



Inside This Issue

Practice Spotlight:

Reductions in Force: An Overview ... [more](#)

Labor Beat

Obama Grants Union Wish List by Signing Four Executive Orders ... [more](#)

A Bit of Background on President Obama's Proposed Secretary of Labor ... [more](#)

Starbucks Found in Violation of NLRB During Battle Against IWW ... [more](#)

To Strike or Not to Strike: Update on Vought Aircraft Machinists Strike at Nashville Plant ... [more](#)

Aliens Who Vote for a Union Are Not "Illegal" ... [more](#)

Court Clears Meatpacking Company of Wrongful Termination Claims by Striking Employees... [more](#)

Obama Appoints Wilma Liebman as Chairperson of the NLRB ... [more](#)

Immigration and Compliance

USCIS Delays New I-9 Employment Verification Form... [more](#)

E-Verify Required for Federal Contractors Starting February 20, 2009 ... [more](#)

New Immigration Regulations Issued for Temporary and Agricultural Worker Visas ... [more](#)

President of Military Goods Manufacturing Company to Serve Prison Sentence for Immigration Violations ... [more](#)

Legislative Update

The Arbitration Fairness Act Potentially Dooms Pre-Dispute Arbitration Agreements ... [more](#)

Tennessee Attorney General Issues Opinion on Unpaid Rest Breaks and Meal Periods Under Tenn. Code Ann. § 50-2-103(h) ... [more](#)

President Obama Signs Lilly Ledbetter Fair Pay Act ... [more](#)

Discrimination Digest

EEOC Expects Increased Budget for Increased Enforcement ... [more](#)

Judgment Reversed for Ford Motor Credit in National Harassment Claim ... [more](#)

Court Rejects Claims by Male Janitor Refusing Demands for Sex by Female Supervisor ... [more](#)

Wage Claims

"Top Chef" Gets Cooked for Wage and Hour Violations ... [more](#)

[▶ About Butler Snow](#)

[▶ L&E Group](#)

[▶ Latest News](#)

[▶ Contact Us](#)

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• **[Todd P. Photopulos](#)** is a member of the firm's [Labor and Employment Group](#). His practice is concentrated in the areas of employment litigation, traditional labor issues and business immigration. Todd can be contacted via e-mail at todd.photopulos@butlersnow.com. He is licensed to practice in Tennessee.



• **[Jeffrey A. Walker](#)** is a member of the firm's [Labor and Employment Group](#). His practice is concentrated in the areas of traditional labor law, employment litigation and union organizing campaigns. Jeff can be contacted via e-mail at jeff.walker@butlersnow.com. He is licensed to practice in Mississippi.



• **[Graham W. Askew](#)** is a member of the firm's [Labor and Employment Group](#). His practice is concentrated in the areas of employment litigation, traditional labor law and business immigration. Graham can be contacted via e-mail at graham.askew@butlersnow.com. He is licensed to practice in Tennessee.



• **[Carlyle C. White](#)** is a member of the firm's [Labor and Employment Group](#). His practice is concentrated in the areas of employment litigation and traditional labor law. Carlyle can be contacted via e-mail at carlyle.white@butlersnow.com. He is licensed to practice in Tennessee.



• **[Paula G. Ardelean](#)** is a member of the firm's [Labor and Employment Group](#). Her practice is concentrated in the areas of employment litigation and employment disputes. Paula can be contacted via e-mail at paula.ardelean@butlersnow.com. She is licensed to practice in Mississippi.



• **[Bart N. Sisk](#)** is a member of the firm's [Labor and Employment Group](#). His practice is concentrated in the areas of employment litigation and business immigration law. Bart can be contacted via e-mail at bart.sisk@butlersnow.com. He is licensed to practice in Tennessee.





Reductions in Force: An Overview

By Todd Photopulos

Unfortunately, reductions in force have become quite common during the last few months and are expected to continue throughout 2009. Recognizing that each situation is different and that there are no precise formulas that can be applied to every workforce reduction, this article is designed to provide an overview of issues for employers to consider when faced with the need to reduce the number of employees.

Consider other alternatives: Before initiating a RIF, consider whether there are other alternatives which may meet the needs of the business. Hiring freezes, wage freezes, elimination of bonuses, and reduction of hours are alternatives that may provide the relief needed without resorting to employment terminations.

Anticipated impact of RIF: Recognize that a RIF will impact employee morale and divert management's attention from revenue-producing tasks. Further, when business improves, there will almost certainly be additional costs incurred as new employees are hired and trained to do the work of those released during the RIF. In addition, the assumption should be made that legal expenses will be incurred when preparing for and implementing the RIF, and inevitably when defending a claim or claims asserted by those discharged.

Business reasons for a RIF: If a RIF is the best or only option available, carefully document the legitimate business reasons for the RIF. Specific information should be gathered regarding the loss of customers and business, increased expenses, decreased revenues, the loss of product lines, the impact of new competitors on business, and other factors causing harm to the company. Specific business goals should be set to overcome the financial obstacles, with a clear explanation of how the RIF helps to achieve those goals.

When gathering and preparing the information, consideration should be given as to the best manner to communicate the financial status of the business to management and employees, with the assumption that the same information will eventually be presented to a jury.

Implementing a RIF: Before determining how to proceed with the RIF, review employee handbooks, personnel policies and procedures, and other internal documents to confirm that there are no representations in place regarding the manner in which termination decisions will be made. Collective bargaining agreements and individual employee contracts must also be considered. If there are no policies or procedures in place, a decision must then be made regarding the process to be followed in implementing the RIF.

Selection Factors: Decisions that are based on objective rather than subjective criteria are typically the easiest to defend. For example, discharging all people in a certain position rather than selecting only certain people in the position for termination may eliminate arguments that the decision was discriminatory. In reality, however, most struggling businesses prefer to retain the best employees and release the weaker employees when trying to survive an economic slump. Therefore, while basing decisions on seniority, time in position, attendance, education, training, and other objective factors may be easier to defend, in order to survive, employers consider subjective factors such as performance, initiative, critical skill sets, potential ability to perform other tasks and other less quantifiable factors.

