



## UNION MOVEMENT CRISIS



**Ronald G. Daves**

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In September 2013, the AFL-CIO unions voted overwhelmingly to incorporate into their ranks groups that are called "worker centers." The President of the federation, Richard Trumka, stated that the strategy is to address the "crisis" that is reflected in the fact that union membership in the country has dropped to a 97-year low. Current union representation in the U.S. is at approximately 11% of the workforce and that includes public sector workers, including school teachers, federal workers, etc. The percentage of unionized workers in the private economy is about 6%. That is down about 85 percent since the 1960's.

The concept of "worker centers" is not a new one; however, it has recently gained momentum through its effort to create "nationwide strikes" against certain retailers like Wal-Mart and fast-food establishments like McDonald's. The demonstrations clearly appear to be traditional-type union strikes or unionizing drives. These groups, however, deny that they are bona fide unions. They legally identify themselves as non-profits, community organizations, charities, etc. That "legal status" enables them to circumvent the National Labor Relations Act's restrictions that apply to labor organizations/unions.

The importance of these groups claiming that they are not labor unions is that they are unrestricted in many of their activities which would be deemed illegal if done by labor unions. For example, labor unions can picket for a maximum of thirty days unless they have the support of a sufficient number of the affected employer's employees to enable them to file a petition with the National Labor Relations Board (NLRB) for a secret-ballot election, which would allow the employees of the employer to decide if they want to become affiliated with a union. The so-called worker center groups most frequently are not even made up of employees of the affected employer; they are "volunteers" or are paid by outside organizations to stage the demonstrations and picketing. The NLRB has ruled that the worker center groups are not subject to the regulations that govern unions so long as the demonstrators/pickers limit their activities to making intransigent demands on an employer but demonstrate no intent to attempt to negotiate or bargain with the affected employers. Therefore, their tactics are not governed by federal labor laws and regulations.

The appearance that the groups want to project is that the employees are the persons doing the complaining when, in fact, that is rarely the case. If the actual employees wanted to unionize, they could do so by exercising their rights under the federal law that has been in place for over 75 years for regulating union-management relations. Wal-Mart, for example, has reported that no more than 50 of its 1.3 million employees have gone on "strike" in the September demonstrations that were so widely publicized on television new shows. Fast-food companies that have been targeted show similar statistics. Much like the well-known "Shame On" campaigns of recent years, the picketers or demonstrators are not employees of the employers, rather, they are paid demonstrators.

The fact is that the "worker centers" that have garnered most public attention are established by and/or funded by big labor. An example is the "Our Wal-Mart" group, which was created by the United Food and Commercial Workers' Union (UFCW). The group that has staged the recent demonstrations against the fast-food industry is a creation of the Service Employees International Union (SEIU), the largest labor union in the country. The SEIU alone has given that group alone \$7.5 million. The worker centers have flourished financially as a result of their tax-exempt advantages. They are also exempt from the federal law (The Labor-Management Reporting and Disclosure Act of 1959) which requires labor unions to file annual reports of their financial activities.

Regardless of their stated goals and legal status, the ultimate goal of the "worker centers" is to increase the unionization success of major unions. Initially, their tactics are to create unrest and resentment toward the targeted employers and to incite negative public opinion against the targeted employers. Big labor has failed in its efforts to unionize American workers within the legal framework established by Congress and under national labor policy. It is now relying on political campaign contributions and upon tactics such as "worker centers" to make an end-run around the National Labor Relations Act.

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# IT'S ALWAYS SOMETHING: IRS GRANTS EMPLOYERS A REPRIEVE WITH ONE-YEAR DELAY OF AFFORDABLE CARE ACT'S EMPLOYER MANDATE, BUT OTHER RULES AND RULINGS WILL KEEP EMPLOYERS BUSY IN 2014



**Catherine E. Shuck**.....

“There are still plenty of other requirements in the ACA to keep employers on their toes next year.”

On July 9, 2013, the IRS officially granted employers covered by the Patient Protection and Affordable Care Act (“ACA”) a welcome, one-year reprieve from the ACA’s employer mandate.<sup>1</sup> The reprieve provided that enforcement of the mandate will not take place until 2015. The IRS’s action also included relief from two key reporting requirements associated with the employer mandate. Other portions of the law, including the individual mandate, are unaffected by this delay in enforcement.

There are still plenty of other requirements in the ACA to keep employers on their toes next year, however. And in other news, the IRS recently issued a Revenue Ruling stating that, in light of the U.S. Supreme Court’s ruling in *United States v. Windsor*,<sup>2</sup> same-sex couples who are legally married will be treated as spouses for federal income tax purposes. Following is a brief look at these recent developments.

