

## In this issue

- P1 Divided Supreme Court Finds Discrimination in Firefighter's Case
- P2 U.S. Supreme Court Holds the Burden of Persuasion Remains with Employee in Age Discrimination Lawsuit
- P3 Sixth Circuit Joins Other Circuits in Holding that Employees Must Personally Engage in Protected Conduct to Possess Retaliation Claim
- P4 Third Circuit Clarifies Definition of "Management Level Employee" for Purposes of Imputing Knowledge to Employer in Sex Harassment Cases
- P5 Sixth Circuit Decision a Reminder that Caution is Key When Contemplating Deductions in Pay of Exempt Employees Under FLSA
- P6 NLRB Update: Supreme Court Asked to Rule on Authority of Two-Member Board; President Obama Announces Two Labor-Friendly Nominations to Board; and EFCA Languishes in Congress
- P7 Preferential Provision of Non-Seniority Benefits Not Required Under USERRA

## A legal update from Dechert's Labor and Employment Group

### Divided Supreme Court Finds Discrimination in Firefighter's Case

In a closely watched case, a narrow majority of the U.S. Supreme Court ruled on June 29 that an employer's fear of disparate impact litigation is not a legitimate basis for disregarding facially neutral criteria used to make promotion and other employment decisions unless the employer possesses a "strong basis in evidence" for believing that a valid disparate impact claim can be asserted. The ruling, issued in the case of *Ricci v. DeStefano*, Nos. 07-1428 and 08-328, reflects a significant shift in the Court's analysis of disparate impact claims under Title VII of the Civil Rights Act of 1964 and could present difficult challenges to employers seeking to comply with both Title VII's disparate impact provisions and its prohibition of disparate treatment based on race and other protected characteristics.

*Ricci* arose out of the City of New Haven, Connecticut's use of a standardized test for identifying candidates for promotion in its fire department. In 2003, 118 firefighters took the written and oral test to qualify for promotion to lieutenant or captain. The results of the test revealed a significant statistical disparity between the performance of white candidates and the performance of African-American and Hispanic candidates. After a lengthy and heated public debate about the use of the test results, the City decided that, because of the statistical disparity and the risk of disparate impact litigation that resulted, it would disregard the results. Seventeen white candidates and one Hispanic candidate, who would have been considered for promotion had the test results been used, sued alleging intentional discrimination on the basis of race in violation of Title VII.

The United States District Court for the District of Connecticut granted summary judgment in favor of the City and the other defendants, ruling that the defendants' "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute a discriminatory intent" under Title VII. A panel of the Court of Appeals for the Second Circuit, which included current Supreme Court nominee Sonia Sotomayor, affirmed the District Court's decision. The Supreme Court, in an opinion authored by Justice Kennedy on behalf of himself, Chief Justice Roberts, and Justices Alito, Scalia, and Thomas, reversed, finding that summary judgment should have been granted in favor of the plaintiffs.

The Court began its analysis by quickly rejecting the lower courts' conclusion that the City's action was not "based on race." According to the majority, "[w]hatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race." The only issue therefore, the Court held, is "whether the City had a lawful justification for its race-based action."

The City and the other respondents urged the Court to conclude that, in light of the tension between Title VII's disparate treatment (intentional discrimination) and disparate impact provisions, disparate treatment by an employer should be permissible as long as it possessed a "good faith" fear of disparate impact liability. The Court rejected this argument, instead holding that, as in affirmative action cases in which government actors take explicitly race-based actions in order to remedy prior discrimination, an employer's disparate treatment can only

be excused where the employer can establish “a strong basis in evidence of disparate-impact liability.” Although this standard requires more than a mere good faith belief, the Court held, “it is not so restrictive that it allows employers to act only when there is a provable, actual violation.”

The Court then went on to consider whether the City’s action was lawful under its new “strong basis in evidence” standard, ultimately concluding that it was not. The Court noted that while there was indeed a clear statistical disparity in the City’s test results, “a prima facie case of disparate-impact liable—essentially a threshold showing of a significant statistical disparity, and nothing more—is far from a strong basis in evidence that the City would have been liability under Title VII had it certified the results.” Rather, to establish a strong basis in evidence of liability, an employer must show that there is evidence that its practice failed to satisfy Title VII’s requirements that a practice that causes a disparate impact was “not job related and consistent with business necessity” and that there were “equally valid, less-discriminatory alternatives that served the [employer’s] needs but that the [employer] refused to adopt.” Here, the Court ruled, the City could not establish a basis for a finding that either of these factors could be met. Accordingly, the City’s failure to apply the result of its promotion examination constituted impermissible intentional racial discrimination.

