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## Is Your Business Ready for a Flu Pandemic?

Ford & Harrison, LLP

In light of the extensive news coverage given to the possibility of an Avian flu pandemic, many employers are concerned about their operations as well as potential legal obligations should such a pandemic occur. Employers have a responsibility to help ensure the safety of the workplace should a pandemic occur. Having operational as well as communication plans may also prepare the organization in the event of other emergencies.

Because a pandemic will impact different types of businesses differently, and because different types and sizes of businesses will have different needs, there is no single solution for every business.

### What is Avian Flu? What is Pandemic Flu?

According to the Department of Health and Human Services (HHS), Avian flu is caused by influenza A viruses that occur naturally among wild birds. The H5N1 variant is deadly to domestic fowl and can be transmitted from birds to humans. There is no human immunity and no vaccine is available. It is feared that the virus can eventually mutate to transmit from human to human.

HHS defines pandemic flu as virulent human flu that causes a global outbreak, or pandemic, of serious illness. Because there is little natural immunity, the disease can spread easily from person to person. Currently, there is no pandemic flu. The H5N1 virus has raised concerns among health care professionals regarding a potential human pandemic because it is especially virulent, has been transmitted to humans and, like other influenza viruses, continues to evolve.

A pandemic flu would likely affect millions more people than the common or seasonal flu and all age groups could be at risk for infection, not just "at risk" groups. For example, adults under age 35 (a key segment of the U.S. workforce) were disproportionately affected during the 1918 pandemic. To emphasize how severe a potential pandemic could be, HHS has prepared a chart comparing the impact of the annual flu to a potential pandemic flu, which is available at <http://www.pandemicfluandyou.org/clientuploads/TFAHBizFluBroChamberOL.PDF>.

### Steps Your Business Can Take to Prepare for a Pandemic

#### 1. Form a pandemic team/disaster preparedness team.

Companies may want to form teams to develop plans and assign responsibility for dealing with a possible pandemic. Others may use teams already in place, such as emergency response teams or disaster preparedness teams. Consider who, from operations, human resources, and elsewhere should participate. Does your organization have access to an occupational medicine department, or, for organizations without the infrastructure for an internal medical department, a reliable occupational medicine consultant? Employers who currently have disaster preparedness and emergency response plans in place should start with these plans and evaluate whether they address all of the potential issues that may arise, or whether they need to be amended. The organization should try to learn how other organiza-

continued on page 5

## Computer Software has New Property Tax Classification in Tennessee

Carl E. Hartley and Carolyn Schott ★ Baker Donelson Bearman & Caldwell & Berkowitz, P.C.

Effective June 2, 2006, the Tennessee property tax statutes were amended to add "operational computer software" to the category of "tangible personal property" for property tax purposes. The taxability of computer software for property tax purposes has been an issue of increasing debate in many states. The amendment to Tennessee law clarifies for commercial and industrial taxpayers the extent to which software is subject to the property tax in this state.

This statutory amendment alleviates many concerns that were raised by a rule change proposed by the State Board of Equalization late last year. The rule would have included all computer

software in the definition of tangible personal property. Almost every business has a substantial investment in computer software in the form of databases, customer relationship management software, enterprise resource planning software, document management software, and other forms of intra-office networking, often referred to as application software. The Tennessee Chamber of Commerce & Industry led an initiative to educate lawmakers about the effect that taxation of all computer software could have on Tennessee's business climate. Ultimately, the Chamber was instrumental in achieving a

continued on page 4



## Sometimes, We Just Need To Fly High

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The weather is hot, the days are long and we all are just a little physically lazy. Perhaps the most energy we can muster is for some mental rumination.

I heard Peter Hart, one of the leading analysts of public opinion in the United States, speak last month. He was a fascinating speaker and his message was thought provoking.

In today's fast-paced world, we neither have the time nor take the time to fly at the 50,000-foot level and wonder about the "whys" instead of the "hows". Peter Hart's presentation made me do just that.

He was discussing his insights on trends that are shaping our society and the impact they will have on everything from the 2006 elections to our future economy. Definitely, they are heavy topics for a hot summer day.

