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## ***Recent Federal Labor Decisions Good for Business***

After almost a decade of pro-labor decisions, there seems to be a slight pendulum swing by the National Labor Relations Board (NLRB) that should be encouraging to both the business community and the employee. Two June decisions are creating hope. The first and probably the one with the biggest potential impact is a June 7 decision that will result in a review of neutrality agreements and the right to a decertification election. A June 9 decision reverses a ruling by the Board appointed by then-President Bill Clinton giving “Weingarten” rights to employees in non-unionized settings.

### **Neutrality Agreements**

In a 3-2 decision, the NLRB brought under scrutiny the United Auto Workers’ (UAW) most effective tool to organize new members. The Board’s vote will allow it to review neutrality pacts, in which companies agree to recognize the union if a majority of workers sign cards supporting the union. The petitions were filed on behalf of workers at a Dana plant and at Metaldyne factory. Hourly employees at both plants filed petitions to decertify the UAW within weeks after the union won the right to represent workers through card check elections.

In the case of Dana and Metaldyne, the companies had entered into neutrality/card-check recognition agreements prior to the start of union organizing drives. When the unions notified the employers that they had the support of a majority of employees in the agreed-upon bargaining units, card checks were conducted and the employers voluntarily recognized the unions. Decertification petitions were filed by employees within weeks of recognition. The NLRB’s regional directors, applying the traditional recognition bar, found that “a reasonable time had not elapsed since recognition” and dismissed both decertification petitions. In granting the requests for review, a three-member majority of NLRB expressed the view that the recent surge in the use of neutrality/card check recognition agreements provides a compelling reason to take a “critical look” at the recognition bar — or one year timeframe — in neutrality cases only.

While the upcoming final decision will not affect the general validity of neutrality and card-check recognition agreements, the NLRB will review whether workers must wait as long as a year before petitioning to hold a decertification vote. “Although no party here challenges the legality of voluntary recognition,” the NLRB majority opinion said, “the fact remains that the secret ballot election remains the best method for determining whether employees desire union representation.”

In recent years, unions have found that neutrality agreements — and the accompanying card checks — are their most successful organizing strategy. While unions will claim they have adopted this method because companies illegally thwart the ballot election process, the simple truth is that unions are becoming less and less successful at the ballot box. An informed employee is more likely to reject union representation. Look at the statistics: Unions won only about one-half of the traditional organizing votes during 2002, compared with 78 percent when card checks were used and 86 percent when cards were used in tandem with neutrality agreements.

Neutrality agreements impact many facilities in Tennessee. Campaigns have been waged and unions have sought recognition by virtue of a card check. Because this case might not be decided until 2005, it could be a significant Presidential election issue this fall. The President appoints the members of the NLRB; currently, three of the five members are President George W. Bush appointees. It will certainly be rallying cry for unions that support card check elections through neutrality agreements.

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## A Test We Must Pass

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It was almost 2,500 years ago when Pericles said, "Just because you do not take an interest in politics doesn't mean politics won't take an interest in you." Pericles' lesson was never truer than it is today.

While many people in business have distaste for politics, a wise business person recognizes that participating in the political process can help ensure his or her voice is heard and his or her interests are represented. In fact, business people who are not involved in the political process and conveying ideas or needs to policy makers are giving up control of their businesses.

Think about it. Each aspect of a company's operations is controlled in some manner by the political process. Laws that are passed impact the daily decisions that are necessary to run a successful business. Politicians routinely make decisions about how a business is going to be run and then hand those decisions to bureaucrats to implement. Those who run businesses live with the creative handiwork of their elected officials. We only have two ways we can react...we can sit back and complain or we can stand up and take charge. I prefer to think that there is no choice.

There are three fundamental ways to make our voices heard in the public policy arena — and, like a three-legged stool, without all three, the stool will not stand up.

