

# Employment & The *Law*



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## **R**eporting For Duty - What Employers Need To Know About USERRA

Katherine M. Stricker

According to the Department of Defense, more than 1.25 million men and women served in the American military reserves in 2001. As of October 4, 2004, nearly 180,000 of these people were serving on active duty. Many of these individuals fill a dual role, working full time in the civilian world and serving in the military part-time. Increasingly, these two roles have intersected, placing employers in the precarious position of balancing the requirements of protecting employees who are called to active duty military service with the necessity of continuing business operations. The Uniformed Services Employment and Reemployment Rights Act (USERRA) guarantees broad protection for employees who have been absent from work, either voluntarily or involuntarily, due to uniformed service. In light of the massive deployment of troops over the past few years, employers should be especially cognizant of USERRA's requirements.

### **I) SHIPPING OUT – QUESTIONS THAT ARISE WHEN AN EMPLOYEE BECOMES A SOLDIER**

- What Does USERRA Require and What Protections Does It Provide? USERRA provides enhanced leave rights and job protections for employees absent from work due to military duty. Specifically, it prohibits discrimination in employment and retaliation against any person who was, is, or applies to become a member of a uniformed service. USERRA further provides that an employer must grant a leave of absence for up to five years to any person who is absent from a job because of military service, including reserve training obligations. An employer ordinarily must reinstate the returning veteran to the position he would have held if his employment

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## **R**eporting for Duty - What Employers Need to

### **KNOW ABOUT USERRA**

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had not been interrupted by military service, including pay raises, increases in seniority and benefits he or she would have received.

- Does an Employer Have to Pay Employees on Military Leave?

While employers are required to give employees time off for military service with no adverse consequences, employers are not required to compensate those employees during their absence. Regardless of whether an employer chooses to pay employees who are on leave for military service, an employer should treat those employees in the same manner as employees who are on leave for other reasons, such as maternity leave. Failure to do so may allow an employee to claim that he or she was discriminated against due to military service.

- What Impact Does USERRA Have on Employment Benefits?

USERRA requires employers to allow any employee on military leave to elect and pay for continuation of health care coverage for the employee and the employee's dependents. The amount that must be paid by an employee to maintain coverage varies with the length of military service.

USERRA also requires employers to treat military leave as service with the employer for purposes of vesting and accruing benefits under a pension plan. As for reemployment, the employer must make any employer contributions to the pension plan that would have been required on behalf of the returning employee had he continued working during the period of military leave.

Additionally, the returning veteran must be allowed to make up any employee contributions or elective deferrals he or she would have been eligible to make during his or her period of service.

Employees returning from military leave are also entitled to any benefits determined by seniority that they had when their leave began as well as those benefits which would have accrued had they remained continuously employed. Thus, if an employer's vacation policy is based on seniority, the employer must count the period of military leave as actual work time in determining the number of weeks of vacation the returning veteran would then receive. It should be noted, however, that the employer does not have to count this time as accrued vacation, unless other employees on leave are allowed to do so. Once again, the key to complying with USERRA is treating employees who are absent due to military service in the same manner as employees who are absent for other reasons.

### **II) REDEPLOYMENT – MINIMIZING POTENTIAL USERRA PROBLEMS**

USERRA provides many protections to service members returning to the civilian workforce. These provisions impact areas as diverse as promotions, reductions in force, company reorganization, the Family and Medical Leave Act and the Fair Labor Standards Act. Employers who have employees returning from military leave must be aware of the potential implications of USERRA and take steps to ensure a successful transition from soldier to worker.

- Are there circumstances Where USERRA Does Not Protect a Returning Employee?

USERRA specifies certain limited circumstances under which an employer is relieved of its obligation to reemploy veterans returning from military service. The burden is on the employer to prove that one of these exceptions applies. These circumstances include:

- 1) A change in the employer's circumstances, such as a reorganization or bankruptcy.
- 2) A disabled veteran's employment is an undue hardship on the employer.
- 3) The veteran receives a dishonorable discharge.

- Can an Employee Who Returns to Work Be Discharged without Cause?

