LEHR MIDDLEBROOKS VREELAND & THOMPSON, P.C.

# Employment Law Bulletin

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VOLUME 28, ISSUE 2

*Your Workplace Is Our Work®*

## *Inside this issue:*



FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

### The Effective Supervisor®

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Decatur..... May 14, 2020
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### Save the Date for Our Employer Rights Summit on November 10, 2020

Reserve the date to participate in our bi-annual Employer Rights Summit. The Summit will be at the McWane Center at 200 19th Street North, Birmingham, AL on November 10, 2020.

## EEOC Charges Reach Record Low

According to information recently released by the EEOC, a total of 72,675 charges were filed during Fiscal Year 2019 (ending September 30). This is the fewest ever since the EEOC began releasing charge statistics in 1997. Nine years ago, the highest number of charges were filed: 99,922.

Although the number of charges continued to decline, there are noteworthy trends for employers to consider. Every year since FY 1997, the percent of total charges alleging retaliation has increased, from 22.6% for FY 1997 to 53.8% for FY 2019.

The other noteworthy trend is the continuing increase in ADA charges, which now comprise 33.4% of all charges. This is the 11th consecutive year in which those charges have increased. For FY 2008, 20.4% of all charges alleged ADA violations. We believe this trend is closely connected to dismal U.S. public health trends and that ADA claims and charges will continue to increase.

There is great focus on pay equity, but that is not reflected in Equal Pay Act charges filed with the EEOC. 1.5% of all charges alleged Equal Pay Act violations, compared to 1.4% during 2018. We think this number remains low because pay discrimination claims are often based on an alleged violation of Title VII and not the Equal Pay Act.

After an increase in the number of sexual harassment charges in FY 2018 (7,609 FY 2018 from 6,096 FY 2017), the total number of sexual harassment charges dropped slightly for FY 2019 to 7,514. Racial harassment charges increased slightly during FY 2019, to 8,682. Of those, the EEOC concluded 73.9% of the time that the charge was meritless and found "reasonable cause" only 2.2% of the time. The remaining racial harassment charges were settled or withdrawn. This is quite a contrast to sexual harassment, where "no cause" determinations were found 54.6% of the time and "cause" findings occurred 4.5% of the time. We believe the other 40% or so sexual harassment charges were not identified as "cause" or "no cause" because they were withdrawn with benefits or otherwise settled.

Pregnancy discrimination charges remained steady compared to FY 2018, but at 2,753 charges, well below the high of 4,029 filed during FY 2010. 57.8% of pregnancy discrimination charges resulted in "no cause" findings and only 4.6% resulted in "cause" determinations. As with charges regarding sexual harassment, we think a higher percentage of pregnancy discrimination charges were resolved at the EEOC level compared to charges alleging race, sex, age, or disability discrimination.

So, what do these trends mean for employers:

1. Retaliation charges and claims under all statutes will only continue to increase.

2. As our country continues to have problems with obesity, drug abuse and medical conditions associated with both, expect an increase in ADA charges as employers grapple with reasonable accommodation and what is considered a disability.

3. Perhaps the number of sexual harassment charges in the #MeToo timeframe will now decrease. Employers who address sexual harassment overall in an aggressive and comprehensive way no doubt contributed to a reduction in the number of charges filed.

## Economy Expands, Unions Decline

A strong economy does not "raise all boats." According to the Bureau of Labor Statistics in its January 22, 2020 press release, private and public union membership in 2019 declined to 14,574,000 from 14,744,000 in 2018. Private sector union membership declined to 6.2% in 2019 compared to 6.4% for 2018, and private sector representation by unions declined from 7.2% in 2018 to 7.1% in 2019. In 1983 - the first year BLS released this data - there were 17.7 million union members, comprising 20.1% of all private and public sector employees.

Private sector employers with the highest level of unionization are utilities (23.4%), transportation/ warehousing (16.1%), and telecommunications (14.1%). The lowest unionization levels are in finance (1.1%), insurance (1.4%), professional and technical services (1.4%), and food services/drinking establishments (1.4%).

Black workers are members at a higher percentage than other demographics. 11.2% of black employees are members, while 10.3% of white employees, 8.8% of Asian employees, and 8.9% of Hispanic employees are members. Thus, the overall difference in membership based on race or national origin is minimal. In fact, union membership for black employees declined by 1.3% from 2018. The strongest age range for union membership is ages 45 to 64, with 12.6% of individuals in those age groups belonging to unions.

