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FREE BACKGROUND



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## STIMULUS BILL IMPACTS U.S. EMPLOYERS

By

[Todd P. Photopulos](#)

At a signing ceremony in Denver last month, President Obama signed into law the most expensive legislation in our nation's history in an effort to create jobs, rebuild transportation infrastructure, and otherwise stimulate the economy. The massive stimulus package, called the American Recovery and Reinvestment Act of 2009 ("Recovery Act") has been the source of much political wrangling in the past few weeks.

So what does the Recovery Act mean for employers? The stimulus package includes several employment-related provisions, including measures aimed at increasing and extending unemployment insurance benefits, COBRA subsidies for those who have lost their jobs to help them continue paying health care premiums, job training funds, executive compensation limits, and limits for the use of H1b visas for banks and other financial industry employers who receive Troubled Asset Relief Program ("TARP") funds. The COBRA and H1b program changes are discussed in more detail in other articles in this edition of Workplace. Below is a glimpse at other impacts the Recovery Act will have on employers.

### **Executive Compensation**

Following the first round of stimulus payments to troubled firms, media outlets teemed with stories of misspent money and poor financial decisions, such as lavish parties, expensive executive bonuses, Lear jet purchases, and the like. Should we really be surprised about the seemingly brazen misuse of public funds and financial irresponsibility? After all, there was a reason why these firms were in need of a financial bailout in the first place.

Reacting to the criticism of the lack of oversight in the spending of the first round of stimulus payments, the Recovery Act attaches specific pay limits to high level executives at organizations who receive TARP funds. The executive compensation requirements apply to financial institutions for so long as the government holds any equity or debt position in the institution. The extent of the limits for an employer's executive compensation corresponds to a sliding scale depending on the amount of TARP funds received by the employer. The more funds the employer receives, the greater the number of employees that will be impacted. The sliding scale begins with financial institutions that receive \$25 million in TARP funds. For these employers, only the most highly compensated employee is affected. At the other end of the scale, employers receiving \$500 million or more in TARP funds will be required to abide by the compensation limits for the five most senior executive officers and the 20 next most highly-paid employees.

The Recovery Act prohibits TARP fund recipients from making much criticized golden parachute agreements. Affected employees will also be banned from receiving bonuses, incentives, and other awards that are based on earnings statements that are later found to be materially inaccurate, although these restrictions are prospective only and do not apply to written employment agreements signed on or before February 11, 2009. Affected employees are also allowed to receive bonuses and the like that include long term restricted stock that does not vest during the time the employer is receiving TARP funds and provided the value is no more than one third of the employee's total annual compensation.

The final version of the Recovery Act broadly references limits on compensation, but does not specifically incorporate the limits made public in President Obama's comments at the beginning of February. The Treasury Department's Guidelines, however, do limit executive pay for TARP fund recipients to \$500,000

The Recovery Act also requires recipients of TARP funds to adopt company-wide policies prohibiting or limiting "excessive or luxury expenditures" such as entertainment or events, office renovations, private airplanes, and so forth. News flash to banks and financial firms – cancel those Lear jet purchases, golf outings, and executive retreats to Las Vegas.

### **Unemployment Benefits and Tax Issues**

The Recovery Act also greatly expands available unemployment benefits, which could impact employers' unemployment insurance taxes. The Act increases current weekly benefits by \$25, and extends the previously expanded 33 week limit for unemployment benefits to December 31, 2009. The increase in benefits, however, comes with strings attached. States opting for the benefit must choose two of the following:

- Allowing individuals only seeking part-time work to be eligible.
- Allowing individuals to be eligible if they lost their job due to "compelling family reasons" (such as domestic violence, spouse relocating for work, or family member illness).
- Allow individuals to be eligible for participating in a state-approved training program.
- Increase the allowance for dependents if the state already provides this allowance.

The stimulus package also contains "Making Work Pay" tax credits, which allow employees making less than \$97,000 annually (\$190,000 for couples filing jointly) to reduce the amount of income tax withheld by up to \$400 (\$800 for couples) for 2009 and 2010. The IRS will be issuing revised withholding tables for employers to load into their payroll system to account for these changes.

Employers may also qualify for Work Opportunity Tax Credits if they agree to hire unemployed veterans or "disconnected youth" after December 31, 2008. Unemployed veterans include anyone who during the five year period prior to their hire date was released from active duty from the armed forces. "Disconnected youth" include persons between 16 and 25 that are

not regularly attending school and are not “readily employable by reason of lacking a sufficient number of basic skills.”

### **Measuring Projected Job Gains**

It may be impossible to find a measuring stick for determining how many jobs are created. The White House released a state by state estimate of how many jobs the stimulus package is expected to create. The top three states are California with 396,000 jobs, Texas with 269,000 jobs, and New York with 215,000 jobs. The estimated job gains from the stimulus package range wildly from 1.2 million to 3.6 million jobs either created or saved over the next two years, according to the latest projections from a joint report by IHS Global Insight, a private forecasting firm working in connection with the Congressional Budget Office. CBO Director Douglas Elmendorf concedes, however, that these estimates are “very uncertain” and that because these packages have never been attempted before, “some economists remain skeptical that there would be any significant effects” from the stimulus. The projects created by the package have also been the source of much criticism, with many of the estimated jobs not being created until 2010.

