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Management Update

Changes to Tax Treatment of Nonqualified Deferred Compensation Plans Take Effect January 1, 2005

The American Jobs Creation Act of 2004 (the "Jobs Act"), signed into law on October 22, 2004, makes fundamental changes to the rules governing the tax treatment of nonqualified deferred compensation plans. These new rules, which take effect on January 1, 2005, will require that most such plans be formally amended to incorporate the new legislation.

subject to the Jobs Act include traditional nonqualified deferred compensation plans (whether or not funded through a rabbi trust) and supplemental executive retirement plans, and may also include phantom stock plans and stock appreciation rights plans. The new rules also apply to employment contracts that contain deferred compensation provisions, and could apply to certain severance plans.

Employers will generally have at least one plan that is affected by the Jobs Act. Except for certain specified types of retirement plans (including qualified plans, tax sheltered annuities, simplified employee pension plans and SIMPLE plans), any plan or arrangement that defers compensation must comply with the new rules. Plans

The Jobs Act imposes significant restrictions on nonqualified deferred compensation plans, including restrictions on most types of in-service distributions. For example, these plans may no longer permit a participant to request a distribution at any time subject only to the forfeiture of a portion of the

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NLRB Holds That Bargaining Units of Temporary and Non-Temp Workers Require the Parties' Consent

The National Labor Relations Board (NLRB), in a 3-2 decision, recently returned to its long-standing precedent that combined units of solely and jointly employed employees (such as temporary and non-temporary employees) are multiemployer bargaining units and are permissible only with the consent of the parties. See *H.S. Care LLC, d/b/a/ Oakwood Care Center*, 343 N.L.R.B. No. 76 (November 19, 2004). This decision overrules the Board's 2000 decision in *M.B. Sturgis*, 331 N.L.R.B. 1298 (2000).

In overruling the prior decision, the Board held "the *Sturgis* Board's reinterpretation of the concept of an 'employer unit' severed that term from its statutory moorings." The Board further noted this "loss of direction" gave rise to such "anomalous decisions" as *Gourmet Award Foods*, which applied a collective bargaining agreement between an employer and its employees to employees supplied by a temporary agency. The Board further stated, "[w]e find that the new approach adopted in *Sturgis*, however well intentioned, was misguided both as a matter of

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Federal Court Finds Employer's Sick Leave Policy Violates ADA

A federal trial court in New York recently held that an employer's policy of making general inquiries about an employee's health before approving a request for sick leave violates Title I of the Americans with Disabilities Act (ADA). See *Transport Workers Union of America v. New York Transit Authority*. The court also held that such inquiries may be permissible with regard to certain groups of employees and remanded the case for trial to determine which employee groups may be subjected to these inquiries.

In this case, the employer's policy was codified in the collective bargaining agreement (CBA) between the plaintiff unions and the Transit Authority and had been in effect, in some form, for decades. The policy required that, before missing work, any employee seeking sick leave must call the Transit Authority to give notice at least one hour before the start of the employee's scheduled tour of duty. The policy required that the notice include a brief statement of the nature of the illness or condition causing the absence. Upon returning to work, employees were required to submit a sick leave application form to their supervisor, which stated the "nature of [the] disability" that caused the employee's absence.

Additionally, in some circumstances, employees were also required to obtain a certification from their doctor stating that the employee was so incapacitated by illness that s/he was incapable of performing his/her duties during a specific period of time. The sick leave form also required the doctor to briefly state the employee's "diagnosis/objective findings" and "treatment/prognosis and expected date of return."

Generally, all employees were required to submit a certificate after an absence of more than three days. Additionally, all employees on the "sick leave control list" were required to submit a doctor's certificate after an absence of any length. An employee was placed on the sick leave control list after taking six absences without a doctor's certification in one year or after a suspicious pattern of usage.

The Transport Workers Union and two local chapters of the union sued the Transit Authority in federal court, seeking a declaratory judgment that the policy violates the ADA. The ADA prohibits covered entities from making medical inquiries of employees as to whether the individual has a disability or as to the nature or severity of the disability unless the inquiry is shown to be job-related and consistent with business necessity.

The Transit Authority's justification for the practice was twofold: curbing sick leave abuse and maintaining workplace and public safety. The court determined that curbing sick leave abuse is a business necessity for the Transit Authority and that the diagnosis requirement in the sick leave policy served the purpose of curbing sick leave abuse. However, the court held that the Transit Authority had not shown a reasonable basis for making inquiries of all employees taking three or more days of sick leave and that "there has been no showing that abuse is so widespread as to justify the virtually universal sweep of the current Policy."

However, the court found that the policy was justified as to the class of employees on the sick leave control list. The court also held that the policy was reasonably effective in maintaining safety and was justified with respect to bus operators and remanded the case to determine whether safety considerations might justify the application of the policy to other classes of employees.

