

NEW MEXICO Lawyer

August 2010 Volume 5, No. 3

www.nmbar.org





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JURISDICTIONAL LAYERS of JOB LAWS

and UNANSWERED QUESTIONS

By Aaron Viets



May an employer lawfully refuse to hire a job applicant because her husband already works for the company? How about a question as simple as: What is the minimum wage? The answers to these will vary depending upon whether the employment relationship is in New Mexico or another state, and in New Mexico it will even depend on the city in which the work will occur. Fortunately for lawyers and their clients who have to keep track of such things, municipal employment law is fairly limited in New Mexico (all you need to know is that Albuquerque and Santa Fe have their own minimum wage ordinances). Federal and state discrimination and wage laws, however, are more comprehensive. These sources often overlap and when they do, they tend to have many similarities. State law, however, when it is the only source of law, tends to leave a number of open questions—aka opportunities—for New Mexico lawyers.

Anti-Discrimination Laws

The granddaddy of the federal statutes governing workplace behavior is Title VII of the Civil Rights Act of 1964. As the name suggests, it is the product of the civil rights movement, and it is the central federal law making it unlawful for employers to discriminate against job applicants and employees because of race, national origin, religion, and gender. The analog in our state is the New Mexico Human Rights Act, which has a broader reach. While employers with fewer than fifteen employees are not covered by Title VII or the Americans With Disabilities Act, and the minimum threshold under the federal Age Discrimination in Employment Act is 20 employees, the NMHRA generally covers employers with as few as four workers.

Moreover, the NMHRA protects the same groups as federal law plus more. For example, Title VII does not currently shield homosexuals from workplace discrimination and it affords no protection for cross dressers or transvestites, but the NMHRA does. The NMHRA even guards against discrimination due to “spousal affiliation.”¹ Unfortunately for those searching for definitions, none exists for this protected class. But employees and job applicants in New Mexico should know that if their employer or prospective employer has taken adverse action against them because of who their spouse is (or is not), they may have an NMHRA claim.

The NMHRA also serves as the state’s answer to the federal Age Discrimination in Employment Act, which has one of the few bright lines in the anti-discrimination laws: workers 40 years old and older are protected; workers under 40 are not. The NMHRA, in contrast, has no age cut-off. Might it violate state law to fire a 38 year old to make room for someone who is “more energetic”—and also much younger? How about refusing to hire a young person (of legal

working age) simply because of his or her youth? These questions will have to be answered by New Mexico lawyers, their clients, and the courts.

Nowhere is the extent of the overlap between state and federal law less clear than with disability claims. The Americans With Disabilities Act protects disabled workers from job-related disability discrimination, and so does the state statute—after a fashion. The word “disability” cannot be found in the NMHRA. Instead, state law makes it unlawful to discriminate based on an applicant’s or employee’s “physical or mental handicap or serious medical condition.” NMSA 1978, § 2817(A). Are these the same as disabilities under the Americans With Disabilities Act? Maybe, not but necessarily. Our state appellate courts have said that analogous federal law can provide helpful guidance—while at the same time taking care to state that the NMHRA is unique and that federal case law should not necessarily be incorporated into state law.²

The NMHRA also creates an administrative procedure with which potential plaintiffs must comply. The federal anti-discrimination laws have something similar (federal claimants first file with the Equal Employment Opportunity Commission), but the administrative process in New Mexico is more comprehensive. To preserve their rights under the statute, NMHRA claimants must file a discrimination charge with the New Mexico Human Rights Bureau. If the NMHRB finds “probable cause” to believe that discrimination occurred, it will set the matter for a hearing on the merits with the New Mexico Human Rights Commission (NMHRC). The NMHRC consists of 11 citizens appointed by the governor. A panel of three commissioners takes evidence, hears argument from

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ADVISING YOUR CLIENTS REGARDING **Layoffs**

By Gregory P. Williams



Layoffs are still a troubling fact of life for both employers and employees around the country. According to the U.S. Bureau of Labor Statistics, U.S. employers initiated 1,564 mass layoff events in the first quarter of 2010 that resulted in the separation of 221,150 workers from their jobs. This environment presents new challenges for attorneys. Even attorneys who regularly practice employment law may have little experience with layoffs (also called reductions in force). What issues should an attorney explore, either when a corporate client is considering layoffs or when an individual seeks advice after being advised of a layoff at his or her workplace?

