

SmithAmundsen Labor & Employment

MONTHLY

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NEWS AND EVENTS OF INTEREST
to SmithAmundsen clients.

Inside this issue

CONTENTS:

NLRB's 'Agenda' Directed at Non-Union Workforce.....	1
Are You Applying the "Tip Credit" to Your Employees' Wages Correctly?.....	2
U.S. Supreme Court Declines Opportunity to Kill Project Labor Agreements.....	3
Private Entities Beware: Accepting State Issued Bonds Triggers Application of the Illinois Prevailing Wage Act.....	3
Wisconsin Case Law Reviews & Updates:	
Common Law, and Not Wis. Stat. § 103.465, Governs Restrictive Covenants in Non-Compete Agreements Signed Where the Employee Has Equal Bargaining Power	4
Just Cause Termination of Permanently Restricted Employee Following Placement of Employee in 'Suitable Employment' Does Not Result in Denial of Vocational Rehabilitation Benefits Under Wisconsin's Workers' Compensation Act.....	4
Seminars and Events.....	6

CONTRIBUTORS:

- Rebecca L. Dobbs, Editor
- Beverly P. Alfon
- Heather A. Bailey
- Aaron J. Graf
- Jonathon D. Hoag
- Jeffrey A. Risch

LABOR & EMPLOYMENT ATTORNEYS:

- Beverly P. Alfon
- Molly A. Arranz
- Heather A. Bailey
- Allison L. Chaplick
- Jill A. Cheskes
- Rebecca L. Dobbs
- Terry A. Fox
- Jeffrey M. Glass
- Jonathon D. Hoag
- Anita S. Johnson
- Jacqueline Lentini McCullough
- Julie A. Proscia
- Jeffrey A. Risch
- Lawrence R. Smith
- Ronald S. Stadler
- Neil G. Wolf
- Sara S. Zorich

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NLRB's 'Agenda' Directed at Non-Union Workforce

By Jeffrey A. Risch

Under the direction of Chairman Wilma Liebman, the National Labor Relations Board (NLRB) has taken unprecedented steps to regulate the private non-union workforce. While the board traditionally administers and enforces labor law through administrative decision making subject to judicial review, and has mostly confined its activity to union-management relations, it has recently taken several regulatory actions that indicate a shift in policy and politics at the agency. The board is seeking to broaden its scope, and to wield a larger influence over the way that employers manage their non-union workforce. Through administrative rulemaking and changes in how it decides unfair labor charges, as well as shifts in the focus of its general counsel's office, the NLRB is making clear that it intends to play a more active role in regulating labor law in the non-union setting.

Recent Examples:

In October 2010, the board announced (via press release) that it had filed a complaint against a Connecticut corporation for allegedly retaliating against an employee engaged in concerted action under the NLRA. The employee's supposed protected activity was far from an internal communication, however, she was terminated for posting disparaging comments about a supervisor on Facebook. *See Complaint and Notice of Hearing, American Medical Response of Connecticut, Inc.*, Case No. 34-CA-12576 (NLRB Region 34, October 27, 2010). While the American Medical Response (AMR) matter settled before a hearing was conducted, the case shows that the NLRB is making employers' social media and internet policies a priority – one that will apply to companies regardless of whether their workforce is unionized. Indeed, this complaint completely reverses the interpretation of a nearly identical social media policy by the previous general counsel only a year prior. *See Advice Memorandum in Sears Holdings*, Case No. 18-CA-19081, <http://www.nlr.gov/cases-decisions/advice-memos> (December 4, 2009).

On June 16, 2010, the NLRB's general counsel's office issued a memorandum that is intended to review and clarify the NLRB's position on mandatory arbitration clauses. *See MEMORANDUM GC 10-06*. While in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991), the Supreme Court determined that an employer can require an employee to channel his or her individual non-NLRA employment claims into a private arbitral forum for resolution, the general counsel's memorandum sought to protect the non-union employee's right to engage in protected concerted activities pursuant to Section 7 of the NLRA. 29 U.S.C. § 157. Specifically, the general counsel proclaimed that in order to be compliant with federal labor law, mandatory arbitration agreements in the non-union setting must be guided by very strict uncompromising principles.

