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Employment Law Bulletin

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JULY 2009
VOLUME 17, ISSUE 7

Employers Monitoring Health Care Reform Legislation

As we begin the seventh month of the Obama Administration, employers again are closely watching developments in Washington where Congress and the President tackle health care reform. America's Affordable Health Choices Act of 2009 (AAHCA) is now the leading legislation in a crowded field of health care reform proposals being debated in Congress. The AAHCA still appears to be short of the requisite number of "yes" votes in either house to secure its passage without further amendment, but its general scheme for health care reform has broad support among Democrats—and broad support among Congressional Democrats with their large majority in both houses is probably all that's needed. Those Democrats who are not yet supporting the bill, seem to be holding out over funding and budgetary concerns rather than any of AAHCA's key provisions.

If AAHCA passes, employers can expect significant new obligations for providing health care benefits to employees and steep penalties for non-compliance.

Universal Coverage. AAHCA requires every American to obtain health insurance. Americans who fail to obtain health insurance would have to pay an income tax penalty equal to the lesser of 2.5% of their modified adjusted gross income or the national average health care premium for the tax year. Employers would be required to offer their employees certain minimum health insurance coverage or pay an additional 8% payroll tax on the wages of their employees.

Employers offering the minimum health insurance coverage would have to: (i) offer to all employees both single and family coverage that qualifies as either (a) a "qualified health benefits plan," or (b) a grandfathered "employer-based health plan," and (ii) make contributions to the plan for each electing employee in an amount equal to (1) 72.5% of the premium of the lowest cost qualified plan for single coverage offered by the employer for employees electing single coverage, or (2) 65% of the applicable premium of the lowest cost qualified plan for family coverage offered by the employer for employees electing family coverage. Employers failing to comply with these requirements would be subject to penalties of up to $100 per non-covered employee per day plus the additional 8% payroll tax on employee wages. Some small employers with annual payrolls less than $250,000 would be completely exempt from these requirements, and employers with payrolls between $250,000 and $400,000 would be subject to a reduced payroll tax if they did not elect to provide the minimum coverage. As currently proposed, these rules would take effect in tax years beginning after December 31, 2012.

Small Businesses Included. Employers with average annual employee compensation of $20,000 or less and 10 employees or less would be eligible for a tax credit equal to 50% of their qualified employee health coverage expenses for the year. The credit would be available at a reduced rate for employers with average annual employee compensation between $20,000 and $40,000 (with 10 employees or less), and employers with between 10 and 25 employees (with average annual employee compensation of $20,000 or less).

Funding for the Bill. Proponents of the AAHCA estimate that it will cost between $600 billion and $1.5 Trillion over the next 10 years. Debate over the method of funding continues in both houses of Congress. The current proposal would pay for the AAHCA with an additional income tax of between 1% and 5.4% on individuals with modified adjusted gross income of $350,000 or more. President Obama has said that any provision that would raise taxes on individuals earning less than $250,000 a year could draw a veto. As a result, we think earlier proposals to limit or even eliminate the tax exemptions available for health care benefits are probably off the table.

Minimum Coverage. The AAHCA's definition of minimum health insurance coverage would force nearly all employers to change the terms of their current group health plans. AAHCA would, for example: (1) prohibit plans from imposing any pre-existing condition exclusions; (2) prohibit plans from implementing annual or lifetime caps on benefits; (3) prohibit plans from establishing premiums based on health status-related factors, gender, class of business, or claims experience; and (4) require plans to accept every individual and employer that applies for coverage. The increasing expense of these requirements would be offset, Congressional leaders say, by savings from new mandates forcing the implementation of case management, care coordination, and chronic disease management, along with wellness programs and health promotion.

Creation of A Low-Cost Federal Insurance Plan. AAHCA would create a federally-sponsored, national low-cost insurance plan, available to employers and individuals, which would compete with private insurance companies in providing health insurance. The low cost plan would operate alongside other federally-sponsored health care options like Medicare, Medicaid, and the states' Children's Health Insurance Program (CHIP).

Gateways. AAHCA would establish state-run insurance plan "gateways", an agency-like resource available to employers and individuals to act as a conduit for connecting them with the various public and private health insurance options for which they are eligible.

