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The Employment Law
AUTHORITY

Today's Hot Topics in Labor & Employment Law — December/January 2007

This Issue

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Unions Expect Help From New Congress

Seek Guaranteed Success In Organizing, Mandated Contracts

When the 110th Congress convened in early January, organized labor had many legislative demands in return for helping elect a new majority and new Congressional leadership.

Labor's agenda includes: raising the minimum wage to $7.25/hour (and possibly expanding overtime pay requirements); increasing the coverage of the Family and Medical Leave Act and requiring paid leave; expanding OSHA criminal penalties; banning employment discrimination based upon genetic information; restricting executive compensation and "offshoring" of jobs; mandating enforceable labor standards clauses in trade agreements; and other anti-business proposals.

In addition, labor will encourage Congressional oversight and investigative hearings of federal agencies, such as the Department of Labor, Equal Employment Opportunity Commission and National Labor Relations Board (NLRB). Companies that are union targets of "corporate campaigns" will also be scrutinized, using Congressional subpoena power.

"Employee Free Choice Act"

However, labor's "top priority" is

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New Year Brings Three New Offices

Cleveland, Philadelphia, Pittsburgh Latest Additions

On January 1, Ogletree Deakins significantly expanded its ability to provide nationwide labor and employment law legal representation with the addition of offices in three major U.S. cities – Pittsburgh, Philadelphia and Cleveland. Ogletree Deakins now has 350 lawyers in 28 locations across the country.

Founding shareholders Dan Pace, Bruce G. Hearey, and Wade M. Fricke opened the firm's Cleveland office, bringing nearly 75 years of legal experience to Ogletree Deakins. Pace, Hearey and Fricke previously were with a general practice firm and bring with them many of the city's top employers.

The firm's offices in Philadelphia and Pittsburgh were established through two separate mergers with individual standalone labor and employment law firms. Philadelphia firm Simon Moran, P.C. and Pittsburgh firm Polito & Smock, P.C. both merged into Ogletree Deakins, creating a strong presence for the firm in Pennsylvania.

In Philadelphia, attorneys Barry Simon and Christopher J. Moran opened the new office as shareholders of the firm. Founding shareholders Thomas A. Smock, Michael D. Glass, John C. Artz, and Jack Owen, III opened the firm's Pittsburgh office.

"This is an exciting time for Ogletree Deakins as we've experienced tremendous growth over the last five years. In that period of time we've doubled the number of our offices from 14 to 28 and have grown from 165 attorneys to 350," said Gray Geddie, managing shareholder of Ogletree Deakins. "Adding offices in Cleveland, Philadelphia and Pittsburgh was a natural progression for us and has enabled the firm to better serve our clients with operations in these locations. Our mission has always been to provide premier client service – not to become the biggest law firm. By focusing on our clients, we've been able to grow our legal work into new areas of the country in order to meet their expanding needs." ■

DISCLOSURE OF SYMPTOMS HELD TO BE SUFFICIENT NOTICE UNDER FMLA

Court Finds Employee Provided Company With Adequate Information About His Condition

A federal appellate court recently reinstated a lawsuit brought by a worker who claimed that his former employer interfered with his right to take protected leave under the Family and Medical Leave Act (FMLA). The Seventh Circuit Court of Appeals held that the worker – who disclosed a series of health problems to his employer over a four-month period (including the need for a biopsy) – provided sufficient notice of his need for FMLA leave. ***Burnett v. LFW Inc. dba The Habitat Company,*** *No. 06-1013, Seventh Circuit Court of Appeals (December 26, 2006).*

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Factual Background

David Burnett was employed as a "detailer" by The Habitat Company, a property management company. As a detailer, he was sometimes required to lift heavy objects. In late 2003, Burnett told his supervisor, Sergio Polo, that he was experiencing medical problems. Polo offered to transfer Burnett, but he declined the transfer given his "weak bladder" and the restricted restroom access in the new position.

In December 2003, after a week-long absence, Burnett again spoke with Polo about his health. On December 11, he gave Polo a copy of the doctor's order for blood work to justify some of the time off. Burnett also explained that during his absence he had visited the doctor, undergone a physical exam, and learned that he had a high PSA (prostate-specific antigen) and high cholesterol.

On December 16, Burnett met with Polo and a union representative to further discuss his absences. During this meeting, Burnett told Polo that he had been "sick" during his week-long absence. He also named the probable source of his illness by comparing his circumstance with that of his brother-in-law, who had been diagnosed with prostate cancer. Polo approved Burnett's request for sick leave on January 6 and 8 to attend doctor's appointments.

