MANAGEMENT UPDATE

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TOP TEN LABOR & EMPLOYMENT EVENTS AND TRENDS OF 2007

During the past year, employers continued to confront a number of significant labor and employment issues – many of which are likely to have a profound impact on the workplace. Our second annual Top Ten Labor & Employment Events and Trends issue, prepared by John Bowen, a partner in our Minneapolis office, analyzes these notable developments.

1 SUPREME COURT LIMITS EMPLOYER EXPOSURE TO DISCRIMINATORY PAY CLAIMS

In *Ledbetter v. Goodyear Tire and Rubber Co.,* 127 S.Ct. 2162 (2007), a sharply divided U.S. Supreme Court held that the relevant period for filing a charge alleging discriminatory pay commenced on the date the allegedly discriminatory pay decision was first communicated to the employee (rather than a new filing period commencing each time the employer issued a paycheck). According to the Court, a discrete employment act occurs at the time an employer makes and communicates a pay decision to an employee; thus, any discriminatory pay claim stemming from a particular pay decision arises at the time the initial decision is made. Subsequent discriminatory acts that merely entail the adverse effects resulting from purportedly discriminatory acts do not trigger a new charging period.

Significance For Employers: The *Ledbetter* decision provides employers with significant protection against stale discriminatory pay claims based on employment evaluations, promotions, and other wage-related decisions made throughout the employee's work history. In effect, *Ledbetter* bars employees from filing a disparate pay claim under Title VII if the employee fails to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days (or within 300 days in certain jurisdictions, depending on specific state filing requirements) after the allegedly discriminatory pay decision was made and communicated to the employee. •

2 BOARD RULES EMPLOYERS MAY RESTRICT USE OF CORPORATE E-MAIL TO PRECLUDE UNION-RELATED COMMUNICATIONS

In a highly anticipated decision, a sharply divided National Labor Relations Board (NLRB) ruled by a vote of 3-2 that employers may prohibit employee use of a company's e-mail system for non-work solicitations, including union-related solicitations. *See Guard Publishing Co.,* 351 NLRB No. 70 (Dec. 16, 2007, *released* Dec. 21, 2007).

In *Guard Publishing*, the employer had established a narrow e-mail policy limiting employees' use of company equipment for non-business related purposes and expressly stating that "[c]ommunications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." In finding that the employer's e-mail policy did not violate the NLRA, the Board majority held, "consistent with a long line of cases governing employee use of employer-owned equipment, we find that the employees here had no statutory right to use the Respondent's e-mail system for Section 7 matters."

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Even though the Board concluded that an employer lawfully could restrict the use of corporate e-mail to preclude union-related communication, the Board further held that such restrictions must be enforced non-discriminatorily. In that regard, the Board found that Guard discriminatorily enforced the policy by disciplining an employee for sending an e-mail that discussed union-related issues without soliciting employees to take action, but also held that the employer did not violate the Act by disciplining the employee for sending e-mails that solicited employee action in support of the union. The Board majority made the distinction in this case because, while the employer prohibited all non-job-related **solicitations**, it permitted employees to use its e-mail system for some non-work-related e-mails.

Significance For Employers: *Guard Publishing* clarifies for employers that employees have no "right" to use the employer's e-mail system for Section 7 purposes. Moreover, employers can lawfully restrict the use of corporate e-mail to preclude union-related communication by establishing policies that prohibit the use of e-mail systems for non-work-related purposes. This is true even where the employer permits some non-work-related uses while prohibiting others, as long as Section 7 is not the basis for distinguishing between permissible and impermissible uses. •

3 MINIMUM-WAGE WORKERS RECEIVE FIRST PAY HIKE IN MORE THAN A DECADE

On May 24, 2007, Congress passed the Fair Minimum Wage Act of 2007, increasing the federal minimum wage to $7.25 per hour by 2009. Signed into law by President Bush on May 25, 2007, the Fair Minimum Wage Act marks the first increase in the federal minimum wage since 1997.