At least 5 Congressional committee chairmen are working on the AAHCA or similar health care reform proposals. The House Ways and Means Committee and the House Education and Labor Committee have already approved the AAHCA. The House Energy and Commerce Committee is considering the bill this week. The Senate's Health, Education, Labor and Pensions Committee approved the bill last week. The AAHCA has cleared more hurdles and made it further than any prior legislative effort to provide comprehensive health care reform. A floor vote on the bill by both houses is expected by October.

Employee Free Choice Act Compromise Closer To Vote

As we have been tracking here each month, the momentum for passing the Employee Free Choice Act (EFCA) stalled out over objections to the bill's card-check provision, which would eliminate the secret-ballot union election. A broad coalition of Senators is now working on a compromise bill that would drop EFCA's controversial card-check provision and substitute a requirement for speedy union elections and equal time for unions during company campaigns.

Details of the bill are still being negotiated, but we expect the legislation will require that union elections be held within 5 or 10 days after the union files a petition with signed authorization cards from at least 30% of the employees it seeks to represent. This would substantially shorten the period in which employers and the union formally campaign for employee votes. Currently, elections are held an average of 45 days after the filing of the union petition.

The bill is also expected to require that employers allow union representatives equal time to sway employee support. If the employer holds a captive audience meeting on company time to try to persuade employees to vote against union representation, the employer would have to make the same opportunity available to union persuaders, on company time.

Generally unaffected by the compromise would be EFCA's provisions requiring that first contracts be submitted to binding federal arbitration if the parties cannot come to a quick agreement and EFCA's other penalties and increased fines for employer unfair labor practices.

Health care reform is the legislation du jour in Congress, but labor unions expect a vote on the EFCA legislation by the fall. Stay tuned.

Labor And Business—Developing Strategic Partnerships?

Two recent events show that some businesses believe they can develop a strategic relationship with organized labor while also resisting labor's efforts to unionize. For example, on June 30, 2009, Wal-Mart, the Service Employees International Union, and the Center for American Progress sent a joint letter to President Obama expressing their support for mandated employer health insurance. The Service Employees International Union and the United Food and Commercial Workers have a national campaign to organize Wal-Mart. The Center for American Progress is led by John Podesta, who coordinated President Obama's transition team.

On June 17, 2009, the American Petroleum Institute signed an agreement to create an oil and gas industry labor management committee involving 14 building trade unions and, among others, Marathon Oil Corporation and Exxon Mobil Corporation. The unions include the Carpenters, Operating Engineers, IBEW, Teamsters, Laborers, and Sheet Metal Workers. The purpose of the Committee, according to API and the AFL-CIO, is "to work together through the Committee to preserve and create jobs by promoting innovative and affordable access to energy that is vital to the American economy."

So here's the situation these leading employers face:

Wal-Mart provides health insurance and most retailers do not. Alignment with the SEIU for employer-mandated health insurance "levels the playing field" for Wal-Mart, by requiring its competitors to provide that benefit as well. The oil and natural gas producers realize that a significant change in our nation's energy policy may occur based on the party composition of Congress and the President's objectives for renewable and alternative energy sources. Forming this labor-management committee positions the oil and natural gas businesses to work on legislation acceptable to the industry.

As an outcome of these strategic alliances, will those participating employers become more vulnerable to unionization? Probably not, as employers can distinguish to the workforce the difference between a relationship to address legislative and industry issues with why that same relationship is unnecessary at the workplace. However, we expect labor unions to use these alliances during their national and local organizing campaigns to claim that the leading companies in our country view unions as an asset to enhance benefits, job creation and industry preservation.

Careless E-Mail Evidence Of Age Discrimination

Too often e-mail has become the source of a "self-inflicted wound" by an employer. For example, in the case of Wold v. El Centro Fin, Inc., (D. Idaho, June 16, 2009), the age discrimination lawsuit of a rejected applicant was permitted to go to trial when the president mistakenly sent him the following e-mail: "Damn…check it out—I don't know what I think. He must be old…and just looking for something to do." The president of the company intended to send the e-mail to the company's hiring coordinator, but instead sent it to the applicant. With this direct evidence in hand, the applicant filed an age discrimination charge and lawsuit, which the court concluded should go to a jury.

