the Informal Conference

- If an informal conference is preferred, demand it as soon as possible after a citation is received.
- Demand that the conference take place within 20 days of the receipt of the citation.
- Have a formal notice prepared so that if resolution is not achieved at the informal conference, the formal notice can be sent immediately.

Intent to Contest

As indicated above, the Code provides that an employer or employee may notify the Occupational Safety and Health Commissioner of objections to the citation, which the regulations label a "notice of intention to contest." Tennessee DOL Rule 0800-1-4-18.

The notice must specify if it is directed to the citation, the penalty given, or both. Again, requesting an informal conference does not extend the twenty days.

The Hearing

The result of the intention to contest is a hearing in front of the Occupational Safety and Health Commission. The hearing is governed by T.C.A. §50-3-803.

- Hearings will be held "at places of convenience to the parties concerned."
- Employer must post timely notice of the time and place of the hearing.
- May be based on oral or written evidence.
- Commission may administer oaths and issue subpoenas for witnesses and the production of documents.
- Governed by Tennessee Rules of Civil Procedure.
- Citation will be affirmed, modified or vacated. Tenn. Code Ann.§50-3-307(b)(3).
- Order becomes final 30 days after it is issued.

Judicial Review

T.C.A. §4-5-322 governs judicial review of an administrative decision. However, the standard to overturn a hearing order is high and difficult to achieve.

While the procedure may seem burdensome and confusing, being able to properly navigate through them can lessen the anxiety associated with a citation and may help to reduce the financial burden created by the citation.

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