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Briefly

February 2014 Volume 14, Issue 2

Mary Moffatt Helms

"Benefits to the proposed rule include increased workplace safety from expanded OSHA access to timely injury/illness information...and 'to target its compliance assistance and enforcement efforts accordingly.'"

COMMENT PERIOD FOR OSHA'S PROPOSED RULE EXTENDED TO MARCH 8TH

In a Proposed Rule issued November 8, 2013, the Occupational Safety and Health Administration ("OSHA") wants to add more regulatory compliance for businesses subject to OSHA recordkeeping rules. Intended to "Improve Tracking of Workplace Injuries and Illnesses," by amending 29 CFR1904.41, the Rule would add three electronic reporting requirements for businesses already subject to OSHA recordkeeping rules ("covered businesses").

OSHA's first proposal would require covered businesses with 250 or more employees to submit information electronically to OSHA on a quarterly basis using information from records kept under Part 1904, including the individual entries on the OSHA Form 300 and the information entered on each OSHA Form 301; summary data from Form 300A would be submitted annually.

The Rule would also require covered businesses with 20 or more employees in designated industries to submit information from the Summary Form (Form 300A) annually, replacing the current requirement in Section 1904.41(a) for employers receiving OSHA's Annual Survey Form to complete and submit. Industries subject to this requirement would include industries such as utilities, construction, manufacturing, automotive parts, furniture stores, home health care services, nursing care facilities, and a wide range of other covered businesses, as listed in Appendix A of the Proposed Rule.

The third proposal would require all employers directly notified by OSHA to submit electronically specified information from their Part 1904 Injury and Illness Records to OSHA for the time period and at the intervals specified by OSHA.

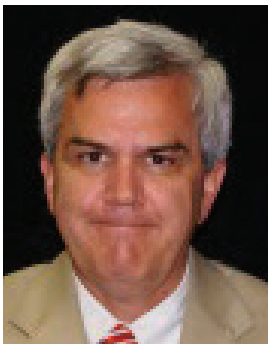
OSHA intends to make the collected data (unless protected by FOIA, the Privacy Act or specific Part 1904 provisions) available to the public and "ensures" that the names of employees with recorded injuries or illnesses are removed from any published information. OSHA intends to provide a secure Web site for data reporting and collection by covered businesses, who, after registration, will be assigned a log-in ID and password.

According to OSHA, benefits to the Proposed Rule include increased workplace safety from expanded OSHA access to timely injury/illness information...which will allow OSHA "to identify the workplaces where workers are at greatest risk.... and "to target its compliance assistance and enforcement efforts accordingly." OSHA further notes "public access to this information will allow current employees to compare their workplaces to the best workplaces for safety and health and will allow potential employees to make more informed decisions about potential places of employment" and "will allow members of the public to make more informed decisions about current and potential companies with which to do business."

Many business leaders have expressed several concerns about the Proposed Rule, such as that public posting of the information may be misused or misinterpreted by readers. The original deadline for comments, February 6, 2014, has been extended to March 8, 2014.

Employers required to maintain injury and illness records under Section 1904 are: (1) employers under OSHA jurisdiction with 11 or more employees unless subject to a partial exemption (specific low-hazard retail, service, finance, insurance or real estate industries listed in Appendix A to 29 CFR 1904.2, subpart B); and (2) employers either with ten or fewer employees or in partially exempt industries who are specifically informed by OSHA or BLS in writing to keep such records. 29 CFR§1904.1 and §1904.2.

NLRB UPDATE: PROHIBITION OF EMPLOYER RULE "WALKING OFF THE JOB" ENFORCED IN COURT



Howard Jackson

"The NLRB focused on the language of the particular rule, and concluded that 'walking off the job' sounds a lot like 'walkout,' which is a common synonym for 'strike.'"