Despite the stimulus package, IHS Global Insight’s Chief US Economist Nigel Gault predicts that unemployment will continue to climb to 9.3% by the end of the year, with real gross domestic product falling 2.7% in 2009. IHS estimates that despite the stimulus package there still will be a total loss of approximately six million jobs during the recession. Without the stimulus, however, IHS projects that the recession would have cost more than eight million jobs. So, are we fixing a problem? Or, are we simply pumping more blood into a patient that really needs a tourniquet to survive? Only time will tell.



# WORKPLACE

## NEW FEDERAL HEALTH PLAN LAWS REQUIRE IMMEDIATE COMPLIANCE ATTENTION

By

[Gene Magee](#)

In addition to provisions designed to invigorate the economy, the economic stimulus bill enacted February 17, 2009 also contains COBRA premium assistance for certain employees. In order to coordinate their Children's Health Insurance Program ("CHIP") with group health plans ("GHPs") and Medicaid, the CHIP Reauthorization Act enacted February 4, 2009 also deals with health plan premium assistance by permitting states to subsidize premiums for employer-provided GHP coverage for eligible children and their families, making the state the secondary payor to the GHP, as well as provides related new HIPAA special enrollment rights. Both new laws impose new notice, disclosure and other compliance obligations. These new GHP requirements are highlighted below.

### COBRA Provisions

**Premium Assistance.** "Assistance eligible individuals" ("AEIs") are eligible for COBRA premium assistance for a COBRA "period of coverage" (generally a month) beginning on or after February 17, 2009 (generally March 1<sup>st</sup>). An AEI is a "qualified beneficiary" ("QB") under COBRA (so domestic partners and same-sex spouses are not included) who, at any time during the period beginning September 1, 2008 and ending December 31, 2009, is eligible for COBRA due to *any* type of involuntary termination (not limited to layoffs or reductions-in-force but excluding gross misconduct) of a covered employee's employment during that time and who elects COBRA. An individual who is denied treatment as an AEI may file an appeal directly with the Department of Labor ("DOL"). The DOL is then required to provide an expedited review, having only 15 business days after receipt of the appeal to make a determination of AEI eligibility.

This premium assistance is only available for a maximum of nine months of the maximum coverage period for the AEI and will terminate before then if the AEI merely becomes *eligible* (not entitled) to coverage under Medicare or another GHP (including a spouse's plan, whether at initial, special or open enrollment) or upon any expiration of the COBRA coverage period. The AEI is required to provide written notice of eligibility for Medicare or other GHP coverage and is subject to a 110% penalty for failure to do so.

For purposes of premium assistance, COBRA includes a state mini-COBRA program. In addition, premium assistance is available for any group health coverage for which COBRA is available (major medical, prescription drugs, vision, dental, some employee assistance plans – whether stand-alone or bundled, as well as some HRAs [to the extent not also a FSA] but not HSAs), with the exception of health FSAs under a Section 125 cafeteria plan.

An AEI (or anyone on behalf of the AEI except the employer) is only required to pay 35% of the full 102% COBRA premium to the employer (or, if for state mini-COBRA coverage, to the insurer), with the employer (or insurer) being reimbursed for the other 65% of the full 102% COBRA premium by the federal government through a credit or refund of an overpayment of federal payroll taxes. Premium assistance provided to higher-income AEIs is subject to a phased-in recapture between \$125,000 and \$145,000 (\$250,000 and \$290,000 on a joint return) on the AEI's individual federal income tax return. Premium assistance is automatic for all AEIs, irrespective of income level, except that those higher-income AEIs subject to recapture can permanently elect to opt-out.

**Special Election Period.** While premium assistance is not retroactive to September 1, 2008, if a qualified beneficiary who was involuntarily terminated on or after September 1, 2008 does not have a COBRA election in effect on February 17, 2009 (because COBRA was not elected when initially eligible; because an election was made but subsequently lost; or because the election period is still open), then the AEI has a special extended COBRA election period. This extended election period began on February 17, 2009 but does not end until 60 days following the date on which the qualified beneficiary is given notification of it (*see Notices* below).

If a qualified beneficiary makes a COBRA election during this extended election period, the COBRA coverage is not retroactive to the date of termination but will begin with the first "period of coverage" beginning after February 17, 2009 (generally March 1st). COBRA coverage resulting from an extended election period also does not extend the maximum COBRA coverage period, and COBRA coverage resulting from an extended election period will not exceed the maximum period of coverage that would have been available if COBRA had been elected when originally available to the qualified beneficiary. (However, for a COBRA election during the extended election period, the period between the date of the involuntary termination and the beginning of the period of COBRA coverage will be disregarded for purposes of the 63-day break in creditable coverage rules with respect to pre-existing conditions exclusions under HIPAA.)

**Options.** The employer may permit AEIs to enroll in certain coverages which are different than the coverage the AEIs had upon termination. This optional coverage must be coverage which is offered to active employees and cannot have a premium in excess of the premium for the coverage in which the AEI was enrolled at termination. If available, the plan administrator has 60 days to give notice of the option to the AEI, who then has 90 days to elect optional coverage.