In an interesting bit of dictum, the majority noted that it was not addressing any constitutional issues relating to employers’ efforts to comply with Title VII’s disparate impact provisions. Specifically, the majority wrote that “[w]e . . . do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case.” Justice Scalia wrote a concurring opinion that suggested that in his view Title VII’s disparate-impact provisions might be incompatible with the Constitution’s prohibition of intentional discrimination: “[i]t is one thing to free plaintiffs from proving an employer’s illicit intent, but quite another to preclude the employer from proving that its motives were pure and its actions reasonable.” As the dissenting Justices notes, the Court had not previously expressed concern with the constitutionality of Title VII’s disparate impact provisions. The statements of the majority and Justice Scalia thus suggest that further erosion of Title VII’s disparate impact protections may be on the horizon.

In dissent, Justice Ginsburg, writing for herself and Justices Stevens, Breyer, and Souter, stated that

because Title VII provides “unambiguously that selection criteria operating to the disadvantage of minority group members can be retained only if justified by business necessity . . . employers who reject such criteria due to reasonable doubts about their reliability can hardly be held to have engaged in discrimination ‘because of’ race.” Accordingly, the dissent would hold “an employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII’s disparate-treatment bar automatically or at all, subject to this key condition: The employer must have good cause to believe the device would not withstand examination for business necessity.” The dissent also took issue with the Court’s finding that the City had failed to satisfy the “strong basis in evidence” standard, stating that it is the Court’s “ordinary course . . . to remand and allow the lower courts to apply the rule in the first instance.”

There is no question that the Court’s decision in this case carries with it the potential for a seismic shift in the application of Title VII’s disparate impact provisions. What remains to be seen is how lower courts formulate the contours of the Court’s “strong basis in evidence” standard. Will those courts require something close to proof of the actual existence of a valid disparate impact claim before the rejection of facially neutral selection criteria will be excused, or will they afford deference to an employer’s judgment with respect to the risks of disparate impact liability created by the existence of statistical disparities? While the answers to these questions remain to be seen, employers will undoubtedly face significant challenges in attempting to balance the competing risks created by Title VII’s disparate treatment and disparate impact provisions.

### **U.S. Supreme Court Holds the Burden of Persuasion Remains with Employee in Age Discrimination Lawsuit**

In a case in which Dechert participated on behalf of two *amicus curiae*, the U.S. Supreme Court held, in *Gross v. FBL Financial Services, Inc.*, No. 08-441 (June 18, 2009), that an employee asserting a disparate treatment age discrimination claim under the Age Discrimination in Employment Act (“ADEA”) retains the burden of persuasion to prove, by a preponderance of the evidence, that age was the “but-for” cause of the challenged adverse employment action, even if the employee has produced evidence to show that age was one motivating factor. In so holding, the Court rejected the argument that the so-called “mixed motive” analysis

applicable in cases under Title VII of the Civil Rights Act of 1964 is permissible under the ADEA.

This case arose when Jack Gross sued his employer, asserting that he was demoted and reassigned because of his age in violation of the ADEA. The ADEA prohibits an employer from taking an adverse employment action against an employee “because of” age. At trial, Gross introduced evidence suggesting that his reassignment was based, at least in part, on age. Borrowing from Title VII, the trial court instructed the jury that it was to find in favor of Gross if it determined that Gross established that “age was a motivating factor” (i.e., “played a part or a role”) in the decision to reassign him, unless the employer could show that Gross would have been reassigned regardless of his age. This instruction, often referred to as a “mixed motive” instruction, essentially shifted the burden of proof to the employer to disprove that age was the determining factor in the challenged employment action, once the employee established that age was considered in the decision. The jury found for Gross, and the employer appealed. The Eighth Circuit reversed, holding that the jury was improperly instructed. The Supreme Court agreed to consider the case.