In early January, Burnett requested leave to undergo a prostate biopsy. He gave documentation describing the procedure to a different supervisor. Over the next week, Polo issued Burnett several written reprimands for "substandard work" and disruptive behavior. Burnett filed a union grievance and, on advice of the union, did not return to work until January 26 (which was the day set for the grievance meeting). At the meeting, Burnett told Polo that he was scheduled for a biopsy the next day.

After the biopsy, Burnett provided his employer with a "Treatment Plan" which instructed him to avoid heavy lifting or strenuous activity. Over the next two days, Burnett submitted vacation requests for the first and second weeks of February. At a meeting on January 29 with Polo, Burnett stated that he felt sick and wanted to go home. Burnett left for the day and was terminated effective January 30 for insubordination. He was diagnosed with prostate cancer on February 2.

Burnett sued Habitat alleging violations of the FMLA (among other claims). The trial judge dismissed the suit, concluding that Burnett failed to provide his employer with notice of his medical condition as required by the FMLA. Burnett appealed this ruling.

Legal Analysis

The Seventh Circuit first noted that an "employee's notice obligation is satisfied so long as he provides information sufficient to show that he *likely* has an FMLA-qualifying condition." The court acknowledged, however, that "an employee's bare assertion that he is 'sick' is insufficient."

Habitat argued that Burnett's remark that he felt sick and wanted to go home on January 29 was insufficient notice of his need for leave. In rejecting the employer's position, the court wrote: "This argument effectively disregards the surrounding context of Burnett's remarks." Over a four-month period, the court noted, Burnett's communications included statements about his "weak bladder," frequent doctor's visits (including a biopsy), and equating his condition to his brother-in-law's prostate cancer. Because "Burnett's declarations . . . were more than a vague and untethered claim of sickness," the court reinstated his FMLA claim.

Practical Impact

According to Brian McDermott, a shareholder in Ogletree Deakins' Indianapolis office: "This ruling demonstrates that leave issues continue to pose problems for employers. Specifically, the court in this case found that various statements made by the employee were sufficient to place the employer on notice. To limit or avoid such claims, employers must pay attention to employee communications about the need for leave and the relevant context, be consistent in their approach to leave issues, and retain proper documentation to justify employment decisions that may be questioned in the future." ■

Ogletree Deakins State Office Round-Up

ALABAMA

The Eleventh Circuit Court of Appeals has dismissed a lawsuit brought by an African American employee who claimed that he was fired based on his race. The court held that the worker failed "to establish that similarly situated non-African American employees were retained despite the fact that complaints alleging sexually inappropriate behavior were made against them." *Keith v. MGA Inc.*, No. 06-12803 (November 8, 2006).

ARIZONA

On November 7, 2006, Arizona voters approved Proposition 202, which establishes Arizona's first state minimum wage law. Due to the extraordinary short time frame between the passage of the initiative and its effective date of January 1, 2007, the Industrial Commission of Arizona issued temporary Emergency Regulations to implement the law. An explanation of several key provisions in the Emergency Regulations can be found at www.ogletreedeakins.com.

CALIFORNIA

A California Court of Appeal recently held that an employer was not liable for threatening e-mails sent by an employee through the employer-provided computer system. According to the court, the employer was immune from liability under the Communications Decency Act of 1996. *Delfino v. Agilent Technologies, Inc.*, No. H028993 (December 14, 2006).

GEORGIA

A federal jury in Atlanta recently awarded $2.25 million to an employee who claimed that she was harassed by the company's chairman. The case reached the jury after the Eleventh Circuit held that there was sufficient evidence to conclude that the chairman's comments about the worker's interracial relationship were prohibited under Title VII.

ILLINOIS*

The Illinois Supreme Court recently held that a workers' compensation claim was not time barred even though the employee filed the claim more than three years after she first noted symptoms arising from her work. In so holding, the court "decline[d] to penalize an employee who diligently worked through progressive pain until it affected her ability to work and required medical treatment." *Durand v. Industrial Commission,* No. 101109 (October 19, 2006).

INDIANA*

A federal judge in Indiana has ruled that a company may be held liable for retaliation in a lawsuit brought by a worker who ended a sexual relationship with his supervisor. According to the court, the employee's statement that he refused to leave his wife to save his job constituted opposition to an unlawful employment practice. *Tate v. Executive Management Services, Inc.*, No. 1:05-CV-47 (October 12, 2006).

