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LABOR **PERSPECTIVES**

Employers need to be aware of the various means that labor has, in addition to EFCA, to reach their goals. Much will be changed through amendments to Board precedent and regulation, as well as by other bills presently pending, or soon to be introduced, in Congress.

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The Storm Builds as EFCA Drama Continues: Favorable Union Changes Likely by Other Means

by Radamés (Rudy) A. Torruella

Organized labor is constantly on the lookout for opportunities to increase its ranks. However, its dues paying members in the private sector continue to steadily decline. During the years of The New Deal, as much as 35% of the private work force was organized; recently, the official percentage is 7.2%.

On March 1, 2007, the first version of the Employee Free Choice Act ("EFCA"), introduced in the 110th Congress, was passed in the House of Representatives. However, it soon met its demise when the Republican-controlled Senate successfully filibustered the bill. Nevertheless, in 2008, with the prospect of Candidate Obama being elected and the possibility of Democratic control of both the House and Senate, labor's hopes were once again revived; strategies were rethought; plans were redrafted; budgeting priorities were reestablished; and renewed spirits and hopes surged. The elections resulted with a new Democratic, pro-labor President and with Democratic majorities controlling both Chambers of Congress. Candidate Obama's promises for a brighter future for unions in America were a clear and unambiguous beacon of bright light showing the way into a safe harbor in labor's stormy navigation of rough waters.

Since the 2008 elections, much has been going on (and going off) in labor's efforts. On March 10, 2009, EFCA was reintroduced. Back in September of 2009, the Wall Street Journal reported that Secretary of Labor Hilda Solis, speaking to the AFL-CIO convention in Pittsburgh, had significantly shifted her position as to EFCA: from "passive support" to one of actively working with the White House to "make the strongest case possible for passage of EFCA." Seven months later, Secretary Solis showed she was consistent, at least in her support for getting EFCA approved. During the California Democratic convention on April 17, 2010, she stated that the reversing of the prior administration's anti-worker policies had begun; among the measures contributing to this reversal, she predicted EFCA would become law.

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Of course, it hasn't all been smooth sailing for labor's legislative and regulatory efforts. Some unexpected storms have created set backs, at least as far as EFCA passage is concerned. These strong head winds have ripped some sails and headed labor's vessel dangerously close to the lee shore. Predictions as to EFCA's passage, and its eventual form if it does pass, have been all over the place. Thus, labor has been forced to set a new course, dusting off other contingency plans, but never abandoning its main ship: EFCA.

Other tidbits have added to the stormy drama. Arkansas Democratic Senator Blanche Lincoln, a strong critic of EFCA, faced a strong challenge to her 2010 re-election from Lieutenant Governor Bill Halter, who received significant support from labor. Yet, Senator Lincoln defeated Lieutenant Governor Halter in the June 8, 2010 primary election.

Also, by March of this year, it was a well-known fact that Pennsylvania Democratic Senator Arlen Specter was the beneficiary of SEIU backing, curiously, in spite of his position against EFCA. Coincidentally, back in September of 2009, Senator Specter had raised hopes of softening his opposition to EFCA when he announced to the AFL-CIO that "the Senate would pass a bill providing for quicker elections, mandatory interest arbitration and increase penalties against employers." These are three of the main changes that EFCA would provide to the present state of the law.

But probably the most significant event, and a noticeable setback for labor, at least on Capitol Hill, was the Democratic Party's February 2010 loss of Senator Edward Kennedy's Senate seat to a Republican. The election of Massachusetts Republican Scott Brown gave the GOP the 41st Senate seat and handed the Democrats the loss of the 60th vote they needed to make the Senate filibuster proof. Needless to say, Senator Brown opposes EFCA.

After the election of Senator Brown, the thought of a repeat of the 2007 successful EFCA filibuster was now a real possibility that caused Republicans' mouths to salivate. Nevertheless, even before, when the Democrats still had the needed 60 votes to potentially stop a filibuster, they could not get EFCA passed; they could not convince a number of moderate Democratic Senators to overcome a threatened Republican filibuster on this pro-labor bill. Thus, even without Senator Brown, the EFCA bill, introduced in March of 2009, had remained in limbo. Seating Senator Brown in the upper chamber merely gave the GOP a certain margin of safety and provided Republicans with some peace of mind.

