

# Perspective

On Tax, Estate & Family Business Planning

Fall 2001

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## New Developments With Worker's Compensations

### New headaches for self-insured employers

Self-insured employers beware. A new Ohio Supreme Court ruling makes it even more difficult to recover worker's compensation benefits paid to an employee whose injuries are the result of a third party. On June 27th, Ohio's Supreme Court held that the Worker's Compensation subrogation statute is unconstitutional. This 1993 statute is the one that entitled the Bureau of Workers Compensation (BWC) and self-insured employers (as statutory subrogees) to reimbursement for monies paid out in workers' compensation benefits when an injured

worker receives damages from a third party over the same incident.

In *Holeton*, an employee working on the Ohio Turnpike was severely injured by a Crouse Cartage truck. The employee received over \$190,000 in Workers' Compensation benefits. He also sued third party Crouse Cartage for his personal injuries. The BWC, as a subrogee, asserted its rights to any funds the employee might recover from Crouse Cartage. The employee challenged the constitutionality of the subrogation statute.

The Court found that the subrogation statute gave the subrogee a claim against "estimated future values of compensation and medical

benefits." This was considered unlawful because the subrogee was being "reimbursed" for benefits the claimant might never receive. For example, if a claimant were to die before collecting the entire expected amount of Workers' Compensation, the subrogee would obtain money never actually received by the claimant. The potential windfall for the subrogee at the expense of the claimant was tantamount to an unlawful taking of the claimant's property. The Court also found the statute unconstitutional because it subjected the entire amount of any third party tort settlement to subrogation regardless of the kinds of damages that the settlement represented. Workers' Compensation only covers certain kinds of injuries to the claimant himself. In *Holeton*, the spouse and two minor children also had claims for their damages. The Court also found that

a claimant might be forced to settle a third party tort action for the limits of an insurance policy that could be much less than the Workers' Compensation expenditures.

The Court made no mention of whether there would be any retroactive effect of the *Holeton* decision or whether it would apply to past settlements. The good news for self-insured employers is that you can still attempt to recover your Workers' Compensation costs caused by third parties under a breach of contract theory.

### Ohio Supreme Court decision to raise insurance costs

In a decision that many employee groups are calling crazy, the Ohio Supreme Court decided that depression triggered by causing a co-worker's injury qualifies for Ohio Workers' Compensation payment. The decision should cause concern for both employers and the Bureau of Workers' Compensation.

The case involves Leonard Bailey, a forklift operator for Republic Engineered Steel, who accidentally ran over and killed a co-worker. As a consequence, he became severely depressed. Usually, the courts have allowed employees who develop emotional problems like depression or anxiety as a result of a work-related physical injury to add emotional injuries onto their physical claim. The same is true for preexisting emotional conditions that are exacerbated by a physical injury. But over the years, the courts have denied workers' compensation benefits to any employee with only a psychiatric injury.


In this decision, the Supreme Court said that to deny coverage for such claims would frustrate the very purpose of this Act, which is to compensate workers who are injured as a result of the requirements of their employment." The decision is a clear departure from established law in Ohio. Be prepared to pay huge price increases as

new claims come out of the wood-work.

### New law takes burden off of employers

Ohio Workers' Compensation law has always provided benefits to employees who suffer an injury or illness arising out of their employment, but that has excluded injuries that are a result of illegal drug or alcohol intoxication. Until now, the burden has been on Ohio employers to prove that drugs or alcohol caused the injury. Now the burden is on the employee.

A new law that went into effect this April requires employees who test positive after an accident, or refuse to be tested, to prove that drugs or alcohol did not cause the injury. The new law lets employers rely on a positive drug or alcohol test (or refusal to take the test) to prove that an employee's injuries are drug or alcohol related. Employees denied benefits will have the right to appeal to the Ohio Industrial Commission. If the employee proves that the injury was not caused by his drug or alcohol use, benefits may be awarded.

Of course, you may still fire an employee who violates an alcohol or no drug policy regardless of whether the employee is found eligible for Workers' Compensation benefits. In order to take advantage of this new law, it's a good idea to revise your policies to provide for drug and alcohol testing if they don't do so already, particularly as it applies after an accident or injury. Be sure you give your employees notices that positive drug or alcohol tests, or the refusal to submit to those tests may affect their eligibility for Workers' Compensation benefits. Also notify the laboratory to test at the level specified in the law and make sure employees test as soon as possible after accidents. 

