



# Veritas™

A newsletter of Human Resources highlights, helpful hints, suggestions and reminders to assist employers in their daily interactions with employees.

## HUMAN RESOURCES POTPOURRI

Pregnancy Discrimination: Happy Birthday!

The Pregnancy Discrimination Act turns 30 years old and seems to be getting better with age. The EEOC recently reported that in 2007 it had received a record high number of pregnancy bias charges and women of color account for the largest increase. Despite the agency's best efforts for enforcement, stereotypes persist regarding pregnant mothers in the work force; a situation the EEOC describes as "downright scary." Pregnancy discrimination charges filed with the EEOC have increased by almost 65% over the past 15 years, while pregnancy bias charges filed by white women decreased by almost 16%. It appears that "race and ethnicity" seem to matter regarding who is most likely to encounter pregnancy bias, and is becoming a nationwide problem. The alleged discrimination tends to occur (a) right after an employee discloses the pregnancy to her employer, (b) at the "very end" of the pregnancy when the employee is most visibly affected, or (c) when the employee attempts to return to work after pregnancy.

*Employers beware:* the EEOC will enforce the law.

In memory  
of our beloved employee  
and friend  
Cheryl ("Cheri") Rucano  
11/16/51 - 11/9/08  
Rest in Peace



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## Season's Greetings

Best wishes to you and your family for a happy holiday season  
and a new year filled with peace, happiness and prosperity.

Thank you for being a client and friend of our firm.  
We appreciate and value your business and friendship!

## UNIONS ARE ACTIVE

It was reported that thousands of union members mobilized to campaign for the presidential election of Barack Obama who had campaigned that he would sign the Employee Free Choice Act (EFCA) "so that people can join unions again." The unions have stated "we have an opportunity to reclaim the American dream." (Did not know it was lost.) EFCA, if you forgot, is proposed legislation that would amend the National Labor Relations Act to give workers the option to form a union through an NLRB check of authorization cards signed by a majority of employees. The legislation would also provide for the Federal Mediation and Conciliation Service to mediate and arbitrate first collective bargaining agreements if the parties fail to reach agreement within certain time periods and would establish tougher penalties for unfair labor practices committed by employers during an organizing campaign or during bargaining for a first contract.

Management, as you might expect, sees it differently and has stated that "Barack Obama's election victory will bring about some of the most dramatic changes in the U.S. labor relations environment in decades." Employers should start preparing themselves for the union petition wave that will likely follow. From the employers' point of view, this change in the labor movement may have already begun.

## UNION ELECTION UPDATE

The union organizing surge may already have begun, and with the likely passage of some form of the Employee Free Choice Act, it will only get worse. Here are some recently reported numbers:

- Unions won 518 private sector elections in the first half of 2008, up from 454 wins in the same period of 2007 (66.8% vs. 58.5%)
- Number of workers organized by unions for this same period increased from 28,441 to 35,960
- Decertification elections (getting rid of the union) were down, 183 to 148, and unions won 48.6% of those elections, up from 34.4%

### Three Most Active Unions

1. International Brotherhood of Teamsters (IBT) won 56.5% of its elections
2. Service Employees International Union (SEIU) won 70% of its elections
3. International Association of Machinists (IAM) won 77.8% of its elections

### Most Affected Industries

Services sector, including healthcare, finance, real estate, transportation, construction, communications and retail. Interestingly, unions only won half of the elections in which they participated in the manufacturing sector (but this could change dramatically with the likely passage of EFCA).

### Unionization by Unit Size

1. Units with fewer than 50 employees; 69.9% of elections won
2. Units of 50-99 employees, 64.2% of elections won
3. Larger units of 500 or more, union won 60%

NOTE: NLRB statistics do not represent union organizing outside the Board's process, i.e., through neutrality and card-check authorization. Source: BNA, Daily Labor Report, Nov. 10, 2008

A coincidence or a sign of things to come? At the first signs of union organizing, we recommend a call to an experienced labor attorney.

## Things I Have Learned:

- That everybody has something to teach.
- That a minute of extra thinking beforehand can save hours of worry later.
- That you should never be a passenger on a one-seat bicycle.
- That broken cookies have fewer calories.
- That the only thing you can be sure of improving is yourself.
- That you should never go up a ladder with just one nail.

## COLD, HARD FACTS

The coldest temperature ever recorded on Earth was  $-129^{\circ}$  F in Vostok, Antarctica on July 21, 1983.