States with the highest union membership include Alaska (17.1%), California (15.2%), Illinois (13.6%), Michigan (13.6%), New Jersey (16.7%), New York (21%), Rhode Island (17.4%), and Washington (18.8%). Those with the lowest percentage of union membership are Georgia (4.1%), Idaho (4.9%), North Carolina (2.3%), South Carolina (2.2%), Tennessee (4.6%), Texas (4%), and Virginia (4.4%).

So now that we've looked at the statistics, what do they mean? One would think that labor's failure to grow in an expanding economy means that employees are satisfied at work and unions therefore do better when employees face difficult times. However, this has not been case historically. Whether employees do well or not does not appear to motivate employees to select or join unions. Instead, the lack of growth in the labor movement is due to labor's outdated message to employees. During organizing campaigns, we see various unions take the approach of "good employee, evil employer." This does not resonate with today's workforce overall.

Unions are major contributors to political candidates, approximately 98% of whom are Democrats. It will be curious this election cycle to see how those states with strong union density other than California, New York, and New Jersey vote. For example, in 2016, Wisconsin, Michigan, Ohio, and Pennsylvania voted for President Trump. If the message from the Democratic nominee is one of income inequality, will that resonate with union members particularly in those key states President Trump carried by a narrow margin in 2016? President Trump received the highest percentage of union support of any Republican candidate since President Reagan. In our view, where labor misses the mark is its somewhat universal "us versus them" approach toward employers. For all the collective bargaining agreements we have negotiated as a firm, not once do any of us recall a union saying to the employer at the bargaining table, "What can we do to help grow the business?" Instead of characterizing itself as a potential relationship partner with the employer, the union messaging politically and at

the workplace is one of an adversarial relationship, which simply does not appeal to enough employees in order to support unions.

## The House Passes Labor's Wishlist: It Will End There

On February 6, the House passed HR 2474, the Protecting the Right to Organize Act of 2019 ("PRO Act"). This Act is a dream for unions that will not come true with this Congress. For example:

1. Key Obama-era NLRB decisions would become codified as law, which means they could not be changed by the Trump Board.

2. The Act adopts California's requirements for determining whether an individual is an employee or independent contractor. If those who work in the gig economy are employees, they can unionize. If they are independent contractors, they may not.

3. The Act codifies the 2015 "ambush" or "quick" election rules.

4. The Act returns to the proposed 2016 persuader regulation, which would limit the scope of the "advice exception" under the Labor Management Reporting and Disclosure Act. The proposal in 2016 would require employers to disclose attorney/client information related to communications about unions and remaining union-free, even to the point of handbook reviews.

5. The Act prohibits all right-to-work laws. Thus, in all 50 states, there could be union security language in bargaining agreements, which means that employees must join a union or pay union fees or else be fired.

6. The Act provides for a private cause of action for unfair labor practices and adds civil penalties for labor law violations. Now, penalties may involve notice posting and back pay where applicable, but no fines.

7. The Act requires mandatory arbitration of first contracts. Approximately 25% of the time when a union is selected, a contract is not reached and thereafter the union disappears. This change would guarantee a contract.

8. Employers will be prohibited from replacing strikers. If employees engage in a strike, an employer has the right to hire replacements and not to terminate those replacements at the end of the strike. The PRO Act would prohibit employers from doing this.

9. Secondary boycotts would be permitted. This occurs when a union pressures key partners of the employer the union has its labor dispute with.

This Act has no chance of passing the Senate and if it were to pass the Senate, it would be vetoed. However, depending on the national election results in November, the PRO Act may become a more realistic threat to employers in 2021.

## The Coronavirus: What is an Employer to Do?

This virus was first identified in December in Wuhan, Hubei province, China. Symptoms of the virus typically appear within two weeks after exposure. The general consensus is that there has been a vast underreporting of the number of cases arising in China and there is an indefinite number of cases that may be occurring globally.

The symptoms include fever, cough, shortness of breath and respiratory illness ranging from mild to severe. The Center for Disease Control and Prevention (CDC) recommends that the best approach to avoid contracting or spreading this virus involves a variety of preventative actions, which affect the workplace. To OSHA, the work environments with the highest risk of exposure to employees include healthcare, the travel industry, laboratory employees, waste management, and border

and customs employees. In other workplaces, the overriding concern should be based upon either employees who traveled to China or had contact with those who travelled to China.

