Clean-Up on Aisle Four!
Maryland District Court Derails Wal-Mart Legislation
By: Kevin C. McCormick, Esq.

Recently the U.S. District Court for Maryland struck down the Maryland Fair Share Health Care Fund Act, commonly known as the "Wal-Mart Bill," on grounds that the Employee Retirement Income Security Act (ERISA) preempts it. The decision is a major setback for the unions that targeted Wal-Mart and for other groups seeking to require private employers to provide paid health insurance for their employees.

Facts
On January 12, 2006, the Maryland General Assembly enacted the Wal-Mart Bill, to become effective January 1, 2007. The act applied only to nongovernmental employers with 10,000 or more employees in the state. Under the bill, a for-profit employer that failed to spend at least eight percent of total wages it paid to employees in the state on health insurance costs would have to pay the difference to the state.

The act also required a covered employer to provide the state with an annual report on the total number of its employees in the state, and the total amount and percentage of the payroll spent on health insurance costs.

Maryland has only four nongovernmental employers with 10,000 or more employees: Johns Hopkins University, Northrop Grumman Corp., Giant Food, Inc., and Wal-Mart. However, the Maryland General Assembly anticipated that only Wal-Mart would be affected by the law's spending requirement. Johns Hopkins, a nonprofit institution, meets the lower (6%) spending standard that the legislature set for nonprofits. Giant Food, which actively lobbied for enactment of the legislation, spends substantially more than eight percent of total employee wages paid to Maryland employees on health insurance costs. Northrop Grumman lobbied for a provision that permits employers to exclude compensation paid to its employees above the median Maryland household income (approximately $20,000 per year) to bring the company into compliance with spending requirements.

Governor Robert L. Ehrlich, Jr., vetoed the Wal-Mart Bill last year, prompting key Maryland politicians to promise a veto override. Not unexpectedly, with the heavy influence of national unions and other interest groups, the legislature overrode the governor's veto during one of the first items taken up in this year's legislative session.

The Retail Industry Leaders Association (RILA), a trade association of which Wal-Mart is a member, later sued for declaratory and injunctive relief. In the lawsuit, RILA contended that the Wal-Mart Bill was preempted by ERISA and violated the Equal Protection Clause of the U.S. Constitution.
Court's Decision

After finding that RILA did have the right to initiate the litigation, the district court reviewed ERISA and found that it preempts any and all state laws as they relate to employee benefit plans covered by the act. According to the court, a state law "relates to" an ERISA plan if it has either a "reference to" or "connection with such a plan." In determining whether a statute has a "connection with" an ERISA plan, the court considered the ERISA statute's objectives as a guide to the scope of the state law that Congress understood would survive and the nature of the state law's effect on ERISA plans.

In considering the first factor, the court found that the ERISA preemption clause's main objective is to avoid a multiplicity of regulation and permit a nationally uniform administration of employee benefits plans. The Wal-Mart Bill, according to the district court, creates health care spending requirements not applicable in most other jurisdictions.

Moreover, the bill's requirements directly conflict with the requirements of at least two other jurisdictions and pending legislation in many other states. As a result, a nationwide employer would have to segregate a separate pool of expenditures for Maryland employees and structure its contributions, deductibles, and copays with an eye toward the act's eight percent pending requirements.

As for the second factor, the court found that the bill's intended effect was to force Wal-Mart to increase its contributions to its health benefit plan, an ERISA plan. But the actual effect would have been to coerce the company to increase its health insurance contributions for all its Maryland employees.

The court also noted that a long-established U.S. Supreme Court decision makes state laws that impose employee health or welfare mandates on employers invalid under ERISA.

Although the court acknowledged that the legislation was directed at one particular employer, the bill did not violate the Equal Protection Clause as it applied to Wal-Mart. Retail Industry Leaders Ass'n v. James D. Fielder, Jr., Maryland's Secretary of Labor, Licensing and Regulation, D.C. Md., Civil No. JFM-06-316, decided, July 19, 2006.

