

Labor & Employment Law UPDATE

*Practical and preventive information for managing
your workplace*

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Reports of EFCA's Death Have Been Greatly Exaggerated

With the recent announcement by two key U.S. Senators that they intend to vote against the Employee Free Choice Act (EFCA), there is misplaced sentiment that EFCA is dead for 2009. This sentiment underestimates the commitment of organized labor and the leadership of both the House and the Senate to see this issue come to a vote before the year is out. These parties remain committed to EFCA because there is little question that if EFCA were to come up for a vote in both the House and the Senate, it would pass. Thus, the fate of EFCA turns on a procedural motion in the Senate called cloture, which requires 60 votes to end debate on a piece of legislation. Supporters of EFCA may have as many as 58 votes for cloture today, only two shy of the 60 needed to force an up or down vote.

EFCA, as it is currently drafted, would require employers to recognize and bargain with unions based on signature cards rather than government-conducted secret ballot elections. In addition, employers who do not succeed in reaching an agreement within 120 days of recognition

will be required to participate in binding arbitration to create a two year contract. For a more in-depth analysis of EFCA, see our [March 10, 2009 Legal Alert](#).

In the meantime, a number of varying compromise solutions are being floated to bridge the divide between supporters and opponents of EFCA. H.R. 1355, which has been introduced in the House of Representatives, maintains the current secret ballot system for elections of unions but adds the binding arbitration and enhanced penalty provisions of EFCA. There have also been discussions outside of Congress that would eliminate both the card check and binding arbitration provisions of EFCA, while strengthening penalties for employers that retaliate against workers trying to organize a union and that refuse to engage in collective bargaining negotiations after a union has been recognized by a majority of workers. Penalties would be added for union violations. Employers would be able to pursue decertification of a union more easily. This proposal would specify the time

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frames for elections, limit the ability of the employer to unduly pressure employees, and permit unions to have equal access to workers before elections on company property.

While the House and outside compromise efforts are interesting, the Senate is the place where EFCA will live or die. A number of Senators are currently working behind the scenes to craft alternate legislation that could muster the 60 votes for cloture. Many of the above ideas are certainly in the discussion. Sen. Arlen Specter (R-Pa), who is widely viewed as one of the key swing votes, recently outlined 12 proposed changes to the National Labor Relations Act (NLRA) that could serve as the framework for a compromise in the Senate. Among his proposals:

- Establishing a three-tiered mandatory timetable – Requiring consent elections to be held in 10 days from the filing of a petition; a contested election to be held in 21 days; and extraordinarily complex elections to be held in 35 days.
- Expediting the disposition of challenges and objections.
- Adding union and employer unfair labor practices to the Act, including:
 - The prohibition of employer and union home visits without consent;
 - Forbidding employers from conducting captive audience speeches unless the union is given “equal time under identical circumstances”; and
 - Prohibiting all union and employer campaign activity in the 24-hour period before the election.
- Enhancing Board Remedies in failure to bargain cases:
 - By requiring the parties to

begin negotiations within 21 days after a union is certified and to participate in mediation after 120 days of bargaining.

- By ordering, upon a finding of bad faith bargaining, the establishment of a negotiation schedule and requiring reimbursement for costs and attorneys’ fees.
- Modifying the NLRA to give the court broader discretion to impose an order requiring an employer to recognize and bargain with the union when finding that the environment has deteriorated to the extent that a fair election is not possible.
- Authorizing the NLRB to impose treble back pay without reduction for mitigation when an employee is unlawfully fired, and authorizing civil penalties up to \$20,000 per violation on an NLRB finding of willful and repeated violations of employees’ statutory rights by an employer or union during an election campaign.
- Enacting procedural changes to expedite the Board decision-making processes.

None of these proposed changes to the NLRA or EFCA should give employers much comfort. We will continue to monitor EFCA and the compromise legislation and will provide updates in future issues of *Labor and Employment Law Update*.

David J. Kramer

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Nebraska's LB 403: New Verification Requirements for Employers

Last year, 19 bills addressing immigration in the employment context were enacted in 13 states. On April 8, 2009, Nebraska joined these states when Governor Heineman signed LB 403 into law effective October 1, 2009. LB 403 requires verification of lawful presence in the United States for certain public benefits and verification of employment eligibility for certain “public” employers and certain tax incentive programs.

Please note that LB 403 affects many health care providers. Our Health Care Section will address those areas in their upcoming *Health Law Advisory* expected out later this month. This article addresses how LB 403 affects employers in general.

First, LB 403 requires that all state agencies and political subdivisions verify the lawful status of all applicants for public benefits, with a few exceptions. Public benefits is defined as “any grant, contract, loan, professional license, commercial license... or unemployment benefit... provided... by an agency of the United States, the State of Nebraska, or a political subdivision of Nebraska.”

