FORD & HARRISON LLP

Management Update

Watch Out for Labor/Employment Issues in Acquisitions

(Part One of a Two-Part Article)

There were 28% more mergers and acquisitions in the United States in 2005 than in 2004. In fact, 2005 closed out as the best year for mergers and acquisitions since 2000, and experts predict this trend will continue in 2006. Companies involved in mergers and acquisitions may find themselves subject to enormous legal liability if labor and employment issues are not examined early and addressed properly during negotiations. These issues may arise under many federal and state labor and employment laws, including the National Labor Relations Act (NLRA), federal antidiscrimination laws, federal and state plant-closing laws, statutes regulating employee benefits, federal immigration laws and common law.

One question that often arises in a merger or acquisition is whether the purchaser must assume the seller's contracts or bargaining relationship with the seller's unions. Often, parties to the sale assume that a union contract simply must come along as part of the purchased business. An early, thorough examination of any existing collective bargaining agreements or bargaining duties, as well as exploration of alternative means of structuring the sale, may reveal that this is not the case. In an asset

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EEOC Issues Final Revisions to EEO-1 Report

The Equal Employment Opportunity Commission (EEOC) has announced the implementation of final revisions to the EEO-1 Report. Private sector employers with 100 or more employees and employers with federal government contracts of $50,000 or more and 50 or more employees must file an EEO-1 Report annually. The EEO-1 Report provides the federal government with workforce profiles by ethnicity, race, and gender, divided into EEOC defined job categories referred to as "EEO-1 Categories."

For each calendar year, the EEO-1 Report should be based on employment data drawn from a payroll date in July and typically must be filed no later than September 30th. The new report format will be required for 2007. Employers may use the current report format for 2006.

The EEOC's revisions affect the manner in which race and ethnicity data is reported by adding a new category titled "Two or more races, not Hispanic or Latino"; deleting the "Asian and Pacific Islanders" category; adding a new category titled "Asians, not Hispanic or Latino"; and adding a new category titled "Native Hawaiian or Other Pacific Islander, not Hispanic or Latino." They also extend the race and ethnicity data collection requirement to the State of Hawaii and

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purchase, although the purchaser may assume certain bargaining obligations with a pre-existing union, it generally is not bound by the substantive provisions of the seller's collective bargaining agreement.

In the asset purchase context, the National Labor Relations Board (NLRB) will apply a successorship analysis to determine whether the purchaser has an obligation under the NLRA to recognize and bargain with existing unions and whether the purchaser has assumed the seller's collective bargaining agreement. To determine successorship status, the NLRB and the courts examine the continuity of the work force, the continuity of the employing industry, and, to a lesser extent, the impact of a hiatus in operations. The key determinant of successorship status is whether a majority of the purchaser's new workforce in an appropriate bargaining unit is composed of the seller's employees who were represented by a union. A purchaser must ensure that the method utilized to staff its operation does not violate the NLRA; hiring decisions cannot be made in a discriminatory fashion to exclude any of the seller's union-represented employees.

If the purchaser is deemed a successor, it retains certain rights but also assumes certain duties. An assets purchaser generally has the right to set initial terms and conditions of employment and to hire its own workforce, provided that hiring decisions are not based on the status of the seller's employees as members of a bargaining unit. A purchaser also may disregard the seller's collective bargaining agreement as long as the purchaser has not impliedly or in fact assumed the agreement.

A successor also takes on a number of duties after the sale. The most substantial of these may be a duty to bargain with a union. This obligation, however, typically attaches only **after** the seller's former union-represented employees comprise a majority of the purchaser's employees in an appropriate unit. Once the obligation arises, the successor cannot make unilateral changes in wages, benefits or other terms and conditions of employment without first meeting with the union and making a good-faith effort to reach agreement with regard to the proposed changes.

An important aspect of pre-sale due diligence is to examine the seller's collective bargaining agreements for the presence of successorship clauses. Such clauses vary, but generally purport to require a purchaser to be bound by the contract. Depending on the specific language, the seller may be liable to the union for damages if it fails to secure the purchaser's agreement to be bound by the union contract. Also, the union may seek to enjoin the sale pending arbitration of a grievance alleging breach of the successor clause.

The seller should be alert to the possibility that the collective bargaining agreements may impose financial obligations. For example, some agreements obligate the seller to make severance payments to its employees, to pay accrued vacation pay, or to continue health and welfare benefits for a certain period of time after the sale or closure of the business. The NLRA also requires the seller of a business to notify and to bargain with the union representing its employees over the effects of the sale on those employees. Although this is usually not burdensome, the seller's failure to give the union sufficient advance notice of the sale or to engage in "effects bargaining" can create substantial liability under the NLRA.

