

EMPLOYMENT, LABOR & BENEFITS QUARTERLY

July 2011



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

Collective Bargaining for Public Employees is Virtually Eliminated for Some and Significantly Changed for Others

By: Dean Dietrich

Recent action by the Wisconsin Legislature has significantly changed the landscape of collective bargaining for public employees in Wisconsin. The changes to Section 111.70 and Section 111.77 of the Wisconsin Statutes affect all public employees but affect them in very different ways depending upon the classification of the employee.

Most public employees are no longer allowed to negotiate with the public employer over conditions of employment. The only topic that can be discussed in collective bargaining for a labor agreement for most public employees is the amount of a general wage increase that will be paid to positions in the bargaining unit. A public employer is prohibited from bargaining with the public employee union over any working conditions or fringe benefits; these are to be set by the public employer in accordance with its regular policies and decision-making process. Issues such as premium pay, special compensation, or overtime compensation also are not subject to collective bargaining with the public employee union.

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Federal Court Confirms Validity of EEOC's Expansive Investigatory Powers In Discrimination Cases

By: Bryan Symes

In Equal Employment Opportunity Commission v. Konica Minolta Business Solutions U.S.A., Inc., the United States Court of Appeals for the Seventh Circuit (which has jurisdiction over Wisconsin businesses) recently endorsed the EEOC's aggressive use of its investigatory powers to collect employment-related information in discrimination cases. As a result, employers should be on high alert.

The legal action arose out of Business Solutions' ("Konica") decision to terminate the employment of an African-American salesman ("Thompson") who had approximately eight months of experience on the job. Thompson filed a charge of discrimination with the EEOC, alleging Konica subjected him to different terms and conditions of employment, disciplined him for not meeting sales quota (he claimed Konica did not discipline a non-black, similarly situated co-worker who allegedly failed to meet his sale quota), and terminated his employment in the wake of a race-discrimination complaint he lodged with Konica's human resources department (Konica terminated Thompson's employment ten days after he allegedly lodged his internal complaint with human resources department).



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Attorneys  
Dean R. Dietrich, Chair

Sara J. Ackermann  
Jeffrey T. Jones  
Ronald J. Rutlin  
Mary Ellen Schill  
Bryan T. Symes

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The EEOC conducted an administrative investigation into the validity of Thompson's allegations of race-based discrimination. Konica cooperated initially. Through the EEOC's initial investigation, the EEOC discovered that of Konica's 120 total employees, only six were African-American—and all six African-American employees were employed at one of Konica's four facilities. The EEOC also discovered that within the single facility in which all of Konica's black employees worked, employees were divided into two sales teams, which were segregated largely along racial lines. As a result of its preliminary investigation, the EEOC suspected that Konica may have engaged in discriminatory hiring practices. To that end, the EEOC issued a wide-reaching administrative subpoena to Konica seeking numerous records related to the hiring of sales personnel at all four of Konica's facilities, including:

- Application forms of those who pursued sales work at any of the four facilities (not just the facility at which Thompson worked)
- Communications with applicants about sales positions
- Evaluations for each applicant for sales positions
- Information about each applicant, including each applicant's race



Konica refused to comply with the EEOC's subpoena, claiming the materials the EEOC requested were completely irrelevant to Thompson's charge of race discrimination. In response to Konica's refusal to comply with the subpoena, the EEOC filed an application with a federal trial court seeking an order requiring Konica's compliance. The trial court ordered Konica's compliance, concluding that it was reasonably relevant to the EEOC's investigation into Thompson's charge of discrimination. On appeal, the federal appellate court affirmed the trial court's decision to require Konica's compliance with the subpoena, endorsing the EEOC's expansive investigatory power to obtain "virtually any material that might cast light on the allegations against the employer." According to the federal appellate court, although Thompson's discrimination charge was related to being disciplined for failing to realize his sales quota, information about Konica's hiring practices "cast[s] light" on Thompson's race-discrimination complaint.

Significantly, the appellate court opined, "[t]he answer to the question of whether Konica discriminates in hiring or in assigning employees to its various facilities will advance the agency's investigation into possible discrimination against Thompson based on his race, as well as any more general case it might choose to bring." [underscore added for emphasis]. The Court rejected the notion that the EEOC "embarked on the proverbial fishing expedition," and further acknowledged that the EEOC is vested with broad investigative authority in furtherance of its "broader mission" to eradicate discrimination in the workplace.

