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Management Update

Only One Chance To Get It Right

Have you ever experienced first-hand a union organizing drive at one of your facilities? If so, you know that every day of the campaign brings a new set of challenges. So much is going on that if you are not careful, the company can miss out on an opportunity to significantly affect the ultimate outcome.

A critical step in a labor union's attempt to unionize a group of employees is the determination of the voting unit. This is done in

one of two ways. In a stipulated election agreement brokered by the Regional Office of the National Labor Relations Board (NLRB), the company and union agree to such things as which employees will be eligible to vote in the election and the time, date and place of the election. If the parties do not agree to a stipulated election, the Board will hold a hearing. In this hearing, the employer may litigate matters such as the supervisory status of individuals; the appropriateness of the petitioned-for unit, including expansion or contraction of the

unit, unit placement issues, and multi-facility unit; managerial and confidential status of employees; eligibility of part-time employees; and eligibility of certain classes of employees such as "plant clericals" and quality control employees.

This hearing takes place a week or two after the union files its election petition with the Board. The petition must be supported by a showing of interest (usually signed union authorization cards) from at least 30% of the employees in an appropriate bargaining unit.

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Use of MMPI Violates ADA

The Seventh U.S. Circuit Court of Appeals has held that an employer violated the Americans with Disabilities Act (ADA) when it administered a version of the Minnesota Multiphasic Personality Inventory (MMPI) to employees seeking a promotion within the company. See *Karraker v. Rent-A-Center, Inc.* The ADA prohibits employers from, among other things, administering pre-employment medical examinations, administering medical examinations to current employees unless the examinations are job-related and consistent with business necessity, and administering medical examinations that screen out or tend to screen out people with disabilities. Under the ADA, psychological tests that are designed to identify a mental disorder or impairment are considered medical examinations; however, psychological tests that measure personality traits such as honesty, preference, and habits are not.

In *Karraker*, the employer argued that it used the MMPI only to measure personality traits. The employer pointed out that it used vocational protocol, not clinical protocol, to score the tests, and that it did not use a psychologist to interpret the test results. The Seventh Circuit held that the practical result of the employer's use of the MMPI

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As you might expect, unions often try to tailor the unit to the job classifications at a facility that have expressed the most interest in having union representation. Fortunately, an employer does not have to acquiesce and is entitled to litigate the issue of the appropriate unit for bargaining at the hearing.

The benefits of a hearing include the possibility of getting the petition dismissed, particularly where the appropriate unit is determined to be much larger than the one sought by the union. Also, the cut-off date for eligibility to vote in the election is the payroll period immediately preceding the NLRB Regional Director's order directing an election. Therefore, by going to a hearing, the eligibility cutoff date for voting in the election is postponed until a decision is issued, which may result in employees hired after the hearing being eligible to vote.

Conversely, there can be advantages to a stipulated election agreement in certain cases. The employer can get the specific date it wants for an election, while in directed elections following a hearing, the election date is 25-30 days after the decision and direction of election, absent highly unusual circumstances. A stipulated election also avoids the cost of a hearing, the brief to the Regional Director, and a possible appeal to the Labor Board in Washington, D.C. Additionally, the union, in order to avoid the expense and potential delay of a hearing, may be willing to agree to include or exclude certain disputed job classifications that otherwise might be determined adversely to the employer's interests if the issues were litigated at a hearing. A stipulated election also prevents the union from having the opportunity

to "politicize" the hearing for campaign purposes and/or to use it as a way to learn more about the company's operations.

Employers with more than one facility in the area should consider carefully their options before agreeing to an election at a single location or multiple locations. The NLRB considers several factors in determining whether a single or multi-location bargaining unit is "appropriate": (1) centralized control of daily operations, supervision and labor relations; (2) similarity of wages and benefits; (3) degree of multi-site employee interchange, contact and transfer; (4) similarity of skills, functions, and working conditions; (5) functional integration; (6) geographic proximity; and (7) the parties' bargaining history. See *Cleveland Construction, Inc. v. NLRB*; *New Britain Transportation Co.*

A recent NLRB case illustrates the importance of making a wise decision on the best course of action for securing a unit determination. See *Jerry's Chevrolet, Cadillac, Inc.* In this case, the union sought an election involving the automobile technicians at just one of the employer's four dealerships. The Board majority ruled that the employer overcame the strong presumption in favor of a single-facility bargaining unit and held that a unit of technicians at all four dealerships was the appropriate unit for bargaining. Two factors primarily were responsible for this result: (1) the facilities in question were located next to each other; and (2) the technicians' immediate supervisors at each location had extremely limited authority over the employees; key employment-related decisions were made centrally by top management.