In the meantime, interest and focus on EFCA has faded. Resources were moved to the Administration's number one priority: passage of the President's health-reform legislation. The AFL-CIO's 57 affiliated unions quickly huddled to discuss options and decide on new strategies. We all know that pro-union labor reform may come in many shapes, forms, sizes, and varied packaging. Legislation is one very important way. However, tools which range from Executive Orders to reversal of NLRB precedent and rule-making can be just as effective, and often times easier for organized labor to accomplish. Nevertheless, labor must have its ducks lined up and key players in the right places.

As the health-reform drama played out, on another stage efforts to fill three vacancies on the National Labor Relations Board gained momentum. The Board had long been operating without its full, statutory contingency of five members. The two members still on the Board, one a Democrat and the other a Republican, although resolving many cases of secondary importance, were at deadlocks, impeded from deciding many sensitive, policy-setting cases.

Last December, the Senate rejected one of President Obama's NLRB nominees, Craig Becker. In addition to having been counsel to the SEIU and the AFL-CIO, Mr. Becker had proved to be a staunch proponent of radical shifts in employee-employer labor relations; his goal was to facilitate the unionization of workplaces. Mr. Becker joined the other two NLRB Obama nominees on whom the Senate had not yet voted on: Republican Senate staffer Brian Hayes and Democrat union lawyer Mark Pearce.

Time passed and the drama continued to play out. Days after the health-reform bill was finally approved in the Congress and President Obama signed it into law, the Chief Executive made good on his threat to use his executive prerogative on the pending NLRB nominees. On March 27, 2010, the President recess-appointed both Democratic nominees Becker and Pearce. Not surprisingly, the President pulled his "leave the Republican behind" move and did not appoint the third nominee, Republican Brian Hayes. Nominee Hayes was subsequently sworn in on June 29. 2010.

Members Becker and Pearce now join Board Chair Wilma Liebman, a former Teamsters' and Bricklayers' union attorney. This now gives the Democrats a 3 to 1 margin on the NLRB, with Republican Brian Hayes taking over the vacancy left when Peter C. Schaumberg's term ended on August 7, 2010.

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ous means that labor has, in addition to EFCA, to reach their goals. Much will be changed through amendments to Board precedent and regulation, as well as by other bills presently pending, or soon to be introduced, in Congress. Employers need to plan accordingly. Among the many probable topics for change, either through the Board or through Congress, are: (1) changes in the definition of supervisors; (2) expansion of paid leave and rules related to plant closures; (3) liberalization of rules related to union access to private property; (4) the establishment of rules that would allow supervisors to solicit on behalf of unions; (5) alterations in the definition of temporary employees so that they may be included in appropriate bargaining units; (6) establishing rules to allow salting; (7) approving rules that would allow employees and union organizers to use electronic means, including social media, for pro-union campaigning and solicitation; and (8) changing existing rules to speed up the election process.

In short, employers cannot let their guard down, even if the unions' efforts to pass EFCA seem to be stalled. Unions will not let their guard down. With the help of friendly Executive and Legislative branches, labor will continue to use their resources to push through their agendas. Management must do the same, with or without the backing of the government.

The Importance of Clarity and Consistency in Employer Privacy Policies: The City of Ontario v. Quon Chronicle

by Francisco A. Vargas

Even though the Quon case deals with governmental employees and privacy rights under the Fourth Amendment of the U.S. Constitution, it exemplifies how important it is for any employer, private or public, to have clear and comprehensive rules for the use of electronic communications, as well as the dangers of not adhering to the same and being inconsistent in their application

In the recent case of City of Ontario, et al. v. Quon, et al., decided on June 17, 2010, the U.S. Supreme Court was asked to decide if the privacy rights of a police Sergeant, Jeff Quon ("Quon"), were violated by the City of Ontario, California (his employer), by auditing and reviewing the text messages he sent using a city-owned pager during working hours.

Even though the Quon case deals with governmental employees and privacy rights under the Fourth Amendment of the U.S. Constitution, it exemplifies how important it is for any employer, private or public, to have clear and comprehensive rules for the use of electronic communications, as well as the dangers of not adhering to the same and being inconsistent in their application.

