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Embarrassing Email Evidence

The Federal Aviation Administration on Thursday, January 9, 2020 released damaging emails from Boeing regarding its 737 Max Jetliner. In particular, the emails relate to Boeing professionals' comments about whether Lion Air and other carriers requested training on the new plane through a simulator. One of the selling points for the Max was that an experienced 737 pilot would not need a simulator, thereby reducing the cost to the customer and expediting the timeline from delivery to flying the new plane.

So, what does the Boeing 737 Max have to do with employment law? The following are examples of email communications within Boeing which no doubt in addition to embarrassment will cause Boeing great expense: "Now friggin' Lion Air might need a sim[ulator] to fly the Max, and maybe because of their own stupidity. I'm scrambling trying to find out how to unscrew this now! Idiots." Or if that email was not enough to be glad that you're no longer flying the 737 Max, consider this one: "WHAT THE F%$&!!!! But their sister airline is already flying it!"

We continue to be disappointed at how managers and supervisors use email as if it were nothing but casual conversation. Email is evidence mail – what is intended as electronic chit chat can become evidence in an employment-related matter. The following are important lessons learned for employers regarding workplace electronic communications:

1. Focus on communicating facts, not opinions. Speak your opinion but write down facts. As they say in Fairfield, Idaho, "speak your mind, but ride a fast horse."

2. Email is not electronic therapy. It is not a stream of consciousness correspondence. Prepare email as if you were formalizing a memo which may be reviewed by a regulatory agency or jury.

3. Is it necessary to copy everyone on the email? The broader the scope of people copied, the greater the risk of a "reply to all" that may be inappropriate. Only copy those who need to be copied.

4. Pause before you send. Often, emails are treated as if the response is immediate in a conversational manner. Be careful – each piece of email correspondence is potential evidence.

Medical Marijuana Creates Joint Employer

At some point, we'll run out of the medical marijuana pun, but not today. In a case of first impression, an employer was ordered to pay a medical marijuana prescription for an employee on workers' compensation. *Vincent Hager v. M&K Construction* (N.J. App. Div. January 13, 2020). The workers' compensation injury arose in 2001, when employee Vincent Hager suffered nerve damage, herniated disks and other injuries after a truck load of concrete was dumped onto him. After several years of unsuccessful treatments, Hager's workers' compensation physician recommended that he use medical marijuana "for the rest of his life." The medical marijuana was prescribed in order to help diminish Hager's constant pain. The cost of the prescription is $616 per month and the New Jersey Appellate Court ruled that that cost was properly charged as a workers' compensation medical benefit.

At the hearing to determine Hager's permanent and total disability, the workers' compensation judge determined that Hager had a 65% partial total disability, 50% of which was attributed to his accident and 15% attributed to the effects of medical marijuana. The judge ordered the company to reimburse Hager for any cost related to his use of medical marijuana.

In its appeal, the employer argued that the Federal Controlled Substances Act superseded New Jersey's Compassionate Use Medical Cannabis Act. The employer claimed that if it complied with the New Jersey law, it would violate the federal law. In rejecting this argument, the Appellate Court stated that under federal law, the "possession, manufacture and distribution of marijuana are criminal and punishable offenses, but an employer's reimbursement of a registered [medical marijuana] patient's use of medical marijuana does not require the employer to commit those offenses."

The Court also addressed the fact that the New Jersey law does not require providers to reimburse those who use medical marijuana. However, the Court stated that workers' compensation health benefits are not the same as an employer's medical plan coverage. Therefore, the employer was appropriately required to reimburse the employee $616 a month for the rest of his life for medical marijuana prescriptions.

Thus far, we continue to see exceptions which narrow the scope of the Federal Controlled Substances Act's impact on the workplace. For example, two courts ruled that the use of medical marijuana under the Americans with Disabilities Act necessitates an employer to consider the use as reasonable accommodation. Reasonable accommodation does not mean that the employer has to accept the risks that may be associated with lawful marijuana use, but it means that an employer may not per se reject accommodating an employee who uses medical marijuana.

