



**Wimberly Lawson**  
Seale Wright & Daves, PLLC

*Attorneys & Counselors at Law*

**Briefly**  
July 2009 Volume 9, Issue 7

**OBAMA'S FIRST 100 DAYS** AND LABOR AND EMPLOYMENT CHANGES



**Howard B. Jackson**

*"In separate announcements, officials stated OSHA will use the general duty clause to cite employers for ergonomic and workplace violence hazards, and that OSHA will be referring to the Justice Department all qualifying potentially criminal cases for prosecution."*

President Obama has wasted no time in implementing reforms favoring organized labor and increased enforcement of labor and employment laws. In January and early February, the Administration revoked a Bush Executive Order requiring employers that are federal contractors to post a notice advising employees of their right to join or not join a labor union, and instead issued an Executive Order requiring a notice advising employees of their rights to bargain collectively via a union. The second order limits employers' access to federal funds for anti-union activities, so that federal contractors are prohibited from using any funds associated with a federal contract to influence workers' organizing or bargaining decisions. A third Executive Order gives the right of first refusal to existing employees when service contractors change on federal projects. Unless the existing employees are unqualified or turn down a job, the new contractor will likely have to assume any union relationship or contract. The fourth Executive Order encourages executive agencies to require the use of project labor agreements (union-only agreements) for large-scale construction projects of \$25 million or more. On the other hand, the Administration has further delayed and proposed to rescind a final rule issued by the Bush Administration imposing additional financial reporting requirements on labor unions. The Bush Administration disclosure requirements would have forced labor unions to reveal expenses as low as \$5,000, covering such expenses as one union's "retirement gift" of a \$52,000 Cadillac in 2006, \$10,000 on a "golf outing" for union officials in another situation, and \$131,000 on tee shirts. Such disclosures led to nearly 1,000 indictments of union officials for fraud and more than 900 convictions. Now the regulation is not only being rescinded, but funding of the portion of the Department of Labor enforcing these requirements has been reduced.

In contrast, other parts of the Labor Department are being beefed up for additional enforcement. Labor Secretary Hilda Solis, who benefitted by more than \$900,000 in union campaign contributions over four terms in Congress, spoke during March to the AFL-CIO Executive Council and said she plans to "put enforcement back in the Department of Labor." She stated that "any good semblance of investigation and monitoring has been eroded over the last eight years," with the Bush Administration putting more of a priority on investigating unions rather than employers who abuse their workers. She said she would be putting more investigators back in the Wage and Hour Division and the Occupational Safety & Health Administration. In separate announcements, officials stated OSHA will use the general duty clause to cite employers for ergonomic and workplace violence hazards, and that OSHA will be referring to the Justice Department all qualifying potentially criminal cases for prosecution.

More recently, the Administration has nominated two union attorneys to join the five- member NLRB, in addition to the one former union attorney already on the Board. One of the Administration nominees, Craig Becker, has published articles explaining that the traditional notion of democracy should not apply in union elections. He has written that employers should be barred from attending NLRB hearings about elections, and from challenging election results even amid evidence of union misconduct. He argued that any meeting the company holds with employees on the subject of

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*Our Firm Wimberly Lawson Seale Wright & Daves, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.*

## DEALING WITH SWINE FLU AND RELATED MALADIES



### Kelly Campbell

“Swine Flu would in most cases qualify as a “serious health condition” within the meaning of the Family and Medical Leave Act (FMLA).”

The Center for Disease Control (CDC), the Occupational Safety and Health Administration (OSHA) and the Equal Employment Opportunity Commission (EEOC) have published recommendations concerning the recent outbreaks of the Swine Flu. These guidelines and suggestions pertain to the disease in order to help prevent an outbreak and to protect employees. There also remain some unanswered questions for employers.

#### WHAT IS SWINE FLU?

The Swine Flu is a respiratory disease previously only found in pigs. Recently, however, a new strand has developed and is spreading rapidly through people.

Symptoms are similar to the common flu including fever, cough, sore throat, body aches, headache, chills, and fatigue. More serious cases include diarrhea, vomiting, and even death.

#### HOW CAN I PREVENT THE SPREAD OF SWINE FLU?

- 1) WASH YOUR HANDS regularly with soap and water. Especially wash them after you are in public places and before you eat.
- 2) AVOID TOUCHING YOUR NOSE, MOUTH AND EYES. Many illnesses including the Swine Flu can be transmitted this way.
- 3) COVER YOUR NOSE AND MOUTH WHEN YOU COUGH OR SNEEZE. Use a tissue and throw it away.
- 4) AVOID CLOSE CONTACT WITH SICK PEOPLE. Try to stay at least 3 feet away.
- 5) IF YOU ARE AT HIGH RISK OF CATCHING THE FLU, N95 RESPIRATORS SHOULD WE WORN. Surgical masks are not efficient in protecting against the Swine Flu.

#### LEGAL IMPLICATIONS OF SWINE FLU

Swine Flu would in most cases qualify as a “serious health condition” within the meaning of the Family and Medical Leave Act (FMLA). Thus, an employee would be entitled to FMLA leave for time off because he had Swine Flu, or because he needed to care for his spouse, parent, or child who had it.