MISSOURI

The Missouri Court of Appeal recently upheld a $1.275 million jury verdict awarded in favor of the University of Missouri's head baseball coach. The appellate court found that there was "ample" evidence to support the coach's claims of age discrimination and retaliation. *Brady v. Curators of University of Missouri*, No. ED86214 (November 28, 2006).

NEW JERSEY*

On December 19, Governor Jon Corzine approved a bill that amends the New Jersey Law Against Discrimination by adding "gender identity or expression" to the list of protected characteristics. S. 362, which takes effect 180 days following enactment, was sponsored by Senators Ellen Karcher and Joseph Vitale, and Assemblymembers Reed Gusciora, John McKeon, Bonnie Watson Coleman and Joseph Vas.

NORTH CAROLINA

A federal judge in North Carolina recently dismissed a lawsuit filed against the United Auto Workers (UAW) and Freightliner LLC alleging that they violated federal law by entering into a neutrality/card-check agreement and a "preconditions" agreement in 2002. The judge found that "there is no evidence that 'things of value' were improperly exchanged between the UAW and Freightliner" in violation of Section 302 of the Labor-Management Relations Act. *Adcock v. UAW,* No. 3:06cv32 (November 9, 2006).

SOUTH CAROLINA*

The Fourth Circuit Court of Appeals recently dismissed a lawsuit brought by an employee who was reassigned to a new position after returning from FMLA leave. According to the court, the employee's claim failed because his new position differed from his pre-leave position in only its "intangible aspects." *Csicsmann v. Sallada*, No. 05-2087 (December 12, 2006).

TENNESSEE*

The Tennessee Attorney General's office recently issued a key opinion letter that addresses the payment of a separated employee's final paycheck. The letter expressly disagrees with the Tennessee DOL's position on the issue and states that the Wage Payment Statute means what it says – whether an employer is required to pay vacation pay to a terminated employee is governed by the written company policy.

TEXAS

A federal judge in Texas recently held that a former public relations employee at Texas College may proceed with her illegal retaliation claim against the college. The court dismissed her sexual harassment claim, however, because of the employer's prompt response to her complaints. *Mumphrey v. Texas College*, No. 2:05-cv-413 (December 5, 2006).

**For more information on this state-specific ruling or development, visit www.ogletreedeakins.com.*

THE CHANGING STATE OF THE LAW REGARDING RELEASES

*by J. Howard Daniel and Peter B. Murphy**

Recent cases from different circuits illustrate the uncertain state of the law regarding employers' use of releases in exchange for severance pay. These cases serve both as hope that courts may begin to look more favorably upon releases by employees in exchange for severance payments and as a constant reminder of the perils that can befall even the most vigilant employers in preparing and tendering releases.

Sundance Rehabilitation

In *EEOC v. Sundance Rehabilitation Corp.*, the Sixth Circuit Court of Appeals recently held that offering a release that prohibits an employee from filing a charge with the Equal Employment Opportunity Commission (EEOC) is not, by itself, retaliatory. This case marks a victory for employers in that a prominent, seemingly less employer-friendly, district court opinion regarding employers' uses of releases was reversed by this ruling, possibly signaling a change of the tide in this unsettled area of the law.

For two years, the touchstone of caution in drafting releases was the 2004 decision in *EEOC v. Sundance Rehabilitation Corp*. In that case, the U.S. District Court for the Northern District of Ohio held that an employer's offer of severance benefits in exchange for a release of the right to file a charge of discrimination was *per se* illegal retaliation under the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Equal Pay Act (EPA), and Title VII of the Civil Rights Act.

In so holding, the district court relied upon the Seventh Circuit Court of Appeals' reasoning in the 1992 case of *EEOC v. Board of Governors of State Colleges and Universities*. In *Board of Governors*, the employer terminated a grievance proceeding, as permitted under the collective bargaining agreement, when the employee who brought the grievance later filed an EEOC charge. The *Board of Governors* court found the collective bargaining agreement provision allowing the employer to terminate the grievance proceeding upon the filing of an EEOC charge to be discriminatory on its face under the ADEA.

Relying upon the *Board of Governors* decision, the district court in *Sundance* found that "although Sundance did not have to offer its terminated employees severance packages, once it decided to do so, it could not do so in a retaliatory manner." The court stated that "when an employer requires an employee as part of a separation agreement to give up her right to file a charge with the EEOC in exchange for severance benefits, the employer violates the anti-retaliation provisions of the laws enforced by the EEOC."

