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PRESIDENT OBAMA NOMINATES SONIA SOTOMAYOR TO U.S. SUPREME COURT

By

[Todd P. Photopulos](#)

Since the presidential campaign and election last Fall, there has been much speculation regarding who Obama may nominate to several vacancies likely to arise on the Supreme Court during his administration. This speculation intensified following Justice David Souter's announcement of his intent to retire. On May 26, President Obama announced his first nomination to the Supreme Court – Judge Sonia Sotomayor.

According to his aides, President Obama is hoping the U.S. Senate will confirm Judge Sotomayor before the Senate's recess on August 7. The process includes the standard FBI background checks and vetting before the Senate Judiciary Committee prior to submission to the Senate for voting. The Senate Judiciary Committee is chaired by Senator Patrick Leahy (D-Vt.), and Democrats enjoy a 12 to 7 majority. Judge Sotomayor has been confirmed by the Senate on two prior occasions, first for appointment as a judge to the U.S. District Court for the Southern District of New York when nominated in 1992 by President George H. W. Bush, and again in 1998 when nominated by President Clinton to the Second Circuit Court of Appeals. While her prior success before the Senate is certainly helpful, it does not necessarily ensure automatic approval as there are now 17 years' worth of decisions to comb through. Additionally, several of her speeches are now resurfacing and forming the basis of some concern among Republican politicians and pundits that she would be an "activist" judge.

Judge Sotomayor has an appealing personal background that is consistent with President Obama's stated criteria for judicial nominations. President Obama has said that he wished to appoint judges to the Supreme Court who had "empathy" and who would temper the Court's decisions with a concern for the downtrodden. If confirmed, Judge Sotomayor would be the third female Justice appointed to the Supreme Court, and the first Hispanic. Judge Sotomayor grew up in a South Bronx housing project after her family moved to New York from Puerto Rico. Judge Sotomayor attended Princeton University on a scholarship, where she graduated summa cum laude in 1976. Judge Sotomayor earned her law degree from Yale University in 1979 and then served as an Assistant District Attorney in Manhattan for five years before practicing in a private firm for four years focusing on intellectual property litigation. Since 1992, Judge Sotomayor has worked as a Federal Judge, first for the U.S. District Court for the Southern District of New York, and since 1998 as a Judge on the Second U.S. Circuit Court of Appeals.

The initial criticisms of Judge Sotomayor's nomination to the Supreme Court have centered on concern whether she will be an "unbiased" justice. These concerns have rested largely on speeches made by Judge Sotomayor, as well as recent employment discrimination decisions issued by the Second Circuit. In 2001, Judge Sotomayor delivered a lecture at the

University of California called, "A Latina Judge's Voice." Conservatives have pointed to the following statement from the speech as raising a concern about her ability to be a fair and impartial jurist:

"I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."

Judge Sotomayor has also said that there is a need for diversity in the judiciary because a judge's experiences and background necessarily affect how that judge rules.

Judge Sotomayor was most recently involved in a high-profile "reverse" discrimination case involving racial quotas which is now before the U.S. Supreme Court. In *Ricci v DeStefano*, one Hispanic and 17 white firefighters filed suit when the City of New Haven, Connecticut threw out test results used to evaluate firefighter candidates for promotion because not enough minority candidates had scored high enough on the test to gain promotion. This resulted in the white firefighters being denied promotion even though they had received high test scores. Prior to reaching the U.S. Supreme Court, the case had been heard by a three-judge panel of the U.S. Court of Appeals for the Second Circuit. Judge Sotomayor was on that three-judge panel that affirmed the City's actions.

Interestingly, Judge Sotomayor was also involved in a dispute between the Major League Baseball owners and the players' union. In 1995, then District Court Judge Sotomayor granted an injunction requested by the NLRB to require the baseball owners to reinstate the terms of an expired collective-bargaining agreement, effectively ending the 1994-95 baseball strike, much to the delight of baseball fans. Judge Sotomayor has issued a number of other labor and employment cases, including claims of employment discrimination, harassment, and retaliation, ruling for both employer and employee.

