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## WORKPLACE UPDATE®

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### HOLIDAY ISSUE

November/December 2004

<b>LABOR NOTES</b>
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#### NLRB REVERSES POSITION ON THREE CASES

The National Labor Relations Board (NLRB), like most government agencies, the members of which are appointed by the President, shifts its position from right to left and back depending upon which president made the appointments. The present Board is made up of a majority of Bush appointees. As such, it has made a definite shift to the right and in doing so has overturned three decisions made by the Clinton-appointed Board. These include the following:

#### CONTINGENT WORKERS CANNOT BE INCLUDED IN BARGAINING UNIT WITHOUT EMPLOYERS' CONSENT

In 2000, the Clinton Board issued a ruling in *M.B. Sturgis* holding that it was permissible, without employer consent, to include in a bargaining unit both temporary workers jointly employed by a supplier employer and a user employer with regular workers solely employed by the user employer. In a 3-2 decision, the present Board reversed that decision and ruled that the user employer must consent to the inclusion of the supplier employer's employees before including them in a unit of regular workers employed solely by the user employer. *H.S. Care LLC d/b/a Oakwood Care Ctr.*, 343 NLRB No. 76 (11/26/04). The Board majority concluded that Congress in enacting Section 9(b) of the National Labor Relations Act had "not authorized the Board to direct elections in units encompassing the employees of more than one employer."

#### NO PRESUMPTION OF PLANTWIDE DISSIMINATION OF EMPLOYER'S THREAT TO CLOSE PLANT

On November 29, 2004, the Board issued its decision in *Crown Bolt Inc.*, 343 NLRB No. 86, ruling in a 3-

2 split that an employer's threat to close a facility if employees voted in a union would not be presumed to have been disseminated to employees throughout the bargaining unit. This ruling overturned the Clinton Board's ruling in *Springs Industries*, 332 NLRB No. 40, which had overruled a 1986 ruling. Thus, where there is an employer threat to close a facility if the employees vote in the union, "the party that seeks to rely on dissemination throughout the plant must prove it." The decision did hold, however, that the opinion would be applied prospectively only and that the *Springs Industries* rule would apply to all pending cases involving plant closure threats.

#### WORKRULES PROHIBITING PROFANE LANGUAGE AND HARASSMENT UPHELD

In another 3-2 decision, the Bush members of the NLRB ruled that an employer's work rules prohibiting "abusive and profane language, harassment and verbal, mental and physical abuse" were lawful rules intended for the purpose of maintaining order in the workplace and did not prohibit Section 7 activity. Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, guarantees to employees the right to join or assist labor organizations, engage in other concerted activities or refrain from doing such things. The majority found that the rules served legitimate business purposes, that is they were designed to maintain order in the workplace and to protect the company from liability by prohibiting conduct that if permitted could result in such liability. The dissent found that the rules would inhibit Section 7 activity citing as examples that they could inhibit "an angry conversation with a supervisor in expressing dissatisfaction over an evaluation, a heated discussion between employees over the benefits of unionization, or a loud protest by employees over safety conditions." *Martin Luther Memorial Home Inc. d/b/a Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (11/24/04).

PIZZA DRIVERS OF THE  
WORLD UNITE!

The Association of Pizza Delivery Drivers was formed for the purpose of organizing pizza delivery drivers across the country. However, in the first two representation elections held, the union has failed to deliver. On November 23, 2004, the union lost an election by a 9-3 vote against representation at a Pizza Hut store in Cleveland, Ohio. On November 16, 2004, the employees at a Domino's store in Nebraska voted 2-2, meaning the union lost the election. A union spokesman has indicated that the union intends to press its efforts to establish unions in every pizza store across the country. According to the union, it has over 700 members who meet and discuss issues on the Internet.

WALMART'S CHINESE WORKERS FREE TO  
UNIONIZE

Wal-Mart stores, one of the largest employers in the United States, has always taken a position against unionization by its employees, preferring to deal with each employee individually rather than through a union representative. So far, the company has been successful in defeating efforts to unionize its facilities in the United States. Wal-Mart now maintains some forty-three stores in the Peoples Republic of China. Recently, the China Federation of Trade Unions announced that it would blacklist and possibly sue foreign companies that interfered with unionization of their employees in China, naming specifically Wal-Mart, Dell, and McDonald's. Wal-Mart responded by acknowledging that its Chinese workers had the right to join unions and that should they request to do so, Wal-Mart would respect their wishes. Wal-Mart went on to add that none of its employees had made such a request.