USERRA protects returning veterans from discharge without cause for a period of time after reemployment. The duration of this protected period depends on the length of active duty service. Remember that a returning worker may allege discrimination based on military service even if he or she is discharged for cause. As a nation at war, with many of our service members activated from civilian life, it is essential that employers know and comply with the provisions of USERRA, in order to protect both the returning service member and the employer. As with all compliance matters, competent legal counsel can help employers handle the reemployment of veterans. ◆

## **S**AME-SEX HARASSMENT: WHAT CONSTITUTES TREATMENT

### **“BECAUSE OF SEX”?**

Lindsay S. Marks

You receive a complaint from a male employee who claims that he has been subjected to harassment from a male co-worker. This employee reports that his co-worker constantly teases him about his small frame, feminine gait, and “sissy” pink shirts, calls him names such as “queer” and other vulgar terms related to the female sex, and ridicules him for refusing to participate in sexually related conversations about women. The complainant discloses that he is gay, but he is not sure whether the alleged harasser is aware of his sexual orientation. As a well-informed employer, you know that sexual orientation is not a category protected by Title VII and other federal anti-discrimination laws. You also recall that your equal employment opportunity and harassment policy does not mention sexual orientation. You recognize that this type of behavior is inappropriate in the

workplace, but has the employee been subjected to sexual harassment?

Perhaps because of the controversial nature of sexual orientation and the ongoing scientific debate as to whether this characteristic is innate or learned, federal courts have expressed confusion regarding the definition of unlawful same-sex harassment. In light of the growing public concern with the issue of same-sex marriage and other civil rights for homosexuals, it is important for employers to recognize and guard against same-sex harassment and discrimination in the workplace.

#### **Definition of Same-Sex Harassment**

More than six years ago, the United States Supreme Court first recognized same-sex harassment in the landmark case of *Oncale v.*

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## SAME-SEX HARASSMENT: WHAT CONSTITUTES TREATMENT “BECAUSE OF SEX”?

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*Sundowner Offshore Services*, 523 U.S. 75 (1998). In that case, the Supreme Court held that employers will be liable for same-sex harassment where the plaintiff presents credible evidence showing (1) the harasser was motivated by sexual desire, (2) the harasser made gender-specific statements demonstrating that he or she was motivated by general hostility to persons of the same gender, or (3) the harasser treated members of both genders differently. Like the traditional sexual harassment framework, once the employee demonstrates one of these three types of evidence, the employee must show the conduct was severe or pervasive enough to create an objectively hostile or abusive work environment.

Relying on *Oncale*, plaintiffs have successfully brought all three types of same-sex harassment claims. The first type of claim – where the harasser was motivated by sexual desire – involves a scenario similar to opposite-sex harassment cases, such as offensive sexual touching, comments, or gestures by the harasser, but does not require proof that the harasser is homosexual. The second type of actionable harassment under *Oncale* – where the harasser exhibits hostility toward the victim’s sex – could include such behavior as a female airline president treating female pilots with hostility based on a belief that women should not be pilots or a male doctor demoting a male nurse because the doctor believes men should be precluded from serving in traditionally female positions. The third type of case contemplated by *Oncale* has been recognized where, for instance, the harasser directs sexually explicit and offensive conduct toward the plaintiff and other

male employees, but does not subject female employees to the same type of behavior.

### Sex Stereotyping

Although many employees continue to rely on the *Oncale* framework, a growing number of plaintiffs have based same-sex harassment claims on the theory of “gender nonconformity bias,” derived from the 1989 Supreme Court decision *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Under this theory, employees claim they were subjected to discrimination or harassment because their appearance or conduct does not conform to social stereotypes for their biological sex. Employees who believe they were subjected to bias because of their sexual orientation might choose to utilize this theory of recovery to circumvent the courts’ strict interpretation of laws that preclude protection for sexual orientation.

