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WEST VIRGINIA CHAMBER

West Virginia Chamber of Commerce Manufacturers Issues Forum

November 16, 2009

Contemporary Labor And Employment Issues Facing West Virginia Manufacturers

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I. TRADITIONAL LABOR LAW ISSUES

A. Even Non-Union Employers Are No Longer Safe From The National Labor Relations Board

Recent decisions from the National Labor Relations Board (“NLRB”) prove that all employers fall under the authority of the National Labor Relations Act (“NLRA”). No longer can non-union employers dismiss the NLRA as applying only to employers who employ union workers. Section 7 of the NLRA grants employees the right to act as a group, or “concertedly,” in regard to wages, hours, and other terms and conditions of employment. Specifically, the law provides that non-supervisory employees have the right to:

... self-organization, to form, join, or assist any labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Federal courts, as well as the NLRB, have interpreted the “mutual aid or protection” clause in Section 7 to apply union and non-union employees alike. In 1962, the Supreme Court held that employees without a union may take concerted and collective action to air grievances relating to the terms and conditions of their employment. NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962). The conduct need only be concerted (action together or seeking to prepare for or initiate group action) for the mutual aid and protection of the employees to fall under Section 7. Thus, the union/non-union distinction is largely irrelevant.

Section 8(a)(1) is the teeth behind Section 7 of the NLRA. Section 8(a)(1) provides that an employer (union or non-union) commits an unfair labor practice when it takes any action to “interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7.” Accordingly, an employer violates the Act when it takes any adverse action against an employee who engages in collected concerted activity. Moreover, Section 8(a)(1) applies even when an employer acts without malicious intent.

Given this information, an employer’s understanding of the modern application of the NLRA is paramount – even in non-union settings.

1. What is “Concerted” Activity?

The leading case in determining whether activity is concerted is Meyers Industries, 268 NLRB 493 (1984) (Meyers I), reaff’d., 281 NLRB 882 (1986) (Meyers II).

a. The “With Other Employees” Requirement

There must be evidence that the employee, “at any relevant time or in any manner joined forces with any other employee, or by his activities intended to enlist the support of other employees in a common endeavor.” Meyers II at 886. “Individual employee concern, even if

openly manifested by several employees on an *individual* basis, is not sufficient evidence to prove concert of action.” Meyers I at 498.

b. Concerted Action by Two or More Employees

The clearest “concerted” activity occurs when two or more employees literally act together to improve their working conditions. In Five Star, an employer refused to hire formerly unionized employees because they had previously written letters complaining about the employer’s track record. The Board held that letter-writing campaigns by two or more employees were, in fact, protected concerted activity, and the employer’s refusal to hire the drivers based solely on their letter-writing was wrong. Five-Star Transportation, Inc., 349 NLRB No. 8 (2007).

In North Carolina Prisoner, an employee complained about her denial of maternity benefits. When the employee circulated a petition for support, the employer made various threats against those who signed, and eventually, constructively terminated the complaining employee and withheld raises from all employees as punishment for their support. The Board held that such petitions were concerted actions, protected by the NLRA, and the employer’s actions were unlawful. North Carolina Prisoner Legal Services, Inc., 351 NLRB No. 30 (2007).

In Owner’s Maintenance Corp., two employees were fired for falsely answering a question on their employment applications. The employer then tried to prevent the ex-employees from garnering support from other employees. The Board held that when two or more discharged employees leaflet for support from former co-workers, such action is protected under the NLRA. Owners Maintenance Corp., 232 NLRB 100, 103 (1977).

Action by two employees is not always concerted. Simultaneous employee protests are not “concerted” if there is no evidence of prior communication between the employees. In Pamco, two employees refused a management order, but neither could produce evidence that they had relied on each other when refusing the order. Therefore, the actions of the two employees were not deemed “concerted.” Traylor-Pamco, 154 NLRB 380 (1965). In Continental, the Board held that an employee acting alone, even if his actions refer to other employees, is insufficient. Continental Mfg. Corp., 155 NLRB 255 (1965). However, later decisions have found such activity concerted, so long as the activity might benefit all employees. See Prill v. N.L.R.B., 755 F.2d 941 (D.C. Cir.1985).

c. Concerted Action by One Employee

Actions by only one employee can sometimes be concerted. An employee speaking on behalf of other employees is often considered concerted. In Bryant, the Board held that the action was concerted because one employee complained that “we” are unhappy. Bryant & Cooper Steakhouse, 304 NLRB 750 (1991). However, it is important to note that the “authority” need not be explicitly given by other employees. See Midland Hilton & Towers, 324 NLRB 1141 (1997).

Action “solely by and on behalf of the employee himself” is not protected. There must be some evidence that the employee was initiating, inducing, or preparing for group action. In Adelphia, after being placed on probation, an employee asked her co-worker if they too had ever been disciplined. The employer then terminated the employee for her inquiry. The Board held that the inquiry was not “concerted” because it was a purely personal individual action. Adelphia Institute, Inc., 287 NLRB 1073 (1988).

i. Examples Where Individuals Sought to Induce, Initiate, or Prepare for Group Action Include:

In Empire Gas, the Board found that letters to co-workers seeking to rally support for a common cause is concerted activity. Empire Gas, Inc., 224 NLRB 628 (1976). In that case, an employer unilaterally cut an employee bonus program. An employee, upset about the cut, wrote a letter to co-workers, asking them to join with him to protest the employer’s action. When the employer later terminated him for suspect reasons, the Board found that the firing was actually in response to the employee’s letter-writing. The Board went on to opine that letter-writing in an attempt to enlist the support of fellow employees for all of their “mutual aid and protection,” was, in fact, protected concerted activity. Accordingly, the termination was illegal. Id.