**FLSA**

FLSA CLAIMS CONTINUE TO ESCALATE -  
TIME FOR AN AUDIT

Each day, it seems that another significant claim against a company for alleged violations of the Fair Labor Standards Act is reported. Many of these have resulted in multi-million dollar judgments or settlements. For example, the Automobile Club of Southern California recently agreed to pay \$19.5

million to some 1,300 sales agents based on claims of overtime and wage and hour violations. A \$22.4 million settlement in favor of janitors working for a building service contractor at a major supermarket chain was announced. A company in New York that employs pretzel vendors in Central Park has agreed to pay a \$450,000 settlement to compensate the vendors for alleged failure to pay minimum wages and overtime. A district court in the District of Columbia recently certified a suit by nine network engineers at Sprint Corporation to proceed as a collective action against the company for alleged overtime violations of the Act. These and other like cases make clear that companies are facing significant risk for wage and hour violations and steps should be taken to minimize those risks. We recommend an audit be done now to determine, among other things, if:

Employees being treated as exempt from overtime and minimum wage payments meet the requirements of the new regulations covering such exemptions;

Employees are working off the clock;

Accurate time records are being maintained;

Bonuses and other forms of compensation are being accounted for in the calculation of overtime;

Employees are being compensated properly in connection with travel;

Employees should be paid for their lunch breaks; or

Improper deductions are being made from employees' pay.

Should you need assistance in carrying out such an audit, please contact the attorney with whom you work at our firm or a member of our labor and employment law section.

**SUPREME COURT**

POLICE OFFICER LOSES FIRST  
AMENDMENT CLAIM

In our February, 2004 newsletter, we reported on a decision by the Ninth Circuit Court of Appeals upholding a claim by a San Diego police officer who alleged that his First Amendment right of protected

speech of public concern had been violated when he was terminated after the police department found that he had sold video tapes of himself in a police uniform stripping and masturbating. The United States Supreme Court has disagreed with the Ninth Circuit, ruling that the officer's actions did not constitute comment on an issue of public concern. Rather, the "speech in question was detrimental to the mission and functions of his employer" and there was "no basis for finding that it was a concern to the community as the Court's cases have understood that term in the context of restrictions by governmental entities on the speech of their employees." The officer's conduct had been detected by his supervisor who, while searching eBay, found a tan police uniform that had formerly been used by the San Diego Police Department listed for sale under the officer's username. The supervisor then searched the site for other items offered for sale under that username and found the videotapes made by the officer in an adults-only section. The supervisor recognized the officer from the pictures in the ad. *San Diego v. Roe*, U.S. No. 03-1669 (12/06/04).

**DISCRIMINATION CASES**

**REBEL WITHOUT A CAUSE**

Curtis Storey claimed that his national origin was "Confederate Southern-American" and that the Confederate flag was a religious symbol because it incorporated the cross of St. Andrew and could be interpreted as the Greek letter "X," an ancient symbol of Christ. Storey was a security guard at a Sony plant in Pennsylvania when in 1998 he began carrying a lunch box with a Confederate flag sticker on it, and he placed two Confederate battle flag bumper stickers on his pick-up truck, one sticker reading "The South Was Right" and the other "Heritage Not Hate." After Burns took over the security at the facility, Storey's supervisors met with him and told him that under the company's diversified hiring program, he would have to remove the Confederate stickers from his lunch box and truck. Storey refused and he was ultimately terminated. He filed a charge with the EEOC claiming discrimination because of his national origin, Confederate Southern -American, and religion, Christian. The EEOC dismissed his charge and he then sued Burns in federal court in Pennsylvania. The district court dismissed his claims and the Third Circuit affirmed. In a 2-1 decision,

that court held that Storey had failed to allege an "employment action" under Title VII, that is, he failed to claim an action by Burns that was serious and tangible enough to alter his terms, conditions, and privileges of employment. The Court found that Storey had acknowledged that he was not fired because of his alleged national origin or religion, but rather because he refused to cover or remove his Confederate flag symbols when he was told to do so. The court further noted that in his complaint the plaintiff had claimed that he displayed the Confederate stickers because he was proud of his heritage and was passionate about sharing it with others, not because it conflicted with a sincerely held religious belief. In dissent, Chief Judge Scirica found that Storey had satisfied the pleadings requirements to establish a prima facie case, but that a "Confederate Southern-American" was not a valid national origin class under Title VII and Storey had never claimed to Burns that the stickers had any relation to a religious belief or observance. *Storey v. Burns Int'l Sec. Servs.*, 3rd Cir. No. 03-2246 (12/09/04).