The company argued that it did not reject Wold's application for employment because it never considered him in the first place. The court rejected the company's argument, based on the company's position statement that it submitted to the Idaho Human Rights Commission. The company told the IHRC that the applicant was rejected because of his aggressiveness. The court stated that the inconsistency between the position statement and the company's position during litigation (that it never considered Wold) "could lead a rational [jury] to find that El Centro's explanation is unworthy of credence."

Think of e-mail as "evidence mail." E-mail communications that discuss employees or applicants should be fact-based, not opinion-based. Remind the entire workforce that the company's policies prohibiting discrimination, harassment and retaliation include communications sent or stored via e-mail. Furthermore, the sense of urgency to send an immediate e-mail reply can lead to carelessness at a number of levels. Remember that e-mails are evidence—be comfortable with the evidence you are creating.

Included in this case is a very important lesson for employers about EEOC position statements and responses to claims for unemployment. Your organization's "theory" as to why an individual was terminated or suffered some other adverse decision should be decided upon before that decision is made. If an employer's response to unemployment is inconsistent with a response to a discrimination charge, and if either or both are inconsistent with the position the employer takes once the matter turns into litigation, the employer may have provided the plaintiff with a jury trial, rather than summary judgment for itself.

Contractor Or Employee? An $8.4 Million Mistake

For 17 years, Robert Gardner worked as a Sales Representative for Baby Trend, Inc., until his termination in 2005. Gardner sold Baby Trend products to retailers such as Toys "R" Us and Babies "R" Us. On June 30, a California jury awarded him $8.4 million arising out of his termination from employment. Prior to his termination, Gardner complained that the company was not paying him his full commission. The company asked him to attend a meeting to discuss the situation, which Gardner could not attend, and then the company terminated him.

Gardner sued under a number of theories, all of which asserted that he was an employee, not an independent contractor. The company argued that he in fact was an independent contractor and, therefore, it had the right to reduce unilaterally his commissions. The jury awarded Gardner $5.1 million for economic damages, lost earnings of $1.5 million, $275,000.00 for mental suffering, $1 million for failure to be paid for "waiting time" in violation of state wage and hour law, and over $300,000.00 for breach of contract.

In determining that Gardner was an employee and not an independent contractor, the court found that the employer maintained the right to control Gardner's activities and how he performed his job duties. This "control," said the court, was the most important factor in its decision that Gardner was an employee.

Employers need to be careful when classifying someone as an independent contractor. Misclassification may subject the employer to back wages, benefits liability and tax liability. Usually, a bona fide independent contractor is in business for himself or herself, not exclusive to one employer, not under that employer's direction and control and not for an indefinite period of time.

Please contact us if you have questions or concerns about independent contractor relationships.

Fed Up With The Rising Costs Of Medical Benefits In Workers' Compensation Cases? Consider Closing Future Medical Benefits (Part 3)

This month we continue our discussion of closing medicals in workers' compensation cases. We have previously discussed the rising costs of medical benefits in workers' compensation cases, and why settlements that close medical benefits can be advantageous for both employers and employees. We have also discussed that some cases are more appropriate for closing future medical benefits than others, and identified factors that may make a case more disposed to closing future medical benefits. This month, we address the procedure for successfully closing future medical benefits in a litigated Alabama workers' compensation case.

Amendments to the Alabama's Workers' Compensation Act in 1992 make it clear that future medical benefits may be closed as part of a workers' compensation settlement. But settling a litigated workers' compensation case is not as easy as reaching an agreement and asking the court to dismiss the case. Court approval of the settlement must be obtained.

The first step is to prepare and submit a settlement petition to the court, setting forth the terms of the settlement. The trial judge will then conduct a brief settlement hearing, called a "Best Interest Hearing," to determine whether the settlement is in the best interest of the employee. The injured worker, the injured workers' attorney, and the employer's attorney usually attend this hearing.

