LABOR PERSPECTIVES

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PROPOSED FEDERAL LEGISLATION WOULD BOOST UNION MEMBERSHIP AND MORE

Forget about traditional secret ballot elections to decide union representation, having control over the terms to be negotiated in a collective bargaining agreement, and the non-punitive remedies available under the provisions of the National Labor Relations Act ("NLRA"). In turn, prepare yourself for the mandatory recognition of unions without an election, having less control over negotiations, paying higher penalties for violations of the NLRA, and on top of it all, confronting an increased number of eligible employees that can be unionized. In essence, this would be the impact that proposed federal legislation if enacted, could have upon the workplace.

Recently, the Employee Free Choice Act (EFCA) was before the consideration of the U.S. Congress. The bill passed the House by a clear majority, but died in the Senate. Nevertheless, further changes in the composition of the U.S. Congress and even a change in the White House tenant are expected in 2009. These changes make it highly likely that the EFCA will be reintroduced and passed in both Houses; and either democratic candidate for President would most likely sign it.

If enacted, the EFCA would result in drastic changes to both unionized and non-unionized workplace environments. First, it would do away with the traditional secret ballot election certification process. Currently, the process is conducted in conjunction with and under the supervision of the National Labor Relations Board ("NLRB"). Instead, EFCA would allow a union to merely show that a majority of employees (50% plus 1) signed authorization cards in support of union representation and that the employees of the appropriate unit are not currently represented by any other labor organization. If these two requirements are met, the NLRB would then certify the union as the exclusive bargaining representative of the petitioning employees. Simply put, the EFCA would replace the traditional employee secret ballot voting mechanism to decide whether they wish to have union representation, with mandated recognition after a simple process that merely requires the NLRB to verify employee signatures on authorization cards which the Union submits in seeking certification.

Also pursuant to the EFCA, when efforts to reach an initial collective bargaining agreement fail within a mere 90-day negotiation period, the employer would be forced to enter a compulsory 30-day mediation process. Thereafter, an obligatory arbitration process would eventually bind the parties by an arbitrator's award; the award would

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set the terms of a collective bargaining agreement for a period of up to two years. In other words, under the EFCA, an employer has a 120-day period from the time negotiations begin to reach an agreement; if it fails to do so, the employer could end up bound not by its own volition, but by an arbitrator's award; this award would set benefits such as wages, health care benefits and others, for a period of up to two years.

Finally, the EFCA seeks to modify current penalties for the commission of unfair labor practices during the card signing and initial process: it provides for the automatic doubling of back-pay awards and exposes employers to additional civil penalties of up to $20,000 per violation. An employer could even be subject to a mandatory injunction for such violations.

Also pending for consideration in the U.S. Senate was the Re-empowerment of Skilled and Professional Employees and Construction Tradeworkers Act ("The RESPECT Act"). Essentially, it seeks to amend the definition of the "Supervisor" position under the provisions of the NLRA; it would require that a supervisor spend the majority of his/her individual work time "assigning" tasks among other important factors. To that effect, the RESPECT Act definition makes it harder for an employee to fall squarely within the definition of a "Supervisor;" currently supervisors are not eligible to join a union. Thus, a traditional supervisor could end up being eligible to join a union. This would be the case if he/she does not spend at least 51% of his time directly assigning tasks and supervising them.

The proposed changes in the two bills would definitely make employers more vulnerable to, and bolster, union organizing. First, the new process would certainly make it easier for unions to obtain support in their organizational efforts; it would merely require an employee to sign a card. It would also allow union proponents to secure insincere support from employees who feel forced to sign cards for union representation; at the end, these employees will not have the mechanism to vote, through the secret ballot system, free from pressure. Moreover, allowing for a redefinition of a "Supervisor," would place literally thousands of employees in the path of being considered eligible to join a union. This would boost union membership to unprecedented levels.

On the other hand, the proposed changes heighten the importance of being alert to employees' first movements to form a union. It also highlights the value of educating employees on the employer's position on unionization and about the benefits and inconveniences of a union environment. Such awareness needs to be communicated to employees before or during the card signing process.

