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THURSDAY, JUNE 16, 2011

**HIGHLIGHTS****Democrats Miller, Cummings Call for Delay or Limits on *Boeing* Hearing**

The ranking Democrats on two House committees tell Rep. Issa (R-Calif.), chairman of the Committee on Oversight and Government Reform, that he should either delay a June 17 hearing on the National Labor Relations Board complaint against Boeing Co. or instruct committee members to avoid questioning the NLRB's acting general counsel on the particulars of the case now being heard by an administrative law judge.

Reps. Miller (D-Calif.), ranking member on the House Education and the Workforce Committee, and Cummings (D-Md.), ranking Democrat on the Oversight committee, say Issa has disclosed plans to question Acting General Counsel Solomon about the pending case at the June 17 field hearing the committee will hold in North Charleston, S.C.

Miller and Cummings say Issa's plans for questioning Solomon about an active case involving private litigants "indicate a serious potential for improper interference" with the unfair labor practice case, and "a disturbing disregard for what that interference could mean for the due process rights" of the parties involved. But an Issa spokesman says the committee chairman already has addressed Solomon's concerns about the hearing. **AA-1**

**House Republicans Revive Proposal to Cut Protection for 'Salting'**

Six Republican House members introduce legislation (H.R. 2153) that would amend the National Labor Relations Act to eliminate protection for employees and job applicants who seek or obtain employment as part of a campaign to "salt" an employer's workforce with professional union organizers or other individuals who are really applying for jobs "in furtherance of other employment or agency status."

Rep. King (R-Iowa) introduces the proposed Truth in Employment Act, which is identical to bills (H.R. 2808/S. 1227) that Republicans offered in June 2009. The earlier proposals died in House and Senate committees.

Stating that an "atmosphere of trust and civility" is essential in labor-management relationships, the proposed legislation asserts that "[t]he tactic of using professional union organizers and agents to infiltrate a targeted employer's workplace, a practice commonly referred to as 'salting' has evolved into an aggressive form of harassment not contemplated when the National Labor Relations Act was enacted and threatens the balance of rights which is fundamental to our system of collective bargaining." **A-1**

**Court Denies Meatpacker's Bid to Dismiss EEOC Bias Suit**

The Equal Employment Opportunity Commission may proceed with a broad discrimination suit against the meatpacking firm JBS Swift & Co. on behalf of Somali Muslim workers even though the relevant union local is not a party to the suit, a federal district court in Colorado rules (*EEOC v. JBS USA LLC d/b/a JBS Swift & Co.*, D. Colo., No. 10-cv-02103, 6/9/11).

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**TRADE:** The Labor Department's Office of Trade and Labor Affairs says it has accepted for review an AFL-CIO submission alleging Bahrain violated obligations in the U.S.-Bahrain Free Trade Agreement. **A-6**

**ARBITRATION:** Actor Charlie Sheen's breach of contract and wrongful termination lawsuit against a producer and studio must be submitted to an arbitrator to decide whether the dispute must be resolved through arbitration, a California Superior Court judge rules. **A-10**

**ALSO IN THE COURTS**

**LITIGATION:** Roundup summarizes several recent labor and employment court rulings. **BB-1**

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EEOC sued JBS Swift last year, claiming the company violated Title VII of the 1964 Civil Rights Act by discriminating against Somali Muslim workers in Greeley, Colo., and Grand Island, Neb. EEOC charged the company with national origin, religious, and race discrimination, and two groups of current and former Greeley employees intervened. JBS Swift urged the court to dismiss EEOC's complaint because it does include United Food and Commercial Workers Local 7 as a party.

The UFCW local is not a "required" party because the court can afford the plaintiffs' requested relief even in the union's absence, Judge Brimmer decides. EEOC has not alleged any wrongdoing by the union and does not challenge the collective bargaining agreement, the court says. To the extent JBS Swift fears an unfair labor practice charge if the court orders it to unilaterally accommodate Somali Muslim workers, the court says any relief ordered would be within the parameters of the union contract. **A-13**

### **New York City Restaurant Chain to Pay \$5.1 Million in Settlement**

A sandwich restaurant chain based in New York City has agreed to pay \$5.1 million in back wages, damages, and penalties to settle state minimum wage and overtime violations, New York Gov. Cuomo (D) announces.

The settlement with the chain known as Lenny's: The Ultimate Sandwich is the largest on record with the state labor department, Cuomo says. The previous record was a \$2.3 million settlement with the owner of the Ollie's chain of nine Asian restaurants in the city. Cuomo says the Lenny's settlement "sends a strong message to employers that exploiting employees will not be tolerated in New York State."

From 2002 to 2008, the state says, more than 800 employees at 11 Lenny's locations were cheated out of millions of dollars. A state labor department investigation found employees were regularly paid below the minimum wage and were not paid overtime. Employees worked 10 to 12 hours a day, six to seven days a week, at an average weekly salary of \$275 per week, and under state minimum wage and overtime law, employees should have been paid at least \$500 per week for the hours worked, the state says. In addition, it charges, time records kept by the employer were not accurate and wage statements were not provided to workers, as required by law. **A-11**

### **RWDSU, Macy's Reach Tentative Pact for 4,000 at New York Stores**

Macy's and Retail, Wholesale and Department Store Union Local 1-S announce they have reached a tentative five-year collective bargaining agreement covering more than 4,000 workers at four Macy's department stores in the New York City area.

Union members employed at Macy's flagship store in Manhattan's Herald Square begin the ratification vote, while members working at Macy's stores in Queens, Parkchester, and Westchester will vote June 20-22 on the proposed settlement praised by union leaders. The union negotiating committee is recommending that members vote to approve the proposal, a union spokesman tells BNA.

"This is a solid contract and it reflects the fact that our workers are the true magic of Macy's," Local 1-S President Ken Bordieri says in the union's announcement. RWDSU is withholding details of the tentative contract until members are briefed about it. **A-8**

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**EMPLOYMENT:** Bureau of Labor Statistics releases regional and state employment in May, 10 a.m.

**Daily Labor Report****CHAIRMAN AND CHIEF EXECUTIVE OFFICER:**

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# Leading the News

## *Labor Law*

### **Democrats Miller, Cummings Call for Delay Or Limits on House Panel's Boeing Hearing**

**T**he ranking Democrats on two House committees June 16 told Rep. Darrell Issa (R-Calif.), chairman of the Committee on Oversight and Government Reform, that he should either delay a June 17 hearing on the National Labor Relations Board complaint against Boeing Co. or instruct committee members to avoid questioning NLRB's acting general counsel on the particulars of the case now being heard by an administrative law judge.

Rep. George Miller (D-Calif.), ranking member on the House Education and the Workforce Committee, and Elijah E. Cummings (D-Md.), ranking Democrat on the Oversight committee, said that Issa has disclosed plans to question Acting General Counsel Lafe E. Solomon about the pending case at the June 17 field hearing the committee will hold in North Charleston, S.C.

Miller and Cummings said Issa's plans for questioning Solomon about an active case involving private litigants "indicate a serious potential for improper interference" with the unfair labor practice case, and "a disturbing disregard for what that interference could mean for the due process rights" of the parties involved.

A spokesman for Issa told BNA in a June 16 e-mail that the committee chairman will respond to the letter from Miller and Cummings, but said their comments "largely mirror" arguments that Issa had already addressed in correspondence to Solomon.

**Dispute Over June 17 Committee Hearing.** The Oversight and Government Reform committee has announced that the subject of the June 17 hearing is "Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise." But Issa has said the hearing will explore the decision to issue a complaint against Boeing, and he has been pressing for several weeks to have Solomon appear at the hearing to discuss the unfair labor practice complaint against Boeing that was issued April 20 with Solomon's authorization.

The complaint alleges that Boeing unlawfully established a second assembly line for production of 787 Dreamliner aircraft at a nonunion plant in South Carolina in order to retaliate against workers in Washington state represented by International Association of Machinists District Lodge 751 who have in past years engaged in lawful strikes over contract disputes with the company (77 DLR AA-1, 4/21/11).

Solomon said that he would seek an administrative order requiring the company to add a second line for assembly of its 787 Dreamliner plane in Washington, utilizing supply lines maintained by IAM-represented workers in the Seattle area and Oregon.

An administrative law judge June 14 opened a hearing on the unfair labor practice allegations in Seattle.

The hearing is expected to last approximately six weeks, spread over a period of 2-3 months (114 DLR AA-1, 6/14/11).

The committee's field hearing on June 17 is scheduled to take place in North Charleston, S.C., where Boeing's nonunion facility is located.

**Flurry of Letters Over Solomon Appearance.** In a May 26 letter to Solomon, Issa told the acting general counsel "The Committee asks you to provide testimony about the NLRB's action against Boeing and how its actions could impact the thousands of Boeing employees at a non-union worksite in South Carolina" (110 DLR A-1, 6/8/11).

Solomon responded in a June 3 letter that NLRB would provide public documents along with trial testimony and exhibits as they became available, but declined to appear at the hearing, stating his appearance could "threaten the rights of the parties to a fair trial" of the unfair labor practice allegations against Boeing.

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**Miller and Cummings said Issa's plans for questioning Solomon about an active case involving private litigants "indicate a serious potential for improper interference" with the unfair labor practice case, and "a disturbing disregard for what that interference could mean for the due process rights" of the parties involved.**

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Issa replied on June 7 that the hearing would not intrude on Solomon's decisionmaking process or legal strategy, but "will focus on how your actions against Boeing could impact the thousands of Boeing employees at a non-union worksite in South Carolina." Issa asked Solomon to reconsider the chairman's invitation to testify.

On June 10, Solomon wrote to Issa. Solomon noted that he had offered to provide a written statement to the committee as well as testimony by Associate General Counsel Richard A. Siegel, an agency official who was not a decisionmaker in the Boeing case but could explain NLRB's general policies and procedures. Solomon said he would appear at the South Carolina hearing if Issa insisted, but said he "cannot and will not compromise the very legitimate interests that I have articulated in all of my communications to you."

**Issa Rejected Acting General Counsel's Objections.** Issa answered Solomon's letter on June 14 and insisted on Solomon's personal appearance at the hearing.

“As you know,” the committee chairman wrote to Solomon, “the NLRB is an agency that was created by Congress and is accountable to Congress. Further, taxpayers have a strong interest in how the NLRB is carrying out its legislative mandate under the NLRA.”

Addressing Solomon’s assertion that questioning him on the Boeing complaint could prejudice the rights of litigants, Issa said that the acting general counsel’s role in the litigation was not to act as a final agency decisionmaker on the merits of the unfair labor practice complaint against Boeing. Arguing that Solomon’s appearance would not affect the due process rights of the parties in the NLRB proceeding, Issa added that “to the extent that it may, such a claim is for the affected parties to raise, not the agency, in federal court after a decision has been rendered by the agency.”

Issa told Solomon that “the policy implications of your interpretation of the National Labor Relations Act (NLRA), coupled with the corresponding impact on jobs, are far too great for Congress to ignore.”

“[A]s recognized by the Supreme Court,” Issa wrote, “the Committee is appropriately inquiring about your administration of an existing law.”

**Miller, Cummings Express ‘Grave Concerns.’** Miller and Cummings said in their June 16 letter that they have “grave concerns” about the planned hearing.

Noting that the unfair labor practice case is now under way and is expected to go on for several months, the Democrats said that Solomon would likely be involved in decisions about the case, at least until NLRB attorneys complete their case against Boeing.

“Yet,” they wrote to Issa, “you have indicated that you plan to subject this decision-maker to questions about the active case at the hearing.”

The letter contended that Issa had pressed an “intrusive” demand for NLRB documents about the Boeing litigation and charged that the document demand and other statements by Issa “indicate that you have every intention at the upcoming hearing of pressing the very questions that put the due process rights of private parties in jeopardy.”

Miller and Cummings wrote that “There is still an opportunity for you to demonstrate some modicum of concern about the constitutional and ethical impact of what you are doing.”

Urging Issa “to be circumspect about the nature of the questions you and other Members pose to the chief prosecutor of this live case,” Miller and Cummings wrote “At a minimum, we ask that you direct Committee Members to limit all questions to Mr. Solomon to general questions about the NLRB and its processes, and not issues related to the ongoing proceeding before the Administrative Law Judge.”

In addition to Solomon, the committee has scheduled six witnesses to appear at the field hearing. Attorney Philip Miscimarra of Morgan, Lewis & Bockius in Chicago and Neil Whitman, president of Dunhill Staffing Systems in Charleston, S.C., are scheduled to appear on one panel with law professor Julius G. Getman of the University of Texas at Austin, and Cynthia Ramaker, a South Carolina Boeing worker and former union officer.

The committee is also to hear from South Carolina Gov. Nikki Haley (R) and South Carolina Attorney General Alan Wilson.

BY LAWRENCE E. DUBÉ

*Text of the June 16 Miller-Cummings letter to Rep. Issa may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=ldue-8hvsq6>.*

# News

## Organizing

### House Republicans Revive NLRA Proposal To Eliminate Protection for Union 'Salting'

Six Republican House members June 13 introduced legislation (H.R. 2153) that would amend the National Labor Relations Act to eliminate protection for employees and job applicants who seek or obtain employment as part of a campaign to "salt" an employer's workforce with professional union organizers or other individuals who are really applying for jobs "in furtherance of other employment or agency status."

Rep. Steve King (R-Iowa) introduced the proposed Truth in Employment Act, which is identical to bills (H.R. 2808/S. 1227) that Republicans offered in June 2009 (112 DLR A-16, 6/15/09). The earlier proposals died in House and Senate committees.

