Barley Snyder

Employment Law Update July 2010

PUBLISHED ON
July 1, 2010

TABLE OF CONTENTS

Health Care Reform Act Mandates Employee Breaks to Express Breast Milk

By: Jennifer Craighead Carey

The recently enacted health reform legislation includes an unexpected provision amending the Fair Labor Standards Act (FLSA). Specifically, the Patient Protection and Affordable Care Act requires employers covered by the FLSA to give mothers "reasonable" breaks to express milk for their infants up to the time the infant reaches age one. The Act does not define "reasonable" and regulations have not yet been promulgated defining the number and length of break times. However, the breaks can be unpaid. The Act further mandates that employers must provide a private location that cannot be a bathroom to express milk.

The Act does not apply to employers of less than 50 employees if compliance would pose an undue hardship. Undue hardship means that the employer would incur significant difficulty or expense in compliance when taking into account the employer's size, financial resources, and nature or structure of the employer's business.

The Act does not delineate an effective date. Nevertheless, we recommend that employers begin compliance with the Act as soon as feasible.

Back To Top

Final Rule Requires Employers to Post Employee Rights Under NLRA

By: Richard L. Hackman

On May 20, 2010, the U.S. Department of Labor's Office of Labor-Management Standards (OLMS) published its final rules implementing Executive Order 13496, which was signed by the President in the beginning of 2009. The rule requires certain federal contractors and subcontractors to post notices informing employees of their rights under the National Labor Relations Act (NLRA). The final rules set forth the content of the required notice, provide guidance on how the notice is to be posted, identify which federal contractors and subcontractors are required to post the notices,

and explain how the Department of Labor will enforce the posting requirements. The previous version of the poster, known as the Beck poster, required federal contractors to post workplace notices informing employees of their right to not join a union.

Specifically, federal contractors and subcontractors are required to post the notice conspicuously in plants and offices where employees covered by the NLRA perform activity, including all places where notices to employees are customarily posted. Moreover, federal government contracting departments and agencies must include provisions requiring contractors to post the prescribed notice in every government contract. Government contractors must also include provisions requiring posting of the prescribed notice in all subcontracts.

Generally speaking, the notice advises employees of their rights to form, join, or assist a union; to bargain collectively; to discuss terms and conditions of employment with co-workers or a union; to engage in concerted activities with co-workers; and to strike and picket. The notice also informs employees that they should contact the National Labor Relations Board if they believe their rights or the rights of others have been violated.

Enforcement of the new posting requirement will be undertaken by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). If a complaint investigation or compliance evaluation indicates noncompliance with the requirements of the final rules, the OFCCP will attempt to secure compliance through conciliation. If that process is unsuccessful, the OFCCP will refer the matter to the OLMS to commence administrative enforcement proceedings.

Notably, this posting requirement marks the first time that employers have been required to post a notice fully summarizing employee rights under the NLRA. By providing employees with this required information about rights and unlawful practices under the NLRA, employers should be prepared to address increased employee inquiries and challenges to employer's policies and practices. Also, in light of the new posting requirement, non-unionized employers in particular should review their employment policies and practices to make sure they comply with the NLRA.

A copy of the new poster may be found at *http://www.dol.gov/olms/regs/compliance/EmployeeRightsPoster11x17_Final.pdf.* The new poster must be posted by June 21, 2010.

Back To Top

Unions' Election Win Rate Continues to Rise

By: Richard L. Hackman

Contrary to allegations of union leaders that card check legislation is required due to an unfair election process, in 2009, unions won 68.5% of representation elections conducted by the NLRB, which is up from the 66.9% win rate of a year ago. Notably, unions have won more than half of all representation elections in each of the past 13 years.

Fortunately, for employers wishing to remain non-union, there is some good news since the number of representation elections held in 2009 dropped. The International Brotherhood of Teamsters led all unions by participating in 366 elections in 2009.

By bargaining unit size, unions had the greatest organizing successes among very small and very large bargaining

units. Unions won 70 percent of the 862 elections in units of fewer than 50 employees, and 71.4 percent of 14 elections in units of 500 workers or more.

Unions won 50 percent or more of the elections held in all industries in 2009, except manufacturing (48.5 percent), and mining (33.3 percent). The industry with the highest number of wins was transportation, communications, and utilities (73.7 percent), followed by construction (73 percent), finance, insurance, and real estate (72.2 percent), health care (72 percent), and services (70.5 percent). Other sectors where unions won at least 50 percent of the elections in which they participated included communications (58.8 percent), wholesale (54.2 percent), and retail (51.1 percent).

