

# EMPLOYMENT, LABOR & BENEFITS QUARTERLY

January 2011



Welcome to the inaugural issue of the Employment, Labor & Benefits Quarterly, a newsletter addressing current issues written by attorneys who regularly provide counsel in these changing areas of law.

## Important Employment Law Decisions in 2010

**W**elcome to 2011! There was much to keep up on in 2010 in employment law, with major changes to health care, continued increases in discrimination claims before the EEOC, and landmark decisions issued by both Wisconsin and Federal Courts. This article is intended to provide some of the highlights of labor and employment law from 2010.

### Privacy Cases

In *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010), the U.S. Supreme Court analyzed an employer’s ability to monitor its employees’ texts on employer provided pagers. In this case, the City provided its police officers pagers to be used for work purposes. The City adopted a policy which indicated that the City reserved the right to “monitor and log all network activity, including e-mail and Internet use, with or without notice. Users should have no expectation when using these resources.”

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## What’s Coming in 2011

**W**ith big changes resulting from the November, 2010 election, we can expect some changes to Wisconsin employment and labor law in 2011. Rumors are rampant thus far, with indications that municipalities may see changes to the collective bargaining laws, including a possible Qualified Economic Offer law affecting all municipal employers, as well as the potential that the employee’s share of retirement contributions be a prohibited subject of bargaining. Time will tell whether these rumors will come to fruition. At the Federal level, many expect legislative gridlock on labor and employment related issues because of the split control of Congress. To the extent there are changes, they may be affected by administrative rulemaking by the Department of Labor (DOL) or the National Labor Relations Board.

For example, the DOL recently created a Private Attorney Referral Program to assist plaintiffs in obtaining legal counsel for claims under the Fair Labor Standards Act and the Family and Medical Leave Act. The DOL will provide a referral to a private lawyer in situations where the DOL decides not to pursue a claim. This initiative is the first of its kind and virtually ensures more employment-related claims to move forward.

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Ultimately, Quon exceeded the number of texts permissible under the City's plan with its provider, Arch Wireless. When notified that the texts exceeded the permissible number, the City investigated how Quon was actually using the pagers to determine whether its plan was appropriate, and determined that the vast majority of his texts sent during working hours were for personal reasons. In some cases, the texts were sexually explicit. As a result, the City disciplined Quon, and Quon sued the City for, among other things, violation of his Fourth Amendment Rights.

The U.S. Supreme Court determined that the City did not violate the Fourth Amendment when it searched the text messages. In analyzing this case, the Court articulated a two-step analysis. First, because some government offices may be so open that no expectation of privacy is reasonable, a court must consider the operational realities of the workplace to determine if an employee's constitutional rights are implicated. Second, where an employee has a legitimate privacy expectation, an employer's intrusion on that expectation for non-investigatory work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. The Court determined that the City had legitimate reasons for the search of the text messages in the first place, and consequently that the search was reasonable. As a result, the City did not violate Quon's Fourth Amendment rights. However, the Court interpreted these facts very narrowly, and determined that as the role and acceptance of personal use of technology continues to develop in the workplace, the law will develop as well.

In Schill v. Wisconsin Rapids School District, 2010 WI 86, the Wisconsin Supreme Court found in a 5-2 decision that the contents of purely personal e-mails of teachers are not subject to public disclosure through the Wisconsin Public Records Law. In this case, the District received an open records request seeking all e-mail correspondence from certain teachers. The teachers objected to the disclosure of purely personal e-mails. In a complicated ruling, the Court determined that the records were not subject to the open records law, although on differing grounds. The Court was unwilling to permit a categorical disclosure of all personal communication by public employees to the public. Disclosure of personal e-mails does not keep the electorate informed of the conduct of government business. Second, the Court acknowledged that some personal use of technology during a work day is more efficient than using other, more time-consuming methods of personal communication. Full disclosure of all communications of public employees "might hamper productivity, negatively impact employee morale, and undermine recruiting and retention of government employees." Like the Court's decision in Quon, the Wisconsin Supreme Court was reluctant to issue too broad of a decision until the personal use of technology becomes a more socially settled issue.