The respondent, along with Dechert on behalf of *amici* National Federation of Independent Business Small Business Legal Center and the Society for Human Resource Management, urged the Court to hold that the burden of persuasion in an ADEA disparate treatment claim remains with the employee at all times to establish that age was the “but-for” cause of the challenged employment action. The Court agreed in a 5-4 decision. Whereas Title VII explicitly provides for the burden of proof to shift to an employer once the employee shows that the protected characteristic played a role in the adverse employment action, the ADEA does not contain similar statutory language. The Court agreed that the ADEA’s prohibition on discrimination “because of” age meant that age had to be the “but-for” cause of the adverse employment action, rather than simply a motivating factor. The Court concluded: “We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the ‘but-for’ cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.”

Justice Stevens and Justice Breyer each authored dissenting opinions, joined by a minority of the Court,

arguing that the ADEA does permit “mixed motive” instructions upon a showing, by direct or circumstantial evidence, that age was a motivating factor in the adverse employment action. According to the dissenters, as the Court had previously recognized in interpreting the pre-1991 amendments version of Title VII in *Price Waterhouse v. Hopkins*, the most “natural” reading of the term “because of” age prohibits any action motivated “in whole or in part” by the age of an employee.

*Gross* is a major victory for employers in that it clarifies that the ADEA requires an employee to show that age was the “but-for” cause of the challenged employment action. As such, the employee retains the burden of proof on this element in all ADEA cases. This decision could have ramifications well beyond the ADEA, however, in the likely event that lower courts apply *Gross* to other non-Title VII employment discrimination statutes containing similar statutory language. As a practical matter, the Court’s decision in *Gross* will also make it easier for employers to obtain summary judgment on disparate treatment claims brought under the ADEA or other discrimination laws to which *Gross* may be applied. This decision, however, could also complicate employment discrimination cases in which an employee asserts claims under both Title VII and the ADEA, as is often the case. Whereas the employee will be forced to bear the burden of proof on the higher “but-for” causation standard of the ADEA claim, the burden of proof will shift to the employer to show that it would have taken the same adverse action in the absence of the protected characteristic, once the employee meets the lower causal showing that the Title VII-protected characteristic was a “motivating factor” in the Title VII claim.

### **Sixth Circuit Joins Other Circuits in Holding that Employees Must Personally Engage in Protected Conduct to Possess Retaliation Claim**

In *Thompson v. North American Stainless, LP*, No. 07-5040 (6th Cir. June 5, 2009), the Sixth Circuit, sitting *en banc*, rejected a claim by an employee who contended that his employment was terminated in retaliation for complaints of discrimination by his co-worker fiancée and ruled that only employees who have been directly involved in protected activity under federal non-discrimination laws can assert valid claims of retaliation. In so holding, the court rejected the conclusion reached by the panel that initially decided

the case and aligned itself with the three other federal Courts of Appeals that have addressed the issue.

In *Thompson*, the plaintiff and his fiancée both worked for North American Stainless. They had met on the job and their relationship was common knowledge throughout the company. In September 2002, the plaintiff's fiancée filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that she was the victim of gender discrimination. In February 2003, the EEOC notified North American Stainless of the charge. Approximately three weeks later, the plaintiff was terminated, allegedly for performance-related reasons. The plaintiff filed a charge with the EEOC alleging that the company terminated him in retaliation for his fiancée's protected activity.

The district court granted the employer's motion for summary judgment, holding that an employee cannot assert a valid Title VII retaliation claim based on his or her relationship with a third-party who is engaged in protected activity. On appeal, a panel of the Sixth Circuit reversed. The panel described the sole issue as whether Title VII created a cause of action for third-party retaliation by persons who did not themselves engage in protected activity. The court looked to the plain language of the statute and held that "a literal reading of [Title VII] section 704(a) suggests a prohibition on employer retaliation only when it is directed to the individual who conducted the protected activity." The court concluded, however, that the language of the statute itself should not be controlling because "tolerance of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights." In so holding, the court adopted the argument urged by the EEOC, which contended that statutory protection should be extended to any third party who is deemed to be "so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights."

However, the Sixth Circuit granted review *en banc* and subsequently reversed the panel's decision. In doing so, the court looked to the plain language of the statute and held that "in our view, the text [of Title VII] . . . is plain in its protection of a limited class of persons who are afforded the right to sue for retaliation. To be included in this class, plaintiff must show that his employer discriminated against him 'because he has . . . made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter.'"

