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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**

On March 1, the U.S. House of Representatives voted 241-185 to pass H.R. 800, the misnamed "Employee Free Choice Act (EFCA) of 2007." With its passage by the House, organized labor's efforts to overhaul the Nation's labor laws cleared its first legislative hurdle. The bill now goes to the U.S. Senate that will take up either the House-passed bill or a companion bill to be introduced by Senate Health, Education, Labor and Pensions Committee Chairman Edward Kennedy (D-MA). The passage of H.R. 800 by an overwhelming House vote was put on a "fast track" as a "top priority" by the new House leadership in an effort to keep the business community from organizing against it. The vote came less than a month after the bill was introduced.

It is widely anticipated that the Senate will "filibuster" a motion to proceed to a vote on the bill, and thus prevent it from reaching the Senate Floor for a vote. Senate rules require 60 votes to "invoke cloture" that shuts off debate and ends a filibuster, versus a simple majority of votes to pass the bill. While these procedural hurdles do not deter the unions, organized labor and democrats may seek additional votes by modifying the bill to make it more acceptable to Senators looking for a compromise to end the filibuster.

The Bush Administration stated that the President would veto H.R. 800. This Presidential veto statement, however, does not end the discussion because the bill may be modified and attached to unrelated, "must pass" priority legislation that is important to the President. In the short run, employers should not become complacent because of the veto promise. More significantly, the




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long term concern is the unions' calculation that a veto, in their words, "tees up" the issue for the 2008 elections when they hope to elect a President that will sign the bill. Soundly defeating this legislation in the Senate is the only way to ensure that proponents won't harbor the hope of later reviving it.

*Labor Relations*

**"Salt" Illegally Fired for Lying**

William Hughes went to work at Primo Electric in part to help organize employees on behalf of Local 24 of the International Brotherhood of Electrical Workers. This practice is called "salting." He passed out some information about wages for union electricians in the parking lot of the company before work. When the company investigated, Hughes denied violating the company's rule against distributing non-company literature during working time. The appeals court unanimously held that, while company witnesses claimed Hughes gave out material during employees' working time, the NLRB found Hughes was more credible when he testified that he handed out the material before work began. *Integrated Electric Services v. NLRB,* 181 LRRM 2393 (4th Cir. 2/13/07)

**Court Struck Down Provisions in Employee Handbook**

Workplace policies found to interfere with employees' protected rights to engage in concerted activity are unlawful. The court of appeals for the District of Columbia heard an appeal concerning three handbook rules: (1) a chain-of-command rule telling employees not to register complaints with any representative of the client; (2) a solicitation rule prohibiting solicitation and distribution of literature at all times while on duty or in uniform; and (3) a fraternization rule prohibiting employees from fraternizing on duty or off duty with other employees. This case involved a unionized workforce but the results may also impact non-unionized workforces because the protected concerted activity of non-union employees is protected by the National Labor Relations Act. The court found that all three rules "had a chilling effect" on employees' rights. The court held:

(1) Because employees have a statutorily protected right to solicit sympathy, if not support, from the general public and customers regarding their terms and conditions of employment, prohibiting employees from registering complaints with clients, customers, hotel guests, etc. constitutes an unfair labor practice.

(2) Limiting off-duty solicitation and distribution while in uniform is overbroad and unlawful.

(3) The fraternization provision would have a chilling effect on employees' rights because they would reasonably interpret the rule to prohibit discussion about terms and conditions of employment within their union.

Employers are encouraged to review their handbook language to determine whether any provisions would have a "chilling" effect on employees' rights. *Guardsmark, LLC v. NLRB,* 475 F.3d 369 (DC Cir. 2/2/07)

*Family Leave*

**Family Medical Leave Act is Full of Hidden Surprises**

Employers cannot require employees to substitute accrued paid leave for unpaid leave under the FMLA when the employee is receiving paid disability leave during the FMLA leave. In this case, an employee received $300 per week disability benefits from her union during the six weeks she was on FMLA. Upon her return to work, the employer paid her for five sick days and two weeks of vacation. She sued alleging a violation of the FMLA. The court agreed with