The new House bill is co-sponsored by Reps. John J. Duncan (R-Tenn.), Dennis A. Ross (R-Fla.), Gary G. Miller (R-Calif.), Dan Burton (R-Ind.), and Lynn Jenkins (R-Kan.).

**Bill Proposes NLRA Amendment.** Stating that an "atmosphere of trust and civility" is essential in labor-management relationships, the proposed legislation asserts that "[t]he tactic of using professional union organizers and agents to infiltrate a targeted employer's workplace, a practice commonly referred to as 'salting' has evolved into an aggressive form of harassment not contemplated when the National Labor Relations Act was enacted and threatens the balance of rights which is fundamental to our system of collective bargaining."

Stating that union organizers have sought employment with targeted employers in order to organize workers "or to inflict harm specifically designed to put non-union competitors out of business," the bill provides that "an employer should have the right to expect job applicants to be primarily interested in utilizing the skills of the applicants to further the goals of the business of the employer."

The legislation provides that a "balance of rights" of employers and employees should be required under federal labor law, and proposes adding a subsection to the existing NLRA Section 8(a), a provision that lists prohibited employer unfair labor practices.

H.R. 2153 would add to the NLRA provision:

"Nothing in this subsection shall be construed as requiring an employer to employ any person who seeks or has sought employment with the employer in furtherance of other employment or agency status."

The bill has been referred to the House Committee on Education and the Workforce.

Text of the bill may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=ldue-8hvg6g>.

## Federal Employees

### Three-Year Agreement Between FAA, NATCA Cost \$669 Million More Than Previous Pact

A 2009 collective bargaining agreement between the Federal Aviation Administration and the National Air Traffic Controllers Association will cost FAA an estimated \$669 million more than it would have cost to extend a 2006 agreement, according to a report issued June 16 by the Transportation Department's Office of Inspector General.

While the OIG found FAA's approach to developing the estimate to be reasonable, it said several provisions in the collective bargaining agreement could escalate the agency's additional costs beyond \$669 million before September 2012, when the current three-year agreement, ratified in September 2009 (184 DLR A-4, 9/25/09) is scheduled to expire.

"In developing its estimate, FAA assumed that the retirement rate of veteran controllers and overtime usage would be comparable to historical data. However, if either of these factors varies from FAA's projections, the portion of the cost estimate related to controller pay and benefits could be impacted. For instance, FAA projected in its 2009 Controller Workforce Plan that 779 controllers would retire in fiscal year (FY) 2010. However, the actual number of controller retirements for FY 2010 was 468. As a result of the lower retirement rate, FAA personnel costs under the 2009 CBA were \$14 million higher than it initially estimated for the first year of the contract," the report said.

**Provisions Could Boost Costs.** Provisions in the 2009 contract also could escalate costs beyond FAA's estimate, the report said.

For example, it said, the OIG in 2003, looking at a 1998 collective bargaining agreement between FAA and NATCA, found hundreds of negotiated memoranda of understanding (MOUs) that resulted in \$23 million in overtime costs, \$1.8 million in cash awards, \$30 million in additional salary incentives, and 65,000 hours in time-off awards.

There are three areas where FAA's internal controls currently are insufficient to prevent contract cost escalations, the report said.

"First, although FAA has a detailed policy for reviewing and approving MOUs before they can be implemented, we found that some local air traffic managers and regional managers do not strictly comply with the steps specified in the policy. Second, we found that the national MOU database, FAA's primary tool for tracking all national, regional, and local MOUs, is not yet fully operational. Finally, FAA does not have adequate controls over union participation in workgroups," it said.

Without sufficient internal controls covering these areas, FAA risks repeating the mistakes that contributed

to some of the additional costs that occurred during the five-year term of the 1998 CBA, the report said.

The OIG recommended that FAA:

- update the contract cost estimate of the 2009 CBA annually to reflect any changes to the underlying assumptions and incorporate it into its annual budget request;
- expedite completion of an MOU database and enter all MOUs that were agreed to since the 2009 CBA was enacted;
- conduct an internal evaluation of its MOU policies and procedures to ensure that the guidelines incorporated in FAA Order 3710.18 are being followed; and
- implement formal policies and procedures to oversee the formation of controller workgroups, workgroup productivity, and the implementation of workgroup results and agreements.

**FAA in Partial Agreement.** In its response, which was included in the report, FAA fully concurred with the first three recommendations and partially concurred with the fourth.

"The Agency has met with NATCA to jointly address the appropriate and effective use of a collaborative process, including the use of workgroups. As a result of this process, the FAA and NATCA have formed a national Collaborative Work Group, and entered jointly into a formal program which requires managers and union representatives to receive structured training on the use of work groups as established in Article 48 of the parties' CBA. This includes determining the appropriate need for workgroups, defining scope and authority, and establishing definitive measurable outcomes to be achieved," FAA said in the report in response to the OIG's recommendation on workgroups.

In addition, it said, FAA is working to track workgroup costs in cooperation with NATCA while also developing a formal labor strategy emphasizing the need for fiscal responsibility. "[W]e expect these measures to suffice without the need for additional formal policies and procedures," FAA said.

**Requested by Rep. Mica.** The report was requested by Rep. John Mica (R-Fla.), chairman of the House Transportation and Infrastructure Committee, who said he asked for the report because of what he said were significant cost overruns associated with the 1998 agreement between FAA and NATCA.

According to a statement from Mica, FAA's initial cost estimate for the 1998 agreement was \$200 million, but the agreement eventually required more than \$1 billion in additional funds. These overruns spurred the request that the OIG issue this report now, while FAA has the opportunity to avoid repeating its earlier mistakes, he said.

"With this report, the FAA has been given fair warning that it must closely oversee the use of taxpayer money and put controls in place to avoid another \$1 billion bill that we can ill afford. It is crucial that we do all we can to protect the American taxpayer and ensure that those cost overruns are not repeated with the current agreement," Mica said.

By LOUIS C. LABRECQUE

*The OIG audit report, FAA Needs to Strengthen Controls Over the 2009 FAA/NATCA Collective Bargaining Agreement, No. AV-2011-120, may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=srm-8hvsr9>.*

## International Labor

### ILO Adopts New Convention On Protection of Domestic Workers

**G**ENEVA—Representatives from governments, labor unions, and employer groups attending the International Labor Organization's annual general assembly meeting in Geneva voted June 16 to adopt a new global convention on the protection of domestic workers.

The United States voted with a large majority of ILO member governments in approving the new convention and accompanying recommendations, the first international instrument of its kind aimed at improving the rights and protection of household workers.

Swaziland was the only government voting against the convention, while the governments of the Czech Republic, El Salvador, Malaysia, Panama, Singapore, Sudan, Thailand, and the United Kingdom abstained from the vote.

Employer groups from 15 ILO member states voted against the convention, while labor unions from all ILO member states in attendance, with the exception of Egypt, voted in favor.

Under the ILO's "tripartite" system, each of the organization's 183 member states is represented by two government delegates, one employer delegate, and one worker delegate.

**At Least 53 Million Domestic Workers.** ILO director-general Juan Somavia said there were at least 53 million domestic workers around the globe, with some estimates putting the figure at up to 100 million. The great majority of these workers are women, and many are migrant workers, he noted.

Among other things, the new convention offers guidance on limiting the practice of payment in kind to domestic workers, addresses food and accommodation for live-in workers, and calls on ILO member states to ensure reasonable hours of work and sufficient hours of rest, he said.

"But above all, this convention states that domestic workers are workers," Somavia declared. They are neither servants nor members of the family. This might sound obvious, but it is not."

"Many domestic workers today are closer to being forced laborers than workers," he added.

**AFL-CIO's Shuler Lauds Convention.** AFL-CIO Secretary-Treasurer Liz Shuler also welcomed the adoption of the convention.

"For far too long, domestic workers not only have faced widespread exploitation and abuse, they have been denied basic recognition as workers," Shuler said. "This is an emotional and proud day for these workers, mainly women, who toil long, hard hours for meager wages."

The ILO's Manuela Tomei cautioned that the situation of domestic workers "won't improve overnight" as a result of the adoption of the convention, and that a lot will depend on how national governments implement the agreement.

She noted that the convention contains "lots of flexible clauses" allowing for gradual implementation at the national level.



In fact, the convention gives national governments leeway to exclude categories of domestic workers from the agreement's coverage, including workers where "special problems of a substantial nature arise." Also excluded are workers who perform domestic work "only occasionally or sporadically."

**Provisions of Convention.** Tomei however dismissed suggestions that the new convention was toothless, citing provisions to ensure that domestic workers are informed of their terms and conditions of employment (preferably through written contracts) and requiring governments to implement measures allowing labor inspectors (under strict conditions) to access households in order to verify compliance with domestic laws. She said these are provisions "which make a difference."

Other specific provisions in the convention include a minimum of 24 consecutive hours of rest each week; allowing domestic workers to leave the home when not working; allowing domestic workers to keep travel and identity documents in their possession; ensuring domestic workers enjoy minimum wage coverage (where such coverage exists) and are paid directly in cash at regular intervals at least once a month; and ensuring effective access to courts, tribunals, or other dispute resolution procedures.

Tomei also said ILO members would not be starting from scratch, noting that a number of governments already have adopted regulations specifically aimed at protecting domestic workers.

"Indeed, many of the provisions that are contained in the convention are a reflection of what is already out there," she said.

Tomei said she believed that the two national ratifications necessary to bring the convention into force would be achieved by the end of 2012.

By DANIEL PRUZIN

*The ILO convention may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=czon-8hvs3>.*

## Religious Discrimination

### Fired Jehovah's Witness May Not Proceed With Discrimination Claims, Court Determines

**A** Michigan rehabilitation assistant and Jehovah's Witness who was fired after missing two meetings scheduled on his days off failed to prove his religious accommodation and retaliation claims under Title VII of the 1964 Civil Rights Act, the U.S. District Court for the Eastern District of Michigan ruled June 14 (*Fields v. Rainbow Rehab. Ctr. Inc.*, E.D. Mich., No. 10-10079, 6/14/11).

Granting summary judgment to Rainbow Rehabilitation Center Inc., Judge Patrick J. Duggan found that the employer gave Leonardo Fields the options to trade shifts with co-workers and to schedule one-on-one meetings whenever he missed a training session or a monthly staff meeting scheduled for one of his requested days off. But Fields missed a training session after agreeing to attend it and failed to schedule a one-on-one meeting after missing a staff meeting, the court said. It found that Fields therefore failed to show that Rainbow fired him for failing to meet a job requirement that conflicted with his religious beliefs.

The court also granted summary judgment to Rainbow on Fields's claim that the center retaliated against him for submitting an internal grievance by scheduling him for shifts and arranging meetings on days he requested not to work. Fields failed to show a causal link between his grievance and either allegedly retaliatory action, the court said.

**Allowed to Take Multiple Days Off Each Week.** Rainbow, which provides rehabilitation services to neurologically impaired people at a facility in Paint Creek, Mich., hired Fields in 1990 as a rehabilitation assistant responsible for patient care. About 1994, he requested that Rainbow not schedule him to work on Sundays, Tuesdays, and Thursdays to accommodate his religious beliefs and to allow him to care for his son. Fields had custody of his son on those three days each week. He asserted that Rainbow accommodated this request until June 2008.

After Rainbow suspended Fields for two days and gave him a final written warning for failing on Nov. 17, 2007, "to stay when mandated until appropriate staffing arrived and le[aving] the facility without permission," he filed an internal grievance complaining that he was forced to stay beyond his scheduled shift multiple times because co-workers did not arrive on time to relieve him. A review board reduced his suspension to one day but kept the final written warning.

To address the problem of employees working beyond their shifts when replacements had not arrived, which incurred overtime costs for Rainbow, the center implemented a "fair share weekend" policy under which it required staff members to work a certain number of weekends. Fields was scheduled to work on Sunday, June 23, 2008, and on Sunday, July 6, as a result of the policy. But he swapped shifts with co-workers to avoid working on either date.

In August 2008, Fields met with his supervisor Julie Wigand and human resources director Tiffany Alexander regarding conflicts with his scheduling accommodation. Afterward, Rainbow never scheduled Fields to work on an accommodated day. In November 2008, the center approved his request to add Wednesdays as one of his accommodated days so he could go to Bible class.

Fields failed to attend a required cardiopulmonary resuscitation/first aid class on Jan. 13, 2009, a Tuesday that he and Wigand had jointly chosen for him to take the class. Fields explained that he had to stay with his son at school. As a result of the absence, Rainbow issued him a "last and final written warning with a suspension until you complete your recertification training requirements" on Jan. 19. Fields returned to work on Jan. 24 upon attending a training session.

On Jan. 27, 2009, a Thursday, Fields failed to attend a mandatory monthly staff meeting. Pursuant to Rainbow's policy, a rehabilitation assistant who is unable to attend a training session or a staff meeting must inform a supervisor ahead of time and set up an alternative one-on-one session.

Rainbow fired Fields on Feb. 24, 2009, due to the staff meeting absence and his prior policy violations, including a December 2008 incident in which he did not properly supervise a patient and received a three-day suspension and a written warning. He proceeded to sue Rainbow, Wigand, and Alexander.

**Conflict With Job Requirement Did Not Cause Firing.** To show a prima facie case of religious discrimination, Fields needed to show he holds a sincere religious belief that conflicts with an employment requirement; he informed the employer about the conflicts; and he was discharged or disciplined for failing to comply with the conflicting employment requirement, the court said. It found that Rainbow did not dispute Fields's ability to satisfy the first and second elements.