A threshold inquiry is whether the employer falls under the federal Worker Adjustment and Retraining Notification Act (WARN Act), which generally applies to private employers with at least 100 employees conducting a plant closing or mass layoff of 50 or more employees. If the WARN Act is implicated, the employer must comply with a series of federal Department of Labor regulations. The most important requirement is that the employer must give 60 days' advance notice of the layoffs. (Many states have their own version of the WARN Act, but New Mexico does not. A bill that would create a state WARN Act was defeated in the most recent session of the New Mexico Legislature).

Although many employees in New Mexico work for employers not covered by the WARN Act, a number of other considerations apply. Attorneys should consider the following factors, among others.

Written contracts/employee handbooks: An employer's ability to lay off an employee may be limited if the parties have entered into a written employment contract. These contracts often set forth the parties' rights and responsibilities in regard to termination of the employment relationship. Furthermore, even if an employee does not have a written contract, actions taken during the employment relationship can create an implied employment contract that fur-

ther binds the parties. For example, if an employer uses an employee handbook that promises certain procedures before termination, it is possible that the employer may not lay off employees without following those procedures.

Illegal discrimination: Generally, an employer may not choose employees for layoffs based on certain protected characteristics, including sex, race, national origin, age, or disability. Also, if an employer uses a non-discriminatory method to select employees for layoff but that method has a disparate impact on a certain protected class, the employer may be liable for discrimination. For example, if an employer chooses a facially objective method for selecting employees for layoff (such as terminating only those employees with a certain experience level or a particular level of compensation) but that method disproportionately affects a certain class of people, such as employees over 40 years of age, that method may not be permissible.

Severance agreements: Often, employers will offer certain compensation to laid-off employees, such as severance pay or benefits, and ask that in return the employee waive rights against the employer, including the right to file suit for wrongful termination. In 2009, the Equal Employment Opportunity Commission (EEOC) issued guidance as to when waivers of discrimination claims in severance agreements are enforceable. The EEOC's guidance focuses on whether a waiver is knowing and voluntary, including such factors as whether the employee received consideration, whether the agreement was clear and specific, and whether the employee had the opportunity to consider the agreement and have it reviewed by counsel before signing. If a severance agreement does not incorporate these protections, it may not be valid.

Benefits: Some employee benefits are protected by federal and state law, and those laws may come into play during layoffs. For example, a layoff may be considered a "qualifying event" that triggers continuing coverage under COBRA, the federal statute that allows some employees to continue existing medical coverage after termination. Also, certain severance benefits may be covered by ERISA, which covers some welfare and pension plans.

These are just some of the factors that counsel should consider when advising employers or employees in a layoff situation. Attorneys must carefully examine all of the circumstances surrounding the layoff in order to protect their clients' rights.

About the Author

Gregory P. Williams is a shareholder with Dines & Gross PC in Albuquerque, where he represents and advises employers in many aspects of employment law. He is a member and past chair of the board of directors of the State Bar's Employment and Labor Law Section.

Understanding the Risks of Social Media in the Workplace



By Victor P. Montoya



The Risks

Social media applications give employees opportunities to engage in conduct that is not acceptable in the workplace. Employees may post negative comments regarding their employer or co-workers. They may send co-workers inappropriate sexual or racial comments or jokes. Supervisors may post negative comments about or personnel actions taken against employees. These postings could result in hostile work environment or discrimination claims being asserted against an employer. The postings also may be used as evidence of discrimination in a later lawsuit or charge.

Employee use of social media applications—Facebook, MySpace, Twitter, blogs, and video sharing—has become increasingly common in the workplace, presenting both benefits and risks to employers. As employers integrate these applications into their businesses, they must understand these risks and prepare to address potential misuse.

Social media postings may also give rise to defamation claims. Disgruntled or hostile employees can use these sites to spread rumors, gossip, or false accusations, and to generally cause unrest in the workplace. Employees may post false comments or information about a company or its products, or the company or products of a competitor. The employer also may be exposed to defamation or intentional interference with contract claims if false comments are posted regarding a former employee's performance which result in a lost job opportunity for that former employee.

