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## **NLRB Overturns Clinton-Era Rulings**

*Special to the Business Insider*

**Richard R. Parker, Esq., and Michael Shim, Esq., of Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**

During the administration of President Bill Clinton, the National Labor Relations Board (NLRB) overturned several long-established workplace practices, drawing the ire of employers who were forced to deal with significant changes in the interpretation of the National Labor Relations Act (NLRA). Employers have been calling on the NLRB to reexamine these changes in the law since President George W. Bush was elected in 2000.

The NLRB recently answered these calls by overturning several of the Clinton-era NLRB rulings. The first is *Epilepsy Foundation*, issued in July 2000, which held that non-union workers are entitled to have a co-worker present during investigatory interviews. Throughout most of the history of the statute, this right has been limited to workers who are represented by a union. The NLRB returned to this standard in the *IBM Corporation* decision issued in June 2004.

The second is *Lafayette Park Hotel*, issued in 1998, under which many workplace policies addressing employee misconduct could be held to be illegal. The legal issue in the case was whether certain workplace rules interfered with workers' Section 7 rights in terms of their right to organize and be represented by a union. In *Martin Luther Memorial Home, Inc.*, issued in November 2004, the NLRB revisited the standards for evaluating whether an employer's work rules violate federal labor law. At issue were three work rules adopted by Martin Luther Memorial Home. The first prohibited employees from using "abusive or profane language" directed at any person (co-worker, supervisor, resident, etc.) while on company property. The second rule barred "harassment of other employees, supervisors and any other individuals in any way." Finally, the third policy banned "verbally, mentally, or physically abusing" anyone "under any circumstances."

After examining each of these rules, the NLRB concluded that all were lawful under this analysis. The NLRB held that these rules were clearly intended to maintain order, create a civil and decent workplace, and avoid legal liability (for claims such as harassment)—all of which are within the rights of the employer under the NLRA.

The third significant case overturned is *M.B. Sturgis*. This case addressed the issue of whether a staffing firm and a user employer must consent if workers from both organizations are to be combined into one bargaining unit for purposes of conducting an election to determine whether they want to be represented by a union. Traditionally, consent has been required in these circumstances under the NLRA. In its 2000 ruling in *M.B. Sturgis*, however, the Clinton NLRB overturned this precedent and held that both groups of workers may be unilaterally combined into a single unit. The NLRB agreed to revisit this issue in *Oakwood Care Center* issued November 2004. The majority concluded that, the *M.B. Sturgis* decision was "misguided both as a matter of statutory interpretation and sound national labor policy."

The final case also addressed an issue arising in the union organizing context—specifically with regard to the effect of an employer's threat to close a facility if the workers vote in favor of representation. Once again a case from the Clinton NLRB was involved—*Springs Industries*. This 2000 decision held that if an employer makes such a remark, it must be presumed that the threat was widely disseminated and that the election should be set aside. In *Crown Bolt, Inc.*, issued December 2004, the NLRB rejected *Springs Industries* and reverted to the prior interpretation. According to the NLRB, the burden of proof should rest on the party seeking to overturn an NLRB-supervised election to show that the threats are actually disseminated through the workplace.

It is clear that the Bush Board is attempting to restore the balance in interpreting the National Labor Relations Act that was lost in the final years of the Clinton Administration.

***Richard Parker and Michael Shim of Ogletree Deakins can be reached at 615-254-1900.***



## The Best Lobbyist for Business

**Deborah K. Woolley**

**President** ★ [deb.woolley@tnchamber.org](mailto:deb.woolley@tnchamber.org)

611 Commerce Street  
Suite 3030  
Nashville, TN 37203-3742

**615-256-5141**

615-256-6726 Fax

[www.tnchamber.org](http://www.tnchamber.org)

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With the Legislature slowly getting down to serious business as bills make it to and through committees, it becomes even more important for all of us to be effective in sending our message to our elected officials.

The Tennessee Chamber keeps four experienced lobbyists at the State House, looking out for your business. But we all know that our strength is in what you say and do—one comment from a constituent in the home district is decibels louder than any Capitol Hill lobbyist. Your greatest strength is the fact that you are a home district voter who impacts directly the economy of the area through your business, your community involvement, your employees and your job creation. You can relate your position and your message in a way that it becomes real, impacting people and places in the legislator's district.

Yet to many business leaders, talking to a legislator—lobbying a legislator—is not a comfortable role. For those of us who do it daily, it never hurts to remember some of the less noted axioms that can make one successful. As association lobbyists, our greatest strength has to have an overall strategic impact on the full legislature as well as individuals. As business individuals, your greatest strength is talking to the person who you and your employees elect.