The most obvious way is lobbying, which is, quite simply, the act of persuasion. Whether you are a registered lobbyist of the Tennessee Chamber or a concerned business person, when you attempt to convince legislators to shape policy in a pro-business manner, you are lobbying. It is what representative government is all about and why we embrace free speech.

Grassroots activity is critical to moving policy forward. It is activity, such as letters and telephone calls, by large numbers of constituents designed to influence policy outcomes. Elected officials know who put them in office — and who can take them out! They make a special effort to evaluate policy in light of its ramifications for their constituents. We must always remember that we — and our employees — are their constituents.

Political Action Committees — or PACs — are the third major strategy used to influence policy outcomes. A PAC is a group of people with common interests who pool their money to support candidates who share the same interests. Pooling political contributions results in increased visibility and clout. A single \$20 campaign contribution has little impact, but when combined with many \$20 contributions, it is an entirely different matter.

The Tennessee Chamber PAC provides a means by which business leaders across Tennessee can pool their money to create sizable enough contributions to get noticed by candidates. It is a way to hold our elected officials and candidates accountable for their commitments and their votes.

Financially supporting candidates who understand the specific concerns of the business community just makes good sense. Yet this is an area where the business community is least comfortable. In Tennessee, it is even less comfortable because all contributions to candidates must come from the individual — either directly or through a PAC.



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## ***Will Business Pass the Test?***

It is a duty we cannot shirk. Not only do we have a right to participate financially in the political process, we have a responsibility to our businesses, to our investors, to our employees and to our customers. We cannot allow elected officials to become the default managers of our companies. The choice to give to a PAC such as the Tennessee Chamber PAC is a business decision, and it is one I encourage you to make.

First, a decision to give is a decision to join an elite group of Tennesseans who drive public policy. It shows that you support the Chamber and its ability to represent the interests of your company and your employees. The Chamber cannot support candidates with dues from its members. We have to raise contributions from individuals or other PACs. It is not an easy task, yet, I can assure you that those elected officials and candidates who support us are also seeking our support.

Second, the Tennessee Chamber PAC supports politicians who believe as we do — elected officials or candidates from across the state who individual business people might not even know about — and would probably never give personal money to support. The Tennessee Chamber PAC can, through its members, evaluate candidates and make informed decisions, giving support to those individuals who have earned it. For example, a final vote for workers' compensation reform this session was a fairly easy vote; an earlier vote to stop efforts to increase the "multiplier" was a deciding vote.

Third, when the Tennessee Chamber PAC gives financial support, our message is clear and the candidate knows exactly why support is being given. Personal money often lacks a clear message but is seen as a donation built on personal friendship or just on proximity of the business. Money given by a PAC can make the difference between electing someone who believes as we do and letting a unfriendly candidate win. After all, the strength of PACs such as those run by organized labor and trial attorneys is legendary, and I think we all know that their candidates just do not have our interests at heart.

A PAC signals that the Tennessee Chamber is serious about politics — that we understand to be effective during the legislative session we have to be effective in ensuring the right people are elected. A strong PAC sends a signal to elected officials that garners respect. They know that it is about more than money. They know that it represents all the people who gave and the deliberate process that selected them to receive the contribution.

It has been said that money is the mother's milk of politics. If so, the baby is hungrier than ever. Legislators from both parties are eyeing the business community this election year. They know they came through on major business issues this past session. They want to see if we will walk the talk. They want to see if our money will be there after they were there for us. It is a test we cannot fail.

We are asking you — either individually or from your company's PAC — to contribute to the Tennessee Chamber's PAC. Our ability to be effective during the January to June legislative season relies heavily on our ability to support pro-business candidates from June to January. We can take your contribution — no matter its size — and leverage it for greater impact. We do not want to replace your individual giving or that of your company's PAC, but we all know that the stronger the team, the more certain the victory. We are asking you to help us build a large, multi-faceted pro-business team that will win this November.