If performance is a factor to be considered, the employer must decide whether to rely on past written performance reviews, oral representations of supervisors, or whether current reviews should be conducted. If current reviews are conducted, the reviewers should be carefully selected and trained to apply the same standards to all employees. In any event, when performance ratings are used as a selection criteria, there is a risk that the rating will be challenged based on a reviewer's perceived biases or retaliatory motives.

If a decision is made to consider the employees' potential to perform other tasks, consider whether there is sufficient information to make this assessment. Often employers are not aware of employees' educational background or prior work experience. To make certain that there are

no surprises, consider requiring employees to submit updated resumes and/or conducting interviews to assist in selecting the best-qualified candidates.

Selection of Decision Makers: Employers may or may not have flexibility in selecting the best persons to make the RIF decisions. When possible, the decision makers should be comprised of a diverse group. Consideration should be given as to the decision makers' credibility with employees as well as their ability to present the facts supporting the selection decisions to a jury. Past claims of discrimination or harassment against a decision-maker may affect his credibility or have an impact on his motives.

Training of Decision Makers: Proper training of the decision makers cannot be overemphasized. Often, time is of the essence when conducting RIF's and employers are anxious to implement and end the process. The time taken to train decision makers can provide big dividends if the selection decisions are later challenged.

Despite prior training, the decision makers should be retrained on legal obligations arising under federal and state discrimination statutes such as Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Family and Medical Leave Act. Statutes prohibiting retaliation, including the Fair Labor Standards Act and those protecting whistleblowers, should also be discussed.

Discussions held during selection meetings must be limited to issues that are job-related. Informal cooler discussions should be discouraged or prohibited. Decision makers should also be reminded that comments intended as jokes could later haunt both them and the company. In sum, the decision makers are being given a serious responsibility and they should understand the significance of their actions and the importance of following the protocols and procedures established by the company.

Emails warrant specific discussion during the training session. In addition to informal or "off the record" discussions, surprisingly, managers often think that emails are a "private chat forum." Consideration should be given to inviting someone from the information technology

department to discuss the company's back up data for "deleted" emails, the ability to conduct searches for emails referencing key terms, the cost associated with such searches. Nothing should be written in an email that the company would not want to be repeated in a courtroom.

Email / Document Protocol: Due to the foregoing, consider discouraging email communications regarding the RIF. Special templates for memoranda regarding the RIF can be prepared with specific directions to provide copies of the memoranda to a Human Resources manager or other designee responsible for reviewing and maintaining copies of all correspondence regarding the RIF. Although this could be a burdensome process, providing ongoing oversight of communications related to the RIF may enable the company to catch and correct problems before bad discharge decisions are made.

Review of Decisions: In some instances, it may be appropriate to appoint a team to review the selection decisions of various decisional units. Again, diversity should be considered when selecting the team members. Persons who may be familiar with confidential complaints of harassment, unfair pay, or other protected activity should also be included on the team, as well as legal counsel.

To assist in analyzing the decisions, the review team should have access to information such as the following: seniority with the company, time in the position, wages, age, gender, race, FMLA or other protected leave time, and specific criteria used in the selection process such as attendance, performance ratings, etc. This information should be provided for those selected for termination, as well as for those chosen to remain with the company.

Depending upon the size of the RIF, it may also be appropriate to conduct a disparate impact analysis for legal counsel's review before conveying the final decisions.

Communicating Decisions to Employees: Information provided to employees should be scripted to ensure that it is accurate and consistent. Two managers should be involved in employee termination meetings to ensure that there are at least two witnesses to the discussion. In addition, the meeting should be documented with reference to any comments made by the employee or any unusual conduct or behaviors noted.

Communicating Decisions to State and Local Authorities: The Worker Adjustment and Retraining Notification Act (29 USC § 2101) provides that 60-days notice of a layoff or terminations must be provided to both employees and certain local and state authorities in certain situations.

Severance Agreements and other Termination Documentation: Determine whether severance pay is required pursuant to any company plan or policy. If severance pay is offered in an amount beyond that which employees are otherwise entitled, consider obtaining a release of any claims the employee may have in exchange for the additional consideration.

The Older Workers Benefit Protection Act provides that when an employer is implementing a termination program, to obtain a valid release of a claim of age discrimination, the waiver must meet certain requirements such as the following: it must clearly identify the claims waived, provide 45 days for the employee to consider the release, provide a 7-day revocation period after the release is signed, and must advise the employee to consult with legal counsel before signing the release. The OWBPA also requires employers to disclose certain information to employees regarding the ages of those selected for termination as well as those retained. Because the requirements are very specific and must be complied with in full for a waiver of an age discrimination claim to be valid, legal counsel should be consulted when preparing the disclosures.

Post-RIF Considerations: Consider providing assistance to those employees displaced due to the reduction in force. Potential offerings include employee counseling, outplacement assistance, resume preparation, and training for job interviews. These relatively inexpensive measures can provide good will as well as assisting in the mitigation of damages if an employee does choose to sue the company.

Procedure for Call Backs: Finally, in the event that the company's condition improves and more employees are needed, the company should consider implementing a process for rebuilding its workforce. Generally, it is best to put the burden on the displaced employees to check the employer's website or HR job line to determine whether positions are available and to

apply if interested in an open position. If a more proactive approach is preferred, make certain that the process is fair and consistent with consideration given to the same factors used during the termination process.

Reductions in force are painful for all involved. Proper planning and analysis on the front end, however, can make the process more bearable for everyone and can help reduce the risk of litigation by displaced employees.



