

LABOR & EMPLOYMENT LAW DEVELOPMENTS

PRAY WALKER

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Highlights:

Federal Minimum Wage Increases. Effective July 24, 2008, the federal minimum hourly wage increased to \$6.55 with an additional increase effective in 2009.

Employment Policies are being scrutinized. The National Labor Relations Board has decided another case which makes it clear that both union and non-union employers must review their policies for compliance with the National Labor Relations Act.

Immigration: The Federal and State Approach. All federal contractors must use E-Verify. 39 States, including Oklahoma, have proposed or passed legislation addressing immigration issues.

Workers' Compensation and Liability for Subcontractors' Employees. On April 15, 2008, the Oklahoma Supreme Court interpreted for the first time what the statutory exception means by "good faith" in a principal employer's reliance on proof of workers' compensation coverage from subcontractors.

Union Legislation: The Employee Free Choice Act. If passed, this legislation would require the NLRB to certify a union as the representative of an employee group without an election.

Federal Minimum Wage Increases.

Effective July 24, 2008, the federal minimum wage increased to \$6.55 per hour. The minimum wage will increase to \$7.25 per hour effective July 24, 2009. Minimum wage increases impact non-exempt employees. Please remember that some states have passed their own minimum wage laws establishing a minimum hourly wage in that state that is higher than the federal wage. Where states have taken this action the higher state minimum wage is applicable.

Employers should be displaying a new federal poster that notifies employees of the change in the minimum wage. Employers can obtain a copy of the poster from the U.S. Department of Labor, Wage and Hour Division website at:

www.wagehour.dol.gov.

Please let us know if you have any questions about how this change may impact your operations.

Employment Policies are scrutinized for compliance with the National Labor Relations Act.

In *Guardsmark, LLC and Service Employees International Union, Local 24/7* (June 7, 2005), the National Labor Relations Board held that an employer's rule against fraternization with an employer's clients and customers violated the National Labor Relations Act. The employer's rule did not permit employees to "fraternize on or off duty, date or become overly friendly with the

client's employees or with co-employees." The Board did uphold another rule prohibiting fraternization with co-employees as discussed below. Additionally, the Board concluded that forcing employees to stay within the "chain of command" to voice their grievances, improperly restricted the rights of employees under the NLRA. The employer could not prohibit the employees from complaining to clients and customers about wages, hours and working conditions.

In *Crowne Plaza Hotel* (April 30, 2008) the National Labor Relations Board reviewed several employment policies established by Crowne Plaza.

- *Employee Use of Hotel Facilities:* employees were to leave the premises after work, and they were not permitted to use the hotel restaurants after hours without permission. Held: Not a violation of the employees' rights under the National Labor Relations Act. This is different from the *Guardsmark* case, because in *Guardsmark* employees were restricted from talking to customers at anytime.
- *Press releases and News Media:* all press releases and other statements of general information related to "significant public interest" will be handled by management only. Held: These terms are broad enough to include a labor dispute and thus the rule improperly prohibits employees from exercising their rights under the National Labor Relations Act.
- *Discussing Company Business:* whenever on duty in or around the hotel, employees were prohibited from discussing business or work difficulties in front of guests – problems should be

addressed by following the steps outlined in the handbook. Held: The rule does not violate the NLRA since it does not prohibit the employees from using other avenues, such as seeking the assistance of a union or other employees to resolve their problems.

- *Employee Conduct Policy:* prohibited conduct included leaving the work area without permission; walking off the job; and inciting actions against fellow employees. Held: Rules prohibiting employees from leaving work or walking off the job are overbroad and improperly restrict an employee's rights under the NLRA, because they would require management permission before engaging in protected activity. A general rule against "inciteful actions" is too broad since it was not limited to violence or uncivil behavior and could be interpreted to prohibit employees from engaging in concerted activity protected by the NLRA.

Employers should review and consider revising policies that limit an employee's ability to voice grievances or discuss wages, hours and working conditions with co-workers or third parties.

Immigration: The Federal and State Approach

The Federal Approach: E-Verify

E-Verify (formerly referred to as the "Basic Pilot Program") is a federal program that allows employers to enter into an agreement with the Social Security Administration and the Department of Homeland Security ("DHS") to verify the employment eligibility

of all newly hired employees. Employers participating in E-Verify will: (1) require every new employee to complete an I-9 form; (2) log on to a secure DHS website and enter the employee's information; and (3) identify the document, or combination of documents, that the employee presented with the I-9 form. DHS will then issue a response, which could take up to 10 days, advising whether the individual identified in the documents is authorized to work within the United States.

On June 6, 2008, President George W. Bush signed an Executive Order requiring all federal agencies and departments that hire contract workers to require, as a condition of each contract, the independent contractor use E-Verify to determine the eligibility of all employees hired during the contract term who will perform duties within the United States on the federal contract.

The State Approach:

An increasing number of states have decided to address immigration issues by requiring employers, local governments and state agencies to verify the eligibility of employees, contractors, subcontractors, students and prisoners. Georgia and Colorado have received attention as leading the push, but at least 39 other states have either proposed or passed legislation aimed at addressing immigration issues.