Unit determinations involving multi-sites are fact-specific and results can vary. Not only did the Board panel split 2-1 in *Jerry's Chevrolet*, a week later the same Board panel ruled against another employer in a similar case. See *Catholic Healthcare West*. There the employer argued that the appropriate unit must be the skilled maintenance employees at all four of its hospitals, while the union argued it should be limited to those employees at just one of the employer's facilities. The NLRB Regional Director agreed with the employer but the Board reversed. In finding that the employer had not rebutted the single-facility presumption, the Board majority focused on the geographical separation (12-20 miles), the fact that temporary transfers between facilities "are the exception rather than the norm," and the local autonomy exercised by supervisors at each facility on "such matters as assignment of work, discipline of employees, preparation of performance appraisals, scheduling, grievance handling, and hiring."

Some employers wait until an NLRB representation case is initiated before thinking about unit composition issues. However, forward-thinking companies consider these issues in advance to determine whether there might be organizational approaches that have significant advantages from a labor law standpoint and do not compromise the efficient operation of the business.

If you have any questions about the issues addressed in this article, or labor or employment-related issues in general, please contact Jerry Coker, the author of this article, at jcoker@fordharrison.com, 404-888-3820. ■

E-Evidence: Evolving Rules for an Electronic Age

As we move closer to a paperless society, electronic information takes on greater importance in all aspects of our lives. Employers and businesses use electronic means for everything from record retention to business-wide communications. Included in this gamut is, of course, the e-mail that goes from one employee to another or many others, be it personal or business communications.

Recently, courts have addressed the preservation and production of electronic documents and communications. This can involve everything from data on a single computer, which includes e-mails and instant messages, to backup documentation on numerous tapes. Organizing this material so that it may be easily preserved and produced should become a primary goal of businesses and employers. Two recent cases have underscored this need - *Zubulake v. UBS Warburg LLC* and *U.S. v. Philip Morris USA, Inc.*

At the core of both cases was the failure to produce or the destruction of e-mails. In *Zubulake*, the court found that UBS Warburg failed to satisfy its duty to produce documents requested during the discovery process. This failure resulted from several things including deletion of e-mails in defiance of explicit instructions to the contrary; not producing discoverable e-mails when requested; and responsive e-mails permanently lost to deletion. The court sanctioned UBS Warburg monetarily and by giving an adverse jury instruction about the missing and deleted electronic information. The court also chastised UBS Warburg's counsel for failure to request retained information from certain key witnesses, failure to give litigation hold instructions to the client, and failure to ensure that the client safeguarded stored information.

In *U.S. v. Philip Morris USA, Inc.*, the court had issued a case management order that required preservation of all documents potentially relevant to the subject matter of the litigation. The defendant, however, continued its monthly system-wide deletion of e-mails 60 days or older. The court sanctioned Philip Morris \$2.75 million for failing to follow the court order and

purposefully deleting these documents. Additionally, the court precluded each person who failed to comply with the retention program from testifying at trial.

These cases demonstrate the potential risks involved in failing to ensure that electronic data is preserved and that discoverable data is produced during litigation. While employers ultimately are responsible for preserving and producing documents relevant to litigation, experienced employment counsel can assist employers in developing policies regarding the preservation of electronic data, including ensuring the policies comply with all state and federal laws.

Following are some factors employers should consider in developing policies and procedures regarding the preservation of electronic data and production of such data during litigation.

- Identify who will be responsible for the coordination of discovery responses in litigation, including the production of documents. Ensure that these individuals are familiar with the company's computer or electronic data storage processes.
- Identify which individuals in the chain of command in the company's IT department are responsible for the storage and access of electronic data and identify a contact person to be notified when discovery requests are received. This individual should be able to identify where electronic information is located and what systems contain relevant data as well as what back-up methods exist and where back-up data is stored.
- Determine who will be able to recover stored electronic data and testify as to the validity of the recovery method utilized (which may be necessary to authenticate discovery responses).
- Determine whether there are any existing recoverable electronic logs or other "digital fingerprints" that may be discoverable.
- Ensure there is a plan in place to suspend or override normal network storage, back-up and archiving routines to preclude the destruction of documents covered by a discovery request.

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Employer's Reservation of Right to Change Internal Dispute Resolution Procedure Does Not Nullify Arbitration Agreement

The Fourth U.S. Circuit Court of Appeals, reversing the decision of a federal trial court, has held that an employer's reservation of the right to unilaterally amend an internal dispute resolution procedure did not render its arbitration agreement unenforceable. See *Hill v. PeopleSoft USA, Inc.* In *PeopleSoft*, the trial court held that because the employer could unilaterally amend its internal dispute resolution procedure, any consideration for signing the arbitration agreement, which the plaintiff employee signed when she was hired, was "illusory." Accordingly, the trial court held that the agreement was unenforceable.