Courts have increasingly recognized same-sex harassment claims under this gender non-conformity theory. For example, courts find an employer who acts based on a belief that women should not be aggressive has acted on the basis of sex. Likewise, conduct exhibited toward male employees in the workplace whose appearance, mannerisms, or conduct fail to fit the male stereotype can be considered harassment because of sex. Some examples of such conduct include: (1) calling an employee “queer,” “fag,” or “b\*tch” because of a traditionally non-masculine appearance (such as long hair, slight physique, and soft voice); (2) mocking an employee by speaking in high-pitched voices and mimicking feminine movements; and (3) criticizing an employee for

walking “like a woman” and referring to him as “she” and “her” and vulgar female-related names.

### **Sexual Orientation Is Not “Because of Sex”**

In deciding same-sex harassment cases based on sex stereotyping theories, courts emphasize the distinction highlighted in *Oncale* that harassment because of sexual orientation is not harassment “because of sex.” Where an employee is harassed by his co-workers because they think he is gay, and there is no additional evidence linking the bias to sex rather than sexual orientation, the employee has not proven discrimination based on a failure to meet sex stereotypes. For instance, one court rejected an employee’s sex stereotyping claim – alleging that he was called a “fag” and that his name was written in graffiti on restroom walls stating that he performs oral sex on men – on the grounds that the employee’s co-workers deprived him of a proper work environment because they believed he was homosexual, as opposed to harassing him because of his sex.

### **Mere Horseplay Distinguished From Actionable Harassment**

In addition to disregarding sex stereotyping claims that appear to be based on treatment because of sexual orientation, courts have also distinguished mere horseplay from actionable harassment. Courts often dismiss offensive language by employees of the same sex that is arguably sexual in nature as juvenile or horseplay, and unrelated to sex. Because vulgar comments ostensibly requesting performance of sexual acts (such as “kiss my \*ss”) are commonplace in certain environments, and are not connected to the sexual acts to which they refer even when accompanied by crotch-grabbing or some other vulgar gesture, courts often find that these

comments do not amount to harassment because of sex.

### **An Employer’s Response**

Although some confusion still exists, courts are closer to reaching a clear explanation of what constitutes same-sex harassment. Unless your company employs individuals in a state or locality whose sexual orientation is recognized as a protected class, it is your choice as an employer whether or not to include sexual orientation in your anti-discrimination and anti-harassment policies. However, in providing sexual harassment training to your employees, it is important to educate them to remain open-minded and to discourage conduct by co-workers based on a belief that an employee does not conform to the social stereotypes of his or her gender. Although conduct based on sexual orientation or simply conduct which is juvenile behavior is not unlawful, as a prudent employer, it is important to investigate a complaint involving such conduct and whether it was “because of sex.” ◆

## **T**HE WHISTLEBLOWER PROTECTIONS OF THE SARBANES-OXLEY ACT OF 2002: ALL BARK AND NO BITE?

Sara J. Bass

In 2002, Congress passed the Sarbanes-Oxley Act in response to “whistleblower” complaints such as those made by an Enron Corp. vice president. The whistleblower protection provisions of Sarbanes-Oxley prohibit publicly traded companies from retaliating against employees who provide information about actions they reasonably believe constitute violations of federal securities regulations or laws relating to fraud against investors. Under Sarbanes-Oxley, employees who “blow the whistle” on securities law or investor fraud issues are protected from discharge, demotion, suspension, threats, harassment, and other forms of retaliation. To prevail under Sarbanes-Oxley, a whistleblowing employee only needs to show that his or her protected activity was a contributing factor in an adverse employment action.

### **What Constitutes Protected Activity?**

Protected activity under Sarbanes-Oxley includes: (i) providing information or otherwise assisting in an investigation into actions that an employee reasonably believes constitutes a violation of federal securities regulations or any federal law relating to fraud against investors; and (ii) filing, testifying, or participating in a proceeding regarding any conduct reasonably believed to violate the federal securities regulations or any federal law relating to fraud against investors.

Employers should pay particular attention to the “reasonable belief” standard. Under this standard, an employee is not required to show

an actual violation of the law so long as he or she has a reasonable belief that the law has been violated. In other words, Sarbanes-Oxley protections apply even if the employee is wrong about his or her accusations.