Bottom Line

With the passage of the Wal-Mart Bill and the proposal of similar legislation in other states, many employers are concerned that the threshold level for coverage (i.e., 10,000 employees) will drop dramatically over time. If that occurs, the government could require smaller employers to provide paid health insurance benefits or face financial penalty.

The decision effectively puts the brakes on the legislation in Maryland. It is expected to be appealed to the Fourth U.S. Circuit Court of Appeals and may make its way to the U.S. Supreme Court. In the meantime, Wal-Mart and other Maryland employers can rest somewhat easier.

Gathering Storm: How Recent Changes at SEIU Will Affect the Local Health Care Industry

By: James P. Gilleece, Jr.

Recent changes in the labor movement suggest drastically increased organizational activities for the health care industry in the Baltimore-Washington area.

Change to Win

Change to Win is a new labor organization made up of various unions that left the AFL-CIO. Led by Anna Burger, Change to Win includes the Service Employees International Union (SEIU), the Teamsters, UNITE
HERE, the United Food and Commercial Workers Union, the Labors International Union of North America, the United Brotherhood of Carpenters and Joiners, and the United Farm Workers of America.

SEIU president Andy Stern and James Hoffa of the Teamsters felt that under President John J. Sweeney the AFL-CIO was concentrating its efforts in the political arena and failing to increase the labor movement through aggressive organizing. By freeing themselves from the obligation to pay AFL-CIO dues, the unions associated with Change to Win have committed vast sums of money to organizational efforts.

SEIU's health care branch, 1199, is at the forefront of the organizing and has targeted the Baltimore-Washington area. Dennis Riviera, an effective and respected union president who heads the 1199 in New York, has attempted to increase his union's influence by merging with other 1199s on the East Coast. As a result of a merger referendum held over the summer, 1199E-DC was absorbed into the New York union. Riviera has dispatched some of his best and brightest union officials and organizers to the Baltimore-Washington area, given them a significant budget, and told them to organize.

**New Tactic: Focus Groups**
The organizers have demonstrated a new approach to organizing, proving that SEIU has surged into the 21st century. One of the first things the union did was schedule meetings with focus groups in Baltimore by retaining Observation Baltimore, one of the city's premiere focus group facilitators. The focus groups met on various Saturdays. Hospital workers were paid $75 in cash for their participation, and the workers were asked to express their views and opinions on various issues affecting health care employment. At no point were they solicited for union membership.

By using focus groups to indicate issues for later campaigns, SEIU has identified several hot-button issues for health care workers and developed strategies around them.

**Nurses Under the Microscope**
In addition to service workers, a renewed effort at organizing nurses is under way. The Nursing Alliance of SEIU, 1998, joined with the District 1199E-DC, and has contacted nurses about staffing issues and other concerns about patient care; distributed a paper titled, "Professional Staff Nurses Association Assignment Despite Objection Form" asking nurses to report assignments they considered adverse to patient care due to staffing issues; and mailed nurses information about joining the alliance's efforts to convince the Maryland Legislature to pass staffing legislation.

The alliance's approach could be very effective. Sophisticated nursing organizers have been dispatched to the area, and the union recognizes that attempts to organize nurses must stress professionalism, staffing, and patient care issues.

Additionally, other nursing unions have increased their activities, especially the California Nursing Association (CNA). Nurses report home visits and increased mailings from those organizations. The CNA has followed the SEIU's lead in attacking staffing issues and has urged nurses to join a letter-writing campaign to President George W. Bush urging staffing reforms.

In the first week of October, at least two hospitals reported finding CNA organizers talking with nurses inside their facilities. More recently, the CNA held a public rally and press conference in downtown Baltimore to kick off its organizing campaign. What that group did for California health care, the alliance wants to do for Maryland.

**Bottom Line**
The Baltimore-Washington area health care industry is facing the prospect of well-financed, sophisticated organizational efforts from revitalized unions. During the fall and winter, you may expect renewed efforts to
organize service employees as well as nurses. Health care employers in the Baltimore-Washington area should be concerned about these new developments.