Beginning with the premise that most things we need to know are in plain view if we will only step back to see the big picture, he discussed the five areas he sees as drastically changing or reshaping today's society. See if you are surprised by any of them: Immigration; Personalization; Innovation; Sophistication; Globalization.

**Immigration**, Hart said, is the most critical issue of our time, and "if we don't get it right, we won't retain our No. 1 position in the world." His most recent poll shows that 45 percent of all adults believe immigration helps the U.S., and an equal number believes it does not. On the other hand, when Hispanic adults are asked, the margin is 62 - 40 percent favorable. All of this must be viewed with the realization that, in 2040, one-half of all Americans will be non-Caucasian.

Why is this significant? Mostly it is because the dynamics are different today. Immigrants used to assimilate themselves by subtraction - by losing many of the cultural traits and identities that set them apart. Today, there is assimilation by addition. Native heritages are celebrated through dress, names, customs, all becoming a part of the American culture. Focus groups, according to Hart, show that these new Americans have a strong picture of who the American business executive is and an equally strong perception that the American executive does not know them. They are probably right.

**Personalization** is, quite simply, the fact that most decisions today are driven by personal concerns. The top Washington issues - the war in Iraq, gas and energy prices, health care, immigration and jobs - are all personal issues to most

people. Think about health care. While businesses talk about the costs of health care, there are 4.5 million Americans with Alzheimer's, 9.8 million cancer survivors, 13.5 million on statin drugs and 21 million diabetics. Since 1954, there have been 500,000 organ transplants and the waiting list today is almost 90,000 people. When Americans talk about health care, they are talking about themselves.

Personalization is resulting in product refinement unlike anything we have seen in history. Remember when there was one Tylenol product? Today, there are 50. M&M's started with one color and today offer color choices with personalized messages.

Communications has become two-way with e-mail leading the way. Americans expect message and product to relate to them personally. The internet, blogs and e-mails all are having a greater impact than the traditional press. We worry about using Teflon because one part in a billion *might* flake off because an Internet e-mail chain tells us so. We are influenced by blogs that discuss political candidates. Even those who have never read a blog are impacted because many mainstream news stories are birthed in a blog.

It means, quite simply, that both risk and reward are being redefined daily. The challenge is not in just keeping up ..... it is in knowing where it is all going.

**Innovation** follows directly with personalization. Whether it is wheels on luggage (which revolutionized and revitalized the luggage industry) or specialty fitness centers or ring tones for the cell phone, we as Americans expect products and services to match our personal needs. And, we are willing to pay for it.

Think about those products we willingly pay for today that we once would have refused to pay for. We pay to watch television, we pay to select ring tones, we pay fees to get our own money from ATMs, we pay to buy tickets online, we pay to get telephone numbers from information - all things that once were free. On the other hand, we want free checks, free information from Internet libraries and Google, free access to on-line newspapers and free long distance - all things we willingly paid for not so long ago.

What it tells me is that success will come to those who determine what need is coming and innovate to provide it.

**Sophistication** is a further refinement of  
**continued on page 7**



## Workers' Compensation Reform Benefiting Tennessee

James Neeley ★ Tennessee Labor and Workforce Development

In 2004 the Tennessee Legislature passed the Workers' Compensation Reform Act with the leadership of Governor Phil Bredesen, the teamwork of several state departments including the Tennessee Department of Labor and Workforce Development and the business community, with the leadership of the Tennessee Chamber of Commerce & Industry. It's been my job over the past year to implement the program, meeting all mandates and promulgating rules in a timely fashion. I am proud to say the process has gone very well with all Tennesseans, both workers and employers benefiting from the new legislation.

The biggest change regarding the Workers' Compensation system is in the dispute of a Workers' Compensation claim. It became mandatory that all parties go through the Benefit Review program before filing a lawsuit. This prohibition applies to all injuries sustained on or after January 1, 2005. In the first 11 months of 2005, the number of temporary disability and medical treatment disputes, which the Tennessee Department of Labor resolved, rose 61 percent versus same period in 2004. That tells us the State of Tennessee is instrumental in working out the often-contentious question of whether a workers' injury is attributable to work on the job and how much that worker should be compensated.

In those cases in which the employee and

employer came to mediation to negotiate a final settlement instead of going to court, the state has seen an increase in participation of 23 percent. In more than 60 percent of these cases, an agreed settlement was reached.