Early indications suggest that Judge Sotomayor will likely be confirmed, based both upon her credentials and record. Ultimately, the Republicans likely lack the political capital to oppose Judge Sotomayor's appointment, and many may be unwilling to do so absent the revelation of some unknown facts. Also, the appointment of Judge Sotomayor would not likely shift the overall balance of the Court since she is replacing Justice Souter, considered one of the more "liberal" justices presently sitting. We will of course keep you updated on the status of her confirmation.



SUPREME COURT OVERTURNS IDENTITY THEFT CONVICTION OF MEXICAN WORKER

By

[Todd P. Photopulos](#)

The U.S. Supreme Court last month unanimously ruled that the conviction of an illegal immigrant worker from Mexico for aggravated identity theft must be thrown out because the worker did not know that the fraudulent identification belonged to another person. *Flores-Figueroa v. United States*. The conviction for aggravated identity theft was based on the Identity Theft Penalty Enhancement Act, which was signed into law in 2004 by President Bush to impose enhanced penalties on individuals who use the identification of another person while committing a felony. An individual convicted of aggravated identity theft under this Act receives an additional two years on top of any other punishment for committing the underlying felony. At issue before the Supreme Court was whether the word “knowingly” applied required the government proving that the legal immigrant actually knew that the identification belonged to another person. Mr. Flores-Figueroa admitted purchasing fake ID’s to obtain employment, but argued he had no idea that the numbers on the cards he purchased actually belonged to a real person.

Ignacio Flores-Figueroa, a Mexican national, illegally entered the United States and used a fake Social Security Number and resident alien card (“green card”) to obtain employment with L&M Steel Services, Inc., an East Moline, Illinois steel company. The false identification used by Flores listed the name Horatio Remurez, although the numbers on the cards had not been issued to anyone with that actual name, nor did they belong to any other real person.

After six years of working under a false name, Flores wanted to start working under his real name. Unfortunately, Flores was still here illegally and did not have proper identification. Therefore, he purchased new false identification documents, this time with his real name. Flores presented his employer with a new Social Security Card with his proper name, as well as a new permanent resident card with his name. Both of the documents were forged. His employer reported Flores to Immigration and Customs Enforcement (“ICE”). ICE investigated the fraudulent documents and found that the Social Security Number and the permanent residency number belonged to real people. Flores was arrested and charged with two counts of misuse of an immigration document, one count of illegal entry, and one count of aggravated identity theft. Flores pleaded guilty to all counts except for the aggravated identity theft count, arguing that while he used false documents, he did not realize that the numbers actually belonged to a real person. After trial, the court found him guilty and sentenced him to 75 months in prison, which included 24 months for aggravated identity theft. Initially, the U.S. Court of Appeals for the Eight Circuit affirmed the lower court’s finding, prompting the appeal to the Supreme Court.

The Supreme Court was faced with resolving ambiguities in the way the language of the

statute was drafted. The statute states that an individual violates the Act if that person in committing other felonies, including violations of immigration law, “knowingly transfers, possesses, or uses, without lawful authority, any means of identification of another person. . . .” The Supreme Court unanimously ruled that to be subject to the additional two years of imprisonment under the Identity Theft Penalty Enhancement Act, the individual must not only knowingly transfer, possess, or use identification of another, but also must know that the identification actually belonged to another person. In this case, the government failed to present any evidence that Flores knew the Social Security Number and alien identification number on the fraudulent documents he presented for employment actually were numbers belonging to another person. Thus, his conviction for aggravated identity theft was overturned.



SUPREME COURT FINDS NO PREGNANCY BIAS IN AT&T'S BENEFITS CALCULATIONS

By

[Carlyle C. White](#)

In a 7-2 decision, the U.S. Supreme Court held on May 18, 2009 that the AT&T Corporation did not violate Title VII of the Civil Rights Act when it did not count days that women took off for maternity leave for purposes of vesting in their pensions. In *AT&T Corp v. Hulteen* (U.S. No. 07-543), the Supreme Court reversed a Ninth Circuit Court of Appeals ruling that AT&T's reliance on a pension system that disadvantaged pregnant women by reducing their retirement benefits constituted sex and pregnancy discrimination under Title VII.