**Notices.** An "additional notice" describing COBRA premium assistance must be given to *any* qualified beneficiaries (even though not eligible to be an AEI) who became or becomes entitled to elect COBRA between September 1, 2008 and December 31, 2009 for whatever reason. A notice of extended election period must be provided to any potential AEI who became eligible for COBRA between September 1, 2008 and February 17, 2009 explaining the assistance and the extended election period within 60 days after February 17, 2009. The consequences for noncompliance are the same \$110/day DOL and \$100/day IRS penalties generally applicable to all other COBRA notice violations, as well as possible private lawsuits.

## **MEDICAID, CHIP and Special Enrollment**

**Premium Assistance.** Each of the states may decide whether or not to offer a subsidy that will pay an employee's share of the premium for coverage of an eligible low-income child (and in some cases for the parent and other family members also) for "qualified employer-sponsored coverage" (specifically excluded are health FSAs and high-deductible health plans). This subsidy may be provided as a reimbursement to either the employee or the employer (but the employer may opt out of receiving direct payments).

**New Special Enrollment Rights.** An employer's GHP must permit employees and their dependents who are eligible but not enrolled for coverage to enroll at any time in two new situations beginning April 1, 2009: (i) if the employee or a dependent becomes eligible for a premium subsidy under Medicaid or CHIP; or (ii) the Medicaid or CHIP coverage of the employee or dependent is terminated as a result of loss of eligibility. In both cases the employee must request coverage within 60 days (the enrollment period for all other special enrollment rights is only 30 days) after the eligibility determination or termination, as applicable.

**Employee Notices.** If an employer maintains a GHP in a state that elects to provide premium assistance, written notices must be provided to its employees giving them state-specific information regarding the premium assistance available to them. DHHS is required to provide model notices by February 4, 2010, with the notice requirement being effective for the first plan year beginning after the date on which model notices are first issued by DHHS. This notice may be provided to the employee at the same time as other information about health plan eligibility, at open enrollment, or upon an SPD being provided. There is a \$100/day penalty for failure to comply with notice provision.

## **IMMEDIATE EMPLOYER ACTIONS REQUIRED**

- Coordinate with any third-party service providers responsible for COBRA and enrollment, as well as benefits legal counsel, with respect to compliance responsibilities.
- Begin process of identifying all QBs who became eligible for COBRA between September 1, 2008 and February 17, 2009 for whatever reason
- Begin process of identifying all potentially eligible AEIs from that group of QBs
- Prepare new "additional notice" for *all* qualified beneficiaries who became entitled to COBRA between September 1, 2008 and February 17, 2009
  - Describing the new premium subsidy
  - Describing any options available to enroll in different coverage
  - Containing the statutorily required contents information
  - Describing the appeal rights to the DOL for determinations of AEI eligibility

- Providing information about how electing COBRA can prevent the application of certain pre-existing condition exclusions
- Prepare notice of extended COBRA election period for any potential AEIs who did not have COBRA coverage on February 17, 2009
  - Due within 60 days after February 17, 2009
  - Describing information on right to extended election period, premium assistance, and enrollment options (if applicable)
  - Provide opt-out for higher-income AFIs
  - Describing the appeal rights to the DOL for determinations of AEI eligibility
  - Providing information about how electing COBRA can prevent the application of certain pre-existing condition exclusions
- Revise or supplement initial or general COBRA notice, COBRA election notice, plan document, and SPD (or provide summary of material modifications) to provide information on right to extended election period, premium assistance, and enrollment options (if applicable)
- Revise COBRA Notice Procedures to describe notice required to be given by AFIs upon becoming eligible for Medicare or another GHP and the appeal rights to the DOL for determinations of AEI eligibility
- Revise Special Enrollment Rights Notice (provided to employees at or before being offered opportunity to enroll in the GHP) in order to explain the new special enrollment rights effective April 1, 2009.
- Amend plan documents for covered GHPs and revise summary plan descriptions (or prepare summaries of material modifications) with respect to new HIPAA Special Enrollment Rights.
- Review cafeteria plan documents to assure that the new special enrollment rights and requests to disenroll a child from a GHP in order to enroll in CHIP are covered and explained as change of status events
- Actively monitor states in which GHPs are maintained for state elections to provide premium subsidies in order to determine for which states state-specific premium subsidy notices will need to be provided.





## **TARP FUND RECIPIENTS RESTRICTED FROM USING H1b VISA PROGRAM**

**By**

**[Todd P. Photopulos](#)**

A last minute modified amendment to the American Recovery and Reinvestment Act of 2009 (“Recovery Act”) will severely restrict employers from using the H1b visa program as a condition to receiving Troubled Asset Relief Program (“TARP”) funds. The H1b visa program is used by employers seeking to hire foreign nationals into high level "specialty occupations" – those occupations requiring at least a Bachelor's level degree or its equivalent for entry into the occupation. The H1b program is largely credited as the vehicle US employers use to attract and retain the world’s brightest workers. Many of the world's brightest minds are first attracted to the United States' superior colleges and universities. Many of these foreign students stay, work, and invent new ideas and jobs, starting first as H1b employees for U.S. employers.

