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The Obama NLRB

The National Labor Relations Board (Board), for the first time since 2007, consists of five members – at least until member Schaumber's term expires in August of this year. The current composition of the Board is as follows:

- Chairman Wilma Liebman (Democrat-confirmed through August 2011; former union lawyer)
- Member Peter Schaumber (Republican-confirmed through August 2010)
- Member Mark Pearce (Democrat-confirmed through December 2013; spent his entire career as a union attorney)
- Member Brian Hayes (Republican-confirmed through December 2012; a Republican labor coordinator for the Senate Committee on Health, Education, Labor, and Pensions)
- Member Craig Becker (Democrat-serving a recess appointment that expires at the end of 2011; previously the Associate General Counsel for the Service Employees International Union [SEIU] and for the AFL-CIO. Becker, who has been famously quoted as saying that employers should have no role in union representation elections, is certainly one of the most controversial appointees in years.)

President Obama will soon nominate a new General Counsel for the Board. This powerful position is currently being filled on an interim basis by a longtime Board employee, Lafe Solomon. The General Counsel has vast discretion in influencing which cases come before the Board and when. It is likely the General Counsel will exercise this discretion to tee up cases for the Board that will result in reconsideration and reversal of many Bush-era precedents that are unpopular with organized labor.

Employers need to be prepared for unwelcome changes in national labor law, and be ready for increased union-organizing activity. Every employer should assess its vulnerability, implement "best practices" and train management on union avoidance and card authorization.



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New Whistleblower Protections for Financial Services Employees

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Act), signed into law by President Obama on July 21, 2010, contains broad new whistleblower protections for workers in the financial services industry.

Employees Covered. Under the Act, a "covered employee" is "[a]ny individual performing tasks related to the offering or provision of a consumer financial product or service."

Discrimination Prohibited. An employer cannot discharge, or otherwise discriminate against, a covered employee because the employee provided information about any act or omission that the employee reasonably believes is a violation of the Act to: the employer; the newly created Bureau of Consumer Financial Protection; or any other authority or law enforcement agency. Employees are also protected if they (1) testify in a proceeding to enforce the Act, (2) file any action under any federal consumer financial law, or (3) object to or refuse to participate in any violation of the Act.

Employee-Friendly Burden of Proof. An employee with a whistleblower claim must file a complaint with the Department of Labor within 180 days of the alleged adverse employment action. The Department will conduct an investigation and make a determination. To prevail, an employee need show only that his/her protected activity was a "contributing factor" in the adverse employment action. If the employee makes that showing, the employer is then subject to a heightened burden of proof to defend itself. To avoid liability, the employer must prove by "clear and convincing" evidence that it would have taken the same adverse employment action if the employee had not engaged in protected activity.

Remedies Available to Employees. If the employee prevails, the Department can order the employee reinstated to his/her position, award back pay, and award compensatory damages. In addition, the employer must pay the employee's attorney's fees and costs. On the other hand, if an employee brings a frivolous claim, or brings a claim in bad faith, the employer may recover its attorney's fees from that employee – but only up to \$1,000.

Claims Exempt from Pre-dispute Arbitration. The Act provides that any pre-dispute arbitration agreement between an employer and employee is invalid to the extent it requires arbitration of the employee's claims under the Act. Arbitration provisions in collective bargaining agreements, however, may be enforceable.

For additional information regarding this article, please contact [Pat Konopka](#).

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Individuals Personally Liable under FMLA

The Family and Medical Leave Act (FMLA) makes it "unlawful for any *employer* to interfere with, restrain, or deny the exercise of or the attempt to exercise" those rights provided to employees under the FMLA. The FMLA defines "employer" as "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." In *Narodetsky v. Cardone Industries, Inc., et al*, a Pennsylvania U.S. District Court confirmed that an individual, such as a human resources manager, can be held liable for FMLA breaches.

In that case, Narodetsky filed FMLA claims against his employer, Cardone Industries, Inc., and five individuals employed by the company, claiming that the individuals participated in a forensic search of his work computer in order to find a reason to justify terminating him after he requested FMLA leave. The District Court, in reviewing Narodetsky's complaint, determined that he had set forth sufficient allegations against the individuals to allow the claims to proceed. Notably, Narodetsky's allegations supported an inference that "each of the defendants exercised control over plaintiff in the decision to terminate him." The individuals included the company's president and CEO, a human resources manager, a director, a representative and a plant manager.

