

*Into the Lion's Den
Old Laws with New Importance
Employee Free Choice Act and the
Fair Labor Standards Act.*



Mary Grace Balazs
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- I. Employee Free Choice Act (EFCA)
Re-Empowerment of Skilled & Professional
Employees & Construction Trade Workers Act.
(Respect Act)

*Both proposed laws would amend the National
Labor Relations Act.*

- A. National Labor Relations Act (NLRA) was part of
New Deal Legislation in 1935.

Only significant amendments were in 1947 in
Taft-Hartley laws to strengthen regulation of
unions.



B. National Labor Relations Act Recharged.

- NLRA covers almost every private sector employer in the U.S.A., union or not. Employer must only be engaged “in commerce” . No minimum number of employees.
- EFCA will significantly alter balance of power between labor, management, and employees.
- EFCA will also strengthen NLRB remedies (triple back pay; mandatory injunctions; monetary fines against employers only)
- Unions already organizing employees.



C. Primary purposes of law:

- Regulate rights of non–union employees (Section 7)
 - Regulate relations between employees, unions and employers. (Section 8)
 - Regulate union election process (Section 9)
- NLRB has developed extensive case law and regulations regarding both.



D. Protected Concerted Activity.

- Although the NLRA focuses primarily on the rights between employers and unions, the Act also protects non-union employees regarding their terms and conditions of employment, such as wages, benefits, or company policies.

Sec. 7. – Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities...



E. Section 7 Protects:

- Right to Strike (even without a union)
- Right to discuss wages
- Right to complain about wages, hours and working condition.
- Right to refuse to work in unsafe conditions.

F. Representation Process.

- Currently petition can be filed with 30% of employees in a bargaining unit.
- Numerous issues which may arise and are resolved through a hearing.
- Median date for holding election is 38 days.
- Secret ballot election conducted by NLRB.



- G. Current law permits card checks, but employers can demand a secret ballot election.
- Current law allows NLRB to order an employer to bargain with union even though the union has not won an election. (Gissel Order).



- H. – EFCA first called for a certification by card check.
- As of July 17, 2009, EFCA was amended to drop card check certification, but require elections within five to ten days.
- I. As a Quid pro Quo for above other provisions are proposed.
- Union access to company property.
 - Prohibition of “captive audience” meetings.



J. Bargaining Process

- Current law requires only good faith bargaining.
- If no agreement, parties assert economic power, i.e. strikes, lockouts.
- EFCA would require “interest arbitration” on first contracts after 90 days and impose contract on both parties.

K. Increased Penalties.

- Increased penalties during an organizing campaign.
- Triple back pay.
- Civil penalty of \$20,000 per unfair labor practice.
- Mandatory Injunctions in union organizing campaigns.



L. RESPECT Act.

Into the Lion's Den

- Section 2(11) of the NRLA defines a “supervisor” as an employee with the authority to “hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, or to adjust their grievances, or effectively to recommend such action” so long as this authority requires the use of “independent judgment.”
- Supervisors owe their loyalty to the management of the company.
- The RESPECT Act would remove from the definition of “supervisor” the duties of assigning and responsibly directing other employees.
- The legislation also specifies that supervisors must “hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees” for a *majority* of their work time.



M. Other NLRB Issues.

- President Obama has three nominations to NLRB pending before Senate.
 - *Craig Becher - SEIU attorney.*
 - *Mark Pearce - Union side labor lawyer.*
 - *Brian Hayes, Management side labor lawyer.*



N. Bush NLRB issued many controversial decisions.
Most likely overturned.

- *Guard Publishing Company*, 351 NLRB No. 70 (2007). Ruled that employer could prohibit use of e-mail system for non “job-related” solicitations.
- *Dana Corp*, 351 NLRB No. 28 (2007) Ruled that an Employer’s voluntary recognition of a union will not bar a decertification or rival union petition during 45 days after recognition.
- *Toering Electric Co.*, 351 NLRB No. 18 (2007) “Salting case” - General counsel must show individual’s genuine interest in seeking a job.

