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FIVE UNIONS FORM CHANGE TO WIN COALITION

1 Five international unions – Laborers
2 Union, Teamsters, Service Employees
2 International Union (SEIU), United Food
2 and Commercial Workers (UFCW), and
2 UNITE HERE – have organized a new
2 coalition entitled the “Change to Win
3 Coalition.” The primary purpose of the
3 Coalition, according to its Constitution,
3 is to “help millions more workers join the
3 union movement” on the assumption
4 that “the only way to bring true change
4 in the direction of our nation” is for the
4 labor movement to “grow on a mass
4 scale.” Coalition officials have stated
4 that their main disagreement with the
4 AFL-CIO is its unwillingness to allocate
4 sufficient resources to union organizing
4 and its decision to emphasize political
4 action, rather than expansion of union
4 ranks.

One issue raised by the formation of the Coalition is how its existence will affect the continued functioning of the AFL-CIO. As of now, three of the five participating unions – SEIU, UFCW, and the Teamsters – have resigned from the AFL-CIO. The Laborers have decided to stay in the AFL-CIO, and it is expected that UNITE HERE will also withdraw.

Another issue is whether unions in the Coalition which resign from the AFL-CIO will be free to raid AFL-CIO unions. Such raids are now precluded by the AFL-CIO Constitution. But after a union disaffiliates from the AFL-CIO, those restrictions will not be in force. The Coalition’s Constitution states that Coalition members will not raid “any other labor organization in disrupting the representation rights of the members of another affiliated labor organization.” This language is hardly explicit but

seems to say that the no-raid rule applies only to “affiliates,” which is defined elsewhere in the Constitution as encompassing only unions that affiliate with the Coalition. The prospect of Coalition members raiding AFL-CIO unions raises the possibility of wide-scale raids that are not prohibited by the AFL-CIO Constitution.

This is not the first time that labor unions have vowed to increase membership. To date, American unions have been unsuccessful in increasing their ranks, and the private sector percentage of unionized workforce has continued to drop from over 35% in the 1950s to under 8% today.

It remains to be seen how the new Coalition will affect that percentage, if at all. We suspect that the decline in private sector unionization stems from several factors, some of which pose major difficulties for any union. For example, the loss of union power stems in significant measure from the loss of public support that unions previously enjoyed. Without that support, the ability of a union to obtain economic gains by threatening economic action is greatly impaired. That employers have the ability to relocate or outsource the work of unionized employees – either to other parts of the country or internationally – is another factor which makes it difficult for unions to increase the unionized sector of private employment. Not surprisingly, much of gains achieved by unions have occurred in industries where the jobs cannot be moved, such as hospital workers, building service employees and teamsters. A third factor is that unions have not yet found a way to organize most of the growing sectors in the economy, such as technological or internet providers. Whether the

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Coalition for Change, even with more money allocated to organizing, can overcome these obstacles remains to be seen.

NON-COMPETE AGREEMENTS: WILL THE COURT USE A BLUE PENCIL?

Non-compete agreements are commonplace. Some companies have drafted non-compete agreements as broadly as possible, believing that even if a court does not enforce the agreement in its broadest form, the court will "blue pencil" the agreement and enforce it to the extent that it is found to be legal. A recent case in New Hampshire illustrates the risk of this approach. *Merrimack Valley Wood Products Inc. v. Near*, 22 IER Cases 1696 (Sup. Ct. NH, 2005).

The plaintiff in this case, Near, worked as a sales representative for a company that manufactured "millwork" such as doors and window units. Six months after being employed, Near was asked to sign a non-compete agreement which said that for six months following termination of his employment, he would not solicit any customer of the company for twelve months. After his employment terminated, the company sought to enforce this agreement. It argued that the covenant not to compete was reasonable, and, even if it wasn't, it was signed in good faith and should be enforced to the extent legally permissible.

The Supreme Court of New Hampshire found otherwise. It noted that the company had about 1,200 customers and that Near serviced about 60 of them. The court found that Near had no particular claims on the good will of 1,140 of the company's customers, and in relation to those customers, Near was in no better position than a stranger. Therefore, the court found that the restrictive covenant was broader than necessary to protect the company's interests and failed the reasonableness test.

The court then turned to the company's contention that the agreement should be enforced to the extent that the court determined it was reasonable, a practice known as "blue penciling." The court noted its ability to "reform" agreements that had been executed in good faith. It found, however, that Near's agreement had not been executed by the company in good faith. It noted that when Near was hired, he was told nothing about a non-compete agreement; that he was asked to sign the agreement six months later and was told at that time that he had to sign the agreement to keep his job. Because the company had not acted in good faith, the court declined to "blue pencil" the agreement and found it unenforceable.