**NOTES ON TEST FORMS LAND COMPANY  
IN TROUBLE**

Many years ago, it was not uncommon for companies to note on applications the race, sex, and other identifying information concerning applicants. This practice got many companies in trouble under Title VII and other anti-discrimination laws, such that most companies now steer clear of this. Mills Fleet Farm, a wholesaler of farm and animal products and car supplies in Minnesota, administered applicants the "Reid Report", a commercially available pre-employment test designed to assess "tastes, preferences, attitudes, habits, behaviors and personality traits" in applicants. Completed reports were forwarded to Reid for scoring following which the applicant would be rated as either "recommended," "recommended with qualifications," or "not recommended." Mills requested to provide Reid the race and sex of the job applicants on the test forms so that Reid could determine if the tests were having a disparate impact on females or minorities. When Christopher Modtland was rejected for employment, he filed a class action suit against Mills under Title VII and the Minnesota Human Rights Act claiming that the practice discriminated against him and a class of similarly situated individuals. The district court

refused to dismiss the case on summary judgment, ruling that the plaintiff was entitled to take discovery in the case in an effort to establish whether race or sex was a factor in the employment decisions. *Modtland v. Mills Fleet Farm Inc.*, D. Minn. No. 04-3051 PAM/RLE (11/28/04).

**RELIGIOUS DISCRIMINATION**

**FOLLOWER OF CHURCH OF BODY  
MODIFICATION LOSES CLAIM**

Kimberly Cloutier, who worked at a Costco in West Springfield, Massachusetts, engaged in various forms of body modification including facial piercing and cutting. Costco revised its dress code and prohibited all facial jewelry other than earrings. Cloutier was ultimately confronted by her supervisors and told that she would have to remove her facial piercings. Cloutier responded that she was a member of the Church of Body Modification and that her eyebrow piercings were part of her religion. The mission of the Church of Body Modification is the encouragement of its members to “grow as individuals through body modification and its teachings” and to be “confident role models in learning, teaching and displaying body modification.” The church does not require members to display their body modifications at all times, however. Cloutier claimed that she had interpreted her role in the church as a “confident role model” which would require her to display her body modifications at all times. Cloutier was eventually terminated for unexcused absences and she filed suit under Title VII and state laws claiming discrimination based on failure to accommodate her religious practices. The district court ruled that Costco had reasonably accommodated Cloutier by offering to let her return to work if she agreed to cover or temporarily replace her piercings. On appeal, the First Circuit Court of Appeals recognized the importance of personal appearance regulations to employers. As such, the Court found that Costco was within its rights to adopt a policy prohibiting facial jewelry and that for the company to accommodate Cloutier’s refusal to remove her jewelry would impose an undue hardship on the company because it would result in the company’s loss of its ability to control how it projects itself to the public. *Cloutier v. Costco Wholesale Corp.*, 1st Cir. No. 04-1475 (12/01/04).

**ADA**

**EEOC SAYS NO TO PERIODIC MEDICAL  
EXAMS FOR OFFSHORE WORKERS**

A company engaged in offshore oil drilling requested guidance from the EEOC as to whether it could require periodic medical examinations for its employees working on offshore drilling rigs to screen them for threatening AE illnesses. The company likened its employees to police officers, firefighters and airline pilots, who can be required to undergo periodic medical exams or to report the use of prescription medications that may affect their job performance. The company urged that the ability of its employees to perform their jobs without posing a direct threat to others affected the public safety of individuals who lived and worked on the rigs. The EEOC rejected this position in its informal guidance letter, adhering to its long-standing position that the Americans with Disabilities Act prohibited such across-the-board medical examinations. Rather, according to the letter, the employer could require examinations on an individual basis where a particular offshore worker had a condition that could affect his or her ability to perform the job functions, or where that condition might pose a direct threat. Further, the company could provide “voluntary medical examinations” for its employees, but those must truly be voluntary.