The NLRB also has broad discretion to hold a successor employer liable for its predecessor's unfair labor practices. A purchaser can address this risk by securing an appropriate indemnification clause in the sales agreement.

This is part one of a two-part article written by Jerry Coker, a partner in Ford & Harrison's Atlanta office. Part two of this article will appear in the April 2006 issue of *Management Update*, and will address other employment-related issues that may arise in the merger or acquisition context, including discrimination, plant closing laws, benefits issues, and immigration issues. Longer versions of this article previously were published in the *National Law Journal* and the *NADC Defender*. If you have any questions regarding the issues addressed in this article or labor or employment related issues in general please contact Mr. Coker at jcoker@fordharrison.com or (404) 888-3800. ■

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 call 1-800-357-4107 or email events@fordharrison.com. ■

Federal Contractors Beware of New and Revised OFCCP Regulations

The Office of Federal Contract Compliance Programs (OFCCP) recovered a record $45.2 million in financial remedies for alleged discrimination in 2005. In light of this record-breaking financial recovery and the agency's indication that it will conduct substantially more audits in 2006 than it did in 2005, federal contractors subject to the OFCCP's affirmative action requirements should ensure that they are in full compliance with all of the agency's requirements. Compliance for 2006 is somewhat more complicated than before because of the OFCCP's new "internet applicant" rule and its revised regulations interpreting the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA).

The "internet applicant" rule was published October 7, 2005, and took effect February 6, 2006. The rule defines "internet applicant" as an individual who: submits an expression of interest in employment through the internet or related technologies; is considered by the government contractor for a particular position; indicates in the expression of interest that he or she possesses the basic qualifications for the position; and at no point in the selection process, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in employment in the position. The contractor must retain records of all internet-based expressions of interest in employment if the individual was considered for a particular position. In cases where the contractor used an external database to search for applicants, records must be retained only if the individual also possesses the basic qualifications for the position. The final rule can be accessed at http://www.dol.gov/esa/regs/fedreg/final/2005020176.htm. Frequently asked questions clarifying several aspects of the final rule can be accessed at http://www.dol.gov/esa/regs/compliance/ofccp/faqs/iappfaqs.htm - Q3.

The OFCCP has revised its VEVRAA regulations to conform to the requirements of the Veterans Employment Opportunity Act of 1998 (VEOA) and the Veterans Benefits and Health Care Improvement Act of 2000 (VBHCIA) as follows: increasing the amount of a contract required to establish VEVRAA coverage from $10,000 to $25,000; adding the category of "other protected veterans" – those who have served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized; and adding the category of "recently separated veterans" – any veteran during the one-year period beginning on the date of such veteran's discharge or release from active duty.

The revisions to the VEVRAA regulation were effective January 3, 2006. Contractors are required to update their affirmative action programs (AAP) to reflect the requirements of the revised rule during their standard twelve-month AAP review and updating cycle. A contractor that has prepared an AAP under the old regulations may maintain that AAP for the duration of the AAP year even if that AAP year overlaps with the effective date of the new regulations.

The revised regulations do not incorporate changes made to VEVRAA by the Jobs for Veterans Act (JVA) that was signed by the President on November 7, 2002. JVA amended the VEVRAA requirements applicable to federal contracts and subcontracts entered on or after December 1, 2003, by raising the contract amount threshold for VEVRAA coverage, modifying the categories of protected veterans, and making changes to job listing requirements. The OFCCP has indicated that it will issue regulations implementing these changes at a later date.

If you have any questions regarding the OFCCP's regulations, please contact the Ford & Harrison attorney with whom you usually work or Karin Verdon at kverdon@fordharrison.com, (303) 592-8865, or Karen Tyner, ktyner@fordharrison.com, (864) 699-1134. ■

Court Finds Employer Has Duty to Third Party to Act on Knowledge that Employee Accessed Pornography at Work

A New Jersey appeals court has permitted a plaintiff to proceed with her negligence claims against her ex-husband's employer based on allegations that the employer knew her ex-husband was accessing pornography at work and had a duty to investigate and report this access to the proper authorities. The plaintiff claims her ex-husband molested her ten-year-old daughter at home and took nude pictures of the child, which he then transmitted to child pornography web sites using his work computer. The plaintiff also claims the ex-husband's employer is liable for harm to the child resulting from her ex-husband's unlawful conduct. *See Doe v. XYC Corp.* The trial court granted summary judgment in favor of the employer, but the court of appeals reversed this decision.

In this case, the employer was aware that the employee had, on several occasions, used his work computer to access pornographic sites. However, while the employee's supervisors could tell that some of the sites were pornographic based on their names, none of the supervisors or IT employees actually accessed the sites; thus the employer was not aware that some of the sites featured child pornography. The employer's policies prohibited employees from accessing web sites that are not "of a business nature." Although the employer was aware that the employee had violated this policy, it did not take disciplinary action that was effective in stopping the employee's actions.

