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# WORKPLACE

## **ARLEN SPECTER WILL NOT SUPPORT CARD CHECK LEGISLATION IN ITS CURRENT FORM**

**By**

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

As we have been reporting, Big Labor saw the change in the political tide as a significant opportunity to pass pro-union legislation making it much easier for unions to organize. The Employee Free Choice Act (EFCA) would easily pass in the House of Representatives. Thus, Big Labor's focus has been on reaching the magic number of 60 votes needed to make EFCA "filibuster-proof" in the Senate. The Senate's procedural process becomes key to EFCA's passage. Big Labor needs 60 votes to invoke the "cloture" rule. Voting for "cloture" ends debate on the floor and sets up EFCA for a vote. Absent a vote for cloture, the rules of the Senate allow for senators to discuss and debate the bill for as long as they so desire. Big Labor came up just short of the 60 votes during 2008's elections. This necessitated Big Labor reaching out to Republican senators who had shown some support for unions in the past. Thus, significant pressure has been built around Senator Arlen Specter (R-PA), who had been seen as a potential vote needed to lift Big Labor over the 60 vote hurdle needed to close debate on EFCA.

Late last month, Senator Specter announced that he would not support the Employee Free Choice Act (EFCA), at least not in its current form. Significantly, Specter announced he would not vote in favor of cloture, making it unlikely that Big Labor could stop debate on EFCA and send the matter to a vote. This sets up the likelihood that EFCA could only pass if significant compromises were made to the bill. Specter's views on labor thus become a potential focal point for how EFCA may evolve.

While Specter's announcement is no doubt a major blow to supporters of EFCA, the battle is far from over. Although Specter has indicated he cannot support eliminating the secret ballot election and is not in favor of mandatory arbitration, he has endorsed other options including:

- Holding quick elections;
- Making it unlawful for an employer to hold "captive audience meetings" with employees unless the union has been given equal time;
- Increasing penalties upon finding an unfair labor practice, including treble back pay for unlawful termination and penalties of up to \$20,000 per violation where an employer is actually found to have committed willful or repeated unfair labor practices;
- Requiring negotiations on first contract to begin within 21 days after the union is certified; and,

- Imposing costs and attorneys fees upon a finding an employer is not negotiating in good faith.

Andy Stern, President of the SEIU, in comments critical of Senator Specter, complained that he was "dismayed by those who say they support the democratic process, yet refuse to allow meaningful debate and a democratic vote on critical legislation like the Employee Free Choice Act." Of course, many would remind Stern that a fundamental element of the "democratic process" is the ability for individuals to vote by secret ballot where they would be free from threats and intimidation. The Employee Free Choice Act that Stern supports would eliminate the secret ballot vote in union elections.



## CONVERGENCE: COLLECTIVE BARGAINING AGREEMENTS AND THE FMLA

By

[Ann Bowden-Hollis](#)

The obligations of covered employers under their collective bargaining agreements ("CBA") with unions and under the Family and Medical Leave Act of 1993 (the "FMLA") often converge. A recent case from a federal district court in Illinois offers an example of such convergence. The case also features the impact of "custom or practice," rather than formal collective bargaining negotiations, in crediting certain unpaid union-related work for FMLA eligibility purposes.

### **The Case**

In *Maples v. Illinois Bell Telephone Co.*, 2009 US Dist LEXIS 3156, decided January 14, 2009, the International Brotherhood of Electric Workers, AFL-CIO, Local 21 (the "Union") and some current and former union stewards (the "stewards") sued Illinois Bell Telephone Company (the "Employer") alleging violations of the FMLA and seeking to compel arbitration of grievances under the Labor Management Relations Act and the Federal Arbitration Act. The plaintiffs' partial motion for summary judgment on the question of FMLA eligibility was granted; the defendant employer's motion was denied.