At the Best Interest Hearing, the trial judge will briefly examine the injured worker to ensure that both the court and the injured worker understand the particulars of the settlement. The court typically explores the facts of the case and the nature and extent of the worker's injury. The court will inquire into—and ensure the worker's understanding of—the workers' compensation benefits that are being closed by the settlement (i.e., indemnity, vocational, and/or medical benefits). The court will also evaluate the ability of the worker to make an informed decision.

If the trial judge determines that the settlement is in the best interest of the employee, he or she will enter an order approving the settlement. On the other hand, if the judge declines to approve the settlement, then the parties are back at square one. Such a finding by the court can dishearten both the employee and the employer. But there are ways to increase the likelihood that a settlement will be approved by the court.

Workers' compensation settlements, like politics, can make strange bedfellows. It is not uncommon for a workers' compensation settlement to follow bitter, adversarial litigation. But once a settlement is achieved that is agreeable to both sides, it is in the parties' best interests to present a "united front" to the court and let bygones be bygones. If bitter or divisive tones are detected by the trial judge at a Best Interest Hearing, he or she will likely be less inclined to find that the settlement is in the best interest of the injured worker. Particularly when medicals are being closed, both sides should be prepared to explain with confidence the reasons behind the settlement, and why closing medicals is appropriate.

A few trial judges are extremely disinclined to approve a settlement that closes an injured workers' right to future medical benefits. But most judges are willing to approve a settlement closing medical benefits if a united front is presented, along with cogent reasoning behind the parties' agreement to close medicals. Adequate preparation and foresight into the court's potential concerns will increase the likelihood of court approval.

Next month we will take a look at more considerations for closing future medical benefits. For more information on closing medical benefits in workers' compensation cases, contact Don Harrison at dharrison@lehrmiddlebrooks.com or (205) 323-9276.

EEO Tips: Why The EEOC Is So Concerned About Age Discrimination

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.

On July 15, 2009, the EEOC held a special hearing to highlight what it called the "devastating impact of age discrimination." Specifically, the Commission wanted to discuss some of the "recent, controversial case law developments, the growing number of age-related layoffs, threats to employee benefits and generally to invite suggestions for regulatory and legislative action" to deal with the apparent rising tide of age discrimination cases.

Based on what's happening in the business world they may have good reason to be concerned. There are at least two reasons for the EEOC's concerns:

1. There has been, indeed, a sharp rise in age discrimination claims—most probably a result of recent economic troubles.
2. Recent unfavorable case law, such as the Supreme Court's holdings in Kentucky Retirement System v. EEOC and Gross v. FBL Financial Services, Inc., has, says the EEOC, significantly weakened older employees' chances for prevailing against an employer in age discrimination cases.

The Sharp Rise in Age Cases. While there has been a marked increase in charges filed under all of the other statutes, the rise in age cases is striking. According to the EEOC, during the three-year period between 2006 and 2008, the number of age discrimination charges rose from 16,548 to 24,582, an increase of 48.5%. Between 2007 and 2008 alone, there was an increase of 28.6% in the number of age discrimination charges. Actually, during 2008, age discrimination charges rose to the point that over one in every four charges filed involved an allegation of age discrimination.

The chart below shows the steady growth in age discrimination charges over the last three-year period, as a percentage of all charges filed.

	FY 2006	FY 2007	FY 2008
Total Charges Filed – all Statutes	75,768	82,792	95,402
ADEA Charges Filed	16,548	19,103	24,582
% of AGE Charges to all charges filed	21.8%	23.2%	25.8%

The question is Why? What is fueling this drastic increase?

The reasons for the growth in ADEA charges vary. According to Stuart Ishimaru, EEOC Chairman, "…age discrimination is an equal opportunity plague. It is not limited to members of a particular class or a particular race. It is not limited to particular industries or particular regions. And it is not limited to a particular gender." However, there does seem to be a common component involved, namely economics. For example, it is conjectured that older employees are being targeted because:

- Senior employees have usually worked longer than younger employees and therefore are paid more. Whether true or not, some employers believe that they can get the same productivity out of younger employees for lower costs.
- Or, according to the EEOC, employers embrace the false stereotype that older workers are "less flexible or critical."
- Some fringe benefits such as health insurance are usually somewhat less expensive for younger employees. (Although it is generally a violation to directly discriminate on that basis, alone.)
- In layoffs and reductions-in-force, age discrimination may be a hidden reason that becomes even less apparent when combined with other, possibly legitimate business reasons for the termination. And, now, as will be discussed below, it may be harder to prove age discrimination in such cases because of the high standard of proof necessary to prevail.

