

MANAGEMENT UPDATE

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No Labor Exemption for University of Chicago Hospitals in Nurses' Antitrust Lawsuit

A federal judge in Illinois has ruled that the University of Chicago Hospitals cannot invoke the nonstatutory labor exemption to escape an antitrust lawsuit brought by Chicago area registered nurses. *Reed v. Advocate Health Care et al.*, (N.D. Ill. 3/28/07).

In this case, a group of registered nurses asked a federal court to certify an antitrust class action against a group of Chicago area hospitals charging that the hospitals conspired for a number of years to depress their wages in violation of the Sherman Act (the federal antitrust law), and did so in the face of a Chicago area nursing shortage. The nurses claim that the hospitals had an agreement to regularly exchange detailed, non-public information about the compensation each hospital was willing to pay its nurses. The University of Chicago Hospitals, which had a collective bargaining relationship with the nurses for almost 40 years, sought to avoid the lawsuit claiming its conduct fell within the nonstatutory labor exemption to the antitrust laws. The U.S. District Court for the Northern District of Illinois denied the Hospitals' motion.

The Sherman Act prohibits any contract in restraint of trade or commerce; the Clayton Act and the Norris-LaGuardia Act exempt labor activities from antitrust lawsuits. Federal courts interpreting these laws recognize two distinct exemptions to the antitrust laws – a statutory exemption that covers specific conduct described in the Clayton or Norris-LaGuardia Acts, and a nonstatutory exemption.

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The nonstatutory labor exemption to the antitrust laws generally protects agreements or activities between or among employers and unions in the collective bargaining process from the antitrust laws. The University of Chicago Hospitals invoked the nonstatutory labor exemption pointing out that all wages, benefits, and conditions of employment for its registered nurses were determined by a series of collective bargaining agreements going back to 1969.

Maybe so, said the court, but the issue is not the collective bargaining activities or agreements with the nurses' union. Rather, the issue is whether there were agreements among the defendant hospitals – including nonunion hospitals – that affected the compensation of registered nurses. The court ruled that alleged multiemployer conduct occurring **outside the context** of any collective bargaining is not entitled to the nonstatutory labor exemption. The court denied the Hospitals' motion for summary judgment.

The court's decision in this case adopted most of a remarkably similar decision from the U.S. District Court for the Northern District of New York, *Unger v. Albany Medical Center* (N.D.N.Y. 12/11/06). The court in *Unger* noted that the single hospital invoking the nonstatutory labor exemption could not demonstrate that sharing nonpublic wage information with nonunion hospitals was part of the give-and-take of the collective bargaining process. The mere existence of a collective bargaining agreement, it said, does not automatically insulate anti-competitive activity outside the negotiations process from the antitrust laws.

“The court ruled that alleged multiemployer conduct occurring outside the context of any collective bargaining is not entitled to the nonstatutory labor exemption.”

Antitrust cases in the area of labor relations are rare, but can be quite costly. A prevailing plaintiff in an antitrust case is entitled by statute to treble damages. Employers that are members of multiemployer bargaining associations or who have consented to multiemployer bargaining likely have little to fear from the antitrust laws because their dealings with the other employers are part and parcel of a coordinated bargaining strategy and process. This normally places their conduct squarely within the nonstatutory labor exemption to antitrust liability. The defendants in *Reed* and *Unger* lost the exemption because they included nonunion employers in their dealings, which fatally weakened the argument that their actions were part of the collective bargaining process.

Sharing wage and benefit information can be risky for nonunion employers as well. For example, in 2001, the Second Circuit permitted an antitrust suit to proceed against a group of nonunionized oil companies who shared salary information with each other through a third party survey and also discussed current and future salary and salary-related information with each other. See *Todd v. Exxon*. While such suits are unlikely if the third-party survey is conducted correctly, employers should be aware of the risk of an antitrust suit if it is not conducted correctly (if, for example, it reveals current salary information that can be traced to a specific employer).

