

## New Law Prohibits Discrimination for Employer-Sponsored Religious or Political Meetings

By Sally A. Piefer

Effective May 27, 2010, Wisconsin law prohibits employers from discriminating against or discharging employees who choose not to attend company meetings designed to discuss religious or political issues. The new law also prohibits employers from threatening to discharge or otherwise discriminating against employees as a means of inducing employees to attend company-sponsored meetings or participate in communications where the primary purpose is to communicate the opinion of the employer about religious or political matters.

The phrase *political matters* is defined to include political party affiliations, political campaigns, attempts to influence legislation, or decisions on whether to join or support lawful political or constituent groups or their activities. *Constituent groups* are defined to include civic associations, community groups, social clubs, fraternal societies, mutual benefit alliances, and labor organizations.

The new law does not apply to meetings or communications in the following limited circumstances:

- Where the primary purpose of the meeting or communication is to communicate information about religious or political matters that the employer is required by law to communicate and no information is communicated about those matters beyond what is legally required.
- Where participating in the meeting or other communication is strictly voluntary.
- Where the employer is a non-profit religious association or corporation that is primarily owned or controlled by a religious association and where the primary purpose of the meeting or communication is to communicate the employer's religious beliefs or practices.
- Where the employer is a political organization, including a political party or any other organization that engages, in substantial part, in political activities, and where the primary purpose of the meeting or communication is to communicate the employer's political beliefs.

## Federal Contractors Required to Post NLRA Rights Poster

By Sally A. Piefer

The U.S. Department of Labor recently published a final rule requiring certain federal contractors and subcontractors to alert employees about their rights under the National Labor Relations Act (NLRA). A covered contractor is required to post the Notice once it enters into a new or modified federal contract or subcontract after June 19, 2010. The Notice applies to prime contracts which exceed \$100,000 or to subcontracts which exceed \$10,000.



The Notice lists employee rights under the NLRA, including the right to form, join and assist a union and to bargain collectively. The Notice also provides examples of unlawful activity by unions and employers, and describes how an employee can contact the National Labor Relations Board (NLRB). A copy of the Notice is available from our website.

## Legislature Plans to Extend COBRA Subsidy and Jobless Benefits Through 2010

By Sally A. Piefer



H.R. 4213 proposes to extend through 2010 long-term unemployment benefits and the federal COBRA subsidy.

The COBRA subsidy requires employers to pay 65% of the monthly premium for continuation health insurance for employees who have been involuntarily terminated. Under the current law, eligibility for COBRA premium assistance will expire for individuals laid off after May 31, 2010. The proposed legislation would extend eligibility for the program to workers who lose their job by the end of 2010.

In addition, unemployment benefits for long-term unemployed employees is set to expire on June 2, 2010. The bill as proposed would extend the unemployment benefits until Dec. 31, 2010, which would increase the total of benefits to 99 weeks in many states.

Stay tuned for further developments.

## U.S. Supreme Court Expands Time Limits for Filing Disparate Impact Discrimination Claims

By Sally A. Piefer



Employers need to be wary of "disparate impact" claims. *What exactly is a "disparate impact" claim, you may ask?* When an employer is not motivated by discriminatory intent, state and federal law prohibit an employer from using a neutral employment practice that has an unjustified *adverse impact* on members of a protected class. Examples of practices that may be subject to a disparate impact challenge include written tests, height and weight requirements, educational requirements, and subjective procedures, such as interviews.

The U.S. Supreme Court recently clarified when disparate impact claims will be considered timely. In *Lewis v. Chicago*, the City of Chicago administered a written test to applicants for firefighter positions in 1995, and then notified the applicants of the results at the end of January 1996. Several African American applicants filed an EEOC charge in March 1997 alleging that the test had a disparate impact on black applicants and did not appropriately test firefighting aptitude. The EEOC charge was filed more than 400 days *after* the black applicants were notified of the test results, but within 300 days of the date the City began to hire applicants.

During the litigation, the City challenged whether the EEOC charge was timely. The trial court ruled that the lawsuit was timely because *each* hiring was a *fresh violation of Title VII*. The appellate court (7<sup>th</sup> Circuit) reversed, finding that "discrimination was complete when the tests were scored" and "was discovered when the applicants learned the results." Therefore, the appellate court found that the EEOC charge was not filed on time.