In United States Automobile, the Board found that the distribution of flyers asking co-workers to take some action for purposes of protest is concerted – United Service Automobile Association, 340 NLRB 784 (2003). There, an employee was terminated, following her distribution of flyers that sought support for former co-workers who had been laid off. The Board held that the employee engaged in concerted activity, when she attempted to be the spokeswoman for the former employees. Id.

In Phillips Petroleum, an employee was terminated, following his discussions with fellow employees regarding his frustration with the company’s sick leave policies. The Board found the termination illegal because the employee’s actions were concerted, in that he sought to obtain benefits for all of his fellow employees. Phillips Petroleum Co., 339 NLRB 916 (2003).

d. Other Noteworthy Topics

Generally, employee action that is a “logical outgrowth” or a continuation of earlier concerted activity is protected. For example, termination of employees who acted individually to protest extra work hours was held unlawful, when there was an earlier concerted protest. Mike Yurosek & Son, Inc., 310 NLRB 831 (1993). Despite employee testimony that they were not “protesting” anything, the Board held that how an employee categorizes his own action is not necessarily dispositive. Viewed objectively, the employees acted as a group when they refused to work the extra hours and, accordingly, their actions were concerted and protected. Id. at 832.

An individual employee’s call to the Labor Department, questioning the validity of an employer’s holiday pay practices was held to be protected, when the call stemmed from earlier discussions between a group of employees and a manager. Every Woman’s Place, 282 NLRB 413 (1986).

An employer's belief that its employees are engaging in concerted activity brings them under the protection of the NLRA. This is true, even if the employee action is not really concerted. In CGLM, an employer terminated a group of employees for what it thought was a strike over perceived racial injustice in the workplace. Even though the strike never came to fruition, and thus no real concerted activity, the Board still held the terminations unlawful because the employer *believed* there was a strike. CGLM, Inc., 350 NLRB No. 77 (2007).

There is no requirement that employees accept another employee's invitations or inducements for said invitations to be protected concerted activity. El Gran Combo, 284 NLRB 1115 (1984). There, two employees repeatedly tried to gain support for a raise in wages. The Court noted that even though there was only a speaker and a listener, the two workers were "attempting to induct group action" and thus, the activity was concerted. Id.

Employees might have different reasons for engaging in a concerted activity. Even when they do, the activity is still protected. For example, in Hahner, two employees complained about two different things – the loss of health care vs. lack of monetary compensation for the loss. According to the Board, both employees were both protesting the loss of benefits generally and therefore, their actions were concerted and protected. Hahner, Foreman, & Harness, Inc., 343 NLRB 1423, 1423 (2004).

2. Recent Examples of The NLRA's Application to Non-Union Employers

a. Think Before You Terminate, Choose Your Words Wisely

In North Carolina License Plate Agency, employees in a meeting complained about wages and favoritism. Additionally, the employees threatened to report the employer to its biggest customer. The employer subsequently fired the employees for being "disloyal." The NLRB found the firings illegal and held that the employees had acted concertedly by coming together to complain about the terms and conditions of their employment. The labeling of the employees as "disloyal" only strengthened the employees' position. The NLRB is generally suspicious of such terms. Other terms to watch out for include labeling an employee as a "troublemaker" or as not being a "team player." North Carolina License Plate Agency, 346 NLRB No. 34 (2006).

b. Be Careful With Your Employee Confidentiality Agreements

Many non-union employers are unaware that they cannot prevent employees from discussing matters such as compensation. Indeed, many employers have such illegal rules written down in employee handbooks. In Asheville School, the employer's handbook contained the following clause: "Your compensation is a matter of strict confidence and concern only to you and to me." Even though there was no evidence that the rule had ever been enforced, the NLRB noted that the mere maintenance of such a rule violates § 8(a)(1) of the NLRA. Asheville School, 347 NLRB No. 84 (2006).

In Cintas Corp, the U.S. Court of Appeals for the D.C. Circuit held that the uniform company violated the NLRA when it maintained a policy that stated: "We honor confidentiality.

We recognize and protect the confidentiality of any information concerning the company, its business plans, employees, new business efforts, customers, accounting and financial matters.” It further warned employees that they could be disciplined for violating the policy. Cintas argued that these provisions did not prohibit employees from discussing employment provisions amongst themselves or with any prospective unions. The Court rejected this argument that, regardless of the language’s intent, it could be reasonably construed as prohibiting protected activity. Moreover, the court once again noted that the mere maintenance of such a rule was illegal. Cintas Corp. v. N.L.R.B., 482 F.3d 463 (D.C. Cir. 2007).

c. Sexual Harassment Complaints and How They Can Become
“Concerted Activity”

Non-union employers must also be careful when dealing with sexual harassment cases. Recently, some of these cases have become concerted activity cases under the NLRA. In Ellison Media Co., the NLRB found that Ellison Media violated § 8(a)(1) when it told employees to “stop gossiping” about a supervisor’s alleged sexually inappropriate comments. The fact that the supervisor’s comments were not ultimately deemed to rise to the level of sexual harassment was irrelevant. The NLRB held that since the employees’ “gossiping” was actually meant to encourage others to confront the supervisor and report his actions, the company had illegally discouraged concerted action when it stated “this needs to stop now.” Ellison Media Co., 2005 NLRB No. 136 (2005).