Under OSHA, Swine Flu is characterized as a contagious disease, and confirmed cases are recordable if the case is work related and involves medical treatment, days away from work, restricted work activity, loss of consciousness, or death.

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## KNOW YOUR ATTORNEY

T. Joseph Lynch



T. JOSEPH LYNCH is a Senior Associate in the Knoxville, Tennessee office of Wimberly Lawson Seale Wright & Daves, PLLC. His law practice includes an emphasis in premises liability, commercial law, wills and estates, real estate transactions and the defense of workers’ compensation claims for employers. Joe received his Bachelor of Arts in English, cum laude, from Carson-Newman College and his law degree from the University of Tennessee School of Law. He is a deacon and member of Covenant Presbyterian Church. Joe is a member of the Knoxville Bar Association.

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## SAVE THE DATE

The  
**WIMBERLY LAWSON**  
LABOR & EMPLOYMENT  
LAW UPDATE



**TARGET OUT OF RANGE**

**Knoxville Marriott**  
Knoxville, Tennessee  
November 5-6, 2009

**SEE DETAILS ENCLOSED**

## DHS ANNOUNCES NEW WORKSITE ENFORCEMENT STRATEGY



On Thursday, April 30, 2009, updated worksite enforcement guidance was distributed to Immigration and Customs Enforcement (ICE) officers, which reflects a renewed Department-wide focus targeting criminal aliens and employers who cultivate illegal workplaces by breaking the country's laws and knowingly hiring illegal workers.

Effective immediately, ICE will focus its resources in the worksite enforcement program on the criminal prosecution of employers who knowingly hire illegal workers in order to target the root cause of illegal immigration.

### Anita Patel .....

**"For employers and managers, the message is clear: the government wants to catch you violating the law."**

ICE will continue to arrest and process for removal any illegal workers who are found in the course of these worksite enforcement actions in a manner consistent with immigration law and DHS priorities. Furthermore, ICE will use all available civil and administrative tools, including civil fines and debarment, to penalize and deter illegal employment.

ICE officers will be held to high investigative standards including:

1. ICE will look for evidence of the mistreatment of workers, along with evidence of trafficking, smuggling, harboring, visa fraud, identification document fraud, money laundering, and other such criminal conduct.
2. ICE offices will obtain indictments, criminal arrest or search warrants, or a commitment from a U.S. Attorney's Office (USAO) to prosecute the targeted employer before arresting employees for civil immigration violations at a worksite.

### Comments

For employers and managers, the message is clear: the government wants to catch you violating the law. The government will use its resources to gather evidence that employers and managers are knowingly hiring illegal aliens. The evidence will come from improperly completed I-9s, "smoking gun" memos, and testimony of informants who are planted in your workforce, enforcement officers who are planted in your workforce, disgruntled former employees, and illegal aliens who want to stay in the United States.

DHS is issuing employment authorization cards to illegal aliens who have assisted in DHS investigations.

DHS informants and investigators will use all kinds of tricks to obtain harmful statements from managers and supervisors. For example, it is not uncommon for a manager to say that he knows the workers are illegal, even though the manager has no actual knowledge other than the "looks and language" of the workers. It is much better for a manager or supervisor to respond:

"We believe that all the workers are legal because they have completed the I-9 process and we have no knowledge that any of the workers are illegal. It is against company policy to hire and to employ people who are not authorized to work in the United States. It is against company policy to discriminate against an employee or applicant based on the way they look or speak."

Employers and managers should make immigration law compliance a top priority. Employers should make sure that all I-9s are completed timely and properly, that managers and supervisors and HR staff are trained in immigration compliance procedures, and that HR clerks responsible for I-9 completion do their jobs with perfection. In fact, it may be appropriate for employers to test their immigration law compliance procedures by using "plants" who attempt to obtain employment by presenting fake documents or by failing to complete Form I-9 properly, and who attempt to trick

managers and supervisors into making harmful statements. If the "plants" beat your system, employee discipline and/or more training are in order.

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**“OBAMA’S FIRST  
100 DAYS”  
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unions that involves a “captive audience” ought to be grounds for overturning an election. If a company wants to distribute leaflets that oppose the union, for example, Mr. Becker said it must allow union access to its private property to do the same.

About the only area in which unions and enforcement against employers have not progressed is the so-called “card check” legislation. Now that the Democrats are approaching having 60 votes in the Senate, making the legislation filibuster-proof, many moderate Democrats are having concerns about the Employee Free Choice Act (EFCA) “as currently written.” Indeed, some writers are now suggesting that having 60 Democrats in the Senate will not necessarily make it easier to pass that proposed law, as there are serious political differences between liberal Democrats and moderates. On May 24, President Obama reiterated his support for the EFCA, and stated it was needed because “the scales have been tilted to make it really hard to form a union.”

If the current law is so unfair to unions, proponents of the EFCA may have a difficult time explaining why unions are winning secret ballot elections at the highest rate since the Bureau of National Affairs began analyzing such data in 1984 (67%), and that 95% of all elections are conducted within 56 days of a union petition filing, with a median election period of 38 days.

