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Annual Legal Update

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**NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING
IN HIGHER EDUCATION AND THE PROFESSIONS**

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“Academic Bargaining in an Era of Constraint”

Annual Legal Update

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Interplay of Discrimination Statutes and Arbitration

Supreme Court decision in *14 Penn Plaza v. Pyett*

On April 1, 2009, the Supreme Court issued its decision in *14 Penn Plaza v. Pyett*, 556 U.S. --- (2009), a case that involves the question of whether an arbitration provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims under the Age Discrimination in Employment Act is enforceable. The Second Circuit had found this type of clause unenforceable (See *14 Pyett v. Pennsylvania Building Co.*, 498 F. 3d 88, [2nd Cir., 2007]). The Supreme Court, in a 5-4 decision, reversed the Second Circuit and held that the clause was enforceable. Justice Clarence Thomas wrote the majority opinion in which Chief Justice Roberts and Justices Scalia, Alito and Kennedy joined.

The particular clause in the union contract in *Penn Plaza* stated:

There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including but not limited to claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code... or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

Justice Thomas observed that the employer and union had freely negotiated this clause and, under the National Labor Relations Act, the clause was clearly a bargainable topic. It is recognized that unions have wide latitude to agree upon some provisions in a collective bargaining agreement in exchange for concessions elsewhere. Thus, the contract clause in this case must be honored, according to the Court, unless the ADEA itself removes this particular class of grievances from the National Labor Relations Act's broad sweep. The ADEA does not preclude arbitration of claims brought under the statute, and the Court had previously so held (see *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, where it was held that an individual employee may agree to waive his right to a judicial forum in favor of arbitration). Thus, there was no statutory impediment to the parties agreeing on such a clause.

The Court distinguished its earlier decision in *Alexander v. Gardner-Denver*, 415 U.S.36 (1974). In that case, an employee who was discharged filed a grievance claiming there was no just cause for the termination and, further, that he was the victim of race discrimination. The matter was heard in arbitration. The arbitrator ruled that he was discharged for just cause but made no reference to the racial claim. Afterwards, when the

employee sought relief through the courts under a Title VII claim the lower district court issued a decision, affirmed by the Court of Appeals, which granted summary judgment to the employer, that the claim of racial discrimination had been submitted to the arbitrator and resolved adversely to the plaintiff. The Supreme Court reversed, on the ground that the arbitration was not preclusive because the union contract did not cover statutory claims. The collective bargaining agreement did not mandate arbitration of statutory antidiscrimination claims, and therefore the principle of “election of remedies” did not apply to that employee’s dual pursuit of arbitration and Title VII claims in court. The arbitrator had not been given specific authority in that case to resolve statutory claims. The Court also expressed concern about whether arbitrators in general could adequately deal with the statutory issues raised in discrimination claims.

However, Justice Thomas found that *Gardner-Denver*, and its progeny, only dealt with the issue of “whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims.” [556 U.S. *slip op.* at 14.] In contrast, the case before the Court now involved an arbitration provision that expressly covered **both** statutory **and** contractual discrimination claims. While the Court still held to the view that the “federal antidiscrimination rights may not be prospectively waived,” the decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace discrimination; rather, it only defines the forum in which those rights can be asserted. In other words, by agreeing to arbitrate a statutory claim, a party does not relinquish a “substantive right afforded by the statute.” [*Slip op.* at 16.]

The majority also noted that the previous skepticism about the use of arbitration to vindicate statutory antidiscrimination claims, noted in *Gardner-Denver*, rested on a “misconceived view of arbitration that the Court has since abandoned.” The Court said that “these misconceptions have been corrected,” citing with approval the use of arbitration to deal with complex litigation matters, and noting that “an arbitrator’s capacity to resolve complex questions of fact and law extends with equal force to discrimination claims brought under the ADEA.”

Moreover, the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration. Parties “trade the procedures and opportunities for review of the courtroom for the simplicity, informality and expedition of arbitration... In any event, “it is unlikely... that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as RICO and antitrust claims.” [*Slip op.* at 20.]

Finally, the majority was untroubled by the view, mentioned in *Gardner-Denver* as dicta and asserted by the respondents, that the union has exclusive control over the manner and extent to which an individual grievance is presented in arbitration, and may pursue some grievances more vigorously than others. The Court said “we cannot rely on

this judicial policy concern as a source of authority for introducing a qualification into the ADEA that is not found in its text... Congress is fully equipped to identify any category of claims as to which agreements to arbitrate will be held unenforceable.” [Slip op. at 21.] The Court also noted that the nature of labor unions is premised on majority rule and may work on occasion to the disadvantage of an individual.

In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority (cite omitted). It was Congress’ verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands. Respondents’ argument that they were deprived of a right to pursue their ADEA claims in federal court by a labor union with a conflict of interest is therefore unsustainable; it amounts to a collateral attack on the NLRA.

Besides, Justice Thomas notes, there are checks on unions, such as the fact that they cannot breach their duty of fair representation or that they themselves can be subject to lawsuits from members claiming that they discriminated against them. The Court did express some concern about those situations where a union decides not to pursue arbitration at all for an alleged victim of discrimination, but noted that this particular topic was not adequately addressed below or briefed, and “we are not positioned to resolve in the first instance whether the CBA allows the Union to prevent respondents from “effectively vindicating” their “federal statutory rights in the arbitral forum.”

In a dissenting opinion written by Justice Souter, and joined in by Justices Stevens, Breyer and Ginsburg, the dissent read *Gardner-Denver* more expansively than the majority and argued under the principles of *stare decisis* that its essential holdings should be affirmed again. The dissent saw *Gardner-Denver* as holding that “the rights conferred” by Title VII (with no exception for the right to a judicial forum) cannot be waived as “part of the collective bargaining process.” One of the key issues separating the majority from the dissent is that the latter group of justices saw the right to a judicial forum as a **substantive right** that cannot be bargained away by a union, while the majority does not hold to the same view.

The majority seems inexplicably to think that the statutory right to a federal forum is not a right, or that *Gardner-Denver* failed to recognize it because it is not “substantive.” But *Gardner-Denver* forbade union waiver of employees’ federal forum rights in large part because of the importance of such rights and a fear that unions will too easily give them up to benefit the many at the expense of the few, a far less salient concern when only economic interests are at stake. [*Dissent, Slip op* at footnote 2]

Other cases on similar theme

In *Richardson v. Commission on Human Rights*, 2008 U.S. App. LEXIS 15206 (2nd Cir., 2008), the Second Circuit ruled that a Connecticut agency and a union representing its employees did not violate Title VII by agreeing on and complying with a provision in the union contract requiring employees to choose between grievance arbitration of discrimination claims or administrative and judicial remedies.

The clause in question stated that “disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with the Connecticut Commission on Human Rights and Opportunities arising from the same common nucleus of operative fact.” The plaintiff, an African-American, was ironically employed by the CHRO, and after she was fired, she filed a claim with the Commission and a union grievance. The union refused to arbitrate her claim, citing the contract language prohibiting such dual forums. The plaintiff ultimately sued both the union and the employer.

The U.S. District Court for the District of Connecticut granted summary judgment to the State and to the union, finding that complying with the collective bargaining agreement’s choice-of-remedies provision was not retaliatory.

At the Court of Appeals level, the Court said that the Supreme Court’s decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) does not preclude a union and an employer from agreeing that employees must forego their right to arbitrate a grievance if they bring a lawsuit in federal court arising out of the same facts. Judge John Walker, writing for the Court, said that the plaintiff remained free to file a charge with the EEOC as well as a court action. The judge saw the union contract language as “sensible” in that it does not force the employer to defend itself twice on the same facts and issues, and it does not take away the right of the employee to file with the EEOC or in court if he or she desires.

More technically, the Court did not construe the contract provision as an “adverse employment action” by either the employer or the union against the plaintiff. The Court cited with favor an earlier decision in *United States v. New York City Transit Authority*, 97 F. 3d 672 (2nd Cir., 1996), where the court had upheld an agency policy that it would not process internal discrimination complaints once an employee filed an administrative charge or lawsuit. Like the Transit Authority’s policy, the collective bargaining provision in the instant case “avoids duplicative proceedings in the two for a [system] maintained by the employer for adjudicating claims of discrimination without affecting a complainant’s work, working conditions, or compensation.” The provision correctly “requires that the employee make a concrete choice, at a specific time, between filing a state claim with the CHRO and having the union pursue his or her grievance to arbitration.”

