



# Employment, Labor & Benefits Update

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MasudaFunai

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## Is Your Company Prepared for Union Organizing in 2010?

By Alan M. Kaplan

The headlines are ominous for unions. A Republican won the Senate seat in Massachusetts. The Democrats no longer have a 60-vote supermajority to enact legislation without Republican assistance. During 2009, union membership decreased. Unions have been filing fewer petitions for elections with the National Labor Relations Board. Yet, as one union organizer for the Teamsters Union told me, the unions are still organizing workers and waiting for Congress to enact labor law reform.

Regarding membership, the Bureau of Labor Statistics issued its statistics on January 22, 2010. By the end of 2009, unions lost 771,000 members, a decrease from 12.4% to 12.3% of all workers. 15.3 million workers were members of unions. This is a decrease from 17.7 million workers in 1983, when 20.1% of employees were union members. In light of what is being called the Great Recession, the loss of members has more to do with the loss of jobs, in general, than the loss of support by employees for a union.

Of the 15.3 million union workers, 7.9 million union members were employees working for local, state and federal governments while 7.4 million work for privately-owned companies. In government agencies, 37.4% of employees were union members, whereas, in privately-held companies, only 7.2% of the employees were unionized. In the states, New York had the highest percentage of union members (25.2%) and North Carolina had the lowest percentage of union members (3.1%). States in the South had the lowest percentage of union membership due, in our opinion, to the lack of a historic industrial base and the right-to-work laws in those states which allow employees represented by a union to decide not to become members of the union representing them.

Unions are very aware of these statistics and union leaders are continuing to push for labor law reform. The Employee Free Choice Act was introduced and we believe compromises will be made to enact it.



More importantly, President Obama has appointed three new members to the National Labor Relations Board, who can issue decisions and draft rules making it easier for unions to organize workers. Although the Senate has not yet approved these nominations, the Senate will act this year. And, if the Teamsters' organizer is correct, employees may be secretly talking with unions and unions are just waiting for the best time to file a petition for an election. Therefore, as one senior vice president of human resources for a multi-national corporation told us recently, all human resource professionals need to plan and manage with an understanding and appreciation for union organizing and the expected changes.

### **Secretary of Labor Says “Union Jobs Are Good Jobs”**

By Frank J. Del Barto

On January 22, 2010, the Secretary of Labor, Hilda L. Solis issued a pro-union statement in response to the Bureau of Labor Statistics (“BLS”) recent report on union membership for 2009. In its report for 2009, the BLS indicated that the unionization rate of employed wage and salaried workers was 12.3% in 2009 as compared to 12.4% in 2008. For private sector employers, the unionization rate dropped from 7.6% to 7.2%.

Commenting on the BLS data, the Secretary stated that *“the data also show the median usual weekly earnings of full-time wage and salary union members were \$908 per week, compared to \$710 per week for workers not represented by unions. Union members earn 28% more than their non-union counterparts. When coupled with data showing that union members have access to better health care, retirement and leave benefits, the numbers make it clear that union jobs are good jobs. As workers across the country have seen their real and nominal wages decline as a result of the recession, the numbers show a need for Congress to pass legislation to level the playing field to enable more workers to access the benefits of union membership. This report makes it clear why the administration supports the Employee Free Choice Act.”*

Having left no doubt where Secretary Solis stands on the value of unions, all non-union employers would be well-served to begin planning their individualized union avoidance strategy. Under the mantra of “information is power,” employers should begin gathering data about the size and type of unions operating in their area and the wages and benefits being provided by those unions. Using this information as an initial starting point, employers can develop an ongoing union avoidance strategy that considers among other things, (1) executive, manager and supervisor training, (2) an open door policy for employee complaints and suggestions and (3) increasing senior manager visibility to all employees. To be successful, a union avoidance strategy must be an ongoing strategic strategy of the company that seeks to create a culture of employee inclusion and ownership in the company's success. Please call your Masuda Funai relationship attorney for more information.

### **IRS Provides Guidance on Correcting 409A Plan Document Failures**

By Mary W. Shellenberg

The IRS has recently provided additional methods for taxpayers to correct certain failures to comply with Code Section 409A. This latest guidance in Notice 2010-6 sets forth methods by which a taxpayer can voluntarily correct certain failures to comply with the plan document requirements under Code Section 409A. This new correction program is intended to encourage taxpayers to review non-qualified deferred compensation plans to identify provisions that fail to comply and to correct those provisions promptly.

