FORD & HARRISON LLP

AIRLINE MANAGEMENT LETTER

DOL Issues Final USERRA Regulations

The Department of Labor (DOL) has issued final regulations interpreting the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301-4334. USERRA prohibits employers from discriminating against veterans, members of the military services, or applicants for military service, and provides for reemployment rights and continuation of benefits for qualifying employees returning from military service.

The DOL regulations were published in the December 19, 2005 issue of the Federal Register and were effective on January 18, 2006. The regulations do not establish any new legal requirements, but provide guidance regarding USERRA issues on which courts have taken opposing positions. The regulations also codify the DOL's long-standing position on many issues.

The regulations are designed to be easy to understand and are written in a question and answer format similar to the FMLA regulations. The preamble to the regulations addresses the comments received in response to the proposed regulations and explains the DOL's reasoning in incorporating or rejecting the comments.

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DOL Announces Grace Period for Filing Information Regarding Financial Transactions with Unions

The U.S. Department of Labor (DOL) recently announced what is essentially a "grace period" for employers to file records of financial transactions with unions as required by the Labor-Management Reporting and Disclosure Act (LMRDA). The LMRDA requires employers to report certain financial transactions with unions within 90 days after the end of the employer's fiscal year. For employers whose fiscal year ended December 31, 2005, the disclosures must be filed by March 31, 2006. Recognizing that many employers are not familiar with the LMRDA's reporting requirements, the DOL has issued an advisory announcing that, while it does not have the authority to extend the LMRDA's statutory filing deadline, it will not compel compliance with the reporting requirements until May 15, 2006 for employers whose reports are due March 31, 2006.

The required financial information must be submitted on DOL Form LM-10. (Unions are to make similar disclosures on Form LM-30.) Extensive "Frequently Asked Questions" regarding the reporting requirements are posted on the DOL's web site at: http://www.dol.gov/esa/regs/compliance/olms/LM10_FAQ.htm.

This article highlights some of the LMRDA's reporting requirements and exceptions; however, it is not intended to be a detailed discussion of all of the circumstances in which a report may be required. A determination

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of whether an airline is required to report a specific payment depends on the facts and circumstances of the transaction and should be made in conjunction with experienced labor counsel.

Who is an employer under the LMRDA? Generally, every private sector business within the United States that has one or more employees, and any person acting as an employer or agent of an employer (regardless of whether that person has employees), must file a Form LM-10.

The LMRDA requires an employer to report payments made to a union that represents, or seeks to represent, its employees. The act also identifies other situations in which employers must report certain payments to unions.

What Transactions Must be Reported? The transactions that must be reported on the Form LM-10 include:

- Payments and loans made to any union or union official, subject to certain exceptions discussed below. However, payments and loans by insurance companies and credit institutions made in the regular course of business are excluded;
- Payments to any employees to cause them to persuade other employees regarding bargaining and representation rights, unless the other employees are told about these payments before or at the same time they are made;
- Payments for the purpose of interfering with employees in the exercise of their bargaining and representation rights, or obtaining information on employee or union activities in connection with labor disputes, other than information obtained solely for use in a judicial, administrative or arbitral proceeding; and
- Arrangements (and payments made under these arrangements) with a labor relations consultant or other person for the purpose of persuading employees with respect to their bargaining and representation rights, or obtaining information on employee or union activities in connection with labor disputes, other than information obtained solely for use in a judicial, administrative or arbitral proceeding.

The payments and loans **excluded** by the LMRDA include:

- payments made to employees as compensation;
- payments in satisfaction of a court or administrative judgment, or in settlement of a dispute;
- payments made at the prevailing market price in the regular course of business with respect to the sale or purchase of an article or commodity;
- amounts deducted from the wages of employees in payment of union dues;
- payments to certain health and welfare trust funds or labor management committees.

Payments Made to Employees as Compensation – The DOL permits employers, under certain conditions, to exclude payments made to employees as wages or other compensation when an employee engages in activities other than productive work during regular work hours. Thus, under this provision, the employer need not report payments to employee union officials for time spent processing grievances and conducting other union-related business. Additionally, payment to pilots for flight pay loss because of union business can likely be excluded.