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the employee. While the FMLA permits the employee to elect or an employer to require the employee to substitute accrued paid leave, such accrued leave can only be required when the employee is taking unpaid leave. 29 CFR 825.207(d) Because the employee was receiving $300 disability benefits each week, she was not in an unpaid leave status. The court pointed out that this provision also applies to employees receiving workers' compensation. *Repa v. Roadway Express, Inc.,* 2007 WL 569852 (7th Cir. 2/26/07)

*Harassment*

**Employer Entitled to Affirmative Defense**

Susan Baldwin worked for Blue Cross Blue Shield. She complained that her supervisor used vulgar and profane language on a daily basis and made romantic overtures to her. However, Baldwin did not file a complaint with anyone at Blue Cross. Baldwin knew about the anti-harassment policy and procedures because she had periodically received training in them. She told her secretary and two coworkers about the alleged conduct, but Baldwin made no attempt to report anything to Employee Relations. She said she didn't want anything to appear in her personnel file or on her record that could get in the way of a future promotion. Baldwin finally complained to Employee Relations after she received a lower bonus than she expected. She submitted a five-page written synopsis of the conduct she found offensive that had happened since her supervisor's promotion a year earlier. An investigation was started immediately but no one corroborated Baldwin's complaints. Offers to resolve the dispute between Baldwin and her supervisor were rejected by Baldwin, so the company demanded Baldwin's resignation. Baldwin refused to resign and was terminated.

The district court concluded that the alleged incidents of harassment were not sufficiently severe or pervasive to constitute sexual harassment and that, in any event, Blue Cross had established the affirmative defense under Faragher-Ellerth. Baldwin contends there was a tangible employment action when her employment was terminated. But, the court said, termination will support a claim only if it was caused by discrimination. "Firing an employee because she will not cooperate with the employer's reasonable efforts to resolve her complaints is not discrimination based on sex, even if the complaints are about sex discrimination." As to her hostile work environment claim, Baldwin points to the widespread use of profanity. The court said, "Title VII does not prohibit profanity alone, however profane. It does not prohibit harassment alone, however severe and pervasive. Instead, Title VII prohibits discrimination, including harassment that discriminates based on a protected category such as sex. An equal opportunity curser does not violate a statute whose concern is, as the Supreme Court has phrased it, 'whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'"

The Faragher-Ellerth defense is not available where the discrimination the employee has suffered included a tangible employment action. However, Baldwin did not suffer any tangible employment action as a result of the claimed sexual discrimination. The only arguable basis for recovery that she has is hostile environment discrimination, and the Faragher-Ellerth defense is available to an employer defending against that type of Title VII claim.

An employer avoids liability under this defense if: (1) it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior"; and (2) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities [it] provided." Because it is an affirmative



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defense, the employer bears the burden of establishing both of these elements. Baldwin contends that Blue Cross has established neither one, but the court was convinced that it has established both. As to the first element of the defense, Baldwin does not dispute that Blue Cross has a valid anti-discrimination policy prohibiting harassment, which was effectively communicated to all employees, nor does she dispute that there were reasonable reporting requirements and procedures of which she was fully aware. Blue Cross' policies and procedures not only were in place but had been used to fight harassment in the past. All that is required of an investigation is reasonableness in all of the circumstances, and the permissible circumstances may include conducting the inquiry informally in a manner that will not unnecessarily disrupt the company's business, and in an effort to arrive at a reasonably fair estimate of truth. The court has held in the past that even if the process in which an employer arrives at a remedy in the case of alleged sexual harassment is somehow defective, the defense is still available if the remedial result is adequate. As to the second element—an employee's failure to take advantage of preventive or corrective measures can take two forms—not using the procedures in place to promptly report any harassment and not taking advantage of any reasonable corrective measures the employer offers after the harassment is reported. Either failure is sufficient to establish the second element of the defense, and in this case there were both. Baldwin refused to take advantage of the counseling option, a reasonable corrective measure which Blue Cross offered her, and that by itself is enough to carry the day for Blue Cross on the second element of the Faragher-Ellerth defense. Even if Baldwin had not refused to cooperate with the corrective measure Blue Cross offered after she finally reported the alleged harassment, her failure to report the harassment sooner would establish the second element of the defense. The court held that Blue Cross has established both elements of the Faragher-Ellerth defense. *Baldwin v. Blue Cross/Blue Shield of Ala.*, 2007 U.S. App. LEXIS 6298 (11th Cir. 3/19/07)



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