Although Fields was disciplined for failing to attend a training session on one of his days off, he and Wigand had selected that date together, the court said. It found that Rainbow fired Fields after missing a staff meeting on an accommodated day because he failed to set up a one-on-one meeting with Wigand.

Pointing to Fields's ability to arrange one-on-one training as an alternative to attending meetings on his accommodated days, the court agreed with Rainbow that Fields did not make out a prima facie case of religious discrimination because he failed to show that the center fired him for noncompliance with a job requirement that clashed with his religious beliefs.

"However, even if Plaintiff established a prima facie case of discrimination, the evidence shows that Defendants in fact accommodated Plaintiff's religious beliefs throughout his employment by not scheduling him on the three and then four days each week that he sought off, allowing him to trade shifts when he was scheduled (whether intentionally or unintentionally) on one of his accommodation days, and permitting him to arrange a one-on-one meeting or training session when such meetings or sessions were scheduled on his accommodation days," the court said.

It would be unreasonable to expect an employer to schedule such staff meetings or training sessions around a single employee's accommodated days, especially when that employee can only work three days a week, the court said. It found that Rainbow provided Fields with reasonable alternatives to attending meetings or training sessions or simply working on his accommodated days by letting him arrange alternative meetings or training sessions and swap shifts with co-workers.

As to Fields's retaliation claim, he ultimately did not work either of the two Sunday shifts at issue after trading them with other employees, and he therefore was not subject to an adverse employment action, the court said. It found that Fields presented no evidence showing a causal connection between his internal grievance and Rainbow's scheduling either of the two shifts or of the staff meeting and the training session on his accommodated days.

Fields represented himself, pro se. Gregory M. Meihn of Foley & Mansfield in Ferndale, Mich., represented the defendants.

By ELLIOTT T. DUBE

*Text of the decision may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=edue-8hukeg>.*

## Pensions

### ASPPA, ICI Highlight Advantages Of Broader Use of Electronic Disclosure

**A**llowing defined contribution pension plans to provide plan disclosure and information in an electronic format would give participants easier access to the information in a more user-friendly format, according to a white paper released June 14 by the American Society of Pension Professionals and Actuaries, and the Investment Company Institute.

The paper, *Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery*, compares the effectiveness of electronic and paper delivery and makes the argument that "there are large and growing advantages of electronic over paper delivery."

ASPPA and ICI submitted the paper as a supplement to their comment letters responding to the Department of Labor's call for comments to determine whether to modify current rules governing the electronic distribution of employee benefit plan information (67 DLR A-5, 4/7/11).

Access to material delivered electronically has increased dramatically, and plan information provided this way can be accessed anywhere a plan participant can access the internet, the paper said. Electronic delivery also is cost-effective and environmentally friendly, the paper said.

Additionally, the paper said the Obama administration's policy in Executive Order 13563 "decisively supports a major shift toward electronic disclosure." The order called for federal agencies to detail which existing significant regulations they will review to identify whether the regulations can be made more effective or less burdensome (11 DLR A-9, 1/18/11).

"The arc of change is overwhelmingly in the direction of electronic rather than paper delivery," the two groups said. "Now that access to electronic disclosure is widespread, and access is actually better electronically in major respects, there is a compelling case for the next regulation to permit plans to choose a default rule of electronic delivery."

*Text of the paper may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=scrm-8hvrrs>.*

## Safety & Health

### West Virginia Metal Plant Cited Over 'Fine Metal' Blast That Killed Three Workers

**T**he Labor Department's Occupational Safety and Health Administration proposed more than \$150,000 in penalties against AL Solutions Inc.'s West Virginia facility June 14 for a 2010 "fine metal" explosion that killed three workers.

The explosion occurred at the company's New Cumberland facility, which processes titanium and zirconium. The U.S. Chemical Safety and Hazard Investigation Board is also investigating and has said it could have been a dust explosion, as both metals can auto-ignite at room temperature if their particle size is small enough (237 DLR A-12, 12/10/10).

The 18 citations alleged against the company include one willful violation under the general duty clause for maintaining a water suppression system that, when used in the presence of combustible metals, could actually result in an explosion. OSHA proposed a \$70,000 fine for that citation.

"This tragedy could have been prevented," David Michaels, assistant secretary of labor for occupational safety and health, said in a written statement. "It is imperative that employers take steps to eliminate hazards and provide a safe working environment."

OSHA cited the company for 16 serious violations, including others under the general duty clause, for not maintaining a properly designed system for detecting hydrogen gas, failing to provide over-pressure protection, failing to provide personal protective equipment, and failing to safely store flammable metals.

The agency also issued one other-than-serious citation for failing to fill out an injury and illness report for an employee placed on restricted work duty for 64 days in 2009 after an injury in an unrelated incident.

**Placed in Severe Violator Program.** OSHA entered AL Solutions into the Severe Violators Enforcement Program as a result of the citations.

The program, begun in the spring of 2010, is intended to focus agency resources on employers that commit willful, repeat, or failure-to-abate violations involving: a fatality or catastrophe; industry operations that expose workers to severe occupational hazards; exposure to highly hazardous chemicals; or "egregious" actions. The company declined to say whether it planned to challenge the citations, which it must do within 15 days.

"We are aware OSHA issued its report," AL Solutions said in a written statement. "The accident is still under investigation and the company continues to fully cooperate with all investigators. We must defer comment until all investigations are complete."

**Particles Not Airborne.** While some of the metal particles were small enough to be characterized as dusts, "OSHA findings were that the nature of the process was such that the metal was wet and not airborne," Joanna Hawkins, a spokeswoman for OSHA Region III, told BNA in a June 15 e-mail. "The explosive component here in OSHA's opinion was hydrogen."

OSHA also recently initiated a national emphasis program aimed at the primary metals manufacturing industry that will focus, among other hazards, on metal dusts (107 DLR A-13, 6/3/11).

Furthermore, OSHA is continuing with its combustible dust rulemaking, the next step being the convening of a Small Business Regulatory Enforcement Fairness Act panel. Among the questions OSHA will consider is whether to include metal dusts in its proposal.

By GREG HELLMAN

## International Labor

### Canada Contracts Negotiated in April Produced Average Wage Gain of 2.4 Percent

**O**TTAWA—Major collective bargaining agreements reached in Canada during April produced average base rate wage increases of 2.4 percent, more than double the 1.1 percent average in March, Human Re-

sources and Skills Development Canada reported June 15.

The April figure also was larger than the averages of 2.1 percent in February, the 1.2 percent in January, the 1.3 percent average for the first quarter of 2011, and the 1.8 percent average for 2010 as a whole, the department said in the latest issue of its *Workplace Bulletin* publication.

"Wage adjustments in April ranged from a wage freeze in three agreements—Connor Bros., division of Clover Leaf Seafoods L.P. with 750 employees in New Brunswick; government of British Columbia, with 800 nurses; and the University of Victoria with 500 instructors and lecturers—to a high of 5.8 percent for the University of Windsor, with 950 teaching assistants," HRSD Canada said.

The April figure was based on 37 agreements covering 90,180 employees. The last time parties to those settlements negotiated, the contracts had wage increases averaging 3.5 percent and durations averaging 35.4 months. The new agreements average 34.5 months in duration.

**Private Sector Contracts Gain 2.0 Percent.** Private sector agreements reached in April showed average annual wage increases of 2.0 percent, down from the 2.3 percent average in March and 2.2 percent in February, but matching the 2.0 percent in January. Private sector settlements had averaged 2.2 percent in first quarter 2011 and 2.1 percent in 2010 as a whole.

Public sector agreements, meanwhile, showed average annual wage increases of 2.8 percent in April, more than double the 1.0 percent average in March and larger than the averages for 2.1 percent in February, 1.2 percent in January, 1.2 percent in first quarter 2011, and 1.6 percent in 2010 as a whole.

"The larger public sector figure was due largely to 12 agreements in the Alberta education sector, which provided 21,580 teachers across the province with wage gains of 4.5 percent; in the private sector, six construction agreements, also in Alberta, provided 33,350 employees with wage adjustments averaging 2.0 percent," HRSD Canada said.

Settlements without cost-of-living adjustments in April showed average wage growth of 2.7 percent, up from 1.1 percent in March, 1.8 percent in February, 1.2 percent in January, 1.3 percent in first quarter 2011, and 1.8 percent for 2010 as a whole. Settlements with COLA provisions showed average annual wage increases of 2.0 percent, down from the 2.7 percent in March and the 3.0 percent in first quarter 2011. The gain for 2010 as a whole was 1.9 percent.

On a sectoral basis, the largest average annual wage increases in April were reported for primary industries (3.9 percent), followed by utilities (3.4 percent), transportation (3.2 percent), education, health, and social services (3.1 percent), finance and professional services (3.0 percent), construction (2.0 percent), public administration (1.5 percent), entertainment and hospitality (1.3 percent), wholesale and retail trade (1.2 percent), and manufacturing (0.0 percent).

On a regional basis, the largest average annual wage increases in April were reported for the federal jurisdiction (3.1 percent), followed by Alberta (3.0 percent), Ontario (2.0 percent), Quebec (1.9 percent), Manitoba (1.5 percent), British Columbia (1.3 percent), Nova Scotia (1.0 percent), and New Brunswick (0.0 percent). No

settlements were reported for the remaining provinces or the territories.

By PETER MENYASZ

*The latest issue of the Workplace Bulletin may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=czon-8hvrma>.*

## Public Employees

### Chicago Teachers Enter Negotiations After Losing Bargained Wage Increase

**C**HICAGO—The Board of Education of the Chicago Public Schools voted June 15 to rescind a previously bargained 4 percent wage increase for thousands of district employees, touching off a wave of accusations from unions representing teachers and educational support personnel and raising concerns about a possible strike later this year.

The board voted unanimously not to fund a 4 percent wage bump, scheduled to commence July 1, in a bid to trim \$100 million from a massive budget deficit. The funds are desperately needed as CPS faces a projected \$712 million shortfall heading into the upcoming school year. The board's decision will affect most of CPS's 40,000 employees, represented by seven different unions.

The wage increases were specified during the fifth and final year of the unions' collective bargaining agreements with CPS. Three quarters of the affected workers are teachers, represented by Chicago Teachers Union (CTU) Local 1. The other unions representing CPS employees include: Local 73 of the Service Employees International Union; Local 143-143B of the International Union of Operating Engineers; Local 7 of the Fireman and Oilers; Local 1 of UNITE HERE; Local 726 of the State and Municipal Teachers, Chauffeurs and Helpers Union; and Local 134 of the International Brotherhood of Electrical Workers.

**Process Calls for Negotiations.** Liz Brown, a spokeswoman for CTU, said June 16 the board's action is required under a provision in the collective bargaining agreement if it believes it does not have reasonable resources to fund the increase. Formal rejection, however, triggers processes by which the affected unions can accept the denied compensation or enter into negotiations with CPS. Brown told BNA that the seven unions signed a letter June 15 expressing their desire to commence negotiations on the issue.

But Brown stressed that the process could escalate over the course of the summer. If the parties reach an impasse, she said, the unions could authorize a strike. Teachers have not struck the nation's third largest school district since 1987.

CTU President Karen Lewis said she was "appalled" by the board's decision to shirk its duties under the contract.

"We've kept our promise to them. But today the newly appointed Chicago Board of Education voted to break its promise to us and not fund our four percent raises for the next and final year of our contract," Lewis said in a memorandum to her 30,000 members. "We plan to fight the refusal to honor commitments to teach-

ers and school professionals who help educate our children."

**New Mayor Brings Tougher Stance.** At multiple levels, the board's decision signifies a new chapter in the labor-management relationship.

The vote came during the very first meeting of a completely reconstituted school board and responded to recommendations by CPS's new Chief Executive Officer Jean-Claude Brizard. The new board and Brizard were handpicked by Mayor Rahm Emanuel (D), who took office one month ago. While former mayor Richard Daley was often willing to invest generously to achieve long stretches of labor peace, Emanuel campaigned on a platform stressing shared sacrifice and concessions from public employee unions.

In a statement, Emanuel commended the board for its "courage" in the face of a massive budget deficit that only will be partially solved with a freeze on wages. He said the school district would do its best in the coming weeks to ensure classroom resources are spared during the budget crisis.

"I want to thank the dedicated teachers and administrators who will make the sacrifice in the interest of improving our children's education," Emanuel said. "I look forward to working with them to give our children the tools they need to compete and win in the economy of the future."

Brizard took issue with suggestions by Lewis and others that CPS is attempting to balance its budget on the backs of teachers. He said the school district faces an unprecedented crisis demanding shared sacrifice from all constituencies. Moreover, CPS stressed that 74 percent of teachers would continue to receive "step increases," rewarding them for their years of service. Another 1 percent of teachers will collect increases compensating them for earning an advanced degree.

"I have the utmost respect and admiration for teachers and all that they do for our children," Brizard said in a statement. "But today's Board action was taken in response to the massive financial crisis facing our system. My team is now tasked with developing a balanced budget and presenting it to the Board and the public in August and our promise remains to minimize any impacts on the classroom and our kids."

By MICHAEL BOLOGNA

## Trade

### DOL Reviewing AFL-CIO Submission Alleging Violations of U.S.-Bahrain FTA

**T**he Labor Department's Office of Trade and Labor Affairs in a June 16 *Federal Register* notice said it has accepted for review an AFL-CIO submission alleging that Bahrain has violated its obligations in the U.S.-Bahrain Free Trade Agreement (76 Fed. Reg. 35,244).

