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## **Employers Should Be Prepared for More Immigration Rallies**

Delaine Smith, Esq., and Jay Sumner, Esq. ★ Ford & Harrison, LLP

In the past several weeks, many employers have experienced increased incidents of employees not reporting for work to participate in immigration reform rallies. It is anticipated that additional marches will occur around the country over the next few weeks, culminating with the recent “Day Without An Immigrant” or “En Gran Boycott” May 1. Employers in the hospitality industry, as well as other industries that rely heavily on immigrant labor, must be especially careful in responding to absenteeism resulting from employee participation in these events given the industry’s high level of dependence on immigrant labor.

From a legal perspective, employers must consider implications under various laws, including the National Labor Relations Act’s (NLRA) protection of protected concerted activity, Title VII’s race and national origin nondiscrimination provisions, and, possibly, state and local laws.

Generally, an employee who does not report to work and gives no reason, either before or after the absence, can be subject to the employer’s existing disciplinary policy.

The NLRA protects employees who “engage in ... concerted

activities for the purpose of ... mutual aid or protection.” The National Labor Relations Board (NLRB) (the agency charged with enforcing the NLRA) has issued some decisions that could lend support to a finding that an employee who misses work to participate in one of these rallies for the purpose of supporting and aiding in securing protection for illegal/undocumented co-workers (or illegal/undocumented workers in general) engages in protected concerted activity. This means that any disciplinary action taken against the employee could be unlawful, regardless of whether the employee is represented by a union. Moreover, rights granted under a collective bargaining agreement may provide additional protection to employees covered by the agreement.

Other laws, such as Title VII, may also impact how an employer deals with this situation. Employers must be careful to ensure that any disciplinary actions taken as a result of employees’ participation in these marches are consistent with the employer’s existing policy and past practices in enforcing the existing policy. For example, not granting an Hispanic employee’s

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## **EEOC To Crack Down On Systemic Discrimination**

Camille W. Steward ★ Miller & Martin, PLLC

On April 4, 2006, the Systemic Task Force of the Equal Employment Opportunities Commission (EEOC) submitted and the EEOC adopted recommendations that will provide more incentive for EEOC investigators to explore whether an individual charge of discrimination is part of a larger systemic problem. The report also provides methods to better identify, investigate and litigate systemic discrimination cases.

### **Systemic Case v. Traditional Case**

The EEOC defines a systemic discrimination case as a pattern or practice, policy and/or class case where the alleged

discrimination has a broad impact on an industry, profession, company, or geographic location. Typically, when an employee brings an EEOC charge of discrimination against an employer, the EEOC focuses on the individual allegations raised in the charges. Logically, in such a case, the investigation centers on the complaining employee’s specific allegations and the particular employer or the particular facility or location, if the employer operated in multiple locations. As a result of the newly recommended changes, however, an employer’s chance of

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**Not If, But When**

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U.S. Secretary of Health and Human Services came to Tennessee with a message that got the attention of more than 500 people gathered at Tennessee Pandemic Planning Summit.

There has been a new emphasis on pandemic planning ... spurred by the flight of the "bird flu" across continents and by the warnings of the medical community that we are long overdue. The debate received an extra boost by Katrina because people everywhere realized the impact outside forces can have on life and the economy.

But a pandemic is different. A pandemic is a unique disaster. When Katrina occurred, it caused its damage in a defined area and a confined time.

A pandemic will strike differently. It will be happening in Nashville and New York and Los Angeles and Seattle all at the same time. We won't control its start, and we won't know when it will end.

Pandemics are a fact of the unseen world of viruses and bacteria, which are constantly mutating, adapting, and attacking. The are, quite simply, a fact of biology, a testament of history.

Any preparation we make beforehand will seem alarmist. Yet any preparation we make afterward will definitely be inadequate. When it comes to pandemics, we are overdue and under prepared.

Not long ago, we asked member companies if they thought that the threat of a pandemic or the ongoing planning for one were issues of concern. The answer was a pretty nonchalant shrug. That is not surprising. In a world where there are alarmists for everything and a market in which competitiveness and profit must be earned today, taking on another project requires deliberation.