The dissent focused on the anti-retaliation law's prohibition of discrimination against anyone who "has opposed" an unlawful employment practice. Citing the recent Supreme Court case of *Crawford v. Metropolitan Government of Nashville*, the dissent rejected the majority's assertion that the meaning of the term "oppose" is unambiguous and only encompasses "active" opposition to discriminatory practices. Thus, the dissent argued, the term could arguably have encompassed the plaintiff's actions in this case.

This decision represents a victory for employers. In reversing its prior course, the Sixth Circuit brought its law in line with that of the Third, Fifth, and Eighth Circuits. The practical implication of the decision is that an employer contemplating an adverse action against an employee will not need to determine whether the employee has a relationship with other employees who have engaged in protected conduct before taking the action. It should be noted, however, that it is still possible that an employer who takes action against an employee because of his or her relationship with a person who engaged in protected conduct could face liability directly to the individual who personally engaged in the protected conduct based on the adverse action.

### **Third Circuit Clarifies Definition of "Management Level Employee" for Purposes of Imputing Knowledge to Employer in Sex Harassment Cases**

In *Huston v. Procter & Gamble Paper Products Corp.*, No. 07-2799 (3d Cir. June 8, 2009), the Third Circuit recently clarified the standard for determining who constitutes a "management level employee" for purposes of imputing knowledge of allegedly harassing conduct to an employer under Title VII. Specifically, the court held that an employee's knowledge of allegations of co-worker sexual harassment may be imputed to the employer in two circumstances: 1) where the employee is sufficiently senior in the employer's governing hierarchy, or otherwise in a position of administrative responsibility over employees under him, such as a departmental or plant manager, so that such knowledge is important to the employee's general managerial duties; and 2) where the employee is specifically employed to deal with sexual harassment, as in the case of human resources personnel.

The plaintiff in this case claimed sexual harassment and retaliation. The plaintiff, Huston, worked at the

Mehoopany plant of Procter & Gamble (P&G) for more than a decade. Huston relied on a series of incidents to support her Title VII claim including allegations that, although she did not witness it, her male teammates exposed themselves in a control room on two occasions. Huston alleged that someone informed two supervising technicians of the conduct. She also alleged that she witnessed one of her male teammates exposing himself in the control room. Some time later, the plaintiff reported this incident to a senior-level manager and a human resources manager. At the same time, she complained that her male teammates viewed pornography in the control room. P&G investigated the complaints and ultimately P&G sanctioned everyone on Huston's team, including Huston, in keeping with the five-step discipline program in place at the company. Several months later, P&G terminated Huston for falsifying machine log data.

In order to make a claim for hostile work environment, the plaintiff must prove, among other things, the existence of *respondeat superior* liability. Huston conceded that the employees involved are co-workers, not supervisors. Employer liability for a co-worker exists only if the employer failed to provide a reasonable avenue for complaint, or, alternatively, if the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action. The Third Circuit has held that an employer knew or should have known about workplace harassment if management-level employees had actual or constructive knowledge about the existence of a hostile environment. Huston argued that the two supervising technicians who were allegedly informed of the harassment were management-level employees because they hold the supervisory positions of process coach and machine leader, respectively. The United States District Court for the Middle District of Pennsylvania decided that the employees were not management level employees and granted summary judgment in favor of the employer. The Third Circuit affirmed and held that an employee's knowledge of allegations of co-worker sexual harassment may be imputed to the employer in the two circumstances discussed above. The court based its holding that the supervising technicians were not management level employees on testimony that P&G hired two types of employees at the Mehoopany plant: technicians and managers. Managers are salaried employees who have the authority to hire, discipline, and discharge technician employees, whereas technicians are paid hourly wages and did not have the authority to hire, discipline, and discharge. The court determined that the supervising technicians were technicians and that, although they happened to

perform some oversight functions as process coach and machine leader, they generally possessed the same skills and often performed substantially the same functions as the other non-managerial members on Huston's work team.

