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## Supreme Court Overturns Hundreds of NLRB Decisions

For 27 months prior to March 27, 2010, the National Labor Relations Board operated with only two members appointed to its usual five member panel. During this time the Board issued approximately 600 decisions. The U.S. Supreme Court effectively vacated all of those rulings with its 5-4 opinion in *New Process Steel v. NLRB*, No. 08-1457 (2010) issued on June 17, 2010.

During the time in question the Board only had two members – Wilma Liebman and Peter Schaumber. These two members were on the opposite ends of the political spectrum, and they generally only decided cases when both of them could agree as to the outcome. The Board is designated to have five members, but there were three vacancies due to Congress' failure to confirm appointees.

The Board had taken the position that because statutory law allowed it to delegate authority to decide cases to a three member panel that two members could constitute a quorum. The Court disagreed stating that the statute did not allow for an overall two member quorum.

Because the Board was only issuing decisions where Members Liebman and Schaumber could agree it had built up a serious backlog of cases to be decided. Now, all work the Board has accomplished in over a two year period has been negated. In essence the NLRB has been closed for business for 27 months.

Any employer that had a NLRB decision affecting it between January 2008 and March 2010 needs to revisit that decision because it is likely now void. In addition, employers should keep a wary eye on the newly constituted NLRB which now has four members and is heavily tilted towards unions. The Board has a lot of work to accomplish, and many new decisions dramatically affecting the balance of rights between unions and employers are likely forthcoming.

Questions about defending against union organizing may be directed to Tom Scroggins at (205) 633-0227.

## Supreme Court Proves Cautious on Employer Searches of Employee Electronic Communications

In the modern era, workforce employee's personal and business lives intersect more than ever before. Employees use Facebook to communicate both personal and work-related messages sometimes while at work, they use employer-provided smartphones both to conduct business and as their primary personal phone, and many work from home. As this situation has developed over the last 15 years, the line between what is privately personal and what is open to scrutiny by employers has become quite thorny. The U.S. Supreme Court recently waded into this briar patch and came out with no clear answers for employers.

In *City of Ontario v. Quon*, the employee was a police officer and SWAT team member who was issued a city-owned pager for use in alerting and organizing SWAT members in emergencies. The pagers had a monthly usage limit on them. The officer regularly exceeded this limit, and initially it was resolved with him just paying the overage charges. Ultimately, his supervisor decided to audit the messages by reviewing them to determine if the overages were due to work-related messages or personal use. This audit proved to be embarrassing for the officer revealing a great deal of personal use including many sexually explicit texts to his wife and another woman that he worked with at the police department.

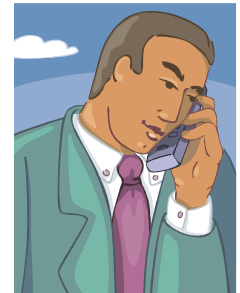
The employee sued alleging, among other things, that his Fourth Amendment right to be secure against unreasonable searches and seizures by the government was violated. Initially the City won at the trial court level, but the Ninth Circuit Court of Appeals ruled against the City holding that there were less intrusive ways for the City to satisfy its legitimate work-related concerns than reviewing the actual text of the messages. The City then appealed to the U.S. Supreme Court.

The Supreme Court reversed and ruled in favor of the City holding that the City need not choose the least intrusive search – only that it needed to choose a reasonable search. It stated that the precautions the City took, which included redacting all messages sent outside the officer's work hours and only reviewing two months of messages, indicated the search was reasonable. The Court also focused on the reason for the search and indicated that had the search been initiated to determine if the officer was wasting time then it might have been unreasonable. But because the search was initiated to determine if the overages should have been paid by the City then it was reasonable.

The Court reviewed a number of employee privacy related decisions from the last 20 years and elected not to set forth any concrete, discernable guidelines for employers to follow in addressing employee privacy concerns. It was obviously concerned with setting forth such tests now while the role of social media in the workplace and other technological advances remains unsettled.

It is important to note that this decision has particular importance to public employers whose employees have Fourth Amendment rights against unreasonable searches and seizures. It has limited application to private employers who are not similarly bound. However, it does indicate the Court will be sensitive to employer's needs to monitor the usage of its electronic resources even when used by the employee for dual purposes – business and personal. Private employers would still be wise to carefully plan and execute any action involving the review of employee communications that would likely lead to private information.