The employee in *Sundance* was offered a separation agreement by the company as part of a planned reduction in force (RIF). The separation agreement provided for severance pay to the employee if she promised not to file a lawsuit or an administrative charge and released all claims against Sundance. The employee believed that she could not sign the agreement because it provided that if she filed a charge with the EEOC, which she intended to do because she believed she had been unlawfully denied a promotion, Sundance could have sued her for the return of the severance payment, attorneys' fees and other costs.

The employee called the Sundance human resources (HR) toll-free number and asked if she could strike through the provision which prohibited her from filing an EEOC charge. The HR representative told her that if she struck through that provision the agreement would be null and void. The employee later filed an EEOC charge alleging that she was discriminated against when she was denied a promotion and that she did not sign the separation agreement because she believed that it violated her rights.

In rejecting the EEOC's argument that such a provision is facially retaliatory, the Sixth Circuit found that the language of the separation agreement would only become retaliatory when an employer sought to enforce it through some action, such as discontinuing severance payments. Because Sundance had taken no action to enforce the release, the court held, it had not engaged in any retaliatory conduct.

Other courts have looked to the *Sundance* district court opinion in holding that severance pay contingent upon a release of all claims was facially retaliatory. The Sixth Circuit's decision overturning *Sundance* may call into question the persuasiveness of decisions based upon the reasoning of the U.S. District Court for the Northern District of Ohio.

IBM

On August 31, 2006, a unanimous panel of the Ninth Circuit Court of Appeals held that a release with minor internal inconsistencies used by IBM was not "knowing[ly] and voluntar[ily]" agreed to and as such did not comply with the Older Workers Benefit Protection Act (OWBPA). The case is *Syverson v. IBM*.

As part of a RIF in 2001, IBM offered workers scheduled for termination severance pay in exchange for executing a "Release and Covenant Not To Sue." The release agreement clearly stated that the employees were releasing "all claims, demands, actions or liabilities you may have against IBM of whatever kind including, but not limited to, those that are related to your employment with IBM, the termination of that employment, or other severance payments or your eligibility for participation in the Retirement Bridge Leave of Absence, or claims for attorneys' fees."

The release agreement also contained a "covenant not to sue" provision which stated that the employees agreed not to "institute a claim of any kind against IBM." Any individual who violated this provision would be

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* Howard Daniel is a shareholder and Peter Murphy is an associate in Ogletree Deakins' Greenville, South Carolina office. Both represent management in labor and employment law related matters.

EMPLOYER'S DECISION TO FIRE EMPLOYEE AFTER REINSTATEMENT UPHELD

Court Finds Second Termination For "Independent Grounds" Was Permitted

A federal appellate court recently held that an employer did not violate an arbitration award by paying an employee back wages and then firing the employee a second time for conduct unrelated to the first termination. The court found that the employer was "free to terminate the employee a second time based on independent grounds." ***UFCW Local 1776 v. Excel Corp.,*** *No. 05-2091, Third Circuit Court of Appeals (December 1, 2006).*

Jose Diaz and Sandra Diaz were employed by Excel Corp. Both employees were represented by the United Food and Commercial Workers, Local 1776. On November 1, 2002, Excel discharged both Jose and Sandra for "attempting to steal Excel Company meat on the night of October 29th." The employees allegedly attempted to use a stolen receipt to claim the meat.

The union grieved the terminations, and an arbitrator was assigned to hear the dispute. On May 20, 2004, the arbitrator issued his award, finding that the company did not establish just cause to support the workers' termination. Based on this conclusion, the arbitrator ordered that Jose and Sandra be reinstated to their positions with back pay and full seniority and benefits.

The arbitrator acknowledged that evidence was submitted to show post-termination misconduct, including an allegation that Jose Diaz had assaulted a guard. The arbitrator concluded, however, that "the Grievants' post-termination conduct is not considered herein as a basis for determining whether the Company had just cause to terminate Jose and Sandra Diaz."

By letter dated June 2, 2004, Excel reinstated Sandra Diaz with back pay. By a separate letter written that same day, the company informed Jose that he would receive back pay from the date of suspension until November 1, 2002, when he was alleged to have engaged in "abusive and violent conduct." Further, the company stated that his employment was terminated effective November 1, 2002 based on this misconduct.

