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Congress to Consider the Employee Free Choice Act

Proposed Amendments to the National Labor Relations Act.

Presently pending in the United States Congress is the Employee Free Choice Act (EFCA), a proposed law that would amend the National Labor Relations Act (NLRA) by making it easier for unions to organize employees for the purpose of representing them in collective bargaining. The law was proposed in response to only 7.4% of the workforce being represented by unions under the NLRA, which generally applies to private employers engaged in interstate commerce. The stated objectives of the new law are to achieve the NLRA's original policy goals of "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their choosing."

The EFCA would change the practice and procedure for requiring employers to recognize and bargain with unions representing their employees in four ways:

(1) Certification of a union as the representative of an employer's employees could occur following the union's presentation of authorization cards obtained from a majority of workers in the bargaining unit, as opposed to a majority of employees voting for a union in a secret ballot election. The present process of requiring the National Labor Relations Board (NLRB) to conduct such elections, following a union's making of a "showing of interest" of only 30% of the employees in the bargaining unit, has been criticized as too slow and cumbersome to permit employees to expeditiously obtain representation of a union of their choice.

(2) Once a union is certified as the collective bargaining representative of employees, the employer must bargain in good faith with the union for an initial collective bargaining agreement. Under the EFCA, an arbitrator could impose an agreement on the employer if the parties are not able to negotiate a mutually acceptable agreement within 90 days. Under present law, in which the parties are free to bargain for an initial contract without the prospect of government intervention, they are unable to reach an agreement approximately 45% of the time.

(3) The NLRB would be required to seek injunctive relief against employers who have discriminatorily discharged employees for engaging in union activity during an organizing campaign or after a union is certified as the collective bargaining representative.

(4) Violations of the NLRA's self-organization guarantees would subject employers to civil fines of up to \$20,000 as well as treble back pay to workers fired as a result of their union activity.

President-Elect Barack Obama was a co-sponsor of the EFCA and campaigned to support the Act's passage. However, given the more centrist approach to business interests that is being advocated in light of the continuing downturn in the economy, and the present shortage of Democratic Senators to achieve a filibuster-proof majority, it is uncertain whether the EFCA will pass in its presently-proposed form.

Additional Changes Arrive in Federal Labor Laws foreseen in the Obama Administration

New Laws Adding Proposed Protections of Workers' Rights Are Anticipated

In addition to the EFCA, the President-Elect has vocally supported a number of additional laws designed to strengthen workers' rights. These include:

- The Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers (RESPECT) Act, which would overrule several NLRB decisions classifying hundreds of thousands of nurses, construction, and professional workers as supervisors who are not protected by federal labor law;
- Proposed legislation to raise the federal minimum wage to \$9.50 an hour by 2011 and index it to inflation;
- A proposed law amending the Fair Labor Standards Act (FLSA) to allow employees to use "comp time" instead of overtime for working more than 40 hours in one workweek;
- A ban on hiring permanent replacement employees to fill the positions left vacant by employees who go on strike, and
- The "Hold Corporate America Responsible Act," which would attempt to force giant employers such as WalMart to improve wages, health care, and working conditions.

The initial months of the Obama Administration will likely see aggressive efforts of labor-oriented interest groups and legislators to enact as many of these laws as possible in the current financial and economic climate.

New FMLA Regulations Balance a Right to Leave Against a Right to Know

On November 17, the Department of Labor published a Final Rule which revamps the regulations governing the FMLA. The Final Rule adds new regulations to address military leave entitlements signed into law by President Bush last January and overhauls much of the pre-existing FMLA regulations. The revised regulations clarify the leave-taking process, medical certification requirements and an employer's right to access employee medical information. Taken as a whole, the new FMLA regulations provide needed modifications to the leave-taking process, improve the manageability of requests for leave, and do little to hinder valid employee claims for leave under the Act.

The New Military Leave Regulations

The FMLA allows eligible employees a total of 12 work weeks of unpaid leave during any 12-month period to give birth, care for a child or immediate family member with a serious health condition, or to take leave for a serious personal health condition. The National Defense Authorization Act ("NDAA"), signed into law in January, provides two new forms of FMLA leave, both related to military service. The Final Rule, in part, addresses the new forms of leave created by the NDAA and creates new regulations governing such leaves.

