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Labor and Employment Law Update

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In This Issue

Growing Pains: Federal Health Care Reform's Impact On Employers

By William E. Hannum III[1]

The landmark federal health care reform, signed into law in March, will have a significant impact on employers and plans. Many important aspects of the law remain undetermined (and won't be implemented for years). But the federal government is now beginning to issue regulations to help clarify the Patient Protection and Affordable Care Act (the "PPACA"). Thus, important aspects of the new law are becoming more clear, as is discussed below.

Small Business Tax Credit

Effective January 1, 2010, qualified small employers are eligible for a significant tax credit aimed at encouraging them to offer health insurance coverage to employees. To be eligible, an employer must: (1) employ 24 or fewer Full-time Equivalent Employees ("FTE"); (2) have average annual wages of less than $50,000 per FTE; and (3) make a uniform contribution of at least 50% towards the cost of the health insurance.

For tax years 2010 through 2013, an eligible small employer can receive a tax credit of up to 35%, or 25% for a qualified tax-exempt employer. Beginning in tax year 2014, the tax credit can be claimed for two additional years and is increased to as much as 50% (35% for tax-exempt small employers) of the employer's health insurance premium expenses.

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FMLA Child-Care Leave Extended To Domestic Partners And Others

By Paul Dubois

The U.S. Department of Labor ("DOL") recently issued an Administrative Interpretation (the "Interpretation") that extends child-care leave under the Family and Medical Leave Act of 1993 ("FMLA") to domestic partners and other providers who do not have a legal or biological relationship with the child. The Interpretation achieves this by expanding the circumstances in which a person is deemed to be standing *in loco parentis* to a child. (*In loco parentis*, Latin for "in place of a parent," refers to a person who assumes the obligations of a lawful parent without the legal formalities.)

Although the DOL's position is an interpretation and not a binding regulation, it will likely influence the way in which courts examine cases brought under the FMLA, and it will also challenge employers by potentially expanding the population of employees who may be eligible for FMLA leave.

Under the Interpretation, *either* day-to-day care or financial support of a child may be

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OSHA Penalties May Increase Dramatically Now That OSHA May Impose Penalties On *Per-Worker* Basis

By Suzanne W. King

The authority of the Occupational Health and Safety Administration ("OSHA") to impose penalties on a *per-worker* basis was recently upheld by the U.S. Court of Appeals for the District of Columbia. This dramatically heightens the need for employers to actively manage their obligations under OSHA.

Specifically, in *National Association of Home Builders v. OSHA*, 602 F.2d 464 (D.C. Cir. 2010), the court held that OHSA lawfully treated an employer's failure to provide both respiratory protection and corresponding training to 11 workers as *22 separate OSHA violations*—two violations per each affected worker.

This is bad news for employers, as OSHA assesses penalties based on the *number of violations* found. Penalties vary depending on the severity of the violations: up to $7,000 for serious and other-than-serious violations, up to $70,000 for repeat violations, and between $5,000 and $70,000 for willful violations. 29 U.S.C. § 666(a)-(c).

Genesis Of OSHA's Per-Worker Approach

1. The *Ho* Case

The genesis of the court's decision was an OSHA ruling regarding employer Eric K. Ho ("Ho"). In January 1998, Ho hired 11 illegal immigrants to remove asbestos from a building he owned and was renovating in Houston, Texas. Ho did not provide respiratory protection or any of the other personal protective equipment ("PPE") required by OSHA. Nor did he provide required training on hazards associated with exposure to asbestos.

Approximately one month after the work started, a city inspector visited the site and observed that at least ten workers who were scraping fire-proofing material from the building had visible dust in their breathing space yet did not have adequate respiratory protection. The city inspector issued a stop-work order citing the possibility of exposure to asbestos.

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[1]*This article previously appeared in* New England In House *on July 26, 2010.* *Will gratefully acknowledges* New England In House *for its support in publishing this article. Will also gratefully acknowledges the efforts of Shannon Lynch, who assisted in drafting this article.*

Growing Pains: Federal Health Care Reform's Impact On Employers

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Protections For Nursing Mothers

The PPACA amends the Fair Labor Standards Act ("FLSA") to provide certain protections for nursing mothers, effective March 23, 2010, including a reasonable break time to express breast milk, each time the employee needs to do so; and a private place to do so, other than a bathroom. These accommodations must be available to the nursing mother for *one year* after the child's birth.

