FORD & HARRISON LLP

This is an advertisement.

Management Update

AFL-CIO Fragments; Labor Union Declares "Managed Warfare"

In a recent statement, the top lawyer at UNITE HERE was quoted as saying, "American labor allows managed warfare." Citing alleged problems with the National Labor Relations Act processes, David Prouty went on to say, "What we're left with, like it or not, is a system where the union uses every legal means it can to convince the employer it should recognize the union and bargain. And that is managed warfare. That's where we are and that's why we use corporate campaigns." Source: *"Attorney Warns Activism Is Replacing NLRB Process in Unionization Drives;"* Michael Bologna, Daily Labor Report (BNA, Inc.); August 9, 2005.

To understand what is going on, some context is in order. Labor unions are not dead, but some are on life support. Unions have seen their dues-paying membership rolls decline to an all-time low - only about 8% of the workers in the U.S. private sector are union members. Organized labor's image suffered another blow recently when bitter disagreement over how to "fix" big labor's problems caused several major unions to boycott the AFL-CIO Convention. Three of these high-profile unions, the Service Employees International Union, the Teamsters Union and the United Food and Commercial Workers Union, then announced their withdrawal from the AFL-CIO. At the time of publication, UNITE HERE had not decided whether it would pull out as well.

A major reason for the fracture was the dissident unions' strong belief that the AFL-CIO was not willing to make unionizing unrepresented employees a top priority. In the

Continued on page 2

New Hours of Service Rule for Commercial Motor Vehicle Drivers Effective October 1, 2005

The Department of Transportation (DOT) has issued a new rule governing hours of service for property-carrying commercial motor vehicles (CMVs) in interstate commerce. The DOT previously published a new hours of service rule in 2003, which was vacated by the U.S. Court of Appeals for the D.C. Circuit, then reinstated by Congress for the duration of fiscal year 2005. Much of the new 2005 rule is the same as the 2003 rule, but changes were made in three areas: sleeper berths, rules applicable to operators of property-carrying commercial motor vehicles not requiring a commercial driver's license (CDL), and the thirty-four-hour restart period.

The 2005 rule retains the 2003 provision that drivers may drive a maximum of eleven hours after ten consecutive hours off duty and may not drive beyond the fourteenth hour after coming on duty, following

Continued on page 3

IN THIS ISSUE

AFL-CIO FRAGMENTS 1

NEW HOURS OF SERVICE RULE FOR COMMERCIAL MOTOR VEHICLE DRIVERS 1

HIPAA SECURITY RULE COMPLIANCE DEADLINE 3

EXPLOITING EMPLOYEES' IDIOSYNCRASIES COULD RESULT IN RETALIATION TRIAL 4

VETS-100 REPORT DEADLINE IS SEPTEMBER 30, 2005 5

DALLAS OPEN HOUSE 5

AFL-CIO - *Continued from page 1*

view of the three unions, job one has to be bringing in new members. The big question is how.

Look for all unions to accomplish their goal of improving "market share" (the percentage of union-represented workers in the U.S.) in two ways. One way is through traditional organizing drives where employees at a facility are solicited and, if there is sufficient interest, an election petition is filed with the NLRB. This has been the primary method for resolving representation disputes since the NLRA became law in 1935, and it can still be an effective tool for unions. For example, the most recent government statistics reflect that unions win about 57% of the elections conducted by the NLRB. But what frustrates unions like UNITE HERE is that winning an election does not guarantee that the union will be able to secure a first contract with improvements in wages, benefits and other terms and conditions of employment. Which leads to method number two: corporate campaigns, the "managed warfare" to which Mr. Prouty of UNITE HERE recently made reference.

So just exactly what is a "corporate campaign?" Simply stated, it is a multi-faceted effort to pressure the targeted employer to agree to do what the union wants. While it sometimes is used during contract negotiations, the typical corporate campaign is unleashed against a company with the goal of forcing the employer to agree to something called a neutrality/card check agreement, which gives the union an easy way to become the employees' collective bargaining representative without an NLRB election and with little or no opposition from the employer. The SEIU, UFCW and UNITE HERE probably have conducted more corporate campaigns than all other labor unions combined.