II. Fair Labor Standards Act.

A. Enacted in 1938 as remedial legislation, also part of New Deal.

- The FLSA sets minimum wage, overtime pay, equal pay, record keeping and child labor standards.

B. Under FLSA, created in 1938 to protect industrial workers from exploitation, employees are guaranteed time-and-a-half pay for hours worked beyond a 40-hour workweek, unless they are salaried and fall into one of three main exempt categories: professional, executive or administrative.



C. Why Care???

- 2009 Wal-Mart paid \$350–640 Million in back pay, liquidated damages, fees, costs and interest to settle 63 cases.
- 2008 top 10 private settlements totaled \$253 Million.
- Service Corp. International settled overtime claims for \$4.5 Million.
- Merrill Lynch paid \$37 Million to settle lawsuit brought by stock brokers.
- Sterling Jewelers paid \$1.29 Million in back wages to 16,000 employees in 41 states.



D. Most significant growth has been in class action cases in state and federal courts.



- E. In 2004, the Department of Labor modernized the FLSA by making it easier for employers to determine overtime exemptions and by raising the salary threshold below which workers automatically qualify for overtime pay.

Rather than decreasing the number of overtime lawsuits as the Labor Department had hoped the changes caused more law suits.



F. FLSA applies to any employee either:

- engaged in interstate commerce
- employed in an enterprise engaged in commerce



- G. Applies only to employees, not independent/contractors.
- Label given relationship not controlling
 - Courts apply economic realities test
 - Degree of control over manner of work
 - Opportunities profit or loss
 - Investment in equipment or material
 - Degree of skill required
 - Permanence of relationship
 - Whether service rendered is important part of employer's business



H. Two Basic Requirements

1. Pay at least minimum wage all hours worked.
2. Pay one and one half the regular rate for all hours in excess of 40 in the work week.
3. Federal minimum wage is \$7.25 as of 7/24/09
 - » Ohio Constitution requires \$7.00 hour



I. FLSA Enforcement

a. Department of Labor

- § 17 Injunctive Action
- § 16(c) Back Wage Collection

Action with prayer for liquidated damages. Subject to jury trial.



b. Private Right

- § 16(b) Back Wage Collection Action with prayer for liquidated damages and attorneys' fees.
- “Opt-in” Class action for “similarly situated” employees.
- May be filed in either state or federal court

c. State of Limitations

- 2 years back from filing date, 3 years if “willful”



J. Travel Time

- Home to Work - non-compensable
- 1-Day Trip Out-of-Town - compensable
subject to deduction for normal commute
- Travel Between Sites - compensable
- Work Performed WHILE Traveling is
compensable.
 - Cell phones
 - Blackberries

Converting commuting to working time and
application of continuous workday rules.



K. Lectures, Meetings & Training Programs.

Employer-sponsored activities are “on the clock” unless all factors are met.

- Event is outside the regular working day
- Attendance is truly voluntary
- Activity is not directly related to job
- No productive work is performed
- Post-hiring training to meet hiring pre-requisite is off-the-

clock.



L. Compensable Time/Hours Worked

- Was employee engaged to wait (working time); or
- Was employee waiting to be engaged (non-compensable)
- Suffer or Permit Doctrine and Duty of Management. *Wood v Mid-America Management Corp., 6th Circuit - August 1, 2006.*
- “An employer cannot suffer or permit an employee to perform services about which the employer knows nothing.”

M. Preliminary/Postliminary Activities

“Donning & Doffing Case”

- Preliminary/Postliminary Activities - off the clock

UNLESS

- Activities are “integral and indispensable” to a “principal activity”
- Continuous workday concept.



N. Meal/Break Time

To be “off-the-clock”

- At least 30 minutes in duration
- Relieved of work duties

Employer may require employee to remain on the premises without liability.



O. On-Call Time

- If an employee must remain on employer's premises or so close thereto that he cannot use the time effectively for his own purposes - it is compensable.
- Courts look to activities that employee can perform rather than those which he/she are unable to do.
- Highly undesirable, oppressive and confining conditions of employment do not make on-call time compensable.