Next, we are asking you to share with us when you or your PAC contributes to a candidate. Too often, because our contributions are individual and not collective, the business community is not seen as a player. The perception is that organized labor and the trial bar, for example, support their candidates while business keeps its hands in its pockets. Nothing could be further from the truth, but our opponents have the ability to aggregate their contributions and we have not effectively done that. This year we hope to. So when you decide to support a candidate this year, please take two more steps: Let us know you have given and let the candidate know that your contribution is in recognition of his or her pro-business support.

Our success this November will forecast our success in the next legislative session. We have built — with your support and involvement — a stool with two really strong legs. We now need your help in building that third strong leg. It takes so little to accomplish so much. We must heed Pericle's admonition and get involved and shape our destiny. The price to not do so is simply too high to pay.



## Supreme Court Ruling Favors Employers

In a recent decision, the U.S. Supreme Court addressed the application of existing workplace harassment rules to an employee's claim that she was "constructively discharged," i.e., forced to resign, from her job because of harassment by her supervisors. Previously, the Supreme Court had established that if a supervisor's harassment culminates in a "tangible employment action" such as termination or demotion, then the employer is liable for the actions of the supervisor. If, on the other hand, the supervisor's harassment does not culminate in termination or demotion, then the employer has the opportunity to avoid liability by showing that the employer maintained a policy designed to prevent and remedy unlawful harassment; and, the employee unreasonably failed to take advantage of the policy by complaining to management of the harassment.

In *Pennsylvania State Police versus Suders* (2004), the Supreme Court was asked to determine how to apply this standard in cases involving constructive discharge. In that case, the plaintiff was subjected to repeated sexually suggestive remarks and gestures by three of her supervisors over the course of six months.

The harassment culminated in Ms. Suders's resignation after her supervisors arrested her for theft in 1998. While the trial court dismissed her claims because she did not complain of the harassment during her employment, the Third Circuit Court of Appeals reversed that decision, ruling that a constructive discharge is a tangible employment action, and that the employer is therefore automatically liable for harassment in such cases.

The Supreme Court disagreed with the Third Circuit, noting that the ruling established by the lower court would make it easier for a plaintiff to establish a claim of constructive discharge than a claim of workplace harassment, even though a plaintiff in a constructive discharge case is required to meet the higher standard of showing intolerable working conditions that left him or her with no other option but to resign.

To resolve this problem, the Supreme Court ruled that a plaintiff may establish a claim of constructive discharge if he or she can show that a pattern of workplace harassment "became so intolerable that [his or] her resignation qualified as a fitting response." In such cases, constructive discharge may be the result of "co-worker conduct, unofficial supervisory conduct, or official company acts." However, only if "the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing [his or] her employment status or situation" will the employer be considered automatically liable for the constructive discharge. In other words, as long as the constructive discharge involves no "official act" such as a demotion, the employer may not be automatically liable and may be able to take advantage of certain defense arguments.

How does this decision affect employers in Tennessee? Certainly, this case abandons the more restrictive, plaintiff-friendly rule created by the Third Circuit, and as a result employers are far less likely to be held liable for constructive discharge where an employee resigns due to inappropriate workplace conduct. Absent some connection between the supervisor's harassing conduct and an official decision on the part of the company, a plaintiff will be hard-pressed to establish a valid constructive discharge claim unless he or she makes some attempt to notify the employer of the problem before resigning.

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Governor Phil Bredesen signed the workers' compensation reform bill into law June 15, 2004. Businesses should soon begin to see the benefits as many of the new law's sections take effect this month. In the last several weeks, many of you have expressed your appreciation to the Governor for his strong support of the business community. While many legislators supported us, too, it was the Governor who led the charge. If you have not contacted the Governor's office with your message of gratitude, please take a moment to send a personal letter, e-mail message, fax or to make a telephone call thanking him. Far too often elected officials only hear what we want, and do not hear our thanks. **Please say "Thank You" to the Governor and those legislators who supported business this year!** If you want to know how your legislator voted on the bill and its most significant amendments, visit [www.tnchamber.org/advocacy](http://www.tnchamber.org/advocacy).