d. You Can Restrict Employee Use of Email

The NLRB has recently held that employers may restrict employee use of email, including the right to restrict email use for union-organization efforts. In Gould Publishing, the NLRB held that an Oregon newspaper’s policy, prohibiting the use of company email did not violate the NLRA. The policy in question prohibited employees from using company email “to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.” The paper disciplined a worker, who happened to be union president, for sending union-related emails, even though the messages were sent during break, or from places other than the company’s premises. The NLRB held that like bulletin boards or phones, companies possess a basic property right over their email systems and can restrict their use. However, the NLRB also noted that workers still have the right to orally solicit others during non-working time. Moreover, a company’s restrictive email policy may not be intentionally designed to deny rights granted under section 7. The Guard Publishing Company, 351 NLRB No. 70 (2007).

e. No Right to Representation During Investigations in a Non-Union Environment

As of 2004, non-union employees no longer have any “Weingarten” rights. Still, employers might want to consider granting representation requests by non-union members to improve efficiency and to avoid future litigation. In IBM, the NLRB reversed itself and once again restricted representation rights during investigations to union members only. Referring to an earlier Supreme Court decision, which granted such rights to *all* employees, both union and non-union, the Board stated: “While there is nothing in Weingarten that inexorably precludes us from extending the right, we are confident that in carrying out our responsibility here – defined by the Court as achieving a “fair and reasoned” balance between the conflicting interests of labor and management – we best effectuate the purposes of the Act *by limiting the right of representation in investigatory interviews to employees in unionized workplaces who request the presence of a union representative.*” (Emphasis added). IBM Corp., 341 NLRB 148 (2004).

f. Be Careful With Those Employee Handbooks

In 1999, the NLRB exercised its authority over a non-union employer, due to “illegal” restrictions in an employee handbook. In Flamingo Hilton, the NLRB struck down a laundry list of provisions contained in a non-union employer’s handbook.

Among the prohibited policies were the following. First, the hotel’s dress code stated that “management may discipline any employee for failure to comply with the dress code.” The NLRB struck down the rule because it could potentially prevent employees from wearing union buttons.

Second, the NLRB struck down a rule that prohibited employees from “making false, vicious, profane, or malicious statements regarding another employee, guest, patron, or the hotel itself.” According to the NLRB, the rule was overbroad. They further reasoned that such a rule that fails to define clear areas of permissible conduct might deter some employees from engaging in protected activities.

Third, the handbook also included a provision that prohibited employees from “using loud, abusive or foul language” and from engaging in “disorderly conduct” which included “fighting, horseplay, threatening, insulting, abusing, intimidating, coercing, or interfering with any guests, patrons, or employees.” According to the NLRB, this rule was unlawfully vague because it failed to define abusive or insulting language and conduct. Moreover, the rule could possibly be construed as prohibiting confrontational, yet lawful, union organization efforts.

Fourth, the NLRB struck down a provision in the handbook that prohibited employees from patronizing the facility eight hours immediately before a shift. The NLRB held that such a rule could unlawfully interfere with union organization efforts because it did not limit its application to the interior of the employer’s property. Flamingo Hilton-Laughlin, 330 NLRB No. 34 (1999).

B. The Employee Free Choice Act (EFCA)

One of the most troubling and aggressive potential changes facing employers involves the manner in which unions are able to infiltrate and organize non-union workplaces. The EFCA would amend the National Labor Relations Act by establishing “an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes.” H.R. 800, 110th Cong. (2007).

1. The Hype

The EFCA drastically alters the method by which employees decide whether to join a union. Traditionally, under the National Labor Relations Act of 1935, employees can choose whether to join a union by acting under a federally supervised secret ballot election. The EFCA would replace the secret ballot election with a system called “card check” which allows a union to organize if a majority of employees simply sign an authorization card. Under the EFCA, the employees’ signatures are made public to the employer, the union organizers and co-workers.

In short, the EFCA would dramatically overturn the current labor law system by eliminating over 70 years of precedent established under the National Labor Relations Act (NLRA) of 1935. The NLRA grants workers the right to join or form a labor union and to collectively bargain over wages, hours and working conditions. It requires unions to secure the support of a majority of employees through a free and fair election. Under the NLRA, elections are administered by the National Labor Relations Board by private ballots.

2. The Big Deal

Further, the EFCA provides that if an employer and a union are unable to agree on their first collective bargaining agreement within 90 days, either party may refer the dispute to the Federal Mediation and Conciliation Service (FMCS) for mandatory mediation. If mediation fails, then the dispute proceeds to arbitration. Importantly, the arbitrator would determine the binding wages and terms between the parties for a period of two years. The arbitrator’s decision is final and binding on the parties.

Pursuant to the EFCA, additional remedies are available for employer violations, such as discharging or threatening to discharge an employee in order to interfere with or coerce employees in the exercise of guaranteed self-organization or collective bargaining rights. The EFCA provides remedies for such violations in the form of back pay plus liquidated damages and additional civil penalties.

Even though the NLRA is frequently a source of increased costs and aggravation to employees, the EFCA contains even greater concerns. Overall, critics of the EFCA argue that the check card elections will lead to illegal coercion on the part of union organizers. In addition, opponents assert that the new system will actually be contrary to employee privacy.

Former Presidential candidate Senator John McCain opposed the EFCA. In fact, he supported an opposition bill known as “The Secret Ballot Protection Act’ (S. 1312) which

eliminates the use of the optional card check procedure. Specifically, Senator McCain stated “I am strongly opposed to H.R. 800, the so-called Employee Free Choice Act of 2007. Not only is the bill’s title deceptive, the enactment of such an ill-conceived legislative measure would be a gross deception to the hard-working Americans who would fall victim to it.” Employee Free Choice Act of 2007, Motion to Proceed, *Congressional Record*, GPO (2007-06-26).