The AFL-CIO filed the submission April 21, alleging that Bahrain violated Article 15.1.1 of the FTA by failing to fulfill its obligations and commitments under the International Labor Organization Declaration on Fundamental Principles and Rights at Work and its follow-up on the rights of association and nondiscrimination against trade unionists.

"These allegations were supported by specific factual descriptions which, if substantiated, could demonstrate that the Government of Bahrain's actions were inconsistent with its commitments under the Labor Chapter," the agency said in the notice.

The FTA requires Bahrain to enforce domestic laws providing internationally recognized labor rights.

**AFL-CIO Seeks U.S. Withdrawal From FTA.** The AFL-CIO submission stated that, in light of the brutal repression in Bahrain of peaceful protest, the United States should serve notice of its withdrawal from the FTA.

"The U.S. simply should not provide preferential trade treatment to a country that has and continues to engage in well-documented widespread and serious violations of human rights, including labor rights of its citizens and residents," the submission argued.

The AFL-CIO called on the U.S. government to immediately enter into consultations with Bahrain.

In May, U.S. Trade Representative Ron Kirk said the administration was taking the charges seriously. However, he added, "I don't know that we would agree with the assessment that we go from A to Z in terms of saying that we're going to pull out of the trade agreement."

According to the notice, the affected trade unionists have tried to engage in dialogue with Bahrain's government on the allegations contained in the AFL-CIO's submission.

OTLA said its decision to accept the submission for review is not intended to indicate any determination on the validity of the allegations. The review will gather information so that OTLA can better understand and publicly report on the U.S. government's views regarding whether Bahrain's actions were consistent with the obligations set forth in the FTA's labor chapter, the notice said.

The review will be completed and a public report issued within 180 days unless circumstances require an extension of time, the notice said.

The U.S.-Bahrain FTA took effect in 2006 (228 DLR A-5, 11/28/06).

**AFL-CIO Applauds OTLA Move.** The AFL-CIO June 16 issued a statement applauding DOL's decision to accept its complaint regarding the government of Bahrain's failure to live up to its trade agreement commitments with respect to workers' rights.

The statement said for two months, "the union movement around the world and in the United States has called on the government of Bahrain to halt its all-out attack against workers." According to the statement, "in retaliation for peaceful protests and as part of the Bahraini government's overall crackdown on dissent," more than 1,700 workers have been summarily dismissed from their jobs, state-owned press and social media have been used to identify and threaten people who joined the demonstrations, union leaders have been threatened by members of the Bahraini parliament and some pro-reform activists have been arbitrarily detained, some have died in custody, and others are being tried by military courts.

"The egregious attacks on workers must end, and the Bahraini government's systematic discrimination against and dismantling of unions must be reversed. These actions directly violate the letter and the spirit of the trade agreement," AFL-CIO President Richard Trumka wrote. "Workers must be reinstated to their jobs and the elected union leadership must be allowed

to function without fear of reprisals. Failure by the United States to intervene to support workers and their democratic institutions would make a mockery of the labor protections included in the free trade agreement."

By ROSSELLA BREVETTI

*Text of the notice may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=scrm-8hvre>.*

## National Origin

### EEOC National Origin, Race Case Results in \$125,000 Settlement

**R**ALEIGH, N.C.—Ricoh Americas Corp. has agreed to pay \$125,000 to settle charges that three employees were subjected to harassment based on their national origin and race and were fired after they complained, the Equal Employment Opportunity Commission announced June 15 (*EEOC v. Ricoh Ams. Corp.*, M.D.N.C., No. 1:10-cv-743, settlement filed 6/15/11).

In addition to paying the compensatory damages and back pay to the three former employees, Ricoh, which denied all of EEOC's allegations, will implement employee training, report to EEOC on any harassment complaints it receives, post its policy against harassment, and provide compliance updates to the commission, according to the settlement filed in the U.S. District Court for the Middle District of North Carolina.

Ricoh Americas is based in West Caldwell, N.J., and sells and services copiers, printers, and fax machines, and provides related supplies.

**Comments on Intelligence, Work Ethic.** In its lawsuit, EEOC had alleged that James Nyema-Davies, a black Liberian, Anibal Melendez, a Puerto Rican, and Gustavo Tovar, a Colombian, were subjected to offensive national origin- and race-based harassment by their site manager at Ricoh's site in Greensboro, N.C., in violation of Title VII of the 1964 Civil Rights Act. The commission contended that the three employees were subjected to the offensive conduct on a daily or near-daily basis from June 2006 through October 2009.

The harassment included ongoing comments about the intelligence or work ethic of the employees' nation of origin or their race, according to EEOC. The employees all complained to management about their treatment multiple times—Nyema-Davies also requested a transfer, which was denied—but the harassment continued, the commission said.

According to EEOC, the three employees were fired Nov. 2, 2009, shortly after making additional complaints about the harassment to Ricoh management.

Under the settlement agreement, Nyema-Davis and Melendez each will be paid \$47,000 in compensatory damages and back pay, and Tovar will receive a total of \$31,000. Ricoh also will remove any references to the EEOC charges and related events from their personnel files.

"Race and national origin harassment include racial or ethnic slurs or other expressions of dislike for different racial and ethnic backgrounds," Lynette A. Barnes, regional attorney for EEOC's office in Charlotte, N.C., said in a June 15 statement. "The EEOC is deeply committed to combating such harassment and holding em-

ployers or managers accountable if they ignore complaints or, even worse, punish the complainants.”

**Company Denies Allegations.** Ricoh in a June 17 statement said it “has always been committed to ensuring that it treats all of its employees fairly and that it fosters a work environment free of harassment and discrimination, and where employees are able to raise concerns without the fear of retaliation.”

“In relation to the Greensboro EEOC matter, Ricoh continues to deny the allegations contained in the Complaint,” the company said. “However, consistent with our commitment to take allegations of this matter seriously, we entered into discussions with the EEOC early in the litigation in an effort to reach an amicable resolution.”

It added: “It is important to note that the cornerstone of this settlement is Ricoh’s continued commitment to on-going employee training. . . . Ricoh is an equal opportunity employer and remains committed to fostering a culture of diversity and inclusion.”

BY ANDREW M. BALLARD

*Text of the settlement agreement may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=vros-8hvrw7>.*

## Retail Stores

### RWDSU, Macy’s Reach Tentative Agreement Covering 4,000 Workers at New York Stores

**M**acy’s and Retail, Wholesale and Department Store Union Local 1-S June 16 announced they have reached a tentative five-year collective bargaining agreement covering more than 4,000 workers at four Macy’s department stores in the New York City area.

Union members employed at Macy’s flagship store in Manhattan’s Herald Square will begin the ratification vote June 16, while members working at Macy’s stores in Queens, Parkchester, and Westchester will vote June 20-22 on the proposed settlement praised by union leaders. The union negotiating committee is recommending that members vote for ratification, a union spokesman told BNA.

“This is a solid contract and it reflects the fact that our workers are the true magic of Macy’s,” Local 1-S President Ken Bordieri said June 16 in the union’s announcement.

RWDSU President Stuart Appelbaum June 16 said the deal contains impressive gains for Macy’s employees. “The workers at Macy’s today are sending a clear message to working people throughout this country: when people join together in strong unions, they can fight back and win,” Appelbaum said in a statement. “While working people throughout this state and country have been under assault, the unionized workers at Macy’s have been able to make impressive gains. It is a lesson that working people everywhere need to understand.”

RWDSU is withholding details of the tentative contract until members are briefed about it.

“Following an all-night negotiating session, Macy’s is pleased to have reached a tentative agreement with Local 1-S of the RWDSU on a new five-year agreement,” Macy’s spokeswoman Elina Kazan said June 16. “We

look forward to a ratification of the agreement by our associates, and to serving our customers without interruption. This tentative agreement reflects tremendous efforts by company and union negotiators over the past several weeks to reach an agreement that addresses the economic and business realities of the retailing industry, while keeping jobs at Macy’s among the best in the department store industry.”

**Unanimous Strike Authorization.** RWDSU members had voted unanimously at membership meetings June 6-9 to authorize the union executive board to call a strike if a new contract was not secured by midnight on June 15. The last strike by RWDSU Local 1-S at Macy’s was in 1972, according to a union spokesman.

The union and employer negotiated June 15 throughout the day and night, agreed to continue talks into the next day, and by 9 a.m. announced a tentative settlement had been reached.

Speaking June 8 before the deal was reached, Appelbaum said the main issues of contention during bargaining were wages, benefits, and work hours. “Clearly Macy’s is in a position to offer decent wages, benefits, and hours—which is all that the 4,000 workers we represent want. But the company is pushing back and saying it cannot afford to do this, despite paying its executives record high compensation.”

According to the union, Macy’s had sought to make work shifts available on a first-come-first-served basis, not by seniority; to reduce paid time off; to eliminate retirement benefits under the defined benefit pension plan for new employees; and to raise the employee cost of health care.

RWDSU pointed out that Macy’s is in solid financial health, earning \$847 million in profits in 2010, and that the company’s credit rating recently was upgraded.

BY SUSAN R. HOBBS

## Race Discrimination

### No Bias in Union’s Refusal to Refer Worker In Hiring Hall, Tenth Circuit Determines

**A** black worker failed to show that race discrimination motivated his union’s failure to refer him for employment after it received “no-rehire” letters about him from employers, the U.S. Court of Appeals for the Tenth Circuit ruled June 7 (*Powell v. Laborers Union #1271*, 10th Cir., No. 10-8087, 6/7/11).

Affirming a district court’s grant of summary judgment for Laborers’ International Union Local 1271, the appeals court, in a decision written by Judge David M. Ebel, found that George Powell failed to show that the union’s actions were a pretext for race bias. The no-rehire letters presented by the union, it said, demonstrated a “legitimate justification” for not referring Powell to the employers.

Powell claimed that on several occasions the local had passed over his name on a hiring hall list under a collective bargaining agreement with companies using temporary labor. The union explained that it did so because it had received no-rehire letters from employers directing the union not to send Powell to their worksites because of work performance problems. Powell maintained that the union’s action stemmed from race dis-



crimination in violation of Title VII of the 1964 Civil Rights Act.

Powell alleged that the union removed him from his position in the hiring list without questioning the legitimacy of the no-rehire letters. He contended that the union had vigorously opposed a no-rehire letter regarding a white laborer, but failed to investigate and challenge the letters regarding his own employment because of race bias.

In granting the union's motion for summary judgment, the district court held that the "few isolated and fairly innocuous comments" Powell cited as direct evidence of discrimination did not demonstrate a genuine issue of fact. In addition, it ruled that Powell failed to create a triable issue of pretext with respect to the union's legitimate justification for not referring him to employers that sent no-rehire letters.

**Work Performance Problems.** The union articulated and substantiated a justification for not referring Powell for work with P.S. Cook LLC, Gregory Piping Systems Inc., and Western Refractory Construction Inc., the court found. All three companies sent no-rehire letters requesting that Powell not be referred to their worksites because of problems associated with work performance, attendance, tardiness, and insubordination, it said.

Under the collective bargaining agreement, each employer is the judge of a union member's qualification for work, and the letters regarding Powell left him ineligible for work with the three companies, the court observed. James Hansen, the local's business manager, testified that Powell's situation was unusual, in that it was uncommon for a worker to have even one such letter in his file. The combination of the collective bargaining agreement and the no-rehire letters established a legitimate, racially neutral basis for the union's action, the court found.

Powell insisted that the no-rehire letter from P.S. Cook, which complained that he had worked only seven hours in a three-day period of 12-hour shifts overstated the nonattendance issue, in that only it had been a two-day period, some other laborers worked only eight-hour shifts, and he had asked the foreman for time off to attend to personal matters.

**Employer Perception Controls.** This line of argument was a "non-starter," the court found, because it is a "commonplace" in employment law that the employer's perception of employee performance controls the pretext inquiry, and can justify termination even if mistaken. Even if the no-rehire letters were groundless—which was not shown here—Powell offered no evidence to prove that the union would have known that, the court found. The three separate no-rehire letters would have been mutually corroborative as to the unsatisfactory nature of Powell's work performance, it added.

Powell contended that union efforts to contest a no-rehire request received for a white member demonstrated that its capitulation in his own case was racially biased. It was undisputed, however, that business manager Hansen contacted the company that sent Powell's first no-rehire letter, to attempt to persuade it to allow him to return to work, the court observed. While Hansen's attempt was unsuccessful, it was the union's effort, not the employer's response, that was material, the court determined. And although it did not appear that Hansen opposed the two subsequent no-rehire letters

for Powell, there also was no evidence that the union opposed successive no-rehire letters for the white employee or anyone else, the court said. Powell therefore was left without a similarly situated comparator necessary to make out a case for disparate treatment by the union, the court ruled.

Powell argued that racial comments by some employers, including Larry Gregory of Gregory Piping Systems, and Hansen's reaction to the comments, raised an issue of discriminatory animus behind the union's actions.

The comments were, however, of very limited significance given that it was the union's racial bias that was relevant, not that of third parties, the appeals court found. Two of the instances were remote in time, it said, occurring three years before the events giving rise to the lawsuit. In addition, the court found, there was no evidence that Powell himself ever complained to Hansen about the incidents.

