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## **Pro Union**

The Obama administration has announced that it is pro union by words as well as deeds. To date, the following actions have been initiated by the administration:

- The appointment of a current pro union NLRB member, who prior to her appointment to the NLRB represented the Teamsters union, to be the chairwoman of the NLRB.
- The proposed appointment of two additional members of the NLRB who previously represented unions. One of them was the attorney for the Service Employees International Union.
- The selection of a union advocate to be Secretary of Labor.
- The reversal of previous executive orders and the issuance of new orders.
- One new executive order requires federal contractors to post notices that workers have the right to join a union. A second executive order bars federal contractors from seeking reimbursement from the government for expenses incurred in trying to persuade employees not to sign cards or vote for a union in an election. A third executive order rescinded a prior executive order which required employers to post notices advising workers that they can limit their financial support for unions even if they are covered by a union contract.
- The administration also rescinded a pilot program allowing Mexican trucks into the United States to make deliveries or pick ups. The administration is also backing the card check bill, which is now being considered by Congress. Other executive orders and bills are now being considered.

## **Settlements and Awards**

A Federal jury in D.C. awarded a former special forces commander \$491,000 in back pay and damages because the jury concluded that the U.S. Library of Congress illegally discriminated against this job applicant when it withdrew its job offer after learning that the applicant was in the process of changing from being a man to a woman. The lawsuit was filed in 2006 on behalf of “Diane,” formerly “David,” Schroder. The applicant had scored the highest on a test given to all applicants for the job.

The EEOC settled an age discrimination case against a Pennsylvania heating oil company for \$80,000. The company fired a 71 year old salesman. The salesman filed a charge of age discrimination against the employer claiming that he was fired because of his age. The salesman presented proof to the EEOC’s satisfaction of statements made by his sales manager that led them to conclude that age was the cause of the discharge. The sales manager, on several occasions, asked the salesman when he was going to retire and urged him to retire. The sales manager also made comments that the company needed “new blood” in the sales department. This is yet another example of the need to train supervisory employees to be sensitive and knowledgeable about discrimination laws.

## **Invalid?**

The D.C. Court of Appeals held in Laurel Baye Health Care of Lake Lanier that all decisions by the NLRB when it had only two of its five members were invalid. The court based its decision on the language in the NLRA that requires the Board to have at least three members “. . . at all times . . .” The Seventh Circuit in New Process Steel LP v NLRB reached the opposite conclusion, as did the First Circuit in Northeastern Land Serv v NLRB. At stake is the validity of 300 decisions by the NLRB, including decisions affecting a number of elections. This conflict in decisions is likely to be resolved by a decision of the U.S. Supreme Court.

## **Layoffs**

The First Circuit affirmed a decision by the NLRB in Pan American Grain that the employer violated federal labor law by laying off fifteen striking workers in 2002 without giving the union the opportunity to bargain about a tentative decision to layoff. Forty employees had been on strike for two months when the employer announced that fifteen of the strikers would be laid off “due to economic reasons and as a result of a substantial decrease in sales.” The union filed an unfair labor practice. The NLRB ruled that in situations where there are multiple reasons for layoffs, including economic reasons, the employer had a duty to bargain with the union over the layoff “as long as it is partially based on labor costs.”

## **Arbitration**

The Second Circuit in ReliaStar Life Insurance Co of New York v EMC National Life Company affirmed a decision by a District Court that arbitrators, in some cases, can ignore the parties contractual agreement requiring each party to pay its own arbitrator in a three arbitrator panel and an equal share of the impartial arbitrator’s fee and its own attorneys fees and issue an award ordering the losing party to pay the attorney fees and arbitration fees incurred by the winning party. While the contractual language between the parties does not mention good or bad faith, the Court decided that the arbitrators had the right to impose the fees on the losing party because the arbitrators concluded that the losing party acted in bad faith. The Circuit Court concluded that a broad arbitration clause results in “inherent” authority by which an arbitration panel can sanction bad faith conduct. The parties can avoid this result by specifically including language that bars the panel from considering good or bad faith. There is no record of just what the losing party did to convince the majority of the arbitration panel that they acted in bad faith. While this is not a labor arbitration case, the decision may be cited in future labor arbitration cases.

## **Undue Burden**

In Fraternal Order of Police Newark Lodge No 12 v City of Newark, the Third Circuit found that a plaintiff policewoman who sued because the police department refused to allow her to wear a religious scarf while on duty, proved a prima facie case. The court noted that she satisfied her initial burden of proving a prima facie case by showing: (1) she held a sincere religious belief that conflicted with a job requirement; (2) she informed her employer of the conflict, and (3) she was disciplined for not complying with the conflicting requirement. However, the court concluded that the city of Newark was not guilty of religious discrimination because when the burden of proof shifted to the city to show that they did not discriminate on the basis of religion when they insisted that religious scarf could not be worn while on duty, they were able to show that complying with the employee’s religious request would have been an “undue burden” on the city. The court recognized the police department’s need to have all police officers remain neutral as to their uniform when on duty so as to present a “neutral appearance” when enforcing the law. The court noted that an undue burden on an employer may be economic or non economic.

## More Government Follies

The Pension Benefit Guaranty Corporation, PBGC, is the government agency that collects premiums from pension plans to pay at least some benefits if a pension plan, referred to as a defined benefit plan, is essentially in default of their obligations to adequately fund the pension benefits promised to employees. When the PBGC takes over, they cut benefits severely, to the extent that the trustees of the pension plans can not do. At the conclusion of fiscal 2008, the Secretaries of the Treasury, Commerce and Labor Departments decided to more aggressively invest the amount collected from pension plans and held in reserve by the PBGC. Prior to that time, the funds were invested conservatively. At the end of fiscal 2008, the PBGC held \$48 billion in reserve and had obligations to pay pension benefits of \$74 billion. This is a tripling of the deficit. The PBGC asked investment companies to bid on their investment business. Goldman Sachs, Blackrock and JP Morgan were among the bidders. During the sealed bid process, the Director of the PBGC, Charles Millard, had almost three dozen telephone conversations with these three bidders, who ultimately were awarded the contracts and then lost \$12 billion of the investments. A House and Senate committee is investigating whether Millard directed the investments to these three companies and whether he solicited their help in securing him employment after he lost his job when the administration changed in January 2009.

Democratic Senators Kennedy and Baucus and Republican Senators Grassley and Enzi have urged the Inspector General of the PBGC to investigate Mr. Millard's activities. The PBGC faces much more of a deficit because the Chrysler and GM pensions are underfunded by \$29 billion. The PBGC funds deficit can be made up by increased insurance premiums or a taxpayer bailout or some combination of both. A number of multiemployer plans are lobbying for changes in the law making it, among other things, possible for funds to cut the basic pensions of already retired employees. The law now allows cutting pension amounts and types of benefits added after an employee retires, but does not allow cutting the basic benefits of already retired pensioners.

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