The facts before the Supreme Court can be summarized as follows. In October 2001, the City acquired 20 pagers for the members of its SWAT Team. The pagers had a limit on the number of messages that could be sent. Before acquiring the pagers, the City announced a Computer Usage, Internet and E-Mail Policy ("Computer Policy") that applied to all employees. Under said policy, employees were specifically warned by the City of its "right to monitor and log all network activity…with or

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without notice…[and that] [u]sers should have no expectation of privacy or confidentiality when using these resources."

Quon and the other members of the SWAT Team were advised that the text messages would fall under the Computer Policy, and, thus, were eligible for auditing. However, according to Quon, the Team was informed by a supervisor that no auditing would be necessary as long as they paid for any overage charges. This particular fact was critical for Quon's theory, for his main argument consisted in sustaining that pursuant to the supervisor's statements, he developed a reasonable expectation that the City would not review the content of his text messages, because he paid for his overage charges.

Quon and other members of the SWAT Team consistently exceeded their allotted number of text messages. Consequently, the City decided to conduct an audit to determine whether the existing character limit was too low—that is, whether officers such as Quon were having to pay fees for sending work-related messages—or if the overages were for personal messages. The audit revealed that the vast majority of Quon's text messages were personal, and even sexually explicit. As a matter of fact, it also revealed that Quon was using the City's pager to exchange messages with his wife, as well as his lover, who was also a co-worker. Quon was disciplined for violating the City rules, and he sued the City for alleged violation of his right to privacy.

In order to narrow down the issues under its consideration, the Supreme Court presumed, without deciding, that Quon had an expectation of privacy over the text messages he sent and received in the City-owned pagers. However, the Court clarified that a recognition of an employee's expectation of privacy is not tantamount to conceding that such privacy would remain wholly inviolate.

Specifically, the Court stated that "[e]ven if [Quon] could assume some level of privacy…in his messages, it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny. Quon was told that his messages were subject to auditing. As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications. Under the circumstances, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used."

It is noteworthy that the Supreme Court even stated that the City's audit would have been "regarded as reasonable and normal in the private-employer context." In reaching said conclusion, particular weight was given to the fact that the City did not search any of the text-messages sent by Quon during off-duty hours, and that only a two-month sample of text messages was reviewed, instead of all the messages that were sent and received during all months in which Quon had exceeded his monthly limit.

Quon's claim may have been avoided had the City had a more comprehensive policy which included text messages and applied the terms of its Computer Policy consistently. Consequently, it is advisable for private employers to draft their communication policies in an all-inclusive way, and specifically, to make reference to each and every electronic communication instrument or device used or made available to employees at the workplace. By the same token, it is also advisable for employers to continuously revise and update their policies to reflect any change in the technology used or made available to employees. Finally, employers should train supervisors about adhering to company rules and policies, and about the dangers of allowing practices inconsistent with company policies.

Should you have any questions regarding these matters or require assistance with developing an electronic communications policy, you may contact any of the attorneys of our Labor & Employment Law Practice Group.

Puerto Rico Supreme Court Defines Constructive Discharge in Transfer Cases under Act 80

by Maggie Correa

In the case Figueroa Rivera v. El Telar Inc., 2010 TSPR 59, a majority of the participating Justices of the Puerto Rico Supreme Court approved the employer's seniority plan which resulted in the dismissal of one of its store's general managers. Three of the Associate Justices of the Court concurred with the decision, two dissented, and one abstained from participating.

The facts of the case were not controverted: 1) the employee was the general manager of the Guayama Mall store; 2) she had been employed for several years; 3) she was the most senior general manager; 4) the Guayama Mall store was closed, but the Guayama Pueblo store remained open and so did the Mayagüez store; 5) the employer had to close the Guayama Mall store for financial and good business reasons; 6) the employer dismissed the Mayagüez store's general manager who was the least senior of all the store's general managers; and 7) offered the position in Mayagüez to the Guayama Mall's general manager. The employee did not accept the position in Mayagüez, and because of the transfer to Mayagüez, resigned from her employment. She alleged that the offered transfer was a burdensome condition which forced her to resign, and since she was the general manager with more seniority, the employer had to offer her the Guayama Pueblo position which was occupied by a manager with less seniority. She alleged constructive discharge without just cause in violation of Puerto Rico Act No. 80 of May 30, 1976 ("Act No. 80").