The employer appealed this decision and the Fourth Circuit reversed. The Fourth Circuit held that because the internal dispute resolution procedure was contained in a separate document, not in the arbitration agreement the employee signed, the employer's ability to unilaterally revise the procedure did not render the arbitration agreement unenforceable.

The court distinguished cases in which courts have found arbitration agreements unenforceable because the employer retained the right to unilaterally revise the arbitration agreement. The court held that in arbitration agreements, a court must look only at the four corners of the agreement and not at other evidence that the trial court found the agreement to be unenforceable. Accordingly, the Fourth Circuit remanded the case for arbitration proceedings in accordance with the arbitration agreement.



to unilaterally revise the arbitration agreement determining the enforceability of an arbitration agreement to it was only by going beyond the looking at other evidence that the unenforceable. Accordingly, the proceedings in accordance with the

While arbitration agreements in employment contracts have been upheld in many situations, this case demonstrates the importance of having a separate arbitration agreement that is not contained in any other document. Doing so helps ensure the enforceability of the agreement because a reviewing court should only consider the provisions of the agreement itself and not other documents in determining enforceability. Additionally, some courts have found employee handbooks that contain arbitration agreements create an employment contract because the employee signs and agrees to be bound by the agreement, and the employee can then argue that the employer and employee agreed to be bound by the entire handbook. Thus, a better practice is to provide a separate arbitration agreement because this enables a reviewing court to evaluate the enforceability of the agreement standing alone.

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Further, if an employer reserves the right to make unilateral changes it may also be advisable to state that notice will be given in advance of the change taking effect and that any change would not have an impact on any disputes pending prior to the effective date of the change.

If you have any questions regarding this case or employment-related arbitration agreements, please contact the Ford & Harrison attorney with whom you usually work or Kevin Kraham, kkraham@fordharrison.com, 202-719-2016 or John Allgood, jallgood@fordharrison.com, 404-888-3832. ■

State Laws Restrict the Use of Social Security Numbers

In response to the ever-increasing number of incidents of identity theft, Michigan, Arizona, California, Texas, Missouri, Virginia, and Arkansas all have enacted laws protecting social security numbers. The provisions of these laws vary and it is important for companies with employees in these states to be aware of the laws' requirements. For example, most of the laws prohibit the use of an employee's social security number on any identification badge or card and some prohibit public display of social security numbers and mailing documents or information containing social security numbers, subject to certain exceptions.

As more and more states enact laws protecting the confidentiality of social security numbers, it is recommended that employers consider using something other than social security numbers as employee identification numbers, or at least consider not displaying these numbers on employee identification badges. Doing so could help preclude liability for failure to protect employees' personally identifiable information

If you have any question regarding the specific provisions of these state laws or labor or employment related issues in general, please contact the Ford & Harrison attorney with whom you usually work. ■

▶ *MMPI - Continued from page 1*

was similar regardless of which scoring protocol was used and regardless of whether the employer used the test to weed out applicants with certain disorders – the use of the MMPI likely had the effect of excluding employees with disorders from promotions. Thus, the court held that because the test “is designed, at least in part, to reveal mental illness and has the effect of hurting the employment prospects of one with a mental disability we think the MMPI is best categorized as a medical examination.” The court did not address the issue of whether the use of the MMPI was job-related and consistent with business necessity.

Employers considering this testing should not only consult experienced labor counsel (in coordination with mental health experts) but should also carefully consider at what stages (post conditional offer, versus other times) such tests are used, and weigh the possible benefits against the risks. If you have questions about the ADA or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work. ■

▶ *E-Evidence - Continued from page 3*

- Ensure there is a plan in place to identify individuals who may have knowledge of or documents related to the litigation and immediately notify them to preserve all relevant communications, including e-mail, word processing documents, spreadsheets, calendars, telephone logs, etc.
- Ensure there is a policy for identifying and labeling e-mail and other electronic documents as confidential, privileged, or work-product, as appropriate. The policy should include provisions for storage of confidential or privileged communications to help protect confidentiality and limit access to these documents.

the company's IT department is essential in developing and implementing policies and procedures regarding the preservation, storage, recovery, and destruction of electronic data. With the courts' suggested proactivity on the part of the employer or business in this arena, as onerous and perhaps impossible as it may seem, the benefit of beginning sooner rather than later to implement a program to preserve and protect all forms of electronic information is crucial.

If you have questions regarding the issues discussed in this article or labor or employment-related issues in general, please contact the author of this article, Alexandra Spaulding, aspaulding@fordharrison.com, 202-719-2021, or the Ford & Harrison attorney with whom you usually work. ■

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