We have accomplished this by hiring more Workers' Compensation Specialists and placing them in offices across the state, with new satellite offices in Clarksville, Cookeville, Dyersburg and Murfreesboro. In other words, we are bringing our services closer to all Tennesseans and therefore eliminating lengthy travel time to major cities.

Another phase of the Workers' Compensation Reform Act is the focus on assuring timely payment of temporary disability benefits, which has produced more compliance. In looking at our penalty statistics from July 2004 to June 2005, the state imposed fines against companies and insurers in 51 cases totaling more than \$36,000. From July 2005 through October 2005, the state levied 24 fines totaling more than \$18,000. That tells us that employers and insurance companies are getting the message that failure to make appropriate payments to injured workers in a timely fashion will hit them in the pocketbook. The penalties for untimely payment are paid to the injured workers, so they are compensated for the delay in receiving the benefits to which they are entitled.

The final phase of the Reform Act was the implementation of the medical fee schedule which became effective for services provided on and after July 1, 2005. Although it is too early to state the impact of the medical fee schedule on the workers' compensation system, it is believed to be a fair medical fee schedule which provides access to quality medical care to injured workers.

The implementation of the reform act was developed with a business plan and completed within one year – quite an accomplishment for any business in the private sector or state agency. I am honored to work with all the individuals in my department, specifically our Workers' Compensation Division, who gave 100 percent of their support and have made this process extremely efficient. I also want to thank all the individuals from hospitals, insurance companies and many different medical professions who helped us develop a universally fair medical fee schedule. I truly believe the Workers' Compensation Reform will indeed benefit all Tennesseans, and businesses who want to come to our great state.

James Neeley is the the  
Commissioner of Labor and  
Workforce Development, appointed by  
Governor Bredesen in 2002.

## Employers Need to Be Aware of New Standards for Retaliation Claims

Waller, Lansden Dortch & Davis

Year after year, retaliation claims are among the most difficult to defend. They just became more difficult.

The United States Supreme Court's recent decision in *Burlington Northern & Santa Fe Railway Co. v. White* has significant implications for employers in how they deal with employee complaints of unlawful discrimination or harassment.

In *Burlington*, the plaintiff initially complained internally of sex discrimination and harassment by her immediate supervisor. Her employer did the right thing in response: The company launched an investigation and ultimately suspended the supervisor and required him to attend sex harassment training.

The employer's problems began with what happened next. It then assigned the plaintiff less desirable tasks within her job classification. She filed an EEOC charge of discrimination in protest, now claiming sex discrimination and retaliation. The following month, she filed a second EEOC charge alleging that management had placed her under surveillance and was monitoring her daily activities. Not long thereafter, the

plaintiff became involved in a disagreement with another supervisor and was suspended without pay. Her suspension was eventually overturned through an internal grievance procedure, and she was paid in full for the 37 days she had been off work. Not surprisingly, she filed a third EEOC charge, alleging that her suspension was retaliatory.

The Supreme Court agreed to hear the *Burlington* case to resolve a key question on which courts across the country have disagreed: What type of adverse action by an employer or employer's representative is significant enough to create a potential retaliation claim? The Supreme Court's answer was broader than many courts previously had concluded. Now, any action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination" can be challenged in a retaliation lawsuit. This definition includes a wider range of actions than the standard for discrimination claims, which generally only reaches actions that affect the more tangible terms of an individual's employment, such as pay, demotion, failure to promote, suspension, discharge, and the like.



## Computer Software has New Property Tax Classification

continued from page 1

consensus among the various business interests and assessing bodies to facilitate the passage of the statutory amendment.

Unlike the State Board of Equalization's proposed rule, the new statutory definition of "operational computer software" will not encompass these application software programs. Rather, the amendment defines the taxable "operational computer software" as "embedded software so integral to the operation of a computer that such computer could not perform any valuable or useful function without such software." Other computer software, whether prepackaged or custom-designed, remains intangible personal property under the amendment and is not subject to the property tax. Inventory databases and document management software, for example, are integral components to a business' operation, but they are probably not integral components of the computer itself, such that, without them, the computer "could not perform any valuable or useful function."