### **The Collective Bargaining Agreement**

During the relevant period, the stewards worked for the Employer and served as stewards for the Union. The CBA in question permitted time off to the stewards for meeting with the Employer's representatives during working hours. Wages for these hours were paid by the Employer and counted for overtime payment and benefits eligibility purposes. The hours were coded as "Absence-Union-Paid." The CBA did not expressly address the FMLA or confer any rights substantially similar to those conferred by the FMLA.

In addition, under the CBA, the stewards were allowed time off during working hours to perform duties related to enforcement of the CBA and internal union business. This time was paid by the Union and coded by the Employer as "Absence-Union-Unpaid." Although the CBA did not require the stewards to report the nature of their work during Union-Unpaid time, the hours were credited by the Employer toward overtime payment and benefits eligibility.

## **The Employer's Time Counting System**

The Employer's mechanized system pulled data from electronic payroll and was programmed to include or exclude time associated with various time-reporting codes to determine the 1,250-hour FMLA eligibility requirement for a given steward. Prior to December 2005, stewards' working time coded both Union-Paid and Union-Unpaid was counted to determine the yearly 1,250-hour requirement. Starting in November 2005, however, the system began to include for FMLA-hour eligibility purposes only Union-Paid coded time.

## **The Dispute**

When the Union became aware of this change in practice, rather than request bargaining or a modification of the CBA, the Union claimed the stewards were already entitled to FMLA crediting of the Union-Unpaid time. The Employer then denied the FMLA leave requests of two stewards based on their not having met the 1,250 hours of service requirement. The Union filed grievances on their behalf, but the Employer refused to arbitrate because the CBA did not address their grievances.

## **The FMLA and Union Work**

Under the FMLA, whether an employee has met the yearly 1,250 hours of service requirement is determined under the Fair Labor Standards Act ("FLSA") definition of "hours of service." A regulation of the United States Department of Labor ("DOL") under the FLSA, 29 C.F.R. § 785.42, provides that "[t]ime spent adjusting grievances between an employer and employees during time the employees are required to be on the premises is hours worked." If a union is involved in this process, as a matter of enforcement policy by DOL, whether such time is counted as hours worked is left up to collective bargaining or "custom or practice" under a CBA.

## **The "Custom or Practice" Test**

In the *Maples* case, the issue was whether time spent by the union stewards outside of negotiations and meetings with the Employer, i.e. time coded Union-Unpaid, had to be counted as "hours of service" for purposes of determining FMLA-leave eligibility. The relevant test in the particular litigation for whether the hours the stewards spent in these outside activities was "custom or practice" since the CBA was silent, and the issue had not been addressed in the CBA negotiating process.

According to the Employer, no custom or practice had developed through acquiescence between the employer and the Union that the Union-Unpaid-coded time would count toward the 1,250 hours of service requirement. To the extent it had been so counted, that resulted from mere "happenstance, habit, or inadvertence by local managers."

## **The Employer's Practices and Testimony**

On the other hand, the Union successfully established as a matter of law to the satisfaction of the court that since at least 1997, a considerable time prior to implementation of the mechanized system referred to earlier in this article, the Employer had credited Union-Unpaid time toward the eligibility requirement; further, during that same period, some stewards were granted FMLA leave that they would not have been entitled to had the Union-Unpaid time not been considered FMLA-qualifying hours of service.

Moreover, the Employer's human resources official who oversaw processing of FMLA requests testified that there were "uniform policies within the internal administrative team, the FMLA processing unit" to handle FMLA leave requests. This active participation by such Employer personnel in the FMLA leave process meant to the court that the previous decision to count Union-Unpaid-coded time for FMLA leave purposes was the result of a particular practice by the Employer and not the "happenstance" the Employer claimed. Finally, in previous contract negotiations in 2004, the Employer had not stated that additional contract language was necessary to continue to count the Union-Unpaid-coded time as hours of service for FMLA eligibility determination purposes.

