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Political Drama In New Hampshire

Showdown Over Right To Work

By Reyburn Lominack (Columbia) and Steve Bernstein (Tampa)

Like its New England neighbors, New Hampshire has long been perceived as a friendly state for labor unions. Much like Wisconsin, many would view it as an unlikely candidate for legal reforms that attempt to shift the balance away from organized labor. Yet New Hampshire stands poised to become the first state in many years, and the only one within the Northeastern United States, to pass comprehensive right-to-work legislation that would do just that. Even more remarkably, a growing number of other states are now entertaining the same notion.

We believe this may be the start of a nationwide trend.

Background

In 1947, Congress passed the Taft-Hartley Act over President Truman's veto. Among other things, it amended the National Labor Relations Act (NLRA) to outlaw "closed shops," through which employers agreed with unions to employ only dues-paying members. As an alternative, Taft -Hartley permitted arrangements, in which the parties utilized "union security" clauses to require employees to either join the union, or to pay a fee that was equivalent to union dues, within a specified period of time after hire. Such workplaces are referred to as "union shops" or more commonly "agency shops."

Among the more controversial sections of Taft-Hartley was an additional provision allowing states to enact their own "right-to-work" laws, prohibiting even agency shop arrangements. Not to be confused with "employment-at-will" statutes, right-to-work legislation prohibits unions and employers from agreeing to impose union membership or the payment of dues as a condition of employment.

Since that time, 22 states (primarily in the southeast and southwest) have enacted various forms of right-to-work legislation, the most recent being Oklahoma in 2001. Analyzing various statistics, the National Institute for Labor Relations Research has drawn a strong correlation between these laws and ensuing economic growth. Among the 22 right-to-work states, private sector (non-farm) employment grew by 3.7% from 1999 to 2009, while shrinking 2.8% within the 28 remaining states. During that decade, real personal income rose 28.3% in right-to-work states, while dropping 14.7% elsewhere. Oklahoma offers the most recent case in point, reflecting a 13.6% growth rate in real personal income between 2003 and 2006 alone – over twice as fast as the average in non-right-to-work states.

Businesses create jobs. Jobs build income. And more income leads to a better way of life for most Americans. Proponents of right-to-work laws point to these statistics as evidence that forced-unionism states (i.e., states without right-to-work laws in place) are losing the economic development game. Consequently, it's not surprising that many of those states are now seriously considering right-to-work legislation to jump-start their troubled economies.

Currently, 13 states are considering right-to-work initiatives to promote job growth. Indiana Representative Jerry Torr explained it this way: "What I'm trying to do is bring jobs to Indiana. We have lost manufacturing jobs in Indiana because we are not a right-to-work state."

The Fight Is At The State Level . . .

Thus far, New Hampshire has made the hardest charge among traditionally unionized states. The House accepted a Senate-passed version of the right-to-work bill on May 4. While the Senate passed the measure with a veto-proof majority, the House did not. As he had promised to do, Gov. Lynch vetoed the measure a week later. The House plans to take up a challenge of that veto in late May, and as we went to press it remains to be seen whether the bill's supporters have the votes to override it. Consequently, New Hampshire could remain a non-right-to-work state – at least for the time being.

Nonetheless, this debate is unlikely to fizzle out any time soon. Right-to-work laws have been a hot topic lately, sparked in part by the recent Wisconsin standoff over collective bargaining rights for public sector employees. In February 2011, a group of Democrat senators fled to neighboring Illinois in an attempt to prevent the passing of legislation that would effectively eliminate the rights of some public employees to engage in certain forms of collective bargaining. The standoff drew national attention to a related controversy over whether workers should be free to refrain from union financial obligations if they so desire.

. . . And At The Federal Level

Federal legislators are now chiming in, having recently proposed a national right-to-work law that would effectively amend the NLRA to prohibit agency-shop arrangements in all 50 states. In the short term, political dynamics suggest that this legislation faces an uphill battle. While its prospects over the longer term remain to be seen, it seems clear that organized labor is fighting a battle for its remaining viability on all fronts. Even federal agencies such as the National Labor Relations Board (NLRB) are drawing fire.