Furthermore, the threat of this proposed legislation makes it even more important to prepare and carefully plan strategies for the expeditious negotiation of any related collective bargaining agreement. This way, the employer would avoid having a third party force it into terms and conditions not of its own choosing.

In sum, employers should begin to consider their options to confront and deal with the dangers and pressures such legislation poses. To that effect, they should begin to reinforce their employee manuals with the inclusion of statements expressly stating their philosophy or preference to maintain a work environment free from third party interference and the reason thereof. They should commence to provide active, systematic training to its supervisors.

Their training should orient them on how to prevent employee organization through legal means, as well as on the recognized factors that make companies more susceptible to union organization. Additionally, employers should revise their non-solicitation/non-distribution policies in the workplace. They should ensure that these policies are in line with NLRB requirements. Finally, supervisors' duties as well as their job descriptions should be revisited in anticipation of the possibility that the RESPECT Act becomes law.

Of course, should you have additional questions regarding this matter or require our assistance in the handling of related issues, please contact any of the members of our Labor & Employment Law Practice Group. M&V

**Karem Rodríguez contributed to the preparation of this article.*

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PRACTICE GROUP NEWS

by: María Antongiorgi

The **Labor and Employment Law Practice Group** hosted its annual Labor and Employment Law Update Seminar on April 4, 2008. The all-day seminar was held at the new La Concha Hotel in San Juan and almost 100 clients and friends of the firm were in attendance. The seminar covered all significant labor and employment law developments during 2007 and the first trimester of 2008, in the areas of discrimination, labor relations, disability, immigration law, welfare benefits, approved legislation, pending legislation and recent jurisprudence. The speakers, who are all members of the practice group, were: **Sandra Negrón, Francisco (Frankie) Chévere, Alfredo Hopgood, Agustín Fortuño-Fas, Francisco Vargas, Jessica Figueroa, Luis Amadeo, Juan F. Santos, Radamés "Rudy" Torruella, María Antongiorgi** and **Miguel Rivera-Arce**. After the seminar, participants and members of the practice group gathered for a friendly cocktail at the hotel's lobby bar area.

On March 1, 2008, the San Juan Star newspaper published an article on **Francisco (Frankie) Chévere's** presentation at the Labor Forum sponsored by the Society for Human Resources Management (SHRM) on February 26, 2008. The article specifically addressed **Frankie's** remarks on the impact of the proposed Employee Free Choice Act and the RESPECT Act on union and non-union workplaces. (See cover article.)

María Antongiorgi was a speaker at an immigration seminar sponsored by the Puerto Rico Federal Bar on March 12, 2008. **María's** topic covered all aspects of business immigration and the employment visas available to corporations who want to employ foreign nationals.

Karem Rodríguez García joined the Labor and Employment Law Practice Group as an associate in February 2008. Before joining McConnell Valdés LLC, **Karem** worked for seven years in a firm specializing in Labor and Employment Law. She had been an intern at the San Juan Regional Office of the National Labor Relations Board during the Summer of 2000. **Karem's** primary practice areas include wage and hour, employment discrimination, sexual harassment and employment litigation. She has also actively worked in training human resources professionals and developing standards and procedures relating to the client's collection, retention and preservation of electronic records for litigation purposes. M&V

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1, 2... 4? COUNTING THE APPROPRIATE STEPS TO PROGRESSIVE DISCIPLINE

The key to successful rules of conduct and policies is for those rules and policies to be clear and put the employees on notice of which conduct is prohibited as well as the consequences of the violation of said rules and policies. Employers must do so while avoiding self-restricting rules and without making progressive discipline an entitlement

One, two, four... Tell me where did three go? Well, depending on the particular case, there may be no need for it, or you may just have to keep counting. The steps (and sometimes missteps) to following progressive discipline in the workplace are a challenging aspect of the disciplinary process.

