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EEOC Obtains Record ADA Settlement--$6.2 Million

The EEOC on September 29, 2009 entered into a consent decree with Sears Roebuck and Company covering ADA violations involving more than 400 employees. The consent decree requires Sears to notify each employee who is on leave for job-related injuries 45 days before their leave ends that they may request reasonable accommodation to return to work upon completion of the leave. The policies also must mention various forms of reasonable accommodation that may be available to the employee, such as modified duty, transfer to another job, or a continuation of leave. Sears is required to establish a central management team to administer the leave requests and reasonable accommodation analysis.

This case arose when a former service technician attempted to return to work when his workers' compensation leave expired and while he still had limiting effects due to the job-related injury. Sears neither discussed reasonable accommodation with the technician nor offered the technician reasonable accommodation. The employee filed a discrimination charge and the EEOC sued Sears. During the discovery process, the EEOC discovered that Sears did not consider reasonable accommodation for those who completed workers' compensation leave but were still disabled.

This consent decree illustrates a problem we often see with employer treatment of workers' compensation claims under the ADA and FMLA. If an employee has a job-related injury or illness, the employer should assess whether it qualifies as a serious health condition. If so, the employee's FMLA rights should run concurrently with his or her workers' compensation rights. If upon the expiration of FMLA or more generous leave for job-related injuries or illnesses, an employee seeks to return to work and has limitations due to the injury or illness, the employer should engage the employee in a reasonable accommodation dialogue. Remember that under the new ADA, the definition of disability is broadly interpreted in favor of concluding that an individual has a disability. The ADA requires a case-by-case reasonable accommodate analysis. For example, in one situation, the employer may be able to accommodate the injured employee by extending leave with the opportunity to return to the same or an equivalent position; in another situation, perhaps accommodation is possible by transferring the employee to a different job which the employee can perform within his or her restrictions, even if that job pays less.

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EEOC Sues Employer Over Background Check

In our June 2009 Employment Law Bulletin, we alerted our readers to the EEOC's focus on criminal background checks. On September 30, 2009, the EEOC filed a lawsuit against an employer that used criminal background checks. EEOC v. Freeman (D. Md). The EEOC alleged that the Freeman Companies disqualified applicants based upon either their credit history or arrest or conviction records. The EEOC claims that the use of these background checks has a discriminatory impact based upon race, national origin and gender, because they tended to disqualify African American, Hispanic and male applicants at a substantially higher rate than other classes. The EEOC claims that the credit and background checks "are not job related and consistent with business necessity." Furthermore, the lawsuit alleges that "appropriate, less discriminatory alternative selection procedures" are available to the employer. The EEOC further claims that the use of the background check and credit histories deprive "African American, Hispanic and male job applicants of equal employment opportunities and otherwise adversely affect their status as applicants because of their race, national origin and sex," and claims that the use of background checks deterred African American, Hispanic and male candidates from even applying.

Note that the EEOC's case is not based on whether an employer has the legal right to use credit and criminal history checks. Rather, the EEOC's position is that the use of such information has a discriminatory impact based upon race, national origin and gender, and therefore it violates Title VII unless the employer can show the business necessity of using this information and that less discriminatory alternatives are unavailable. This case may have a substantial impact on employer hiring practices throughout our country. We will monitor this case and apprise you of any developments.

Court Upholds Verdict For Invasion Of Employee's Social Media Site

In the case of Pietrylo v. Hillstone Restaurant Group d/b/a Houston's (D.N.J., September 25, 2009), the court upheld a jury verdict on behalf of two servers who were terminated based upon comments they posted on their MySpace account. Two managers obtained the password to the employees' private account. The messages posted on that account left a bad taste in the mouths of the managers, which resulted in the employees' terminations. The jury awarded approximately $4,000.00 to each of the two employees.

The Stored Communications Act prohibits the unauthorized access to or use of privately stored electronic communications. This includes e-mails, MySpace, and Facebook. The two servers opened a MySpace account with access limited to servers and other employees. An individual had to be invited to participate in the group, and access was limited by password only. The purpose of the group, as posted on the site, was to "talk about all of the crap/drama/and gossip occurring in our workplace without having to worry about eyes prying in." Discussions that occurred on the account included workplace safety issues, wage concerns and unionization activity.

