



**Wimberly Lawson  
Seale Wright & Daves, PLLC**

*Attorneys & Counselors at Law*

**Briefly**  
May 2009 Volume 9, Issue 5

**UNION CARD-CHECK LAW REINTRODUCED, OPPOSITION MOUNTS**



**Gary Wright** .....

**“The reality is that the unions are currently winning government-supervised secret ballot elections at one of the largest margins in decades, well over 60% in the first half of 2008.”**

The so-called union “card-check” law, technically called the Employee Free Choice Act, was reintroduced in Congress on March 10. The law as it is reintroduced is substantially the same as it was introduced in 2007 and 2008, the main difference in circumstances being a Democratic President who supports the legislation, and a Congress that is substantially more Democratic.

The details of this law have been repeated so many places that they will only be summarized herein. Probably the most publicized feature of the proposal is to certify a union as collective bargaining representative, if the NLRB is presented evidence that over half of the employees have signed authorization cards designating union representation.

Unions and their supporters in Congress argue that allowing representation after card-checks reduces voter intimidation. These supporters are in essence arguing that union authorization cards have less intimidation if the “vote” is supervised by union organizers, rather than by a secret ballot election conducted by the federal government.

The reality is that the unions are currently winning government-supervised secret ballot elections at one of the largest margins in decades, well over 60% in the first half of 2008. Further, although unions claim that one in five workers gets fired for trying

to form a union, other statistics show that less than 4% of all NLRB elections included a firing. Employers claim the civil penalty provisions of the proposed legislation are designed to prevent employer free speech during union organizational campaigns. The union can say under current law that if the union wins an election, “they’ll get you a 50% raise,” but if an employer says that a union victory can lead to declines in business for economic reasons, that might be considered an unfair labor practice for such speech directed towards each worker, so that employers would become fearful of saying anything. Further, the proposed legislation would provide triple back pay to employees who are unlawfully discharged or discriminated against while involved in union activities during an organizing campaign, as well as immediate reinstatement by court order of those terminated during an organizing campaign. These remedies go far beyond any remedies in any other type of employment matter, even the discrimination laws.

Ironically, one of the least noticed provisions in the new law is the most dangerous, the “arbitration” provisions for a first collective bargaining contract. Such an approach goes against the grain of this country’s entire history of labor relations, which is designed to let the parties (unions employers) negotiate their agreements without government interference. As an example of what could happen, a small company in middle Georgia that is required to arbitrate a first collective bargaining agreement with a union, may be confronted with a union argument that the new auto plant in the area is going to be paying over \$20.00 per hour, providing fully employer-paid insurance and pensions, and that this small company ought to meet that same standard since it is located near the auto plant. Under the proposed law, the arbitrator would have the power and totally unbridled discretion to require that small company

Continued on page 4 ►►

*Our Firm Wimberly Lawson Seale Wright & Daves, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.*

## UNIONS DISCUSSING POSSIBLE REUNIFICATION WITH AFL-CIO



**Jeff Jones** .....

**"The AFL-CIO split in 2005, and seven former affiliates formed a separate federation, Change To Win."**  
.....

group stated that the labor movement needed to put more emphasis on organizing rather than on politics. However, many believe the split was really attributable to a dispute over who would control and lead the federation.

At the same time there were discussions about reunifying the labor movement into one major federation, another major union is splitting up, UNITE-HERE. At its General Executive Board meeting on March 13, UNITE-HERE addressed the attempt by a group to secede from the union. The Board voted to authorize co-President Wilhelm, who had been President of HERE, to negotiate with the AFL-CIO for reaffiliation, and to disaffiliate from Change To Win allegedly based on the SEIU's interference in UNITE-HERE's affairs and its intrusion on UNITE-HERE's industry jurisdiction. The other faction of UNITE-HERE, led by co-President Bruce Raynor, will apparently affiliate with the SEIU and possibly other unions to form a new federation, possibly known as Workers United, that may include the UAW and the TWU.

A feud between the former UNITE leaders and the former HERE leaders is deep and bitter, both sides announcing their merger a "total failure." The former HERE group asserts that UNITE-HERE's way of operating was authoritative, secretive, and undemocratic. This group also threatened UNITE-HERE co-President, Bruce Raynor, with "criminal liability," and argued that Raynor and his allies have shredded or removed documents from the union's New York headquarters, which Raynor's side controls. Raynor's group has referred to the HERE group as a "bunch of thugs," and the two groups are expected to attempt to raid within each others areas of influence, or union jurisdiction. The two factions are also battling over the division of the assets previously owned by UNITE-HERE, including the union's bank, the only union-owned bank in the U.S.