On December 21, 2010, the NLRB announced a proposed rule that would require all employers under its jurisdiction, union and non-union, to publish a poster notifying employees of their rights under the NLRA. This notice further advises that it is illegal for an employer to retaliate against employees for engaging in union activities, to prohibit employees from soliciting for a union during non-work time and in non-work areas, and to prohibit employers from questioning employees about union activities in a manner that discourages such activity. The poster would also contain the board's web address and a toll-free number for workers to call if they believe their labor rights are being violated. Under the rule, an employer's failure to post the notice would be considered an unfair labor practice. Additionally, a failure to properly display the posting could be used by the NLRB as evidence of unlawful anti-union animus in NLRB unfair labor practice proceedings in which employer motive is at issue.

On January 28, 2011, in *Parexel Int'l LLC*, the board majority agreed that the company did not terminate the employment of Theresa Neuschafer for protected concerted activities under Section 7 of the NLRA. See 356 NLRB No. 82 (January 28, 2011). Neuschafer was found to have discussed alleged pay raises and purported preferential treatment towards South Africans by management (Neuschafer was not South African). However, the board concluded that the company wanted to prevent her from engaging in such discussions with her coworkers in the future. *Id.* Such action, according to the board's majority, served as an unlawful preemptive strike against protected concerted activity. *Id.* The board reasoned that because an employer

violates the NLRA by threatening to terminate an employee in order to prevent her from exercising Section 7 rights, it follows that an employer similarly violates the law by terminating the employee in order to be certain that she does not exercise her rights in the future. *Id.* In finding so, the board majority expanded the theories on which the agency may hold employers liable, stating that an employer violates the NLRA when it fires an employee "to be certain that she does not exercise her Section 7 rights." *Id.*

The board's decision in *Parexel* is noteworthy on two fronts. First, it sets forth what is arguably a new theory of liability under the NLRA. Under the preemptive strike theory of liability, virtually any adverse employment action in the non-union setting could be the subject of a Section 7 violation. Second, the preemptive strike theory of liability was not advanced by the NLRB's general counsel at the underlying administrative hearing, but nonetheless prevailed.

Through its very public words and actions, the board is using new methods to regulate federal labor law, and shows a newfound interest in capturing the spotlight for its efforts. The board has indicated that, going forward, it will play a larger role in non-union employment issues. Major shifts in board practice and policy will have a serious impact on U.S. employers in any industry, in any geographic location, and regardless of any union affiliation.

Jeffrey A. Risch is a partner concentrating his practice on the representation of management in all areas of traditional labor law. Through his in-house and private practice experience, Jeffrey is particularly adept in countering various union tactics in both union and non-union settings. Jeffrey may be contacted jrisch@salawus.com.

Are You Applying the "Tip Credit" to Your Employees' Wages Correctly?

By Heather A. Bailey

The Federal Labor Standards Act allows employers to pay their employees who regularly and customarily receive more than \$30 a month in tips a reduced wage under the existing minimum wage (this is commonly known as taking a "tip credit"). However, problems occur when the employer applies the tip credit during all hours of the employees' shifts, even though they may be performing dual jobs – one job that generates tips and another that does not. For example, a bartender or server may make coffee or set tables incidental to their tip generating duties, and thus can be compensated by using the tip credit even when performing such duties. However, employers need to know what to do when these incidental jobs or other non-tip generating duties take up a substantial amount of an employee's work day. When this happens, an employer does not get the benefit of paying the reduced wages for time spent doing the other work.

The U.S. Court of Appeals for the Eighth Circuit in *Fast v. Applebee's*, 2011 U.S. App. LEXIS 8178 (8th Cir. April 21, 2011) now gives employers more guidance. Here, the appeals court upheld the district court's reliance on a 1988 U.S. Department of Labor Wage and Hour Division Field Operations Handbook that provides that the tip credit may not be given "where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance...." Section 30d00(e).

