MANAGEMENT UPDATE

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Federal Appeals Court Rules that Shopping Mall Lawfully Prohibited Union From Distributing Literature

The U.S. Court of Appeals for the Second Circuit (the federal appeals court with jurisdiction over New York, Connecticut and Vermont) recently overturned a National Labor Relations Board (NLRB) decision finding a union had the right to set up a table and distribute literature at a large enclosed shopping mall in Watertown, New York. *See Salmon Run Shopping Center v. NLRB* (July 18, 2008).

In this case, one of the mall's tenants, Dick's Sporting Goods, engaged a contractor for remodeling work. The contractor, in turn, retained a non-union subcontractor. The Carpenters' Union (Carpenters) requested the mall's management permit it to set up a table inside the mall to distribute literature. Carpenters later explained that the pamphlets highlighted the advantages of Carpenters' membership, including one stating "[Let] us Show You the Money. . . ." Another pamphlet noted Dick's record profits and its prior use of subcontractors "[who] did not pay the area standard wage" and who "[keep] worker wages in a slump."

When the mall's manager denied the Carpenters' request, the union filed an unfair labor practice charge with the NLRB alleging that the mall's action had violated the National Labor Relations Act (the Act).

At the hearing before the administrative law judge (ALJ), the mall's manager testified that it has "No Solicitation" signs posted at its entrance doors and, in deciding whether to allow a non-tenant group to distribute or solicit, it considers whether the activity would benefit the mall – by either increasing foot traffic or enhancing the mall's public image. The mall had previously permitted charities such as the American Cancer Society to conduct fundraisers and had allowed the United Food and Commercial Workers and a local firefighters' union to participate in a health fair and a charity drive at the mall. The mall's management argued that in each of these situations, the activity enhanced the mall's public image.

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Florida Expands Domestic Violence Leave Statute to Include Victims of Sexual Violence

Since July 1, 2007, Florida employers have been required to give an employee up to three days of leave in a twelve-month period if the employee or a family or household member is a victim of "domestic violence." On July 1, 2008, the statute was amended to allow victims of sexual violence the same protections previously provided under the statute. The amendment defines "sexual violence," to include sexual battery, a lewd or lascivious act on or in the presence of someone sixteen years or younger, luring or enticing a child, sexual performance by a child, any forcible felony wherein a sexual act is committed or attempted, regardless of whether criminal charges based on the incident were filed, reduced, or dismissed by the state attorney, or "any crime the underlying factual basis of which has been found by a court to include an act of sexual violence."

The amended statute's leave requirements apply to all employers in Florida who employ fifty or more employees, and cover employees who have worked for the employer for three months or longer. The leave may be paid or unpaid, at the employer's discretion, and must be provided for the following specific activities:

- Seeking an injunction for protection against domestic violence or an injunction for protection in cases of repeat violence, dating violence, or sexual violence;

- Obtaining medical care or mental health counseling, or both, for the employee or a family or household member to address physical or psychological injuries resulting from the act of domestic violence or sexual violence;

- Obtaining services from a victim services organization, including, but not limited to, a domestic violence shelter or program or a rape crisis center as a result of the act of domestic violence or sexual violence;

- Making the employee's home secure from the perpetrator of the domestic violence or sexual violence or seeking new housing to escape the perpetrator; or

- Seeking legal assistance in addressing issues arising from the act of domestic violence or sexual violence or attending and preparing for court-related proceedings arising from the act of domestic violence or sexual violence.

The law requires employees to provide "appropriate advance notice" of the need for leave, unless prevented from doing so because of imminent danger to the health or safety of the employee or a family member. Employees also are required to exhaust any available annual vacation or personal leave and sick leave, if applicable, unless the employer waives this requirement. Additionally, the law requires that employers keep confidential all information relating to the leave. The law also prohibits employers from interfering with, restraining, and denying the exercise or attempt to exercise the rights provided by the law, and from discriminating or retaliating against an employee for exercising his or her rights.

By adopting these leave provisions, Florida has joined a growing number of states seeking to provide protection to employees victimized by violent acts. For example, the Illinois Victims' Economic Security and Safety Act prohibits discrimination against the victims of domestic or sexual violence and requires employers to give employees who were the victims of such violence, or whose family members were victims of such violence, twelve weeks of unpaid leave. The District of Columbia's recently enacted Accrued Sick and Safe Leave Act of 2008 requires employers to provide paid sick leave to employees for a variety of reasons, including for absences relating to obtaining social or legal services for the employee or a family member who has been the victim of stalking, domestic violence, or sexual abuse, where those services are directly related to the stalking, domestic violence, or sexual abuse. Additionally, North Carolina law prohibits employers from discriminating against victims of domestic violence. Washington State has also enacted legislation guaranteeing "reasonable leave" for victims of domestic violence, sexual assault and stalking. In addition to the rights provided under these various state laws, victims of domestic or sexual violence may be entitled to leave under the federal Family and Medical Leave Act.

