IT'S THE LAW

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SERVING THE CONSTRUCTION INDUSTRY IN EMPLOYMENT AND LABOR MATTERS AND CONSTRUCTION CONTRACT CLAIMS

MEMBERSHIP IN AN EMPLOYER TRADE ASSOCIATION MAY BIND YOU TO A CBA

While going through your mail one evening, you come across a solicitation by an Employer Trade Association for a free membership. Your company, Hawkeye Painting, is a non-union company and new to the area. Being that nothing is free, you take five minutes and fill out the application entitled "Free 2002 PDCA &FCA Membership Application" and place it in the mail. Unbeknown to you, the Painters' Union and its Trust Funds will soon be seeking to bind you to the Collective Bargaining Agreement (CBA) and to further compel Hawkeye Painting to submit to an audit and pay benefits.

The question becomes is Hawkeye Painting bound to the CBA by virtue of its membership in the Employer Association? The Federal Court in the Northern District of Illinois held in Trustees of the Chicago Painters and Decorators Pension, Health, Welfare Trust Funds v. LaCosta that the employer was not bound to the CBA. In LaCosta, the employer signed a free membership application in January 2001 to become a member of the Chicago Painting and Decorating Contractors' Association. Unknown to the employer, in signing the application, it, according to the Union, became bound by a CBA that required it to make contributions to the Chicago Painters and Decorators Pension, Health, Welfare, and Deferred Savings Plan Trusts. When the employer failed to make contributions to the funds, the fund trustees brought an action against the company in federal court. In opposing the trustees' lawsuit, the employer argued that it was not bound by the CBA because it was unaware when it signed the free membership application that it would be bound by the CBA.

In ruling in favor of the employer, the Court opined that the application that the Employer Association lured the employer into signing is predominantly a solicitation for a free membership and did not provide the individual employer with sufficient information to bind such an employer to a CBA. Analyzing the membership application, the Court noted that the form failed to make it clear to the employer whether the form was an application for "Active Membership" or "Associate Membership." This omission is important since the Constitution and By-Laws of the Employer Association provide that only "Active Members" are bound by the CBA.

Moreover, the Court noted that the employer was not given a copy of the Constitution

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This Newsletter is not intended as legal advice since each situation depends specifically on the facts presented. Persons reading this Newsletter should seek competent legal advice with regard to the subjects contained herein before making any employment or other decisions.

and By-Laws of the Employer Association. The Court stated "[t]he manner in which the Employer Association selected [employer] to free membership...with the ensuing consequence of being bound to a collective bargaining agreement borders on deception." The Court added: "A membership by an employer in an association with resulting consequences to be bound by a collective bargaining agreement should be based upon mutual trust and a clear understanding of the rights and obligations of all the parties and not be based upon vagueness, confusion, or trickery."

Federal law requires that an employer's conduct manifest an unequivocal intention to be bound to a CBA. Under these circumstances, the Court concluded that no such intention existed and summarily dismissed the trustees' lawsuit.

While the employer was victorious, the five minutes it took to fill out the application resulted in the employer expending a considerable amount of time and money in defending itself. The LaCosta case demonstrates the importance of proceeding very carefully when presented with employer association and/or multi-employer group literature. When confronted with such literature, it would be prudent to contact either the association, multi-employer group, or competent legal counsel to inquire about the ramifications of becoming a member.

IMPLICIT VOLUNTARY RECOGNITION - WHEN DOES BARGAINING BEGIN ?

At what point do friendly discussions between an employer and a union create an inference that the employer is implicitly recognizing the union as the bargaining representative for its employees? This was addressed in International Union of Operating Engineers Local 150 v. N.L.R.B. and Terracon. In Terracon, the U.S. Court of Appeals for the Seventh Circuit ruled that the International Union of Operating Engineers Local 150 ("Union") "courtesy call" to an engineering firm employing workers the union was attempting to organize did not initiate bargaining, nor did a second meeting between the parties indicate the company had recognized the union. Before discussing the dispositive facts of the case, a brief overview of the law is in order.

