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E*ZINES
November 2001 Vol. 11

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JONES WALKER ATTORNEY DEBATES OSHA JURISDICTION BEFORE U. S. SUPREME COURT

by Jennifer A. Faroldi

Jones Walker Maritime partner, Patrick Veters, recently debated lawyers for the Justice Department in oral arguments before the U.S. Supreme Court over whether the Occupational Safety and Health Administration ("OSHA") has the authority to issue citations against barge owners for safety violations. The case involved an explosion on a barge used in oil well drilling on a navigable waterway within the territorial waters of Louisiana. Four employees were killed and two were injured in the explosion.

The Justice Department asked the Court to overturn a decision by the U.S. Fifth Circuit Court of Appeals, which dismissed three OSHA citations against the barge owner. The Fifth Circuit said the Coast Guard, not OSHA, had jurisdiction over working conditions on the barge. In fact, the Coast Guard conducted an investigation of the explosion, and OSHA issued its citation based on the Coast Guard's investigation.

The Justice Department argued against an industry-wide exemption for uninspected vessels from OSHA's employee health and safety protections, which it said the Fifth Circuit's decision effectively created. Veters, who represented the barge owner, countered that the Coast Guard has the absolute authority to regulate safety conditions on vessels, such as the barge in this case. In fact, Veters pointed out that the Coast Guard can take a barge out of service, or even sink it, if it poses a threat to life or property. The Justice Department responded that the Coast Guard's safety regulations for uninspected vessels are limited and OSHA standards should apply to fill the gaps.

The Supreme Court's decision will determine which agency, the Coast Guard or OSHA, has the authority to regulate health and safety issues on uninspected vessels. An opinion is expected by July 2002, at which time we will discuss the Supreme Court's decision in detail. *Chao v. Mallard Bay Drilling, Inc.*, No. 00-927 (U.S. Sup.Ct., argued Oct. 31, 2001).

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FEDERAL APPELLATE COURT AFFIRMS NONUNION EMPLOYEE'S RIGHT TO BRING A COWORKER TO DISCIPLINARY MEETINGS

by Jennifer A. Faroldi and Thomas P. Hubert

In our August 2000 issue, we reported on a National Labor Relations Board ("NLRB") decision that extended to *nonunion* employees the right to have a coworker present in any investigatory meeting or interview the employee reasonably believes might result in disciplinary action. *Unionized* employees have had the right to have a union representative present in such meetings for many years, but until the NLRB's decision last year, nonunion employees have not had the right to coworker representation. On November 2, 2001, the U.S. Court of Appeals in Washington, D.C. upheld the NLRB's decision.

The court agreed with the NLRB that an employee's request for a coworker "representative" in a disciplinary meeting is a "concerted activity for the purpose of collective bargaining or other mutual aid or protection," which is a protected right enjoyed by all employees, whether union or nonunion, under the National Labor Relations Act ("NLRA"). The court reasoned that a coworker's presence during an investigatory interview enhances the employees' collective opportunity to act together to address any concerns about unjust punishment by the employer. The presence of a coworker, said the court, gives an employee a witness, advisor, and advocate in a potentially adversarial situation.

What does all of this mean? The court's affirmation is good reason to prepare your managers for the possibility of an employee subject to discipline requesting a witness. Most employees will not know about this right, but unions do and will use it to trip up employers that are being organized. If an employee asks for a representative or witness, you may have organizing going on in your operation, and you need to take steps to immediately thwart such activity. Following are some of the practical issues you need to consider:

- The right to request a coworker's presence applies only to "investigatory" meetings between an employee and his managers or supervisors that the employee *reasonably* believes could result in discipline (e.g., a meeting with an employee accused of sexual harassment).

- The new rule does not require you to advise or even inform your employees that they have the right to have a coworker present in such meetings. An employee simply has the right to *request* the presence of a coworker. The employee need not use special words to make the request, just enough

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to put you on notice that he would like to have a coworker present.

- Supervisors and managers do not have the same right to request coworker "representation" because the NLRA only protects nonsupervisory employees.

- If your employee requests the presence of a coworker, you don't have to go ahead with the meeting. You can give your employee a choice: meet without a coworker or forego the opportunity to tell his side of the story in a meeting.

- If you decide to go forward with an investigatory meeting with an employee and his coworker "representative," you don't have to agree to the employee's choice of coworker representative.

- The right to a representative only applies to coworkers. Employees do not have the right to have a relative or lawyer attend disciplinary meetings.

- The coworker "representative" does not have to remain silent but may not be disruptive or interfere with the questioning.

- Taking disciplinary action against an employee for refusing to meet without a coworker as a witness is prohibited.

Epilepsy Foundation of Northeast Ohio v. NLRB, 2001 WL 1344062 (D.C. Cir. Nov. 2, 2001).