OBAMA GRANTS UNION WISH LIST BY SIGNING FOUR EXECUTIVE ORDERS

By

Todd P. Photopulos

In his first ten days in office, President Obama has set the tone for a new day in the labor and employment arena. First, President Obama signed into law the Lilly Ledbetter Fair Pay Act. Then, on Friday January 30, President Obama signed four executive orders that were at the top of Big Labor's "wish list." As was reported in earlier editions of Workplace, organized labor put in more than \$400 million into 2008's campaigns. President Obama signed the executive orders flanked by union leaders who had been visiting the White House on two consecutive days.

President Obama is delivering on his campaign pledge for a pro-labor agenda despite the nation's economic woes and the spotlight that has been placed on the costs of unionized labor on America's competitive advantage, particularly in the automobile industry. While President Obama said that the economy is a "continuing disaster" for families, at the White House signing ceremony President Obama said that he would nonetheless be reversing several of President Bush's labor policies making union organizing easier. President Obama said, "we have to reverse many of the policies toward organized labor. I do not view the labor movement as part of the problem. To me, its part of the solution. You cannot have a strong middle class without a strong labor movement." As he signed a series of executive orders, President Obama pledged to "level the playing field" for labor unions in their "struggle with management."

The first executive order will no longer allow unionized companies to post signs informing employees that they have a right to decertify their union if they are dissatisfied with

the level of representation that the union is providing. The President rationalized this decision by noting that non-union businesses are not required to post signs letting workers know they were legally allowed to vote for a union. Of course, this belies the fact that unions are there to promote membership in the first place and certainly do all they can to get that message across during organizing drives. Unfortunately, the window for decertifying or "kicking out" a union is small, and the process is technical. President Obama's executive order will virtually eliminate any communication an employer may have with its workforce on how to remedy their dissatisfaction over an ineffective union. In other words, it will become much easier for a union to get in, and much harder for workers to kick the union out.

President Obama's next executive order will prevent federal contractors from being reimbursed for expenses that were intended to influence workers' decisions to form unions or engage in collective bargaining. Put another way, President Obama would prevent federal contractors from using money from the federal contract to fight against union organizing efforts. If you want to be a part of the big wave of federally funded stimulus spending, then you may have to agree to remain silent in the face of union organizing efforts. A third executive order signed by President Obama will require federal vendors receiving more than \$100,000 in contracts to post workers' rights under the National Labor Relations Act. The final executive order will require service contractors at federal buildings to offer jobs to qualified current employees when the contract changes to a new contractor.

President Obama signed these executive orders after meetings on two consecutive days with union leaders at the White House. Vice President Joe Biden echoed President Obama's pro-labor sentiments, saying "over the last one-hundred years, the middle class was built on the back of organized labor. Without their weight, heft and their insistence starting in the early 1900's, we

wouldn't have the middle class we have now in my view. So I think labor getting a fair share of the pie is part of it." This dramatic departure from the Bush era labor policies should come as no surprise, especially given the more than \$400 million that organized labor put into the 2008 campaigns. Labor unions have been lobbying the Obama administration to repeal scores of executive orders, with big labor giving the Obama White House their top ten executive orders they wanted to see dismantled quickly. President Obama has certainly given big labor a jump start on their New Year's wish list.



A Bit of Background on President Obama's Proposed Secretary of Labor

By Jeffrey A. Walker

President Obama's nomination of U.S. Representative Hilda Solis to become Secretary of Labor may prove to be the first of many aggressive moves by the incoming administration to expand workplace protections for employees. Representative Solis, a California Democrat whose House District encompassed most of East Los Angeles, is a longtime and well-known advocate for organized labor and the employment rights of aliens. A strong supporter of the proposed Employee Free Choice Act, Representative Solis' website advocates that "[o]nly by organizing immigrants and allying with their cause can we ensure all worker [sic] receive fair and equal compensation." According to the Center for Responsive Politics website, OpenSecrets.org, four of Representative Solis' five top 2007-2008 contributors were labor unions. The Los Angeles Times has reported that "[a] Congressional voting analysis conducted by the AFL-CIO showed that she voted with organized labor 100% of the time last year."

Employers should expect substantial changes to regulatory and enforcement actions by the U.S. Department of Labor in the event that Representative Solis is confirmed as Secretary. In particular, the Department of Labor's Office of Federal Contract Compliance programs, Wage & Hour Division and Occupational Health & Safety Administration will almost certainly undergo important changes designed to expand worker rights. Indeed, employers should expect that a U.S. Department of Labor led by Representative Solis will make consistent efforts to impose by agency regulation and enforcement activity those portions of President Obama's labor agenda which he is otherwise unable to obtain through Congress.



Starbucks Found in Violation of NLRA During Battle Against IWW

By Carlyle C. White

An administrative law judge ruled that Starbucks violated Section 8(a)(1) and Section 8(a)(3) of the National Labor Relations Act (“NLRA”) by unfairly discriminating against employees who supported the Industrial Workers of the World Union (“IWW”) and through the termination of three employees who sought to unionize several Manhattan Starbucks cafes.

On December 19, 2008, Judge Mindy W. Landlow substantiated allegations that Starbucks interfered with employees’ rights guaranteed by the NLRA. The IWW’s April 2007 complaint alleged that management at four New York City stores: threatened workers’ jobs for engaging in union activity, issued several negative performance evaluations to union supporters, prevented employees from wearing multiple union buttons or using break-room bulletin boards for union related activity and prohibited employees from discussing the union or employment conditions while at work. Starbucks argued that business justifications warranted their actions, however, their position was invalidated when evidence demonstrated that rules used to prohibit union-related conduct were not equally enforced against employees in respect to other non-union activity.

Additionally, Judge Landlow found that Starbucks illegally fired three baristas for their support of the IWW and ruled that the company must offer them job reinstatement with back pay. Starbucks had asserted that the three employees were terminated for legitimate reasons unrelated to their union activity, which included poor work performance, insubordination, and disrespectful conduct.