Pursuant to the Fair Minimum Wage Act, the federal wage floor increased from $5.15 an hour to $5.85 per hour effective July 24, 2007. The Act calls for additional increases in the minimum wage in stages over the next two years. Effective July 24, 2008, the minimum wage will increase to $6.55 an hour and will then increase to $7.25 per hour effective July 24, 2009. •

4 EMPLOYEE FREE CHOICE ACT REACHES CRITICAL JUNCTURE IN CONGRESS

One of the most important "events" of 2007 should more aptly be called the most significant "non-event." Number Four in our Countdown is the failure of Congress to pass the union-backed "Employee Free Choice Act (EFCA)" – once again forestalling passage of the highly controversial legislation for at least another year. What makes this "non-event" so significant is: (1) the far-reaching implications of this proposed legislation; and (2) the slim margin by which the EFCA failed to clear the Senate.

Vigorously opposed by employers and employer advocacy groups, the EFCA would decidedly alter the balance of labor relations in the United States in favor of organized labor. Under one of the more contentious provisions the EFCA would replace the Board's secret ballot election procedures in favor of "card-check" representation. With "card-check" representation, the NLRB would certify a union as the exclusive representative of employees when the union presents signed authorization cards from a majority of the employees. In addition, the EFCA calls for more stringent penalties against employers who willfully or repeatedly violate employee rights during an organizing campaign – including triple damages to employees subject to unlawful discrimination. Another controversial provision of the proposed EFCA would require mandatory mediation and arbitration for first contracts – which would permit an arbitrator to impose contract terms even if unacceptable to the employer.

Although the House of Representatives passed the EFCA in March, it never came to a vote in the Senate because of a filibuster by Senators opposing the bill.

Significance For Employers: Securing passage of the EFCA has been a top priority for organized labor for many years and the AFL-CIO has indicated that it will continue to push the legislation. Because of the close measure by which the bill has been defeated in the past, the outcome of the November 2008 elections will likely have a profound impact on the status of the EFCA. •

5 LABOR BOARD LIMITS PROTECTION FOR UNION "SALTS"

A pair of decisions issued by the NLRB in 2007 significantly limits potential "salting" abuses by labor unions trying to organize non-union employers. "Salting" is a common union organizing strategy in which professionally trained (and often-times paid) union organizers seek employment with a non-union company for the purpose of using their status as "employees" to organize on behalf of the union.

Salting is considered protected activity under the NLRA. In *NLRB v. Town & Country Electric, Inc.,* (Sup. Ct., 1995), the U.S. Supreme Court held that paid professional union organizers who apply for work with non-union employers, purportedly for the purpose of organizing, are nevertheless "employees" within the meaning of the NLRA. Therefore, an employer may not deny employment to the trained union organizer/job applicant merely because the organizer is a paid union employee or has otherwise announced the intention to organize the employer.

However, in *Toering Electric Company*, 351 NLRB No. 18 (Sept. 29, 2007) a divided NLRB established a new legal standard for determining whether an applicant for employment is entitled to statutory protection against hiring discrimination. In *Toering*, a 3-2 Board majority ruled that an applicant for employment is no longer entitled to statutory protection against discrimination based on union affiliation or activity unless the applicant is "genuinely interested" in an employment relationship with the hiring employer. Moreover, in discrimination cases brought under the NLRA, the General Counsel has the "ultimate burden" of proving the applicant has a "genuine interest" in employment. As a practical matter, the *Toering* decision limits the statutory protections typically extended to union salts and will likely reduce organized labor's reliance on salting campaigns in the course of organizing a non-union employer or attempting to uncover potentially discriminatory practices.

6 BOARD ESTABLISHES NEW STANDARD FOR BACKPAY FOR "SALTS"

A second decision issued by the Board (also by a 3-2 majority) adopted a new evidentiary standard for establishing the appropriate backpay period for a union "salt." Typically, the Board applies a "rebuttable presumption" that the back pay for an alleged discriminatee should continue indefinitely from the date of discrimination until after an offer of reinstatement is made. In *Oil Capitol Sheet Metal, Inc.,* 349 NLRB No. 118 (May 31, 2007), however, the Board recognized the presumption should not apply to a union "salt," because the salt does not seek employment for an indefinite duration. Therefore, the Board ruled that the General Counsel will now be required, "as part of his existing burden of proving a reasonable back pay amount due, to present affirmative evidence that the salt/discriminatee, if hired, would have worked for the employer for the back pay period claimed . . ."

