EMPLOYMENT FLASH

Skadden November 2011

INSIDE

NLRB Overturns Three Key Precedents

The National Labor Relations Board (Board) is the source of several very significant recent rulings for employers and unions. On August 26, 2011, the Board sided with unions in three important 3-1 decisions involving rules for organizing and representing workers — *Lamons Gasket Company,* 357 NLRB No. 72 (Aug. 26, 2011), *UGL-UNICCO Service Company*, 357 NLRB No. 76 (Aug. 26, 2011) and *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (Aug. 26, 2011) — each of which overturns prior Board precedent.

Recognition Bar

Lamons Gasket Company focuses on the new bargaining relationship created by an employer's voluntary recognition of a union based on a showing of support by a majority of employees (typically through a card check procedure). For more than forty years, federal law had barred challenges to a union's representative status for a "reasonable period" following voluntary recognition, in order to give the new bargaining relationship a chance to succeed. In its 2007 decision in *Dana Corp.*, 351 NLRB 434 (2007), the Board had modified that long-standing "recognition bar" doctrine by establishing a 45-day period following an

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Second Circuit Adopts *Moench* Presumption in ERISA "Stock-Drop" Actions

In two separate decisions issued on October 19, 2011, the Second Circuit joined the Third, Fifth, Sixth and Ninth Circuits in adopting the *Moench* "presumption of prudence" test for Employee Retirement Income Security Act (ERISA) "stock-drop" actions. *In re Citigroup ERISA Litig.*, No. 09-3804, 2011 WL 4950368 (2d Cir. Oct. 19, 2011); *Gearren v. McGraw-Hill Cos., Inc.*, Nos. 10-792, 10-934, 2011 WL 4952628 (2d Cir. Oct. 19, 2011). The "presumption" arises from the Third Circuit decision in *Moench v. Robertson*, 62 F.3d 553 (3rd. Cir. 1995), in which the court held that an employer's decision to offer company stock as an investment option in an ERISA-governed employee benefit plan may be reviewed only for an "abuse of discretion" by the plan's fiduciary (*i.e.*, the fiduciary was aware or should have been aware of the company's imminent financial collapse or other dire circumstances).

Both the *Citigroup* and *Gearren* "stock-drop" claims arose out of the subprime mortgage crisis, following which plaintiffs, who were participants in their companies' 401(k) plans, alleged breaches of fiduciary duty in connection with the decrease in their companies' stock prices. Specifically, in *Citigroup*, the plaintiffs alleged that the various Citigroup defendants violated their duties of prudence and loyalty under ERISA by (i) continuing to offer a stock fund consisting primarily of

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California Court Upholds Class Action Waiver in Employment Arbitration Agreement

On October 12, 2011, the United States District Court for the Central District of California issued an opinion upholding a class action waiver in an employee arbitration agreement. *Dauod v. Amerprise Financial Services,* No. 8:10-CV-00302 (C.D.Cal. Oct. 12, 2011). At issue in *Dauod* was the Financial Advisor's Agreement between Amerprise and former employee Iman Dauod. The agreement contained an arbitration provision and also purported to waive any right to bring claims on a class action basis. Ms. Dauod filed suit against her former employer alleging a variety of class action wage and hour claims on behalf of herself and other similarly situated employees. Amerprise sought summary judgment to dismiss Ms. Dauod's putative class allegations in light of the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740 (2011).

In *AT&T Mobility LLC v. Concepcion*, the Supreme Court ruled 5-4 that an arbitration agreement in a consumer contract prohibiting class-wide arbitration was enforceable. *See* June 2011 edition of *Employment Flash*. The Supreme Court noted in *AT&T* that refusing to uphold a class action waiver in an agreement and allowing consumers to demand class-wide arbitration was "an obstacle to the accomplishment and execution of the Federal Arbitration Act's full purposes and objectives."