The amendment to the stimulus package, called the Employ American Workers Act (“EAWA”), was added to the stimulus package by Senators Sanders (I-VT) and Grassley (R-Iowa) to limit certain banks and financial institutions from using the H1b visa program. The EAWA impacts employers receiving funds under Title I of the TARP program. Note that companies receiving funds from the American Recovery and Reinvestment Act (e.g., engineering firms contracting with states to build transportation infrastructure funded by the stimulus bill) are not covered by EAWA. The Treasury Department publishes a list of TARP fund recipients weekly on its website, which can be found by clicking here: <http://www.treasury.gov/initiatives/eesa/transactions.shtml>.

The EAWA prevents TARP fund recipients from hiring H1b workers unless the TARP employer attests that it engaged in a good-faith but unsuccessful efforts to recruit U.S. workers for the H1b position prior to applying for the visa. The TARP fund recipients must also attest that they offered the H1b job to any qualified U.S. worker who applied for the position.

The EAWA also prohibits TARP recipients from using the H1b program if it has laid off or will be laying off any U.S. worker in a job that is essentially equivalent to the H1b position in the area where the H1b worker would be employed during a period beginning 90 days before and ending 90 days after the filing of the H1b petition.

Senator Sanders (I-VT), one of the sponsors of the amendment, found concern with the fact that the twelve banks now receiving more than \$150 million in TARP funds have petitioned for nearly 22,000 foreign H1b workers over the past six years. Sanders sought the bill to make sure the banks receiving the taxpayer bailout were not allowed to "import cheaper labor from overseas while they are laying off American workers."

Critics of the EAWA, however, counter that the legislation could help start a reverse “brain drain” that could accelerate the trend toward off-shoring of research and development positions. For several decades (if not generations), the U.S. economy has benefited from being the destination of choice for the world’s best minds both entering U.S. universities, and seeking better working opportunities.

I must confess that I am biased in this regard. After all, I am the great-grandson of a Greek immigrant. Chances are, however, that the majority of readers share a similar family background reaching back as early a three or four generations. For those with deeper roots to the American continent, there is a more practical concern. Immigrants make up a disproportionate number of entrepreneurs in this country. This of course helps fuel job creation.

As it becomes more difficult for foreign nationals to obtain work visas (like the H1b) or permanent residency, more foreign workers are choosing to return to their home countries, often taking their high paying technical jobs with them. The H1b program requires that participants pay at least what the government considers to be the “prevailing wage” for that occupation in that geographic region. Companies quickly learn, however, that many skilled positions can be accomplished remotely from the foreign national’s home country where pay is cheaper and not regulated. Instead of importing the world’s top talent, we could be beginning to export the world’s best occupations. Perhaps our concern should be less about keeping high level foreign workers from entering the U.S. economy, and more about what to do when we are no longer their destination of choice.



# WORKPLACE

## **A NEW WHISTLEBLOWER CAUSE OF ACTION IS BORN WITH PASSAGE OF THE McCASKILL AMENDMENT**

**By**

**[Graham W. Askew](#)**

In what has become known as The McCaskill Amendment, the recently enacted economic stimulus bill creates an entirely new whistleblower cause of action. The McCaskill Amendment applies to private contractors, state and local governments, and other non-federal entities that receive a contract, grant or other payment appropriated or made available by the economic stimulus bill. Banks and other companies receiving a large amount of financial assistance should be especially wary.

Employers are now prevented from firing or taking any other adverse action against an employee from taking part in what The McCaskill Amendment defines as protected conduct. An employee engages in protected conduct when he discloses information that shows:

- Gross mismanagement of an agency contract or grant relating to stimulus funds;
- A gross waste of stimulus funds;
- A substantial and specific danger to public health or safety related to the implementation or use of stimulus funds; or
- A violation of a law, rule, or regulation that governs an agency contract or grant related to stimulus funds.

Establishing a claim is not difficult. An employee must prove that the protected conduct was a “contributing factor” in a retaliatory employment action taken against him. It does not have to be the sole reason or even a substantial reason. A damage award can be significant. Any employee who proves that he was retaliated against for engaging in protected conduct is entitled to relief including reinstatement, back pay, compensatory damages and attorneys fees and litigation costs. Punitive damages may also be available.



## **NEW SUPREME COURT RULING EXTENDS ANTI-RETALIATION PROTECTION OF EMPLOYEES**

**By**

**[Carlyle C. White](#)**

In continuing the liberal standard for retaliation discrimination claims, the United States Supreme Court unanimously ruled on January 26, 2009, to expand the scope of the anti-retaliation provisions under Title VII of the Civil Rights Act to protect employees who answer questions in an employer's investigation of another employee's charge of discrimination.

The Supreme Court reversed the Sixth Circuit Court of Appeals ruling in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, U.S. No. 06-1595, that held the anti-retaliation provisions of Title VII do not apply to employees who have not actively and consistently opposed an employer's discriminatory practices by provoking the discussion themselves. An employee is protected under Title VII when speaking out on alleged discriminatory practices of the employer even if the employee did not initiate the investigation or has not filed any formal charge of discrimination, for example with the Equal Employment Opportunity Commission ("EEOC").

In the case, Vicky Crawford, a thirty-year employee of the school district in the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro"), was probed by a Metro human resources officer concerning complaints from other co-workers regarding possible sexual harassment by Metro's director of employee relations, Gene Hughes. During the investigation, Crawford alleged that she too had been a victim of sexual harassment by Hughes and gave specific accounts of his alleged discriminatory behavior. A few months later, Metro terminated Crawford, reportedly for the mishandling of public funds, along with two other employees who also spoke of Hughes behavior. Crawford filed suit against Metro, claiming she was discharged in retaliation for cooperating and making statements during the internal investigation. Both the federal trial court and the Sixth Circuit Court of Appeals denied Crawford relief under Title VII after concluding that Crawford did not engage in any protected activity, because she had not opposed any unlawful conduct or participated in an investigation pursuant to the initiation of an EEOC charge.