If you have any questions about the issues discussed in this article, please contact the author, Brian Kurtz, an attorney in our Chicago office, at bkurtz@fordharrison.com, 312-960-6137, or the Ford & Harrison attorney with whom you usually work.

Status of Employee “Free Choice” Act

The U.S. House of Representatives passed the so-called Employee Free Choice Act on March 1, 2007. The bill was introduced in the Senate on March 29 and it has been referred to committee, but no further action has been taken. The Bush Administration has issued a Statement of Administration Policy in which it strongly denounced the Act because, among other reasons, it “would strip workers of the fundamental democratic right to a supervised private ballot election.” President Bush has indicated he will veto the bill if it is presented to him. If you have any questions regarding this legislation, please contact Chris Johlle, an attorney in our Chicago office, at cjohlle@fordharrison.com, 312-960-6114, or the Ford & Harrison attorney with whom you usually work.

Trends In State Laws Affecting Employers

Although federal laws govern many employment relationships, employers should be aware of trends in state legislation that could also affect the workplace.

Civil Unions: New Jersey's Civil Union Law became effective February 19, 2007. The law establishes civil unions and provides these couples with the same rights as married couples in New Jersey. The Civil Union Law amends the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., to prohibit discrimination on the basis of civil union status. New Jersey's Family Leave Act has been amended to expand the definition of a family member to include "one partner in a civil union couple." The Civil Union Law also provides that civil union partners can receive workers' compensation benefits, including payment of back pay wages and survivors' benefits.

Massachusetts law recognizes same-sex marriages and California, Vermont, and Connecticut have laws recognizing civil unions, although they are not all as far-reaching as New Jersey's. Additionally, Hawaii, Maine and, most recently, Washington state, have laws that give some legal rights and obligations (such as hospital visitation and inheritance) to domestic partners.

Bills are pending in Oregon and New Hampshire that would recognize domestic partnerships or civil unions for same sex couples. The governors of both states have indicated they support the bills. The Illinois House Human Services Committee recently approved the Illinois Religious Freedom and Civil Unions Act, which would give partners in a civil union the same rights and obligations as married couples, including protection under the state law prohibition against discrimination based on marriage, group insurance for state and municipal employees, assignment of wages and spousal benefits under the state's workers' compensation law. The bill must still be considered by the full House and the Senate.

Prohibiting Discrimination Based on Gender Identity or Expression: The New Jersey legislature has amended the New Jersey Law Against Discrimination to prohibit discrimination on the basis of gender identity or expression. The amendment is effective June 17, 2007. The New Jersey law defines "gender identity or expression" as "having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth." The law is designed to protect transgendered individuals, which can include transsexuals (those who identify themselves as being a member of the opposite biological sex and who may seek to live as a member of that sex by undergoing surgery and/or hormone therapy), transvestites (those who adopt the dress and behavior typical of people of the opposite biological sex but do not wish to change sexes), and those who appear androgynous (those who identify as neither specifically masculine or feminine).

New Jersey's Law Against Discrimination already prohibited discrimination based on sexual orientation; the recent amendment expands the law to specifically include protection for transgendered individuals. New Jersey is the eighth state to prohibit employment discrimination based on gender identity or expression. The other states are: California; Illinois; Maine; Minnesota; New Mexico; Rhode Island; Washington, D.C.; and Washington state. The laws in these states also prohibit discrimination based on sexual orientation. Other states that prohibit employment discrimination based on sexual orientation without specifically addressing gender identity are: Connecticut, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York, Vermont, and Wisconsin.

Legislation prohibiting discrimination based on sexual orientation and gender identity is pending in Oregon and Iowa, which the governors of both states have indicated they support.

