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Management Update

Protected “Harassment” – Not Necessarily An Oxymoron

In 2005, no prudent employer would fail to have a published policy which, among other things, defines sexual harassment and other unlawful harassment; prohibits such conduct; encourages employees to report it; assures employees that such a complaint will be the subject of a prompt and impartial investigation; and states that appropriate action, up to and including discharge of the offender, will be taken if the claim is found to have merit. Such a policy is a “must” for legal and practical reasons.

But some employers do not realize that a harassment policy can “collide” with a provision of the National Labor Relations Act (NLRA). Section 7 of the NLRA grants to employees the right to “engage in...concerted activities for the purpose of collective bargaining or **other mutual aid or protection.**” The National Labor Relations Board has historically defined “concerted activity” as activity undertaken on behalf of a group of employees rather than merely for personal purposes. It is an unfair labor practice to

“interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.” In plain English, employees who join together to oppose a practice concerning wages, hours, or working conditions and the presentation of job-related grievances on behalf of a group are protected from discipline under the Act, even in a non-union environment. This is true even when a solitary employee undertakes the activity on behalf of a group of employees.

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Jury Trial Waivers – A New Form of Alternative Dispute Resolution?

Any employer who has been involved in a jury trial knows that they are notoriously unpredictable. Employers facing jury trials face ever-changing odds that make it difficult to assess the wisdom of a decision to continue or settle.

In Ford & Harrison’s mock trial program, managers watch a videotaped trial and then deliberate like a jury. The verdicts in this training exercise always vary widely, even though the “jurors”

are all members of management in the same company and all watch the exact same trial.

These managers are probably no different from actual jurors. All jurors bring their personal perspective to the jury box, which affects how they view facts and events and makes it tricky to predict how they will respond to any set of facts. Fortunately, however, there are alternatives to jury trials – some more promising than others.

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The NLRB has used Section 7’s broad protection to regulate the non-union workplace in ways that can surprise the unsuspecting employer. For example, the Board found a violation when a company requested employees who were “bothered” or “harassed” by other employees advocating a union to report it to management because such a request could be interpreted by employees to include lawful attempts by union supporters to persuade employees to sign union cards. Under the Board’s rationale, this would have the tendency to restrain union supporters from attempting to persuade their co-workers because they would be fearful of being reported to management. See *Nashville Plastic Products*.

In another case, *Lafayette Park Hotel*, the Board held that it was unlawful for an employer to maintain a rule prohibiting “false, vicious, profane, or malicious statements.” Since the rule was in the disjunctive, false statements were prohibited even if they were not malicious. The U.S. Supreme Court has held that non-malicious false statements can be protected in the context of a labor dispute. *Linn v. United Plant Guard Workers of America, Local 114*.

Fortunately for employers, the Board recently applied a “rule of reason” that provides some guidance in this troubling area. See *Martin Luther Memorial Home, Inc.* The employer maintained work rules prohibiting “abusive and profane language,” “harassment,”

and “verbal, mental and physical abuse.” The Board found the rules to be **lawful** “because they were intended to maintain order in the employer’s workplace and did not explicitly or implicitly prohibit Section 7 activity.” The Board recognized that companies have the right to adopt prophylactic rules ensuring a harassment-free workplace because they are subject to civil liability under federal and state law should they fail to do so. Importantly, the Board noted that “there is no evidence that the challenged rules have been applied to protected activity or that the [company] adopted the rules in response to protected activity.” The Board said that a **reasonable** employee could not interpret the rules to prohibit conduct protected by Section 7 of the Act and rejected the notion that a violation should be found “whenever the rule **conceivably** could be read to cover Section 7 activity, even though that reading is unreasonable.” (emphasis supplied).

The Board in *Martin Luther Memorial Home* was quick to note that while the maintenance of such rules is not unlawful per se, employers are not immunized from employees or unions challenging specific instances in which the rules are applied. The Board gave an instructive illustration: “[w]e recognize that, in some workplaces, the use of profane language may be commonplace. If an employer, notwithstanding the rule, generally tolerates such profanity, but then applies the rule

to profanity in a Section 7 context, such disparity may make the rule unlawful.”

What should you do? First, make sure that your “no harassment” policy is carefully worded to protect the corporation as much as possible under the various state and federal fair employment practices laws, while at the same ensuring that it is not so broad that there is a risk that the Board will declare it unlawful on its face. Second, make sure you apply the policy **evenly** in all contexts. Of course, a critical part of this is regular education of all management team members so that they understand their responsibilities when it comes to consistent enforcement of all company policies and rules.