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Addressing the Risks of Social Media

- **Maintain regular oversight.** Employers should take affirmative steps to determine how employees are using social media sites. If an employer uses a website or blog to communicate with its employees, it should monitor those sites to ensure that no improper activity is occurring.
- **Establish clear policies.** An employer should have clearly defined policies regarding the use of social media both in and outside of the workplace. A recent Jackson Lewis survey found that 46 percent of employers do not have a firm policy for social media use inside and outside the workplace. Employees should be advised that postings to social media sites could expose the employer to risk, both during and after working hours.
- **Set limitations.** Employees should be advised that discriminatory, harassing, and defamatory postings, or unauthorized disclosure of trade secret, confidential, or proprietary information on social media sites will not be tolerated and may result in discipline up to and including termination. Employers should also advise employees that any postings they make to social media

sites about the employer or a competitor, and their products or services, must be accompanied by a disclaimer that the comments are the employee's own, not those of the employer.

- **Clarify expectations.** Employees should be advised that they have no expectation of privacy when using an employer's computer, e-mail, Internet, or Intranet systems, and that all usage will be monitored. Employees should be required to acknowledge social media policies in writing.

The U.S. Supreme Court recently held (*City of Ontario v. Quon*, ___ U.S. 2010) that a public employer's search of an employee's text messages on an employer-provided pager did not violate the Fourth Amendment because it was motivated by a legitimate work-related purpose and not excessive in scope. The Court assumed, without deciding, that the employee had a reasonable expectation of privacy in the messages. The Court also concluded that the search would be "regarded as reasonable and normal in the private-employer context."

Understanding the Risks of Social Media in the Workplace

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Employers risk the disclosure of trade secret, confidential, or proprietary information which could have serious effects on its operations. Inadvertent disclosures (an innocent “tweet”) or intentional disclosures (an employee vent posted on a blog site) of such information could be used improperly by a recipient for personal gain. Additionally, employers risk liability for product or service endorsements made by an employee who does not disclose her or his employment relationship.

Employees may use their computers to view pornography or visit websites offensive to others. Employees may use company-provided cell phones or pagers to engage in “sexting,” the sending of sexually explicit messages or images. Employees may also improperly disseminate web links to offensive pages or post offensive images to their computer monitors. All of these activities could result in multiple claims of discrimination or a hostile work environment.

Another risk to employers is the loss of productivity. Sites such as YouTube provide easy access to user-generated videos, which not only divert employees from their assigned duties, but consume important employer assets, such as Internet bandwidth. Access to these sites could result in viruses being introduced into a computer network, resulting in theft of information or the loss of valuable computer software or hardware. Improper use of an employer’s computer systems also can lead to civil or criminal liability, depending on the circumstances and whether an employer knew about the improper use.



About the Author

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Jurisdictional Layers of Job Laws and Unanswered Questions

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the parties, makes findings and conclusions, and awards damages—in effect, a mini-trial. Any party dissatisfied with a decision of the NMHRC may appeal de novo to district court. A claimant may opt out of the administrative hearing procedure, at his or her sole discretion, and proceed directly to state district court.

Wage and Hour Law

The New Mexico Legislature has addressed the most fundamental areas of wage and hour law, just like the U.S. Congress has through the Fair Labor Standards Act: both federal and state law require employers to pay overtime to non-exempt employees when they work more than 40 hours in a workweek. And, both federal and state law have minimum wage rates. For the last several years the state and federal minimum wages have leapfrogged one another with the state minimum wage currently in the lead. The New Mexico minimum wage is \$7.50 per hour as of this writing; the federal minimum wage is \$7.25 per hour. On the other hand, New Mexico law is much less comprehensive than federal law regarding how an employee qualifies for the various exemptions to the minimum and overtime wage requirements. This is may be welcome news to anyone who has waded into the dense federal regulatory thicket about these exemptions. It does leave some uncertainty, however, about whether an employee who is exempt under federal law will also enjoy the same status under state law.

There are several areas where state law is the only source of wage and hour law. For example, New Mexico law alone determines when employees must be paid, the circumstances under which payroll deductions are allowed, and even the number of hours an employee may lawfully work in a 24-hour period (not more than 16 hours for most workers, “except in emergency situations.” NMSA 1978, § 50-4-30(A).