– Patricia Weisberg

## New NLRB Ruling Makes It Harder To Stop Dealing With A Union Nobody Wants

Think of it as one of the aftershocks of a Democratic White House. In April, the NLRB reversed its own precedent of fifty years, which had previously allowed an employer to withdraw recognition from a union when the employer doubted there was a majority support. But even by the end of the year, the precedent could be turned on its head again. A Bush-appointed five-member Board consisting of two Democrats and three Republicans will most likely replace the current more "liberal" Clinton-appointed Board. But in the meantime, it will be even harder than before to stop dealing with a minority union.

In *Levitx Furniture Co.*, the Board found that there were "compelling legal and policy reasons" why employers should no longer be allowed to withdraw recognition from a union based upon a reasonable good-faith doubt that a majority of unit employees continue to support the union. Instead, an employer has to prove that the union has *actually* lost the support of a majority of the bargaining unit. No more room for good faith doubt.

In the past there were two ways to get rid of a union: management or the employees could file a petition for decertification election, or management could withdraw recognition from the union because it had lost its majority support. In a 1951 case, *Celanese Corp.*, the Board held that the employer not only could withdraw recognition if the union had actually lost its support, but also if management had a good-faith doubt, based on objective observations, that the union has majority support. This "good-faith doubt" test was the standard for over fifty

years. But at least for the moment, it no longer applies.

What's troubling about this ruling is how hard it is to actually prove that a union has lost the support of its members. In fact, it's nearly impossible because employers are still prohibited from polling or questioning their employees about their union sentiments. And if you relied on the old objective factors such as employee turnover, union inactivity, verbal and written employee renunciation of the union and withdrew recognition based on a perceived loss of union support, you could be in violation of labor law if you turn out to be wrong, even if you were acting in good faith.

The only good news is that it's now easier to obtain a management decertification election from the NLRB. The NLRB will now allow an employer's "good-faith uncertainty" as evidence for the need for a decertification election rather than the prior requirement of "good-faith doubt." In practical terms, this means that employers can now use employees' statements concerning other employees' dissatisfaction with the union as evidence for a decertification election instead of requiring verified statements from employees.

Unfortunately for employers, unions can still file unfair labor practice charges to stall a decertification election. Also, there is a potential for unfair labor practice charges — for aiding and supporting a union — to be brought against employers if they continue to recognize and bargain with unions which have lost majority support. So potentially an employer may have a good faith doubt as to the union's majority support, but be unable to meet the new burden to withdraw recognition from the union. The employer may then be subject to unfair labor practice charges for either withdrawing recognition or continuing to recognize the union. The General Counsel has not issued

any guidance to clear up this conflict.

### What you need to know

In these changeover years you need to be extra careful when you believe that the union has lost majority status. And your best course of action is to obtain a decertification election when you have "good-faith uncertainty" about the status of the union in your organization. [Well](#)

— Randall G. Ammons

## Cooperation Between Workers and Management?

As many of you know all too well, maintaining the traditional adversarial relationship between management and its workers is very important to organized labor. And until recently it was pretty important to the NLRB as well. The necessity of the NLRB has become hazy since the downswing of organized labor began fifty years ago, and the improved relations between management and their workers, not to mention all those happy software employees with their on-site fitness centers and Starbucks.

But in a new ruling this July (*Crown Cork & Seal Co.*) the NLRB was decidedly less concerned with its institutional self-preservation and actually lauded progressive management techniques that improve employee morale and productivity. It's a brave new world indeed. And yes, this is the same NLRB board that in April reversed a fifty-year-old precedent that allowed a company to withdraw recognition from a union. However, the decision doesn't come without its problems. The tricky part is making the distinction between illegal employer-dominated labor organizations and an employee management system that exercises authority, delegated by management, to operate a company. What would a brave new world be without the catch?

The case in question involves Crown Cork & Seal's aluminum can manufacturing plant in Sugar Land, Texas that employs about 150 production and maintenance workers. Nothing unusual there, except that since opening its doors in 1984, the plant has used an employee management system designed to delegate substantial authority to employees so that the plant is effectively operated through participation. Participation? Not a word that unions or, usually, the NLRB likes to hear. According to the National Labor Relations Act (NLRA), it's an unfair labor practice for an employer to dominate or support a labor organization which is defined as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of *dealing with* employers concerning grievances, labor disputes, wages, rate of pay, hours of employment, or conditions of work."

This doesn't leave much room for inventive employee management techniques. But in Sugar Land, remarkable things happen. Every production or maintenance worker belonged to one of four production teams, which each included one manager. The teams made and implemented decisions regarding production, product quality, training, attendance, safety, maintenance, and some kinds of discipline. The teams had the authority to stop production lines without management approval, stop delivery of cans that failed quality standards, decide which workers should receive training, decide whether to grant leave requests, and investigate and correct safety problems.

