FORD & HARRISON LLP

Management Update

Supreme Court Addresses Pay for Time Spent Walking and Waiting Before and After Donning and Doffing Required Specialized Protective Gear

In a unanimous decision issued November 8, 2005, the U.S. Supreme Court held that employees must be paid for time spent walking to their work stations after putting on (donning) specialized protective gear required by the job and for time spent walking from work stations to the place the gear is removed (doffing). *See IBP, Inc. v. Alvarez*. The Court also held that employees must be paid for time spent waiting to remove required specialized protective gear, but not for time spent waiting to don such gear.

In IBP, which involved two cases consolidated for Supreme Court review, the Court noted that the lower courts had determined that the required specialized protective gear worn by the employees was integral and indispensable to the employees' work. Thus, in accordance with Supreme Court precedent, the time the employees spent donning this gear and doffing it each day is considered part of the employees' principal activities for which compensation is required under the Portal-to-Portal Act. (The Portal-to-Portal Act amended the Fair Labor Standards Act (FLSA) in 1947 to provide, among other things, that activities which are

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Request for Leave to Assist with Childbirth Did Not Provide Notice of Need for FMLA Leave

Ford & Harrison attorneys recently won an important case before the Eleventh U.S. Circuit Court of Appeals. The court held that an employee who did not provide sufficient notice to the employer did not trigger the protections of the Family and Medical Leave Act (FMLA). *See Cruz v. Publix Super Markets, Inc.* (Oct. 31, 2005). Accordingly, the employer did not violate the FMLA by discharging the employee when she failed to return to work as scheduled, following a period of unpaid leave.

In this case, the employee requested two weeks of leave for the birth of her grandchild. The company approved the request in accordance with its policy regarding unpaid leave, not under the FMLA. After learning her daughter might deliver earlier than originally anticipated, the employee requested permission to begin her leave immediately and to extend it to four weeks. The company told the employee that she could begin the previously scheduled two weeks of leave immediately, but could not take four weeks of leave.

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IN THIS ISSUE

New Union Organizing Initiatives Bear Watching

Seven unions recently formed the "Change to Win Coalition" (CWC) and withdrew from the AFL-CIO. The division was caused by the inability of the unions to agree on how best to attempt to halt declining union membership. The unions that formed CWC are: International Brotherhood of Teamsters, UNITE-HERE, the Carpenters and Joiners of America, the Laborers International Union, the Service Employees International Union, the United Farm Workers and the United Food and Commercial Workers Union.

At its founding convention, CWC members adopted a constitution that devotes 75% of per capita taxes to organizing. In addition, CWC members have pledged to devote all of their $23 million in savings from leaving the AFL-CIO to unionizing employees who presently are not represented for purposes of collective bargaining by a labor union. Altogether, CWC estimates that the new organization and its member unions will spend nearly $750 million annually on organizing, including spending at the local, state and national levels.

CWC will have a strategic organizing center where strategic organizers from each union will work with other member unions to spread their expertise. This center will guide both multi-union and single-union organizing campaigns. CWC claims to have the best strategic organizers, which could be true, since this coalition as a whole won 60% of all elections and filed one-half of all election petitions in 2004.

Bruce Raynor of UNITE-HERE and Andrew Stern of SEIU are two of the most innovative labor leaders right now. These unions are on the cutting edge of organizing tactics. In recent years they have used card check/recognition agreements in addition to federally supervised union elections as methods of seeking new union members. While these unions favor neutrality and card check/recognition agreements, it is likely they also will continue to seek union elections conducted by the National Labor Relations Board to resolve representation disputes at companies.

While all employers now are at greater risk of being targeted for a unionization effort, the majority of organizing drives will continue to be sparked by one or more disgruntled employees contacting a union by telephone or through its website. All major unions have sophisticated websites that provide information to employees who may be interested in learning more about union representation in the workplace. Experience has shown that once employees contact a union, a trained union representative will arrange a meeting, usually within 24 to 48 hours. As soon as 30% of the employees in an appropriate bargaining unit have signed cards authorizing the union to represent them, the union is free to file an election petition with the local NLRB office. As a general rule, the NLRB will conduct a secret ballot election at the worksite 40 to 45 days later.

The end of the year is a good time for companies who value their union free status to "audit" their level of preparedness. Managers should always be alert to any change in "normal" employee behavior, which could be a warning sign of union activity. Also, companies should: (1) identify any workplace issues that a union organizer could seize upon and address them in a timely and effective manner; (2) review all pay plans to ensure internal equity and competitiveness; and (3) review benefits policies (particularly health insurance) to make sure that what you are doing is competitive and that employees understand the value of these benefits. Sometimes this review of benefits policies can be communicated effectively on a "user-friendly" spreadsheet that is distributed to employees along with their W-2 Forms. Also, Ford & Harrison has developed an Employee Opinion Survey that is an effective method of "taking the temperature" of the workplace to enable the employer to gauge employee satisfaction and pinpoint issues that need to be addressed before they become major problems.