A union becomes the exclusive bargaining representative for a group of employees either by prevailing on a secret ballot election conducted by the NLRB or by convincing the employer to voluntarily recognize it as the employees' representative. Voluntary recognition can be either explicit or implicit. Implicit voluntary recognition occurs when an employer's statements or conduct clearly and unequivocally demonstrate that it has made a commitment to enter into negotiations with a union. On the other hand, explicit voluntary recognition occurs when an employer expressly assents to a union's representation. The Terracon case discusses implicit voluntary recognition.

The source of the problem in the Terracon case stemmed from two meetings between Terracon and the union. In January, 2001, the drillers and drill helpers employed by Terracon began union organizing efforts by meeting with organizers from IUOE and collecting union authorization cards. On February 19, 2001, a union organizer and union attorney paid a visit to Terracon's office. There, they approached Terracon's office manager and demanded voluntary recognition of the union. During the meeting, Terracon's office manager reviewed the signed authorization cards. The union organizer informed Terracon's office manager that the employees wanted better winter clothing and shoes, and wanted more time to inspect equipment and receive training. At this time, the office manager was presented with a Voluntary Recognition Agreement which he refused to sign.

At the conclusion of the meeting, the union asked for another meeting and the office manager referred them to another Terracon official who also refused to sign the Voluntary Recognition Agreement. The official called the employees' requests "peanuts," but said it could not afford to pay employees union wages and that it would use subcontractors if forced to pay union wages. At the conclusion of the meeting, the union organizer inquired whether the parties could meet again and the Terracon official said he would get back with them.

The next day, the union sent the company a letter stating that it believed bargaining had begun, but Terracon responded that the conversation was merely a "courtesy call" and that no negotiations or bargaining had commenced. Terracon filed a petition for an NLRB-supervised representation election and the union countered with an unfair labor practice charge contending that the company had withdrawn recognition.

The union argued that by reviewing the authorization cards, Terracon was implicitly recognizing the union. The court disagreed stating that "merely reviewing authorization cards does not

count as implicit recognition." Further, "employers have the right to a Board [NLRB] election to resolve the issue of majority status, and they waive that right only if they enter into a clear agreement to do so." The court noted that in cases where reviewing cards led to authorization, there was an additional element of planned further discussions that indicated that recognition was being given; however this was not present in the Terracon case. The court concluded that Terracon never manifested such an intent, which would amount to implicit voluntary recognition.

The court also dismissed the union's argument that Terracon engaged in bargaining when it discussed working conditions, union benefits, training and compensation. The court noted that although bargaining with a union is one of the ways an employer can implicitly recognize a union, the "serious give and take negotiations" which indicate bargaining were not present. Terracon's questions and discussions regarding working conditions, union benefits, training and compensation can reasonably be interpreted as an attempt to educate itself about the union and the employees' interests. As of great significance, the court noted that there were no compromises made and the parties' positions did not change. Accordingly, the court concluded " bargaining" did not occur in the meetings between Terracon representatives and the union.

In light of the Terracon decision, an employer should always present union representatives with a letter outlining the scope and purpose of a meeting in order to avoid being held liable for implicitly recognizing a union. Strong language indicating an unequivocal interest not to enter into negotiations at the meeting is a must, and the employer's conduct must be consistent with the terms of the letter.

SUPREME COURT EXPANDS DISPARATE IMPACT CLAIMS TO INCLUDE AGE DISCRIMINATION

In late March, the Supreme Court announced that age discrimination claims can be brought by workers who can only show "disparate impact". That is, an employee who alleges age discrimination under the Age Discrimination in Employer Act (ADEA) only needs to show that an employer's action has a greater impact on the employees' age group and need not show that the employer actually intended to discriminate.

The case, Smith v. City of Jackson, revolved around the problems in Jackson, Mississippi and its inability to recruit police officers. For several decades, the starting salaries of officers with less than five years of seniority were below the average starting salary of officers in similar towns in the southeast. To remedy this disparity, the City of Jackson decided to raise the pay of its officers across the board. However, these officers with less than five years received proportionately greater raises than those with more seniority. This aspect of the policy caused a group of police officers over 40 years old to bring suit under the ADEA against the City alleging that the City deliberately discriminated against them because of their age and that the policy had a disparate impact on them due to their age.