## **The Lessons of *Maples***

When considering the interplay of labor laws and practices and the requirements of the Family and Medical Leave Act, employers often face a trade off in selecting points for collective bargaining. If the CBA spells out how given time will be counted for FMLA purposes, the CBA will control that process. If the CBA does not, the question may become whether the employer's custom or practice is one that suits the employer. If it does, and the employer believes it can show successfully that the union has acquiesced in that custom or practice, the employer may not desire to negotiate the question. What the *Maples* case demonstrates is that absent an express provision in the CBA or clear evidence of negotiations on a point, changing a practice may require the employer to show that any previous actions were "mere happenstances." Otherwise, the change may not be successful, and testimony by employer management personnel may provide the proof that defeats the employer's position.



# WORKPLACE

## **SEIU & CNA/NNOC JOIN FORCES TO ORGANIZE HEALTHCARE INDUSTRY**

**By**

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

The SEIU and CNA/NNOC have reached an agreement they hope will accelerate the passage of the Employee Free Choice Act and promote increased unionization in the healthcare sector. Acknowledging that the agreement might be a surprise to those who have watched the SEIU and CNA/NNOC's very public feud, SEIU President Andy Stern says it is time to "put the past behind us and move forward by putting all healthcare workers in the strongest possible position to define reform, move legislation, and make the new healthcare system operational." In the recent past, CNA/NNOC Executive Director Rose Ann DeMoro has been critical of the SEIU and Stern. You may also recall that the SEIU accused CNA of undermining union elections in Ohio. SEIU staged a loud and disruptive protest at a conference where DeMoro was speaking. This agreement also comes less than a month after CNA/NNOC announced it would unite with the United American Nurses and the Massachusetts Nurses Union to form the largest RN union in the United States. Elements of the agreement include:

- Joint efforts to organize non-union hospital workers throughout the United States, with CNA/NNOC taking the lead in organizing RNs and the SEIU organizing all other healthcare workers;
- A joint national organizing campaign initially focusing on the nation's largest hospital systems;
- Initiating a joint campaign in support of the Employer Free Choice Act;
- Endorsing measures that allow states to adopt single-payer healthcare systems;
- Each union claims it will refrain from "raiding" existing members of the others' union and will not interfere in each other's internal affairs; and,
- Creation of a new joint RN organization in Florida to represent current and future RNs of both unions.

While it remains to be seen whether these two former rivals can coexist, there is no doubt that organizing will continue to be a priority for both.



## **UNIONS SET BULLSEYE ON GAMING INDUSTRY**

**By**

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

On March 16, the heads of several unions announced a "pledge of solidarity" in the formation of the Gaming Workers Counsel aiming to consolidate efforts to unionize casino workers in the U.S. gaming industry. The Gaming Workers Counsel was announced in a teleconference by John Sweeney, President of the AFL-CIO, Elizabeth Bunn, Secretary-Treasurer of the United Auto Workers, Harry Lombardo, Executive Vice President of the Transport Workers Union, and Andy Stern, President of the Service Employees International Union. According to the unions' statement, the Counsel "will bring together the UAW, the Transport Workers Union Gaming Division, SEIU, and the AFL-CIO, and reach out to other partners to support a common agenda on behalf of the workers in the casino industry."

In 2007, unions scored victories in organizing several thousand dealers and other casino employees, primarily in Atlantic City, New Jersey. The UAW won several elections at Atlantic City casinos, including the Tropicana Casino Hotel, Trump Plaza Hotel and Casino, Bally's Atlantic City, and Caesar's Atlantic City. Meanwhile, the Transport Workers Union also had success in 2007 among dealers in Vegas at Caesar's Palace and Wynn Las Vegas. While the unions' 2007 campaigns were successful in organizing, they have yet to result in a single first contract at any of the casinos.



## **UNION OF UNION REPRESENTATIVES FILES UNFAIR LABOR PRACTICE CHARGES AGAINST SEIU**

**By**

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

It may seem hard to believe, but the Service Employees International Union (SEIU) has labor issues of its own. The Union of Union Representatives (UUR) represents approximately 210 SEIU employees throughout the country, including organizers, researchers, and administrative support staff. According to the Unfair Labor Practice Charge (ULP) that UUR filed with the National Labor Relations Board, the SEIU failed to bargain with the UUR before laying off about 75 workers, representing 45% of the UUR's bargaining unit.