The Supreme Court's new ruling resolves the conflict among the various Circuit Courts of Appeals on the application of the "opposition clause" under Title VII. The "opposition clause" makes it unlawful for an employer to discriminate against an employee because he or she has opposed an alleged unlawful employment practice. In this case, Crawford's participation in Metro's internal investigation constituted "opposition" when she responded to questions regarding rumored sexual harassment by Hughes. Crawford's statements were in "opposition"

of presumed sexual harassment in the workplace, and she need not have previously initiated any claim of discrimination against the employer.

The decision in the *Crawford* case creates a low threshold for employees who claim they were retaliated against for reporting alleged discrimination. The Supreme Court has now stated that it matters not whether the employee responds to questions in an already pending internal investigation initiated by someone else, but rather even passive internal complaints of discrimination are sufficient for protection from retaliation under Title VII.

As a result, employers should be aware of a potential increase in retaliation claims and take steps necessary to protect themselves. Employers should train human resources personnel and management to recognize potential “me too” claims of unlawful discrimination by employees who participate in internal investigations and refrain from taking any retaliatory actions. Each claim of discrimination should be separately addressed and fully investigated, regardless of whether the employee initiated the allegations.



# WORKPLACE

## **EEOC TO PAY \$225K IN ATTORNEY'S FEES FOR GROUNDLESS LAWSUIT**

By

[Carlyle C. White](#)

In the onset of a year where an onslaught of pro-employee legislation will become effective and likely passed in Congress, employers saw a silver lining when the Equal Employment Opportunity Commission (“EEOC”) was ordered to pay \$225,000 in attorney’s fees and costs to an employer for a meritless Americans with Disabilities Act (“ADA”) lawsuit. On January 15, 2009, the Fifth Circuit Court of Appeals affirmed summary judgment for defendant Agro Distribution of Hattiesburg, Mississippi, after holding that the EEOC failed to bring a cognizable claim on behalf of Henry Velez, a former truck driver for Agro.

In the case of *EEOC v. Agro Distribution, LLC*, Velez claimed to be disabled under the ADA due to a condition that prevented him from producing sweat. The EEOC alleged that Agro failed to provide Velez a reasonable accommodation and Agro terminated his employment because of his disability after he refused to report to a work assignment to load cattle feed barrels onto trucks. The court disagreed and held that Velez was not a qualified disabled individual under the ADA, and even if, the EEOC would have been incapable of proving that Agro failed to provide a reasonable accommodation.

In the lawsuit, the EEOC contended that Agro did not offer Velez a reasonable accommodation when the company mandated that he participate in a morning work detail, despite the employee’s contention that he would have been unable to work due to the extreme heat. The court pointed out that both Velez and the EEOC unjustifiably assumed that Agro would not have accommodated Velez’s physical condition on the day in question, but instead demanded a different accommodation – for him to be completely excused from work.

During Velez’s deposition, he testified that he could perform manual labor just like any other ordinary person, despite his condition that prevented him from sweating in warm temperatures, so long as he was given appropriate breaks to cool off. Furthermore, Velez testified that he had never been denied a reasonable accommodation in the past, because Agro had always allowed him to take breaks as necessary to cool himself off.

In a Title VII case, a district court has the discretion to award the prevailing defendant attorney’s fees upon a showing that the plaintiff’s claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. Chief Justice Edith H. Jones wrote, “the EEOC was absolutely unjustified in proceeding past the deposition of Velez.” As a basis for awarding Agro attorney’s fees, the court reasoned that once the EEOC was aware that mitigating measures were available for Velez’s physical impairment, it was

readily apparent that Velez was not substantially limited in a major life activity. Thus, he was not “disabled” under the ADA.

Furthermore, the court found that the EEOC failed to act as a neutral investigator and arbitrarily assessed that Agro violated the ADA by bringing an unsubstantiated claim for compensatory and punitive damages. The EEOC also violated its statutory obligation to conciliate Velez’s charge of discrimination by failing to make a good faith attempt to settle the claim with Agro’s defense counsel. Chief Justice Jones concluded the opinion by stating “the EEOC must vigorously enforce the Americans with Disabilities Act and ensure its protections to affected workers, but in doing so, the EEOC owes duties to employers as well: a duty to reasonably investigate charges, a duty to conciliate in good faith, and a duty to cease enforcement attempts after learning that an action lacks merit. In this case, the EEOC abandoned its duties and pursued a groundless action with exorbitant demands.”



# WORKPLACE

## **SIXTH CIRCUIT REQUIRES PRIMA FACIE EVIDENCE AS IT DISMISSES ADEA CLAIM**

By

[Van D. Turner, Jr.](#)

Employers can expect to see more EEOC claims and employment litigation as a result of the country's declining economy and the unfortunate consequence of mass lay offs. Plaintiffs, however, will still be required to meet long-held prima facie evidentiary standards when presenting their cases before the court. The Sixth Circuit Court of Appeals recently gave us an example of its unwillingness to relax prima facie standards in *Abnet v. Unifab Corp.*, No 06-2010 (6th Cir. Feb. 3, 2009).