An added reason for an increase in age discrimination charges is that older employees who lose their jobs often have more difficulty in securing new employment and, thus, file EEOC charges because they more readily feel discriminated against. Because of these and other related reasons, the burgeoning rate of age discrimination charges has become an object of great concern to the EEOC.

Unfavorable Case Law Developments. In the case of Kentucky Retirement Systems v. EEOC, the Supreme Court in a 5/4 decision held that it was not age discrimination to impute a certain number of years of service to an employee who was disabled and forced to retire before reaching the normal retirement age of 55, but deny the imputation of any additional years of service to an employee who became disabled after the age of 55. The EEOC and the Sixth Circuit Court of Appeals saw this as a prima facie case of age discrimination with respect to retirement benefits. However, the Supreme Court reversed, finding that there was no discrimination because the difference in treatment was based on pension status, not age.

In the case of Gross vs. FBL Financial Services, Inc., the Supreme Court held that in a "mixed motive" case under the ADEA, a Plaintiff must prove that "but for" the employee's age, the employer would not have taken the alleged discriminatory action in question. This level of proof is somewhat higher than the "direct evidence" level, because even though there may be direct evidence of age discrimination, an employer still would not have violated the ADEA under the FBL holding if the plaintiff failed to prove that the alleged discriminatory action would not have been taken "but for" the plaintiff's age.

At this level of proof, a plaintiff is essentially required to delve into the employer's mental processes and find discriminatory animus. This case has broad implications on the proof necessary to prevail in all disparate treatment cases under the ADEA. For example, it would seem to indicate that in every instance a plaintiff must prove by a preponderance of the evidence that the employer's allegedly discriminatory actions would not have been taken "but for" the plaintiff's age, keeping the burden of proof at all times on the plaintiff. Thus, in effect it would seem to undermine Section 1625.7(e) of the EEOC's Procedural Regulations (29 C.F.R 1625) which hitherto required that "…in an individual claim of discriminatory treatment, the employer bears the burden of showing that *a reasonable factor other than age exists factually*."

Hence, under the reasoning in the FBL case an employer may be able to assert a "reasonable factor other than age" whether or not that factor actually exists with respect to the business in question. At least that is arguable.

EEO TIPS:

What Actions are Likely to be Taken by the EEOC?

Under the circumstances described above, the EEOC says that it will take some, if not all, of the following actions:

- It will amend its regulations found generally at 29 C.F.R. 1625 to re-define the components and burdens of pleading and proof pertaining to "the reasonable factor other than age defense" under the ADEA.
- It will develop new policy guidance to make uniform the relevance and weight of ageist comments. (It is not clear what this will do to directly help charging parties unless the comments are tantamount to a confession of antipathy toward older workers.)
- It will propose new rules under the ADEA to clarify the factors announced by the Supreme Court in the case of Kentucky Retirement Systems v. EEOC;
- It will seek legislation to reduce the "but for" level of proof established by the Supreme Court in Gross v. FBL Financial Services. Specifically, it will be looking for legislative action to make the burdens of proof under the ADEA the same as under Title VII and the ADA.

In the meantime, at least for a year or two, employers will find that their employment actions under the ADEA can be carried out in a generally favorable legal climate.

If you have questions about how the recent ADEA case law developments might affect your current employment policies, please call this office at (205) 323-9267.

OSHA Tips: OSHA READINESS REVIEW

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 an employer, what would you do if you knew that OSHA would be at your door tomorrow to conduct an inspection? Your first impulse might be to tell your employees to stay at home, since the facility would be closed for the day. After realizing this isn't a solution, you are likely to launch a frantic clean-up effort to prepare for their visit. The futility of checking everything and making significant corrections in such a short time may also become evident.

After more than 35 years, thousands of inspections and thousands of alleged violations, the items and conditions OSHA will be checking are no secret. Employers should periodically assess their overall safety and health program to include their readiness for an OSHA inspection.

