Workplace Notes

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Will Employees Have Freedom in Free Choice?

The National Labor Relations Board is one of the oldest government agencies regulating employment, but with the decline of labor union representation to about seven percent of the non-public workforce, the NLRB's impact in recent years on most private employers has been negligible. However, if the Orwellian-named Employee Free Choice Act, passed by the House of Representatives on March 1, actually becomes law, the NLRB may return "big time" to the American workplace, as the Act unleashes union organizing of employers large and small in ways not seen for decades.

The proposed amendment to the venerable National Labor Relations Act does nothing less than eliminate the secret ballot union election, a democratic element with its origins in New Deal legislation that was once thought to be the cornerstone of national labor relations policy. The general organizing process for over 70 years has been that union organizers obtain from employees signature cards that serve the modest purpose of showing an interest in union representation. The union would then petition the NLRB for an election, the employer would receive formal notice and would have the opportunity to inform its employees of its side of the story, and the NLRB would conduct a secret ballot election. Labor lawyers of a certain age well remember NLRB agents coming to a work site with a portable voting booth complete with curtain, which they would assemble, then handing out paper ballots which employees would mark in private and deposit in a ballot box.

> "The Employee Free Choice Act seems to put labor unions in sole control of the organizing process..."

But the proposed new law eliminates the election and elevates the sign-up cards to "proof" of selection of union representation by employees. A professional union organizer could show up at a company with cards signed by a majority of employees and demand to bargain a union contract. The NLRB would certify the union's representation status and enforce such collective bargaining under penalty of law.

Even though unions now often get over 50 percent of employee signatures on the showing-of-interest cards, only about half of all secret ballot elections are won by the union. This is in part because the employers have time to educate their employees and because the secret ballot insures true free choice. The Employee Free Choice Act seems to put labor unions in sole control of the organizing process, with no check on how much peer or other pressures influence "free choice."

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Michael N. LaVelle is a member of the firm's Labor & Employment Law Section where he concentrates his practice in the areas of labor and employment law including employment discrimination, labor board and other administrative agency practice and wrongful discharge litigation and municipal law.

Employee Liability for Patent Infringement

Today, most businesses are well aware of the dangers they face under patent law. If a business develops a new product that infringes a patent owned by someone else, that business is in big trouble. It faces the possibility of costly and time-consuming litigation that

could stop the marketing of the new product in its tracks. If the business loses in court, it could be required to pay large damage awards to the patent owner and it could be prohibited from any future sales or other uses of the product that it developed.

Most businesses are also aware that their exposure under patent law extends well beyond products that they develop themselves. Businesses can be held liable for patent infringement if products that they purchase, rent, or license infringe a patent held by a third party. For instance, if a business purchases a component that the business incorporates into a product that it manufactures, and the component infringes a patent, the business can be held liable for patent infringement. Or, if a business licenses a computer system for use in its operations, and the computer system infringes someone else's patent, the business can be held liable for patent infringement.

What most businesses and their employees are not aware of is that, when an employer infringes a patent, its employees can be held personally liable for patent infringement.

Ordinarily, when an infringement occurs, patent owners pursue the company that committed the infringement, rather than the employees of that company. The company is usually the one that benefited from the infringement and the one that directed the activity that led to the infringement. Moreover, companies usually have deeper pockets than their employees.

Nevertheless, it is possible for patent owners to pursue the employees in addition to their employer. Some patent plaintiffs are taking advantage of this option. The specter of personal liability for large patent infringement judgments and the related costs of litigation can make employees, some of whom are often company decision-makers, much more willing to seek settlements than they might be if their personal assets were not at stake.

The likelihood that a patent owner might be able to prevail against employees of a patent-infringing company will depend upon the facts and circumstances of the particular case. Important factors include the nature of the patent infringement, the relative culpability of individual employees, the degree of autonomy enjoyed by employees, and the ability of the patent owner to pierce the "corporate veil" of the employer. But the mere threat of litigation and personal liability can be very daunting for employees.