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## Recent NLRB Decisions

It is interesting to note the comment of one of the employees at the Dana facility about the card check procedure. She said the failure to have a secret ballot on union membership was “the most unfair, undemocratic, un-American way that I ever heard of.” There has already been political interest in preserving and strengthening the rights of employers to organize through card checks. Last year, the *Employee Free Choice Act* was introduced in Congress. It is designed to make card check elections the preferred option for gaining union recognition. It also increases penalties for violation of workers’ rights during organizing drives.

### Weingarten Rights Case

Last month the NLRB held that employees who are not represented by a union do not have the right, under the *National Labor Relations Act*, to have a coworker present during an investigatory interview. This right, known as the Weingarten right, is based on a 1975 Supreme Court decision. The Board’s decision in the IBM Corporation case last month marks a return to earlier precedent, which stated that the Weingarten right does not apply in a non-union workplace. The decision eliminates this obligation for the more than 90 percent of private sector employers whose employees are not represented by a union.

Twenty-nine years ago, the Supreme Court in Weingarten ruled that it is a violation of the *National Labor Relations Act* to deny an employee’s request to have a union representative present during an investigatory interview at which the employee reasonably believes will result in disciplinary action. From 1975 until 2000, the NLRB held that Weingarten did not apply in non-union work places. But in 2000, in a case involving the Epilepsy Foundation, the Board dramatically expanded the availability of the Weingarten right to non-union workplaces.

The Board majority in last month’s IBM case reexamined the Epilepsy Foundation decision and held that policy considerations do not support application of the Weingarten right in non-union workplaces. In particular, the Board noted the increasing need for employers to conduct investigatory interviews in response to complaints of discrimination or sexual harassment, incidents of workplace violence, security concerns in the aftermath of September 11, and various other allegations of criminal activity or violations of company policy. The Board found that employers must be allowed to conduct such investigations in a “thorough, sensitive, and confidential manner.” The Board concluded that “this can best be accomplished by permitting an employer in a non-union setting to investigate an employee without the presence of a coworker.”

### Conclusion

In celebrating these two decisions, we must keep in mind that the NLRB is political and that a change in the White House could take us back to where we hope we have come from.

Do these two decisions create momentum for other changes? We do not know yet. But these two decisions do represent a move towards reason and balance. We know that unions are increasingly unable to sell their message to the American working people. Year after year, union membership declines, particularly in the private sector. Unions continue to look for new strategies to increase their membership. It is wrong when the NLRB becomes one of those strategies. This NLRB is showing early signs of being committed to fair and reasonable decisions that uphold the rights of our employees without diminishing the rights of their employers.

We will keep watching.

**For more information, contact Bob Gaskill, Tennessee Chamber Vice President for Employment Issues, at [bob.gaskill@tnchamber.org](mailto:bob.gaskill@tnchamber.org) or 615-256-5141.**



## High Court to Review Industrial Machinery Decision

Tennessee sales and use tax laws require that "...no tax is due with respect to industrial machinery." The Tennessee Chamber is fully aware of the importance of that law in attracting and maintaining industry and the accompanying industrial workforce in the state. That 1983 law is a cornerstone around which the Chamber has helped build the state's business climate. Despite the multitude of economic benefits derived from this "no tax" law not only by the business sector but also by the state, the Tennessee Department of Revenue (DOR) has from year-to-year attempted to narrow the scope of the law through either legislative efforts or court cases. The Department's recent efforts in that regard are profound and potentially devastating to manufacturers that use catalysts in the manufacturing process.

In the case of *Eastman Chemical Company versus the DOR*, the Department successfully argued before the Tennessee Court of Appeals that the "no tax" statute for industrial machinery did not apply to catalysts utilized by Eastman Chemical in its production of chemical products and plastics. In its January 12, 2004 decision, the Appeals Court determined that the General Assembly did not intend to create a tax exemption for industrial catalysts used in the manufacturing process.