Unfortunately, this new amendment contains numerous uncertainties, and there is presently no guidance.[2] For instance, it neither limits the number of breaks nor specifies the permissible duration of breaks. Also, although all covered employers are subject to this FLSA amendment, those with fewer than 50 employees are exempt *if* compliance would pose an "undue hardship." Unfortunately, the statute does not elaborate on when this standard is met.

Whistleblower Protection

The PPACA also amends the FLSA to provide whistleblower protections, effective as of March 23, 2010. These prohibit employers from discriminating or retaliating against employees who apply for health benefits subsidies; who receive tax credits; who provide information or testimony about possible violations of the PPACA; and/or who object to activities that the employee "reasonably believes" to be in violation of the PPACA.

Large Employer Automatic Enrollment

Employers with more than 200 full-time employees and who offer enrollment in one or more health benefits plans must automatically enroll new full-time employees in one of the plans offered. A full-time employee under the PPACA is an employee who is regularly scheduled to work 30 or more hours per week. Covered employers must also provide automatically enrolled employees with adequate notice of the automatic enrollment program, including the employee's ability to opt out of participation in the plan. There is no explicit effective date for this provision.

Temporary Reinsurance Program For Early Retirees

The PPACA creates a Temporary Reinsurance Program for Early Retirees, from June 23, 2010, to January 1, 2014, to provide reimbursement to Employment-based Plans for a portion of the cost of providing health insurance coverage to "Early Retirees" (an individual who is age 55 or older, who is no longer an active employee, and who is not eligible for Medicare) and their eligible spouses, surviving spouses and dependents.

To be eligible for the Program, an Employment-based Plan must be approved by the Department of Health and Human Services ("HHS"). If approved, the Employment-based Plan will be reimbursed for up to 80% of costs for health benefits.

Fall Seminar Schedule

Social Media	September 21st
Employment Law Boot Camp	September 28th and 29th
EFCA Boot Camp	October 7th
Advanced Employment Law Boot Camp	October 14th
Hot Topics (Annual Firm Seminar)	October 18th
Employment Law Boot Camp	October 25th and 26th

For further information, please visit the Firm's website at www.shpclaw.com or contact the Firm's Seminar Coordinator, Kathie Duffy, at kduffy@shpclaw.com or (978) 623-0900.

Health Insurance Market Reforms

The PPACA mandates certain changes to group health plans (including insured and self-insured employer-sponsored plans) which must be implemented by September 23, 2010. A plan in existence on March 23, 2010 (a "Grandfathered Plan") is exempt from some (but not all) of these requirements.

Pursuant to the Interim Final Regulations recently issued by the U.S. Departments of the Treasury, Labor, and Health and Human Services Departments, a Grandfathered Plan can make certain routine changes and maintain Grandfathered status. For example, a plan that adds new benefits, makes modest adjustments to existing benefits, voluntarily adopts new consumer protections under the PPACA, or makes adjustments to comply with other state or federal law can maintain the plan's status as a Grandfathered Plan.

However, a plan may lose its Grandfathered status if the plan significantly cuts benefits or increases consumer costs, *e.g.*, by: eliminating benefits to diagnose or treat a particular health condition; increasing a percentage cost-sharing requirement; significantly increasing co-payment charges; reducing employer contributions to premium costs by more than 5%; or adding or tightening an annual limit. Therefore, employers should proceed with caution when making changes to a Grandfathered Plan, since the changes may jeopardize the plan's status.

Requirements For New And Grandfathered Plans

For plan years beginning on or after September 23, 2010, plans, both new and Grandfathered, must make many reforms. For example, plans are barred from rescinding or cancelling health care coverage of an enrollee, except for fraud or an intentional misrepresentation of material fact. This provision is aimed at preventing plans from dropping individuals from coverage when they become ill.

Generally, plans are prohibited from imposing lifetime or annual dollar limits on essential benefits. However, prior to January 1, 2014, plans may impose an annual limit on certain essential health benefits as determined by regulations yet to be issued.

Plans are precluded from excluding from coverage children under the age of nineteen (19) with pre-existing conditions.

For plan years beginning on or after September 23, 2010, new and Grandfathered Plans that provide dependent child coverage must continue to make coverage available for a participant's adult child through age 26. Similarly, group plans are prohibited from varying the terms of coverage for children.

Further, the Interim Final Regulations have clarified that plans cannot use the following factors for defining adult child eligibility: financial dependency on the participating employee; residency with the participating employee; student status; marital status; or access to other coverage. Under a special exception to this extended dependent coverage, for plan years beginning before January 1, 2014, a Grandfathered Plan that provides dependent coverage of children may exclude from coverage an adult child who has not reached the age of 26 if the adult child is eligible to enroll in an employer-sponsored plan other than the plan of the child's parent, *e.g.*, through the child's own job.