Another possible pitfall for employers is that a discharge may violate Sarbanes-Oxley even if the discharge was being considered before the employee alleged security or accounting fraud. In *Richards v. Lexmark International, Inc.*, a Department of Labor Administrative Law Judge denied the employer’s motion for summary judgment despite evidence that the employer had been contemplating terminating the employee months prior to the employee making any complaints. Because the employee was fired after raising a complaint covered by Sarbanes-Oxley, there was sufficient evidence to link the complaint with his termination.

Likewise, employers should be aware that a plaintiff does not have to identify a specific legal breach to maintain a Sarbanes-Oxley case. In *Collins v. Beazer Homes, Inc.*, the employer moved for summary judgment, arguing that the plaintiff was not protected by the Act because she never specifically alleged securities or accounting fraud. The Court denied the motion, finding that the Act does not require plaintiffs to specifically identify the code section they feel has been violated. As long as the complaint or alleged wrong-doing sufficiently involves the securities laws or investor fraud, they may be covered by Sarbanes-Oxley.

### **What Damages May Be Recovered?**

Sarbanes-Oxley is intended to deter and punish corporate and accounting fraud, and available remedies include: reinstatement, back pay with interest, and compensation for any special damages including litigation costs, expert witness fees, and reasonable attorneys' fees. Many plaintiffs complain that these remedies are inadequate, as the possibility of re-employment with a company in which the employee is viewed as a "troublemaker" provides little incentive for employees to come forward with information. Indeed, punitive damages, which would serve to punish and/or deter employers from future violations, are not available.

### **Current Impact of Sarbanes-Oxley:**

Despite the relative ease with which employees may bring and maintain Sarbanes-Oxley claims, employers have fared well in defending against them. Since Sarbanes-Oxley was enacted in 2002, OSHA, the agency placed in charge of administering Sarbanes-Oxley complaints, has handled approximately 253 claims. It dismissed 176 of these claims, and 39 were withdrawn by employees. OSHA found in favor of the employee in only 38 instances.

### **How Employers Can Protect Themselves:**

- Make sure your company has current written employment policies that address the proper procedures for reporting and redressing complaints.
- Make sure the policy states that retaliation against any employee who provides information regarding the securities laws or accounting fraud will not be tolerated.
- Make sure that your company trains all management employees with respect

to their responsibilities under Sarbanes-Oxley.

- Make sure your company properly documents employee misconduct or other events that might lead to adverse employment actions as they occur. Employers must be able to provide clear and convincing evidence that any adverse employment action taken against an employee is for legitimate reasons and is not retaliation for whistle-blowing or activity protected by Sarbanes-Oxley. ◆

## **N**EW FEDERAL REGULATIONS REGARDING DRIVER SAFETY INVESTIGATIONS AFFECT EMPLOYERS OF CMV DRIVERS

Ross W. Bergethon

The Federal Motor Carrier Safety Administration (FMCSA), a sub-agency of the Department of Transportation, which is responsible for regulating the use of large trucks on the nation's highways, recently amended the Federal Motor Carrier Safety Regulations ("FMCSR"s) pertaining to investigations of driver safety performance history data. Generally speaking, the FMCSRs apply to all employers of drivers who operate commercial motor vehicles ("CMV"s), such as tractor-trailers, buses, and other large trucks requiring commercial driver's licenses in interstate commerce. The new amendments, which went into effect on October 29, 2004, impose new obligations on employers regarding driver safety history investigations both at the pre-employment and post-employment stages.

Employers who hire CMV drivers are required to investigate applicants' safety histories by contacting former employers and state driving agencies. The amended FMCSRs broaden the scope of information that must be obtained for this purpose. The regulations also mandate changes to the applications that must be completed by the drivers, require employers to obtain written consent from applicants to investigate certain types of information, impose new recordkeeping requirements, and require prospective employers to notify applicants in writing about the new "due process" protections to which the applicants are entitled under the regulations. One of these due process protections requires prospective employers to provide applicants with the information they have received from the

applicant's previous employers within five days if the applicant requests this information in writing.

