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March 2013 Airline Management Newsletter

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NMB Announces Voting Procedures Changes

By: Lilia R. Bell

On March 11, 2013, the National Mediation Board (NMB) published a Notice, 40 NMB No. 43, announcing changes to the Board's voting procedures and Representation Manual. Specifically, the Board announced:

- Effective with elections commencing on or after March 25, 2013, voters will cast their vote using one confidential access code, instead of the prior system with two different numbers (a Voter Identification Number (VIN) and a Personal Identification Number (PIN)). The access code will be a randomly generated twelve digit number known only to the voter and the NMB.
- Changes to Sections 3.601 and 19.601 of the Representation Manual, related to the showing of interest requirement for elections.
- A change to the Merger Procedures in Section 19 of the Representation Manual, increasing the amount of time an organization has to make the necessary showing of interest (from 14 to 30 days) following the Board's single transportation system determination.
- An amendment to Representation Manual Section 2.4 requiring carrier "attestation" of the accuracy of the List of Potential Eligible Voters. [In comments to the Final Rule published in December 2012, discussed below, the Board had noted that an AFL-CIO coalition of transportation unions had indicated that the new showing of interest requirement would incentivize carriers to "pad" voting lists with hard-to-reach workers or individuals no longer employed at the company.]

The changes to the showing of interest requirement in Representation Manual Sections 3.601 and 19.601 were mandated by a 2012 amendment to Section 152 of the Railway Labor Act (RLA), requiring that all representation applications be supported by a showing of interest from not less than 50 percent of the employees in the applicable craft or class. Prior to the amendment, NMB procedures required only a 35 percent showing of interest, except in certain circumstances involving raids on existing representatives (which required a greater than 50 percent showing of interest).

In its Final Rule regarding the 2012 RLA amendments, the NMB addressed various comments to its Notice of Proposed Rulemaking from the industry and labor organizations. A coalition of unions argued in favor of maintaining the 35 percent showing of interest for incumbent organizations in newly-created single transportation

systems following a merger or other similar corporate transaction. AMFA also sought to maintain the 35 percent showing of interest for intervening organizations, which was opposed by IBT and TWU. The Board rejected all such arguments based on the plain language of the RLA amendment. It did observe that an employee may sign more than one authorization card. In this way, where an incumbent already represents more than 50 percent of the craft or class, an intervenor may collect authorization cards from employees already counted toward the incumbent's showing of interest.

In its Final Rule, the Board also rejected a request from the industry seeking a modification to its Merger Procedures, which maintain existing certifications in effect pending the issuance of a new certification or dismissal. The industry pointed out that, in the event of a merger or similar transaction, the Representation Manual allows a union to continue representing less than a majority of the craft or class. The Board observed that under current legal authority, it may not extinguish a certification on its own initiative or at the carrier's request but, instead, must await an application from an employee or labor organization.

If you have any questions regarding this article, please contact the author, Lilia Bell, lbell@fordharrison.com, who is a partner in our Atlanta office and a member of FordHarrison's Airline Industry Practice Group, or the FordHarrison attorney with whom you usually work.

Second Circuit Weighs In On AIR21 Burden-Shifting Framework

By: Douglas W. Hall

Retaliation and whistle-blower claims are on the rise, including those based on the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), which prohibits carriers from discriminating against those who report alleged violations of the FARs or other aviation safety standards. Cases involving interpretation of AIR21, or of other statutes such as the Sarbanes-Oxley Act ("SOX") that incorporate AIR21's elements and burdens of proof, have started to make their way to the Circuit Courts of Appeals, providing us with insight on how such claims will be analyzed. In a recent decision arising under SOX, the Second Circuit expressed its view on these issues for the first time. *Bechtel v. ARB*, 2013 U.S. App. LEXIS 4539 (2d Cir. March 5, 2013).

Showing how long these cases can take to get resolved, Bechtel filed his SOX claim almost 10 years ago, after he was terminated by his employer, CTI. The case had a checkered procedural history, including a decision in CTI's favor by the Administrative Law Judge ("ALJ"); a remand by the Administrative Review Board ("ARB") because of legal errors by the ALJ related to the applicable burdens of proof; and a second decision in CTI's favor by the ALJ that was affirmed by the ARB even though it found that decision "not easily deciphered." The ARB found that errors the ALJ had made in the second decision regarding the burden-shifting requirements under SOX (and thus under AIR21) were harmless because the ALJ's evidentiary findings established that Bechtel had failed

to prove that his protected activity was a contributing factor in his termination. The Second Circuit affirmed the ARB's ruling, finding that the ARB did not act arbitrarily or capriciously, or abuse its discretion, in affirming the ALJ's dismissal of the complaint.