The union filed a lawsuit to enforce the arbitrator's reinstatement award. The trial judge declined, and the union appealed. The Third Circuit held that while this is a "novel issue," the trial judge's decision should be upheld. Since the arbitrator refused to consider Excel's evidence of Jose Diaz's post-discharge misconduct, the court wrote, the company never surrendered the freedom to "terminate [Diaz] a second time based on independent grounds, pending a second arbitration."

Practical Impact: According to Patrick Stanton, a shareholder in Ogletree Deakins' Morristown office: "This is a positive ruling because the court upheld the employer's decision to terminate the employee for post-termination misconduct. It should also be noted that the court rejected the union's contention that this decision will encourage employers to hold reasons for a second discharge in reserve to undermine an adverse arbitration award."

As noted by the court, "[w]hereas this concern may be valid in some situations, it is inapplicable here in that Excel attempted to place the issue of Jose's attack on the security guard before the arbitrator, who declined to consider it." Moreover, the court added that a second arbitrator will have the opportunity to rule with respect to whether there was good cause for the second termination. ■

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liable to IBM for its attorneys' fees and costs. However, the agreement further stated that the "covenant not to sue does not apply to actions based solely under the [ADEA]"; thus, "if [an employee] were to sue IBM . . . only under the [ADEA], [the employee] would not be liable under the terms of this Release for their attorneys' fees and other costs and expenses of defending against the suit."

Ten employees who had signed the release later filed EEOC charges against IBM alleging that the RIF violated the ADEA. The charges were dismissed by the EEOC because the releases were found to be "knowing and voluntary." The employees later filed suit in the U.S. District Court for the Northern District of California, where IBM was granted summary judgment when the releases were once again upheld. The employees appealed to the Ninth Circuit.

The Ninth Circuit noted that while the release addressed "all claims," the covenant not to sue (contained in the release) precluded all claims with the exception of those brought under the ADEA. The court deemed these two provisions to be in conflict and confusing; therefore, it held that the waivers were unenforceable because they could not be entered into "knowing and voluntary." The Ninth Circuit reversed the grant of summary judgment on the employees' ADEA claims and sent the case to the district court for trial.

Practical Advice In Light Of These Decisions

While it is clear from *Sundance* and *IBM* that releases cannot prohibit the filing of charges of discrimination, these cases provide cause for concern that an employer's ability to offer releases in exchange for severance pay may vary from circuit to circuit. As a primary consideration, employers should carefully review their releases to ensure that they do not violate the current state of the law in their circuit, and that they clearly do not purport to prevent employees from filing charges or claims. The releases should make clear that it is only the workers' right to remedies which are waived, and not the right to assert the protected rights by filing charges or lawsuits.

In light of the *IBM* decision, employers should review their releases to ensure that there are no internal inconsistencies which could give courts cause for concern. In *IBM*, even an internal inconsistency between two separate and distinct sections of the agreement – the terms of the release and the terms of the covenant not to sue – was considered sufficient to make the waiver confusing and thus not entered into "knowingly" under the OWBPA.

Ogletree Deakins Moves Up On "NLJ 250"

Ogletree Deakins once again has been named to *The National Law Journal's* annual list of the 250 largest U.S. law firms. The firm has moved up from number 142 last year to number 131 in this year's report. The publication ranks firms by the total number of full-time equivalent attorneys. This ranking, along with the recognition of 60 of the firm's attorneys in the 2007 edition of *Best Lawyers*, solidifies Ogletree Deakins' spot as one of the largest and most prestigious labor and employment law firms in the country. (For more information on the *Best Lawyers* list, see the accompanying article on the opposite page.)

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the Employee Free Choice Act (EFCA). Union leaders say that this legislation will enable them to win more union representation campaigns, increase union membership and dues income, and enhance their political and economic clout. In turn, organized labor will use its additional clout to elect more "progressives" to Congress and a pro-union candidate to the White House in 2008, so that they can pursue a more "progressive" legislative and regulatory agenda.

Quite simply, the EFCA is a forced card-check, anti-secret ballot union representation bill that would radically alter business practices and upset the balance in labor-management and employer-employee relations. The EFCA would make three major changes in the National Labor Relations Act. First, it mandates that the NLRB certify a union seeking representation rights based on signed union authorization cards ("card check") – without a secret ballot election among employees. Specifically, the bill requires that the NLRB certify a union as the exclusive collective bargaining representative of employees where the union demonstrates that a majority of the employees have signed union authorization cards – an election is not required.