LB 403 further requires that all public employers and all public contractors and/or their subcontractors verify the employment authorization of all new employees. A public contractor is defined as “any contractor or his or her subcontractor who is awarded a contract by a public employer for the physical performance of

services within the State of Nebraska.” As a result, as a condition of contracting with a Nebraska public employer, their contractors and subcontractors must verify the employment eligibility of all new employees physically providing services within the state through a federal immigration verification. Currently, this would mandate the use of the E-Verify program. This also means that any contract between a contractor and a public employer must include a provision requiring the contractor to verify the employment eligibility of all new employees.

Lastly, LB 403 necessitates that all employers that apply for tax incentives under the Nebraska Advantage Act, the Nebraska Advantage Rural Development Act, the Nebraska Advantage Research and Development Act, or the Nebraska Advantage Microenterprise Tax Credit Act to verify the employment authorization of all new employees. For purposes of calculating any tax incentive, the Tax Commission will be required to exclude hours worked and compensation paid to an employee that is not eligible to work in Nebraska.

As noted above, LB 403 becomes operative on October 1, 2009. As a result, LB 403 does not apply to contracts awarded by a public employer or to any applications filed for tax incentives under the applicable programs prior to this date.

Quinn H. Vandenberg

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Regulating Blogs, Social Networking Sites, and “Tweeting” in the Workplace

A few years ago, Baird Holm published an article about regulating “blogs” in the workplace. Today, not only are employers faced with employee blogs, but also postings on social networking sites like MySpace, Facebook, and LinkedIn, or on on-line pages called wikis. Indeed, blogs have even spawned strange-named offspring with the popularization of micro-blogs like “Twitter” or “Yammer.” This terminology may seem foreign to you, but to your employees, it is commonplace. More and more employees engage in some sort of internet activity either at work or on their own time, making it even more important to ensure your workplace policies address internet activity.

Helpful Definitions

A **blog** (or weblog) is a type of web site that is maintained by an individual who makes regular entries commenting on a particular topic or issue, describes certain events, or posts material such as graphics or video. Entries are commonly displayed in reverse-chronological order.

Social networking sites such as MySpace, Facebook, and LinkedIn are web-based communities of people who share interests and/or activities, or who are interested in exploring the interests and activities of others. These sites allow the users the opportunity to e-mail, instant message, and post videos and pictures in a public venue, or to a defined group of people.

A **wiki** is a collection of web pages designed to enable anyone with access to contribute or modify content. Wikis are often used to create collaborative web sites or to power community web sites. The most well-known wiki is Wikipedia, the on-line collaborative encyclopedia.

Twitter is a free micro-blogging or micro-sharing site that allows registered users to send and read text-based updates (“tweets”) of up to 140 characters in length. Users can “follow” each other’s updates as well as see what others are reading and chatting about by clicking on links embedded in their update.

Yammer is similar to Twitter, but geared toward businesses rather than individual users. Only individuals with the same corporate e-mail address may join a given network.

Legal Considerations

These technological advances in communications and seemingly unlimited web access have created unique problems for employers in their attempts to regulate employee conduct. While it is theoretically possible to outlaw personal internet use in the workplace completely, the negative implications of such a ban (such as increased costs to monitor employee compliance with a total ban; detrimental effect on business for failing to keep up with “internet society”) outweigh the utility of it. Rather, employers are better advised to formulate policies that merely restrict internet use, rather than prevent it.

As a matter of sound business practice, an employer may develop policies that regulate its employees’ internet activities while in the workplace. However, the ability to regulate internet activity outside the workplace, while possible, is less clear-cut. While employers would have a difficult time preventing employees from

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blogging or tweeting about their private lives during their private time, they can regulate postings created outside of work if those postings relate to the company or work environment. By ensuring that each employee signs certain non-disclosure, privacy agreements, the employer will be able to discipline employees for, and hopefully therefore prevent them from, revealing confidential proprietary information in their internet postings, even when done outside of the workplace.

In addition to the dissemination of confidential information, negative and derogatory comments by employees about their company can have serious effects on company business when posted on the internet. It is therefore important to regulate such comments. While one naturally might think that an employee's freedom of speech is implicated by such regulation, private employees are not, in fact, protected from regulation from their employer by the First Amendment. Nevertheless, any efforts by the employer to constrain speech should be done with caution.

An employer may have an avenue of regulation under basic principles of agency law. Specifically, unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of that principal in all matters connected with his agency. This general rule forbids acting in competition with the principal, as well as taking unfair advantage of agent's position in his use of information acquired by him because of his position as agent. Because of these fiduciary duties, any employee who makes disparaging comments about the company on the internet will have violated, for example, the duty of loyalty. It is therefore permitted, and even necessary, for an employer to develop a policy regulating internet postings so that such disparagement does not occur.