The dispute between Starbucks and the IWW dates back to March 2006, when the IWW filed unfair labor practice charges alleging that Starbucks attempted to quash unionization by

implementing new anti-union policies, more strictly enforcing old policies, interrogating employees, and retaliating against employees for their union support. Starbucks eventually resolved this complaint with the IWW through settlement, which included reinstating two employees and paying back pay amounting to \$2,000 to several employees who were allegedly threatened for their union activity.

Starbucks officials have denounced the current ruling and stated their intention to appeal the decision to the National Labor Relations Board.



To Strike or Not To Strike: Update on Vought Aircraft Machinists Strike at Nashville Plant

By Carlyle C. White

Employees of the International Association of Machinists' Local 735 ("IAM") have effectively been given a return to work ultimatum by Vought Aircraft in an ongoing strike at the Nashville, Tennessee plant location. The company has stated that permanent workers will be brought in to replace those employees who are unwilling to cross the union picket lines.

As previously reported in our November 2008 Workplace Newsletter, approximately 900 employees went on strike last September at the Nashville plant when collective bargaining talks broke down over a proposed three-year contract. Employees rejected the contract after disagreements primarily arose over a provision that would have removed the existing defined benefit pension plan for employees with less than sixteen years of service and replaced it with a new company sponsored 401(k) defined contribution plan. IAM was also at odds with the company over seniority, insurance and overtime provisions in the contract.

In efforts to keep the plant open during the strike, Vought had been utilizing a workforce comprised of salaried workers and employees from other plants. However, with the strike going into its fourteenth week, Vought Aircraft's vice president Steve Davis mailed striking employees a letter on January 3, 2009, stating the company's intentions to seek permanent replacement workers in order to appropriately continue its business operations.

According to the January 3 letter, Davis stated that Vought respected the employees' rights to bargain collectively and to strike in support of contract negotiations. In addition, the letter informed employees that the company would not discipline or discharge employees for

failing to return to work and outlined the steps necessary to return if they so desired. Since the strike first began, about seventy employees have crossed the picket lines.

Although previous attempts to mediate have failed to result in a contractual agreement, both sides have stated they are willing to continue negotiations. At a December 2008 federally supervised mediation, the parties scheduled a subsequent meeting for January 13, 2009.



ALIENS WHO VOTE FOR A UNION ARE NOT "ILLEGAL"

By Todd P. Photopulos

In September 2005, twenty-one employees at Agriprocessors, Inc. in Brooklyn, New York voted in a union election to be represented by the United Food and Commercial Workers Union (UFCW). Shortly thereafter, Agriprocessors received letters from the Social Security Administration alerting them that 17 of the 21 people who voted in the union election had given the company names and Social Security numbers that did not match. The employer, therefore, refused to bargain with the UFCW, contending that these 17 employees were ineligible to vote as illegal aliens. The National Labor Relations Board rejected the employer's position, and the employer appealed to the Federal Court of Appeals for the D.C. Circuit. Although one of the judges on the three-judge panel for the D.C. Circuit found it "somewhat peculiar" to require the company to negotiate under the National Labor Relations Act about employees it was required to fire under the Immigration Reform and Control Act, the D.C. Circuit found that the National Labor Relations Act did not exclude illegally employed immigrants from the statute's definition of "employee." In so holding, the D.C. Circuit Court of Appeals relied upon a 1984 U.S. Supreme Court decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). That ruling, however, predated the Immigration and Reform Control Act's prohibitions on employment of undocumented workers.

Unfortunately, the U.S. Supreme Court last month refused to hear Agriprocessor's appeal. In filing its petition for the U.S. Supreme Court to review the D.C. Circuit's decision, the employer noted that since the 1984 *Sure-Tan* ruling, the Federal laws toward illegal immigrant workers had undergone a "sea-change." Indeed, at the time the *Sure-Tan* decision was released, there was no such thing as an I-9 Form required for employees to prove their authorization to work in the United States. The National Labor Relations Board opposed the petition to the Supreme Court arguing that Congress has not changed the National Labor Relations Act's

definition of "employee," and that the NLRB has continued to interpret the term as broadly as it did in 1984 when the *Sure-Tan* decision was released.

Now, unfortunately, the employer is faced with being stuck with a union, despite the fact that the overwhelmingly majority of those who voted in favor of the union have now been terminated because they were illegally employed. The bad timing creates an unfortunate result. Had the employer known in advance of the election that these employees were in fact illegal, it would have likely terminated the employees, and they would have been ineligible to vote.



COURT CLEARS MEATPACKING COMPANY OF WRONGFUL TERMINATION CLAIMS BY STRIKING EMPLOYEES

By Todd P. Photopulos

The Sixth Circuit Federal Court of Appeals (which has jurisdiction over Tennessee, Michigan, Kentucky and Ohio) found that management at Fineberg Packing Company did not wrongfully terminate workers who went on strike without the union's permission at Fineberg's meatpacking plant in Memphis, Tennessee. The strike arose when Fineberg began facing increasing production costs which resulted in cutbacks in staff. The plant manager decided to trim employee hours from 35 hour workweeks to 10 to 15 hour workweeks in an effort to avoid layoffs. The plant manager cleared this new policy with the union's representative.

After employees were unable to contact their union representatives, the employees left their workstations to speak to their boss about the reduced hours, congregating at the front of the plant. Plant worker Billy Exum showed the plant manager a list of employees who he said were on strike. The plant manager then told the employees to return to their workstations and that if they did not, he would consider them as having abandoned their jobs. The next day the employees who did not return to their jobs after the strike arrived at Fineberg's plant to find the gates locked, later receiving separation notices indicating that they had voluntarily quit.