De Minimis Exception

Employers are not required to report *de minimis* payments to a union or union official. To qualify for the *de minimis* exception, the payment must not exceed $250 and must not be related to the recipient's status in a labor organization. Gifts or loans from multiple employees of one employer to a single union or union official must be aggregated to determine whether the *de minimis* exception applies. If the total value of the gifts or loans exceeds the $250 threshold, all of the payments made to that official or union must be reported.

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Plaintiffs Can Proceed with ERISA Claims Against US Airways

A federal court in Virginia has held that participants in US Airways' 401k Saving Plan (the Plan) can go to trial on their ERISA class action claim against US Airways. *See DiFelice v. US Airways Inc.* The lawsuit claims that US Airways, which was the plan administrator and named fiduciary for the Plan, breached its fiduciary duty owed under ERISA by retaining the Company Stock Fund as one of the investment options under the Plan after a federal court blocked the proposed merger of US Airways and United Airlines.

As the Plan administrator and named fiduciary, US Airways was responsible for selecting and terminating investment options available to Plan participants. One of the investment options was the Company Stock Fund through which participants could buy units of publicly traded US Airways Group Inc. stock (US Airways Group Inc. was US Airways' parent company). The plaintiffs claim that US Airways had a duty under ERISA to close the Company Stock Fund in August 2001 because of US Airways' dire financial prospects.

ERISA holds plan fiduciaries to the standards of a "prudent man" when making investing decisions regarding a plan. The court held that a jury should be permitted to decide whether US Airways fulfilled its fiduciary duty in maintaining the Company Stock Fund as an investment option based on the record evidence. This evidence, when construed in the plaintiffs' favor, included the US Airways' long-term financial problems, the possibility of bankruptcy, well-known cash flow problems, and the impact of the September 11 terrorist attacks.

The court's decision could result in expensive and lengthy litigation for US Airways. ■

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According to the DOL, whether payments are unrelated to the recipient's status in a labor organization depends on whether the employer ordinarily provides such consideration to individuals in similar circumstances who are not union officials. For example, if an employer routinely provides meals to all of its clients during the course of a day-long meeting, such meals would be unrelated to the recipient's union status. However, if the employer does not routinely provide meals during such meetings, the provision of meals to union officials during collective bargaining negotiations would be reportable, because the meals were provided to the union officials because of their union status. If you have any questions regarding the LMRDA reporting requirements or any other labor or employment related issue, please contact the Ford & Harrison attorney with whom you usually work ■

Ford & Harrison Consultant Jerry Glass Speaks at Webcast on the New Generation of RJs

Jerry Glass, President of J. Glass and Associates, a division of Ford & Harrison, recently spoke at a webcast presented by Air Transport World (ATW) on the topic of the new generation regional jets in the airline industry. This was the first time ATW has presented a webcast on this issue. Mr. Glass spoke on pilot unions, scope clauses and other labor issues impacting airline integration of regional jets. The webcast will be available on ATW's web site until December 14, 2006, and can be accessed at http://atwonline.com/webcasts/index.html. ■

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. If you would like more information about the Conference, please contact Lee Watts at 1-800-357-4107. ■

Arbitrator Upholds Termination of CCAir, Inc. Pilots

An arbitrator has held CCAir, Inc. acted appropriately in terminating its pilots instead of furloughing them when the airline went out of business. *CCAir, Inc. and Air Line Pilots Ass'n*. ALPA claimed that, pursuant to the terms of the collective bargaining agreement (CBA), the pilots should have been furloughed, which would have permitted them to receive furlough pay, instead of being terminated.

In this case, CCAir began furloughing pilots in 2002 because of financial difficulties. The furloughed pilots received furlough pay of one weeks' pay for each year of employment, in accordance with the CBA. On November 3, 2002, the airline ceased business and terminated the remaining pilots. Subsequently, CCAir returned its aircraft to the lessor and surrendered its operating certificate to the Department of Transportation. The corporation was formally dissolved in March 2003.

ALPA filed a grievance over the pilots' termination, claiming that they should have been furloughed instead of terminated because, under the CBA, a pilot can only be terminated for cause. ALPA also argued that the term furlough, as used in the CBA, was intended to apply to situations in which the workforce was reduced to zero. ALPA further claimed that CCAir violated the CBA by failing to pay the pilots furlough pay.