This decision is a reminder that employers should review all of their employment-related policies, even those that have been in place for years and those that are incorporated into CBAs, to ensure that these policies comply with state and federal anti-discrimination laws. If you have any questions regarding this case, leave of absence policies or the ADA, please contact the Ford & Harrison attorney with whom you usually work or the author of this article, John-Edward Alley, jalley@fordharrison.com, (813) 261-7801. ■

Organized Labor At a Crossroads: What Does it Mean for You?

What will 2005 bring for organized labor? A further decline in union membership and political clout or new initiatives designed to protect its power base and promote growth? More concessionary contracts and damaging strikes or the development of innovative organizing initiatives and bargaining strategies?

Look for labor unions to recover from the election day loss of Senator Kerry and to rededicate themselves to an essential core activity: unionizing employees who currently are not represented for purposes of collective bargaining. For example, the International Association of Machinists recently announced that it would transfer \$30 million from its \$150 million strike fund into a new organizing fund.

Unions will seek to accomplish their organizing objectives the “old fashioned way”: by assigning well-trained professional staff organizers the mission of developing relationships with key employees at targeted companies. A successful organizer is first and foremost an excellent communicator; a good listener who empathizes with the employees’ concerns and issues. It is all about relationships and issues. It’s really quite simple when you think about it. As a general rule, employees trust management to look after their interests as well as the corporation’s. – when managers breach this trust - Sometimes good employees leave and often they choose to put their trust in time to develop personal relationships their workplace issues.

As a general rule, employees trust management to look after their interests as well as the corporations’.

When management fails to do this then employees explore alternatives. find employment elsewhere; but all too a union organizer who has taken the with employees and to understand

An effective professional organizer that management can refute during organizer emphasizes that he or employees as a group and convinces them that their working lives will improve over time. The risk of strikes is downplayed (“We get more than 98% of our contracts without a strike!”). Instead, unions point to successful “corporate campaigns.” These multi-faceted attacks include boycotts, media events, the filing of charges with government agencies, establishing “lemon” websites and other activities designed to pressure the targeted company to give in to union demands. The organizer’s goal is to cause employees to believe that there is much to gain through collective bargaining at little or no risk.

does not rely on wild promises an election campaign. Rather, the she will provide leadership for the

What is a prudent employer to do? For starters, if you value your union free status, make sure every level of management shares that feeling. All too often top management and Human Resources personnel can do a good job of articulating the many reasons why “union free” is beneficial for their organization and their employees; however, the problem – and it can be a fatal one – is that little or nothing has been done to get “buy-in” from first-level supervisors. And who has the vast majority of contact with the employees?

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Ford & Harrison Opens South Carolina Office

We are pleased to announce that the lawyers and staff of Edwards Ballard, a labor and employment boutique firm with offices in Spartanburg, SC and Asheville, NC, will join the firm effective January 1, 2005. With the addition of these offices, Ford & Harrison will have more than 140 lawyers and consultants in 14 offices located throughout the country.

Ford & Harrison Wins Decertification Campaign for Client

On Thursday, November 4, 2004, Ford & Harrison won a decertification campaign for a New York stock exchange billion-plus dollar company. Prior to decertification, the employees in this client's plant had been represented by the United Auto Workers (UAW) for 34 of the 35 years the plant has been in operation. The employees in this "union town" had experienced four strikes during this time and many employees were more loyal to the union than the company. After the last 10½ week strike, which occurred three years ago, the company had to decide whether to close the plant or to make a change in the employee relations climate. The decision was to change the climate and Richard Reinhardt, Ford & Harrison consultant in the Memphis office, was hired to assist in this matter.

Through our management consultant's "Vital Signs" program, our firm initially conducted an employee opinion survey to better understand the issues, establish priorities and signify to employees that significant changes were forthcoming. From the survey our firm recommended three significant changes, including:

1. Put the management team in the position of being the resource for information rather than having the union play this role.
2. Establish a communications process consisting of such things as daily management meetings, weekly supervisory "tool box" meetings with employees, and monthly plant manager meetings with employees.
3. Provide recognition for employees whenever the plant achieved significant accomplishments.

The results of these efforts contributed to the plant achieving a two-year record without a lost-time accident, generating the highest quality of any of the client's plants, and coming in third of the client's seventeen North American plants for the President's Award, signifying the best plant.

Finally, on November 4, 2004, the employees, by an almost two to one margin, decertified the UAW. This is truly a success story for the employees, the community and the company. Ford & Harrison management consultants also shared in the success because the firm spent three years working with them under "Vital Signs" and then managed the successful counter-union campaign.

For more information regarding employee opinion surveys or other services our consultants can provide, please contact Richard Reinhardt, rreinhardt@fordharrison.com, 901- 291-1546. ■

Save the Dates!