Practitioners should always be mindful that employment discrimination law and wage payment law is really a patchwork of statutes, regulations, and ordinances from multiple jurisdictions. Moreover, many times when New Mexico statutes might address a particular employment or wage/hour topic, there will be little or no case law or other interpretive guidance. In other words, state law especially presents a fertile source of opportunity for the enterprising New Mexico lawyer.

Endnotes

¹NMSA 1978, § 2817(A) (2004).

² *Smith v. FDC Corp.*, 109 N.M. 514, 517, 787 P.2d 433, 436 (1990).

About the author

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Caregiver Discrimination: A New Frontier in EEO Claims?

By Ernestina R. Cruz

You do not need to be a board-certified specialist in employment law to know that it is an unlawful practice to discriminate against applicants or employees based on their race, color, religion, sex, national origin, disability or age. However, you might not know that it is also unlawful to discriminate against applicants or employees because of their responsibilities to provide care to family members. While federal statutory law does not expressly prohibit discrimination based on family caregiving responsibilities, litigants have successfully brought such claims under existing federal law for the past 30 years. Such claims are referred to as *caregiver discrimination* or, alternatively, *family responsibilities discrimination* (FRD).

In 2006, the Center for WorkLife Law (WLL), a nonprofit center for research and advocacy based out of the University of California Hastings College of Law, undertook a groundbreaking study analyzing over 600 FRD lawsuits filed between 1971 and 2005.¹ From 1996 to 2005, WLL documented a 400 percent increase in the number of FRD cases filed throughout the country, as compared to the prior decade (1986-1995).

Taking note of the growing number of claims in this arena, in 2007 the Equal Employment Opportunity Commission adopted guidance² setting forth circumstances under which employees can bring forth claims of discrimination based on their responsibility to provide care to family members. The claims are typically brought under Title VII by way of a “gender-plus”³ theory of discrimination. Alternatively, claims can be brought under the Americans with Disabilities Act. The EEOC’s 2007 *Enforcement Guidance* identified examples of caregiver discrimination (see sidebar).

Notably, FRD lawsuits have been filed in every state throughout the country. In its 2010 *Litigation Update*, WLL discussed litigation trends and success rates noting that, while it has been documented that plaintiffs who take traditional employment discrimination cases to trial have win rates of less than 30 percent, litigants who allege FRD prevail 50.7 percent of the time.⁴ With reference to New Mexico, WLL referenced ten FRD lawsuits filed in the state with the reported employee win rate of 70 percent.⁵ This overall trend suggests that employers should be mindful of caregiving obligations for both applicants and employees.



Examples of Caregiver Discrimination

- **Unlawful Disparate Treatment:** Precluding a female employee who has two preschool-aged children from participating in a managerial training program while male employees with children in the same age group were selected.
- **Gender Role or “Benevolent” Stereotyping:** Failing to hire a female applicant based on the assumption that childcare responsibilities will make a female worker less reliable than her male counterparts.
- **Subjective Assessments on Work Performance:** Changing assessment standards for work performance after the employee becomes pregnant or assumes caregiving responsibilities.
- **Discrimination against Male Caregivers:** Denying a male employee’s request for leave in order to care for children where similar requests made by female employees are granted.
- **ADA Associational Claims:** Refusing to hire an applicant who makes note of needing to care for a disabled family member based on the assumption that the applicant will have to use leave or will not be punctual.

In an effort to avoid potential liability in this evolving and burgeoning area of law, employers should make use of the various resources developed by the EEOC, including the “Questions and Answers about EEOC’s Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities”⁶ and “Employer Best Practices for Workers with Caregiving Responsibilities,”⁷ which was issued in April 2009.

In sum, the benefits of adequate training and policy development by employers cannot be overstated considering the litigation trends in this arena. The EEOC’s recent attention to FRD claims certainly places employers on notice that employee concerns pertaining to family obligations will be given due consideration at the EEOC’s investigation stage.

Endnotes

¹Mary C. Still, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination Against Workers with Family Responsibilities*, (Center for WorkLife Law, 2006), available at <http://www.worklifelaw.orgs/pubs/FRDreport.pdf>.

²For more information, see <http://www.eeoc.gov/policy/docs/caregiving.html>.

³Barbara Lindemann and Paul Grossman, *Employment Discrimination Law* 456 (3d ed. 1996).