Secondly, the EFCA mandates arbitration of initial union contracts. Specifically, contract terms must be submitted to the Federal Mediation and Conciliation Service (FMCS) if the union and the employer cannot reach an agreement on an initial collective bargaining contract. In particular, the EFCA requires that: 1) parties meet within 10 days after a union makes a demand to initiate collective bargaining; 2) within 90 days, FMCS must provide mediation and conciliation services if the parties fail to agree on an initial contract and one of the parties requests the agency's intervention; and 3) 30 days later, FMCS must refer the dispute over the initial contract to an arbitration panel with the authority to issue a decision resolving the dispute (which is binding on the employer and union for a two-year period).

Finally, the EFCA contains a panoply of new anti-employer penalties. These include prioritizing NLRB investigations of unfair labor practice charges alleged to have been committed by an employer during an organizing campaign, and possibly pursing injunctive actions in federal court to remedy any such unfair labor practice. The proposal also requires the NLRB to award liquidated damages in the amount of two times any back pay found due and owing, and it subjects an employer to a civil penalty not to exceed $20,000 per violation of the National Labor Relations Act.

The Practical Effect

The provisions of the EFCA would dramatically tilt organizing in favor of unions by eliminating an employer's right to demand an NLRB-supervised secret ballot election to determine union representation. Currently, an employer's recognition of a union is voluntary. If an employer does not want to voluntarily recognize a union, the employer has a right to a secret ballot election among its employees when a union claims it has a sufficient number of signed authorization cards. Instead, the EFCA mandates a less reliable "card check" authorization system, which is more easily subject to union influence and peer pressures for employees to sign authorization cards.

Under the bill, unions would gain control over the timing of the representation process. Union organizers could demand employer recognition and require NLRB certification whenever the union attains a majority of signed cards. NLRB certification of a union as the exclusive bargaining representation would be treated the same as certification based on a secret ballot election under current law; thus, following certification the union may not be challenged for the certification year. This would deprive employees or employers from seeking a subsequent secret ballot election to determine continuing union support.

Mandatory, binding first contract arbitration, in addition to guaranteeing a union contract, raises a host of other practical problems. By requiring third party arbitration, the EFCA would cause unions to be less flexible in collective bargaining, as they know that a contract will be imposed in any event. When persuading employees to organize, unions frequently over-promise future contract terms (which they are unable to deliver at the bargaining table). Currently, upon reaching impasse an employer may unilaterally institute terms and conditions of employment (as long as it has bargained in good faith). Under the EFCA, however, the terms and conditions for two years would be imposed by an outside arbitrator, during which the current "contract bar" rule prevents the union's continuing majority status from being challenged.

Legislative Status

In the last Congress, the EFCA had 215 cosponsors in the House of Representatives (3 short of a House majority) and 44 cosponsors in the Senate. Although the bills did not receive a vote in Committee or on the Floor last year, new House Speaker Nancy Pelosi has declared passage of a reintroduced bill as an early priority, with a vote expected in the spring. Last year's original sponsors of the EFCA – Sen. Edward Kennedy and Rep. George Miller – now

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OGLETREE DEAKINS CONTINUES TO LEAD THE PACK

Firm Has 60 Attorneys Named To "Best Lawyers" List

Ogletree Deakins is again leading the way in excellence in the legal field – as 60 of the firm's attorneys have been named in the 2007 edition of *The Best Lawyers in America*. Of these 60 attorneys, 54 were recognized as among the top labor and employment attorneys in the country – the most of any law firm in the nation.

Seven of Ogletree Deakins' attorneys are making their first appearance on this exclusive list. They include: A. Craig Cleland (Atlanta); Michael Buchanan (Dallas); Donald Cockrill (Greenville); Michael Mitchell (Houston); Richard Parker (Nashville); Lawrence Smith (San Antonio); and Grant Petersen (Tampa).