In discussing the relevant burdens of proof under AIR21, which apply to SOX, the court concluded that, to prevail, the claimant must prove by a preponderance of the evidence that: (1) he or she engaged in protected activity; (2) the employer knew that the claimant engaged in the protected activity; (3) the claimant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. The court observed that this four-part framework applies both when deciding whether the allegations are legally sufficient to justify further investigation and when an ALJ determines whether the claimant has satisfied his or her evidentiary burden. At the evidentiary stage, however, the fourth element requires that the claimant **prove** by a preponderance of the evidence that the protected activity contributed to the adverse action, not just that the circumstances were sufficient to raise the **inference** that the protected activity was a contributing factor. Even if the claimant can establish each of these four elements, the employer still may avoid liability if it can prove, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the protected activity.

Bechtel is just the latest effort by the courts – as well as the ALJs and ARB – to explain how the AIR21 burdens of proof work. These decisions are not always easily harmonized. *Compare Ameristar Airways, Inc. v. ARB*, 650 F.3d 562, 566-67 (5th Cir. 2011) (evaluating AIR21 claim under *McDonnell Douglas* burden-shifting framework; once claimant adduces evidence of pretext, the burden-shifting framework "drops out," and trier of fact must determine whether protected activity contributed to adverse employment action and whether employer can prove it would have taken the same action regardless of protected activity) with *Araujo v. New Jersey Transit Rail Operations, Inc.*, 2013 U.S. App. LEXIS 3380 at *17 (3rd Cir. Feb. 19, 2013) (Federal Rail Safety Act ("FRSA") claim; holds that *McDonnell Douglas* does not apply and that "the AIR-21 burden-shifting framework that is applicable to FRSA cases is much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard").

One thing that is clear is that AIR21 claims are becoming more prevalent, and that they need to be handled carefully from the outset, especially given the possibility that an OSHA reasonable cause finding may include a requirement that the employee be returned to work pending further appeal. If you have any questions about AIR21 or this article, please contact the author, Doug Hall, dhall@fordharrison.com, who is a partner in our Washington, DC office and a member of FordHarrison's Airline Industry Practice Group, or the FordHarrison attorney with whom you usually work.

DOL Issues Final FMLA Crewmember Regulations

By: Sarah Pierce Wimberly

At long last the Department of Labor has issued final regulations implementing the Airline Flight Crew Technical Corrections Act (AFCTCA), which established new standards for airline flight crewmembers to qualify for FMLA leave. These regulations have been released over two years after President Obama signed this legislation into law and resolve much uncertainty in the industry over how these new standards impact established FMLA programs.

There are five significant components of these regulations: (1) explanation of the new crewmember eligibility standards; (2) establishment of a uniform FMLA leave bank for crewmembers; (3) implementation of a new manner of calculating crewmember FMLA leave usage; (4) retention of the "physical impossibility exception," which permits extending FMLA leave when crewmembers cannot immediately be returned to service; and (5) establishment of unique recordkeeping obligations.

(1) Flight Crew Eligibility Standards

The AFCTCA established special hours-of-service FMLA eligibility requirements for airline flight crewmembers: during the previous 12 months a crewmember must have worked or been paid for (1) 60 percent of his or her monthly guarantee AND (2) 504 hours (which must not include personal commute time or time spent on vacation, medical, or sick leave) in order to be eligible to take FMLA leave.

The AFCTCA provided that the "monthly guarantee" is the minimum number of hours that a carrier has agreed to schedule a lineholder and to pay a reserve.

The new regulations clarify that the proper measure of a crewmember's hours "worked" is duty hours, not flight or block hours. Although the regulations do not define "duty hours," DOL commentary suggests that they include pre- and post-flight duties as well as training time.

(2) Flight Crew Leave Bank

One of the regulations' most significant provisions is the establishment of a uniform bank of 72 days of FMLA leave for crewmembers to use over the carrier's 12-month FMLA period. The bank is based on the Federal Aviation Regulation (FAR) that mandates a maximum 6-day duty period for crewmembers. Multiplying this maximum 6-day duty period by the universal 12 weeks of FMLA leave yields the 72-day bank.

This is a significant deviation from traditional FMLA methodology, which bases FMLA banks on an average of actual time worked for those employees with fluctuating schedules. This provision may significantly expand FMLA

leave benefits for crewmembers and entitle them to more leave than a carrier's other employees.

The regulation also establishes a 156-day crewmember leave bank (within a single 12-month period) for military caregiver leave purposes. This calculation is based on the same FAR 6-day duty period, but represents the 26-workweek entitlement afforded for military caregiver leave.