For plan years beginning on or after January 1, 2014, Grandfathered Plans will be prohibited from having a waiting period in excess of 90 days; from denying health care coverage for pre-existing conditions; and from imposing annual dollar limits on coverage.

Requirements For New Plans Only

The PPACA has a number of requirements that apply only to new plans beginning on or after September 23, 2010. For example, if a plan requires an enrollee to designate a primary care physician, the enrollee can elect *any* participating primary care provider who is willing to accept the enrollee.

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[2] *In July of 2010, the United States Department of Labor Wage and Hour Division issued a fact sheet providing general information on the break time requirement for nursing mothers in the PPACA.*

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Also, plans cannot impose deductibles or other cost-sharing requirements for preventive care, which includes immunizations and mammograms and will be further defined by a task force created by PPACA. Likewise, a plan is obligated to cover an enrollee's emergency health services, without prior authorization or in-network requirements. Further, plans are prohibited from imposing eligibility rules that discriminate in favor of highly compensated full-time employees.

There are myriad other health insurance reforms, as well, with implementation dates after 2010. For 2011, employers will be required to report the value of employer-sponsored coverage on each employee's Form W-2. Effective January 1, 2011, over-the-counter drugs will *not* be eligible for reimbursement from a flexible spending account ("FSA"), health savings account, health reimbursement account or Archer medical savings accounts, unless prescribed by a physician. Effective January 1, 2013, annual contributions to FSAs will be limited to $2,500. Effective January 1, 2014, large employers (one with 50 or more employees who work on average at least 30 hours per week) may be subject to a penalty if they do not offer affordable coverage that meets the minimum essential coverage. However, it is uncertain whether some of these obligations will change before the scheduled implementation date.

* * *

The implementation of the PPACA is still in its infancy. Nonetheless, some employer and plan requirements for 2010 are relatively clear. Thus, for now, employers should: (1) determine if they are eligible for the small business tax credit; (2) implement the nursing mother accommodations; (3) revise policies and procedures to reflect the new whistleblower protections; (4) implement training for the nursing mother accommodation and new whistleblower protections; (5) determine if the employer is eligible to apply for the Temporary Reinsurance Program for Early Retirees; (6) determine if the employer is required to implement the large employer automatic enrollment; (7) document the terms of any plans in effect on March 23, 2010, and add the model disclosure language regarding Grandfathered Plans to any participant communications, if applicable; and (8) carefully consider any changes to the plan that may jeopardize status as a Grandfathered Plan. Employers will also need to stay tuned for further developments. ◆

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A searchable archive of past Update Articles and E-Alerts is available on the Firm's website, www.shpclaw.com.

FMLA Child-Care Leave Extended To Domestic Partners And Others

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sufficient to establish an *in loco parentis* relationship if the employee intends to assume the responsibilities of a parent, regardless of the employee's legal or biological relationship to the child. The Interpretation departs from the previous requirement that *both* factors be present. Consequently, the Interpretation extends eligibility for FMLA child-care leave to many domestic partners and others who, until now, were not considered "parents" under the FMLA.

According to the DOL, this is "a victory for many non-traditional families, including families in the lesbian-gay-bisexual-transgender community, who often in the past have been denied leave to care for their loved ones." The DOL further explained that "neither the statute nor the regulations restrict the number of parents a child may have under the FMLA."

The FMLA provides eligible employees with up to 12 weeks of unpaid, job-protected leave for the birth or placement of a son or daughter, to bond with a newborn or newly-placed son or daughter, or to care for a son or daughter with a serious health condition. The FMLA's definition of "son or daughter" includes not only a biological or adopted child, but also a foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*.

Whether an employee stands *in loco parentis* to a child is a fact-specific issue. However, the Interpretation provides several examples of *in loco parentis* relationships that will suffice to establish FMLA eligibility:

- Where an employee provides day-to-day care for his or her unmarried partner's child (with whom there is no legal or biological relationship) but does not financially support the child;
- Where a grandparent takes in a grandchild and assumes ongoing responsibility for raising the child because the parents are incapable of providing care; and
- Where an aunt assumes responsibility for raising a child after the death of the child's parents.

The sole limitation that the Interpretation provides is that an employee who cares for a child while the child's parents are on vacation would not be considered to be *in loco parentis* to the child.

If an employer has questions about whether an employee's relationship to a child is covered by the FMLA, the employer may require the employee to provide reasonable documentation of the family relationship. Under existing DOL regulations, a "simple statement" by the employee may satisfy this request.