Application software, or non-operational software, is not free from the Tennessee property tax completely, however. To the extent that such software is included in the sale price or lease amount of a computer and is not a separately stated cost, the non-operational software will be taxable. Under the new amendment, reported computer software – whether "operational" or non-operational not separately stated in the sale or lease price – will be classified with computers and subject to a three-year depreciation schedule.

While a three-year depreciation life may be appropriate for computers and their accompanying operational computer software, the same may not be true for application or non-operational software. Such software evolves so quickly that it may become obsolete even while it is relatively new, and even three years (the shortest period in the statutory depreciation schedules) may be too long. Nevertheless, the amended statute does allow the taxpayer to seek a value different from a standard depreciated cost where such value more closely approximates the fair market value of the product.

In summary, the new statutory amendment to the Tennessee property tax statutes delineates which computer software constitutes taxable per-

sonal property and should minimize somewhat the severity of the consequences for businesses operating in Tennessee. Still, the new law may raise concerns for taxpayers with respect to depreciation value, especially for non-operational software that cannot be separately stated. These issues may become better defined as they arise within the county appeal process and as the Board of Equalization responds to the legislation.

Carl Hartley and Carolyn Shott are shareholders with the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Mr. Hartley chairs the firm's Tax Department and concentrates his practice in federal as well as state and local taxation law, real estate law and corporate law. He served as chairman for more than 15 years of the Tax Committee of the Tennessee Chamber of Commerce & Industry. He can be reached at [CHartley@BakerDonelson.com](mailto:CHartley@BakerDonelson.com).

Ms. Shott concentrates her practice in federal as well as state and local taxation law. Her experience includes corporate tax planning, individual tax and estate planning, real property transactions, business entities, probate litigation and property tax litigation. She can be reached at [CSchott@BakerDonelson.com](mailto:CSchott@BakerDonelson.com). Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, is a 440-attorney firm with offices throughout the south central United States.



## Commissioners Headline Chamber Tax Seminar

Have you marked your calendar to attend the **2006 Business Tax Update Seminar** on October 5, 2006, at the Millennium Maxwell House Hotel?

This annual seminar brings together the top Tennessee revenue officials to share their knowledge and give you straight and correct answers to your many questions. It will provide you with updates on recent changes in the tax code that will not only give you with the most up to-date information, it will explore trends – and the changes they might bring – in 2007.

The Tennessee tax code was amended in 2006 and you need to know about those changes. REITs were changed, and computer application software was clarified as intangible personal property, not to be taxed as real property. This seminar will provide you with the information you need to

properly administer your business taxes, to avoid paying more taxes than you are lawfully obligated to pay and to plan your company's future.

Revenue Commissioner Loren Chumley will discuss successes in using existing incentives to create new jobs or provide new industry locations. Finance and Administration Commissioner Dave Goetz will discuss the "Wealth and Wellness of Tennessee" as revenues from our tax dollars have continued to exceed projections and the state has implemented the replacement program for TennCare. The afternoon session will deal with a big picture view of business taxes in Tennessee including what we might expect in the future from the Department of Revenue and the State Board of Equalization. Some of these may spark new laws and regulations.

Continuing Legal Education along with Accounting Credits will be approved for this Seminar. The program begins at 8:15 and ends at 4:30 p.m. Central Time. Registration information is available on our Website [www.tnchamber.org](http://www.tnchamber.org) under Calendar.



# Is Your Business Ready for a Flu Pandemic?

continued from page 1

tions, worldwide, have addressed this issue as well as other health crises.

The team should then establish an emergency communications plan that identifies key contacts (with back-ups), a chain of communications (including suppliers and customers), and processes for tracking and communicating business and employee status. Consider how employee communications will be maintained in the event of a pandemic (for example, a password protected web page, e-mail, telephone). Develop a protocol to warn employees during emergencies. Communicate with clients and partners either to warn them of interruptions in service/supply or reassure them of your ability to deliver despite a disaster.

The team should also schedule routine plan tests to allow your employees to become comfortable with the procedures and allow the team to assess vulnerabilities. Include all departments and use test results to make improvements to your plan. Look for weaknesses in your facility and particularly in the MIS department. Does your computer system have the capacity to handle a large number of offsite logins at one time? If not, consider scheduling employees to login and work only during their designated time frame to avoid overloading the system.