Significance For Employers: *Toering* and *Oil Capitol* will likely limit the potential for salting abuses against non-union employers, effectively shielding employers from the many abusive tactics and misconduct that typically accompany a salting campaign. •

7 "NO MATCH" GAME '07: DHS GETS *BLANKED* ON MEASURES DESIGNED TO DEAL WITH UNDOCUMENTED WORKERS

Legal challenges blocked measures implemented by the Department of Homeland Security (DHS) designed to curb the hiring of illegal immigrants. Under guidelines issued by the DHS (which would have gone into effect in September 2007) employers who receive "no-match" letters from the Social Security Administration (SSA) indicating that the name and/or social security number provided on an employee's W-2 Form does not match SSA records would have 90 days to resolve the discrepancy and an additional three days for an employee to submit a new, valid social security number. The DHS regulation further provided that if the discrepancy was not resolved within the 90-day window period, any employer that failed to fire the worker would be subject to civil fines and possible criminal prosecution.

However, in October 2007, a federal district court in California issued a preliminary injunction barring the DHS from prosecuting businesses that fail to fire employees whose Social Security numbers do not match government records. The court held that the

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unions challenging the DHS regulations had raised serious questions about the legality of the measures and further showed that legal workers and their employers would suffer far greater hardship from immediate enforcement of the plan than the government would incur from a delay.

Despite the injunction, the employment status of illegal immigrants remains a priority for DHS. Thus, employers should ensure that they have appropriate documentation for current workers and that they obtain such documentation for all newly hired employees. •

8 NLRB PROTECTS EMPLOYER RIGHTS TO LEGALLY CHALLENGE UNION TACTICS

In September 2007, the NLRB issued a key decision protecting the right of employers to file lawsuits against labor organizations that engage in potentially unlawful conduct when trying to organize the employer. In *BE&K Construction Co.*, 351 NLRB No. 29 (Sept. 29, 2007), a 3-2 majority of the NLRB held that the employer did not violate the National Labor Relations Act by filing and maintaining a reasonably based but ultimately unsuccessful lawsuit against the union, regardless of the employer's motive for initiating the lawsuit. The Board's decision established a new standard for determining when an employer may take legal action challenging union campaign tactics without violating the NLRA.

In *BE&K*, a non-union construction company won a contract to modernize a steel mill. Various labor unions who wanted union labor used at the steel mill attempted to delay the project by lobbying for adoption and enforcement of an emissions standard, picketing and handbilling at the construction site, filing a state court action alleging violations of state health and safety laws, and filing numerous grievances against the employer's joint venture partner. In response, BE&K filed suit in federal court seeking damages under the Labor Management Relations Act and also asserting violations of the antitrust laws. The employer's legal actions were ultimately dismissed.

The unions then filed unfair labor practice charges against the employer, claiming that the unsuccessful litigation initiated by the employer unlawfully interfered with employees' rights to engage in protected organizing activities in violation of Section 8(a)(1) of the NLRA. If the employer was found liable under Section 8(a)(1), the Board could order it to pay the costs of the union's legal defense of the employer's lawsuit. The Board initially ruled in favor of the union and the Board's decision was ultimately appealed to the United States Supreme Court. In 2002, the Supreme Court invalidated the Board's old standard that all reasonably based but otherwise unsuccessful lawsuits filed with a retaliatory purpose violate Section 8(a)(1) of the NLRA. Rejecting the prior standard, the Supreme Court remanded the case to the NLRB for reconsideration of the employer's case. In addition, the Board also had to resolve whether an employer violated the NLRA by initiating an unsuccessful but otherwise reasonably based lawsuit in response to NLRA-protected activity for the sole purpose of imposing litigation costs upon the unions.

Upon remand from the Supreme Court, the NLRB held that the employer did not violate the NLRA by filing and maintaining a reasonably based but ultimately unsuccessful lawsuit against the unions, regardless of the employer's motive for initiating the lawsuit. The Board's decision effectively confirmed that merely filing an unsuccessful lawsuit against a labor union is not an unfair labor practice. The Board majority recognized that an employer's right of access to the courts is a facet of its First Amendment right to petition the government for redress of grievances, and that its former policy that all reasonably based but unsuccessful lawsuits constitute an unfair labor practice burdens the employer's First Amendment right to petition.