Ogletree Deakins attorneys renamed to the list include: John Anderson, Margaret Campbell, Homer Deakins, William Gray and Robert Sands (Atlanta); Michael Fox (Austin); Richard Carrigan, Harry Hopkins, Peyton Lacy and Timothy Palmer (Birmingham); Eric Schweitzer (Charleston); James Spears (Charlotte); Charles Murphy, Randolph Ruff and Arthur Smith (Chicago); Bruce Hearey and Dan Pace (Cleveland); Katherine Helms, Leigh Nason, Elizabeth Partlow and Charles Speth (Columbia); John McFall (Dallas); Thomas Christina, John Creech, Howard Daniel, Joel Daniel, Gray Geddie, Thomas Greaves, Knox Haynsworth, Robert King, William McKibbon, Lewis Smoak, Jimmie Stewart, Kristofer Strasser and Fred Suggs (Greenville); Jeffrey Londa (Houston); Kim Ebert and Brian McDermott (Indianapolis); David DeMaio (Miami); Mark Diana, Peter Hughes, Sharon Margello, Richard Mariani and Patrick Stanton (Morristown); Keith Frazier (Nashville); Joseph Clees and David Selden (Phoenix); Rodolfo Agraz, Gretchen Ewalt, Thomas Farr and Matthew Keen (Raleigh); Tibor Nagy (Tucson); and Stanley Strauss (Washington, D.C.).

The Best Lawyers in America was first published in 1983 and is regarded as one of the premiere referral guides to the legal profession in the United States. *Best Lawyers* surveys thousands of top attorneys in the United States, who confidentially evaluate the legal abilities of their professional peers. ■

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chair the labor committees in the Senate and House, and they have made passage of the EFCA a "top priority" for their committees.

Last year, the unions made cosponsorship of the EFCA a "litmus test" for political and financial support in the mid-term elections. Following their success, unions are now demanding passage of the bill. Organized labor is mobilizing a massive, nationwide campaign to pressure new and returning Members of Congress to again cosponsor the EFCA. In December, the AFL-CIO and Change to Win labor federations organized a Washington rally with thousands of unionists supporting the bill, and announced formation of thousands of "steward teams" of employee activists in workplaces throughout the country to create grassroots pressures on Congress.

In short, not since the ill-fated 1977-78 Omnibus Labor Law "Reform" Bill has there been a more aggressive campaign to overhaul union organizing rules. Labor law reform passed the House and was stopped only by a one vote margin in the Senate (after a 19-day, 6-cloture vote filibuster). This coordinated commitment by organized labor and the leadership of the 110th Congress to pass the EFCA means there is a real threat of enactment.

The business community is organizing a counter-campaign, coordinated by the U.S. Chamber of Commerce and other leading trade associations and companies. Based on over 30 years' experience in working with similar business coalitions, Ogletree Governmental Affairs, Inc., the public policy subsidiary of Ogletree Deakins, will be an integral partner in that coalition effort.

If you have questions about this legislative proposal, contact the Ogletree Deakins' attorney with whom you normally work or Harold Coxson, Jr. or Alfred Robinson in the firm's Washington, D.C. office at (202) 887-0855. ■

Ogletree Deakins News

New to the firm. Ogletree Deakins is proud to announce the attorneys who have recently joined the firm. They include: Justin Coffey and Shera Varnau (Atlanta); Scott Humphrey (Charlotte); Kristin Snyder (Dallas); Tom Bright, John Merrell and Peter Murphy (Greenville); Jennifer Miscovich and Natalie Roberts (Houston); Brett Buhl and Dorothy Parson (Indianapolis); Andrea Bernica and Stacy Bunck (Kansas City); Myung Kim and Thomas Rattay (Morristown); Jennifer Rusie (Nashville); Elizabeth Heetderks and Nicholas Sanservino, Jr. (Raleigh); Julie Mueller (St. Thomas); and Alfred Robinson, Jr. and Francina Segbefia (Washington, D.C.).

Judicial nomination. In December of 2006, President George W. Bush nominated Ogletree Deakins' Thomas Farr to fill the vacancy on the U.S. District Court for the Eastern District of North Carolina. Farr, a shareholder in the firm's Raleigh office, was recommended for the bench by U.S. Senator Elizabeth Dole. "Tom Farr would be an outstanding addition to the federal judiciary in North Carolina," said Dole. "He is an accomplished and respected attorney with extensive litigation experience in the federal courts." The Senate confirmation process is scheduled to begin in January.

Electronic alerts. Ogletree Deakins is planning to transition its hard copy state alerts to an electronic format with the next issue of *The Employment Law Authority* (which will continue to be available in hard copy format). To ensure that you stay informed about the "hot" employment law developments in your state – or another state where you may have operations – please send your name, company, address, e-mail, and interested states to Client Services at clientservices @ogletreedeakins.com. Note: All clients with e-mail addresses on record will automatically receive alerts from their home state.