In comparison, when he was a U.S. Senator, President Barack Obama was an original sponsor of the EFCA and urged his colleagues to pass the bill during a 2007 motion by stating, “I support this bill because in order to restore a sense of shared prosperity and security, we need to help working Americans exercise their right to organize under a fair and free process and bargain for their fair share of the wealth our country creates. The current process for organizing a workplace denies too many workers the ability to do so. The EFCA offers to make binding an alternative process under which a majority of employees can sign up to join a union. Currently, employers can choose to accept – but are not bound by law to accept – the signed decision of a majority of workers. That choice should be left up to the workers and workers alone.” Employee Free Choice Act of 2007, Motion to Proceed, *Congressional Record*, GPO (2007-06-26). Proponents, like President Obama, argue that the EFCA is necessary to protect workers’ rights to join unions.

II. EMPLOYEE HEALTH CARE AND LEAVE ISSUES

A. Healthy Families Act (HFA)

The HFA was introduced to the United States House of Representative by Representative Rosa L. DeLauro, (D) Connecticut, on May 18, 2009. The HFA is in its first step of the legislative process and is being reviewed in the House Education and Labor Committee, Subcommittee on Workforce Protection.

1. What is it And Does it Affect Me?

H.R. 2460: The HFA, currently being considered by Congress, deals specifically with employers’ paid sick leave policies. If passed, the HFA would affect all employers with more than 15 employees. Exempt from the HFA would be employers with existing paid sick leave policies that offer the same paid sick leave policies as the HFA. Employers would be allowed to modify their current sick leave policies to become compliant with the HFA.

2. How Much Paid Sick Leave Will I Have to Give My Employees?

Under the proposed HFA, employers would have to provide all employees, including some part-time employees, with up to seven paid sick days of leave per year. Paid sick leave for employees would begin to accrue on the employee’s first day of work. The employee’s paid sick leave would accrue at a rate of one hour for every 30 hours worked. However, employers would not be required to permit an employee to earn more than 56 hours of paid sick leave during a calendar year. The employee’s paid sick leave could be used for their own illnesses, to care for parents or children, or to visit a healthcare provider for treatment.

3. How Do I Become Compliant?

If the HFA is passed, as an employer you will be required to post notices around your workplace concerning the HFA. Also, you will be required to maintain records showing that you are in compliance with the HFA. Beginning to plan and prepare for the HFA today will ensure that you are in compliance with the HFA, if, and when, it is passed by Congress.

B. Containing Business Health Care Costs

In the middle of an economic downturn, the cost of health for businesses across the nation has continued to skyrocket. U.S. employers are expected to see a 9 % jump in their health-care costs in 2010. Employers, who have already had to find ways to be more efficient in the day-to-day running of their businesses, should also consider strategies to effectively manage increasing premiums and create potential cost savings. A recent article in the Wall Street Journal by Diane Ransom entitled *Seven Ways to Contain Business Health-Care Costs* outlined several strategies that employers can use to “soften the blow of a health-care price hike,” including the following:

1. Get Group Coverage

Combining your bargaining power with that of other groups and companies can increase the negotiating power of a business that is looking to cut down on costs. Groups have more of an advantage than single payers and can negotiate for more costs savings. Some states allow sole proprietorships to form “group of one” plans that allow for group rates and guaranteed access to health insurance, regardless of the pre-existing conditions. Some states require at least two people to create a group. Although groups can bring benefits, they may not always bring cost reductions. For example, some states require that group plans provide certain benefits that cost more, but that an employer’s participants may not need.

2. Bundle Services Under One Provider

Companies can find insurance discounts when they decide to buy more than one type of insurance policy from a provider. If a company provides its employees with health insurance, dental insurance, disability insurance, life insurance, ect, it may want to consider checking as to whether the provider would give a discounts for being able to provide each of these to the company. Although shopping around for the lowest price will often be beneficial, bundling could make sense if the provider is willing to acknowledge the benefit of your business.

3. Offer Consumer-Directed Option

Health savings accounts or HSA-qualified plans, in which employees use pre-tax dollars to pay for medical expenses such as co-pays and medications, are innovative ways to control costs and give employees more control over their health care. Employers can reduce premiums by shifting to these plans, which normally involve high deductibles and require more out-of-pocket expenses for employees. Also, employees have control over the amount in their HSA accounts based on the amount that they spend, which should influence their decision-making.

4. Wellness Plans

If a business chooses to switch to HSA plans and the high-deductibles that come along with them, it is important that there is a focus on employee wellness. Wellness programs encourage employees to have healthy behaviors, and include screenings and preventive care. If employees are healthier, in the end, the premiums will be lower. Also, such programs may not only influence costs, but could help make a business's workplace more efficient as a result of having healthier workers.

5. Pare Down Your Plan

Many businesses are choosing to have employees pay more of the costs associated with health care. Some limited plans pay more of the up-front costs associated with preventive medicine. This encourages employees to seek care early to prevent more costly treatments later. However, many of these plans only provide limited coverage. Also, limiting health-care can have an effect on the quality of employees that a business is able to recruit and the overall health and efficiency of a workforce.

III. WORKPLACE SAFETY UPDATE: OSHA ADMINISTRATIVE AND LITIGATION PROCEDURES

There are various administrative and legal procedures that follow an OSHA citation. They are discussed in the general order in which they would be applicable in practice.

A. Informal Conference

After receiving a citation and before a notice of contest is filed, an employer may request an informal conference with the Area Director to discuss and attempt to resolve the citation and penalty. An informal conference may be used to accomplish the following:

1. Obtain answers to any questions the employer has regarding the violations charged, the penalties imposed, and the abatement dates established;
2. Obtain a better understanding of the applicable safety and health standards;
3. Discuss the options available to correct the violations;
4. Discuss problems regarding employee safety practices;
5. Resolve disputed violations and penalties;

6. Discuss problems with the abatement dates;
7. Negotiate and enter into informal settlement agreements.

Generally, the informal conference must be requested and held prior to the filing of a Notice of Contest. Once a Notice of Contest is filed, the opportunity for an informal settlement of the citation is somewhat limited.