In *Abnet*, a former purchasing agent for a Michigan metal fabricator was unable to demonstrate that he was laid off in violation of the Age Discrimination in Employment Act ("ADEA"), even though Unifab Corporation ("Unifab") was looking for a "change agent" and gave the former employee's job to a much younger individual. The *Abnet* Court held that although Mr. Abnet had established at least three (3) elements of a prima facie case of age discrimination under the ADEA, he failed to demonstrate that he was "replaced" by the younger employee who took over the purchasing operation. Contrary to Mr. Abnet's argument, the Sixth Circuit found that Unifab's economic justification for laying off Mr. Abnet was not pretext for age discrimination.

### **Company Sought "Change Agent"**

According to the court's opinion, Jerry Abnet began his career with Unifab in 1966 and served as the company's purchasing agent for more than 20 years before his lay off in February 2004. Mr. Abnet held a high school diploma and had received some college credits. He was 66 years old and earned approximately \$30,000 per year when he was laid off.

Unifab had been experiencing a downturn in its business for some time and as a result, had laid off several employees over the years. The company's staff fell from 69 employees in 2000 to 25 employees by January 2005. In 2003, Unifab hired a new general manager, Robert Seely, to obtain new financing and to improve the company's performance. Seely laid off Abnet in February 2004 and approximately five (5) months later, hired Robert Payne, a 23 year old college graduate. Payne, who was reviewed by an independent consulting firm, was recommended because the company was seeking "a change agent who [could] constantly shake up the status quo". Payne started with a salary of \$38,000, and he assumed Abnet's purchasing responsibilities as well as other duties. Abnet filed an age discrimination lawsuit under the ADEA, and the trial court granted summary judgment for the company. Abnet appealed to the Sixth Circuit.

## **Sixth Circuit Did Not Find Pretext**

The Sixth Circuit in its opinion stated that in order to make a prima facie case under the ADEA, Abnet had to prove: “(1) he belonged to a protected age class; (2) he suffered an adverse employment action; (3) he was qualified for [the] position; and (4) he was replaced by a younger individual.” Although it was undisputed that Abnet met the first three requirements, the appeals court found that Payne was not Abnet’s replacement because Payne performed not only Abnet’s purchasing job, but also “many other significant responsibilities.”

Abnet went on to highlight Seely’s remarks about bringing in a “change agent” or “new blood” as evidence of age bias. The court, however, did not find that to be the case. The court stated that the proof indicated that the company was attempting to “implement new programs and processes” and that the “change agent” comments were consistent with Seely’s plans. Further, the court pointed to the fact that Unifab had significantly reduced its workforce, eliminated some positions and cross trained Payne in different departments to perform a variety of tasks, as evidence that Unifab’s decision was not pretext for age discrimination.

## **Sixth Circuit Did Not Consider New Employee’s Performance**

The Sixth Circuit further held that Abnet’s claim that Payne’s performance reviews revealed deficiencies was unpersuasive. The court wrote: “Whether Payne was successful for Unifab . . . does not impact our decision on whether plaintiff’s termination was motivated by age discrimination.” Accordingly, the appeals court found that Abnet failed to raise any genuine issues of material fact concerning his claim of pretextual termination of his employment, and the court concluded that Unifab was properly granted summary judgment on Abnet’s age discrimination claims.

The Sixth Circuit also affirmed the trial court’s dismissal of Abnet’s retaliation claim. Abnet alleged that after his layoff, Unifab offered to return him to work on a temporary basis. Abnet, however, claims that the company withdrew the offer because of the ADEA lawsuit. The Sixth Circuit, agreeing with the trial court, said there was no prima facie retaliation because Abnet did not respond to the company’s offer.



# WORKPLACE

## **INTERNAL STRUGGLE DOOMS UNITE-HERE**

**By**

**[Bart N. Sisk](#)**

Much like the recent internal battle within the Service Employees International Union (SEIU), UNITE-HERE is fighting its own internal battle for control of the union. In 2004, UNITE, a textile and apparel workers union led by Bruce Raynor, merged with HERE, the hotel, restaurant and casino workers union, led by John Wilhelm. At the time of the merger, HERE's members far outnumbered the members of UNITE. However, UNITE had more money and assets. Since the merger, the HERE side of the union has continued to add members while UNITE has not.

Calling the 2004 merger a "dismal" failure, International President Raynor (along with a number of vice presidents) sought to dissolve the merger. When that failed, UNITE loyalists filed suit to separate from the union. The suit alleges that HERE's Wilhelm is seeking to take control of the union and its financial resources, the majority of which were contributed by former UNITE affiliated organizations.

In February, another lawsuit was filed seeking to, among other things, end the merger and allow the reformation of UNITE. The suit also alleges that HERE entered into the merger in 2004 in order to gain access to UNITE's assets. The suit claims that at the time of the merger, HERE was in "perilous financial condition" with resources of less than \$20 million. UNITE had, at that time, assets of about \$500 million.