Lobbying, despite all its negative connotations, is simply an effort by anyone who wishes to influence the outcome of government decisions and has taken steps to achieve his or her aims through providing meaningful information in a productive manner. Plain and simple, the person who has done that has lobbied. It can take place in the State House during the week, in the neighborhood hardware store on Saturday afternoon or on the church steps on Sunday morning.

There are fundamental axioms that any good lobbyist—or citizen—needs to adhere to if he or she is to be successful. Be truthful, be credible, know the facts, know the political climate, pick your time and follow up. But there are some other axioms while a little less obvious are fundamental to remember if you are to succeed. As we start the heaviest part of our lobbying season, I want to think out loud about my 10 favorite ones...to remind me and to share with you.

1. The best time to lobby is when you don't need anything. That is when you can build the relationship that will be critical to your future success.
2. A large majority of the General Assembly is irrelevant on any single vote; know who you need to be talking to and why. They will be the committee chairs, the caucus and party leaders, and the ones with personal involvement who really care about your particular issue. Remember, no one will ever care as much as you do about your issue.
3. Selling your message is more than just garnering understanding. It is making sure the elected official knows why the position is good for him or her politically. Political facts of life are often more important than issue facts.



## Class Action Reform Enacted

*Special to the Business Insider*

Larry W. Bridgesmith, Esq., of Waller Lansden Dortch & Davis

On February 18, 2005 President Bush signed into law the *Class Action Fairness Act of 2005*, which makes it much more difficult for a plaintiff claim to proceed in state court. Introduced in successive sessions of Congress, the Act lacked broad-based support until the current term. In largely bipartisan fashion, the U.S. Senate backed the bill 72-26 and the House passed it 279-149. The legislation is prospective, applying only to cases filed after February 18, 2005. The speed of enactment caught plaintiff class action law firms off guard, although there was a flurry of class action filings in the week between the Senate passage and the President's signature.

A growing tide of public opinion caused Congress to move. Many highly publicized cases were filed on behalf of consumers, resulting in virtually worthless coupons being awarded to the plaintiff classes in settlements while class lawyers negotiated multi-million dollar fees. Everything from defective appliances to credit card fee policies and telephone usage practices became focuses of these class action lawsuits. Typically filed in state county courts, which had demonstrated a willingness to embrace the class action procedure, plaintiff law firms quickly brought national businesses to the point that settlement made economic sense when faced with protracted and costly litigation before plaintiff-sympathetic courts and local juries.

The Act permits large state court class action cases involving: (1) 100 or more class members, (2) seeking more than \$5 million in damages; and, (3) which involve predominantly out-of-state interests to be brought in or removed to federal court. Federal courts have far more reluctance to certify class actions if unwieldy in size or involving novel questions of law arising under conflicting state law principles. Defendants and business interests tend to be better served by federal court procedures than is often the case in state courts which may bow to local interests and political pressure.

The *Class Action Fairness Act* seeks to protect consumers by requiring attorneys' fees to be proportionate to the remedy in coupon and rebate cases. It does so by measuring fees against the value of coupons actually redeemed. Remarkably few coupons are used by class members in these cases, and attorneys' fees will be reduced accordingly. Also, before a coupon or rebate settlement can be approved, notice must be given to any federal or state officials who have the regulatory responsibility over the defendant entities in order to insure governmental oversight of settlements that may not be in the consumers' best interest. Coupon settlements will require a judicial fairness hearing to insure that the plaintiff class is appropriately protected by the proposed resolution. If any portion of an undisbursed settlement fund or resolution is reserved for charitable organizations, that portion cannot be counted for the purpose of determining appropriate attorneys' fees.

**Whether or not additional such initiatives surface, this law significantly alters the landscape companies must navigate as a cost of doing business and does so in their favor.**

What does the Act cover? The law provides a test by which covered cases may find their way to federal court:

- Original federal district courts jurisdiction exists in cases where there are 100 or more class members claiming more than \$5 million in damages in the aggregate, and:
  - Any class member is a citizen of a state different from any defendant;
  - Any class member is a foreign state or citizen and any defendant is a citizen of a state; or
  - Any member of the class is a citizen of a state and any defendant is a foreign state or citizen.

This jurisdictional standard is far less difficult to establish than the commonly sought "complete diversity" required under traditional federal jurisdictional statutes.