## 2. Identify whether your company has an existing business continuity plan applicable to a pandemic.

If your company does not have a business continuity plan, you may want to consider creating one. If your company presently has a plan, consider whether the plan addresses long-term absenteeism rates. Can the pivotal business functions be maintained with minimal staff? What portion(s) of your business functions can be performed remotely?

## 3. Identify the company's essential functions and who performs them.

- Determine what is critical to ensure that the business and/or particular facility can continue to operate. What are your essential technology needs? For example, what are the systems or system applications necessary to perform critical business functions? Who are your essential employees? What are your essential raw materials? Identify your critical partners or suppliers, knowing that they will likely be affected. Will you be disproportionately affected by partner relationships with organizations in locations at higher risk?
- Develop backup plans to ensure the availability of employees and material essential to the continuation of operations. Cross-train your employees on essential jobs. Identify

alternative sources of raw materials or supplies. Develop professional relationships with more than one company to use in case a primary contractor or supplier cannot meet your needs.

## 4. Identify the essential government functions that affect your business.

How can you ensure that the essential functions of your business continue to operate given limited supplies of: power, water, sanitation, transportation, and a sufficient food supply?

## 5. Identify the external activities that are critical to maintaining your business functions.

Does your business require travel to other areas affected by a pandemic? Have you developed contingencies to restrict travel to these areas? Does your business maintain inventory reserves? Does your business run on a "just in time" inventory? If possible, stockpile essential raw materials or supplies.

## 6. Identify your company policies and how they would be affected by a pandemic.

- What is your company's policy on sick leave? To what extent are employees able to carry over or share/bank accrued sick leave? What are the implications of such a policy under wage payment and benefits laws?
- What is your company policy on medical leave? Have you considered developing leave policies to be used in a pandemic situation that encourage employees to remain at home if they are sick or are caring for sick dependants? Such policies should be clearly worded to apply only in situations that implicate the use of your emergency management plan, to ensure they do not affect your day-to-day policies. Limit the contours of your plan to prevent it from working against you.
- Do you have a telecommuting policy or at least an emergency telecommuting policy? Have you addressed any possible security concerns (through technology and through agreements creating binding legal obligations) if more employees are forced to work remotely?
- Do your company policies address issues that may arise in a possible pandemic, such as: quarantine policies, social distancing policies, and increased sanitation policies to ensure a healthy work place?

## 7. Identify what health information is presented and given to employees.

Are employees sufficiently educated on basic sanitation at work? Do your employees have access to hand sanitizers and/or N95 Respirator masks? (N95 Respirator masks are the only approved masks to prevent the spread of the flu virus.) Educate your employees on the signs of

infection. Develop a relationship with a medical professional who can provide information now at the planning and educating stage and later when questions arise during an emergency. This will allow your management team to make decisions based on objective medical standards rather than on subjective fears.

## 8. Develop plans to allow employees to work from home or remotely.

Does your company have the software or other equipment to enable employees to work from home? Does your company have computers for employee use at home? Do employees have home computers that they can use for work? Have you explained your employees' obligations and your expectations should employees need to work at home? Do you have policies in place to continue to ensure quality and productivity? Is it possible to expand online and self-service business options for your company?

## 9. Discuss pandemic policies with insurance carriers.

How are your insurance providers preparing for a possible pandemic? How will a pandemic affect you: health insurance, disability insurance, or life insurance coverage? Are your insurance providers communicating accessible health information on flu and other health issues on their websites or by other means?

## 10. Ensure effective employer/employee communication regarding a pandemic flu.

Communication with employees is essential, especially during the tumultuous atmosphere a pandemic will likely create. Before a pandemic arises, employers should consider their internal and external communications plans. For example, is it feasible to establish a hot line for employees to use in the event of a pandemic?

Discuss the threat and implications of a pandemic flu with your employees and be open about the steps your company is taking to prepare for a pandemic. Preparing ahead of time and articulating a plan may reduce anxiety and give employees a greater sense of control if an emergency does arise. Consider preparing and distributing information that will help employees prepare themselves for a potential pandemic, such as planning checklists for use at work and at home, a list of emergency health information, and emergency contact lists.

