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What Will an Obama Administration Mean for Employers?

What will an Obama administration mean for employers is a frequently asked question and the source of much speculation. This article is devoted to an analysis of the labor and employment issues that will be at the forefront during the first two years of the Obama administration and the President-elect's projected position regarding those issues.

At the outset, the President-elect has made it clear that the two areas of his immediate focus are the economy and national security. Recognizing that the "honeymoon" for a newly elected President is short, we expect President Obama to push an agenda focused on preserving and creating jobs and jump starting our economy. The President-elect's selection of Rahm Emanuel as his Chief of Staff is as much intended to control Speaker of the House Pelosi as it is to further the President-elect's legislative agenda. Obama will pursue bipartisanship, and we thought it was interesting that Senate majority leader Reid and Senate Democrats were considering expelling Senator Leiberman from their caucus, as they no longer need his vote, to which Obama stated that there should be no retribution for Senator Leiberman's support of John McCain.

Payback to Unions

Organized labor was instrumental in helping Obama obtain the nomination and presidency. The Service Employees International Union—one of the nation's largest—was the first union to support Obama. Labor's legislative "wish list" is a long one. Leading the way is the Employee Free Choice Act, which would result in union representation based upon signed cards instead of a secret ballot election, require that if a newly elected union is unable to reach an agreement with the employer, the terms of a first contract will be set for up to two years by federal arbitrators and increase the damages provisions for violations of the National Labor Relations Act.

Labor's proposal to eliminate secret ballot election in the selection of unions, which has existed since 1935, is outrageous, and a proposal that employers can and should freely communicate to employees—how can a workforce trust an organization that calls itself democratic but wants to eliminate an employee's secret ballot right? However, the greatest risk and impact to employers is not the loss of the secret ballot vote; even with secret ballot votes, we know that if there are no cards signed, there can be no union. Rather, the biggest risk to the business community is the mandatory contract requirement of the Employee Free Choice Act.

Currently, if a union tries to organize a workforce, the employer explains to employees that should the union win, all it gets the right to do is ask in the bargaining process—the law does not require either side to agree to any proposal that it does not believe is in its best interest. Approximately 30% of the time a newly elected union does not get a contract and ultimately disappears. Thus, if this provision of the Free Choice Act passes, during an organizing campaign unions will tell employees that the law guarantees employees a contract, which is something they do not have now. Unions will contrast what employees have now—termination-at-will and no contract language in the Handbook—with a "sure thing" to be settled by federal arbitrators. The contract terms that the arbitrators may decide would be for up to two years. The impact on the business community is that federal arbitrators, rather than the business itself, would set the terms and conditions under which the employer would have to do business for up to two years regarding wages, benefits, work rules and conditions of employment.

President-elect Obama knows that once the Free Choice Act is pushed (and we expect it to be introduced on January 20, 2009), efforts at bipartisan cooperation in the Senate and with the business community will be seriously impaired, if not end. Though we do not believe the Employee Free Choice Act will be an early Obama agenda item, labor will receive rewards for its efforts in support of Obama.

Other Labor Legislative Initiatives

Unions desire to increase the opportunity for public sector first responder employees to unionize (known as the Public Safety Employer/Employee Cooperation Act); provide for neutrality in organizing campaigns and voluntary recognition through legislation called the Patriot Employer Act; repeal the "right-to-work" law of the National Labor Relations Act, which makes union shop language illegal in several states; and change the statutory definition of "supervisor" under the National Labor Relations Act to provide that a supervisor may be considered an eligible bargaining unit employee.

Regardless of the pace at which legislative initiatives result in a payback to organized labor, the President through executive authority and appointments to the National Labor Relations Board, may also create a more favorable climate for unions. For example, Executive Order 11246, issued by President Johnson, requires affirmative action based upon race and sex –this was not an act of Congress. President Obama may issue executive orders broadening the rights of unions to organize those employers working on government contracts, whether manufacturing, service, or construction. Furthermore, the National Labor Relations Board is comprised of five appointees, three of whom are of the party of the current President. The "Clinton Board" was followed by the "Bush Board." An Obama Board may choose to reverse key decisions of the Bush Board, including one that states that temporary employees are ineligible to be unionized at the user employer's location unless the user employer and temporary employer both agree.

