

MANAGEMENT UPDATE



FEB 2007

TOP TEN LABOR & EMPLOYMENT EVENTS AND TRENDS OF 2006

Employers confronted a number of significant labor and employment issues in 2006 – many of which will significantly impact the American workplace for many years to come. Reflecting on these notable developments, Ford & Harrison LLP has dedicated the February issue of *Management Update* to our first annual Top Ten Labor & Employment Events and Trends of the past year, which was developed by John Bowen, a partner in our Minneapolis office.

1 Change In Congressional Leadership May Lead To Profound Shift In The Congressional Legislative Agenda

The now historic elections of November 2006 highlight the shift of power in Congress away from the Republican Party for the first time since 1994. With Democrats now controlling both the Senate and House of Representatives, we will undoubtedly see a pronounced shift in the legislative agenda affecting the workplace by expanding workers' rights and enhancing the influence of organized labor.

Some of these initiatives will likely include:

- **Mandated Paid Sick Leave:** Under the “Healthy Families Act” employers would be required to provide up to seven days of paid sick leave to all eligible employees. Although this same legislation was defeated when first introduced in 2005, it will likely receive much greater support from a Congress now controlled by the Democrats.
- **Increased Protections Under the Family & Medical Leave Act:** Several prominent Democrats have repeatedly proposed expanding the benefits and protections under the FMLA.
- **Employee Free Choice Act:** Another extremely controversial piece of legislation that will likely prompt spirited debate in the new Congress is the Employee Free Choice Act (EFCA). Essentially, the EFCA – strongly promoted by organized labor – is designed to modify existing provisions of the National Labor Relations Act (NLRA) to pave the way for increased union organizing. One of the more divisive provisions of the EFCA would effectively eliminate the secret ballot election procedures currently provided under the NLRA in favor of “card-check” representation. Thus, under the EFCA, if a union presented signed authorization cards from a majority of a company’s employees, the employer would then be required to recognize and bargain with the union – without the employees ever voting in a secret-ballot election! For more information on the EFCA, see the December 2006 issue of *Management Update*.
- **Increase the Minimum Wage:** The new Congress has already proposed a substantial hike in the federal minimum wage rate – up to \$7.25 per hour.

Continued on pg. 3



2 NLRB Clarifies The Definition of “Supervisor”

On September 29, 2006, the NLRB issued a trilogy of decisions (*Oakwood HealthCare, Inc.*, 348 NLRB No. 37; *Croft Metals, Inc.*, 348 NLRB No. 38; and *Golden Crest Healthcare Center*, 348 NLRB No. 39) that provide much anticipated guidance regarding when an individual is considered a supervisor under the NLRA. In what have become known collectively as the “*Kentucky River Cases*,” the NLRB clarified the statutory duties of a “supervisor” as defined by Section 2(11) of the NLRA. The Board’s clarified definition should encourage both unionized and non-unionized employers to examine the issue of supervisory status within their organizations.

Generally, Section 2(11) of the NLRA defines a supervisor as “any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or adjust their grievances, or effectively recommend such action” if the exercise of such authority is not routine or clerical but “requires the use of independent judgment.”

In *Oakwood Healthcare*, the Board specifically clarified the definitions of “independent judgment,” “assign,” and “responsibly direct” as those terms relate to the exercise of supervisory authority under Section 2(11). According to the Board:

- “Independent judgment” refers to non-routine and non-clerical judgment free of the control of others and not “dictated or controlled” by detailed instructions, policies, rules, guidelines, or the provisions of a collective bargaining agreement.
- “Assign” means the act of designating an employee to a particular workplace (location, department, area, etc.), appointing an individual to a specific work time (such as a shift or overtime period), or giving significant overall duties and tasks to an employee. The Board specifically noted that “ad hoc” instructions to perform discrete tasks do not constitute the supervisory assignment of duties to qualify under Section 2(11).
- “Responsibly direct” indicates the delegated authority to direct other employees’ work and the authority to take corrective action if necessary. Moreover, to qualify under Section 2(11), the purported supervisor must also be ultimately accountable for the task in that he or she could suffer adverse consequences if employees are not directed properly.