Accordingly, it makes sense for employers to educate their employees regarding the possibility that patent infringements might give rise to personal liability. This, by itself, might motivate employees to act with greater diligence to avoid actions that might result in patent infringements. It is virtually impossible to eliminate all risk of patent infringement claims. Companies and their employees can significantly reduce this risk, however, by conducting patent searches whenever they adopt new technology, obtaining availability opinions from competent legal counsel, maintaining records chronicling the company's development of any new technology and insisting on intellectual property warranties whenever purchasing, leasing, or licensing technology.

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San Francisco Mandates Pay for Time Not Worked

The federal Fair Labor Standards Act and similar state wage-hour laws clearly provide that pay is for time worked. Other than modest amounts for jury duty pay, employers have always had the discretion as to how much, if indeed any at all, would be paid for time not worked, such as vacations, sick days or personal days.

But now comes the City of San Francisco with an ordinance that mandates that every employee who works within the city limits accrue up to 72 hours of sick leave pay annually. Moreover, the ordinance also requires that employees be allowed to use their sick pay not just for their own illnesses, but for time off to care for family members. Even employees without spouses or domestic partners can nominate a "designated person" for whose care they can then take paid time off.

Connecticut took a small step in this direction in 2003 in amending the State Family and Medical Leave Law to require that employees who had accumulated sick pay under their employer's sick pay policy could take up to two weeks of such pay if they were on leave to care for a family member (the prior law had allowed vacation to be paid out for family leave, but not sick pay). However, the FMLA does not mandate that an employer establish a sick pay policy.

Connecticut municipalities do not seem to have the authority to enact private wage ordinances, so if the San Francisco model is to be followed here, it would have to be by the Legislature.

How likely is it that the Connecticut Legislature would decide to give away some of your company's money? The next article describes Connecticut's first attempt to impose a similar mandate on Connecticut employees.

Will Connecticut Mandate Paid Sick Leave?

This year's session of the Connecticut Legislature saw the introduction of a proposed bill entitled An Act Mandating Employers to Provide Paid Sick Leave to Employees. The initial version would have required any employer of more than 25 employees to accrue sick pay for non-exempt employees at the rate of one hour of sick pay for each 40 hours of work. For full-time employees, this results in about six and one-half sick days per year. Sick pay could be used after the 90th day of employment and would be carried over from year to year but with no more than a maximum of 52 hours of accrued leave per year.

The proposed bill left several obvious questions unanswered, such as whether accrued but unused sick pay would be paid out at termination. Also, the bill allows employers to require reasonable documentation of sickness after three or more consecutive days of absence, which suggests that employers could not demand earlier documentation even from suspected chronic abusers such as an employee who is typically absent on Fridays and Mondays.

An additional social policy mandate in the proposal required leave time to be paid if an employee who was a victim of family violence, sexual assault or stalking took time off for counseling, to obtain services from a victim services organization, to relocate a family or to participate in civil or criminal proceedings. The bill prohibited retaliation and authorized the Commissioner of Labor to enforce civil penalties without making it clear whether employees fired for absenteeism could use the law as the basis for a wrongful discharge lawsuit.

Although the obvious point was made in the Senate debate that most employers provide some form of paid sick time and that the decision for any business was best left to the marketplace for labor, the Senate passed the bill with some amendments and sent it to the House in the final week of the legislative session. It was unlikely to pass the House before the session ends but even if it didn't, it may appear again next year.

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Attorney Notes

On May 23, the NLRB conducted a representation election in a unit of drivers and warehousemen employed by a client in North Haven. Things did not look positive for the client when the Teamsters petition for an election caught them by surprise a few weeks ago. With Bob Mitchell's expert guidance, the management was able to garner a decisive victory winning "no" votes from a significant majority of the voters. Congratulations to Bob for a stunning win!

Peg Sheahan, chair of the Labor & Employment Section, was recognized in the May 21 edition of the *Fairfield County Business Journal* as one of ten successful women in Fairfield County who were designated as "Ten on Top."

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