Corporate campaign tactics vary (think "guerilla warfare"). With that in mind, however, the key components of a "corporate campaign" typically are: (1) building coalitions with local civil rights groups, politicians, religious leaders, community activists, etc; (2) getting the union's message out through "media events" and demonstrations of various kinds; (3) establishing "lemon web sites" and "educating" the public on campaign issues and alleged employer misconduct; (4) subjecting the employer to charges and audits by regulatory agencies, including OSHA, the Department of Labor, the EEOC and the FDA, and mobilizing opposition before zoning authorities; (5) organizing boycotts of company goods and services; (6) pressuring lenders and creditors; (7) urging large pension funds not to invest in the targeted employer; (8) appealing to sympathetic stockholders to bring pressure to bear on the company through various initiatives; (9) utilizing workplace tactics short of strikes, including periods of "work-to-rule," mass refusals of overtime and other forms of concerted activity; and (10) conducting traditional organizing drives at "targets of opportunities" (i.e. facilities where the company may be particularly vulnerable).

Can you defeat a union "corporate campaign?" Yes, but it requires planning, determination and patience - corporate campaigns at some companies have gone on for years! The forward-thinking employer should be proactive far in advance of the launch of a corporate campaign. Some important "action items" are: (1) anticipate the union's primary "message points" and tactics; don't wait until the union starts the campaign, forcing you to play "catch up"; (2) establish a high-level task force to develop a defensive and offensive game plan; (3) build a "coalition" with your employees centered on the union's efforts to harm the business; (4) develop a sophisticated public relations function and PR campaign; (5) publicize (internally and externally) the union's campaign for what it is; (6) identify vulnerable areas and fix them; don't forget to focus on "product integrity," as well as compliance with all federal, state and local laws; (7) consider all legal options (e.g. NLRB charges, defamation claims); and (8) train/educate every member of the management team; be sure to get buy-in from first-level supervisors – they are key.

What's the bottom line? All unions are going to do more organizing. Some will be more active than others. Some will rely more on corporate campaigns, while others will use the election procedures of the NLRB. The companies that remain union free will be the ones where all managers treat every employee with dignity and respect while providing a competitive wage and benefit package and opportunities for advancement.

If you have any questions regarding the issues raised in this article, or labor or employment related 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. ■

HIPAA Security Rule Compliance Deadline For Small Health Plans

Employers should be aware of the approaching Health Insurance Portability and Accountability Act (HIPAA) Security Rule compliance deadline. The HIPAA Security Rule requires employer-sponsored health plans to implement administrative, physical, and technical safeguards to protect health information in electronic form. Large health plans were required to be in full compliance with the HIPAA Security Rule on April 21, 2005. Small health plans (plans with less than $5 million in annual receipts) have until April 21, 2006.

The Security Rule requires health plans to: (1) designate a Security Official; (2) implement security specifications; (3) develop written policies and procedures; (4) train personnel with access to electronic protected health information; (5) amend health plan documents; and (5) revise business associate agreements. Even if your company sponsors a smaller health plan, there is much work to be done to achieve full compliance. Although many employers believe the Security Rule is a responsibility of the IT department, in fact there are many management and administrative requirements as well.

Employers are encouraged to begin planning for Security Rule compliance sooner rather than later. Ford & Harrison's employee benefits group is assisting employers with varying degrees of Security Rule compliance – from reviewing policies, procedures, and documents prepared by administrators and vendors to assisting employers with each step of the Security Rule compliance process. If you have questions regarding HIPAA Security Rule compliance, please contact the Ford & Harrison attorney with whom you usually work or Dave Pearson, dpearson@fordharrison.com, 813-261-7811; Penny Wofford, pwofford@fordharrison.com, 864-699-1131; or Joe Godwin, jgodwin@fordharrison.com, (904) 357-2006, in Ford & Harrison's employee benefits group. ■

New Hours - *Continued from page 1*

consecutive hours off duty. Additionally, there is no change to the 2003 provision that drivers may not drive after being on duty sixty hours for seven consecutive days (if the employer does not operate CMVs every day of the week) or seventy hours for eight consecutive days (if the employer operates CMVs every day of the week). Under the 2005 rule, this period may be restarted after the driver takes thirty-four or more consecutive hours off. The 2003 rule required drivers to be in compliance with the "sixty/seventy on-duty hours in seven/eight days" limitation before the driver could start counting a thirty-four-hour restart period. Under the 2005 rule, the thirty-four hour restart period may begin at the start of any consecutive thirty-four-hour off-duty period.