Justice David H. Souter wrote the majority opinion and found that AT&T's policy was lawful because it occurred before the Pregnancy Discrimination Act ("PDA") was enacted. The PDA became law in 1979 and amended Title VII by prohibiting employers from treating pregnancy leave differently than other medical leave. AT&T subsequently changed its disability and pension plan when the PDA became effective, but it did not make any retroactive adjustments to previous policies and procedures in place prior to the PDA. Prior to the PDA, AT&T had given full service credit to employees who were off work for disability leave. However, AT&T did not count maternity absences as disability-related leave. As a result, four former female employees filed suit against AT&T claiming that because they took maternity leave prior to the enactment of the PDA, AT&T's policy unlawfully impacted their pensions on the basis of their sex and pregnancy.

The Supreme Court reasoned in its decision that AT&T relied on a bona fide seniority system that was protected by Section 703(h) of Title VII at the time. The Court stated that the newly passed Lilly Ledbetter Fair Pay Act would not aid the plaintiffs, because AT&T's pre-PDA policies were lawful under Title VII at the time they were in place. Therefore, the plaintiffs were not disadvantaged through the application of a discriminatory compensation decision or other practice. Moreover, the majority opinion found that the PDA did not require AT&T to retroactively grant service credit to employees who had taken maternity leave under the old policies. The Court noted that Congress could have but did not make the PDA retroactive.

This decision is a significant victory for employers who had pre-PDA policies that treated maternity leave differently than other forms of leave under a seniority or pension system. Had the Supreme Court ruled the other way, the decision would have required all companies to recalculate pensions of any affected women.



SENATE SHAKE-UP SETS STAGE FOR COMPROMISE ON EFCA

By

[Todd P. Photopulos](#)

For the past several months, we have been reporting on the concerns and status of the proposed Employee Free Choice Act (EFCA). While Big Labor created momentum for EFCA in last Fall's elections, that momentum stalled following the downturn in the economy, particularly with more light being shed on the cost of unionization to the U.S. auto industry. Recent maneuvering in the Senate, however, points the way for compromise legislation, possibly as early as this summer.

The Employee Free Choice Act is pro-labor legislation aimed at amending the National Labor Relations Act to allow unions to organize by having the National Labor Relations Board certify a union as a bargaining representative if a majority of employees sign valid union authorization cards, doing away with the democratic process of a secret ballot election. EFCA would also allow for the Federal Government to appoint an arbitrator to determine the terms of a first union contract if the parties fail to reach agreement within 120 days. In other words, EFCA as presently proposed would both eliminate a secret ballot election and allow a government arbitrator to impose upon the employer the terms of the first contract, including wages, benefits, and so forth for the unit of affected employees.

Versions of this bill have been proposed in the past, most recently in 2007 where the same legislation passed the House by a margin of 241 to 185 votes. That bill, however, died in the Senate because supporters fell short by 9 votes of the 60 needed to limit debate on the House-passed bill. As the composition of the Senate has inched closer to the 60 votes needed by Democrats to stop debate on the bill, however, the chances of EFCA being passed in some form have increased dramatically.

EFCA supporters need 60 Senate votes to overcome Republican opposition. The Democrats have 57 Senators and two Independent Senators who caucus with them, with Democrat Al Franken's Minnesota Senatorial race remaining unsettled. On April 28, 2009, however, Pennsylvania Senator Arlen Specter announced his switch from the Republican Party to the Democrats, in a move to preserve his political viability as he runs for re-election next year in an increasingly Democratic state.

Initially, union leaders hailed Specter's switch as a "new day for labor law reform." Specter, however, has since publicly stated that his switch does not signal "an automatic 60th vote." Instead, Specter joins at least seven other Democrats in the Senate with "cold feet" about portions of the bill. Specifically, Specter has stated that "card check" is a "bad deal." In other words, in order to bring EFCA to a vote, the concerns of Senator Specter and the other Democrats expressing reservations about the bill as currently drafted must be met.

Despite the current economic uncertainty, on May 19, Senator Tom Harkin (D-Iowa) announced that he intended to bring up the controversial bill for debate “in the next month.” Senator Harkin originally introduced the EFCA bill on March 10, which was then referred to the Senate Health, Education, Labor and Pensions Committee. While Harkin said that he intended to follow the regular procedural order for the bill (meaning that it would have to be first approved on the committee level), Harkin announced that a compromise bill could get sent directly to the Senate floor. While Harkin declined to provide any details about what form a compromise bill may take, speculation is circling around several possible options.