## ACA Checklist for 2014

### *Notice of Coverage Options*

As of October 1, 2013, all employers covered by the *Fair Labor Standards Act* (FLSA) were required to distribute a Notice of Coverage Options to employees, informing employees of coverage options available through the Health Insurance Exchange (now called the “Marketplace”), as compared with coverage options available through the employer. The notice requirement applies to all employers subject to the FLSA, regardless of whether or not the employer offers health insurance and regardless of whether the employer is subject to the employer mandate. Although it got off to a bumpy start, Tennessee’s federally-run online Marketplace did open on October 1 as scheduled.

Even though there is no fine or penalty for failing to provide the notice, according to guidance the DOL posted to its website on September 11, 2013,<sup>3</sup> employers who have not already done so should provide the notice as failing to do so could run afoul of disclosure requirements regulated by ERISA.

Going forward, the notice must be provided to new employees upon hire. In May of 2013, the DOL issued Technical Release 2013-02 to provide temporary guidance regarding the notice requirement until final regulations are issued.<sup>4</sup> The DOL has also promulgated model notices.<sup>5</sup>

### *Summary of Benefits and Coverage*

As in 2013, a Summary of Benefits and Coverage (SBC) must be distributed during open enrollment for the 2014 coverage period. The SBC must indicate whether the employer’s plan provides minimum essential coverage as defined by the ACA and whether the plan or coverage meets the minimum value requirements. The SBC template has been revised somewhat for 2014; the template is available on the Employee Benefits Security Administration (EBSA) website.<sup>6</sup>

### *W-2 Reporting*

Employers that issued 250 or more W-2s in the previous tax year must again comply with the ACA’s requirement to report the aggregate cost of health coverage on employees’ W-2 forms. Employers filing fewer than 250 W-2s continue to be exempt from the requirement. In other words, small employers will not need to report health insurance coverage on 2013 W-2 forms, issued in January 2014.

### Tax Treatment of Same-Sex Spouses

In light of the Supreme Court’s *Windsor* decision, the IRS issued a Revenue Ruling on August 29, 2013 broadly interpreting the marriage provisions of the tax code in a gender-neutral way.<sup>7</sup> This means that for all federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” include an individual married to a person of the same sex if the individuals are lawfully

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## MINIMUM WAGE AND OVERTIME FOR HOME CARE WORKERS



**Carol R. Merchant** .....

**“This change ensures that nearly two million workers – such as home health aides, personal care aides, and certified nursing assistants – will have the same basic protections already provided to most U.S. workers.”**

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The U.S. Department of Labor’s Wage and Hour Division announced a final rule on September 16, 2013 extending the Fair Labor Standards Act’s minimum wage and overtime protections to most of the nation’s direct care workers who provide essential home care assistance to elderly people and people with illnesses, injuries, or disabilities. This change, effective January 1, 2015, ensures that nearly two million workers – such as home health aides, personal care aides, and certified nursing assistants – will have the same basic protections already provided to most U.S. workers. It will help ensure that individuals and families who rely on the assistance of direct care workers have access to consistent and high quality care from a stable and increasingly professional workforce.

There are three significant changes from the prior regulations, including: (1) the tasks that comprise “companionship services” have been more narrowly defined; (2) the exemption from minimum wage and overtime for companionship services and the exemption from overtime for live-in domestic services are no longer available for such workers when employed through a third party such as a home care agency; and (3) the record keeping requirements for employers of live-in domestic service employees are revised.

Under the new regulations, companionship services is defined as the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. No more than 20 % of the worker’s time can be spent in providing “care” services such as dressing, grooming, feeding, bathing, toileting, meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications and arranging medical care. Household work that primarily benefits other members of the household, such as making dinner for another household member or doing laundry for everyone in the household, results in the loss of the companionship exemption, thus entitling the employee to minimum wage and overtime pay for that workweek.

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Companionship services does not include the provision of medically related services which are typically performed by trained personnel such as registered nurses, licensed practical nurses, or certified nursing assistants. Performance of medically related tasks during the workweek results in loss of the exemption and the employee is entitled to minimum wage and overtime pay for that workweek.

The revised regulations also prohibit third party employers of direct care workers (such as home care staffing agencies) from claiming the exemption for companionship services or the exemption for live-in domestic service employees. Third party employers may not claim either exemption even when the employee is jointly employed by the third party employer and the individual, family or household using the services.

In the case of live-in domestic service workers, the employer will be required to keep a written copy of any agreement to exclude the amount of time spent during a bona fide meal period, sleep period and off-duty time from hours worked. Additionally, the employer must track and record all hours worked by the domestic service worker, including live-in workers, and the worker must be compensated for all hours actually worked notwithstanding the existence of an agreement.