Apparently, the SEIU has figured out that unionization is bad for business. The UUR filed a second ULP Charge alleging that the SEIU was trying to weed out the staff union. The numbers certainly suggest that result. In September 2008, the UUR had 285 members. By January, that number had dwindled down to 217. Following the next round of proposed SEIU layoffs, the number of UUR employees would drop down to 128. The UUR also alleges that while the SEIU is laying off its members, the SEIU is hiring other staff to do the work formerly done by UUR members.

Ironically, the SEIU maintains that these mass terminations are the result of the "Justice for All Plan" adopted at the SEIU's convention last summer. The SEIU also contends these were not "layoffs," but rather a "restructuring." Note to employers – file that terminology away for later use against a union.

Last month, the UUR also filed a complaint of discrimination with the Equal Employment Opportunity Commission alleging that the SEIU's layoff practices discriminated against African-American and Latino union organizers, as well as organizers over the age of 40. The EEOC Charge also alleges that the SEIU is less likely to promote African-American, Hispanic, or older workers than their white counterparts. Ironically, the SEIU often uses race as a "wedge" issue when trying to organize U.S. businesses. Apparently, the SEIU is experiencing some difficulty "practicing what they preach."



## **CINTAS EMPLOYEES PREVAIL IN SUIT AGAINST UNITE-HERE**

**By**

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

Do you ever wonder how unions find out information about your employees? A group of Cintas employees found out the hard way and fought back against what they felt was an invasion of their privacy by UNITE-HERE. Approximately seven years ago, UNITE-HERE began an organizing campaign against Cintas. Cintas has over 28,000 employees working in 350 sites in North America. Fundamental to any union's organizing drive is the need to obtain information on employees in order to meet with them. UNITE-HERE, doing what many unions have done in the past, obtained such information by "tagging." Union representatives "tagged" Cintas employees by sneaking into workplace parking lots and writing down license plate numbers from cars parked there. Some of these license plates belonged to Cintas employees. Some were from cars employees borrowed from friends and family. The union then used that information to access motor vehicle records and obtain information, including home addresses, on those employees.

Once the union knew the employees' home addresses, it began dispatching union organizers to make unsolicited "house calls" to discuss workplace issues and dig up possible legal claims against the employer to use as leverage during the organizing campaign. Using the internet, private investigators, and paid-for-lists, the union was able to use the license plate numbers to track down home addresses of thousands of Cintas employees.

The union's efforts at "gathering dirt" and creating pressure were apparently successful. From January 2002 until October 2004, the union either brought or assisted nine lawsuits against Cintas. Cintas also filed numerous charges with the National Labor Relations Board, the Equal Employment Opportunity Commission, and the Occupational Safety and Health Administration. Using the "tagged" information, the union next began a letter writing campaign to thousands of current and former employees soliciting a nation-wide overtime pay lawsuit against Cintas drivers.

Not surprisingly, a group of employees and their friends and relatives whose cars were "tagged" became upset with the union's tactic, and filed suit against the union under the Drivers Privacy Protection Act (DPPA). The DPPA is a federal law that restricts the access and dissemination of motor vehicle records. Under the DPPA, state officials are prohibited from knowingly distributing personal information contained in motor vehicle records. The DPPA also prohibits anyone else from obtaining or disclosing such information, or making a false representation to obtain the information. There are a few exceptions to the DPPA. In defending its actions, UNITE-HERE relied upon one exception that allows access to records for use in connection with a lawsuit, or the investigation of an anticipated lawsuit.

Initially, the U.S. District Court for the Eastern District of Pennsylvania certified a class action covering a group of approximately 2,000 employees, family, and friends whose privacy had been violated. In September 2006, the federal court granted summary judgment in favor of the class members. The court awarded each class member \$2,500 in damages, but denied punitive damages.