The U.S. Court of Appeals in the Eighth Circuit (which includes Missouri) has likewise interpreted FMLA's definition of "employer" to include individuals, including individuals working for both public and private sector employers. Moreover, at least one U.S. District Court in Kansas has interpreted the FMLA to impose liability on individuals, assuming the individual has a sufficient corporate role, responsibility or stature within the company.

Bottom Line. Employers cannot assume their employees are immune to individual liability under the FMLA. To avoid individual liability under this growing body of case law, employers should designate persons knowledgeable about the FMLA and FMLA regulations to provide compliance training to employees in the company who handle FMLA requests.

For additional information regarding this article or FMLA requirements in general, please contact [Cicely Lubben](#) or [Laura Kipnis](#).

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Coverage Testing Not Required in 2009 Form 5500

For many years, the annual Form 5500 has been a reminder to plan sponsors of the need to perform coverage testing on qualified plans. Schedule R of the 2009 Form 5500 has been revised to eliminate the question regarding how a qualified plan satisfies the coverage test under Internal Revenue Code Section 410(b). Plan sponsors should be aware that although the Form 5500 has changed, plans are still subject to coverage testing. In the absence of prompting on the annual Form 5500, plan sponsors should consider implementing an annual reminder to perform nondiscrimination testing to ensure continued compliance. For additional information, please contact the [Employee Benefits group](#).



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DHS Issues Final Rule on Electronic Signature and Storage of Form I-9

In late July 2010, the Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) issued a [final rule](#) regarding electronic signature and storage of the Form I-9, Employment Eligibility Verification. This rule deals with the preparation and storage of actual I-9 forms. This final rule does not affect the basic I-9 process or the usage of the e-Verify system. In addition, the final rule makes minor modifications to an interim rule promulgated in 2006 (the Interim Rule), codified as 8 C.F.R. § 274a.2.

Electronic Storage of Form I-9s. Since the Interim Rule, employers may complete, sign, scan, and store Form I-9s electronically. However, the Interim Rule did not specify any particular format or software. The final rule sets forth performance requirements for electronic storage systems. These requirements include: a retrieval system with indexing, retention of an audit trail for I-9 forms, government access (upon request), and access record creation. An employer is also required to provide a printed copy of the electronic I-9 transaction if requested by an employee.

Minor Modifications to the Interim Rule. The final rule includes the following minor modifications to the interim rule:

- Clarifies the timing for an employer to review the employee's documents and complete Section 2 of the Form I-9. Employers must complete Section 2 within three business days (not calendar days).
- Employers may use paper, electronic systems, or a combination of both to store I-9s.
- Employers may change electronic storage systems as long as the systems meet the performance requirements of the regulations.
- Employers are not required to retain Form I-9 Instructions or the List of Acceptable Documents. Employers must only retain those pages of the Form I-9 on which employers and employees enter data.

The new rule is effective August 23, 2010.

For additional information regarding this article or Form I-9 and e-Verify compliance in general, please contact [Deanna Atchley](#).

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Inside Washington

New Laws, Regulations and Agency Guidance

ADA. . July 26, 2010, marked the 20th anniversary of the Americans with Disabilities Act. In a [statement](#) issued by the Department of Labor, Hilda Solis remarked that "the ADA's 20th anniversary provides a unique opportunity for the Department of Labor to reaffirm its commitment to the ADA's principles of equality, access, and inclusion; and to recommit itself to ensuring that the goal of good and safe jobs for everyone includes workers with disabilities. According to recent data from the U.S. Department of Labor's Bureau of Labor Statistics, just one in five people with disabilities were in the labor force and the unemployment rate for those with disabilities remains much higher than the national average. Last week, the Department of Labor published an Advance Notice of Proposed Rulemaking inviting the public to assist in the revision of the regulations implementing Section 503 of the Rehabilitation Act of 1973 and strengthen disability regulations related to federal contractors. We are seeking input from the public on ways to strengthen regulations requiring federal contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities."