## WELCOME TO THE FIRM KAREN G. CRUTCHFIELD



KAREN G. CRUTCHFIELD is a Member in the Knoxville, Tennessee office of the Firm, joining in October 2013. Her law practice focuses on general civil litigation involving premises liability, products liability, auto liability, workers’ compensation defense, contractual and construction defect issues, food liability and toxic exposures, professional liability defense and general liability. Karen received her B.S. degree from the University of Tennessee. She obtained a Masters in Social Work from Washington University and a Doctor of Jurisprudence degree from the University of Tennessee College of Law. She has been selected to participate in the OECD-NEA Nuclear Law Program in October 2013. Karen is a member of the Tennessee Bar Association, the Knoxville Bar Association, the American Bar Association, the Anderson County Bar Association, and the East Tennessee Lawyers Association for Women (President in 2011). She is also a member of the Tennessee Defense Lawyers Association and the Defense Research Institute.



In a somewhat-related situation in East Tennessee, the United Autoworkers Union (UAW) is attempting to unionize employees at the Volkswagen facilities in Chattanooga. The UAW claims that it simply wants to establish a German-style “works council” to enable it to represent blue-collar and white-collar employees of VW in Chattanooga. A former National Labor Relations Board Member, John Raudabaugh, has recently stated that he believes that VW employees and the company can reach a “win-win” situation without creating a requirement that employees have to pay a third party, such as the UAW.

Early in September 2013 the UAW claimed that a majority of the VW Chattanooga plant workers have signed authorization cards. The UAW is asking that VW recognize the union based on those cards and that the workers not be granted a secret ballot election. Subsequently, attorneys have, on behalf of a number of VW workers, filed Unfair Labor Practice Charges against the union with the NLRB in Atlanta. The workers charge that they were told by UAW organizers that their signatures on the cards were only going to be used to call for a secret ballot election (surprise, surprise). Other charges against the union include that the UAW used cards that were “stale,” i.e., that they were signed too long ago to be valid.

Standby for more actions that may be extremely interesting and will certainly be of extreme importance to employers in the geographic area and other areas who are affected by the fortunes or misfortunes of VW in Chattanooga. The Germans have a lot at stake in their efforts to have a union-free VW plant in the United States. Employers, employees in the South have a lot at stake, also. The UAW must surely be viewing this fight as a “last gasp” for its hopes of unionizing VW. Who knows, our politicians in Washington may have to bring their magical skills into play to solve this “international incident.”



# TARGET OUT OF RANGE



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married under state law. Additionally, for federal tax purposes, the term “marriage” includes a marriage between individuals of the same sex. The Ruling is to be prospectively applied beginning September 16, 2013.<sup>8</sup>

The general rule recognizes a same-sex marriage if the marriage was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex. The marriage is recognized *even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages*. Thus, if an individual marries a same-sex spouse in another state that recognizes same-sex marriage, the IRS will (and the Tennessee employer must, for *federal tax purposes*) recognize the marriage, even if the state of residence (e.g., Tennessee) does not.<sup>9</sup>

The IRS declined, however, to extend the definition of marriage to individuals (whether of the opposite sex or the same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a “marriage” under the laws of that state.<sup>10</sup>

Finally, note that in a similar but *not identical* vein, the DOL recently issued guidance applying the *Windsor* ruling to FMLA leave. Specifically, the DOL states that leave to care for a spouse with a serious health condition must be granted to same-sex spouses, but *only if the state where the employee resides recognizes the marriage*.<sup>11</sup> Thus, because Tennessee does not recognize same-sex marriage at this time, under the DOL’s current interpretation a Tennessee employer would not be obligated to offer FMLA leave to care for a same-sex spouse to its employees residing in Tennessee.

<sup>1</sup>Notice 2013-45 officially provided the transition relief from the employer mandate that had been first announced on two Obama Administration blogs a week earlier. The ACA’s employer requires covered employers (those with 50 or more full-time-equivalent employees) to provide qualifying health insurance to full-time employees and their dependents or pay a penalty.

<sup>2</sup>570 U.S. \_\_\_, 133 S. Ct. 2675 (2013)

<sup>3</sup>See <http://www.dol.gov/ebsa/faqs/faq-noticeofcoverageoptions.html>

<sup>4</sup>The ACA created Section 18B of the Fair Labor Standards Act, requiring all employers covered by the FLSA to provide a notice to employees of coverage options available through the Health Insurance Marketplace.

<sup>5</sup>See <http://www.dol.gov/ebsa/newsroom/tr13-02.html> (the Technical Release, which includes a link to the model notices).

<sup>6</sup>See <http://www.dol.gov/ebsa/healthreform/>.

<sup>7</sup>IRS Rev. Rul. 2013-17, available at <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf>. A FAQ is available at <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples>

<sup>8</sup>Id. p. 13.

<sup>9</sup>See id. pp. 9-12.

<sup>10</sup>Id. p. 12.

<sup>11</sup>DOL Fact Sheet #28F (Rev. Aug. 2013), available at <http://www.dol.gov/whd/regs/compliance/whdfs28f.htm>