The Supreme Court recently unanimously *reversed* the appellate court decision. The Court stated that an employee who does not file a timely charge challenging the *adoption* of a practice may assert a disparate-impact claim in a timely charge challenging the employer's later *application* of that practice.

The Court said that, "a plaintiff establishes a prima facie disparate-impact claim by showing that the employer 'uses a particular employment practice that causes a disparate impact' on one of the prohibited bases."

Employers should use care when using employment tests or when using subjective procedures when making hiring decisions.

## New Penalties for Unemployment Insurance

By Sally A. Piefer

Employers can be assessed civil penalties for taking certain actions, including the following:

- knowingly making false statements or representation in connection with any reports;
- failing to keep or submit records;
- deducting from the wages of employees to lessen liability for contributions; or
- attempting to induce employees to refrain from claiming or accepting benefits.

The penalty increases to \$1,000 on July 4, 2010.

In addition, effective July 4, 2010, employers who discriminate or retaliate against an employee who claims unemployment benefits, participates in an audit or investigation by the Wisconsin Department of Workforce Development, testifies in a hearing, or exercises any other right under the unemployment insurance law, are subject to a penalty of up to \$1,000.

## Wisconsin Imposes Penalties for Misclassifying Workers

By Sally A. Piefer

While federal legislation is currently pending on the misclassification of employees as independent contractors, employers should be aware that Wisconsin has already taken steps to prevent misclassification.

Employers who willfully provide false information to the Department of Workforce Development for the purpose of misclassifying or *attempting* to misclassify a worker as a nonemployee can be subject to a \$25,000 fine for each violation.

As of May 27, 2010, this penalty provision includes employers and contractors who are engaged in the painting or drywall finishing of buildings or other structures.

On January 1, 2011, employers who fail to prove worker classification compliance, following an audit or investigation by the DWD, can be issued a stop work order. Employers who do not comply with the stop work order are subject to a penalty of \$250 for each day – beginning with the date the order is served and ending on the date the employer provides evidence that it has stopped work or that it is in compliance with the law.

All employers – regardless of size, should continue to be vigilant in ensuring that you are not misclassifying individuals as independent contractors. There are a variety of tests that are used to determine whether an individual is an employee or an independent contractor. Please contact your TSG attorney for further guidance.



## IRS Releases Revised Form 941 for HIRE Act Employees

By Sally A. Piefer



The IRS has issued a newly revised payroll tax form that eligible employers can use to claim the special payroll tax exemption that applies to many new workers hired during 2010, including the new payroll tax exemption and the related new hire retention credit created by the HIRE Act.

Employers who hire unemployed workers between February 4, 2010 and December 31, 2010 may qualify for a 6.2% payroll tax incentive. This incentive essentially exempts employers from its share of Social Security tax on wages paid to these workers after March 18, 2010.

In addition, for each qualified employee retained for at least a year whose wages did not significantly decrease in the second half of the year, businesses may claim a new hire retention credit of up to \$1,000 per worker on their income tax return.

Please contact TSG if you have further questions about the HIRE Act and how it might apply to you.

## Non-Union Concerted Activity – Is Your Company in Compliance?

By Cindy L. Fryda



Many employers believe that, if their employees are not unionized, they are not governed by the National Labor Relations Act (“NLRA”). However, this is not accurate. Employees engaging in “protected concerted activity” are covered under the NLRA. Therefore, it is critical for employers to understand what is “protected concerted activity”. Essentially, it is two or more employees expressing a concern about working conditions to management or one employee acting as a spokesperson bringing issues to management’s attention.

Employers should be cautious as to how they respond to this kind of activity. Employers who discipline, terminate, or otherwise engage in an action which tends to discourage the employees’ activity, may be held accountable for retaliating against employees. An employer may be required to reinstate employees who have been discharged for engaging in concerted activity with full back pay and interest. The employer may also be required to post the violation and the remedy for all employees to see.

In order to avoid interfering with nonunion employees’ protected rights, each employer should consider the following:

- Are two or more employees acting together, or is one employee acting as the representative of other employees?
- Are the employees engaging in the activity for their “mutual aid and protection”?
- Has the employer taken an employment action against the employees that negatively impacts the employee’s position with the company (e.g. discipline or termination) or otherwise discourages the employees from coming to management with concerns?

- Was the employer's action motivated by the employees' protected concerted activity?