This decision provides a few lessons for employers. The most significant lesson is the importance of having clearly identified employees who are responsible for investigating discrimination complaints. It is also highlights the importance of clearly identifying the job duties of each position within an employer's hierarchy. Where it is clear that the duties of a particular position do not include handling and addressing employee concerns and issuing discipline, it is unlikely that a court within the Third Circuit will conclude that employees in that role are management level employees for Title VII purposes.

### **Sixth Circuit Decision a Reminder that Caution is Key When Contemplating Deductions in Pay of Exempt Employees Under FLSA**

In a case interpreting regulations promulgated under the federal Fair Labor Standards Act ("FLSA"), the United States Court of Appeals for the Sixth Circuit held, in *Baden-Winterwood v. Life Time Fitness, Inc.*, Nos. 07-4437, 07-4438 (6th Cir. May 19, 2009), that exempt employees whose guaranteed salary payments are improperly reduced to recover bonus overpayments are entitled to overtime wages for the pay period in which the improper deductions are made.

The case arose when a group of department heads and other managers sued their employer, Life Time Fitness, Inc., alleging that they were improperly classified as exempt employees under the FLSA and thus were entitled to overtime compensation. The employees at issue in this case were paid a set amount of base salary and were also eligible to receive periodic bonus payments attributable both to periods already worked and to future periods. Under Life Time's compensation plans, however, Life Time reserved the right to make deductions from the employee's base salary if his or her performance following the payment of a bonus dropped to a level such that the bonus paid exceeded the amount actually earned.

In order for an employee to be considered exempt under the FLSA's executive, administrative, or professional exemptions, the employee must be paid on a "salary

basis.” Under the applicable FLSA regulations, for an employee to be paid on a salary basis, his or her pay during a pay period cannot be “subject to reduction because of variations in the quality or quantity of the work performed.” Although the 2004, 2005, and early 2006 compensation plans allowed for the challenged deductions, Life Time only actually made such deductions during three pay periods in 2005. The employee plaintiffs argued that because of this policy, they were not compensated on a salary basis and thus not properly treated as exempt employees for the entire period in which the compensation plans were in effect. The trial court agreed in part, holding that Life Time violated the FLSA by failing to pay certain plaintiffs overtime compensation for the three pay periods in which actual deductions were taken from the employees’ pay. Both the employees and Life Time appealed.

The Court of Appeals affirmed the trial court’s conclusion that the FLSA exemption was lost for pay periods in 2005 in which Life Time made deductions from an employee’s base salary to recover bonus overpayments. Noting that while the FLSA does allow deductions from pay in limited situations, such as to recover loans and remedy mistakes by the payroll department, the Sixth Circuit concluded that “there is no support for the contention that the FLSA allows for the reduction of guaranteed pay under a purposeful, incentive-driven bonus compensation plan.” Given that the bonus plans were tied to individual performance, the Sixth Circuit also rejected Life Time’s argument that the deductions at issue were not based on the quality or quantity of work. Applying the FLSA regulations currently in effect, the Sixth Circuit held that the plaintiffs who worked in the job classification in which the improper deductions were made were entitled to overtime compensation during the three relevant pay periods in 2005. The Court, however, found that the exemption was not lost for pay periods in which no deductions were made. Although it did not impact the Sixth Circuit’s final order, the court also found that the district court had incorrectly held that Life Time’s practice was permissible under the FLSA regulations in effect prior to August 23, 2004.

This decision highlights the importance of properly structuring bonus, commission, and similar incentive plans so as not to risk losing applicable FLSA exemptions. Whereas employers may properly institute bonus plans to incentivize exempt employees, they must be careful not to make deductions from guaranteed pay, such as base salary, that are arguably based on the “quality or quantity” of an exempt employee’s work.

Doing so can cause both the employee whose pay was deducted and other employees in the same job classification to be treated as nonexempt under the FLSA for at least the pay period in which the improper deductions were made, thus entitling them to overtime compensation for such periods. Particularly because salaried employees will have a very high “regular rate” for periods in which they are considered nonexempt, this can amount to substantial liability for an employer. In addition, deductions from wages can implicate state laws, which often impose strict standards regarding deductions from employee wages.

