Labor's Wish List for Democratic Congress Includes Changes in Federal Labor Law

No one could have been happier than John Sweeney, President of the AFL-CIO, when the Democrats took control of Congress last month. "Big Labor" had poured millions of dollars into Democratic candidates' campaign funds as part of the effort to unseat the Republican majority. With the Democrats capturing majority control of both houses of Congress, Sweeney and other labor leaders see a real opportunity for payback.

In fact, an article that ran in the *Minneapolis/St. Paul Business Journal* ("Unions Expect Help from Congress with Organizing Workers", November 17, 2006), detailed labor's agenda for the new Democratic Congress. At the top of labor's wish list is significant change in federal labor law to permit unions to gain certification representing employees without having to go through the NLRB election process. Labor's favored approach would be to allow unions to be certified on the basis of signed authorization cards – otherwise known as a "card check." Another wish list item is a limitation on employers' right to campaign against union representation.

Nonunion employers need to be alert to these potential changes in the law and how they could impact their workforces. The possibility of neutrality requirements and card checks means that management needs to recognize conditions that could foster interest in unions and take steps to rectify those conditions. If labor gets any part of its wish list granted by Congress, employers will not be able to resist unionization through traditional campaign strategies.

Ford & Harrison LLP and F&H Solutions Group have developed a two-part strategy for our clients in response to labor's bold agenda. First, experienced trainers will educate management about labor's newest organizing tactics with the emphasis on card signing. The training session includes a four-hour session for supervisors and managers and a one-hour executive session for top management. The second aspect of the strategy is a comprehensive confidential employee survey conducted by labor consultants with F&H Solutions Group. The survey includes a pen and paper questionnaire, follow-up interviews with employees and managers, and a detailed analysis of employee attitudes and vulnerability to card signing.

For more information or to schedule this program, please contact the Ford & Harrison attorney or F&H Solutions Group consultant with whom you usually work. •

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· Identify an individual in the IT department, preferably one high in the chain of command, who will be notified when discovery requests for electronic documents are received and who will be responsible for ensuring compliance with litigation hold instructions.

· Create a team of individuals, including those who are familiar with the company's computer technology, who will work together in responding to electronic discovery requests.

The implementation of the amended rules will likely focus the attention of courts and parties involved in litigation on discovery of electronic information. To ensure compliance with the amended rules, employers should have an electronic communications policy and a document retention policy in place before any litigation is commenced or threatened and should ensure that these policies are followed consistently. Existing case law along with the new rules heralds a need for unprecedented cooperation between the parties to avoid preservation missteps.

The duty of preservation makes it important to ensure that there is a procedure in place for communicating litigation hold instructions and ensuring these instructions are followed. Ford & Harrison attorneys can provide assistance in complying with the amended rules, including reviewing policies and procedures and providing training to in-house counsel, IT managers, HR managers and others responsible for complying with discovery requests.

If you have any questions regarding the any of these issues, please contact Marion Walker, mfwalker@fordharrison.com, 205-244-5916, Kay Wolf, kwolf@fordharrison.com, 407-418-2317, or Delaine Smith, dsmith@fordharrison.com, 901-291-1547, or the Ford & Harrison attorney with whom you usually work. •

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MANAGEMENT UPDATE

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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 contact Lynne Donaghy (404-888-3858 or ldonaghy@fordharrison.com) or write to the Atlanta office.

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MANAGEMENT UPDATE

DEC 2006

IN THIS ISSUE

Amendments to the Federal Rules of Civil Procedure Governing E-Discovery Were Effective December 1, 2006 - Are You Ready?

The amendments to the Federal Rules of Civil Procedure relating to e-discovery were effective December 1, 2006. These amendments should provide guidance to employers and their counsel regarding the retention and production of electronic information in litigation. The amendments address five areas: (a) the need to address electronic discovery in the initial meeting of the parties, including preservation of information, the form of production, and privilege issues; (b) discovery of electronically stored information that is and is not reasonably accessible; (c) the assertion of privilege after production; (d) the application of Federal Rules of Civil Procedure 33 and 34 to electronically stored information; and (e) a limit on available sanctions under Federal Rule of Civil Procedure 37 for the loss of electronically stored information resulting from routine operation of computer systems.

