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LETTER
AIRLINE MANAGEMENT

Airline Management Letter

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Recent Election Results Will Likely Impact Airline Employers

Airline employers, like other business groups, should be prepared for possible regulatory and legislative changes as the balance of power in Washington shifts to the Democrats in the wake of the 2008 elections. Although the currently proposed changes to the National Labor Relations Act (NLRA) identified as the Employee Free Choice Act (EFCA) will not directly affect airlines and other employers covered by the Railway Labor Act (RLA), recent Congressional criticism of the National Mediation Board's election rules and release policies may portend future attempts to change these procedures as well.

Additionally, other pending legislation could significantly impact airline employers. Some of this legislation is highlighted below:

• **Airline Flight Crew Technical Corrections Act:** This Act would amend the Family and Medical Leave Act (FMLA) to make flight attendants and flight crewmembers FMLA eligible if, during the twelve-month period preceding the leave, they were paid for or worked: (1) at least 60% of their full-time schedule and (2) a minimum of 504 hours. This legislation passed the House and has been referred to the Senate Committee on Health, Education, Labor and Pensions.

• **Healthy Families Act:** This legislation would expand the FMLA to require employers with fifteen or more employees to provide seven days of paid sick leave to full-time employees. Employees would be considered full-time if they worked at least thirty hours per week. The Act states that it does not diminish the obligation of an employer to comply with any contract, collective bargaining agreement, or any employment benefit program or plan that provides greater paid sick leave rights to employees than the rights established under the Act. Additionally, the Act states that the rights established under it shall not be diminished by any contract, collective bargaining agreement, or any employment benefit program or plan. Versions of this legislation are pending in the House and the Senate.

• **Employment Nondiscrimination Act:** This bill proposes to prohibit discrimination in employment based on an applicant's or employee's sexual orientation. The House passed the ENDA on November 7, 2007, but the Senate did not take it up.

• **Civil Rights Act of 2008:** Among other items, this bill would eliminate the damages cap under Title VII of the Civil Rights Act. Versions of this legislation have been referred to committees in the House and Senate.

• **Family Leave Insurance Act:** This pending legislation would provide eight weeks of paid leave under the Family and Medical Leave Act to employees who work for companies that employ at least fifty workers. The legislation states that it does not diminish the obligation of an

employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater paid leave rights to employees than the rights it establishes. Similarly, the rights established by this legislation shall not be diminished by any collective bargaining agreement or employment benefit program or plan. Versions of this legislation have been referred to committees in the House and Senate.

• **Survivor's Empowerment and Economic Security Act:** This bill would require companies that employ fifteen or more persons to provide up to thirty days of unpaid leave for employees to handle issues arising out of domestic violence. The Act states that the rights it establishes shall not be diminished by any state or local law, collective bargaining agreement, or employment benefits program or plan. Similarly, the Act would not diminish greater benefits provided by Federal, state or local law, a collective bargaining agreement, or employment benefits program or plan. Versions of this legislation have been referred to committees in the House and Senate.

• **Ledbetter Fair Pay Act:** This legislation would amend Title VII, the Age Discrimination in Employment Act of 1967, the Americans With Disabilities Act of 1990, and the Rehabilitation Act of 1973 to provide that discrimination in compensation occurs every time a paycheck is issued, not just when a discriminatory compensation rate is established. The House passed the Act and it has been referred to committee in the Senate.

While it is not clear which, if any, of these legislative proposals ultimately will become law, it is important for employers to be aware of these pending measures, many of which were supported by President-elect Obama. We will continue to keep you updated on the status of this pending legislation and any other significant legislative developments.

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.