Parking Lot Gun Legislation: Legislation that would make it illegal for employers to maintain a policy banning weapons in vehicles in their parking lots was pending in several states including Florida, Texas, Georgia, Tennessee, Indiana, and Utah this year; however, in the wake of the Virginia Tech tragedy, it is likely these bills will either be defeated or not come to a vote this session. Despite this, gun lobbyists have indicated that getting such laws enacted is a priority. Thus employers should be aware that similar legislation may be proposed in the future. Currently, Kentucky, Minnesota, *Oklahoma, Mississippi, and Alaska have such laws.

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*The Oklahoma law has been challenged by employers and is currently subject to a federal court temporary restraining order against its enforcement.



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Florida: HB1417, the “Individual Personal Private Property Protection Act of 2007” was voted down by a Florida House committee on April 19, 2007. This bill would have made it illegal for employers to search their employees’ vehicles for any “legal product,” which includes weapons, but also could include a number of other products that, although legal, could be inappropriate at work.

Texas: The Texas legislation, SB 534 (providing a cause of action for an employee who is fired for having a weapon in his or her car in the employer’s parking lot if the employee has provided a written statement to the employer that meets the law’s requirements), was scheduled for formal meeting in committee on April 19, 2007; however, the last legislative calendar entry indicates no action was taken in committee. HB 992, similar to SB 534, and HB 220, which would make it illegal for employers to prohibit weapons in locked vehicles in their parking lots, were approved by the House committees and reports were sent to calendars, but no further action has been taken.

Georgia: SB 43 would make it illegal to prohibit employees from transporting or storing firearms in a locked vehicle in an employee parking area unless the parking area is secure and access by the general public is restricted. The Georgia Senate was scheduled to vote on this bill on March 27, 2007, but did not do so; however, it is eligible for further vote this session. A Georgia senator who usually supports NRA-backed legislation criticized the group for sending out a crush of e-mails to members accusing many large companies of trying to curtail Second Amendment Rights and has indicated that he will not support SB 43.

Tennessee: SB 153/HB 0067, which are identical, would prohibit a property owner, tenant, employer, corporation or business entity from prohibiting any person possessing a valid handgun carry permit from transporting and storing a handgun out of sight in a locked vehicle on the employer’s (or property owner’s) premises in a designated parking area. Both bills were filed in January 2007 and were both taken off notice for calendar in committee in February 2007. These bills are almost identical to legislation that died in committee last year.

Indiana: HB 1118 would make it illegal for a person to adopt a rule prohibiting an individual from legally possessing a firearm that is locked in that individual’s vehicle on the person’s property. The bill was referred to the House Committee on Rules and Legislative Procedures on January 8, 2007; no further action has been taken on it.

Utah: SB 78 would make it illegal for employers to prohibit any individual who is legally permitted to carry a firearm from transporting or storing a firearm in the employer’s parking area, if the firearm is out of sight. The bill also would make it illegal to establish a rule prohibiting items in or on vehicles in the employer’s parking lot if the rule would constitute a substantial burden on the person’s freedom of religion. The Utah House Committee rejected the bill in February 2007.

Immigration-Related Laws: The Georgia Security and Immigration Compliance Act requires citizenship verification of state employees and employers with state contracts and subcontracts. This provision is effective July 1, 2007, for covered employers with 500 or more employees; July 1, 2008, for those with 100 or more employees; and July 1, 2009, for employers with fewer than 100 employees. It also provides that private employers cannot claim compensation over \$600 per year paid to undocumented employees as a business expense for state income tax purposes. This provision only applies to individuals hired on or after January 1, 2008, and only to deduction claims made after that date. The law also requires heightened state income tax withholding for employees with incorrect or missing taxpayer identification numbers and subjects employers to liability for failure to properly withhold. This provision is effective July 1, 2007.

Colorado’s law requires employers to go a step further than the federal immigration law by keeping a copy of the documentation presented by employees to prove identity and work eligibility. Additionally, Colorado employers must create and maintain, either electronically or on paper, an affirmation that the employer has examined the legal work status of the employee, has retained copies of the employee’s I-9 documentation, has not altered or falsified these documents, and has not knowingly hired an unauthorized alien. A sample attestation form is available on the Colorado Department of Labor’s (DOL) web site. The Colorado DOL now suggests, but does not require, employers to subscribe to the Social Security verification program and to the Department of Homeland Security BASIC Pilot Program and to verify the information presented to them by employees. Note that while most Colorado employers are merely encouraged to join the programs, employers seeking public contracts are required to do so.