In addition to these four teams, two boards and one committee — namely the organizational review board, the advancement certification board, and the safety commit-

tee — monitored the administration of plant policies, reviewed production team recommendations to suspend or fire a workers, recommended pay increases, and considered ways to ensure a safe workplace among other duties. These boards and committee each had about 12 members — two from each of the four production teams plus several managers. A team of 15 managers and the plant manager reviewed decisions by these three groups. Decisions by the boards and committee were rarely overturned.

In previous decisions involving cases like this, the NLRB has used the phrase “dealing with” in the NLRA to determine whether or not a company is participating in unfair labor practices. So if “dealing” is present, i.e. the groups or committees exist solely to “deal with” management, then they’re illegal. Or as the NLRB says, “a bilateral mechanism” that establishes a pattern over time in which a group of employees makes proposals and recommendations about terms and conditions of employment and management responds by either accepting or rejecting them.

So when isn’t dealing present? Well obviously the Board didn’t think it was present in *Crown*, and it also didn’t think it was present in *General Foods Corp.* In that case, the NLRB found that “these are managerial functions being flatly delegated to employees and do not involve any dealing with the employers on a group basis within the meaning of Section 2(5), however expansively that term is applied....these functions were just other assignments of job duties, albeit duties not normally granted to rank-and-file personnel.” The board said that there is no “dealing” if the organization’s “purpose is limited to performing essentially a managerial” function.


So how do you know? Well in the two cases in which the board found

illegal dealing (*Keeler Bras Co. and Electromation, Inc.*) these weren’t part of the company structure. They were part of a quick-fix for problems between employees and management. Think of them more as add-ons. The non-managerial workers could voluntarily sign up for the committees, and then make recommendations to management employees who then had the power to accept or reject the proposals. Not every employee was involved in these committees and the “bilateral mechanism” the Board talked about was clearly established. Workers presenting proposals to management. Sounds more like labor negotiations.

In contrast, the “committees” of General Foods and Crown Cork were part of company-wide organizational strategies that involved all employees to the point that, in practice, managerial functions were being delegated to employees. These weren’t two separate and opposing groups with the powerless making recommendations to the powerful. Both General Foods and Crown Cork referred to their “committees” as programs or systems. The Board made it very clear in its ruling on *Crown Cork* what the difference is. “The evidence shows that, within their delegated spheres of authority, the seven committees are management.”

### What you need to know

Be very careful when setting up committees, special groups or teams that make recommendations or proposals to “management”. If you want to involve your employees more in managerial decision-making and to delegate responsibilities in a more efficient manner, the key is to make these organizational changes company-wide. It’s not enough to make sure there are a couple of representatives of management in a committee of subordinates. All employees need to be involved. To truly do this without

arousing the ire of the NLRB, it would be best to talk to one of our labor or employment lawyers who would be happy to help you come up with a plan that will benefit both your employees and your bottom line. 

– Michael McMenamin

## New Developments in FMLA Leave: The Fate Of A Regulation Hangs In The Balance

You can almost (but not quite) hear the promo: “Two cases. Two appeals courts drunk with power. Two opposing decisions. An issue that’s gone all the way to the highest court in the land . . . What will happen to the little DOL regulation caught in the crossfire?” Okay, so 20/20 it’s not, but while we wait for the Supreme Court’s decision, the conflict over that little Department of Labor (DOL) regulation is still raising questions about how to handle your employees’ Family and Medical Leave Act (FMLA) leave.

For instance, Jane Smith is taking some time off to help care for her dying mother. Have you let her know, in writing, that you’re counting it against the 12 weeks allotted to her by the FMLA? Good question. Even though the Supreme Court has taken the issue into the deep folds of its robes, the answer is the same as it was before. If you weren’t keeping track before, start now. And if you were, keep doing it.

The Supreme Court has decided to review this case because of the conflict between the Sixth Circuit Court of Appeals and the Eighth. The “controversial” issue centers around the validity of the Department of Labor’s (DOL) regulation that requires employers to provide employees with advance notice that their paid or unpaid medical leave will be counted


toward their 12 weeks of leave under the FMLA.

Last year in the case *Plant v. Morton International*, the Sixth Circuit ruled that under the DOL's regulation, the employer must designate leave time as FMLA and inform the employee of this. Because the employer, Morton International, failed to do this, the court allowed the plaintiff to proceed with his claim. (See "Keep Good Track of Your Employees' FMLA Leave" *W & H Client Briefing*, August 2000) In a different case, *Ragsdale v. Wolverine Worldwide, Inc.*, the Eighth Circuit invalidated the regulation, because they thought it "created rights which the statute clearly does not confer." The court was particularly concerned that the regulation could force employers to provide more than the Act's allotted 12 weeks of leave, just because they didn't inform an employee or designate her leave as FMLA time.