An effective progressive discipline scheme, pursuant to the employer's policies and procedures, is of particular importance in Puerto Rico given that the employment-at-will concept is inapplicable in our jurisdiction. In Puerto Rico, employers must have "just cause" to dismiss an employee as defined by the provisions and interpretative case law of Act No. 80 of May 30, 1976, as amended, or otherwise face significant severance pay liability. To prove "just cause," the employer, as a general rule, has the burden of proving a pattern of improper conduct, performance problems or reiterated violations of company rules, among others. Thus, being properly trained and familiar with administering a uniform and consistent progressive discipline standard not only becomes a good employment practice, but also a business necessity, in order to be able to prove a pattern or reiteration of conduct or performance problems.

The administration of effective progressive discipline standards is a multi-layer proposition. It is essential to have clear rules of conduct which have been distributed to all employees to whom those rules apply. Also, since employees normally must comply with a number of policies, procedures and other job responsibilities and obligations, these must also be distributed or otherwise made available to employees. Furthermore, employers must maintain a record of the distribution of the same, and of training and/or discussion sessions they have had with their employees in relation thereto.

The key to successful rules of conduct and policies is for those rules and policies to be clear and put the employees on notice of which conduct is prohibited as well as the consequences of the violation of said rules and policies. Employers must do so while avoiding self-restricting rules and without making progressive discipline an entitlement.

In light of this, the dichotomy of being clear and precise while being flexible is not easily achieved. Thus, employers must perform a balancing act between developing a clear set of rules and policies, while maintaining the flexibility to administer disciplinary actions on a case-by-case basis following the general rule of progressive discipline.

One thing is clear, employers cannot possibly foresee every instance where an employee may commit a violation of their rules and standards. Therefore, in plain terms having "room to move" is essential.

Employers must make efforts to not only have an employee handbook with a set of rules of conduct and to distribute

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the same along with any other policy and procedure for which employees may be disciplined for, but to keep those handbooks and policies updated as the laws, regulations and company practices evolve. Moreover, when such changes are made it is imperative that any amended rule, policy or procedure be redistributed to all employees who may be affected by the change, and documentary evidence of such distribution must be kept.

Act 80 does not require a specific scheme of progressive discipline in all cases as exceptions in grave cases may be made, including a discharge for a first offense that is very serious.

When determining the type of disciplinary measure that is warranted in a particular circumstance, there are several factors which employers should consider: the severity of the offense; the employee's employment record; the employee's period of employment; the employer's past practices in relation to the violation committed by the employee; and the nature of the violation. Also, depending on the circumstances of each case, for example, an employee who has made a discrimination complaint, an investigation may be necessary in order to determine whether or not an act of discrimination has occurred. Once the investigation has been completed, the company will be in a better position to determine which disciplinary action is appropriate. Internal investigations, such as one in connection with an employee's claim, are a helpful tool to assess and subsequently correct a deficient workplace practice. The benefits of self-evaluation in this instance cannot be underestimated.

On the other hand, it is fundamental to point out that at the heart of the disciplinary process is the belief that the employee can improve his or her performance or conduct. Progressive discipline gives the employee an opportunity to improve the behavior, performance or conduct which is unacceptable in light of the employer's reasonable expectations for that employee and his or her job duties and responsibilities. Therefore, a clear objective of the disciplinary process is to maximize employee performance and compliance with rules and policies. This is undoubtedly the most beneficial aspect for employers and in the long run for employees too. When employees are performing at optimum levels they also become motivated to continue working and achieving success, not only for themselves but for the business which they are a part of.

The effective administration of disciplinary action also deters other employees from engaging in prohibited conduct. When disciplinary standards are applied consistently, employees perceive that whenever unacceptable conduct is done, negative consequences will follow. Uniformity and consistency become essential to avoid any claim or appearance of discriminatory practices, thus, diminishing the risk of potential legal claims.