In affirming the National Labor Relations Board's decision, the Sixth Circuit ruled that there was no evidence showing the union had approved the strike, noting that the employees had

not told the union representative on the day of the strike that they planned to return to work the next day. Thus, Fineberg lawfully terminated the striking workers.



**OBAMA APPOINTS WILMA LIEBMAN
AS CHAIRPERSON OF THE NLRB**

By Todd P. Photopulos

On January 22, President Obama designated Wilma Leibman as the new Chairperson for the five-member National Labor Relations Board. Leibman, a Democrat and strong supporter of employee rights, has served on the NLRB since November 1997. Her current term expires in August 2011. Presently, there are only two persons serving on the five-member Board – Leibman and Republican Peter C. Schaumber, the former Chairman. Schaumber's term expires in August 2010. Thus, Obama has an opportunity to create a Democratic majority on the Board. Chairperson Leibman has a long professional history of representing unions, having worked as an attorney for the Teamsters from 1980 to 1989, and for the Bricklayers and Allied Craftsmen from 1990 to 1993. Undoubtedly, 2009 will see a flurry of anti-management decisions from the National Labor Relations Board.



USCIS DELAYS NEW I-9 EMPLOYMENT VERIFICATION FORM

By Todd P. Photopulos

On January 30, the U.S. Citizenship and Immigration Services announced it was delaying for 60 days the implementation of its new rule modifying the I-9 form and procedure for verifying employment eligibility. The new rule was to go into effect on February 2, 2009, but will now be delayed until April 30 to allow the government to further consider the rule and to allow for additional comments from the public. An informational copy of the revised I-9 may be found here:

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=31b3ab0a43b5d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD>

The new rule aims to streamline the number of acceptable documents for employment verification. On December 12, 2008, the Department of Homeland Security's Citizenship and Immigration Services issued an interim final rule changing the list of acceptable documents for determining employment eligibility on the now familiar I-9. The Immigration and Nationality Act requires that all employers complete an I-9 for newly hired employees to verify both their identity and work authorization in the United States. The new form still splits the list of documents into three categories. List A documents verify both identity and employment authorization. An employee who presents a document from List A need not present any other documents. Alternatively, potential employees could present one document each from List B and List C. List B documents, such as drivers' licenses, only establish the person's identity, while List C documents, such as a Social Security card, only identify an applicant's employment authorization.

The new rule and I-9 form will eliminate temporary alien resident cards and an older version of an Employment Authorization Document which are no longer being issued by the government. The primary concern in eliminating these documents is that as these documents expire, they are prone to tampering and fraudulent use. We will keep you updated on the status of the new rule and any additional changes made during the extended comment period. In the meantime, employers should continue to use the prior version of the I-9 form.



E-VERIFY REQUIRED FOR FEDERAL CONTRACTORS STARTING FEBRUARY 20, 2009

By Todd P. Photopulos

Beginning February 20, 2009, all federal contractors and subcontractors will be required to use the E-Verify Employment Eligibility System to screen all new hires and current employees. The new rule actually went into effect as of January 19, 2009, but federal contracting officers delayed the implementation of the rule and will not start inserting the E-verify requirement into federal contracts until February 20, 2009.

The law becomes effective despite a significant number of official comments submitted in opposition to the measure. Even the Government Accountability Office criticized the program, noting that the E-Verify program would require massive increases in regulatory capacity and would cost nearly \$1 billion to implement. Customs and Immigration Services and the Social Security Administration have stated that they will only be able to guarantee that about 92% of employers' submission could be answered in a timely fashion. While E-Verify can detect fraudulent documents, it will be unable to detect identity theft issues where employees provide stolen documents for I-9 employment verification. Nonetheless, the rule will require that the federal government can only do business with companies that have agreed to use the E-Verify system to verify the employment eligibility of new hires and current workers.



NEW IMMIGRATION REGULATIONS ISSUED FOR TEMPORARY AND AGRICULTURAL WORKER VISAS

By Todd P. Photopulos

On December 11, 2008, the Department of Labor and the Department of Homeland Security issued final rules amending regulations for the H-2A temporary agricultural worker visa program with the hope that these rules would both modernize the program and strengthen worker protection. This is the first reform to the H-2A program in 20 years, which many employers have found to be a burdensome and cost prohibitive process. The final rule became effective January 16, 2009.

Due to the burdensome and cumbersome process, the H-2A visa program is underutilized. Last year, only about 50,000 H-2A visas were granted. Estimates of illegal alien farm workers in the U.S., however, is in the hundreds of thousands. Under the old process, an employer had to first obtain certification from the Department of Labor that there were no U.S. workers for the position, and that the wage rates being offered the alien employees were comparable to rates found for U.S. workers. Under the final rule, the time consuming and expensive labor certification process is replaced by the employer filing statements under threats of penalties (such as fines, revocation of labor certification, and future ineligibility to participate in the program) that they have fully complied with all program requirements. Employers are required to verify the wage rates being offered fall within the range of acceptable wages for U.S. workers by using the Bureau of Labor Statistics Occupational Employment Survey Data. BLS data provides wage data for about 500 different geographic locations in the United States with a variety of agricultural occupations and skill levels.

The new rule prohibits employers from passing the costs of the visa application process on to workers, and labor contractors who place H-2A visa applicants throughout the country will be required to maintain a surety bond so that DOL will be able to make a claim against the bond

to collect any unpaid wages or benefits due to the workers. The final rule also requires employers to perform additional recruiting for U.S. workers prior to submitting an application to hire foreign workers. This will include the employer submitting a job order to the State workforce agency no more than 75 calendar days and no fewer than 60 calendar days before the date they need the workers to begin work.

The new rule contains increased fines for violations of the terms of the H-2A program. For instance, the fine for willful failure to meet a condition of the work contract that results in a U.S. worker losing his or her job increases from \$1,000 under the current system to \$10,000 under the new rule. The new rule will also allow the government to conduct random and targeted auditing of applications to insure employer compliance with program requirements.