Secretary Leavitt was here to convince us otherwise and the people who heard him took heart. His warning was clear:

*The history of pandemics is not so much the history of health as it is the history of*

*humanity. When pandemics strike, they not only cause massive sickness and terrible loss of life, they reshape nations.*

*The first great pandemic in recorded history struck Athens at the height of its glory. In 430 BC, a pestilence killed about a quarter of the city's population. Other pandemics followed. Perhaps the best known is the Black Death of the 14<sup>th</sup> century. Historians will probably never be certain of how many people it carried away, but rough estimates put it at about 25 million, or about a quarter of Europe's population at the time.*

*There have been ten pandemics of influenza in the last 300 years. There have been three in the last century.*

*Two of the pandemics — of 1957 and 1968 — were relatively minor events. But the great pandemic of 1918 was catastrophic. If it occurred today, the Pandemic of 1918 would cause 90 million sick, 45 million in need of medical attention and 2 million dead.*

*Why are we so concerned right now? That's a good question, since the H5N1 virus, the one that scientists are most worried about, is currently a bird disease.*

*There are two reasons for concern. First, the H5N1 virus is being spread by wild birds all over the world. A virus is a relentless aggressor, constantly mutating.*

*Scientists are concerned that the virus will develop the ability to efficiently transmit from person to person. The virus has already crossed the species barrier into more than 190 people, and more than 100 people have died.*

*The second reason for concern is that the H5N1 virus looks and acts more like the virus of 1918 than any of its more moderate cousins.*

*It is a vicious killer.*

Secretary Leavitt said there is no rational basis to believe that the early years of the 21st century will be different than the past. It happened in 1918, and if a pandemic strikes, it will come to Tennessee. If estimates that a pandemic will result in at least 40 percent of the workforce not going to

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## EPA Has Aggressive Agenda to Address Air Quality

Rick Bolton ★ Center for Toxicology & Environmental Health, L.L.C.

In just returning from Washington, D.C., I wanted to share some Environmental Protection Agency air quality policy news coming down our way soon.

In January 2005, I had the good fortune to receive a two-year appointment to the Federal Clean Air Act Advisory Committee (CAAAC) by the U.S. EPA administrator. The CAAAC is a senior-level policy committee established to advise the U.S. EPA on issues related to implementing the Clean Air Act Amendments of 1990. We provide independent advice and counsel to the EPA administrator on economic, environmental, technical, scientific, and enforcement policy issues. Tennessee is well represented with both Dr. Tony DeLucia of ETSU and me serving on the committee.

During opening remarks as CAAAC chair, Bill Wehrum of Memphis, Acting Assistant Administrator for Air & Radiation for the EPA, listed the following priorities for his office during 2006-2007:

### Implement Key Clean Air Programs

- Work with states to implement Ozone and PM<sub>2.5</sub> NAAQS
- Clear Air Interstate Rule and Clean Air Mercury Rule
- On-road and non-road diesel rules
- Air monitoring network re-structuring
- Monitoring Study for Concentrated Animal Feed Organizations (CAFOs)

### Develop New Major Rules

- Air toxics residual risk and area source rules
- Mobile source air toxic rule
- Locomotive and marine rules
- Small engines rule (Bond amendment)

### Support Voluntary Programs

- National Clean Diesel Campaign
- Reinvigorate Radon Awareness Campaign
- ENERGY STAR
- SmartWay Transport Partnership

During our April 2006 meeting, we discussed our "Recommendations for Reducing Emissions from the Legacy Diesel Fleet"

report, which concluded a 2-year study by 40 national experts. Did you know that the EPA has limited authority to regulate the more than 11 million diesel engines in our country's legacy fleet? While there are regulations for new engines, few incentives exist to retrofit the old engines still producing PM<sub>2.5</sub> pollution. A few states have incentive programs for retrofitting the legacy fleet in the locomotive, marine, and on-road sectors, but new rules in development for controlling diesel engine emissions make this issue forefront within the EPA.

