Employment Law Matters

March 2007

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Organized Labor's Top Legislative Priority Could Dramatically Change Union Organizing and Bargaining

In February 2007, a bi-partisan coalition of Congressional members introduced a bill which would dramatically change the National Labor Relations Act (NLRA) with respect to both union organizing and bargaining over initial collective bargaining agreements. The bill entitled "The Employee Free Choice Act" (EFCA) is expected to pass both Houses of Congress, however, the President has promised to veto the legislation. Nevertheless, the AFL-CIO and "Change to Win" are strongly advocating for the passage of this law on their websites, emails, newspaper ads, and overall lobbying efforts. Employers should take note of this bill even if President Bush vetoes the legislation because it will likely be re-introduced following the election of a new president in 2008.

The EFCA essentially makes the following five changes to the NLRA:

1. The union can be certified as the bargaining representative of a company's employees without a campaign or secret ballot vote. Specifically, the bill would allow unions to simply submit "authorization cards" from a majority of employees (within a proposed bargaining unit) to become certified. In other words, if a majority of the employees in the unit signed authorization cards, the union would automatically represent them without any campaign or vote.

Under the current law, the NLRA does not require an employer to recognize a union unless the union receives support by a majority of employees that vote in a secret ballot election. Such an election is typically conducted by the National Labor Relations Board (NLRB) after a 42-day campaign period. During that campaign period the employer has an opportunity to provide employees with information about union representation so that employees can make an informed decision in the secret ballot vote. The EFCA would essentially do away with this campaign period.

2. Once the union is certified, the EFCA would require the employer and union to reach agreement on their first contract within 90 days. If the parties cannot reach agreement during that time, either party can request assistance from the Federal Mediation and Conciliation Service. If that assistance does not result in a contract within a month, the matter will be referred to binding arbitration. The results of the arbitration will create the parties' first collective bargaining and will be binding for a period of two years.

Under the current law, the content of the parties' collective bargaining agreement is left entirely to the bargaining process. There is no obligation on the part of the employer to accept union proposals nor is there a requirement on the part of the union to accept employer proposals. All the law requires is that the parties bargain in good faith. The EFCA would result in arbitrated labor contracts which will most likely be much more favorable to unions.

3. Employers may be fined up to $20,000 per violation for willfully or repeatedly violating employees' rights in either a union organizing campaign or in some way related to the bargaining of the first contract.

4. If it is found that an employer unlawfully discriminates against an employee in relation to the union organizing campaign or the negotiations over the first contract, the employee will be entitled to damages in the amount of triple his/her backpay.

5. The bill would permit the National Labor Relations Board to enjoin an employer under circumstances where there is "a reason to believe" that the employer has discharged, threatened to discharge, or engaged in conduct that significantly interferes with employee rights during an organizing campaign or first contract negotiations.

Clearly, the EFCA would be the most dramatic change of the NLRA in its more than 70- year history. We will keep you informed as to its progress in Congress in the upcoming months. If you have any questions, please feel free to contact our office at 315-437-7600.

In This Issue …

Ferrara-Fiorenza Law Firm Welcomes New Partners and Associates

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. in East Syracuse takes great pleasure in announcing that **Miles G. Lawlor** and **Michael L. Dodd** have been elected Partners of the Firm.

Mr. Lawlor, of Manlius, devotes a substantial portion of his practice to employment and labor relations matters, including the representation of school districts and other employers in the public and private sector. He also writes extensively with respect to employer obligations under various laws, and preventive maintenance techniques.

Mr. Dodd, of Liverpool, works with the Firm in the day-to-day representation and counseling of public and private sector employers. He is a member of the New York State Bar Association and the Onondaga County Bar Association.

The Firm is also pleased to announce that **Kristin B. Greeley**, **Katherine E. Gavett** and **Daniel J. Petrone** have become associated with the Firm.

Ms. Greeley, of Syracuse, currently concentrates her practice on representation of school districts in various matters. She serves on the Board of Directors of the Onondaga County Bar Association, and is treasurer of the Onondaga County Bar Foundation. In June 2006, she began her first term representing the Fifth Judicial District in the New York State Bar Association House of Delegates.