⁴Cynthia Thomas Calvert, *Family Responsibilities Discrimination: Litigation Update*, (Center for WorkLife Law, 2010) at 11, available at <http://www.worklifelaw.orgs/pubs/FRDupdate.pdf>.

⁵*Id.* at 17.

⁶For more information, see http://www.eeoc.gov/policy/docs/qanda_caregiving.html.

⁷For more information, see <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html>.

About the Author

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Duty of Fair Representation: *Employees' Rights to Sue Their Union*

By J. Edward Hollington



Union members have limited rights and remedies against their union when it fails to adequately represent them with a grievance. With the growth of public employee unions in New Mexico, attorneys should be aware of the duty of fair representation (DFR) and standards and requirements to bring suit for employees who have been harmed by their union's breach of the duty.

Employees have a significant burden of proof for a claim of breach of DFR. Unions have the responsibility to fairly represent all members of a bargaining unit regardless of race, color, sex or political views. A union may only be liable to a member for arbitrary or bad faith action in representing, or failing to represent, a member. There is no absolute right to have a grievance taken to arbitration, and negligence by a union in representing its member is not sufficient to establish a breach of DFR.

Generally, New Mexico courts only interfere with a union's decision not to pursue an employee's grievance in extreme cases.

In *Callahan v. N.M. Fed'n Teachers*, plaintiffs were employees of TVI who were fired without notice or explanation. The union filed grievances on their behalf, but did not take their cases to final arbitration. Instead, the union settled the cases without the input, knowledge or consent of the employees. The settlement did not provide for reinstatement of employment and also caused dismissal of the employees' related federal lawsuits. The Court found the following facts sufficient for a DFR claim: 1) the union did not investigate and obtain information of reasons the employees were fired; and 2) it settled the employees' claims and cases without knowing the employer's reasons for firing.

In *Akins v. United Steel Workers*, a black employee alleged racist actions and comments against him by other union members. He filed a grievance and the union president told him he was "the wrong

color." The verdict in favor of the plaintiff, which included punitive damages, was affirmed. The New Mexico Supreme Court granted certiorari on the issue of punitive damages.

In *Granberry v. Albuquerque Police Officers Ass'n.*, two sergeants with the Albuquerque Police Department qualified for participation in a lieutenant promotion process. They were not promoted and complained to their superiors that the promotion process was flawed because unqualified sergeants were included on the promotional list. The union filed a "prohibited practice complaint" alleging APD was improperly administering the test and qualifications for promotions. The union settled with the city but only on behalf of four male sergeants and not the two plaintiffs who had complained to their superiors. The case did not include a description of the terms of the settlement from which the plaintiffs were excluded. The plaintiffs sued the union for breach of DFR. The union argued the two plaintiffs had not brought their complaint directly to the union; the plaintiffs countered that under the collective bargaining agreement they properly filed their complaint with their superiors in the chain of command. The Court reversed summary judgment in favor of the union and found there were sufficient facts for a jury to determine whether the union's stated reason for not including the plaintiffs in the settlement was irrational and arbitrary.

Unions that fail to investigate member grievances, treat members differently because of their protected status and exclude members from settlements may be subject to claims for breach of the DFR in New Mexico.

Beware Statute of Limitations

It is critical to determine if an employee is a member of a public employee union or a private employer union. Private employee unions are governed by the National Labor Relations Act (NLRA) and those DFR claims must be brought within six months.

The NLRA does not apply to collective bargaining in the public sector. The New Mexico Public Employee Bargaining Act (PEBA) governs public employee unions. The Court of Appeals on the *Akins* case also held that DFR claims are subject to a four-year statute of limitations.

Conclusion

Proving breach of DFR is difficult and practitioners must carefully review actions and inactions of unions regarding grievances for terminations or other adverse employment action. The more egregious the union conduct, the more likely a claim will prevail. Unions are given much power and authority as exclusive bargaining agents for employees and owe members the duty of fair representation in protecting individual members rights.

About the Author

J. Edward Hollington is a certified civil trial specialist who has practiced for 30 years. Employment law is a significant part of his practice. He is a member of the board of the State Bar's Employment and Labor Law Section.