The District Court granted Summary Judgment to the City on the disparate impact claim and ruled that the ADEA does not recognize a disparate impact claim. The Court held that in order to bring a claim under the ADEA, the plaintiffs must claim that the City actually intended to discriminate. This ruling was upheld by the court of Appeals.

The Supreme Court upheld the verdict saying that the officers had not presented a valid claim of disparate impact claim. However, the Court did announce that the ADEA does authorize disparate impact claims.

In coming to its decision, the Court compared the language of the ADEA with Title VII of the Civil Rights Act. Both Acts contain language that prohibits actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee." Relying on this language, the Court held that the focus of the Act was on the effects of an employer's actions and not just on its motivation.

This is a reversal of the recent trend wherein several courts have refused to hear disparate impact claims under ADEA. The main hurdle in the ADEA to disparate impact claims is that the ADEA provides that an employer may take "any action otherwise prohibited...where the differentiation is based on reasonable factors other than age."

What does this mean for our clients? Since the Supreme Court has stated that a claim can be made under the ADEA without a showing of discriminatory intent, companies must be careful not to act in ways which will have a disparate impact on workers over 40. That having been said, employers need not live in fear of the ADEA lawsuits. As shown

by the Court's upholding of Summary Judgment for the City of Jackson, a disparate impact claim is not difficult for a plaintiff to prove.

In order to bring a disparate impact claim, a plaintiff must: 1) begin by identifying the specific employment practice that is challenged; 2) offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. These statistics must show statistical disparities that are so sufficiently substantial that they raise such an inference of causation. Additionally, courts are not obliged to assume that plaintiffs' statistical evidence is reliable. "If the employer discerns fallacies or deficiencies in the data offered by the Plaintiff, he is free to adduce countervailing evidence of his own." Once a plaintiff can make a claim for disparate impact, the employer has the burden of showing that its action was based on reasonable factors other than age. In other words, the employer had some other legitimate business reason for its action. Once an employer can show a reasonable factor other than age, then a plaintiff must show that the employer had other means to accomplish this goal which did not have the same undesirable discriminatory effect of the policy being challenged.

NLRB IMPLEMENTS NEW VOLUNTARY PROCEDURE

The National Labor Relations Board implemented a new, voluntary procedure that will allow employers and unions as part of a stipulated election agreement to consent to the resolution of all disputed pre-election and post-election issues by a regional director, with no appeal to the board.

The new procedure added to the NLRB's rules and regulations is identified as Section 102.62(c), the full text of which may be found under the "Rules & Regs" at www.nlrb.gov. Section 102.62(c) accompanies the two other options for stipulated representation elections. Under Section 102.62(a), the parties can agree that post-election disputes will be resolved with finality by the regional director, while Section 102.62(b) allows a stipulated election agreement in which parties retain their right to file exceptions or requests for review with the board.

These Sections only apply to stipulated representation elections in which the employer and union agree that the board has jurisdiction, define the appropriate bargaining unit, and agree on the time and place of the election. For further information about the new rule, contact the Information Officer of the NLRB or Berglund & Niew, P.C.

NLRB ADDS AUTOMATED ANSWER SYSTEM TO WEB SITE

The National Labor Relations Board has added a new feature to its Web site consisting of "a self-service, automated system that provides users with immediate, relevant answers to many questions," the agency announced March 18, 2005.

The new system uses "an intelligent 'knowledge base' built on user interactions," an NLRB statement said. The online knowledge base makes it "easy and convenient for the public to get on a 24/7 basis quick answers to frequently asked questions that do not require human interaction." The online system is an adjunct to the network of information officers in the 32 regional offices who answer telephone inquiries during normal business hours.

The home page of NLRB's Web site (http://www.nlrb.gov) includes a "Questions?" line, which takes the user to an interface. The user can type in a question in a search box or browse a "tree structure" of all the questions and answers in a subject category. The system interprets the question and provides potential answers. "If the system cannot answer a question, it will notify the NLRB system administrator, and an answer will be provided by NLRB subject experts in the Division of Operations-Management," the agency said. The system then incorporates the new question and answer into its knowledge base, the board said.

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