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NLRB CHANGES LAW ON EMPLOYER VIDEO CAMPAIGNS

Until March of this year, the National Labor Relations Board ("NLRB" or "Board"), for all practical purposes, prohibited employers from using employees' pictures and images in union campaign videos, particularly the popular 25th-hour video presentation toward the end of a campaign. For companies facing strong union challenges, this was devastating and unfair. Multimedia presentations like videos present a stronger message than do more traditional print media because of the "personal" touch captured in a video. Video clips give employees a friendly, noncombative visual message during an otherwise disruptive and tumultuous time.

Fortunately, the Board has changed its position. In a ruling issued on March 30, 2001, the NLRB clarified the circumstances in which an employer may lawfully include visual and video images of its employees during union campaign presentations. *See Allegheny Ludlum Corp.*, 333 NLRB No. 109 (2001).

The Board set forth in specific detail a series of guidelines regarding permissible video "clip." The Board held that an employer may lawfully solicit employees to appear in campaign videos if each of the following requirements is satisfied:

- The solicitation is in the form of a general announcement that discloses the purpose of the filming is to use the employee's picture in a campaign video. The solicitation also must include assurances that participation is voluntary, that nonparticipation will not result in reprisals, and that participation will not result in rewards or benefits.
- Employees are not pressured in the presence of a supervisor into making a decision about whether to participate in the video.
- The employer has not created a coercive atmosphere by engaging in severe or pervasive unfair labor practices.
- The employer does not exceed the legitimate purpose of soliciting consent by seeking information concerning union matters or otherwise interfering with statutory rights of employees.

Employers are, of course, encouraged to ask employees who volunteer to appear in a campaign videotape to sign an appropriate consent form memorializing their willingness to be filmed.

The Board also provided guidance regarding a more benign use of employee images in video productions. Specifically, the Board clarified whether an employer who has not solicited employees to participate in a campaign video nevertheless may use images of employees without violating the law. As a practical matter, this guidance applies to a company's general promotional materials or other multimedia productions that do not set forth an employee's ideas or opinions on a particular topic. Consistent with the foregoing principles, the Board held that employers may lawfully include the images of employees

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in a campaign video (including "stock footage" taken prior to the campaign for other purposes) under the following circumstances:

- The employees were not affirmatively misled about the use of their images at the time of the filming.
- The video contains a permanent disclaimer stating that the video is not intended to reflect the views of the employees appearing in it.
- Nothing in the video contradicts the disclaimer nor conveys the message that employees shown in the video either support or oppose union representation.

- Thomas P. Hubert and Howard T. Boyd, III

NEW REGULATIONS ON MINIMUM REQUIRED DISTRIBUTIONS: WHAT DO THEY MEAN FOR YOUR QUALIFIED PLAN?

Under the Internal Revenue Code, holders of IRAs have to start withdrawing "minimum required distributions" ("MRDs") when they reach age 70½. Similar rules apply to qualified plans, although benefits from plans usually don't have to be paid until the participant terminates employment. If a participant in a qualified plan receives a payment that includes an MRD, he cannot roll over the MRD to an IRA; he must include it in his taxable income for the year.

The old rules for determining a participant's MRDs were very complicated. This year the IRS issued new proposed regulations that greatly simplify the determination of a participant's MRDs and, in almost all cases, *reduce* the amount of an MRD.

If your company's qualified plan allows participants to receive installments in the smallest annual amounts permitted under the Internal Revenue Code, you need to decide whether to apply the new rules or the old rules this year. In the absence of a plan amendment, the minimum amounts to be distributed from the plan this year will be determined under the old rules.

Even if the plan is not amended to incorporate the new rules, the IRS has stated that participants can apply the new rules. What does that mean? Here's an example: Assume the MRD under the old rules is $15,000 and the MRD under the new rules is $10,000. The plan, following the old rules, distributes $15,000. The participant can roll over (within 60 days of receipt of the benefit) $5,000, so he only has to take into taxable income the $10,000 he is required to receive under the new rules.

Plan administrators should consider how they will administer the qualified plan and

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whether to incorporate the new rules into the plan document before next year. Even if the new rules are not incorporated in the plan document at this time, plan administrators may want to advise participants that a portion of the MRD, determined under the old rules, will be eligible for rollover.

- Timothy P. Brechtel

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact::

H. Mark Adams
Jones Walker
201 St. Charles Ave., 47th Fl.
New Orleans, LA 70170-5100
ph. 504.582.8258
fax 504.582.8015
email: madams@joneswalker.com

Sidney F. Lewis, V
Jones Walker
201 St. Charles Ave., 47th Fl.
New Orleans, LA 70170-5100
ph. 504.582.8352
fax 504.589.8352
email: slewis@joneswalker.com

Thomas P. Hubert
Jones Walker
201 St. Charles Ave., 47th Fl.
New Orleans, LA 70170-5100
ph. 504.582.8384
fax 504.582.8015
email: thubert@joneswalker.com

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