Significantly, while the Interpretation is expected to have the greatest impact in the context of domestic partnerships, it does *not* allow an employee to take FMLA leave to care for a domestic partner who is not considered a "spouse" under federal law. Rather, the Interpretation applies only to leaves associated with the birth, adoption or serious health condition of a child.

In light of this expanded interpretation of the FMLA, we recommend that employers take the following steps:

- Update their FMLA compliance packages to ensure that the compliance process includes appropriate forms and guidance for an employee seeking leave based on *in loco parentis* status; and
- Train managers and human resources staff about this expansion of the FMLA and its associated implications.

The Firm offers an FMLA Compliance Package that includes all required FMLA forms, tailored to each employer's specific policies and practices. In addition, the Firm offers a three-hour "Nuts and Bolts of Compliance with the Amended FMLA" seminar that covers all aspects of the amended FMLA, the revised FMLA Regulations that went into effect in 2009, and this most recent Interpretation. For more information, please contact Kathie Duffy at (978) 623-0900 or at kduffy@shpclaw.com.

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Please do not hesitate to contact us with any questions you may have about this new expansion of the FMLA and how to achieve compliance with it. ◆

OSHA Penalties May Increase Dramatically Now That OSHA May Impose Penalties On *Per-Worker* Basis

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Not deterred by the city's enforcement efforts, Ho ordered the workers to work at night behind a locked fence. Ho made no effort to conduct training or to provide appropriate PPE.

In March 1998, an explosion and fire occurred at the worksite, and several employees were injured. The Texas Department of Health investigated the incident and found levels of asbestos in excess of federal and state standards. This led to a criminal conviction under the Clean Air Act.

In addition, OSHA cited Ho for 22 willful violations of the applicable asbestos standard, determining that Ho failed to provide both required PPE and required training to each of the 11 affected workers. Ho challenged OSHA's per-worker approach, arguing that he was, at most, responsible for one violation of the standard's respiratory protection requirement and one violation of its training requirement.

The Occupational Safety and Health Review Commission ("Commission"), an independent tribunal which hears employers' challenges to health and safety citations, agreed with Ho, vacating all but one of the respiratory protection violations and all but one of the training violations. In the Commission's view, "the plain language of the standard addresses employees in the aggregate, not individually." *Erik K. Ho*, 2003 WL 22232014 (O.S.H.R.C.).

2. OSHA's Challenge To *Ho* And The Ensuing Litigation

In 2008, OSHA effectively challenged the Commission's Ho ruling by amending its PPE standards to "add language clarifying that the personal protective equipment and training requirements impose a compliance duty *to each and every employee* covered by the standards and that noncompliance may expose the employer to liability on a per-employee basis." 73 Fed. Reg. 75,568 (Dec. 12, 2008). This final rule became effective on January 12, 2009.

The National Association of Home Builders, along with the Chamber of Commerce and the National Association of Manufacturers, challenged the final rule, claiming that the Secretary of Labor had no statutory authority to determine the "unit of prosecution" for violations of OSHA standards. This case was brought to the United States Court of Appeals for the District of Columbia Circuit, which, as noted, ruled in OSHA's favor.

Impact Of *National Association Of Home Builders*

National Association of Home Builders significantly raises the stakes of OSHA non-compliance. Unfortunately, it is unclear precisely when OSHA will wield its authority to issue penalties on a per-worker basis, creating further risk and uncertainty for employers.

OSHA's Field Operations Manual states that each violation of a standard will result in only one citation unless the employer's behavior is willful and egregious. Certainly, the facts in Ho appear to satisfy this standard, as OSHA would be expected to impose harsh penalties on any employer that exposes workers to asbestos and then forces them to work at night behind a locked gate in order to evade a stop-work order.

But what about a more typical situation, such as a failure to provide respirators to a group of employees who faced potential exposure to lead or other heavy metals? Neither the Field Operations Manual nor *National Association of Home Builders* indicates where OSHA is expected to draw the line.

Recommendations For Employers

Given the significance of *National Association of Home Builders*, we recommend that employers redouble their efforts to ensure compliance with the *many* OSHA standards related to PPE and training. In particular, we strongly recommend that employers audit their OSHA practices and procedures and, in doing so, affirmatively identify and remedy any existing safety and health hazards.

In this regard, OSHA's authority to issue penalties on a per-worker basis is *not* limited to violations of the asbestos standard concerning respiratory protection, which was in dispute in *National Association of Home Builders*. As penalties calculated on a per-worker basis are unpredictable and can be extremely costly, employers now have yet another good reason for being proactive about OSHA compliance.