ADA Amendments Act Takes Effect January 1, 2009

On September 25, 2008 President Bush signed into law the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). The statute, which expands protection of persons with disabilities in the workplace, will become effective on January 1, 2009. ***Expansion of Who the Act Covers as Disabled*** The "Findings and Purposes" section of the ADAAA notes that the U.S. Supreme Court, and lower courts, have interpreted the definition of disability too restrictively, meaning that persons who should have been protected under the ADA have not been. Although not changing the ADA's technical definition of disability, Congress states that the term must be interpreted in favor of broad coverage to the maximum extent permitted under the terms of the law. ***Mitigating Measures No Longer Relevant*** Revising a major prior victory for employers, the Act overturns the Supreme Court's decision in *Sutton v. United Air Lines, Inc.* (1999), and related cases, which held that whether an individual is disabled should be determined with reference to mitigating devices, such as medication. The ADAAA 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. As a result of these changes, millions of persons not previously covered by the ADA will now qualify for its protections. ***"Regarded As" Claims Expanded*** In addition to protecting persons who actually have a disability, the ADA has always protected persons from discrimination because an employer "regarded" them as having a disability that they did not have. Under the original version of the ADA, persons who claimed discrimination because they were regarded as having a disability were required to prove that the perceived disability substantially limited a major life activity. According to the ADAAA, this

interpretation was too narrow. Now, employees only need to show that discrimination based on a perceived disability violates the law, regardless of whether the impairment actually limits, or is perceived to limit, a major life activity. Further, settling a disagreement among federal courts under the prior version of the ADA, the ADAAA clarifies that employers do not have a duty to reasonably accommodate individuals who claim "regarded as" discrimination. The ADAAA also specifically states that "regarded as" claims cannot be based on impairments that are transitory or minor, which the Act defines as impairments with an actual or expected duration of six months or less. ***"Substantially Limits" Expanded*** To be protected as an individual who has an actual disability, the law requires the individual to prove that he or she is substantially limited in a major life activity. 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." The Act directs the EEOC to revise its regulations on the definition of "substantially limits" to be consistent with the Act's goal of broadening coverage of individuals protected under the ADA. The Act also states that an impairment that limits one major life activity does not need to limit other major life activities in order to be a disability. Also, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. ***"Major Life Activities" Clarified*** The ADAAA contains an expanded, nonexclusive list of examples of major life activities. Among those now included are caring for oneself, performing manual tasks, learning, reading, bending, concentrating, and thinking. The Act also clarifies that "major life activities" include major bodily functions including, but not limited to, functions of the immune system, normal cell growth, digestion, bowel and bladder functions, as well as neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. ***No Reverse Discrimination*** The ADAAA makes clear that reverse discrimination claims may not be made under the ADA. Specifically, the Act states that individuals who do not have disabilities may not claim that they were subject to discrimination because of their lack of a disability.

Court Finds that Airline did not Discriminate Against Sleeping Instructor

The Fifth Circuit Court of Appeals recently affirmed the decision of a federal trial court granting summary judgment to Southwest Airlines on a former employee's claims that the airline violated the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA). *See Grubb v. Southwest Airlines* (5th Cir. October 10, 2008). In this case, the plaintiff, a flight instructor, claimed Southwest violated the ADA by firing him rather than accommodating his sleep apnea – which caused him to "nod off" at work – and the FMLA by firing him rather than granting his request for leave.

In his position as a flight instructor, Grubb was required to train pilots through flight simulator and class instruction and maintain a certain level of expertise by his own training and technique development in instructor meetings and activities. Beginning in 2002 and continuing until his termination in 2004, Grubb was counseled repeatedly for falling asleep during instructor meetings and while training pilots on simulators. Grubb told Southwest he was being treated for a sleep problem; however, he failed to submit a diagnosis and prognosis from a doctor as requested by Southwest. Instead, Grubb submitted only a conclusory note that "he was being seen for sleep apnea."

Although Southwest counseled Grubb about his sleeping issues several times and offered schedule adjustments as well as time off, his performance did not improve and, ultimately, he was discharged.

Assuming, without deciding, that Grubb's sleep apnea qualified as a disability under the ADA, the Fifth Circuit affirmed summary judgment in favor of Southwest, finding that Grubb was unable to perform his job in a manner that Southwest could reasonably accommodate. The court noted, "courts have repeatedly approved of ADA-challenged discharges for falling asleep at work, particularly in safety-sensitive positions." In this case, the court found it "difficult to fathom how Grubb could instruct future pilots with confidence, or receive training on how to do so, if he was repeatedly 'nodding off.'"