The *Kentucky River Cases* provide significant direction regarding which employees should be considered “supervisors” under the NLRA. This distinction could be critical for employers as “supervisors” cannot be included in any bargaining unit and an employer can expect a supervisor to support its position with regard to unionization. Thus, both unionized and non-union employers need to reevaluate the particular job duties and responsibilities of employees to determine whether they qualify as “statutory supervisors.” •

3 Supreme Court Expands Protections Against Employer Retaliation

In *Burlington Northern v. Santa Fe Railway Company*, the United States Supreme Court significantly expanded the legal protections afforded to employees subject to potential retaliation by their employer. In this case, the Court held that individuals complaining of retaliation under Title VII are not required to prove that the allegedly retaliatory conduct was related to their employment or to the workplace. In addition, the Court also ruled that a retaliation claim can proceed if the complaining person shows that a reasonable person would have found the challenged action “materially adverse” – i.e., that it might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

The standard applied by the Supreme Court in *Burlington Northern* is significantly more lenient than the standard typically applied to retaliation claims and could result in more retaliation claims reaching a jury. This decision highlights the importance of implementing proactive measures to ensure that employees who complain of discrimination are not subject to any form of retaliation. For a further discussion of the *Burlington Northern* decision, see the July 2006 issue of *Management Update*. •

4 Targeting Hidden Bias: EEOC Revises Compliance Manual To Address Implicit Discrimination

In April 2006, the Equal Employment Opportunity Commission revised its Compliance Manual to address the potential impact of “unconscious bias” in employment discrimination. The new guidelines suggest that decision makers may harbor “unconscious biases” based on race, gender, and ethnic stereotypes that unduly influence their employment-related decisions with regard to women or minorities.

In the employment context, the possible influence of unconscious bias may lead to claims of “inherently discriminatory” personnel decisions that violate Title VII and other federal and state anti-discrimination laws. For example, “implicit bias” can lead to flawed and discriminatory decisions in recruitment, hiring, job placement, employee performance reviews, promotion and compensation decisions, and disciplinary action.

Plaintiffs have successfully relied upon the “unconscious bias” theory in support of employment discrimination claims in two key aspects: (1) to provide sufficient evidence of discrimination to survive summary judgment; and (2) to obtain certification of class actions against employers. Thus, if courts accept the unconscious bias theory, it could significantly impact employment related litigation. •

Congressional Leadership - Continued from pg. 1

- **Immigration Reform:** Representatives Sheila Jackson-Lee and John Conyers have indicated they will likely propose comprehensive immigration reform legislation – which would likely include increasing the number of H-1b visas, creating guest worker programs, creating a new visa category for nurses, and increased civil penalties for employers who violate immigration laws.
- **Removing the Title VII Damages Cap:** Senator Ted Kennedy – Chairman of the Senate Health, Education, Labor and Pensions Committee – has indicated a top priority will be repealing the cap placed on compensatory and punitive damages under the Civil Rights Act of 1991.

If the new Democratic Congress is able to pass any of these legislative initiatives, the proposed bills would still need to survive a Presidential veto – at least for the next two years. In the meantime, we will need to wait until next year’s “Top Ten” list to see whether the 110th Congress was able to successfully achieve any part of its proposed workplace agenda. •

5 Davids 1 through 100 v. Goliath: FLSA Collective Actions Target High Profile Companies

High profile collective action lawsuits under the Fair Labor Standards Act (FLSA) continue to dominate the employment litigation scene. In 2006, collective actions under the FLSA exceeded by a substantial margin the number of class action lawsuits filed in federal court under all the federal anti-discrimination statutes – combined.