After a detailed discussion of the purpose of Act No. 80, a majority of the participating Associate Justices of the P.R. Supreme Court, concluded that: 1) the transfer of employees with the purpose of maintaining the operation of the business, or for the more efficient administration of the business will not be considered an unjustified dismissal; 2) although employee seniority must be observed within the same occupational classification, the employer complies with the law when the employee with less seniority is dismissed and the open position is offered to the employee with more seniority; 3) the employer does not have to implement a chain of transferring the more senior employees to replace the ones with less seniority and so forth; 4) the employer's obligation under the law is to dismiss the employee with less seniority and offer the position to the one with more seniority.

In the specific facts of the Figueroa v. El Telar Inc. case, the employer did not constructively discharge Figueroa since it had no obligation to offer her the positions of other employees with less seniority, it only had to dismiss the one with less seniority and offer the open position to Figueroa, as El Telar did, even if the general managers of Guayama Pueblo and other stores were less senior than Figueroa.

The concurring opinion of the Supreme Court stated that, to determine whether the employer's conduct complied with Act 80's requirements, courts must consider: 1) the employer's financial situation; 2) the changes made by the company; 3) the employee's performance; 4) the employee's level of compensation; 5) the working conditions of the other employees of the company; 6) the employees' seniority; and 7) the employer's reasons to justify its decision. The employer's decision must be supported by a valid business reason and the efficient administration and operation of the business. The fact that the employee has more seniority than the others, in and of itself, is not the only consideration. The employer's decision based on the administration of its business must also be considered and balanced with the employee's interests.

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More Benefits for Employees Serving in the Armed Forces

by Karen Morales Ramírez

The Puerto Rico Legislature enacted Act No. 26 of March 18, 2010 ("Act No. 26"), which amended the United States Armed Forces Members Protection Act, Act No. 218 of August 28, 2003, ("Act No. 218") to guarantee the jobs of employees serving in the armed forces; increase the benefits that their families will receive if the employee dies in active duty, is reported missing, or is a prisoner of war; and to grant powers to the Veteran's Advocate to protect the rights of the employees covered by this Act.

The purpose of Act No. 218, was to protect the employees that were members of the armed forces, including those in the Reserve and National Guard, when their income was reduced due to active military duty. Originally, Act No. 218 only applied to regular public employees who were not on a probationary period nor working under a temporary contract, and whose income was less than the income that the employee received in a civilian employment because of active military service in any branch of the United States Armed Forces. Under Act No. 218, employees on active military duty were entitled to receive the difference between their salary as a public employee and their salary while on active military service.

However, the Puerto Rico Legislature understood that the benefits provided by Act No. 218 were insufficient to guarantee the employment rights of men and women who serve in active military duty. Thus, Act No. 26 now establishes that the benefits afforded to public employees under Act No. 218, will also be afforded to employees that work in private establishments or businesses. Therefore, any private or regular public employee that: 1) is not on a probationary period nor working under a temporary contract; and 2) whose income is less than the income the employee received in a civilian employment with any private establishment or agency because of active military service in any branch of the United States Armed Forces, the United States Army Corp of Engineers, or the National Disaster Medical System; is entitled to receive the difference between the net salary received as a private or public employee and the net salary to be received while on active military service.

Act No. 26 also provides that any private or public employee who qualifies for the protections of this Act has to certify in writing the net income to be received during active military service and the length of time of such military service. During military service, the private or public employee will receive the salary pay on the same dates and with the same frequency they received their salary prior to beginning active military service.

Furthermore, Act No. 26 establishes the right of the widows, dependents or permanently disabled minor children of public employees that are entitled to the benefits of this Act, to receive from the employer the total net salary that the public employee received while employed at the agency or governmental agency, for a term not greater than twelve (12) months, in addition to the month in which the employee died while on active military service, was declared missing in action, or became a prisoner of war. Although Act No. 26 now applies to private employees, this section only applies to the widows, dependants or disabled minor children of public employees.

Moreover, Act No. 26 states that the employer shall credit the term served by the employee who is called for military duty and/or who is on active military duty, as work experience for purposes of job performance, provided that the duties performed by the employee during active military service, are the same or equivalent to the duties he/she performed in his/her civilian employment. The employer shall also credit, for purposes of the employee's job performance, all military training and skills courses that the employee received, provided that the same are related to the employee's duties in his/her civilian employment.

