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Department of Labor Issues New FMLA Rules

by **Todd P. Photopoulos**

On November 17, the Department of Labor issued 750 pages of final revised regulations for the Family and Medical Leave Act. The FMLA was originally passed in 1993 during the Clinton Administration. This is the first major regulatory update in more than thirteen years. The regulations implement statutory amendments authorizing military leave which were originally signed into law in January by President Bush. The regulations also address several other areas of the FMLA, with the hope that the new rules will help improve communications between employees, employers, and healthcare providers to make the FMLA operate more smoothly. The new regulations will go into effect on January 16, 2009. The following are some of the highlights of the changes found in these new regulations.

FMLA MILITARY REQUIREMENTS

The new regulations implement the active duty and military caregiver leave provisions of the FMLA. Essentially, the new military leave laws give eligible employees the right to take up to 26 weeks of FMLA leave to care for a family

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member in the Armed Forces who is injured or becomes ill while on active duty and allow eligible employees to take up to 12 weeks of FMLA leave for a "qualifying exigency" that arises because a family member is in the Armed Forces or is called to or notified of pending active duty.

Caregiver Leave

The new regulations allow an eligible employee who is the spouse, son, daughter, parent, or "next-of-kin" of a "covered service member" to take up to 26 work weeks of leave during a 12-month period to care for the service member who is on the temporary disability retired list, who has a serious injury or illness incurred in the line of duty, or is otherwise in an outpatient status as a result of military service. "Next-of-kin" is the nearest blood relative other than a spouse, parent, son, or daughter.

Qualifying Exigency Leave

This new military leave entitlement is intended to help families of members of the National Guard and Reserves manage their affairs while their family member is on or being deployed to active duty in support of a contingency operation. This new entitlement gives the normal 12 work weeks of FMLA job protected leave to eligible employees to use for certain listed "qualifying exigencies" that arise out of the fact that the military member is on active duty or is being called to active duty status in support of a military operation. Essentially, eligible employees will be able to take leave for a specific and exclusive list of reasons to take care of various personal issues associated with a relative's call to duty. Eligible employees include those whose spouse, son, daughter, or parent is on active duty or is being called to active duty status for one of the following qualifying exigencies: 1) short-notice deployment; 2) military events and activities; 3) childcare and school activities; 4) financial and legal arrangements; 5) counseling; 6) rest and recuperation, 7) post-deployment activities; and 8) additional activities which arise out of active duty, provided that the employer and the employee agree on the timing and duration of such leave.

New Military Caregiver Leave Certification Forms

To allow employers to obtain certification from a healthcare provider of the covered service member, the DOL is developing an additional certification form (WH-385). If you would like to see a prototype of the DOL's new form, please feel free to contact me. While an employer may seek authentication and/or clarification of the medical certification for military caregiver leave, the regulations do not allow for second and third opinions or re-certifications for a covered service member.

THE RAGSDALE DECISION/PENALTIES

The regulations address a number of technical and regulatory changes to reflect current law in response to the U.S. Supreme Court's 2002 decision, *Ragsdale v. Wolverine Worldwide, Inc.* In *Ragsdale*, the Court struck down the DOL's regulations that provided a "penalty" for employers who did not designate an absence as FMLA leave by not allowing the employer to count that absence toward the employee's FMLA leave entitlement without regard to the harm or injury that may or may not have been suffered by the employee because of the notice deficiency. The employee plaintiff in *Ragsdale* had sought an additional 12 weeks of FMLA-protected leave after his employer had already provided 30 weeks of leave because the employer had not specifically designated those 30 weeks as "FMLA" leave. The regulation clarifies that an employer may only be liable for an additional 12 weeks of FMLA leave in such circumstances if the employee can establish suffering an individual harm because of the employer's failure to follow the notification rules.

LIGHT DUTY

The new regulations state that an employee who voluntarily accepts a light duty assignment while eligible for FMLA leave maintains FMLA reinstatement rights to the original or equivalent position. The right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year. The time spent on a light duty assignment, however, does not use up the employee's entitlement to 12 weeks of FMLA leave.

WAIVER OF RIGHTS

A recent decision out of the U.S. Court of Appeals for the Fourth Circuit caused problems for employers' ability to settle FMLA claims with employees. In its decision, the court prohibited employees from prospectively or retroactively waiving their rights. The final rule continues to prohibit employees' waiver of prospective (in-the-future) FMLA rights, but clarifies that employees may settle claims for alleged past FMLA violations without approval of the court or the Department of Labor.