Protected concerted activity can be a challenging area even for human resource professionals. Be sure to contact your labor counsel in the event of a “close question.” An employer who discharges an employee for engaging in protected concerted activity can be ordered to reinstate the employee with full back pay and benefits from the date of termination to the date of reinstatement.

If you have questions regarding any issue raised in this article or labor or employment issues in general, please contact the Ford & Harrison attorney with whom you usually work or the author of this article, Jerry Coker, jcoker@fordharrison.com, 404- 888-3820. ■



If you’d like to receive the Management Update electronically, or if you need to update your mailing address, please contact Lee Watts at lwatts@fordharrison.com.

Amendment to USERRA Creates New Obligations for Employers

President Bush has signed the Veterans Benefits Improvement Act of 2004, which amends the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA provides for reinstatement rights and continuation of benefits for employees who are members of the uniformed services and who meet the requirements of USERRA.

The Veterans Benefits Improvement Act of 2004 improves and extends housing, education, and other benefits for veterans and uniformed service members. Specifically, the Act makes the following changes to employers' responsibilities under USERRA:

The Act extends the maximum period for which an employee may elect to continue employer-sponsored health insurance coverage from 18 months to 24 months. Under USERRA, 38 USC 4317(a)(1), an employee who has coverage under an employer's health plan and is absent from work because of service in the uniformed services is entitled to elect to continue his or her employer-sponsored health insurance coverage during this absence, even if the employer is not covered by COBRA. The maximum period of coverage for such an employee and that employee's dependants is now the lesser of 24 months beginning on the date the employee's absence began or the day after the date on which the employee fails to apply for or return to a position

of employment. Under USERRA, an employee who elects to continue employer-sponsored health insurance coverage cannot be charged more than 102% of the full premium under the plan. However, an employee who is absent from work because of service in the uniformed services for less than 31 days cannot be charged more than the employee share, if any, for the coverage. This amendment applies to elections made under section 4317 on or after December 10, 2004.

The Act also amends USERRA by adding a new section, 4334, which requires employers to "provide to persons entitled to rights and benefits under [USERRA] a notice of the rights, benefits, and obligations of such persons and such employers." Employers can meet the notice requirement by posting the notice where they customarily place notices for employees. Within 90 days, the Secretary of Labor will make available to employers the text of the notice required by the Act. Employers will be required to post the notice as of March 10, 2005. As of the date of publication of the *Management Update*, the DOL had not issued the text of the notice.

If you have any questions regarding the Act or your rights and obligations under USERRA, please contact the Ford & Harrison attorney with whom you usually work. ■

2005 Annual Client Conference

In 2005, we will be holding our annual client conference in two locations to accommodate more of our clients and friends! The conference theme is: "Riding the Currents of Change in Labor and Employment Law." Our first location will be Atlanta, Georgia, on Friday, May 6, 2005, at the Four Seasons Atlanta located in midtown Atlanta. This location will be offering a workshop track for our airline clients. The second is Orlando, Florida on May 13, 2005, at the Hyatt Regency Grand Cypress.

The cost to attend is \$295 for clients, \$395 for non-clients and a \$50 discount for multiple registrants for the same company and for early bird registration. For more information contact Lee Watts, lwatts@fordharrison.com, (404) 888-3981. ■

► *Jury Trial - Continued from page 1*

Some employers have attempted to avoid the risk of jury trials by implementing various forms of dispute resolution procedures designed to settle employment claims at the earliest possible stage. Typically, the last resort in a multistep procedure – and the only alternative to a jury trial in many organizations – is arbitration.

While some employers have been satisfied with the arbitration process, others have not been and continue to seek ways to avoid the risk and uncertainty of a jury trial. The goal of establishing a dispute resolution mechanism before any conflict arises and the drawbacks associated with mandatory arbitration are prompting many employers to consider jury trial waiver agreements. Used as an alternative dispute resolution tool, the employer requires employees to sign a jury waiver agreement as a condition of employment.

Under a jury waiver agreement, employees retain all substantive and procedural rights to sue their employers, except the right to request a jury, and all potential statutory remedies. Bench trials (trials by a judge) are usually much more cost effective for employers. A study released by the Department of Justice shows that employers fair better in verdicts returned by judges than juries. The study, which analyzed civil trial cases and verdicts in 75 of the country's largest counties from 2001, found that winning plaintiffs in employment discrimination cases received a median award of \$218,000 from juries, but only \$40,000 from judges.