Military Caregiver Leave

First, the NDAA allows for military caregiver leave under the FMLA. Family members caring for wounded military personnel will now be allowed up to 26 work weeks of unpaid leave in "a single 12-month period." This is currently the only FMLA leave that allows more than 12 weeks of leave. In addition, unlike a traditional FMLA leave, which is limited to caring for one's parent,

child or spouse, leave taken on this basis may also be used to care for a "next of kin."

To qualify for caregiver leave, the debilitated servicemember must either be undergoing treatment or therapy, receiving outpatient care, or be on the temporary disability retired list (but not be permanently disabled), and must be a member of the Armed Forces, National Guard or Reserves. The regulations allow for 26 weeks of leave per injury, meaning that the same employee may take one 26-week leave to care for a wounded family member and take a separate 26-week leave over a different "single 12-month period" to care for the same person with a subsequent injury or illness or another wounded family member. Certification for such leaves may be completed by a Department of Defense or Veteran's Administration health care provider or an authorized TRICARE provider.

Qualifying Exigency Leave

Second, the NDAA provides FMLA leave to families of members of the National Guard and the Reserves called to active duty. The new regulations allow the parents, children or spouses of such military personnel to use the normal 12 work weeks of FMLA leave for "qualifying exigencies" arising out of the call to active duty.

Employees may use leave on this basis to handle the following activities: 1) short-notice deployment; 2) military events and activities; 3) childcare and school activities; 4) financial and legal arrangements; 5) counseling; 6) rest and recuperation; 7) post-deployment activities; and 8) additional activities agreed upon by the employer and employee.

Changes to Existing Regulations

In addition to addressing the new forms of military leave under the FMLA, the Final Rule also markedly revamps the now-existing regulations governing the FMLA as a whole.

While these changes undoubtedly increase an employee's obligations to his employer, these obligations are balanced against a very generous vehicle for leave.

Notice Requirements

One key change made by the regulations relates to notice requirements for leave taken under the FMLA. While employees previously had two business days after an absence to provide an employer with notice of the need for leave, the new rule will require employees to comply with their company's usual procedures for reporting an absence if they are able to do so.

Only under extenuating circumstances may an employee delay notifying an employer of the need for leave. For example, while a company might require advanced notice of impending leave or have a daily call-in policy to prevent unexcused no-shows, an employee injured in a car accident would not be penalized for failing to call in until the following day, unless it was possible for him to call sooner.

Within five days of learning that an employee's leave may qualify under the FMLA, employers are required to provide notice of potential eligibility for leave, which must be accompanied with a rights and responsibilities notice. Within five days of obtaining enough information to determine whether the leave qualifies for FMLA, the employer must notify the employee of its determination. General notices about the FMLA must also be provided in employee handbooks or other written material concerning benefits or leave, or must be provided upon hire. However, the new regulations remove categorical penalty provisions for failing to follow these notification rules and clarify that an employer may be liable where an employee suffers individualized harm due to improper or untimely notice of FMLA rights.

Medical Certification and Fitness-for-Duty

The requirements for certification of a medical condition are also changed by the Final Rule. First, employers may now implement policies requiring the renewal of medical certifications every 12-month FMLA period. Second, employers may request recertification of ongoing conditions every six months in conjunction with an absence. If an employer deems the medical certification incomplete or insufficient, it must specify in writing what is lacking and allow the employee seven days to cure the deficiency.

Because a "chronic serious health condition" is defined under the new regulations as a condition that requires at least two visits to a health care provider over the course of a year, the employee should easily be able to obtain a new certification during these doctor visits. While employees might consider this an imposition, it is designed to prevent abuse by employees who no longer have a serious health condition.

