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Management Update

Supreme Court Decision Impacts Employer Record Keeping Practices

The U.S. Supreme Court recently held that a four-year statute of limitations applies to most claims of race discrimination brought under 42 U.S.C. § 1981. *See Jones v. R.R. Donnelley & Sons*. Before this decision, courts used the applicable state statute of limitations to determine how long a plaintiff had to bring a § 1981 claim. Because most applicable state limitations periods were shorter than four years, this decision affects employers in most states by giving plaintiffs a longer period of time in which to file a lawsuit.

In *Donnelley,* the Court held that the four-year limitations period applies to § 1981 claims that were made possible after the 1991 Civil Rights Act amended the statute to permit causes of action based upon racial discrimination that occurred after the formation of the employment contract. Such claims include harassment, wrongful termination, demotion, and failure to promote. Failure to hire claims, which could have been brought under § 1981 prior to the 1991 Civil Rights Act, are still governed by the personal injury state statute of limitations of the state in which the lawsuit is filed.

Employers should examine their record retention practices and policies to ensure that records are being maintained for the appropriate four-year time period. If you would like more information about this case or assistance in developing or reviewing your employment-related practices and procedures, please contact the Ford & Harrison attorney with whom you usually work. ■

Benefits for Same Sex Spouses/Domestic Partners

On May 17, 2004, the State of Massachusetts began issuing marriage licenses to same-sex couples. At least one other state, Vermont, recognizes such partnerships as civil unions. The changing legal status of same-sex relationships can impact your company's benefit plans, particularly with respect to whether a same-sex spouse or domestic partner is entitled to coverage under those plans. We recommend that you become familiar with the rules that apply in this area and review benefit plan documents to ensure that those documents reflect your company's intent.

For purposes of this article, we define a same-sex spouse as the same-sex partner of an employee, where the partnership can be legally recognized as a marriage under the laws of his or her state of residence. Currently, only the State of Massachusetts directly grants marital status to same-sex couples. However, other states could – and a few have indicated they likely will – recognize a

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How Do the DOL's New FLSA White Collar Regulations Affect You?

Which of the following actions should employers take as a result of the Department of Labor's revision of regulations implementing the white collar exemptions to the Fair Labor Standard Act's (FLSA) requirements?

- Review current salary levels of exempt employees to identify anyone who is paid less than the new minimum of $455 per week ($23,660 per year)?
- Conduct an analysis of the actual, specific job duties of each exempt employee, measured against the new exemption standards?
- Be able to explain why an exemption applies to each exempt employee?
- Review pay practices for exempt and non-exempt employees?
- Develop a written policy explaining the salary program for exempt employees prohibiting improper deductions and providing a procedure for employees to complain of improper deductions?
- Distribute a copy of the policy to each exempt employee?
- Develop a clear and specific policy requiring that non-exempt employees record all working time and that all recorded working time (and all time actually worked even if not recorded) must be paid?

Answer: All of the above. Yes, this was a trick question, but if you haven't taken the actions listed above, you may not be ready when the DOL's new regulations become effective (August 23, 2004).

The regulations will affect all employers to some degree. Additionally, some of the changes, such as the elimination of the sole-charge exemption and the clarification of the applicability of exemptions to chefs and outside sales people who are also drivers, will directly impact certain industries, such as the hospitality industry.

The publicity generated by the DOL's revised regulations has raised public awareness of the wage and hour laws, which may lead to employee complaints of violations of other aspects of the law. A review of your pay practices and policies now can enable you to better justify these policies and practices if they are questioned.

Over the next few weeks, our firm will be conducting seminars, breakfast briefings, and training sessions for our clients in various locations to explain the impact of the revisions. In addition to educational materials and seminars, our experienced attorneys and consultants can assist

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NLRB Reverses Position - Finds that Non-Union Employees Are Not Entitled to *Weingarten* Representative

The National Labor Relations Board (NLRB) has reversed its prior position and held that non-union employees are not entitled to have a representative present in an investigatory interview that could lead to disciplinary action (the ***Weingarten*** right). *See IBM Corp.* The Board's decision overrules its 2000 decision in ***Epilepsy Foundation of Northeast Ohio*** and returns to earlier Board precedent holding that the ***Weingarten*** right does not extend to employees who are not represented by a union.

