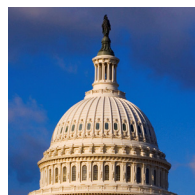


WASHINGTON LABOR & EMPLOYMENT WIRE

On The Hill.....1
 Agency Activity Alert.....1
 Candidate Corner5
 Bill Tracker7



ON THE HILL

Congress Addresses President's Criticisms of Defense Bill That Would Expand FMLA Coverage for Military Family Members

On January 16, 2008, legislation providing for the enactment of a modified version of the National Defense Authorization Act for Fiscal Year 2008 (H.R. 4986) was introduced and passed in the House. The bill responds to President Bush's unexpected decision not to sign the National Defense Authorization Act for Fiscal Year 2008 (H.R. 1585), which was passed by Congress on December 14, 2007. President Bush's pocket veto was unrelated to the bill's provisions that would have amended the Family and Medical Leave Act (FMLA) to provide unpaid leave to employees to care for a family member injured through service in the Armed Forces or to deal with an urgent family situation that occurs when a close family member is called away because of military service. H.R. 4986 modified the original legislation to address the foreign sovereign immunities provisions criticized by President Bush in his memorandum of disapproval, but left intact the provisions expanding the FMLA. The House passed H.R. 4986 by a vote of 369 to 46. On January 22, 2008, the Senate passed the revised National Defense Authorization Act by a vote of 91-3.

AGENCY ACTIVITY ALERT

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

OSHA's Federal Agency Targeting Inspection Program

On January 8, 2008, OSHA implemented a new nationwide targeting program for planned inspections of federal agency worksites, including sites staffed by contractors whose work is supervised on a daily basis by federal agency personnel.

The program targets federal agency establishments that experienced large numbers of lost time injuries during fiscal year 2006. As part of this program, OSHA has developed primary and secondary inspection lists. The primary inspection list includes 100 percent of the establishments reporting 100 or more lost time cases (LTCs), 50 percent of the establishments reporting 50 to 99 LTCs and ten percent of the establishments reporting

20 to 49 LTCs. OSHA used a random numbers table to select the establishments reporting less than 100 LTCs. If a region or area office has the ability to conduct more inspections than those on the primary list, OSHA will create a secondary inspection cycle for the remaining establishments.

An establishment may defer a programmed inspection if it participates in an OSHA Strategic Partnership or if it is applying to OSHA's Voluntary Protection Program. If involved in a partnership, the inspection could be deferred up to six months from the signing of the partnership agreement or from the establishment's subsequent entry into the partnership. If applying for the voluntary protection program, the deferral period will start no more than 75 calendar days prior to the commencement of the scheduled pre-approval on-site review.

OSHA Publishes Notice of Proposed Rulemaking for New Respirator Fit-Testing Protocol

On December 26, 2007, OSHA published a proposed rulemaking that adds a new fit-testing protocol, the Abbreviated Bitrex Qualitative Fit-Testing (ABQLFT), to Appendix A of OSHA's Respiratory Protection Standard. The ABQLFT "has a shorter exercise duration than the current methods" and "will give employers additional flexibility in selecting procedures for conducting fit-testing." In particular, the ABQLFT will shorten the duration for each of the seven fit-test exercises from one minute to 15 seconds. The proposed rule would apply to employers in general industry, shipyard employment and the construction industry.

Public comments must be submitted no later than February 25, 2008. All comments on this proposed rulemaking must include the docket number, OSHA 2007-0006. Comments may be submitted in three ways: 1) post the comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>, 2) send three copies of the comments to the OSHA Docket Office, Room N-2625, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room N2625, Washington, D.C. 20210 or 3) fax the comments to 202.693.1648.

NATIONAL LABOR RELATIONS BOARD (NLRB)

NLRB Takes Steps to Keep Agency Running with Only Two Board Members

On December 20, 2007, four days after the expiration of the term of Chairman Robert Battista (R), the four remaining NLRB members took steps to ensure continuous operation of the NLRB in anticipation of the expiration of two other Board members' recess appointments on December 31, 2007. The Board temporarily delegated authority on all court litigation matters that otherwise would require Board authorization to General Counsel Ronald Meisburg. This delegation will give the general counsel full and final authority to initiate and prosecute injunction proceedings under Section 10(j), and to enforce or defend Board orders and decisions under Sections 10(e) and (f) of the National Labor Relations Act (NLRA).