In addition, Act No. 26 instructs the Veteran's Advocate to conduct investigations when the position or office held by the member of the armed forces is changed or eliminated as a result of the employee being on active duty, to guarantee the employees right to employment. Particularly, the Veteran's Advocate shall conduct investigations when the widows, dependents or disabled minor children of the public employee who died in active military service, was declared missing in action, or is a prisoner of war, do not receive the benefits provided by Act No. 26.

Any natural or juridical person that intentionally violates or otherwise denies the benefits granted by Act No. 26 to the employees in active armed forces, shall be punished by a fine that shall not be less than one thousand dollars ($1,000) and nor more than five thousand dollars ($5,000). Subsequent violations of

this Act, shall be punished with imprisonment which shall not exceed six (6) months. The employer that is deemed in violation of this Act shall also provide, without delay, the benefits that were denied to the employee or family member.

Act No. 26 also establishes that its provisions shall be construed in the manner most favorable to the employee in active military service and that any right granted under the Act shall be given in addition to any other rights that the employee is entitled to. In the event of conflict between the provisions of this Act and any other statute that also provides for benefits of employees that are in active military service, the provisions that are more favorable to the employee shall prevail. Finally, Act No. 26 establishes certain posting requirements for public and private employers.

In sum, employers shall now take into consideration the provisions of Act No. 26, Puerto Rico Act No. 62 of June 23, 1969 and the Uniformed Services and Employment and Reemployment Rights Act, when evaluating the benefits that an employee that is serving on the armed forces is entitled to.

Please contact any of the attorneys of our Labor & Employment Law Practice Group if you have any questions regarding Act. No. 26.

The Department of Labor Clarifies the FMLA's Definition of "Son or Daughter"

by Iraida Diez

The FMLA entitles an eligible employee to take up to 12 workweeks of leave during any 12-month period "[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter," "[b]ecause of the placement of a son or daughter with the employee for adoption or foster care," and in order to care for a son or daughter with a serious health condition. The term "son or daughter" is defined by the FMLA as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis..."

On June 22, 2010, the U.S. Department of Labor, Wage and Hour Division, issued Administrator's Interpretation No. 2010-3, clarifying the definition of "son or daughter" as defined by the Family Medical Leave Act ("FMLA"), and consequently expanding leave rights to non-traditional families, including same-sex couples.

The FMLA entitles an eligible employee to take up to 12 workweeks of leave during any 12-month period "[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter," "[b]ecause of the placement of a son or daughter with the employee for adoption or foster care," and in order to care for a son or daughter with a serious health condition. The term "son or daughter" is defined by the FMLA as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis..." The current FMLA regulations define in loco parentis as including those with day-to-day responsibilities to care for and financially support a child without having a biological or legal relationship.

Many employers have struggled with the term in loco parentis and are unsure of how to handle requests for leave by employees for the birth or placement of child, to care for a newborn or newly placed child, or to care for a child with a serious health condition when there is

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no legal or biological parent-child relationship.

As per the newly issued Administrator's Interpretation, an employee who intends to assume the responsibilities of a parent will not be required to establish that he or she provides both day-to-day care and financial support in order to be found to stand in loco parentis to a child. In other words, it will be sufficient for an employee to establish that he or she either exclusively supports the child financially or provides day-to-day care. The Interpretation provides that when an employer is unclear as to whether an employee's relationship with a child is covered under the FMLA, it may seek from the employee reasonable documentation or a statement of the family relationship. However, it also provides that "[a] simple statement asserting that the requisite family relationship exists is all that is needed in situations such as in loco parentis where there is no legal or biological relationship."

Once it is determined that the employee stands in loco parentis to the child, he or she would then be entitled to FMLA leave to care for a child with a serious health condition as well as for bonding with a newborn child or with a child placed for adoption or foster care. For purposes of determining if a child is the "son or daughter" of an employee, the Administrator's Interpretation states that it is irrelevant if there is no biological or legal relationship with the child, the child has a biological parent in the home, or has both a mother and father. As a result, an employee who shares equally in the raising of an adopted child with a same-sex partner would be entitled to leave because the employee would stand in loco parentis to the child.

Employers should review their employment policies and practices to ensure that they comply with the new guidelines. Furthermore, as with any request for a FMLA-protected leave, employers should request the necessary information from employees and rely on the particular facts of each case when considering the request.

Should you have any questions regarding this matter or would like assistance in handling a request for FMLA-protected leave, please contact any of the members of the Leaves and Accommodations Practice Team of our Labor & Employment Law Practice Group.

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