B. Notice of Contest

If the informal conference fails to resolve the disputed issues, and if the employer wishes to contest the citation, the employer must notify the Secretary of the Department of Labor within 15 working days of its receipt of the citation. 29 U.S.C. § 659(a). The contesting employer must identify each item of the citation, penalty, and abatement issue that is being contested and include language that clearly identifies each of the contested issues. A timely notice of contest suspends the employer's obligation to abate the contested violations and pay the resulting penalties until the violations have been resolved. 29 U.S.C. § 659(b).

The Secretary of Labor is required to file a complaint with the Occupational Safety and Health Review Commission no later than 20 days after receipt of the notice of contest, which will initiate the litigation stage of the proceedings. Failure to file a timely Notice of Contest will cause the citation to become a final enforceable order.

C. Defenses to Citations

An employer must file an answer to the complaint within 20 days of being served. The Commissioner's pleadings rules require that affirmative defenses be raised in the answer to the complaint. 29 C.F.R. § 2200.34(b)(3). A failure to do so will result in the defenses being waived unless the Administrative Law Judge finds that the employer has asserted the defense as soon as practicable. 29 C.F.R. § 2200.34(b)(4).

1. Greater Hazard Defense: To establish the greater hazard defense, the employer must prove that:
 - a. The hazards caused by complying with the standard are greater than those encountered by no complying;
 - b. Alternative means of protecting employees were either used or were not available; and
 - c. Application for a variance under the Act would be inappropriate.
2. Infeasibility Defense: To establish the infeasibility defense, the employer must show that:

- a. Literal compliance with the requirements of the standard was infeasible under the circumstances, in that:
 - i. Its implementation would have been technologically or economically infeasible, or
 - ii. Necessary work operations would have been technologically or economically infeasible after its implementation; and
 - iii. Either an alternative method of protection was used or no alternative method of protection was feasible.
3. Employee Misconduct Defense: To establish the employee misconduct defense, the employer must demonstrate that:
 - a. It had established work rules to prevent the violation;
 - b. The rules were adequately communicated to employees;
 - c. It took steps to discover violations; and
 - d. It effectively enforced rules when infractions were discovered.

D. Settlement Issues

The Commission permits and encourages settlement at any stage of the proceedings. 29 C.F.R. § 2200.100(a). A settlement agreement must include language specifying the terms of settlement for each contested item and whether any issues remain to be decided. 29 C.F.R. § 2200.100(b).

The Area Director is authorized to enter into an informal settlement agreement with an employer before the employer files a written Notice of Contest, and this usually is done at the informal conference mentioned above. The Area Director also is permitted to pursue a formal settlement agreement after a written notice of contest has been filed if the Regional Solicitor concurs. OSHA Field Operations Manual, Sixth Edition, V-12.

IV. TAMING THE PAPER TIGER: EMPLOYEE RECORDKEEPING

A. General Recordkeeping Requirements.

An employer must maintain appropriate personnel records to ensure proper functioning of its payroll, benefits, and employee management systems. Employment recordkeeping is controlled in different ways by numerous federal and state laws. Some of those laws require employers to retain records for specific periods of time, other laws prohibit employers from gathering certain types of information. In addition, some personnel records and recordkeeping

practices, while not covered by an employment law, can create other kinds of legal problems for employers.

B. Which Record to Keep

When classified by purpose, human resource records fall into several overlapping categories. Personnel files contain a variety of records regarding each employee. For internal purposes, the information in an employee's file serves as a basis for managing both individuals and the workplace as a whole.

Employers use an employee's records to implement personnel actions concerning that individual from the time of hire to departure. Recordkeeping underlies many routine human resource responsibilities, such as calculating paychecks with appropriate deductions, tabulating and issuing annual tax and benefits statements, and tracking benefit plan choices and changes. Records also provide the justification for less routine activities regarding the employee, such as taking disciplinary action, awarding merit pay increases or bonuses, implementing promotions or demotions, and scheduling training.

When combined in different ways, individual personnel files supply the data needed for broader human resource management activities. Statistics derived from personnel files allow human resource managers to perform strategic analysis and planning activities, such as evaluating managerial performance; assessing departmental performance and productivity; tracking absenteeism, accidents, benefit claims, and turnovers; comparing the effectiveness of recruiting strategies; determining the relative effectiveness of different human resource initiatives or training activities; and so on.

C. Records to Maintain for External Reasons

Under federal and state laws, employers must maintain specific personnel records for different periods of time. Documents required under these laws fall into three broad categories:

1. Non Discrimination Records

Employers must keep all records relating to employee selection, promotions, demotions, lay-offs, and terminations. These materials document an employer's compliance with federal and state laws prohibiting discrimination based on sex, race, ethnic background, age and disability.

2. Payroll and Tax Records

Compliance with federal and state tax laws requires employers to maintain records for each employee documenting wages, salaries, benefits, tips, work hours, absences, withholding and deductions, and so on. Similar recordkeeping is required under the federal Family Medical Leave Act, state and federal wage-hour laws, and laws barring discrimination and compensation and other terms of employment.

3. Employment Eligibility Records

Federal labor and immigration laws require employers to certify that every person hired is eligible for employment in the United States. In addition, employers of minors must maintain records demonstrating compliance with employment standards governing non-adults.

Along with these broad categories governing most employers, other federal laws establish recordkeeping requirements for specific types of employers, such as federal contractors or unionized employers; for specific employer practices, such as polygraph testing; and for certain jobs or work environments, such as ones that expose workers to hazardous substances and other physical risks.