Through this report, the CAAAC recommended developing a model guidance for low interest loans and rebate programs for diesel retrofits; further, CAAAC suggested creating tax incentives to be pursued at the federal level. The report broadens awareness of retrofits and strategies to reduce diesel emissions. Several of the recommendations are affirmed by provisions in the Energy and Transportation Acts recently passed by Congress. The CAAAC adopted the report unanimously and sent it to EPA Administrator Stephen Johnson. Shortly, the full report will be posted on the EPA CAAAC website.

The CAAAC reviewed a report on the Title V Implementation Experience. Through CAAAC's Title V Task Force that included Tennessee's own David Golden of Eastman Chemical, the Title V report addressed more than 20 areas and made key recommendations to improve the efficiency and cost effectiveness of the program. It suggests that the EPA and state/local regulatory authorities should facilitate sharing best practices related to permitting procedures (e.g. using electronic databases, public outreach, streamlines permit revision procedures) and should consider cost and benefits when developing these best practices. It recommends permitting authorities should use a citation approach to incorporate applicable requirements in MACT and other regulations into Title V permits. In all, more than 100 recommendations were made and adopted by the full CAAAC before unanimously adopting the report to be sent to the EPA administrator. The full report can be found on the EPA CAAAC website.



Rick Bolton, a former Chairman of the Tennessee Chamber's Environmental Committee is Director of Air Quality Services for The Center for Toxicology and Environmental Health, L.L.C., is a science-based company established to provide toxicology and environmental health consulting services. Mr. Bolton Can be reached at [rbolton@cteh.com](mailto:rbolton@cteh.com) or by phone at 615-591-6616.

## Welcome New Cornerstone Members

★ American Ordnance ★

★ Wal-Mart Stores Inc. ★

★ UNUM Provident Corporation ★

The Cornerstone of Leadership recognizes members who are investing at exceptional levels. These leading companies shape the future of Tennessee and help make the state a better place to live and work.

A prominent group of members have chosen to strengthen their commitment to the Tennessee Chamber by investing in the Cornerstone of Leadership, a program that maintains the highest possible level of service. Cornerstone leaders provide the seed capital to build the future.

We welcome and thank these three companies, who have joined with 30 other companies who have gone the extra mile to make a difference in Tennessee.

## EEOC To Crack Down On Systemic Discrimination

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being subjected to a charge of discrimination may increase either because it is within an industry that has historically lagged behind in employing individuals protected by the EEOC, because it is a large employer whose employment actions impact or influence industry practices or because it is located in a geographic region in which the overall demographic may contrast with the employer's work force.

### *Identity, Investigate and Litigate*

The Task Force Report recommends as a general principle that the Commission should promote a culture that supports identification, investigation and litigation of systemic cases at all levels of the agency. The EEOC intends to rely on employment trends and demographic changes, other agency reports and even an employer's EEO-1 report to enhance its ability to identify lawsuits that uncover a systemic problem within a company or an industry. To improve its investigations of systemic discrimination cases, the Commission intends to decentralize its investigation efforts, increase staffing, enhance staff expertise, coordinate with other agencies, including state agencies and educate the public. It also appears from the recommen-

dations that the EEOC intends to litigate these cases and improve how attorneys are assigned systemic lawsuits, better define the role of headquarters, and to enhance expertise of lawyers and paralegal staffing.

### *Pointers for Employers*

The Task Force has determined that work on systemic discrimination cases will be its top priority. As such, employers should expect to be required to produce more information when responding to an EEOC charge of discrimination and expend more time and resources responding to a charge. Listed below are some proactive steps an employer may take in effort to reduce its exposure to a systemic investigation:

- ❑ Be aware of the cultures and practices of the industry or profession.
- ❑ Stay abreast of diversity training. Large employers should ensure that management in all of its locations or offices is trained in discrimination matters so that one local investigation will not trigger a company-wide investigation.
- ❑ Periodically review EEO-1 reports and compare the report with past reports to determine if there are any trends in

hiring or termination practices that may raise a red flag to an EEOC investigator now assigned to look beyond a simple charge for patterns of discrimination.