Florida employers should ensure that their policies provide for the required leave and comply with the amended statute's various requirements. Given the scope of these laws, and the specific nuances that have been adopted from state to state, employers conducting business outside the state of Florida should consult the state and federal laws applicable to their various places of business to ensure compliance.

If you have any questions regarding this article, please contact the author, Brian Ussery, at 813-261-7818 or bussery@fordharrison.com. •

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The ALJ ruled that the mall violated Section 8(a)(1) of the Act by denying the Carpenters equal access to the mall. On appeal, a three-member panel of the NLRB agreed, finding that the mall operator had excluded the Carpenters because it was a labor organization.

The Second Circuit overturned the NLRB's decision. The court noted that an employer may not use a no-solicitation policy to prohibit union organizing activities by employees in non-working areas during non-working time. However, it observed that an employer has greater latitude when enforcing a no-solicitation policy against non-employees, relying on the U.S. Supreme Court's 1956 decision in *Babcock & Wilcox Co.* In *Babcock*, the Court upheld an employer's right to exclude non-employees from its property during a union organizing drive **except** where: (1) the organizational activity was directed at employees who are "inaccessible" through other means (the "inaccessibility exception"); and (2) the employer's notice or order does not "discriminate" against the union by allowing other distribution (the "discrimination exception"). In *Salmon Run*, the NLRB's decision was based solely on the "discrimination" exception.

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Reversing the NLRB's decision, the Second Circuit held that the facts of the case did not constitute discrimination, finding no evidence that the mall had treated the Carpenters less favorably than other groups. It found that the fundraising and health fair activities in which other unions participated were invalid comparisons. Specifically, the court noted that there was no evidence that the mall had favored one union over another or allowed employers to disseminate employer-related information while barring similar union-related information. The mall, for example, had never permitted an employer to communicate to the public its reason for not paying area wages or allowed any other union to engage in organizational activities.

Lesson learned

This case serves as a reminder that no-solicitation/no-distribution policies often invite difficult legal challenges when used to forbid union solicitation or distribution. They must be concisely worded, and consistently and uniformly enforced. Whenever an employer bans union related solicitation or distribution but has permitted other solicitation and distribution by non-employees, there is a substantial risk that the union will file an unfair labor practice charge and that the employer will end up in protracted litigation. In this case, it took a costly and lengthy appeal process for the employer to vindicate itself.

If you have any questions regarding this decision or the issues discussed in this article, please contact the authors, Kenneth D. Stein, kstein@fordharrison.com, 212-453-5901 or Andrew S. Hament, ahament@fordharrison.com, 321-724-5633. •

Ford & Harrison Launches Webpage Focused on Employee Free Choice Act

The Employee Free Choice Act (EFCA) is the biggest and most controversial piece of labor legislation in decades. With this in mind, we want to make you aware of the potential repercussions of EFCA if this bill becomes law. To help in this regard, we have launched a new page on our website devoted to EFCA. The page discusses the background of the legislation, its potential impact on employers and employees, the questions the bill leaves unanswered, how employers can plan for EFCA, the legislation's current status, and related publications/positions on the bill.

The web page can be accessed at: http://www.fordharrison.com/efca.aspx. •

Georgia and Louisiana Join Florida in Enacting "Guns at Work" Laws

Recently, several states have passed laws that significantly restrain employers' abilities to prohibit guns on their property. In the past few months, Georgia and Louisiana have joined Florida in becoming the most recent states to enact "guns at work" laws. The Florida and Georgia laws took effect July 1, 2008, while Louisiana's law was effective August 15.

Most "guns at work" legislation has been controversial among firearm owners and private property owners. As a result, the Florida law recently was challenged as unconstitutional. Despite this challenge, a federal court refused to enjoin the portions of the law that apply to employer actions toward employees and applicants who possess valid Florida concealed weapons permits. This court's ruling is not a final decision on the merits of the law. A final ruling is expected in the summer of 2009. In the interim, the provisions of the law related to employees are in effect and employer compliance is mandatory. For more information regarding the Florida law, please see our Legal Alert, *Florida Governor Signs "Bring Your Guns to Work" Law*, located on our web site at http://www.fordharrison.com.

