The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed

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Federal NLRA

New Developments Under The National Labor Relations Act

by Eric Paltell

Recent actions by the National Labor Relations Board and the United States Congress signal changes on the horizon in the world of "traditional" labor law. At the NLRB, the Board's recent decision in Dana Corp., 351 NLRB No. 28 (October 2, 2007) delivered a blow to labor organizations seeking to expand the use of "card checks" to organize workers without an election. Meanwhile, at the Congressional level, the House Education and Labor Committee approved the "RESPECT Act" – new legislation that would change the definition of a supervisor under the National Labor Relations Act.

The NLRB's decision in Dana Corp. has been watched with great anticipation by both labor and management groups. In recent years, organized labor has taken to using "neutrality agreements" and "card checks" to try to organize employees. These methods provide that an employer will "voluntarily" recognize a union as the representative of its employees without a secret ballot election. Instead of giving employees the option to vote for or against union representation in the privacy of the voting booth, "voluntary recognition" is generally based upon evidence that a majority of workers signed "authorization cards" indicating their support for the union.

Under Board law dating back to the mid-1960s, once an employer voluntarily recognizes a union, the union is entitled to recognition for "a reasonable period of time" without being subject to an election. This means that employees cannot file a decertification election to get rid of the union, nor can a rival union petition to represent the employees. The decision in Dana Corp., revamps established Board law by providing that employees will now have a 45 day period after receiving notice from the NLRB that the employer has voluntarily recognized the union within which they may file a decertification petition. Similarly, a rival union may file a petition to represent the employees during that same 45 day period. The Board directed the NLRB General Counsel to develop a new notice that must be posted in the workplace after the NLRB Regional office receives written notice from the employer and/or the union that the employer has voluntarily recognized the union. This NLRB-issued notice will inform employees that they have the right to file a decertification petition supported by 30% or more of the bargaining unit employees, and also have the right to file a petition for representation by a different union if it is supported by 30% or more of the bargaining unit employees. In the event that no election petition is filed within 45 days of the posting of the notice, then the union is entitled to recognition for a "reasonable period of time" following expiration of the window period.

While the Board's decision in Dana Corp. is a major victory for management, Congress's recent actions with the "RESPECT" Act are anything but a favorable development for employers. The RESPECT Act ("Re-empowerment of Skilled and Professional Employees and Construction and Trades Workers Act) would redefine "supervisor" under the National Labor Relations Act to exclude persons who are not engaged in managerial duties "for a majority of the individual's work time." The legislation would also eliminate the phrases "assign" and "responsibility to direct" from the statutory definition of supervisory responsibilities. The net effect of the changes would be to reduce the number of employees who are excluded from coverage under the NLRA as supervisors.

The RESPECT Act is a response to a trio of 2006 Board decisions, Oakwood Healthcare, Inc., Golden Crest Healthcare Center, and Croft Metals. In the lead case, Oakwood Healthcare, the Board ruled that 12 charge nurses at a Michigan hospital should be exempt from the NLRA because they regularly assign staff to patients and exercise independent

judgment while doing so. The Board found that employees who assign other employees to overall duties, are responsible for directing subordinates to undertake specific tasks, and have discretion to do so without close direction from management are supervisors under the Act.

These two recent developments may mark the beginning of significant changes in the organizing landscape. While the RESPECT Act would expand union representation to supervisors currently excluded from coverage, the Dana Corp. decision creates a major obstacle to the use of informal card check agreements. Now, no employer can enter into a collective bargaining relationship with a union until the employees have been given a chance to have a secret ballot election. We should expect to see organized labor take its efforts to Congress -- just as it did with the Employee Free Choice Act -- to try to counteract the effects of the Board's decision.

ADA

Fragrance Sensitivity

by Peter S. Saucier

A new series of emerging cases based upon the use of perfume has added spice to the summer of 2007. In *Thomas v. Avon Products. Inc.*, a decision featuring facts that might be labeled preposterous if they appeared in a Hollywood script. Cheryl Thomas worked for several years at Avon as a Customer Service Representative and Returns Processor. Thomas has a propensity to migraine headaches from exposure to strong odors. Fortunately for Thomas, her jobs did not require her to be around the manufacturing of Avon products.

For a reason not discussed in the opinion, Thomas decided that the allure of being on the fabrication side was too strong to resist, so she applied for a job in the Manufacturing Department in 2001. Because she would have to wear a respirator at all times to avoid fragrances, which Thomas considered untenable, she took herself out of consideration for the job and submitted to sinus surgery to try to remedy her malady. Then, in 2002, Thomas sought and received a position in the Lipstick Department. During the cross-training that followed Thomas became incapacitated by migraine headaches and obtained a personal physician's opinion that Thomas "may not medically work in perfumed ambiance, ever." Avon's physician agreed with that assessment in pointed language:

[S]ince Plaintiff is unable to tolerate exposure to fragrances and given the nature of Avon's business an accommodation is "virtually impossible and beyond the standard of 'reasonable' that is required by the ADA."

