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Foley's Quarterly Food Industry Web Conference Series

Presenters:
Bernard J. Bobber, Labor & Employment Practice
John H. Douglas, Labor & Employment Practice
Roy J. Barquet, Labor & Employment Practice

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Today's Presenters



Bud Bobber
Milwaukee



John Douglas
San Francisco



Roy Barquet
Miami

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Housekeeping

- We will take questions throughout the program via the Q & A tab at the top of your screen and live questions at the end of the program
- Foley will apply for CLE credit after the Web conference. If you did not supply your CLE information upon registration, please e-mail it to mlopez@foley.com
- Today's program is being recorded and will be available on our Web site
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Probable Labor and Employment Changes Following the November 2008 Election

Labor/Employment Law: A Look Back

- Organized labor activity has decreased dramatically
- The past eight years have been devoid of significant new employment legislation
 - Last broad expansion of employee rights was FMLA in 1993
- Many argue employee rights have been reduced in past eight years
 - Pro-employer rulings by the NLRB and courts have restricted previous broad interpretations of law
 - Demise of ADA as a truly viable cause of action
 - Broader definition of supervisor under NLRA
- There is a “pent up” demand for employment and labor law changes

Employee Free Choice Act

- Most significant labor law change in 60 years
- A Revolutionary Shift Of Power To Unions:
 - Would permit certification of Union without secret ballot election simply based on card count
 - Would establish tight timelines for first CBA and authorize a government-appointed arbitrator to bind parties to a two-year deal
 - Would create bigger penalties and fines for unfair labor practices, like triple back pay and fines up to \$20,000 per violation

Employee Free Choice Act - Status

- Passed the House of Representatives in March 2007 (H.R. 800)
- Had support to pass in Senate, but stalled on veto threat
- Barack Obama Web site:
 - “Obama cosponsored and is strong advocate for the Employee Free Choice Act, a bipartisan effort to assure that workers can exercise their right to organize. He will continue to fight for EFCA’s passage and sign it into law.”

Employee Free Choice Act

- 1. Would replace the secret ballot system employees now use to select union representation with a card check system
 - If majority of a designated group of employees signed cards, then the union is certified
 - Greater flexibility for union to define the group
 - No campaign opportunity
 - No secret ballot
 - Probably no employer knowledge this is happening

Employee Free Choice Act (cont'd)

- 2. Would force a labor agreement on the employer (eliminates new union's risk of not getting a contract in one year)
 - Eliminates employer bargaining power by removing threat of stalemate
 - If no deal after 90 days, either side can require mediation (through FMCS)
 - If still no deal after 30 days of mediation, an arbitrator would establish the terms of a 2-year CBA

Employee Free Choice Act (cont'd)

- 3. Would create bigger penalties and fines for unfair labor practices
 - Triple back pay and fines up to \$20,000 per violation
 - BUT, no corresponding increase in penalties for unions that violate the organizing provisions
 - Despite the potential for coercing workers in an anonymous voting process

Employee Free Choice Act - Preparation

- Supervisor training
 - Spotting signs of organizing and responding
 - Employee relations training – “people skills”

- Create pro-employee changes that undermine typical union organizing themes
 - Give employees a “voice”
 - Share information
 - Solicit input (surveys and audits)
 - Create effective grievance mechanism
 - “open door policy” not enough

New Employment Legislation

- Civil Rights Act of 2008 (H.R.2159/S.2554)
 - Sponsors cite need to restore worker’s rights that have been limited by Supreme Court decisions
 - Would eliminate damages caps in Title VII and ADA claims
 - Would make void pre-dispute arbitration clauses
 - Would allow state employees to sue under ADEA and FLSA
 - Would expand remedies for women under EPA

New Employment Legislation (cont'd)

- Employment Nondiscrimination Act
 - Would make sexual orientation protected
 - Passed the House (235-184) on Nov. 7, 2007
 - Now in Senate; Senator Kennedy (D-Mass.) promises to move the legislation forward

- Arbitration Fairness Act
 - Would ban pre-dispute arbitration agreements in many employment contexts
 - Supported by Senators Dodd (D-Conn.), Durbin (D-Ill.) and Kennedy (D-Mass.)

New Employment Legislation (cont'd)

- Genetic Information Nondiscrimination Act
 - H.R. 493 passed the House (420-3) and Senate (95-0)
 - Waiting President's signature
 - Prohibits employment decisions based on individual's genetic information
 - Amends ERISA to prohibit such discrimination by health plans
 - Prohibits collection of genetic information by employers

Update on the Family and Medical Leave Act (FMLA)

New FMLA Military Service-Related Regulations

- Military-related amendments to the FMLA signed by President Bush on January 28, 2008
- Two main provisions
 - “Caregiver leave” - 26 weeks of FMLA leave to care for family member seriously injured or becoming ill while on active duty (effective upon signature)
 - “Active duty leave” - 12 weeks of FMLA leave in a 12-month period for “qualifying exigency” (not yet effective)