Beyond showing compliance with employment laws, records are an employer's best defense against charges brought by an individual or a union. For example, careful documentation of performance appraisals and disciplinary actions can protect an employer if a former employee claims unfair discharge.

D. Gathering Personnel Information

When collecting personnel information, employers must balance their need for data against an employee's privacy concerns. Although no federal privacy law governs private employers' recordkeeping practices, the 1977 report of the federal Privacy Protections Study Commission issued guidelines for employers to use in collecting and disseminating information about employees. These recommendations, while not legally binding, set standards for fair information practices that have since been adopted by some state legislatures.

Specific actions that the commission recommend employers take include the following:

1. Articulate, communicate, and implement fair information practice policies for employment records.
2. Inform employees, applicants, and former employees of which records are maintained and how this information will be used
3. Adopt reasonable procedures to ensure the accuracy, timeliness, and completeness of personnel records.
4. Permit individual employees, former employees, and applicants to see, copy, correct, or amend their personnel records.
5. Limit internal and external disclosures of personnel records.
6. Monitor compliance with the company's fair information practice policy.

E. Recordkeeping Practices to Avoid

Good recordkeeping can defend an employer against legal claims but mishandling of records or creating inappropriate records can give rise to lawsuits. In some instances, state or federal non-discrimination, privacy, or anti-blacklisting laws prohibit employers from collecting certain types of information about applicants and employees. Records that most employers should avoid creating include ones containing information about an employee's:

1. After-hours behavior
2. Arrest records
3. Personal finances
4. Family background
5. Club memberships
6. Religious affiliations
7. Union memberships
8. Political beliefs

Keeping other records, while not specifically prohibited under an employment law, could create legal trouble. For example, a written reprimand that cites an employee's attitudinal or character defects instead of specific work behaviors could become evidence against the company in a defamation suit. Even when a record focuses on work behaviors, non-uniform recordkeeping practices could hurt the employer. For example, if a manager begins documenting every time one employee is five minutes tardy, but ignores other employees' tardiness, the singled-out employee could claim disparate treatment.

F. Maintaining Personnel Records

1. Medical Records

By law, employers must treat medical records as confidential files. This requirement means keeping all medical records separate from an employee's main personnel file and strictly limiting access to this information. Under the Americans with Disabilities Act, for example, access to medical records is limited to the following individuals and circumstances:

- a. Supervisors and managers may know about restrictions on an employee's duties or combinations necessitated by a disability.

- b. First aid and safety personnel may have information about an employee's medical condition if the disability might require emergency treatment or special evacuation procedures.

2. Equal Employment Opportunity ("EEO") Data

Certain employers must compile annual statistics on applicants' and employees' race, gender, ethnic background, Veteran's status, etc., for annual EEO reports. However, since supervisors cannot use this information as a basis for personnel actions, the Equal Employment Opportunity Commission recommends using separate forms to collect EEO data and keeping these forms in limited-access files.

3. Payroll and Benefits Data

Managers who handle departmental budgeting and supervisors who negotiate terms of employment or recommend raises need basic information on employees' salaries. But only designated payroll and benefits personnel should have access to detailed pay and benefit records. These records contain information on employee's marital status, dependents, medical conditions, wage garnishments, and other factors that are illegal to use as a basis for employment decisions.

4. Planning and Reporting Information

Employers should copy any personnel records needed to conduct annual reports and organize these records by department, function, planning activity, or report topic. However, if identifying information regarding individual employees is not needed for these reports, transferring essential data onto a separate form or summary file may prove more efficient than copying entire records from an employee's file.

G. Recordkeeping Requirements Under Federal and State Anti-Discrimination Laws

1. Title VII

The EEOC has not adopted a general requirement that records be made or kept for the purpose of enforcing Title VII. However, where an employer does keep personnel or employment records, such as requests for reasonable accommodation, application forms or other records having to do with hiring, promotion, demotion, transfer, layoff, termination, rates of pay or selection for training or apprenticeship, the employer must preserve these records for a period of one (1) year from the date of the making of the record, or for one year from the date of the personnel action involved, whichever occurs later. 29 C.F.R. § 1602.14(a). If an employer prematurely destroys employment applications in violation of these rules, the EEOC will assume, for its investigatory purposes, that all successful applicants were qualified at the time of hiring and that any parties charging unlawful employment practices were also qualified. EEOC, Decision No. 71-1477 (1971).

2. Age Discrimination and Employment Act (“ADEA”)

Each employer subject to the ADEA must keep for three (3) years records on each employee containing the following information:

- a. Name;
- b. Address;
- c. Date of birth;
- d. Occupation;
- e. Rate of pay;
- f. Compensation earned each week;

The following records must be kept for one (1) year after the date of a personnel action to which they relate:

- a. Records pertaining to the failure or refusal to hire any individual;
- b. Records pertaining to the promotion, demotion, transfer, selection for training, layoff, recall, or discharge of any employee;
- c. Job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings;
- d. Test papers completed by applicant or candidates for any position that disclose the results of any employer-administered aptitude or other employment test considered by the employer in connection with any personnel action;
- e. The results of any physical examination considered by the employer in connection with any personnel action; and
- f. Any advertisements or notices to the public or to employees relating to job openings, promotions, training programs, or opportunities for overtime worked. 29 U.S.C. § 621.

3. Americans with Disabilities Act (“ADA”)

The ADA’s recordkeeping and reporting regulations do not require the creation of any new documents, but do require the same record retention requirements of Title VII.

4. West Virginia Human Rights Act (“WVHRA”)

The WVHRA does not specifically provide for the retention of any employment-related documents. Presumably, the WVHRA anticipates employers’ compliance with Title VII’s recordkeeping requirements.