* * *

If you have any questions about the *National Association of Home Builders* case or would like assistance with your OSHA compliance program, please do not hesitate to contact us. ◆

Federal Enforcement Agencies Set Their Sights On Equal Pay

By Paul Dubois

Several federal enforcement agencies have recently announced that they will be taking dramatic new action to eliminate or reduce pay discrepancies between men and women.

The Obama Administration has created the National Equal Pay Enforcement Task Force (the "Task Force"), composed of officials from the Equal Employment Opportunity Commission ("EEOC"), the Department of Labor ("DOL"), the Department of Justice ("DOJ") and the Office of Personnel Management ("OPM"), to crack down on violations of federal equal-pay laws.

Recently, the Task Force convened and announced an agenda for carrying out its mission. Specifically, the Task Force has identified certain "persistent challenges" to equal-pay enforcement and announced an action plan for overcoming them. The action plan calls for (1) improving coordination among EEOC, DOL and DOJ; (2) increasing data collection from private-sector employers; (3) launching a public-education campaign; (4) improving the federal government's role as a model employer; and (5) supporting passage of the Paycheck Fairness Act by the Senate. Some of the key features of this action plan are summarized below.

1. Interagency Coordination

The Task Force has established a "standing working group" to coordinate the efforts of EEOC, DOL and DOJ in enforcing laws concerning equal pay and pay discrimination. These agencies will promote consistency in their policy and litigation positions so as to "improve investigation and enforcement abilities."

Their collaboration will involve cross-training staff members of EEOC and DOL's Wage and Hour Division "on how to identify compensation discrimination in the course of their investigations" in order to "increase referrals between the agencies." Similarly, EEOC, which enforces Title VII of the Civil Rights Act of 1964 ("Title VII") in the private sector, and DOJ, which enforces Title VII in the public sector, have begun an "intensive pilot program" to coordinate the investigation and litigation of pay-discrimination charges against state and local government employers.

Federal contractors are also on the Task Force's radar screen. EEOC and DOL's Office of Federal Contract Compliance Programs ("OFCCP"), which administers and enforces federal laws regarding the non-discrimination and affirmative-action obligations of federal contractors, will establish a pilot program requiring certain field offices "to work together to identify sectors where increased enforcement activity is necessary."

As a prelude to stepped-up enforcement efforts, OFCCP has announced that it will rescind existing standards concerning the non-discrimination obligations of federal contractors and establish new ones with "appropriate input from the EEOC and DOJ"; rescind a directive prohibiting the on-site audit of a federal contractor unless a desk audit first

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identifies at least ten victims of discrimination; and hire more than 200 employees, most of whom will be Compliance Officers, "the front line employees responsible for detecting discriminatory practices." Additional, OFCCP has removed its cap on the number of federal contractors that may be subject to a full audit review at any one time.

2. Data Collection From Private-Sector Employers

EEOC will commission an outside study "to determine what data it should collect to most effectively enhance its wage discrimination law enforcement efforts." Similarly, OFCCP is exploring whether to implement a survey to collect gender-identified wage data. According to OFCCP, "implementation of a survey is expected to result in better identification of those contractors who are likely to be out of compliance, particularly with regard to compensation discrimination; a narrowing of the issues on which the resulting review will focus; and identification of contractors for corporation-wide and industry-focused reviews." (Private-sector employers presently are not required to systematically report gender-identified wage data to the federal government. This, says the Task Force, "makes identifying wage discrimination difficult and undercuts enforcement efforts.")

3. Public-Education Campaign

In response to its belief that both employees and employers are "insufficiently educated on their rights and obligations with respect to wage discrimination," the Task Force is developing a public-education campaign concerning the right to equal pay. As part of this campaign, each EEOC District Office will host a Fair Pay Day "designed to focus the attention of the public and the media on fair pay issues." As a follow-up to their respective Fair Pay Days, EEOC offices "will conduct joint outreach with other local federal agencies and local Industry Liaison Groups on wage discrimination issues."

4. Federal Government As Model Employer

The Task Force intends to use a 2009 study by the Government Accountability Office ("GAO")—which revealed an eleven-cent gap between men's and women's pay in the federal workforce—to improve its role as a model employer and to provide additional training to enforcement agencies. Specifically, EEOC and OPM are to collaborate with GAO "to identify the reasons for this wage gap and ways to close it." EEOC then will use the information gained from this collaboration "to provide agencies with better guidance in analyzing wage gap issues."