Never one to let an opportunity pass, SEIU President Andy Stern has sent a letter to both Raynor and Wilhelm inviting UNITE-HERE to merge into the SEIU. The SEIU would apparently accept a merger of UNITE-HERE as a unified group, or would accept the separate organizations of UNITE and HERE, should the merger be dissolved.

Whatever may happen with the SEIU's offer, it seems likely that the old UNITE-HERE will not survive.



## **MERGER WOULD CREATE LARGEST REGISTERED NURSE UNION IN THE U.S.**

**By**

**[Bart N. Sisk](#)**

Three unions – the United American Nurses (UAN), the California Nurses Association/National Nurses Organizing Committee (CNA/NNOC) and the Massachusetts Nurses Association (MNA) have agreed in principle to form a new RN union. While the details are not yet final, the new union, the United American Nurses – National Nurses Organizing Committee, would be the largest RN union in the United States and would represent about 150,000 RNs. The motivation to create the union is based on the principle that all registered nurses should be represented by a single RN union. According to CNA's Executive Director, nurses are currently represented by as many as fifteen (15) different unions. The merger is designed, in part, to prevent other unions from organizing RNs. The stated goals of the new union are to:

1. Build an RN union to defend and advance the interests of direct care nurses across the county;
2. Organize all non-union direct care RNs;
3. Provide a powerful national voice for RN rights, safe RN practice, including nurse-to-patient staffing ratios;
4. Provide a vehicle for solidarity with sister nurse and allied organizations; and,
5. Create a national Taft-Hartley pension for union RNs.



## **UNION OFFICIAL PLEADS GUILTY FOR EMBEZZLING UNION DUES TO PAY STRIP CLUB EXPENSES**

**By**

**[Todd P. Photopulos](#)**

Ever wonder where union dues go? The former Secretary for the Laborer's International Union, Local 500, in Toledo, Ohio used union funds to pay for \$4,386 in strip club expenses. Laborer's former Secretary Thomas Leonard apologized for using the union's credit card to pay for these expenses, and ultimately reimbursed the union for the misspent funds.

A federal judge gave Leonard a year of probation and required that Leonard meet with a probation officer who will be given access to all financial information that the probation officer requests. Leonard must also participate in an out-patient mental health program.

The indictment against Leonard arose from a Department of Labor investigation into the Local's finances when the DOL began questioning "unusual receipts" listed in the Local's required annual financial disclosures. This led the Laborer's International Union to file disciplinary charges against Leonard and Steven Thomas, a former union business manager. The Laborer's International Union removed both Thomas and Leonard from office, and took over the Local in 2006. Former Business Manager Thomas was indicted with Leonard and is scheduled to stand trial in May on two counts of labor union embezzlement if he does not enter a plea agreement before then.

Unions are required to file annual an LM-2 Labor Organization Annual Report with the Department of Labor. These reports disclose to the public the financial information relating to the union. Local 500 of the Laborer's filed its 2008 LM-2 on October 22, 2008. The union noted that its dues were \$26 per month. Based on this reporting, it appears that Leonard and Thomas in one night spent the equivalent of 170 members' dues for a month at a strip club. Put another way, Leonard and Thomas' night on the town came at the expense of one union member contributing dues for 14 years.

To add further perspective, Steven Thomas' annual salary as Business Manager for the year of the strip club incident was \$128,458. Thomas received an additional \$27,099 in "disbursements for official business," leading one to guess how much more in union dues he spent on such nights on the town.

As Recording Secretary, Thomas Leonard was paid \$96,760 in annual salary, and was granted an additional \$12,149 in "disbursements for official business." All of these salaries, of course, were paid for by union members. The union took in nearly \$1.4 million in union dues and fees that year. Interestingly, the union reported spending \$0 on behalf of individual

members for the same year. Apparently, the union chose instead to spend its money on high paid union boss salaries and field trips to adult performing arts establishments.

Much can be learned about unions by simply looking at how they spend their money as disclosed on the annual LM-2 Labor Organization Annual Reports. If you are curious about any particular union and how they spend their money, this information is available online at the Department of Labor's website, <http://erds.dol-esa.gov/query/getOrgQry.do>.



## UNION MEMBERSHIP ON THE RISE

By

[Todd P. Photopulos](#)

While the number of employed workers decreased significantly in 2008, the number of workers who became members of unions increased by nearly 430,000, representing the largest increase since the Labor Department's Bureau of Labor Statistics ("BLS") began keeping records in 1983. This is the second year in a row the U.S. economy has seen an increase in overall union membership. Prior to that time, union membership had seen a steady decline for several years in a row. 36.8% of the public sector workers were members of unions in 2008, up approximately 1% from the prior year. Union members in the private sector increased to 7.6% from 7.5% during the prior year.

Labor proponents are certain to use this increased trend of unionization to argue for the passage of the Employee Free Choice Act. Significantly, union advocates point to the increase in average wages for union members compared to non-union workers. In 2008, the median weekly earnings for full-time union workers rose from \$863 per week in 2007 to \$886 per week in 2008. In contrast, the median weekly earnings for non-union workers rose from \$663 to \$691. California remained the highest unionized state.

BLS found that nearly half of all United States union members lived in only six states: California, New York, Illinois, Pennsylvania, Michigan, and Ohio. By race, African-American workers represented the highest percentage of union membership at 14.5%, followed by white workers at 12.2%, and Asian and Latino workers at approximately 10.6% each.