The Board also temporarily delegated its decision-making authority to members Wilma Liebman (D), Peter Schaumber (R) and Peter Kirsanow (R) so that Liebman and Schaumber, as a quorum of the three-member group, will be permitted to issue decisions and orders in unfair labor practice and representation cases. The recess appointments of Kirsanow and Dennis Walsh (D) expired with the adjournment of the Senate at the end of year.

The Board acted pursuant to NLRA section 3(b), which permits it to delegate its authority to any three members and stipulates that two members of this group constitutes a quorum. The Board also relied on a March 4, 2003, opinion issued by the U.S. Department of Justice Office of Legal Counsel that concluded that "if the Board delegated all of its

powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained.” The temporary delegations will be revoked when the Board returns to at least three members.

NLRB Upholds Employer Policy Prohibiting Use of Company Email for Union Solicitation

In a 3-2 decision issued on the final day of outgoing Chairman Robert Battista’s term, the NLRB determined that an employer may lawfully prohibit employees from using its email system for union business as long as the policy is not discriminatorily enforced against union-related emails. In *The Guard Publishing Co.*, 351 NLRB No. 70 (Dec. 16, 2007), the Board considered the legality of an employer policy that prohibited use of company email for non-job-related solicitations. In accordance with this policy, an employee was reprimanded on two different occasions for three emails about union activities she sent to employees at their company email addresses. The general counsel provided evidence that employees were permitted to use the employer’s email system to send personal emails. The Board determined that the employer’s policy did not constitute an unfair labor practice under Section 8(a)(1) of the NLRA, and ruled that an employee has no statutory right to use an employer’s email system to further union activities.

In reaching its decision, the Board relied on past cases involving employer property rights. Although the issue of whether an employer’s email system may be used for Section 7 communications is an issue of first impression, the Board determined that an email system is similar to other employer-owned property such as bulletin boards, telephones and televisions. Thus, the Board applied the principle that applies to these other forms of property, which is that there is no statutory right to use an employer’s equipment or media as long as the restrictions an employer places on the use of its property are nondiscriminatory.

However, the Board also noted that there was not any contention that the employees here rarely or never saw each other in person or only communicated with each other by electronic means. The Board thus stated that its decision did not address circumstances in which there was no means of communication among employees at work other than email, raising the possibility that a different rule might apply under those circumstances.

Modifying its previous rulings, the Board determined that an employer’s enforcement of a policy restricting use of its email system or other property is only discriminatory if “the employer has drawn a line between permitted and prohibited activities on Section 7 grounds.” Thus, the fact that union solicitation is barred and other non-work-related activities are permitted is not enough to establish that a restriction or its enforcement is discriminatory. It must be shown that the restriction or its enforcement results in “disparate treatment of activities or communications of a similar character because of their union status.”

NLRB General Counsel Issues Guidance for Handling Bill Johnson’s Charges after Board’s Decision in BE&K Construction Company

On December 27, 2007, the NLRB’s general counsel issued a Guideline Memorandum regarding the handling of unfair labor practice charges where the charging party alleges an unlawful lawsuit was filed.

In *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 748-49 (1983), the Supreme Court held that the Board may find a violation of the NLRA where a lawsuit was filed with a retaliatory purpose and the lawsuit resulted in a judgment adverse to the plaintiff, was withdrawn or otherwise shown to be without merit. In *BE&K Construction Co.*, 536 U.S. 516, 532-37 (2002), the Supreme Court revised the *Bill Johnson’s* standard by finding that the Board could no longer rely upon the fact that a lawsuit was ultimately unsuccessful, but instead must determine whether the lawsuit was reasonable from the perspective of the plaintiff at the time the lawsuit was filed. In addition, the Supreme Court in

BE&K rejected the Board's policy of finding a retaliatory motive in a reasonably based lawsuit if it attacked protected conduct.