The decisiveness and contentiousness of labor legislation, combined with what we have observed thus far regarding the President-elect, lead us to conclude that although this agenda will be pushed before the 2010 mid-term elections, it will not be pushed by the President early. However, should the President's economic initiatives result in more confidence in the economy and show signs of success, the President's leverage to influence some Republicans to vote to cut off debate on the Employee Free Choice Act will be enhanced, such that a delay in pushing the labor agenda may actually enhance the possibility of its passage.

Employment Legislation Co-Sponsored by Senator Obama

In his two years in the Senate, Senator Obama was a co-sponsor of the Equal Remedies Act and the Independent

Contractor Proper Classification Act. The Equal Remedies Act proposes to lift the caps on damages available to prevailing plaintiffs in employment discrimination claims. Currently, the damages caps are $300,000.00; there will not be a ceiling under the legislation previously supported by Senator Obama. The Independent Contractor Proper Classification Act focuses on the requirements for an individual to be a bona fide independent contractor and the economic consequences to employers who misclassify such individuals. This legislation is a combination of extending broader workplace rights to independent contractors, while also increasing the tax revenue that would be generated by classifying contractors as employees.

Other Legislative Changes

There will be another proposal to revise the **Family and Medical Leave Act**. One such proposal is to reduce the threshold of coverage to 25 employees. Additionally, changes would include providing leave for elder care and domestic violence, parent-teacher conferences, and child-related activities. Proposed changes would require employers to provide employees with up to seven paid sick days per year.

Another proposed change is under the **Worker Adjustment and Retraining Notification Act (WARN)**. Currently, 60 days notice is required under WARN; proposed changes would make it 90 days. The changes would also lower the threshold requirement for employers to be covered under the Act from 100 employees to 50, and would result in double the penalties for employer violations of the Act.

We expect legislation to pass that would prohibit discrimination based upon sexual orientation—the **Employment Non-Discrimination Act (ENDA)**. Only a few states prohibit discrimination based upon sexual orientation, but more employers include sexual orientation as a factor upon which discrimination is prohibited, even though it is not a legally protected class.

The Lilly Ledbetter Fair Pay Act

This legislation addresses the jurisdictional requirement of when a claim must be brought for gender-based wage discrimination. The legislation arose after the U.S. Supreme Court concluded that the time for filing a claim began when the initial wage disparity based upon gender occurred, rather than when the employee knew that such a disparity occurred or where the differences in pay continued based upon the initial disparity.

We also expect to see legislation that will propose minimum wage increases, even though the minimum wage is scheduled to increase to $7.25 per hour effective July 2009. We do not expect legislative initiatives directed toward exempt and non-exempt status.

EEOC, Secretary of Labor, OSHA and OFCCP Appointments

We expect appointees to these key positions to be advocates of change and aggressive enforcement. There is speculation that the new Secretary of Labor may be a current or past president of a major labor union, such as Andrew Stern of the Service Employees International Union. President-elect Obama during the campaign referred to the Department of Labor under the Bush administration as the “Department of Management.” The appointees to these positions will signal the type and speed with which change occurs in their respective agencies.

Concluding Observations

The labor and employment legislative agenda during the first two years of the Obama administration will move rapidly through the House, but run into filibuster difficulties in the Senate. The question is when, not will, President Obama push for labor and employment legislation that is responsive to the agenda labor and advocacy groups expect. Compromises may be reached on some of these legislative issues, or they may morph into a different type of proposal. However, employers should be prepared for a changed legislative and regulatory environment and thus consider creative approaches for employee relations and risk management.

Military Family Leave and FMLA Regulations Issued

On November 17 the Department of Labor published the final regulations implementing the Military Family Leave Act and updating portions of the Family and Medical

Leave Act regulations. Below is an outline of the major changes, which will be effective on January 16, 2009.