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Do Your Job Descriptions Still Fit?

By Tillman Coffey (Atlanta)

Almost everyone has clothes in their closet that no longer fit. Admit it; things change, whether it's the fashion or you. In fact, some of those clothes probably never really fit, despite your alterations and efforts. Maybe you thought you would "grow" into them. Or maybe you thought you looked good enough. No problem.

Now picture your company's job descriptions. Do they still fit today? Did they ever really fit? Maybe the company got them off the rack and added an employee's name without regard to whether the job description actually "described" the job expected to be performed. Or maybe the job description was accurate when created but, as the job changed, the written description of the job did not. No matter how it happened, a bad fit is a bad fit. In the case of job descriptions, a bad fit is probably more serious than a fashion mistake.

Is It Even Needed?

Why have job descriptions in the first place? What is their purpose? Generally, a job description sets forth the job duties in a general way and serves as the company's "official" job requirements. It is a menu of sorts. The problem is that many job descriptions don't describe the job presently being performed by an employee (if they ever did). Regardless of how the actual job duties and the job description parted ways, whenever a controversy arises the job duties performed will control. A job description rarely helps in a controversy and can often make matters worse.

So, why is it important that the description and the job match? Consider the Americans with Disabilities Act (ADA). The ADA protects employees and applicants who can perform *essential job functions* with or without a reasonable accommodation. Often, the issue in an ADA case is determining what job duties are "essential." Employers who use job descriptions have the opportunity to set forth those essential job functions in writing before a controversy arises, and most job descriptions purport to do so. But for the job description to be of value it must accurately describe or list those essential job functions. Often they do not.

Let's say that Maria applies for a position with a written description which clearly states that the ability to lift 25 lbs is an essential job function. However, Maria is capable of lifting only 20 lbs. Under these circumstances, the employer can safely deny the applicant the position, right? Not necessarily. What if the lifting restriction was left over from the Middle Ages and today no one in that position actually is required to lift 25 lbs due to new equipment? What if all those persons in the job would testify that they never lift more than 10 lbs? Based on these facts, could you lawfully deny employment to Maria on this basis without violating the ADA?

Conversely, what if the job as it currently exists has a 25 lb lifting requirement but your written job description makes no mention of that requirement? Should you deny Maria employment based on her inability to lift 25 lbs under these facts? Maybe you can, with the knowledge you have to prove later that the requirement really existed and that your job description simply was outdated. In both scenarios, the job description potentially can hurt the employer.

The same concern exists under wage and hour law (the Fair Labor Standards Act, or FLSA). Many employers determine exempt versus non-exempt status based on a job description. The danger in doing this is that, much like essential job functions, the primary job duty described in the job description may not be the job actually being performed by the person in the job position. If faced with a challenge as to exempt status, the job description likely will be irrelevant if the employee shows that his or her primary job duties are not as stated on the job description and those actually performed do not allow the employer to lawfully classify the position as exempt. Remember, when claiming an exemption under the FSLA (and typically under many state wage and hour laws), the employer has the burden of establishing exempt status. Exempt status is not determined by job descriptions any more than it is determined by job title.

Our Advice

What should you do? Review your job descriptions. Do they still fit? Do they actually and accurately describe the job performed? To make this determination, solicit input from the supervisors, and the employees themselves, to ensure that the job description captures the actual job duties performed. If not, change the job duties or the job description. If the job description changes again, modify the job description along with it. At a minimum, consider reviewing job descriptions on a regular basis to ensure the right fit.

Additionally, ensure that the job description actually includes all essential job functions, including the often overlooked "mental" requirements. If your company considers attendance an essential job function, which should be obvious but is not to some, include that in the job description. Likewise, if the ability to understand and follow instructions and the ability to concentrate are considered essential to job performance, those traits should be included. And if the ability to get along with others or to be part of a team is considered essential, list those qualifications as well.

While the value of job descriptions may be debated, there is no debate that a bad job description likely has negative value. So, go through your "closet" and look for those job descriptions that no longer "fit." With a few alterations, you should be looking good.

