



## Big Changes Expected in Labor and Employment Law

Expect to see significant changes in the areas of labor and employment law in the coming months. Congress has signaled that it will consider bills that would do the following: (1) change the way labor unions are allowed to organize for collective bargaining purposes; (2) expand bargaining units by narrowing the definition of “supervisor;” (3) allow employees to form a “union of one;” (4) expand the amount of sick leave for employees and; (5) establish a national collective bargaining law that covers public safety employees.

### Employment Free Choice Act

Currently, a union that wishes to organize a group of employees must get at least thirty (30) percent of those employees to sign a union authorization card before a union

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## New Law Requires Employers to “Subsidize” COBRA Premiums

The American Recovery and Reinvestment Act of 2009 (“ARRA”), signed into law by President Barak Obama on February 17, 2009, contains amendments to the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”) that

will affect every employer that has a group health plan. In the past, assistance eligible individuals were given the option of maintaining their health coverage for eighteen (18) to thirty-six (36) additional months under COBRA upon separation but they had to pay the entire premium (plus two percent for administrative costs) for the entire period.

ARRA requires employers to “subsidize” nine (9) months of an eligible individual’s COBRA premiums. The COBRA “subsidy” encompasses the entire period from September 1, 2008 to December 31, 2009.

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DH&F is proud to announce that Brad Bennett and the Firm are recipients of the 2009 Burton Award as a “Distinguished Law Firm”. This award is given in association with the Library of Congress and only 30 such awards are given nationwide each year. Brad received recognition for an article that he wrote concerning potential changes in employment law. Brad will be recognized at a ceremony to be held at the Library of Congress on June 15, 2009. Please contact us if you would like a copy of this article.

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election may be held. Union elections are private, anonymous, and supervised. The proposed Employment Free Choice Act ("EFCA") requires only a majority of employees in a group a union wishes to represent sign an authorization card in order for the union to be certified. EFCA eliminates secret-ballot elections. Opponents of EFCA argue unions could be formed through duress or employee misunderstanding.

EFCA would also force an employer and union into binding arbitration if an agreement cannot be reached. Currently, the National Labor Relations Act requires that the union and employer negotiate in good faith the terms of a collective bargaining agreement. EFCA amends the NLRA and provides that parties have ninety (90) days to reach an agreement. If after ninety (90) days they cannot, the parties will be referred to mediation for thirty (30) days. If, after those 30 days the parties still have no agreement, the matter will be referred to an arbitrator who would then have the authority to set the terms of the collective bargaining agreement and to bind the employer and union to those terms for two (2) years.



Finally, EFCA would increase penalties for unfair labor practices. Currently, if an employer is found to commit an unfair labor practice, they are ordered to cease such activities and reinstate, with back pay, an employee who is

terminated for union organizing activities. Under EFCA, an employer may be forced to pay triple back pay and be subject to civil penalties up to \$ 20,000 in damages for each unfair labor practice committed "willfully or repeatedly."

It should be noted EFCA is a proposed amendment to the National Labor Relations Act ("NLRA") and would not affect public sector employees who are not subject to the NLRA.

### **RESPECT Act**

The proposed Re-Empowerment of Skilled and Professional Employees and Construction Trades-

workers Act ("RESPECT") would dramatically limit the definition of "supervisor" under the National Labor Relations Act ("NLRA"). RESPECT would overturn the National Labor Relations Board's ("NLRB") definition of supervisor. Specifically, the NLRB's current definition of supervisor is someone who "assigns other employees to overall duties..." Under RESPECT, a supervisor must have the authority, "for a majority of the individual's work time, to hire transfer, suspend, lay off, etc." RESPECT, by imposing a "majority of time" requirement, would significantly expand the size of collective bargaining units.

### **Working Families Flexibility Act**

The "Working Families Flexibility Act" ("WFFA"), if enacted, would provide employees with an annual right to apply to their employer for a modification of the employee's work hours, schedule, or work location. The Act would require an employer to meet with an employee to discuss the requested modification within fourteen days. Thereafter, within fourteen days of the meeting, the employer would be required to provide the employee with a written decision regarding the requested modification. If the modification is denied, the employer would be required to state the grounds for the denial and may propose an alternative modification.

If the employee is dissatisfied with the employer's decision, the Act would permit the employee to request reconsideration and would require the employer and employee to hold a meeting to discuss the request for reconsideration. The bill would also give the employee the right to a representative of the employee's choosing at both the initial meeting and the reconsideration meeting.