The new regulations also allow an employer to require a job-specific fitness-for-duty certification before an employee returns to work, indicating that the individual is capable of performing the essential functions of his or her job. A fitness-for-duty certification need not be job-specific under the old regulations. This change helps to ensure that a specific employee is capable of performing a specific job. The use of a fitness-for-duty certification will also be allowed where an employee takes intermittent leave if there are reasonable job safety concerns.

Access to Medical Information

The changes also provide greater access to medical information than previously allowed. Under the new rule, an employer's leave administrator, management or human resources personnel may

contact the employee's health care provider to obtain medical information. However, only information required for the certification form may be discussed. The employer will not be allowed greater access to information regarding the employee's health or medical history. To protect the employee's privacy, direct supervisors will not be allowed to contact the health care provider.

Management and human resources personnel should be counseled on the continuing privacy rights of employees taking FMLA leave. Furthermore, employers should implement procedures to safeguard employee medical information and prevent its transmittal beyond those processing a leave of absence. Improper use or communication of the medical information would likely risk claims under the FMLA and under the umbrella of disability discrimination and privacy laws.

Other Relevant Changes

Other changes and clarifications that will impact the administration of FMLA leave include:

Defining "Serious Health Condition":

The new rule leaves the six varieties of "serious health condition" in tact, but adds some subtle clarification. For example, one definition of a "serious health condition" requires three consecutive calendar days of incapacity plus two visits to a health care provider. Under the new rule, the two visits must occur within 30 days of the onset of the condition with the first of these visits occurring in the seven days following the first day of incapacity.

Substitution of Paid Leave: While FMLA leave is unpaid, employers may require or employees may elect to take accrued paid leave concurrently with any FMLA leave. Previously, the regulations treated the taking of accrued vacation or personal leave ("paid time off") differently from accrued sick leave. The new regulations treat all types of

paid leave the same. An employee electing to concurrently use paid leave must follow employer rules/policies that apply to other employees for use of such paid leave unless the employer waives any of the procedural requirements.

Light Duty: The new regulations clarify that “light duty” does not count against a leave entitlement. An employee on light duty retains the right to return to full duty in the same or equivalent position until the end of the applicable 12-month FMLA year.

Perfect Attendance Awards: The new rule clarifies that an employer may deny perfect attendance awards to employees absent due to FMLA leave so long as such awards are similarly denied to other employees on non-FMLA leave.

Waiver of Rights: The final rule continues to prohibit prospective waivers of FMLA rights, but codifies the Department’s longstanding position that employees may settle or release all FMLA claims (effectively waiving their rights retroactively) without court or Department approval.

Together, these changes do not weaken the FMLA, as some have argued, but rather make the implementation of its provisions more manageable with little more required of the employee than clearly notifying the employer of a qualifying leave and providing timely medical certifications.

The addition of military leave, likewise, provides employees with greater rights to care for their family and to manage urgent health care needs. As a whole, these changes will restore balance between an employer’s needs in the workplace and an employee’s need to address legitimate family and medical issues.

While the new regulations do not take effect until January 16, employers should review their policies now and discuss these

procedures with supervisory and human resources personnel.

Supreme Court to Consider Retaliation Claims of Participant in Internal Investigation

Do employees who participate in internal probes of discrimination receive the same protection against retaliation as the people who formally file charges? The Supreme Court will decide this issue in the coming months. The plaintiff in the case, Crawford, testified against her supervisor in an internal investigation of a sexual harassment claim made by another employee.

Crawford was not pursuing a claim herself and, in fact, had not volunteered any information until she was asked, at which time she told the investigator that the supervisor had acted in a sexually inappropriate manner with her. The supervisor was reprimanded, and Crawford - a thirty year employee - was fired less than six months later for independent work-related reasons.

Crawford filed suit, contending that she was discharged for her statements in connection with the sexual harassment investigation. While both the district and appellate courts rejected her position that federal discrimination laws extend to participation in an internal harassment probe, the Supreme Court may feel otherwise. Under Title VII, an employee is protected if he opposes a discriminatory employment practice or pursues a claim of discrimination. 42 U.S.C. § 2000e-3(a). Here, the Court will have to draw a line as to those actions that “oppose” discrimination. The Court of Appeals stated that Title VII “demands active, consistent ‘opposing’ activities to warrant ... protection against retaliation,” such as filing a complaint. It further concluded that statements made during an internal investigation do not qualify as “participation,” while

statements made to the EEOC or some outside authority do qualify.