### **NLRB Update: Supreme Court Asked to Rule on Authority of Two-Member Board; President Obama Announces Two Labor-Friendly Nominations to Board; and EFCA Languishes in Congress**

In December 2007, faced with the imminent departures of three of its five members, the National Labor Relations Board delegated its authority to a panel of three of its members: Wilma Liebman, Peter Schaumber, and Peter Kirsanow. Kirsanow left the Board shortly thereafter (along with former member Dennis Walsh and Chairman Robert Battista), leaving the Board with but two active members. Relying on §3(b) of the National Labor Relations Act, which permits certain cases to be decided by a two-member quorum of a three-member panel, and a memorandum from the Justice Department’s Office of Legal Counsel, Liebman and Schaumber have carried on the Board’s business for the past 18 months, deciding those cases in which they have been able to agree on the result. Not surprisingly, the Board’s authority to issue binding rulings in this manner has been subject to a number of challenges.

To date, four federal Courts of Appeals have addressed the legality of the Board’s two-member rulings. The First, Second, and Seventh Circuits have concluded that the Board’s actions are permissible, while the District of Columbia Circuit has rejected the Board’s approach. According to the First Circuit in *Northeastern Land Services Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), the Second Circuit in *Snell Island SNF LLC v. NLRB*, No. 08-3822 (2d Cir. June 17, 2009) and *New Process Steel LP v. NLRB*, 564 F.3d 840 (7th Cir. 2009) respectively, the language of § 3(b) is clear and unambiguous in allowing the Board to proceed with a two-member quorum where it has delegated its authority to a group of three members, as this Board has done. For its part, the D.C.

Circuit held, in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564F.3d 469 (D.C. Cir. 2009), that while the issue was a “close question,” because § 3(b) states that three members of the Board constitutes a quorum “at all times,” the Board must have at least three members to act, even where the full Board has delegated its authority to three members.

Now, New Process Steel, which challenged the Board’s authority before the Seventh Circuit, has filed a petition for *certiorari* with the U.S. Supreme Court asking it to resolve the split among the circuits. In support of its petition, New Process Steel has noted that there are approximately 110 open unfair labor practice cases in which the Board’s authority could be challenged. New Process Steel has also asserted that the effects of the circuit split are heightened because the D.C. Circuit possess jurisdiction over all decisions of the NLRB, meaning that, in cases that could also be appealed to the First or Seventh Circuits, the validity of the Board’s decision “turns on who wins the race to the courthouse.”

The procedural concerns raised by the Board’s vacancies could be alleviated soon, however, if President Obama’s plan to nominate two labor-side lawyers to the Board comes to fruition. On April 24, 2009, the President announced his intention to nominate Craig Becker and Mark Pearce to fill two of the three open seats on the Board. Both Becker and Pearce are Democrats. Becker currently serves as Associate General Counsel to both the Service Employees International Union and the AFL-CIO and has taught at the UCLA School of Law and the University of Chicago and Georgetown Law Schools. Pearce is one of the founding partners of the union-side law firm of Creighton, Pearce, Johnsen & Giroux in Buffalo, New York and also serves as a member of the New York State Industrial Board of Appeals. Prior to entering private practice, Pearce served as a trial lawyer for the NLRB. By tradition, the Board is composed of three members from the President’s party, and two members from the minority party. President Obama has yet to send his nominations for the Board to the Senate for confirmation.

Finally, there have been few concrete developments with respect to the most significant labor law issue currently pending: the passage of the Employee Free Choice Act (EFCA). The EFCA in its current form proposes sweeping changes to the NLRA by, among other things, allowing unions to compel certification through the use of card checks and requiring binding arbitration of the terms of first collective bargaining agreements. While the Act was introduced in both the House and Senate in March

2009, it has stalled since several prominent Democrats withdrew their support, citing concerns relating to the current economic climate. While numerous compromise versions of the bill are being discussed—including proposals from Senator Arlen Specter and Representative Joe Sestak of Pennsylvania that would eliminate the EFCA’s card check and arbitration provisions and focus on allowing equal union access to the workplace during election campaigns—none have yet been brought to the floor.

### **Preferential Provision of Non-Seniority Benefits Not Required Under USERRA**

The Court of Appeals for the Seventh Circuit recently considered whether an employer had violated the Uniformed Services Employment and Reemployment Rights Act (“USERRA”) by rescinding a longstanding work scheduling policy that treated employee National Guard members more favorably than non-military employees. It concluded that the policy rescission was lawful. *Crews v. City of Mt. Vernon*, No. 08-2435 (7th Cir. June 2, 2009).