Many employers currently are evaluating staffing levels. If your company is considering a reduction in force for business reasons, carefully consider the employee relations aspects and the many alternatives to a RIF. Make sure you have a plan to avoid meritorious discrimination claims. If you are considering the acquisition of a faltering company, be aware that job security concerns might make employees more receptive to union promises. Also, if the targeted company already has a union contract covering

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Are "Regarded As Disabled" Employees Entitled to An Accommodation Under the ADA?

The Americans with Disabilities Act (ADA) requires, among other things, that an employer provide a reasonable accommodation to a qualified disabled employee, if the employee needs the accommodation to perform the essential functions of his or her job. However, the federal appellate courts are divided on the issue of whether an employee who is merely *regarded* as disabled is entitled to an accommodation. The U.S. Supreme Court has declined to address this issue. Currently, the First, Third, Tenth, and Eleventh Circuits have held that an accommodation is required, while the Fifth, Sixth, Eighth and Ninth Circuits have held that there is no such duty. The Second, Fourth, and Seventh Circuits have not decided the issue.

An employee is "regarded as" disabled if the employer mistakenly believes that he or she has an impairment that substantially limits a major life activity, when in fact either the impairment is not so limiting, or the employee has no impairment at all. An employee can show that he or she is "regarded as" disabled either by direct evidence, such a supervisor's statement that the employee is disabled, or by indirect evidence, such as an employer's decision that the employee's medical condition renders him or her unable to perform any job in the employer's facility despite a doctor's note to the contrary. Most courts that have addressed the issue have held that an employee is not "regarded as" disabled merely because the employer has voluntarily provided an accommodation.

The most recent case to find that an employer must accommodate an individual who is "regarded as" disabled is *D'Angelo v. ConAgra Foods, Inc.,* issued by the Eleventh Circuit. In this case, the plaintiff had vertigo, a condition causing extreme dizziness and nausea. The plaintiff's job duties required her to stare continually at objects moving down a conveyor belt, which triggered bouts of vertigo. The plaintiff produced a poorly drafted doctor's note explaining that, due to the risk of falling because of her vertigo, she should avoid assignments requiring her to "look at moving objects." Based on this note, the employer decided that the plaintiff could not work anywhere in the plant, because it was filled with all types of moving equipment, and terminated her employment. The trial court held that the plaintiff was not actually disabled because she was not substantially limited in the major life activity of working. It also held that, while the plaintiff may have been "regarded as" disabled, someone who is merely "regarded as" disabled is not entitled to a reasonable accommodation. Accordingly the trial court granted summary judgment for the employer.

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▸ *Supreme Court - Continued from page 1*

preliminary and postliminary to the employee's principal work activities are not covered by the FLSA.)

Here, the Court held that because the employees' principal activities include donning and doffing required specialized protective gear, the employees' workday begins and ends with the donning and doffing of the gear. Furthermore, the locker rooms where the required specialized protective gear is donned and doffed are the relevant places of performance of the employees' principal activities. Accordingly, during a continuous workday, any walking that occurs after the beginning of the employee's first principal activity (donning specialized protective gear) and before the end of the employee's last principal activity (doffing the specialized protective gear) is covered by the FLSA.

Additionally, the Court held that time spent waiting to doff required specialized protective gear is covered by the FLSA because it is part of the continuous workday. However, time spent waiting before donning required specialized protective gear at the start of the workday is not covered by the FLSA because such activity is preliminary to the employee's principal activity and, as such, is specifically excluded from FLSA coverage by the Portal-to-Portal Act.

Although the Supreme Court's decision involves a fairly narrow area of the FLSA, it may have a significant impact on the pay practices of some employers. If you have questions about this decision and its potential impact on your workplace, or any other labor or employment related issue, please contact the Ford & Harrison attorney with whom you usually work. ■

2006 Labor and Employment Law Conference

Ford & Harrison's 2006 Labor and Employment Law Conference will be held Thursday, May 4 and Friday, May 5, 2006, at the Gaylord Palms Resort & Convention Center in Orlando, Florida. Conference brochures will be mailed in 2006. If you would like more information about the Conference, please contact Lee Watts, lwatts@fordharrison.com, 404-888-3981. ■

Leave- Continued from page 1

The employee subsequently requested FMLA leave, including a note from her adult daughter's doctor stating that the daughter felt that she needed her mother's assistance during labor; however, the note did not indicate that the daughter suffered from any pregnancy-related complication. The company properly denied FMLA leave. When the employee tried to return to work four weeks later, she was informed that she had been discharged for job abandonment.