While Ms. Dauod argued that there was a meaningful distinction between consumer cases (such as the cell phone contract dispute in *AT&T)* and employment cases, the *Dauod* Court disagreed and stated that it declined to construe *AT&T* so narrowly that it would not apply to an employment-related class action waiver like the provision at issue. Ms. Dauod also argued that the arbitration provision in her agreement with Amerprise was unconscionable and unenforceable under California law because it precluded her from bringing a representative action under California's Private Attorney General Act of 2004 (PAGA), a law allowing private citizens to pursue civil penalties against employers on behalf of the California Labor and Workforce Development Agency. While the court agreed that a PAGA waiver is considered unconscionable under California law, the court noted that Ms. Dauod's argument was not applicable to the case as she had not asserted any claims under PAGA and, even if she had, the arbitration waiver would not preclude her from bringing a PAGA claim.

DOL Clarifies SOX Whistleblower Rights

The U.S. Department of Labor Administrative Review Board (ARB) recently issued a decision clarifying the rights of whistleblowers who raise complaints under Section 806 of the Sarbanes-Oxley Act (SOX). The case arose when an employee of Halliburton filed a complaint under SOX alleging that his employer retaliated against him after he alerted the SEC and the company's audit committee about certain concerns regarding Halliburton's accounting practices. The employee alleged that he suffered adverse actions when his employer disclosed his identity as the complainant to several other employees in violation of company policy, resulting in him being shunned in the workplace and compelling him to take a leave of absence and ultimately resign from his employment. *Menendez v. Halliburton Inc.*, ARB No. 09-002 (Sept. 13, 2011).

The administrative law judge (ALJ) who initially heard the *Menendez* case found that the employee engaged in SOX-protected activity but failed to prove that his employer subjected him to a retaliatory adverse action. The ARB disagreed, concluding that the employee had indeed sustained an adverse action under SOX when his employer breached his confidentiality and that the resulting isolation, removal of job duties and resignation all constituted evidence of harm.

The ARB concluded that the ALJ (and the ARB itself, in other whistleblower cases) had misapplied Title VII precedent in deciding cases in the whistleblower context. As a result, SOX whistleblowers claiming they had been subject to adverse employment actions had been required to show that they experienced a significant, tangible employment action or a material change in working conditions as a result of their reporting (which is not even the current standard under Title VII's anti-retaliation provision). Here, however, the ARB found that SOX's anti-retaliation provision explicitly proscribes *nontangible* activity, evidencing a congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers. The ARB also concluded that SOX must be more expansively construed than Title VII and deemed the standard for an adverse action under SOX to be "unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions," stating that adverse actions under SOX need not be either "economic or employment-related." As the ARB further commented, an adverse action is simply one that would discourage a reasonable person from engaging in protected activity and is "not necessarily retaliatory or illegal."

NLRB Postpones Notice Requirement

In the wake of a number of pending lawsuits and attempts by the U.S. House of Representatives and the Senate to pass legislation prohibiting implementation, the Board has postponed the date that most employers will be required to post a notice informing employees of their rights under the National Labor Relations Act from November 14, 2011, until January 31, 2012. The Board implemented the requirement via a proposed regulation in December 2010 and a published final rule in August 2011. *See* September 2011 edition of *Employment Flash*.

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The notice can be found on the Board website at https://www.nlrb.gov/poster. If the January 31, 2012, deadline remains in place, most private sector employers will be required to post this notice in a conspicuous place, where other notifications of workplace rights and employer rules and policies are posted, and employers also should publish a link to the notice on an internal or external website if other personnel policies or workplace notices are posted there.

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employer's voluntary recognition of a union during which employees were permitted to petition the Board for a secret ballot election to test the union's majority status.

