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EMPLOYMENT LAW LETTER

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Employee Benefits

The EEOC recently issued a major ruling regarding retiree health benefits and Medicare, and all the presidential candidates have a plan for resolving the country's health care problems. If employee benefits are at the top of your worry list, go to www.HRhero.com/news, where you can find the following helpful tools:

- Hot Topics — Employee Benefits
- HR Executive Special Report — How to Evaluate & Manage Employee Health Plans
- HRhero.com Nationwide Survey — Benefits 2008

TAXES

IRS rules FedEx Ground's drivers are employees, not independent contractors

FedEx characterizes a recent IRS ruling against the company as "tentative" and says it may have to pay the government \$319 million plus penalties and interest for failing to classify pickup and delivery owner/operators as "employees" in 2002. The IRS is also reportedly auditing FedEx for similar violations for the tax years 2004 through 2006. Let's take a closer look at what's going on here.

American dream?

The ground division of FedEx was formed in 1998 when the package delivery company purchased Roadway Package Service. FedEx Ground has used an independent contractor model for its owner/operator drivers since its inception (with no union representation) in contrast to the employee status of drivers at UPS (who are represented by the Teamsters). FedEx Ground claims the independent contractor model allows owner/operators, who are paid according to the number of packages they deliver, to achieve the "American dream" because they can chart their own course to financial freedom. Union officials argue that FedEx's independent contractor model is used as a way to avoid union organizing and paying taxes, social security, and overhead expenses.

In recent years, however, FedEx Ground owner/operators have sued the company in several state and federal class actions, including a pending action in federal court in Tampa. In fact,

owner/operators scored a victory in August 2007 when a California state appeals court upheld a state superior judge's ruling that FedEx must reclassify workers as employees and awarded the nearly 7,000 owner/operators in the class \$5.3 million for reimbursement of expenses. The IRS has since gotten involved, seeking to recoup millions of dollars in taxes resulting from the alleged misclassification of "employees" as "independent contractors."

FedEx recently submitted its latest Form 10-Q filing with the Securities and Exchange Commission. That document included the following statement:

On December 20, 2007, the [IRS] informed us that its audit team had concluded an audit for the 2002 calendar year regarding the classification of owner-operators at FedEx Ground. The IRS has tentatively concluded, subject to further discussion with us, that FedEx Ground's pick-up-and-delivery owner-operators should be reclassified as employees for federal employment tax purposes. The IRS has indicated that it anticipates assessing taxes and penalties of \$319 million plus interest for 2002. Similar issues are under audit by the IRS for calendar years 2004 through 2006. We believe that we have strong defenses to the IRS's tentative assessment and will

vigorously defend our position, as we continue to believe that FedEx Ground's owner-operators are independent contractors. Given the preliminary status of this matter, we cannot yet determine the amount or a reasonable range of potential loss. However, we do not believe that any loss is probable.

FedEx Ground and the IRS continue to battle over this issue, and the owner/operator lawsuits have been consolidated into a large multidistrict lawsuit. We'll keep you posted on any new developments on both fronts. *Carlson v. FedEx Ground*, USDC, M.D. Fla, Case No.

LEGISLATIVE UPDATE

U.S. House passes ENDA

The Employment Non-Discrimination Act (ENDA), the long-belabored bill to ban employment discrimination for gays, lesbians, and bisexuals, has jumped one hurdle in Congress and now moves on to another. The debate between First Amendment advocates for religious freedom and activists for gay, lesbian, and bisexual rights continues, however.

What the bill says

House Bill 2015 passed the U.S House of Representatives by a 235-184 vote on November 7, 2007. The bill was read a second time on November 13 and has been placed on the Senate Legislative Calendar under General Orders Calendar No. 479. Senator Edward Kennedy (D-Massachusetts) has promised to move the Senate's version of the bill forward as quickly as possible.

ENDA would prohibit employers with 15 or more employees from discriminating against anyone on the basis of sexual orientation. The bill also prohibits employment agencies, labor organizations, and joint labor-management committees from discriminating based on a person's sexual orientation. The proposal allows only disparate treatment claims and prohibits retaliation against employees for making claims of discrimination.

The bill exempts religious organizations and the armed forces from coverage. It was modified from its original version to delete language prohibiting discrimination against transgendered individuals.

Between the legislative lines

Remember, the last time this bill reached the Senate in 1996, it failed by a 50-49 vote. Because President George W. Bush has promised to veto any such legislation, the bill's pace may actually slow down as its advocates hope for a different President in the White House who would be more likely to sign it. We'll keep you apprised of any further activity on this highly contested legislation. ♣

3:05-MD-527-RM, filed January 9, 2006; *Estrada v. FedEx Ground*, Second Appellate District, State of Cal., Case No. B189031, August 13, 2007.

Take-away

This issue is far from settled. Although Teamsters officials are claiming victory as they attempt to organize the delivery drivers, many parts of the cases remain unresolved. The courts are examining the amount of control FedEx exerted over the owner/operators. Although FedEx Ground drivers own their own trucks, the company imposes certain requirements on them, including the display of the FedEx logo and colors on the trucks. Because the federal cases have been consolidated into a multidistrict action, we should see some uniformity in the resolution of the issues. In the meantime, FedEx Ground will keep on truckin'. ♣

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