The incident that was the least indicative of racial animus, the court said, involved Gregory Piping Systems. Larry Gregory removed Powell from a worksite and sent a no-rehire letter to the union after Powell left a \$40,000 Bobcat vehicle running in the field, and later was not working when Gregory felt he was supposed to be working, the court noted.

**No Bias Found.** Gregory characterized these legitimate criticisms as "acting black on me," the court observed. While this comment was inappropriate, Gregory had legitimate grounds for the no-rehire request, which was honored by Hansen in accordance with the collective bargaining agreement, it ruled.

The court dismissed Powell's "underdeveloped" argument that the no-rehire letters "seemed to be prepared" by the union, not by the employers. This argument was not adequate, either factually or legally, the court said.

The court also found Powell's passing criticism of the union for its delay in telling him of the no-rehire letters insufficient to require further discussion.

Judges Scott M. Matheson Jr. and Senior Judge Monroe G. McKay joined the opinion.

Bernard Q. Phelan of Phelan Law Firm in Cheyenne, Wyo., represented Powell. Richard D. Bush, David Evans, and Kristi M. Radosevich of Hickey & Evans in Cheyenne represented the union.

*Text of the decision may be accessed at <http://op.bna.com/eg.nsf/r?Open=Iroe-8hut9x>.*

## *International Labor*

### **Solis, Ambassadors Sign Pacts to Protect Workers From Guatemala and Nicaragua**

**L**abor Secretary Hilda Solis and the ambassadors from Guatemala and Nicaragua June 16 signed declarations intended to help the Labor Department protect the rights of Guatemalan and Nicaraguan citizens who work in the United States.

The heads of DOL's Wage and Hour Division and its Occupational Safety and Health Administration also signed letters of arrangement with the embassies from the two countries.

"Individuals from Guatemala and Nicaragua make important contributions to the U.S. economy, and their workplace rights should be protected," Solis said. The Labor Department is "committed to ensuring they're safe on the job and fully and fairly compensated for their hard work," she said.

The declarations will enable the regional enforcement offices of the Occupational Safety and Health Administration and the Wage and Hour Division to cooperate with local Guatemalan and Nicaraguan embassies and consulates to identify vulnerable workers and distribute information to migrant workers about U.S. health, safety, and wage laws. Training also will be provided to both migrant workers and their employers.

Speaking in both English and Spanish, Solis, whose mother grew up in Nicaragua, said, "No matter how they came to this country, these workers have certain rights," including a safe workplace and a minimum wage.

DOL already has signed similar agreements with the Mexican and Salvadoran embassies (86 DLR A-16, 5/6/10, 55 DLR A-6, 3/22/11).

Workers will be able to get information or report complaints at toll-free, confidential DOL hotlines that will be open day and night and be staffed by employees who speak Spanish as well as English.

By GAYLE CINQUEGRANI

*Text of DOL's joint declaration with Guatemala may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=gcii-8hvv4g>, and the joint declaration with Nicaragua at <http://op.bna.com/dlrcases.nsf/r?Open=gcii-8hvv88>.*

## Arbitration

### Arbitrator Must Decide Arbitrability Of Sheen's Claims, California Court Rules

**L**OS ANGELES—Actor Charlie Sheen's breach of contract and wrongful termination lawsuit filed against a producer and a studio after he was fired from the hit television sitcom *Two and a Half Men* must be submitted to an arbitrator to decide whether the dispute must be resolved through arbitration rather than in court, a California Superior Court judge ruled June 15 (*Sheen v. Lorre*, Cal. Super. Ct., No. SC111794, 6/15/11).

Judge Allan J. Goodman of the Los Angeles County Superior Court did hold that Sheen's Private Attorney General's Act (PAGA) claim is not subject to arbitration. But the judge stayed further court proceedings on the PAGA claim pending the arbitrator's decision on whether Sheen's nine other claims must be arbitrated.

Goodman's rulings came on Sheen's motion to stay arbitration, WB Studio Enterprises Inc.'s petition to compel submission of the arbitrability of the disputes to arbitration, and a petition to compel arbitration on the merits brought by producer Chuck Lorre. Sheen asked the court to stay all proceedings before the arbitrator pending a court trial on his claims, which include breach of contract, retaliation, and violation of the California Fair Employment and Housing Act. Sheen filed suit in March (48 DLR A-3, 3/11/11).

**Who Decides Arbitrability a Threshold Issue.** WBS and Lorre sought an answer to what Goodman characterized as a "threshold issue: Should the question of arbitrability of the claims made in the First Amended Complaint be submitted to binding arbitration under the Sheen—WB contract?" Goodman examined two subsidiary questions: 1) whether there is a contract between the parties; and 2) whether the contract's arbitration clause expressly requires that the arbitrator determine arbitrability.

The widely recognized "general rule" is that arbitrability of a dispute covered by the Federal Arbitration Act is decided by a court, Goodman said. However, he found there is a "well-recognized exception: Arbitrability is to be determined by the arbitrator when the parties have 'clearly and unmistakably' agreed that the arbitrator decide such issues."

The question, then, was whether the arbitration clause in the contract between Sheen and WB was broadly worded, such that it was clear and unmistakable that the two parties agreed to submit the issue of arbitrability to the arbitrator instead of a court.

The relevant provision of the contract defines the term "dispute" broadly, to encompass "any and all controversies, claims or disputes arising out of or related to [the] Agreement or the interpretation, performance or breach thereof, including but not limited to, alleged violations of state or federal statutory or common law rights or duties, and the determination of the scope or applicability of [the] agreement to arbitrate . . ."

Goodman acknowledged that courts have differed in their interpretation of whether even clearly written arbitration clauses require referral of the arbitrability question to arbitrators, or to courts, which he ascribed to a preference, "particularly in state courts, for open court proceedings, enforcing the state's Constitutional right to trial by jury, and for the clear and well-understood and public procedures of trial and appeal."

But Goodman decided that the parties to the Sheen—WB contract, and the identically worded Lorre—WB contract "intended to submit to the Arbitrator for determination the matters defined as Disputes by this carefully worded text, including the matter of arbitrability and all defenses related thereto."

**PAGA Claim Definitely Not Arbitrable.** On Sheen's PAGA claim, however, Goodman found no basis to refer it to the arbitrator. That particular cause of action seeks a remedy not belonging to any individual, but rather to the state's Labor and Workforce Agency (LWA), which did not execute the arbitration clause at issue, the judge said.

"PAGA suits seek penalties for violations of state law," Goodman wrote. "That a PAGA claim may be enforced in an action brought by an individual standing in for the under-staffed LWA . . . does not convert it into a private claim," he said, concluding that such enforcement actions are exempt from the preemptive provision of the FAA that otherwise might prohibit such lawsuits.

Nevertheless, Goodman granted WB and Lorre's request to stay trial court proceedings on the PAGA claim, pending conclusion of the proceedings before the arbitrator.

WB, in a statement e-mailed to BNA, said: "We're very gratified by the court's ruling enforcing the parties' arbitration agreement."



Howard Weitzman, an attorney for Lorre, said in an e-mail: "The court made the appropriate ruling in denying Mr. Sheen's request to stay the arbitration in referring his lawsuit against Warner Bros. and Chuck Lorre to arbitration as his contract calls for. This matter will now proceed in an orderly fashion as the parties agreed to."

Sheen's lawyer, Martin D. Singer of Lavelly & Singer in Los Angeles, did not return a call seeking comment on the rulings.

By TOM GILROY

*Text of the decision may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=smgk-8hvpjf>.*

## Wage & Hour

### New York City Restaurant Chain to Pay \$5.1 Million in Record State Settlement

**N**EW YORK—A sandwich restaurant chain based in New York City has agreed to pay \$5.1 million in back wages, damages, and penalties to settle state minimum wage and overtime violations, New York Gov. Andrew M. Cuomo (D) announced June 14.

The settlement with the chain known as Lenny's: The Ultimate Sandwich is the largest on record with the state labor department, Cuomo said. The previous record was a \$2.3 million settlement with the owner of the Ollie's chain of nine Asian restaurants in the city (52 DLR A-5, 3/20/09).

Cuomo said the Lenny's settlement "sends a strong message to employers that exploiting employees will not be tolerated in New York State."

From 2002 to 2008, the state said, more than 800 employees at 11 Lenny's locations were cheated out of millions of dollars.

A state labor department investigation found that employees were regularly paid below the minimum wage and were not paid overtime wages. Employees worked 10 to 12 hours a day, six to seven days a week, at an average weekly salary of \$275 per week, the state said.

Under state minimum wage and overtime law, employees should have been paid at least \$500 per week for the hours worked, the state said. In addition, it charged, time records kept by the employer were not accurate and wage statements were not provided to workers, as required by law.

The state minimum wage is \$7.25 an hour.

The \$5.1 million settlement includes \$100,000 in penalties, the state said. Of the wages and damages amount, the chain has paid \$1 million and will pay the remaining \$4 million over the next 24 months.

An attorney for the Lenny's chain, Ronald B. Kremnitz of the New York law firm Pryor Cashman, in a brief statement said the company "has worked closely with the investigators" and "is now, and has been for some time, fully compliant" with DOL regulations.

By JOHN HERZFELD

## Immigration

### Mandatory E-Verify Legislation Unlikely To Clear Senate, Become Law, Opponents Say

**O**pponents of legislation (H.R. 2164) that would mandate use of the federal government's employment verification system, E-Verify, are confident the bill will not become law, officials with the Service Employees International Union said June 16.

Eliseo Medina, SEIU international secretary-treasurer, and Mitch Ackerman, SEIU international executive vice president, held a teleconference to criticize the bill, which was introduced June 14 by House Judiciary Committee Chairman Lamar Smith (R-Texas) (114 DLR A-15, 6/14/11).

"It's a bad, bad idea that Smith had," Medina said. "It's bad for the economy, it's bad for business, it's bad for immigrants, and it's bad for all of society."

Separately, the Society for Human Resource Management (SHRM) sent Smith a letter June 15 supporting the legislation.

The proposed Legal Workforce Act would require public and private sector employers to use the currently voluntary E-Verify system, which allows Social Security numbers of new hires to be checked against Social Security Administration and Homeland Security Department databases. The requirement would be phased in over three years based on the number of an employer's employees.

**Mandate Called 'Burdensome.'** Medina said the requirement will be costly and burdensome for small business owners, as about 40 million new hires are made each year across the nation.

"Someone is going to have to manually put in every name," Medina said. "Ninety percent of small businesses don't use it voluntarily. They find it cumbersome."

Medina and Ackerman said it would be particularly difficult for the agriculture sector, in which undocumented workers constitute about 70 percent of the total workforce. "It would be devastating," Ackerman said.

Farms likely would shift to the use of contractors to provide workers, Ackerman said. He asserted that contractors are prone to abuse of workers by paying them below the minimum wage.

Medina said farm operations already face a shortage of workers to do menial labor such as picking tomatoes.

"People show up the day the job starts," Medina said. "Owners do not have time to check [for verification]. Every day the owner has to wait, he is going to lose a lot of money."

In addition, Ackerman said, the E-Verify databases are "very much inaccurate."

The error rate is between 2 percent and 3 percent, but "when you talk about millions of people, that's a lot of people," Medina said. She asserted that some 80,000 undocumented workers were fired as a result of verification last year.

**Boehner Has Not Taken Position.** While the legislation is expected to be marked up and approved by the Judiciary Committee in the near future, House Speaker John Boehner (R-Ohio) has yet to take a position on the bill. With his support, House passage would be a bygone conclusion.

"It's an uphill battle in the House, but we're going to give them a run for their money," Medina said.

The committee held a hearing on the legislation June 15 (115 DLR A-14, 6/15/11).

However, the legislation is expected to be dead in the water in the Senate, where Democrats have maintained control. "We're confident we can stop it in the Senate," Medina said.

**SHRM Thanks Smith.** Meanwhile, in its letter, SHRM thanked Smith for introducing the legislation.

Henry Jackson, SHRM interim president and chief executive officer, said that human resource professionals "are on the front lines of employment verification and are fully committed to only hiring work-authorized individuals."

"We also recognize, however, that the current employment verification system is in need of real reform," Jackson said. "The patchworks of state and local verification laws are unworkable and creating a confusing set of legal requirements for American employers and employees."

The legislation would preempt any state laws dealing with E-Verify.

"There is also ample evidence that the employment verification system is prone to fraud, forgeries and identity theft, making it difficult, if not impossible, for an employer to differentiate between the legal and illegal worker," Jackson said.

The bill includes a provision creating a biometric pilot program with the aim of cracking down on fraud in the system. Supporters of the bill argue that a mandatory E-Verify system would open up millions of jobs for U.S. workers.

By DERRICK CAIN

*Text of the legislation may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=amky-8hts4u>, and text of the SHRM letter at <http://op.bna.com/dlrcases.nsf/r?Open=smgk-8hvvdf>.*

## Hotels

### UNITE HERE Launches Boycott in Hawaii At Hyatt Regency Waikiki as Bargaining Lags

**U**NITE HERE Local 5 is set to launch June 17 a consumer boycott of the Hyatt Regency Waikiki in Honolulu where the union represents 500 employees whose collective bargaining agreement expired nearly one year ago, the union announced June 16.

Local 5 has been in sporadic labor negotiations with the Hyatt Regency Waikiki since the contract expired June 30, 2010, union spokesman Cade Watanabe said. The union and employer last engaged in bargaining for two days in early May but prior to then had not met since fall 2010, he said. The parties are scheduled to hold negotiations June 27-28.

Union-represented workers at the Hyatt Regency Waikiki "are fighting to defend and maintain their union contract standard that includes putting an end to subcontracting and providing safe working conditions for workers," Local 5 said.