5. Family and Medical Leave Act (“FMLA”)

All records and documents relating to medical certification, medical history of employees, or employees created for FMLA purposes must be maintained as confidential medical records in files separate from the usual personnel files. If the ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements. An employer must maintain the following information:

- a. Employee’s full legal name as it appears on and is used for social security record keeping purposes;
- b. Employee’s home address, including zip code;
- c. Employee’s job position;
- d. Time of day and week on which the employee’s work week begins;
- e. Regular hourly rate of pay for any work week in which overtime compensation is due, an explanation of the basis on which wages are paid and the amount and nature of each payment which is excluded from the regular rate;
- f. The total amount of hours worked for each work day and total hours worked each work week;
- g. Total daily or weekly straight-time earnings or wages due for hours worked during the day, excluding any premium or overtime;
- h. Total premium pay for overtime hours;
- i. Total additions to or deductions from wages paid each pay period, including employee purchase orders;
- j. Total wages during each pay period;
- k. Date of payment and the pay periods covered by each payment;

- l. The amount, date and period covered by retroactive payment of wages made under the supervision of the wage and hour administrator;
- m. Dates the FMLA leave is taken by employees;
- n. If the FMLA is taken in increments of less than one full day, the hours of leave;
- o. Copies of employee's notices of leave furnished by the employer and copies of all general and specific notices given to employees as required by the FMLA;
- p. Any documents describing employee benefits or employer's policies and practices regarding the taking of paid and unpaid leaves;
- q. Premium payments of employee benefits;
- r. Record of disputes between the employer and the employee regarding designation of leave as FMLA leave;
- s. Written record of intermittent or reduced leave schedule for employees; and
- t. Records and documents related to medical certifications, recertifications or medical histories of employees or employees' family members. (All such information must be kept in confidential medical files, separate from the employees' general personnel files, 29 C.F.R. §825.500).

H. Recordkeeping Requirements Under The Fair Labor Standards Act ("FLSA")

1. Under the FLSA, an employer is required to maintain thirteen (13) pieces of information with respect to each employee. An employer is obligated to keep the records in a safe and accessible location at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. Upon request, all of the required records and information must be made available to the Department of Labor ("DOL"). 29 C.F.R. § 516.7.

2. Failure of an employer to maintain any records, or to maintain accurate records, may expose that employer to liability in an action by an employee for back wages or unpaid overtime. In such cases, the burden of proof rests on the employer to prove the actual time an employee worked. Where an employer's records are inadequate or inaccurate, the DOL will rely on the notes, records, or memory of the employee in arriving at a determination. Only

as a last resort will the DOL adopt an employer's estimate of the time worked. See Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2d Cir. 1997).

3. 29 C.F.R. § 516.2 requires an employer to retain the following thirteen (13) pieces of information for non-exempt employees:

- a. The employee's full legal name as it appears on and is used for Social Security recordkeeping purposes. On the same record, it is also necessary to include any symbol or number which may be used in place of the employee's name on any time, work, or payroll records.
- b. The employee's home address, including zip code.
- c. The employee's date of birth, if that employee is under age 19.
- d. The sex and occupation of the employee. An employee's sex may be indicated by the use of the prefixes Mr., Mrs., Miss, or Ms. This information is necessary for purposes of ensuring compliance with the equal pay provisions of the FLSA, which are administered by the Equal Employment Opportunity Commission.
- e. The time and day of the week on which the employee's workweek begins. If an employee is a member of a work force or other establishment where all of the workers have a workweek beginning at the same time and on the same day, a single notation of that information for the entire group is sufficient.
- f. The regular hourly rate of pay for any workweek in which overtime compensation is due, an explanation of the basis on which wages are paid (hourly, daily, monthly, weekly, or by piece, commission, or other basis), and the amount and nature of each payment which is excluded from the "regular rate."
- g. The total number of hours worked each workday and total hours worked each workweek. For purposes of this requirement, a workday is any fixed period of twenty-four (24) consecutive hours and a workweek in any fixed and regularly recurring period of seven (7) consecutive workdays.
- h. Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, excluding any premium/overtime pay.
- i. Total premium pay for overtime hours.

- j. Total additions to or deductions from wages paid each pay period, including employee purchase orders.
- k. Total wages paid during each pay period.
- l. The dates of payment and the pay periods covered by each payment.
- m. The amount, date, and period covered by retroactive payment of wages made under the supervision of the Administrator of the Wage and Hour Division.

4. Employers are required to maintain all of the records enumerated above for exempt employees except for numbers 6-10. 29 C.F.R. § 516.3.

5. Records preservation

In addition to the recordkeeping requirements already noted, 29 C.F.R. § 516.5 also requires that employers preserve, for a period of three (3) years, the following information:

- a. All payroll records or other records containing the required employee information;
- b. From their last effective date, all written:
 - i. collective bargaining agreements relied upon for the exclusion of certain costs under sections 3(m), 7(b)(1) or (2) of the FLSA;
 - ii. plans, trusts, employment contracts, and collective bargaining agreements under section 7(e) of the FLSA;
 - iii. individual written or oral contracts, collective bargaining agreements, or summaries under section 7(f) of the FLSA;
 - iv. any applicable certificates and notices; and
 - v. written agreements or memoranda summarizing the terms of oral agreements or underwriting under section 7(g) or 7(j) of the Act.
 - vi. record of the total dollar volume of sales or business and goods purchased or received.