The decision in *Lamons Gasket* restores the law to its pre-*Dana Corp.* status by reinstating a complete voluntary recognition bar that blocks any challenge to the union's majority status for a reasonable period following the employer's voluntary recognition. During this period, no employer, employee or union may petition the Board for a secret ballot election. In *Lamons Gasket,* the Board also defined the "reasonable period" of the recognition bar as no less than six months and no more than one year after the first bargaining session of the parties. The Board stated that the specific period in each case must be determined based on consideration of a number of factors, including: whether the parties are bargaining for an initial contract; the complexity of the issues being negotiated and of the parties' bargaining processes; the amount of time elapsed since bargaining commenced and the number of bargaining sessions; the amount of progress made in negotiations and how near the parties are to concluding an agreement; and whether the parties are at impasse. Finally, the Board held that its new rule will be applied retroactively in all pending cases, except those in which an election was held and the ballots have been opened and counted.

Successor Bar

UGL-UNICCO Service Company addresses a union's representative status during the period following a change in ownership at a company. It overrules the Board's decision in *MV Transportation*, 337 NLRB 770 (2002), which created an immediate window after a sale or merger for a union's status to be challenged by 30 percent of employees, the successor employer or a rival union.

In *UGL-UNICCO*, the Board restored the "successor bar" doctrine, creating "a conclusive presumption of majority support for a defined period of time, preventing any challenges to the [incumbent] union's status." The majority explained that under Supreme Court precedent established in *NLRB v. Burns Security Services*, 406 US 272 (1972), while a successor employer is required to recognize and bargain with an incumbent union, it is generally not required to adopt its predecessor's collective bargaining agreement and, except where it is "perfectly clear" that the successor intends to retain all of the predecessor's unit employees, the successor may unilaterally set initial terms and conditions of employment. Under such law, in the *UGL-UNICCO* majority's view, the transition from one employer to another threatens to "seriously destabilize collective bargaining." Accordingly, the majority reasoned that the "successor bar" is needed to ensure the incumbent union a reasonable period of time, without any potential challenge, to represent the employees in collective bargaining with the successor employer.

The *UGL-UNICCO* Board also defined the length of the "reasonable period" of the successor bar, articulating a two-part standard. Where a successor employer expressly adopts the existing terms and conditions of employment in effect at the time of the transition as a starting point for bargaining, the incumbent union shall be insulated from challenge for six months, measured from the date of the first bargaining session between the successor and the union. Alternatively, where a successor unilaterally sets initial terms and conditions of employment before proceeding to bargain with the incumbent union, the "reasonable period" will be a minimum of six months and a maximum of one year from the date of the first bargaining session, with the actual period determined under the approach described in the *Lamons Gasket* case. The Board commented that a longer insulated period of bargaining is appropriate in such cases because, even if a successor employer has acted lawfully, "the destabilizing factors associated with successorship are at their height."

Furthermore, the Board held that where a successor and a union successfully reach a first contract within the reasonable period during which the successor bar applied, and where there was no open period permitting the filing of a decertification petition during the final year of the predecessor employer's bargaining relationship with the union, the contract-bar period applicable to election petitions filed by employees or by rival unions will be a maximum of two years, instead of three.

Bargaining Units

Specialty Healthcare & Rehabilitation Center of Mobile significantly raises the bar for employers arguing that a proposed bargaining unit is inappropriate because it excludes certain employees. In such cases, employers now must show that the excluded employees share an "overwhelming community of interest" with the proposed bargaining unit. While the Board's decision in *Specialty Healthcare* centered on a proposed unit in a nonacute healthcare facility, the ruling may impact employers engaged in other types of businesses.

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In *Specialty Healthcare*, the union petitioned for approval of a bargaining unit composed of 53 certified nursing assistants (CNAs) at an Alabama nursing home. However, the employer contended that under settled Board law, an appropriate unit must also include the facility's clerks, cooks and maintenance workers. In making such an argument, the employer relied on Board regulations defining appropriate bargaining units for acute healthcare facilities and on the Board's 1991 decision in *Park Manor Care Center*, 305 NLRB 872 (1991). In *Park Manor*, the Board held that appropriate bargaining units in the context of nonacute health care facilities such as nursing homes should be determined using the "empirical or pragmatic" community of interest approach, which utilized not only an analysis of the employees' "community of interest," but also "evidence presented during rulemaking with respect to units in acute care hospitals, as well as prior cases involving either the type of unit sought or the particular type of health care facility in dispute." The Board's majority in *Specialty Healthcare* disagreed with the employer, explicitly overruled *Park Manor* and set a new standard for employers challenging unit determinations.