The new rule also relaxes several requirements to make the program more "user friendly." For instance, the new rule allows employers to petition for multiple, unnamed agricultural workers, and also allows H-2A workers to remain in the United States for 30 days following the expiration of his or her H-2A visa. Under prior law, an employee had to leave the country within 10 days of the visa expiring, and an H-2A worker who has been in the United States for 3 years must live outside the United States for 6 months before becoming eligible to obtain a new H-2A visa. The new rule reduces that requirement to only 3 months outside the United States.

Hopefully, the new H-2A rules will eliminate or at least lower some of the barriers employers found in using the program to supplement its agricultural workforce to handle seasonal or peak production period increases in work. By making it less burdensome and costly to employers to participate in the program, the number of illegal workers currently in the United States working in agricultural positions will begin to decrease. If you need assistance, or have questions regarding this program, of course do not hesitate to contact me.

**PRESIDENT OF MILITARY GOODS MANUFACTURING
COMPANY TO SERVE PRISON SENTENCE
FOR IMMIGRATION VIOLATIONS**

By Todd P. Photopulos

Massachusetts military goods manufacturing company Michael Bianco, Inc. (MBI) is the latest casualty of increased immigration compliance efforts by the Immigration and Customs Enforcement Agency (ICE). On March 6, 2007, ICE first raided MBI's worksite and detained at least 360 alleged illegal aliens. MBI president and principle shareholder Francesco Insolia and MBI's production manager and government contracts administrator were also arrested and charged with various violations of federal criminal law as well as the Immigration and Nationality Act. On November 3, 2008, MBI pleaded guilty to 18 counts of knowingly hiring illegal aliens, helping to harbor and shield illegal aliens from detection from authorities, fraudulently misrepresenting Social Security numbers, and mail fraud when it submitted Social Security numbers to the IRS and Social Security Administration. MBI also pled guilty to failing to pay many employees overtime from 2005 to 2007. MBI's president pled guilty for his part in helping to harbor and conceal illegal aliens by allowing the company to submit false Social Security numbers.

MBI was formed in 1985 by Mr. Insolia and specialized in the manufacture of handbags and leather goods. Beginning in 2001, MBI won a number of Department of Defense government contracts worth approximately \$230 million, resulting in MBI increasing its workforce from 85 employees to approximately 360 employees in 2006. Insolia agreed to accept a prison term of up to 18 months and to pay a personal fine of \$30,000. The company has agreed to pay a fine of approximately \$1.5 million, and to pay approximately \$460,000 in restitution for the overtime owed to employees. Unfortunately for employers, these huge fines and personal criminal liability for principles and managers are the current trend in ICE's efforts to increase pressure on employers hiring illegal aliens. As previous editions of Workplace have discussed,

now is the time for companies to be reviewing their immigration compliance policies and practices to avoid such potential personal and corporate liability.



**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 the 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.



**TENNESSEE ATTORNEY GENERAL ISSUES OPINION ON UNPAID
REST BREAKS AND MEAL PERIODS UNDER TENN. CODE ANN. § 50-2-103(h)**

By Graham W. Askew

Employers have seen an explosion in the number of wage and hour lawsuits filed against them within the past year. Victims have ranged from individual lawsuits filed against so-called “mom and pop” entities to collective actions against such giants as Wal-Mart. In light of the increased trend of wage and hour litigation, employers should make a special effort to insure that they are in compliance with all relevant federal and state wage and hour legislation.

One area of recent development in wage and hour law is the meal and rest periods required by Tennessee Department of Labor and Workforce Development. Tenn. Code Ann. § 50-2-103(h) provides:

Each employee shall have a thirty-minute unpaid break or meal period if scheduled to work six (6) hours consecutively, *except in workplace environments that by their nature of business provide for ample opportunity to rest or take an appropriate break*. The break shall not be scheduled during or before the first hour of scheduled work activity.

Relying on the highlighted portion of the statute above, some Tennessee employers have tried to comply with Tennessee's break time law by providing employees multiple unpaid breaks which, in combination, amounted to 30 minutes or more of rest time during a shift. A recent Opinion released by the Tennessee Attorney General, however, rejected this approach, ruling that two separate 20 minute breaks in one shift did not comply with the statute's 30 minute break requirement for shifts of 6 or more hours. The Opinion found that such a policy “generally” constituted a violation of Tenn. Code Ann. § 50-2-103(h). Any employer implementing such a policy could be guilty of a class B misdemeanor and could be required to pay a civil penalty for a

willful violation. These punishments would be in addition to a cause of action available to employees against the employer in question.

The recent change in the law pertaining to meal and rest breaks is just one of many developments that employers should consider in reviewing their current policies regarding employee compensation.



PRESIDENT OBAMA SIGNS LILLY LEDBETTER FAIR PAY ACT

By Todd P. Photopulos

On January 29, 2009, President Obama signed his first bill into law – the Lilly Ledbetter Fair Pay Act – in a ceremonial signing at the White House during the start of two days of meetings with Big Labor leaders. On January 22, the Senate voted to approve the Lilly Ledbetter Fair Pay Act, a bill designed to overturn a 2007 U.S. Supreme Court decision that limited the time frame for bringing pay discrimination claims. The House approved the Senate’s version on January 27, and two days later President Obama enacted it into law. The stroke of his pen signaled a new era of pro-labor policies promised on the campaign trail. Unfortunately, it is sure to be followed by an increasing wave of wage and hour litigation. This is the first in a series of proposed pieces of employment legislation that are expected to be taken up by Congress in 2009.