This case is specifically at odds with the Seventh Circuit, which in *EEOC v. Board of Governors*, 957 F. 2d 424 (7th Cir., 1992) struck down a comparable collective bargaining agreement provision as retaliatory and illegal.

Another case that came out last year in the area of grievance provisions versus judicial remedies was *Davenport v. Richfood, Inc.* (E.D. Va., No. 07-595, 6/13/08). In *Davenport*, the U.S. District Court for the Eastern District of Virginia ruled that an African-American grocery store employee was not required to arbitrate his race discrimination claims under the union contract because the contract “did not clearly and unmistakably” waive his right to sue in federal court.

In *Wright v. Universal Maritime Services*, 525 U.S. 70 (1998), the Supreme Court did allow for the possibility that a union contract can waive an employee’s right to file a Title VII claim in federal court, but only when the waiver language in the contract is “clear and unmistakable.” [See also *Alemann v. Chugach Support Services*, 485 F. 3d 206 (4th Cir., 2007)] In *Davenport*, by contrast, the language was vague.

The plaintiff had filed multiple grievances against his employer over false accusation of theft, unfair work assignments, and unfair discipline. But he never pursued them to arbitration, nor did he ever file a grievance explicitly under the anti-discrimination article of the contract, which banned discrimination “under applicable law.” When *Davenport* filed his lawsuit, the company argued in its summary judgment motion that the court should compel arbitration under the union contract in light of the fact that the plaintiff had not exhausted his administrative internal remedies.

The Court said that a waiver of the right to sue in court can be clear and unmistakable if 1) the arbitration clause in the contract clearly encompasses Title VII claims; or 2) if there is other language in the contract that makes it clear that Title VII claims are covered by the arbitration provision. In the instant case, the contract did not specifically incorporate Title VII by reference. Second, the broad language about banning discrimination under “applicable law” was too vague to unmistakably incorporate Title VII *in toto* into the collective bargaining agreement.

Preemption

In November of 2007, the Supreme Court had agreed to consider whether a California law that bars employers from using state funds to oppose unionization is preempted by the National Labor Relations Act. [*Chamber of Commerce of the United States v. Brown*, U.S. No. 06-939, cert granted 11/20/07.] The Ninth Circuit in a 12-3 decision the previous year had held that the law was not preempted because “California’s exercise of its sovereign power to control the use of its funds does not conflict with

national labor policy as expressed in the NLRA [463 F. 3d. 1076, 180 LRRM 2641 (9th Cir. 2006)].

In *Chamber of Commerce v. Brown*, 554 U.S. --- (2008), the Supreme Court reversed the Ninth Circuit and held that the California statute **was indeed preempted** by federal law.

The California statute in question (A.B.1889) established a state policy “not to interfere with an employee’s choice about whether to join or to be represented by a labor union” by subsidizing either side of the argument. Thus, the law prohibited all recipients of state grants and private employers that receive more than \$10,000 annually in state funds from using “any of those funds to assist, promote or deter union organizing,” which was further defined as “any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding [w]hether to support or oppose a labor organization that represents or seeks to represent those employees... or [w]hether to become a member of any labor organization.” An employer who qualified under this language could not use state funds for “any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning or coordination of, or carrying out, an activity to assist, promote, or deter union organizing.” The employers also would have been required to keep detailed records to show the funds have not been used for improper purposes. The law further created a presumption that if state and nonstate funds were commingled in any way, the state funds were used for an illegal purpose.

Violations of the law would not merely involved loss of state funds but included fines and treble damages, and the employer could be sued by both the State and by private taxpayers.

The various groups seeking Supreme Court review contended, among other things, that the Ninth Circuit’s decisions conflicted with the Second and Seventh Circuit decisions in *Healthcare Association of NY State v. Pataki*, 471 F.3d 87, 180 LRRM 3265 (2006) and *Metro Milwaukee Assn of Commerce v. Milwaukee County*, 431 F. 3d 277, 178 LRRM 2609 (7th Cir., 2005) respectively, both of which **found preemption** for similar state laws.

In *Chamber of Commerce v. Brown*, 554 U.S. --- (2008), the Court first visited the question of preemption in general, noting that there were basically two types. The first, the so-called *Garmon* preemption [*San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)] was intended to “preclude state interference with the National Labor Relations Board’s interpretation and active enforcement of the integrated scheme of regulation established by the NLRA.” To this end, states cannot regulate activity that “the NLRA protects, prohibits or arguably protects or prohibits.” [*Wisconsin Dept. of Industry v. Gould*, 475 U.S. 282, 286 (1986).]

The second, known as *Machinists* pre-emption [*Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976)] forbid both the NLRB and the states from regulating conduct that Congress intended to be “unregulated” and “left to be controlled by the free play of economic forces.”

In the *Chamber of Commerce* case, the Court held that the statutes in question were pre-empted under the *Machinists* theory “because they regulate within a zone protected and reserved for market freedom.”

The Court began its analysis by reviewing the history of the National Labor Relations Act, early NLRB decisions that restricted employer speech, subsequent Supreme Court reversals of such NLRB decisions and, finally, the Taft-Hartley Amendments of 1947 that codified the employer’s right to engage in free speech. [29 U.S. Section 158 (c).] Section 8 (c) of the Act not only implemented the First Amendment right but its enactment “also manifested a congressional intent to encourage free debate on issues dividing labor and management.” [quoting *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966)]

The Court wrote:

This explicit direction from Congress to leave noncoercive speech unregulated makes this case easier, in at least one respect, than previous NLRA cases because it does not require us “to decipher the presumed intent of Congress in the face of that body’s steadfast silence.” [*Sears, Roebuck v. Carpenters*, 436 U.S. 180, 188 (1978).] California’s policy judgment that partisan employer speech necessarily “interferes with an employee’s choice about whether to join or be represented by a labor union” [2000 Cal.Stats. ch 872, Section 1] is the same policy judgment that the NLRB advanced under the Wagner Act and that Congress renounced in the Taft-Hartley Act. To the extent [other sections of the California law] actually further the express goal of AB 1889, the provisions are unequivocally pre-empted.

The Court then dealt with the arguments from the Court of Appeals that no preemption existed because (1) the spending restrictions only applied only to the use of state funds; (2) Congress did not leave a zone of activity free from *all* regulation; and (3) California modeled AB 1889 on federal statutes.

On the first point, the Court explained that, while a state can engage in some regulation of labor relations in its capacity as a market participant,¹ it cannot engage in such activity as a regulator.

¹ For example, in *Boston Harbor*, 507 U.S.218 (1993), the Court allowed a state agency supervising a construction project to require that contractors abide by any labor agreement they entered into. The Court explained that when a state acts as a market participant with no interest in “setting policy,” as opposed to a “regulator,” it does not offend the preemption principles. The state agency’s actions were tailored to a specific project and aimed to ensure that the project would be completed efficiently and quickly at the lowest cost.

It is beyond dispute that California enacted AB 1889 in its capacity as a regulator rather than a market participant. AB 1889 is neither “specifically tailored to one particular job” nor a “legitimate response to state procurement constraints or local economic needs.” As the statute’s preamble candidly acknowledges, the legislative purpose is not the efficient procurement of goods and services but the furtherance of a labor policy. Although a state has a legitimate proprietary interest in ensuring that state funds are spent in accordance with the purposes for which they are appropriated, this is not the objective of AB 1889. In contrast to a neutral affirmative requirement that funds be spent solely for the purposes of the relevant grant or program, AB 1889 imposes a targeted negative restriction on employer speech about unionization. Furthermore, the statute does not even apply this constraint uniformly. Instead of forbidding the use of state funds for *all* employer advocacy regarding unionization, AB 1889 permits use of state funds for *select* employer advocacy that promote unions. Specifically, the statute exempts expenses incurred in connection with giving unions access to the workplace and voluntarily recognizing unions without a secret ballot election.

The Court was unimpressed with the Court of Appeal’s distinction on the use of funds versus the receipt of funds. The Court of Appeals had noted that the statute does not place any barriers in front of an employer for *receiving* state funds, only on the *use* of such funds. The statute’s heavy compliance provisions and litigation risks “are calculated to make union-related advocacy prohibitively expensive for employers that receive state funds and makes the Act one that effectively reaches beyond the use of funds over which the State maintains some sovereign interest.”