Avon's physician had adeptly anticipated the future course of the relationship between Thomas and Avon. Litigation under the American's with Disabilities Act was in the wind. The elements of a typical claim under the ADA are established. The court concluded that Thomas was not disabled because she was not substantially limited in her ability to work. It was not enough that Thomas could "not be a hairdresser, or a painter, nor could she work at Kinko's or a vinyl manufacturer because of the fumes." There remained a host of jobs that Thomas could perform, Customer Service Representative and Returns Processor coming immediately to mind. Thomas, the court concluded, was unable to meet the definition of a person with a disability.

Beyond finding that Thomas was not disabled, the court added that Thomas's situation is hopeless even if she is disabled. Avon offered a legitimate reason for its action that would have carried the day. That was common sense:

Plaintiff's personal physician indicated that she was not medically allowed to work in a "perfumed ambiance, ever." Avon's entire manufacturing department is in one large room and, thus, is a "perfumed ambiance." Based upon Plaintiff's doctor's orders no accommodation could be made.

For these reasons, Thomas's case was dismissed.

A few weeks after the *Thomas* decision issued, another court released an opinion in a similar fragrance case under the ADA. In June 2002, Linda Kaufmann took a job in the Construction Loan Department of GMAC where she almost immediately experienced "severe allergic reactions to the perfumes worn by her coworkers." Kaufmann claimed to be particularly susceptible to Avon perfumes, which caused the employer to tell "all employees about the need to not wear perfume and specifically request that employees refrain from using Avon products."

From June through September 2002, GMAC installed personal air filters and fans, moved Kaufmann's desk into isolated areas, and implemented a perfume free zone in the Construction Loan Department. Still, Kaufmann's symptoms did not abate, so she took leave from September until December 2002. Upon her return, Kaufmann's employment was tumultuous. She complained chronically that her coworkers were wearing scents, tried to miss training meetings or participate from remote spots, and became erratic in her attendance. Kaufmann was so preoccupied with her fragrance aversion that she did not concentrate on her work. In early May 2003, shortly after Kaufmann sent her supervisor yet another email as she shot out the door about the need to leave early because she was reacting to someone's perfume, GMAC discharged Kaufmann. There was no written documentation of poor performance, but Kaufmann was told that "it was simply not working out for both sides."

Kaufmann brought suit under the ADA and the parallel provisions of the Pennsylvania Human Relations Act. Kaufmann contended that she was not accommodated because the "perfume-free policy was not adequately enforced . . ."

The court disagreed, finding that it would not be reasonable to expect GMAC to provide an absolutely odor free environment, and adding that "Kaufmann does not explain how it would be possible to create such a perfectly-sealed environment."

Kaufmann's claim failed, but opened the door a bit. The *Kaufmann* court allowed that fragrance sensitivity could be a disability. The facts presented by Kauffmann were sufficient to get that part of her case to trial.

One month after the *Kaufmann* decision, a comprehensive opinion on the interplay between fragrance sensitivity and disability law with a twist was presented in *McDonald v. Potter.* Tracy McDonald is plagued by a number of interrelated physical and mental ills, including vascular rhinitis which manifested as fragrance sensitivity. McDonald contended that exposure to fragrances gave her migraine headaches. McDonald worked in the Remote Encoding Center (REC) of the Postal Service where she was one of 750 employees.

The REC has a large room, approximately 104 feet by 128 feet, with rows of computer monitors and keyboards and a rolling secretarial-type chair at each work station. The room is carpeted, and there is a small divider between each work station.

McDonald's fragrance sensitivity had a singular history. Apparently it was a byproduct of two automobile accidents, the second of which exacerbated the already existing problem. The trouble did not interfere with her holding a job at one point as a bartender, and McDonald was not bothered by the odor of the six house cats with whom she shared an apartment. But at work she could smell fabric softener from the clothes of persons ten rows away, and could detect the "vapor trails" of persons who had passed. It developed that

McDonald's ailment had a mental component. One physician who examined her for some 12 hours testified that she had cacosmia. The physician explained:

[I]f they perceive the odor is coming from a coworker they dislike, the odors are horrible and cause headaches. On the other hand, when the person perceives the identical odor from somebody they like or from another environment that's a positive one for them, the odor doesn't bother them.

The Postal Service nonetheless took measures to address McDonald's fragrance sensitivity, including implementing a rule against excess fragrance and offering a light mask to McDonald. McDonald never was denied a request to be absent or leave early.