(3) Flight Crew Utilization Calculations

Another significant provision of the regulations authorizes charging crewmembers in full-day increments for FMLA leave taken on an intermittent or reduced schedule basis. Previously carriers may have been required to charge crewmembers in increments of an hour, or less, depending on the carrier's broader leave practices.

This provision relieves what has traditionally been a huge burden in the administration of FMLA leave. It also should be easier for crewmembers to understand and manage.

(4) Retention of Physical Impossibility Exception

The final regulations leave intact (after threatening removal of) an exception to the general rule that employee leave banks may not be charged more time than the employee is absent from work for an FMLA-related reason. The "physical impossibility exception" permits employers to charge employees with more FMLA leave than they requested or needed where it is "physically impossible" to restore them to their original job or assign them to alternate work.

This exception is particularly applicable to crewmembers because of the unique nature of their jobs. Crewmembers usually cannot be rejoined with their original trip at the time they are ready to return from FMLA leave, and sometimes they also cannot be immediately placed on reserve or are not called to work another flight while on reserve. In these instances, the physical impossibility exception may authorize a carrier to charge the crewmember's leave bank for additional FMLA time until the crewmember can be returned to service.

DOL commentary warns, however, that it does not consider contractual or other scheduling restrictions to be lawful reasons to delay a crewmember's return to her trip or to equivalent duty. Thus, seniority restrictions that delay or prevent a crewmember's reinstatement to her original or equivalent duty do not justify the extension of her FMLA leave.

(5) Crewmember Recordkeeping Obligations

In addition to the FMLA's existing recordkeeping obligations, which continue to apply to crewmembers, an air carrier must also maintain (1) documentation of crewmembers' monthly guarantee (which in most instances means copies of applicable collective bargaining agreements), and (2) records of hours worked and hours paid for purposes of verifying a crewmember's duty hours.

Like the existing FMLA recordkeeping obligations, these records need only be maintained and made available to the DOL in the event of an inspection or investigation.

Effective Date and Resource Materials

These new regulations were effective on March 8, 2013.

The DOL republished the entirety of its FMLA regulations with this rulemaking. They can be found at http://www.dol.gov/whd/fmla/2013rule (Click on "Final Rule" under Additional Information and Guidance). The crewmember regulations are located in a new Subpart H ("Special Rules Applicable to Airline Flight Crew Employees") at Sections 825.800-803. The physical impossibility exception is located at Section 825.205(a)(2).

The DOL has published two Fact Sheets discussing the crewmember amendments. They can be found at http://www.dol.gov/whd/fmla/2013rule/fs-airline.htm and http://www.dol.gov/whd/regs/compliance/whdfs28j.htm. Also helpful are a list of Frequently Asked Questions about this rulemaking, found at http://www.dol.gov/whd/fmla/2013rule/militaryFR_FAQs.htm, and a Side-by-Side Comparison of Current/Final Regulations, found at http://www.dol.gov/whd/fmla/2013rule/comparison.htm.

If you have any questions about the new FMLA crewmember regulations or their application to existing FMLA programs, please contact Sarah Wimberly, a partner in our Atlanta office and a member of FordHarrison's Airline Industry practice group, at swimberly@fordharrison.com, or the FordHarrison attorney with whom you usually work.

OFCCP Issues New Directive for Analyzing Pay Discrimination Claims

By: Linda Cavanna-Wilk

The Office of Federal Contract Compliance Programs (OFCCP) announced that it is rescinding its "Voluntary Guidelines" and "Compensation Standards," which the agency adopted in 2006 to evaluate pay discrimination claims

against federal contractors. In their place, OFCCP has issued Policy Directive 307, which sets out the procedures OFCCP investigators will use to review the systems and practices by which government contractors pay their workers. The Directive is available on OFCCP's web site at: http://www.dol.gov/ofccp/regs/compliance/CompGuidance/index.htm.

OFCCP stated that the 2006 guidance documents imposed arbitrary restrictions that kept the agency from doing its job and "effectively protecting workers from illegal pay discrimination." OFCCP will now follow Title VII principles in investigating and addressing compensation discrimination, using the same standards courts use in evaluating pay discrimination claims brought by individual workers, classes of workers, or federal agencies.

