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***“Employee Briefs”***  
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## **Pro Union**

The Department of Labor has invited public comment on a proposed new rule which would implement an Executive Order signed by the President requiring all Federal government contractors who have contracts valued in excess of \$100,000 and their subcontractors, without regard to the value of the subcontract, to post a notice in the workplace advising employees of their right to organize and join a union. The policy would state in part “It is the policy of the United States to encourage collective bargaining and protect the exercise by workers of full freedom of association, self organizing and deciding on representatives of their choosing, for the purpose of negotiating the terms and conditions of their employment.”

## **Stats**

The U.S. Bureau of Labor Statistics reported that 47% of all businesses nationwide provide pensions to their employees. 11% of these pensions are defined benefit plans with the remainder offering only defined contribution plans such as 401(k) plans. In manufacturing companies alone, the percentages change to 57% offering pension plans, 9% of which are defined benefit plans.

The total increase in wages in the 12 months ending March 2009 was 2%, down from 3.2% in the preceding 12 months. For unionized workers alone, the average wage increase was 3% in the year ending March 2009. Of course, many of these contracts were negotiated before the advent of the recession.

Nationwide for all occupations, employers pay 71% of the total cost of premiums for family medical insurance coverage, with employees paying the remaining 29%. For individual coverage, on average, employers pay 81% of the cost of premiums with employees paying 19%. Percentages vary by section of the country. For example, in the Mid Atlantic region, employers pay 75% of the premiums for family coverage and 83% of the premiums for individual coverage. Under union contracts, nationwide employers pay 87% of the premiums for family coverage and 92% of the premium cost for individual coverage.

In August it was reported by the DOL that the rate of unemployment was 9.4% in July 2009, down from 9.5% in June. This rate takes into account only those employees who are receiving unemployment compensation. The DOL computes another table of the percentage of unemployment which is not generally reported. This second table is the rate of unemployment which includes not only the number of people who are receiving unemployment compensation, but also the people who have received the maximum number of weeks of unemployment they are entitled to as well as those people who are working part time who would rather be working full time. That rate of unemployment, which some believe paints a more accurate picture of the economy, was 16.3% in July 2009, down from a record high of 16.5% in June.

## **EEOC**

Charges of discrimination filed with the EEOC increased by 15% in fiscal 2008 to an all time high of 95,402. Age discrimination claims increased by 29%, retaliation charges increased by 23%. The high volume of layoffs in the current recession will no doubt lead to even more charges being filed with the EEOC during fiscal 2009.

The EEOC has issued a "guidance document" describing the required ingredients in releases that may be signed by employees which will prevent EEOC charges from thereafter being filed by employees. For releases filed concerning all types of discrimination other than age discrimination the requirements are as follows:

- the language must be clear and specific
- the signing of the release is not induced by fraud or duress
- the employee must be given ample time to read and understand the terms of the release
- the employee consulted with, or at minimum was advised by, the employer to consult with an attorney
- the employee participated in the negotiation of the release
- the employee is offered consideration, e.g., severance pay or other benefits to which he is not otherwise entitled

The Older Workers Benefit Protection Act (OWBPA) provides additional requirements necessary for a release to be binding to prevent charges based on age discrimination:

- the release must specifically refer to the ADEA
- give the employee 21 days to consider the offer
- give the employee 7 days to revoke his or her signature
- not include reference to rights or claims that may arise after the signature date
- include consideration, as indicated above.

If an exit or other termination program, e.g., buyout program, is offered to two or more employees, the 21 days is changed to 45 days and the employer must identify all of the individuals and all job classifications that are covered by the program.

The following claims may not be waived in a release: unemployment , worker's compensation, FLSA, COBRA, and vested pension benefits.

## **Pensions**

Many multiemployer defined benefit pension plans in the U.S. are increasingly underfunded resulting in increased employer withdrawal liability (EWL), benefit cuts, increased employer contributions and possible takeover by the Federal government. A recent survey reports that in 2009, 29% of these plans were so underfunded as to be considered "endangered". The PBGC in 2009 as of July have taken over the following partial list of pension plans: Delphi, Nortel, Mothers Cake, Interlaken, Metaldyne, Senscorp., Mendoza, Hurd. The PBGC had a deficit of \$33.5 billion before the takeovers. The takeover of Delphi alone will add \$6.6 billion to the PBGC deficit.

The National Coordinating Committee for Multiemployer Plans consisting of representatives of many large pension plans has advocated a number of changes in the law that, if enacted, would help more plans from being endangered and help those plans that are now endangered from being taken over in the near future by the PBGC. A bill was introduced by Rep. Pomery (D-ND) that would incorporate these changes into law.

## **Employer Personal Liability**

The Ninth Circuit in Boucher v Shaw held that a corporation's managers can be held personally liable for wages owed and not paid to employees prior to the corporation's filing for bankruptcy. In this case, former employees of the Castaways Hotel and Bowling Center sued three managers of the hotel for unpaid wages owed to the employees at the time the hotel filed for bankruptcy claiming a violation of the Fair Labor Standards Act and Nevada state law. The managers were the Chairman/CEO who owned 70% of the stock in the company, the CFO and the Labor and Employment Manager who owned the other 30% of the shares. The State Supreme Court decided that the state law did not hold the managers liable because the managers were not considered employers under state law. The managers filed a motion for summary judgment in Federal Court arguing that their obligation and the corporation's obligation to pay wages under the FLSA ended when the corporation filed for bankruptcy. The Federal District Court granted the motion. The Ninth Circuit reversed the District court and held that the three supervisors are personally liable for unpaid wages under the FLSA. The court gave a broad interpretation of the word "employer" in the FLSA. Other Circuits, including the First, Sixth and Fifth reached the same conclusion in earlier cases. The Ninth Circuit somewhat relied on the fact that since there was no contractual obligation for the corporation to indemnify the individual managers for legal expenses or a judgment, any liability would not affect the bankruptcy. The court, however, held that if a finding of liability by the managers effected the assets or liabilities of the corporation through indemnification or a directors and officers insurance policy, then the bankruptcy protections might apply to these claims.

## **Age**

The EEOC filed a lawsuit against AT&T alleging age discrimination in violation of the ADEA. The EEOC alleged that the company policy that prohibits the rehiring of workers who have previously retired from the company is inherently discriminatory. About 50,000 AT&T workers have left the company under either the retirement or severance programs. An unknown number of these employees have asked to be rehired and have been refused. The EEOC is asking the court to prohibit the continuation of this company policy and that the company pay back pay to the at-this-time unknown number of workers who have been refused reinstatement. The EEOC is not asking that jobs be created for these individuals where none exist, but that these more experienced individuals be rehired when appropriate. The EEOC comments "The government doesn't prohibit you from having a policy that makes no sense, but if it adversely affects workers over 40, then it violates the law."

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