The arbitrator rejected this argument, holding that the commonly accepted definition of the word furlough contemplates a continuity of the enterprise and a continuing employment relationship with the displaced employees. The arbitrator noted that nothing in the CBA suggests the parties intended to depart from the normally accepted meaning of the term. The arbitrator also noted that the "furlough and recall" provisions of the CBA contemplate a continuing operation of the enterprise and a continuing relationship following furlough.

The arbitrator also determined that CCAir did not use the shut down as a ruse to escape its collective bargaining duties. The arbitrator noted that the airline's financial problems began in 2000 and culminated when it closed its operations in November 2002. In addition to ceasing operations, the airline returned its aircraft to the lessor, terminated its health insurance benefits, and surrendered its operating certificate to the DOT. The arbitrator found this to be a total cessation of all operations.

The arbitrator held that the airline did not violate the CBA by not paying the pilots furlough pay because the pilots were terminated, not furloughed. ■

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Some of the provisions of the new regulations are highlighted below:

· The regulations identify the criteria an employee must meet to be eligible for reemployment under USERRA: (1) the employer had advance notice of the employee's service; (2) the employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employer (with a number of exceptions that almost swallow the rule); (3) the employee timely returned to work or applied for reemployment; and (4) the employee has not been separated from the service with a disqualifying discharge or removal from the rolls for officers.

· The regulations do not impose a limit on the amount of time that may elapse between the date an employee leaves his or her position and the date he or she actually enters the service.

· The employee may provide written or verbal notice of the need for leave and should give notice as far in advance as possible; however, the regulations do not require that notice be given a specific number of days in advance of the leave.

· USERRA's provision for a two-year recovery period for injuries or illnesses arising from military service begins on the date of completion of the service. The recovery period applies only to reemployment and is not applicable to illnesses that manifest themselves after reemployment.

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Recent Election Results

GoJet and Trans States Airlines

On December 21, 2005, the NMB issued a determination that GoJet Airlines, LLC and Trans States Airlines, Inc. do not operate as a single transportation system for purposes of the craft or class of pilots. Accordingly, the Board dismissed ALPA's application to extend its certification over the GoJet pilot group.

Airtran Airways

IBT lost an election to represent Fleet and Passenger Service Employees. Out of 2,353 eligible employees, IBT received 849 votes; there was 1 vote for other and 7 void votes. (Dismissal December 21, 2005).

Ryan International Airlines

TWU won an election to represent Dispatchers. Out of 8 eligible voters, TWU received 7 votes. (Certification November 3, 2005). ■

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· Employees on military leave are considered to be on furlough or leave of absence status and are entitled to the nonseniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or leave of absence. According to the preamble to the regulations, the accrual of vacation is a nonseniority benefit.

· A reemployed service member is entitled to the seniority and seniority-based benefits and rights that he or she had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if he or she had remained continuously employed.

· Employers must permit employees with health plan coverage to continue such coverage while on covered military leave for a period of time that is the lesser of: (1) the twenty-four month period beginning on the date on which the employee's absence for the purpose of performing service begins; or (2) the period beginning on the date on which the employee's absence for the purposes of performing service begins, and ending the date on which he or she fails to return from service or apply for a position of employment.

· If health plan coverage for the employee or a dependent was terminated by reason of service in the uniformed services, that coverage must be reinstated upon reemployment. No waiting period can be imposed on the returning service member.

· A returning service member must be returned to employment as soon as practicable under the circumstances. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment.

· If an opportunity for promotion, or eligibility for promotion, that the employee missed during service is based on a skills test or examination, the employer should give him or her a reasonable amount of time to adjust to the employment position and then give the skills test or examination.

· If a returning employee has a disability incurred in or aggravated during the period of service in the uniformed services, the employer must make reasonable efforts to accommodate that disability and help the employee become qualified to perform the duties of his or her reemployment position.

If you have any questions regarding the new USERRA regulations or your rights and obligations under USERRA, please contact the Ford & Harrison attorney with whom you usually work or John Lowrie, jlowrie@fordharrison.com, 303-592-8866. ■

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Airline Management Letter 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 more information, please call Shannon Houghton at 404-888-3834 or write to the Atlanta office at the address below.

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