The Court particularly noted the burdensome recordkeeping requirements imposed by the statute, requiring recipients to maintain detailed records sufficient to show that no state funds were used for prohibited purposes; presuming that any funds used on union issues made from “commingled” funds violate the statute; defining “any expense” as including everything from the salaries of supervisors to overhead costs to legal fees. Not only the state, but individuals are allowed to bring injunctive and other actions against employers not in compliance. Prevailing plaintiffs can recover attorneys’ fees and treble damages. As the Court noted, “a trivial violation of the statute could give rise to substantial liability.”

In light of these burdens, California’s reliance on a “use” restriction rather than a “receipt” restriction “does not significantly lessen the inherent potential for conflict” between AB 1889 and the NLRA.” The law forces employers to either forego their Section 8 (c) rights or else refuse the receipt of state funds. In doing so, “the statute impermissibly predicates benefits on refraining from conduct protected by federal law and chills one side of the robust debate which has been protected under the NLRA.”

On the second point, while recognizing that the NLRB has policed a very narrow zone of employer free speech – namely, the prohibition on election eve speeches to captive audiences – the Court felt it was clear that this minor regulation was in

furtherance of ensuring free and fair elections, and further that Congress has denied it the authority to regulate the broader category of noncoercive speech encompassed by AB 1889.

Finally, the Court of Appeals had cited other federal regulations on employer speech, such as the Workforce Investment Act [29 U.S.C. Section 2931 (b) (7)] which prohibits employers from using such funds to promote or deter union organizing. However, while conceding some federal regulation in this area, the Court said that “unlike the states, Congress has the authority to create tailored exceptions to otherwise applicable federal policies and also unlike the states it can do so in a manner that preserves national uniformity without opening the door to a 50-state patchwork of inconsistent labor policies. Consequently, the mere fact that Congress has imposed targeted federal restriction on union-related advocacy in certain limited contexts does not invite the states to override federal labor policies in other settings.”

Religious Institutions and the NLRB

In *Carroll College v. NLRB*, (D.C. Cir., March 19, 2009), the D.C. Circuit refused to enforce an NLRB order to Carroll College in Wisconsin to bargain with the recognized collective bargaining agent of its faculty. The College on appeal argued that because of its religious environment and affiliation with the United Presbyterian Church, it is beyond the Board’s jurisdiction under the authority of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) and *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir., 2002)

The UAW had been certified as the faculty’s representative, despite the College’s arguments to the NLRB that subjecting the College to collective bargaining would substantially burden its free exercise of religion under the Religious Freedom Restoration Act of 2000, 42 U.S.C., Section 2000 bb-1. [*Carroll College*, 345 NLRB 254 (2005).] In the alternative the College had argued unsuccessfully that its faculty were managerial employees under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

On appeal, the College centered its argument on *Catholic Bishop* and its progeny. In *Catholic Bishop*, *supra*, the Supreme Court read the National Labor Relations Act in light of the First Amendment and held that the Board did not have jurisdiction over church-operated schools. In that case, the Court held that for the Board to order collective bargaining may inevitably lead the Board into “an examination of the good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission.” [*Id.* at 502.] In the wake of that case, the NLRB created a framework for analysis that looked to whether or not a school has a “substantial religious character” to determine if it was exempt from jurisdiction. [*Livingstone College*, 286 NLRB 1308, 1309. (1987).] However, in *Great Falls*, *supra*, the D.C.Circuit held that the Board’s approach was exactly the kind of “intrusive inquiry” that *Catholic Bishop* sought to avoid. Instead, the Court fashioned its own three-part test:

1. Does the school “hold itself out” as providing a religious educational environment?
2. Is the school organized as a non-profit?
3. Is the school “affiliated with, or owned, operated or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion?”

The Court saw this as a “bright line” test that would avoid delving into the depth or motive of religious beliefs or doctrinal matters.

The Court held that Carroll College easily satisfied the *Great Falls* test.

The College’s charter documents make clear that it holds itself out to students, faculty and the broader community as providing a religious educational environment. The Articles of Incorporation describe the College’s relationship with the Synod and provide that the College was incorporated “for the purpose of maintaining and conducting itself as a Christian liberal arts college dedicated to God.” The mission statement referred to demonstrating “Christian values by... example.” The Board of Trustees has adopted a “Statement of Christian Purpose,” which declared the college mission to provide “a learning environments devoted to academic excellence and congenial to Christian witness.” The court found that such objectives and statements “easily satisfy the first element of our test [from *Great Falls*.]”

The Regional Director had claimed that the College did not provide “evidence of actual religious influence or control over the college or the education it provides.” The Court said this analysis missed the mark, noting that “in determining whether a school is exempt from the NLRA under Catholic Bishop, the NLRB may not “ask how effective the institution is in inculcating its beliefs.”

To do otherwise and require proof of “actual religious influence or control”...is tantamount to questioning the sincerity of the school’s public representations about the significance of its religious affiliation. This neither the Board nor we may do. See *Great Falls*, 278 F.3d. at 1344 (stating that to avoid “constitutional infirmities,” courts cannot “ask about the centrality of beliefs or how important the religious mission is to the institution.)”

The Court also explained that focusing solely on a school’s public representations is “also a more useful way for determining the school’s religious bona fides,” as “not all students and faculty are attracted to overtly religious environments, so public representations of religious ties come at a cost to the school claiming a *Catholic Bishop* exemption.”

The second and third tests were easily handled by the Court. Carroll College is a non-profit institution and it is also affiliated with a recognized religious organization.

In summary, the Court wrote:

After our decision in *Great Falls*, Carroll is patently beyond the NLRB's jurisdiction. *Great Falls* created a bright line test of the Board's jurisdiction according to which we ask three questions easily answered with objective criteria. From Carroll's public representations, it is readily apparent that the college holds itself out to all providing a religious educational environment. That it is a nonprofit affiliated with a Presbyterian synod is beyond dispute. From the Board's own review of Carroll's publicly available documents... it should have known immediately that the college was entitled to a *Catholic Bishop* exemption from the NLRA's collective bargaining requirements. The Board thus had no jurisdictions to order the school to bargain with the union, and we have authority to invalidate the Board's order even though the College did not raise the jurisdictional challenge below.²

Dues Checkoff Survives Expiration of Contract

In *Local Joint Executive Board of Las Vegas v. NLRB*, (9th Cir., No. 07-73979, 8/27/08), the Ninth Circuit held that a union had not waived its right to bargain over the cessation of dues-checkoff provisions in their collective bargaining agreements upon expiration of those contracts. The Court refused an NLRB order to the contrary.

This was the second time the Ninth Circuit ruled in this matter. Two casinos had contracts with UNITE HERE. When those contracts expired, they unilaterally terminated their dues-checkoff provisions. The NLRB did not find a violation on the grounds that the dues-checkoff provisions were only in effect for the life of the contract, and therefore, the casinos properly ceased adhering to their provisions once the contract expired.

The contract had stated that the deduction of union dues "shall be continued in effect for the term of this Agreement."

In July of 2000, the NLRB had ruled that the termination of dues checkoff is an exception to the prohibition on an employer making unilateral changes. [See 331 NLRB 665 (2000).] The Board had cited considerable precedent in support of its decision, but the dissenters at the time noted that the precedent involved cases where the union security provision was in play, and they were based on the rationale that that the dues-checkoff provision merely implemented the union security clause, which the Board has held must expire at the end of the contract.

In 2002, the Ninth Circuit overruled the Board and said the Board had failed to articulate a reasoned explanation why dues-checkoff would be excepted from the prohibition on unilateral changes in a situation that does not involve a union security clause. [309 F. 3d 587 (2002).]

² Given its disposition of the jurisdictional issue, the Court did not address the managerial employee argument posited by the College.

In *Hacienda Hotel, Inc. Gaming Corp.*, 351 NLRB No. 32 (2007), the Board held that the employer did not violate Section 8 (a) (5) of the Act when it unilaterally discontinued dues-checkoff after the parties' collective bargaining agreements expired. The Board reasoned that in the circumstances of this case, the dues-checkoff clause in the contract "contained explicit language limited the Respondent's dues-checkoff obligation to the duration of the agreements."

The Board based its decision on *Bethlehem Steel Co.*, 136 NLRB 1500 (1962) and its progeny, that an employer's obligation to continue a dues-checkoff arrangement ceases with the end of the contract that created the obligation.

Contrary to the dissent, we find that the language limiting dues checkoff to the duration of the respective collective bargaining agreements explicitly included in the dues checkoff provision itself distinguishes that provision from other contract terms subject to the unilateral change doctrine articulated in *NLRB v. Katz*, 369 U.S. 736 (1962) pursuant to which most contractually established terms and conditions of employment are mandatory subjects of bargaining and cannot be changed unilaterally on contract expiration... In agreeing to this language [that the checkoff continues "for the duration of the agreement"], we find that the Union thereby explicitly waived any right to the continuation of dues checkoff as a term and condition of employment after the expiration of the collective bargaining agreement.