One concern if retaliation claims like Crawford’s are encompassed by Title VII is that employers will stop conducting thorough investigations. Despite such concerns, the best way to enforce an anti-harassment policy is to conduct a detailed and time-sensitive investigation, and the benefits of doing so likely outweighs any increased risk of retaliation claims.

Revival of the Social Security Administration No-Match Letter

On October 23, 2008, the Department of Homeland Security (DHS) published the final version of its “no-match” rule, outlining the steps employers must take upon receiving a “no-match” letter from the Social Security Administration (SSA). Shortly thereafter, the DHS indicated it would look to lift the injunction imposed by the United States District Court for the Northern District of California which currently bars it from enforcing the rule.

Under the “no-match” rule, the SSA would be required to include information on how to resolve discrepancies in letters notifying employers that an employee’s Social Security number does not match government records. Following the procedure established by the no-match regulations provides safe harbor from criminal and civil fines and sanctions imposed on employers who knowingly employ individuals unauthorized to work in the United States.

Though little has changed to the text of the regulation since the District Court imposed its injunction, the final rule contains a 95-page preamble to address concerns raised by the court. If the injunction is lifted, thousands of employers could receive no-match letters already issued by the SSA. Employers should

be conscientious of deadlines to respond and resolve discrepancies.

New State Laws Going Into Effect in 2009

The following new state laws are set to take effect on 1/1/09.

A.B. 10 amends the Labor Code to add an annual income restriction for exempt computer software professionals who are paid on salary. Under existing law, to qualify as exempt, computer software pros must be paid at rate of at least \$36/hour, on an hourly basis. The amendment also permits exemption where the employee is paid an annual salary of at least \$75,000, paid at least monthly, and in a monthly amount of not less than \$6,250.

A.B. 2075 makes it illegal to require an employee, as a condition of being paid, to sign a statement of the hours worked during the pay period if the employer knows the statement to be false.

A.B. 2654 harmonizes anti-discrimination provisions in a range of state laws – including those dealing with discrimination in contracting, insurance, and workers' compensation – to ensure that the anti-bias protections track those in the Unruh Civil Rights Act and the Fair Employment and Housing Act.

S.B. 28 expands existing prohibitions on using cell phones while driving to bar text messaging, emailing, and instant messaging while driving.

Liability for Missed Meal Periods Hangs in the Balance in California

Brinker Restaurant Corp. v. Superior Court, Supreme Court Case No. S166350

Last month, California Supreme Court granted review in *Brinker Restaurant Corp. v. Superior Court*, a wage and hour case of great consequence to California

employers. The appeal challenges the decision of the California Court of Appeal, which ruled in July that an employer cannot be liable for the one-hour per day premium under California law for missed meal periods so long as it made the meal break available to employees and did not do anything to prevent them from taking it. Under the appellate court's interpretation, employers need only "provide, not ensure," that such periods are taken. The Court of Appeal also ruled that cases seeking the recovery of premiums for missed meal periods should rarely be certified as class actions.

The pendency of the case before the state Supreme Court means that the appellate court opinion can no longer be relied upon as legal precedent. However, in a memorandum issued by the state Department of Labor Standards Enforcement on October 23, 2008, that enforcement agency indicated that it will continue to take the position that "employers must provide meal periods to employees but do not have an additional obligation to ensure that they are taken." The DLSE memorandum further states that:

- An employer does not satisfy its obligations under the law if its policies or practices prevent or discourage employees from taking their meal breaks.
- An employer's obligation to provide employees with an adequate meal period is not satisfied by merely assuming that the meal periods were taken.
- Unless expressly permitted by an applicable Wage Order, the first meal period provided by the employer must commence prior to the fifth hour of work.
- Employers have a duty to record their employees' meal periods, unless they are

provided during a time that the employer's operations "cease."