Federal courts are cautioned to exercise discretion in declining jurisdiction over those cases in which the interstate interests should bow to local state interests. The law accomplishes this result by imposing a "one third/two thirds" rule: if more



## NSR Program Reform Overdue

**Wayne K. Scharber**

Vice President of Environmental Affairs ★ [wayne.scharber@tnchamber.org](mailto:wayne.scharber@tnchamber.org)

New Source Review (NSR) regulations have been in place for more than 25 years in one form or another. When Congress adopted NSR requirements as part of the federal Clean Air Act, NSR was intended to apply primarily to new sources and secondarily to existing sources undertaking major plant changes such that the investment and the associated increase in emissions justified treating them as if they were new sources. NSR was never intended to apply to all changes at existing sources, nor was it intended to be used as the primary vehicle for attaining and maintaining national ambient air quality standards under the Clean Air Act.

Instead, NSR is aimed at ensuring that new sources install state-of-the-art controls and that existing sources do so when they undertake substantial projects that provide an opportune time to install controls. Despite what seems like a simple concept underlying the program, over the years, the issues surrounding NSR have only grown more complex—so complex that it is frequently impossible to determine if even the simplest activity requires a permit. There are many issues of concern to industry regarding the prior NSR rules, including:

- *Dramatic variations in what states and the EPA consider modifications requiring NSR.*
- *Unworkable NSR guidance and interpretations.*

- *Pollution prevention and efficiency improvements were thwarted by the application of an actual-to-potential test.*
- *The U.S. Court of Appeals (7th Circuit) held that the actual-to-potential test could not be applied to existing sources.*
- *The time required to get a major NSR permit is approaching the development cycle times for many industries.*

It is critical that Tennessee have an approved program so that it retains its autonomy over permitting decisions. The federal rules have been subject to years of public comment. They have been reviewed, again and again, by regulatory experts, and they reflect a balanced and reasonable approach. Any deviations from the federal rule also have the potential to jeopardize approval of the program and reduce the benefits that U.S. EPA intended to achieve from the issuance of these rules.

As a practical matter, significant variations between state and federal NSR regulations, and among various state programs are problematic for efficient business planning, particularly for companies with operations in many states. Finally, state rules that differ from the federal rules may put a state at an economic disadvantage to other states when investment and employment decisions are made.

The NSR Improvement Rules provide that needed clarification and they provide certainty and clarification to facilities and the public by (1) explaining the parameters and data required for projecting future emissions; and, (2) establishing validation mechanisms for source projections of future emissions through uniform recordkeeping and reporting requirements to track emissions after a change. These two elements of the rule actually enhance the enforceability of the pre-2003 rules by imposing consistent and replicable requirements for all sources to document the impact of projects on emissions and to track those emissions over time.

Tennessee Chamber of Commerce members must submit comments of support for these rules to the state *prior to March 11, 2005*. The state Air Board will then be asked, following staff summarizing comments received and preparing a final language, to promulgate these rules and then submit the required State Implementation Plan revision to the EPA.

If you have not filed comments to the state, you are urged to do so, stating your support for the state to proceed expeditiously. You should address your comments to:

Technical Secretary  
Tennessee Air Pollution Control Board  
9th Floor, L&C Annex  
Nashville, TN 37243-1531



## New Wage Discrimination Proposal

*Special to the Business Insider*

**Richard R. Parker, Esq., and Michael Shim, Esq., of Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**

The Office of Federal Contract Compliance Programs (OFCCP) published in the November 16, 2004, *Federal Register* two critical documents outlining the agency's new approach to compensation discrimination. In an "Interpretive Guidance on Systemic Discrimination," the OFCCP sets forth its proposed official standards for analyzing government contractors' pay practices. In a separate document, the agency proposes parallel "Guidelines for Self-Evaluation of Compensation Practices" which, if followed, will insulate contractors from OFCCP claims of discrimination in pay. The OFCCP published both documents in the form of proposals and gave interested parties until January 19, 2005 to submit any comments. These proposals will probably become final rules sometime this Summer.

### Systemic Discrimination Guidance

The OFCCP proposes to compare the pay of employees in "Similarly Situated Employee Groupings" (SSEGs) rather than by pay grade or salary level (the previous method). "Similarly Situated Employees" are those who perform "similar work, have similar responsibility level, and occupy positions involving similar skills and qualifications...In determining whether employees are similarly situated under these standards, actual facts regarding employees' work activities, responsibility, and skills and qualifications are determinative."

The OFCCP's proposal indicates that even an unexplained statistically significant pay disparity will not justify a finding of discrimination. Ordinarily, the agency will need meaningful anecdotal evidence. Finally, the OFCCP proposal notes that where it alleges pay discrimination, the agency will provide a *Notice of Violation* that will include a copy of the agency's multiple regression analysis and a summary of the anecdotal evidence.