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Managing Baby Boomers

By Robert McCalla (New Orleans)

There have been many comments and analyses lately about how employers should handle the emerging youngest generation, usually referred to as Gen Y. But as the 77 million baby boomers begin reaching 65 years of age this year, they will present some unique challenges to employers.

On one side of the issue, there will be the continuing challenge of making sure your work force retains sufficient employees with critical skills and experience to benefit the operation. The well-publicized problem created by the coming retirement of large numbers of experienced air traffic controllers is an example. To address this side of the issue, employers are taking various steps to keep these valuable employees in their work force including flexible work schedules, restructuring of job duties and responsibilities, creation of consulting positions, and positive reinforcement and encouragement.

On the other side of the issue, there is the equally difficult challenge of managing those boomers who want to continue to work but who may be experiencing declining physical and mental capabilities. The challenge includes ensuring that you are handling promotions, transfers, wage increases, and terminations in a way which will minimize your legal risk. Under federal law, and in many states, it is unlawful to discriminate against employees who are 40 years of age or older because of their age.

In a recent survey by the Associated Press, one in four of the boomer group said they will never retire, and two thirds of them said they will work at least part time for financial reasons. Although according to the survey 61% of boomers surveyed said their age is not an issue at work, the boomers continue to file a large number of EEOC charges and lawsuits claiming age discrimination. For example, in 2010, they filed 23,264 charges alleging age discrimination. This constituted 23.3% of all of the charges filed.

What Makes Age Different?

Unlike race and sex, which are immutable characteristics, age is ever evolving. One day you are not in the protected category, the next day you are. That day is your 40th birthday. This has enormous implications for employers when making employment decisions, such as promotions. Based on extensive studies, labor economists have found that as employees grow older, they may be less willing to relocate, less willing to devote the time necessary to learn new skills, such as how to use new computer software, and may be less motivated to work the hours or do the other things that increase their potential for promotion to a higher level.

For example, let's use a fictitious employee, Alan Silver. While Alan, as a 20, 30, or 40 year old is still the same Alan when he is in his 50s, 60s, and 70s, a whole lot of his physical, mental, and emotional characteristics and goals *may* be quite different. For example, when Alan joined your work force at age 25, he was single, highly energetic, and ambitious. He was willing to put in very long hours, and leapt at the chance to learn new skills. He was also willing to move anywhere if there was an opportunity for advancement.

Today Mr. Silver is 60 years old. He is married, very involved with his community, and has paid off his house note. He feels he has paid his dues, and is no longer willing to sacrifice his leisure time in the name of moving up the ladder. He is not, under any circumstances, willing to move to a different city. And, perhaps, most importantly, over the years Silver has received a number of promotions because of his satisfactory performance in his job. But, as is sometimes the case, after his most recent promotion he is now at the highest level consistent with his abilities, or – as noted by Laurence Peter, the author of *The Peter Principle* – may be one level higher than his level of competence. Additionally, at his level in the organization, there are fewer opportunities for promotion, and the criteria for promotion are more stringent.

The question facing employers is how to manage this issue in a way that minimizes legal risks. Before discussing some tips in making some of the normal day-to-day employment decisions, we felt it would be useful to briefly discuss how the courts analyze age discrimination claims.

How Courts View The Issue

The courts typically categorize age discrimination claims based on how an employee intends to prove the claim. In cases where there is a single plaintiff, an employee will try to prove intentional discrimination by using either direct or circumstantial evidence. Direct evidence usually consists of alleged statements by the person who made or participated in making the employment decision, which indicate that the employee's age was a factor in making the decision. Some examples are:

- comments by the manager making the decision or recommending the decision that the employee is "over the hill," "too old to do the job," or "needs to retire";
- statements in job advertisements suggesting an intent to discriminate based on age, such as "Looking for motivated, young self-starter," "Prefer new high school or college graduates," or "Delivery boy wanted"; or
- statements or questions in documents included in the personnel records concerning age.