Following nine years of employment by the City of Mt. Vernon as a police officer, Plaintiff Ryan Crews was promoted in 2006 to Corporal in the Patrol division. For many years, Crews also had been a member of the Army National Guard. He and other Patrol division supervisors were scheduled to work five days a week in a manner that ensured seven-day coverage; unlike higher-ranking Captains, Corporals were regularly scheduled to work Wednesday through Sunday.

For many years prior to August 2006, the City allowed National Guardsmen whose weekend military drills fell on scheduled city workdays to instead work their scheduled days off. During a week where this occurred, the employees received full salary from the City and retained government military pay. Non-Guard employees were not allowed to reschedule work shifts missed for outside activities. Guardsmen who chose not to reschedule their workshifts worked a shortened week and had the option of either using paid time off to cover military absences or of turning in their military pay in exchange for receiving their full salary from the City. In either case, there was no net loss in weekly compensation from the City.

For operational reasons, the City rescinded its shift rescheduling policy in August 2006. Crews filed a lawsuit claiming the rescission violated § 4311 of

USERRA, which prohibits an employer from denying a member of the U.S. Armed Forces any benefit of employment on the basis of his/her military membership, service, or application for membership or service. The Seventh Circuit evaluated Crews's § 4311 claim in conjunction with § 4316(b)(1) of the statute, which entitles an employee absent for military service to such rights and benefits not determined by seniority as are generally provided by an employer to similarly-situated employees who take comparable non-military leaves. The court concluded that the latter section

required only equal benefits for Guard and non-Guard employees, not more generous or preferential treatment of the former. Furthermore, since "benefit of employment" as referenced in § 4311 is one provided to both military and non-military employees, and not a benefit solely given to military employees, the section would only prohibit an employment action that provided military employees with fewer benefits than other employees. The City's rescission of the shift rescheduling policy resulted in equal treatment of Guard and non-Guard employees, and thus was permissible.

## Practice group contacts

If you have questions regarding the information in this update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at [www.dechert.com/employment](http://www.dechert.com/employment).

### Alan D. Berkowitz

Philadelphia  
+1 215 994 2170  
alan.berkowitz@dechert.com

### Timothy C. Blank

Boston  
+1 617 728 7154  
timothy.blank@dechert.com

### Kevin S. Blume

Boston  
+1 617 728 7145  
kevin.blume@dechert.com

### Brian M. Collins

Philadelphia  
+1 215 994 2342  
brian.collins@dechert.com

### Matthew V. DeDuca

Princeton  
+1 609 620 3202  
matthew.deduca@dechert.com

### J. Ian Downes

Philadelphia  
+1 215 994 2346  
ian.downes@dechert.com

### Linda Dwoskin

Philadelphia  
+1 215 994 2721  
linda.dwoskin@dechert.com

### Leora F. Eisenstadt

Philadelphia  
+1 215 994 2940  
leora.eisenstadt@dechert.com

### Jerome A. Hoffman

Philadelphia  
+1 215 994 2578  
jerome.hoffman@dechert.com

### Nicolle L. Jacoby

New York  
+1 212 698 3820  
nicolle.jacoby@dechert.com

### Terry D. Johnson

Princeton  
+1 609 620 3280  
terry.johnson@dechert.com

### Thomas K. Johnson II

Philadelphia  
+1 215 994 2756  
thomas.johnson@dechert.com

### Enc C. Kirsch

New York  
+1 212 649 8719  
enc.kirsch@dechert.com

### Betina Miranda

Philadelphia  
+1 215 994 2233  
betina.miranda@dechert.com

### Jane Patullo\*

Philadelphia  
+1 215 994 2803  
jane.patullo@dechert.com

### Jeffrey W. Rubin

Philadelphia  
+1 215 994 2807  
jeffrey.rubin@dechert.com

### Melissa B. Squire

Philadelphia  
+1 215 994 2829  
melissa.squire@dechert.com

### Frank L. Tamulonis

Philadelphia  
+1 215 994 2309  
frank.tamulonis@dechert.com

### Claude M. Tusk

New York  
+1 212 698 3820  
claudetusk@dechert.com

\* Legal assistant

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