Penalties for an employer's violation of WFFA or retaliation against an employee who would attempt to exercise their rights under WFFA would be a fine of up to five-thousand dollars per violation.

### **Public Safety Employer-Employee Cooperation Act**

This proposed legislation would establish minimum standards for state collective bargaining laws for public safety officers. The Act would: (1) ensure the right to join a union and have the union be recognized by the employer; (2) the right of public safety officers to bargain over wages, hours, and working conditions and; (3) the ability to enforce contracts through the state courts. The Act would also establish a dispute resolution mechanism in a collective bargaining agreement. The Act would give the authority to the



Federal Labor Relations Authority (“FLRA”) to determine whether a state’s collective bargaining agreements meet the standards in the Act. The FLRA would be given the authority to: (1) determine the organization of units within a collective bargaining agreement; (2) resolve unfair labor practice complaints and; (3) supervise and conduct elections to determine if a labor organization has been selected as an exclusive representative by the employees. States would be able to enact more expansive collective bargaining laws but would not be able to pass laws narrower than those contained in the Act.

Downes, Hurst & Fishel LLP will continue to monitor the status of these and other proposed changes to labor and employment laws and provide updates as developments warrant.

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*Cont’d from Pg. 1: COBRA*

### **Eligible Individuals**

Assistance eligible individuals are employees who were involuntarily terminated on or after September 1, 2008 as well as the employee’s spouse and/or dependents. An employee is involuntarily terminated if they are let go by the employer. Employees who resign or are terminated for gross misconduct are not eligible for COBRA.

The “subsidy” is available prospectively to eligible individuals who are involuntarily terminated after the date of enactment. The “subsidy” is available retroactively to eligible individuals who were terminated before March 1, 2009. This includes those who (1) declined COBRA coverage; (2) accepted COBRA coverage and paid the premium; or (3) accepted and lost COBRA coverage because the premium was not paid.

### **COBRA “Subsidy” Benefits**

Assistance eligible individuals who elect to use COBRA receive a nine (9) month subsidy from their former employer. The employer would pay sixty-five (65) percent of the premium for nine months while the individual would pay the other thirty-five (35) percent. The premium includes both the actual cost plus two percent for administrative fees. The COBRA “subsidy” will begin on March 1, 2009 for those individuals who were terminated before March 1, 2009.

### **Notice**

Employers must give notice to employees who were previously terminated, on or after September 1, 2008, by April 18, 2009 regardless of whether they elected COBRA coverage in the past. These employees will have a 60 day special election period to choose to elect COBRA coverage and the subsidy. Employees terminated after March 1, 2009 will have 60 days upon notification of the COBRA subsidy to elect COBRA coverage.



The notice must include (1) the availability of the “subsidy;” (2) the second chance to elect COBRA coverage; (3) the option of less expensive coverage (the different coverage must cost the same or less than the coverage the individual had at the time of the qualifying event; be offered to active employees; and cannot be limited to only dental coverage, vision coverage, counseling coverage, a flexible spending arrangement or an on-site medical clinic.); and (4) the duty to notify the employer when other coverage or Medicare is available.

### **Reimbursement**

The ARRA clearly defines how reimbursement occurs for private employers. Once the eligible employee pays the employer and/or insurer his or her portion of the premium, the employer may claim a credit on its payroll taxes that is equivalent to the amount of the COBRA premium obligations.

The ARRA is unclear on how public employers will be reimbursed for their COBRA premium payments. Our office has contacted the appropriate authorities and will provide you with this information as soon as it comes to our attention.

### **Conclusion**

Because the new COBRA “subsidy” requirements apply both prospectively and retroactively, employers should review all terminations and/or separations that have occurred since September 1, 2008. If the individual was involuntarily terminated, he or she is eligible for the nine (9) month subsidy and the employer is obligated to provide eligible individuals notice of these benefits.

If you have any questions regarding the COBRA “subsidy” requirements, including notice of eligibility forms, please do not hesitate to call Downes, Hurst & Fishel LLP at (614) 221-1216.