The [Konica Minolta](#) opinion illustrates how the EEOC's investigation into a single claim of discrimination can quickly balloon into an intrusive examination of an employer's systemic workplace practices. In response to [Konica Minolta](#) and its blessing of the EEOC's "mission creep," employers faced with charges of discrimination are encouraged to carefully scrutinize responses to administrative requests for information and narrowly tailor position statements to ensure that the EEOC is provided with responsive information, but not more information than is absolutely necessary.

The only issue that may be negotiated is the general wage increase to be given to the employees on a yearly basis. A general increase may not exceed the increase in the Consumer Price Index that existed six months prior to the date of the new labor agreement. For most public employees, the new labor agreement will consist of a title page, a recognition clause, and a listing of wage rates for positions or employees.

Collective bargaining for public safety employees (firefighters, police officers, and deputy sheriffs) is very different. The public employer is required to negotiate with the union representing the public safety employees in generally the same fashion that has occurred in the past. Recent changes in the Budget Bill, however, have placed limitations on the subjects for bargaining with the public safety employee unions. The public employer is not required to bargain with the public safety employee union over the structure and design of the health insurance plan that the public safety employees participate in as a benefit of employment. This provides additional flexibility to the public employer to exercise control over the design and structure of the health insurance plan provided to all of its employees. The amount of premium contribution is still a subject of bargaining as is the amount of employee contribution to the Wisconsin Retirement System ("WRS") for current public safety employees. Newly hired public safety employees must pay the employee-required contribution to WRS like general municipal employees.

The collective bargaining law for public safety employees has also been changed to require an interest arbitrator that is considering an interest arbitration dispute between the public employer and the public safety employee union to give the greatest weight to the local economic conditions that impact upon the ability of the public employer to give the wage increase sought by the public safety employee union.

Collective bargaining for transit workers is also different than collective bargaining for general public sector employees. Transit workers are defined as those employees whose compensation is funded by federal funds through state and federal transit programs. A determination of whether or not an employee or a position in the transit department would qualify as a transit worker and therefore be afforded additional collective bargaining rights will depend upon union election proceedings administered by the Wisconsin Employment Relations Commission.

Under the municipal collective bargaining law, transit workers are entitled to the same bargaining rights that they have previously enjoyed. This means that transit worker unions can continue to negotiate over wages, hours, and conditions of employment as in the past. Transit worker unions may also proceed to interest arbitration and are subject to the same arbitration criteria that existed in the past. Simply stated, transit worker unions continue to bargain with the public employer under the same conditions and ground rules that existed prior to any changes to the municipal collective bargaining law. How this will impact discussions on health insurance benefits remains to be clarified under the provisions of the new collective bargaining law.



## IRS Announces Mid-Year Adjustment of Business and Medical Mileage Rates

By: Mary Ellen Schill

Due to the increases in the cost of gasoline since establishing the 2011 rates last year, the Internal Revenue Service is increasing mid-year the optional standard mileage rates for computing the deductible cost of operating an automobile for business, medical, and moving expenses. Effective July 1, 2011, the optional standard mileage rates will be 55.5 cents per mile for business transportation, and 23.5 cents per mile for travel relating to medical and moving transportation expenses.

These increased mileage rates apply only to those expenses incurred or paid by a taxpayer on or after July 1, 2011 (and if reimbursed by an employer, reimbursed by the employer on and after that date). Expenses incurred prior to July 1, 2011 (whether reimbursed by the employer before or after that date) are still subject to the old 2011 rates (51 cents for business transportation, 19 cents for medical and moving transportation). The standard mileage rate for the deduction for charitable contributions remains 14 cents per mile.

This increase in mileage rates is relevant to employers that reimburse employees for business transportation based on mileage. While there is no legal requirement that employees be reimbursed at the IRS standard rate, many employers have a policy of doing so. As a reminder, any payments to an employee based on business travel at a rate in excess of the IRS standard rate generally is taxable income to the employee.

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## AFTER FMLA

By: Jeff Jones

**W**hat should an employer do when an employee has exhausted his/her Family and Medical Leave Act (FMLA) leave and is still unable to return to work? The answer to this question can be complicated based upon the particular facts.