Employees may also attempt to prove there was intentional age discrimination by circumstantial evidence. They can do this if:

- similarly situated employees who are meaningfully younger, such as five to six years younger, were treated more favorably;
- the reason articulated by the employer for the action is not supported by the underlying evidence;
- the employee's age is noted on the employee's personnel records or other records that were reviewed by the decision maker; or
- the employee's personnel evaluations consistently rated the employee satisfactory or higher.

Where employees have no persuasive direct or circumstantial evidence, they may attempt to prove their case by showing that the company relied on an objective factor, or a subjective decision-making system, which has a statistically-significant adverse impact on older workers. This category of claims is usually referred to as disparate-impact cases. Even if an employee is able to identify a specific employment practice that has a disparate impact on older employees, the employer can, nevertheless, lawfully continue to use the practice by proving the practice is based on reasonable factors *other than age.*

How To Avoid Trouble

Following are some useful suggestions you can follow in order to minimize your legal risks when making some typical employment decisions involving an older worker. Of course, first and foremost, while the scenario involving Alan Silver discussed above is not, in any sense, an aberration from what often happens, it cannot be stressed enough that an employer cannot and should not stereotype its employees based on their age.

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Meanwhile, current right-to-work states are fighting against what they perceive to be a pro-union federal administration. Specifically, senators from South Carolina have introduced a bill titled the "Right to Work Protection Act" that would preserve states' power to decide for themselves whether they want right-to-work laws in place. The bill is an expressly acknowledged response to the NLRB's recently issued complaint against the Boeing Company, challenging its decision to locate a new production line in South Carolina. The complaint is seen by many as a federal attack on state right-to-work laws, given the NLRB Acting General Counsel's controversial assertion that the new line should essentially have been awarded to Boeing's unionized employees in Washington – which happens to be a non-right-to-work state.

Where Things Are Headed

It remains to be seen where all this will end up, but the decline of unions and organized labor is not new or even recent; it is a decades-long trend. There are those who say that the union movement will continue to decline to the point that it is no longer a significant political force. That certainly remains to be seen. But there is an unmistakable sense that compulsory unionism is drawing increased scrutiny at both a state and federal level. Additional pressure is expected to be brought to bear when it comes time to evaluate the proposed appointments of the Acting General Counsel, along with the current NLRB Chair. Budgets for the agency are also likely to draw severe scrutiny come this fall.

But unions remain closely allied with the political left, and as the left prospers so will unions. Currently we've seen the NLRB moving full speed ahead with a decidedly pro-union agenda, while unions are vowing to counter the long-term nationwide trend by stepping up their own organizing efforts.

One thing remains clear – complacent employers could get caught in the crossfire. Our advice is that employers should seize the initiative by training supervisors to recapture their legal free speech rights, and to look for other legal means to protect their union-free status.

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Managing Baby Boomers

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Here are some additional points to remember:

- base your employment decisions on job-related criteria;
- apply the job-related criteria consistently to *all* candidates potentially affected by the employment decision;
- train your managers involved in making the employment decisions on the company policies and legal prohibitions against age discrimination and the importance of using job-related criteria for making the decision;
- if the older employee was hired in the last four or five years, include the manager who hired the employee as one of the decision makers if not the key decision maker;
- include managers who are in a similar age group as the older employees potentially affected by the employment decision; and
- if you use performance evaluations, make sure they are valid and job-related and that the managers completing the performance evaluations have been properly trained on how to evaluate their employees.

The importance of doing performance evaluations properly can't be stressed enough. When defending age discrimination claims that the older employee was unlawfully passed over for promotion, we often are faced with attempting to explain a history of positive or satisfactory performance evaluations when the reason for the decision was based on unsatisfactory performance.

While it's beyond the scope of this article to discuss in any detail what's required for a valid performance evaluation, some of the critical requirements include: 1) using only job-related criteria in your evaluation; 2) clearly communicating those job requirements ahead of time to the employee; 3) basing your evaluation on specific demonstrated behaviors as opposed to general traits; 4) ensuring that the job criteria being used are being applied consistently by all evaluators; and 5) training your evaluators to avoid common mistakes and biases in completing the evaluations.

Following these few simple guidelines can not only help you avoid costly litigation, it will also ensure that you are making the most of one of your company's most valuable resources – its older employees.

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