If you have any questions about investigating your employee's communications or your organization's electronic communications policy please contact Tom Scroggins at (205) 633-0227.



*“...it does indicate the Court will be sensitive to employer's needs to monitor the usage of its electronic resources even when used by the employee for dual purposes...”*

## DOL Revises Many Child Labor Law Provisions

On May 20, 2010, the DOL announced revised child labor regulations. The final regulations can generally be described as doing three things: providing detailed descriptions of hazardous occupations where child labor is prohibited, setting conditions under which underage workers

can participate in work-study programs, and increasing the maximum penalty assessed for child labor violations resulting in the death or serious injury of a young worker. The revised

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maximum penalty is \$50,000 for each violation or \$100,000 for repeated or willful violations.

Under the current Fair Labor Standards Act, the minimum age for nonagricultural workers is 16, but the Secretary of Labor may provide by regulation for workers age 14 and 15 to work in suitable occupations other than manufacturing and mining. Additionally, workers between the ages of 16 and 17 may generally work without hour or time limitations except under certain circumstances.

The new regulations, which went into effect on July 19, 2010, include, among others, these interesting provisions:

- New prohibited occupations for children under 18: forest firefighting, forestry services, operating power-driven chain saws and wood chippers.
- Ban on employment of 14- and 15-year olds in youth peddling occupations such as door to door sales. The ban does not apply

to legitimate fundraising activities such as those conducted by the Girl Scouts.

- Young workers are allowed to be employed in work-study programs for up to 18 hours per week.
- Changes the law which previously prohibited 14- and 15-year olds from entering freezers and meat coolers; now, these young workers can enter momentarily to retrieve items.
- Permits 16- and 17-year olds to operate pizza dough rollers and some mixers.
- Allows 15-year-olds to work as lifeguards.

The DOL next plans to turn its attention to issuing regulations on child labor in the agricultural sector. Additional questions about employers' requirements under the DOL's new child labor law regulations may be directed to Brooke Nixon at (205) 633-0236.



## DOL Announces Anything Goes When It Comes to “Son or Daughter” Relationship Under the FMLA

In a move designed to placate the non-traditional family support of the current administration the U.S. Department of Labor announced that essentially any intention to be the primary caregiver for a child will suffice as qualifying the child as a “son or daughter” for the purposes of taking FMLA leave. An actual legal or biological relationship with the child is not necessary.

The FMLA allows employees to take off up to 12 weeks unpaid leave off to care for the serious health conditions of their minor children or for the adoption or birth of a child. The actual definition “son or daughter” in the FMLA has always been a “biological, adopted, or foster child, a stepchild, a legal wards, or a child of a person standing *in loco parentis* . . . .” The meaning of *in loco parentis*, a Latin phrase that literally means “in the place of a parent,” is subject to some interpretation and has provided the Department of Labor the room it needed to expansively interpret what kind of relationship with the child would be required for the FMLA to be implicated.

In announcing the Administrator’s Interpretation No. 2010-3 on June 22, Secretary of Labor Hilda Solis stated, “No one who steps in to parent a child when that child’s biological parents are absent or incapacitated should be denied leave by an employer because he or she is not the legal guardian. No one who intends to raise a child should be denied the opportunity to be present when that child is born simply because the state or an employer fails to recognize his or her relationship with the biological parent.” The move is particularly helpful to the lesbian, gay, bisexual, and transgender community whose relationships with children they may be raising are often not recognized under state law.

The interpretation states that even if a child has a biological parent in the home or has both a mother and father present, the child could still be the “son or daughter” of an employee who lacks a biological or legal relationship with the child for FMLA purposes. In fact, a child could have any number of parents for FMLA purposes. As for the employer being able to verify the existence of some kind of relationship, the DOL

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says that a simple statement asserting the requisite family relationship is all that is needed.

This interpretation seems ripe for abuse by employees. Without any actual legal or biological relationship required, employers will essentially be forced to take their employee’s word for whether they will be the primary caregiver for the child in question via the simple written statement the interpretation proposes. One easily foreseeable scenario

would be an employee who wants to take time off to care for the child of a family member (or just a friend even!) who has been called to active duty military. Obviously no actual familial relationship exists, so the employer will just be required to trust the employee that such is the situation.

If you have any questions regarding the Family and Medical Leave Act or your organization’s compliance with it contact Tom Scroggins at (205) 633-0227.