U.S. DOL Clarifies Joint Employer Standard

The United States Department of Labor's New Year's gift to employers is its final joint employer rule, which becomes effective on March 16, 2020. Rather than focusing on the economic model of the relationship (franchisor – franchisee), DOL announced a four-part test to determine whether joint employment exists:

1. Do both employers have the right to hire and fire the employee?

2. Do both employers supervise and control the employee's conditions of employment, work schedule, job assignment and training?

3. Do both employers determine the employee's rate of pay, including discretionary and nondiscretionary bonuses?

4. Do both employers maintain the employee's records, such as hours worked, I-9's and other such information?

Not all four factors must be met in order for joint employment to exist. DOL stated that no one factor is dispositive in determining joint employer status, and the appropriate weight to give each factor will vary based on the circumstances.

DOL focused on the actual "control" that an employer has over an employee. The "right to control" does not create joint employment, according to DOL. "The reserved right to act can play some role in determining joint employment status, though there still must be some actual exercise of control." DOL also mentioned several factors which are not dispositive one way or the other about joint employment:

1. Franchisor/franchisee relationship.

2. One company sells another company's products under the producer's brand name.

3. Policies intended as compliance or to promote a constructive work environment, such as safety policies, no discrimination/harassment/retaliation and ethics/morality.

4. Where one employer may provide business practices benefits to the other, such as sample applications, handbooks and the like.

5. Where one employer permits the other to operate on its premises.

6. Where one employer suggests to the other practices or processes which may improve its business, such as a franchisor to a franchisee.

7. A requirement that the work performed by one employer meets the quality standards determined by the other.

A business relationship that is more difficult to overcome with joint employment is the temporary service/customer relationship. The new DOL joint employer standard creates an opportunity to assess and prevent a joint employment outcome. Employers who use temporary services should have those contracts reviewed so that the guidance that DOL offers with its examples is incorporated into contract terms.

NLRB Levels the Playing Field

During the past six weeks, the National Labor Relations Board changed several areas of labor law which were implemented during President Obama's administration. The NLRB is one of the most political agencies, where three members of the five-member Board are of the same party as the incumbent President. Board decisions made during one President's term do not necessarily survive the next President of a different party. For example, the Trump Board made the following key changes to decisions and rules which were issued by the Obama Board:

1. Certain "quickie" election rules have been eliminated, effective April 16, 2020. The most practical change for employers is the time built into the new procedures, which will help employers. For example, under the "quickie" election rule of 2014, contested elections before votes occurred lasted a total of 23 days from the date of the petition until the date of the election. Under the Board rules, the delay could be as long as 78 days before an election is held. In essence, the new Board changes give employers time, and time is often helpful for employers to provide facts to employees about why remaining union-free is the right choice to make on election day.

2. The NLRB reversed the *Purple Communications* decision of 2014, which ruled that employees could use employer email and other information technology systems for purposes of mutual aid and protection, such as union organizing. The Obama Board characterized email as the "water cooler" of today's workplace. In the case of *Caesar's Entertainment*, the Board concluded that "there is no basis for concluding that a prohibition on the use of an employer's email system for non-work purposes in the typical workplace creates an unreasonable impediment to the exercise of self-organization." Employers may reestablish their policies to prohibit the use of email or other I.T. for non-work-related purposes.

3. Employers have the right to stress the confidentiality of impending investigations, which does not violate an employee's rights under the NLRA. In the 2015 Obama Board decision of *Banner Estrella*, the Board ruled that the employer had the burden to establish that its interest in confidentiality outweighed employee interest in Section 7 rights. In the case of *Apogee Retail, LLC*, the Board ruled that an employer requirement for employees to keep pending investigations confidential is presumptively legal. An employer investigating harassment or other workplace-related matter has the right to tell and expect employees to keep the investigation confidential while it is pending.