The Lilly Ledbetter Fair Pay Act seeks to overrule a May 2007 Supreme Court decision in the case *Ledbetter v. Goodyear Tire & Rubber Co.* In that case, the Supreme Court ruled that the time limit for filing a pay discrimination claim begins to run when the employer first made the discriminatory pay decision about the employee's compensation. Thus, in most states employees had to bring a wage discrimination claim within 300 days of the allegedly discriminatory pay decision. (This time period shrinks to 180 days in the handful of states that still do not have their own fair employment agency.)

The Lilly Ledbetter Fair Pay Act reverses that ruling and allows the time limit for a pay discrimination claim to renew with each paycheck that the employee receives. Thus, pay discrimination claims could remain viable literally for years, as long as the employee remains employed. Workers could file lawsuits to reclaim lost wages based on a decision made years before as long as the claim is filed with the EEOC within 300 days (or 180 days in the handful of non-deferral states without their own fair employment agency) of the last paycheck. This puts employer at an incredible disadvantage in terms of defense, with witnesses being gone, paper

records lost, and so forth. The Ledbetter law applies retroactively to the May 28, 2007 controversial Supreme Court decision.



EEOC EXPECTS INCREASED BUDGET FOR INCREASED ENFORCEMENT

By Todd P. Photopulos

The Equal Employment Opportunity Commission is looking for 2009 to bring more money and more enforcement activities. During the Presidential Campaign, President Obama chastised the Bush administration for making cuts to the EEOC's budget. Obama pledged to increase staffing at the agency to reduce charge backlogs and stated he would appoint a Chairperson and nominate Commissioners who are more committed to enforcement of anti-discrimination laws. Current and proposed changes to employment legislation could signal the shift in emphasis which will follow the increase in dollars for enforcement activities. For example, the Americans with Disabilities Act Amendments will expand the EEOC's enforcement of disability discrimination claims. Likewise, the pending Lilly Ledbetter Fair Pay Act (already passed by the House) would significantly increase the number of pay discrimination claims.

The EEOC has said it will try to bring bigger cases dealing with "broad policy" implications and "systematic discrimination." In other words, the EEOC will be looking to make examples out of employers by bringing big ticket litigation and class actions. Another area of discrimination on the rise is pregnancy discrimination. The number of pregnancy discrimination claims made to the EEOC jumped 65% in recent years. Fifty-three percent of those claims were filed in the service, retail, trade, financial services, insurance, and real estate industries. Significantly, claims by Hispanic women for pregnancy discrimination increased by 135%, while claims by white females declined by 16% during the same time period. Also on the rise are claims for discrimination and harassment based on religion and national origin.



JUDGMENT REVERSED FOR FORD MOTOR CREDIT IN NATIONAL HARASSMENT CLAIM

By Todd P. Photopulos

The Sixth Circuit Federal Court of Appeals reversed summary judgment granted by the trial court to Ford Motor Credit on claims brought by an Hispanic employee who alleged she was called a "spic" and barred from office lunches because of her Mexican origin. *Calderon v. Ford Motor Credit Co.*, (6th Cir. November 6, 2008). Calderon alleged that soon after beginning work with Ford Credit in 1999, her coworkers began to harass her because of her race and national origin. One coworker told her not to speak Spanish, to go back to her own country, and that they "did not need any (expletive) Mexicans on the job."

The company initially handled the matter correctly. After Calderon complained to human resources, her supervisor investigated the claim, apologized, and made the coworker apologize to Calderon. Although Calderon was initially satisfied with the way the company handled her concern, the supervisor thereafter warned her that she should not report any other incidents to HR. The supervisor also cautioned Calderon that the coworker about which she complained had a longer history with the company and would probably win in a dispute between the two. Literally adding insult to injury, another supervisor then called Calderon a "(expletive) spic," and another coworker told Calderon she could not attend a department lunch. When another branch of Ford Motor Credit sent the department straw hats, a manager told Calderon, "Oh, here's one thing you and your people do well is make hats. Maybe you ought to stay with that type of career." Calderon also alleged that her manager told a coworker that Calderon "was a little (expletive), that went up against her managers in the past and she wasn't going to do it to him."

Typically, harassment claims can be difficult because the plaintiff must demonstrate that the harassment was "severe and pervasive." In other words, mere offensive utterances will not

win the day. Another problem facing Calderon was that many of the actions she complained about occurred more than three years prior to her filing a claim with Michigan's Civil Rights Agency, the state equivalent to the EEOC. Typically, employees are unable to bring claims of discrimination or harassment unless they file a Charge of Discrimination in a timely fashion. In states with their own civil rights agency, this time period is 300 days. In other states, the time period is 180 days. The U.S. District Court on the trial level initially accepted Ford Motor Credit's arguments, and dismissed Calderon's claims as not being sufficiently severe or pervasive, and as being mostly time barred.

The Sixth Circuit Court of Appeals (which has jurisdiction over Tennessee, Michigan, Ohio, and Kentucky) reversed the trial court and is giving Calderon the right to have a jury trial on the allegations. The court found that Calderon raised trial issues about whether Ford Motor Credit should have known about the harassment because of its pervasive nature. The court also found significant that Ford Motor Credit's management and human resources department did not respond promptly in an effort to remedy the situation, finding Ford Motor Credit took no action to prevent employees from engaging in harassment of Calderon. Thus, the court found it would be appropriate to consider the string of events Calderon alleged as a continuous violation of which Ford Motor Credit should have been aware and should have corrected.

At this stage in the litigation, the court had to assume that all of Calderon's allegations were true. It will ultimately be up to the jury to decide who is telling the truth – Calderon or Ford Motor Credit. Regardless, employers can see the obvious moral of the story. Based on Calderon's allegations, Ford Motor Credit initially took appropriate steps to remedy the problem once Calderon complained. Thereafter, Ford Motor Credit appears not to have retained control over its managers and employees. Thus, an incident that was initially contained and controlled was allowed to reignite, resulting in significant distraction and litigation expense, as well as possible liability for Ford Motor Credit.