On appeal, the Third Circuit Court of Appeals not only affirmed the judge's ruling that the union had violated the DPPA, but also reversed the trial court's denial of punitive damages. In its ruling, the Court of Appeals rejected the union's argument that it was seeking the information for legitimate purposes – its ongoing efforts to mine employees for potential lawsuits against Cintas. "The litigation component to UNITE's campaign should not obscure what UNITE was trying to accomplish – organizing labor . . . ." The Third Circuit of Appeals sent the case back to the trial court judge to determine what amount of punitive damages would be appropriate.

In January 2009, UNITE-HERE petitioned for a review of the case by the U.S. Supreme Court, concerned not only with the potential damages to be awarded, but also with the impact of the lower Court's ruling on the union's organizing strategy. Late last month, however, the U.S. Supreme Court declined to accept the appeal (denying *certiorari*), thus letting stand the Third Circuit's decision against UNITE-HERE. The case now returns to the trial court level to determine the amount of punitive damages to be awarded the class members.



# WORKPLACE

## **DOL ISSUES OPINIONS ON HOSPITAL PAID TIME OFF, TIP POOLING ARRANGEMENTS, ON-CALL STATUS, COMPANY PILOTS, AND NON-PROFITS**

By

[Todd P. Photopulos](#)

The last few years have seen a swelling tide of wage and hour litigation moving across the country. Quite simply, we have an archaic and complicated wage and hour system which does not fit well within our fluid economy. This creates a situation ripe for plaintiffs' attorneys to catch employers with their feet firmly set in a trap. The continuing economic downturn, of course, will only exacerbate this trend. While the current markets demand fluid business decisions to react to frequent changes in the economy, many aspects of the law demand rigid application and punish employers who seek or need to make quick adjustments. The recent Wage and Hour Opinion Letters issued by the Department of Labor reflect the struggles that some employers are facing as they try to navigate the turbulent seas of the present economy while at the same time trying to avoid crashing into immovable regulatory cliffs.

### **Reduced Work Weeks for Hospital Salaried Employees**

Two Opinion Letters addressed questions raised by hospitals proposing similar reductions for salaried staff based on fluctuating patient census numbers. Many hospitals allow salaried employees to accrue "paid time off" (PTO) banks of time which can later be used for vacations and other personal leave issues. As a cost cutting measure, the two hospitals requesting Opinion Letters sought DOL guidance about whether salaried employees could be asked to stay home from work for full day increments when patient census levels (i.e. the number of patients at the hospital) dropped below a certain level. In these circumstances, the employees would first deplete their accrued PTO banks. Once those PTO banks were depleted, the employees would then begin to see their salaries reduced in one-day increments. One of the hospitals proposed a "voluntary time off" (VTO) program where "volunteers" could sign up to take a day off. If not enough volunteers were found, the hospital would then begin to use "mandatory time off" (MTO) to send workers home based on reversed seniority.

To be an exempt employee, an employee must be paid on a "salaried basis," meaning they receive regular pay of a predetermined amount constituting all or part of the employee's compensation which is not subject to reduction because of variations in the quality or quantity of work performed. (Of course, the work performed must also fall within one of the statutory exemptions as well.) Thus, subject to some specific exceptions, an employee must receive a full salary for any week in which the employee performs work without regard to the number of hours or days worked. In no event can deductions be made from an exempt employee's salary for full or partial day absences due to a "lack of work."

The Department of Labor found that deductions for absences from an exempt employee's PTO leave bank, even in hourly increments, is permissible so long as the employee's salary is not reduced. In other words, provided the employees continue to receive their full salary, deductions from a "leave bank," even in hourly increments, to account for time off would not affect their exempt status even if the employer instructed the employee to stay home because of lack of work.

Also, the DOL found that salary deductions may be made when exempt employees "voluntarily" take time off for personal reasons for one or more full days. The employee's decision to take VTO, however, must be completely voluntary and not "occasioned by the employer or by the operating requirements of the business."