In finding that ***Weingarten*** rights do not apply to non-union employees, the Board relied on the following policy considerations: 1) co-workers do not represent the interests of the entire workforce, as would a union representative in a unionized setting; 2) a co-worker in a non-union setting does not have the force of the bargaining unit behind him or her and cannot redress the "imbalance of power" between the employer and employees; 3) a co-worker in a non-union setting typically does not have the same skills as a union representative and may impede the investigatory process rather than facilitate it; and 4) the presence of a co-worker may compromise the confidentiality of the investigation.

The Board's decision is good news for employers and will enable employers to conduct workplace investigations more efficiently and confidentially. If you have questions about this case or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work. ■

Department of Labor Issues Final COBRA Regulations

The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") requires most employers that sponsor health care plans to offer continued coverage to "qualified beneficiaries" who would otherwise lose that coverage due to certain "qualifying events." While the Internal Revenue Service is responsible for interpreting much of the COBRA rules, the Department of Labor ("DOL") has the authority to regulate the notice and disclosure requirements of COBRA.

The DOL recently issued final regulations regarding the timing and content of COBRA notices. The new rules are effective for plan years beginning on or after November 26, 2004, and require that you:

- Include in your health care plan summary plan description information regarding the possible availability of a second COBRA election period for certain individuals eligible for trade adjustment assistance under the Trade Act of 1974.
- Update your general and qualifying event COBRA notices. The DOL has provided new model notices, but these notices must be tailored to reflect plan-specific information.
- Provide the initial, general COBRA notice within specific time frames (generally within 90 days of the date an employee or spouse becomes covered under your health care plan). The new rules allow you to provide the initial notice by including it in the summary plan description for the plan, and provide guidance on whether and when separate notices must be provided to beneficiaries other than the employee.
- Establish reasonable procedures to be followed by qualified beneficiaries in notifying the plan administrator of certain qualifying events. The procedures should, at a minimum, be described in the summary plan description, identify the person to whom the qualifying event notice is to be sent, and describe how the notice must be provided and what information the notice must contain. If reasonable procedures are not established and communicated, a qualified beneficiary could possibly satisfy the notice requirements simply by mentioning a pending divorce, or the upcoming graduation of a child, to a member of the department that handles employee benefit matters. For that reason, **it is critical that reasonable procedures be established and communicated**.
- Notify individuals who have informed you of a qualifying event if you determine that they are not eligible for COBRA coverage, and why that determination was made. This new notice must generally be provided within 14 days of the date you were informed of the qualifying event.
- Notify individuals who have elected COBRA coverage if their coverage ends before the maximum period for COBRA coverage ends (*e.g.*, if an individual is eligible for 18 months of COBRA coverage and the coverage ends before the 18 months has elapsed due to nonpayment of premiums or due to the existence of other coverage).

The new rules must be followed beginning with the first day of the first plan year beginning on or after November 26, 2004. That means employers and third-party COBRA administrators have **a little less than seven months to prepare** for the new rules (for calendar year plans). For employers who outsource their COBRA administration, service contracts with the COBRA administrator should also be reviewed and updated as needed.

The Ford & Harrison Employee Benefits Group has prepared a COBRA forms package that we can tailor to your health care plans. This package will ensure you are in compliance with the final COBRA regulations. If you would like us to prepare a COBRA forms package for you, or if you have any questions regarding the new rules, please contact any member of our Group, as follows:

David A. Pearson, Partner (407) 418-4358
Stephen Zweig, Partner (212) 453-5906
Margaret R. Bernardin, Senior Associate (407) 418-4365
Joseph A. Godwin, Consultant (904) 357-2006

Federal Court Finds NLRA Does Not Apply Outside U.S.

The Third U.S. Circuit Court of Appeals has held that the National Labor Relations Act (NLRA) does not apply outside the territorial jurisdiction of the United States. *See Asplundh Tree Expert Co. v. NLRB*. Thus, the National Labor Relations Board (NLRB), which is the administrative body charged with enforcing the NLRA, does not have jurisdiction over employees working outside of the United States.

In holding that the NLRA does not apply outside of the U.S., the court relied on the U.S. Supreme Court's decision in *EEOC v. Arabian Oil Co. ("ARAMCO")*, in which the Supreme Court found that Title VII does not apply extraterritorially. (Congress subsequently amended Title VII to apply outside the U.S. in certain circumstances.)

While this decision may be seen as a coup for employers, it may be short lived. Shortly after and in partial response to the *ARAMCO* decision, Congress amended Title VII to apply extraterritorially under certain circumstances. Congress could similarly exercise its power to amend the NLRA to apply extraterritorially.

