



Inside The Beltway

Keeping You Informed

A publication of Nixon Peabody LLP's Washington, DC, office

AUGUST 23, 2010

Critical developments in labor and employment law

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Legislative Branch/Senate

Create Jobs and Save Benefits Act of 2010 (S. 3157) – Introduced by Senator Robert Casey (D-PA), the bill would shift an estimated \$165 billion in underfunded multi-employer/union pension plan liabilities to the Pension Benefit Guarantee Corporation (PBGC). The PBGC uses private premiums paid by plans to insure retirees are paid should a plan become insolvent. Under the Casey bill, public funds would be used to underwrite multi-employer/union plan liabilities of “orphaned” plans where a company goes out of business or withdraws from a plan. Reportedly, the impending release of new rules by the Financial Accounting Standards Board (FASB) that will require publicly reporting multi-employer underfunded pension liabilities is creating the political pressure for passage.

Executive Branch/Administration

Department of Labor (DOL)

DOL has followed in the steps of the Office of Management and Budget (OMB) in its program to publicly report/expose debarred, suspended, or otherwise excluded contractors/parties from government contracts, grants, or financial or non-financial assistance and benefits. OMB's program is entitled the Excluded Parties List System: <https://www.epls.gov/>

DOL, in its efforts to promote the welfare of wage earners and retirees of the United States by ensuring their safety, improving their working conditions, and protecting their retirement and health-care benefits, has launched a site to report enforcement data (violations and fines) collected by the Employee Benefits Security Administration (EBSA), Mine Safety & Health Administration (MSHA), Office of Federal Contract Compliance Programs (OFCCP), Occupational Safety & Health Administration (OSHA), and Wage & Hour Division (WHD): <http://ogesdw.dol.gov/search.php>

Occupational Safety & Health Administration (OSHA)

On August 12, 2010, OSHA published a notice asking for comment on its intention to survey more than 14,000 private-sector employers as part of its effort to collect information on injury and illness prevention programs and proceed with prevention program rulemaking.

OSHA Administrator David Michaels marked OSHA's 40th anniversary by emphasizing again that there must be stronger enforcement and increased fines, including regulation by "shaming" those employers who play a game of "catch me if you can." He also announced that attention would be shifted from compliance assistance to enforcement.

Office of Labor-Management Standards (OLMS)

OLMS announced proposed rulemaking on August 10, 2010, to revise Form LM-30, the annual financial disclosure form required to be filed by union officials and union employees who receive payments from or have financial arrangements with employers whose employees the union represents or is actively seeking to represent. It also calls for complying with the Labor-Management Reporting and Disclosure Act, Section 202. Essentially, the proposed reporting cuts back on Bush Administration rules. <http://edocket.access.gpo.gov/2010/pdf/2010-19250.pdf>

Wage and Hour Division (WHD)

On June 16, 2010, WHD issued its second Administrator's Interpretation, in lieu of the former opinion letter that could be relied upon in defending against a claim of unpaid wages. This Interpretation addresses time spent "donning and doffing." The new pronouncement rejects the former Bush administration's guidance on the compensability of time spent "changing clothes." Under the new Interpretation, compensable time includes changing clothes or donning and doffing protective equipment required by law, the employer, or the nature of the job.

http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAI2010_2.htm

National Labor Relations Board

Members Mark Pearce (D) and Brian Hayes (R) were confirmed by the Senate on June 22, 2010, for terms ending August 27, 2013, and December 16, 2012, respectively. The term of member Peter Schaumber (R) ends August 27, 2010. To date, there has been no announced nominee to replace him. Chairperson Wilma Liebman's term ends August 27, 2011 and the service of recess appointee Craig Becker (D) ends with the adjournment of Congress in late fall 2011. He continues to be the focus of criticism for not recusing himself from cases involving local chapters of the Service Employees International Union (SEIU), which he previously served as associate general counsel.

<http://www.washingtonpost.com/wp-dyn/content/article/2010/08/16/AR2010081605082.html>

Following the U.S. Supreme Court's June 17, 2010, ruling in *New Process Steel, LP v. NLRB* finding that the National Labor Relations Board (NLRB) was without authority to issue two-member-only decisions over 27 months, the NLRB began "re-issuing" decisions by a three-member panel on August 5, 2010. Of the 595 two-member decisions issued, 328 were closed through compliance with the original decision or by settlement or withdrawal. Whether any of the closed cases will be challenged is unknown. Of the remaining 263 decisions, the NLRB has "re-determined" 20 cases as of August 17, 2010, reaffirming the two-member decision in each case.

Judicial Branch/U.S. District Courts

On August 11, 2010, the U.S. District Court for the Northern District of Indiana granted summary judgment in favor of FedEx Ground Package System Inc., finding that current and former drivers are independent contractors under the Kansas Wage Payment Act. Judge Robert L. Miller held that the “right to control the manner and methods of the worker is the single most important factor in determining a worker’s status.” Under the FedEx agreement, the contractor or owner-operator was compensated based on daily rates and piece rates, was free to hire his/her own helpers, paid his/her own taxes and workers’ compensation insurance, and could sell routes to other drivers meeting FedEx requirements.

Labor/Employment News Reports

The August 12, 2010, Gallup poll of the public’s view of unions finds a 52-percent approval rating, a slight improvement over last year’s 48 percent, which was the lowest in the poll’s 74-year history: <http://www.gallup.com/poll/142007/Americans-Approval-Labor-Unions-Remains-Near-Record-Low.asp>

Recently elected United Autoworkers (UAW) President Bob King announced his union’s radically different 21st-century strategy of building relationships with employers based on respect, shared goals, and a common mission of producing the best-quality product, safest product and longest-lasting product at the best price, and to do what it takes to make its companies successful. King reported that the UAW is preparing guidelines for Principles for Fair Elections, banning threats or pressure by management or the union. If companies do not agree to the Principles, “we will expose those companies in any and every way we can until they agree to respect workers’ rights and to rectify their anti-union action.” Additional targets are foreign-owned companies doing business in the United States that are non-union but fully cooperate with unions in their home countries and in other countries where they have operations. <http://www.uaw.org/articles/uaw-21st-century>

Charges were filed last week with the NLRB accusing both the National Nurses United and SEIU Healthcare Missouri/Kansas and Research Medical Center of secretly agreeing to a neutrality agreement giving both unions employee lists and special access, prohibiting managers from discussing union issues, and denying access to employees opposed to union organizing: <http://www.kansascity.com/2010/08/16/2154145/research-medical-center-nurse.html>

Laborers’ International Union of North America (LIUNA) announced on August 15, 2010, that it will re-affiliate with the AFL-CIO effective October 1, 2010. LIUNA disaffiliated in June 2006, joining Change-to-Win (CtW), formerly led by Andy Stern, former chair of CtW and president of the SEIU.

For further information on the content of this **alert**, please contact your Nixon Peabody attorney or:

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