## KNOW YOUR ATTORNEY

T. Tamara Gauldin



T. TAMARA GAULDIN is a practicing trial Associate in the Nashville office of the firm, joining in April 2009. Her law practice includes an emphasis on defense of workers' compensation claims for employers, premises liability defense, and employment law. Tamara is a native of Dyersburg, Tennessee, where she is called "Tammi" and holds the "key to the city." Tamara earned her Bachelor's Degree from Union University in Jackson, Tennessee, where she double majored in Political Science and Social Work. Tamara was also a collegiate athlete and played four years for the Union University Lady Bulldog Basketball team. After graduation from Union University in 2002, Tamara earned her Doctor of Jurisprudence Degree from the University of Tennessee College of Law in Knoxville, Tennessee, in 2005. Tamara's legal career in private practice took her to Nashville, Tennessee, which has provided her great opportunities in her community as she is an active member of Born Again Church, a basketball coach at St. Cecilia Academy, member of a non-profit board of directors, and member of three Bar associations.

**Be sure to visit our website often  
[www.wimberlylawson.com](http://www.wimberlylawson.com)  
for the latest legal updates, seminars, alerts and firm biographical information!**

## NEW COBRA NOTICES DUE APRIL 18, 2009



**Jerry Pinn** .....

"The appropriate notice must have been delivered by April 18, 2009 to workers who terminated before February 17, 2009."

.....

The Department of Labor has issued model COBRA notices to incorporate changes required by the American Recovery and Reinvestment Act of 2009 (ARRA). The model notices are available at <http://www.dol.gov/ebsa/COBRAmodelnotice.html> or can be obtained from Wimberly Lawson. The appropriate notice must have been delivered by April 18, 2009 to workers who terminated before February 17, 2009.

The Department created model notices to help plans and individuals comply with these requirements. Each model notice is designed for a particular group of qualified beneficiaries and contains information to help satisfy ARRA's notice provisions. The following three notices would be used by most employers:

General Notice (Full version). Plans subject to the Federal COBRA provisions must send the General Notice to all qualified beneficiaries, not just covered employees, who experienced a qualifying event at any time from September 1, 2008 through December 31, 2009, regardless of the type of qualifying event, AND who either have

not yet been provided an election notice or who were provided an election notice on or after February 17, 2009 that did not include the additional information required by ARRA. This full version includes information on the premium reduction as well as information required in a COBRA election notice.

General Notice (Abbreviated version). The abbreviated version of the General Notice includes the same information as the full version regarding the availability of the premium reduction and other rights under ARRA, but does not include the COBRA coverage election information. It may be sent in lieu of the full version to individuals who experienced a qualifying event during on or after September 1, 2008, have already elected COBRA coverage, and still have it.

Notice in Connection with Extended Election Periods. Plans subject to the Federal COBRA provisions must send the Notice in Connection with Extended Election Periods to any assistance eligible individual (or any individual who would be an assistance eligible individual if a COBRA continuation election were in effect) who:

1. Had a qualifying event at any time from September 1, 2008 through February 16, 2009; and
2. Either did not elect COBRA continuation coverage, or who elected it but subsequently discontinued COBRA.

This notice includes information on ARRA's additional election opportunity, as well as premium reduction information. This notice must have been provided by April 18, 2009.

Employers can delay starting subsidy payments until May. Former employees must pay the full COBRA premium for March and April, but employers must reimburse them within 60 days of receiving payments or give credit toward future premium costs, as long as it is reasonable to believe that the credit can be used within 180 days of the overpayment. Otherwise, the overpayment must be reimbursed to the individual within 60 days of receipt.

**TO SUBSCRIBE** to our complimentary newsletter, please go to our website at [www.wimberlylawson.com](http://www.wimberlylawson.com) or email [bhoul@wimberlylawson.com](mailto:bhoule@wimberlylawson.com)

# POOR ECONOMY LEADS TO INCREASED DISCRIMINATION CHARGES AND LITIGATION



## **Brent Wilkins** .....

**“The charges filed in 2008 represent a 15% increase over the number filed the prior year, and represent an increase not seen for many years.”**

A record-high 95,402 private sector discrimination charges were filed with the EEOC during 2008, with increases occurring in every major category. The charges filed in 2008 represent a 15% increase over the number filed the prior year, and represent an increase not seen for many years. Age discrimination charges and retaliation charges accounted for the largest annual increases, while discrimination charges based on race, sex, and retaliation remain the most frequently alleged violations.

During recessionary times, more employees are laid off or otherwise terminated, and may feel the only way to retain their income is to bring some type of legal claim. New federal laws and massive layoffs lead to more charges, as well as new court rulings. The new amendments to the ADA are likely to result in increased claims and litigation, and the new “Lilly Ledbetter” Fair Pay Act broadened the definition of pay discrimination and expanded the time period in which a claim could be filed. Charges of retaliation are up the most, now topping sex discrimination and second only to race discrimination. Retaliation refers to a claim that an employer discriminated against an employee because he or she filed a claim or opposed a discriminatory practice.