However, the Ninth Circuit disagreed with the Board. The Court first reviewed the fundamental principle of labor law as expressed in *NLRB v. Katz*, 369 U.S. 736 (1962), namely, that, absent a waiver, an employer violates sections 8(a)(1) and (5) of the National Labor Relations Act if it makes a unilateral change in a term or condition of employment on mandatory subjects of bargaining without first bargaining over the relevant term.

To find a waiver based on bargaining history and contract provisions, the Board requires "the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter." [*Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989).] However, because there was no bargaining history presented in this case, the alleged waiver on the dues-checkoff issue is based wholly on the contract language, with the employer arguing that the explicit language of the contract limited the employer's obligations on dues-checkoff "to the duration of the agreement."

On this critical and subtle point, the Court distinguished between contract language under which a term or condition of employment continues "for the duration of the agreement" as opposed to contract language under which a term or condition of employment "terminates" at the end of the contract. The Court wrote that durational language by itself "does not necessarily establish that the union bargained away its rights" and cannot necessarily be equated with "termination" language.

As a matter of plain interpretation, the contractual language that an obligation will “terminate” on expiration of an agreement is simply not equivalent to contractual language that an obligation “shall be continued” “during” the agreement.”

Provisions like the one presented – that the dues-checkoff continues “for the duration of the agreement” – “simply do not amount to a clear and unmistakable waiver of the Union’s statutory rights”. The Court cited several cases to support its position, including *Natico Inc.*, 302 NLRB 668 (1991); *Schmidt-Tiago Construction Co.*, 286 NLRB 342, 366 (1987); and *NLRB v. General Tire*, 795 F. 2d 585, 588 (6th Cir., 1986) – all cases where “continuation for the term of the agreement” was found not to be equated with “termination” of the provision at the end of the contract.

Neutrality Enforcement

In *United Steel, Paper and Forestry, et al v. TriMas Corp.*, 531 F. 3d 531, 7th Cir., 2008), the Seventh Circuit ruled that an employer that signed a neutrality agreement committing itself to remain neutral during any future organizing campaign by the United Steelworkers was required to arbitrate a dispute over the agreement’s coverage of particular plants. The company argued that the agreement did not cover a certain plant in Auburn, Indiana, and thus refused to submit the dispute over that issue to arbitration. The Court ruled instead that the scope of the agreement was a matter of arbitration, noting that “one does not remove issues from arbitration simply by changing the scope of the underlying agreement.” The union filed the action under Section 301 of the National Labor Relations Act and the district court ordered the company to arbitrate the dispute in February of 2007.

The company’s principal argument was that there was an oral sidebar agreement between the company and the union that only selected sites were covered by the agreement, and the Auburn, Indiana, plant was not included in the agreement’s coverage.

Grievability of Changes to Retiree Benefits

While the Supreme Court held³ years ago that retirees are not “employees” within the bargaining unit under the NLRA and thus an employer did not violate its duty to bargain by taking unilateral action as to their benefits, courts have held over the years that unions may have the right to arbitrate in appropriate settings grievances of changes to retiree benefits that affect former members of their unit. [See, for example, *International Union v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir., 1983); *United Steelworkers v. Cannon, Inc.*, 580 F. 2d 77 (3rd Cir., 1978); and *Grievance of Kelly*, 19 VLRB 100 (Vermont LRB, 1996).]

In *Exelon Generation Co. v. IBEW*, 540 F. 3d 640 (7th Cir., 2008), the Seventh Circuit ruled that the IBEW could arbitrate such a dispute over retiree benefits and also ruled that

³ *Chemical & Alkali Workers Local 1 v. Pittsburg Plate Glass Co.*, 404 U.S. 157 (1971)

the union was not required to obtain the consent of almost 6000 retirees before arbitrating the dispute with Exelon over their entitlement to certain retirement benefits. In 2004, Exelon made changes to the retirees' medical benefits. The union filed a grievance over the change, contending the company's changes violated the collective bargaining agreement. The company claimed the matter was not arbitrable because it had no obligation to bargain with the union with respect to current retirees.

The union conceded it had not obtained the consent of all retirees in bringing forth the grievance to arbitration. Indeed, only seven of the retirees consented to representation by the union.

The company filed a complaint in federal court seeking a declaration that the disputes were not arbitrable. The court granted a summary judgment motion in favor of the union, finding that the subject of retiree benefits fell within the scope of the union contract and the union was not required to obtain the approval of all retirees before proceeding with its grievance.

The Seventh Circuit ruled against the company. The court found that in this case the union contract did not define an arbitrable grievance as one merely between the company and an employee, nor did it the agreement expressly restrict arbitration to grievances filed by employees. The key language in this regard read:

The grievance procedure applies to "any dispute or difference... between the Company and the Union or its members as to the interpretation or application of any of the provisions of the Agreement." Exelon had agreed that a dispute exists between it and the Union regarding the interpretation and application of the retiree medical benefit provisions of the MOAs, which are part of the collective bargaining agreement.

In the court's view, this language allowed the union to proceed with claims on behalf of retirees. As for obtaining the consent of all the retirees, the court distinguished this case from one of its earlier decisions where it seemingly required a union to obtain the consent of all retirees. [*Rossetto v. Pabst Brewing Co.*, 128 F. 3d 538 (7th Cir., 1997).] In *Rossetto*, however, there was simultaneous litigation going on that was filed by some retirees independent of a parallel union grievance. Under those circumstances, where the litigation and arbitration involved the same parties and the same claims asserted by the retiree class in litigation and by the union purportedly on the retirees' behalf in arbitration, it was appropriate for the court to restrict the union from representing retirees who did not want their claims arbitrated. No such conflict was apparent in the instant case. In addition, in *Rossetto*, the collective bargaining agreement defined a grievance as one between an employer and employee, thus excluding retirees by definition.⁴

⁴ The *Rossetto* court wrote:

This is not to say a union can never take retirees' claims to arbitration. Although a union has no duty to represent retirees, and retirees need not submit to union representation, retirees are free to make a union their agent if they so choose. And, of course, retiree benefits are a permissive subject of bargaining – a

See also *IBEW v. Citizens Telecommunications Co.*, No. 06-16189, 12/5/08, where the Ninth Circuit held that a union does not need the consent of all retirees before it can arbitrate with the company over a change to the union contract that would effectively cancel retiree medical benefits. The Court distinguished the Rossetto case from the Seventh Circuit, referred to above, and refused to follow the Sixth Circuit ruling in *Cleveland Electric Illuminating Co. v. Utility Workers Union*, 440 F. 3d 809 (6th Cir., 2006), where employer changes to retiree benefits affected both current and retired employees and where the Sixth Circuit ruled that retiree consent was necessary before the union could proceed to arbitration. This decision was based on the facts that 1) retirees could lose their right to pursue claims directly if the union lost in arbitration; and 2) the employer could be faced with numerous retirees' claims if a determination is made that the union is not authorized to act on their behalf. The court therefore held that the union must obtain the consent of retirees to proceed to arbitration on issues of concern to it and the retirees, and that it was the arbitrator's responsibility to establish the nature and extent of the consent requirement.

Walkout Not Protected Concerted Activity

Six drivers who left work without permission to attend union negotiations were not engaged in protected activity according to the U.S. Court of Appeals for the District of Columbia. [*Northeast Beverage Corp. v. NLRB*, -- F. 3d -- D.C. Cir., No. 07-1206, 1/30/09.] In that case, the Court reversed a Board ruling that it was protected activity.

The company was considering closing a plant where the drivers worked. The union and company were holding bargaining sessions to discuss the effects of the closing. The drivers were impatient to find out what their job prospects were going to be, and despite admonitions from union counsel and union business agents, insisted on going to the bargaining session. When management representatives arrived, the drivers introduced themselves and then returned to work and did not stay for the bargaining. The company suspended the drivers, however, since they left work to attend a meeting without permission.

The Board had held that the walkout was protected because it was concerted activity for mutual aid directly related to a labor dispute and did not violate the no-strike provisions of the contract. (See 349 NLRB 1166). However, the Court noted that the drivers' walkout to obtain information from management at the bargaining session about their future employment was not related to an ongoing labor dispute and that the drivers had not compelling reason to be there. As the Court put it, the drivers "simply used work time to engage in union-related activity customarily reserved for non-working time."