The court decided a motion for summary judgment in favor of the Postal Service. The court concluded that her "request for either segregation, a fragrance-free REC, or a more strictly enforced light fragrance environment is not objectively reasonable under the circumstances."

Fragrance sensitivity cases promise to keep coming. Reasoning in the cases presented here signal that a fragrance sensitivity case is difficult for a claimant, but not impossible. The mounting number of such cases increases the likelihood that the right combination of fact, law, and argument will come together to establish a case.

Immigration Law

What To Do When ICE Comes Knocking

by Ken C. Gauvey

In case you haven't noticed, the U.S. has become much more aggressive towards employers who may hire undocumented workers. The Department of Homeland Security's "no-match" regulations are just the latest example of this. By the end of 2006, raids on employers by Immigration and Customs Enforcement ("ICE") were up by more than 700% compared to 2002. Therefore, it is important for employers to know what to do when ICE agents show up at your workplace.

In general, the law requires that employers receive three days' notice of the government's intention to conduct an inspection of an employer's I-9 forms. However, the law does not prohibit ICE agents from showing up unannounced and aggressively suggesting that the employer consent to an immediate review of I-9 records. ICE agents may even suggest that if the employer denies permission the employer may look guilty and that ICE will investigate the employer more aggressively. If an employer consents, ICE may examine records not related to an I-9 inspection, such as payroll. They may also speak to employees. In some cases, ICE agents even take the I-9 records with them, making it difficult if not impossible for an employer to defend against subsequent charges filed against them.

The best policy is for the employer to be prepared to respond if agents appear unannounced for an I-9 inspection. The first thing to note is that an employer should NEVER consent to an immediate review of the I-9 forms or any other records, absent a court order. Employers should invoke the three-day rule for the production of the I-9's. Employers should feel free to liberally use the phrase, "My counsel has advised me not to provide immediate consent to your review or our records. He may be contacted at..." In addition, never let agents remove original documents from the premises. It may be a good idea to maintain a separate file with copies of all I-9 forms with the original I-9s for agents to take with them. Finally, never give consent to agents to speak with any employees on the premises. When agents attempt to question employees, inform them that they do not have permission to speak with the employees and, if they have any questions, they should contact the employer's counsel. Employers should, at all times, feel free to refer ICE agents to an attorney and have them speak to the attorney over the telephone.

There are some circumstances where ICE agents may show up with a warrant demanding immediate access to I-9 records. In these situations, the employer should immediately provide those records, however, the warrant should be read to make sure of the scope of the demand. For example, a warrant may demand that agents be given access to all I-9 records, however this does not include payroll records, workers' compensation records, or the right to speak with or interrogate employees. It means exactly what it says, all I-9 records. When an employer is presented with a warrant or subpoena, the employer should contact their attorney immediately, but while contacting their attorney, employers should not attempt to interfere with the agents at any time.

The majority of ICE investigations begin with three days' notice. When notice is provided to the employer, the employer typically has several options. They may attempt to reschedule the appointment. Recently, the government has been unwilling to extend the three day deadline. In fact, many of the most significant fines imposed in recent years have been for failure to produce all of the I-9s at the end of the three-day period. The ability to reschedule depends on the ICE agent in charge of the investigation.

The location of the inspection may be adjusted as well. The law provides that the I-9 forms may be delivered to the ICE office for inspection or the inspection may occur on the employer's premises. The Notice of Inspection always requests that the inspection occur on the employer's premises. If the employer allows this, the employer should set up a location on the premises completely sequestered from other work areas where employees are located and separated from where other business records are maintained. The inspection should be in a room where the employer's representative can sit with the ICE agents while the records are reviewed and answer any questions as they arise.

The government does have the ability to request any other employer records that may be useful in establishing whether the employer is complying with I-9 regulations. An employer may refuse to provide other documentation, which would then require agents to obtain an administrative subpoena. These subpoenas may be defeated on constitutional grounds based on lack of reasonable suspicion or specificity. However, the cost of litigation may necessitate the production of the documents.

It should be noted that when employers receive a Notice of Inspection, they should immediately conduct an internal audit to correct any problems in their I-9 forms. Even corrections at this late stage will eliminate a substantial amount of fines and penalties.

Inspections may also be made by the Department of Labor ("DOL"). The DOL inspectors follow a "walk-in" procedure in conducting inspections. The employer may decline the inspection, but this will cause the DOL to alert ICE that compliance with I-9 regulations could not be determined. However, it will also give the employer time to conduct an internal audit to reduce any possible fines. The DOL can also issue a Notice of Inspection requesting the I-9 forms within a specific time frame.

While an inspection may be a traumatic time, it can be managed by being prepared and knowing the rights afforded employers. It is important to have counsel who is familiar with I-9 procedures and staff who is trained in how to react to investigations. In addition, it is extremely helpful to have an I-9 internal audit to make sure that the I-9 forms are being completed correctly and

employers are not opening themselves up to unnecessary civil or criminal penalties.