The union represents almost all nonmanagement workers at the hotel.

By an 89 percent majority of those who voted, Local 5 members June 8 approved authorization for union leaders to call for customers to refuse to book rooms, hold events, or spend money at the Hyatt on the island of Oahu. The consumer boycott will be the first since 2006 that Local 5 has launched against a major Oahu hotel, according to the union.

After the contract expired in June 2010, UNITE HERE has conducted a number of demonstrations outside the Hyatt Regency Waikiki to draw attention to its fight for a new contract. Workers participated in a civil disobedience action in July 2010 (138 DLR A-13, 7/20/10), a one-day strike in September 2010 (170 DLR A-17, 9/2/10), and numerous informational pickets and rallies.

The union intends to send letters to travel groups to communicate about the labor dispute, Watanabe said. UNITE HERE also is working to educate the local community about the importance to the Honolulu economy of keeping well-paying jobs and opportunities in the tourism industry. And union retirees will continue to demonstrate outside the hotel in leafleting action in support of the employees.

**Subcontracting Is Major Issue.** Employer subcontracting of union jobs is the biggest issue preventing the parties from reaching labor agreement, according to Watanabe. The union is seeking to stop subcontracting of night cleaning workers, accounting and finance department workers, food and beverage concession stand employees, and maintenance and engineering workers, he said.

Watanabe said the situation is particularly acute at the Hyatt Regency Waikiki, a property owned by the Goldman Sachs Group Inc. At other large hotels, Local 5 has been able to ensure that subcontracted work maintains union standards followed elsewhere in the hotel, he said. In contrast, Hyatt pays subcontracted workers who clean public areas and kitchens at night about half of the union wages of about \$18 per hour paid at the hotel.

"Our basic position is that we will not allow the Hyatt Regency Waikiki to pay poverty wages in our community," Watanabe said.

In the labor agreement Local 5 reached with Hilton Hawaiian Village Beach Resort & Spa on Waikiki Beach in Honolulu earlier this year (46 DLR A-11, 3/9/11), about 75 cleaning and food and beverage positions at the Hawaiian Village currently performed by subcontracted workers will be returned in-house to the bargaining unit by March 1, 2013.

UNITE HERE members ratified contracts with Hilton and Starwood (54 DLR A-2, 3/21/11) hotels in Honolulu in March covering about 1,500 workers and 2,800 workers, respectively, but the union has not reached agreement yet with Hyatt Hotels Corp., Marriott International Inc., and several smaller hotel properties.

Watanabe said although union and Hyatt negotiating teams have not yet reached agreement about wages and benefits, the union is confident it will be able to maintain the standards set in bargaining with Hilton and Starwood.

UNITE HERE has called for boycotts of Hyatt hotels in 17 other U.S. cities where workers are seeking union representation or are working to reach agreement on a labor contract, including San Francisco, Chicago, Indianapolis, San Diego, and Los Angeles, the union said.

A Hyatt representative was not immediately available for comment.

By SUSAN R. HOBBS

## Health Care

### Obama Administration Denies Employers Will Drop Health Insurance Under Health Law

**T**he head of the federal office that regulates private health insurance told a congressional subcommittee June 15 that the Obama administration does not believe that large numbers of employers will drop employee health insurance once state insurance exchanges begin in 2014 under the health care overhaul law.

"We certainly don't think they will, and we don't expect that they will," Steve Larsen, director of the Center for Consumer Information and Insurance Oversight (CCIO), told the House Energy and Commerce Subcommittee on Health.

Rep. Henry A. Waxman (D-Calif.), ranking member of the full committee, asked Larsen about a report issued June 6 by management consulting firm McKinsey & Co. that estimated that 30 percent of employers would drop employee coverage once health insurance exchanges start in 2014 (112 DLR A-6, 6/10/11). The Obama administration has reacted sharply to the report, calling the study an "outlier."

Larsen said other studies, including one by the RAND Corp., predicted that the number of small businesses and their employees who would have coverage "would increase significantly, thanks to the efficiencies of" the Patient Protection and Affordable Care Act.

The hearing was a continuation of a June 2 hearing on the effect of the health care law on employment.

**Baucus Demands Answers From McKinsey.** On June 16, Senate Finance Committee Chairman Max Baucus (D-Mont.) sent a letter to McKinsey & Co. Global Managing Director Dominic Barton, who is based in London, calling on the company to release information on the methods it used in conducting the survey on which the report was based.

"Honest public discourse requires a standard level of transparency—one McKinsey simply has not met," Baucus said in a statement. "The conclusions McKinsey reached differ sharply from results of other reputable, transparent research on the subject. McKinsey's findings also counter what actually happened in Massachusetts when similar policies increased employer-sponsored health insurance."

Baucus's letter asked McKinsey who funded McKinsey's survey, how participants were chosen, and what script was used to "educate respondents" about the PPACA. The McKinsey report stated that respondents interviewed expressed more interest in dropping employee coverage when interviewers "educated" them about the law.

**Medical Loss Ratio's Effect.** Rep. Michael C. Burgess (R-Texas) asked Larsen whether provisions of the PPACA would make it unlikely that popular high-deductible health plans and health savings accounts can be used.

Burgess asked whether contributions to health savings accounts would be counted as medical expenses under the medical loss ratio rule of the PPACA. The rule requires individual and small group health plans to spend at least 80 percent of premiums on medical expenses or quality improvements and large groups to spend at least 85 percent, or the difference must be refunded to policyholders, beginning in 2012.

"High deductible health plans are extremely popular," Burgess said, citing increases in the number of Americans covered by them. "What kind of assurances can you give me to those millions of people who have high deductible health plans that they'll still have access to this as a coverage option?" he asked Larsen.

According to a report released June 14 by America's Health Insurance Plans, a group that represents the health insurance industry, more than 11.4 million Americans were covered by insurance plans eligible for health savings accounts as of January, a more than 14 percent increase since last year. Proponents of health savings account plans say the plans give consumers incentives to manage their health care costs efficiently by combining tax-favored savings accounts used to pay medical expenses with high deductible health plans.

Larsen said he was not sure how health savings account contributions would be counted under the medical loss ratio, and he promised to provide more information to the subcommittee.

But, Larsen added, the popularity of high deductible health plans "demonstrates the manner in which the current market is broken, and for many people, unaffordable."

"Many people end up purchasing these types of policies because, frankly, that's maybe what they can afford," Larsen said. "It may not be what they want. I'm not sure many people want to have to pay out-of-pocket the thousands of dollars that they may have to for a high deductible plan. But in the current health care environment, pre-reform, pre-2014, that may be your option. But we find that most people actually want comprehensive coverage for their costs."

By SARA HANSARD

*Baucus's letter to McKinsey Consulting may be accessed at <http://finance.senate.gov/newsroom/chairman/release/?id=ec1aeae8-7220-4b00-9128-1f3ab6f25105>. The AHIP report on health savings accounts may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=kpin-8hvvtk>.*

## Discrimination

### Court Denies Meatpacker's Bid to Dismiss EEOC Bias Suit for Somali Muslim Workers

**T**he Equal Employment Opportunity Commission may proceed with a broad discrimination suit against the meatpacking firm JBS Swift & Co. on behalf of black Somali Muslim workers even though the relevant union local is not a party to the suit, the U.S. District Court for the District of Colorado ruled June 9 (*EEOC v. JBS USA LLC d/b/a JBS Swift & Co.*, D. Colo., No. 10-cv-02103, 6/9/11).

In August 2010, EEOC filed two lawsuits against JBS Swift, claiming the company violated Title VII of the

1964 Civil Rights Act by discriminating against Somali Muslim workers at its meatpacking plants in Greeley, Colo., and Grand Island, Neb. (169 DLR A-16, 9/1/10).

EEOC alleged that JBS Swift failed to accommodate the Muslim workers' religious beliefs by hindering their prayer breaks and Ramadan observances, and that supervisors and co-workers harassed the Somali workers by uttering vulgar epithets and throwing bones, meat, and blood at them. In September 2008, the employer locked out, suspended, and ultimately fired Somali Muslim employees in Greeley who had walked outside the plant to break their Ramadan fasts, EEOC alleged. It charged JBS Swift with unlawful national origin, religious, and race discrimination.

JBS Swift moved to dismiss EEOC's suit regarding the Greeley plant on several grounds. The company claimed the entire case should be dismissed either because EEOC failed to join United Food and Commercial Workers Local 7, which JBS Swift contended is a necessary party to the litigation, or because EEOC failed to conciliate the discrimination charges. The company also urged the court to dismiss the claims of two groups of plaintiff-intervenors, arguing the individuals failed to exhaust their administrative remedies.

**Union Is Not a 'Required' Party.** Rule 12(b)(7) of the Federal Rules of Civil Procedure allows a court to dismiss a suit for failure to join a "person" under FRCP Rule 19, Judge Phillip A. Brimmer wrote. Rule 19 requires a two-step process before dismissing a claim for failure to join an "indispensable" person, the court said. It must first determine whether the absent person is "required" for the claim to proceed, and if so, the court then must decide if it is feasible to add that person to the litigation or whether the claim must be dismissed, Brimmer wrote.

A person must be joined under Rule 19 if "in that person's absence, the court cannot order complete relief among existing parties" or if the absent person claims an interest in the suit's subject matter and disposing of the matter without the absent person would "impede or impair" that person's ability to protect the interest or leave an existing party subject to "a substantial risk of incurring double, multiple, or otherwise inconsistent obligations."

JBS Swift argued that the relief sought by EEOC—including requiring the company to accommodate Somali Muslim workers' religious beliefs, to either reinstate terminated workers with back pay or give them front pay, and an injunction against future discrimination—could not be achieved without UFCW Local 7, which represents the Greeley plant workers.

The court, however, said it could afford the relief sought by EEOC and the intervening plaintiffs even in the union's absence. EEOC has not alleged any wrongdoing by the UFCW local, and the plaintiffs do not challenge the collective bargaining agreement between JBS Swift and the union, the court said. "[T]he relief requested by plaintiffs will not significantly impact the [collective bargaining agreement], which provides for flexible scheduling of break times and prohibits discrimination," Brimmer wrote.

The "mere fact" that EEOC seeks reinstatement, or alternatively front pay, for the terminated Somali Muslim workers "does not make the union necessary to accord that relief," even assuming that such relief would violate union contract seniority provisions, the court

said. "Moreover, it is not clear that reinstatement of these employees would violate the CBA, as the CBA only allows for loss of seniority where an employee is discharged for cause," Brimmer wrote.

The union is not a "required" person under Rule 19, even though it has "claimed an interest" in any possible future negotiations about break schedules and religious accommodation of bargaining unit employees, the court said. It found that the union's articulated interest is "not patently frivolous."

But allowing EEOC's suit to proceed without the union as a party does not "impermissibly risk impairing the union's ability to protect its interests," the court said. "The union's interest in obtaining religious accommodation for Muslim employees as required by the CBA is not impeded by this suit; rather, it is furthered by it," Brimmer wrote.

The court acknowledged it is "a more difficult question" whether the union's interest in representing non-Muslim employees could be impaired by EEOC's suit. JBS Swift argued that any court-ordered religious accommodation for Muslim employees "will significantly impact non-Muslim employees" and "could result in major discord at the plant."

The court, however, said that since the plaintiffs' requested relief "does not substantially impact" the bargaining agreement, "it is not clear what legitimate, non-frivolous interest the union has in mollifying any discord that may arise from accommodating Muslim employees." The bargaining agreement allows JBS Swift to make such religious accommodations unilaterally as long as such accommodations do not require modification or waiver of the union contract, Brimmer wrote. "Therefore, the court concludes that the union's ability to protect its interests is not so impeded" as to require joinder of UFCW Local 7, he wrote.

**Low Risk to Company of Conflicting Duties.** Allowing the case to proceed without the union also will not expose JBS Swift to "a substantial risk of incurring double, multiple, or otherwise inconsistent obligations," the court said. The company expressed concern that if it unilaterally changes workplace policies regarding accommodation, it will risk unfair labor practice charges, the court observed.

But the company "has not established that the risk of such charges is substantial in light of the fact that the CBA itself directs defendant to accommodate employees' religious practices and allows defendant to make unilateral changes in its policies to do so, provided that such changes do not waive or modify provisions of the CBA," Brimmer wrote.

"As discussed above, were the court to grant the relief [that] plaintiffs request, it would be within the parameters of the CBA. Defendant's fears in this regard are largely speculative."

**EEOC Conciliation Held Sufficient.** JBS Swift argued EEOC's complaint should be dismissed because the commission did not "conciliate in good faith" before filing suit as required by Title VII.

Under applicable U.S. Court of Appeals for the Tenth Circuit precedent, EEOC must make "a sincere and reasonable effort to negotiate" by providing the employer with "an adequate opportunity to respond to all charges and negotiate possible settlements," Brimmer wrote. But the Tenth Circuit also has said that a court "should only inquire whether its minimal jurisdictional require-

ment is satisfied" when considering whether EEOC has met its conciliation obligation and should not "examine the details" of "offers and counteroffers" by the agency and employers responding to charges.

JBS Swift does not deny that EEOC attempted conciliation but rather argues that the agency's failure to include the union precluded the possibility of an acceptable settlement, the court said. The company "provides no authority" for the proposition that EEOC was required to include the union, and it does not appear from the record regarding its interchanges with the agency that JBS Swift "truly believed" the union's presence was necessary, Brimmer wrote.

