SPECIAL EMPLOYMENT EDITION

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Giving Careful Consideration Before Conducting Reductions-In-Force: US Supreme Court Holds That an Employer Must Prove it has a Legitimate Reason Other Than Age When it Makes an Employment Decision that has a Disparate Impact on Older Workers

In its most recent ruling on the Age Discrimination in Employment Act ("ADEA"), the United States Supreme Court in Meacham v. Knolls Atomic Power Laboratory has ruled that, when an employer engages in an employment action, such as a lay-off, and a disparate number of the laid-off employees are over forty (40) years old, the employer, in any law suit, must prove that it had a reason other than age for its actions.

Prior to the Meacham case, in an age-based lawsuit, once an employer had presented a legitimate business reason for its action, the laid-off employee had to prove that the employer's stated reason was untrue or that it could have accomplished its goal in a non-discriminatory manner. Thus, the burden of proof was on the plaintiff/employee – the employer needed only to state its reason. Meacham changes that rule.

The facts in the Meacham case were fairly straightforward. The employer Knolls was going through a reduction-in-force ("RIF"). As part of the RIF, Knolls directed its managers to determine who would be laid-off by identifying and rating certain performance factors. Employees scoring the lowest would be the employees subject to lay-off. As a result of these conditions, thirty (30) out of the thirty-one (31) laid-off employees were over forty (40) years old. Some of the laid-off employees filed a lawsuit against Knolls alleging that Knolls violated the ADEA because the RIF had a disparate impact on older workers.

The Meacham decision negatively impacts employers as it makes it more difficult to defend actions brought challenging RIF's. Summary judgments, which allow employers to get meritless cases dismissed before an expensive trial, will be more difficult to obtain. In addition, fact finders will now be in the business of deciding whether the employer's reasons for choosing certain employees for lay-off were legitimate.

In addition to the impact on litigation, the Meacham decision will necessarily effect how employers conduct RIF's. Employers might be reluctant to carry out thoughtful, albeit subjective, decisions concerning which employees will be subject to lay-off and instead use a lock-step method that might not be the most beneficial to the employer, but will more easily withstand legal challenge. Employers contemplating RIF's should consult with their labor counsel as they struggle to determine the criteria to select employees for lay-off.

The Employee Free Choice Act is at the Top of the Unions' Long List of Bills on Which They Will Concentrate Their Efforts in the New Administration.

These past few years have seen a surge of union organizing efforts in assisted living communities. We can expect even more activity in the very near future. In March 2007, the United States House of Representatives passed the Employee Free Choice Act ("EFCA"), legislation introduced by Senator Edward Kennedy (D-Mass.) and Representatives George Miller (D-CA) and Peter King (R-NY) aimed at strengthening unions' ability to organize employer workforces. Although the legislation was blocked by a Republican filibuster, President-Elect Barack Obama has promised that he will make the passage of the EFCA a priority during his administration. Many expect it to be passed into law during Obama's first 100 days in office.

There are many troubling aspects of the bill for employers. One significant, and troubling, change that the EFCA will bring about to the union organizing process is the elimination of the secret ballot election. Under current labor law, when an employer is faced with a union organizing effort and the union produces union cards purportedly signed by a majority of employees, the employer can insist upon a secret ballot election with the National Labor Relations Board ("NLRB") for its employees, allowing the employees privately to cast a vote for or against the union. During the time between the employer's request for the election and the election, the employer has an opportunity to campaign to its employees in an effort to convince its employees they do not need a union.

If enacted, the EFCA will amend the National Labor Relations Act ("NLRA") to require the NLRB to certify the union as the employees' bargaining representative without an election if a majority of the bargaining unit employees sign union authorization cards. Unions claim this process will protect the employees' ability to choose whether they want a union by eliminating the employers' ability to express

their views on unionization during an election campaign. In fact, the opposite is true. Without an election, the employee can no longer vote "yes" or "no" in private and there is little an employer can do to be certain that its employees were not "strong-armed" into signing union cards. Often, union organizers ask employees to sign cards directly creating the opportunity for threats, intimidation and harassment.

The EFCA will also dramatically change employers' bargaining obligations and the consequences of failing to reach an agreement. Currently, there are no time limits on the actual bargaining process if the union wins the election. In addition, there is no requirement that the parties come to an agreement – only that they bargain in good faith. For the most part, if the parties have reached impasse, the employer can implement its final offer to the union.

Pursuant to the proposed bill, a union can demand that an employer begin bargaining with it ten (10) days after the union is certified through the card check process. In addition, if the union and employer cannot come to an agreement on the first collective bargaining contract within ninety (90) days, either party can request federal mediation. If the parties still cannot agree after thirty (30) days of mediation, the matter will be referred to binding arbitration. Thus, there is a very real possibility that a third-party arbitrator – not the employer – will impose the terms and conditions of employment for the employees. In those cases in which an arbitrator determines the terms of the agreement, employees also lose their current right to ratify the agreement, cutting them out of the process entirely. These changes will significantly limit the parties' ability to develop creative compromises through negotiation and will place important decisions about employers' businesses in the hands of third parties.

Finally, the EFCA provides for stronger fines against employers that are found to have violated the NLRA. For example, if an employer is found to have terminated an employee for his or her union-related activities, it will now be required to pay three times the owed back pay. If a court or the NLRB finds that the employer acted willfully or repeatedly, a $20,000 penalty will be imposed.

If passed, the EFCA has the potential to create a dramatic surge in unionization – as its stated purpose is to allow for an easier process for employees to organize. Assisted living communities can expect to see an even bigger surge in unionizing attempts than they have seen in the past. The bill may be amended somewhat in an attempt to assure passage – such as providing for an expedited secret ballot election – but even if that amendment happens, the bill will still change the landscape on how the collective bargaining process is conducted. Employers should be speaking with their labor counsel to determine how to create workplaces that will not foster union organizing and to prepare for drastic changes in the bargaining process if the EFCA becomes law.

Some organizations are already galvanized in response to the union push on this bill. A group identifying itself as "Save Our Secret Ballot" has instituted a national campaign to urge states to adopt constitutional amendments requiring secret ballots for union representation elections. You can read more about the organization on its web site: http://www.sosballot.org/.