Additionally, the court held that Southwest provided any accommodation it may have owed Grubb. The airline granted all of Grubb's requested accommodations other than a set shift assignment, which Southwest established would impose inordinate burdens on other Southwest employees and require the airline to fundamentally alter its schedules.

The court also affirmed summary judgment on Grubb's FMLA claims because he could not show that leave was the reason he was discharged. The court found that Southwest articulated a legitimate, nondiscriminatory reason for Grubb's discharge – his performance. Southwest's failure to follow its internal procedures in discharging him and speculation based on the timing of his FMLA application and his discharge were not sufficient to create a genuine issue of fact as to discriminatory motives.

The court also held that Grubb's termination did not violate the FMLA by denying him leave to which he would have been entitled. An employee who requests or takes protected leave under the FMLA is not entitled to any greater rights or benefits than he would be entitled to had he not requested or taken leave. Thus, under the FMLA, an employee "can be fired for poor performance even if that performance is due to the same root cause as the need for leave." Accordingly, since Southwest's termination of Grubb was otherwise appropriate, "any right to leave would have been extinguished by SWA's exercise of that prerogative."

NMB Rescinds Proposed Changes to Representation Manual

On September 11, 2008 the NMB issued a notice rescinding its proposed revisions to its Representation Manual. As noted in the August 2008 issue of the *Airline Management Letter*, the NMB proposed revisions to certain sections of the Representation Manual in an effort to clarify existing policy. However, in its September Notice, the NMB stated that it received a number of comments from a variety of representatives of labor, management, Congress and other organizations, which indicated the proposals "engendered more ambiguity than clarification." Accordingly, the NMB will not implement the proposed revisions at this time. The NMB stated that it will continue to review and study these proposals and the comments received and may issue new proposals for comment at some point in the future. In the meantime, the NMB will continue to apply its long-standing precedent and policies, including not allowing the use of authorization cards for certification where all participants have not agreed.

Court Dismisses Harassment Claim Alleging Offensive Behavior not Based on Sex

Reiterating the principle that Title VII is not designed to remedy offensive behavior that is not discriminatory, a federal trial court in South Dakota recently granted summary judgment in favor of an airline employer on a sexual harassment complaint filed by the Equal Employment Opportunity Commission (EEOC) on behalf of a female employee. *See EEOC v. Air Wisconsin Airlines Corp.* (Nov. 6, 2008). In this case, the plaintiff complained that her co-workers used profanity toward her, made disparaging comments and engaged in other inappropriate, antagonistic behavior. However, few of the alleged comments were gender based and the plaintiff admitted that she often used profanity in the workplace. Further, the plaintiff admitted that she was not offended by the comments that were sexually oriented. Other employees complained of the plaintiff's behavior as well as that of her co-workers, characterizing the workplace environment as tense and similar to a "junior high locker room because of all the gutter talk."

The court found that the conduct in the plaintiff's workplace was "intimidating, ridiculing, and insulting. The conduct, however, was not discriminatory because it was not directed only at females." The court held that the EEOC failed to demonstrate a prima facie case of sexual harassment because the alleged misconduct was not based on the plaintiff's sex nor did it target females. According to the court, "the offending behavior was the result of antagonism among and between employees. Title VII does not address the type of behavior involved in this litigation."

Recent Election Results: November

OpenSkies
IBT withdrew its application to represent Flight Attendants. Dismissal October 23, 2008.

Delta Airlines, Inc.
The NMB determined that AFA failed to state a case of election interference in the representation election involving Flight Attendants. Interference claim dismissed September 30, 2008.

GoJet Airlines
IBT lost an election to represent Flight Attendants. Out of 129 eligible employees, there were 36 votes for IBT, 3 void votes and 3 votes for other. Dismissal September 4, 2008.

NetJets Aviation
NetJets Association of Shared Aircraft Pilots (NJASAP) won a privately-conducted election to determine who would represent Pilots. Out of 2264 eligible employee, there were 2212 votes for NJASAP and 52 votes for IBT. Certification August 26, 2008.

Northern Air Cargo
IBT won an election to represent Cockpit Crewmembers. Out of 33 eligible employees, there were 20 votes for IBT. Certification August 14, 2008.