## 11. Develop a recovery plan.

Determine what will be necessary to rebuild your company and consider recovery time objectives. Determine when it will be possible to return to the office. How will

continued on page 6



# Is Your Business Ready for a Flu Pandemic?

continued from page 5

you sanitize the workplace, assess damages, resume operations, and restore sales?

## Basic Contamination Avoidance Steps

Ensure employees understand how the avian flu virus can be transmitted - through contact with poultry, and their droppings, feathers, intestines, and blood. Emphasize basic standards of good hygiene, such as:

1. Frequent hand washing
2. Use of handsanitizing products
3. Covering the nose and mouth when coughing or sneezing
4. Staying home when ill

## Other steps employers can take to reinforce good hygiene practices include:

1. Preparing or re-circulating hygiene policies and information regarding the symptoms and modes of transmission of influenza.
2. Ensuring sufficient supplies of sanitizing products (i.e. hand sanitizers, sanitizing wipes, soap in restrooms, etc.) are available for all employees. Consider making other items, such as disposable gloves and goggles, available where appropriate. Currently, masks are not considered effective in preventing the spread of Avian flu; however, N95 respirator masks are believed to be effective. Where appropriate, employers should ensure that such respirator masks are available.
3. Ensuring medical kits are adequately supplied and refreshed.
4. Ensuring facilities are properly ventilated and that ventilation systems are working properly throughout the workplace.
5. Keeping the workplace clean. This includes carpets, restrooms, eating areas, doorknobs, and switches, as well as each workstation. Educate your cleaning staff on how to reduce the outbreaks (i.e. use damp rather than dry dust rags to avoid spreading dust particles; use chlorine based solutions).

## Preparation Costs

How much preparation is necessary? What should you spend preparing for a pandemic that may never occur? This may vary in accordance with the employer's particular business and level of risk-tolerance.

## Potential Legal Issues

Pandemic flu will force employers to confront

a host of workplace legal issues, including:

1. **FMLA:** What rights and obligations do your employees have at each location under federal or parallel state leave laws? Who are your "key employees" and how will you address their inevitable absences? How do your policies address employees unable to return within the twelve weeks provided under law? Are you prepared to count and adapt to employees using intermittent leave?
2. **OSHA and other workplace safety laws:** Are you susceptible to claims under the Occupational Safety and Health Act (OSHA) stemming from exposure to harmful viruses at work? What rights do employees have to refuse to work based on reasonably based perceptions of health risks? What are the other rights of employees who collectively express concerns over safety and health risks?
3. **ADA concerns:** Although a temporary, albeit acute, condition like the flu is not likely to be considered a "disability" under the federal ADA, employees may have protections under state or local disability laws that define "disability" more generously. In addition, the ADA's privacy provisions grant protection to all employees with respect to employer medical tests and inquiries and the dissemination of employees' medical information. How will you address employees' questions or concerns over the health and possible contagiousness of a co-worker? In addition, persons with compromised immune systems may begin making reasonable accommodation requests to telecommute or other accommodations designed to protect them from exposure to illness. Are you prepared to address these requests? To what extent do you have a right to exclude employees from the workplace if they pose a threat to safety and health? And, finally, are you prepared to address legal claims under ADA theories or related tort theories stemming from conduct by employees acting on unfounded fears toward other employees with disabilities or perceived as disabled? What training and education is being made available to combat these impulses and to reduce stigmatization of others?
4. **NLRA concerns:** If your employees are unionized, how restricted is your ability to make changes and impose new policies unilaterally under the collective bargaining agreement? When a large number of employees decides not to come to work, when can you hire replacements? Even employers with union-free workplaces should consider whether a refusal to work because

of concerns over safety or health risks could be considered protected concerted activity under the National Labor Relations Act (NLRA).

5. **Workers' compensation claims:** Will you need to respond to workers' compensation claims by employees claiming to have become ill due to workplace exposure to the virus? How do your state's laws address this issue?
6. **Negligence claims:** Have you taken all precautions reasonably necessary to prevent infection? If an employer knows or should have known of an infection and fails to take appropriate action to prevent the spread of the flu, the employer may be liable for negligence.
7. **Contract claims:** Will you be able to defend against contract claims if you are unable to meet your contractual obligations to your customers?
8. **Trade secret protection:** If you are forced to change your traditional methods of performing work, have you taken measures to protect your trade secrets and confidential business information?
9. **International operations:** If you have overseas operations and employees, are you aware of your obligations that may arise from the fallout of an epidemic under the laws of those countries?