Noting that a "labor dispute" under section 2 (9) of the Act is defined as a "controversy concerning terms, tenure or conditions of employment or concerning the

union may bargain for retirees if the employer agrees. What we are saying is that any right District 10 has to pursue arbitration of the retirees' grievance must come from the retirees. [128 F. 3d at 540]

association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms and conditions of employment,” the Court found that the drivers were not engaged in a labor dispute. In this case, the Court said, the drivers “knew their shop steward, who was a member of the Union’s bargaining team, would be at the meeting, was aware of their questions, and would report back to them.” The information the drivers sought would be forthcoming from their representatives and could have been obtained from them during non-working hours.

Union Right to Settle Grievance Without Employee Involvement

In *Ramos v. Tacoma Community College*, 2008 WL 5341855, (9th Cir., 2008), the Ninth Circuit held that a settlement agreement entered into on behalf of an instructor, that released a community college from all claims and causes of action relating to the instructor’s employment for purposes of an instructor’s wrongful termination action, was valid and binding since the union had the authority to enter into the agreement on her behalf despite her objections.

In this case, the instructor had been terminated from the college. The union negotiated a settlement agreement with the college that allowed her to receive pay through the end of her contract term and also had the termination letter rescinded from her file. Nevertheless, she had objected to the settlement and then filed suit against the college and also against the union for violating its duty of fair representation. The court held that the union had full authority to settle the matter, despite her objections.

The court cited its earlier decision in *Shane v. Greyhound Lines, Inc.*, 868 F. 2d 1057 (9th Cir., 1989). In that case, several Greyhound maintenance workers had brought suit against the company for wrongful discharge after their union had negotiated a settlement on their behalf. The settlement gave the workers reinstatement with back pay, except for one month. The workers objected to the settlement because it did not reserve their right to file an independent lawsuit against Greyhound.

In the subsequent lawsuit the workers claimed that they were illegally discharged and defamed. The court noted that their federal lawsuit was effectively a suit for breach of the collective bargaining agreement under Section 301 of the LMRA (29 U.S.C. Section 185 (a)). In such a 301 suit, a plaintiff must prove that the union breached its duty before proceeding with a Section 301 suit against his or her employer. The court found no such breach.

The court explained that one of the grounds presented by the workers as to why the duty of fair representation was breached by the union was because the union accepted a settlement on their behalf instead of proceeding to arbitration. The court found that the union did not act in a perfunctory or arbitrary manner in handling the grievances, nor was its decision to accept a settlement which gave the employees reinstatement and considerable back pay an arbitrary or bad faith exercise of judgment:

Appellants contemporaneous objections to the settlement do not render the Union's acceptance of it a bad faith act. When employees make their union the sole bargaining representative with the employer, they relinquish the right to control the settlement of their grievances. Unions are free to negotiate and accept settlements even without the grievants' approval.

New Federal Legislation

Lilly Ledbetter Fair Pay Act (Pub.L. No. 111-2)

Signed into law by President Obama on January 29, 2009

Previous history:

Passed House as H.R. 11 by a vote of 247-171 on January 9, 2009
Passed Senate as S.181 by a vote of 61-36 on January 22, 2009
House approved Senate bill by vote of 250-177 on January 27, 2009

Summary:

The Ledbetter Fair Pay Act was specifically designed to reverse the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co*, 550 U.S.618, 127 S. Ct 2162, 100 FEP Cases 1025 (2007), where the Court ruled that the time limits for filing a discrimination charge with the EEOC starts to run when the employer makes a discriminatory decision about the employee's compensation, not each time the employee receives a paycheck affected by discrimination.

The Act amends the Civil Rights Act of 1964⁵ to declare that an unlawful employment practice occurs when: 1) a discriminatory compensation decision or other practice is adopted; 2) an individual becomes subject to the decision or practice; *or* 3) an individual is affected by application of the decision or practice, including each time compensation is paid. An aggrieved person may obtain relief including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to practices that occurred outside the time for filing a charge. The Act applies the amendments to claims of compensation discrimination under the Americans with Disabilities Act of 1990⁶ and the Rehabilitation Act of 1974⁷.

⁵ 42 U.S.C. sections 2000e *et seq.*

⁶ 42 U.S.C. sections 12101 *et seq.*

⁷ 29 U.S.C. sections 701 *et seq.*

The Act also amends the Age Discrimination in Employment Act of 1967⁸ to declare that an unlawful practice occurs when: 1) a discriminatory compensation decision or other practice is adopted; 2) when a person becomes subject to the decision; or 3) when a person is affected by the decision, including each time compensation is paid.

The law has retroactive effect so as to apply to all claims as if it were enacted on May 28, 2007 (the day before *Ledbetter* was decided by the Court).

For Title VII, the ADA, and the Rehabilitation Act, back pay awards are limited for up to two years preceding the individual's filing of a charge with the EEOC. The ADEA claims are likely to be interpreted in the same manner, although specific reference is not made in the statute. The two-year limitation period is for back pay awards only; thus, claims for punitive or compensatory damages under Title VII are still available on top of the back pay.

The term "compensation decision or other practice" as used in the statute certainly covers wages and salaries, and, consistent with EEOC regulations defining "compensation," it is likely to also cover "overtime, bonuses, vacations and holiday pay; cleaning or gasoline allowances; hotel accommodations; use of company car; medical, hospital, accident, life insurance; retirement benefits; stock options, profit sharing or bonus plans; reimbursement for travel expenses, expense accounts, benefits or some other name."⁹

The main purpose of the Ledbetter Act is to clarify that discriminatory compensation decisions or other practices occur "each time compensation is paid..."¹⁰ With regards to wages and salaries, it is clear that those forms of compensation are paid when an employee receives a paycheck. Ambiguity exists however regarding the determination of when other forms of compensation are considered paid for purposes of this legislation.

With regards to pensions, the Ledbetter Act makes clear that it does not have any effect on the way the affected statutes treat the question of when pension distributions are considered paid.¹¹ Thus, the previous interpretive practice remains intact holding that pension distributions are considered paid and the statute of limitations begins running when each individual plaintiff retires and his or her pension benefits vest.¹² Therefore, the statutory filing period does not renew each time a retiree receives a pension benefit check.

Impact and questions

⁸ 29 U.S.C. sections 621 *et seq.*

⁹ *EEOC Compliance Manual: Compensation Discrimination*, No. 915.003 (2000), Section 10-3 n.13

¹⁰ Pub. L. No. 111-2.

¹¹ *Id.* at § 2(4).

¹² *See e.g. Maki v. Allele, Inc.*, 383 F. 3d 740, 745 (8th Cir. 2004).

The difficulty raised by the legislation is primarily in its reach back in time. If 10 or 20 years ago, a decision was made to pay a male employee more than a female employee, that decision might now be tested in litigation, since the female employee is now allegedly “affected by the application” of that earlier compensation decision by virtue of this week’s paycheck. Each paycheck begins anew the 300-day filing period. While the back pay in any subsequent litigation may be limited by a two-year statute of limitations, the allegedly discriminatory act occurred years earlier.

Witnesses may no longer be available; memories may have faded even if the witness is available. Documentation that might be helpful in defending decisions may be long gone. While record retention under EEOC guidelines might be only a year in duration, the employer will need documents from much earlier in many cases. Employers will need to evaluate their documentation retention policies and consider expanding them. Information about any compensation decisions, including initial starting salary decisions, will be vital in defending against future lawsuits.

Another issue raised by the legislation is that the language that an “individual” may be “affected by the application of the decision” suggests the language might reach to non-employees, such as a widower who claims that his wife was the victim of discrimination and sues claiming he is “affected” by the earlier discrimination.

Promotions – normally discrete actions in time that immediately start the clock for filing – might be inextricably wrapped up in compensation discrimination, and thus promotion decisions from years earlier might be tested in litigation, again with the litigation burdens mentioned above. Early decisions under the new Act already suggest this is the path. *Bush v. Orange County Corr. Dep’t* (M.D. Fla., No. 6:07-cv-588-Orl-28DAB, 2/2/09), allowed an employee to challenge a 16-year-old demotion because it allegedly reduced the employee's pay, reflected in a current paycheck. *Gilmore v. Macy's Retail Holdings* (D.N.J., No. 06-3020, 2/4/09), applied the law to a promotion.

American Recovery and Reinvestment Act of 2009: Temporary COBRA Subsidy Provisions

Among the myriad of provisions under the stimulus package passed and signed into law in February is the COBRA continuation premium payment requirements. The changes in the law apply to all employers who maintain a group health plan.