..... While there are no simple solutions to avoiding discrimination claims and other employment litigation, steps in the right direction include having good written rules and policies, appropriate procedures and protocols for handling important issues, and appropriate training of supervision. The best defense for termination and discipline claims remains documented evidence of poor performance or rule violations, and consistent treatment of similar situations. In layoffs and large numbers of terminations, it is important to review whether there is any disproportionate impact on particular protected groups, and if so, whether such adverse impact can be justified by legitimate, job-related reasons, and appropriate documentation.

## **“UNION CHECK-CARD LAW REINTRODUCED” continued from page 1**

to do just that, and the employer would have no say-so, other than possibly going out of business (even that would probably be challenged as an unfair labor practice). There would be no effective appeals from this process.

Much of the unanimous Democratic Party’s support for this proposed legislation over the past few years resulted in part from the fact that Congress knew the legislation would not pass, and if passed, it would be vetoed by President Bush. Now some of these Democrats in Congress are beginning to have doubts about the legislation, including Senators Lincoln and Pryor of Arkansas, Senator Landrieu of Louisiana, Senator Udall of Colorado, and at least one other Democratic Senator, who have voiced concerns about aspects of the Democratic proposals. Further, Senator Specter of Pennsylvania, the lone Republican who supported the bill in previous Congresses, has also signaled that he will not back ending a filibuster against the card-check legislation.

Further, there are two “counter attacks” against the proposed union card-check bill developing. Republicans in the House and Senate introduced proposed legislation called The Secret Ballot Protection Act, which seeks to guarantee that all employees can vote in a secret ballot election, conducted by the National Labor Relations Board, when voting on union representation. Further, several major corporations have organized a “Committee for a Level Playing Field” to support a “third way” approach, providing for a fixed time period for a secret-ballot elections, and setting forth certain principles including penalties for serious and pervasive violations of the law by labor or management and expedited procedures to impose them.

At a closed-door meeting between President Obama and the AFL-CIO on March 3, President Obama told more than 100 top labor officials that the Employee Free Choice Act would pass. However, even some of President Obama’s supporters are having concerns about the effect on the current economy of the legislation, including Warren Buffett.



**Wimberly Lawson**  
Seale Wright & Daves, PLLC  
*Attorneys & Counselors at Law*

## TARGET OUT OF RANGE



Dear Clients and Friends:

Our Annual Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. Please plan now to join us.

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. Some of the twenty-five or more topics are:

- FMLA Amendments and Issues
- Records Retention and Destruction
- Amendments to Americans with Disabilities Act
- COBRA Regulations
- Genetic Information Non-Discrimination Act
- Wage/Hour Compliance under New Administration
- Lilly Ledbetter Fair Pay Act
- Employee Free Choice Act
- I-9, E-Verify and Immigration Issues
- Recession and RIFs – Tips for Dealing with the Downturn
- Workers' Compensation Strategies

Join us in Knoxville on November 5 and 6! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves  
Managing Member

**We are also pleased to announce that our keynote speaker will be author, motivational speaker, trainer, radio talk show host and one of the nations most sought after public speakers,**

***Hallerin Hilton Hill***





**Wimberly Lawson**  
 Seale Wright & Daves, PLLC  
 Attorneys & Counselors at Law

# TARGET OUT OF RANGE



## THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott - Knoxville, Tennessee - November 5-6, 2009

**COST:** Early, Early Bird (registration AND payment received by June 1)

- \$280 per person
- \$260 for each additional person from same company
- \$215 for eight or more from same company

Early Bird (registration AND payment received by October 1)

- \$295 per person
- \$275 for each additional person from same company
- \$230 for eight or more from same company

Registration and payment received AFTER October 1

- \$335 per person
- \$315 for each additional person from same company
- \$295 for eight or more from same company



**REGISTRATION INCLUDES:**

Seminar (1½ days), materials, two continental breakfasts, lunch and evening reception on Thursday

**CANCELLATION POLICY:**

50% cancellation fee will be incurred for cancellations after October 14. Cancellations made after October 28, 2009 will forfeit registration fee (registrants will receive the conference materials post-seminar)

**FOUR WAYS TO REGISTER:**

1. **Mail to:** Bernice Houle  
 Wimberly Lawson Seale  
 Wright & Daves PLLC  
 P.O. Box 2231  
 Knoxville, TN 37901-2231
2. **Fax to:** 865-546-1001
3. **Email to:** bhoule@wimberlylawson.com
4. **Via website:** www.wimberlylawson.com

*Name* \_\_\_\_\_

*Company* \_\_\_\_\_

*Address* \_\_\_\_\_

*City* \_\_\_\_\_ *State* \_\_\_\_\_ *Zip* \_\_\_\_\_

*Phone* \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_ *Fax* \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_

*Email* \_\_\_\_\_

*BPR and State for CLE* \_\_\_\_\_

*Number attending reception* \_\_\_\_\_