Employers also face new requirements relating to former employees. The new regulations require former employers to respond to inquiries from prospective employers regarding a former employee's safety history, including drug and alcohol information, within 30 days of the request — even if there is no information to report. Many employers who have established practices of releasing only minimal "name, dates of employment, and position" information regarding former employees must now gather and provide requested information within the 30-day timeframe. Further, because of the new-applicant due process rights, in cases where former employees contest the safety information a former employer has provided to prospective employers, former employers must include that employee's written rebuttal along with any information they provide to prospective employers every time they receive a request for information about the former employee's safety history.

This article merely touches on some of the highlights of the new regulations. Because failure to comply with the new regulations can result in civil fines by the FMCSA in amounts of up to \$11,000 per violation, employers of CMV drivers are strongly encouraged to ensure that they are in compliance with the new regulations if they have not already done so. If you would like further information about the new FMCSRs and the issues they raise for employers, contact an attorney. ♦

## **R**EQUIRING THE ARBITRATION OF EMPLOYMENT DISPUTES: IS IT THE RIGHT CHOICE FOR YOU?

Ashley C. Adams

As an employer, you probably have been hearing more and more about the use of agreements requiring employees to arbitrate their employment-related claims, rather than allowing them to take their claims straight to court (and ultimately to a jury). You know you are legally permitted to require your employees to enter into agreements to arbitrate employment disputes, but is it a good idea? To help you evaluate whether an arbitration program may be a good idea for your company, the following is a list of some of the pros and cons of arbitration versus traditional litigation:

### The Pros

- **Arbitration Is Not Decided By A Jury.** An Arbitrator is the decision-maker on any claims brought in arbitration. In court, a judge and/or a jury decide the case. There is always the risk that a jury will be influenced by emotion (rather than the law) and will find for the employee. This is true even when the law does not necessarily support such a finding. Juries also may award the employee large amounts of monetary damages based on emotion. Arbitrators are often regarded as more reliable in this respect and less swayed by emotion than juries.
- **Arbitration Is Cheaper.** On a case-by-case basis, arbitration is almost always less expensive than litigation.
- **Arbitration Is Quicker.** Arbitrating a dispute will generally last less than 10 months, while litigation can last from one to three years (or more, if the decision is appealed).

- **Arbitration Can Be More Confidential.** Court filings are generally a matter of public record and open to inspection. Jury trials are typically open to the public too. In contrast, an arbitration agreement can provide that the arbitration proceedings will be kept completely confidential.
- **Arbitration Can Be More Predictable.** An employer can research an arbitrator's past decisions in order to propose an individual to serve as arbitrator who is likely to rule in a particular way.

### The Cons

- **An Arbitration Program May Result In An Increase In Claims.** It is generally easier and cheaper for employees to initiate the arbitration process than the legal process, which may lead to an increase in the number of employment-related claims that are filed.
- **Summary Judgment Is Unlikely In Arbitration.** Even if the arbitration procedure permits the filing of motions for summary judgment, it will be much more difficult for the company to win such a motion before an arbitrator, largely because an arbitrator may be less willing than a judge to dispose of a case on a technicality.
- **Courts Are Not Consistent Regarding The Enforceability Of Certain Provisions In Arbitration Agreements.** While a provision in an arbitration agreement may be fully enforceable in one state, it may be held unenforceable in another state.
- **Judges Are Generally More Reliable Than Arbitrators.** While arbitrators are generally considered to be more reliable than a jury, most

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## **R**EQUIRING THE ARBITRATION OF EMPLOYMENT DISPUTES: IS IT THE RIGHT CHOICE FOR YOU?

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employers would rather have their cases decided by a judge than an arbitrator because:

- Federal district court judges are intimately familiar with employment discrimination statutes, while an Arbitrator may not have much experience or education in the area of employment discrimination (and may not even be a lawyer).

- Judges are very comfortable with the concept of resolving cases upon purely legal grounds or technicalities, while Arbitrators may be much more reluctant to do so.

- Arbitrators are more likely to be swayed by emotional arguments or a sympathetic employee than judges.

- Arbitrators are far more likely than judges to “split the baby” and award some measure of relief to any employee who brings a claim.