Employers under the ADA may require medical examinations or evaluations when such examinations are job-related and consistent with business necessity. For example, if your organization has an employee who has travelled or will travel internationally, would it violate the ADA to require that employee to take precautions to limit the risk of exposure to the Coronavirus and to be tested when the employee returns? Some commentators believe that is an ADA violation. However, our recommendation to employers is to err on the side of protecting the health of the employee who travels and those the employee comes into contact with at the workplace. The more serious risk of an ADA or other employment issue is if adverse action is taken toward the individual who tests positive for the virus. If the individual tests positive, the employer needs to evaluate what steps may be taken if reasonable accommodation is at all possible. It may not be, in which case the employee should be placed on leave until the employer receives to the employer's satisfaction medical confirmation that the virus no longer exists or the employee is not contagious.

## Marijuana Lawsuit for Wrongful Termination

Pennsylvania recently joined Arizona, Connecticut, Delaware, Massachusetts, New Jersey, and Rhode Island, which have permitted employees to sue under the state's medical marijuana law. In *Palmiter v. Commonwealth Health Systems*, the Court held that Pennsylvania's Medical Marijuana Act creates a private right of action if an employee believes there has been a wrongful termination. Palmiter was prescribed medical marijuana in December 2018 as a consequence of fatigue, migraines and chronic pain. In January 2019, she applied for a medical assistant position and provided a physician's prescription for the medical use of marijuana. The employer told Palmiter that it would not hire her based upon her marijuana use. Palmiter sued, arguing that the state's Medical Marijuana Act prohibits discrimination against an employee "solely on the basis of such employee's status as an individual who is certified to use medical marijuana." Furthermore, the law states that it is illegal to "terminate an employee or refuse to hire an employee simply because she is prescribed medical marijuana."

Although there is no specific right to a cause of action for a violation of this Act, the Court looked to similar statutes in other states and joined those states to conclude that a private right of action exists. Otherwise, the Court said that the Pennsylvania Medical Marijuana Act would "ring hollow" and "be meaningless" regarding its nondiscrimination language. In states where employees may lawfully use marijuana with a prescription, employers should not per se disqualify an applicant or terminate an employee for such use. Rather, evaluate the nature of the work the employee would perform and the potential risk regarding safety, quality, and reliability based upon the marijuana use. Can the employee be accommodated? If not, then the employer has options which include termination. However, do not jump from prescription to termination without first considering those options.

## Bill to Prevent Workplace Violence in The Healthcare Industry

According to the Occupational Safety and Health Administration, violence in the healthcare industry is as much as the violence in all other industries combined. Acting on OSHA's concern, the House of Representatives passed on November 21, 2019 the Workplace Violence Prevention for Healthcare and Social Service Workers Act. If passed by the Senate, the law would require healthcare and social services employers to develop comprehensive plans to reduce the risk of workplace violence.

Those employers covered under the Act include hospitals, nursing homes, skilled nursing facilities, long term care facilities, drug or substance abuse centers, group homes, mental health and psychiatric clinics, outpatient clinics, emergency centers and "any other facility the Secretary [of Labor] determines should be covered." The Act protects "any person," which means

that there is no jurisdictional threshold of employees in order to be covered. Furthermore, the Act includes responsibilities of employers who utilize independent contractors on their premises. Excluded from coverage are those employers whose employees provide healthcare or social services support at a client's residence.

The bill is not expected to pass in the Senate. OSHA has identified healthcare employees as the priority for workplace violence prevention. If incidents occur, expect OSHA to be aggressive in its enforcement processes where such incidents could have been prevented.

## What Has the EEOC Been Up to Recently?

*This article was prepared by JW Furman, EEO Consultant Investigator, Mediator and Arbitrator for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Ms. Furman was a Mediator and Investigator for 17 years with the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). Ms. Furman has also served as an Arbitrator and Hearing Officer in labor and employment matters. Ms. Furman can be reached at 205.323.9275.*

The Trump Administration was finally able to put its senior leadership in place at the Equal Employment Opportunity Commission last year. New leadership in federal agencies always brings change, sometimes more than others. Little has been announced by the EEOC about new priorities or whether charge handling procedures will change. But we can put together some statistics as to the agency's recent accomplishments.