DOL Offers Guidance on Personnel Policies Affecting Exempt Employees
By: Kevin C. McCormick

According to a recent opinion letter from the U.S. Department of Labor (DOL), making deductions from exempt employees' salaries for damages or loss of company equipment may jeopardize their exempt status under the Fair Labor Standards Act (FLSA). In another opinion letter, DOL made it allowable to require an exempt employee to make up missed time as long as no pay docking is involved.

Paycheck Deductions
DOL's Wage and Hour Division's administrator stated that any deductions from exempt employees' salaries or a requirement that they reimburse the company for damage to or loss of company equipment may jeopardize their exempt status under Section 13(a)(1) of the FLSA, the so-called white-collar exemption.

In the opinion letter issued on March 10, 2006, the administrator considered the scenario of an employer who proposed imposing a fine on its exempt employees for damaged company equipment such as cell phones and laptops. While the employer had a policy requiring deductions from the wages of its nonexempt employees for lost or damaged tools or equipment, it did not have a policy for exempt employees. The employer suggested instituting a fine or salary reduction for replacement or repair costs, or having employees pay for damages out of pocket. In rejecting the proposal, the wage and hour administrator reasoned to be paid on a "salaried basis," employees must be paid a predetermined amount that may not be reduced due to variations on the quality or quantity of their work. An exempt employee must receive his/her full salary for any week in which he/she performs any work unless he satisfies certain exceptions in the DOL regulations.

None of the exceptions set forth in DOL regulations contemplated charging employees a fine for damaging or losing company equipment. The penalty proposed by the employer would violate the salary basis rule, even if the employee signed a written agreement authorizing the deduction. Such an agreement would defeat the exemption because the employee's salary wouldn't be "guaranteed" or paid "free and clear" as the regulations require.

Be careful with nonexempt employees, too. The wage and hour administrator also commented on the employer's policy requiring nonexempt employees to sign a statement agreeing to be financially responsible for lost or damaged company tools or equipment. Nonexempt employees may not be lawfully required to pay for an expense of the employer's business if that penalty reduces their pay below any statutorily required minimum wage or overtime pay. Employers must pay all wages and overtime premiums unconditionally.

More specifically, "tools of the trade" and other materials or equipment needed to carry on an employer's business are considered business expenses that may not be transferred to employees if doing so cuts into their statutory minimum wage or overtime pay. Violations could occur in two ways: directly, when an employer deducts the cost of furnishing the employee with the tools or equipment used in its business, or indirectly, when the employee must incur out-of-pocket expenses to buy an item for which he/she is not reimbursed. Deductions may be made from a nonexempt employee's wages for loss or damage to the employer's tools or equipment only if the deduction does not put his/her hourly wage below the statutory minimum of $5.15 under the FLSA and $6.15 in Maryland. See FLSA Opinion Letter, 2006-7, March 10, 2006.

Making Up Missed Time
According to the DOL's other opinion letter, an employer may require an employee to work either 45 or 50 hours per week without jeopardizing his exempt status under Section 13(a)(1) of the FLSA if it doesn't dock his
salary for failing to work the prescribed schedule. Instead, the employer could impose discipline, including discharge, for not complying with that policy.

According to the administrator, determining the number of hours an exempt employee works is a matter to be worked out between the employer and the employee. An employer may, for example, require an exempt employee to record and track hours and work a specific schedule without affecting his exempt status so long as it doesn't dock his pay if he doesn't fully comply with the schedule.

In the same opinion letter, the administrator also approved the employer's policy of requiring exempt employees to make up work time lost because of personal absences of less than a day. The administrator found that practice was permissible if the employer didn't dock the employee's salary for not performing the required makeup time. But an employee could face discipline, up to and including discharge, for not complying with the policy. See FLSA Opinion Letter, 2006-6, March 10, 2006.