### Self-Evaluation Guidelines

"Guidelines for Self-Evaluation" track the Interpretive Guidance and indicate that the agency will accept a contractor's self-audit if, after further review, the OFCCP determines that the self-audit satisfies all the standards set forth in the Interpretive Guidance. In a completely novel move, the OFCCP offers contractors an alternative to obtain the OFCCP's approval of its compensation self-audit—an "Alternative Compliance Certification." Under this alternative, a contractor must certify in writing, over the signature of a "duly authorized officer of the contractor under penalty of perjury" that the contractor has performed a self-audit that fully satisfies the OFCCP's Interpretive Guidance and found no unexplained pay disparities.

*Richard Parker and Michael Shim of Ogletree Deakins can be reached at 615-254-1900.*

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## Businesses Prepare for Wage Survey

Employers across the state of Tennessee are preparing for the *Compensation Data Kentucky/Tennessee 2005* pay and benefits survey. Tennessee Chamber members that participate in this annual Chamber-sponsored survey will receive a substantial discount on the survey results due in June. Members have until April 18, 2005 to submit their completed questionnaires.

In early March, businesses that have signed up to participate in the survey will be sent their questionnaire packets. Compdata Surveys is conducting the survey, now in its tenth year. Both Chamber members and other employers are invited to participate. The expanded participation gives you access to a massive database of valuable information.

The survey is the largest of its kind in the state and is designed to provide a comprehensive picture of pay and benefits for almost any organization. An example of the kind of information found in the benefits section is healthcare cost



## Compliance News

### Time to Post OSHA Form 300A

It is now time to post the summary of your organization's log of OSHA reportable injuries and illnesses. OSHA Form 300A must list the total number of occupational injuries and illnesses that occurred in 2004. These figures come from the OSHA 300 log which requires employers to note workplace injuries and illnesses as they occur. The summary must be displayed in an area where employers normally post notices to employees from February 1, 2005 to April 30, 2005. *Note: The Chamber is sponsoring a workshop on TOSHA's record keeping requirements in Cleveland March 23, 2005.*

### OSHA's Standards Improvement Process

As part of its ongoing process to improve, simplify and update its standards, OSHA has revised or eliminated some outdated medical provisions. It has also eliminated reporting requirements that do not benefit workers' health and updated chemical exposure provisions. These were published in the January 5 *Federal Register* and can be accessed from OSHA's website: [www.osha.gov/as/opa/quicktakes/index.html](http://www.osha.gov/as/opa/quicktakes/index.html).

Remember that for most rules Tennessee OSHA must adopt the federal standards before they become effective in Tennessee. That process generally takes three to six months.

### Youth Employment Changes in FLSA

Several rules regarding the employment of youths have been revised and are now in effect. An exception to the power-driven paper-products machine standard allows youths under 18 to unload but not load machines under specific guidelines. These guidelines are contained in *Fact Sheet #57* and can be accessed through the U.S. Department of Labor web site: [www.dol.gov/esa](http://www.dol.gov/esa).

Another exception allows 17-year olds to drive cars or small trucks during daylight hours for limited times and under strictly limited circumstances. (See *Fact Sheet #34*.)

There are some other changes that allow youths under 18 to work in proximity to roofs if they are in apprenticeships or student learner training programs. This change is consistent with exceptions for training programs in other hazardous occupations.

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## Wage Survey Available in June

containment and reduction measures. Last year's survey showed that more than 46 percent of employers in the region were responding to rising healthcare costs by increasing the employee portion of the health insurance premium and nearly 35 percent raised deductibles in their plan.

Organizations from all industries provide information on pay and benefits they offer employees in job descriptions ranging from entry-level positions to the president and CEO of the company. With survey results broken out by industry, region and company size, employers can learn how their compensation structures compare to the competition.

Each year, the survey results become available late in June. The book is typically more than 600 pages and provides information on nearly 140,000 incumbent workers in more than 450 jobs. New in 2005, customers can receive the survey results in publication format, or they can choose an interactive CD-ROM at no additional charge.

The non-participant price of the survey is \$729. The price for participating employers is \$319, but Tennessee Chamber members that participate pay only \$299 for the comprehensive survey results. For further information or to place an order, contact Compdata Surveys at 1-800-300-9570 or visit [www.compdatasurveys.com](http://www.compdatasurveys.com) to see sample data. Remember to mention your Tennessee Chamber membership to receive the additional discount.