One of the most common work rules that any employer utilizes is a rule prohibiting "walking off the job" without permission. This newsletter has included many articles over the last year or so warning employers of the current view of the Administration and the NLRB, that many employer work rules are over broad and "chill" legitimate union and other protected concerted activities. A classic example of a protected concerted activity is a general work stoppage or strike, whether a union is involved or not. The NLRB has concluded that a general work rule prohibiting "walking off the job" might be interpreted by employees to prohibit such a general work stoppage or strike. The United States Court of Appeals for the Eleventh Circuit recently upheld that decision. *Ambassador Services, Inc. v. NLRB* (Eleventh Circuit, 11/15/2013).

The NLRB focused on the language of the particular rule, and concluded that "walking off the job" sounds a lot like "walkout," which is a common synonym for "strike." Of course, employees have a right to strike. Therefore, reasoned the NLRB, a rule against "walking off the job" can reasonably be read as prohibiting protected activity.

This decision may well constitute legal overkill by the NLRB. But employers can fix their policies easily by using different language such as: Employees may not leave their department or the premises during the work shift without obtaining a supervisor's permission.

Editor's Note: If a policy is unlawful as written, the NLRB will find that discipline under the policy is not valid. Also, in the NLRB election context, a union can use unlawfully issued discipline as one factor when attempting to challenge election results. For these reasons, policy language should be updated from time-to-time to ensure that the language used comports with current legal principles.

NLRB RULES PROHIBITING CLASS ACTION WAIVERS AGAIN REJECTED BY COURT

The National Labor Relations Act protects certain "concerted activity" on the part of employees. Generally, concerted activity refers to the concept of two or more employees joining together to improve their working conditions, or to even one employee when the activity is directed toward improving working conditions generally. A relatively recent application of the concept pertains to employers who require all applicants and employees to sign arbitration agreements that require all legal claims (with some exceptions) to go through private arbitration rather than through the court system, and generally prohibit class or collective actions. The U.S. Supreme Court has generally upheld the legality of such arbitration agreements and class action waivers based on the provisions of the Federal Arbitration Act. However, the NLRB has ruled that any employment agreement waiving an employee's rights to bring class or collective actions in court is unlawful, because it prohibits employees from engaging in the concerted activity of filing a class or collective action lawsuit.

In December, the United States Court of Appeals for the Fifth Circuit rejected the NLRB's position and ruled that an employer may require that all employment-related disputes be resolved through individual arbitration. *D.R. Horton, Inc. v. NLRB* (Fifth Circuit, 12/3/13). The court did enforce the NLRB's order to the extent that it required the employer to rescind or revise the arbitration agreement to clarify that employees are not prohibited from filing unfair labor practice charges with the NLRB.

The case arose when an employee brought a nation-wide class action alleging that the employer improperly classified him and others as exempt under the statutory overtime provisions of the wage-hour law. The employer responded that the arbitration agreement barred collective claims but invited individual arbitration procedures. The claimant then filed an unfair labor practice charge, and the Board issued an order finding that the arbitration agreement interfered with the right of employees to engage in "concerted activity" under the Labor Act. The employer then petitioned for review in court, and the ruling was overturned.

Editor's Note: Many large employers across the U.S. are instituting individual employment agreements with their employees. Such agreements can be lawful, provided they are properly drafted and implemented. Such agreements may offer the advantage of avoiding class and collective action litigation, as well as avoiding the additional expenses and risks that often occur in court litigation. On the other hand, implementing such agreements can result in employee relations issues, and employees and their counsel often challenge the validity of the agreements and so create an additional layer of litigation. An employer should plan and consider the matter carefully before implementing a mandatory arbitration program.

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KNOW YOUR CONSULTANT
CAROL R. MERCHANT

CAROL R. MERCHANT is a consultant with the Firm working from the Knoxville office. She provides consulting services, in conjunction with the Firm's attorneys, with emphasis on compliance with regulations under the Fair Labor Standards Act, Family and Medical Leave Act, Davis Bacon and Related Acts, Service Contract Act, Contract Work Hours and Safety Standards Act, Migrant and Seasonal Agricultural Worker Protection Act, H2A provisions of the Immigration Reform and Control Act, Employee Polygraph Protection Act and the Federal Wage Garnishment Law (Title III of the Consumer Credit Protection Act).

