WILLCOX & SAVAGE

EMPLOYMENT LAW OUTLOOK

FOURTH CIRCUIT HIGHLIGHTS FMLA PITFALLS

Samuel J. Webster

The Fourth Circuit, the Federal appellate court for Virginia, Maryland, West Virginia, North Carolina and South Carolina, recently highlighted employer pitfalls in Family and Medical Leave Act (FMLA) administration. In *Dotson v. Pfizer, Inc.*, the Court of Appeals affirmed a jury award of $1,876 on an FMLA interference claim and $331,429.25 on an FMLA retaliation claim. It also affirmed the District Court's award of statutory liquidated damages in the amount of $333,305.25; $375,000 in attorneys' fees and $14,264.88 in costs. Finally, noting that FMLA mandated prejudgment interest, it reversed the District Court's refusal to award prejudgment interest.

The plaintiff, a Pfizer account manager, took steps to and ultimately adopted a Russian orphan. Part of that process required his taking two trips to Russia. Pfizer denied his request for FMLA leave, instead requiring him to use vacation time. He understood that it was customary with a Russian adoption to take a "gift" to the Russian adoption agency. Dotson arranged with his supervisors to take an antibiotic "starter pack" to the Russian orphanage. Upon his return, Pfizer discharged him for allegedly violating the company policies regarding starter packs. He sued Pfizer for FMLA interference and FMLA retaliation, resulting in the above awards.

The Fourth Circuit held that Pfizer incorrectly required the plaintiff to explicitly request intermittent FMLA leave. Dotson had made known his reason for requiring leave – adoption. Adoption is a specific FMLA qualifying event, thereby placing the burden upon the employer to determine whether he qualified for FMLA leave and granting it – "it is the employer's responsibility to determine the applicability of the FMLA and to consider requested leave as FMLA leave."

The Fourth Circuit also affirmed the retaliation claim, finding that sufficient evidence existed to show that Pfizer's alleged reason for terminating Dotson, failure to comply with "starter pack" policies, was not uniformly enforced. None of the supervisors and executives who knew of Dotson's plan to make a gift of the starter packs took any steps to stop him. Therefore, the Court sustained the jury's finding that the reason for his discharge was pretextual. Significantly, the Court held that Pfizer's failure to discharge its FMLA obligations once

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I-9 CHANGES: ALL DOCUMENTS MUST BE UNEXPIRED

Susan R. Blackman

President Obama's administration followed through with Bush administration changes to the I-9 Form, but postponed the effective date of the change to April 3, 2009. The Bush administration had issued an interim final rule from the U.S. Citizenship and Immigration Services (CIS) on December 12, 2008, concerning changes to the Employment Eligibility Verification Form (I-9 Form). Previously, employees could present an expired identity document from List B on the I-9 Form, such as an expired driver's license. In addition, U.S. citizens previously could present an expired U.S. passport to prove both identity and work authorization (a List A document). The new rule says that all documents presented to satisfy I-9 Form requirements must be unexpired.

The new rule was originally supposed to go into effect forty-five days after publication in the *Federal Register*. However, the new administration published an amendment of the interim rule in February, in order to delay the effective date of the new I-9 Form until April 3, 2009. For all new hires after that date, employers must

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Cher received her J.D. and an LL.M. in Taxation from Capital University and her undergraduate degree from the United States Air Force Academy. She is a retired Air Force Captain.

EFCA UPDATE – SPECTER OF A COMPROMISE?

Thomas M. Lucas

The new version of the Employee Free Choice Act (EFCA) has been pending in Congress again now for some months – and has been a frequent topic of debate among labor and management, in the press and labor and employment law journals. In its pending form, EFCA would virtually eliminate the secret-ballot election in union certification proceedings before the National Labor Relations Board, substitute third-party interest arbitration for the parties' bargaining for initial contracts, and impose stiff penalties on management (only) for alleged Unfair Labor Practices committed during union organizational campaigns.

Special attention has been paid to Pennsylvania Senator Arlen Specter's position on these issues, and with good reason. He has emerged as a central figure in discussions on a possible compromise on EFCA, so his position on the issues may be of consequence. Senator Specter, who had supported the prior version of EFCA and voted for cloture to cut off debate on the bill in June, 2007, announced on March 24, 2009 that he would not do so again this year. On the merits of the new bill, Senator Specter announced that he does not support 'card-check' in lieu of the secret-ballot election, and that he views the requirement for compulsory arbitration if the parties do not reach agreement within the first 120-days of bargaining as possibly subjecting the employer to a "deal he or she cannot live with."