EFCA’s provision requiring federal arbitrators to determine first-time contracts has given Senators on both sides of the aisle significant heartburn. Senator Harkin has commented, however, that while this provision may be problematic, there must be “finality to reaching a contract.” One possible compromise would borrow from the labor process for Major League Baseball by appointing a federal arbitrator to look at the last, best offers of both sides and pick one of these offers. Senator Specter is rumored to support this “winner takes all” approach.

As a compromise for the card check provision of EFCA, Senator Dianne Feinstein (D-Cal.) has advocated for a mail-in ballot rather than the present secret ballot election process. Proponents of this approach would also like to shorten the days of the campaign period to as short as 10 days. Another variation of this proposal is for a hybrid card check where the union card would give the employee signing it two choices – one requesting a secret ballot election, and another requesting union representation immediately without secret ballot election.

Yet another variation of the election process would retain the secret ballot election, but significantly shorten the campaign period. Under current law, most representation elections are held within 42 days of the union filing a petition with the National Labor Relations Board. During this time, an employer has the opportunity to discuss with its employees the possible pitfalls of unionization in general, and potential concerns about the particular union requesting representation. Prior to the petition being filed by the union, many employers are wholly unaware of union activity, resulting in employees only hearing one side of the story. Supporters of EFCA have complained that during this campaign period, employees once favoring the union become disenchanted upon hearing the other side of the story. Thus, some supporters of EFCA have advocated for a substantially shortened election period, as little as 10 days following the filing of the petition. This would greatly reduce the chances of an employer effectively communicating with its employees, especially when compared with the amount of time the union would have likely spent on its “underground campaign” prior to filing the petition for an election. Typically, unions will spend six months or more secretly visiting with employees to obtain signatures on union cards and to gain support for their cause prior to filing a petition.

While it is uncertain what form EFCA will finally take, it is likely that employers will be faced with some form of legislation making it substantially easier for unions to organize. While unions during the past decade have experienced a significant decline, in 2008 they saw a substantial jump in winning percentages under current labor law, rising to a 67% win rate for new elections. At the same time, a recent survey of nearly 180 companies by global consultant firm The Hay Group found that 85% of companies were concerned about the impact of EFCA, and that almost 90% of employers thought the bill would increase their vulnerability to unionization. We will of course continue to keep you updated on the status of this important

piece of legislation. In the meantime, employers would be wise to review their policies, engage in management and supervisor training, and take other efforts to minimize their exposure in the event EFCA is passed.



UNION HIT WITH SIGNIFICANT PENALTY FOR ATTEMPTING TO DRIVE CONTRACTOR OUT OF BUSINESS

By

[Graham W. Askew](#)

Earlier this month, a federal court upheld a significant arbitrator's award of damages to a contractor against the Chicago Regional Council of Carpenters for violating a "most favored nations" clause in a collective bargaining agreement in a "vendetta" against the contractor. According to the arbitrator, the union engaged in a combination of tactics designed to run the contractor out of business. Such tactics included a four month strike, harassment, and confrontations with management. The court required the union to pay a penalty of over \$5 million to the contractor.

In reviewing the arbitrator's decision, the court acknowledged that judicial review of arbitration awards is extremely narrow and that the opinion of an arbitrator is entitled to great deference by the court. The court declined to review the merits of the arbitrator's decision. Instead, the court focused its inquiry on determining the damages that the arbitrator was entitled to award pursuant to the authority given to him under the collective bargaining agreement.

The importance of this decision is two-fold. First, it serves as a warning to unions of the severe repercussions that exist for violating a collective bargaining agreement and engaging in activities to harm an employer. Second, it further emphasizes the high level of deference courts have consistently given arbitration decisions when they are appealed. Employers are advised to make every effort to put their best foot forward during arbitration. It is a rare occasion when a reviewing court steps in to overturn an arbitrator's decision.