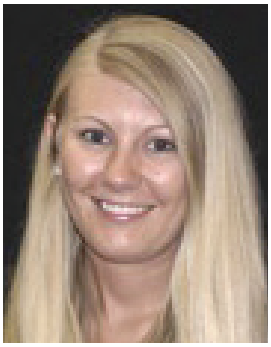
Carol retired from the U. S. Department of Labor, Wage and Hour Division, in December 2007, after 33 years of service with the Division. From 2000 to the end of 2007 she was the Nashville District Director, supervising enforcement of Wage and Hour laws in the state of Tennessee. Prior to that, she had been Assistant District Director of the Knoxville Wage and Hour office after 11 years as an investigator in Columbia, South Carolina.

During her years as District Director and Assistant District Director, she reviewed investigative files, conferred with the Solicitor's Office of the U.S. Department of Labor on cases that should be litigated, and assessed and negotiated payment of civil monetary penalties under the Fair Labor Standards Act (including child labor), Migrant and Seasonal Agricultural Worker Protection Act, H2A and Employee Polygraph Protection Act.

She worked on rewriting portions of the Wage and Hour Divisions' Field Operations Handbook, organized and conducted three national training classes for Wage and Hour Technicians, and co-wrote the national training manual for investigators on developing litigation cases.

From 2003 until her retirement in December 2007 she was the Southeast Regional Representative on the National Health Care Team examining compliance problems in the health care industry. She testified in Federal Court on numerous cases litigated by the U. S. Department of Labor.

Carol received her Master of Arts degree in American History from the College of William and Mary and her Bachelor of Arts degree in History from Columbia College. In 2000 she was awarded the Distinguished Career Service Award from the Secretary of Labor.



Ashley Griffith.....

"While Tennessee numbers may have increased in 2013, unions still have major hurdles ahead, such as declining membership."

UNION MEMBERSHIP IN 2014

Surprisingly, in 2013, Tennessee had the largest percentage increase for union membership among the entire country. Thirty-one thousand people joined the union in Tennessee. Ethan Link, the program director with the Laborers' International Union of North America's Southeast Laborers' District Council, stated that there were a variety of factors for this increase in Tennessee, including more construction and manufacturing jobs and increased organizing efforts based on disparity among workers.

So why did union membership increase in Tennessee? Most likely it is due to the increase of manufacturing jobs. For instance, General Motors announced that it was investing $350 million dollars at the plant in Spring Hill, in which 1,800 jobs were added. According to Mike Herron, the chairman of the United Auto Workers Local 1853, the added jobs doubled the membership for Local 1853.

However, while Tennessee saw an increase in union membership, the national figure did not change from the previous year. According to the Bureau of Labor, 11.3 percent of wage and salary workers were union members in 2013, which was the same for 2012.

While Tennessee numbers may have increased in 2013, unions still have major hurdles ahead, such as declining membership. The Bureau of Labor reported that in 1983 the union membership rate was 20.1 percent, and there were 17.7 million union workers. In addition to rapidly declining membership, states continue to pass right to work legislation. Thus far, 24 states are right to work states meaning that employees are not required to join a union or pay union fees.

So what is in store for Tennessee? The latest battle with the union is the one brewing in Chattanooga with regard to the Volkswagen plant. The case originated when workers filed complaints in the midst of the union's organizing efforts at the plant. Workers alleged that the United Auto Workers ("UAW") and Volkswagen violated federal labor law. One complaint specifically alleged that UAW representatives got workers to sign union authorization cards by coercion and misrepresentation.

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"NLRB UPDATE"

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UNION FINES EMPLOYEE OVER $21,000.00 FOR CROSSING PICKET LINE

Employers often hear rumors of employees being fined for crossing picket lines during union strikes or other work stoppages. Indeed, a union's ability to fine its members is one of the arguments raised by employers in union organizational campaigns. Employers rarely get to see the results of an actual case to see how unions operate in this regard. A recent case involving a 2012 strike at Caterpillar is quite revealing in this respect. *International Association of Machinists Local Lodge 851 (Caterpillar)* (ALJ decision, 11/12/13).