The first change noticed was that gathering statistical information was a bit more challenging this year than in the past. Since at least 2013, the EEOC has issued a press release toward the end of each year entitled "EEOC Releases Fiscal Year 20(--) Enforcement and Litigation Data." A standard format with similar information provided began in 2014. The press release has shown the numbers of charges filed, broken down by bases alleged, every year – from a high of 93,727 in FY 2014 to a low of 74,675 in FY 2019. FY 2013 – 2018 included discussions of accomplishments and initiatives and quotes from the presiding Chair. FY 2014 – 2018 press releases indicated the amounts of monetary relief secured prior to litigation (low of $296 million for 2014 to high of $525 million in 2015) and 2015 – 2018 listed the numbers of charges resolved (low of 90,558 in 2018 to high of 99,109 in 2017). FY 2014 – 2018 provided the numbers of lawsuits filed (low of 133 in 2014 and high of 199 for 2018), with 2016 – 2018 indicating the numbers of active lawsuits at the end of the period (168 in 2016 to 302 in 2018) and percentages of successful outcomes in resolved cases. FY 2016 – 2018 press releases also included the reduction of pending charges during the period (reduced to 73,508 in 2016 and to 49,607 in 2018) and numbers of telephone and in-person inquiries the agency responded to.

The obvious pattern is that the annual press release provided more and more information until the one issued January 24, 2020. Even though its title indicates it contains "Enforcement and Litigation Data" there is no Litigation data and very little from Enforcement – only the number of new charges filed broken out by bases alleged. This is not to say that the information is not available; it simply is no longer provided in the comprehensive and tidy package we have become used to. For instance, if you look to a FY 2019 Agency Financial Report press release of November 19, 2019, you can find the monetary amount recovered for charging parties pre-litigation ($346 million), the number of lawsuits filed (144) and percentages of successful outcomes in resolved cases. (My count of individual EEOC press releases for lawsuits filed during FY 2019 was 112.) Another press release dated February 10, 2020, seems to indicate a much higher dollar amount secured for victims and alleged victims prior to litigation ($486 million) and lists the year's reduction in pending inventory (reduced to 43,580). My study was limited to information published in EEOC press releases; other public information may be available if you go through its website.

As we have seen in other areas, this presidential administration has not been as forthcoming with information of public interest as some others. It follows that the appointed leaders at the EEOC will follow the administration's example. However, much if not all of the same information seems to be out there; you just have to look harder for it. I called the main number at the EEOC

headquarters and asked about the dissemination of public information and received no response. A former colleague in its Legal division told me only that "all information required to be released to the public is available to it." So, whether the newest press release of "Enforcement and Litigation Data" is a sign of things to come remains to be seen.

Another bit of interesting news that may provide some insight to the new leadership's approach to the EEOC's future comes from its recent congressional budget justification. The EEOC is seeking $362 million for its FY 2021 budget, a reduction of $27 million from its FY 2020 funding level. The National Labor Relations Board is likewise requesting a $27 million reduction from its 2020 funding level. Although previous proposals by the administration to drastically cut the Department of Labor's budget have failed, it has proposed over a billion-dollar reduction for DOL next year.

# Wage and Hour Update

*This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act. Mr. Erwin can be reached at 205.323.9272.*

## Effects of the Change in Administration

Since the current Administration has been in office, they have made several changes in how they operate. Prior to the previous Administration, and for as long as I have been involved with Wage Hour enforcement, they have had a practice of issuing "opinion letters" that could be used by employers desiring to ensure they were complying with the Fair Labor Standards Act. Early in 2018, Wage Hour began issuing new letters and since then they have published 45 letters. All the letters that have been issued since early in the 21st century are available on the Wage Hour website.

Even though it appears that the current administration is taking a lower key enforcement policy, Wage Hour collected some $322 million in back wages during the FY ending on September 30, 2019, an increase of almost $20 million from the previous year. In addition, there continues to be much private litigation. Consequently, employers should remain diligent to ensure they are complying with the various wage hour statutes.

## Increases in Minimum Wage

While there has not been an increase in the federal minimum wage for many years, twenty-nine states have instituted state minimum wages greater than $7.25 per hour. Some organizations are continuing to advocate a $15.00 minimum wage. Five states in the Southeast, including Alabama, do not have a state minimum wage. However, Florida's rate in 2020 is $8.56 per hour. If you operate in states other than Alabama, I suggest that you check to make sure that you are not required to pay a higher minimum wage. A list containing the minimum wage for each state can be found on the Wage Hour website under "State Laws". If you have employees for whom you taking a tip credit toward the minimum wage, you should also check the Wage Hour website as several states either do not allow an employer to take a tip credit or only allow a smaller amount of tip credit.