The employees argued that their non-tip generating duties (i.e., wiping down bottles, cutting fruit, taking inventory and cleaning up after closing) consumed a substantial amount of their shift, and, consequently, Applebee's should not be allowed to pay them a reduced hourly rate when performing these duties. The appeals court stated that the Department of Labor's 20% rule should be followed when assessing such claims.

Practice Tips:

- Assess the duties performed by your tipped employees to see if they are incidental to the tip-producing duties, or if they take up 20% or more of the employees' work day.
- Keep accurate records, such as job descriptions, which support that the employees' duties are related to and intertwined with tip-generating and anything else is just incidental.

Please note that some states have different tip credit laws that differ from federal law and should be consulted in order to make sure you comply with state law as well.

Heather A. Bailey has counseled various restaurants and bars extensively on how to appropriately compensate tipped employees and on other wage and hour laws. For assistance in any area related to wage and hour compensation, please feel free to contact Heather at 312.894.3266 or hbailey@salawus.com.

U.S. Supreme Court Declines Opportunity to Kill Project Labor Agreements

By Beverly P. Alfon

A project labor agreement (PLA) is essentially a pre-hire collective bargaining agreement that sets all terms and conditions of employment on an entire construction project. In short, PLAs require all contractors performing work on a particular project to be or become union. PLAs are particularly controversial when public officials exercise executive powers and “encourage” the use of PLAs for publicly funded projects. Unions have aggressively pursued PLAs on public projects since the U.S. Supreme Court upheld their legality eighteen years ago.

In *Boston Harbor*, the court was faced with the question of whether the National Labor Relations Act (NLRA) preempted a government requirement that a project proceed under a project PLA (*Building & Construction Trades Council v. Associated Builders and Contractors*, 507 U.S. 218 (1993)). The court answered with a resounding “no,” reasoning that when a governmental entity acts as a market participant building a project, rather than a regulator setting rules for labor relations, a PLA is not prohibited by the NLRA.

Fast forward to 2011 and the theory of federal preemption of PLAs remains just that – a theory. In *Bertelan v. Rancho Santiago Community College District*, U.S., No. 10-889, cert. denied 04/18/2011, the Supreme Court declined to review a decision by a lower appeals court that followed *Boston Harbor*, signaling that despite subsequent challenges to the reasoning of that decision, the Supreme Court is not changing its position.

Similar to *Boston Harbor*, the PLA in *Bertelan* provided that the signatory unions were the exclusive bargaining agents for all employees,

required contractors to use union hiring halls to obtain workers, and further required all workers on covered projects to start paying union dues within seven days of their employment. The PLA also prohibited strikes, picketing and other disruptions. Relying on *Boston Harbor*, the appeals court affirmed the district court’s ruling that the PLA was not preempted by federal law because the agreement “reflects [the state’s] interest in the efficient procurement of goods and services,” by stabilizing labor relations with the union for the purpose of ensuring no labor disruptions.

PRACTICAL POINT: So long as a government entity can prove that it entered a PLA to protect its interests like any other market participant, then it is on the same footing as a private employer dealing with its subcontractor and labor force. In such case, there is no federal preemption and the PLA will stand.

LEGISLATIVE UPDATE: A project labor agreement bill (HB 2987) is currently being considered by the Labor Committee of the House of Representatives of the Illinois General Assembly. The bill attempts to codify Executive Order 2010-03 (Gov. Pat Quinn) into state law. If passed into law, it would require all state departments, agencies, authorities, boards, and instrumentalities to negotiate a PLA in good faith with labor organizations in the construction industry. The bill is scheduled for final action by the Labor Committee on May 6, 2011.

Beverly P. Alfon is attorney in the Labor & Employment Practice Group concentrating her practice on the representation of management in all areas of employment law. If you have questions about this or any other employment law-related matter, please contact Beverly at 312.894.3323 or balfon@salavus.com.

