

MODERN MANAGEMENT

UPDATE ON EFCA

Stalled Card Check Could See Changes

Supporters of the Employee Free Choice Act (“EFCA”) are searching for ways to get the legislation moving. Introduced in March 2009 to the House and Senate, the EFCA proposes to change the way unions organize by giving workers a choice on voting methods – either card-check process or secret-ballot election. The legislation has remained stalled in committees. On July 17, 2009, six Democratic senators discussed the need to remove or amend some aspects of the bill that were deemed controversial, including the card-check provision under which employers would have to recognize a union once the majority of their employees signed cards asking for union representation. The group has not made an official proposal to amend or introduce a new version of the EFCA.

EFCA Alternatives Rejected by Business Groups

A business group identifying themselves as “a coalition of workers, employers, associations and organizations who are fighting to protect the right to a federally supervised private ballot when workers are deciding whether or not to join a union” see none of the alternative proposals to the EFCA as viable options. This was in reaction to a recent report in the New York Times indicating bill supporters were considering dropping the “card check” provision of the bill.

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USSERA—FAILURE TO REHIRE RESERVIST

A naval reservist in Florida gets the green light to proceed with a lawsuit under USERRA after his job offer was retracted. In *Atteberry v. Avantair Inc.*, the U.S. District Court for the Middle District of Florida ruled that Atteberry may proceed with his lawsuit under USERRA.

After serving as a flight dispatcher with Avantair, Inc. in Florida from 2005 to 2006, Atteberry resigned his position in order to move out of state. In addition to being a flight dispatcher, he also served in the Navy Reserves since 2001. In November 2007, he contacted Avantair about moving back to Florida and returning to work. A job offer was extended and accepted with a start date of December 27, 2007. Following the job acceptance, the company made several inquiries about his military service and training responsibilities, which included a four-day drill in January 2008 and a two-week training requirement during the summer. On December 20, 2007, Atteberry was notified that the job offer was

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AGE BIAS CLAIMS ON THE RISE

An increase of Age bias claims of 29 percent in 2008 raises concerns by the U.S. Equal Employment Opportunity Commission (“EEOC”) that 2009 may be even higher. The anticipated increase is linked to the ongoing financial crisis.

Recent Supreme Court decisions are making it harder to prove age discrimination claims. In June, the Court held that workers have the burden of proving that age discrimination was a key factor in a mixed-motive demotion of layoff. (*Gross v. FBL Financial Services Inc.*) The decision changes the requirement for workers to show that age was a factor in an employment decision and moves the burden to show permissible motive to the employer.

E-VERIFY UPDATE

In early July an amendment to the Fiscal Year 2010 Department of Homeland Security appropriations bill that will require federal contractors to use the government’s voluntary electronic employee verification system known as E-Verify was adopted by the U.S. Senate. The spending bill also extends E-Verify for three more years.

As reported in previous issues of *Modern Management*, E-Verify is the U.S. Citizenship and Immigration Services’ system that organizations with federal contracts would be required to use to determine if their new hires and existing employees were authorized to work in the U.S.

EFCA, continued

If passed, EFCA would amend the National Labor Relations Act to establish a procedure whereby the National Labor Relations Board ("NLRB") would certify a union as the bargaining representative of employees if a majority of employees of the unit signs valid union authorization cards without secret ballot election. The EFCA in its current form also provides for government arbitration of a collective bargaining agreement in the event that the employer and the union are unable to negotiate a contract.

USSERA, continued

being retracted due to there being no job openings, a rule against rehiring of employees and his poor exit interview. A law suit was filed alleging violation of USERRA.

The Court concluded that there existed strong circumstantial evidence on behalf of Atteberry and inconsistent testimony on behalf of Avantair that could lead a jury to find that the retraction was due to Atteberry's military obligations. The testimony from Avantair employees revealed there was a hiring need at the time Atteberry applied and that Atteberry was considered a good candidate. Additionally, an employee testified that the job offer was retracted after management discovered that Atteberry had two more years of military service remaining. The Court found that "the timing of the retraction of the job offer alone seems sufficient to suggest that the Plaintiff's military status was at least a motivating factor that influenced the Defendant's hiring decision...the only proper course is to view all disputed facts in a light most favorable to Plaintiff and submit this cause for jury determination."

USERRA requires all employers to allow employees to take leave to serve military duty and provides job, benefits, and nondiscrimination protections to employees returning from service. It applies to all employers and all employees except for temporary workers.

THIRD AND FINAL STEP OF WAGE INCREASE

The minimum wage increase went into effect on July 24, raising minimum wages by 70 cents to \$7.25 per hour. This was the third and final step of increases under legislation enacted in 2007.

The increase from \$6.55 per hour lifted wages in 30 states. These were states with no state minimum wage or wages lower than the new federal rate. The District of Columbia's minimum wage, set \$1 above the federal minimum, climbed 70 cents to \$8.25 per hour.

Additionally, the maximum tip credit an employer is allowed to take against the minimum wage rose by 70 cents to \$5.12 per hour, so the minimum cash wage employers can pay tipped employees remains \$2.13 per hour.

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