## Attendance at Training Meetings

From time to time employers may desire to have employees attend training programs or meetings and may not be sure whether the employee must be paid for this time. The Wage Hour regulations state that an employee's attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:

(a) Attendance is outside of the employee's regular working hours.

(b) Attendance is in fact voluntary.

(c) The course, lecture, or meeting is not directly related to the employee's job; and

(d) The employee does not perform any productive work during such attendance.

If a non-exempt employee fails to meet any of the criteria above, then the employee must be compensated for these hours. Of course, the employer does not have to provide additional compensation to exempt employees for any time spent attending such training meetings.

**Outside the employee's regular working hours** - The training meeting must be during hours or days that are not during the employee's regularly scheduled work hours. For example, consider an employee who is scheduled to work from 8 AM to 5 PM Monday through Friday. For the training not to be considered as work time, it would either have to be on Saturday or Sunday, or after 5 PM and before 8 AM Monday through Friday.

**Attendance must be voluntary** – Where the employer (or someone acting on his behalf) either directly or indirectly indicates that the employee should attend the training, the attendance is not considered voluntary. For example, a vendor tells the employer that he will provide a dinner for the employees at which they will discuss a new product, or a proposed marketing method and the employees are encouraged to attend. Thus, the time spent at the dinner would be considered as work time.

However, where a state statute requires individuals to take training as a condition of employment attendance would be considered as voluntary. An example would be the childcare worker who must complete a 40-hour class before than can work in the childcare industry. Conversely, if a state requires the employer to provide training as a condition of the employer's license then attendance at the training would not be considered as voluntary. Therefore, this criterion would not be met, and employer would have to consider the training as work time.

**Training must not be directly related to the employee's job** – Training that is designed to make the employee more efficient at his job would be considered as work time while training for another job or a new or additional skill would not. Training, even if job related, that is secured at an independent educational institution (i.e. – trade school, college & etc.) that is obtained by the student on his own initiative would not be considered as work time. Also, training that is established by the employer for the benefit of employees and corresponds to courses that are offered by independent educational institutions need not be counted as work time. An example would be a course in conversational English that an employer makes available to his employees at his facility.

**The employee performs no productive work during the training course** – Training that is conducted away from the employer's facility usually does not pose a problem, but that conducted at the employer's business can potentially cause a problem. Many times, the employee receives the training using the employer's equipment, which could have some benefit to the employer and thereby make the time compensable.

Prior to a nonexempt employee attending a training course, the employer should make sure that attendance meets each of the four criteria listed above, otherwise he or she must be prepared to compensate the employee for the time spent attending the training. Employers should also remember that when the training hours are determined to be work time then this time must be added to the employee's regular work time for overtime purposes.

## New Employee Orientation & Completion of Employment Related Documents

In today's world of electronic records, many employers are now having their new employees complete the employment related documents on-line prior to physically reporting to work. Also, some employers are having the new employees view on-line videos as a part of their orientation to the firm. Once the employee is hired, any time spent in these activities is considered as work time and must be paid for at a rate not less than the current minimum wage of $7.25 per hour. You should track this time and record it in the payroll records. If the time spent in these activities when added to the employee's hours in their initial workweek causes the employee to work more than 40 hours, then you should pay them time and one-half for all hours over 40.

If you have additional questions or would like to discuss the matter further, do not hesitate to give me a call.

## EFFECTIVE SUPERVISOR®

**Montgomery – May 7, 2020**
Homewood Suites – EastChase Montgomery
7800 EastChase Parkway
Montgomery, Alabama 36117

**Decatur – May 14, 2020**
City of Decatur Fire Police Training Center
4119 – A Old Highway 31
Decatur, Alabama 35603

**Huntsville – October 8, 2020**
Redstone Federal Credit Union
220 Wynn Drive – Patriot Room
Huntsville, Alabama 35893

**Birmingham – October 15, 2020**
Vulcan Park & Museum
1701 Valley View Drive, Electra Room
Birmingham, Alabama 35209



Click here the agenda or to register.

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Jennifer Hix at 205.323.9270 or jhix@lehrmiddlebrooks.com.

## 2020 Employee Relations Summit

**Birmingham – November 10, 2020**
McWane Center
200 19th St N, Birmingham, AL 35203
www.mcwane.org

Registration Fee – Complimentary

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Jeannie Cobb at 205.323.9271 or jcobb@lehrmiddlebrooks.com.

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