When you begin your countdown to proper discipline, keep in mind that counting is not as simple as you thought. For more information regarding the development of adequate and effective disciplinary standards, you may contact any of the members of our Labor and Employment Law Practice Group to assist you. McV

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UNITED STATES SUPREME COURT OPENS DOOR FOR CERTAIN INDIVIDUAL CLAIMS AGAINST RETIREMENT PLAN ADMINISTRATORS

For the first time, in LaRue v. DeWolff, Boberg and Associates, et al., No. 06-856, 552 U.S. ___ (2008), the United States Supreme Court held that an individual participant in an employee retirement savings plan may sue on behalf of the plan against its administrator for breach of his/her fiduciary duties. James LaRue ("LaRue") was a former employee of DeWolff, Boberg & Associates ("DeWolff") and a participant in DeWolff's 401K retirement savings plan. The plan was regulated under the Employee Retirement Income Security Act ("ERISA") and administered by DeWolff. La Rue allegedly directed DeWolff to make investment changes in his individual account within the 401K plan. However, DeWolff did not execute LaRue's investment instructions. Consequently, he suffered around $150,000 in lost assets in his individual account. LaRue filed suit in federal court against DeWolff and the plan to be "made whole."

Both at the lower court and on appeal before the corresponding federal circuit court, DeWolff prevailed against LaRue under the theory that LaRue did not have an actionable claim under ERISA as an individual claimant. The Circuit Court based its decision on the Supreme Court's holding in Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985). In Russell, the Supreme Court held that generally, the sections of ERISA pertinent to remedies provide remedies for losses suffered by plans as a whole, not by individual participants.

Notwithstanding its prior holding in Russell, the Supreme Court reversed the Circuit Court. It based its decision on Section 502(a)(1)(B) of ERISA. This section allows for the Secretary of Labor of the U.S., plan participants, beneficiaries, and/or fiduciaries, to file a claim on behalf of a plan. The claim may be brought against its administrator to recover the losses to the plan because of the administrator's breach of fiduciary duties. In De Wolff, Supreme Court deemed that LaRue's claim fell within the scope of the claims on behalf of a plan that are allowable under Section 502(a)(1)(B). Specifically, it ruled that LaRue's claim was one for losses to a plan caused because of the administrator's breach of his duties. As such, it held that LaRue's had an actionable claim on behalf of the plan. This was so even when the loss pertained to LaRue's individual account.

In reaching that conclusion, the Supreme Court relied on the fact that in DeWolff, the plan in question was "a defined contribution plan." Nowadays, this is the prevalent type of plan. Under it, a participant has an individual account within the plan as a whole. To the contrary, in Russell the disability plan was "defined benefit plan". Moreover, in the "defined contribution plan," the participant is able to control and make investment decisions regarding his/her individual account; thus, the plan administrator is required to handle diligently the participant's decision as a part of his/her fiduciary duties. If a plan administrator's breach of his/her duties causes a loss to an individual's account, that loss affects the plan assets as a whole as well.

The Supreme Court also highlighted the difference in the nature of LaRue's claim as compared with the claim in Russell. LaRue's claim was for the loss of $150,000 in assets in his individual account. In Russell, the plan participant did not seek recovery of losses. On the contrary, she sought to recover individual damages, arising from a delay in processing her claim; she had received all the plan benefits to which she was entitled. Under ERISA, an individual does not have an actionable claim for individual damages from the alleged delay in processing a benefits claim under an employee benefits plan.

In sum, under LaRue v. DeWolff, Boberg and Associates, et al., a plan administrator is liable for losses to a participant's individual account because of a breach of his/her fiduciary duties. The plan must be a "defined contribution plan" such as a 401K retirement savings plan. Specifically, the aggrieved participant may file a claim on behalf of the plan against the plan administrator for breach of fiduciary duties under Section 502(a)(1)(B) of ERISA. The claim would seek that the loss to the individual participant's account, and as such to the plan as a whole, be rectified. Consequently, we can expect to see an increase in claims under ERISA.