Private Entities Beware: Accepting State Issued Bonds Triggers Application of the Illinois Prevailing Wage Act

By Jonathon D. Hoag

The Illinois Prevailing Wage Act plainly states that it applies to fixed works constructed by a public body. The act goes on to define “public body” as the state, local governments, or any institution supported in whole or in part by public funds. At first glance, the act seems to make it clear that the prevailing wage rate is not required on construction projects initiated by private entities that are not supported by public funds. This is not the case, according to a recent Illinois appellate court ruling.

In *McKinley Foundation v. Illinois Department of Labor*, 404 Ill. App.3d 1115 (4th Dist. 2010), the court held that a private entity becomes a “public body” under the act when it accepts certain state issued bonds. The case involved a not-for-profit Presbyterian ministry for college students that contracted to construct student housing and parking on its property. The McKinley Foundation is funded entirely through private donations. However, for purposes of the housing project, part of the funding stemmed from tax-free bonds issued through the Illinois Finance Authority.

The Illinois Department of Labor audited the project, asserting that it was governed by the Prevailing Wage Act. McKinley argued that it was not a “public body” as defined by the act because it was not supported in whole or in part by public funds. The court acknowledged that McKinley was not supported by public funds, but pointed out that it had accepted funding through one of the statutes (The Illinois Finance Authority Act) that was specifically enumerated in the act, which arguably triggers application of the Prevailing Wage Act.

The court relied on the legislative debates that occurred when the act was amended to incorporate specific funding sources that would prompt application of the act. According to the court, the legislative debates made it clear that the intent was to expand coverage of the act to projects constructed by entities benefitting from financing under an enumerated public-financing mechanism, even if the entity itself was not a traditional public body.

As a result of the court's ruling, contractors and subcontractors must proactively seek out the funding source of construction projects. If public funding can be ruled out, the contractor or subcontractor should confirm in writing that the project is not covered by the Prevailing Wage Act. Lastly, if financing through a state-issued bond or statute is necessary or otherwise unavoidable, the parties should identify the scope of the project being constructed with the financing

and narrow the project to the extent possible. The court's ruling states that a private entity is only considered a "public body" for purposes of the project that is financed by the enumerated public-financing mechanism.

Jonathon D. Hoag, a member of the Labor & Employment Practice Group, concentrates his practice on the representation of management in all areas of employment law. If you have questions about an employment law-related matter, please contact Jonathon at 630.587.7914 or jhoag@salawus.com.

Wisconsin Case Law Reviews & Updates

Common Law, and Not Wis. Stat. § 103.465, Governs Restrictive Covenants in Non-Compete Agreements Signed Where the Employee Has Equal Bargaining Power

By Aaron J. Graf

In *The Selmer Co. v. Rinn*, the Wisconsin court of appeals addressed the distinction between non-compete agreements governed by the scrutinizing Wis. Stat. § 103.465 and those governed by the more relaxed common law standards. The court held that where an employee enters into a non-compete agreement with equal bargaining power with the employer, the common law governs the enforceability of the non-compete, not the highly scrutinizing provisions of § 103.465.

The defendant employee was the vice president of sales and marketing for the plaintiff employer. Given his value to the employer, the employee was offered an opportunity to purchase stock options at a reduced price. However, the stock option purchase agreement included nonsolicitation and confidentiality provisions which mandated that the employee could not solicit or divert any customers for one year following termination and could not disclose confidential information to anyone at any time. The employee was not forced to accept the offer, and his refusal would not have affected his employment in any way. Following his termination, he both solicited customers of his former employer and disclosed confidential information to others.

Wis. Stat. § 103.465 endorses a strong public policy against the

enforcement of unreasonable restraints and has been historically applied in situations where an employee is required to sign a non-compete when entering into an employment contract. Before the existence of § 103.465, restrictive covenants were subject only to the rules that it be 'reasonably necessary' for the protection of the legitimate interests of the employer, and at the same time should not be oppressive and harsh on the employee or harm the public interest. Although technically § 103.465 did not materially alter the common law standards, it did increase the degree of scrutiny that courts apply to such agreements.