5. Support For Paycheck Fairness Act

The Task Force will support efforts to achieve passage by the Senate of the Paycheck Fairness Act (the "PFA"). (The House of Representatives passed the PFA as part of the larger Lilly Ledbetter Fair Pay Act, but the Senate required removal of the PFA provisions before agreeing to send the Ledbetter law to the President for his signature.) The PFA would amend the Equal Pay Law of 1963 (the "EPA") by exposing businesses to unlimited compensatory and punitive damages; facilitating EPA class actions; making it more difficult for employers to establish an affirmative defense when pay discrepancies are found; and creating a cause of action for employees alleging retaliation for disclosing their wages.

Recommendations For Employers

In light of the federal government's sharpened focus on equal-pay enforcement, as well as the potential passage of the PFA, employers are encouraged to carefully audit their payroll and related employment practices, in collaboration with outside counsel, to identify any actual or perceived gender-based pay disparities. The audit should cover not only compensation but also related functions, such as performance appraisal processes, promotion policies and incentive programs. Working with counsel will help ensure a comprehensive review and protect the audit to the greatest extent possible under the attorney-client privilege.

If you have any questions about the Equal Pay Act, claims of pay discrimination under Title VII, the proposed Paycheck Fairness Act, or applicable federal-contractor obligations, or if you need assistance conducting an audit of your company's pay practices, please do not hesitate to contact us. ◆

Supreme Court Strikes Down Nearly 600 NLRB Decisions

By Stephen T. Melnick

The National Labor Relations Board (the "Board" or "NLRB") lacked the authority to issue nearly 600 decisions from December 2007 to March 2010, ruled the U.S. Supreme Court in a June decision captioned *New Process Steel, LP v. NLRB*. This has meant additional work for the current Board and almost certainly will result in additional delays for the parties litigating before it. In addition, employers should exercise caution when relying on any of those nearly 600 decisions in formulating labor-relations or litigation strategies.

The decisions vacated by the Court had been issued by the Board, which has five seats, when it was operating with only two members, Wilma B. Liebman and Peter C. Schaumber. This unusual situation arose as 2007 was coming to a close. At that time, the Board was operating with four members—Ms. Liebman, Mr. Schaumber, Peter N. Kirsanow and Dennis P. Walsh—and one vacancy. However, the recess appointments of Members Kirsanow and Walsh were set to expire on December 31, 2007, and political gridlock was expected to prevent the appointment of any Board nominees.

In an effort to preserve the Board's authority to function, the four members delegated "to Members Liebman, Schaumber and Kirsanow, as a three-member group, all of the Board's powers." The Board expressed the opinion that its action would permit the remaining two members, Ms. Liebman and Mr. Schaumber, to exercise the powers of the Board "after [the] departure of Members Kirsanow and Walsh, because the remaining members will constitute a quorum of the three-member group."

As authority for its action, the Board relied upon Section 3(b) of the National Labor Relations Act (the "Act"). The first sentence of this provision, known as the "delegation clause," authorizes the Board to delegate its powers to "any group of three or more members." Section 3(b) further provides that "three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof."

Over the ensuing 27-month period, Members Liebman and Schaumber decided nearly 600 cases as a purported two-member Board. They made a point of avoiding cases involving controversial issues during this time, focusing their review on errors by administrative law judges, rather than on novel questions of law. New Process Steel, LP, a respondent in one of those cases, appealed their decision to the U.S. Court of Appeals for the Seventh Circuit, arguing that Members Liebman and Schaumber lacked authority to issue any decisions at all. The Seventh Circuit sided with the NLRB, ruling that the two-member decision was valid. This decision was consistent with the rulings of five other federal appeals courts that had been presented with this issue.

A divided Supreme Court reversed the Seventh Circuit's decision, ruling, in agreement with New Process Steel, LP, that the purported two-member decision was invalid. The Court interpreted Section 3(b) to *always* require a quorum of at least three sitting members in order for the Board to exercise its powers. The language "two members shall constitute a quorum of any group designated pursuant to the first sentence hereof," the Court held, was for limited circumstances, such as when a member needed to recuse himself or herself from a three-member quorum because of a conflict of interest, and did not allow the Board to operate with only two members in the ordinary course.