In September 2007, the Board issued its decision in *BE&K* on remand by the Supreme Court. *See BE&K Constr. Co.*, 351 NLRB No. 29 (Sept. 29, 2007). The Board held that the filing and maintenance of a reasonably based lawsuit does not violate the NLRA, regardless of whether the lawsuit is ongoing or concluded, or whether it was filed with a retaliatory motive. In determining reasonableness, the Board adopted the Supreme Court's antitrust standard, which states that a lawsuit is objectively baseless if "no reasonable litigant could realistically expect success on the merits." The Board further found that the NLRA only prohibits lawsuits that are "both objectively and subjectively baseless," but it did not define "subjectively baseless."

In his Guideline Memorandum, the general counsel described several "guiding principles" in determining whether a lawsuit is reasonably based:

- Claims that are novel and unsupported by existing precedent may nevertheless be reasonably-based if they raise a "reasonable argument for the extension of existing law" or involve an unsettled area of the law.
- The Board's inquiry into factual or legal claims or theories is generally limited to whether they are frivolous or plainly foreclosed.
- Survival of a motion for summary judgment generally indicates that a lawsuit should be deemed reasonably-based.
- A lawsuit can be considered reasonably based even where it is dismissed on summary judgment, particularly where it involves an unsettled area of the law.

The general counsel's Guideline Memorandum also provides direction to the Board Regions for processing of *Bill Johnson's* charges. First, the region must initially investigate whether the challenged lawsuit is reasonably based. If the lawsuit is found to be reasonably based, the charge should be dismissed unless it is withdrawn first. If the lawsuit is found to be baseless, the region should then investigate the evidence that the lawsuit was brought with a retaliatory motive, including evidence that that lawsuit attacked protected conduct, is causally related to protected activity or was filed to impose the costs of litigation without regard to its outcome. After such investigation, the region must submit a reasoned analysis to the Division of Advice.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

The EEOC Eliminates Three Bases for Dismissal of Charges Under Title VII and the ADA

The EEOC is eliminating three bases for dismissal of charges under Title VII and the Americans with Disabilities Act (ADA). Effective February 19, 2008, the Commission will no longer authorize dismissal when the charging party fails to cooperate, cannot be located or refuses to accept an offer of full relief for the harm alleged in the charge. The Commission added these grounds in 1977 as a case management tool, but now notes that they are no longer necessary, have caused confusion in the courts, and are inconsistent with procedures in the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act. Once the rule takes effect, the only authorized grounds for dismissal will be when the Commission issues a no cause determination, a charge was untimely or a charge fails to state a claim on which relief can be granted.

EEOC Issues New Rule Regarding Retiree Health Benefit Coordination

The EEOC has issued a new rule allowing employers to coordinate retiree health benefits with Medicare, or comparable state health benefits, without violating the Age Discrimination in Employment Act (ADEA). First proposed four years ago, the rule was developed in response to a 3rd Circuit ruling in 2000 in *Erie County Retirees Association v. County of Erie*, which held that the ADEA requires employers to spend the same amount on health benefits for retirees eligible for Medicare as it spends for younger retirees. The new regulation allows employers to continue the common practice of providing health benefits to retirees by supplementing government healthcare or by offering benefits to cover retirees between the time of retirement and the time they become eligible for Medicare. The AARP, which opposes the rule, filed suit challenging the Commission's authority to issue the regulation. The 3rd Circuit upheld summary judgment in favor of the Commission in June, and a petition for Supreme Court review is pending.

EMPLOYEE BENEFITS SECURITY ADMINISTRATION

Proposed Regulation Relating to Civil Penalty Rules under the Pension Protection Act

On December 18, 2007, the Department of Labor (DOL) announced a proposal regarding the assessment of civil penalties against plan administrators who fail to disclose certain documents to participants, beneficiaries and others as required under the Pension Protection Act. Section 502(c)(4) of the Act allows the DOL to assess civil monetary penalties of up to \$1,000 per day against plan administrators for violating the new disclosure requirements. The proposed regulation discusses the administrative procedures for assessing and contesting such penalties.

The complete text of the proposal is available at <http://www.dol.gov/ebsa/regs/fedreg/proposed/12192007.htm>.