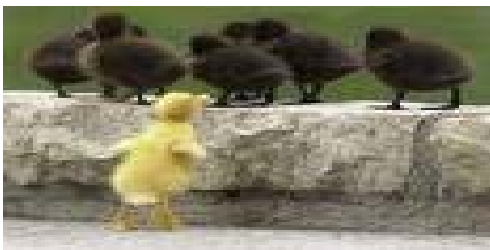
## **Job Discrimination Claims Hit Record High**

The U.S. Equal Employment Opportunity Commission (“EEOC”) recently announced that workplace discrimination charge filings with the federal agency nationwide hit a record level during fiscal year 2008. Discrimination claims filed with the EEOC jumped 15 percent in fiscal year 2008 to 95,402 claims – the highest level since the agency opened in 1965. That number is up sharply from 82,792 claims filed the year before by workers who believe they were discriminated against because of their age, race, religion, gender or other reasons. Figures released by the EEOC show that claims of age discrimination saw the biggest jump, up 28.7 percent to 24,582. Retaliation claims, in which employees believe they were fired or demoted based on their complaints of bias or other issues in the workplace, was the second largest increase.



## **Lilly Ledbetter Fair Pay Act of 2009 Signed Into Law**

On January 29, 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009. The law is retroactive to May 28, 2007, coinciding with the United States Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). The Act expressly overturns the Supreme Court’s decision in *Ledbetter* by specifying that a discriminatory pay decision, which begins the statute of limitations for filing a pay discrimination claim, occurs each time a discriminatory paycheck is issued, not just the first time an employer makes an adverse pay-setting decision.



***“I will get backpay for this, guys.  
Haven’t you heard of Lilly Ledbetter?”***

Under the Act, an unlawful employment practice occurs with respect to disparate pay when (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to the decision or practice; or (3) an individual is affected by an application of a discriminatory compensation decision or practice. Therefore, the statute of limitations restarts each time an employee receives a paycheck based on a discriminatory compensation decision.

Thus, an unlawful employment practice occurs when an individual becomes subject to, or “is affected” by a discriminatory pay decision or “other practice”. This broad language could allow for “non-employees” such as the spouses of deceased workers, to file pay discrimination claims so long as those individuals claim they have been affected by the discriminatory practice. Also, plaintiffs could argue that “other practice” includes such things as promotion or initial job placement decisions. Because these terms are not defined in the Act, litigation will likely arise over their meaning.

The new law will allow plaintiffs to recover back pay and damages for unlawful wage disparities occurring up to two years preceding the filing of the charge where the unlawful employment practices that have occurred during the charge filing period are “similar or related to” unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing the charge. Thus employers may be able to assert statute of limitations defenses to back pay for some prior pay differences if those pay differences were not caused by unlawful employment practices that are “similar or related to” the practices that caused pay differences during the charge period. In addition, the Act allows for punitive damages against an employer where the employer acted with malice or reckless indifference.

**What does this mean for employers?** If you have not done so already, now is the time to review and update, as needed, your compensation practices and criteria. Emphasis should be placed on developing compensation practices that are objective, measurable and applied consistently throughout the organization.

## Probationary Employees Eligible for Maternity Leave?

The Fifth District Court of Appeals recently issued a decision that may impact employer leave policies and the availability of leave to employees during their initial probationary period. *Nursing Care Management of America, Inc. v. Ohio Civil Rights Commission*, 2009 Ohio 1107 (5<sup>th</sup> Dist. Ct. App., 2009). The court's ruling was issued as the result of a Charge of Discrimination filed by a pregnant employee who was denied leave by her employer and terminated. The employee was a probationary employee who did not qualify for leave under her employer's policies. Following her termination, the employee filed a Charge of Discrimination with the Ohio Civil Rights Commission (OCRC).

The OCRC found that the employee was terminated simply due to her need for maternity leave, in violation of Ohio's laws against pregnancy discrimination. The employer appealed OCRC's decision to the common pleas court which reversed the OCRC and upheld the termination. The employee appealed the decision to the Fifth District Court of Appeals which overruled the common pleas court and held that the employee was wrongfully terminated for taking a leave of absence as a result of her pregnancy.



Tiffany McFee (McFee) was employed as a Licensed Practical Nurse. On January 26, 2004, after working for approximately eight months, McFee obtained a physician's note stating she was unable to work due to pregnancy-related swelling, until six weeks after the delivery. McFee gave birth on February 1, 2004, and was terminated three days later on February 4, 2004. At the time of her termination, McFee was a probationary employee who did not qualify for leave pursuant to the employer's policy.

Pursuant to Ohio Law, an employer must provide a reasonable maternity leave policy. Specifically, R.C. § 4112.02(G)(2) states:

Where termination of employment of an employee who is temporarily disabled due to pregnancy or a related medical condition is caused by an employment policy under which insufficient or no maternity leave is available, such termination shall constitute unlawful sex discrimination.