PROJECT LABOR AGREEMENTS ALLOWED IN FEDERALLY FUNDED CONSTRUCTION PROJECTS

by Jennifer A. Faroldi and Thomas P. Hubert

President Bush's Executive Order 13202 ("EO 13202") restricting the use of project labor agreements on federally funded construction projects was recently blocked by a permanent injunction issued by a federal district court. A project labor agreement ("PLA") is an agreement between a construction contractor and a union whereby the parties agree to having a union represent the company's employees on a particular project. Typically, the labor union is designated as the collective bargaining representative for all employees on the project and agrees there will be no strikes or disputes. Project agreements are limited in duration to the particular project and are permitted under the law,

without the consent of employees, because of the transient nature of the industry and its workers. Often, the company bidding out work will require as a prerequisite that its subsidiary agree to enter a PLA with a union.

In February of this year, President Bush issued EO 13202 barring federal agencies or recipients of federal funding from requiring or prohibiting PLAs in a project's bid specifications. Essentially, EO 13202 made the decision to enter such agreements voluntary on the part of a contractor interested in bidding a job. Not surprisingly, the AFL-CIO's Building and Construction Trades Department ("BCTD") challenged the executive order and sought a permanent injunction against the part of the EO that prohibited PLAs on federally funded projects.

The U.S. District Court for the District of Columbia found that the BCTD had standing to challenge the legality of EO 13202 and that President Bush "exceeded his constitutional and statutory authority" with respect to the section of the EO that prohibited recipients of federal funding from requiring PLAs. The court issued a broad injunction blocking enforcement of EO 13202 and lifting its restrictions on PLAs. The Justice Department is expected to make a decision in the near future on whether to appeal the district court's decision. We'll keep you posted. *Building and Constr. Trades Dept. AFL-CIO v. Albaugh*, (D.D.C., 11/7/01).

"GUST" AMENDMENT DEADLINE EXTENDED AGAIN

by Timothy Brechtel and Edward F. Martin

Last month's Tip Sheet included an article regarding the deadline for amending qualified plans to comply with "GUST" (GATT, the Uniformed Services Employment and Reemployment Rights Act of 1994, the Small Business Job Protection Act of 1996, the Taxpayer Relief Act of 1997, and several other law changes). Plan sponsors originally had to take action to comply with GUST by December 31, 2001 (for prototype and calendar year individually designed plans) or by the end of the plan year beginning 2001 (for fiscal year individually designed plans). In light of the September 11 terrorists attacks, and perhaps realizing that many plans are making changes due to the recently passed Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), the IRS has extended the December 31, 2001 deadline to **February 28, 2002**. Plans directly affected by the attacks may have an even later deadline. However, you should still review your plans this year to determine

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which changes you would like to implement for EGTRRA (see following article).

EGTRRA PROVIDES OPPORTUNITIES FOR EMPLOYEES TO EXPAND RETIREMENT SAVINGS

by Timothy Brechtel and Edward F. Martin

While you've been busy making sure your plan complies with GUST, you may not have heard about Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), which made major changes, most favorable, concerning the taxation, operation, and administration of qualified retirement plans. Most changes are effective **January 1, 2002**. The most sweeping changes apply to 401(k) defined contribution plans. The highlights are as follows:

- The annual limits on allocations to participants increased from the lesser of 25% of pay or $35,000 to the lesser of 100% of pay or $40,000. Participant deferrals no longer are included in the test.

- The annual deferral limit increased from $10,500 to $11,000 and will increase by $1,000 each year until it reaches $15,000 in 2006. Also, over-age-50 participants may defer an extra $1,000 in 2002, $2,000 in 2003, $3,000 in 2004, $4,000 in 2005, and $5,000 in 2006 (called "catch-up" contributions).

- The limit on compensation that can be taken into account increased from $170,000 to $200,000.

- The limit on deductible contributions increased from 15% to 25% of compensation of all participants. Participant deferral contributions will be included in the "compensation" denominator, but not in the "contribution" numerator.

- Matching contributions made after 2001 will have to vest 100% after three years (for cliff vesting) or 20% per year for years two through six (for graduated vesting).

- The default rule for mandatory distributions of less than $5,000 will be a

direct rollover to an IRA rather than writing a check to the participant (with 20% withheld for taxes). This change will not be effective until the IRS issues regulations on how it will work and will not apply if the amount is under $1,000.

- No hardship distributions will be eligible for rollover. Presently this rule applies only to hardship withdrawals from a 401(k) deferral account. Also, if a hardship withdrawal is taken from the deferral account, the safe-harbor rule that the employee must be prohibited from making additional deferrals for 12 months was changed to 6 months.

- The top-heavy rules were simplified, making it less likely that a plan will be top-heavy. But the plan must be amended in order for the new rules to be effective.

- The multiple-use test in 401(k) plans was eliminated.

- It's now possible to make plan loans to all S Corporation and partnership owners.

- Plans must allow rollover of any after-tax employee contributions (if the recipient plan will take them) and participant and surviving spouse rollovers into many types of plans (if the recipient plan will take them). Additionally, plans may be amended to allow more types of rollovers, even from IRAs.

- A tax credit of up to $1,000 is now available for contributions to 401(k) plans made by low-income individuals. Also, employee deferrals no longer are included in compensation to determine eligibility for the earned income credit. An IRS model notice is available to communicate these tax benefits to employees.

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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