Given that EEOC informed JBS Swift of the nature and extent of the allegations, gave the company an opportunity to respond, and informed the employer that a breakdown in conciliation could result in legal action, the court concluded the commission met its statutory obligation to conciliate.

**Mixed Rulings on Plaintiff-Intervenors.** The court issued mixed rulings on JBS Swift's motions to dismiss the complaints of two groups of plaintiff-intervenors for failure to exhaust administrative remedies. The "Abade intervenors" consist of approximately 104 employees or former employees at Greeley who filed a Nov. 2, 2010, motion to intervene in EEOC's suit. On Nov. 29, 2010, a group of six former employees—the "Abdulle intervenors"—filed a separate motion to intervene.

The court previously granted the motions to intervene, but JBS Swift argued that at least some of the plaintiff-intervenors' claims must be dismissed because they never filed EEOC charges, filed untimely charges, or filed charges that were never "verified," that is, sworn to or affirmed by the charging party.

Although the court acknowledged that many of the Abade intervenors' charges were never verified, it ruled that the "technical" verification requirement may be waived and that JBS Swift waived this defect by responding to the substance of those charges.

As for Abade intervenors who never filed any EEOC charge, the court said it needs more information about individual claims to decide who, if anyone, may take advantage of the "single filing" rule that allows individual claimants to "piggyback" on EEOC charges filed by others with substantially similar claims.

Regarding the six Abdulle intervenors, JBS Swift argued that none of them received an EEOC right-to-sue letter before proceeding to federal court, that all their claims are time-barred, and that one of them never filed an EEOC charge.

The court said the intervenors' claims are untimely to the extent they challenge discrete acts occurring more than 300 days prior to their filing of EEOC charges, but said their harassment claims may be viable as "continuing violations" if one act of alleged harassment occurred during the 300-day period.

The Abdulle intervenor who did not file an EEOC charge may take advantage of the "single filing" rule because his claims stem "from the same discriminatory treatment as the other intervenors' claims," the court said.

EEOC attorneys David A. Winston, Iris Halpern, Stephanie Struble, and William E. Moench in Denver represented the agency. Ashley McCall Kelliher and Diane S. King of King & Greisen in Denver represented the plaintiff-intervenors. Heather Fox Vickles, Ray-

mond M. Deeny, and Walter V. Siebert of Sherman & Howard in Denver represented JBS Swift.

By KEVIN P. MCGOWAN

*Text of the decision may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=kmgm-8hvlv>.*

## Trade

### Members of House, Labor Leaders Oppose Passage of U.S.-Colombian Trade Agreement

Several members of Congress joined with U.S. and Colombian labor leaders June 16 in calling on the Obama administration to delay submitting implementing legislation on the U.S.-Colombia free trade agreement until there is verification that the Action Plan on Labor Rights, which was negotiated between the two countries in April, is working.

Addressing a press conference called by the AFL-CIO and the Communications Workers of America, Rep. Hank Johnson (D-Ga.) said he and 13 of his colleagues have signed on to a letter that will be sent within the next week to President Obama, telling him the agreement should not be approved until "stronger and more credible actions" are taken to protect Colombian workers' rights. Johnson added that he expects more members to sign the letter before it is transmitted.

Johnson contended that multinational companies in Colombia are using cooperatives to subcontract workers to enable the companies to employ workers without giving them "any basic labor rights," such as the right to get paid in a timely fashion. He said sometimes these workers work for weeks without a paycheck, and the paycheck they finally receive does not always reflect all the overtime hours they were required to work. This "abridges the rights of workers to organize," he said, adding that there are "techniques in place [in Colombia] to subvert the human rights guaranteed to workers."

**Effort to Delay Congressional Consideration.** The press conference was called as part of an effort by organized labor to delay congressional consideration of the trade agreement. Labor and some congressional Democrats are opposed to enactment of the agreement because of murders and other violence directed at labor unionists in Colombia, as well as violations of human and labor rights. The administration has not indicated when it will transmit implementing language to Congress.

CWA President Larry Cohen told the press conference that now is not the time to proceed with the FTA. He contended that "nothing has changed" in Colombia since the action plan was negotiated two months ago, adding that the killings and exploitation of workers continue. "Every week a trade unionist is killed," he said.

A recent report released by the International Trade Union Confederation found that Colombia continues to be the most dangerous place in the world for trade unionists, with 49 trade union members murdered in Colombia last year (115 DLR A-10, 6/15/11).

Cohen maintained that until Colombia "adheres to and provides tangible progress on Action Plan goals and metrics, we fear the plan is more rhetoric than reality. We should use this time and this opportunity to

encourage true democratic reforms in Colombia before moving forward on the FTA," he said.

AFL-CIO President Richard Trumka, who was scheduled to be at the press conference but was unable to attend, issued a statement maintaining that the action plan "does not go far enough to protect workers and ensure their safety and security."

Trumka said passage of the FTA is not the solution to the violence in Colombia. "Once the deal is in place, we'll lose our leverage if the violence against average Colombians begins to rise again," he said. Noting that there have been more than 2,850 trade unionists killed there in the last 25 years, Trumka said "the violence and impunity against trade unionists in Colombia is a decades long problem" that will not be solved "in a matter of weeks."

**Elements of Action Plan.** Under the action plan, by June 15 Colombia was to launch enforcement regimes on the use of temporary service agencies to circumvent workers' rights and the detection of collective pacts undermining the right to organize, among other things (66 DLR A-14, 4/6/11).

U.S. Trade Representative Ron Kirk announced June 13 that Colombia had met the requirements slated for completion by June 15, including securing legislation to establish criminal penalties, including imprisonment, for employers that undermine the right to organize and bargain collectively, or threaten workers who exercise those rights (113 DLR A-17, 6/13/11).

**No Evidence That Plan Is Having an Impact.** While Rep. George Miller (D-Calif.) said the trade agreement and the action plan are "a step forward," he added that there is no "evidence on the ground that the plan is having any impact." He contended that workers who try to form unions or are union members still experience violence, threats, and even murder. "This is something that the Congress of the United States cannot ignore, and before we give American preference to another country for trade arrangements, we need to ask if this is good for American workers and good for American values. The Colombian free trade agreement does neither," he said.

Rep. Linda Sanchez (D-Calif.) said it is "hard to understand why Congress is considering this agreement," adding it is not the time to do so. "We should be focusing on creating jobs," she said, and the agreement "does not create jobs here."

Noting that the administration has said the requirements of the action plan have been met, Sanchez contended "they do not go far enough."

"[The plan] benefits transnational corporations that already repress Colombian workers," she said, adding that "nothing gets better for workers, who don't get an equal share of the benefits this FTA could bestow."

"Why are we rushing to approve an agreement that most workers don't even want?" Sanchez asked, stating that her colleagues are overlooking the working conditions in Colombia. She added there is an "economic impact to workers in the United States when they have to compete with workers who are not allowed the rights to form a union" or have a minimum wage or overtime. "When corporations can move to other countries where workers can't stand up for themselves, how can American workers compete?"

Sanchez maintained that the workers in Colombia have been attacked and killed for trying to improve

their economic situation. "Without fair competition we will see more American jobs shipped overseas," she said.

**Colombian Union Leaders Oppose FTA.** Also appearing at the press conference were several Colombian union leaders who have been meeting this week with members of Congress to tell them why they oppose the agreement.

One of those union leaders, Jose' Dio'genes Orjela Garcí'a, an educator and a member of the CUT labor federation, told the press briefing that the action plan is "nothing more than a trick" to get Congress to pass the agreement. He contended that the plan "won't stop the violence" against unionists, adding that since the plan was negotiated, at least four teachers have been murdered and three more have been threatened. "Congress should not be fooled," he said, adding that the plan "needs to be monitored for a long time."

Jhonsson Torres Ortis, the treasurer of Fiscal Sinalcorteros, a union representing sugar cane cutters, said the action plan has not been put into practice. Recently, he said, one large company fired nine workers for trying to form a union, and other companies are using temporary workers to perform permanent work. The treaty should not be ratified, he said, because "there is no trust by the workers that it will improve their lives."

By MICHELLE AMBER

## In Brief

### OPM Touts Increase in Veterans Hired

The Office of Personnel Management June 15 released a report showing an increase in the hiring of veterans in the federal government last year, despite a decrease in overall hiring.

The announcement came with the release of its report, *Employment of Veterans in the Federal Executive Branch Fiscal Year 2010*, the first since President Obama issued Executive Order 13518, which established the Veterans Employment Initiative and the Council on Veterans Employment.

"Through the President's Veterans Employment Initiative, OPM and our agency partners are helping tens of thousands of veterans and their families continue their legacy of service," OPM Director John Berry said in a statement. "These are some of the best, brightest and hardest-working Americans in the federal government. While we've accomplished a lot in the first year, too many veterans are still unemployed and we're going to keep pushing to do even better going forward."

Text of the report may be accessed at <http://op.bna.com/gr.nsf/r?Open=lfers-8hvj5n>.

### Lockheed Martin to Cut 1,200 Space Systems Jobs

Lockheed Martin Corp. June 14 announced that one of its subsidiaries, Lockheed Martin Space Systems Co., would eliminate approximately 1,200 jobs by the end of 2011.

The affected positions are across the country, the Bethesda, Md.-based company said, but would be concentrated in Sunnyvale, Calif., the Delaware Valley region of Pennsylvania, and Denver. The cuts primarily will af-

fect “middle management,” the company said. A Lockheed Martin spokesman told BNA June 16 that the move was “not expected to seriously impact” union-represented workers.

“This is a difficult but necessary action to improve efficiencies and make our business more competitive going forward,” Joanne Maguire, executive vice president of Lockheed Martin Space Systems, said in a statement. “We will remain relentlessly focused on achieving operational excellence and mission success for our customers as we position to deliver more affordably in the future.”

The space systems division of Lockheed Martin designs and manufactures “a full spectrum of advanced-technology systems for national security, military, civil government, and commercial customers,” such as human space flight systems and satellites, the company said. The division currently employs about 16,000 workers in 12 states.

### **MSHA to Hold Hearing on Work Area Exams and POV**

The Labor Department’s Mine Safety and Health Administration will hold an additional public hearing July 12 on its proposed rules regarding work area examina-

tions and pattern of violations, MSHA’s deputy assistant secretary for operations Patricia Silvey announced June 15 at a hearing that was expected to be the final hearing on the proposals.

The additional hearing will be held in Hazard, Ky., at the Forum at the Hal Rogers Center at 101 Bulldog Lane. The hearing on the work area examination rule will begin at 8:30 a.m. and will be followed by the POV hearing. The agency has extended until Aug. 1 the deadline for submitting public comments on the proposed rules.

The proposed work area exam rule, (75 Fed. Reg. 81,165), would require mine examiners to identify and correct violations of mandatory health or safety standards while conducting preshift, supplemental, onshift, and weekly safety examinations of underground coal mines (246 DLR A-5, 12/23/10).

The proposed pattern of violations rule, (76 Fed. Reg. 5,719), would revise MSHA’s POV system. It would eliminate the potential POV procedure, under which the agency notifies mine operators in writing when their mine is in danger of being placed on a pattern of violations status (20 DLR A-15, 1/31/11).





# Also in the Courts

## ■ Disabilities—Discrimination—Hiring—D.D.C.

(*Alford v. Providence Hosp.*, D.D.C., No. 10-132, 6/14/11)

Granting summary judgment to a hospital on a wheelchair-bound secretary's Americans with Disabilities Act claim that it did not hire her for another position due to her disability, the U.S. District Court for the District of Columbia rules she did not show the hospital's qualifications-related reason was pretextual, as she at most showed she was only slightly more qualified than the selectee. Text at <http://op.bna.com/dlrcases.nsf/r?Open=edue-8hutve>.

## ■ Employment Contracts—State Laws—Public Employees—D.N.J.

(*Millar v. Pitman Bd. of Educ.*, D.N.J., No. 10-4104, unpublished opinion 6/13/11)

The U.S. District Court for the District of New Jersey grants a school board's motion to dismiss an elementary school teacher's detrimental reliance claim related to the nonrenewal of her employment contract, finding that she based her claim on representations made by a teacher and a principal who were not board members and that she did not plead a viable vicarious liability theory as to those representations. Text at <http://op.bna.com/dlrcases.nsf/r?Open=edue-8hut23>.

## ■ FLSA—Overtime—Wage & Hour—S.D.W. Va.

(*Davis v. Skylink Ltd.*, S.D.W. Va., No. 11-00094, 6/15/11)

Denying in part a satellite television installation company's motion to dismiss, the U.S. District Court for the Southern District of West Virginia rules that installation and repair technicians sufficiently pleaded that the company failed to properly record employees' work time and thus failed to pay them overtime compensation for time worked in excess of 40 hours per week in violation of the Fair Labor Standards Act. Text at <http://op.bna.com/dlrcases.nsf/r?Open=jaca-8hvk2>.

## ■ National Origin—Retaliation—Sexual Harassment—State Laws—S.D.N.Y.

(*Lartey v. Shoprite Supermarkets Inc.*, S.D.N.Y., No. 08 Civ. 8272, 6/14/11)

Granting summary judgment to Shoprite Supermarkets, the U.S. District for the Southern District of New York rules that a supervisor from Ghana fired after a sexual harassment investigation in which he admitted hugging and touching female subordinate employees has no national origin or retaliation claim under Title VII of the 1964 Civil Rights Act or New York state law because he cannot show the employer's asserted legitimate, nondiscriminatory reasons for firing him were a pretext. Text at <http://op.bna.com/dlrcases.nsf/r?Open=kmgm-8hvnny>.

