

# Labor & Employment Law Developments

PRAY, WALKER, JACKMAN,  
WILLIAMSON & MARLAR

July 2007

## **Highlights:**

**Federal Minimum Wage Increases.** Effective July 24, 2007, the federal minimum hourly wage increases to \$5.85 with additional increases effective in 2008 and 2009.

**Immigration becomes a topic for State Legislatures.** Oklahoma, like several other states, has adopted a law requiring that employers, contractors, and schools verify the immigration status of employees, contractors and students. How will this impact your hiring practices?

**Confidentiality Policies Can be Challenged by a Labor Union.** Unions and the National Labor Relations Board will take action to make employers change any policies that prevent employees from discussing wages, hours and working conditions. This is true even if an employer's employees are not currently represented by a union.

## **Federal Minimum Wage Increases Become Effective.**

Effective July 24, 2007, the federal minimum wage increases to \$5.85 per hour. The minimum wage will increase to \$6.55 per hour beginning July 24, 2008, with the last increase to \$7.25 per hour becoming 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 higher minimum hourly wage in that state. Where states have taken this action the higher state minimum wage is applicable.

Employers are expected to have a new federal poster in place by July 24, 2007, which notifies employees of the change in the minimum wage. Employers can obtain a copy of the poster by visiting the U. S. Department of Labor, Wage and Hour Division website at [www.wagehour.dol.gov](http://www.wagehour.dol.gov).

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

---

## **Immigration: The Federal and State Approach**

### **The Federal Approach: The Basic Pilot Program**

The Basic Pilot Program (currently a voluntary program) is a federal program which 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 the

Basic Pilot: (1) would have the new employee complete an I-9 form; (2) log onto a secure DHS website and enter employee information, and (3) enter the names of the document/combination of documents which the employee presented. DHS will issue a response, which may take up to 10 days, advising whether the individual identified in the documents is authorized to work within the United States.

*Some Benefits of the Basic Pilot Program:*

- It is free and easy to use.
- It provides an affirmative defense to charges of hiring an illegal alien.
- Employers can invest in training immediately (upon receiving verification) without the risk that the new employee will later be determined illegal.

*Some Burdens of the Basic Pilot Program:*

- The employer can only use the Basic Pilot verification process for newly-hired employees. Employers **may not** use the Basic Pilot to: (1) verify existing employees; or (2) re-verify employees who were initially verified through the Basic Pilot procedures.
- The employer must modify its I-9 procedures to only accept certain documents that contain a photograph.
- Employers may be subject to fines if an unauthorized employee is retained after the Basic Pilot process is completed and the results indicate the individual is not authorized to work.
- The employer must not take any adverse action against an employee (based

upon eligibility) while awaiting verification through the Basic Pilot.

*The State Approach: Oklahoma*

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.

On May 8, 2007, Oklahoma's Governor signed "The Oklahoma Taxpayer and Citizen Protection Act of 2007." Effective **November 1, 2007**, the statute makes it a felony for any person to transport, move, conceal, harbor or shelter any unauthorized alien in Oklahoma, including any building or means of transportation when the person knows, or shows reckless disregard of the fact that the alien has entered the United States in violation of law.

*Contractors and Subcontractors:*

- 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 must be registered and participating in the Basic Pilot.

*Discrimination Charges:*

- The Act states that an employer commits a discriminatory practice if it terminates an employee in Oklahoma who is a United States or permanent resident alien, while retaining an employee who the employer knows or reasonably should have known, 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.

- Participation in the Basic Pilot protects employers from such liability.

*Independent Contractors:*

- The Act requires that any person or entity who contracts with an *individual independent contractor* for the physical performance of services in Oklahoma must verify the employment authorization of the independent contractor.

- Failure to verify an independent contractor's employment authorization renders the contracting entity liable for withholding state income tax for the independent contractor.

*Public Employers:*

The Act requires that all public employers use the Basic Pilot effective November 1, 2007.

***Confidentiality Policies:***

***If your employees are not represented by a Union then why are Unions and the National Labor Relations Board reading your Employee Handbook?***

In a recent case against Cintas Corporation (*Cintas Corporation v. National Labor Relations Board, No. 05-1305, March 16, 2007*) the National Labor Relations Board (the "Board") alleged that the confidentiality rule in the policy handbook that Cintas provided to its employees violated provisions of the National Labor Relations Act ("NLRA" or the "Act"). The

Board found, and the Court of Appeals affirmed, that Cintas' policy prevented employees from discussing the terms and conditions of their employment, thus violating the employees' rights under the Act. It is important to note that the court found the "*mere existence*" of the policy constitutes the violation. The court found that because the employees "could reasonably construe the confidentiality provision" as restricting their right to discuss the terms and conditions of their employment, the fact that Cintas had not enforced the provision was irrelevant. Rather, merely having such a policy in place constituted the violation.

Nothing in the record demonstrated that any employees actually interpreted the confidentiality rule as prohibiting their discussion of wages and other terms and conditions of their employment. The court stated that "no such evidence is required." Cintas' confidentiality rule stated:

*We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners [a word Cintas used to describe its employees], new business efforts, customers, accounting and financial matters.*

In sum, the court found: (i) Cintas had not enforced the confidentiality rule; (ii) the confidentiality rule did not expressly prohibit the discussion of wages and other terms and conditions of employment; and (iii) no employee had actually interpreted the rule as prohibiting their discussion of wages and other terms and conditions of employment. Nonetheless, the court found the mere existence of a rule which may reasonably be interpreted as prohibiting

employee discussion of wages and other terms and conditions of employment violated the NLRA.

**For human resources professionals, this case emphasizes the need to:**

- Review company policies for provisions which may expressly restrict, or reasonably be construed as restricting employee discussion of wages and other terms of working conditions.

- Review company policies which may violate the NLRA, including policies related to bulletin boards, solicitation and distribution and access to company property.

---

*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:*

[Kevin P. Doyle](mailto:kpd@praywalker.com)

918.581.5516

[kpd@praywalker.com](mailto:kpd@praywalker.com)

*Visit our website to learn more about Pray Walker*

[www.praywalker.com](http://www.praywalker.com)

*Notice: This issue of Labor & Employment Law Developments is offered as a commentary concerning legal issues and should not be considered as legal advice.*