But how much comfort should we take from what Senator Specter regards as acceptable substitute revisions to the National Labor Relations Act? If the answer is reflected by his press release of March 24, very little indeed. First, Senator Specter proposes that employees' right to a secret ballot should be retained, but that elections be conducted in an extraordinarily short time frame – within 21 days of the filing of a petition for an election (twice as fast as the NLRB's current 42-day time target). While significantly better than 'card-check' recognition, elections held within 21 days still amount to a virtual "election-by-ambush" when compared with the NLRB's current 42-day practice. Those of you who have been through election campaigns understand how fast 42 days pass, and that even the NLRB has problems complying with its own short time deadlines.

On the second major issue – compulsory arbitration to establish the terms of an initial bargaining agreement – Senator Specter's position is no more reassuring to the management community. He proposes to modify the interest-arbitration concept to be modeled on professional baseball contract arbitration – an arbitrator would be empowered to pick either party's 'final offer' in negotiations to set the wages, benefits and other terms and conditions of employment. He suggests that the arbitration provision would be 'substantially improved' by the 'last best offer procedure which would limit the arbitrator's discretion and prompt the parties to move to more reasonable positions.' Finally, Senator Specter would retain the draconian penalty provisions of the EFCA bill, which are directed only at management – not at unions.

Apparently there is compromise in the air – the question is how much damage it will do to companies whose employees become the target of organizing efforts. Service Employees International Union President Stern signaled in comments to *The Washington Post's* editorial board that labor is on the hunt for a solution, and his comments about substantive changes to EFCA are surprisingly like those outlined by Senator Specter. Stern noted that there are ways to 'level the playing field' without giving away the secret-ballot election, such as shortening the time period before elections are held, and stiffening up penalties for employer violations! On May 14, after his jump to the Democratic Party, Senator Specter announced that he has been meeting with labor leaders and fellow senators to fashion a compromise on EFCA which he will support and that "prospects are pretty good" for such a compromise.

It seems clear that labor law reform is upon us, and that a compromise on EFCA may result in a bill with significant changes in election practice before the National Labor Relations Board. What should companies be preparing for? First, for the possibility of quick notice from the NLRB that a petition for an election has been filed by or on behalf of your employees, and to prepare for an election to be held within 21 days! Are your supervisors and managers prepared to be immersed in a whirlwind union campaign? Do they know what your position is on those issues? Do they know how to communicate that position and how to respond to employee questions? Do they know how to do so without breaking the law? If not, they should be trained now – without the pressure-cooker atmosphere of a union campaign.

Second, your workplace policies - solicitation/distribution, e-mail/Internet, leave and discipline - will come under very close scrutiny almost immediately. Do they exist and are they legal? Are they being enforced, and in a uniform manner? Third, any initiatives you may be considering, but not have finalized, with respect to pay and benefit changes, may have to be placed on hold. Once a petition is filed, the rules concerning pay/benefit changes make it essential that they cannot be interpreted as interfering with employee freedom of choice – by either 'buying' employees off, or coercing them into abandoning support for a union.

EFCA, or a modified version, may yet not pass. But will EFCA-like changes in labor law come about in some other way? Indeed, they may. The Administration has announced candidates to fill two of the three open seats on the NLRB – both attorneys from the Union side

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Major Health Plan Reform Issues – It's Time to Update Your Health and Welfare Plans!

Recently, Congress and several governmental agencies have enacted and/or amended various legal requirements regarding the operation and administration of employer-sponsored group health and welfare plans. Many of these requirements become effective during 2009 or 2010. Employer plan sponsors and plan administrators of group health and welfare plans will most likely need to take action. For a summary of these major health care reform issues, go to our Web site at: www.willcoxsavage.com and click on the link, "Major Health Plan Reform Issues – It's Time to Update Your Health and Welfare Plans."

E-VERIFY REQUIREMENT FOR FEDERAL CONTRACTORS IS A MOVING TARGET

Susan R. Blackman

The Obama administration is continuing certain Bush administration policies concerning immigration enforcement, including requiring use of the E-Verify system for federal contractors. However, due to a court challenge filed by the U.S. Chamber of Commerce, the Society for Human Resource Management, and other groups, the administration has once again postponed the date on which the system will become mandatory for contractors.

In November, the *Federal Register* published a final rule concerning the obligation of federal contractors and subcontractors to begin using E-Verify to verify the work eligibility of employees who work on federal contracts. E-Verify is an electronic system created by the Department of Homeland Security (DHS) and the Social Security Administration (SSA) for employers to verify an employee's eligibility to work in the United States. The program was initially introduced on a trial basis and has been available for employers to use on a voluntary basis. On June 6, 2008, President George W. Bush issued Executive Order 12989 requiring contractors to use E-Verify to verify the employment eligibility of their employees. The effective date of the requirement has been a moving target due to legal challenges and multiple delays in the implementation.