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Wage Issues

Minimum Wage: Forty-five states have a state minimum wage law; of these, thirty states and the District of Columbia have a minimum wage rate higher than the federal minimum and only Kentucky has a minimum wage rate lower than the federal. Alabama, Louisiana, Mississippi, South Carolina, and Tennessee do not have state minimum wage laws.

In 2007, the hourly minimum wage in the following states increased either due to adjustments in accordance with existing law or new legislation: Arizona (\$6.75); Arkansas (\$6.25); California (\$7.50); Colorado (\$6.85); Connecticut (\$7.65); Delaware (\$6.65); Florida (\$6.67); Hawaii (\$7.25); Illinois (\$6.50 - will increase to \$7.50 on July 1, 2007); Maine (\$6.75 - will increase to \$7.00 on October 1, 2007); Maryland (\$6.15); Massachusetts (\$7.50); Michigan (\$6.95 - will increase to \$7.15 on July 1, 2007); Missouri (\$6.50); Montana (\$6.15); Nevada (\$6.15 - employers who make a qualified health insurance plan available to employees may pay an hourly rate of \$5.15); New Jersey (\$7.15); New York (\$7.15); North Carolina (\$6.15); Ohio (\$6.85); Oregon (\$7.80); Pennsylvania (\$6.25 - will increase to \$7.15 on July 1, 2007); Rhode Island (\$7.40); Vermont (\$7.53); Washington (7.93); West Virginia (\$5.85 - will increase to \$6.55 July 1, 2007); and Wisconsin (\$6.50).

The following states also have minimum wage rates higher than the federal; however, these rates are the same as 2006 and are not currently scheduled for increase in 2007: Alaska (\$7.15); District of Columbia (\$7.00); and Minnesota (\$6.15 for employers with annual receipts of \$625,000 or more; \$5.25 for employers with annual receipts of less than \$625,000).

Living Wage: Maryland has become the first state to pass a "living wage" law, which requires certain state contractors to pay employees wages higher than the federal and state minimum wage. Under the new law, for fiscal year 2008, the living wage is set at \$11.30 per hour for eligible contracts in which contract services valued at 50% or more of the total value of the contract will be performed in the Baltimore corridor (Montgomery, Prince George's, Howard, Anne Arundel, and Baltimore counties and Baltimore City). The rate is set at \$8.50 per hour for eligible contracts in all other areas of the state.

State contractors who subsidize the cost of health insurance for their employees may reduce the wages they pay by all or part of the hourly cost of their share of the insurance premiums. Additionally, employers who contribute to employees' deferred compensation plans may be permitted to reduce the wages they pay by up to \$.50 per hour.

Contracts valued at less than \$100,000 and employers with fewer than ten employees and contracts valued at less than \$500,000 are exempt from the living wage requirement. There are other exemptions as well.

While Maryland is the first state to enact a living wage law, nationwide, 145 cities and counties have enacted such requirements.

Family Leave

Washington state has enacted legislation providing for family leave for eligible employees following the birth or adoption of a child. Under the new law, effective October 1, 2009, employers with 25 or more employees must provide eligible employees with up to five weeks of leave following the birth or adoption of a child. To be eligible for this leave, employees must have worked for their employer for at least twelve months and must have worked at least 1,250 hours during that twelve-month period. Employees on family leave are entitled to be reinstated to their prior position when the leave has expired.

The law also provides that employees on family leave are entitled to benefits of up to \$250 per week for five weeks. Leave taken under the state law is to run currently with leave taken under the federal Family and Medical Leave Act.

Currently, California is the only other state to provide for a period of paid family leave.



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