Under the new law, any employee who involuntarily lost his or her job between September 1, 2008 and December 31, 2009 and who otherwise has elected COBRA coverage will only have to pay 35% of the cost of COBRA benefits for a maximum of nine (9) months. The employer will pay the other 65% but will be subsidized by the federal government in the form of a credit against federal withholding and payroll taxes.

The Act also mandates that employers provide an extended COBRA election period to individuals who gained eligibility at some point following September 1, 2008,

and would have been eligible for the COBRA subsidy if enrolled on February 17, 2009. For these individuals who had either declined to elect coverage or who had elected and subsequently terminated coverage, employers are required to grant them an additional 60-day period in which to elect or re-elect coverage. This 60-day period runs from the date on which an individual receives an extended election notice. *Note:* This extended election period has no effect on the determination of individual's maximum COBRA coverage period, which is still calculated from the individual's "qualifying event."

Eligibility is also affected by the individuals' income, with the subsidy beginning to phase out for single taxpayers with an annual modified adjusted gross income of \$125,000 (\$250,000 for joint filers) and being eliminated entirely at \$145,000 (\$290,000 for joint filers).

Where eligible individuals who had elected COBRA coverage have already paid the full COBRA premium, employers must either reimburse them for the amount of such premium paid in excess of the amount required to be paid or provide credit to them for such amount towards future COBRA payments. An employer may only provide credit in lieu of a reimbursement if it is reasonable to believe that the credit will be used by the individual within 180 days of the full premium payment.

Employers must notify eligible individuals advising them of the availability of the subsidy and the option to enroll in a different health plan if they so choose and if permitted by the employer. Similar notices must go to those individuals who rejected COBRA.

Pending Legislation

Paycheck Fairness Act (H.R. 12)

Status:

Passed House by a vote of 256-163 on January 9, 2009

Pending in Senate before the Health, Education, Labor and Pensions Committee

Summary:

Amends the portion of the Fair Labor Standards Act of 1938 (FLSA) known as the Equal Pay Act, to revise remedies for, enforcement of, and exceptions to prohibitions against sex discrimination in the payment of wages.

The current Equal Pay Act, passed in 1963, states:

No employer having employees subject to any provisions of this section [section 206 of title 29 of the United States Code] shall discriminate, within any establishment in which such employees are employed, between employees on the

basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs[,] the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, ***except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex***

The proposed Paycheck Fairness Act:

- Allows prevailing plaintiffs to recover compensatory and punitive damages. Current EPA provides only liquidated damages and back pay.
- Allows EPA lawsuit to proceed as a class action (EPA currently requires plaintiffs to *opt in* to a suit).
- Requires EEOC to survey pay data and issue regulations that require employers to submit any needed pay data identified by race, sex and national origin.
- Prohibits employers from punishing employees for sharing salary information with their coworkers.
- Under the current Equal Pay Act, once employees have provided prima facie evidence of sex discrimination, the burden of proof shifts to the employer to show that the difference in wages results from "any factor other than sex."
 - The PFA eliminates the "any factor other than sex" defense and replaces it with a "bona fide factor other than sex" defense. Employers can use this "bona fide factor" defense only if the employer demonstrates that such factor: (1) is not based upon or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with business necessity. (For example, a male's higher previous salary would no longer be a "factor other than sex," nor would a male employee's stronger negotiating skill in reaching a certain salary.)
 - Such defense shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.
- Revises the prohibition against employer retaliation for employee complaints. Prohibits retaliation for inquiring about, discussing, or disclosing the wages of the employee or another employee in response to a complaint or charge, or in

furtherance of a sex discrimination investigation, proceeding, hearing, or action, or an investigation conducted by the employer.

- Makes employers who violate sex discrimination prohibitions liable in a civil action for either compensatory or (except for the federal government) punitive damages. States that any action brought to enforce the prohibition against sex discrimination may be maintained as a class action in which individuals may be joined as party plaintiffs without their written consent. Authorizes the Secretary of Labor (Secretary) to seek additional compensatory or punitive damages in a sex discrimination action. Requires the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs to train EEOC employees and affected individuals and entities on matters involving wage discrimination.
- Authorizes the Secretary to make grants to eligible entities for negotiation skills training programs for girls and women. Directs the Secretary and the Secretary of Education to issue regulations or policy guidance to integrate such training into certain programs under their Departments. Directs the Secretary to conduct studies and provide information to employers, labor organizations, and the general public regarding the means available to eliminate pay disparities between men and women.
- Establishes the Secretary of Labor's National Award for Pay Equity in the Workplace for an employer who has made substantial effort to eliminate pay disparities between men and women. Amends the Civil Rights Act of 1964 to require the EEOC to collect from employers pay information data regarding the sex, race, and national origin of employees for use in the enforcement of federal laws prohibiting pay discrimination.
- Directs: (1) the Commissioner of Labor Statistics to continue to collect data on woman workers in the Current Employment Statistics survey; (2) the Office of Federal Contract Compliance Programs to use specified types of methods in investigating compensation discrimination and in enforcing pay equity; and (3) the Secretary to make accurate information on compensation discrimination readily available to the public. Directs the Secretary and the Commissioner of the EEOC jointly to develop technical assistance material to assist small businesses to comply with the requirements of this Act.

Comments:

Multiple issues for employers exist if this act passes. First, liability would skyrocket under the statute. The EPA only allows for back pay and liquidated damages, but the PFA would alter that to allow for unlimited compensatory and punitive damages. This is particularly remarkable since the EPA is not a statute that governs *intentional* discrimination, like Title VII, but is a no-fault type statute based on objective factors and statistical comparisons.

Next, the entire litigation format for equal pay claims would be turned on its head. For example, the fact that an employer must show that the “bona fide factor other than sex” was driven by “business necessity” adds another dimension to the employer’s burden. Further, the fact that the plaintiff can then trump this defense by claiming that “alternative business practices” could have met this “business justification” potentially puts the courts into the business of scrutinizing business practices. For example, if a man with ten years’ experience is paid more than a newly hired woman, the woman may claim that the employer should put into practice extensive training for her as an “alternative” to meet the business need of experienced employees.

The fact that the “opt in” requirement is taken out of the EPA in favor of an “opt out” provision means that class actions are likely to grow in quantity and scope.

While the Paycheck Fairness Act does not turn the EPA into a “comparable worth” statute (as originally contemplated in past iterations of this bill), the PFA in its current form would dramatically alter the landscape of compensation disparities arguably based on gender.

Employee Free Choice Act (H.R. 1409 and S. 560)

Status:

The Employee Free Choice Act was introduced on March 10, 2009 in both the House and Senate. This version is identical to the bill filed in Congress last session.

EFCA was previously introduced in Congress in 2007 by Senator Ted Kennedy, (D-Mass) and Representatives George Miller (D-CA) and Peter King (R-NY). It passed the House as H.R.800 on March 1, 2007 by a vote of 241-185. In the Senate, S. 1041 was supported by a vote of 51-48, but fell nine votes short of the 60 necessary to foreclose Senate debate and proceed to final consideration. Final passage was blocked by a Republican filibuster.

This bill is the core plank of the labor platform that is supported by the Democrats and President Obama and his Labor Secretary Hilda Solis. While it has been predicted that the bill will once again easily pass the House, the Democrats can currently count on only 58 votes in the Senate, thus potentially leading to yet another filibuster.

Millions of dollars have been and will be spent by supporters and opponents of the bill. In January, for example, American Rights at Work, a labor policy and advocacy organization, announced a \$3 million campaign to push Congress to approve the bill. This effort supplements the ongoing efforts of the AFL-CIO, SEIU and other labor organizations. On the other side, the Coalition for a Democratic Workplace is vigorously lobbying against the bill, along with chambers of commerce and business groups around the country.