The amendments may impact employers involved in federal litigation in several ways:

· The requirement that the parties address electronic discovery early in the litigation process means the employer and employment counsel must discuss these issues very soon after engagement. Employers need to identify whether there is electronic information relevant to the lawsuit, including e-mails, spreadsheets, and other information or documents stored in an electronic format.

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EEOC Implements Changes to EEO-1 Report

For the first time in forty years, the EEOC has made changes to the EEO-1 Report, which take effect beginning with the 2007 survey due to be filed by employers on September 30, 2007.

The EEO-1 Report, which must be filed annually by private employers with one hundred or more employees and federal government contractors with government contracts of $50,000 or more and 50 or more employees, is an employer-compiled report that provides the federal government with workforce profiles by ethnicity, race and gender divided into several job categories. Employers may use employment figures from any pay period in July through September of the reporting year. Data must include all full-time and part-time employees. Leased, casual and temporary employees are not included in the filing.

> "The revised report should better enable the EEOC to accurately monitor the advancements of women and minorities into the upper ranks of management."

According to the EEOC, the new report recognizes the shifting demographics of today's workplace. The revised report should better enable the EEOC to accurately monitor the advancements of women and minorities into the upper ranks of management. The EEOC strongly recommends that EEO-1 reports be submitted via the EEO-1 Online Filing System.

The new report requires employers to ask their employees to self-identify by ethnicity and race. The method of data collection consists of a two question format. The race and ethnicity categories are: Hispanic or Latino, which covers all people of Cuban, Mexican, Puerto Rican, South or Central America or other Spanish culture or origin regardless of race; White, not Hispanic or Latino; Black or African American, not Hispanic or Latino, Native Hawaiian or Other Pacific Islander, not Hispanic or Latino; American Indian, not Hispanic or Latino; and Two or More races, not Hispanic or Latino.

In addition to the changes in ethnicity and race reporting, the Job Categories have also been revised. "Officials and Managers" are now divided into two subcategories. The first is "Executive/Senior Level Officials and Managers." These individuals plan, direct and formulate policy. They provide the overall direction of the organization. The second subcategory, "First/Mid Level Officials and Managers" are the individuals who direct implementation or operation within the parameters established by Executive/Senior Level Management.

Non-Management Officials with expertise in business and financial occupations should now be included as part of the "Professional" job category, and hourly paid supervisors and lead operators who are not members of management should be reassigned from "Craft Workers" to "Operatives." The "Office and Clerical" job category has been renamed "Administrative Support Workers."

The EEOC has stated that it strongly prefers the use of self-identification rather than visual observation when gathering data. Only when an employee declines to self-identify may observation or employment records be used.

The EEOC will not mandate that employers resurvey their workforce before submitting their 2007 EEO-1; however, it cautions employers to keep in mind that opportunities to resurvey should be utilized as often and as soon as possible. Employers should begin immediately to take steps to update any software used to track EEO-1 information to include the newly created categories; create or modify post hire forms used to gather EEO-1 information for new employees to include the newly created categories; and distribute updated forms to existing employees to allow self-identification of race and ethnicity.

It is important to note that for federal contractors, the current regulations under EO 11246 still require reporting by original race and ethnic groups. This means you will be required to survey your work force two times -- once for EEO-1 purposes and once for AAP purposes.

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Ford & Harrison Continues National Expansion

Continuing its national expansion, Ford & Harrison will open an office in Phoenix, Arizona and will merge with Chicago labor and employment law firm Matkov Salzman, both effective January 1, 2007. Additionally, on December 15, the firm opened a fifth Florida office in Melbourne. Andrew S. Hament is the managing partner in the Melbourne office.

In the new Phoenix office, Richard S. Cohen, Stephanie M. Cerasano and Troy P. Foster, all partners in the Labor and Employment Section of Lewis and Roca LLP, will become partners with Ford & Harrison. Rick Cohen will serve as the managing partner of the Phoenix office. Four associates from Lewis and Roca's Labor and Employment Section will also be joining Ford & Harrison – Justin Pierce, Sonya Parrish-Boun, Jonathan Hauer and Kylie B. Crawford. In addition, Karen C. Reynolds, an associate from Ford & Harrison's Washington, DC office, will relocate to the Phoenix office.