- ❑ Be mindful of the geographic region and demographic make-up of the location and use these factors to defend against charges or allegations as well as to promote a workplace reflective of the community.
- ❑ Finally, because the Commission has determined that educating employers about systemic discrimination is important to deterring these patterns, employers should routinely read articles in media publications in their trade, mainstream media, press releases and legal alerts that inform employers about their rights and responsibilities under the law as well as the latest cases brought.

The Equal Employment Opportunity Commission provides a copy of the Systemic Task Force Report in its entirety on its website at [www.eeoc.gov](http://www.eeoc.gov).

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work, we have to ask who will manufacture the products we need to live and survive, who will drive the trucks that deliver the medical supplies and vaccines and other products we need. If businesses close, jobs will be lost. The cascading impact on the economy and on the lives of Tennesseans could be catastrophic.

The threat is real, and that is why there is a push for preparation ... by the state, local governments, hospitals and the medical community and by the engines that drive our economy – our state's employers.

Local preparedness is the foundation of pandemic readiness. In addition to state governors, leadership must come from mayors, county commissioners, school principals, church pastors, college presidents, corporate planner, employers and the entire medical community.

The federal government is mobilizing the nation to prepare, and Congress has already passed emergency funding of \$350 million to assist in preparation. Of the \$100 million being released now to assist with state and local preparation, Tennessee will receive more than \$1.9 million.

While the federal government is utilizing emergency funds to build stockpiles of anti-virals, facilitating local planning and working internationally and nationally, it is warning state and local governments that they must do the same.

“Any community that fails to prepare — with the expectation that the federal government can come to the rescue — will be tragically wrong,” Secretary Leavitt warned.

Communities across the state are beginning to plan. It is imperative that the business community be involved in the process. We understand first hand that there is a major difference in having a plan and being prepared. We need to make sure the communities that provide our services and that provide homes to our employees and their families are prepared. And we need to be prepared ourselves.

There are those who believe we this is unnecessary. Others do not.

But even if a pandemic does not occur for a decade, there are real benefits for preparing. As a nation, we will have established a new vaccine technology, we will have developed the capacity to quickly make vaccines, annual flu will no longer be the threat and we will be better prepared for any medical disaster.

It should not be an exercise in futility.

For further information and resources, visit <http://www.pandemicflu.gov/plan/states/tennessee.html> and <http://www2.state.tn.us/health/CEDS/PandemicFlu/index.htm>.

## Supreme Court Holds Waiver of Reconsideration Provisions in Workers' Compensation Settlements Unenforceable

In *Overman v. Altama Delta Corporation*, the Tennessee Supreme Court decided that provisions in workers' compensation settlements which waive an employee's right to reconsideration are unenforceable and contrary to public policy. This decision, appealed from the Chancery Court of Henderson County, affirmed the same ruling from the trial court.

In reaching its ruling, the Court acknowledged that parties in a workers' compensation settlement have a right to settle all matters of compensation between themselves. The Court, however, emphasized that such waiver provisions constitute invalid attempts by employers to relieve themselves of their rightful obligations to employees under the state workers' compensation law. The Court re-stated that an employee's right to reconsideration could not in any way be contracted away by the parties in a workers' compensation settlement.

Because the 2004 Workers' Compensation Reform Act disallows any waiver of reconsideration rights for injuries occurring after July 1, 2004, this decision will impact reconsideration waivers on injuries occurring before this date. The *Overman* ruling appears to allow employees who had previously settled away their reconsideration rights to reopen their cases if they meet the statutory requirements for such an action.

For further information, contact workers' compensation attorneys at Manier & Herod, 615-244-0030.