**FMLA**

**MICROMANAGING WORK NOT  
CONSTRUCTIVE DISCHARGE**

After returning from eight weeks of FMLA medical leave, a human resources employee at Alliance Compressor experienced what she described as ostracism by her peers and micromanagement by her superiors, including the imposition of an onerous performance plan for alleged fabricated deficiencies in her performance, her exclusion from HR department meetings, and the plant manager’s ridiculing her in front of her co-workers. Following this treatment, she resigned, claiming that she had been constructively terminated in violation of the FMLA and sued her employer. The Fifth Circuit, in reviewing the case, disagreed, finding that such alleged conduct “does not constitute the type of badgering or harassment designed to encourage the employee’s resignation that is required for constructive discharge.” The plaintiff claimed that

the district court, in considering the defendant's motion for summary judgment, had erred in refusing to consider evidence of the company's intent. The Fifth Circuit agreed that intent should have been considered, but even when that was taken into consideration, the plaintiff had still not met her burden of proof that a reasonable person who was treated as was she, would have felt compelled to resign under the circumstances. Rather, according to the court, a reasonable person would have tried to resolve those problems rather than to have quit so quickly. *Haley v. Alliance Compressor LLC*, 5th Cir. No. 04-30007 (11/17/04).

**USERRA**

**NO REST TIME BEFORE JOB RETURN**

The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") provides job protection for members of the armed forces, including those serving in the Reserves and the National Guard. Willie Gordon, a reservist, was returning from weekend duty to his home in New Jersey when he stopped at his place of employment, a Wawa Food Market, to pick up his check and his schedule for the coming week. He was allegedly told by the store manager that he had to work the night shift or be fired. Gordon worked the night shift and, on his way home the next day, he lost consciousness, crashed his car, and died as a result of the accident. His family sued the employer under USERRA, claiming that the company had violated the Act by failing to provide him an eight hour rest period between his release from military exercises and his return to work and, further, that the threat to fire him if he did not return to work constituted an adverse employment action under the Act. The district court dismissed the claim and the Third Circuit agreed. That court ruled that "USERRA is not designed to protect employees from tortious acts of employers or to remedy work-related harms."

Rather, the statute provided protection of "a service member's employment rights." The eight hour period set forth in the Act was an outer limit for the employee to return to work, rather than a requirement that the employer must provide such an eight hour cushion for the employee before requiring him or her to return to work. *Gordon v. Wawa Inc.*, 3rd Cir. No. 03-3089 (10/28/04).

**COBRA**

**CHARGING FOR RETROACTIVE PREMIUMS UPHELD**

A former employee of Sun Microsystems was not given a COBRA notice on his termination of employment as required by COBRA. When he subsequently learned of his COBRA rights seven months later, he contacted the company, and the company claims administrator enrolled him in the health plan retroactively for the seven months and sent him an invoice for \$2,200 to cover the premiums. The employee paid the invoice under protest, claiming that he should not have had to pay for premiums when he did not have any benefits. The employee failed to pay for plan premiums that thereafter became due and his coverage was dropped. He filed suit against Sun and the administrator claiming a violation of COBRA. The district court ruled that Sun had violated COBRA by failing to give the plaintiff a timely notice of his COBRA rights and assessed a penalty of \$12.00 per day or \$2,292 for the violation. The court went on to hold, however, that Sun and the administrator had properly billed the former employee for the retroactive coverage, in effect putting him in the position he would have been in had the company complied with the notice requirements of COBRA. Coverage was properly dropped when the plaintiff failed to meet his payments. *Chaganti v. Sun Microsystems*, N.D. Cal. No. C-03-05785 CRB (11/23/04).

FRILOT, PARTRIDGE, KOHNKE  
& CLEMENTS, L.C.  
3600 ENERGY CENTRE  
1100 POYDRAS STREET  
NEW ORLEANS, LA 70163-3600

PRSRT STD  
U.S. POSTAGE  
**PAID**  
PERMIT No. 665  
NEW ORLEANS, LA

FRILOT, PARTRIDGE, KOHNKE & CLEMENTS, L.C.

ATTORNEYS AT LAW  
3600 ENERGY CENTRE  
1100 POYDRAS STREET  
NEW ORLEANS, LA 70163-3600  
TELEPHONE (504) 599-8000  
FACSIMILE (504) 599-8100