Code Section 409A provides that all amounts deferred under a non-qualified deferred compensation plan for all tax years are currently includible in income to the extent not subject to a substantial risk of forfeiture and not



previously included in gross income, unless the plan satisfies certain distribution, acceleration of benefit and election requirements and is operated in accordance with them. Noncompliance with Code Section 409A results in the inclusion in income for all amounts deferred under the plan by a participant in the plan, an interest charge and an additional 20% excise tax.

Notice 2010-6 is the second round of correction guidance. Previously, the IRS issued Notice 2008-113 which provided relief from the full application of rules relating to income inclusion and the applicable additional taxes arising out of the failure to comply with Code Section 409A in operation. Notice 2010-6 also clarifies certain aspects of Notice 2008-113.

### **DOL Skins Chicken Company for More Than \$1 Million**

By Frank J. Del Barto

On Friday, January 29, 2010, the U.S. Department of Labor (“DOL”) announced the filing of a consent judgment against Pilgrim’s Pride Corp. (“PPC”) in a case involving the company’s failure to properly compensate non-exempt employees for the time they spent donning and doffing work-related gear and the company’s recordkeeping. In the agreement filed with the U.S. District Court for the Western District of Arkansas, El Dorado Division, the DOL recovered \$1,001,438 in overtime back wages for 798 current and former employees of PPC. In addition, PPC agreed to pay for time spent donning and doffing work-related gear in all plants nationwide.

According to the DOL, the employees were not paid for all “hours worked” because they were not paid for the time spent donning and doffing their work-related protective clothing at the beginning and end of the workday and before or after meals. Pursuant to the Fair Labor Standard Act (“FLSA”), all covered employees must be paid at least the federal minimum wage (\$7.25) for all hours worked, plus time and one-half their regular rate of pay for all hours worked beyond 40 hours per work week.

### **Masuda Funai Develops Training Sessions to Reduce Employment Risks**

By Frank J. Del Barto

In response to informal discussions with many HR professionals, the Firm’s Employment, Labor and Benefits Practice Group has developed several 1 to 2 hour employee and/or management training sessions that are designed to reduce the risk of costly employment-related actions. In addition to the obvious costs of litigating any employment-related matter, a substantial amount of key manager, sales, executive and human resource professional time is lost gathering information, developing a defense strategy and preparing for litigation. These training sessions are designed to reduce the risks of litigation and avoid the significant amount of lost productivity time for key employees. Some of the key topics include union avoidance training for executives and managers, harassment prevention, proper hiring and firing techniques and requirements, imposing discipline properly, diversity in the workplace, the risks of electronic discovery and an overview of the U.S. employment laws for managers and transfers from the parent company. Because these training sessions are customized to your company’s concerns and objectives, please call your Masuda Funai relationship attorney for more information and the fee structure that can be developed for these programs.



For more information about this or any other employment law topic, please contact Nancy Sasamoto, Chair of the Employment, Labor & Benefits Group, at 312.245.7500 or via email at [nsasamoto@masudafunai.com](mailto:nsasamoto@masudafunai.com).

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### About the Employment, Labor & Benefits Group

Masuda Funai's Employment, Labor and Benefits Group provides expertise in all aspects of employment and labor law. Our attorneys represent management in everything from day-to-day counseling to employment litigation, training, reorganizations, benefits and compensation plans, OSHA issues, union campaigns and collective bargaining. Our attorneys regularly conduct employment audits, present seminars and publish articles and newsletters to help keep our clients up to date about the ever-changing world of employment and labor law.

### About Masuda Funai

Masuda Funai is a full-service law firm representing international and domestic companies operating and investing in the United States. Our 45 attorneys located in Chicago, Schaumburg and Los Angeles counsel clients in every aspect of business, including establishing, acquiring, and financing operations; ownership, development and leasing of real estate; transfer of overseas employees to the U.S.; employment, labor, and benefits counseling and dispute resolution; intellectual property, copyright and trademark; business litigation; creditors' rights and business risk management; structuring the distribution and sale of products and services throughout the U.S.; and estate planning and administration.

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