- Did the employer know of the activity?

- Was the employer motivated to act by it?

The following areas of employment are uniquely vulnerable to claims under the NLRA. An employer can limit its risks under the law by taking these precautionary steps:

- **Committees.** Make certain that committees which include management and rank and file employees are purely for the purpose of information gathering. For example, a committee formed to discuss the employee handbook should be used only for getting input from the employees on what sections are unclear or confusing rather than a session where decisions are made as to what policies the company should employ.

- **Investigations.** In an NLRB decision issued in 2000, it was determined that nonunion employees have the same rights as union employees to ask for a co-worker to be present during an investigatory interview that could lead to discipline. The right exists as part of the right of both union and nonunion employees to engage in concerted activities under the NLRA.

- **Pay Policies.** Pay policies that prohibit employees from discussing their wages have been interpreted by the NLRB to be an unlawful interference with the right of employees to engage in concerted activity. The policy need not be in writing as long as it is orally communicated to employees.

- **Complaints About Company Policies.** Employee activity is protected when it involves two or more employees, or one employee acting on behalf of others, coming to management about terms and conditions of employment. If an employer responds with adverse employment action against the employee or employees, it may be deemed illegal.

For example, in *NLRB v. Henry Colder Co.*, 907 F2d 765 (7th Cir 1990), an employer fired a salesman for being an "outspoken critic" against special two-hour meetings which sales personnel were required to attend without compensation before the store opened. The employee was awarded reinstatement with full back pay plus interest.

Meetings requested by employees to discuss terms and conditions of employment are the proverbial minefield and should be approached with caution and preparation as to how best to respond. Employers should follow the concepts below to reduce the potential for liability:

- Attempt to meet with each employee individually, avoiding any risk of inadvertently "recognizing" the group as a bargaining unit.

- If individual meetings are not practical or possible, address each individual's concern or request as if he or she alone had raised the issue. For instance, rather than discussing the hours of the first, second and third shift together, discuss with the individual employee what their concerns are as to the hours.

- Use the meeting purely as an information gathering meeting. Gather the concerns of the employees, let them know that management will consider the concerns and will follow up individually with each employee.

- Avoid threats. A meeting involving employee concerns can strike an emotional cord for management. Be sure comments do not convey ill will toward the employee for coming to management with the concern. Keep the conversation positive and professional. An employer might say that the door is always open to discuss employee concerns but that it can only do what is possible considering the circumstances.

- Facts should be conveyed in a neutral manner. For instance, “The Company has decided to reduce wages by 3% for the next six months in order to avoid a lay off.”

- Do not discipline or terminate an employee for bringing concerns to management.

Finally, be sure to have your attorney review your policies and procedures for NLRA compliance and speak with your attorney prior to engaging in a meeting requested by employees to discuss terms and conditions of employment.

**The Schroeder Group, S.C.,  
Attorneys at Law**  
Crossroads Corporate Center  
20800 Swenson Drive  
Suite 475  
Waukesha, WI 53186  
**Main Phone**  
(262) 798-8220  
(800) 372-3020  
**Facsimile**  
(262) 798-8232  
[www.tsqglaw.com](http://www.tsqglaw.com)

**Sally A. Piefer**  
[sap@tsqglaw.com](mailto:sap@tsqglaw.com)  
**Direct Dial:** (262) 754-1325

**Cindy L. Fryda**  
[clf@tsqglaw.com](mailto:clf@tsqglaw.com)  
**Direct Dial:** (262) 754-1332

*If you have questions about the subjects discussed in this Issue, or if you need help with any employment matters, please contact your TSG attorney or one of the members of our Employment Law Team: **Sally Piefer** at (262) 754-1325, or by e-mail at [sap@tsqglaw.com](mailto:sap@tsqglaw.com); **Cindy Fryda** at (262) 754-1332, or by e-mail at [clf@tsqglaw.com](mailto:clf@tsqglaw.com).*

The Schroeder Group, S.C., Attorneys at Law provides comprehensive services covering all aspects of employment, employee benefits and labor relations law to closely-held businesses and companies. *This document is a publication of The Schroeder Group, S.C., Attorneys at Law and is intended to provide information on recent employment law developments. This document should not be construed as legal advice or an opinion on specific situations. You should consult with legal counsel before taking action to ensure its applicability to your particular situation.*