6. Under 29 C.F.R. § 516.6, an employer is also required to preserve, for a period of two (2) years, the following information:

- a. All basic time and earning cards or sheets memorializing employees' daily starting and stopping times or the amounts of work accomplished by employees during the designated period when those amounts are the basis of employees' wages.
- b. All tables or schedules which provide the rates used in computing regular or overtime pay computations.
- c. The originals or copies of all customer orders or invoices, shipping or delivery records (not including sales slips, cash register tapes, or the like).
- d. Records of additions to or deductions from wages paid, including:
 - i. records relating to individual employees referred to in 29 C.F.R. § 516.2(a)(10); and
 - ii. records used by the employer in determining the original cost, operating and maintenance cost, and depreciation and interest charges, where they affect wages paid.

I. Recordkeeping Requirements Under The West Virginia Wage Payment and Collection Act ("WVWPCA")

The "WVWPCA" requires that each employer make such records of the persons employed by him, including wage and hour records, preserve such records for such periods of time, and make such reports therefrom to the Commissioner, as the Commissioner shall prescribe by regulation as necessary or appropriate for the enforcement of the provisions of the WVWPCA. W. Va. Code § 21-5-9(6). State regulations require that records required under the WVWPCA be maintained for a period of not less than five (5) years. 42 W. Va. C.S.R. 5 § 4.1.

The regulations require that the written record or records with respect to each and every employee contain:

- 1. Name in full, identifying symbol or number if such is used in place of name on any time, work or payroll record. This shall be the same name as that used for social security record purposes;
- 2. Social security number;
- 3. Home address;
- 4. Date of birth, if under 18;
- 5. Occupation or job classification;

6. Rate of regular pay and rate of overtime pay;
7. Hours worked each workday and total hours worked each workweek; and
8. Method of calculating the percent of fringe benefits owed to an employee at any given time. 42 W. Va. C.S.R. 5 § 4.2.

J. Special Consideration For Recordkeeping in The Event of Litigation.

Special care must be taken to preserve records that may be subject or relevant to pending or potential litigation. For example, an employer must refrain from discarding records from the personnel file of an employee who has threatened litigation under state or federal anti-discrimination laws.

Many employers have created document retention policies in order to create a uniform system of retaining and discarding records. Frequently these policies are designed to reduce the amount of non-revenue generating space that is taken up by aging company records. No document retention policy should ever be created for the purpose of eliminating records that may be used against the company in litigation, and a properly drafted policy will include a statement of appropriate purpose at the outset.

A document retention policy must include a provision for the event of litigation. The policy must ensure that all efforts are made to identify, designate, and preserve documents that may be relevant to pending or potential litigation.

In the event that an employer has discarded documents after it became aware of pending or potential litigation, the employer may be subject to judicial sanction or additional litigation. West Virginia law now recognizes causes of action for negligent and intentional spoliation of evidence. Hannah v. Heeter, 584 S.E.2d 560 (W. Va. 2003).

1. Intentional spoliation requires proof of:
 - a. A pending or potential civil action;
 - b. Knowledge of the spoliator of the pending or potential civil action;
 - c. Willful destruction of evidence;
 - d. The spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action;
 - e. The intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action;
 - f. The party's inability to prevail in the civil action; and

g. Damages.

Hannah, 584 S.E.2d at 573.

2. Negligent spoliation requires proof of:

- a. The existence of a pending or potential civil action;
- b. The alleged spoliator had actual knowledge of the pending or potential civil action;
- c. A duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances;
- d. Spoliation of the evidence;
- e. The spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; and
- f. Damages.

Hannah, 584 S.E.2d at 569.

K. Document Retention Under The Sarbanes-Oxley Act of 2002.

In response to Enron and other recent corporate accounting scandals, on July 30, 2002, President George W. Bush signed into law the Sarbanes-Oxley Act of 2002. The Act seeks to increase the reliability and accuracy of corporate reporting, accounting, and auditing practices and to ensure the independence of securities-analyst advice and recommendations. In furthering these goals, the Act creates new protections for employees of publicly traded companies who report securities or accounting fraud. The Sarbanes-Oxley Act strengthens existing federal law by prohibiting alterations, destruction, mutilation, or concealment of documents and other objects, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding. 18 U.S.C. § 1512(c)(1) (2002).

A second document retention provision in the Act prohibits not only document destruction or alteration but also falsifying or making a false entry in the document. This second provision applies to anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under Title 11, or in relation or contemplation of any such matter or case." 18 U.S.C. § 1519 (2002). This second provision is very broad and arguably could be relevant to any federal employment-related matter.

A violation of either section of the Act is punishable by fine and/or 20 years imprisonment. Id. and 18 U.S.C. § 1512(c)(2) (2002).

Similar to the criminal statutory provisions addressing retaliation, the criminal statutory provisions addressing document destruction are applicable to, and could have a significant impact on, private companies (not just publicly traded companies). These criminal statutory provisions are likewise applicable to officers, directors and employees of both privately held and publicly traded companies.

L. Recommendations With Regard to Employee Recordkeeping

1. Review federal, state, and local laws with regard to required records.
2. Establish “tickler” systems so that records are kept no longer than necessary.
3. Review employment application forms, evaluation forms, and other similar documents to ensure they are non-discriminatory.
4. Review with supervisors the kind of disciplinary documentation which should be maintained in all employee files.
5. Know to what extent your state law mandates employee access to personnel files and establish a system for controlling such access.
6. Do not disclose information on employees except to those who have a legitimate need to obtain such information.
7. Do not discuss charges against employees with more people than necessary.
8. If possible, get consent before disclosing any information about an employee.
9. Designate a single person in charge of disclosure to ensure consistency of treatment.
10. Provide “neutral” references for former employees, where consistent with state laws.
11. Inform employees in writing as to all communication media (e.g., e-mail, voice mail) and areas in which they have no expectation of privacy.