“Caregiver” Leave

- Eligible employee who is: (a) the spouse, son, daughter, parent or “next of kin”; (b) of a seriously injured or ill member of the Armed Forces
- 26 workweeks of FMLA leave during a single 12-month period to care for the service member

“Caregiver” Leave (cont'd)

- “Next of Kin” defined as “nearest blood relative”
- “Serious illness or injury” defined as “an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the members’ office, grade, rank or rating
- Member must be: 1) undergoing medical treatment, recuperation or therapy; (2) an outpatient; or (3) on a temporary disability retired list

“Caregiver” Leave (cont'd)

- Employers entitled to “reasonable and practicable” advance notice and can request certification
- Leave can be taken on intermittent or reduced schedule basis
- Caregiver and other FMLA leave runs concurrently (i.e., not in addition to 12 week leave)
- Calculation of 12-month period?
 - When employee first takes leave?
 - When service member is injured?
 - When service member is determined to have serious injury or illness
 - When employee gives notice of need for leave

“Active Duty” Leave

- “Qualifying Exigency” arising out of fact that spouse, son, daughter or parent of employee is on active duty (or has been notified of an impending call or order to active duty) in Armed Forces in support of a “contingency operation”
- “Qualifying Exigency” not currently defined – seeking comments
- “Contingency operation” is military operation designated by Secretary of Defense

Proposed Revisions to FMLA Regulations

- Proposed Rule published February 11, 2008
- Comment period closed April 11
- Comments now under consideration

Proposed FMLA Regs – Advance Notice

- Advance Notice
 - Current “two day” rule eliminated
 - In all but “most extraordinary” circumstances, notice of need for unforeseeable leave must be given before shift starts
 - Proposed rule would require notice be given on same or next business day as when need for leave becomes known
 - Employers can enforce usual and customary call in procedures

Proposed FMLA Regs –

- Medical Certifications for Chronic Conditions
 - Codifies 2005 Wage & Hour Division opinion letter stating that employers can request a new medical certification at the first absence in a new leave year. Clarifies applicable time periods for recertification of chronic serious health conditions of “lifetime” or “unknown” duration – recertification can be required every six months
- Five Day Period to Notify of Eligibility and Designate
 - Proposal extends time to send out eligibility and designation notices from two to five days. If medical certification is incomplete or insufficient, certification must be returned to employee, problems specified in writing and employee given seven days to cure

Proposed FMLA Regs –

- Direct Contact With Health Care Providers
 - Employers can communicate directly with health care providers so long as HIPAA requirements are met, but cannot ask for additional information beyond that allowed in updated certification form (WH-380)
- Fitness for Duty
 - Employer permitted to require employees to furnish fitness for duty certifications every 30 days if employee has used intermittent leave and reasonable safety concern exists

Proposed FMLA Regulations - Other

- Waivers of past rights made enforceable
- New notice posting and distribution requirements
- “To Do” List
 - Make sure policies and posters up to date
 - Make sure current posters posted
 - Monitor status of proposed regulations

“Paid” FMLA Legislative Initiative

- S.B. 1681 Introduced June 21, 2007 by Sen. Christopher Dodd and Sen. Ted Stevens
- Directs Secretary of Labor to establish FMLA Insurance Program
- Entitles eligible employees to benefits (specified percentages of daily earnings) for up to eight (8) workweeks of leave during any 12-month period
- Employers can establish voluntary plans meeting specified criteria
- Amends Internal Revenue Code to impose a premium on employers and employees for contributions to FMLA Trust Fund

Developments in Employment Eligibility Enforcement

Benefits or Drawbacks of Using E-Verify

- Positives
 - Deterrent: Reduces the Number of Undocumented New Hires
 - Government Contractors and Sub-Contractor Compliance
 - Defense Against a Charge of Knowing Hire
 - Compliance with Arizona and other State Laws

Benefits or Drawbacks of Using E-Verify

(cont'd)

- Disadvantages
 - Uneven Playing Field among Competitors
 - Identity Theft
 - Capacity Load and Accuracy Considerations; Lack of DHS and SSA Ombudsmen
 - Administrative and Training Costs
 - Compliance with New Hire Safeguards
 - Liability for Failure to Report Continued Employment after Non-Confirmation
 - Challenges for the Employer of Professional Foreign Nationals (TN/Blanket L-1, H-1 Portability/F-1 students)
 - DHS Broad Access to Company Records

Questions & Answers

Contact Us

Roy Barquet

Partner

100 SE 2nd St., Suite 1600

Miami, FL 33131

Tel: 305.482.8403

rbarquet@foley.com

Bud Bobber

Partner

777 E. Wisconsin Ave., Ste 3800

Milwaukee, WI 23202

Tel: 414.297.5803

bbobber@foley.com

John Douglas

Partner

One Maritime Plaza, 6th Flr.

San Francisco, CA 94111

Tel: 415.984.9878

jdouglas@foley.com