Use of Pension Plan Assets for Politics Violates the Employee Retirement Income Security Act (ERISA)

The Employee Benefits Security Administration (EBSA) recently advised that the use of pension plan assets by plan fiduciaries to further policy or political issues violates fiduciary duties under Sections 404(a)(1)(A) and (B) of the ERISA. These ERISA sections require that plan fiduciaries act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of paying benefits and defraying reasonable administrative expenses. EBSA has previously expressed strong concern about the use of plan assets to promote particular legislative, regulatory or public policy positions that have no connection to the payment of benefits or plan administrative expenses. EBSA made this announcement via an opinion letter made public on January 2, 2008.

The advisory opinion can be found at <http://www.dol.gov/ebsa/regs/aos/ao2007-07a.html>.

CANDIDATE CORNER

This is the third in a series of capsules describing the positions of Democratic and Republican presidential candidates on issues of concern to the labor and employment community. We continue the series with Sen. Hillary Clinton (D-NY) and former Gov. Mitt Romney (R-MA).

HILLARY CLINTON

“In my administration, America’s working families will again have a partner in the White House.” (Hillary Clinton For President, “American Federation of State, County and Municipal Employees Endorses Clinton,” Press Release, 10/31/07).

General

New York Senator Hillary Clinton spent 2007 as the front-runner for the Democratic nomination. After she split the first two states – Iowa and New Hampshire – with Sen. Barack Obama (D-IL) and won in Nevada, her campaign remains competitive around the country but the race remains very dynamic. Sen. Clinton has been endorsed by several unions, including the American Federation of State, County & Municipal Employees.

Positions on Legislation

In Congress, Sen. Clinton voted to raise the minimum wage to \$7.25 per hour. In December 2007 she also introduced The Standing with Minimum Wage Earners Act of 2007, which seeks to raise the minimum wage to \$9.50 by 2011 and link future increases to Congressional pay raises.

Sen. Clinton wants to extend the FMLA to cover 13 million additional workers and guarantee at least seven paid sick days per year. She also co-sponsored an amendment with Sen. Dodd (D-CT) to allow family of wounded military personnel to take up to six months of unpaid leave, up from the three months currently allowed by the FMLA.

Sen. Clinton supports the federal Employment Non-Discrimination Act and has called it “inconceivable” and “un-American” that workers could be fired based on sexual orientation.

Sen. Clinton was a co-sponsor of the Employee Free Choice Act in the U.S. Senate and supports a card check system. She has said that she will sign the Employee Free Choice Act into law in order to allow workers to form a union and bargain collectively without employer coercion.

Sen. Clinton’s health care proposal focuses on providing affordable, comprehensive and portable health coverage. Sen. Clinton’s proposal —

- mandates universal coverage, with tax credits available to small businesses and working families to defray the costs
- prohibits insurance companies from denying coverage based on pre-existing conditions
- supports modernizing the health care system, including wireless and paperless technologies, to reduce cost and improve quality of care.

MITT ROMNEY

“I think union members recognize that it is not a we-they kind of situation between employers and employees. As the old saying goes, you don’t help the wage earner by attacking the wage payer. And we’re in this together.” (Fox News’ “Your World,” 1/14/08).

General

Former Governor Romney (R-MA) has deep experience as a businessman, community leader and governor. A founder of the Boston private equity firm Bain Capital, Gov. Romney ran unsuccessfully for Senate against Sen. Ted Kennedy in 1994, rescued the Salt Lake City Winter Olympics from scandal in 2002 and served as governor of Massachusetts from 2003 to 2007. Although it has suffered setbacks in early losses in Iowa and New Hampshire, Gov. Romney's campaign has continued to focus on his business and economic acumen as one of the primary rationales for his candidacy and he recently won in Nevada and Michigan.

Positions on Legislation

Gov. Romney favors tying the minimum wage to changes in the consumer price index. As governor, he vetoed an increase in the Massachusetts minimum wage to \$8 per hour from \$6.75, but his veto was overridden by the state legislature.

Gov. Romney has not spoken about FMLA during the presidential campaign. As governor, Romney negotiated a contract with the National Association of Government Employees to reduce unpaid leave for state employees from 52 weeks per year to 26 weeks.