If an employee is unable to return from FMLA leave and the employee has a disability within the meaning of the law, the reasonable accommodation requirements of the Americans with Disabilities Act (ADA) and Wisconsin's Fair Employment Act (WFEA) are triggered. Indeed, with the expansion of the ADA as a result of the ADA Amendments Act, it is expected that there will be far more situations involving the duty of reasonable accommodation at the end of FMLA leave. However, temporary conditions such as broken limbs, elective surgeries, and surgical procedures from which an individual will fully recover, do not usually qualify as disabilities and, therefore, do not require an accommodation. Other conditions such as chronic migraines and diabetes, generally qualify as disabilities and do trigger the accommodation requirements.

The first step in the accommodation process is to engage the employee in an interactive discussion as to what accommodations you can provide the employee to permit their return to work. The interactive discussion can include telephone conversations or even e-mail exchanges with the employee. Regardless of how the communication occurs, it should be well documented.

There is no finite list of accommodations for an employee who is unable to return to work. Employers should consider all feasible options. Recent cases under the WFEA have indicated that an employer may be required to modify the job duties of the employee's position to create, in essence, a new job by removing duties that the employee cannot perform from the old job. An accommodation can also include transferring an employee to a position that has duties that the employee can perform, modifying the employee's work hours, or providing an additional leave of absence beyond the FMLA leave.

There is no bright line rule as to how much leave must be provided beyond the end of FMLA leave as an accommodation, with the exception that the Equal Employment Opportunity Commission (EEOC) will likely find any policy which states that leave will be provided only for a specified period of time and that once exhausted, the employee will be terminated, to violate the ADA. Indeed, the EEOC has been vigorously pursuing employers who have adopted such policies. Also, on June 8, 2011, the EEOC held public meetings on the subject of reasonable accommodations and leaves of absences under the ADA. The meeting was held in light of two recent settlements that the EEOC had reached regarding employer policies providing for automatic employee termination on expiration of a set leave period. One matter settled for \$6.2 million. The \$6.2 million settlement was probably the largest stand alone ADA settlement in EEOC history. The other matter settled for \$3.2 million, with additional detailed policy and training mandates.

On the other side of spectrum, however, is the fact that case law still indicates an employer is not required to provide an employee with an indefinite leave of absence. Between these two spectrums lies the reasonable accommodation answer, which will depend upon the facts of any particular case.

Thus, what should an employer do when an employee exhausts his/her FMLA leave and cannot return to work? All of the following:

- Modify or eliminate any policy that states that an employee will be terminated after a specific amount of leave.
- Determine if the employee has a disability protected by law if the employee cannot return to work.
- If so, carefully analyze the employee's situation and determine if you can provide the employee with a reasonable accommodation that will permit the employee to return to work in some capacity.
- Identify what accommodations you may be able to provide to the employee to permit the employee to return to work. Everything is wide open on this issue.
- Engage the employee in an interactive discussion to determine if the employee has ideas of possible accommodations. In this process, you may wish to call upon experts who can assist in determining reasonable accommodations, including the employee's doctor.
- Consider implementing an accommodation on a trial basis. See if it works. If it does not work, do not rule out other possible accommodations.
- If you are faced with a difficult situation, consider reviewing it with your employment attorney before you act so you know what options you have and what potential liability you may be exposed to if you select one option over another.



## News From the National Labor Relations Board

By: Ron Rutlin

A National Labor Relations Board (NLRB) Administrative Law Judge could make a billion dollar business decision on behalf of one of America's largest manufacturers. At issue is whether an employer has the right to move business away from a unionized plant that has a history of expensive striking, to a new facility in a right to work state after it has bargained with the union on concessions necessary to keep the work at the unionized facility. The National Labor Relations Board's decision to file a complaint is being strongly criticized as being politically driven and less about the legality of Boeing's decision to move its 787 Dreamliner production line.

The Administrative Law Judge recently heard testimony in Seattle, regarding allegations contained in a complaint filed by the NLRB on behalf of the International Associate of Machinists and Aerospace Workers ("IAM") Union against Boeing. The complaint, which was filed in April 2011, alleges that the manufacturer located its new assembly line in North Charleston, SC, to retaliate against union workers for exercising their right to strike. As a remedy for this alleged unfair labor practice, the NLRB seeks an order that Boeing operate its second 787 Dreamliner production line not in South Carolina, but in Washington.