The DOL found, however, that once the PTO leave bank is exhausted, the employer could not reduce the employee's pay without violating the salary basis test. Once the employee's pay is reduced, the exemption from overtime pay would be lost. Likewise, the DOL rejected the mandatory time off plan proposed by one of the hospitals because "deductions from salary due to day-to-day or week-to-week determinations of the operating requirements of the business are precisely the circumstances the salary basis requirement is intended to preclude."

In making its determinations, the DOL distinguished its earlier Opinion Letters allowing fixed reductions of salary for a longer period of time based on outside economic conditions. For example, a manufacturing plant that switches to a four-day work week due to economic conditions could apply a corresponding 20% reduction in salary without violating the salary basis test. Thus, employers may implement an extended or permanent reduction in salaried employees' hours and pay without jeopardizing their salaried status, but cannot do so in a more fluid manner to reflect immediate and temporary reductions in work demand.

### **Tip Pool Employees**

We have seen a growing number of wage and hour collective actions being brought against restaurants and other employers who have "illegal" tip pooling arrangements. One restaurant employer sought guidance from the DOL on a tip sharing arrangement involving its bar backs. Under the Fair Labor Standards Act, employers may take a credit toward the minimum wage for a "tipped employee" provided that the employer informs the employee that it is doing this, and the tipped employee retains "all of the tips received." The "all of the tips received" requirement does not prohibit the pooling of tips among employees "who customarily and regularly receive tips." The FLSA defines "tipped employee" as any employee who works in an occupation regularly receiving more than \$30 a month in tips. To take advantage of this lower minimum wage requirement, the employer must pay at least \$2.13 per hour in direct wages. If the employee's tips combined with the employer's direct wages of at least \$2.13 an hour do not equal the minimum wage, the employer must then make up the difference. Currently, the minimum federal wage is \$6.55 per hour, and this amount increases to \$7.25 per hour effective July 24, 2009.

The question becomes, who are the employees who "customarily and regularly receive tips?" Unfortunately, there is no bright-line test for employers to follow, and this new Opinion Letter does little to give guidance other than to the narrow issue of the application of the rule to bar backs. Certain employees easily fall outside of that category such as janitors, dishwashers, chefs, and laundry room attendants. Other employees are regularly viewed as being allowed to share in tip pooling arrangements, such as bus boys. The Department of Labor found that the restaurant's bar back qualified as a tipped employee because it was an occupation that "customarily and regularly" received more than \$30 in tips.

### **On-Call Duty and Travel Time**

The next Opinion Letter was requested by a non-governmental water company which required its employees to be on-call on a rotating basis. The employees were provided cell phones and a vehicle and were not restricted to remain in any location while they were on-call, provided they could respond within 45 to 60 minutes of receiving an emergency call. The employer noted that it took only approximately 5 to 20 minutes to travel to any of the given emergency sites. The average work time upon arriving at the emergency location was only 5 to 10 minutes.

Whether an employee needs to be compensated for time spent "on-call" is a fact intensive inquiry. The answer is determined based upon whether the employee is able to use the on-call time for his or her own purposes. In other words, is the employee "waiting to be engaged" or "engaged to be waiting." Based on the description provided by the employer, the DOL found that the employer did not need to compensate the employees while they were on-call since the on-call requirements were not restrictive and allowed the employees to use the time on-call for their personal benefit.

The employer is required, of course, to pay the employee for the time actually spent on the job assignment. The DOL was not able to answer, however, whether this employer was required to pay employees for time spent traveling to the emergency location because not enough facts were presented. Generally, if the employee travels a substantial distance to an emergency site, the travel would be compensable. Where the employee is required to travel to a regular site, including a regular client site, the DOL would take "no position" whether such time is compensable.