The rule will now become effective for contractors starting on September 8, 2009.

Pursuant to the final rule, as most recently modified by the Obama administration, federal contracts awarded after September 8, 2009, with limited exceptions, will include a clause requiring the contractors to use E-Verify. Certain contracts are exempt, such as contracts valued at less than $100,000, contracts for commercially available off-the-shelf items, contracts lasting less than 120-days, and contracts under which all work will be performed outside of the United States. Subcontracts valued at over $3,000 for services or construction will also be subject to the requirement.

The E-Verify system currently may be used only to verify work eligibility for new hires. However, the rule for contractors will require the use of E-Verify even for existing employees who will be assigned to federal contracts that are subject to the E-Verify requirement. In a recent announcement, Department of Homeland Security Janet Napolitano reiterated the Obama administration's support for the E-Verify system and the federal contractor rule. During the same announcement, Secretary Napolitano said that the DHS would drop its proposed regulations concerning employers' obligations in responding to No-Match letters from the Social Security Administration. Both rules have been challenged by business groups.

E-Verify does not eliminate the need for completing the I-9 Form. In fact, completion of the I-9 Form is the first step the employer must take before submitting the electronic data for verification in the government database. The Bush administration was a big proponent of E-Verify and tried to promote widespread use of the system, even on a voluntary basis. So far, it looks like the Obama administration will also promote E-Verify as an important tool for immigration compliance. ■

I-9 CHANGES: ALL DOCUMENTS MUST BE UNEXPIRED

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complete the latest edition of the I-9 Form (the one marked Revision Date 02/02/09). The new form is available at www.uscis.gov.

In addition to the change requiring unexpired documents, the new I-9 Form will also reflect other modifications. The List A documents will no longer include outdated versions of the Temporary Resident Card and the Employment Authorization Card known as Forms I-688, I-688A, and I-688B. Current versions of the Employment Authorization Cards (Form I-766) will still be acceptable as List A documents.

The new rule also adds a couple of items to List A, documents that will be acceptable to prove both identity and work authorization. The new items include: 1) a machine-readable immigrant visa in a foreign passport with a temporary I-551 stamp; and 2) a passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with a valid Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association between the United States and the FSM or RMI. In accordance with the Compact of Free Association between the United States and the FSM/RMI, citizens of the FSM and RMI have the privilege of residing and working in the United States.

CIS also changed the *Handbook for Employers, Instructions for Completing the Form I-9 (M-274)* to reflect the new rule. This new handbook reflects a revision date of April 3, 2009, and is available at the CIS Web site: www.uscis.gov. In its announcement about the new I-9 Form, CIS clarified that any document listed on the I-9 Form that does not contain an expiration date, such as a U.S. Social Security card, is considered unexpired and therefore acceptable. ■

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of the aisle. One of those candidates, Craig Becker, is the current Associate General Counsel of the Service Employees International Union. What are his ideas on how to administratively improve operation of the NLRB? They include:

- Barring employers from attending NLRB hearings on proposed elections;
- Conducting NLRB elections on a neutral site away from company premises;
- Overturning elections if the company holds a 'captive audience' meeting with its employees to persuade them not to vote for the union;
- Allowing unions 'equal access' to company private property to distribute literature to employees.

We recommend that you review and revise your workplace policies to ensure that they are legally correct, and set the guidelines you want in your workplace. Next, train your managers and supervisors in the basics of labor law – what does the law provide; what are employees' and employers' rights; how do we maintain those rights without violating the law? Finally, conduct a basic labor relations audit – are you vulnerable to organization; if so, in what groups and why? What can and should you do to address that vulnerability? ■

FOURTH CIRCUIT HIGHLIGHTS FMLA PITFALLS

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it knew of an obvious qualifying event could not be used as a defense to a retaliation claim.

In its twenty-page opinion, the Fourth Circuit went to great lengths to take the employer to task for failing to undertake its FMLA duties. The Court has indicated that FMLA is to be liberally construed in favor of leave, particularly when the qualifying event – adoption – is so obviously covered by FMLA. Employers need to be constantly vigilant for FMLA qualifying events and take steps to place its employees on FMLA leave when those qualifying events occur. As *Dotson v. Pfizer, Inc.* demonstrates, a seemingly simple error resulted in a judgment exceeding $1 million. ■

Get Ready for I-9 Inspections!

The U.S. Immigration and Customs Enforcement (ICE) has just announced that it is dramatically ramping up its I-9 enforcement efforts. ICE issued Notices of Inspection to over 650 employers on July 1 of this year. We urge all employers to audit their own I-9 Forms before ICE comes calling.

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