Military Caregiver Leave: Under the first of these new military family leave entitlements, eligible employees who are family members of covered service members will be able to take up to 26 workweeks of leave in a "single 12-month period" to care for a covered service member with a serious illness or injury incurred in the line of duty on active duty. This provision also extends FMLA protection to additional family members (i.e., next of kin) beyond those who may take FMLA leave for other qualifying reasons.

Qualifying Exigency Leave: This new military leave entitlement helps families of members of the National Guard and Reserves manage their affairs while the member is on active duty in support of a contingency operation. This provision makes the normal 12 workweeks of FMLA job-protected leave available to eligible employees with a covered military member serving in the National Guard or Reserves to use for "any qualifying exigency" arising out of the fact that a covered military member is on active duty or called to active duty status in support of a contingency operation. The final rule defines qualifying exigency as: (1) Short-notice deployment; (2) Military events and related activities; (3) Childcare and school activities; (4) Financial and legal arrangements; (5) Counseling; (6) Rest and recuperation; (7) Post-deployment activities; and (8) Additional activities not encompassed in the other categories, but agreed to by the employer and employee. Note that this provision does not cover career soldiers, only National Guard and Reserves.

DOL has developed two new certification forms that may be used by employees and employers to facilitate the certification requirements for the use of military family leave.

The Ragsdale Decision/Penalties: The final rule includes a number of technical regulatory changes to reflect current law following the U.S. Supreme Court's decision in Ragsdale v. Wolverine World Wide, Inc., which invalidated a penalty provision of the regulations.

Light Duty: Time spent performing "light duty" work does not count against an employee's FMLA leave entitlement and that the employee's right to restoration is held in abeyance during the period of time the employee performs light duty.

Waiver of Rights: The final rule codifies the Department's longstanding position that employees may voluntarily settle or release their FMLA claims without court or Department approval. However, prospective waivers of FMLA rights continue to be prohibited under the final rule.

Serious Health Condition: The final rule retains the six individual definitions of serious health condition while adding guidance on three regulatory matters. One of the definitions of serious health condition involves more than three consecutive, full calendar days of incapacity plus "two visits to a health care provider." The two visits must occur within 30 days of the beginning of the period of incapacity and the first visit to the health care provider must take place within seven days of the first day of incapacity. A second way to satisfy the definition of serious health condition under the current regulations involves more than three consecutive, full calendar days of incapacity plus a regimen of continuing treatment. The final rule clarifies here also that the first visit to the health care provider must take place within seven days of the first day of incapacity. Thirdly, the final rule defines "periodic visits" for chronic serious health conditions as at least two visits to a health care provider per year.

Substitution of Paid Leave: FMLA leave is unpaid. However, the statute provides that employees may take, or employers may require employees to take, any accrued paid vacation, personal, family or medical or sick leave, as offered by their employer, concurrently with any FMLA leave. Under the rule, all forms of paid leave offered by an employer will be treated the same, regardless of the type of leave substituted (including "paid time off"). An employee electing to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer's policy that apply to other employees for the use of such leave. The employee is always entitled to unpaid FMLA leave if he or she does not meet the employer's conditions for taking paid leave and the employer may waive any procedural requirements for the taking of any type of paid leave.

Perfect Attendance Awards: The rule changes the treatment of perfect attendance awards to allow employers to deny a "perfect attendance" award to an employee who

does not have perfect attendance because of taking FMLA leave as long as it treats employees taking non-FMLA leave in an identical way.

Employer Notice Obligations: The rule consolidates all the employer notice requirements into a "one-stop" section of the regulations. Employers will be required to provide employees with a general notice about the FMLA (through a poster, and either an employee handbook and upon hire); an eligibility notice; a rights and responsibilities notice; and a designation notice. The rule extends the time for employers to provide various notices from two business days to five business days.

Employee Notice: The rule modifies the current provision that has been interpreted to allow some employees to provide notice to an employer of the need for FMLA leave up to two full business days after an absence. The rule provides that an employee needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence, absent unusual circumstances.