### **Exempt Status of Company Pilots**

The next employer asked whether its eight company pilots were exempt from overtime. The eight pilots were principally responsible for transporting the company's executives, customers, and guests for sales support, and to board meetings and operation facilities. One of the pilots was designated the "Chief Pilot." The Chief Pilot served as the immediate supervisor of the other pilots and flight attendants and was also responsible for new pilot flight instruction.

The DOL found the Chief Pilot may be exempt as an "Executive" if the Chief Pilot is in charge of managing a recognized unit or department of the employer. The other pilots were analyzed under the "learned professional" exemption to overtime requirements. To qualify for

this exemption, the position must require the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. The DOL, however, has taken the position that pilots are not exempt as learned professionals because it has found that flying is not a field of science or learning and that a pilot's license is not "customarily acquired by a prolonged course of specialized intellectual instruction." (Consider that next time you are flying on a commercial airline.) Despite the above, the DOL has taken a position of "non-enforcement" regarding some types of pilots and co-pilots who hold FAA Airline Transport Certificates or Commercial Certificates and who are paid at least \$455 per week on a salary basis. The DOL lists several specific types of pilots who qualify for this position, including those who fly aircraft as business or company pilots. While the DOL takes a position of "non-enforcement" for certain pilots, including company pilots, this would not relieve the employer from potential liability if the pilots were to file a private lawsuit for failure to pay overtime.

### **Non-Profit Corporation Enterprise Status**

The final Opinion Letter issued this Spring involved a non-profit institution that provides care for neglected and dependent children. The employer outsourced all of its employees to a leasing company. Essentially, the leasing company "employed" all of the non-profit's employees for purposes of providing compensation services (payroll, workers compensation, group health benefits, and record keeping), although the non-profit maintained day-to-day control and direction over these employees.

Generally, the FLSA does not apply to religious or educational activities of private non-profit organizations unless they engage in ordinary commercial activities. The non-profit was worried that by engaging a leasing company (which is covered under the FLSA) the non-profit would then become covered as well. Fortunately for the non-profit, the Department of Labor took the position that although the employees were receiving compensation directly from the employee leasing company, the non-profit maintained sufficient control and supervision to establish that the non-profit was the real employer. Thus, the FLSA's overtime requirements did not apply despite this outsourcing arrangement.



## **SUPREME COURT RULING UPHOLDS BAN ON PAYROLL DEDUCTIONS FOR UNION POLITICAL ACTIVITIES**

**By**

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

Recently, the U.S. Supreme Court ruled that an Idaho state law banning local government employers from permitting payroll deductions for union political activities did not violate the unions' First Amendment rights. A group of unions representing Idaho public employees filed suit to challenge the Idaho Legislature's 2003 amendment to the Right to Work Act, which prohibited state and local payroll deductions for union political activities conducted through political actions committees.

On February 24, 2009, Chief Justice Roberts delivered the opinion of the Court in *Ysursa v. Poctello Education Association* (No. 07-869), which reversed a Ninth Circuit Appeals Court ruling that held the law unconstitutional as a violation of unions' First Amendment political free speech rights. The lower courts struck down the law as unconstitutional as applied to local government (including counties, municipalities, and school districts) and private employers, because the State of Idaho was unable to show a compelling interest when it failed to identify any subsidy it provided to local governments' payroll systems to administer payroll deductions. Content-based restrictions on free speech are subject to strict scrutiny and the government must show a compelling interest in the law to be held constitutional.

The U.S. Supreme Court analyzed the law and held that it was constitutional, since Idaho had no obligation to aid the unions in their political activities. Justice Roberts noted that the First Amendment protects the right to be free from government restriction of speech, and laws that place content-based restriction on speech are per se invalid. However, "[the government] is not required to assist others in funding the expression of particular ideas, including political ones." While public employees are free to support union political efforts, the state of Idaho is not constitutionally obligated to permit payroll deductions. Moreover, Justice Roberts found that the Idaho law did not infringe upon the unions' free speech rights. Accordingly the State needed only to demonstrate a rational basis and "the ban on political payroll deductions furthers Idaho's interest in separating the operation of government from partisan politics."