There are a number of key items that the OSHA inspector will ask to see at the outset. Having these readily available when requested will help get the inspection process off to a good start. Further, making sure records are kept current and consistent with OSHA requirements could bode well for the inspection outcome.

Certain to be requested and reviewed for most inspections are the following:

- **Occupational Injury and Illness Records (OSHA Form 300, 301, and Summary).** Unless you are an employer in one of the exempt SIC codes such as various retail establishments or an employer with fewer than 10 employees in the previous year, you should have 5 years of these records to furnish the OSHA compliance officer. All cases meeting the criteria for recording should be included to within seven days of an injury or illness. OSHA's Field Inspection Reference Manual directs compliance officers to review the employer's injury and illness records for the three prior calendar years. Congressional interest has been spawned by charges of extensive under-reporting of work related injuries and illnesses. Due to this alleged under-reporting, you may expect to see inspectors become more picky in their review of such records.
- **Hazard Communication.** An employer's obligation to implement a satisfactory, written hazard communication program for the site continues to be one of the most oft-cited violations. This program must identify all hazardous chemicals that employees may encounter in the workplace, provide for their labeling, ensure that employees have ready access to material safety data sheets for each, and provide information and training on these chemicals to employees.
- **Control of Hazardous Energy (Lockout/Tagout).** Where employees are engaged in maintenance or repair activities they must be protected from any unexpected startup or release of energy. A <u>written</u> program must be devised and implemented that describes how this will be accomplished.
- **Emergency Action/Evacuation Plan.** Where required by an OSHA standard such as 1910.160(c)(1), an emergency action plan must be in place for the site. The plan must be <u>in writing</u> unless there are 10 or fewer employees involved. The plan should serve to facilitate and organize employee actions in the event of a workplace emergency. It should include things such as the means of reporting fires, escape routes, post-emergency accounting for personnel and medical duties.
- **Personal Protective Equipment.** Every workplace is required to have a hazard assessment conducted. This should be a <u>written</u> certification identifying the workplace, the person certifying the assessment, giving the date(s) performed and identifying the document as a certification of hazard assessment. Employees who are required to utilize personal protective equipment because of workplace exposures must be trained in its use. The standard 1910.132(f)(4) requires the employer to verify

that each employee has received and understood the required training through a written certification.

Chapter three of OSHA's reference manual specifically identifies the above as programs and records that compliance officers will review. The statement is also made that "additional programs will be reviewed as necessary." While these would not be universally required, the following are examples of other programs that may be audited depending on conditions and exposures in the workplace: (1) hearing conservation (2) confined space entry and (3) respiratory protection.

Wage And Hour Tips: Current Wage 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.

First, a reminder that the Fair Labor Standards Act minimum wage increased on July 24th to $7.25 per hour. This change will affect employees in 29 states but will not have any effect in seven states that have laws mandating the $7.25 rate or the 14 states that have a minimum wage greater than $7.25. Washington State, with a rate of $8.55 per hour, has the highest rate in the country. To put things in perspective, I recently read that the minimum wage in Australia is $543.78 per week or the equivalent of more than $13.50 per hour.

Recently, I ran across something new dealing with the payment of wages. Effective July 1, 2009, the State of Florida will allow employers to have the option of using payroll debit cards to pay their employees. In order to use this method, employers must ensure that the card is payable, without discount, at an established business in the state. I would expect that other states might follow suit and establish this practice also.

During this economic slowdown many employers are looking for ways to reduce costs. Some employers have begun to use furloughs, reductions in hours per week and reduction in pay. One of the problems in reducing pay is the possibility that you may invalidate the exemption for otherwise exempt people. On July 17, Wage and Hour posted on its website, a series of questions and answers relating to these issues. The following Q&A gives a remarkably clear explanation of many of these pay issues:

1. If an employer is having trouble meeting payroll, do they need to pay non-exempt employees on the regular payday?

In general, an employer must pay covered non-exempt employees the full minimum wage and any statutory overtime due on the regularly scheduled payday for the workweek in question. Failure to do so constitutes a violation of the FLSA. When the correct amount of overtime compensation cannot be determined until sometime after the regular pay periodl; however, the requirements of the FLSA will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable.