Pursuant to the employer's policy, as a probationary employee, McFee was not eligible for maternity leave. The Fifth District Court of Appeals concluded that the lack of any maternity leave policy for probationary employees was a violation of R.C. § 4112.02(G)(2). As a basis for its ruling, the court relied on O.A.C. § 4112-2-05(G) which explicitly states that if no maternity leave is in place, the termination of an employee who is disabled due to pregnancy is prohibited.

In support of its decision to terminate McFee, the employer relied upon R.C. § 4112.02(G)(5), which requires that a female employee must "qualify for leave." However, the court points out that the employer ignored the initial, preemptive sentence, "women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing."

The court failed to define a reasonable amount of leave for a pregnancy. However, the court quotes *California Federal Sav. and Loan Ass'n v. Guerra* which states that "the statute is narrowly drawn to cover only the period of actual disability on account of pregnancy." 479 U.S. 272, 290 (1987). In McFee's case, she had a doctor's note stating she could return to work six weeks following the delivery of her child.

Employers in the Fifth District, which consists of Ashland, Coshocton, Delaware, Fairfield, Guernsey, Holmes, Knox, Licking, Morgan, Morrow, Muskingum, Perry, Richland, Stark and Tuscarawas Counties, should be cautious in excluding female employees from maternity leave. Employers should also note that under a collective bargaining agreement an employer may classify pregnancy leave as unpaid leave. Furthermore, pursuant to R.C. § 4112.08, courts have been advised to liberally construe the law so it can best accomplish its purpose. Thus a "reasonable amount of leave" has become the floor of what is acceptable, not the ceiling.

## **Just Say NO to Drugs!** **Pre-employment Drug Testing and the Fourth Amendment**

Employers invest significant resources in educating and training new employees. However, this cost may not lead to an overall benefit if employees are often absent and/or there is a large turnover rate. A 1999 study done by the Substance Abuse and Mental Health Services Administration found that employees who use drugs are absent more often, are more likely to voluntarily quit, and are more likely to have worked for three or more employers than employees who do not use drugs. Because of studies such as these, employers are often interested in drug testing applicants. In the public sector, the constitutionality of these drug tests has been challenged. To date, the U.S. Supreme Court has yet to address the issue of pre-employment drug testing in the public sector. However, several courts have determined that pre-employment urinalysis tests to determine if an applicant has used illegal drugs, does not violate the 4<sup>th</sup> Amendment's "unreasonable search and seizure" doctrine.



In *Loder v. City of Glendale* 14 Cal.4<sup>th</sup> 846 (1997), residents challenged the City of Glendale's policy of testing current city employees who are applying for a promotion, as well as employee applicants who are applying for a new job. The California Supreme Court held that it is unconstitutional for a government employer to require drug testing of every current government employee who is seeking a promotion. The permissibility of such drug screening depends on the nature and duties of the promotion sought. However, the *Loder* court also held that pre-employment drug testing was constitutionally permissible under the Fourth Amendment. The court also held the test must be reasonable and administered to all applicants. In determining the reasonableness of the test, the court measured the governmental interest for testing against the intrusion on reasonable expectations of privacy. The court concluded that the pre-employment drug testing, when given to job applicants, is less intrusive and is of significant importance to public employers. Therefore, although certain promotional drug testing is not permissible, consistently-applied pre-employment drug testing would be permissible.

The U.S. Court of Appeals, D.C. Circuit, came to the same conclusion in *Willner v. Thornburgh*. The *Willner* matter involved an attorney who, after being offered a job at the Department of Justice, was denied employment after he refused to take a drug test. In upholding the pre-employment drug testing requirement, the *Willner* court looked to the fact that the applicant, Carl Willner, was given notice before applying and accepting the job offer that he would be tested. Furthermore, Mr. Willner answered "no" when asked if he had used illegal drugs. In approving the drug testing, the court first looked at the actual process of the test. The court also made the distinction between current employees and applicants. While current employees would have to take the test in order to be continuously employed, if an applicant "views drug testing as an indignity to be avoided, they only need to refrain from applying." *Willner v. Thornburgh*, 928 F.2d 1185, 1190 (1991).