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## Best Business Lobbyist

4. When you are lobbying a lawmaker, he or she is your customer. You are “selling” them your point of view. Like any customer, they will only buy what meets their own needs, not yours.
5. Tailor your message to the lawmaker with whom you are talking; legislators have different backgrounds, different approaches and different political needs. It is your job to figure out what will be of value to each one.
6. Each lawmaker has his or her special interest areas, and each is motivated by groups that represent them. Talk to the groups, particularly in the case of a legislator who opposes you. You probably won’t change his position, but the special interest group he listens to just might.
7. Most committee votes are won or lost at barbecues—or on Main Street, not in the committee room. If your vote count shows you are going to lose, ask for the bill to be continued to another day. Don’t think that your expert testimony is going to make the difference. Someone else has already made the difference.
8. A great lobbyist for you can be committee or legislative staff members. Talk to them, convince them and they can help do your work for you. There is no unimportant staff.
9. Working the Legislature is not a single issue event. Your success comes with repeated efforts that build relationships, respect and expertise.
10. Never doubt that money talks. Not illegal under-the-table money, but actual campaign support and contributions. It costs to run an election and if the candidate or incumbent is one who has supported your needs, you need to support theirs. As good as money is, however, constituent support is even better.

Lobbying is a healthy recipe of common sense, preparation, understanding the system in which you are working, good manners and having the gumption to ask. While practice doesn’t make perfect, it certainly makes it easier, and you are succeeding in building new and stronger relationships. It will pay off when that next major issue comes along, so start today.

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## Class Action Reform

than two thirds of the class members are citizens in the state in which the state action is filed, one of the defendants has citizenship and the principal injuries occurred in the same state, federal courts are to decline jurisdiction. Likewise, cases involving purely state interests or officials are to be left to the state courts to decide.

How will the law affect the business world? Mass tort, consumer fraud, product liability and employment law class actions will be affected. Any class claim defined by the class action procedures of the federal rules of civil procedure is subject to the law. Moreover, efforts in Congress prior to passage to exclude wage and hour “collective” as opposed to “class” actions were rebuffed. As a result, mass actions subject to the new rules also include those which collectively join the claims of 100 or more individual plaintiffs with the requisite \$5 million exposure, whether brought as class actions or not.

The proponents of the *Class Action Fairness Act* promote this as the first of many efforts to return fairness to the business risks of litigation. Whether or not additional such initiatives surface, this law significantly alters the landscape companies must navigate as a cost of doing business and does so in their favor.

*Larry Bridgesmith of Waller Lansden Dortch & Davis can be reached at 615-850-8732.*



# Calendar

## ***Register Today for Chamber's Annual Meeting***

Governor Phil Bredesen will keynote the Tennessee Chamber's 93rd Annual Meeting and Legislative Reception with an opening luncheon at Noon, March 16, 2005 at Nashville's Downtown Sheraton. Chamber members will participate in panel discussions of TennCare, workforce preparation and legislative issues during the afternoon.

Representatives from the Tennessee Medical Association, the Tennessee Hospital Association, Blue Cross/Blue Shield as well as Commissioner of Finance and Administration Dave Goetz will discuss TennCare and the state of health care. The workforce preparation panel will be led by Commissioner of Economic & Community Development Matt Kisber and representatives of education departments. The last item on the day's program agenda is a panel of key state Senate and House of Representatives' leaders who will discuss the issues now before the General Assembly.

Members of the General Assembly, key Bredesen Administration officials, and senior staff will join us for the 5:30 p.m. Legislative Reception. Sponsorship opportunities at all levels are still available. Call the Chamber's Director of Special Events Suzie Lusk at 615-256-5141 or visit [www.tnchamber.org](http://www.tnchamber.org) to register.

### ***2005 Dates to Remember***

March 16	Meeting of Chamber's Environment, Taxation and Human Resources Committees
March 16	Tennessee Chamber's Annual Meeting and Legislative Reception
March 17	Meeting of Tennessee Chamber's Executive Committee and Board of Directors
March 17	Chamber Hosts Chemical Committee and American Chemical Society Workshop
March 22	Seminar: Basic Safety, Cleveland
March 23	Seminar: Recordkeeping, Cleveland
March 30	Seminar: Basic Safety, Knoxville
April 1	Seminar: Forklift Training, Cleveland
April 5	Seminar: Noise/Health, Knoxville
April 7	Seminar: Noise/Health, Nashville
April 19	Seminar: Noise/Health, Jackson



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Nashville, TN 37203-3742

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