DOL. . The DOL announced an [interim final rule](#) issued July 16, 2010, that will enhance disclosure to fiduciaries of 401(k) and other retirement plans. The rule will assist fiduciaries in determining both the reasonableness of compensation paid to plan service providers and any conflicts of interest that may impact a service provider's performance under a service contract or arrangement. According to the DOL [statement](#), the "interim final rule will enhance disclosure to pension plan fiduciaries by requiring the disclosure of the direct and indirect compensation certain service providers receive in connection with the services they provide. The rule applies to plan service providers that expect to receive \$1,000 or more in compensation and that provide certain fiduciary or registered investment advisory services; make available plan investment options in connection with brokerage or recordkeeping services; or otherwise receive indirect compensation for providing certain services to the plan."

EEOC. . On July 21, 2010, a federal judge in *EEOC v. Yellow Transportation Inc. and YRC, Inc.* ruled that the employer must provide the U.S. Equal Employment Opportunity Commission (EEOC) a list of names with last known addresses and phone numbers of all African-American employees employed at a certain facility during a five-year period based on allegations that the company engaged in widespread discrimination against its African-American employees by fostering a racially hostile work environment, including the presence of nooses and racist graffiti, and by subjecting African-American employees to discriminatory terms and conditions of employment.



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FLSA. . . In July 2010, the Department of Labor issued a new fact sheet with guidance on the new FLSA lactation-break requirement which requires employees to grant break time to a worker for the purpose of expressing breast milk for her nursing child. [Fact Sheet #73](#) confirms that the FLSA amendment took effect when the Patient Protection and Affordable Care Act was signed into law on March 23, 2010, but does not apply to employees who are completely exempt from the FLSA's overtime requirements.

HITECH. . . On July 14, 2010, the U.S. Department of Health & Human Services (HHS) issued proposed [new rules](#) to implement certain provisions of the Health Information Technology for Economic and Clinical Health (HITECH) Act, enacted as part of the American Recovery and Reinvestment Act of 2009. The proposed modifications to the HIPAA Rules include provisions extending the applicability of certain Privacy and Security Rules' requirements to the business associates of covered entities, establishing new limitations on the use and disclosure of protected health information for marketing and fundraising purposes, prohibiting the sale of protected health information, and expanding individuals' rights to access their information and to obtain restrictions on certain disclosures of protected health information to health plans. In addition, the proposed rule adopts provisions designed to strengthen and expand HIPAA's enforcement provisions.

NLRB. . . The National Labor Relations Board (NLRB) has started to lay the groundwork for off-site Internet elections for employees to determine whether they wish to be represented by a union. The NLRB issued a Request for Information (RFI) seeking proposals from the information technology industry regarding the establishment of "secure electronic voting services," which it describes to include telephone, Web-based, and/or on-site electronic voting. Specifically, the Board says it is "seeking industry solutions regarding the capacity, availability, methodology and interest of industry sources for procuring and implementing secure electronic voting services both for remote and on-site elections." It appears the Board is looking for information regarding the feasibility, secrecy, observability, accountability, and auditability of electronic elections before implementing any sort of rulemaking process. This development is significant for several reasons:

- Unions have been looking for alternative ways to make it easier for them to prevail in representation elections because the much-criticized Employee Free Choice Act (EFCA) is stalled.
- Although it specifically requests information regarding what safeguards, if any, can be implemented to ensure votes cast remotely are free from "undue intimidation or coercion," the inherent vices associated with any off-site voting procedure – union coercion of voters during off-site unsupervised voting, de facto public voting, and other opportunities for mischief – may be amplified by Internet voting. Those concerns are largely avoided in traditional on-site elections.



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- The issuance of the RFI suggests the NLRB will aggressively use its procurement authority to avoid the notice and comment procedures for issuing regulations and, in turn, ultimately lay the groundwork for fast-tracking election reform rather than wait out the legislative process.

OSHA. . . On July 2, 2010, OSHA announced Standards Improvement Project (SIP)-III, a proposed [rule](#) to revise and remove requirements within several OSHA standards that are outdated, duplicative or inconsistent. The purpose of this rulemaking is to help keep OSHA standards up-to-date and help employers better understand their regulatory obligations. In a [statement](#) issued by OSHA, it stated that SIP-III will "update the definition for 'potable water' in the Sanitation standard (1910.141) with the current Environmental Protection Agency clean water standard. OSHA is also proposing to remove an outdated provision in the Bloodborne Pathogens standard (1910.1030) that requires employers to provide hand dryers that use warm air. This will allow use of newer technologies that use room temperature air."

For more information regarding these articles, please contact [Stephanie Scheck](#).