If faced with such a claim, you may contact any of the members of our Labor and Employment Law Practice Group to assist you. McV

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CLARIFICATION ON THE POTENTIAL LIABILITY AN EMPLOYER FACES IF HIT WITH AN AGE DISCRIMINATION LAWSUIT BROUGHT UNDER ACT 100

In the recent case of <u>Mestres Dosal v. Dosal Escandón</u>, 2008 T.S.P.R. 20, the Puerto Rico Supreme Court embarked in an analysis of the legal reliefs that are available to an employee who is unlawfully discharged because of his advanced age under Puerto Rico Act No. 100 of June 30, 1959 ("Act 100"). Specifically, the P.R. Supreme Court's focus in this particular case was to determine to what extent an employee, who was unlawfully discharged after reaching 65 years of age, is entitled to front pay. Front pay is the amount in salaries an employee would have earned, up until his/her expected date of retirement, if the employee had not been discharged.

The facts of the case are the following. José Miguel Mestres Dosal ("Mestres") worked as a regular employee for his family's business, a clinical laboratory, since 1995. When Mestres turned 65 years old, his brother, who was the administrator of the laboratory, asked him to retire and to apply for Social Security benefits. Mestres refused to retire voluntarily. After refusing to do so, he was fired. Subsequently, Mestres filed a lawsuit alleging that his former employer unlawfully discharged him and discriminated against him due to his age.

Act 100 prohibits employers from dismissing, suspending or in any other way discriminating against an employee based on the employee's age, among other protected categories. It is important to note that Act 100 does not establish an age limit in order for an employee to be entitled to relief for age discrimination under said legislation.

The relief available under Act 100 is very ample; they can include reinstatement, back pay, front pay, and other non-economic damages, such as emotional damages. The P.R. Supreme Court has consistently stressed that the preferred relief for cases of discriminatory discharge is reinstatement. When reinstatement is possible, the plaintiff will only be entitled to back pay, from the date of termination up until the date of the judgment, in order to compensate for economic damages. However, when reinstatement is not possible or reasonable within the particular circumstances of the case, then a plaintiff might also be entitled to front pay.

In this case, the Court began its analysis by establishing unequivocally that both of these economic remedies are available, regardless of the former employee's age. Nevertheless, front pay will only be available when reinstatement is not possible. The Court established a three-step analysis in order to determine the amount of front pay, if any, to which an unlawfully discharged employee is entitled under Act 100. First, the trial court must determine if the former employee has any probabilities of obtaining another job with similar benefits. If the employee does, then no front pay relief should be granted. Second, if there is very little or no probability of obtaining a new job with similar benefits, then the trial court must look into whether the former employer had a mandatory retirement age for employees. When such a mandatory retirement age existed, the former employee only had a reasonable expectation of earning salaries up to that date. Finally, if the employer did not have a mandatory retirement age, then the trial court must determine the expected age until which the former employee is estimated to be "qualified" to perform his/her former job, had he/she not been discharged.

With regards to this last step of the analysis, the Supreme Court emphasized that Act 100 does not establish a specific age limit until which an employee is considered "qualified." As such, a person's age should generally not be a factor when considering whether a person is qualified for a specific job. Moreover, the Supreme Court specifically rejected using the retirement age established by the Social Security Administration -that is, 65 years of age- as a limit or benchmark for determining until when an employee is expected to be qualified for continued employment, for purposes of quantifying front pay.

Nonetheless, the Supreme Court did not specifically define how to determine the age until which a person is generally qualified to perform his/her job, which will, in turn, be used as the expected retirement date and limit to front pay relief. The analysis must be made on a case-by-case basis, and should take into consideration factors such as: the plaintiff's health; the plaintiff's work habits; and the nature of the work performed before the discharge, among others. This analysis, the Supreme Court concedes, is highly speculative.

This holding by the Supreme Court significantly increases the liability exposure an employer might face if hit with a lawsuit for discriminatory discharge. Employers might be liable, not only for back pay and other non-economic damages, but also for many years of front pay, depending on the age of the former employee, the trial court's determination concerning the former employee's probability of obtaining another job with similar benefits, and the former employee's estimated date when he/she would be considered unqualified for the job, if the employee had remained in the same. Employers should take this into consideration when contemplating the discharge of an employee protected by Act 100.

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