The reluctance of courts to "blue pencil" restrictive covenants seems to be increasing. For example, the Supreme Court in Georgia recently held that it would not permit blue penciling of restrictive covenants because it wanted, as a matter of policy, to encourage companies to draft such agreements more carefully and limit them to protections actually needed.

Restrictive covenants are often difficult to enforce because courts perceive them as limitations on a former employee's ability to make a living. This case illustrates the danger to a company if it drafts an overly broad restrictive covenant and suggests, that in drafting such agreements, the company should include only those protections which are necessary to protect its interests based on each employee's circumstances.

COMMUNICATING NEW COMPANY POLICIES BY EMAIL: DOES IT BIND THE EMPLOYEE?

General Dynamics amended its employment policies to require that all employment-related disputes be resolved in arbitration. The purpose of

this policy change was to waive the right of employees to bring discrimination lawsuits. General Dynamics communicated this change in policy to all affected employees by email. The court of appeals in Boston held that the email communication did not constitute a valid agreement to arbitrate under the Federal Arbitration Act. *Campbell v. General Dynamics, DLL*, May 26, 2005.

The plaintiff, Campbell, sued General Dynamics in federal court for discrimination. General Dynamics moved to dismiss the case, claiming that Campbell was obligated by the company's employment policy to submit his discrimination claim to arbitration. The issues, according to the court, were whether General Dynamics' policy requiring employment disputes to be submitted to arbitration was a valid contract to arbitrate under the Federal Arbitration Act and whether enforcement of that contract was appropriate in the circumstances of this case. The court assumed that the policy did constitute a valid contract but held that enforcement of that contract was not "appropriate" in this case.

The court's assumption that the email policy established a valid contract is interesting since other courts might have held that the policy, which was unilaterally promulgated without independent consideration, did not establish a valid contract. For this reason, companies that institute new policies which waive rights that employees have under law (in this case, to sue in court for discrimination), usually couple those policies with the grant of some benefit (like a bonus) which provides legal consideration for the policy. The court stated that it could "easily envision circumstances in which a straightforward e-mail, explicitly delineating an arbitration agreement, would be appropriate." Although this court seemed willing to accept the concept that waiver of statutory rights could be accomplished by email, companies would be well advised to obtain more definitive confirmation that the waiver was made clear by, for

example, requiring confirmation of receipt by the employee.

On the question of whether enforcing the new policy was "appropriate," the court emphasized that enforcement is not appropriate unless the employee receives "some minimal notice" that he is waiving statutory rights. It also found significant the fact that there were no prior examples of the company introducing new contract terms by email. The court also emphasized that employees were not required to acknowledge receipt of the new policy and that the email containing the new policy did not explicitly contain a statement that the policy was intended to waive the employees' right to sue in court. These factors, in combination, led the court to conclude that enforcement of the agreement to arbitrate was not "appropriate" in the circumstances of this case.

This case is ultimately about how new employment policies which waive statutory rights should be communicated to employees. It shows that apart from the issue of consideration, a waiver of statutory rights must be spelled out explicitly and acknowledged by the employee in writing.

SURVEILLANCE CAMERAS IN THE WORKPLACE: WHEN MUST THE ISSUE BE BARGAINED?

In the last several years, the NLRB has issued several decisions holding that companies must bargain with their union before installing hidden surveillance cameras in the workplace. We have long had reservations about these rulings because they seemed to negate or seriously hamper one of the purposes of surveillance: to apprehend employees who, if they knew that hidden cameras might be installed, would be able to avoid detection.

The court of appeals in Washington has

just affirmed the latest NLRB decision requiring bargaining over the installation of surveillance cameras in the workplace. *Brewers and Malsters Union v. NLRB*, DLR, July 6, 2005. Since other courts have sustained the NLRB on this issue, endorsement by the DC Circuit seems to put this issue largely to rest for the foreseeable future.

The technical issue before the court in this case was whether installation of surveillance cameras was a mandatory subject of collective bargaining, *i.e.*, a subject about which the employer must bargain. While requiring bargaining, the court limited the scope of the employer's obligation by emphasizing that the bargaining obligation does not require the employer to disclose the specific location of the cameras or when those cameras might be installed. Rather, the court suggested that the employer and the union could bargain over the general standards, such as whether cameras would be used at all, in what general areas, whether the employer would need some kind of suspicion or cause to utilize the cameras and whether the cameras could be used to discipline employees. Such bargaining, according to the court, would not require the employer to disclose the specific location of the cameras and would preserve the employer's ability to engage in surveillance while also involving the union in the development of terms and conditions of work.

The problem that we see in this analysis is that it avoids consideration of what will happen if the union and the company cannot agree. Under ordinary precepts of Board law, the employer could not unilaterally change working conditions by installing surveillance cameras without either an agreement with the union or bargaining to impasse over the specifics of the installation, *i.e.*, where specific cameras would be installed and when. If that information had to be provided, the purpose of the hidden cameras would have been largely defeated. Perhaps the court was suggesting that an employer can

unilaterally implement a proposal for surveillance cameras after bargaining to impasse if the proposal contains specific standards defining when and how implementation of those cameras will be deployed. However, the court did not say that explicitly. For now, employers can certainly bargain with the union over general standards for surveillance cameras, but, if agreement can't be reached, the ability of the employer to implement its proposal is problematic.