The Chamber believes that the Appeals Court decision is wrong and should be reversed by the Tennessee Supreme Court. Review by the Supreme Court, however, is discretionary and not mandatory. Eastman Chemical filed an application with the Tennessee Supreme Court for permission to appeal the decision of the Appeals Court. Working with Eastman, the Chamber, filed a motion and lodged an *Amicus Curiae* brief with the Tennessee Supreme Court in support of Eastman's efforts to obtain the Supreme Court's review.

In its brief, the Chamber argued that the Appeals Court decision should be reviewed and reversed since this industrial machinery issue is a question of great public interest and an extremely important question of law for a wide variety of employers. Although few requests for review are actually accepted by the Tennessee Supreme Court, the Court announced on June 14 that it would review this decision by the Appeals Court. The Chamber is delighted that it has been instrumental in setting the stage for further argument on this critical Tennessee tax issue and will file, at the request of the court, an *Amicus Curiae* brief for consideration.

Charles Trost and Michael Stewart at the law firm of Waller Lansden Dortch & Davis, LLP represent Eastman Chemical, and Carl Hartley at Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. represents the Chamber.

***If you have any questions or would like more information regarding this case, please contact Carl Hartley of Baker, Donelson at [chartley@bakerdonelson.com](mailto:chartley@bakerdonelson.com) or at 423-756-2010.***

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## What's Ahead for the Environment?

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In the high profile session that the General Assembly just completed, environmental bills assumed a much welcomed low profile. Unfortunately, the same cannot be said during the legislative off-season.

Real challenges face Tennessee now as we must begin making improvements in many areas to regain attainment for the new ozone standard. The U.S. Environmental Protection Agency (EPA) has designated Hamilton, Shelby and Knox Counties and the counties surrounding Knox as "non-attainment" areas under the new federal ozone standard.

While the designation for the Knox County area is only basic, the area monitors must not reflect any violations or exceed limits for the eight-hour standard in 2007. To assure that is the case, a number of additional controls and practices must be implemented by the six or seven counties included with Knox. The package of controls and practices are not yet known. In efforts to reach attainment, the state Air Pollution Control Board must make certain decisions for new programs. These will involve new regulations, and some of these will likely be aimed at industry.



## 200 Days and Counting

Roland Myers

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By the time you read this article, there will be fewer than 200 days before Tennessee's 104th General Assembly convenes again in Nashville. What the business community does between now and January 15, 2005, will go a long way to shaping our legislative and regulatory fortunes in the future.

The rule of thumb for the questions you probably ask yourself about this time every summer: "When are the elections? Are they this year or next? Didn't we just have an election?" is an easy rule to remember. If the year is "even-numbered" (such as 2000 and 2002), then it is an election year. 2004 is an even-numbered year, so of course, the election dates are set and the campaigning has begun. Tennessee's primary and county elections this year are August 5; the general election is November 2.

At the state level, one-half of the membership of the state Senate is up for re-election (4-year terms) and all House of Representatives members (2-year terms) are up. In the House, all 54 Democrats are seeking reelection while of the eight open seats — all now held by Republicans — six Republicans are retiring and two are running for the state Senate. Democrat Governor Phil Bredesen is not up for re-election until 2006. Republicans see 2004 as a tremendous opportunity for a takeover. Naturally, Democrats are confident that will not happen and are working to hold their seats. The margins are razor thin: in the Senate, the Democrats control the body by 18-15 seats; in the House, it is the Democrats by 54-45. In either Chamber, the loss of a few seats would cost Democrats the majority, and thus control, resulting in a major power shift in state government.

Unlike 2000 and 2002 where the single overriding issue was whether Tennessee should adopt a state income tax, this year incumbent legislators and first-time candidates will be debating a variety of issues... all of them important to business. Expect to hear a lot of talk about TennCare reform, the passage of a balanced, no-new taxes budget, the increase in state employees' and teachers' pay, and, of course, workers' compensation reform. The 2003-2004 legislative session was generally seen by the public, and rightly so, as positive and constructive.