SERIOUS HEALTH CONDITION

The final regulations keep the six individual definitions of "serious health condition" for FMLA coverage and provide guidance on three related issues.

Continuing Treatment

One way an employee may establish a "serious health condition" is to show three consecutive, full-calendar days of incapacity plus "two visits to a healthcare provider." The prior regulations left the time period for those visits open-ended. The new regulations clarify that the two visits occur within 30 days of the beginning of the period of incapacity, with the first visit taking place within 7 days of the first day of incapacity.

Continuing Treatment

Another way to establish a "serious health condition" under the current regulations is for an employee to have three consecutive, full-calendar days of incapacity plus a "regimen of continuing treatment." The final rule clarifies that the first visit to the healthcare provider starting the period of "continuing treatment" must take place within 7 days of the first day of incapacity.

Chronic Serious Health Conditions

Under current regulations, the number of visits of continuing treatment under this category of serious health condition is open-ended. The new regulations require that to establish a serious, chronic health condition, the employee must have at least two visits for treatment per year to maintain a chronic condition.

SUBSTITUTION OF PAID LEAVE

While the FMLA currently does not require paid leave, the law allows employees to take accrued paid vacation or other personal time concurrently with their FMLA. The current regulations apply a different procedural requirement to the use of vacation or personal leave than are applied to the use of medical or sick leave. Under the new regulations, all forms of paid leave offered by the employer will be treated the same regardless of the type of leave submitted. Also, under the new regulations an employee choosing to use paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer's leave policy that apply to other employees for non-FMLA leave. The employee remains entitled to unpaid FMLA leave if the employee does not comply with the employer's conditions for taking the paid time off, and the employer may waive any procedural requirements for taking any type of paid leave if it so chooses. Examples of employer policies restricting the use of paid time off include prohibiting the use of paid time off for periods when a facility is shut down, requiring the use of sick days in full-day increments, requiring advance notice for the use of paid time off, restricting the use of paid vacation during peak periods, and so forth.

PERFECT ATTENDANCE AWARDS

Many employers give perfect attendance bonuses or awards to reward dependable employees. Under current law, an employee may obtain a perfect attendance award for a period during which the employee was absent from work because of FMLA leave. Many employees and employers find this unfair. The final rule changes this requirement by allowing employers to deny "perfect attendance" awards to employees who do not have perfect attendance because they were absent on FMLA leave, provided the employer treats non-FMLA leave in the same fashion.

EMPLOYER NOTICE OBLIGATIONS

General Notice

The final rule consolidates all employer notice requirements into a "one-stop" section of the regulations. Employers will be required to provide employees with a general notice about the FMLA. The Department of Labor has drafted a proposed general notice form which must be posted in conspicuous places that are accessible to both applicants and employees. If the employer has a handbook, then the employer must also distribute the general notice to employees by including it in the handbook for all new hires. Employers are also allowed to use electronic posting and distribution of the general notice.

Eligibility Notice

Under current law, an employer is required to provide notice to an employee who applies for FMLA leave within 2 days of the application informing the employee whether they are eligible to take the FMLA leave. The new regulation will allow employers to provide this eligibility notice within 5 business days after the first time the employee requests FMLA leave for a particular qualifying reason. The Department of Labor has developed a new prototype eligibility notice. If the employer determines that the employee is not eligible, the notice must state at least one reason why it found the employee ineligible for FMLA leave. Please feel free to contact me if you would like a copy of the proposed new notice.

Rights and Responsibilities Notice

Each time an employer is obligated to provide an eligibility notice to an employee, it must also provide a "rights and responsibilities notice." The DOL has drafted a prototype rights and responsibilities notice that is combined on the same form as the prototype eligibility notice. The rights and responsibilities notice informs the employee of the employer's designated 12-month FMLA year (e.g. calendar year, fiscal year, or rolling 12-month year). This notice will also inform employees whether a certification or other documentation will be required, and whether the employer will require that the employee use paid time off benefits while on FMLA leave.