Arbitration

Arbitration Follies
by Peter S. Saucier

Welcome to a new section of The Employment Brief monthly newsletter. Arbitration is a major issue in any employment law conversation. However, a lot of arbitration decisions border on the ludicrous. Every month, Peter S. Saucier will bring some of these decisions to your attention to both educate and warn you about some of the things to look out for in arbitration.

One reason arbitration is "efficient" is the near impossibility of pursuing an appeal, including one from a decision that is contrary to reason or law. The Southern California Gas Company hired a medical group to administer its drug testing procedure. The medical group hired a person who represented himself to be a medical doctor to check the results of tests. It turned out that the ostensible doctor was a fraud, unknown to the medical group, and, of course, to the Gas Company. Once the ersatz physician was discovered, he was arrested, and all the test results were reviewed again by a real medical doctor.

Two utility worker employees of the Gas Company had tested positive for drugs and the results had been certified by the impostor doctor. Once the impersonator was arrested, the results were rechecked and reaffirmed by a real doctor several months later. Again, the urine samples proved positive for drugs. The utility workers and their loyal union took the case to arbitration anyway, arguing that certification by a phony doctor nullified the results, even if they were accurate. The arbitrator accepted that argument, and the federal court of appeals allowed the award to stand on appeal.

So, the Southern California Gas Company was required to reinstate to employment, in safety sensitive positions, two known drug users because the medical company it hired briefly employed an impostor. That the results were accurate, that they were rechecked later by a physician, that the Gas Company could not possibly have known about the phony physician, and that there was no harm or prejudice were all irrelevant to the arbitrator, and not subject to review on appeal, according to the federal court.

Federal Changes

On the Horizon
by Darrell VanDeusen

The Supreme Court's Employment Docket for the 2007-08 Term

Sprint/United Mgmt. Co. v. Mendelsohn:
Is evidence that an employer allegedly discriminated against non-parties admissible in a claim of employment discrimination? Or, does the possible prejudicial effect of such information outweigh any probative value.

Federal Express Corp. v. Holowecki:
Does the date of the "intake questionnaire" from a charging party stop the limitations clock because it satisfies the requirement of filing a "charge of discrimination" with the EEOC under the Age Discrimination in Employment Act. Argument is set for November 6, 2007.

Hall Street Assoc. v. Mattel, Inc.:
Does the federal Arbitration Act permit parties to expand judicial review of an arbitration award by contract? The Court's decision here could have significant implications for the use of Alternative Dispute Resolution in employment cases. Argument is set for November 7, 2007.

Kentucky Retirement Sys. v. EEOC:
The Sixth Circuit held, en banc, that the Kentucky retirement plan was facially discriminatory because it disqualified employees from receiving disability retirement benefits if they became disabled after reaching age 55 if they held hazardous jobs, and at age 65 if they held non-hazardous jobs. The court also found that the plan calculated disability retirement benefits in a manner that resulted in an older employee receiving lower payments than a younger employee who was similar in every relevant factor other than age.

Gomez-Perez v. Potter:
Does the ADEA as applied to Federal employees prohibit retaliation? The First Circuit said no, creating a Circuit split with the District of Columbia Circuit, which held in 2001 that the ADEA does prohibit retaliation against federal employees.

CBOCS West Inc. v. Humphries:
Does Section 1981 permit claims for retaliation? The Court will review a Seventh Circuit decision that such claims are cognizable. In the Cert. petition, attorneys for Cracker Barrel argued that lower federal courts have been in a state of "vacillation and confusion" over this issue. Humphries's lawyers responded that the confusion "exists only in Cracker Barrel's imagination" and that Congress clearly intended Section 1981 plaintiffs to have a cause of action for retaliation.

Kollman's Corner

Watch What You Eat
by Frank L. Kollman

According to the Wall Street Journal, a federal court just struck down a law in New York City requiring chain restaurants to put calorie information on their menus. Good. I am rather tired of the government thinking it knows best, and I am tired of politicians - both on the right and on the left - acting on their biases and prejudices.

I would like to see the number of laws passed each year diminish, or I would like to see more time devoted to getting bad laws off the books. For some reason, legislators see no problem with courts expanding laws beyond their original intent, but they become outraged if a law is struck down. If we don't want courts acting as legislatures, why should we put up with courts applying laws far beyond their clear meaning?

Government needs to stop being paternalistic. Many times, if not most times, the government does not know better than an employer, a chef, a doctor, an engineer, or a scientist. So, if you're not going to eat that Big Mac, send it over.

For more thoughts and comments by Frank Kollman, visit his blog at http://kollmanlaw.com/blogs

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