Summary:

The bill has several key provisions:

1. **Majority Card Check.** The proposed act would require that when a majority of employees in an appropriate bargaining unit have signed authorization cards designating a union as its representative, the union will be certified as the exclusive bargaining representative of such employees by the National Labor Relations Board *without a secret ballot election*. The option will remain for a secret ballot election when, as now, 30% of the employees in an appropriate unit sign authorization cards.
2. **First Contract Negotiations.** For first contract negotiations, when an employer and a newly formed union are unable to bargain a first contract within 90 days, either party can request mediation by the Federal Mediation and Conciliation Service. If no agreement has been reached after 30 days of mediation, the dispute is referred to *binding arbitration*. The decision of any arbitrator would be binding on the parties for up to two years.
3. **Penalties increased over current law.**
 - a. **Civil penalties of up to \$20,000 per violation** will be in place for employers who have willfully or repeatedly violated employees' rights during an organizing campaign or first contract negotiations.
 - b. **Treble back pay.** Increases to three times back pay the amount an employer is required to pay when an employee is discharged or discriminated against during an organizing campaign or first contract negotiations.
 - c. **Mandatory Applications for Injunctive Relief.** Requires the NLRB to seek a federal court injunction when there is reasonable cause to believe an employer had discharged or discriminated against employees, threatened to do so, or engaged in conduct that significantly interferes with employee rights during an organizing campaign or first contract negotiations.

Comments:

As potentially the most sweeping modification of the National Labor Relations Act in over 60 years, EFCA would make unionization easier on a dramatic scale. While technically the option for a secret ballot election would still be on the books, it is unlikely in most settings that a union would ever bother with it. Conventional wisdom is that unions currently never file petitions for elections unless they already have over 50% of an appropriate bargaining unit signed up with authorization cards. It is a rare situation for a

union to file with the minimum of 30%, since union strength rarely increases after the petition is filed and before the election. Thus, under EFCA, most unions will wait until they achieve 51% and then simply demand recognition. Why go through the hassles of an election?¹³

Obviously, what is lost to employers – and employees – is the opportunity for concentrated debate and communication about what unionization means. While early union activity might be visible and known to an employer, and thus an opportunity for communication about unionization might exist, such activity might also be taking place under the surface for a long time.

Of potentially even greater concern are the provisions in EFCA for dealing with a first contract. EFCA ultimately would force disputed issues in a first contract into the decision-making hands of private arbitrators, who could make binding decisions for an institution or company. This is problematic enough with money issues, but if one considers what is at stake in first contract negotiations, with contentious issues like the role of seniority, evaluation procedures, management rights and other language items of importance, these arbitration provisions are particularly frightening.

Not surprisingly, EFCA has provoked the most vigorous lobbying efforts in years. Some of the groups that back EFCA – in addition to virtually every labor organization -- include the aforementioned American Rights at Work, the Sierra Club, the National Organization for Women, People for the American Way, the National Partnership for Women and Families, the National Resources Defense Council, the National Baptist Convention of America, the National Consumers League, and the National Association of Consumer Advocates.

In addition, President Obama, the new Chair of the NLRB, Wilma Liebman, and the new Secretary of Labor, Hilda Solis, are strong supporters. AFL-CIO President John Sweeney is confident of its passage but recognizes that it will have to survive another Republican filibuster.

Opposition to legislation providing workers with card check organizing rights has been led by the U.S. Chamber of Commerce and includes the National Association of Manufacturers, Coalition for a Democratic Workplace, the Center for Union Facts, the National Right to Work Committee, the Heritage Foundation, and the HR Policy Association.

¹³ Perhaps the only exception might be adjunct faculty bargaining units, which are currently very difficult to organize and where it is rare for an organizing union to be able to reach all those who fall into that category. In adjunct situations, the key for a union is usually to just try to get to the magic 30% so an election petition can be filed. In most adjunct faculty elections – unlike full time employee elections – the turnout tends to be very low, and that favors a union, since only a majority of those voting secures the outcome. Unions can, and have, achieved election victories with small minorities of eligible voters casting votes.

Labor Relations First Contract Negotiations Act of 2009 (H.R.243)

Status

Introduced as H.R. 243 on January 7, 2009 by Rep. Raymond Green (D-Tex); no co-sponsors

Similar bills in prior sessions have not moved out of committee

Summary

Variation on EFCA. The act would change the National Labor Relations Act to provide that if management and labor cannot conclude a first collective bargaining agreement within 60 days after certification of the union, then the parties must mediate the dispute. If mediation fails within 30 days after the selection of the mediator, either side may “transfer the matters remaining in controversy to the Federal Mediation and Conciliation Service for binding arbitration.”

Comments:

No likelihood of passage. Labor proponents and the Democrats will offer EFCA as their preferred piece of legislation.

Secret Ballot Protection Act (H.R. 1176)

Status

Introduced as H.R. 1176 on February 25, 2009 by Rep John Kline of Minnesota with 103 co-sponsors (all Republicans)

Similar bill introduced and failed in 2004, 2005 and 2007.

Referred to House Education and Labor Committee on February 25, 2009

Summary

Filed in February as a Republican pre-emptive strike against the anticipated Employee Free Choice Act (discussed above), this proposed act would amend the National Labor Relations Act to guarantee workers the right to vote in secret ballot elections on the questions of unionization in their workplace.

More particularly, this bill would amend the National Labor Relations Act to make it an unfair labor practice for an employer to recognize or bargain with a union that has not been selected by a majority of employees in a secret ballot election conducted by NLRB. The bill also would make it an unfair labor practice for a union to cause or

attempt to cause an employer to recognize or bargain with a union that has not been selected by a majority of employees in a secret ballot NLRB election.

Comments:

The bill does more than simply pre-empt the Employee Free Choice Act. It would actually change the status quo by taking away what is now the right of an employer to *voluntarily* recognize a union with majority support without an election.

The American Rights at Work group, who are lobbying for EFCA, castigated the “anti-worker members of Congress” who introduced the bill. Like H.R. 243 above, this bill has no chance of passage.

National Labor Relations “Modernization” Act (H.R. 1355)

Status

Filed March 5, 2009 by Rep. Joe Sestak (D-PA); no co-sponsors

Referred to House Committee on Education and Labor

Summary

Another variation on the Employee Free Choice Act, this bill would amend the National Labor Relations Act to require employers to provide labor organizations with equal access to employees prior to an election regarding representation, to prevent delays in initial collective bargaining, and to strengthen enforcement against intimidation of employees by employers.

Specifically:

- After the Board directs an election, the employer must notify the union of any campaign it intends to conduct in opposition to the union, including planned meetings, display of signs or distribution of literature, and shall accord the union the same opportunities under the same terms and conditions as the employer engages in such activities.
- Civil penalties for unfair labor practices committed by employers during the period that employees are organizing or negotiation first contract, of up to \$20,000 per violation.
- After a request to begin bargaining for a first contract, parties shall enter into negotiations within 10 days.

- If no agreement after 120 days, either party can petition the Federal Mediation and Conciliation Service for appointment of an arbitration panel to assist the parties in settling dispute
- If no agreement after 120 days of appointment of panel, then the arbitration panel shall begin arbitration proceedings. Panel has 30 days to reach decision. Panel's decision is binding for 18 months

Public Safety Employer-Employee Cooperation Act of 2009 (H.R. 413)

Status:

Introduced as H.R. 413 on January 9, 2009

Referred to the House Committee on Education and Labor.

Previously introduced in 2007 as H.R. 980

7/17/2007 Passed in House

5/18/2008 Senate floor actions: Cloture motion on the measure withdrawn by unanimous consent in Senate.

Summary:

This Act provides collective bargaining rights for public safety officers employed by states or local governments. It directs the Federal Labor Relations Authority to: 1) grant public safety employees the right to form and join a labor organization which excludes management and supervisory employees, recognized as the exclusive bargaining agent for such employees; and 2) require public safety employers to recognize and agree to bargain with the employees' labor organization.

The Act authorizes the Federal Labor Relations Authority, upon the request of an employer or labor organization, to make a subsequent determination as to whether such state law provides such rights and responsibilities if there is a subsequent material change in the state law or its interpretation. In addition, it allows a person aggrieved by a Federal Labor Relations Authority determination to petition the U.S. Court of Appeals for judicial review.

The Act prohibits public safety employers, employees, and labor organizations from engaging in lockouts or strikes.

The bill would ensure:

- The right to join a union and have the union recognized by the employer

- The right of public safety officers to bargain over wages, hours, and working conditions
- A dispute resolution mechanism, such as fact-finding or mediation
- Enforcement of contracts through state courts

Although the Act would allow the parties to seek mediation to resolve their differences, it would not force employers into binding arbitration.

The Federal Labor Relations Authority shall, within 180 days of enactment, make a determination as to whether a State substantially provides for the rights and responsibilities described in the Act.

The Federal Labor Relations Authority shall have the authority to:

- Determine the appropriateness of units for labor organization representation
- Supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a voting majority of the employees
- Resolve issues relating to the duty to bargain in good faith
- Conduct hearings and resolve complaints of unfair labor practices
- Resolve exceptions to the awards of arbitrators
- Protect the right of each employee to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and protect each employee in the exercise of such right
- Take such other actions as are necessary and appropriate to effectively administer the Act

Strikes and lockouts are prohibited by the Act. The Act also provides that existing collective bargaining units and agreements shall not be invalidated by this Act.