Designation Notice

Once an employer has determined that an employee is eligible for FMLA leave, the employer must then provide written "designation notice" to the employee formerly designating the leave as FMLA-qualifying. Conversely, the employer must inform the employee by serving a designation notice if the request does not qualify as FMLA leave. Again, the DOL has developed a prototype designation notice, and this notice must be given within 5 business days after the employer makes its determination. If the leave qualifies as FMLA leave, the designation notice must inform the employee the amount of time that will be counted as FMLA leave, if known. If not known at that time, the designation notice must be provided upon the employee's request, but no more often than once every 30 days. The designation notice also must inform the employee whether a fitness-for-duty certification will be required, and may inform an employee whether a second or third opinion is being required. The notice must also tell the employee if the submitted healthcare provider certification is incomplete or insufficient. While certainly adding to the paperwork required for employers, this designation notice in all likelihood will offer some protection by forcing employer representatives to specifically address and inform employees about each of these issues. FMLA litigation most often arises out of miscommunication and misunderstandings dating back to how the employer initially designated the leave. This new form will hopefully help prevent misperceptions of the leave. Of course, feel free to contact me if you would like a copy of this prototype form.

EMPLOYEE NOTICE REQUIREMENTS

One of the major frustrations under the current FMLA rules occurs where employees provide little to no advance notice of the need for FMLA leave. The final rules seek to clarify employee notice requirements.

Timing of Notice

For foreseeable leave, employees must still provide at least 30 days' advance notice, unless 30 days' advance notice is not possible. If not possible, then the notice must be given "as soon as practicable." The definition for "as soon as practicable" under the new rules will be the same day or next business day. If leave is unforeseeable, the employee must give notice of the need "as soon as practicable." For unforeseeable leave, this employee notice period will be the reasonable time frames established by the employer's usual and

customary leave and absence notification policies. Thus, it is a good time for employers to be looking at their current attendance and leave policies to determine what notice is required for non-FMLA leave absences. Under the new regulations, an employee's failure to provide timely notice will allow the employer to count any such absences during the delay as non-FMLA absences. The employer may then apply its current attendance policies to those absences.

Method of Notice

Unless it is an emergency situation or a need for unforeseeable leave, the employer may implement a policy requiring written notice for foreseeable leave. The new regulations also allow employers to require that the leave be requested from an individual designated by the employer or by calling a designated phone number. This will allow the employer to retain greater control over the FMLA leave process by requiring employees to direct foreseeable, non-emergency FMLA leave to an individual within the organization who is trained to handle such issues. If an employee fails to comply with such a policy, the FMLA leave may be delayed, and the employer could count absences during the delay as non-FMLA absences.

Content of Notice

For employees requesting FMLA-qualifying leave for the first time, the new regulations make clear that the employee does not need to specifically mention FMLA leave. Rather, the employee must provide sufficient information for the employer to "reasonably determine" whether FMLA leave might apply to the specific leave requested. Merely "calling in sick" will not be enough to trigger FMLA leave. If, however, the employee subsequently requests additional leave for a particular qualifying condition which had previously been approved as FMLA leave, the employee must specifically reference the prior qualifying reason, or state the need for "FMLA leave."

MEDICAL CERTIFICATION PROCESS

Content and Clarification


The Department of Labor has developed two new prototype forms for medical certification. One form is used for certifying the employee's own serious health condition. The other form certifies the serious health condition of a family member. Often, medical certification forms come back incomplete or illegible. There may also be a concern about the authenticity of the medical certification. Because of concerns about medical privacy and the impact of the Health Insurance Portability and Accountability Act, the new regulations require that an employer's representative contacting the employees' healthcare provider for clarification must be a healthcare provider, human resource professional, leave administrator, or a management official. Under no circumstances, however, can that employer representative be the employee's direct supervisor. Employers may also not ask healthcare providers for additional information beyond that required by the certification form. Thus, once the employer receives a complete and sufficient certification, the employer may now authenticate the form without the employee's consent by direct contact with the employee's healthcare provider. If the employer has the employee's consent, the employer may also obtain clarification of any vague or unresponsive information contained on the certification form. If the employee's healthcare provider will not complete or clarify the certification without a HIPAA authorization from the employee, the employer cannot require the employee to provide the authorization. The employee, however, will lose FMLA protection if she fails to do so. The final rule states that if an employer finds the medical certification to be incomplete or insufficient, the employer must notify the employee in writing what information is lacking and give the employee 7 days to cure the deficiency. The goal of these changes is to improve FMLA communication while balancing the need to protect the privacy of workers, and to hopefully avoid employees being denied FMLA leave on a technicality.