## **PRESIDENT OBAMA SIGNS ANOTHER PRO-UNION EXECUTIVE ORDER**

**By**

**[Todd P. Photopulos](#)**

On February 6, 2009, President Obama signed an Executive Order encouraging federal agencies to consider requiring that contractors use project labor agreements on a project-by-project basis for federal construction projects of \$25 million or greater. Project labor agreements normally require that all contractors and their sub-contractors be part of a project labor agreement with unions. The unions then set the terms for the wages and work rules for those projects.

This initial Executive Order does not contain a strict requirement for use of project labor agreements on any construction project. However, in 180 days, the Office of Management and Budget, in conjunction with the Department of Labor, is to provide its recommendation on whether the Order should be expanded.

The requirement or non-requirement of project labor agreements has been lobbied back and forth depending on administrations for several terms. The first George Bush's administration precluded the use of project labor agreements that denied opportunities to open shop employers or otherwise discriminate against non-union workers. President Clinton then reversed this Order. President George W. Bush in 2001 then reversed President Clinton. Now, it is the Democrat's turn to resurrect the project labor agreement as the preferred mechanism for federal construction contract projects, albeit with greater significance given the stimulus package rolling out the largest-ever federal spending spree.



# WORKPLACE

## **ROBERT DENIRO'S RESTAURANT HIT WITH \$2.5 MILLION CLAIM BY DISGRUNTLED WAITSTAFF IN TIP POOLING CLAIM**

**By**

**[Graham W. Askew](#)**

Wage and hour lawsuits are all the rage in the restaurant industry. Late last month a class of workers who sued an upscale sushi restaurant chain co-owned by Robert DeNiro agreed to settle their claims for \$2.5 million. Filed by two waiters, the suit alleges the restaurant chain violated state and federal law by requiring service employees to pool their tips and letting managers and non-service employees partake in the tip pools. It is just one example of the numerous similar wage and hour lawsuits currently pending against the restaurant industry around the nation.

Under the Fair Labor Standards Act, employers are required to pay their employees a specified minimum wage. However, if employees receive customer tips during the course of their employment, the employer may be able to take a “tip credit” against their hourly wages. Certain requirements must be met to be eligible for the tip credit. First, the employer must notify the employees of the requirements of the law regarding minimum wages and of the employer’s intention to take the tip credit. Second, all tips given to the employees must actually be received by them.

The recent frenzy of successful litigation has focused on the second element. Only those employees working in occupations which customarily and regularly receive tips can tip pool. All others are specifically excluded. If a court finds that a tip pool is invalid, the employer is disqualified from taking the tip credit and must pay its employees the full minimum wage for the relevant time period. The period in question can extend back for years and can be financially devastating. Even for those employers outside the restaurant industry, the currently pending wage and hour lawsuits based on tip pooling are just another example of how creative plaintiff’s attorneys have made “doing things as they always have been done” a dangerous proposition for any employer.



# WORKPLACE

## **TELLERS BRING FAIR LABOR STANDARDS ACT ACTION AGAINST FINANCIAL GIANT**

**By**

**[Graham W. Askew](#)**

Apparently not dissuaded by the economic downturn, two bank tellers recently brought a collective action lawsuit against Bank of America contending that the financial giant failed to pay them and other employees overtime wages mandated by federal law.

At Bank of America, like many other financial institutions, bank tellers are classified as “nonexempt” employees under the Fair Labor Standards Act. They are therefore entitled to one and one-half the regular rate in overtime compensation if they work more than forty hours per week. The bank tellers contend that Bank of America is trying to circumvent the Fair Labor Standards Act in order to avoid paying them the money owed. The Complaint provides as follows:

In particular, [Bank of America] requires such persons to be present at work and perform work, including both before and after their scheduled shifts, but fails to pay them overtime accordingly. Also, [Bank of America] requires such persons to perform work tasks during meal break time that is deducted from their pay. Doing so denies such persons overtime pay and is in direct violation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*

The Complaint further alleges that:

[Bank of America] erases or modifies bank tellers’ recorded hours to eliminate hours worked in excess of 40 per work week, and/or defendant provides ‘comp time’ to tellers in lieu of paying overtime hours worked in excess of 40 per work week.

The bank tellers are demanding injunctive and declaratory relief as well as attorney fees, back compensation and damages as a remedy.

It is not yet determined whether or not the bank tellers will be successful in the lawsuit against Bank of America. It is important, however, that other financial institutions be especially careful not to do anything that runs afoul of the Fair Labor Standard Act. It is highly likely that similar collective action lawsuits will be filed against other financial institutions within the next year. Any savings that may result by blindly testing the limits of what is allowed under the Fair Labor Standards Act could be dwarfed by a huge potential damage award. Please do not hesitate to contact Butler Snow with any questions regarding the Fair Labor Standards Act and to determine whether your company’s current practices expose it to liability.



## **E-VERIFY RULE DELAYED UNTIL MAY 21**

**By**

**[Todd P. Photopulos](#)**

The U.S. government pushed back the E-Verify date for federal contractors until May 21, 2009, to give the new administration to review the new requirement. The pushback is the result of a lawsuit filed in December 2008 by the U.S. Chamber of Commerce and other trade groups challenging the rule. Originally, the parties to the lawsuit reached a deal delaying its implementation until February 20.