## TABCOMP: An Exclusive Benefit For Manufacturing Members

Over the past several *Business Insider* issues, we have provided information on TABCOMP Workers' Compensation Trust, which the Tennessee Chamber sponsors. Many TCCI members already know that TABSSIT, which closed because of workers' comp market conditions, was the predecessor to TABCOMP. Because TCCI recognized the value of a workers' comp self-insured pool for its manufacturing member, it re-established a workers compensation program in 2001 named TABCOMP. We would like to take this opportunity to make sure TCCI members are aware of this exclusive benefit.

The key difference between TABSSIT and TABCOMP today is that the day-to-day management and administration was contracted to CCMSI in November 2004. CCMSI is a third party administrator that specializes in managing self-insured funds. The company has more than 60 offices throughout the country, providing a depth of professionalism and experience that benefits the fund and its members.

TABCOMP provides a unique benefit that many of the Chamber's manufacturing firms utilize. Look at what it provides:

- ✓ Participants in TABCOMP still find many of the same primary staff members that were in place in the former program,

TABSSIT, ensuring continuity and professionalism in handling both their insurance and claims.

- ✓ The Trust continues to remain exclusive to TCCI's manufacturing members.
- ✓ Full time loss control specialists inspect all participating member companies on a regular basis to provide training and evaluations in order to keep claims to a minimum. This is an important benefit as members have the opportunity to earn dividends based on overall group loss performance.
- ✓ TABCOMP is a non-profit organization that provides competitive premium rates for TCCI manufacturing members that qualify for coverage.
- ✓ Claims are managed aggressively by local, Tennessee-based CCMSI claims staff, familiar with Tennessee workers' comp legislation.

CCMSI serves as the administrator for TABCOMP, the Tennessee Chamber-sponsored worker's compensation trust for manufacturers. For further information, contact TABCOMP Program Manager Janet Bowman at [jbowman@ccmsi.com](mailto:jbowman@ccmsi.com)

### *U.S. Chamber Publishes Briefing Book on Union Corporate Campaigns.*

Within the last several years, unions have initiated approximately 50 "corporate campaigns" against highly visible corporations such as Wal-Mart in an effort to force the corporations to recognize the unions.

In December, the U.S. Chamber of Commerce began circulating a briefing book to Republican members of Congress in an effort to increase support for the proposed Secret Ballot Protection Act (S. 1173 and H.R. 874). The SBPA would make it illegal for employ-

ers to recognize and bargain with unions that have not been selected by a majority of employees through a secret ballot election. The Chamber hopes its briefing book will increase co-sponsorship of the SBPA by moderate Republicans. The bill currently has only 77 of the 218 co-sponsors required to force the bill to the House floor. The Chamber's efforts to energize support for the SBPA is motivated by the stronger position of the Democrat counterproposal the Employee Free Choice Act (S.B. 842

and H.R. 1696), which needs only 11 more co-sponsors, and which would, among other things, require employers to recognize unions through a card check procedure.

The Chamber has no plans to require lawmakers to co-sponsor the SBPA as a condition of receiving election support. On the other hand, organized labor has been aggressive in ensuring support for the EFCA, and as a result, every Democratic candidate for national office in 2004 issued a statement supporting it.



## Retirement Plans Will Require Revisions To Stay Tax-Qualified

Paul O'Rourke, Esq. ★ Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Historically, the IRS has required tax-qualified retirement plans to be completely rewritten ("restated") at irregular intervals, to incorporate all intervening statutory and regulatory changes. Under new procedures, the IRS requires all plans to be rewritten on a staggered, regular cycle. The cycle for a particular plan will depend upon the type of plan involved.

In general, an individually designed plan of an employer, the employer identification number ("EIN") of which ends in 1 or 6, must be restated and should be submitted to the IRS by January 31, 2007. If the EIN ends in 2 or 7, the due date is January 31, 2008; for 3 or 8 the date is January 31, 2009; for 4 or 9 the date is January 31, 2010; and for 5 or 0 the date is January 31, 2011. For prototype plans, a six year cycle will apply. Defined contribution prototype plans must be restated by January 31, 2011, and every six years thereafter. Defined benefit prototype plans must be restated by January 31, 2013, and every six years thereafter.

