WILLCOX SAVAGE

Employment Law Outlook

Summer 2011

NLRB PROPOSES RADICAL CHANGES TO ELECTION PROCEDURES

William E. Rachels, Jr.

On June 23, 2011, the National Labor Relations Board (NLRB) published a Notice of Proposed Rulemaking in the Federal Register to amend its existing rules and regulations regarding representation elections. The representation election is held to determine whether the employees in an appropriate bargaining unit desire to have a particular union as their exclusive representative for purposes of collectively bargaining with that employer. It appears that the Democratic-controlled Board (three-to-one with one Republican vacancy) intends to accomplish some of what was lost when the Employee Free Choice Act (Card Check bill) became defunct after Republicans gained control of the House of Representatives in November 2010.

The overriding result of the proposed rules would be to shorten the time for elections to be held. Under the current procedures, elections are typically held within approximately six weeks of the filing of a petition for election. The proposed rules would require the elections to be held within 10 to 21 days from the filing of the petition. It is apparent that such dramatic reduction in pre-election time is largely aimed to minimize the opportunity for the employer to legitimately express its views about union representation and collective bargaining.

In the vast majority of cases, the union has been conducting its campaign for the employees' votes well before it files the petition and often without the employer's knowledge. Social media clearly increases that opportunity. The union would usually like to have the vote on the day the petition is filed. It is typically at maximum strength before the employer's campaign messages can be conveyed to the employees. A much shorter period for the campaign would not allow for a reasonably-paced employer campaign. Even if the employer could convey its primary messages during the shortened period, it would be necessary to provide them with such rapidity that there is a risk of turning off employees by saturation. In sum, the shortened period does

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Join Our Upcoming Seminar!

Employers Beware!
Tend to Your 401(k) Plan ERISA Fiduciary Duties...Or Else!!

September 14, 2011
8:00am - 10:30am

Willcox Savage
440 Monticello Avenue Suite 2200
Norfolk, VA 23510

Speakers:

Elizabeth Bond, Department of Labor
Julie Alford, MERCER
Bill Welsted, The Pinnacle Group
Cher Wynkoop, Willcox Savage

RESPONSIBILITY AHEAD

Register at: www.willcoxsavage.com
Seating is limited

Approved for 2 HRCI Credits

FLSA ANTI-RETALIATION PROVISION INCLUDES VERBAL COMPLAINTS

Bryan C.R. Skeen

In a Supreme Court term filled with headline-grabbing decisions, one opinion that may have slipped employers' notice is worth noting. On March 22, 2011, the United States Supreme Court ruled 6-2 that an employee's verbal complaints constitute protected activity under the anti-retaliation provision of the Fair Labor Standards Act (FLSA).

In *Kasten v. Saint-Gobain Performance Plastics Corp.,* employee Kevin Kasten alleged that he complained on numerous occasions about the location of his employer's time clocks. The time clocks were located in an area between where employees put on and removed protective gear and the area in which they eventually did their work, such that employees did not get paid for their time donning and doffing protective gear. Kasten told his shift supervisor that he thought that the location of the clocks was illegal, told his lead operator that he was considering filing a lawsuit, and told the human relations manager and operations manager that if he challenged the time clock placement in court, the company would lose. Eventually the company terminated

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WHY EMPLOYERS NEED TO UNDERSTAND 401(k) PLAN FEES AND EXPENSES

Cher E. Wynkoop and Corina V. San-Marina

While sponsoring a 401(k) retirement plan for your employees can help you retain talented employees, it also imposes a high burden on any plan sponsor. The Federal law governing private-sector retirement plans, the Employee Retirement Income Security Act (ERISA), requires that those responsible for managing retirement plans (called "ERISA fiduciaries") carry out their responsibilities prudently and solely in the interest of the plan's participants and beneficiaries. This article presents a brief overview of one of the duties imposed by ERISA on plan sponsors, namely, the duty to ensure that plan fees and expenses are reasonable.

Recent litigation emphasizes the fiduciaries' duty to carefully select recordkeepers and investment managers and monitor fees and expenses charged by these service providers. In April of 2011, a federal court found that Kraft Foods potentially breached its fiduciary duties of 401(k) plan management and allowed the plaintiffs to go to trial on the issue of excessive recordkeeping fees in order to explore the fiduciary breach issues more fully. The plaintiffs argued that the fiduciaries should have solicited competitive bids from other recordkeepers at least every three years. Kraft had used the same recordkeeper since 1995, without a competitive bid, although Kraft received advice from several third-party independent consultants that the fees were reasonable. The plaintiffs submitted an opinion from an expert finding that the fees were excessive. Other high profile cases involving excessive fees that ended with large settlement amounts paid by the plan sponsor include: Caterpillar ($16.5 million), General Dynamics ($15 million), and Bechtel ($18.5 million).