FITNESS FOR DUTY CERTIFICATIONS

Many employers require that employees returning from any type of medical or sick leave provide a "fitness-for-duty" certification from a healthcare provider before resuming work. Under current law, FMLA regulations allow employers to enforce these policies provided they are uniformly applied to all medical leaves, not just FMLA leaves. The new regulations make two changes to the fitness for duty process. First, an employer may require that the

certification specifically address the employee's ability to perform the essential functions of the job. Second, where an employee takes intermittent leave, an employer may request a fitness for duty certification before the employee may return to work if there is a reasonable job safety concern about the employee's return to that position.

CONCLUSION

The above are some of the highlights from the nearly 750 pages of regulations issued by the Department of Labor. Obviously, the "devil is in the details," and not every detail can be captured in a concise summary. The new regulations provide significant new employee benefits in the military leave category. This also provides some relief to employers who have been struggling with the disruptions caused by the FMLA process. Ultimately, it is an imperfect piece of legislation, although the new regulations do make implementation more "workable" for employers. 2009 will also likely see attempts by the new administration to further expand FMLA coverage. For instance, President-elect Barack Obama pledged on the campaign trail that he would apply FMLA to businesses with 25 or more employees, and would also seek to expand leave for elderly care, domestic violence, and children's educational programs. We will, of course, keep you apprised of further developments in this area. [back to top](#) 


The Arbitration Fairness Act Potentially Dooms Pre-dispute Arbitration Agreements

by [Graham W. Askew](#)

With the election of Senator Obama to the presidency, and Democrats picking up as many as 20 seats in the House and at least five seats in the Senate, the new balance of power in Washington is likely to bring dramatic change in the areas of labor and employment law. One piece of legislation likely to be enacted is the Arbitration Fairness Act. The Arbitration Fairness Act amends the Federal Arbitration Act to make any pre-dispute arbitration agreement invalid and unenforceable if it requires arbitration of: (1) an employment, consumer or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights or regulate contracts between parties of unequal bargaining power. The bill also provides that the validity or enforcement of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

The impact of the Arbitration Fairness Act on employers will be substantial. Many employers have adopted mandatory dispute resolution programs which include the requirement that causes of action filed by an employee against his or her employer be submitted to binding arbitration. Such programs avoid the time and expense involved in litigation as well as the potential of an extreme jury verdict. In an effort to address the imbalance of power in the employment relationship, the Arbitration Fairness Act will invalidate the mandatory dispute resolution programs flooding a channel of disputes, including frivolous complaints, into the state court system.

It is not recommended that employers prematurely discard their mandatory dispute resolution programs. Although it most likely will be enacted, the Arbitration Fairness Act is not yet law. Carefully crafted pre-dispute arbitration agreement programs are routinely upheld by the courts consistent with the existing policy in favor of arbitration.

Clients are encouraged to contact Butler Snow for more information on the Arbitration Fairness Act or for advice on developing a mandatory dispute resolution program likely to be upheld if challenged under the pending legislation. [back to top](#) 

Big Labor Expects Big Payoff in 2009

by [Todd P. Photopoulos](#)


Big labor was "all in" on last month's presidential and congressional elections. Now they are counting on an Obama administration to back its agenda in a landmark congressional battle in 2009. Collectively, unions put

more than \$400 million on the line for the November elections, and claim to have had a decisive impact by their voter turnout efforts for President-elect Obama. At the top of big labor's "wish list" for the New Year is the Employee Free Choice Act, which was discussed in detail in the [October edition of Workplace](#). According to AFL-CIO President John Sweeny, EFCA is the "most important issue that we have." Big labor is pushing for EFCA to be introduced in the first 100 days of Obama's administration.

Ironically, the current downturn in the economy could provide a welcome stumbling block for labor's attempts to push this legislation through, at least in early 2009. As economic problems in Detroit escalate, growing attention is being focused on the problems that big labor have had in holding back American competitiveness in the auto industry. Certainly those types of arguments will be brought forth during any congressional debate on EFCA.