4. In 2015, the Obama Board overruled a 50-year precedent to state that when a labor agreement expired, the dues checkoff provision was part of the "status quo" which the employer could not change unilaterally. In *Valley Hospital Medical Center*, the Board ruled that a checkoff provision (and union security language) are not considered "status quo" at the time the contract expires, which means that the employer may cease deducting the dues. Thus, upon expiration, a union has financial risk in the event the employer chooses to exercise its right to cease deducting dues.

5. The NLRB revised the 2014 Obama Board decision on how an arbitrator may decide when the Board will defer to an arbitration, including the arbitration of unfair labor practices. Now, as an outcome of a unanimous decision in *United Parcel Service, Inc.*, an arbitrator's decision which includes unfair labor practice charges will be adhered to if the procedure has been fair, the parties agree to be bound, the arbitrator considered the unfair labor practice matter and the arbitrator's decision is not clearly repugnant to the NLRA. The party that opposes the arbitrator's treatment of the unfair labor practice charges will have the burden to prove that these standards were not met.

These decisions restore the well-established state of the law which existed for several years prior to the Obama Board. Unions have plenty to worry about (like their membership levels) rather than focus on the practical impact of these Board changes. The U.S. government is considering a takeover of the United Autoworkers Union based upon the growing corruption probe of that union and Fiat Chrysler officials. The FBI raided the home of then UAW President Garry Jones and several other UAW leaders.

OSHA Reporting Deadline – March 2

Employers subject to OSHA reporting requirements for Form 300A Illness and Injuries Summaries are required to file those with OSHA by March 2, 2020. This requirement covers those employers with 250 or more employees and employers with 20 or more employees in industries designated by OSHA, including healthcare, manufacturing, transportation and construction. According to OSHA, fewer than half of covered employers file, and OSHA action on such delinquencies has been rare. OSHA attributes the reason that employers are not filing (which started happening during the Obama Administration) to OSHA becoming available to the public.

EEO Tips: How the Supreme Court May Affect Employers in 2020

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.

What is the Supreme Court doing this year that will affect employers? They have a number of things in the works that are worth watching. Some could bring welcomed

clarification and some have the potential of major impact for employers, especially on discrimination issues.

Of course, everyone is awaiting the Court's decisions in the three LGBTQ employment termination cases. (*Altitude Express v. Zarda, R.G & G.R. Harris Funeral Homes v. EEOC, Bostock v. Clayton County*) They are asking the Court to decide whether the language in Title VII of the Civil Rights Act making discrimination "because of … sex" covers sexual orientation and gender identity. The federal circuit courts are divided over these issues and, judging by the questions and comments during the October hearing, the Supreme Court is likewise divided. Their decision is expected in June 2020. If you want more information on the evolution of this issue, see my article from August 2019.

The Supreme Court heard oral arguments January 15 in *Babb v. Wilkie* over the standard of proof required for claims filed by federal employees under the Age Discrimination in Employment Act (ADEA). The parties argued whether employees must show that age was the determining factor in an adverse employment action or merely a motivating factor. Just two days later, the Court ordered briefs be filed by January 23 addressing what "prospective administrative or judicial relief" is available, besides the ADEA, where age was a factor but not the determining factor for the employer's action. The Eleventh Circuit, relying on its own precedent, held the "but for" test here applied but went on to say that "if [it] were writing on a clean slate," it might well favor the motivating factor argument.

The Supreme Court last week agreed to hear a case involving the Affordable Care Act (ACA) requirement that employer health plans cover birth control. (*Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania et al., Trump et al. v. Pennsylvania et al*.) The Trump administration created exemptions to the ACA allowing most employers to avoid compliance with the contraception mandate and the Third Circuit affirmed a nationwide injunction blocking those exemptions. This heated debate has failed to yield compromise by courts or stakeholders between improving women's health with access to birth control through employer health insurance plans and allowing employers with objections to opt out of contraception coverage.