Here are some additional resources you might want to review:

[www.pandemicflu.gov](http://www.pandemicflu.gov)

[www.pandemicflu.gov/plan/businesschecklist.html](http://www.pandemicflu.gov/plan/businesschecklist.html)

[www.cdc.gov](http://www.cdc.gov)

[www.businessgrouphealth.org/globalhealth/avianflu.cfm](http://www.businessgrouphealth.org/globalhealth/avianflu.cfm)

Ford & Harrison LLP is a national labor and employment firm with offices in Memphis. F&H Solutions Group, an affiliate of Ford & Harrison, offers human resources consulting services to organizations.

Ford & Harrison attorneys and F&H Solutions Group consultants are available to assist you in preparing a plan that addresses your company's individual needs and concerns in the event of a pandemic. If you have any questions regarding the issues raised in this Alert or would like further information regarding emergency preparedness plans, please contact Herb Gerson, managing partner of Ford & Harrison's Memphis office, at 901-291-1500.



## New Standards for Retaliation Claims

continued from page 3

Not so in the case of retaliation claims. That difference, says the Supreme Court, is intentional. In fact, the Supreme Court ruled that Title VII's anti-retaliation provision can even reach events outside the workplace.

The range of alleged events that can form the basis of a retaliation claim has some limitations. The challenged action must be *material*, that is, more than a trivial harm. In the Supreme Court's words: "[a]n employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." Neither the plaintiff's relegation to more difficult job duties nor the 37-day suspension were, in the Supreme Court's view, "petty slights" or "minor annoyances," and so the court ruled in her favor.

The line drawn by the Supreme Court is not entirely clear. Actions challenged as retaliatory by an employee, however, will be judged using an objective standard, sort of: Would the actions discourage a reasonable worker *in the plaintiff's situation* from complaining. The Court made clear that the analysis can differ from employee to employee, mentioning as an example that while a schedule change may make little difference to many employees, it "may matter enormously to a young mother with school age children." As a result, in the wake of the Burlington decision, even minor job changes, as well as critical or unfair behavior by supervisors or managers toward a complaining employee, can

put an employer on the hook if a jury determines the actions to be motivated by unlawful retaliation and if someone in the plaintiff's shoes might have been discouraged from complaining.

So what should employers do to minimize its risk under this "moving target" standard?

1. **Reinforce and re-educate.** Make certain that the company's anti-retaliation policy is implemented and enforced, with significant disciplinary consequences for those who violate it. Management and supervisory personnel should receive regular training in identifying and avoiding potential retaliatory conduct. Employment decisions that are much less significant than suspensions and discharges, and thus often made at a much lower supervisory level, are now open to potential challenge. It is therefore more critical than ever that all supervisors at every level are aware of the potential pitfalls of perceived retaliation.
2. **Have a reasonable reason.** Even seemingly minor employment decisions are now subject to challenge. Courts are deferential to an employer's legitimate business judgment, but "just because" is virtually guaranteed to get an employer in front of a jury, and it is not a "reason" that a jury is likely to accept.
3. **Document, document, document.** Events that seem less significant are more easily forgotten, and documentation is all

the more important.

4. **Be consistent.** Confirming that any employment decision made regarding an employee is consistent with the prior treatment of other employees goes a long way toward rebutting a claim that the decision was motivated by illegal retaliation.
5. **Don't let the cat out of the bag.** Employers should implement a "need to know" policy regarding employee complaints. If possible, only those management officials who by virtue of their roles need to be aware of a complaint of discrimination or harassment should be alerted. A supervisor cannot "retaliate" against a complaining employee in any legal sense if the supervisor does not know that the employee has complained.

An employer cannot absolutely insulate itself from retaliation claims altogether. Taking proactive steps, however, such as these can help maximize the company's ability to defend retaliation claims successfully and minimize the monetary exposure in the event of an unfavorable verdict. Now more than ever, an ounce of prevention really is worth a pound of cure.