The court held that § 103.465 applies in situations where (1) the covenant is a condition of employment, or (2) where the employer retains an unfair bargaining advantage over the employee. Without these circumstances, the common law's 'rule of reason' governs. In the present case, the court found that the nonsolicitation and confidentiality provisions were necessary for the protection of the employer; were reasonable considering time, purpose, space, and scope; and were not injurious to the general public.

Aaron J. Graf is an attorney in the firm's Milwaukee, Wisconsin office. If you have any questions about this or any other employment law-related matter, please contact Aaron at 414.847.6128 or agraf@salawus.com.

Just Cause Termination of Permanently Restricted Employee Following Placement of Employee in 'Suitable Employment' Does Not Result in Denial of Vocational Rehabilitation Benefits Under Wisconsin's Workers' Compensation Act

By Aaron J. Graf

In *Oshkosh v. LIRC*, 2011 Wisc. App. LEXIS 125, __ WI App. __, __ Wis. 2d. __, __ N.W.2d __ (pending publication), the employee suffered injuries to each of his knees in a two year period, leaving him with permanent work restrictions. The employer found suitable employment for the employee within his permanent work restrictions. After the transfer, the employee was terminated for allegedly sleeping on the job. Subsequent to his termination, the employee applied for vocational rehabilitation benefits under Wisconsin's Workers' Compensation Act.

The employer denied that it was liable for such benefits, asserting

that since it had provided suitable employment after the employee's injuries, and since the employee was terminated for just cause from that suitable employment, that the employee should not be eligible for vocational rehabilitation benefits. In other words, if the employee was not sleeping on the job, he would not have been fired and thus would not require vocational rehabilitation benefits. The employer's arguments were rejected by the ALJ, the Wisconsin Labor Industry Review Commission, and the circuit court.

While the argument may be logical, the court of appeals also rejected the employer's arguments, finding that nothing in the applicable

statute, Wis. Stat. § 102.61(1g), provides that vocational benefits can be denied if the employee is fired from a suitable employment position for just cause. The court of appeals noted that it was the injury, not the termination, that was the cause of the employee's need for vocational rehabilitation. After all, the purpose of workers' compensation benefits is to compensate employees who have lost the ability to work, regardless of whether they are good or bad employees.

Aaron J. Graf is an attorney in the firm's Milwaukee, Wisconsin office. If you have any questions about this or any other employment law-related matter, please contact Aaron at 414.847.6128 or agraf@salawus.com.