Medical Certification Process: The rule recognizes the advent of the Health Insurance Portability and Accountability Act (HIPAA) and the applicability of the HIPAA privacy rule to communication between employers and employees' health care providers. Further, in response to specific concerns raised by employees about medical privacy, the Department has added a requirement to the rule that specifies that the employer's representative contacting the health care provider must be a health care provider, human resource professional, a leave administrator, or a management official, but in no case may it be the employee's direct supervisor. Further, employers may not ask health care providers for additional information beyond that required by the certification form. The final rule also improves the exchange of medical information by updating the Department's optional Form WH-380 to create separate forms for the employee and covered family members and by allowing—but not requiring—health care providers to provide a diagnosis of the patient's health condition as part of the certification. Further, the new rule specifies that if an employer deems a medical certification to be incomplete or insufficient, the employer must specify in writing what information is lacking, and give the employee seven calendar days to cure the deficiency.

Medical Certification Process: The final rule codifies a 2005 DOL Wage and Hour Opinion letter that stated that employers may request a new medical certification each leave year for medical conditions that last longer than one year. It also clarifies the applicable time period for recertification by allowing an employer to request recertification of an ongoing condition every six months in conjunction with an absence.

Fitness-For-Duty Certifications: The current FMLA regulations allow employers to enforce uniformly-applied policies or practices that require all similarly-situated employees who take leave to provide a certification that they are able to resume work. This is called a "fitness-for-duty" certification. The rule makes two changes to the fitness-for-duty certification process. First, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. Second, where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.

War Hazards Compensation Act

Last month, we discussed the Defense Base Act ("DBA"). This month we take a look at a related statute, the War Hazards Compensation Act ("WHCA"). You will recall that the DBA extends workers' compensation benefits to employees working overseas under contract with the federal government. Whereas the DBA authorizes benefits for standard workers' compensation claims for such employees, the WHCA essentially preempts the DBA when the injury or death is the proximate result of a "war risk hazard." Under the DBA and the WHCA, the same general types of workers' compensation benefits are available, including medical expenses and disability benefits. But when the injury or death is due to a war risk hazard, the federal government (rather than the employer or the employer's DBA insurer) is responsible for payment of the workers' compensation benefits.

The WHCA was enacted in December 1942 at the request of Secretary of War Henry Stimson. The stated purpose of the Act is to shift to the federal government the costs of workers' compensation benefits for employees of federal contractors who are injured or killed by a war risk hazard. The term "war risk hazards" is broadly defined. War risk

hazards may include the use of weapons, explosives, or other noxious things by hostile forces, or from the collision of vehicles or aircraft used in connection with war or armed conflict. Although the WHCA does not specifically address terrorism, the Department of Labor has taken the position that terrorism is a war risk hazard. The WHCA also authorizes total disability benefits for overseas employees of federal contractors who are captured (or reasonably believed captured) by hostile forces, or marooned.

One of the main purposes of the WHCA is to induce insurance carriers to provide DBA coverage for employees in hostile settings. Under the WHCA, if an employee subject to the Act is injured by a war risk hazard, the employer's DBA insurer is obligated to provide workers' compensation benefits to the injured employee. The DBA insurer would then seek reimbursement from the federal government for all disability payments and medical expenses incurred, plus a 15% handling fee (to cover expenses associated with the claim). Insurers' claims for reimbursement are filed with the Department of Labor, Office of Workers' Compensation Programs.

With the exponential growth in the number of civilian contractors in war zones, the importance of the Defense Base Act and the War Hazards Compensation Act continues to increase. For more information, visit the Department of Labor's website (www.dol.gov) or feel free to contact Don Harrison in our office at (205) 323-9276 or dharrison@lehrmiddlebrooks.com.

EEO Tips: Are You Sure Your Independent Contractors are Independent?

This article was prepared by Jerome C. Rose, EEO Consultant for the law firm of LEHR, MIDDLEBROOKS, & VREELAND, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in the states of Alabama and Mississippi. Mr. Rose can be reached at 205.323.9267.