Prior to joining Ferrara, Fiorenza, **Ms. Gavett,** of Syracuse**,** concentrated her practice in civil litigation. Her current practice focuses on representation in contract, employment and education law matters. She is a member of the New York State Academy of Trial Lawyers and Onondaga County Bar Association.

Mr. Petrone, of Camillus, graduated from the State University of New York at Buffalo School of Law in 2006. While at Buffalo, Mr. Petrone clerked for the Erie County Family Court and also worked for a private firm concentrating in education law. He works with the Firm in the representation related to education, employment and labor relations matters.

Other Changes At the Firm

As you may have noticed, we have redesigned our Firm's Newsletter. We have also redesigned our website, www.ferrarafirm.com. Please visit the site and feel free to email us your comments and suggestions regarding both changes.

Tune-Up Your Performance Evaluations

Chances are you have played out the following scenario before, in one of the roles. It's time for the annual performance evaluation – an event despised by all, except possibly human resource managers, consultants, and employment lawyers. The manager and her employee (or maybe "associate" or "team member") uncomfortably gather around a table. The manager stumbles upon what seems like the perfect ice-breaker: "I can tell that you don't want to be here anymore than I do – I can't believe they make us do this." The scene illustrates the most common issue our firm sees sabotaging performance evaluation systems of all types – management's lack of belief in and commitment to its own process. While there are many types of evaluation systems, ranging from the simplest to the most complex, there are a number of universal standards by which all such programs can be judged.

Know Why You Do Performance Evaluations (And Let Others In On The Secret)

No matter what the policy manual or evaluation forms may say, performance evaluations are more often than not viewed as an assessment of the personal worth of an employee. It's difficult to offer objective criticisms, and more difficult to receive them. While often touted as a communications tool which helps build employee morale and productivity, many organizations experience an increase in tensions and a decrease in productivity around evaluation time. Combat this by clearly defining why evaluations are conducted and where they fit within the overall organization. Successful evaluation programs have clearly defined purposes. These include ensuring that employees input on their position and the organization as a whole is understood and considered; that a sound basis exists for daily personnel decisions such as promotions, transfers, layoffs and discharges; that compensation issues are fairly evaluated; and that consistency is maintained throughout the organization. Employees should learn during their orientation, and be periodically reminded, of the organization's policy concerning performance evaluation which outlines how and why evaluations are utilized.

Use A Process Which Is Compatible With Your Organization

Many performance evaluation systems are doomed from the start. They are too complex, they are too esoteric, and they do not meaningfully reflect the employee's work environment or other aspects of an organization's culture. The best employee evaluation programs we have seen have been developed after direct in-

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Tune-Up Your Performance Evaluations (continued)

put from supervisors and managers – and sometimes the workforce as a whole. Most pre-packaged evaluation forms lull managers into a sense of complacency – that the evaluation is a "connect-the-dots" process. Managers must be given tools which are tailored to their work environment. In the printing industry, at a minimum, a good evaluation program has to treat production, sales, supervisory, and clerical areas distinctly. Usually, simpler is better and the shortest, easiest to complete, form that analyzes critical performance criteria is the appropriate one for your group.

Train Managers

While the importance of training in all aspects of human resources management is now becoming commonly understood, performance appraisals are one critical area where training is an absolute must. Like any other tool, an evaluation program cannot achieve positive results unless people know how to use it. In fact, a lot of damage can be done if the program is used the wrong way. Training is important to ensure that the positive communication and morale benefits of an evaluation system are maximized. Managers need an opportunity to learn the basic concepts of successful evaluation programs. They need to role play, or practice how to communicate in this difficult setting. In addition to the basic communication skills required, supervisors must also be trained as to the potential legal significance of performance evaluations and the documents created as part of the process. Performance evaluations are "Exhibit 1" in most cases of wrongful termination and employment discrimination. We commonly see situations where employees are fired for ongoing poor performance, while at the same time having recent performance appraisals ranking them, overall, as "satisfactory" employees. Performance evaluations must be consistent with the rest of the documentation in an employee's personnel file, and supervisors must be trained to ensure such consistency. Managers must be specifically trained to avoid the creation of negative documentation in the evaluation process and to limit their evaluation and written comments to job related, objective, observable, and where possible, quantifiable factors.