2. Is it legal for an employer to reduce the wages or number of hours of an hourly employee?

The FLSA requires that all covered, non-exempt employees receive at least the applicable Federal minimum wage for all hours worked. In a week in which employees work overtime, they must receive their regular rate of pay and overtime pay at a rate not less than one and one-half times the regular rate of pay for all overtime hours. The FLSA does not preclude an employer from lowering an employee's hourly rate, provided the rate paid is at least the minimum wage, or from reducing the number of hours the employee is scheduled to work.

3. Does an employer need to pay an hourly employee for a full day of work if he or she was scheduled for a full day but only worked a partial day due to lack of work?

The FLSA does not require employers to pay non-exempt employees for hours they did not work.

4. In general, can an employer reduce an otherwise exempt employee's salary due to a slowdown in business?

Reductions in the predetermined salary of an employee who is exempt under Part 541 of the Department of Labor's regulations will ordinarily cause a loss of the exemption. Such an employee must then be paid the minimum wage and overtime required by the FLSA, as discussed in **FAQ #2** above. In some circumstances, however, a prospective reduction in salary may not cause a loss of the exemption. See **FAQ #7** below.

Section 13(a)(1) of the FLSA exempts from minimum wage and overtime pay "any employee employed in a bona fide executive, administrative, or professional capacity" as defined in 29 C.F.R. 541. An employee qualifies for exemption if the duties and salary tests are met. FLSA section 13(a)(1) requires payment of at least $455 per week on a "salary" basis for those employed as exempt executive, administrative, or professional employees. A salary is a predetermined amount constituting all or part of the employee's compensation, which is not subject to reduction because of variations in the quality or quantity of the work performed.

An employer must pay an exempt employee the full, predetermined salary amount "free and clear" for any week in which the employee performs any work without regard to the number of days or hours worked. However, there is no requirement that the predetermined salary be paid if the employee performs no work for an entire workweek. Deductions may not be made from the employee's predetermined salary for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing, and able to work, deductions may not be made for time when work is not available. Salary deductions are generally not permissible if the employee works less than a full day. Except for certain limited exceptions found in 29 C.F.R. 541.602(b)(1)-(7), salary deductions result in loss of the section 13(a)(1) exemption.

Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough disqualify the employee from being paid on a salary basis only in the workweek when the furlough occurs and for which the pay is accordingly reduced under 29 C.F.R. 541.710. **See FAQ #9** below. Physicians, lawyers, outside salespersons, or teachers in bona fide educational institutions are not subject to any salary requirements. Deductions from the salary or pay of such employees will not result in loss of the exemption.

5. Can an employer reduce the leave of a salaried exempt employee?

An employer can substitute or reduce an exempt employee's accrued leave (or run a negative leave balance) for the time an employee is absent from work, even if it is less than a full day and even if the absence is directed by the employer because of lack of work, without affecting the salary basis payment, provided that the employee still receives payment equal to the employee's predetermined salary in any week in which any work is performed even if the employee has no leave remaining.

6. Can a salaried exempt employee volunteer to take time off of work due to lack of work?

If the employer seeks volunteers to take time off due to insufficient work, and the exempt employee volunteers to take the day(s) off for personal reasons, other than sickness or disability, salary deductions may be made for one or more full days of missed work. The employee's decision must be completely voluntary.

7. Can an employer make prospective reduction in pay for a salaried exempt employee due to the economic downturn?

An employer is not prohibited from prospectively reducing the predetermined salary amount to be paid regularly to a Part 541 exempt employee during a business or economic slowdown, provided the change is bona fide and not used as a device to evade the salary basis requirements. Such a predetermined regular salary reduction, not related to the quantity or quality of work performed, will not result in loss of the exemption, as long as the employee still receives on a salary basis at least $455 per week. On the other hand, deductions from predetermined pay occasioned by day-to-day or week-to-week determinations of the operating requirements of the business constitute impermissible deductions from the predetermined salary and would result in loss of the exemption. The difference is that the first instance involves a prospective reduction in the predetermined pay to reflect the long term business needs, rather than a short-term, day-to-day or week-to-week deduction from the fixed salary for absences from scheduled work occasioned by the employer or its business operations.