As an initial reaction to the recent surge of cases involving the issue of whether a worker is an employee or independent contractor, a casual observer might ask whether it makes a real difference in an employer's daily operations since either can perform basically the same work. The casual observer would not be altogether wrong. However, the real difference is not in the type of work being done but rather in the responsibility for a host of problems that may develop in the process of doing it.

The status of a worker as an employee or an independent contractor determines, among other things, whether an employer may be responsible for:

- Health benefits
- Retirement benefits
- Wage and Hour payment rates
- Employee business expenses
- Unemployment compensation payments to state agencies
- Family and Medical Leave Rights, and
- Violations of federal and/or state employment anti-discrimination laws and rights.

To illustrate the point cases have been filed in approximately 40 states in recent years against FedEx Ground Package Systems Inc. involving one or more of the above issues with respect to the status of package delivery drivers as follows:

- In October, 2008 a referee appointed by a Superior Court Judge in Los Angeles California awarded $14.4 million to approximately 200 drivers in the case *of Estrada v. FedEx Ground Package System, Inc*. The drivers contended that FedEx had exercised almost complete control over the manner in which their duties were performed leaving little or no room for the exercise of independent judgment. One of the main issues in the case was whether FedEx had illegally classified the drivers as independent contractors instead of employees and refused to reimburse them for over $7 million in job-related expenses. Although the referee awarded the $14.4 million indicated above, an appellate court reversed the "equitable relief" portions of the

lawsuit but allowed the remainder of the appeal to continue.

- Across the country similar cases against FedEx Ground are pending in some 39 other states including **Alabama** (*Tina Floyd v. FedEx Ground*: Violations of Alabama Deceptive Trade Practices Act); **Arkansas** (*Harris v. FedEx Ground*: Violation of Arkansas Wage & Hour Act); **Florida** (*Carlson v. FedEx Ground*: Rights under FMLA) and **New Jersey** (*Tofaute, et al v. FedEx*: Race discrimination in employment).

  In substance the plaintiffs in these and the other pending cases are contending that the "micro-management" of drivers by FedEx is such that it minimizes their status as "independents" and in effect constitutes an employer-employee relationship. On the other hand FedEx asserts that its "owner-operators," as the drivers are called, are properly classified as independent contractors because they were never hired to be employees and that the company's requirements to strictly adhere to certain performance practices does not make them employees. FedEx asserts that it will ultimately prevail in all of the proceedings. Incidentally, most of the forty (40) cases have been consolidated and transferred to the U. S. District Court for Northern Indiana for pre-trial proceedings.

So What's the Difference Between an Employee and an Independent Contractor?

The difference between an employee and an independent contractor, as important as it may be, is not always easy to define. Unfortunately, Title VII, itself, does little to clarify that difference. Title VII defines the term "*employee*" to mean "*an individual employed by an employer*" and fails to elaborate further. However, since 1979 most courts and the EEOC adopted the concept of "economic realities" set forth in the case of *Spirides v. Reinhardt*. (D.C. Cir. 1979) as a means to differentiate between the two. In that case the Court stated:

> "Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative. Nevertheless, the extent of the employer's right to control the "means and manner " of the worker's performance is the most important factor. …If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist."

In substance, the basic principles suggested in the *Spirides* decision were followed by the 11th Circuit in the case of *Cobb v. Sun Papers, Inc.* (11th Cir. 1982). In that case the Plaintiff, Square Cobb, a Janitor/Custodian, alleged that he was an employee based upon his working relationship with Sun Papers and therefore covered by the anti-discrimination provisions of Title VII. However, the 11th Circuit found that although the employer, Sun Papers, Inc., gave directions to Square Cobb concerning the performance of his duties and also provided basic materials and tools used in performing those duties, he was an independent contractor, not an employee. Among the many factors considered in reaching their conclusion, the court found that Cobb did not report his payments as business income on his tax returns.