Connect Employee Performance To Overall Company Goals (Or Eliminate Performance Evaluations)

Much managerial and employee resistance to performance evaluations is rooted in the fact that such procedures have no connection to anything else perceived as important to the organization. To succeed, employee appraisal and development systems must not be static, "paperwork" programs. Ideally, these systems are based on the recognition that every employee, supervisor, manager, and top-level executive benefit from an ongoing open system of communication that directly relates to overall company goals and objectives. The performance evaluation system is part of communicating where an employee fits within an organization, where her contributions have mattered, and where there is room for improvement. It is a process which recognizes and documents successes in terms that relate to overall company goals – quality improvement, new markets, dedicated work ethic, positive work environment, etc., and does the same when documenting failures, such as lost customers, spoiled work, poor attitude, etc. The successful employee appraisal system does not simply evaluate events, but connects daily work events to the overall outcome achieved by the employee, at her job, in her department, and by the organization. Such evaluations provide the opportunity to truly concentrate on the many intangibles of the work environment. They lead managers and supervisors away from concluding that the argumentative, negative, bullying employee is their "best worker", and instead enhance recognition that job performance encompasses more than simply what is done. Performance is just as much about how tasks are performed, and whether employees enhance or undermine the work environment around them.

Absolute Commitment

The success of your organization's performance evaluation process, more than any other factor, is dependent on absolute commitment to conscientiously establishing the program, refining standards and evaluation methods through ongoing managerial and employee input, providing ongoing training, and faithfully adhering to the policy's stated purposes, goals and time tables. Successful performance evaluation policies require absolute management commitment. They are a lot of work and they are difficult to properly administer. Organizations should take an honest look at themselves, the overload of overall day-to-day responsibilities, and the downside to administering ill conceived and poorly thought out evaluation procedures. If it is unrealistic for your organization to truly commit to a positive and effective employment evaluation system, consider eliminating the formal process altogether.

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EEO-1 Report Form Revised for the First Time in 40 Years

The Equal Employment Opportunity Commission (EEOC) has revised the EEO-1 Report – formally known as the "Employer Information Report" for the first time in 40 years. While the first filing of the new report will not be until September 2007, covered employers will have to start gathering information the new way immediately.

The EEO-1 is a government form requiring many employers to provide a count of their employees by job category and then by ethnicity, race and gender. The EEO-1 must be filed by: 1) employers with federal government contracts of $50,000 or more and 50 or more employees; and 2) employers who do not have a federal government contract but have 100 or more employees.

The EEOC has made changes to the ethnic and racial categories on the EEO-1 report. The revised report:

- adds a new category titled "Two or more races"
- divides "Asian or Pacific Islander" into two separate categories: "Asian" and "Native Hawaiian or other Pacific Islander"
- renames "Black" as "Black or African American"
- renames "Hispanic" as "Hispanic or Latino"
- strongly endorses self-identification of race and ethnic categories, as opposed to visual identification by employers

The EEOC has also made changes to the job categories on the report. First, the current category of "Officials and Managers" will be divided into two levels based on responsibility and influence within the organization. These two levels will be: 1) Executive/Senior Level Officials and Managers (plan, direct and formulate policy, set strategy and provide overall direction; in larger organizations, within two reporting levels of CEO); and 2) First/Mid-Level Officials and Managers (direct implementation or operations within specific parameters set by Executive/Senior Level Officials and Managers; oversee day-to-day operations) The revised EEO-1 also will move business and financial occupations from the Officials and Managers category to the Professionals category.

The final EEO-1 report has been posted on the EEOC's website at http://www.eeoc.gov/eeo1/index.html, along with the Instruction Booklet. ***Covered employers must begin to use the newly approved EEO-1 report beginning with the survey due September 30, 2007.***

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