At the time of the Supreme Court's decision, 96 of the two-member decisions were pending on appeal before the federal courts—six at the Supreme Court and 90 in various Courts of Appeals. The Board, which was brought to full capacity by the recent appointments of Craig Becker, Mark Pearce and Bryan Hayes, sought the remand of each of those

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Supreme Court: Employer *Can* Review Employee's Text Messages

By Stephen T. Melnick

In a decision with implications for all employers, the U.S. Supreme Court recently held that a public employer's review of an employee's text messages did not violate the employee's right to privacy under the Fourth Amendment to the U.S. Constitution. Specifically, in *Quon v. City of Ontario*, the Court found that the employer's actions were lawful because (1) the employer had a legitimate reason for the search, which was "justified at its inception," and (2) the search was not excessively intrusive in light of this justification.

To the first point, the Court ruled that the employer was justified in reviewing the employee's text messages at the time of the search in order to determine why the employee was overusing his pager. The employee, police officer Jeff Quon, had been given a two-way pager by the police department, along with a limited number of pre-paid messages each month. After Quon exceeded his message allotment several months in a row (incurring additional costs), the department decided to review the text messages Quon sent during a recent two-month period. The Court found that Quon's overuse gave the police department a legitimate work-related purpose to both download and read his text messages: the City needed to determine whether the number of messages it had purchased through the plan was sufficient to meet operational needs.

The Court also found that there was nothing unreasonable about *how* the police department went about reviewing Quon's text messages. The department read only two months' worth of Quon's text messages (even though his usage exceeded his allotment over a greater time period), excluding those sent and received by Quon when he was off-duty.

Further, the Court noted that Quon's expectation of privacy over his messages was limited by his awareness of a police department policy stating that text messages sent from work pagers might be reviewed.

The fact that the department discovered personal text messages in the course of its search (including racy messages between Quon and his wife – and between Quon and his girlfriend) did not render the search impermissible. As the Court explained, reasonableness is based on how a search is conducted, not on what it uncovers.

The Court also dismissed the argument that the search was unreasonable because less-intrusive alternative methods may have been available. Thus, the Court ruled that an employer is not required to choose the "least intrusive" method of performing a search, only a reasonable one.

The Court specifically declined to fashion a general rule outlining the parameters of an employee's privacy interests in electronic workplace communications. In this regard, the Court observed that communications technologies (like text messages and emails)—and the attitudes of society toward them—are both new and evolving. Accordingly, the Court assumed that the employee had a privacy interest in the messages but concluded, under the facts of this case, that it was unnecessary to determine the precise scope of this interest. This suggests that (i) the Court will likely resolve such cases based on the *employer's conduct* and the *employer's policies* whenever possible, and (ii) the boundaries of workplace privacy will be as dynamic as the ever-changing technology that is used in the workplace. Accordingly, one lesson of *Quon* would appear to be that employers should exercise caution when reviewing any type of employee communications that might implicate an employee's privacy interests, and consult with counsel to determine the appropriate approach under the relevant circumstances.

While *Quon* was decided under the Fourth Amendment, which applies only to governmental actors, it is nonetheless instructive for private-sector employers. Indeed, the Court stated that *the search in Quon "would be regarded as reasonable and normal in the private-employer context"* as well. Thus, a review of text messages that is both justified at its inception and reasonable in scope would arguably be equally lawful for public and private employers alike, although private employers must also be careful to take into account state privacy laws.

In light of this decision, employers are encouraged to consider the following actions with regard to electronic communications:

- Make sure that clear, unambiguous policies regarding electronic communications are in place and distributed to all relevant employees.
- Train employees on what is expected of them under these policies, and train supervisors and managers on how to apply and enforce these policies.
- If a review of an employee's emails, text messages or other electronic communications appears to be in order, make sure to identify a legitimate, work-related reason for the search before conducting it (for instance, controlling excess usage, as in *Quon*, or preventing harassment or bullying in the office).
- When conducting a search, be sure to make it no broader than it needs to be. For instance, there would probably be no reason to review an employee's entire hard drive if the purpose of the search related only to communications between the employee and another person.

Please contact us if you have any questions about the *Quon* decision or workplace privacy issues generally, or if you need assistance in formulating, implementing or enforcing your organization's electronic-communications policies. ◆

Supreme Court Strikes Down Nearly 600 NLRB Decisions

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cases for further consideration and on August 5, 2010, issued decisions in four of those cases. These were the Board's first decisions in the 96 returned cases.

While the Board is making some headway, albeit slowly, the returned cases may be just the tip of the iceberg. In this regard, the Board stated as follows in a recent press release:

> Meanwhile, hundreds of other two-member cases were closed through compliance with the original Board decision, settlement, withdrawal or other means. Still more are in some stage of litigation or compliance stemming from the original decision. It is unclear how many of those rulings can or will be contested.