In light of the significant support unions have given the current federal administration, the NLRB's new pro-union appointees, and the ongoing threat of card check legislation, union elections and win rates will likely rise in the coming years. Accordingly, employers need to be continually vigilant with respect to their workforce by emphasizing open communication with employees and imparting to employees the importance to the company of maintaining a non-union workplace if they wish to remain a non-union employer.

Back To Top

Significant Changes Afoot with Respect to the NLRB

By: Richard L. Hackman

Former union attorneys Craig Becker and Mark Pearce have been sworn into office to begin their recess appointments as members of the National Labor Relations Board (NLRB). This ended an approximately two-year period during which the five-member NLRB operated with just two members. These appointments also created a Democratic majority on the board for the first time since December 2001. Notably, President Obama failed to give a recess appointment to Republican appointee Brian Hayes, leaving the NLRB one member short of its five members.

Becker was an associate general counsel for the Service Employees International Union, and AFL-CIO staff counsel since 2004. Pearce was an attorney with a New York law firm, and represented unions and employees in labor and discrimination cases.

As a result of giving Democratic appointees an edge on the NLRB, these recess appointments could have a dramatic impact on labor law. Several recent and notable NLRB rulings could be overturned by the appointments of Becker and Pearce. Specifically at issue may be the 2007 *Register Guard* decision in which the Board held that an e-mail system is employer property from which union organizing activities may be excluded, and the 2006 *Oakwood Health Care* decision, which broadened the definition of "supervisor" to include supervisory duties to "assign" and "responsibly to direct" workers.

These appointments will expire when the Senate ends its 2011 session. However, should the Senate confirm the nominations of Becker and Pearce in exchange for getting Hayes on board, Becker and Pearce's terms would be extended by approximately three more years. Moreover, the term of Republican appointee Peter C. Schaumber will also expire in August 2010, giving the President another vacancy to fill and another opportunity to make the NLRB an all Obama board. Finally, it is also important to note that the term of NLRB General Counsel Ron Meisburg (R) expires this summer. Given the general counsel's authority to enforce NLRB rulings, an Obama appointment to this position is also likely to have an immediate impact on daily labor management relations.

Back To Top

DOL Wage and Hour Division Clarifies Rules for Unpaid Interns in the For-Profit Sector

By: Joshua L. Schwartz

It is the season when college students turn their sights to internships to boost their resumes and gain vaulable workplace experience. Before hiring unpaid interns, employers are well-advised to review a recent fact sheet published by the U.S. Department of Labor (DOL). Shortly after receiving criticism from the Economic Policy Institute for its purportedly outdated regulations on the issue, the Wage and Hour Division of the DOL on April 21st released a fact sheet further explaining the test to be used to determine if an intern qualifies as an "employee" who must be paid minimum wage and overtime compensation. "Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act (FLSA)" observes that the FLSA defines the term "employ" "very broadly" and cautions that the trainee exclusion is "quite narrow." Accordingly, the fact sheet provides that interns and trainees must be treated as regular employees unless their internship or training program meets the following six criteria:1) the internship is similar to training that would be received in an educational environment;
2) the experience is for the intern's benefit;
3) the intern does not displace regular employees but works under close supervision of existing staff;
4) the employer that provides the training derives no im mediate advantage from the intern's activities and, on occasion, may actually be impeded in its operations;
5) the intern is not necessarily entitled to a job at the conclusion of the internship;
6) the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

With respect to the first two criteria, the fact sheet explains that "the more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations," such as "where a college or university exercises oversight over the internship program and provides educational credit," the more likely the exemption will apply. Likewise, the exemption is more likely to apply if "the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation." Conversely, if interns perform "productive work" like filing, clerical activities, or assisting customers, then "the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them" from the definition of "employee" and the accompanying minimum wage and overtime requirements.

With respect to displacement and supervision, the agency notes that interns who serve as "substitutes" or are used to "augment" the existing workforce should be paid at least minimum wage and, if applicable, overtime compensation. On the other hand, if the employer is providing job shadowing opportunities, and the intern performs no or minimal work only under the supervision of regular employees, the intern is less likely to be viewed as an employee under the FLSA. Finally, unpaid internships should be of a fixed duration, established prior to the outset of the program, and generally should not be used as "trial periods" for individuals who expect to be employed at the conclusion of the internship.

Back To Top