The Governor's 70 percent-plus approval rating makes him a formidable campaigner and fundraiser for his party. Political pundits and many legislators themselves are anticipating several close primary and general races. Given the number of open seats and typical election turnover, it is reasonable to expect at least a dozen new faces in the state legislature next year.

As business people, our role in the 2004 election season is to get to know the incumbents as candidates, talk to them about the issues they want to work on for Tennessee next year if re-elected, discuss with them the issues important to the business community, meet the first-time candidates and tell them what you do for the community in the jobs you provide and create, and the opportunities you provide your employees.

You need to talk to your employees about the election — not about specific candidates or your take on the issues — but sharing election dates and voter registration information. Help them exercise the privilege and duty we share as Americans — the right to choose our leaders. Lastly, make a contribution to the Chamber's Political Action Committee (see page 2 article) so we can re-elect our friends or elect new pro-business candidates. It is up to us to help to protect and promote the state's business climate. Being politically active in the 2004 election is just one way we can do it.

### MAKE AN ELECTION DIFFERENCE!

*It is easy to make your voice and support count at the State Capitol.*

To make a donation to the Tennessee Chamber of Commerce & Industry Political Action Committee, send your contribution to the Tennessee Chamber PAC at 611 Commerce Street, Suite 3030, Nashville, Tennessee 37202.

*To learn more about the PAC and how it works for you, visit [www.tnchamber.org/advocacy](http://www.tnchamber.org/advocacy).*

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## What's Ahead for the Environment?

There have been joint efforts by industries across the state and the Tennessee Chamber, in partnership with the Tennessee Department of Environment and Conservation (TDEC), for the past two years to communicate the new standard and to encourage local government participation in the Early Action Compacts (EAC).

The EPA did not accept the local and combined state plans for Knox and surrounding counties, Shelby County, or Hamilton and Meigs Counties. Hamilton County, however, petitioned for reconsideration and has subsequently received EAC deferral for ozone non-attainment. This means that Hamilton County, while having to implement programs including vehicle inspection and maintenance, will not have to impose the traditional offsets or other prohibitions on industry in the area.

Shelby County and Crittenden County in Arkansas have joined together to secure a "bump-down" designation from the EPA. This can lessen the severity of industry controls, but will probably not eliminate greater controls on NOx emissions from certain sources. Both Knox and Hamilton Counties, and their surrounding areas, will very likely have to impose additional industry controls. Those decisions will be made by the Air Board during the coming months. There is no doubt that other counties in the state will have to implement vehicle inspection and maintenance programs, much like the annual inspection programs currently in affect in Davidson, Wilson, Rutherford, Williamson, and Sumner Counties.

Reclaiming attainment status in Tennessee will require the hard work and sacrifices of both the business community and our citizens. Clean air requirements cannot be achieved on the backs of our state's industry; instead, it is going to take some changes in the social habits and lifestyles of all citizens, especially in these designated areas.

The importance of this issue is so great that the Tennessee Chamber will meet with TDEC's Pollution Prevention group at the Annual Environment Awards Conference October 26-28, 2004, at Montgomery Bell State Park. Please plan to attend.

### 2004 Upcoming Seminars

August 12	Maintenance-Related TOSHA Compliance	Chattanooga, Clarion Hotel	\$199/245*
August 17	Maintenance-Related TOSHA Compliance	Clarksville, Holiday Inn	\$199/245
August 19	Maintenance-Related TOSHA Compliance	Jackson, Holiday Inn	\$199/245
August 31	Basic Safety	Cookeville, Holiday Inn	\$199/245
September 2	Basic Safety	Chattanooga, Clarion Hotel	\$199/245
September 8	Maintenance-Related TOSHA Compliance	Kingsport, Ramada Inn	\$199/245

To register, contact Suzie Lusk at 615-256-5141 or at [suzie.lusk@tnchamber.org](mailto:suzie.lusk@tnchamber.org). \*Non-Member Rate



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