Potentially adding to the complexity of this situation, Member Schaumber (a Republican) departed from the Board on August 27, 2010; now, three of the four remaining Board Members are Democrats. It is possible that this political shift may influence how the present Board reviews the remaining 92 returned cases or any challenges that arise from the additional cases referenced in the Board's press release.

For employers involved in the nearly 600 vacated Board decisions, *New Process Steel, LP* may present an opportunity to seek a more favorable outcome now that the Board is officially up and running again. We would be happy to assist any such employers in developing a strategy to achieve this. And while the "two-member Board" deliberately refrained from making any major new pronouncements or interpretations of the National Labor Relations Act, at least some the decisions it did reach could be overruled in the coming months. Therefore, employers should be cautious about relying on any decisions from this time period. Finally, employers with imminent or pending proceedings before the Board should expect delays as a result of *New Process Steel, LP*.

We will provide further updates on this situation as material developments emerge. Meanwhile, if you have questions about *New Process Steel, LP* or need assistance with any NLRB matter or proceeding, please feel free to contact us. ◆

SCHWARTZ HANNUM PC
LABOR AND EMPLOYMENT LAWYERS REPRESENTING MANAGEMENT

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Tenth Annual Seminar: Hot Topics in Labor and Employment Law

Monday, October 18, 2010

The Westin Waltham-Boston, 70 Third Avenue, Waltham, MA

7:45 a.m. – 12:00 p.m.

SCHEDULE OF EVENTS

7:45 – 8:30 A.M.

Registration, Breakfast and Networking

8:30 – 8:35 A.M.

Welcome

Sara Goldsmith Schwartz

8:35 – 10:15 A.M.

Annual Labor and Employment Update:

Overview of Important Legal Decisions and Legislative Changes

Sara Goldsmith Schwartz, Suzanne W. King and Shannon M. Lynch

This presentation will survey the prior year's most critical court decisions and legislative changes in federal, Massachusetts and multi-state labor, employment and immigration laws. The past year has again included a dramatic number of significant changes, so we expect to add topics as the developments continue to emerge prior to October 18. As of now, this session will include at least the following topics:

- Federal Health Care Law: Deadlines, Demands and Duties for Employers in 2010 and 2011
- The HIRE Act
- Nursing Mothers in the Workplace: Accommodations Required
- The Family & Medical Leave Act: New Requirements (Military Leave, *In Loco Parentis* and More)
- Personnel File Developments: Massachusetts and Beyond
- Employment Applications and Access to Criminal Records: Dramatic Changes in Massachusetts and Elsewhere
- Expanded Whistleblower Rights Under Federal Law
- Data Security Obligations
- Same-Sex Relationships: Expansion of Rights and Benefits

10:15 – 10:30 A.M.

Networking and Refreshment Break

10:30 – 11:00 A.M.

The Perfect Job Description as the Foundation of the Employment Relationship

Jessica L. Herbster

Have you ever used a job description to guide an interview? As an outline for a performance review? When determining eligibility for an FMLA leave? To assist in resolving whether to accommodate a possibly disabled employee? In deciding whether an employee is eligible for overtime pay? To keep an employee out of a union? Job descriptions have become increasingly important, and this session will address how to draft and update job descriptions to keep them current as jobs and organizations evolve.

11:00 – 11:45 A.M.

Bullying: Identifying and Preventing It, In the Workplace and In Cyberspace

Sara Goldsmith Schwartz and William E. Hannum III

Playground and workplace bullies have plagued us for generations. But the methods have changed and are now significantly more challenging to prevent and detect, with the advent of cyber-bullying. Today, employers are encouraged to take steps to prevent bullying. New anti-bullying laws vary state-to-state, but the lessons are universal: what does an ideal anti-bullying policy contain? How should complaints and suspicions of bullying be handled? How can an organization prevent bullying altogether? This session will present practical guidelines for employers to follow in order to prevent bullying in the workplace, including:

- Defining traditional and new types of bullying, including cyber-bullying;
- Examining common elements of anti-bullying laws around the country;
- Drafting effective bullying and harassment policies;
- Implementing internal complaint processes for addressing bullying;
- Preventing bullying through training; and
- Disciplining bullies

11:45 A.M. – 12:00 P.M.

Ask the Experts

The conclusion of the seminar features an "Ask the Experts" session, during which attendees are encouraged to ask questions regarding any labor and employment law topic.

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REGISTRATION

☐ **Early registration for current and former clients** **$150***
(before October 1, 2010)

☐ **Early registration for all others** **$200***
(before October 1, 2010)

☐ **Late registration** **$225***
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