COURT REJECTS CLAIMS BY MALE JANITOR REFUSING DEMANDS FOR SEX BY FEMALE SUPERVISOR

By Todd P. Photopulos

Across the nation we have seen an increase in retaliation claims, a trend which has been fueled by recent decisions by the U.S. Supreme Court and other courts making it easier for plaintiffs to bring such claims. However, the current pro-retaliation environment did not help a male janitor who claimed that he was fired because he opposed his female supervisor's demands that the two engage in sex. Al Shappy Tate, a male janitor, worked for Executive Management Services, Inc. where he cleaned buildings in Indianapolis. Tate alleged that after about a week on the job, he and his field supervisor, Dawn Burban, began having consensual sex two to three times a week. Tate claimed that by October 2003, he told Burban he wanted to call off their sexual relationship because Tate got married that August. Tate alleged that Burban then repeatedly called his home, understandably upsetting his new bride.

According to Tate's testimony, he wanted to end the relationship to "keep the slate clean between me and my wife." Tate alleged that at a December 2003 office party, Burban threatened that he would lose his job if he did not continue having sex with her. Tate alleged that on January 13, 2004, Burban called him to her office and asked Tate if he had made a decision. When Tate said he was not "messing with her anymore," Burban told Tate that he did not know "who [he] was f _ _ king with." Tate then left Burban's office, but she followed him into a break room yelling that she was "going to have my job." At trial, Burban denied the affair, and denied the description of this encounter. Instead, Burban claimed she gave a new work assignment, but that Tate refused to perform his duties and then became loud and belligerent. Burban then called her immediate supervisor, Darron Taylor, who then directed Burban to send Tate home. Tate was then escorted out by a building security officer. The next day EMS General Manager Nancy Scheumann fired Tate for insubordination. Tate filed suit under Title VII alleging sexual harassment and retaliation. The case went to trial in the U.S. District Court of the Northern

District of Indiana, where a jury found no sexual harassment, but ruled in favor of Tate on his retaliation claim.

On appeal, the Seventh U.S. Circuit of Appeals overturned the jury verdict, finding “no rational jury could have found for the plaintiff” The Seventh Circuit ruled that Tate could not establish the first element of a Title VII claim that he had engaged in “protected activity.” There are two types of retaliation claims generally accepted in Title VII actions – opposition conduct where an employee opposes an illegal, discriminatory act of the employer; and participation conduct, where an employee actually participates in an official complaint process to bring a claim, such as the filing of an EEOC charge. While participation conduct does not require that the employee file the charge in good faith, opposition conduct requires that the employee plaintiff prove that he or she reasonably believed in good faith that the practice the employee opposed violated Title VII.

The plaintiff in this case engaged in opposition conduct, and thus was required to demonstrate that he believed in good faith that his supervisor’s conduct violated Title VII’s prohibition on sexual harassment. The Seventh Circuit, however, ruled that no reasonable jury could find that Tate demonstrated he believed in good faith that Burban was engaged in an unlawful activity. According to the court, none of Tate’s testimony demonstrated that Tate objected because he thought Burban was violating the law. Rather, Tate’s testimony showed that he wanted to end the affair because he had recently married, because Burban was bothering his wife, and because Burban was making it hard to close that chapter. Because Tate presented no evidence that he objected because he believed Burban’s conduct was unlawful at the time, the court reversed the jury verdict in his favor, and dismissed Tate’s Title VII retaliation claim.



“Top Chef” Gets Cooked for Wage and Hour Violations

By Carlyle White

On December 11, 2008, celebrity chef Tom Colicchio, known for his role as judge on the television show “Top Chef,” and his nationwide chain of restaurants, Craft, Craftbar, and Craftsteak, were named in a class action lawsuit alleging wage and hour violations under the Fair Labor Standards Act (FLSA). This case is an example of one of the growing trends in wage and hour cases being filed across the country. Nessa Rapone, a former server at Craftbar in New York, filed the suit in New York federal district court. The plaintiff stated that all tipped employees were required to turn over their tips to the employer and the tips were either pooled or redistributed to other employees in the restaurant. According to the complaint, Rapone alleged that Craftbar violated wage and hour laws by: denying servers and other employees their earned tips; improperly redistributing service employees’ tips with management-level employees; and failing to pay overtime for employees who worked more than forty (40) hours per week. In addition to these allegations, the plaintiff claimed she was terminated from the restaurant in retaliation for complaining to management about the alleged unlawful wage and hour policies.

In light of the recent plaintiffs’ trend in wage and hour litigation, employers must beware when taking a “tip credit” or requiring employees to participate in a “tip pool.” Under the FLSA, employers are required to pay employees a minimum hourly wage – currently \$6.55 per hour as of July 24, 2008 – in addition to any overtime wages. However, an employer may elect to use the “tip credit” against tipped employees who customarily receive more than thirty dollars (\$30) per month in customer tips. This provision in the FLSA allows an employer to pay a tipped employee a direct wage of \$2.13 per hour, while taking a credit for tips the employee received to compensate for the remaining minimum wage rate.

To be eligible for the credit, the employer must notify employees of minimum wage laws; inform employees of the intent to take the “tip credit” allowance; and allow the tipped

employee to retain all tips, except to the extent the employee participates in a valid tip pool agreement. An employer may provide a “tip pooling” or sharing arrangement among employees who customarily receive tips, such as wait staff, bartenders, busing employees, bellhops, and service counter personnel. Tipped employees, however, cannot be required to share tips with management-level employees, the employer, or non-tipped employees, such as janitors, cooks, chefs, and dishwashers. In general, an employee cannot be required to contribute more than fifteen percent (15%) of the employee’s total reported tips to the pool. If a court finds an employer has administered an invalid tip pool, the employer is prohibited from taking the tip credit and must pay employees the full minimum wage. If you have any questions about your business’s tip pooling arrangement, please do not hesitate to contact us.