PLANNING AHEAD FOR NEW EEO-1 REQUIREMENTS

by David A. Copus, Ogletree Deakins (Morristown)

Employers should begin now to plan for several major changes in EEO-1 reporting requirements that go into effect with the filing of the 2007 EEO-1 form. Companies with at least 100 employees, and most government contractors, must file an EEO-1 form each year, which reports on the number of female and minority employees in broad occupational categories. In the past, employer workforce data was divided into nine job categories, using five race and ethnic categories. The new EEO-1 form, however, changes these reporting requirements.

Job Categories

The revised EEO-1 report makes two changes in job categories. First, the new form divides the Officials and Managers (O&M) category into two subgroups: Executives/Senior Level Officials and Managers, *and* First/Mid Level Officials and Managers. The new EEO-1 form defines Executives/Senior Level Officials and Managers as employees who "plan, direct and formulate policy, set strategy and provide overall direction" and "in larger organizations [are] within two reporting levels of CEO." First/Mid Level Officials and Managers are now defined as those employees who "direct implementation or operations within specific parameters set by Executive/Senior Level Officials and Managers [and] oversee day-to-day operations." The Equal Employment Opportunity Commission (EEOC) has provided more detail on these two subcategories and recommendations on how to classify employees on its website.

Second, the revised EEO-1 moves certain business and financial occupations from the O&M category to the Professionals category. The challenge with this change is identifying exactly which business and financial jobs should be reclassified. The EEOC appears to suggest that employers move all *non-managerial* business and financial employees out of the O&M category and into the Professionals category. To assist employers in identifying which business and financial jobs to move, the agency has prepared an occupational guide that assigns census categories and Standard Occupational Classification codes to the various EEO-1 categories. The occupational guide also is accessible at the EEOC's website. Employers may refer to the guide to check the accuracy of their classification of other jobs as well.

Implementing the Job Category Changes: Before September 30, 2007, employers must review all job titles currently classified as O&M. The first step is to move the appropriate business and financial occupations from the O&M category to the Professionals category. Employers should then assign the remaining O&M jobs into one of the two new subcategories. Next, employers should incorporate those changes into the appropriate databases.

Racial And Ethnic Categories

The new EEO-1 form incorporates two major changes in racial and ethnic categories. First, the revised EEO-1 form adds a new category, "two or more races." Second, the revised form subdivides the familiar "Asian or Pacific Islander" category into two separate categories: "Asian" and "Native Hawaiian or other Pacific Islanders." These changes will significantly impact employers' recordkeeping practices.

Effective September 30, 2007, when gathering demographic information for EEO-1 purposes, employers must ask separate questions regarding *ethnicity* and *race* using a "Two Question Format." First, employers must ask if an individual is Hispanic or Latino (ethnicity). Next, if the employee answers "no" the employer must ask what race/races the employee considers him or herself to be, choosing among six racial categories: white; Black or African American; Native Hawaiian or other Pacific Islander; Asian; American Indian or Alaska Native; or two or more races (not Hispanic or Latino).

The new EEO-1 instructions also strongly endorse self-identification of race and ethnic categories, as opposed to visual identification by employers.

Implementing the Racial and Ethnic Category Changes: Before September 30, 2007, employers must redesign the questionnaires and/or self-identification forms used to solicit race and demographic information from employees and applicants. In addition, employers must modify their internal computer data systems to accommodate the new racial/ethnic categories. Note that employers do *not* need to apply the new racial/ethnic categories to current employees and are *not* required to resurvey their workforce. Employers may voluntarily do so, however. When completing the 2007 EEO-1 form, employers who do not resurvey should report as "Asian" all employees currently identified as "Asian/Native Hawaiian or Other Pacific Islander."

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Applicant Tracking Obligations

These changes apply only to the EEO-1 form and not to federal contractors' applicant tracking obligations imposed by Office of Federal Contract Compliance Programs (OFCCP) regulations. OFCCP acknowledges that the new EEO-1 form will require changes in its applicant tracking regulations. However, OFCCP notes that "[b]efore any changes can be made, the proposed changes must be published and the public given the opportunity to comment." The agency also will provide contractors with a reasonable transition period before the changes take effect.

Given that the EEOC published its changes to the EEO-1 form more than one year ago, OFCCP's delay in proposing changes to its applicant tracking regulations is somewhat surprising. However, most federal contractors will likely modify their applicant tracking systems to match the new EEO-1 requirements even if the OFCCP has not officially amended its regulations. ■