Significance For Employers: With organized labor increasingly using aggressive and sophisticated "corporate campaign" tactics against employers, the new standard set forth in *BE&K* will enable employers to use more aggressive litigation strategies to defend against corporate campaign abuses. Based on the new ruling, even if the employer's lawsuit is unsuccessful, the employer will not be in violation of 8(a)(1), and not responsible for the costs of the union's legal defense, **unless** the union can sustain its substantial burden of proving the lawsuit was undertaken for a retaliatory motive and there is no reasonable basis for the employer to believe the action would be successful. •

9 NLRB ESTABLISHES NEW RULES FOR VOLUNTARY RECOGNITION THAT FAVOR "REAL" EMPLOYEE FREE CHOICE

On September 29, 2007, the NLRB issued its much anticipated decision in *Dana Corporation*, 351 NLRB No. 28 (Sept. 29, 2007). In *Dana*, the Board modified its long-standing recognition bar doctrine and held than an employer's voluntary recognition of a labor organization does not bar a decertification petition or a petition by a rival union filed within the 45 days of the unit employees receiving notice of the voluntary recognition.

Under the Board's prior recognition bar policy, an employer's voluntary recognition based on a showing of majority status barred the filing of both decertification and rival union petitions "for a reasonable time." By barring any petitions for a "reasonable time" after voluntary recognition, the Board intended to promote labor relations stability by insulating the union from challenges to its status while it negotiated its first contract.

In *Dana*, although the Board recognized the need for an insulation period, it concluded that labor stability did not require the immediate imposition of an election bar following voluntary recognition. In doing so, the Board recognized that the interest "of protecting employee freedom of choice on the one hand, and promoting the stability of the bargaining relationships on the other" warrants delaying the imposition of the recognition bar for a 45-day period, during which the employees can decide whether they want to seek a Board conducted election.

In addition to modifying the recognition-bar doctrine, the *Dana* decision established a new procedure for properly notifying bargaining unit employees of a voluntary recognition to trigger the 45-day period. Under the new procedures, the employer or union that is party to a voluntary recognition must "promptly notify" the Regional Office of the Board concerning the voluntary recognition. Thereafter, the Regional Office will send a Notice to the employer that must be posted throughout the 45-day period specifically informing the employees of their right to either file a decertification petition or a petition in favor of a different union. •

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10 EEOC RULING ALLOWS EMPLOYERS TO COORDINATE RETIREE HEALTHCARE BENEFITS WITH MEDICARE ELIGIBILITY

On December 26, 2007, the Equal Employment Opportunity Commission (EEOC) issued a final rule creating a narrow exemption to the Age Discrimination in Employment Act (ADEA). This exemption permits employers to alter, reduce, or eliminate employer-sponsored retiree healthcare benefits once the recipient becomes eligible for Medicare or comparable state healthcare benefit programs.

Although employers are not obligated to provide health benefits to retirees, the ADEA stipulates that employers who choose to provide such benefits may not discriminate against retirees based on their age. Thus, under the EEOC's prior rule, an employer violated the ADEA if it reduced or eliminated retiree health benefits when the retiree became eligible for Medicare, unless the employer could show either that the benefits available to Medicare-eligible retirees were equivalent to the benefits provided to retirees not yet eligible for Medicare or that it was expending the same costs for both groups of retirees.

As a practical matter, the prior rule led employers and labor unions to reduce or eliminate retiree health benefits (rather than be forced to incur the progressive cost increases associated with providing healthcare to seniors). In order to eliminate the incentive for employers to discontinue or decrease retiree health benefits, the EEOC fashioned a "narrow exemption" to the ADEA. The EEOC's new rule provides that once a retiree becomes eligible for coverage under Medicare, the employer-sponsored healthcare benefits can be lawfully "altered, reduced, or eliminated." In addition, the new rules also allow plan sponsors to reduce or eliminate employer funded health benefits to the spouse or dependants of retired workers eligible for Medicare, even if the retiree's benefits do not change.

Thus, under the new rule, retirees in both age groups would get essentially the same benefits, but the employer can now shift some (or all) of the cost of retiree health benefits to the government once a retiree becomes eligible for Medicare or a comparable state program. •

1275 PEACHTREE STREET, NE • SUITE 600 • ATLANTA, GEORGIA 30309

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Editor: Amy W. Littrell,
alittrell@fordharrison.com

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