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## ***LEGAL AND LEGISLATIVE UPDATE***

*The following is provided as a complimentary service to the firm's clients. It is designed to assist the reader in keeping informed of selected developments in employment law. It is not intended to be nor is it a treatment of all new developments in the field of labor and employment law. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of the applicable laws than can be provided in this format. This summary is not intended to be a substitute for legal advice.*

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### *Proposed Legislation*

#### **Employee "Free Choice" Act H.R. 800 is a Misnomer**

On February 5, 2007, House Education and Labor Committee Chairman George Miller from California and 230 of his fellow representatives in Congress (including 7 Republicans) introduced a bill to amend the National Labor Relations Act. H.R. 800 will shortcut the union organizing process by eliminating the employer's ability to communicate with employees, by doing away with the secret ballot election, and deciding, based on the signing of cards, that the employees want to be represented by the union. Collective bargaining must begin within ten days after receiving a written request from the union. The bill gives the parties 90 days to reach an agreement before a mediator can be brought in. If the mediator does not resolve the outstanding issues within 30 days, the issues go to

binding arbitration. Any first agreement reached under this bill will remain in effect for two years. New and increased civil penalties against employers (but not unions) are added by the bill ignoring organized labors' history of threats, intimidation and harassment against employees who resist their organizing efforts. Employers who discriminate, discharge, threaten to discharge, or engage in any other unfair labor practice while employees are seeking representation and until a first agreement is reached can face civil penalties not to exceed \$20,000 for each violation in addition to back pay and two times the back pay amount as liquidated damages.

The justification for introduction of this bill is that the middle class has been squeezed while corporate profits and executive compensation has skyrocketed. The sponsors believe the fair and democratic process for forming unions is badly broken and skewed in favor of employers.

**Editorial comment:** I doubt that heavily unionized companies such as Ford, General Motors and Chrysler who have seen their products priced out of the market because of the skyrocketing cost of their unionized workforce would agree that the representation and collective bargaining process is skewed in their favor. Further, the unionized employees who lost their jobs at these companies had built a lifestyle around a pay and compensation package they cannot possibly duplicate. They were lured into high-paying union jobs and away from higher education that they did not think they needed. Now they are left with minimal skills.

Supporters of the bill claim the proposal would allow workers to freely choose if they want to be represented by organized labor and help to end harassment and intimidation from employers. Opponents say the law would lead to a hostile work environment, increasing employee intimidation by both employers and unions, and remove free choice in workplace elections. This legislation would leave all employees vulnerable to coercion and intimidation during union organizing drives. There is nothing more sacred to a democracy than private voting rights. The law as proposed would take away that fundamental right and the guarantee to a free and secret ballot so that workers may vote their convictions without fear of reprisal from either their co-workers or their employers.

Presently, to organize a workforce, a union must get at least 30% of the workforce to be represented to agree to an election. They sign cards that declare their interest in an election but the cards do not commit them in any way to voting for or joining the union. During this time, the union is meeting with and organizing employees to encourage them to support the union and get their fellow employees to do the same. Once the union gets at least 30% of the workforce agreeing to an election, they submit the

cards to the National Labor Relations Board along with a petition for representation. Prior to any election, the employer has an opportunity to communicate with the employees so the employees can make an informed choice about voting for or against the union by hearing both sides of the issue. Employers are prohibited from spying on their employees' union activities, threatening, intimidating, harassing, or discriminating against employees because of their union activities. Such conduct is an unfair labor practice and unions are not shy about charging employers with any conduct they believe is improper. If the cards are sufficient for an election and after all challenges are resolved, the NLRB conducts a secret ballot election permitting all employees the union seeks to represent to vote for or against the union. If the employees vote for a union, the employer and union collectively bargain the terms and conditions for their first agreement.

Two witnesses in favor of the legislation said they were fired for their efforts to unionize but were subsequently reinstated after the NLRB determined the employers had engaged in unfair labor practices. Yet they say the system is broken. Another witness, a former union organizer disagreed claiming the card-check process would only lead to increased intimidation from union organizers. She described tactics that labor organizers used to force workers to sign a card supporting union representation.

GOP members of the House said they support the right for workers to decide on union representation, and the most fair and democratic way to do this is by allowing secret ballot elections. They feel that the proposed bill would give organized labor an unfair advantage and allow union organizers to place undue pressure on workers. There must be a way to eliminate misconduct by both employers and organized labor without eliminating the secret ballot election process.

House Speaker Nancy Pelosi has promised to put the “Employee Free Choice Act” on a fast track, hoping for passage before the business community is mobilized to fight the measure. A Senate version of the bill is expected to be introduced within weeks.

### *Discrimination*

#### **Employer’s Prompt Response Thwarts Harassment Liability**

A county received complaints by female employees about their supervisor’s sexually harassing conduct toward them. The employees had not suffered an adverse employment action, so the county was entitled to show that it had exercise reasonable care to prevent and correct any harassing behavior. The county established its affirmative defense by showing that it had a comprehensive anti-harassment policy, it was posted in all departments, complaints were promptly investigated, and appropriate action was taken against the supervisor for his conduct. *Jackson v. County of Racine*, 99 FEP Cases 1025 (7<sup>th</sup> Cir. 1/25/07)

### *Wage and Hour*

#### **Wal-Mart Agrees to Pay \$33 Million**

Wal-Mart Stores, Inc. has agreed to pay more than \$33 million to 86,680 employees nationwide to resolve alleged violations of the Fair Labor Standards Act. The alleged violations involved how Wal-Mart treated incentive bonuses and other premium payments in calculating employees’ overtime pay. Additionally, certain non-exempt salaried interns, manager trainees, and programmer trainees were not properly paid for working the 45 to 48 hours per week expected in their job description. This settlement does not affect a series of

lawsuits charging Wal-Mart with failure to pay workers for off-the-clock work currently pending across the country. The company contacted the Department of Labor after a routine review of its payroll systems uncovered possible violations. The company and DOL then worked together to examine the recordkeeping and payroll systems of all of its stores and divisions in the U.S. to identify improper calculations. *Chao v. Wal-Mart Stores, Inc.*, No. 07-2007, approved 1/25/07. **Note:** This case is a reminder that merely because an employee is paid a salary does not mean the employee is ineligible for overtime pay. The employee must also meet the duties and salary basis test of one of the white-collar exemptions. Also, the regular rate must be recalculated and additional overtime payment made when employees receive incentive bonuses, premium payments and earning supplements.

#### **Employee’s Prior Service Counted Toward 12-Month Eligibility Period for FMLA**

An employee who worked previously for his current employer, then had a five year break in employment before returning, was eligible for Family Medical Leave Act leave when he work 1250 hours in the seven months after returning. The employer argued that he was not eligible because he had not worked for them for twelve months during his current employment, and that the five-year break in employment should cause his eligibility to start all over again when he returned. The Appeals court found that while the FMLA was ambiguous as to whether previous periods of employment count toward the 12-month requirement, the regulations establish that previous periods of employment do count toward the requirement. *Rucker v. Lee Holding Co.*, 12 WH Cases2d 208 (1<sup>st</sup> Cir. 12/18/06)