As an example of fee impact to a 401(k) account balance, a participant with a $25,000 account balance and 35 years to retirement who earns a seven percent return on investments and pays 0.5 percent for fees and expenses will have an account balance at retirement of $227,000, even if there are no further contributions made to the account. A one percent increase in fees and expenses would reduce the account balance to only $163,000 resulting in a $64,000 loss of retirement income.

An ERISA fiduciary has a non-delegable duty to select appropriate plan service providers and investment alternatives and to continually monitor those providers and investments for continued suitability. The Department of Labor (DOL) has emphasized that it is the process of fiduciaries acting prudently that is important, and not necessarily the outcome of the action. ERISA plan fiduciaries should:

► Form an Investment Committee. Have regular Committee meetings and document the fiduciary decision-making process by taking minutes of all meetings where investments or service provider selection are considered, retain copies of reports, analysis and opinions and the basis for conclusion for selecting, retaining or modifying the investment option or service providers. The Committee should hire outside experts, such as consultants and financial advisors, if needed.

► Implement and follow an Investment Policy Statement (IPS). An IPS should contain the procedures for selecting and monitoring investments, establishing performance expectations by selecting a benchmark and specifying criteria for adding/removing investment options. It is very likely that in case of an audit by the DOL the plan sponsor will be asked to produce the IPS and the Committee minutes proving the Committee refers to the IPS and follows its own guiding principles.

► Continually monitor investment alternatives. Review investment alternative results against appropriate benchmarks and performing a comprehensive cost analysis of the plan and the investment alternatives selected.

► Understand the plan's contracts, services, expenses and revenues. The plan sponsor should try to negotiate the best possible terms for all contracts with service providers from terms of hire to termination. They should pay close attention to termination fees and ensure that the expenses incurred by the plan, especially those that are paid by the participants from their accounts, are reasonable. This includes expenses associated with recordkeeping, administration, custody, and, of course, investments. The sponsor should know what is being charged for all services and how these total expenses compare with plans of a similar size. If there is revenue sharing involved, the plan sponsor should receive a full account at least annually of all revenue sharing paid to the plan provider, and how that revenue sharing was spent.

► As illustrated by recent litigation, the duty to continually monitor fees should be a high priority for any plan sponsor. If you have used the same current service provider for over five years, you may be denying participants substantial reductions in their plan costs. A plan sponsor should conduct a Request for Proposal (RFP) process every three to five years for several reasons. First, vendor administration and recordkeeping services can become outdated during that time frame and a vendor is more likely to introduce "best in class" services during a competitive RFP process. Second, it is not unusual during a properly conducted RFP to obtain savings of at least 33 percent in plan expenses. Finally, without a periodic independent comparative analysis of how the 401(k) investment provider stacks up against the competition on investment return, fees and administrative services, it is impossible for a plan fiduciary to comply with its ERISA fiduciary duties. The RFP process for accomplishing this imperative comparison is burdensome – but vital for plan sponsors and plan participants.

New DOL fee disclosure regulations, which become fully effective January 1, 2012, will help fiduciaries assess "the reasonableness" of what plans are charged for services and to avoid unreasonable charges stemming from conflicts of interest and self-dealing. Plan sponsors should be discussing this DOL guidance with their investment providers as soon as possible. *For more information on this subject, please attend our complimentary ERISA Fiduciary Seminar on September 14, 2011 (see page 1 of this newsletter for details).* ■

NLRB PROPOSES RADICAL CHANGES TO ELECTION PROCEDURES

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not allow for the most meaningful presentation of the employer's position. Moreover, it does not allow full consideration by the employees of the competing campaigns for their commitments for the future of the relationship between them and their employer.

Additional very significant changes in the proposed rules are:

► Allowing union access to the workplace.

► Establishing off-site Internet voting, instead of in-person private voting booth for a secret ballot.

► Deferring most voter and bargaining unit issues until after the election.

► Eliminating the right of parties to request review of a Regional Director's decision before an election is held.

► Requiring recognition of "mini" unions that represent just a minority of workers, rather than the current requirement for a majority representation in a given bargaining unit.

► Requiring employers to provide to the union in just two days—not the current seven—a final list of eligible voters containing phone numbers and e-mail addresses, not just names and street addresses.