Now it's up to the Supreme Court to decide the regulation's fate. Will an absent employee still be entitled to 12 weeks of FMLA leave if an employer *fails* to provide prior notice to the employees that the leave will be counted toward the 12 week FMLA allotment? Stay tuned for further developments...

### What You Need to Know

Despite the fact that the outcome is uncertain, Walter & Haverfield advises you to keep doing the following:

1. Designate leave, paid or unpaid, as FMLA-qualifying and notify your employee.
2. Remember that for now, in Ohio, you cannot retroactively designate the leave as FMLA.
3. Check with the employee if you are not certain whether the leave is potentially FMLA-qualifying. 

– Katherine A. Friedell

## To Lease Or Not To Lease - The NLRB Takes Away Benefit Of Leasing Employees

Think temporary employees are the answer to your human resource headaches? You might want to think again and then get some Excedrin. That's because a new NLRB ruling has just turned an actual good thing about temporary or leased employees into fiction.

The mythical allure of the temporary and "baggage free" employee has led many a naive employer to believe, "If he has an impenetrable accent, get rid of him, it's the temp agency's problem" Walter & Haverfield has represented many employers who — when the myths were unmasked — learned the hard way about "joint employers" and how pesky employment laws, like Title VII, the ADA, ADEA, etc., actually do apply to all those seemingly unattached workers. But even in the stark light of day, there were still plenty of actual reasons to lease rather than hire. That is, until this new ruling.

Before last October, there were actually three *real* advantages to leasing employees instead of hiring them directly.

1. You could save on statutory benefits costs such as unemployment compensation and workers compensation premiums. (As long as the leasing agency paid its own workers compensation premiums and had its employees on its own payroll, the lessee-employer did not have to include them on its payroll for unemployment and workers compensation purposes.)
2. You could avoid being required to include the leased employees in pension and health and welfare benefit plans. (Provided you had the proper language in your ERISA plans.)
3. You could avoid having leased or temporary employees, who are often most vulnerable to union organizing tactics, included in a bargaining unit with the employer's regular employees. This would often prevent an employer's own

employees from union organizing that was primarily targeted at, or most successful with, the leased or temporary employees.

But this new NLRB ruling in *M.B. Sturgis Inc.*, a reversal of its own 1973 and 1990 precedents, takes away this third incentive for leasing employees. Now, temporary workers can be combined in the same bargaining unit with the regular workforce, without having to get the consent of all employers involved.


The NLRB changed the rules because of two combined cases. In the first, the Service Trades Union wanted to represent the permanent employees at M.B. Sturgis, Inc, but Sturgis wanted to include its temps in the proposed bargaining unit. Following precedent, the NLRB regional director approved a bargaining unit that excluded the temporary employees. In the second case, the Teamsters, which already represented the permanent employees at Jeffboat Company, wanted to include the company's temporary employees in the bargaining unit. Again, the NLRB regional director denied the request. The NLRB combined the two cases, then overturned them both.

Unless it is overturned on appeal, the NLRB decision raises many questions about your obligations to leased or temporary workers, particularly if you're fighting a union campaign, or if you already have a union and use temporary workers. And if you're dealing with both temporary and permanent workers in the same bargaining unit, how do you involve the temporary agency in your union negotiations? Their workers, as a rule are usually paid less than yours are, which is how the leasing companies make a profit. Obviously, if the leasing agency cannot keep its prices down, you'll have no incentive to continue the contract. And if it costs as much or more to hire a leased employee as it does to hire

your own, why bother with the lease?

### **What You Need to Know**

There are no easy answers. For the moment, there are still two real advantages to leasing employees, but depending on your situation in terms of unions, eventually all advantages to leasing employees might be distant myth. So what should you do? Remember that hir-

ing temporary or leased employees is not a panacea for avoiding the human resource problems that come with various state and federal labor and employment laws. By the time the latest NLRB ruling is sorted out in further Board action or litigation, your human resource department might even need to get prescription-strength Motrin. 

– Nancy A. Noall

*If you have any questions or want more specific legal advice regarding any of these articles, please feel free to call your Walter & Haverfield attorney at 216.781.1212.*

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**Need Further Information?**

Contact your W&H Attorney; or if you are not a client, call Mike McMenamin or Nancy Noall at 216-781-1212 with your questions or comments.



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