Under the new rule, CMV drivers using a sleeper berth must take at least eight consecutive hours in the sleeper berth, plus two consecutive hours either in the sleeper berth, off duty, or any combination of the two. Under the 2003 rule, CMV drivers using a sleeper berth were required to take ten hours off duty but could split the time into two periods, provided neither was less than two hours.

Drivers of CMVs that do not require a CDL, who operate within a 150 air-mile radius of their normal work reporting location and return to their normal work reporting location at the end of their duty tour, are now covered by a separate hours of service provision. The eleven hours driving, minimum ten hours off-duty; fourteen consecutive hour duty period; sixty/seventy hours in seven/eight days; and the thirty-four hour restart provisions discussed above all apply to these drivers. Additionally, these drivers may not drive after the fourteenth hour after coming on duty five days of any period of seven consecutive days and after the sixteenth hour after coming on duty two days of any period of seven consecutive days. For these drivers, time records may be used in lieu of records-of-duty status. The rule is effective October 1, 2005. ■

Catberts Beware – Exploiting Employees' Idiosyncrasies Could Result in Retaliation Trial

Comparing the defendant's management to Catbert, the evil director of human resources in the comic strip Dilbert, the Seventh U.S. Circuit Court of Appeals has held that an employee who claimed her employer changed her working hours in retaliation for filing a discrimination charge can take her retaliation complaint to trial, even though the employer did not change the plaintiff's duties or pay. *See Washington v. Illinois Dept. of Revenue*.

In this case, the plaintiff was working a flex schedule so she could care for her son, who has Down syndrome, when he arrived home. After the plaintiff started working the flex schedule, the employer transferred some of the plaintiff's duties to other employees. The plaintiff filed a charge with the EEOC claiming this transfer of duties was racially discriminatory. Subsequently, the employer eliminated the plaintiff's position and assigned her to a new position, requiring her to reapply for approval to work flex time, which was denied. The plaintiff used vacation and sick leave to enable her to leave work to care for her son until those benefits were exhausted. The plaintiff then took an unpaid leave of absence, but subsequently returned to work for a different supervisor who permitted her to work the flex time schedule.

The plaintiff sued in federal court, claiming the employer's actions were retaliation for her race discrimination charge. The trial court granted the employer's motion for summary judgment, holding that the plaintiff could not establish a prima facie case of retaliation because a change of work hours, while salary and duties remain the same, is not an adverse employment action sufficient to establish a retaliation claim.

The plaintiff appealed and the Seventh Circuit reversed the trial court's decision. Thte plaintiff urged the Seventh Circuit to hold that an adverse employment action is not required in a retaliation claim because the retaliation provision of Title VII is broader than the antidiscrimination provision. The Seventh Circuit declined to do this, holding that the antiretaliation clause, like the other provisions of Title VII that use the term discrimination, requires the employer to have taken action that would be material to a reasonable employee. "An employer's action is not material under [the antiretaliation provision] if it would not have dissuaded a reasonable worker from making or supporting a charge of discrimination." The court then held that where an employer knows an employee has a specific problem and seeks to retaliate against the employee for filing a discrimination charge by exploiting this vulnerability, this action could be a material change.

The court compared such employers to "Catbert, the Evil Director of Human Resources in the comic strip Dilbert," who "delights in pouncing on employees' idiosyncratic vulnerabilities." According to the court, the record in this case suggested the employer "may have a Catbert in its management, seeking out devices that would be harmless to most people but do real damage to select targets."

The court noted that although the plaintiff's reassignment and change in working hours would not be materially adverse for a normal employee, the plaintiff was not a normal employee "and Catbert knew it." Thus, the plaintiff could proceed with her retaliation claim because requiring her to work 9-5 "was a materially adverse change for her." The court also noted that the practical effect of the change was to reduce the plaintiff's pay by 25%, because it induced her to use leave for two hours per day (her salary remained the same, but her vacation and sick leave drained away, which

Continued on page 5 ▸

VETS-100 Report Deadline is September 30, 2005

Federal contractors who are required to comply with the DOL's Veteran's Employment and Training Service (VETS) reporting requirements should be aware that the deadline to file the Federal Contractor Veterans' Employment Report (VETS-100) is September 30, 2005. Federal contractors and subcontractors who entered into a federal contract of $25,000 or more before December 1, 2003, are required to file the VETS-100. A federal contractor who entered contracts both before and after December 1, 2003, also is required to file a VETS-100 Report.