Employment Practice Liability Insurance:

An Insurance Boondoggle or Practical Protection Necessary for all Employers?

by Erin Langenwalter

With employment-related litigation on the rise, employers are facing rising costs of defense and resolution of claims, whether through settlement or an award of damages. Traditional insurance policies, such as Workers' Compensation, commercial general liability and umbrella liability insurance that at one time provided some coverage for employment-related claims, today almost universally exclude coverage for the defense and settlement of these types of claims. Consequently, employers are looking for other ways to ease the burden of litigation of employment matters.

Relatively obscure until a decade ago, insurance companies have capitalized on the increase in claims by offering employment practices liability insurance (EPLI). Today, EPLI is viewed as a necessary cost of doing business to avoid the decimating impact of litigation against small companies and the impact of class action suits against large employers. As EPLI policies have become more widespread, the accompanying increase in adoption of such policies has resulted in better rates, more competition between insurers and more options for employers.

Structure and Coverage Options

EPLI policies vary considerably in the coverage they provide, and each needs to be reviewed carefully to determine if it suits a particular employer's needs. EPLI policies may be stand-alone or may be structured as an endorsement for existing insurance policies. Generally speaking, EPLI policies are not intended to protect companies or their employees against willful or intentional violations of the law. However, most will provide a defense for such claims until a court has determined that a specific individual's action was intentional. Other common exclusions include property damage, bodily injury, violations of the Occupational Safety and Health Act and Worker Adjustment and Retraining Notification Act, class actions, punitive damages and breach of contract, expenses for accommodation pursuant to the Americans with Disabilities Act, criminal acts, and non-monetary relief. Developing areas of coverage include immigration and wage and hour claims.

Employers should ensure specific language is included clarifying the scope of covered employees. Policies typically cover the corporation and past and current officers, directors, partners, and managers. Most policies provide coverage for all employees, with some specifically including seasonal or temporary employees in their definition. However, employers with special workforces should take particular care to ensure that those employees are included. Leased and contract employees may also need coverage, and a number of carriers extend coverage to these individuals if they are indemnifiable like employees.

As EPLI has become more widespread, increased adoption of policies has resulted in better rates, more competition between insurers and more options. Coverage may be provided for the cost to defend a claim and any settlement or judgment, subject to a deductible that can range from \$2,500 to \$1 million for a very large corporation. Cost may turn

on the type of organization, loss history, composition of the workforce, hiring practices, and state laws that may create additional causes of action. Coverage is often more difficult to obtain or more costly for certain industries, such as extended care (nursing home) facilities, law firms, the entertainment industry and temporary staffing agencies.

As employers struggle to reduce costs, EPLI coverage may come under scrutiny by employers. Some insureds are electing policy with reduced limits of liability and increased deductibles as a cost-saving measure. However, employers are cautioned to ensure that limits are adequate and coverage is sufficient, as failure to do so may end up costing more in the future. Experienced counsel should be prepared to review an employer's human resources practices and their workforce to assist in determining the best choice of coverage for that business.

Practical Considerations in Litigation under an EPLI policy

Regardless of the policy chosen, early intervention in employment disputes is critical. In the early stages of a dispute, claims can often be settled with an apology or with minor employment environmental changes. If a dispute escalates to a formal administrative or legal proceeding, early settlement is preferable if there is any validity to the claim. Though at the early stage an employer's deductible is rarely met, the carrier should be notified as soon as possible. Going forward, there should be established a clear understanding of the relationship between the employer and the insurer and the litigation decisions that each will make, starting with selection of counsel in the event it is required. While the attorney-client relationship is sacred, the insurer has an interest in ensuring that fees are reasonable and that the case is managed efficiently and effectively. As a result, almost all carriers maintain some flexibility in allow-

ing the insured to select or approve counsel, especially if the insured requests specific counsel early. A clear understanding of who has final say to make decisions with respect to the use of alternative dispute resolution should also be resolved at the forefront of any employment dispute. In practice, if the insured has a good reason to continue the defense, carriers will not force the employer to settle.