EEOC ISSUES GUIDELINES FOR ADA COMPLIANCE ON H1N1 VIRUS

By

[Carlyle C. White](#)

Recently, the Equal Employment Opportunity Commission issued a technical assistance document that answers basic questions for employers about preparation techniques for the H1N1 virus (Swine Flu) and proper compliance with the Americans With Disabilities Act (“ADA”). The guidelines include a brief discussion on the issue, as well as a frequently asked questions section.

The ADA restricts how and when employers may require applicants and employees to submit to medical examinations or requests for disability related information. The Swine Flu Guidelines state that this restriction also applies to employers’ health information requests regarding the H1N1 flu virus.

The ADA regulates employers’ requests for medical examinations and disability related inquiries in three stages of employment: pre-offer, post-offer, and employment. Prior to an offer of employment, the ADA prohibits *all* disability related inquires and medical examinations, even if job related. After a job has been offered, but before commencement, an employer may make such requests, regardless if they are job related, as long as the employer does so for all entering employees in the same job category. After employment begins, an employer can require medical examinations and make disability related inquiries *only if* they are job-related and consistent with business necessity.

The Swine Flu Guidelines also include a frequently asked questions section for employers on the topics of planning for absenteeism and infection control in the workplace. Notably, an employer may prepare for a pandemic by surveying its workforce to gather personal information. A sample pre-pandemic survey is included in the document.

Finally, the EEOC points out that the recent changes to the ADA under the ADA Amendments Act of 2008 do not affect any of the ADA’s strict restrictions on medical examinations and disability-related inquiries. A copy of the Guidelines may be found at the following link: http://www.eeoc.gov/facts/h1n1_flu.html



**TRANSPORTATION DEPARTMENT'S
“OBSERVED URINATION RULE”
UPHELD BY COURT**

By

[Todd P. Photopulos](#)

Most of us take for granted the highly regulated nature of the transportation industry. The recent Memorial Day weekend reminded me to be thankful for the safety measures taken by the Department of Transportation as I stared into the rearview mirror to see the grill of a rapidly approaching 18 wheeler behind me on the interstate. My biggest fear, of course, was, “what if the driver of that 18 wheeler is impaired and doesn't stop?” But did you know that one of those safety measures includes "observed urination" to make sure drivers are not using "prosthetic genitals" to thwart drug tests?

In June 2008, the Transportation Department passed a rule revamping drug testing for transportation workers which was aimed at reducing the risk of tampered drug test results, particularly for workers previously tested positive for a prohibited drug. Unfortunately, the innovative spirit of the American economy created a cottage industry of devices and products making it easy for offenders, particularly repeat offenders, to circumvent the drug testing procedures. Indeed, the Transportation Department discovered the availability of a variety of products designed to defeat drug tests, including "prosthetic devices" that look like real human anatomy. These products may be ordered in a variety of colors to match the driver's skin tone, making it easier for repeat offenders to use other people's urine to pass a drug screen even when someone is watching them give the specimen.

Thus, the Department of Transportation's new rule requires workers who had previously tested positive for a prohibited drug to submit to “observed urination testing.” Observed urination testing requires the worker to raise their shirt above their waist, lower their clothing to expose their genitals, and furnish their urine while all the time being observed by “specimen collectors.”

On August 13, 2008, BNSF Railway Company and several transportation workers unions sued the DOT, claiming that the “observed urination rule” violated both the Administrative Procedures Act and the Fourth Amendment. Initially, the U.S. Court of Appeals for the District of Columbia ruled that the DOT’s observed urination rule should be optional rather than mandatory until the Court had a chance to fully consider the matter and issue a final opinion.

On May 15, 2009, the court found that the rule was valid in light of the need for safety to the general public, the proliferation of prosthetic and other devices aimed at thwarting drug testing efforts, and the increased chances that a driver who violated a drug test one time would do so again. The court ruled that the "Department acted neither arbitrarily nor capriciously in

concluding that the growth of an industry devoted to circumventing drug tests, coupled with returning employees' higher rate of drug use and heightened motivation to cheat, presented an elevated risk of cheating on return-to-duty and follow-up tests that justified the mandatory use of direct observation." The court found the DOT's conclusion reasonable that returning employees had a heightened incentive to cheat because of the heavy sanctions imposed on repeat offenders, including, for example, a permanent bar on aviation-related employment and termination from many jobs.