The Court went on to hold that in this context, the First Amendment makes no distinction between state and local government entities; and therefore the law is valid as to both.



## **CAESARS ATLANTIC CITY SETTLES TOGA WEARING BARTENDER SUIT**

**By**

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

Caesars Atlantic City recently settled a lawsuit filed by twenty bartenders and servers who were denied employment as toga wearing workers at the casino's Toga Bar. The individuals bringing suit alleged that the casino favored young, attractive women and did not hire the plaintiffs on the basis of their gender and age. The group consisted of all men and one woman who was older than the women applicants hired. The casino's motion to dismiss was denied. The case settled just prior to the start of a scheduled jury trial.

The recent litigation is reminiscent of the famed Hooter's class action lawsuit filed by a group of Chicago men. As in the Hooters litigation, it was the position of the casino in its motion to dismiss that the hired applicants were uniquely qualified in light of the overall theme of the establishment. The casino argued that the Toga Bar bartenders and servers are required to act as characters in a theatrical toga-themed setting. The physical appearance of each applicant must fit the role assigned. The casino further contended that the servers and bartenders must physically appeal to the demographic group targeted by the Toga Bar. Rejecting the casino's arguments, the court held that the causes of action against the casino did not fail as a matter of law and allowed the matter to proceed to trial.

Being unattractive is not a class protected by federal law. An applicant's gender and age, however, generally cannot serve as a factor in an employment decision. Employers are discouraged from basing an employment decision on whether or not a specific applicant has "the look" that is desired. As the Hooter's and Caesars Atlantic City cases make clear, doing so exposes an employer to potential liability.



## **HOSPITAL ORDERED TO PAY OVER \$1.6 MILLION FOR TITLE VII HOSTILE ENVIRONMENT AND RETALIATION CLAIM**

**By**

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

Recently, a neurosurgeon at Brigham and Women's Hospital in Boston, Massachusetts, was awarded over \$1.6 million in damages by a federal district court jury for violation of Title VII of the 1964 Civil Rights Act and the Massachusetts Fair Employment Law.

In the case of *Tuli v. Brigham & Women's Hospital*, No. 07-cv-12338-NG, a federal jury found that the hospital and its department chairman, Arthur Day, subjected Sagun Tuli, a woman of Indian origin, to a hostile working environment and then retaliated against her for complaining to management that the alleged discrimination occurred. Tuli filed a disparate treatment claim under Title VII and the Massachusetts Fair Employment Law claiming national origin discrimination, violation of the Equal Pay Act, hostile work environment harassment, retaliation, as well as state law claims of intentional interference with business relations, slander, and violation of a health care whistleblower statute.

Tuli alleged in her lawsuit that Arthur Day regularly harassed her at work on the basis of sex and national origin. When Tuli complained to the chief medical officer and hospital president about the discriminatory conduct against her and other co-workers, her complaints were ignored. Moreover, Tuli alleged that the hospital required her to submit to a medical evaluation as a condition of renewing her employment qualifications. The jury substantiated these allegations and awarded Tuli \$1 million in damages for the hostile working environment claim and \$600,000 on the count of retaliation.

Similarly, the jury found that the hospital was liable on the state law claims and awarded \$1 for violation of the state whistleblower statute, \$20,000 for intentional interference with her business relationship, and \$1 for slander due to a statement by Day that operating room nurses did not want to work with Tuli.

On a bright note, the jury did find in favor of the defendant hospital on the claims of equal pay and disparate treatment. This partial verdict was a small victory against Tuli's allegations that the hospital failed to compensate her in comparison with other similarly situated male physicians.

However, this case should serve as a reminder to employers and management that all allegations of workplace harassment should be thoroughly investigated, and precautions taken to prevent those accused from retaliating against the complaining employee. Several recent Supreme Court cases have made it significantly easier to bring such claims. Human resource professionals should review their Equal Employment and Discrimination policies and make sure

appropriate reporting mechanisms are in place. If you have any questions on these policies, please give us a call.