The employee then sued the company in federal court. The FMLA requires covered employers to provide qualified employees with up to twelve weeks of unpaid leave during a twelve-month period for, among other things, a child's serious health condition. However, if the child is 18 or older, he or she must be incapable of self-care because of a mental or physical disability.

Although an employee is not required to specifically assert the right to leave under the FMLA when making a request, the notice must be sufficient to make the employer aware that the employee needs FMLA-qualifying leave. The employer must then determine whether the leave actually qualifies for FMLA protection.

The Eleventh Circuit noted that pregnancy is not, by itself, a serious medical condition under the FMLA. Thus, an employee is not entitled to FMLA leave to care for an adult daughter merely because the daughter is pregnant, unless she is incapacitated due to pregnancy.

Here, the employee did not provide any information to the company about the daughter's alleged serious health condition, other than that she believed her daughter was going into labor, her son-in-law had broken his collarbone, and her daughter needed her help. The court held that this "notice" was insufficient to shift the burden to the company to request further information because the company could not reasonably be expected to conclude that her absence qualified for FMLA leave. Specifically, the court stated: "[u]nless the employer already knows the employee has an FMLA-approved reason for leave, the employee must communicate the reason for the leave to the employer; the employee cannot just demand leave."

This decision is good news for employers because it establishes the employee's responsibility to provide the employer with sufficient information to put the employer on notice that a request for leave may be covered by the FMLA. It also emphasizes that an employer is not required to investigate whether the leave may be covered by the FMLA unless the employee has provided some information indicating the leave may be for an FMLA-covered situation. While this decision is only binding on courts in the Eleventh Circuit (Alabama, Florida and Georgia), other courts may look to it for guidance when faced with similar facts.

If you have any questions regarding the FMLA or any other labor or employment-related issue, please contact the Ford & Harrison attorney with whom you usually work, or Ed McKenna, emckenna@fordharrison.com, 813- 261-7821 or Jennifer Moore, jmoore@fordharrison.com, 813-261-7823, the Ford & Harrison attorneys who represented Publix in this case. ■

Ford & Harrison Opens Minneapolis Office

Ford & Harrison is pleased to announce the opening of its Minneapolis, MN office. **John Bowen**, **Charlie Feuss**, **Jeremy Sosna** and **Chad Strathman** have joined the firm as partners. Mr. Feuss is the managing partner of the office. The office is located at 225 South Sixth Street, Suite 3150, Minneapolis, MN 55402, telephone (612) 486-1700. ■

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a group of its employees, the contract may mandate certain advance notice requirements and procedures for selecting employees for layoff (e.g. inverse order of seniority in affected job classifications).

In conclusion, the current uncertain economic climate and the renewed focus by every major union on increasing membership rolls could be a potent combination for some employees who feel insecure in their jobs and who may believe union "promises" of job security. Forward thinking employers should take proactive steps now to create a climate of trust and increased workplace satisfaction in the new year, which will decrease the likelihood of a successful union organizing campaign.

If you have any questions about Ford & Harrison's Employee Opinion Survey, union organizing campaigns, or labor or employment related questions 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. ■

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The Eleventh Circuit reversed on the issue of reasonable accommodation. The court held that the plain language of the ADA contains no exception to the reasonable accommodation requirement for individuals who are "regarded as" disabled. The Eleventh Circuit rejected the reasoning of other circuits, which have refused to find a duty to accommodate "regarded as" individuals because doing so may produce "bizarre results," and give preferential treatment to some, but not all, impaired individuals. The Eleventh Circuit pointed out that: courts must not legislate; "regarded as" individuals are disabled within the meaning of the statute; and there is no irrational preference for impaired individuals who are "regarded as" disabled because they are not similarly situated to impaired employees who are not regarded as disabled.

Courts have certainly taken some winding paths when interpreting the ADA, but those finding a duty to accommodate an individual who is only "regarded as" disabled may not have gone down such a strange path after all. The decisions have all involved individuals with genuine medical conditions. The only "truly bizarre" result would be forcing an employer to accommodate a "regarded as" disabled employee who in fact has absolutely no medical condition. That situation is unlikely, because such an employee would not need an accommodation in order to perform the essential functions of the job (but such a person might be protected from other forms of disability discrimination). Nevertheless, requests for accommodation, even from employees who do not have obviously disabling impairments, should be evaluated carefully with experienced employment counsel.

If you have any questions regarding the issues addressed in this article or labor or employment related issues in general, please contact the author of this article, Judith Moldover, jmoldover@fordharrison.com, 212-453-5923, or the Ford & Harrison attorney with whom you usually work. ■

MANAGEMENT UPDATE

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