JONES WALKER

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RECENT NLRB DECISIONS MEAN CHANGES IN YOUR WORKPLACE

The Democrat-dominated NLRB under the Clinton-Gore Administration has been decidedly prounion. Let's take a look at some of the Board's most significant recent decisions that have tilted the scale in favor of unions:

- Employees in a nonunion company now have the ***right to insist*** on the presence of a coworker in meetings with management that employees reasonably believe could result in disciplinary action.

- Temporary employees supplied to a company by a temporary agency can be ***included*** in the same bargaining unit with the company's regular employees for purposes of a union election, even if the two employers don't consent, as long as the regular and temporary employees share a community of interests.

- An employer violates federal labor law by discharging a union activist ***for pestering his coworkers*** during a union organizing drive when the behavior is neither disruptive nor threatening and he voluntarily stops soliciting employees who express no interest in the union. In one case, the employee pestered an employee four times in a single day and almost provoked a fight with another. Yet the NLRB said firing the employee was unlawful.

- Employer-sponsored ***election day raffles*** are now unlawful. Employers who hold election day raffles risk having a successful election result overturned and set aside.

- An employer may not withdraw from a stipulated election agreement regarding one unit of employees, even if ***the union withholds material information*** about its plan to file a second representation petition for a second, larger unit of the employer's workers.

- Because of a new standard for unit clarification proceedings, it's now ***easier*** for unions to expand their representation of an existing bargaining unit to include nonunion employees who were not part of the original bargaining unit.

- Clyde H. Jacob

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OFCCP ISSUES NEW REGULATIONS FOR AFFIRMATIVE ACTION PLANS

Federal contractors and subcontractors take note. New regulations setting forth the requirements for your Affirmative Action Plans take effect December 13, 2000. The most significant changes are as follows:

- The current workforce analysis will be replaced by a one-page organizational chart of each establishment.
- The eight-factor availability analysis will be replaced by two factors: external availability and internal availability.
- Each year, the OFCCP will select half of all nonconstruction federal contractors to complete the mandatory EEO surveys showing personnel activity and compensation data.
- Federal contractors will be allowed to maintain Affirmative Action Plans on a "functional" as well as a site-specific basis.

Even though many federal contractors have expressed concern over the OFCCP's interpretation of the term "applicant," the new regulations do not change the definition of an applicant. This is a matter of importance because the OFCCP requires covered employers to maintain race and sex data on all applicants; the OFCCP considers any person who shows an interest in a job to be an "applicant," without regard to whether the individual completes an application form. Thus, according to the OFCCP, persons who submit unsolicited résumés through the mail or who show up and ask about a job at times when you're not hiring are applicants who must be included on your applicant flow chart along with their race and sex.

So how do you determine the race and sex of "applicants" who submit unsolicited résumés through the mail? The OFCCP offers some "guidance" in the new regulations. According to the OFCCP, you should send a form or postcard to such persons and request them to fill in their race and sex and return the form to you. Perhaps the best thing to do is adopt a policy requiring all interested persons to apply in person, which is acceptable to OFCCP and gets you off the hook from having to send out postcards or forms to solicit race and sex information from "applicants" who submit unsolicited résumés through the mail. For persons who apply in person, the preferred method is still self-identification by using a "tear-off sheet," but the OFCCP says visual observation is okay, too.

The new regulations also provide that federal contractors aren't required to redraft their current Affirmative Action Plans to conform to these new requirements. So you can retain your current plan and implement the new regulations in the next plan year.

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- Rebecca G. Gottsegen

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FINAL REGULATIONS ADDRESS SMALL RETIREMENT PLAN AUDIT REQUIREMENTS

Last month's *Tip Sheet* included an article on proposed Department of Labor ("DOL") regulations that addressed when small (less than 100 participant) retirement plans can avoid obtaining a financial audit. Currently such plans are automatically exempted from audit requirements. An audit can be avoided under the new regulations only if the sponsor complies with new disclosure requirements and meets other conditions.

The proposed regulations were modified and finalized on October 18, 2000. The final regulations state that a small plan can avoid yearly audits if at least 95% of its assets are "qualifying plan assets" and certain disclosures are made to participants. In the proposed regulations, qualified plan assets were limited to qualifying employer securities as defined in ERISA; participant loans meeting ERISA requirements; and assets held by banks, state-registered insurance companies, broker-dealers registered under the 1934 Securities and Exchange Act, and IRA trustees. The final regulations include these, but add mutual fund shares, insurance company general account contracts, and assets held in an individual account plan if the participant has control over investment direction and is provided with annual statements from the holder of the assets that describe the assets and their value.

If less than 95% of a plan's assets are qualifying plan assets, the sponsor will have to obtain a surety bond or obtain a plan audit. However, the DOL estimates that only 5% of small pension plans will be subject to bond audit requirements as a result of holding nonqualifying assets (such as limited partnership or real estate interests). Most sponsors will merely need to comply with new disclosure requirements. This involves providing the following in the plan's summary annual report (given annually to all participants):

- The name of each institution holding or issuing qualifying plan assets and the amount held;
- A notice that participants may obtain additional information describing the qualifying plan assets upon request;
- A notice directing participants to contact the DOL if they are unable to obtain or examine copies of statements issued by the holders of plan assets; and
- If the plan does not meet the 95% qualifying plan asset threshold, information regarding the surety bond.

The changes in the regulations apply to plan years beginning on or after April 27, 2001. Sponsors that have a calendar year plan year will not have to apply the new regulations until the plan year beginning January 1, 2002.

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However, sponsors should review the types of assets held by their plans to determine in advance whether a bond or audit may be required.

- Timothy P. Brechtel

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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