It isn’t simply the sheer number of FLSA collective actions that makes this a “Top Ten” trend for 2006 – it’s the high number of staggering eight-figure awards and settlements paid by Fortune 1000 companies and other high-profile employers that really makes this a significant issue for employers. Consider, for example, Morgan Stanley agreed to pay \$42.5 million to settle claims failed to pay overtime and other expenses to approximately 5000 financial advisors in California, while UBS Corporation agreed to pay \$89 million to settle several collective action suits alleging the company failed to pay overtime. These are just two of the numerous high-profile, multi-million dollar settlements and verdicts involving FLSA collective actions.

Generally, the FLSA collective action suits are of two types: (1) “misclassification cases” – which claim the employer has misclassified

Continued on pg. 4



Davids - Continued from pg. 3

a group of employees as “exempt” and, thus, unlawfully failed to pay overtime; and (2) “off the clock” cases, in which plaintiffs claim the employer required or knowingly allowed employees to work through breaks or before and after their shift without compensation, resulting in claims for unpaid wages and, in some cases, overtime, depending on the number of hours that should have been considered hours worked.

In light of the significant potential liability at risk in these FLSA collective action suits, employers should consider conducting a comprehensive wage and hour audit (at the direction and under the guidance of legal counsel) to identify potential misclassifications as well as procedures and practices that may result in “off-the-clock” allegations against the employer for failing to pay for hours worked and overtime compensation. •

6 Pandemic Fever: Employers Confront Need For Contingencies To Counter Potential Pandemic Illnesses

Throughout 2006, many employers suffered from “pandemic fever” – an affliction caused by extensive news coverage regarding the possibility of pandemics such as avian influenza, Severe Acute Respiratory Syndrome (SARS), or bioterrorism. Notably, “pandemic fever” can only be treated by establishing a strategic “pandemic contingency plan” – specifically designed to enable employers to maintain the continuity of business operations should such a pandemic emergency occur. For more information on issues to be addressed in establishing a pandemic policy, see Ford & Harrison’s June 29, 2006 Legal Alert, *Is Your Business Ready for a Flu Pandemic?* located at <http://www.fordharrison.com/shownews.aspx?show=2281>. •

7 “Change To Win” Coalition Initiates Aggressive Plans to Organize “Millions of Workers”

One of the most significant stories of 2005 was the breakup of the AFL-CIO and the creation of the “Change To Win” Coalition composed of several major labor organizations. The “Change To Win” coalition continued to make news in 2006 by announcing a comprehensive action plan to “organize millions of new workers.”

The Coalition’s new “Make Work Pay” initiative is designed to form cooperative cross-union campaign teams composed of organizers from all seven “Change To Win” member unions (UNITE/HERE, UFCW, International Brotherhood of Teamsters, SEIU, Carpenters, Laborers, and the United Farm Workers). These campaign teams will employ aggressive “corporate campaign” tactics in targeted organizing drives focused on the “core industries” of the member unions including: transportation, distribution, retail, construction, leisure and hospitality, health care, property services, laundries, food production and processes, and other industrial services.

In order to respond to this threat from organized labor, there are a number of “preventive” measures available to employers who wish to remain union-free. For example:

- Design and implement a comprehensive labor relations strategy designed to identify and eliminate potential vulnerabilities;
- Develop an “issue-free” mindset – intended to eliminate potential issues that may give rise to unionization;
- Review all policies, procedures, and practices to make sure they are lawful, consistent with the “issue-free” philosophy, and promote a positive work environment; and
- Train supervisors and managers in management free speech rights, employee relations “best practices,” and how to lawfully communicate with employees regarding the employer’s strengths and the union’s weaknesses.