**“DEALING WITH  
SWINE FLU”  
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Swine Flu may also raise issues under the Americans With Disabilities Act (ADA). Because Swine Flu is a temporary condition, it is unlikely an employer would generally have to provide a reasonable accommodation under the Americans With Disabilities Act (ADA). An employer may need to do so, however, if the disease left the employee with a lingering and disabling

condition. Employers should note that the privacy rules related to medical information under the Health Insurance Portability and Accountability Act (HIPAA) and the ADA would apply.

Legal issues may arise where the employer considers an employee or employees to constitute a direct threat to others due to the employee having or having been exposed to Swine Flu. In this case, the employer may want to request or demand an employee undergo an appropriate fitness for duty examination, or even take a mandatory medical leave. While the EEOC has issued guidance to employers regarding Swine Flu, it does not answer the question of whether an employer could make such requests or demands without violating the ADA. The Guidance does address the question of how an employer may ask about factors, including chronic medical conditions, that may cause them to miss work in the event of a pandemic. The EEOC advises that employers may survey their employees to obtain personal information to prepare for a pandemic if the questions asked are broad based and not limited to disability-related inquiries. The Guidance goes on to explain that an inquiry would not be disability-related if it asked about both non-medical reasons for absence during a pandemic (e.g. school closures) as well as medical reasons for which the employee might be absent. A sample questionnaire is available on the EEOC website at [http://www.eeoc.gov/facts/h1n1\\_flu.html](http://www.eeoc.gov/facts/h1n1_flu.html). The Guidance also makes it clear that an employer may implement infection control procedures, including requiring the use of personal protective equipment and teleworking as long as employees are not singled out for these steps based on a protected category, and it reminds employers to maintain the confidentiality of any medical information the employer may receive.

**WHAT EMPLOYERS CAN DO**

Some employers have set up internal task forces to evaluate the situation and plan an appropriate strategy similar to the Avian Flu task forces used in the past. These task forces meet with government health officials and discuss what information should go on their companies’ websites, what information should be disseminated to employees, and what contingency plans should be. Sometimes crisis management consultants are included.

More specific information on avoiding transmission among humans is available from the CDC in Atlanta which can be accessed by website at [www.cdc.gov/h1n1flu/guidance](http://www.cdc.gov/h1n1flu/guidance), at the OSHA website [www.osha.gov](http://www.osha.gov), and at the EEOC website at [www.eeoc.gov](http://www.eeoc.gov).

We invite you to attend our 30th Annual Labor and Employment Law Update

## **TARGET OUT OF RANGE**



**THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE**  
**Knoxville Marriott Downtown**  
**500 Hill Avenue, Knoxville, Tennessee**  
**November 5 & 6, 2009**

### ***LEARN MORE ABOUT THESE POPULAR TOPICS***

- ★ The Year in Review - Employment/Labor Update
- ★ Immigration Worksite Enforcement
- ★ Wage and Hour Insights Regarding U.S. Department of Labor Enforcement of FLSA
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- ★ HR Jeopardy - The Game (The Interplay between ADA/FMLA/Workers Comp)
- ★ Workers Compensation - Strategies to Manage Claims
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- ★ Immigration Issues from A to Z
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- ★ Socialism Run Amok-Employee Benefit Strategies in an Era of Governmental Mandates
- ★ Individual Employee Contracts - Who, What, When & How?
- ★ Pending Workplace Legislation - Are You Ready for Change?
- ★ Diversity - Why Can't We All Get Along?
- ★ Class Action Lawsuits - Could This Mean You?
- ★ Union Organizing Update - Don't Be Caught Unaware
- ★ Alternative Dispute Resolution - Mediation & Arbitration Analyzed
- ★ Employee and Employer Rights and Obligations Under the FMLA
- ★ ADA - What Are the Courts Doing With the Amendments?
- ★ Electronic Discovery Rules - What They Mean to You Before a Lawsuit is Filed

We are also pleased to announce that our keynote speaker will be author, motivational speaker, trainer, radio talk show host, *Hallerin Hilton Hill*



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# TARGET OUT OF RANGE



## THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott - Knoxville, Tennessee - November 5-6, 2009

**COST:** Early Bird (registration AND payment received by October 1)

- \$295 per person
- \$275 for each additional person from same company
- \$230 for eight or more from same company



Registration and payment received AFTER October 1

- \$335 per person
- \$315 for each additional person from same company
- \$295 for eight or more from same company

**REGISTRATION INCLUDES:**

Seminar (1½ days), materials, two continental breakfasts, lunch and evening reception on Thursday, November 5, 2009

**CANCELLATION POLICY:**

50% cancellation fee will be incurred for cancellations after October 14. Cancellations made after October 28, 2009 will forfeit registration fee (registrants will receive the conference materials post-seminar)

**FOUR WAYS TO REGISTER:**

1. **Mail to:** Bernice Houle  
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 P.O. Box 2231  
 Knoxville, TN 37901-2231
2. **Fax to:** 865-546-1001
3. **Email to:** bhoule@wimberlylawson.com
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