In reversing the trial court's decision, the court of appeals held that because the employer was on notice that the employee visited web sites other than those "of a business nature," it had a duty to investigate the sites that were visited. An investigation of the sites would have revealed that the employee was accessing sites that included child pornography. The court imputed to the employer "knowledge that Employee was using his work computer to access pornography."

The court held that since the employer had knowledge that the employee was viewing child pornography on his work computer, the employer had a duty to report the employee's activities to the proper authorities and take effective internal action to stop these activities "whether by termination or some less drastic remedy."

The court held also that the employee had

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strongly endorse employee self-identification of race and ethnicity, as opposed to visual identification by employers, as the primary method for data collection.

In addition, the EEOC's revisions change the EEO-1 Categories by dividing "Officials and Managers" into the following two levels based on responsibility and influence within the organization: "Executive/ Senior Level Officials and Managers" (generally those who plan, direct and formulate policy, set strategy, and provide overall direction); and "First/Mid-Level Official and Managers" (generally those who direct implementation or operations within specific parameters set by Executive/Senior Level Officials and Managers or oversee day to day operations).

Non-managerial business and financial occupations are also moved from the "Officials and Managers" category to the "Professionals" category. The EEOC states that this will improve data for analyzing mobility trends of women and minorities within the "Official and Managers" category.

The new report format is available on the EEOC's web site at http://www.eeoc.gov/eeo1/index.html. If you have any questions regarding the new report form, please contact the Ford & Harrison attorney with whom you usually work or Karin Verdon, a partner in Ford & Harrison's Denver, Colorado office at kverdon@fordharrison.com, (303) 592-8865. ■

State Law News

This article highlights some recent developments in state laws that may impact employers.

State Minimum Wage – On January 17, 2006, the **Maryland** legislature overrode the governor's veto of a bill raising the state's minimum wage to $6.15 per hour. With this action there are now eighteen states and the District of Columbia that have state minimum wage laws that are higher than the $5.15 per hour minimum wage required by the federal Fair Labor Standards Act. These states are: Alaska, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.

Insurance – The **Maryland** legislature has overridden the governor's veto of a law that requires employers with 10,000 or more workers in the state to spend at least 8% of their payroll (for a for-profit employer; 6% for a nonprofit) on health insurance or else pay the difference into a state Medicaid fund. The veto was overridden by the legislature on January 12, 2006, and became law in accordance with the Maryland Constitution. Additionally, **New Jersey** has enacted a law that permits eligible dependants under health insurance plans issued in New Jersey to remain eligible for continued health insurance coverage until the dependant's 30th birthday. The law takes effect May 12, 2006.

Sexual Orientation – **Washington** has enacted legislation amending its antidiscrimination law to prohibit discrimination based on sexual orientation in, among other things, employment. The employment provisions of the law do not apply to employers with fewer than eight employees and nonprofit religious or sectarian organizations. Additionally, in 2005 **Maine** voters approved legislation prohibiting discrimination based on sexual orientation. Other states that prohibit discrimination based on sexual orientation or gender identity include California, Connecticut, the District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Wisconsin.

Leave – Depending upon the number of employees, **Illinois** employers must grant a minimum number of days of unpaid family military leave to an employee during the time state or federal deployment orders are in effect for a child or spouse.. Under this law, a qualified employee who is the spouse or parent of an individual who is called to military service lasting longer than 30 days is entitled to job protected unpaid leave of up to 15 days (for employers with between 15 and 50 employees) or up to 30 days (for employers with more than 50 employees). Employees are entitled to continue benefits during the leave. Employees covered by this law include independent contractors. In **Maine**, public or private employers with more than 25 employees and who provide paid leave under an employment policy or collective bargaining agreement shall allow an employee to use the paid leave for the care of an immediate family member who is ill. Employers may limit the amount of leave that can be taken for this purpose, but it cannot be less than 40 hours in a 12-month period. ■

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no privacy interest in the use of his work related computer, which would have prevented the employer from investigating the sites he accessed. The court based this conclusion on the employer's policies, which stated that the employer could review employee e-mails, and on the fact that the employee worked in a cubicle that had no door and was visible from the hallway.

The court remanded the case to the trial court for a determination of whether the employer's breach of its duty to investigate its employee's Internet access was the proximate cause of harm to the plaintiff and, if so, its liability for damages.

While this decision is not binding on courts outside of the jurisdiction of the New Jersey appeals court, the court's decision is based on common law principles that may apply in other states. This decision illustrates the importance of promulgating and enforcing policies designed to prevent computer misuse. ■

MANAGEMENT UPDATE

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