- ***It Is Much More Difficult To Appeal An Adverse Arbitration Decision Than A Court Decision.*** An arbitrator’s decision is almost always the final word on a claim.

- ***An Arbitration Agreement Cannot Limit The Remedies Available To A Successful Employee.*** Employers often incorrectly assume that one of the benefits of arbitration is that the process can be set up to limit the types and amounts of damages and other remedies that an employee can be awarded. Actually, arbitration agreements *must* allow a successful employee to recover the same types and amounts of damages and remedies that he or she could recover in court.

- ***An Arbitration Agreement Does Not Prevent The EEOC From Filing Suit Against The Company.*** Although the employee is forced to raise his or her claims through arbitration, the EEOC may institute separate administrative or legal proceedings against the company on behalf of the employee.

- ***It Is Difficult To Enforce Employment Agreements In Arbitration.*** Non-compete, confidentiality, and/or non-pirating agreements are sometimes very difficult to enforce in arbitration since it is difficult to obtain injunctive relief in arbitration.

- ***It Is Unclear Whether Employees May Arbitrate Claims As A Class.*** It is a little unclear whether employers may preclude class-based employment discrimination claims via provisions in an arbitration agreement. While there is case law indicating that an arbitration program may preclude class action claims, the case law remains unsettled.

There are a number of advantages and disadvantages to requiring your employees to arbitrate their employment-related disputes. While some employers prefer to stick with traditional litigation, many employers have found arbitration to be preferable. If your company is interested in adopting an arbitration program, all of the issues outlined above need to be considered carefully and addressed in the arbitration program. ♦

## **H**HOLD ON TO YOUR EMPLOYEE'S RECORDS A COUPLE OF YEARS LONGER

Laura D. Windsor

In its May 3, 2004 ruling in *Jones v. R.R. Donnelley & Sons Co.*, the U. S. Supreme Court held that employees alleging race discrimination under 42 U.S.C. § 1981 have up to four years from the date of the allegedly discriminatory act to file a lawsuit in federal court. Prior to this decision, the time limit for filing a § 1981 claim depended on state law, which meant that the filing deadline varied from state to state. In some states, the statute of limitations period was only one year.

Because employees can now sue a company for race discrimination up to four years after the allegedly wrongful act occurred, employers should maintain employee records for at least four years from the date of employment termination. To this end, companies should review their document retention policies and practices to determine if they need to be revised.

## **L**EGISLATIVE UPDATE

Matthew R. Almand

### **Fiscal Year 2005 Omnibus Spending Bill Approved – \$11.4 Billion for Labor Department**

The Fall legislative season has been significantly interrupted by the election campaign recess, generating very little activity in the area of labor and employment. During a brief lame duck session, however, the House and Senate, on November 20, 2004, approved an omnibus appropriations conference report (H.R. 4818) funding most domestic agencies, including \$11.4 billion for the Department of Labor, for fiscal year 2005. While most agencies suffered an 0.8 percent across-the-board cut in funding, a few independent agencies, such as the National Labor Relations Board and the Equal Employment Opportunities Commission, experienced a slight increase in funding from

last year's appropriations. President Bush is expected to sign the bill upon receipt.

### **H-1B Visa Exemptions**

While employers may not experience significant effects from the spending bill, several provisions included in the bill regarding the hiring of foreign nationals do directly affect many employers. For example, Georgia Republican Senator Saxby Chambliss and Rep. Lamar Smith (R-Texas) successfully spearheaded a highly publicized campaign to include a limited exemption to the already exhausted cap on H-1B visas issued by the Department of Homeland Security in the omnibus appropriations conference report. The H-1B program allows employers to hire a limited number of highly skilled foreign workers for temporary jobs in the United States, and the exemption will provide an additional 20,000 visas per year for foreign workers who

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## LEGISLATIVE UPDATE

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have obtained a master's degree or a Ph.D. from an American university. Considering that approximately half of the U.S. recipients of master's and doctorate degrees in science and engineering are foreign nationals, this exemption helps to relieve some of the panic many employers experienced upon learning that the H-1B visa cap had been reached.