*“...employers will essentially be forced to take their employee’s word for whether they will be the primary caregiver for the child in question...”*

## Grandfathered Health Plans? What’s Next?

The Patient Protection and Affordable Health Care Act (PPACA), signed into law by President Obama on March 23, 2010, authorized the Departments of Health and Human Services, Labor, and the Treasury to promulgate regulations allowing existing group health insurance policies to continue as *grandfathered* under the new statute. The real questions employers have are (1) what is a grandfathered plan? and (2) what are the benefits of having a grandfathered plan?

### 1. What is a grandfathered plan and how does it lose grandfathered status?

A grandfathered plan is an insured or self-insured group health plan offered by an employer that was in existence on March 23, 2010. A participant’s family members, even if enrolled after March 23, 2010, are covered under the grandfathered plan, as long as the plan permitted family coverage on March 23, 2010. Additionally, new participants may be enrolled after March 23, 2010, in a grandfathered plan. Congress claims that the intent of this provision was to allow individuals to keep their present health care coverage.

On June 17, 2010, interim final regulations were issued and fortunately they contain coordinated rules for determining when changes are sufficient to cause a plan to lose its grandfathered status. Below is a list of those changes:

- \* The elimination of all or “substantially all” benefits or a “necessary element” to diagnose or treat a particular condition.

⇒ Example: A plan that eliminated all benefits for cystic fibrosis (regardless of the small percentage of beneficiaries affected) would lose grandfathered status.

- \* Any increase in a cost-sharing requirement based on percentage (such as coinsurance).
- \* Fixed-amount requirements other than copayments may not be increased above the rate of medical inflation plus 15%. Copayment increases may not be raised above medical inflation plus 15% or five dollars increased by the rate of medical inflation.
- \* Certain changes to annual and lifetime limits.
- \* Any employer who decreases its contribution rate toward a level of coverage by more than 5% (below its contribution rate on March 23, 2010).
- \* Entering into any new policy, certificate, or contract of insurance (rather than renewing an existing policy).

### 2. What are the benefits of having a grandfathered plan?

Once an employer knows what a grandfathered plan is and how to keep it that way, it has to decide if it is really worth it. First, if the participant was enrolled in the plan on March 23, 2010, the plan will satisfy the individual mandate to maintain minimal



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## Grandfathered Health Plans? What's Next?

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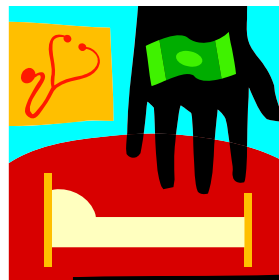
essential coverage. Additionally, grandfathered plans are exempted from:

- \* The requirement to cover, without imposing cost-sharing requirements on participants, various preventive care benefits.
- \* The requirement to comply with certain non-discrimination requirements.
- \* The requirement to incorporate an external review into the benefit claims and appeals process.
- \* The requirement to adopt a program of auto-enrollment for eligible employees.
- \* For self-insured grandfathered plans, the requirement to comply with new "cost-sharing" restrictions.
- \* The requirement to submit annual reports to the Department of Health and Human Services.

However, even grandfathered plans have to comply with certain provisions of the PPACA,

including requirements on annual and lifetime limits, restrictions on rescinding coverage, rules on dependent coverage, coverage of pre-existing conditions, and beginning for plan years after 2014, limitations on waiting periods, the requirement to give at least 60-days advance notice of proposed benefit changes, the requirement to report the cost of coverage on participants' Forms W-2, and the requirement to notify certain employees of the health care exchanges.

In the coming months, the employer community will hear more and more about the requirements of the PPACA and the word "grandfathered" may even enter into common workplace and casual conversations. It is important to know if your organization has a grandfathered health plan, the benefits of the same, and what you have to do to keep it that way. Additional questions about grandfathered health plans or other aspects of the Patient Protection and Affordable Health Care Act may be directed to Brooke Nixon at (205) 633-0236.



## Speakers Available



Members of the Tanner & Guin, LLC Workplace Law Group regularly speak before trade associations, business groups, and clients. If you have questions about any programs, please feel free to contact any member of the Workplace Law Group; or if you would like a copy of the handout materials from any seminar, please contact Sharon Creel, Practice Group Assistant, at (205) 633-0233 or e-mail [screel@tannerguin.com](mailto:screel@tannerguin.com).

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