The Jobs for Veterans Act amended the Vietnam Era Veterans' Readjustment Assistance Act of 1974, changing federal contractor VETS-100 reporting requirements for contracts entered on or after December 1, 2003, by: (1) raising the reporting threshold from $25,000 to $100,000; and (2) modifying the categories of veterans in the VETS-100. However, these changes will not take effect until regulations are put into place.

If you have any questions regarding the VETS-100 requirement or other labor or employment related issues, please contract the Ford & Harrison attorney with whom you usually work or Michelle Harkavy, mharkavy@fordharrison.com, 901-291-1533. ■

Retaliation Claims - *Continued from page 4*

is an effective reduction in salary). Additionally, when her leave ran out, "her pay fell to zero for five months," until she found a supervisor willing to let her work the flex schedule.

Because the court must indulge all reasonable inferences in the plaintiff's favor and a jury could find that the employer set out to exploit a known vulnerability and did so in a way that caused a significant (and hence an actionable) loss, the court held that the plaintiff could take her claim to trial. The court also noted that it was not ruling that the plaintiff's claim would succeed, since, at trial, the employer may be able to show it had a non-retaliatory justification for its actions.

This decision re-emphasizes the need to use caution when considering making a change to the working conditions of an employee who has recently filed a discrimination charge, including considering the impact of the potential change on the particular employee.

If you have any questions about this case or any other labor or employment related issue, please contact the Ford & Harrison attorney with whom you usually work. ■

Dallas Open House

Ford & Harrison will celebrate the opening
of our Dallas office at a reception on
Wednesday, October 19, 2005
5:30 p.m. - 7:30 p.m.

Michael P. Maslanka
Theresa M. Gegen
Richard L. Hathaway
Raymond D. Martinez
Michael A. Munoz
Melissa J. Rye

R.S.V.P. at 214-256-4750 by 10/17/05

This is an advertisement.

MANAGEMENT UPDATE

FORD & HARRISON LLP
Creative Workplace Solutions
1275 Peachtree Street, N.E. • Suite 600
Atlanta, Georgia 30309

This is an advertisement.

The Management Update is a service to our clients providing general information on selected legal topics. Clients are cautioned not to attempt to solve specific problems on the basis of information contained in an article. For information, please call Lynne Wingate 404-888-3858 or write to the Atlanta address below.

Editor Amy W. Littrell
alittrell@fordharrison.com

FORD & HARRISON LLP
Creative Workplace Solutions

1275 Peachtree Street, N.E. • Suite 600
Atlanta, Georgia 30309
404-888-3800 • FAX 404-888-3863

1601 Elm Street • Suite 4501
Dallas, Texas 75201
214-256-4700 • FAX 214-256-4701

350 South Grand Avenue • Suite 2300
Los Angeles, California 90071
213-237-2400 • FAX 213-237-2401

100 Park Avenue • Suite 2500
New York, New York 10017
212-453-5900 • FAX 212-453-5959

101 North Pine Street • Suite 400
Spartanburg, South Carolina 29302
864-699-1100 • FAX 864-699-1101

One Town Square • Suite 341
Asheville, North Carolina 28803
828-697-4071 • FAX 828-697-4471

1675 Broadway • Suite 2150
Denver, Colorado 80202
303-592-8860 • FAX 303-592-8861

795 Ridge Lake Blvd. • Suite 300
Memphis, Tennessee 38120
901-291-1500 • FAX 901-291-1501

300 South Orange Avenue • Suite 1300
Orlando, Florida 32801
407-418-2300 • FAX 407-418-2327

101 East Kennedy Blvd. • Suite 900
Tampa, Florida 33602-5133
813-261-7800 • FAX 813-261-7899

2100 Third Avenue North • Suite 400
Birmingham, Alabama 35203
205-244-5900 • FAX 205-244-5901

225 Water Street • Suite 710
Jacksonville, Florida 32203
904-357-2000 • FAX 904-357-2001

100 S.E. 2nd Street • Suite 4500
Miami, Florida 33131
305-808-2100 • FAX 305-808-2101

1128 Lamar Ave.
Oxford, Mississippi 38655
662-238-7785 • FAX 662-234-4270

1300 19th Street, N.W. • Suite 700
Washington, DC 20036
202-719-2000 • FAX 202-719-2077

Certification as a Labor and Employment Law Specialist is not currently available in Tennessee and Mississippi.

Visit our web site at www.fordharrison.com