Plans may be restated earlier than is required, but restatement in the later the scheduled year would still be required. There are special rules for certain situations (such as mergers or controlled groups), and for certain employers (e.g., all governmental plans are to comply in 2008 and file by January 31, 2009). Any amendment which changes the type of plan can alter its cycle. In some cases, new rules

will still be required to be handled by plan amendment, before the full restatement due date for a plan. For example, all 401(k) plans must be amended for new Regulations, not later than the time the tax return for the 2006 tax/fiscal year is filed.

In some cases (such as for plans which are adding Roth contribution provisions in 2006), at least some of the amendment must be adopted by the end of 2006, so the safer approach is to have these amendments completed this year. It will not be necessary to submit these amendments to the IRS for approval, however, as they will be part of the restated document submitted to the IRS on the cycle described above. Failure to update a plan on a timely basis, either for a restatement or for a required interim amendment, will either subject the employer to payment of what could be a significant penalty, or the Plan will lose its tax-qualified status. The loss of tax-qualified status can have very serious tax consequences for both the employer and the plan participants. The IRS Revenue Procedure which covers these rules is lengthy and complex, so each employer should discuss this with counsel to assure timely compliance

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## Employers Should Be Prepared for More Immigration Rallies

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request for the day off to attend a rally but granting a non-Hispanic employee's request for time off to attend a child's school play, or terminating an Hispanic employee on his first no-call/no-show for attending an immigration reform rally but only giving a written warning to a non-Hispanic employee for his first no-call/no-show could implicate Title VII's national origin and race discrimination provisions.

In addition to the legal aspects of dealing with absences resulting from these marches, employers must also consider the public relations and operational challenges presented. Particularly in the hospitality industry, due to its heavy dependence on foreign workers, employers may decide not to take a hard line on discipline of these individuals. As a practical matter, some employers may have such a high percentage

of employees participating that disciplining or terminating all of them may cripple the company or a facility's operations.

### *Employers' Bottom Line :*

Knowing that more rallies are likely in the near future, and that a one-day "strike" may be in the works, we strongly encourage all employers to be proactive in their approach to handling this extremely sensitive situation. Employers should consider reaching out to or increasing communication with their employees in an effort to avoid creating an "us versus them" atmosphere on this issue that could push non-unionized employees toward the unions who are, in many cases, playing an active role in these rallies. You may want to prepare talking points or guidelines for department and/or Human Resources

managers who may be required to handle these types of situations. These guidelines should attempt to balance the desires of the employees with the operational needs of the business and the practical impact of employees ignoring a company position they view as too strict. The approach you take will depend on your workplace demographics and the sensitivity of your business to work interruptions and public relations. Above all though, plan for this activity and do not simply rely on the policies you have in place without considering whether those policies adequately address the situation.

Attorneys Delaine Smith and Jay Sumner can be reached through the law firm's web site at [www.fordharrison.com](http://www.fordharrison.com).

## 2006 Summer Schedule

DATE	SEMINAR	LOCATION
May 10, 2006 .....	TOSHA 101 .....	Jackson
May 12, 2006 .....	TOSHA 101 .....	Knoxville
May 17, 2006 .....	Safety Programs .....	Jackson
May 23, 2006 .....	Safety Programs .....	Morristown
May 18, 2006 .....	Bloodborne Pathogens & Sharps Injury Preventions.....	Jackson
May 24, 2006 .....	Bloodborne Pathogens & Sharps Injury Preventions.....	Cookeville
June 1, 2006 .....	Bloodborne Pathogens & Sharps Injury Preventions.....	Nashville
June 6-9, 2006 .....	30-hour OSHA Compliance.....	Montgomery Bell State Park-Dickson, TN
October 5, 2006 .....	2006 Business Tax Update .....	Millenium Maxwell House-Nashville
October 26-27, 2006 ...	Annual Environment Conference.....	Montgomer Bell State Park-Dickson, TN



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