The new Directive describes the procedures and protocols the OFCCP will follow in conducting compensation investigations. ***While the OFCCP states that one of its goals is to provide transparency, the Directive also outlines the fact that compensation analyses will be tailored in each compliance review on a "case by case" basis depending on the facts of that particular review or contractor. The Directive continues to outline all types of investigative techniques available to compliance officers (COs). While this increases the tools available to the OFCCP, it does little to provide guidance for what contractors can expect in a compliance evaluation.***

Highlights of the procedures and protocols outlined in the Directive include:

Preliminary Analysis and Assessment of Quantitative and Qualitative Factors

Generally, OFCCP will conduct some form of preliminary analysis at the desk-audit stage but the specific analysis will be influenced by whether the agency received summary data or individual data. OFCCP will use the preliminary analysis to determine whether to continue the compliance evaluation, but will not limit or define the scope of further review based solely on the results of the preliminary analysis.

The preliminary analysis usually will assess both quantitative and qualitative factors.

Quantitative factors may include:

- The size of the overall average pay difference based on race and gender;
- The size of the largest average pay difference within AAP job groups, or the contactor's existing salary band or pay grade system;
- The number of job groups or grades where average pay differences based on race or gender exceed a certain threshold; or
- The number of employees affected by race- or gender-based average pay differences within job groups or grades.

Qualitative factors may include:

- Compliance history, OFCCP or EEOC complaints;
- Anecdotal evidence;
- Potential violations involving other employment practices; or
- Data integrity issues.

Use of a Wide Range of Investigative and Analytical Tools

The Directive states that a variety of tools are available for investigating and analyzing compensation issues and that there is no single tool that must be used in every case. The particular analytical tool that will be used depends on the facts of the case. These tools may include:

- Statistical analysis, including pooled regression analysis for large pay analysis groups or non-pooled regression analysis for small pay analysis groups;
- Non-statistical analysis, including cohort analyses; and
- Anecdotal evidence collected as part of the investigation.

Examples of Employment Practices that May Lead to Compensation Disparities

The Directive provides examples of differences in employment practices that may lead to compensation disparities warranting review and investigation for potential discrimination. These include:

Difference in Salary or Hourly Rates of Pay – e.g., Hispanic customer service agents are paid less than white employees in the same or similar positions.

Differences in Job Assignment or Placement – e.g., women hired into entry-level grocery store positions are disproportionately assigned to the bakery department. Men are assigned to the meat department where pay and promotion opportunities are better.

Differences in Training or Advancement Opportunities – e.g., employees participate in a management training program on a recommendation by a manager. Certain managers are referring only white males resulting in disproportionate participation and subsequent promotions of white males.

Differences in Earning Opportunities – African-American sales workers are disproportionately assigned to territories with less potential.

Differences in Access to Increases and Add-ons – Female lawyers who get exactly the same base pay as male counterparts earn less on annual bonuses.

Effective Date:

The investigation procedures established in the Directive apply to all OFCCP compliance evaluations scheduled on or after February 28, 2013. Additionally, they apply to open reviews to the extent they do not conflict with OFCCP guidance or procedures existing prior to the effective date.

Employers' Bottom Line:

The rescission of the 2006 guidance documents and implementation of the new Directive will result in greater uncertainty in compliance reviews. By eliminating the safe harbor found in the Voluntary Guidelines and eliminating the analytical procedures set out in the Standards, the OFCCP has expanded the potential number of contractors who may be found to have engaged in compensation discrimination.

If you have questions regarding the new Directive and how your pay practices may be evaluated under the new policies and procedures, please contact the FordHarrison attorney with whom you usually work or Linda Cavanna-Wilk, lcavanna-wilk@fordharrison.com, who is a member of FordHarrison's Affirmative Action/Government Contracts practice group.

Recent NMB Results

Avantair – The International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) won an election to represent pilots. Out of 224 eligible employees, 172 votes were cast. There were 133 votes for SMART, 34 no votes, and 5 write-in votes. Certification February 15, 2013.

Bristow U.S. – OPEIU won an election to represent mechanics and related employees. Out of 258 eligible employees, 223 votes were cast. There were 141 votes for OPEIU and 82 no votes. Certification February 14, 2013.

American Airlines – CWA lost an election to represent passenger service employees. Out of 7792 eligible employees, 5954 votes were cast. There were 3052 no votes, 2891 votes for CWA, 6 votes for TWU, 4 void votes, 2 votes for IAM, 1 vote for UAW, 1 vote for IBT and 1 vote for Services Union. Dismissal January 16, 2013.

Allegiant Airlines – IBT won an election to represent flight dispatchers. Out of 21 eligible employees, 20 votes were cast. There were 15 votes for IBT and 5 no votes. Certification December 19, 2012.

Upcoming Events

"Save the Date: FordHarrison's 2013 Airline Labor and Employment Law Symposium"

FordHarrison's 2013 Airline Labor and Employment Law Symposium will be held September 26 and 27 at The Intercontinental Buckhead Atlanta. More information about the program agenda and registration will be posted on our website at http://www.fordharrison.com.