In the new Chicago office, all Matkov Salzman partners – George Matkov, Jim Salzman, Larry Hall, Mike Duffee, Steve Brenneman, Chris Johlie, Craig Thorstenson, Tom Dugard and Melissa Mazzeo will become partners in Ford & Harrison. Attorneys Karen Anderson, Becky Kalas, Brian Kurtz, Teri Thompson and Beth Ward are also joining. Matkov Salzman founding partner Jim Salzman will serve as the managing partner of the Chicago office.

Additionally, we are pleased to announce expansion in our Miami office with the addition of Elizabeth M. Rodriguez as a partner and Victoria Chemerys as a senior associate. Ms. Rodriguez was formerly a shareholder with Kubicki Draper in Miami. Ms. Chemerys was formerly with the Miami office of Holland & Knight and specializes in the area of ERISA and employee benefits. •

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· It may be necessary for counsel to consult with the employer's IT department to determine the location of electronic information and the format in which it is stored. The amended rules permit the party requesting electronic information to specify the format or formats in which it wants electronically stored information produced. If the requesting party does not specify a format, the rules direct the responding party to state the format it intends to use in the production. Thus, it is important for employment counsel to understand the format in which electronic information is stored and can be produced.

· The amended rules also instruct the parties to discuss the preservation of discoverable electronically stored information. Again, it will likely be necessary to consult with the employer's IT department to ensure electronically stored information is properly preserved. The comments to the rules note that the parties should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Thus, it is important for counsel to understand the abilities and limitations of the employer's computer system and the ability to preserve information without limiting the employer's operating abilities.

· The rules have also been amended to provide that absent exceptional circumstances, a court may not impose sanctions on a party for failing to preserve electronically stored information lost as a result of routine, good-faith operation of an electronic information system.

· Rule 45, relating to the issuance of subpoenas, has been amended to apply to the discovery of electronically stored information. Thus, even those not party to the litigation may be required to produce electronically stored information.

If they have not done so already, employers must take steps now to avoid possible sanctions for loss of relevant information and to make electronic discovery less burdensome if they become involved in employment related litigation:

· Develop document retention and electronic communication policies that provide for a consistent process for deleting old e-mails and instant messages, consistent with any regulatory requirements for document retention, which can be halted in the event of litigation.

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DOL Accepting Public Input Regarding FMLA Regulations

According to a request for information (RFI) that appeared in the December 1, 2006 Federal Register (www.access.gpo.gov), the Department of Labor (DOL) is seeking information for its consideration and review of the DOL's administration of the Family and Medical Leave Act (FMLA) and implementing regulations. The DOL will accept comments until February 2, 2007. The RFI identifies twelve areas in which it is requesting input from the public, but states that commentators are not limited to these twelve areas. The twelve areas are:

- who is an "eligible employee", including the current regulatory tests and the question of what is a "worksite";
- the definition of "serious health condition";
- the definition of "day" for purposes of both calculating leave and defining a medical condition;
- substitution of paid leave;
- attendance policies;
- different types of FMLA leave, including the length of time;
- light duty;
- essential functions;
- waiver of rights;
- communication between employers and their employees;
- FMLA leave determinations and medical certifications; and
- employee turnover and retention.

In addition to these twelve areas, the DOL is also seeking comments on how to determine the number of people using FMLA leave, the estimated number of employees taking intermittent FMLA leave, the financial impact of intermittent leave, and whether FMLA leave has a different impact on employers depending on the size of the company.

Employers who have concerns about the FMLA regulations may want to take advantage of this opportunity to provide input to the DOL. Written comments on the RFI should be submitted to Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Electronic comments may be submitted by e-mail to whdcomments@dol.gov. Comments of 20 pages or less may be submitted by fax machine to (202) 693-1432, which is not a toll-free number. Comments should be received by no later than 5 p.m., Feb. 2, 2007. •

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Penalties for failure to file EEO-1s can include record-keeping violations and, for federal contractors, debarment.

More information about the revisions to the EEO-1 Report and sample forms can be found on the EEOC's website at www.eeoc.gov/eeo1/index.html.

Newly hired employees should be surveyed under the new requirements for the 2007 report. Employers are not required to resurvey current employees for the 2007 report; however, these employees should be resurveyed before the 2008 report is filed. If you have any questions regarding the changes to the EEO-1 Report or complying with the changes, please contact the Ford & Harrison attorney with whom you usually work or the author of this article, Michelle Harkavy, mharkavy@fordharrison.com, 901-291-1533. •