8. Can an employee still be on-call or performing work at home during a furlough day?

Whether on-call time is hours worked under the FLSA depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time). For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait." An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is allowed to leave a message where he/she can be reached is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.

Employees who perform part or all of their normal job duties during a furlough day are working while performing such duties.

9. Are the rules for paying furloughed employees different for State and local governments?

For non-exempt, public employees, see **FAQ #2**. For salaried exempt employees, in the case of public sector employees, a specific rule applies to furloughs as described in the following regulatory text, 29 C.F.R. 541.710. Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

10. Does it matter if the state or local government employee is considered an essential or critical employee for the purposes of a required furlough?

The application of the FLSA is not affected by the classification of an employee as essential or critical for the purposes of a required furlough.

11. What remedies are available to correct violations of the FLSA when employees are not paid on a timely basis?

a. The Secretary of Labor may bring suit for back wages and an equal amount as liquidated damages or for interest on the back wages, or the Secretary of Labor may bring suit for an injunction against the failure to pay wages when due.

b. Employees who have filed complaints or provided information during an investigation are protected under the law. They may not be discriminated against or discharged for having done so. If they are, they may file a suit or the Secretary of Labor may file a suit on their behalf for relief, including reinstatement to their jobs and payment of wages lost plus monetary damages.

c. An employee may file suit to recover back wages, and an equal amount in liquidated damages, plus attorney's fees and court costs. Please note that the U.S. Supreme Court has ruled that the Eleventh Amendment prohibits employees of State governments from filing such suits against their State employers for monetary relief in federal courts (under Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)), and in State courts unless the State waives its sovereign immunity (under Alden v. Maine, 527 U.S. 706 (1999)).

d. Civil money penalties may be assessed for repeat and/or willful violations of the FLSA's minimum wage or overtime requirements.

e. Employers willfully violating the law also may face criminal penalties, including fines and imprisonment.

2009 Upcoming Events

EFFECTIVE SUPERVISOR®

Montgomery-September 16, 2009
Embassy Suites

Birmingham-September 23, 2009
Bruno Conference Center

Huntsville-September 30, 2009
Embassy Suites

Muscle Shoals-October 8, 2009
Marriott Shoals

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.

Did You Know…

…that Richard L. Trumka, the AFL-CIO's Secretary/Treasurer, announced he is running for President to succeed John Sweeney, who will retire in September? Trumka's running mates include Elizabeth Schuler, of the IBEW, who will run for Secretary/Treasurer, and Arlene Holt-Baker, who will run for Executive Vice-President. Trumka said that his main objective is to unify the labor movement, joining with the Change to Win Coalition, which broke off from the AFL-CIO five years ago. Trumka would also provide that every AFL-CIO union (56 in all) would have a seat at the organization's Executive Council. Prior to his election as AFL-CIO Secretary/Treasurer in 1995, Trumka was President of the United Mine Workers.

…that on July 9, President Obama selected Brian E. Hayes to serve as a member of the National Labor Relations Board? Hayes is the Republican Labor Policy Director for the Senate Health, Education, Labor and Pensions Committee. Currently, there are only two members of the Boar: the Chair, Wilma Liebman, and Peter Schaumber. The President in April nominated Craig Becker and Mark Pearce to fill the Board. Pearce and Becker are Union attorneys, as was Liebman. If Pearce, Becker and Hayes are confirmed by the Senate, the Board will have its full five member compliment.

…that an employer's STD Plan was exempt from ERISA? Marshall v. Whirlpool Corp. (M.D. OK, July 6, 2009). In granting summary judgment for Whirlpool, the court ruled that the company's short term disability plan is funded exclusively from the company's general assets. Therefore, this was a payroll practice and not subject to ERISA. The account was not set up as a trust account, was not set up in a plan name and was communicated in Whirlpool's claim. The court noted a U.S. Department of Labor Opinion letter which stated that general assets can be segregated into separate accounts, such as a short term disability plan, as long as that account or that plan did not gain some type of ownership in the account's assets.

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