Some Practical Tips on How to Approach the Problem

As an aid to employers in applying the *Spirides* decision, the EEOC developed a number of specific criterion to assist in making a determination as to whether a Charging Party (employee/contractor) is in fact an independent contractor rather than an employee. The most important of these can be summarized as follows:

1. The extent of control exercised by the employer over the details of work;

2. The kind of occupation in which the worker is engaged (e.g. is the kind of work in question usually done by a specialist without supervision.). Related to this criterion is the skill required in that occupation.

3. Whether the Employer of the worker in question supplies the equipment, tools and the place of work.

4. The length of time for which the worker is engaged to work and the method of payment, whether by time or by the job.

5. Whether the Employer withholds payroll taxes from any compensation paid;

6. Whether the Employer provides leave, benefits or other coverage such as Workmen's Compensation.

7. The manner in which the work relationship can be terminated. (E.g. with or without cause, notice or explanation.)

8. Whether the worker was required to work exclusively for the Employer.

9. Whether the worker could delegate the work to another person and whether the worker is an employer with employees of his own.

10. Whether the work affords the worker an opportunity to make a profit or loss depending upon his/her own skill or management abilities; and

11. The actual intentions of the parties in creating the work relationship.

As stated in the *Spirides* decision a determination of the work relationship must be based on all of the facts or economic realities involved. No single factor will necessarily be determinative. In substance the EEOC will consider all of the foregoing factors in order to assess whose business interest the worker was serving, the employer's or his own.

The cases mentioned above are perhaps indicative of only the tip of the iceberg with respect to the many, complicated issues that arise in the context of working relationships between employers, employees and independent contractors. To avoid problems the intentions of the parties should be clear at the outset. Employers are advised to be consistent in acting upon those intentions. If legal counsel is needed, please feel free to call this office at (205) 323-9267.

OSHA Tips: Scheduling OSHA Actions

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at 205.226.7129.

As the new calendar year approaches, it might be time to set dates to accomplish various actions required by OSHA. There are numerous rules that call for annual or periodic actions such as training updates, postings, inspections, certifications, etc. Some of the more widely applicable items are as follows:

You must have completed your prior year's summary of injuries and illnesses, Form 300A, in order to post it by February 1, 2009. It should remain posted until April 30, 2009.

OSHA standard 29CFR1910.1020(g)(1) requires that employees be informed upon their initial hiring and at least **annually** of the following: the existence, location and availability of medical or exposure records; the person responsible for maintaining such records; and each employee's right of access to these records.

Where employees are exposed to an eight-hour, time-weighted average noise level at or above 85 decibels, they are required to have a new audiogram at least **annually**. 1910.95(g)(6)

Where employees have occupational exposure to blood or potentially infectious material, the required Exposure Control Plan must be reviewed and updated at least **annually**. It must also be documented **annually** that the consideration and implementation of effective and available safer needle devices has been taken. 1910.1030©(1)(iv)(B) Further, there is a requirement for at least **annual** training under this standard. 1910.1030(g)(2)(ii)

OSHA's Permit Required Confined Space standard requires that the program be reviewed by using canceled permits within **one year** of each entry into a permit-required space. 1910.146(d)(14) A single **annual** review

may be performed utilizing all entries made within the 12-month period. Employees assigned to rescue duties must practice permit space rescues at least once every **12 months**. 1910.146(k)(2)

The lockout/tagout standard requires the employer to conduct a periodic inspection of the energy control procedure (lock/tagout program) to ensure that the requirements of the standard are being met. This must be done at least **annually** and the employer must certify its accomplishment as to specific machine or equipment, date, employees involved and the name of the inspector. 1910.147©(6)(i)

After the initial fit testing of an employee's tight-fitting respirator, there must be another fit test at least **annually**. 1910.134(f)(2) In addition to the initial training required for an employee in the use of a respirator, retraining must also be accomplished at least **annually**. 1910.134(k)(5)

Annual maintenance checks must be made of portable fire extinguishers and records documenting these checks must be maintained. 1910.157(e)(3) Also where an employer has provided extinguishers for employee use, he must train employees for such use upon initial employment and at least **annually** thereafter 1910.157(g)(2)

OSHA standards require inspections of cranes and crane components at established intervals.. For instance, crane hooks and hoist chains must be visually inspected daily with **monthly inspections** that include certification records. 1910.179(j)92) Complete inspections of a crane must be given at "periodic" intervals which the standard defines as between 1 to twelve months 1910.179(j)(3)

The powered industrial truck operator standard requires that an evaluation of each certified operator's performance must be made at least once every **3 years**.

