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Management Update

Watch Out for Labor/Employment Issues in Acquisitions

(Part Two of a Two-Part Article)

This article is the second part of a two-part article addressing labor and employment related issues that may arise during a merger or acquisition. As noted in part one of this article, which appeared in the February 2006 issue of *Management Update*, in 2005 there were 28% more mergers and acquisitions in the United States than there were in 2004. Experts predict that this trend will continue in 2006, which may even be a record year for M&A activity.

Part one of this article addressed labor-related issues that may arise during a merger or acquisition that could leave a buyer or seller with legal liability. In addition to labor-related issues, problems arising under federal and state antidiscrimination laws may create liability for a buyer or seller and also require advance consideration and due diligence. Although the doctrine of successor liability was developed in the context of violations of the National Labor Relations Act (NLRA), it also applies to claims under antidiscrimination statutes and various other laws.

To protect itself from liability for acts of the seller, the purchaser should conduct thorough due diligence

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Employers Should Be Prepared for More Immigration Rallies

In the past several weeks, many employers have experienced increased incidents of employees not reporting for work to participate in immigration reform rallies. It is anticipated that additional marches will occur around the country over the next few weeks, and some groups have announced a "Day Without An Immigrant" or "En Gran Boycott" planned for May 1. Employers in industries with a high level of dependence on immigrant labor must be especially careful in responding to absenteeism resulting from employee participation in these events.

From a legal perspective, employers must consider implications under various laws, including the National Labor Relations Act's (NLRA) protection of protected concerted activity, Title VII's race and national origin nondiscrimination provisions, and, possibly, state and local laws.

Generally, an employee who does not report to work and gives no reason, either before or after the absence, can be subjected to the employer's disciplinary policy.

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Court Permits Rejected Male to Proceed with Sex Discrimination Claim

A federal court in Indiana has held that a male applicant who was rejected for a protection officer/paramedic job can proceed with his sex discrimination lawsuit against his employer, even though the male applicant was ranked lower than the female applicant who received the promotion. *See White v. Alcoa* (March 27, 2006). In *White*, four candidates, one woman and three men, applied for the job of protection officer/paramedic. After a manager and his team leaders interviewed the candidates (all of whom met the basic qualifications for the job), they ranked the candidates in order of preference. The interviewers' top choice was a male applicant, followed by the female, then White and another male.

Meanwhile, a human resources manager had determined that females were "underutilized" in the sought-after position and, before the interviews were conducted, told the manager that if all of the candidates were qualified, the company "would have to be seriously looking" at the female candidate. The interview team presented the candidates' rankings to the HR manager. Although she had not reviewed the candidates' qualifications, did not know who had interviewed best, and did not look at the interviewing team's scores, the HR manager indicated that she wanted the department manager to hire the female applicant. Ultimately, the manager agreed to do so, even though the female applicant was not "who he wanted to hire."

White sued, claiming sex discrimination under Title VII. The employer asked the court to throw out the case, arguing that it had a legitimate, nondiscriminatory reason for not hiring White – he was ranked lower than the female who was hired. The court rejected this argument because the human resources manager ignored the interview team's preferences when she chose the female candidate. Accordingly, since the interview information played no role in the ultimate hiring decision, the interviewers' preferences did not establish a legitimate, nondiscriminatory reason for failing to hire White.

The court did not hold that White should prevail in his sex discrimination claim, only that he can take this claim to trial. As most employers know, jury trials are expensive, time consuming and often unpredictable. Thus, this case emphasizes the importance of ensuring that the reasons for making an employment decision truly are nondiscriminatory – that is, not based on any legally protected criteria.

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

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with respect to all pending and potential claims of discrimination. The purchase agreement can include an express provision relating to the non-assumption of liability for pending charges as well as a provision whereby the predecessor will indemnify the successor for damages resulting from such claims.

In acquisitions involving facility closures or mass layoffs, the seller may have obligations under the federal Worker Adjustment and Retraining Notification Act (WARN). Covered employers who fail to comply with notice requirements may have to pay monetary remedies to affected employees, as well as a civil penalty. In addition to the federal WARN requirements, some states and municipalities have enacted their own plant closing/mass layoff laws which are, in some instances, more onerous than WARN.