Family-Friendly Workplace Act (H.R. 933)

Status:

Introduced in the House by Republican sponsors as H.R. 933 on February 19, 2009

Referred to House Committee on Education and Labor
Similar legislation failed to be taken up by committee in 2008

Summary:

This Act would amend the Fair Labor Standards Act of 1938 to provide compensatory time for employees in the private sector.

- compensatory time would be at the rate of one and one-half hours for each hour of overtime worked
- employees could choose overtime cash instead
- agreement to offer comp time must be included in any CBA or else reduced to writing for non-union employees.

Sponsors contend that it would remove obstacles for employees that prevent working parents from spending time with their children or taking care of sick relatives. Democratic opponents fear the bill would water down FLSA provisions by allowing employers to persuade employees to take time off rather than receive pay.

Comments:

Compensatory time is an option available for public sector employees but has not yet been expanded to the private sector. Many employees would appreciate the option of converting overtime work into paid time off instead of extra money, and this bill still allows the employee to insist on pay instead of time off. Nevertheless, it is not something the Democrats want and stands little likelihood of passage.

Family and Medical Leave Enhancement Bill (H.R. 824)

Status:

Introduced as H.R. 824 by Rep. Carolyn Maloney (D-NY) and ten other Democratic sponsors

Referred to House Committee on Education and Labor and other committees

Summary:

This Act would further amend the FMLA to allow employees to take “parental involvement” leave;

- 1) “to participate in or attend an activity that is sponsored by a school or community organization and relates to a program of the school or organization that is attended by a son or daughter or grandchild of the employee” or
- 2) “to meet routine family and medical care needs, including for medical and dental appointments of the employee or the son, daughter, spouse or grandchild of the employee, or to attend to the care needs of elderly individuals who are related to the eligible employee, including visits to nursing homes or group homes.”

An employee would have to give his or her employer seven days’ notice for taking such time, or “as much notice as is practicable” and should take “reasonable efforts” to schedule the leave so as to not “disrupt unduly the employer’s operations.”

The amount of time that can be taken for such purposes must not to exceed four (4) hours during any 30-day period and not exceed 24 hours during any 12-month period.

The Act would also modify the FMLA to expand coverage by allowing employees of companies with more than 25 employees to take leave. (Current jurisdictional threshold is any employer with 50 employees)

The Act would explicitly sanction intermittent leave.

The Act states that an employee may elect or an employer may require the substitution of accrued vacation, sick or personal time for FMLA leave.

Massachusetts and some other states have already put in similar “small necessities” or mini-FMLA statutes (see Mass.G.L. c. 149, section 52D). The Massachusetts law, however, does not include grandchildren, and also, while allowing 24 hours during any 12-month period, it does not limit the use of the leave to four hours a month, as the federal law would.

Family Leave Insurance Act of 2009 (H.R. 1723)

Status

Introduced on March 25, 2009 by four Democratic sponsors
Now pending in committee

The bill would provide paid leave of up to 12 weeks under FMLA with benefits paid from the “Family Leave Insurance Fund,” funded by employers and employees, like FICA, with equal contributions from payroll. Each would pay premiums equivalent to 0.2% of each worker’s earnings. Employers with fewer than 20 workers would pay 0.1% premium.

Employees who pay into the fund for six months and have worked part-time for the same employer for at least six months would be eligible.

Benefits would be tied to income along the following lines:

Employee making under \$30,000 per year – full pay
\$30,000 – 60,000 -- 55% pay
\$60,001 – 97,000 -- 45 % pay
Over \$97,000 -- 40% pay

LIKELY TO BE FILED AT LATER POINT

Employment Non-Discrimination Act

Status:

First introduced in 1994 and in every Congressional session since then

Latest effort was in April of 2007, as H.R. 2015. The bill ultimately passed the House by a vote of 235-184 but was watered down to apply to only gays and lesbians, not transgender or transsexual people.

Failed to pass Senate.

Likely to be introduced during this session of Congress

Summary of previous bill:

The Employment Non-Discrimination Act of 2007 prohibits employment discrimination on the basis of actual or perceived sexual orientation or gender identity by covered entities (employers, employment agencies, labor organizations, or joint labor management committees).

This act is inapplicable to: 1) religious organizations; 2) the relationship between the United States and members of the armed forces; 3) employers with less than 15 employees.

The act would prohibit preferential treatment and quotas and it does not permit disparate impact lawsuits. Therefore, an employer is not required to justify a neutral practice that may have a statistically disparate impact on individuals because of their sexual orientation or gender identity.

It also does not require same-sex domestic partner benefits. (“Nothing in this Act shall be construed to require a covered entity to treat a couple who are not married, including a same-sex couple who are not married, in the same manner as the covered entity treats a married couple for purposes of employee benefits. Notwithstanding this Act or any other provision of law, a State or political subdivision of a State may establish rights, remedies, or procedures for the provision of employee benefits to an individual for the benefit of the domestic partner of such individual.”)

It provides for the construction of this Act with regard to:

1) enforcement by employers of rules and policies: “Nothing in the act would prohibit an employer from enforcing rules and policies that do not circumvent the purposes of the act, if the rules or policies are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation or gender identity.”

2) sexual harassment: “Nothing in this Act shall be construed to limit a covered entity from taking adverse action against an individual because of a charge of sexual harassment against that individual, provided that rules and policies on sexual harassment, including when adverse action is taken, are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation or gender identity.”

3) certain shared facilities such as showers or dressing facilities: “Nothing in this Act shall be construed to establish an unlawful employment practice based on actual or perceived gender identity due to the denial of access to shared shower or dressing facilities in which being seen fully unclothed is unavoidable, provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later.”

4) dress and grooming standards: “Nothing in this Act shall prohibit an employer from requiring an employee, during the employee's hours at work, to adhere to reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law, provided that the employer permits any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender transition after the time of employment, to adhere to the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning.”

5) certain matters relating to marriage: “Notwithstanding section 4(g), an unlawful employment practice under section 4 shall include an action described in that section that is conditioned, in a State in which a person cannot marry a person of the same sex, either on being married or being eligible to marry.”

The Act prohibits the Equal Employment Opportunity Commission from collecting statistics from covered entities on actual or perceived sexual orientation or gender identity, or compelling the collection by covered entities of such statistics.

Comments:

Expansion of protections against sexual orientation and gender identity discrimination at the state level continues. Currently, 13 states and the District of Columbia have policies that protect against both sexual orientation *and* gender identity discrimination in employment: California, Colorado, Connecticut, Iowa, Illinois, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington in the public and private sector. An additional seven states -- Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York and Wisconsin -- have state laws that protect against discrimination based on sexual orientation only. Five states have laws prohibiting sexual orientation discrimination in public workplaces only: Delaware, Indiana, Michigan, Montana, and Pennsylvania. Fifteen other states have laws that have been interpreted to protect transgender persons.

Teaching and Research Assistant Collective Bargaining Rights Act

Status:

Previously filed in 110th Congress as H.R. 5838 and S. 2891
Did not proceed past committee

Summary of previous bill:

Teaching and Research Assistant Collective Bargaining Rights Act would have amended the National Labor Relations Act to provide collective bargaining rights for students enrolled at a private institution of higher education who perform work for remuneration at the institution's direction, regardless of whether the work relates to their courses of study.

The Act would have amended Section 2(3) of the NLRA (29 U.S.C.152(3)) by adding the following language:

The term 'employee' includes a student enrolled at an institution of higher education (as defined in section 101 or 102 of the Higher Education Act of 1965 [20 U.S.C.1001,1002], other than an institution of a State or political subdivision) who is performing work for remuneration at the direction of the institution, whether or not the work relates to the student's course of study

Comments:

There is a reasonable chance that this legislation may not be introduced and instead, with a pro-labor NLRB likely, proponents might anticipate that a new labor board would reverse the *Brown University* decision [342 NLRB No. 42, 175 LRRM 1089 (2004)] and reinstate the essence of the earlier *New York University* decision [332 NLRB No. 111 (2000)]. While the status of full-time faculty organizing in private universities will remain unchanged --since the *Yeshiva* decision is from the Supreme Court -- the employee status of graduate teaching and research assistants is strictly controlled at the NLRB level and, as we have seen, is subject to changing interpretations.