Additionally, many of OSHA's substance-specific health standards contain periodic action requirements such as monitoring exposure levels. Actions may also be triggered by changes in work processes or environment. Examples would be the introduction of a new hazardous chemical requiring hazard communication training, or training to address changes to the emergency action plan for the site.

Wage and Hour Tips: Current Wage and Hour Highlights

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Erwin can be reached at 205.323.9272. Prior to working with Lehr Middlebrooks & Vreeland, P.C., 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.

As we near the end of another year most employers will begin planning for 2009. As such you should be aware that nine states will see their minimum wage increase on January 1, 2009. Those states and their minimum wage rates are shown below.

Arizona	$7.25
Colorado	$7.28
Florida	$7.21
Missouri	$7.05
Montana	$6.90
Ohio	$7.30
Oregon	$8.40
Vermont	$8.06
Washington	$8.55

Two of these states will see an additional increase on July 24, 2009 when the FLSA minimum wage increases to 7.25.

It has now been over four years since the Department of Labor, in August 2004, adopted new regulations covering the exemptions provided for executive, administrative, professional and outside sales employees. Because of the extensive amount of litigation that continues under the Fair Labor Standards Act I believe that I should remind you of the requirements set forth in these new regulations. Below is a brief overview of the current regulations that became effective in August 2004. **In order for the employee to qualify for an exemption he/she must meet all of criteria set forth for that specific exemption.**

Executive Exemption

To qualify for the executive employee exemption, the following tests must be met:

- The employee must be compensated on a salary basis at a rate not less than **$455** per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Administrative Exemption

To qualify for the administrative employee exemption, the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less than **$455** per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Professional Exemption

To qualify for the **learned professional** employee exemption, the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less than **$455** per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the **creative professional** employee exemption, the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less than **$455** per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated **either** on a salary or fee basis at a rate not less than **$455** per week or, if compensated on an hourly basis, at a rate not less than **$27.63** an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:

  1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

  2) The design, development, documentation, analysis, creation, testing or modification of

computer systems or programs, including prototypes, based on and related to user or system design specifications;

3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

Outside Sales Exemption

To qualify for the **outside sales** employee exemption, the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

Highly compensated employees performing office or non-manual work and paid total annual compensation of **$100,000** or more (which must include at least **$455** per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

In reviewing the requirements for each exemption you will note there is a "primary duty" test regarding the work performed by the employee. While the old regulations tended to define "primary duty" as more than 50% of the employee's time the new regulations state that primary can mean the "major" responsibility of the employee. This change in terminology gives employers more leeway in determining who is exempt but you should remember that the burden is on the employer to prove that the employee meets all of the requirements for the exemption.

There continues to be much litigation, both by Wage Hour and private attorneys, related to whether employees are exempt from the minimum wage and overtime requirements or whether they should be paid overtime when they work more than 40 hours in a workweek. s to private litigation relating to the exempt status of managers in retail stores. Therefore, employers should have an ongoing evaluation of his pay practices to ensure that he is correctly classifying all employees as failure to do so can become very expensive. If I can be of assistance you may reach me at 205 323-9272.

2008 Upcoming Events

AFFIRMATIVE ACTION UPDATES

Birmingham – December 9, 2008
Vulcan Park

Huntsville – December 11, 2008
Holiday Inn Express

WAGE AND HOUR REVIEW

Birmingham – December 10, 2008
Vulcan Park

For more information about Lehr Middlebrooks & Vreeland, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Edi Heavner at 205.323.9263 or eheavner@lehrmiddlebrooks.com.

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