During the strike, employees were offered strike benefits of about $100.00 per week if they assisted the union by engaging in picket line-related functions. This was announced at meetings that the union had with employees prior to the commencement of the strike. Employees were also told that if employees returned to work during the strike, they would be subject to fines. However, the extent of any fines had not yet been determined and would not be determined until after the strike was over. In the meantime, a number of the employees abandoned the strike and returned to work.

Subsequent to the strike, a committee was chosen to hear charges against those union members who crossed the picket line and to determine the amount of fines to be levied against them. One employee was fined $21,558.00, another $15,564.00, and a third $11,938.00. Other union members who returned to work received fines that were either lower or higher than the three persons involved in the case.

One of the three persons fined, Jackson, was a relatively newly hired employee who did not attend the union meetings and was not aware of the union's position on returning to work, benefits or fines. He testified that because he was short of money, he called the union telephone number, talked to a union official, and asked the official what the consequence would be if he crossed the picket line. The employee was allegedly told that he would get fined and the union would not represent him in the future. When he asked about the amount of the fines, he was told it would be $100.00 to $200.00. The union official denied the telephone conversation.

The second employee, Jones, said he typed out a letter of resignation of his membership, which he mailed to the union local address. The union denied receiving any such letter. Jones testified that he also handed a copy of the letter to a shop steward on the picket line, and told the shop steward that he was resigning from the union before returning to work. Jones testified that the shop steward said he did not think that a person, once a member, could resign. According to Jones, he told the steward that this was incorrect and that the steward could check with the labor board. Jones testified that the steward then took the letter, crumpled it up, and threw it into a garbage pail. The steward denied the conversation.

The union thereafter sent out a letter to the three persons, notifying them that under the union constitution a trial date had been set. At least one of the three members in question attended the trial and claimed he had sent in a resignation letter, tendering a copy of the letter that also had his writing on it. The trial committee rejected his testimony and sent him a letter advising him that he was fined $11,938.00 and that he would not be eligible to hold any union office for a period of five years.

Two of the persons fined filed unfair labor practice charges with the NLRB. The Administrative Law Judge who heard the case stated the following rule of law: if the members resigned from the union before they abandoned the strike, then the attempted imposition of the fine would be unlawful. The question was whether or not the individuals actually resigned before they returned to work. The Administrative Law Judge did not credit the claimants' testimony, finding that if they had in fact resigned they would have taken more steps to insure that they could prove that they resigned prior to returning to work. The Judge credited the testimony of the union steward and the union official that no resignation had been received. The Judge also did not credit one employee's testimony that the union official told him that if employees returned to work they would face a fine of only $100.00 to $200.00. Instead, the Judge credited the union's testimony that at the time of the alleged conversations, the union had not yet determined how much the fines would be. Accordingly, the Judge upheld the fines.

Editor's Note: This case visibly demonstrates the application of union rules, fines, and "justice."

"UNION MEMBERSHIP"

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The Office of General Counsel with the National Labor Relations Board considered the workers' complaints and disagreed that the UAW or Volkswagen violated federal labor law. Specifically, the General Counsel found that the Union did not violate federal labor law by claiming majority status and demanding recognition from the employer. In addition, the General Counsel found that the Union did not violate federal labor law when it solicited authorization cards. As such, the General Counsel recommended that the complaints be dismissed.

Although the UAW gained a small victory with the Office of General Counsel, workers at the Volkswagen plant ultimately decided that they would decline representation by a 712-626 margin. This was certainly a major blow to the UAW and one that has garnered national spotlight. Such negative attention to the UAW may foreshadow a troubling year in 2014. So while 2013 seemed to be a good year for unions in Tennessee, 2014 looks a bit troublesome.