Military Service: DOL Issues New USERRA Regulations

Until recently, federal regulations had never been issued to implement the Uniformed Services Employment and Reemployment Rights Act (USERRA), the 1994 law passed by Congress to protect the jobs and benefits of employees on temporary leaves of absence to fulfill military-related obligations. The law was inspired by service members who lost jobs or benefits following participation in Desert Storm operations in Kuwait, but was open to interpretation.

According to the Pentagon, nearly 500,000 reservists and guardsmen have been called up in the last four years (the largest deployment of reservists and National Guard members since World War II), making new rules from the Department of Labor more important than ever.

Coverage and Eligibility

USERRA applies to all public and private employers in the United States, regardless of size. Foreign employers are also covered as long as a company employee is working in the United States. Virtually every employee is covered no matter what their status, including full-time, part-time, regular, temporary, seasonal, non-seasonal, probationary, or non-probationary. Only independent contractors are ineligible. USERRA applies when an employee provides "service in the uniformed services," whether that service is voluntary or involuntary or performed in times of peace or in times of war.

The rules also stipulate that USERRA protects employees who perform "intermittent disaster response" services as part of the National Disaster Medical System or who engage in associated training. Employees do not have to be members of the uniformed services to be protected under this part of the regulations.

Notice Requirements

Exactly how much and what type of leave notice is required under USERRA is still not clearly defined. Rather, it states only that an employee may be required to provide oral or written notice. The notice must be given "as far in advance as is reasonable under the circumstances," and DOL cites the Department of Defense's (DOD) regulations as a guideline. DOD recommends providing at least 30 days' advance notice when possible, but notice is not required if a military necessity or other circumstances make it impossible. Employees do not need employer approval to leave to perform services in the uniformed services.

Pay

Employers have no obligation to pay employees during military leave under USERRA. However, under the Fair Labor Standards Act, exempt employees who perform any work for their employers in a particular week must be paid for their full wages for that week, minus any military fees received for the same period.
Benefits
State laws may impact benefits. While employers generally are not required to pay an employee's share of his health care premium if his leave is less than 31 days, some state laws (e.g., Pennsylvania) require employers to pick up the tab for the entire premium, including their employee's share, plus a 2% administrative fee. Employees on leave are entitled to retain their coverage under these terms for up to 24 months.

Paid Time Off
If employees have accrued vacation or other paid time off, they are entitled to use it during military leave. They may also use sick leave hours as long as their organization's sick leave policy permits its use for any reason or in comparable leave situations.

Retirement Benefits
Upon returning from leave, employees must be treated as if they had never left with regards to pension plan participation, vesting, and accrual of benefits. Employers must fund any obligations they have to both defined benefit and defined contribution plans when the employee is reemployed. DOL also made it clear that employers do not have to allow employees to make up missed contributions and elective deferrals if they do not return to employment.

Maximum Leave Duration
In general, employees are entitled to five years of USERRA leave from a single employer.

Reemployment Requirements and Obligations
When an employee finishes service, he must notify his employer he intends to return to work. Depending on the length of the employee's leave, he must either report for work within a specified period of time or submit a timely oral or written application for reemployment. Employees out for less than 31 days must report back to their employers no later than the first full regularly scheduled work period following the completion of their service. In contrast, employees on leave for six months or more have up to 90 days after completing service to submit an application for reemployment. Employers should also consult their state laws about reemployment requirements as some states provide longer grace periods before employees must return to their jobs.

Employers must reinstate returning employees as soon as possible, generally within two weeks. They may deny reemployment in certain circumstances, such as the employee being dishonorably discharged from the service, or if the employer's circumstances have changed to make it impossible or unreasonable to welcome back the employee, or if the employee needs assistance to qualify for reemployment and that assistance causes the employer undue hardship.

Typically, employers must return employees to the job position they would have attained had they never left for service. If the employee would have been promoted or given a raise, he or she must be asked to rejoin the organization in the new position and/or at the new rate of pay.

Disabilities
Special rules apply to employees with disabilities incurred in or aggravated during the period of uniformed service. Employers must engage in reasonable efforts to accommodate the disability, such as placing the reemployed person on light duty status, modifying technology or equipment, revising work practices, or shifting job functions.