An effective employee handbook, solid employment policies and human resources procedures are essential for an employer seeking to avoid employment practices litigation. However, even the most sophisticated and airtight policies do not guarantee that litigation will be avoided. For those instances which escalate into a formal claim or lawsuit, EPLI can be a business saver. Employers should seek a reasonable balance between reasonable pricing and broad coverage to ensure the most effective use of the product. Attorneys tasked with reviewing policies and advising clients on general employment practices should consider incorporating a discussion about EPLI. If brought in to a matter to address an actual employment dispute, employment lawyers



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The Labor Board Under the Obama Administration: The Next Chapter

By Danny W. Jarrett



Craig Becker



Mark Pearce



Brian Hayes

On March 27, 2010, one day after Congress adjourned for the Easter recess, President Barack Obama announced the recess appointments of Craig Becker and Mark Pearce to the National Labor Relations Board (NLRB). The NLRB is the federal agency created by Congress in 1935 to administer the National Labor Relations Act, the primary law governing relations between unions and employers in the private sector. On June 22, 2010, the U.S. Senate confirmed the appointment of Pearce, meaning his term will now expire in August 2013. Additionally, the Senate confirmed Republican Brian Hayes, who was not included among President Obama's recess appointments. Hayes will fill a term expiring in December 2012.

Becker and Pearce

Craig Becker is the first NLRB member to come directly from a union. He was the associate general counsel of the Service Employees International Union as well as the AFL-CIO. He was the putative architect of Illinois state law changes that resulted in the mass unionization of home care workers in that state. Becker has argued that the NLRB has the right and ability to implement comprehensive changes to labor regulations without Congressional action or approval—a position that could allow the NLRB to unilaterally implement policy changes contained in bills that have not achieved Congressional approval, such as the Employee Free Choice Act, a bill that would make it easier for unions to organize workers. Mark Pearce represented unions in private practice after serving as an attorney for the NLRB. He is one of the founding partners of the Buffalo, New York, law firm of Creighton, Pearce, Johnsen & Giroux, where he practiced union-side labor and employment law. Pearce is also expected to be a strong advocate for organized labor.

New Process Steel Recently Decided

The drastic changes in the makeup of the current NLRB board are significant, perhaps even more momentous in light of the recent U.S. Supreme Court decision addressing the board's inability to function

without a quorum. Prior to the expiration of their terms near the end of 2007, the outgoing board members delegated their authority to the two remaining board members. In *New Process Steel v. NLRB* (No. 08-1457), decided on June 17, 2010, the Court held that, under Section 3(b) of the National Labor Relations Act, a delegee group must have three members to exercise the delegated authority of the NLRB. Thus, the board was not authorized to decide the nearly 600 cases in which the two delegee board members made decisions in the interim 27-month period. With Becker and Pearce in place, a labor-oriented board will now have the chance to reconsider and rewrite the decisions, as well as make decisions upon the more than 200 pending cases that were not addressed by the two-member board.

NLRB Rulemaking Authority

The new make-up of the NLRB may also impact labor and employers through rulemaking. As previously suggested by Becker and current NLRB Chair Wilma Liebman, rulemaking could be used to streamline election procedures, expand voting "access" through electronic or absentee balloting and enhance special remedies and penalties against employers in initial organizing and first contract situations. Along with traditional case-by-case decision-making and the development of internal agency policies, the board may use rulemaking to circumvent Congress and realize some of the advantages unions sought but have yet to achieve through bills such as the EFCA.

The Next Chapter

Business groups claim that all employers—whether entirely unionized, partially unionized or union-free—will be affected directly by the new NLRB majority President Obama created by the recess appointments. During the last administration, board Chair Liebman stated that "[r]ecess appointees should be hesitant to overrule precedent because it could be seen as a rush to judgment and undermine public confidence. In contrast, a decision to overrule precedent by a fully confirmed board can be perceived as having more credibility." She continued, "Recess boards should be caretakers and keep the railroad running and not make major policy decisions." Although her statement was made when Republicans controlled the board, business groups are now waiting anxiously to see how the next chapter unfolds and whether Chair Liebman's stated position holds true under the new Board.

About the Author

Danny Jarrett is a New Mexico native and managing partner of the Albuquerque office of Jackson Lewis LLP. He is a board-certified specialist in labor and employment and represents employers of all sizes.

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should be aware of the practical considerations surrounding EPLI policies and the potential impact on litigation. Understanding of the issues discussed in this article, among them consideration of the company's deductible compared to the costs of defense, potential exclusions to coverage, and sensitivity to the insurer/insured relationship, is crucial for competent and through representation of a covered employer.

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