EFCA passed easily in the House earlier this year, but failed to get off the floor of the Senate. Since the Democrats failed to win a filibuster-proof majority seat in the Senate, a compromised EFCA bill is more likely to be passed. For example, EFCA could be changed from a pure card check to a shortened five-day election period following the filing of a petition by a union for representation of a company's employees. Under current labor law, an election campaign period usually lasts about 45 days from the filing of the petition to the actual election. During this time, employers are able to educate both their managers and employees about the dangers of unionization and the concerns about the particular union seeking to represent the employees. Compressing that time period to only 5 days, while better than a true card check, would still significantly undermine an employer's opportunity to respond to being blindsided by a union election. In less than a week, an employer's entire business could dramatically change under this legislation.

While it is impossible to tell at this point what form EFCA will take, it is likely that 2009 will see some form of significant change to labor laws making it much easier for unions to organize. Given the amount of money put in by big labor, the pressure will be great on the Obama administration to push this type of legislation. While in the past employers have had the luxury of mobilizing a campaign after the fact, when and if EFCA is passed, their ability to do so will be dramatically undercut. Employers would be well-advised, therefore, to take steps now to lessen their exposure to such a campaign.

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Former Labor Secretary Ray Marshall Concludes Hearing On Placement of UHW-West Under Trusteeship

by [Bart N. Sisk](#)

Earlier this year, the SEIU began an investigation and hearings into alleged financial improprieties by the United Healthcare Workers - West (UHW-West). The SEIU scheduled hearings in light of allegations of financial malpractice and fraud by the UHW-West's leadership that involved diversion of millions of dollars of Union monies and property. The SEIU selected former Labor Secretary Ray Marshall to preside at the hearing. The hearing opened on September 26 and a second round of hearings was completed on November 13. The issue to be decided is whether the UHW-West should be placed in trusteeship. Marshall is expected to provide his findings and recommendations in early 2009.

In the meantime, the United Healthcare Workers - West asked its members to boycott an advisory vote being held by the SEIU on the potential reorganization of healthcare workers in three California locals.

The SEIU said the advisory vote was part of its long-term effort to reorganize and modernize the Union and asked members to vote for one of two options. Under the first option, home care and nursing home workers, currently represented by three locals in California, would be merged into one state-wide union. The remaining members, such as acute care hospital workers, would be represented by the UHW-West. Under the second option, all members of the three locals would be merged into one local union. Under this option, the UHW-West no longer exists. The ballot did not have an option to leave the current structure in place.

While the outcome of the vote is not binding, it will be considered by the SEIU's International Executive Board when it makes its decision on reorganization. Contending the advisory vote was a "sham," the UHW-West encouraged union members to boycott the vote. The UHW-West claims either option would destroy the UHW-West and contends that the advisory vote is part of the SEIU's overall strategy to take over the local. According to the SEIU, the advisory vote is unrelated to the issue of whether the International should place UHW-West in trusteeship. The SEIU gave members until December 11 to return ballots, which are now being counted. A decision from the Executive Board is expected early next year. [back to top](#) 📄

Jury Finds NFL Union Must Pay \$28 Million To Retired Players

by [Bart N. Sisk](#)

Herb Adderley was a Hall of Fame cornerback for the Green Bay Packers and Dallas Cowboys. He was also the lead plaintiff in a lawsuit filed against the National Football League Players Association (NFLPA) on behalf of over 2,000 former players. The suit alleged that the union failed to pay retired players royalties due under licensing agreements with makers of video games and other products.

Much of the case centered on Electronic Art's Madden NFL video games and its use of vintage teams, including the Packers and Cowboys. The suit alleged, among other things, that the images of retired players were intentionally scrambled in the video game because the union simply did not want to compensate the retired players.

The jury found that the NFLPA acted contrary to the interests of the retired players and awarded \$28.1 million in damages. [back to top](#) 📄

Nuisance Claim Allowed To Proceed Against Union For Noisy Demonstrations


by [Bart N. Sisk](#)

When a union pickets or handbills at an employer's facility, it usually seeks to draw attention to its cause by shaking noise-makers, blowing whistles, or banging on anything handy. For eighteen days, members of the SEIU appeared outside entrances to the Empire State Building, distributed leaflets and drummed on plastic containers, metal pots, and/or tin cans. These demonstrations lasted for 20-45 minutes or longer. Having heard enough, several tenants filed a state court nuisance action and the Supreme Court of New York issued a temporary restraining order and preliminary injunction restricting the Union from its noise-making activities. The appellate division of the Supreme Court of New York vacated the injunction and concluded that the nuisance action was pre-empted by federal labor law. However, upon appeal to the New York Court of Appeals (New York's highest court), the Court reversed the appellate division's decision and ruled that the Union properly was enjoined from banging on metal pots and such. The Court found, "The tort of private nuisance, much like the tort of trespass, has historically been governed by state law. It cannot be said that Congress, by enacting the NLRA, intended to preempt states from protecting its citizens from obnoxious conduct." [back to top](#) 📄