Most snowfall recorded in U.S. in a 24-hour period was 63" in Georgetown, Colorado on December 4, 1913.

The greatest snowfall in 12 months was 102' at Paradise Ranger Station, Mt. Rainier, Washington, between 2/19/71 and 2/18/72.



## A CHILD'S LOGIC

Teacher asks the class, "What is a synonym?"

One student answered, "A synonym is a word you use when you can't spell the other one."

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## STILL COLLECTING UNION DUES

When a collective bargaining agreement expires, some might expect that the employer's duty to collect union dues through a "check-off" provision would also expire. In most states, employers would have to continue the "check-off" absent a "clear and unmistakable" waiver by the union or impasse being reached by the parties. However, in conflict with the NLRB, the 9th Circuit Court of Appeals ruled that the duty may extend past the labor contract's expiration in a "right-to-work" state.

In *Local Joint Executive Board of Las Vegas v. NLRB*, 9th Cir., No. 07-73979, 8/27/08, the Court held that the employer could not unilaterally stop collecting union dues because "the Union did not clearly and unmistakably waive its claim to protection from unilateral change following the expiration of the Agreement."

There are two main points to consider in this case:

1. It involved a labor dispute in Nevada, a "right-to-work" state. According to the 9th Circuit, the Board must determine "whether dues check-off in right-to-work states is subject to unilateral change, or whether under such circumstances, dues-check-off is a mandatory subject of bargaining." In effect, the 9th Circuit stated that in most states (i.e., non-"right-to-work" states), any mandatory subject of bargaining is subject to the "clear and unmistakable waiver" standard or the attainment of "impasse" in negotiations, and the Court challenged the Board to adopt a different rule in "right-to-work" states if it intended to prevail.
2. All employers who have collective bargaining agreements are reminded that (a) post expiration is not an opportunity to make unilateral changes to the wages, hours and working conditions of bargaining unit members without following "Board law" concerning waivers and impasse and (b) that when an employer wants a "clear and unmistakable waiver," the employer must bargain for the waiver.

Many times employers try to use normal "common sense" reasoning and are very disappointed when the "clear and unmistakable waiver" fails.

How can we fix the problem? For starters, the check-off provision in the union contract should state that it will terminate upon expiration of the agreement and the agreement should specify what happens when it expires.

When questions on labor matters arise, consultation with experienced labor counsel is recommended.

## THE "BAD BOSS" CONTEST

Winner of the "Most Outrageous Story" was an employee who was asked to organize a company outing and selected a major league baseball game two months ahead of time. On the day of the game, it rained, and the female employee was demoted from manager to assistant manager with a reduction in pay. This employee said, "My boss informed me that I had picked that particular date because I knew it would rain!" Is there a pretext aspect to this story?

## TO RELEASE OR NOT RELEASE

The American Bar Association's Labor and Employment Law Section Conference recently reported that "employees and their attorneys are making numerous mistakes that could result in costly litigation or having the entire release agreement voided." The major mistake most noted is not considering the ramifications of a release which is intended to immunize the employer from liability for past claims. Sloppy drafting can result in other provisions in the document involving those rights. Specifically, covenants not to sue, which are designed to prevent employees from bringing any type of lawsuit, can cause the entire agreement to be voided because they create confusion for the employee. (The OWBPA requires the language of the release to be written so that it is easily understood.) There should be no language in a release that suggests employees are barred from bringing claims where there is statutory protection. If the release is poorly worded, you could end up voiding certain aspects of the agreement such as the non-competition and trade secrets aspects of the agreement. Simply stated, release agreements are drafted to avoid future problems, and writing a bad agreement usually creates more problems. Always seek the advice and counsel of an experienced labor attorney in such matters.

## QUOTES OF THE MONTH

*Start every day with a smile and get it over with.* ~W. C. Fields

*There is more to life than increasing its speed.* ~Mohandas K. Gandhi

*We must teach our children to dream with their eyes open.* ~Harry Edwards

*In three words I can sum up everything I've learned about life: it goes on.*  
~Robert Frost

*Let us not look back in anger or forward in fear, but around in awareness.*  
~James Thurber

*Only our individual faith in freedom can keep us free.* ~Dwight D. Eisenhower

*The reward of a thing well done is to have done it.* ~Ralph Waldo Emerson