The Board stated that *Park Manor*'s approach was "obsolete" and that its reliance on decades-old rulemaking considerations related to acute healthcare facilities failed to provide meaningful guidance for decisions concerning present day nonacute healthcare facilities. The Board determined, rather, that it should use the "community of interest" approach that it has traditionally applied at other workplaces to determine whether a proposed unit was appropriate. Under this approach, the Board examines whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work; are functionally integrated with the employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. Under this test, the Board found that the CNAs clearly shared a community of interest and constituted an appropriate bargaining unit.

Because the NLRA requires that a proposed unit need only be "an appropriate unit," the Board further articulated that an employer challenging the proposed unit must do more than demonstrate that a different unit also might be appropriate, or even more appropriate than the proposed unit. The Board concluded that when a union has identified an appropriate unit, an employer challenging the unit as too narrow must show that employees in a larger unit "would share an overwhelming community of interest with those in the petitioned-for unit."

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Citigroup stock as an investment option and refusing to divest the fund of Citigroup stock (the "prudence claim") and (ii) failing to provide plan participants with complete and accurate information about Citigroup's financial status (the "communications claim"). The *Gearren* plaintiffs brought similar claims.

Analyzing the plaintiffs' prudence claim in *Citigroup*, the Second Circuit observed that "[p]laintiffs' claims place in tension two of ERISA's core goals . . . the protection of employee retirement savings through the imposition of fiduciary duties and . . . the encouragement of employee ownership through the special status provided to employee stock ownership plans ('ESOPs') and eligible individual account plans ('EIAPs')." To accommodate these "competing ERISA values" the Second Circuit adopted the *Moench* presumption with respect to both ESOPs and EIAPs, providing that a "fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision … [which] the plaintiff may overcome … by establishing that the fiduciary abused

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Reminder: Employee Wage Notice Deadlines Approaching in NY and CA

Starting January 1, 2012, employers in both New York and California will be required to provide written notices to employees containing certain wage information, including, among other things, the employee's basis of pay (*e.g.*, hourly, weekly, salary or commission) and allowances claimed against the minimum wage as well as other information about the employer, including the employer's name, principal place of business, telephone number and any other names under which the entity does business. Please see the February 2011 edition of *Employment Flash* for a discussion of the requirements of the New York Wage Theft Prevention Act and the October 2011 Special Edition of *Employment Flash* for information concerning the similar law recently passed in California.

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its discretion by investing in employer securities." The Second Circuit also endorsed the principle that judicial scrutiny should increase with the degree of discretion a plan gives its fiduciaries to invest, and held that the *Moench* presumption should apply at the pleading stage. Because the plaintiffs failed to allege facts sufficient to show that the defendants knew or should have known that Citigroup was in a "dire situation" requiring that the 401(k) plan's terms be overridden to limit the plan participants' investments in Citigroup stock, the Second Circuit upheld the lower court's dismissal of the claim.

Dismissing the plaintiffs' communications claim in *Citigroup*, the Second Circuit held that (i) plan administrators do not have a duty to provide plan participants with non-public information that could pertain to the expected performance of specific investment options, and (ii) neither Citigroup, nor its former CEO, were acting in a fiduciary capacity when making statements to plan participants about Citigroup's expected performance and no facts were alleged such that the Administration Committee knew that it was making false or misleading statements. The Second Circuit reached parallel conclusions in *Gearren*, affirming the dismissal of that action.

Employment Flash **provides information on recent developments in the law affecting the corporate workspace and employees. If you have any questions regarding the matters discussed in this newsletter, please call one of the following attorneys or your regular Skadden, Arps contact:**

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Thank you to Skadden, Arps associates Caroline Honorwski, Beth Libow, Stephanie Poliseno, Christy Peetz and Kathiana Aurelien who assisted in this edition of the *Employment Flash*.