In light of the Change To Win Coalition’s more aggressive tactics, employers need to focus their attention on creating an “issue-free” workplace before the new organized labor comes calling. •



8 New E-Discovery Rules Will Require Comprehensive Document Retention Programs

A number of amendments to the Federal Rules went into effect in December 2006 that significantly tighten the requirements for electronic document discovery. Because of the new “electronic discovery” rules, employers will need to develop more comprehensive document retention and preservation policies to avoid the potential destruction of electronic evidence such as e-mail, metadata, and other electronically stored information. For more information on this issue, see Ford & Harrison’s November 9, 2006 Legal Alert, “Amendments to the Federal Rules of Civil Procedure Affect Employers Obligations Regarding Electronic Discovery,” www.fordharrison.com. •

9 Congress Enacts Sweeping New Pension Legislation

In August 2006, President Bush signed into law the much anticipated Pension Protection Act of 2006 (PPA). Designed to strengthen protections for the pensions American workers rely on to fund their retirement, the PPA as been referred to as “the most sweeping reform of America’s pension laws in more than 30 years.” For more information regarding the PPA, see the August 2006 issue of Ford & Harrison’s Benefits Review, www.fordharrison.com/files/BenefitsReview/AugustPDE, which discusses the new law. •

10 Support Our Troops! The DOL Implements New Military Leave Act Regulations

On January 18, 2006, the Final Regulations to implement the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”) took effect – detailing the reemployment rights of military service members and employers’ obligations to these employees.

Generally, USERRA prohibits employers from discriminating against veterans, members of the military services, or applicants for military service, and further provides reemployment rights and continuation of benefits for qualifying employees returning from military service.

While the new Regulations impose no new legal requirements, they interpret and clarify existing rights and responsibilities of returning military service members. In this regard, the new rules clarify several key aspects of USERRA, including:

- Employers must reinstate returning service members within two weeks after they apply for reemployment, absent extraordinary or unusual circumstances;
- Returning services members must receive the same seniority, status, and pay they would have at-

tained if they had remained continuously employed;

- Service members must follow specific timetables and procedures when they report back to work;

- A service member’s disability incurred during military service does not impede the right to reinstatement at the same seniority status and pay. Employers must make reasonable efforts to accommodate a disability if it limits the service member’s ability to perform the job; and

- Service members have specific rights for continued benefit coverage under their employer’s health care and pension plans.

The new regulations provide that an employee is protected under USERRA for up to five years of actual military service. Moreover, there is no statute of limitations on USERRA claims – meaning that former employees claiming they were not afforded reinstatement could bring DOL enforcement of private lawsuits years after the fact. •

MANAGEMENT UPDATE

FORD & HARRISON^{LLP}
THE RIGHT RESPONSE AT THE RIGHT TIME



FEB 2007

THIS IS AN ADVERTISEMENT

The Management Update is a service to our clients providing general information on selected legal topics. Clients are cautioned not to attempt to solve specific problems on the basis of information contained in an article. For information, please contact Lynne Donaghy (404-888-3858 or ldonaghy@fordharrison.com) or write to the Atlanta office.

Editor: Amy W. Littrell,
alittrell@fordharrison.com

Attorney Advertising
Certification as a Labor and Employment Specialist is not currently available in Tennessee.

VISIT OUR NEW WEBSITE AT

www.fordharrison.com

Labor and Employment Law EXPERIENCE

- Affirmative action plans
- Alternative dispute resolution
- Breach of contract
- Class action litigation
- Collective bargaining
- Corporate restructuring
- Discrimination claims
- Employee benefits
- Employee privacy violations
- Harassment issues
- HR risk-management and compliance
- Immigration issues
- Non-compete disputes
- Trade secret violations
- Union campaigns
- Wage and hour matters
- Workplace violence
- Wrongful termination claims

ATLANTA • ASHEVILLE • BIRMINGHAM • CHICAGO • DALLAS • DENVER • JACKSONVILLE • LOS ANGELES • MELBOURNE
MEMPHIS • MIAMI • MINNEAPOLIS • NEW YORK • ORLANDO • PHOENIX • SPARTANBURG • TAMPA • WASHINGTON, DC