Boeing and the union have a long history of labor disputes. The IAM workers have struck 4 times between 1989 and 2008. These strikes accounted for over 6 months in lost work time and cost Boeing almost \$4 billion in projected losses.

In 2007, Boeing announced plans to assemble seven 787 Dreamliner airplanes every month in the Puget Sound area of Washington. After voluntarily entering into good faith negotiations with the union to keep the entire production line in Washington, talks broke down between the parties, resulting in the most recent strike in 2008. According to Boeing, "[the company] had hoped to secure a long-term agreement with a no-strike clause that would ensure production stability for its customers and be cost competitive for the future." However, Boeing could not agree to the terms presented by the union, including a guarantee that Boeing would place all future commercial airline production in Puget Sound and a promise to remain neutral in all IAM campaigns nationwide. As a result, Boeing opted to build the new facility in North Charleston.

The union claims that Boeing decided to place the new production line in South Carolina in retaliation to the 2008 strike. The National Labor Relations Act prohibits employers from retaliating against workers for engaging in lawful activities. Boeing President Jim Albaugh denies that the decision was in retaliation to the strikes and states firmly that it was the company's intent to keep the production line in Everett, but that after talks broke down, the company determined through an objective business analysis that South Carolina was the best location. Further, Albaugh emphasizes that the remedy requested by the NLRB would effectively shut down a plant in South Carolina that creates more than 9,000 total jobs in the state and a plant that Boeing invested more than \$1 billion to build. Such a remedy is "brazen regulatory activism on the U.S. manufacturing base and long-term job creation" states Albaugh.

Those in South Carolina also believe that the action is an attack on employers. According to South Carolina Senator Jim Demint, "this is nothing more than a political favor for the unions who are supporting President Obama's re-election campaign. Using the federal government as a political weapon to protect union bosses at the expense of American jobs cannot be tolerated." Nikki Haley, the governor of South Carolina who was sued by the IAM after she stated she was opposed to unions, believes that the NLRB's suit is an attack on right-to-work.

"This is an absolute assault on a great corporate citizen and on South Carolina's right to work status. We will continue to do everything we can to protect that status, and to stand with companies like Boeing...This bullying will not be tolerated in South Carolina."

The IAM workers at Boeing have not lost any jobs in Washington because of the South Carolina plant. In fact, "IAM employment in Puget Sound has increased by approximately 2,000 workers since the decision to expand in South Carolina was made."

The NLRB complaint cites multiple instances of company executives making statements alluding to the strikes as motivation for the move from Everett. Boeing CEO Jim McNerney allegedly made a statement regarding "diversifying Boeing's labor pool and labor relationship," and moving the production line to South Carolina due to "strikes happening every three to four years in Puget Sound." The NLRB further cites a video-taped interview of Jim Albaugh with a Seattle times reporter during which Albaugh stated Boeing decided to relocate because of past union strikes and the threat of future strikes.

While a final decision in this case is likely to come months or years from now, employers and executives in unionized industries should take note and learn from Boeing's possible missteps. Public statements and internal company communications can be used to imply an improper motive for legitimate and otherwise totally legal business decisions. While previous decisions of the NLRB regarding a company's right to transfer work from a unionized facility to a non-union facility support Boeing's actions in this case, the company would be facing far less legal trouble had the company and its executives not made the alleged statements.

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## NLRB Considers New Procedures to Expedite Union Election Process

The National Labor Relations Board, which conducts union elections for private sector employers, is considering adoption of new procedures to expedite the union election process. One of the negative outcomes of this proposed change in election procedures would be a reduction in time for a private employer to engage in an anti-union campaign with its employees. More information about these anticipated changes will be contained in the next edition of the Ruder Ware Employment, Labor & Benefits Quarterly e-Newsletter.

### Employment, Labor & Benefits Attorneys



Dean Dietrich, Chair  
ddietrich@ruderware.com



Jeff Jones  
jjones@ruderware.com



Mary Ellen Schill  
meschill@ruderware.com



Sara Ackermann  
sackermann@ruderware.com



Ron Rutlin  
rrutlin@ruderware.com



Bryan Symes  
bsymes@ruderware.com