The court rejected BNSF's argument that the urine test violated the Fourth Amendment's prohibition against unreasonable searches and seizures because, due to the proliferation of cheating devices, the direct observation furthered the government's interests in requiring effective drug testing procedures. The Fourth Amendment to the U.S. Constitution prohibits unreasonable searches and seizures. While an individual ordinarily has an extremely strong interest in freedom from searches that are as intrusive as the direct observation urine testing procedure and the DOT's rule, the court found that the individuals' freedom interests are lowered because the drivers perform safety-sensitive duties in a highly regulated industry. Moreover, the court found that employees "who have intentionally violated a valid drug regulation, at least in the recent past . . . have less of a legitimate interest in resisting a search intended to prevent future violations of that regulation than do employees who never violated the rule." Also, the court noted that while a direct observation rule was extremely invasive, transportation workers could easily avoid this result by simply complying with the drug regulations in the first place.



LABOR DEPARTMENT OPINION LETTER ADDRESSES NOTICE ISSUE FOR UNFORESEEN FMLA LEAVE

By

[Todd P. Photopulos](#)

The Family and Medical Leave Act is a cumbersome and complicated attempt to balance the needs of the individual with the needs of a business. Employees on FMLA leave can place a burden on an employer's operations, particularly when unforeseen medical issues arise causing an employee to be absent with little or no notice. Take, for example, an employer with a policy requiring employees to call in one hour before the start of a shift to report their absence. What is an employer to do when a worker is absent for two days without calling in, but returns to work on the third day reporting to have been absent for an unforeseen FMLA event? Had the employee's absence not been for an FMLA qualifying event, the employee would have been fired under the employer's policy. Does the fact that the employee was absent due to an unforeseen FMLA event cure his failure to follow the employer's call-in procedure? This is the issue addressed recently by the DOL.

In most circumstances, the FMLA requires an employee to provide notice of the need for leave thirty days before the leave is to commence if such advance notice is possible. When it is not possible to provide thirty days of notice, however, the regulations require that the employee give "such notice as is practicable." The DOL's 1995 regulation interpreted this to mean that an employee whose need for leave became foreseeable less than thirty days before the leave was to commence would ordinarily be required to give at least verbal notification to the employer within one or two business days of learning of the need for leave. In 1999, the Wage and Hour Division's Office of Enforcement Policy issued an FMLA opinion letter which many employers interpreted to mean that employers were prevented from applying call-in policies to discipline employees for failing to call in or show up for work as long as the employees provided notice within two business days of an FMLA-qualifying absence. Following this reasoning in the hypothetical situation described above, the internal call-in policy would not apply since the employee could provide the FMLA notice upon returning to work after being absent for two days if the need for the FMLA leave was unforeseeable.

The new FMLA regulations, which went into effect January 16, 2009, deleted any reference to a one or two business day notice when addressing whether a notice for unforeseen leave was given as soon as "practicable." The new regulation on leave that is foreseeable less than thirty days in advance now reads, "[w]hen an employee becomes aware of a need for FMLA leave less than thirty days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day." The new regulations also provide that in requesting leave to address foreseeable and unforeseeable needs, "employees must comply with their employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." Thus, employers should be able to enforce

non-discriminatory call-in procedures unless those procedures are more stringent than the timing for FMLA notice.

Based on the foregoing, the DOL's Opinion Letter concluded that where an employer's usual and customary notice and procedural requirements for requesting leave are consistent with what is practicable given the particular circumstances of the employee's need for leave, the employer's notice requirements can be enforced. There is no required two-day rule concerning employee notification. Thus, the Department of Labor found, "it is our opinion that unless unusual circumstances prevented the employee from providing notice consistent with the employer's policy, the employer may deny FMLA leave for the absence."

While the FMLA is still a cumbersome piece of legislation, the new regulations do make the FMLA more "user friendly" for employers in many respects. If you are a covered FMLA entity, you should be making sure your current policies on FMLA leave are consistent with the new regulations. Also, you should be looking at your current call-in policies and practices for employee absences in light of the new regulations.