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Union Membership is Rising

Even as unions are making their case before Congress that they must have the Employee Free Choice Act (EFCA) to survive, statistics show union membership is increasing without the elimination of the secret ballot election that EFCA would bring. The U.S. Department of Labor's Bureau of Labor Statistics recently released a bulletin discussing the change in union membership from 2007 to 2008. In 2007, union members accounted for 12.1 percent of employed wage and salary workers. This percentage increased to 12.4 percent in 2008.

The 0.3 percent increase is attributable to 428,000 new employees joining a union in the past year. The total number of workers belonging to a union is now 16.1 million. Additionally, 1.7 million workers were represented by a union in 2008 despite the fact that they were not members of the union themselves.

Some noteworthy statistics from the report demonstrate that in 2008 government workers were nearly five times more likely to belong to a union than private sector employees. Also, among various occupations, workers in the education, training, and library fields had the highest unionization rates at 38.7 percent.

Sales and related occupations had the lowest unionization rate at 3.3 percent. The Bureau also found differing rates of unionization among varying races with statistics showing that black workers were more likely to be union members than were white, Asian, or Hispanic workers.

Lastly, when unionization rates were broken down by states the survey revealed that New York had the highest union membership rate (25.9 percent) and North Carolina had the lowest rate (3.5 percent). In 2008, 9.8 percent of Alabama's workforce, or 181,000 workers, were union members. This figure is up from 2007 when the State was at 9.5 percent, or 180,000 employees.

Union membership has slowly crept up over 2008 demonstrating employees have an increasing interest in joining unions. This indicates a potential for an explosive increase in union membership if EFCA passes and effectively eliminates an employer's ability to accurately educate its employees about the pros and cons of union membership. If you have any questions about unions or employment-related matters, please contact Tom Scroggins at (205) 633-0227.

Congress Extends Deadlines for Employees to Sue for Pay Discrimination

One of the more strikingly significant pieces of employment legislation in recent history became the first bill signed into law under President Obama's administration, and all with

very little fanfare or press. The Lilly Ledbetter Fair Pay Act relieves employees of the obligation to file a charge of

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Congress Extends Deadlines for Employees to Sue for Pay Discrimination

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discrimination within 180 of an alleged discriminatory pay decision and instead extends the time to 180 days from the last affected paycheck or retirement payment.

President Obama signed the bill into law on January 29, 2009, but the act is retroactive to May 28, 2007, the day before the U.S. Supreme Court decided the case that sparked the law. Employers may now be required to defend pay decisions made 20 to 30 years ago. This could be a very daunting task in many situations where the decision-makers failed to create a record of their decision-making process and have forgotten it, have left the company, or have died. Some employers could find it nearly impossible to explain why someone did not get a particular raise or promotion or received such a bad performance evaluation so long ago.

The law is designed to overturn a 2007 U.S. Supreme Court decision, *Ledbetter v. Goodyear*

Tire & Rubber Co., which required employees to follow the statutory language by filing a charge of discrimination within 180 days of the alleged discriminatory act – such as failing to give a raise. That case arose from Goodyear’s tire plant in Gadsden, Alabama, where Lilly Ledbetter claimed that she was paid less than her male peers over the course of her two decade career and then sued following her retirement.

Although employers can do little about its documentation of events that occurred 20 years ago, they can and should make sure that the decision-making process regarding promotions, raises, demotions, reductions in pay, and job evaluations that affect pay are currently being documented. Such documentation may be the only evidence available if an employee claims the decision is discriminatory 25 years from now, which is a definite possibility under the Lilly Ledbetter Fair Pay Act.

“...make sure that the decision-making process regarding promotions, raises, demotions, reductions in pay, and job evaluations that effect pay are documented.”



Eleventh Circuit Interprets FLSA's Outside Sales Exemption

The Fair Labor Standards Act (FLSA) is an extensive statutory scheme which mandates that employers adhere to a myriad of overtime requirements and also provide certain employees a minimum wage. Shortly after the FLSA was passed, the Supreme Court described it by stating, “The Fair Labor Standards Act was designed to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day’s pay for a fair day’s work.” However, FLSA section 213(a) (1) provides a complete minimum wage and overtime pay exemption for “any employee employed in the capacity of outside salesman.”

In *Gregory v. First Title of America, Inc.*, this outside sales exemption was the focus of the case. The employee appealed from a ruling by the Middle District of Florida that the employee was not entitled to overtime compensation because she was exempt under the “outside salesman” exception in the FLSA. The employee argued that she did not fall within the outside sales exemption because she was employed as a marketing representative and she never actually consummated a sale. Specifically, the employee contended that she was merely engaged in *promoting* her employer’s services and *stimulating* sales, rather than actually making any sales.

To support her argument, the employee cited a section of the FLSA which provides, in part, that “[p]romotion activities directed toward consummation of the employee’s own sales are exempt . . . [but] [p]romotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.” The employee urged that this language supports her position that she only stimulated sales that were ultimately carried out by others.