Complying with the state law requirements of providing meal periods to employees is proving troublesome to California employers due to the shifting legal pronouncements of the courts and government agencies. Indeed, on October 28, another Court of Appeal held in the case of *Brinkley v Public Storage* that employers need only make meal periods available to their employees, not ensure that they are taken. Until the Supreme Court provides guidance, employers should proceed with caution.

Does Installing a Hidden Surveillance Camera in the Work Room Violate Employee Privacy?

Employee privacy rights are at stake in this pending California Supreme Court case. The Court will consider whether employees may assert a cause of action for invasion of privacy when their employer installs a hidden surveillance camera in the office to investigate whether company computers were being used for improper purposes.

The employer, which operated a residential facility for abused children, was investigating suspicions that employees were accessing pornography on company computers. The plaintiffs were clerical workers who shared an office with a locking door and window shades that were frequently drawn. The plaintiffs testified that they often changed clothes and discussed personal matters in their office. In defense of plaintiffs' invasion of privacy claim, the employer stated that others had access to the office, that there were means of looking into the office even if the shades were drawn, and that the employees were on notice of surveillance cameras in common areas as well as a computer monitoring policy. These arguments persuaded the trial court, but were

overturned on appeal. Specifically, the Court of Appeal rejected the argument put forward by the employer that it had not invaded plaintiffs' right to privacy because it had never actually reviewed the tape, noting that the harm occurs by the intrusive act itself.

While the case may create a broader rule of law on the topic, the employer in *Hernandez* only operated the camera after business hours, and, as stated above, did not actually review the footage. Depending on the scope of the Court's ruling, this case could impact the measures used to catch employees in the act of violating company policy.

San Francisco Ordinance Regulating Employer Health Spending Not Preempted By ERISA

Reversing a 2007 decision by the U. S. District Court for the Northern District of California, the Ninth Circuit ruled that the San Francisco Health Care Security Ordinance, which regulates employer health spending requirements and provides for a government health care program funded partially by employer contributions, is not preempted by the federal Employee Retirement Income Security Act (ERISA).

The Ordinance affects employers doing business in San Francisco and required to obtain a valid San Francisco business registration certificate from the San Francisco Tax Collector's office. It affects for-profit employers with 20+ employees and nonprofit corporations with 50+ employees. For-profit businesses with 20 to 99 employees and nonprofit corporations with 50+ employees must make health care expenditures at a rate of \$1.17 per hour per covered employee, while businesses with 100 or more employees must spend \$1.76 per hour per covered employee. "Covered employees" are persons who work in the City;

work at least ten hours per week; have worked for the employer for at least 90 days; and are not otherwise excluded from coverage.

Employers may fulfill this requirement in a variety of ways, including but not limited to making contributions to a health savings account as defined under Internal Revenue Code section 223, reimbursing covered employees for expenses incurred in the purchase of health care services, paying a third party to provide health care services for covered employees, or making payments to the City for the benefit of covered employees. Where the employer makes payments of at least \$1.17 or \$1.76 per hour (depending on the number of employees and status of the employer), it is exempt from making payments to the City. Moreover, an employer will be partially exempt to the extent it makes lesser expenditures. Accurate recordkeeping is required.

The Ninth Circuit held that ERISA does not preempt the Ordinance, because the Ordinance neither created nor related to an ERISA plan. Rather, payments are made out of the employer's general assets on a periodic basis based on hours worked by the employees with very little discretion as to administration of the benefits. Although employers may elect to make payments through the City, it is not required. The Ordinance does not require an employer to adopt a health plan or provide specific benefits through an existing plan. "Any employer covered by the Ordinance may fully discharge its expenditure obligations by making the required level of employee health care expenditures, whether those expenditures are made in whole or in part to an ERISA plan, or in whole or in part to the City." No change in the administration of an employer's current plan is required.

The Ninth Circuit decision raises the prospect of similar ordinances being upheld in the future.

If you have any questions about these issues or any other labor matters, please contact any member of the Labor & Employment Department at Hill, Farrer & Burrill LLP.

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