SEIU Imposes Lifetime Ban On the Former President Of Its Largest California Local

by [Bart N. Sisk](#)

After allegations of financial misdeeds by Tyrone Freeman, then president of United Long-Term Care Workers Local 6434, the SEIU's largest local union in California, the SEIU removed Freeman from office and placed the local in trusteeship. According to the SEIU, its investigation revealed that Freeman

misappropriated over \$1 million of union funds by, among other things, paying firms operated by family members including his wife, charging the union for expenses related to his wedding, and spending thousands at the Grand Havana Room, a Beverly Hills cigar club. On November 26, 2008, SEIU President Andy Stern imposed a lifetime ban on Freeman. The ban prevents Freeman from being a union member or holding any position in the union. The SEIU has also ordered Freeman to repay about \$1.1 million and return misappropriated local funds. [back to top](#) 

U.S. Chamber of Commerce Challenges Arguments In Favor Of Employee Free Choice Act

by [Bart N. Sisk](#)

The U.S. Chamber of Commerce has released three "white papers" in response to organized labor's arguments in favor of the Employee Free Choice Act ("EFCA"). The Union Representation Process Under the National Labor Relations Act: Maintaining the Employee Free Choice for Over 70 Years, argues that the "NLRB's secret ballot election process has not been the cause of the decline in union membership among private sector workers in recent decades." Indeed, the win rate for unions in NLRB secret ballot elections has "risen from 48% to 62% since 1985." The report concludes:

The secret ballot election is recognized by federal courts as the best vehicle for employees to render an uncoerced decision about union representation. Anything short of that will send the process of card signing into the back alleys of unregulated, uncontrolled, and un-remediable coercion and intimidation by both sides. Employees, the public, and the "free flow of commerce" will lose if the card check process is permitted to replace the existing process of government-supervised secret ballot elections.

In an opinion piece in the Wall Street Journal, former Senator and past Democratic nominee for President, George McGovern seems to agree. Senator McGovern wrote:


There are many documented cases where workers have been pressured, harassed, tricked and intimidated into signing cards that have led to mandatory payment of dues. Under EFCA, workers could lose the freedom to express their will in private, the right to make a decision without anyone peering over their shoulder, free from fear of reprisal.

Finally, in a December 3, 2008, editorial, The Chicago Tribune argued for strengthening current labor laws but preserving the secret ballot election:

The so-called card-check bill would not protect workers and it would not be "free choice." It would strip away [the workers'] rights to vote in secret, making it more likely they would face intimidation from [union] organizers and other workers. The pressure would be on to check the card, whether or not they actually wanted a union.

The editorial concludes:

The inaptly named Employee Free Choice Act would be good for labor bosses. But it would not be good for laborers.

Passing EFCA remains the top priority for organized labor which continues to push for its passage during the first 100 days of President-elect Obama's term. President-elect Obama was a co-sponsor of EFCA and has promised to see it become law. The white papers may be accessed by clicking [here](#). [back to top](#) 

SEIU Seeks To Organize Bank Workers

by [Bart N. Sisk](#)

Citing the \$700 billion bailout for the banking industry, the SEIU announced its intention to organize bank workers. According to CNN, the SEIU is targeting the following entities:

- Fannie Mae
- Freddie Mac
- Chevy Chase/B. F. Saul
- BB&T
- SunTrust
- Bank of America/Countrywide
- Wachovia/Wells Fargo
- PNC/National City
- Citigroup

In what will be a familiar sound to employers organized by the SEIU, the union claims in these economic hard times, bank workers must have a "voice on the job" and a "seat at the table" where decisions are made.