One potential pitfall to regulating employee postings relates to every employee's right to engage in protected concerted activities under section 7 of the National Labor Relations Act (NLRA). For example, an employee who expresses work-related dissension to a co-worker engages in protected concerted activity. An employer therefore must not punish that employee for such behavior, or the employer risks committing an unfair labor practice. As such, if the employee's blog, tweet, or posting is only aimed at co-workers, the employer may not be able to regulate it. Nevertheless, one federal court of appeals has determined that employees who prepared a mocking and sarcastic letter critical of their employer did not engage in "concerted activity" protected by NLRA, for the letter was only intended as satirical comment on the way management chose to thank employees and was in no way for "mutual aid or protection" within contemplation of Section 7. While one would have to assess whether a message was satirical rather than for "mutual aid or protection" on a case-by-case basis, employers may have greater latitude to regulate internet postings without the risk of violating an employee's Section 7 rights under the reasoning of this case. Moreover, modern search engines enable individuals to find virtually anything anyone says in an internet posting. Work-related postings aimed at third parties thus become less about engaging in protected rights and more about engaging in personal activity.

Other Considerations

Most employers would agree that employees who visit social networking sites, or those who tweet or blog during working time, engage in non-work related activity that can hurt productivity. Such behavior also potentially compromises the security of a company's computer networks. Specifically, malware, or malicious software, is designed to take control of a computer and cause

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it damage. Malware can help hackers steal identities and private data. Many computer hackers distribute malware through web sites used for social networking, or on non-secure blogging sites.

Moreover, many employers encourage the use of, and even provide to their employees, Smartphones. While the use of such Smartphones generally increase employee accessibility, productivity, and creativity, they also create problems for employers, such as whether an employee should be compensated for checking their e-mail after hours. Employers should therefore make very clear its expectations with regard to out-of-work activity.

Internet Posting Policies

In light of these risks, it is even more important for employers to adopt (and update) policies related to internet postings and usage in and about the workplace. Even policies created a few years ago are likely outdated in today's changing technological landscape.

Internet posting policies should include clear statements that the employee is not to disclose any proprietary or confidential information of the company or information that has been disclosed to the company by someone else. This could be incorporated into the company's standard confidentiality statement or maintained separately for further emphasis.

Additionally, if the employer chooses to allow employees to post or comment about the company's business, a policy provision should clearly outline the limitations on such postings. For instance, the employee must clearly identify himself as a company employee and include a disclaimer that the views are the employee's own and not those of the company. The internet

posting should reflect the individual's point of view, and not necessarily the point of the company, and neither claim nor imply that the employee is speaking on the employer's behalf. A policy should also warn the employee that the employee, not the company, is legally responsible for his/her postings, and therefore he/she may be liable if the posts are found to be defamatory, harassing, or in violation of any other applicable law.

Policies should also include provisions that address internet security issues, particularly with regard to downloading from or posting material to unsecured web sites. An IT professional can help formulate these standards as well as shore up your overall network security.

Finally, employers should clearly define what is considered "compensable time." Specifically, an employer's policies should expressly prohibit personal internet activity (posting, blogging, or tweeting) during work hours or while at work. Likewise, if employers choose to allow the use of Smartphones, they should clearly define what is considered "work time" and inform employees that checking e-mail outside of that time is purely voluntary and not for the benefit of the employer (and therefore not compensable).

Kelli P. Lieurance

Even policies created a few years ago are likely outdated in today's changing technological landscape.

Dr. Robert Mathis to Receive Honor at the Best Places to Work Omaha Awards Lunch

On Thursday, May 7, Baird Holm will host the 2009 Best Places to Work Omaha Awards Luncheon, sponsored by the Greater Omaha Chamber of Commerce.

New this year, the awards ceremony will include an Individual Contributor Award, which will be presented to Dr. Robert Mathis. Dr. Mathis is Professor Emeritus of Management at the University of Nebraska at Omaha. He has co-authored several books, including "Human Resource Management," which is in its 12th edition. Dr. Mathis has held numerous offices in major professional organizations and has extensive consulting experience with large and small organizations in both profit and nonprofit sectors, both nationally and internationally.

The Best Places to Work Omaha is held in conjunction with the Baird Holm Labor Law Forum and will honor the following companies, who have been recognized as "Best Places to Work":

- Edward Jones
- Vetter Health Services, Inc.
- Lutz & Company, PC

- Medical Solutions, Inc.
- Signature Performance, Inc.
- Marriott Global Sales and Customer Care Center
- Blue Cross and Blue Shield of Nebraska
- Farm Credit Services of America
- C&A Industries, Inc.
- PayPal

Tickets to the Best Places to Work Awards Luncheon can be purchased online at www.bairdholm.com for 35 dollars each or 350 dollars per table of ten. For more information on the Best Places to Work Lunch or the Best Places Initiative, contact Sara Obermeyer at (402) 636-8316.

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