CALENDAR OF EVENTS - May 2011

<p>Illinois Bankers Association Seminar: Wage and Hours Issues--Bankers Beware! Presenters: Jeffrey Risch and Julie Proscia</p> <p>At this session, participants will learn how to identify and properly classify employees under Wage & Hour laws and administer discipline, breaks, and leaves without breaking the overtime exemption status of the position.</p>	<ul style="list-style-type: none"> ■ Date: May 5, 2011 ■ Time: 8:00 am - 12:00 pm ■ Location: Bloomington, IL ■ For more information, please contact Emily Lempa at elempa@salawus.com.
<p>Fair Labor Standards Act Presenters: Jeffrey Risch, Allison Chaplick, Heather Bailey and Sara Zorich</p> <p>As wage/hour lawsuits and class actions reach an all time high, Jeffrey Risch, Allison Chaplick, Heather Bailey and Sara Zorich, in conjunction with Lorman Education Services, will discuss staying up-to-date on new laws and critical legal developments, how policies and practices can minimize claims, how to determine which employees are exempt from federal and Illinois wage and hour laws and what compensable working time really is.</p>	<ul style="list-style-type: none"> ■ Date: May 6, 2011 ■ Time: 8:30 am - 4:30 pm ■ Location: Naperville, IL ■ For more information and to register, visit www.lorman.com/seminars/387420.
<p>Health Care Reform - What You Still Need to Know and Watch Out For Presenter: Rebecca Dobbs</p> <p>In conjunction with the DuPage Association of Health Underwriters, Rebecca Dobbs will present on health care reform issues during this breakfast meeting on May 12, 2011.</p>	<ul style="list-style-type: none"> ■ Date: May 12, 2011 ■ Time: 7:30 am ■ Location: Lisle, IL ■ For more information and to register, visit www.dahuonline.com/events.html.
<p>Employment Law from A-Z Presenters: Jeffrey Risch and Jeffrey Glass</p> <p>In conjunction with Lorman Education Services, Jeffrey Risch and Jeffrey Glass will present on employment compliance and policy creation best practices, protecting yourself and your organization and common pitfalls.</p>	<ul style="list-style-type: none"> ■ Date: May 13, 2011 ■ Time: 8:00 am-4:30 pm ■ Location: Rockford, IL ■ For more information and to register, visit www.lorman.com/seminars/380234.
<p>Valley Industrial Association Immigration Seminar - Avoiding the Issue of Improper I-9 Documentation Presenter: Sara Zorich</p> <p>Learn about the essential worker documentation issues involved in the I-9 documentation process to help employers avoid the potential liabilities and pitfalls of improper documentation and employment of an undocumented workforce. Also learn about tips to manage immigration audits by the US Immigration and Customs Enforcement agency and utilizing E-Verify to document your workforce.</p>	<ul style="list-style-type: none"> ■ Date: May 13, 2011 ■ Time: 8:00 am-10:30 am ■ Location: VIA Office, 2111 Plum Street, Suite 372, Aurora, IL ■ For more information and to register, visit www.valleyindustrialassociation.org.
<p>Back to the Future Again Presenter: Heather Bailey</p> <p>Heather Bailey will present on employment law issues as well as moderate a round table discussion on employment law issues at the 2011 Midwest Conference for the Illinois and Wisconsin Automatic Merchandising Councils.</p>	<ul style="list-style-type: none"> ■ Date: May 14, 2011 ■ Location: Grand Geneva Resort and Spa, Lake Geneva, WI ■ For more information, contact Heather Bailey at hbailey@salawus.com.
<p>Avoiding New Labor and Employment Law Land Mines in 2011 and Managing Compliance With Health Care Reform: What you don't know will hurt you... Presenters: Jeffrey Risch and Rebecca Dobbs</p> <p>In conjunction with Illinois Fox Valley SHRM and Stateline SHRM, Jeffrey Risch and Rebecca Dobbs will present a legal update and health care reform update on May 19, 2011.</p>	<ul style="list-style-type: none"> ■ Date: May 19, 2011 ■ Time: 7:45 am-12:00 pm ■ Location: Crystal Lake, IL ■ For more information and to register http://illinoisfoxvalley.shrm.org/events.
<p>I-9 Compliance and Avoiding the Issues of Improper Documentation Presenter: Sara Zorich</p> <p>In conjunction with the Illinois Chamber of Commerce, Sara Zorich will review how to properly prepare, maintain and manage your I-9's. She will speak on essential worker documentation issues involved in the I-9 documentation process to help employers avoid the potential liabilities of improper documentation and employment of an undocumented workforce. She will also discuss tips to manage an immigration audit by U.S. Immigration and Customs Enforcement and how to utilize E-Verify to document your workforce.</p>	<ul style="list-style-type: none"> ■ Date: May 24, 2011 ■ Time: 10:30 am-12:00 pm ■ Location: Webinar ■ For more information, please contact Julie Brennan at webinars@ilchamber.org.
<p>Minimizing Liabilities With Volunteers: What is Your Risk? Presenter: Julie Proscia</p> <p>Julie Proscia will present the Aurora Regional Chamber of Commerce with a legal update on the liabilities involved with taking on volunteers within your not-for-profit organization.</p>	<ul style="list-style-type: none"> ■ Date: May 25, 2011 ■ Time: 8:30-10:00 am ■ Location: Aurora, IL ■ For more information and to register, please contact Emily Lempa at elempa@salawus.com.