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NLRB Issues Bargaining Order To Cable Installation Contractor

by [Carlyle C. White](#)


On September 30, 2008, the National Labor Relations Board ("Board") ordered ADB Utility Contractors ("ADB"), a St. Louis based cable installation contractor, to begin the collective bargaining process with the International Brotherhood of Electrical Workers Local 2 ("IBEW") as a result of multiple unfair labor practices that occurred during a 2003 union organization effort. The Board found that ADB committed numerous National Labor Relations Act ("Act") violations in the events leading to the discharge of thirteen union supporters whom amounted to twenty-two percent of the bargaining unit.

In the Spring of 2003, the IBEW initiated union organization talks with several of ADB's fifty-nine employees. After a few meetings, the IBEW obtained signed union authorization cards from approximately fifty-six percent of the bargaining unit. ADB's general manager, the second highest ranking company official, called an employee assembly where he encouraged union supporters to move to unionized companies, threatened discipline for the display of union pins, implied the surveillance of union activities and threatened the loss of jobs and company closure if the workers chose union representation. ADB followed the assembly by sending a letter to all employees that stated unionization would be futile, threatened increased subcontracting and reduced benefits if a union was chosen, and urged union supporters to quit. Subsequently, ADB terminated thirteen union supporters, including eight of which were crew leaders.

The Board refuted the ADB's argument that the eight crew leaders were supervisors, making them ineligible for protection under that Act, and affirmed the finding that the terminations were illegal. ADB had committed hallmark violations in its prompt and severe reactions to IBEW's organization efforts with both oral and written threats. The discharge of the thirteen union supporters, whom were prominent leaders in the campaign, demonstrated that the company's retaliatory actions were not to be taken lightly by employees. As a result, the Board found that a remedial bargaining order was appropriate, because the case involved unfair labor practices that were so "outrageous and pervasive" that normal solutions could not render a fair election process. Another deciding factor was ADB's attempt to introduce fraudulent disciplinary reports and photos against the union supporters who were terminated. Although the offending general manger is no longer with company, the Board noted that even after the passage of five years, the attitude of ADB's owner has remained consistent and several managers that were involved with the illegal conduct during the union effort are still employed. [back to top](#) 📄


\$54 Million Price Tag on Wal-Mart Wage and Hour Class Action

by [Todd P. Photopulos](#)

Nationally and regionally, we continue to see an increase in wage and hour claims. Settlements like this one certainly add fuel to that fire. Last month, Wal-Mart agreed to pay \$54.25 million to settle a class action involving wage and hour claims for approximately 100,000 former and current hourly employees at Wal-Mart and Sam's Clubs stores in Minnesota. In June 2008, the state court judge found that Wal-Mart had violated Minnesota's labor laws more than 2 million times by shortening employees' breaks and intentionally permitting employees to perform duties off the clock at computer-based training terminals. The judge also found that Wal-Mart failed to give employees rest breaks more than 1.5 million times and also failed to maintain accurate time records. Judge Robert King found Wal-Mart initially liable for \$6.5 million for compensatory damages, and set the matter for a jury trial to determine additional punitive damages and penalties. The settlement concludes seven years of litigation and came on the eve of a jury trial set to determine the issues of punitive damages and civil penalties. Rather than go forward with that proceeding, Wal-Mart chose instead to pay more than \$54 million to the class, with a substantial portion of that going to the State of Minnesota for civil penalties. [back to top](#) 

FedEx Pays \$27 Million To Settle Drivers' Lawsuit

by [Todd P. Photopulos](#)

For the past decade, FedEx Ground System, Inc. has been battling its classification of delivery drivers as independent contractors rather than employees. FedEx Ground had consistently and vigorously maintained that its thousands of delivery drivers were independent business owners. As independent business owners, the drivers were not able to participate in FedEx Ground's benefits programs. The lawsuit stemmed over the drivers seeking compensation for expenses incurred on the job, such as truck maintenance, registration, uniforms, fuel, and liability insurance. Sixteen months ago, the state appellate court confirmed the ruling in favor of 203 single route drivers, and in October 2008, the lower court determined the amount of compensation owed to the drivers for the expenses they incurred on the job. FedEx agreed to accept the court judgment awarding \$14.5 million to the drivers to reimburse them for these costs, plus interest, and \$12.5 million for the drivers' attorneys' fees and court costs. The settlement applies only to single route drivers which FedEx Ground has largely eliminated over the past twelve months. A parallel action involving 27,000 current and former FedEx Ground drivers is also pending in federal court in Indiana. [back to top](#) 

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