However, please be aware that the Ninth Circuit Court of Appeals came to an opposite conclusion than the two cases above in its decision in *Lanier v. Woodburn*. The *Lanier* matter involved a library page whose job offer was rescinded after she declined to take a pre-employment drug test. The court did not find any "special need" to drug test a page. There was no evidence of a "city drug problem" nor did the position of library page involve "high-risk, safety-sensitive tasks." *Lanier v. Woodburn*, 518 F.3d 1147, 1150 (2008). The court cites *Chandler v. Miller*, which held that a general, societal drug problem is not a sufficient reason for drug testing. *Chandler v. Miller*, 520 U.S. 305, 320-321 (1990). However, The Ninth Circuit Court did not extend its holding too far. The court reinstated Lanier, the library page, but did not hold that the City of Woodburn's overall drug policy was unconstitutional.



From these cases, it appears that courts will look at three factors. The intrusiveness of the test itself, adequate notice to applicants of the test beforehand, and the reasons or "special needs" of the employer for administering such tests.

While case law has validated pre-employment drug testing when the position applied for was safety-sensitive or required a special license, there is no guiding case law for Ohio public employers regarding general pre-employment drug testing. *Fontaine v. Clermont County Bd. Of Commissioners*, 2007 WL 2627338 (S.D. Ohio). Employers who wish to administer pre-employment drug tests should establish a procedure that is minimally invasive (does not require completely undressing and being closely monitored) and provides adequate notice to job applicants. The test should be administered to all possible future employees. Furthermore, employers should not attempt to create special needs where one does not exist nor should they cite a “societal drug problem” as an issue (see *Lanier*). If an employer gives notice, does not further intrude upon the privacy of an applicant, and does not create “special needs” their pre-employment drug test should be valid under the 4<sup>th</sup> Amendment. In light of the divergent case law, it is expected that more challenges to pre-employment drug testing will be forthcoming—if not more court decisions.

## **Arbitrator Upholds Termination of Dishonest Police Officer**

DH & F recently received a decision in a case where an arbitrator recently upheld the discharge of a City police officer who knowingly provided inaccurate, false and/or misleading testimony while testifying in a criminal trial, or while providing statements to investigators during the official homicide and internal affairs investigations. Although the facts giving rise to the termination in this matter were straightforward, the events giving rise to the arbitration hearing were anything but straightforward.



The Grievant’s discharge stemmed from a death in custody which occurred in 2000. Following the death in custody, as an officer on scene, Grievant was interviewed by homicide investigators, internal affairs investigators and provided testimony during the criminal trial of a fellow officer who happened to be his FTO and also charged with involuntary manslaughter. While testifying during the trial, grievant provided testimony that contradicted the testimony that was shared with criminal investigators following the death in custody. During a subsequent internal affairs interview following the in-court testimony, it was determined that Grievant was dishonest in violation of the City’s policies.

As a result of his dishonesty, Grievant was terminated by the City in February 2003. In October 2003, the City and Union proceeded to an arbitration hearing. In November 2003, the arbitrator concluded that although Grievant intentionally lied while under oath giving testimony during a criminal trial, he should be reinstated less a three-day suspension. The arbitrator’s award at the time was based upon a disciplinary table in the City’s policies and procedures manual, at the exclusion of the just cause procedure contained in the parties’ collective bargaining agreement.

Because the arbitrator relied exclusively upon an extraneous document not contained in the bargaining agreement and bargained for by the parties, the City sought to vacate the arbitrator’s award. The Union sought to confirm the award. The court denied the Union’s Motion to Confirm and granted the City’s Motion to Vacate. The decision of the court of common pleas set forth years of litigation ranging from appeals of the decision of the court of common pleas to actions for injunctive relief as to whether or not the matter was to be re-arbitrated. Ultimately, the parties convened for a second arbitration concerning Grievant’s February 2003 termination in October 2008. An award upholding the discharge was received over six (6) years later in April 2009.

In denying the Union’s grievance, the arbitrator concluded that the City proved by clear and convincing evidence that the Grievant was dishonest either during his criminal testimony or during his interviews with criminal and internal affairs. The arbitrator noted that the Grievant intentionally changed his testimony. Therefore, based upon the “just cause” standard contained in the parties’ agreement, not the disciplinary table, the arbitrator concluded that termination was appropriate. Termination was appropriate because “the overwhelming evidence of the record demonstrated that a police officer who intentionally misstates facts, lies or otherwise engages in conduct of the significance engaged in by the grievant, presents on ongoing liability to the police department, risks undermining public confidence in law enforcement, and in some circumstances may undermine the justice system.” As noted by the arbitrator, “any police officer who intentionally fails to tell the truth may be subject to discharge, and that discharge will, absence material procedural error, be upheld if the factual specifications are proven.” Thus, the grievance was denied.