For more information, please contact any member of Waller Lansden Dortch and Davis' Labor and Employment Practice at (615) 244-6380.

## Sometimes, We Just Need to Fly High

continued from page 2

personalization and innovation. The easy access to knowledge and easy access to communications makes each of us a more sophisticated buyer, a more sophisticated citizen. Old-time haggling over a new car price is different today when one goes armed with all the costs, mark-ups and promotions. Information sources are multiple – radio, TV, magazines, internet, blogs, e-mails. It is hard to know what is the influencing factor.

Peddlers of products, services and ideas will only lose if they underestimate the sophistication of today's audience.

**Globalization**, as viewed by the business community, relates mostly to competitiveness and world markets. To the individual, it is the removal of boundaries. When I was growing up, we had two department stores in Oak Ridge

and that is where we shopped. A shopping trip to Knoxville was a major event, experienced only a couple times a year. Today, a person can shop globally – for products or ideas – from his home. The internet has opened a world to even the most isolated person.

So what does it all mean for businesses, industries, chambers, associations, political parties and other groups.

It means, according to Hart, that risks and opportunities are magnified and accelerated; that significant change can come overnight. It means that customer engagement is moving from a one-lane road to a superhighway and if your organization isn't traveling at those break-neck speeds, you will be passed by.

It means that transparency today is more an

attitude than an option; that you need to accept that – no matter what it is – the public will find out. Your challenge is to be out in front of them. It means that an entrepreneurial explosion is happening in America and the opportunities are limitless.

And finally, Hart says, it means that consumers are anxious to move from an era of fear and nostalgia to one of optimism and forward thinking; that they are looking for the leadership and answers that will once again reinforce the USA's role as the world leader.

So, during these lazy hot days of summer, when a cool drink and some mental wanderings are about all the energy that we can muster, take a few moments in the shade to think about what is in plain view .... if you just step back far enough to see it.

## Environmental Awards Nominations Due August 31

The August 31 deadline is nearing for your company to get the recognition that it deserves.

If your company has complied and gone beyond the requirements of your state or local permit(s), please consider nominating your Tennessee industry for one of the Chamber's Environmental Awards.

The awards are given for the media programs of Air, Water, Solid Waste, Hazardous Waste and Environmental Excellence and are divided into categories of industries with more than 250 employees and

those with fewer than 250 employees. The nomination form can be downloaded from [www.tnchamber.org](http://www.tnchamber.org) under Environment and must be received by August 31, 2006. The 2005 award winners also can be viewed at the same site.

The awards will be presented during the Annual Environmental Awards Conference during October 26-27, 2006 at Montgomery Bell State Park. Also hotel reservations can be made at the state Park by calling 615-797-3101 or toll free at 1-800-250-8613.

### 2006 Seminar Schedule

DATE	SEMINAR	LOCATION
August 15, 2006	Maintenance Related TOSHA Compliance	Jackson
August 17, 2006	Maintenance Related TOSHA Compliance	Knoxville
August 29, 2006	Maintenance Related TOSHA Compliance	Dickson
August 31, 2006	Basic Safety	Clarksville
September 7, 2006	Basic Safety	Dyersburg
September 14, 2006	Basic Safety	Knoxville
September 29, 2006	Basic Safety	Cleveland
September 21-22, 2006	10-hour OSHA Vol Compliance	Clarksville
September 26-27, 2006	10-hour OSHA Vol Compliance	Morristown
October 5, 2006	2006 Business Tax Update	Millenium Maxwell House-Nashville
October 26-27, 2006	Annual Environment Conference	Montgomery Bell State Park-Dickson TN
November 2, 2006	Safety Programs	Clarksville
November 8, 2006	Forklift	Dyersburg
November 9, 2006	TOSHA 101	Dyersburg
November 15, 2006	TOSHA 101	Morristown
November 16, 2006	Safety Programs	Kingsport
November 29, 2006	Forklift	Cleveland
December 4-7, 2006	30-hour OSHA	Murfreesboro
December 15, 2006	Forklift	Nashville
<b>2007</b>		
February 28, 2007	Tennessee Chamber Annual Member Meeting	Nashville



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