Unless and until Congress amends the NLRA, however, it appears that employers are not subject to the NLRB's jurisdiction for alleged violations of the NLRA with respect to employees working outside the United States.

If you have questions about this case or about labor and employment law in general, please contact the author, **Brett Ruzzo**, or the Ford & Harrison attorney with whom you usually work. ■

Brett Ruzzo
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Number of Representation Elections Decreases While Union Win Rate Increases

According to the Bureau of National Affairs, while the number of representation elections held by the National Labor Relations Board (NLRB) in 2003 decreased from the previous year, the win rate of unions increased for the seventh consecutive year. *See Daily Labor Report* (BNA), p. C-1, June 8, 2004. Unions won 57.8 % of the NLRB representation elections held in 2003, the highest union win rate in the 16 years this information has been collected.

What does this mean for employers? Unions are becoming more effective in their organizing efforts. We know that unions are using increasingly sophisticated and aggressive techniques to attack employers on a broad range of fronts. Additionally, unions are targeting employers in virtually every industry and targeting all types of employees, with a special emphasis on women and immigrant workers.

Is your workplace at risk? Ford & Harrison's experienced labor attorneys and consultants can help you assess the climate of your workforce, train your managers and implement strategies that will help you avoid an organizing campaign or prevail if you are subject to such a campaign. If you would like more information, please consult the Ford & Harrison attorney with whom you usually work or **Jerry Coker**, jcoker@fordharrison.com, 404-888-3820, or **Keith Warren**, kwarren@fordharrison.com (901) 291-1553. ■

Covering Same-Sex Spouses - Continued from page 1

same-sex marriage performed in Massachusetts. A domestic partner, on the other hand, is a same-sex partner of an employee who resides in a state where the partnership cannot be legally recognized as a marriage, including states (such as Vermont) that recognize such relationships as civil unions.

To determine whether a same-sex spouse or domestic partner is entitled to coverage under your company's benefit programs, you must look at your benefit plan documents. Many plans extend coverage to an employee's "spouse" and "dependents". If your plan document defines a spouse as that term is defined under local law, a same-sex spouse would likely be entitled to coverage. If the plan document does not define who will be considered a spouse, you should consider updating your document to specifically reflect the company's intentions. Similarly, if your plan extends coverage to an employee's dependents, a same-sex domestic partner may be entitled to coverage as a dependent, depending on how that term is defined in your plan document. Again, the terms of your plan will determine the outcome.

If your plan documents permit same-sex spouses or domestic partners to be covered, your company will need to address the tax issues that go along with such a plan design. Under federal tax law, unless the same-sex spouse or domestic partner qualifies as a dependent, the value of many company-provided benefits that are extended to those individuals (less any amounts paid by the employee for the coverage) must be included in the employee's federal income. The taxable value is also considered wages for purposes of federal employment (FICA and FUTA) tax purposes.

Generally, a same-sex spouse or domestic partner will qualify as a dependent for federal tax purposes if (1) he or she receives over one-half of his or her support from the employee; (2) the employee's home is his or her principal place of abode; (3) he or she is a member of the employee's household; and (4) his or her relationship with the employee does not violate local law. The Internal Revenue Service has indicated that companies may rely on an employee's certification that the same-sex spouse or domestic partner qualifies as a dependent. As an alternative, some companies require that the employee provide a copy of a prior federal income tax return showing that the employee claimed the partner as a dependent.

Laws regarding same-sex marriages are currently in a state of flux and will no doubt continue to evolve as state statutes are challenged in court and initiatives are begun or continued to address the issue through amendments to the constitutions of both states and the federal government. If you would like more information regarding coverage of same-sex spouses and domestic partners under specific types of benefits, please contact any member of the Ford & Harrison Employee Benefits Group. ■

White Collar - Continued from page 3

by providing compensation reviews, audits, and policy preparation and revision that complies with the new regulations. We will soon be sending out information regarding the types of services we can offer; however, if you have questions about any of these issues, please feel free to contact the Ford & Harrison attorney with whom you usually work or any of the following: **John Duvall**, jduvall@fordharrison.com, (904) 357-2003; **Joe Godwin,** jgodwin@fordharrison.com, (904) 357-2006; or **Fred Atterbury**, fatterbury@fordharrison.com, (407) 418-2300. ■

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MANAGEMENT UPDATE

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