Make no mistake: these proposals would radically change the opportunities for employers to resist union organizing efforts.

The Board will accept public comments on the proposal until August 22, 2011. The comments may be delivered electronically through the Federal eRulemaking Portal, or by mail to Lester Heltzer, Executive Secretary, NLRB, 1099 14th Street NW, Washington, D.C. 20570.

Additionally, interested persons may wish to express their views to their senators and congressmen. Those representatives, particularly the Democrats, may have opportunity to influence this process even though these proposals are internal within the NLRB and do not provide for direct congressional action. ■

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FLSA ANTI-RETALIATION PROVISION INCLUDES VERBAL COMPLAINTS

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Kasten, and Kasten alleges that he was fired for making these verbal complaints.

Both the district court and the Seventh Circuit Court of Appeals dismissed Kasten's claim, holding that the FLSA's anti-retaliation provision did not apply to verbal complaints. The courts rationalized that because the plain language of the anti-retaliation provision only protected employees who "filed any complaint," the provision's protection did not extend to verbal complaints, but rather was limited to more formal written complaints filed with the employer or a governmental agency.

In vacating the Seventh Circuit decision, the Supreme Court held that both oral and written complaints constitute protected activity under the FLSA. The Court reasoned that the FLSA does not rely on a federal inspection of employer payrolls to ensure compliance,

The Supreme Court held that both oral and written complaints constitute protected activity under the FLSA.

but rather "information and complaints received from employees seeking to vindicate rights claimed to have been denied." If the anti-retaliation provision did not extend to verbal complaints, then employees would be discouraged from bringing such complaints, an outcome contrary to the stated intent of the FLSA.

The Supreme Court did throw a small bone to employers in the opinion, however. The Court found that while verbal complaints did constitute protected activity, such complaint had to be "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." Thus, passing comments by an employee or informal verbal complaints likely would not invoke protections under the anti-retaliation provision.

Conspicuously, the Court declined to rule on the issue of whether the "filed any complaint" language included intra-company complaints, or whether those protections were in fact limited only to verbal or written complaints made to a government agency. Because the Court left this issue undecided, it will be up to the individual circuits to determine how they interpret the anti-retaliation language.

The *Kasten* decision emphasizes the importance of recognizing employee complaints when they happen and addressing them appropriately. Employers who have employees voice concerns about wage and hour issues should address the complaints with those employees and consult counsel as necessary to determine the appropriate course of action. ■

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Return Service Requested

RETALIATION CAN BE AGAINST THIRD PARTY

William E. Rachels, Jr.

In our winter 2010 newsletter, we reported that issues of associational discrimination were developing in the U.S. Circuit Courts of Appeal. One such case, *Thompson v. North American Stainless, LP*, was heading to the U.S. Supreme Court on appeal of the decision of the Sixth Circuit Court of Appeals. Such decision found that Thompson did not have a cause of action for retaliation when he was fired by North American Stainless after his fiancée, who also worked for that employer, filed a sex discrimination charge with the Equal Employment Opportunity Commission (EEOC). In January 2011, the Supreme Court reversed the Sixth Circuit decision and held that Thompson did have a right not to be the subject of retaliation because of the filing of the charge by his fiancée.

Title VII prohibits discrimination against an employee "because he has made a [Title VII] charge." Thompson's retaliation claim stated the employer took action against him because of the fiancée's charge. The Title VII anti-retaliation provision also permits "a person claiming to be aggrieved" by an alleged employment practice to file a civil action.

The Supreme Court revisited its 2006 ruling in the *Burlington N. & S. F .R. Co. v. White* case that Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct. The *Burlington* case established that adverse action would include employer action that "well might have" dissuaded a reasonable worker from making or supporting a discrimination charge.

The *Thompson* Court ruled that a reasonable worker obviously might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired because of it. This case is a good example of the expansion of employee protections under Title VII and related civil rights laws.

The Supreme Court's decision was unanimous and in a concurring opinion, Justices Ginsburg and Breyer attributed significant recognition to the Compliance Manual of the EEOC. Such Manual notes the EEOC's position that Title VII prohibits retaliation against "someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights." The Manual affirms that retaliation can be challenged "by both the individual who engaged in protected activity and the relative, where both are employees."

While the Compliance Manual is neither law nor prescribed regulation, the concurring opinion notes that what the EEOC states in the Manual merits deference under established Supreme Court precedent with regard to enforcing provisions of federal agencies. Courts may disagree with certain aspects of the Manual, however, it is a force with which to be reckoned. ■