The Georgia "Business Security and Employee Privacy Act" revised the law relating to the possession and carrying of firearms to state that the Code shall not prohibit any person from transporting a loaded firearm in any private passenger motor vehicle, as long as that person in not ineligible for a Georgia firearms license. Additionally, the law makes it unlawful for employers to condition employment on an agreement by a prospective employee that prohibits the employee from entering the employer's parking lot if the employee's privately owned vehicle contains a firearm that is locked out of sight, if the employee has a valid Georgia firearms license. The law also prohibits employers from searching an employee's vehicle parked in the employer's parking lot.

Although the Georgia law appears to impose considerable restrictions on employers, the law also contains significant exceptions. Most notably, the law states that nothing in its provisions shall restrict the rights of private property owners or those in legal control of property (through a lease, rental agreement, contract, or any other agreement) to control access to the property. The law also provides that where a private property owner or other person in legal control of the property is also an employer, the employer's property rights govern. Thus, the law appears to be inapplicable to employers who own or control the parking lots associated with their businesses.

For more information regarding the Florida law, please see our Legal Alert, "Florida Governor Signs 'Bring your Guns to Work' Law," located on our web site at www.fordharrison.com

The law's prohibitions also do not apply to employers who provide employees with secure parking that restricts general public access to the parking area, as long as any policy allowing vehicle searches upon entry applies to all vehicles entering the property and is applied on a uniform and frequent basis. Additionally, the law does not apply to an employee who is restricted from carrying or possessing a firearm on the employer's premises as the result of a "completed or pending disciplinary action." The law also provides for other exceptions, including: penal institutions; public utilities; Department of Defense contractors operating facilities contiguous to a military base or within one mile of an airport; parking lots contiguous to facilities providing natural gas transmission, liquid petroleum transmission, water storage and supply, and law enforcement services determined to be vital to public health or safety; areas used for parking on a temporary basis; and areas where the transport of firearms is prohibited by state or federal law or regulation.

The law also provides for exceptions to the prohibition on employer searches, including where: the employer owns or leases the vehicle being searched; the employee consents to the search for loss prevention purposes; a "reasonable person would believe that

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accessing a locked vehicle of an employee is necessary to prevent immediate threat to human health, life, or safety"; or the search is conducted by certified law enforcement officers pursuant to valid search warrants or valid warrantless searches based upon probable cause under exigent circumstances.

The Louisiana law, "Transportation and Storage of Firearms in Privately Owned Motor Vehicles," gives any person who lawfully possesses a firearm the right to transport and store that firearm in a locked, privately owned motor vehicle in any parking lot, parking garage, or other designated parking area and makes it unlawful for employers and property owners to prohibit anyone from doing so. The law permits employers and property owners to require that any firearms stored in vehicles on their property be hidden from plain view or stored in a locked case or container within the vehicle.

The law does not apply to vehicles owned or leased by an employer and used by an employee in the course of his or her employment. In addition, similar to the Georgia law, the Louisiana law permits employers to prohibit employees from storing firearms in their vehicles in parking areas that have restricted access through the use of gates, fences, signs, or security stations. However, this provision applies only if the employer provides a facility for the temporary storage of unloaded firearms or the employer provides an alternative parking area reasonably close to the main parking area in which employees and other persons may transport or store firearms in locked, privately owned vehicles.

Conclusion

As lobbyists continue to push for the enactment of laws such as the ones discussed here, it is important for employers to review any workplace weapons policies to ensure they meet the applicable state law requirements, which may vary greatly from state to state. If you have any questions regarding the issues discussed in this article, please contact the author, Jessica Walberg, 407-418-2324 or jwalberg@fordharrison.com. •

Congress Approves ADA Amendments Act

On September 17, 2008 the U.S. House of Representatives approved legislation passed by the Senate earlier this month, which amends the Americans with Disabilities Act (ADA). The ADA Amendments Act of 2008 overturns a series of U.S. Supreme Court decisions that narrowly interpreted the ADA.

The Act overturns the Supreme Court's decision in *Sutton v. United Air Lines, Inc.*, (1999), which held that whether an individual is disabled should be determined with reference to mitigating devices, such as medication. The ADA Amendments Act states that the determination of whether a condition substantially limits an individual's major life activities must be made without regard to the effects of mitigating measures. The Act specifically excludes eyeglasses and contact lenses from the list of mitigating measures that should not be considered.

The Act also states that in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, (2002), the Supreme Court interpreted the term "substantially limits" to impose too high of a standard. Similarly, the Act states that the current EEOC regulations defining the term "substantially limits" as "significantly restricted" express too high of a standard. Accordingly, the Act states that the determination of whether an individual's impairment is a disability under the ADA "should not demand extensive analysis." Further, the Act states that the definition of disability "shall be construed in favor of broad coverage of individuals."

The legislation will now go to President Bush for signature. The White House press secretary has issued a statement indicating the President is likely to sign the bill.

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

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