FMLA CLAIMS: CAN THEY BE WAIVED BY AGREEMENT?

A recent decision by the court of appeals for the fourth circuit raises the question of whether an employee's claims under the FMLA can be waived by the employee in a private agreement. *Taylor v. Progress Energy*, (July 20, 2005). The case arose when the plaintiff, Taylor, had a disagreement about the amount of FMLA leave to which he was entitled, and Taylor was then terminated because of protracted absence. As part of the termination, Taylor signed an agreement which provided for certain benefits in return for a general release. Although the release did not specifically mention FMLA, it did provide for release of rights under any federal or state laws.

When Taylor sued the company for alleged violation of her FMLA rights, the company asserted the general release as a defense. Taylor countered with the argument that the release was invalid because the Department of Labor regulations interpreting FMLA state that "employees cannot waive . . . rights under the FMLA." The company argued that this regulation was intended to prevent employees from giving up their FMLA rights in the future (for example, by agreeing that the company would not have to grant FMLA leave to them) and that it wasn't intended to prevent a waiver of rights as part of a settlement of an FMLA dispute.

The court read the regulation literally and found that it was broadly intended

to prevent employees from waiving any rights under FMLA unless that waiver was approved by the Department of Labor or a court. The court noted one of its own decisions holding that an employee's agreement to arbitrate disputes under FMLA was valid but found that decision inapposite because arbitration preserves the FMLA right while a release in a private agreement waives it.

This is a surprising decision from an otherwise conservative court, and it poses problems for employers who are trying to resolve FMLA claims. It appears that another circuit court disagrees with the fourth circuit and has found that the DOL regulation is only intended to waive future FMLA rights, not past rights as part of an overall settlement. If, as the fourth circuit has ruled, such disputes cannot be resolved by private agreement (which necessarily would include a release by the employee), and if a settlement can be effective only if approved by the DOL or a court (as the court suggested), a company's ability to resolve FMLA claims will become complicated and problematic. If an employee can waive rights under Title VII or ADEA, it's unclear to us why FMLA rights should be afforded greater protection; if anything, the reverse would seem to be true. The fourth circuit's decision strikes us as unworkable, but, until other courts weigh in on the subject, it is uncertain whether a private settlement of an FMLA claim, which includes a release of FMLA rights by the employee, will be binding in a particular circuit.

PERSONALITY TESTS: WHEN DO THEY VIOLATE THE ADA?

Many companies use personality tests as tools for hiring and promotion. A recent decision of the court of appeals in Chicago addresses the issue of whether such tests violate the Americans With Disabilities Act (ADA). *Karraker v. Rent-A-Center, Inc.*, DLL (7th Cir., June 17, 2005).

The company utilized the APT

Management Trainee Executive Profile to measure math and language skills as well as interests and personality traits. As part of the APT tests, the plaintiffs were asked 502 questions from the Minnesota Multiphasic Personality Inventory (MMPI), which were intended to measure personality traits. These tests did not only measure traits such as teamwork capacity but also where the employee fell on the scales that measured traits such as depression and paranoia. The company used the tests both pre-employment and to aid in promotion decisions.

The ADA limits the ability of employers to use "medical examinations and inquiries" in several ways. Medical tests cannot be administered pre-employment; post-employment medical tests can be administered but only if they are job-related; and such tests cannot be used to screen people with disabilities. The issue before the court in this case was whether the MMPI was a "medical examination." Because the company sought a broad ruling that the MMPI was not a "medical examination" (and, therefore, that it was not covered by ADA), the court did not reach the issue of whether the test was job-related.

The court held that the MMPI was a "medical test" because it was designed, at least in part, to reveal mental illness. That the test was not administered or evaluated by a psychologist did not, in the court's view, negate this conclusion since no matter how the test was scored, its use had the likely effect of excluding employees with personality disorders from promotions. The court accepted the view of the company's expert psychology witness that the test does not diagnose mental disorders but found nonetheless that it was likely that a person with a mental disorder would score high on the test, thereby hurting his chance of being employed or promoted.

This decision could have ramifications for companies that utilize "personality" tests as evaluation tools. It suggests

that if such tests disproportionately hurt people with mental disabilities, they cannot be used as pre-employment tools and can only be used post-employment if they are job-related, an issue not decided in this case.

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We are pleased to welcome David E. Cohn to our Firm. David will work in all phases of our labor/employment practice. His experience with ERISA and multi-employer plans will allow us to provide expanded support for clients in this practice area.

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