Due diligence also should include a thorough examination of all employee retirement and benefit plans. Most retirement and benefit arrangements are subject to complex rules under the Employment Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code. Additional benefits considerations for both purchasers and sellers arise in the context of various welfare benefit plans, obligations to provide continuation coverage under Consolidated Omnibus Budget Reconciliation Act (COBRA), and specific benefits issues arising out of any collective bargaining agreements between the seller and its employees. If a seller has adopted a

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Employers May Rely on After Acquired Evidence in Some FMLA Cases

The Sixth U.S. Circuit Court of Appeals has held that an employer may, in some situations, rely on medical evidence discovered after an adverse employment action is taken, in defending a lawsuit filed under the Family and Medical Leave Act (FMLA). *See Edgar v. JAC Products, Inc.*, (April 6, 2006). In this case, Edgar requested FMLA leave due to stress and anxiety. There was a factual question regarding whether Edgar timely submitted medical certification in support of her leave request. However, the Sixth Circuit held that the trial court acted appropriately in granting summary judgment (that is, throwing out Edgar's case) because she was not medically released to return to work until fifteen months after she requested leave. In making this determination, the court held that it did not matter whether the evidence showing Edgar could not return to work at the end of the protected leave period was available to the employer at the time the decision was made.

The FMLA requires covered employers to provide qualified employees with twelve weeks of unpaid leave for, among other reasons, a serious medical condition as defined by the act. The law also requires employers to reinstate the employee at the end of the protected leave period. In *Edgar,* the Sixth Circuit identified two types of FMLA violations: entitlement claims (also known as interference claims) in which an employee claims the employer interfered with the employee's FMLA-protected rights (such as the right to leave or reinstatement); and retaliation (or discrimination) in which an employee claims the employer took an adverse employment action because the employee exercised FMLA rights or objected to a procedure made unlawful by FMLA.

In *Edgar*, the employee claimed the employer interfered with her FMLA rights (an entitlement claim). The Sixth Circuit noted that the employer's intent is not at issue in an entitlement claim, because the central question in such a claim is whether the employee was entitled to the FMLA benefits in question. The court also noted, however, that the FMLA is not a strict liability statute; employees seeking relief under the statute must establish that the employer's violation caused them harm. The court held that, under its prior opinions and DOL regulations, the employee is not entitled to FMLA benefits when he or she is incapable of returning to work or performing an essential function of the position at the end of the statutory leave period.

In evaluating an employee's ability to return to work in an entitlement claim, the Sixth Circuit held that the court should consider all of the medical evidence bearing on the employee's ability to timely return, not just the evidence available at the time of the adverse employment action. According to the Sixth Circuit, this makes sense because, in an entitlement claim, the court must resolve the objective question of whether the employee was capable of returning to work within the FMLA leave period and is not required to determine the employer's motive at the time of the decision. Thus, even though the employer discharged Edgar during the FMLA leave period and before it knew that she would not be able to return to work within that time frame, it was not liable because after acquired evidence showed that she could not have returned to work during the statutorily protected period.

This case is good news for employers in states covered by the Sixth Circuit (Kentucky, Michigan, Ohio and Tennessee) because it enables them to defend an FMLA interference claim by showing that the employee could not have returned to work during the protected time frame, regardless of when this information was discovered. It is not clear whether other federal appeals courts will follow the Sixth Circuit's analysis. Additionally, employers should be aware that in a retaliation case, as acknowledged by the Sixth Circuit, an employer cannot use after acquired evidence to avoid liability. As in other types of discrimination claims, in a FMLA retaliation case, after acquired evidence can be used only to limit the employer's liability.

If you have any questions regarding this case or the FMLA in general, 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. If you would like more information about the Conference, please call 1-800-357-4107 or email events @fordharrison.com. ■

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The NLRA protects employees who "engage in … concerted activities for the purpose of … mutual aid or protection." The National Labor Relations Board (NLRB) (the agency charged with enforcing the NLRA) has issued some decisions that could support a finding that an employee who misses work to participate in one of these rallies for the purpose of supporting and aiding in securing protection for illegal/undocumented co-workers (or illegal/undocumented workers in general) engages in protected concerted activity. This means that any disciplinary action taken against the employee could be unlawful, regardless of whether the employee is represented by a union. Moreover, rights granted under a collective bargaining agreement may provide additional protection to employees covered by the agreement.

Other laws, such as Title VII, may also impact how an employer deals with this situation. Employers must be careful to ensure that any disciplinary actions taken as a result of employees' participation in these marches are consistent with the employer's policy and prior practice. For example, not granting an Hispanic employee's request for the day off to attend a rally but granting a non-Hispanic employee's request for time off to attend a child's school play, or terminating an Hispanic employee on his first no-call/no-show for attending an immigration reform rally but only giving a written warning to a non-Hispanic employee for his first no-call/no-show could implicate Title VII's national origin and race discrimination provisions.