Current Status of certain Provisions of Oklahoma HB 1804:

The District Court for the Western District of Oklahoma has issued an injunction preventing the enforcement of the provisions of this Oklahoma law that would:

- (i) require, after July 1, 2008, any contractor or subcontractor who enters

into a contract with a public employer in connection with the physical performance of services within Oklahoma to be registered and participating in E-Verify;

- (ii) allow a terminated employee who is a United States citizen or permanent resident alien to file a discrimination charge against his or her employer, where that employer retains an employee who the employer knows or reasonably should know, is an unauthorized alien hired after July 1, 2008, and who is working in a job which requires equal skill, effort, and responsibility as the position held by the discharged employee; or
- (iii) require that any person or entity who contracts with an individual independent contractor for the physical performance of services within the state of Oklahoma to verify the employment eligibility of the individual independent contractor or withhold state income taxes from such individual independent contractor's wages.

Until the Court has ruled on the constitutionality of these provisions of Oklahoma HB 1804, they will not be enforced.

Worker's Compensation and Liability for Subcontractors' Employees:

Workers' Compensation statutes in most states impose secondary liability for an employee's injuries on businesses that contract with subcontractors, deeming the business the primary employer, where the subcontractor fails to carry workers' compensation insurance.

Oklahoma provides an exception to this imposition of secondary liability on the principal employer where the principal employer relies in good faith on proof of coverage produced by the subcontractor. In a recently decided case (*Smalygo Homes v. David T. Green and the Workers' Compensation Court*, 2008 OK 34), the Oklahoma Supreme Court held that the requirement of good faith in the principal employer's reliance is a higher standard than merely requesting proof of coverage at the outset of the contractual relationship. In order to qualify for the exception to liability, a principal employer must exercise reasonable diligence; it must follow up with the subcontractor to ensure coverage is continuous throughout the contractual relationship. Based upon the Court's recent holding regarding good faith, what should you, as an employer, do?

- Verify workers' compensation insurance at the outset of your relationship with the subcontractor.
- Request notification from the subcontractor's insurance carrier prior to termination of coverage.
- Require the subcontractor to continue to provide you with updated proof of coverage upon any change in coverage and especially at the end of the current coverage period.
- In other words, do not simply take a copy of the proof of coverage at the beginning of the relationship and then never revisit the issue.

The Employee Free Choice Act: How Unions Plan to Organize Your Employees in the Future.

The Employee Free Choice Act ("Act") recently passed in the House of Representatives, but was not considered by the Senate. It will very likely be reintroduced during the next congressional session. Accordingly, it is important that employers and employees fully understand the implications of this powerful piece of pro-union legislation.

The Employee Free Choice Act seeks to "Streamline Union Certification" by requiring the National Labor Relations Board to investigate any petition alleging that a majority of employees support the union, and if it is found that a majority of employees in a particular unit have signed union authorization cards, **the Board shall NOT direct an election but shall certify the labor organization as the representative of those employees.** This would remove the Board's current discretion in determining that a Secret ballot election may be appropriate, even where a majority of employees have signed authorization cards, where the employer has not voluntarily recognized the union and has not committed any unfair labor practices that would impact the likelihood of a fair election.

Thus, if a majority of an employer's employees sign authorization cards, which are not anonymous, are not signed in secret, and therefore subject employees to possible pressure from pro-union coworkers and professional union organizers, the employer will be required to bargain with the union.

In addition, and possibly even more impactful, is the language in the Act regarding collective

bargaining agreements. Under the current law, an employer is obligated to bargain in good faith with the union, with no statutory time constraints. The Act would require an employer to meet with the union within 10 days after receiving a written request for collective bargaining from the newly certified union. The employer and union would have to submit to mediation by the Federal Mediation and Conciliation Service if they have not signed a collective bargaining agreement within 90 days after bargaining has commenced. If the 30-day mediation period (or other agreed upon length of time) does not result in a collective bargaining agreement, the matter will be referred to an arbitration board established in accordance with the regulations promulgated by the Federal Mediation and Conciliation Service. The arbitration panel will render a decision regarding the collective bargaining agreement, and **the decision of that arbitration panel will be binding on the parties for two years.** An employer would no longer be allowed to disagree with union terms that would be detrimental to its business, or to refuse to enter into an agreement it does not believe will help its employees, if the employer cannot persuade the arbitration panel that is the case.

This legislation increases the importance of educating employees about the significance of union authorization cards. These cards are no longer just an indication that the employee agrees to a union secret ballot election, they could be the election.

In addition to providing assistance and consultation with respect to a variety of labor and employment matters, Pray Walker's Labor & Employment attorneys provide training designed to assist managers and supervisors in making their interaction with employees more effective and defensible.

The following are examples of training the Firm can offer:

- *Reviewing Employee Handbooks*
- *Preparing for and Responding to Union Organizing Efforts*
- *Employee Evaluations*
- *Investigating Employee Behavior*
- *Documentation of Discipline*
- *Disciplining without Discriminating*
- *Pre-Termination and Termination Considerations*

If you have questions concerning these issues or other labor and employment law matters please contact:

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