Gov. Romney opposes a card check system and supports the right for workers to have a secret ballot. As governor, Romney vetoed a bill that would have done in the public sector what the Employee Free Choice Act does in the private sector.

Gov. Romney has said he would oppose making the Employee Non-Discrimination Act a federal law, but supports it on the state level and would allow states to decide whether to implement it or not.

Unique among the candidates of either party, Gov. Romney signed health care reform into law while he was governor of Massachusetts, mandating universal coverage and expanding access. Gov. Romney's federal health care proposal —

- expands and deregulates the private health insurance market to decrease costs and increase access to affordable, portable and quality private health insurance
- uses competition and market forces to improve quality and enhance transparency
- allows states to spend their Medicaid dollars in whatever way they find most efficient and effective
- makes all health care expenses tax deductible
- caps non-economic and punitive damage awards to eliminate frivolous lawsuits.

BILL TRACKER

LIVING AMERICAN WAGE ACT (H.R. 4637)

Core Provisions: The Living American Wage Act would amend the Fair Labor Standards Act (FLSA) to provide for the calculation of the minimum wage based on the federal poverty threshold for a family of three. This legislation would require the secretary of labor to recalculate the minimum wage rate by no later than June 1, 2008, and subsequently once every four years. The secretary would be required to set the rate at such a level that a person

working for minimum wage 40 hours per week, 52 weeks per year would earn an amount five percent higher than the federal poverty threshold for a three-person household including one child, as published each year by the Census Bureau.

Status: Rep. Green (D-TX) introduced the legislation on December 13, 2007, and it was referred to the House Committee on Education and Labor.

STANDING WITH MINIMUM WAGE EARNERS ACT OF 2007 (S. 2514)

Core Provisions: This Act would tie the federal minimum wage to increases in congressional salaries. Under the proposed bill, the minimum wage would increase incrementally on a set schedule through 2012, settling at \$9.50 per hour. After July 1, 2012, any congressional pay raise would trigger an automatic minimum wage increase, increasing the federal minimum wage by the same percentage as the raise in congressional pay. Congress currently receives an automatic cost-of-living adjustment in pay tied to the rate of inflation, unless it votes affirmatively to reject the increase. Tying the minimum wage to these automatic increases effectively grafts a cost-of-living adjustment mechanism into the federal minimum wage.

Status: S. 2514 was introduced in the Senate by Sen. Reid (D-NV) on behalf of Sen. Clinton (D-NY) on December 18, 2007, and referred to the HELP Committee. Sen. Clinton introduced a similar bill in 2006 that failed to win passage. Senate Republicans are expected to oppose the bill.

DAVIS-BACON ENFORCEMENT ACT OF 2007 (S. 2524, H.R. 4851)

Core Provisions: This Act is intended to improve enforcement of the Davis-Bacon Act of 1931, which requires payment of locally prevailing wages and benefits for public works projects. The Act would create a mechanism for workers to monitor compliance by granting them access to contractor payroll records filed with the federal government under the Freedom of Information Act. The bill also would increase penalties for violations of the Davis-Bacon Related Acts, standardizing treatment of offenses under related statutory provisions of the Davis-Bacon Act, and would also impose equitable penalties for violations of the Act.

Status: S.2524 was introduced in the Senate by Sen. Reid (D-NV) on behalf of Sen. Clinton (D-NY) on December 19, 2007, and referred to the HELP Committee. H.R.4851 was introduced in the House by Rep. Andrews (D-NJ) on December 19, 2007, and referred to the Committee on Education and Labor and the Committee on Oversight and Government Reform.

COMMON SENSE ENGLISH ACT (H.R. 4464)

Core Provisions: The Act would amend Title VII of the Civil Rights Act to add: “Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to require employees to speak English while engaged in work.”

Status: Rep. Price (R-GA) introduced the legislation on December 12, 2007, and it was referred to the House Committee on Education and Labor.