In addition to the legal aspects of dealing with absences resulting from these marches, employers must also consider the public relations and operational challenges presented. Particularly in industries heavily dependent on foreign workers, employers may decide not to take a hard line on discipline of these individuals. As a practical matter, some employers may have such a high percentage of employees participating that disciplining or terminating all of them may cripple the company or a facility's operations.

Knowing that more rallies are likely in the near future, and that a one-day "strike" may be in the works, we strongly encourage all employers to be proactive in their approach to handling this extremely sensitive situation. Employers should consider reaching out to or increasing communication with their employees in an effort to avoid creating an "us versus them" atmosphere on this issue that could push non-unionized employees toward the unions who are, in many cases, playing an active role in these rallies. You may want to prepare talking points or guidelines for department and/or Human Resources managers who may be required to handle these types of situations. These guidelines should attempt to balance the desires of the employees with the operational needs of the business and the practical impact of employees ignoring a company position they view as too strict. The approach you take will depend on your workplace demographics and the sensitivity of your business to work interruptions and public relations. Above all though, plan for this activity and do not simply rely on the policies you have in place without considering whether those policies adequately address the situation.

If you have any questions regarding this issue, please contact Delaine Smith, dsmith@fordharrison.com, (901) 291-1547 or Jay Sumner, jsumner@fordharrison.com, (202) 719-2022, the authors of this article, or the Ford & Harrison attorney with whom you usually work. ■

Employer's Makeup Requirement is Not Sex Discrimination

The Ninth U.S. Circuit Court of Appeals has upheld the dismissal of an employee's lawsuit in which she claimed that her employer's requirement that she wear makeup at work violated Title VII. *See Jespersen v. Harrah's Operating Co*. (April 14, 2006). The full Ninth Circuit held that the trial court was right to throw out Jespersen's case because she failed to present evidence sufficient to permit her to go to trial on her sex discrimination claim.

Here, the employer, Harrah's, revised its dress code to include a requirement that female bartenders wear makeup while at work. Generally, the dress code imposed identical requirements on male and female bartenders – both were required to wear white shirts, black pants, a black vest and black bow tie. However, the policy imposed some sex-differentiated requirements as to hair, nails, and makeup. Jespersen only challenged the policy requiring women to wear makeup. Jespersen claimed the policy subjected women to terms and conditions of employment to which men were not subjected and required women to conform to sex based stereotypes as a term and condition of employment, all in violation of Title VII.

The only evidence Jespersen presented in support of her claim was her own deposition testimony describing how the makeup requirement made her feel degraded and demeaned. She presented no evidence that the makeup requirement caused burdens to fall more heavily on women than men or that Harrah's motivation for the policy was to sexually stereotype women. The court noted that it, and other federal appeals courts, have consistently held that employers' grooming policies that differentiate between men and women do not violate Title VII if they do not unreasonably burden one gender more than the other.

The court also noted that there was no evidence that the dress code was adopted to force women to adhere to more commonly accepted stereotypical images of what women should wear; the dress code was not intended to make women appear sexually provocative nor did it stereotype women as sex objects. Additionally, the dress code did not condone or subject Jespersen to any form of harassment and did not create a hostile work environment. Further, the dress code did not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job.

The court emphasized, however, that its holding in *Harrah's* does not preclude a claim of sex stereotyping based on a dress or appearance code, only that the evidence in this case did not support such a claim since it was limited to Jespersen's subjective reaction to the makeup requirement.

If you have any questions regarding this case or adopting or revising a dress or grooming code, please contact the Ford & Harrison attorney with whom you usually work. ■

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union multiemployer pension plan, there may be significant liability to the seller, or even to the buyer, if the pension plan is underfunded.

Finally, an issue often ignored in an acquisition is the sale's effect on the eligibility of foreign employees to continue working in the United States. Many visas for foreign workers are employer-specific and allow the individual to work only for the named employer in a specific capacity. The terms and timing of the transaction may affect the status of an existing or prospective foreign employee by changing his or her job location, duties or compensation. Under such circumstances, successor employers may have an obligation to amend a foreign worker's visa petition. In addition, a successor employer must be certain that all documentation on I-9 forms for employees of the seller is in order, ensuring that they remain eligible to work in the United States.

By taking steps early in the process to identify and address these important areas, and by expressly allocating duties and responsibilities related to labor and employment issues in the agreement of sale, the parties can prevent unexpected problems and liability, as well as costly litigation down the road.

If you have any questions regarding the issues discussed 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, a partner in Ford & Harrison's Atlanta office, at jcoker@fordharrison.com, (404) 888-3800. Longer versions of this article previously were published in *The National Law Journal* and the *NADC Defender*. ■

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