Dismissal
Employees covered under USERRA enjoy dismissal protection following their return. For the first six months after reinstatement, employees who took leave for 31 to 180 days may only be fired for cause. Employees out for more than 180 days have the same protection for a full year. In addition, some state laws may add more time
to the "for cause" dismissal requirement.

Penalties
Penalties for violating USERRA include lost wages and benefits. If the violation is determined to be willful, the penalty may double as liquidated damages equal to the lost pay and benefits.

Technical Assistance
DOL expects to provide briefings on the USERRA regulations to more than 270,000 service members and others. They are also responding to more than 36,000 requests for technical assistance and have updated their website to reflect the changes. Employers are required to post USERRA's requirements so that employees are aware of their rights and obligations. A new one page poster that summarizes the regulations may be downloaded from DOL at: www.dol.gov/vets/programs/userra/USERRA_Private.pdf#Non-Federal.

Americans With Disabilities Act (ADA): Auto Parts Handler's Tendonitis is not a Disability Under the ADA

A former auto parts handler whose tendonitis restricted him from lifting over 40 pounds of equipment failed to convince a federal appeals court that he was disabled under the American With Disabilities Act (Nuzum v. Ozark Auto. Distribs. Inc., 8th Cir 12/27/05). Affirming a lower court's summary judgment for Ozark Automotive Distributors, the U.S. Court of Appeals for the Eighth Circuit held that Steven Nuzum's permanent medical restriction was not enough to establish a case of discrimination.

Nuzum worked for Ozark Automotive Distributors as an order-picker, collecting auto parts from a warehouse to be distributed to retail stores and manually loading parts onto a conveyor belt. In May 2000, he injured his left elbow while lifting a heavy piece of equipment and was diagnosed with tendonitis.

The doctor prescribed physical therapy and told Nuzum to avoid lifting, pushing, or pulling more than 15 pounds with his left, dominant hand. As his injury "waxed and waned" over the next two years, the company gave Nuzum temporary assignments. In April 2002, the doctor issued a permanent medical restriction, limiting Nuzum to lifting "10 pounds constantly, 20 pounds frequently, and 40 pounds occasionally."

Because Nuzum no longer could do his job as an orderpicker, the company offered him a lower paying job as a part-time security guard. When he refused, the company offered him voluntary resignation, 12 weeks of Family and Medical Leave Act leave, or two weeks to find a compatible job with Ozark. He chose the last option and was subsequently terminated. Nuzum then sued under the ADA and the Iowa Civil Rights Act, alleging Ozark failed to accommodate his disability. After a district court granted summary judgment to the employer, he appealed to the Eighth Circuit.

Limitation is Not Enough
Affirming the lower court, the Eighth Circuit determined that Nuzum failed to show that the tendonitis resulted in a substantial limitation on the major life activity of work, and therefore he was not disabled under the terms of the ADA. The phrase major life activity "has proven to be an elusive concept" under the act, Judge Gibson observed. While the U.S. Supreme Court "has reserved judgment on the question of whether working is properly considered a major life activity," both Equal Employment Opportunity Commission regulations and rulings by the Eighth Circuit have determined that it is.

Similarly, while the Eighth Circuit "has recognized the basic motor function of 'lifting' as a major life activity. . . we have said flatly that restrictions on lifting will not be enough to establish disability," Gibson wrote. In this case, Nuzum failed to establish that the lifting restriction constituted "a substantial limitation in performing the
set of tasks that are of central importance to most people's daily lives," the court concluded. For example, Nuzum's testimony showed that he could do many tasks "such as helping out around the house, doing dishes, tidying up, and doing laundry," the court said, and his contention that he could neither mow the lawn nor drive a manual transmission did not constitute major limitations on his life activity.