NATIONAL DEFENSE AUTHORIZATION ACT (H.R. 1585 & H.R. 4986), CONFERENCE REPORT (H.REPT. 110-477)

Core Provisions: This legislation includes provisions that would extend the FMLA provision of 12 weeks of unpaid leave to up to 26 weeks of leave for an employee who is the spouse, child, parent or next of kin of a service member. Extending FMLA leave to military families was one of the recommendations of the President's Commission on Care for America's Returning Wounded Warriors. The National Defense Authorization Act also increases whistleblower protections for employees of defense contractors. Disclosures by contractor employees are currently protected if such disclosures are (1) made to a member of Congress and (2) reveal information "relating to a substantial violation of law related to a contract." The new provision would protect disclosures to more government actors, including an inspector general and the Government Accountability Office (GAO), and would protect disclosures of information that employees reasonably believe indicate gross mismanagement or waste of defense contract funds, or unlawful activity related to a Department of Defense contract "including the competition for or negotiation of a contract."

Status: On December 12, 2007, the House adopted the National Defense Authorization Act conference report by a vote of 370 to 49. On December 14, 2007, the Senate passed the conference report by a vote of 90 to three and sent it to the president for his signature. President Bush unexpectedly vetoed the legislation on December 28, 2007. On January 16, 2008, a modified version of the National Defense Authorization Act (H.R. 4986) was introduced that addresses the president's stated concerns with the original legislation. The House passed H.R. 4986 by a vote of 369 to 46. On January 22, 2008, the Senate passed the revised National Defense Authorization Act by a vote of 91-3.

EMPLOYEE FREE CHOICE ACT OF 2007 (H.R. 800, S. 1041)

Core Provisions: This Act would allow a union to secure certification as a bargaining representation by presenting the Board with authorization cards from a majority of employees in a proposed bargaining unit. In addition, the Act provides new procedures to ensure employers and unions reach an initial agreement. In particular, bargaining must begin within 10 days of a written request by the union and, if the parties are unable to reach an initial collective bargaining agreement within 90 days, then either party can request mediation. If the mediation is unsuccessful after 30 days, the dispute will be resolved through arbitration, which will have a binding effect for two years. Finally, the Act strengthens enforcement requirements and remedies with respect to unfair labor practices during union organizing drives. For example, the Act imposes liquidated damages in the amount of twice the back pay awarded and civil penalties of \$20,000 for each time an employer willfully or repeatedly violates the employees' right to organize.

Status: Rep. Miller (D-CA) introduced H.R. 800 on February 5, 2007. The bill passed in the House of Representatives by a roll call vote on March 1, 2007. S. 1041 was introduced in the Senate by Sen. Kennedy (D-MA) and it was referred to the Committee on Health, Education, Labor and Pensions. On June 26, 2007, a Senate cloture vote to proceed on H.R. 800 failed after supporters only were able to muster 51 votes in favor of cloture. On February 28, 2007, the White House announced that President Bush would veto H.R. 800 if presented to him.

ADA RESTORATION ACT OF 2007 (H.R. 3195, S. 1881)

Core Provisions: This Act would amend the ADA to respond to three 1999 Supreme Court decisions requiring courts to consider mitigating measures to determine whether an individual is disabled under the ADA. The elimination of the mitigating measures test would mean that the decision of whether individuals are physically or mentally impaired could not take into account the corrective effects of medication or adaptive devices. The Act would also remove the

requirement that a disability substantially limit the claimant’s ability to perform major life activities, and allows the employer to argue as a defense to a charge of discrimination that the claimant is not a qualified individual with a disability.

Status: H.R. 3195 was introduced in the House by Rep. Hoyer (D-MD) on July 26, 2007, and hearings were held by the House Subcommittee on the Constitution, Civil Rights and Civil Liberties on October 4, 2007. In the Senate, S. 1881 was introduced by Sen. Harkin (D-IA) on July 26, 2007, and hearings were held by the Senate HELP Committee on November 15, 2007.

SUGGESTIONS

We welcome feedback from you, our audience. Please feel free to contact us with suggestions for issues to be covered in future editions of the *Washington Labor & Employment Wire*. If you have any suggestions, please contact Bob Lian at blian@akingump.com. If you would like us to add any of your colleagues to our mailing list, please contact Laurie Spielman at lspielman@akingump.com.

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