The Court is considering a petition for certiorari in a case (*Peterson v. Linear Controls, Inc*.) asking whether "terms, conditions or privileges of employment" covered by Section 703(a) of Title VII of the Civil Rights Act is limited to final employment decisions only. The federal circuit courts are divided as to the scope of that phrase. Section 703(a) makes employment discrimination based on race, color, religion, sex or national origin unlawful. The Supreme Court previously defined the scope of unlawful adverse employment actions for Section 704 retaliation purposes as "employer actions that would have been materially adverse to a reasonable employee or job applicant," even those beyond employment related retaliatory acts. While we don't yet know if the justices will even accept the case, they have asked for the U.S. solicitor general to weigh in, a clear sign of their interest in it. A ruling in this case, especially when added to the upcoming rulings in the three sexual orientation/gender identity cases, could upset at least parts of the accepted scope of Title VII in many areas of the country. To further complicate matters, courts historically use Title VII standards when interpreting parts of the ADA, ADEA and GINA, so the Title VII decisions this year could have far reaching effects.

And what is the Supreme Court not doing this year? Earlier this month, it decided not to accept three employment cases. It declined certiorari in a dispute over whether an airline is exempt from state and local laws regarding wages. (*Brindle v. Delta Airlines*). The Court declined to review a ruling that striking workers were illegally fired and requiring their rehire. (*Michael Cetta Inc. v. NLRB*). Another rejected case was brought by a group of public employees who believed they should be included in collective bargaining negotiations even though they were not members of a union. (*Ben Branch et al. v. Massachusetts Dept. of Labor*).

Wage and Hour Tips: Regular Rate for Computing Overtime

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.

In December 2019, Wage and Hour released changes to the regulations regarding the proper computation of overtime. The revised rules were effective January 15, 2020. Below are some excerpts from a document that they posted on their website explaining the changes.

Specifically, the final rule clarifies that employers may offer the following perks and benefits to employees without risk of additional overtime liability:

- The cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance;
- Payments for unused paid leave, including paid sick leave or paid time off;
- Payments of certain penalties required under state and local scheduling laws;
- Reimbursed expenses including cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred "solely" for the employer's benefit; and clarifies that reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts for travel expenses are per se "reasonable payments;"
- Certain sign-on bonuses and certain longevity bonuses;
- The cost of office coffee and snacks to employees as gifts;
- Discretionary bonuses, by clarifying that the label given a bonus does not determine whether it is discretionary and providing additional examples and;
- Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense.

The final rule also includes additional clarification about other forms of compensation, including payment for meal periods and "call back" pay. A complete copy of the final rule is available on the Wage Hour website.

The FLSA applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours - seven consecutive 24-hour periods. The workweek need not coincide with the calendar week but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees, but they must remain consistent and may not be changed to avoid the payment of overtime. Averaging of hours over two or more weeks is not permitted. Normally, overtime pay earned in a workweek must be paid on the regular payday for the pay period in which the wages were earned. However, if you are unable to determine the amount of overtime due prior to the payday for the pay period you may delay payment until the following pay period.

The regular rate of pay cannot be less than the minimum wage. The regular rate includes all remuneration for employment except certain payments specifically excluded by the Act itself. Payments for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays are excluded. Also, discretionary bonuses, gifts and payments in the nature of gifts on special occasions and payments for occasional periods when no work is performed due to vacation,

holidays, or illness may be excluded. However, payments such as shift differentials, attendance bonuses, commissions, longevity pay and "on-call" pay must be included when determining the employee's regular rate.

Even though Alabama does not have a state minimum wage, if you operate in other states you should be aware that over 20 states have mandated increases in their minimum wage in 2020. At a minimum you should check with the State labor offices in those states where you operate to make sure that you are complying with their minimum wage requirements. Although most states having the increases are not in the south, there are a couple of southern states that do have scheduled increases. For example, Florida's minimum changes each year based on inflation whereas Arkansas has increased their minimum wage to $10.00 per hour. The minimum wage for each state can be found on the Wage Hour website under "State Minimum Wage Laws".

Should you have questions regarding these changes, do not hesitate to give me a call.

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