### Wage and Hour Law: DOL Issues Snow Day Guidance

You close, you pay. In two opinion letters recently issued by the U.S. Department of Labor (DOL), the Fair Labor Standards Act (FLSA) is defined to prohibit employers from docking exempt employees' pay based on variations in the quantity or quality of work or when employees are ready, willing, and able to work, but no work is available. Because of this, employers that choose to close due to weather must pay exempt employees their full salaries as long as the shutdown is less than one week.

Employers may, however, require employees to use accrued vacation or other leave time to cover the absence period. Where offsetting leave time is not available, employers still have to pay exempt employees their full salaries. The DOL opinion letters say employers remain obligated to pay even if they have no leave plan, if the employee has no accrued leave benefits, or if the leave would create a negative leave balance.

What happens if a private employer stays open during bad weather? In that case, exempt employees may be docked pay if they fail to report for an entire day. In practice, many employers allow such employees to use vacation or other leave to cover the absence, but FLSA does not require them to do so.

"The Department of Labor considers an absence due to adverse weather conditions, such as when transportation difficulties experienced during a snow emergency cause an employee to choose not to report for work for the day even though the employer is open for business, an absence for personal reasons," Alfred B. Robinson, Jr., deputy administrator in DOL's Wage and Hour Division, explains in one of the opinion letters. "Such an absence does not constitute an absence due to sickness or disability. Thus, an employer that remains open for business during a weather emergency may lawfully deduct one full-day's absence from the salary of an exempt employee who does not report for work for the day due to the adverse weather conditions."

Robinson says employers should note, however, that "deductions from salary for less than a full-day's absence are not permitted for such reasons under the regulations. If an exempt employee is absent for one-and-a-half days due to adverse weather conditions, the employer may deduct only for the one full-day absence and the employee must receive a full-day's pay for the partial day worked."

Employers who think they may have violated these rules should review their practices and consider reimbursing employees if improper deductions were made. According to DOL, "isolated or inadvertent deductions do not result in loss of the exemption if the employer reimburses the employees for the improper deductions."

"Moreover, if an employer has a clearly communicated policy prohibiting improper deductions that includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, the employer will not lose the exemption unless it willfully violates the policy by continuing to make improper deductions after receiving employee complaints."

What about non-exempt employees? Unless their employers are extremely generous, they are not likely to be paid for snow days. Under the FLSA, employers have no obligation to pay non-exempt employees for hours they would have worked if the workplace had not been closed due to inclement weather. While some employers allow non-exempt employees to use vacation or other leave to cover the absence, there are no requirements on an employer to do this.
The bottom line is that employers should establish and communicate to employees a written policy regarding pay for "snow" days prior to the onset of winter.

Summaries of Recent Maryland Employment Cases

In *Shabazz v. Bob Evans Farms, Inc.*, the Court of Special Appeals ruled that under the Maryland statute that prohibits employment discrimination (Article 49B), individual supervisors cannot be held personally liable for back pay.

In *Holloman v. Circuit City Stores, Inc.*, the Court of Appeals decided that an arbitration agreement that allowed the employer to alter or terminate an agreement at the end of any year with 30 days' written notice was supported by adequate consideration. Therefore, it was enforceable because the employer was bound to comply with the agreement for practically an entire year before it could discontinue it.

The Fourth Circuit decided in *Taylor v. Progress Energy, Inc.*, that a release agreement waiving an employee's claim under the Family Medical Leave Act or the Fair Labor Standards Act is invalid unless the release agreement has been approved by the U.S. Department of Labor or a court of law.

The Court of Special Appeals in *Haas v. Lockheed Martin Corp.*, ruled that the statute of limitations in a discriminatory discharge case begins on the date the plaintiff was informed of his/her termination, rather than on the date of the actual termination.

In *Miles v. Dell, Inc.*, the Fourth Circuit held that an employer's decision to replace the terminated plaintiff with someone from the plaintiff's protected class does not necessarily preclude the plaintiff from establishing a prima facie case of discrimination. The court explained that the fact that the plaintiff and her replacement came from the same protected group was not relevant at the prima facie stage because the manager who selected the plaintiff's replacement was a different person from the manager who made the decision to discharge the plaintiff.