## News From the National Labor Relations Board

**Over 600 Board Decisions Invalidated by U.S. Supreme Court.** In New Process Steel, L.P. v. National Labor Relations Board, 130 S.Ct. 2635 (2010), the United States Supreme Court invalidated over 600 decisions issued by the National Labor Relations Board (NLRB). The NLRB is a five member board, but had only two members when it issued the decisions. The U.S. Supreme Court held that Congress' delegated authority to the NLRB could not be exercised with only two members. The Court found that "the Board's delegated power had to be vested continuously in a group of three members." As a result, all decisions issued by only two board members were invalidated.

**New Board Members Appointed.** As the New Process Steel case unfolded, President Obama was attempting to appoint two new board members, Craig Becker and Mark Pierce. Both Becker and Pierce have spent their careers working as union advocates. The appointments were filibustered by Senate Republicans, but in March 2010, President Obama made recess appointments. Therefore, the NLRB consists of three members appointed by Democrats and one by Republicans. It is widely speculated that the Democratic control of the NLRB will result in an expansion of union rights.

**NLRB Adopts New Notice Provisions.** On December 21, 2010, the National Labor Relations Board submitted to the Federal Register a notice of proposed rulemaking which provides for a 60-day

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## Pending Cases

There will surely be litigation that effects employers in 2011. The U.S. Supreme Court will consider Dukes v. Wal-Mart Stores, Inc., 603 F.3d 371 (9th Cir. Cal., 2010), where the plaintiffs are seeking the Court to certify a class of about 1.6 million women in a gender discrimination class-action lawsuit. This case is the largest employment discrimination class in history. If the Court permits class certification and permits the case to move forward, the door will open to other massive employment class actions involving large numbers of employees. The U.S. Supreme Court will also consider the "cat's paw" doctrine.

In Staub v. Proctor Hospital, 560 F.3d 647 (7th Cir. Ill., 2009), the Court will consider whether an employer may be found liable where a neutral decision maker terminates an employee based on tainted information provided by a subordinate supervisor who was allegedly motivated by discriminatory animus. At the 7th Circuit Court of Appeals, the Court found that to be liable, an employer must blindly rely on the discriminating subordinate supervisor.

In Thompson v. North American Stainless, 567 F.3d 804 (6th Cir. Ky., 2009), the Court will decide whether fiancés, close to a co-worker who has complained of workplace discrimination, are protected from termination or other forms of retaliation under Title VII. In this case, the plaintiff claimed that he was terminated because his fiancé, who also worked for the defendant, filed a claim with the EEOC. The Court of Appeals found that the plaintiff did not have a claim under Title VII, as he did not personally oppose an unlawful employment practice.

The Wisconsin Supreme Court will consider DeBoer Transportation, Inc. v. Charles Swenson, 2010 WI App 54. The issue in this case is whether an employer must provide injured workers special accommodations for personal obligations not provided to uninjured workers. In Steffens v. BlueCross BlueShield of Illinois, 2010 WI App 135, the Court will consider whether an employment based (ERISA) health care plan is entitled to reimbursement when a plan participant asserts in the course of personal injury litigation that corrective surgery resulted from an automobile accident and secures a settlement from the tortfeasor that compensates the cost of surgery.

## EFCA Dead? Not So Fast!

With the passage of the Employee Free Choice Act (EFCA) almost guaranteed an impossibility as a result of recent national elections, one might conclude that labor unions didn't get much bang for their buck for supporting the election of President Barack Obama in 2008. While EFCA may be dead, the underlying goals that prompted the introduction of that legislation live on in recent decisions, proposed rulemaking, and pronouncements emanating from the National Labor Relations Board (NLRB). Therefore, it is entirely possible that organized labor will get much of what it wanted and will finally get its payback. Several decisions have been issued by the NLRB that adversely effect employers in their efforts to combat union organizing. Moreover, every indication is that more pro-union decisions are on the way. The new board appears to be looking for any reason to overturn union elections won by employers.