To qualify for a statutory exemption, the FLSA provides that an employee’s “primary duty” must be the performance of exempt work. Citing the factors of the “primary duty” test, the employer contended that the employee’s “primary duty” was bringing in or obtaining orders for the employer and that her compensation was tied directly to orders for title services that ultimately closed. Therefore, according to the employer, the employee was engaged in the performance of exempt work while she was employed.

The Court first noted the two-prong test of the outside sales exemption:

An outside sales employee is an employee:

- (1) Whose primary duty is:

“To qualify for a statutory exemption, the FLSA provides that an employee’s ‘primary duty’ must be the performance of exempt work.”

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Eleventh Circuit Interprets FLSA's Outside Sales Exemption

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- (i) making sales within the meaning of the Act, or
- (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

Both parties conceded that the second prong of the test was met. Next, the Court noted that a job title alone was insufficient to conclusively establish an employee as exempt. The Court also stated, "[t]he word 'services' extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order." Accordingly, if the Court determined that the employee sold or took orders for title insurance services, which were performed for the customer by the employer, then she would be within the ambit of the outside sales exemption.

To make this determination, the Court noted that the primary duty test required it to consider a number of factors such as "the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing the exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." Applying these factors to the case before it, the Court concluded that the employee's primary duty was to obtain

orders for the employer's title insurance services, i.e., her job was to bring in orders. Thus, focusing on prong (i) above, whether the employee obtained orders for services, as opposed to prong (ii) above, whether she made sales within the meaning of the Act, the Court noted the following as important facts in determining the employee's primary duty:

[The employee] obtained commitments to buy (orders for [the employee's] title insurance service) and, most importantly, was credited with the sale. She was hired for her prior sales experience and brought a book of clients with her. . . . All of her efforts were directed towards the consummation of her own sales and not towards stimulating sales for [her employer] in general. . . . As opposed to conceiving of [the employee] as "paving the way" for others to consummate the sale, we view her as acting more as a conduit through which orders for services flowed.

Consequently, the Court concluded that the district court correctly determined that the employee met the requirements of the Fair Labor Standards Act's outside salesman exemption and so was not entitled to overtime compensation.

Employers subject to the FLSA must be familiar with the Court's interpretation of the FLSA's exemptions, and the outside sales exemption is one that is frequently claimed by employers but often contested. The Eleventh Circuit encompasses Alabama, Florida, and Georgia. Questions about the outside sales exemption or other Fair Labor Standards Act issues may be directed to Brooke Nixon at (205) 633-0236.



Paid Sick Leave Initiative Gaining Momentum in Congress

Ever since the passage of the Family and Medical Leave Act in 1993, there have been rumblings about a federal law mandating that employers provide some minimum amount of paid sick leave. That may very well become a reality with the Healthy Families Act (H.R. 2460) (HFA) which was introduced in Congress on May 18.

The HFA, which is sponsored by Rep. Rosa DeLauro, D-Conn., and has 101 co-sponsors in the House of Representatives, would require

employers to provide at least seven days of paid sick leave each calendar year. Seizing on the recent H1N1 virus (formerly known as the "swine flu") scare, Rep. DeLauro released a statement in support of the HFA stating that public health agencies had urged sick people to stay home from work or keep their sick children home from school and day care, but this was impossible for many Americans under current law forcing employees to choose between their job or health.

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"...public health agencies had urged sick people to stay home from work or keep their sick children home from school and day care..."

Paid Sick Leave Initiative Gaining Momentum in Congress

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The HFA would require employers with at least 15 employees (same employee number threshold as Title VII of the Civil Rights Act of 1964) to:

- Provide up to at least seven days of paid sick leave;
- Guarantee a minimum of one hour of paid sick leave for every 30 hours worked up to a cap of 56 hours (the equivalent of seven eight-hour work days);
- Allow employees to begin accruing the leave on the very first day of work (no waiting period) and start using the leave on the 60th day of work;
- Allow employees to use the leave for either their own illness or that of an immediate family member;
- Allow domestic violence victims to use the leave to appear in court or for counseling; and

- Permit carryover of unused leave from one year to the next subject to the 56 total hours cap.

The HFA does not require the accrued but unused leave to be converted to cash at the end of employment, meaning any unused leave is forfeited at the end of employment. Opponents of the HFA argue that now is not the time to dictate a paid leave policy on businesses in the middle of the worst economic crisis in 80 years and that employers should be allowed flexibility to set benefits in a manner dictated by the labor market for hiring and retaining quality employees.

Sen. Edward Kennedy, D-Mass., intends to introduce a companion bill in the Senate, and President Obama has indicated he would sign the bill if passed. Similar bills have been introduced in prior Congresses but lacked support for passage and would have faced a veto from the President even if they had. These obstacles may have been overcome in this Congress, and employers need to be aware that the HFA has a significant chance of becoming law prior to mid-term electioneering beginning.

“Opponents of the HFA argue that now is not the time to dictate a paid leave policy on businesses...”

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Speakers Available



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