In addition, jury trials lasted 4.3 days on average, compared to only 1.9 days for bench trials. Just as important, the time between filing the case and its ultimate disposition was shorter with nonjury cases. During 2001, 78 percent of bench trials were disposed of within 24 months of filing, compared to only 57 percent of jury trials.

Finally, the decision of a trial judge is subject to full review on appeal, unlike an arbitrator's decision, which is subject to extremely limited review.

The case law regarding enforceability of jury waivers is limited for employment cases, but jury

waivers are widely enforced in commercial cases in both federal and state courts. At least one federal court has enforced a jury waiver in a Title VII case. See *Brown v. Cushman & Wakefield, Inc.* (federal court in New York). Although a federal court in Virginia has refused to enforce a jury waiver because it did not satisfy the requirements for waivers of rights under the Age Discrimination in Employment Act as set forth in the Older Workers Benefits Protection Act (OWBPA), other federal courts have found that the OWBPA's requirements do not apply to procedural rights such as the right to a jury trial, so they may not follow this decision.

Additionally, almost all jurisdictions enforce mandatory pre-dispute arbitration agreements in employment cases. Jury trial waivers are less restrictive of employee rights than these, so it is likely that waivers will be broadly enforceable too.

At the state level, only Georgia and California have refused to enforce pre-dispute jury waivers, while many recent state court decisions support their enforcement. For example, in *In re Prudential Insurance Company of America*, the Texas Supreme Court held that jury trial waivers are enforceable in commercial cases. There is no reason to believe the court would not make the same ruling in an employment context.

Although lawyers who represent employees may challenge the validity of jury waiver agreements because many of them rely on the unpredictability of jury trials as leverage for settlement, the overall risk of submitting claims to a jury is likely to outweigh any risk that a court will refuse to enforce the jury waiver.

It is relatively simple to introduce jury trial waiver agreements to employees; they are less complicated than arbitration procedures, and they preserve more of employees' rights to file claims. For more information about implementing such waivers, please contact the Ford & Harrison attorney with whom you usually work or the author of this article, Chad Shultz, cshultz@fordharrison.com, (404) 888-3874. ■

Supreme Court Holds That Plaintiffs Must Report Attorney Fees as Income

The U.S. Supreme Court has held that plaintiffs must include in their gross income amounts paid to their attorneys pursuant to a settlement of a discrimination case. See *Commissioner v. Banks*, consolidated with *Commissioner v. Banaitis*. In these consolidated cases, two plaintiffs settled discrimination cases and both failed to report as income the amount paid to their attorneys pursuant to the settlement agreements. The Court held that these amounts are includable as gross income because the Internal Revenue Code defines gross income as income from whatever source derived. Under the Internal Revenue Code, an individual cannot exclude an economic gain from gross income by an anticipatory assignment, which is what the contingent fee arrangement is, according to the Court.

The Court's decision will likely make settling cases more expensive because it means that the attorney fees portion of a settlement is taxable income to the claimant regardless of whether the fees are paid to the claimant or the attorney. Thus, the defendant should issue a Form 1099-MISC to the plaintiff for the amount of attorney fees (in addition to other taxable amounts that are not allocated as wages, for which a Form W-2 should be issued with appropriate withholdings).

The American Jobs Creation Act, which was not in effect when the parties signed the settlement agreements in *Banks*, may alleviate the impact of this decision somewhat because it permits the plaintiff to deduct the amounts paid for attorney fees and court costs in certain discrimination cases, either when computing adjusted gross income or as an itemized deduction when determining the alternative minimum tax.

The Court did not address the impact of its decision on attorney fees awarded pursuant to a fee-shifting statute because there was no court-ordered fee award in *Banks*. After *Banks* settled his case, the fee paid to his attorney was calculated solely on the basis of a private contingent-fee contract. The Court noted, however, that the amendment added by the Jobs Creation Act redresses the concern for many, perhaps most, claims governed by fee-shifting statutes.

If you have any questions regarding this case, please contact the Ford & Harrison attorney with whom you usually work. ■

Ford & Harrison Opens Dallas Office

On January 3, 2005, Ford & Harrison expanded into Texas by opening a Dallas office. Michael P. Maslanka, former Partner and Chair of the Labor/Employment Section of Godwin Gruber LLP, has joined Ford & Harrison and will serve as the Dallas office's managing partner. Theresa M. Gegen, an Associate with Godwin Gruber, will also join the firm. The office is located at 1601 Elm Street, Suite 4450, Dallas, Texas 75201. The Dallas office brings the total of Ford & Harrison offices to 15 throughout the country. ■

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