## ■ Race Discrimination—Retaliation—Misconduct—Discharge—11th Cir.

(*Watson v. Kelley Fleet Servs. LLC*, 11th Cir., No. 09-16260, unpublished opinion 6/15/11)

The U.S. Court of Appeals for the Eleventh Circuit affirms summary judgment for an employer on race discrimination and retaliation claims under Title VII of the 1964 Civil Rights Act, finding that the employer fired an African American employee after an altercation with a co-worker based on evidence and a good-faith belief that the black employee physically threatened the co-worker. Text at <http://op.bna.com/dlrcases.nsf/r?Open=ldue-8hvl8>.

## ■ Sexual Harassment—Same Sex—State Laws—Cal. Ct. App.

(*Kelly v. Conco Cos.*, Cal. Ct. App., No. A126865, 6/6/11)

A male apprentice ironworker failed to state a same-sex sexual harassment claim under California's Fair Employment and Housing Act for alleged sexual harassment by his supervisor because he lacked evidence that he was subjected to discrimination based on his sex, the California Court of Appeal rules. Text at <http://op.bna.com/eg.nsf/r?Open=jfik-8hpmfk>.



# Economic News

## Unemployment Insurance

### First-Time UI Claims Decrease 16,000 To 414,000 in Latest Week, ETA Reports

**T**he number of jobless workers filing individual unemployment insurance claims decreased by 16,000 in the week ended June 11 following an increase of 4,000 the preceding week, as revised, according to seasonally adjusted figures released June 16 by the Labor Department's Employment and Training Administration.

First time UI claims totaled 414,000 in the latest week, down from 430,000 claims in the week ended June 4. The latest figure is consistent with the gradual downward trend that has occurred over the past year. One year ago, initial claims stood at 474,000.

The four-week moving average of initial UI claims, a less volatile measure, was 424,750 for the week ending June 11, unchanged from the previous week.

Initial claims "are heading in the right direction" as they fell larger than anticipated, Ryan Sweet, a senior economist at Moody's Analytics, said.

"The four-week moving average didn't budge, which suggests that both the labor market and the broader economy are struggling to gather momentum," Sweet added.

When first time claimants were excluded, the number of workers filing ongoing UI claims was 3,675,000, a decrease of 21,000 from the previous week's revised total of 3,696,000, ETA said.

The nation's insured unemployment rate in the week ended June 4 was 2.8 percent before seasonal adjustment, a 0.1 percentage point increase from the previous week. States with the highest insured unemployment

rates in the week ending May 28 were Alaska (4.9 percent), Puerto Rico (4.5 percent), Oregon (4.1 percent), and Pennsylvania (3.9 percent).

States with the largest increases in claims filed in the week ending June 4 were Wisconsin (1,528) and Tennessee (1,055). According to ETA, Tennessee attributed the increase in claims to layoffs in the service industries. Wisconsin did not provide a comment.

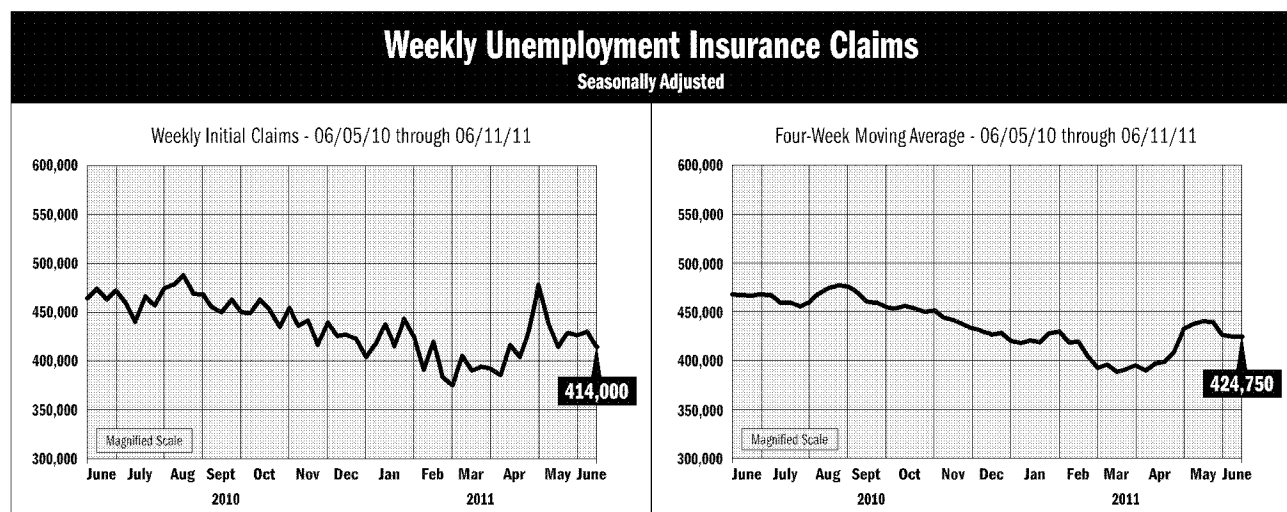
States with the greatest decreases in claims filed were New York (4,060), California (2,510), and Massachusetts (1,846). New York officials attributed the decrease in claims to fewer layoffs in the construction, manufacturing, and retail industries. California officials attributed the decrease in claims to a shorter workweek, as well as fewer layoffs in the service industry. Massachusetts, meanwhile, said the decrease in claims was the result of fewer layoffs in the construction and service industries.

Unadjusted ETA figures showed that nationwide 7,401,228 people filed claims for unemployment insurance benefits under all federal and state UI programs during the week ending May 28, a 209,116 decrease from the previous week. During the comparable week in 2010, 9,600,820 people filed UI claims.

The number of claimants receiving extended unemployment compensation in the week ended May 28 was 591,124, a drop of 27,335 from the previous week, but more than the 496,869 filings reported a year earlier.

Newly discharged veterans claiming UI benefits in the week ended May 28 totaled 35,559, which was 702 fewer than the 36,261 veterans filing claims the previous week. A year earlier, 36,039 claims were filed.

The report may be accessed at <http://ows.doleta.gov/press/2011/061611.asp>. The accompanying table and graphics show the data.



**UNEMPLOYMENT INSURANCE DATA FOR REGULAR STATE PROGRAMS**

WEEK ENDING	Advance June 11	June 4	Change	May 28	Prior Year <sup>1</sup>
Initial Claims (SA)	414,000	430,000	-16,000	426,000	474,000
Initial Claims (NSA)	394,910	366,816	+28,094	381,497	448,305
4-Wk Moving Average (SA)	424,750	424,750	0	426,750	467,250
WEEK ENDING	Advance June 4	May 28	Change	May 21	Prior Year <sup>1</sup>
Ins. Unemployment (SA)	3,675,000	3,696,000	-21,000	3,747,000	4,585,000
Ins. Unemployment (NSA)	3,465,277	3,426,345	+38,932	3,510,507	4,319,021
4-Wk Moving Average (SA)	3,709,000	3,724,250	-15,250	3,748,250	4,608,000
Ins. Unemployment Rate (SA) <sup>2</sup>	2.9%	2.9%	0.0	3.0	3.6
Ins. Unemployment Rate (NSA) <sup>2</sup>	2.8%	2.7%	0.1	2.8	3.4

**INITIAL CLAIMS FILED IN FEDERAL PROGRAMS (UNADJUSTED)**

WEEK ENDING	June 4	May 28	Change	Prior Year <sup>1</sup>
Federal Employees	1,778	2,142	-364	1,616
Newly Discharged Veterans	2,422	2,316	+106	2,228

**PERSONS CLAIMING UI BENEFITS IN ALL PROGRAMS (UNADJUSTED)**

WEEK ENDING	May 28	May 21	Change	Prior Year <sup>1</sup>
Regular State	3,416,331	3,498,800	-82,469	4,187,580
Federal Employees (UCFE)	21,564	23,335	-1,771	16,747
Newly Discharged Veterans (UCX)	35,559	36,261	-702	36,039
EUC 2008 <sup>3</sup>	3,293,507	3,381,090	-87,583	4,798,099
Extended Benefits <sup>4</sup>	591,124	618,459	-27,335	496,869
State Additional Benefits <sup>5</sup>	5,894	6,295	-401	4,975
STC / Workshare <sup>6</sup>	37,249	46,104	-8,855	60,511
<b>TOTAL</b>	<b>7,401,228</b>	<b>7,610,344</b>	<b>-209,116</b>	<b>9,600,820</b>

**FOOTNOTES**

SA - Seasonally Adjusted Data

NSA - Not Seasonally Adjusted Data

<sup>1</sup> - Prior year is comparable to most recent data.<sup>2</sup> - Most recent week used covered employment of 125,572,661 as denominator.<sup>3</sup> - EUC weekly claims include first, second, third and fourth tier activity. Tier-specific EUC data can be found here: <http://ows.doleta.gov/unemploy/docs/persons.xls><sup>4</sup> - Information on the EB program can be found here: <http://www.ows.doleta.gov/unemploy/extenben.asp><sup>5</sup> - Some states maintain additional benefit programs for those claimants who exhaust regular, extended and emergency benefits. Information on states that participate and the extent of benefits can be found starting on page 4-5 of this link: <http://ows.doleta.gov/unemploy/pdf/uilawcompar/2010/special.pdf><sup>6</sup> - Information on STC/Worksharing can be found starting on page 4-9 of the following link: <http://ows.doleta.gov/unemploy/pdf/uilawcompar/2010/special.pdf>

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UNADJUSTED INITIAL CLAIMS FOR WEEK ENDED June 04, 2011

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STATES WITH A DECREASE OF MORE THAN 1,000

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<u>State</u>	<u>Change</u>	<u>State Supplied Comment</u>
NY	-4,060	Fewer layoffs in the construction, manufacturing, and retail industries.
CA	-2,510	Shorter work week, as well as fewer layoffs in the service industry.
MA	-1,846	Fewer layoffs in the construction and service industries.
GA	-1,256	Shorter work week due to holiday.
FL	-1,240	Fewer layoffs in the agriculture, construction, manufacturing, retail, and service industries.
PA	-1,165	Fewer layoffs in the construction, service and retail industries.
MS	-1,125	No comment.
NC	-1,116	Fewer layoffs in the manufacturing industry.
CT	-1,028	No comment.

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STATES WITH AN INCREASE OF MORE THAN 1,000

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<u>State</u>	<u>Change</u>	<u>State Supplied Comment</u>
TN	+1,055	Layoffs in the service industries.
WI	+1,528	No comment.

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**DAILY LABOR REPORT**

# Electronic Resources

NUMBER 116

THURSDAY, JUNE 16, 2011

**TODAY'S ISSUE**

Listed below are headlines and page numbers of selected articles in this issue followed by websites providing related information.

**First-Time UI Claims Decrease 16,000 to 414,000 in Latest Week, ETA Reports (D-1)**

<http://ows.doleta.gov/press/2011/061611.asp>

**Obama Administration Denies Employers Will Drop Health Insurance Under PPACA (A-13)**

<http://finance.senate.gov/newsroom/chairman/release/?id=ec1aeae8-7220-4b00-9128-1f3ab6f25105>;  
<http://www.ahip.org/content/pressrelease.aspx?docid=33714>

**INTERNET SOURCES**

Listed below are the addresses of websites consulted by the editors of BNA's Daily Labor Report and also websites for official government information.

**Department of Labor**

<http://www.dol.gov>

**Bureau of Labor Statistics**

<http://stats.bls.gov>

**National Labor Relations Board**

<http://www.nlrb.gov>

**Equal Employment Opportunity Commission**

<http://www.eeoc.gov>

**Federal Mediation and Conciliation Service**

<http://www.fmcs.gov>

**AFL-CIO**

<http://www.aflcio.org>

**Chamber of Commerce**

<http://www.uschamber.org>

**Change to Win**

<http://www.changetowin.org>

**National Association of Manufacturers**

<http://www.nam.org>

**Congressional Record**

<http://www.gpoaccess.gov/crecord/index.html>

**Federal Register**

<http://www.federalregister.gov>

**Federal Register Table of Contents**

[http://www.access.gpo.gov/su\\_docs/aces/fr-cont.html](http://www.access.gpo.gov/su_docs/aces/fr-cont.html)

**The Federal Web Locator**

<http://www.law.vill.edu/fed-agency/fedwebloc.html>

**White House**

<http://www.whitehouse.gov>

**U.S. House of Representatives**

<http://www.house.gov>

**U.S. Senate**

<http://www.senate.gov>

**Thomas (Congressional legislative information)**

<http://thomas.loc.gov>

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**Labor Relations Week**

<http://www.bna.com/products/labor/lrwk.htm>

**Workplace Immigration Report**

<http://www.bna.com/products/labor/wir.htm>

**Workplace Law Report**

<http://www.bna.com/products/labor/wplr.htm>

**Government Employee Relations Report**

<http://www.bna.com/products/labor/gerr.htm>

**Labor Relations Reporter**

<http://www.bna.com/products/labor/lelw.htm>

**BNA Pension & Benefits Reporter**

<http://www.bna.com/products/eb/pen.htm>

**Construction Labor Report**

<http://www.bna.com/products/labor/clr.htm>

**Daily Tax Report**

<http://www.bna.com/products/corplaw/dtr.htm>

**Employment Discrimination Report**

<http://www.bna.com/products/lit/edr.htm>

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