P. Basic Overtime Rules

- Viewed on workweek basis
- Each workweek stands alone
- Compensation whether paid as a salary, commission, non-cash must be reduced to hourly component.



Q. Free and Clear Doctrine.

Employer cannot make deductions from employee's wages which would reduce wages below minimum level.

EXAMPLES:

- Damage to company equipment
- Cash register shortages
- Restaurant walk-offs/bill errors
- Required uniforms

R. Joint Employer Issues.

- Joint and Several Liability
- Multi-Factor Test
- Control & Direction of Workers is key test



S. Cost Cutting Measures & FLSA.

- Furloughs
 - Exempt employees may create issues
 - Absolutely no work permitted.
 - No e-mails
 - No calls
 - Must furlough for a week long schedule
 - One day per week destroys exemption



T. Other Pending Legislation

1. Family Medical Leave & Enhancement Act.

- Lower coverage of FMLA from 50 to 25 employees and allow leave to participate in or attend children's or grandchildren's school activities and care for elderly relatives.

2. Equal Remedies Act.

- Would remove caps on compensatory and punitive damages in civil rights cases and allow in FLSA cases.



V. Employment Non-Discrimination Act.

- Prohibit Sexual Orientation
Discrimination.

W. Arbitration Fairness Act

- Prohibit arbitration agreements in
employment disputes.



X. Patriot Employers Act.

- Maintain a headquarters in the United States.
- Pay 60% or more of their employee's health care premiums.
- Adopt a policy of strict neutrality during union organization drives.
- Preserve or increase full-time positions in the United States compared to full-time positions in other countries.
- Pay the difference in salary and benefits to employees in the National Guard and Armed forces Reserves if those employees would otherwise lose pay when called to active duty, and
- Provide a specified living wage and retirement benefits to its employees.

Mary G. Balazs

Mary Grace Balazs has over 25 years experience in all aspects of labor and employment law and workplace law. She has counseled diverse management clients throughout the United States in virtually all aspects of labor and employment law. She has represented clients in federal and state courts, including appellate courts and the United States Supreme Court. She has also represented clients before various governmental bodies including the NLRB, EEOC, Wage and Hour Division of the United States Department of Labor, OSHA, the Ohio Civil Rights Commission and other state and local agencies. Mrs. Balazs has served as lead defense trial counsel on numerous individual and class action employment cases involving large corporate clients.

Mrs. Balazs has represented private and public sector clients at main table labor negotiations involving the International Brotherhood of Teamsters, the United Automobile Workers Union, the Steel Workers Union, the American Federation of State, County and Municipal Employees and the American Postal Workers Union.

Mrs. Balazs' labor practice also includes representing management and labor arbitrations involving union represented employees. Additionally, Mrs. Balazs regularly represents clients in matters involving insurance issues including DNO policies as well as EPLI insurance policies.

Mrs. Balazs also counsels employers regarding strategies to avoid liability and sound management practices. She has led significant management training for clients and counseling to protect the interests of corporations.

Mrs. Balazs has been a frequent speaker at seminars and conferences and has been twice named to the Leading Lawyers and Top Lawyers and Top Legal Minds in Ohio by Inside Business Magazine.

FRANK P. NAGORNEY

Frank Nagorney is a senior partner with the Cleveland law firm of Cowden & Humphrey. He is a graduate of New York University School of Law and he received a BS in accounting from Case Western Reserve University.

Frank's practice focuses on strategic business and tax planning for entrepreneurs and raising capital for them through venture capital and debt financing. In recent years his practice has seen an increase in employment law related matters such as non-competition agreements, confidentiality agreements relating to intellectual property, and executive compensation.

Mr. Nagorney is an entrepreneur in his own right, having operated numerous businesses ranging from injection molding of plastic computer accessories, to producing 55 gallon steel drums, to constructing power plants. We will hear more about these during his lecture.

Frank's personal interests include ballroom dancing, fencing, golf, and reading history books about western civilization, and of course, anything having to do with "Star Trek" .

Questions?

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