### L-1 Visa Abuses

The appropriations bill additionally attempts to curb violations of the L-1 visa program. Under this program, multinational companies may temporarily transfer foreign employees into U.S. offices. Some companies, however, have been using L-1 visas to bring foreign workers into the United States, and then outsource the workers to other companies. New language prohibits the entry of foreign workers under this program if these employees will not be stationed at a worksite of the petitioning employer or an affiliate, parent, or subsidiary of that company. Furthermore, the bill requires that all L-1 visa recipients must have worked at least one year in the specialty occupation for which the visa is sought.

### Employers and Unions Face Off on Capitol Hill Over Secret Ballot Elections

Dueling partisan bills have created a high likelihood that change will occur in the current union recognition process. The battle began more than a year ago as Sen. Edward Kennedy (D-MA) and Rep. George Miller (D-CA) introduced the union-supported Employee Free Choice Act (S. 1925/H.R. 3619) which

requires employers to recognize unions when presented with a majority of authorization cards. Not surprisingly, Republicans responded, led by Rep. Charles Norwood (R-GA) and Lindsey Graham (R-SC), with the pro-employer Secret Ballot Protection Act (S. 2637/H.R. 4343), which is designed to make secret ballot elections supervised by the National Labor Relations Board (NLRB) mandatory. Both acts declare eliminating employee coercion in the union recognition process as their primary purpose.

Under current "card-check" recognition laws, employers can recognize unions as the workforce's bargaining unit if they are presented with authorization cards signed by a majority of employees. Union recognition is voluntary and employers can refuse to recognize the authorization cards and opt for an NLRB-supervised secret ballot election instead.

Unions have engaged in an aggressive campaign to implement the Employee Free Choice Act. Supporters argue that unions only have limited access to employees during union campaigns compared with the virtually unfettered access to employees that employers have. Moreover, employer requests for a secret ballot election may result in a two or three-year delay in the recognition process, which unions say deny employees representation rights.

In sharp contrast, the Secret Ballot Protection Act would amend the National labor

Relations Act to make it an unfair labor practice for employers to recognize or bargain with a union that had not been selected by a secret ballot election. A recent study of unionized employees conducted by Zogby International for the Mackinac Center found that 84 percent of union members think that workers should have the right to vote on whether they want to belong to a union. While secret ballot elections can be quite expensive, Rep. Norwood, who chairs the House Education and the Workforce Committee's Workforce Protections Subcommittee, supported the recent increase in funding for the NLRB in order to facilitate secret ballot elections for every campaign.

Hearings on the House version of the Secret Ballot Protection Act concluded in September. Both acts are currently awaiting congressional votes. With the recent congressional election clearly favoring Republicans, the Employee Free Choice Act appears likely to remain idle, while insiders predict the Secret Ballot Protection Act should be up for a vote in 2005. One way or another, the traditional union recognition process may soon experience a change.

### **OFCCP Proposes Standards for Systemic Discrimination in Compensation by Contractors**

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) proposed for publication, in the November 16, 2004 *Federal Register*, standards governing the OFCCP's analysis of federal contractors' compensation practices. The OFCCP acknowledges that the current interpretations of compensation discrimination among federal contractors are inconsistent

with Title VII, the 1964 Civil Rights Act, and Executive Order 11246, a 1965 directive banning discrimination and requiring federal contractors and subcontractors to affirmatively incorporate minorities and females into the workplace.

Currently, the OFCCP utilizes a "pay grade theory" which allows for the comparison of similarly paid, but substantively dissimilar jobs in an employer's workforce. With the proposed standards, the OFCCP interprets Executive Order 12246 as barring systemic discrimination in compensation "involving dissimilar treatment of individuals who are similarly situated, based on similarity in work performed, skills and qualifications involved in the job, and responsibility levels." Pay grade, while useful in a court's analysis, will not be dispositive for compensation purposes. These standards provide the first significant guidance on the subject, replacing broader, more informal means used in the past by the OFCCP. The OFCCP maintains that its position is supported by the courts, and the standards may be used by the courts in future compensation discrimination actions involving federal contractors.

The proposed standards are available for public comment for 30 days. ◆

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