**Ford & Harrison
Annual Labor & Employment
Client Conference**

Atlanta - May 6, 2005 Four Seasons Hotel

Orlando - May 13, 2005 Hyatt Regency Grand Cypress

For more details, contact Lynne Wingate at
404-888-3858 or lwingate@fordharrison.com.

**Coming March 17-18, 2005
A Program for Remaining
Union Free**

**"Labor Relations: Management
Training for the 21st Century"**

For more details, contact Dori Feinman at
404-888-3987 or dfeinman@fordharrison.com.

► *Changes to Tax Treatment* - Continued from page 1

benefit. The Jobs Act also reduces the flexibility of a participant to change his or her elections regarding deferrals and form of payout.

Failure to meet the new requirements for a plan subject to the Jobs Act could result in disastrous tax consequences for plan participants, including full immediate taxation of all benefits under the plan, plus imputed interest, plus a nondeductible 20% penalty tax.

It is extremely important that all employers review the various plans, employment agreements and

other arrangements they sponsor to determine which of them may need to be amended to comply with the new restrictions contained in the Jobs Act.

We recommend you review the steps outlined in the November 2004 edition of our firm's *Benefits Review*. If you have any questions about the Jobs Act, or what you should do to prepare for the new restrictions on nonqualified deferred compensation, please contact Margaret Bernardin, mbernardin@fordharrison.com, 407-418-4365. ■

► *Bargaining Units* - Continued from page 1

statutory interpretation and sound national labor policy."

In *Oakwood Care Center*, the Board returned to the precedent set in cases preceding *Sturgis* and held that the NLRA does not authorize the Board to direct elections in units encompassing the employees of more than one employer, unless the parties voluntarily agree to multiple

employer bargaining units.

This decision is good news for both users and suppliers of temporary employees. If you have any questions regarding this decision or any other labor or employment-related issue, please contact the Ford & Harrison attorney with whom you usually work. ■

► *Organized Labor* - Continued from page 3

That's right – first-level supervisors, some of whom may only recently have been promoted from the ranks of the employees they supervise.

Here are 10 things you should do to help develop positive employee relations:

1. Educate all supervisors on why your company wants to stay union free and their important role in helping you do so;
2. Review all pay plans to ensure internal equity and competitiveness;
3. Identify any issues or problems that a union organizer could seize upon and address them in a timely and effective manner;
4. Review benefits policies (particularly health insurance) and effectively communicate these to employees;
5. Remind supervisors to treat employees with dignity and respect and to utilize progressive discipline for performance problems;
6. Ensure a safe and sanitary workplace;
7. Think through "change." Involve employees, get their ideas and effectively communicate change well in advance;
8. Communicate with employees on how the company is doing and the outlook for 2005. If you face "challenges," talk with employees about their role in helping you overcome them;
9. Find ways to thank employees for their efforts and contributions;
10. Get supervisors out of their offices and in personal contact with the employees they supervise on a regular basis. ■

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MANAGEMENT UPDATE

FORD & HARRISON LLP
Creative Workplace Solutions
1275 Peachtree Street, N.E. • Suite 600
Atlanta, Georgia 30309

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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 call Lynne Wingate 404-888-3858 or write to the Atlanta address below.

Editor Amy W. Littrell
alittrell@fordharrison.com

FORD & HARRISON LLP
Creative Workplace Solutions

1275 Peachtree Street, N.E. • Suite 600
Atlanta, Georgia 30309
404-888-3800 • FAX 404-888-3863

225 Water Street • Suite 710
Jacksonville, Florida 32202
904-357-2000 • FAX 904-357-2001

100 S.E. 2nd Street • Suite 4500
Miami, Florida 33131
305-808-2100 • FAX 305-808-2101

1128 Lamar Ave.
Oxford, Mississippi 38655
662-238-7785 • FAX 662-234-4270

2100 Third Avenue North • Suite 400
Birmingham, Alabama 35203
205-244-5900 • FAX 205-244-5901

350 South Grand Avenue • Suite 2300
Los Angeles, California 90071
213-237-2400 • FAX 213-237-2401

100 Park Avenue • Suite 2500
New York, New York 10017
212-453-5900 • FAX 212-453-5959

101 E. Kennedy Blvd. • Suite 900
Tampa, Florida 33602-5133
813-261-7800 • FAX 813-261-7899

1675 Broadway • Suite 2150
Denver, Colorado 80202
303-592-8860 • FAX 303-592-8861

6750 Poplar Avenue • Suite 600
Memphis, Tennessee 38138
901-291-1500 • FAX 901-291-1501

300 South Orange Avenue • Suite 1300
Orlando, Florida 32801
407-418-2300 • FAX 407-418-2327

1300 19th Street, N.W. • Suite 700
Washington, DC 20036
202-719-2000 • FAX 202-719-2077

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