[Read the full article here.](#)

## Recent Legal Updates

The 2010 Tax Relief Act: What It Means For Employers

2011 Standard Mileage Rates

Employers May Not Terminate At-Will Employees To Avoid Paying Accrued Benefits

[Legal updates can be found online in our Resource Center at \[ruderware.com\]\(http://ruderware.com\)](#)

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comment period. The new proposed rule would require employers to notify employees through a posting of their rights under the National Labor Relations Act (the "NLRA"). If the proposed rule is adopted, it would require private-sector employers to post notices of employee rights under the NLRA. The proposed notice would contain a summary of employees' rights under the NLRA. In addition to requiring physical postings of paper notices, the proposed rule requires that notices be distributed electronically, such as by e-mail, posting on an Intranet or Internet site, and other electronic means, if the employer customarily communicates with its employees by such means.

**Facebook Rant Protected Speech?** In November, 2010, the NLRB filed an unfair labor practice complaint against American Medical Response of Connecticut, Inc. alleging that it has an overbroad Internet and blogging policy that interferes with an employee's right to engage in protected activity. In the complaint, the NLRB has alleged that the company's policy, which bars employees from making disparaging remarks about the company or their supervisors, is a violation of an employee's rights under the NLRA. The NLRA gives employees a federally protected right to form unions and prohibits employers from punishing employees – whether union or non-union – from discussing working conditions or unionization.

In this case, an employee was fired for negative remarks (including vulgar language) made about her supervisor on the employee's private Facebook page. It is alleged that the employee also wrote, "love how the company allows a 17 to become a supervisor." 17 is the Company's lingo for a psychiatric patient. The unfair labor practice complaint is in its initial stages. An Administrative Judge is scheduled to hear the case on January 25, 2011.



## Significant Wisconsin Cases

**Non-Compete Agreements Now Divisible.** In *Star Direct, Inc. v. Dal Pra*, 2009 WI 76, the Wisconsin Supreme Court reviewed a common non-compete agreement that contained a non-solicitation clause, a non-compete clause, and a confidentiality clause. The Wisconsin Supreme Court found that the customer and confidentiality clauses were enforceable restrictive covenants, but found the non-compete covenant was unenforceable. The *Star Direct* case is notable because the Court found that since each clause dealt with separate interests, compliance with one did not depend on compliance with another. Also, since the clauses could be read and understood separately, the three clauses were found to be divisible. Therefore, the employer was able to enforce the customer and confidentiality clauses, even though the business clause was unenforceable. The effect of this decision is that it will be easier for employers to enforce non-compete agreements, as courts will need to separate the enforceable from the unenforceable provisions.

**Non-Compete Agreement Analyzed Under Rule of Reason.** In *Selmer Company v. Rinn*, 2010 WI App 106, the Court of Appeals analyzed a restrictive covenant that was signed by a manager as a condition to purchasing stock in the company. The Court determined that a stock option agreement was sufficient consideration for a restrictive covenant. In addition, this case dealt with the standard in which a court analyzes the covenant. The Court did not apply Wis. Stat. 103.465, which is the higher standard of review, but instead applied the rule of reason. As such, the Court upheld the restrictive covenant and awarded significant damages to the plaintiff.

**More Employees May Owe Duty of Loyalty to Employer.** In *InfoCorp. v. Hunt*, 2010 WI App 3, the Wisconsin Court of Appeals considered whether an employee owed a duty of loyalty to their employer. Prior to this decision, the general rule in Wisconsin was that only high level employees such as executives, officers, or directors, owed a duty of loyalty to their employer. The Court of Appeals expanded the duty of loyalty to include certain "key employees" whose job responsibilities include those that could be manipulated by the employee to cause direct harm to the employer.

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Topic: Human Resources & Employment Law Conference  
Date: April 7, 2011 @ Stoney Creek Inn  
Sponsors: Central Wisconsin Society of Human Resource Management and Ruder Ware

Topic: Annual Local Government Seminar  
Date: April 26, 2011 @ The Great Dane  
Sponsor: Ruder Ware

## Details on Ruder Ware Seminars

- Unless otherwise noted, seminars are complimentary.
- Seminar materials are included with each presentation.
- Registration deadline is seven calendar days prior to the date of each seminar.
- Seating is limited.
- Check [www.ruderware.com](http://www.ruderware.com) for details.
- Previous seminar topics have included health care reform, social networking, and FMLA.

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