A MySpace participant showed the account to her manager while she was visiting the manager's home. She also gave her password to the manager. The employee claimed that she was coerced into giving the manager access, and the jury believed her. The court stated that the managers "knowingly, intentionally, or purposefully accessed the [site] without authorization." The court added that Houston's managers "knew that they were not authorized to access the contents of the [site] from the manner and means that [the managers] used to get access to the password protected page…"

The lesson learned in this case is one which we have stressed over the years when addressing employer interests in accessing employee e-mail. The overall issue is whether there is a reasonable expectation of employee privacy. When there is a social network account which requires password access and by which the users are

selective concerning who may participate, employer rights to review that are limited. If employees are notified that e-mail, for example, is for business purposes and employees do not have a reasonable expectation of privacy, then the employer has the right to follow through with checking employee e-mail. If employees post information on the internet that is not password protected, then the information is in the public domain and the employer has the right to review it and evaluate whether any action should be taken based upon its content.

What The Supreme Court Gave Congress Wants To Take Away

On June 18, 2009, in the case of Gross v. FBL Financial Services, Inc., the U.S. Supreme Court increased the burden that age discrimination plaintiffs must show to bring their case to a jury. In essence, the Supreme Court said that under the ADEA, the plaintiff must show that "but for" age, the adverse action would not have occurred. This is an extraordinarily difficult burden for an individual to meet.

Just as Congress amended the ADA and passed the Ledbetter Pay Act to reverse Supreme Court decisions, now legislation has been proposed to reverse the Gross case. Known as the Protecting Older Workers Against Discrimination Act, the bill was introduced on October 16, 2009. The bill states that an individual would prove that the Age Discrimination in Employment Act was violated where the evidence showed that age "was a motivating factor for the practice complained of, even if other factors also motivated that practice." Alternatively, the age plaintiff could prevail if the individual could show that "the practice complained of would not have occurred in the absence of age." The bill's co-sponsors include the Chair of the Senate Health, Education, Labor and Pensions Committee (Tom Harkin D-Iowa) and the Senate Judiciary Committee (Patrick Leahy D-Vermont). The bill's co-sponsors state that there is no reason to have a more difficult standard in age discrimination cases compared to Title VII. We expect this legislation to pass.

Fed Up With The Rising Costs Of Medical Benefits In Workers' Compensation Cases? Consider Closing Future Medical Benefits Part 5-Medicare's Impact On Closing Medicals

This article was written by Don Harrison, whose practice is concentrated in Workers' Compensation and OSHA matters. Don can be reached at dharrison@lehrmidddlebrooks.com or 205.323.9276.

This is the fifth installment in our series on closing medicals in workers' compensation cases. This month, we take a look at Medicare's impact on closing future medical benefits. We 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 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. We have addressed the procedure for successfully closing future medical benefits in a litigated Alabama workers' compensation case, and the role of ombudsmen in the workers' compensation settlement process.

During this series, we have discussed in detail the process for closing future medical benefits in Alabama workers' compensation cases. To briefly summarize, the parties (i.e., the employer and the employee) must reach a settlement, and a judge or ombudsman must approve the settlement. Medicare can add a wrinkle to this rather straightforward process. If the workers' compensation settlement leaves future medical benefits open, then Medicare is not an issue. However, if future medical benefits are to be closed, then Medicare needs to be considered.

Before we delve into Medicare's role in the workers' compensation settlement process, let's discuss what Medicare is and why Medicare's interests must be protected. Medicare was created by Congress in 1965 to provide federally-funded health insurance to qualified recipients, including anyone (1) over 65 years of age, (2)

in receipt of Social Security Disability Benefits for at least 24 months (regardless of age), or (3) who suffers from End Stage Renal Disease regardless of age.

Fifteen years after the creation of Medicare, Congress enacted the Medicare Secondary Payer Act (MSPA). The essence of the law is that Medicare is to be protected as a secondary payer for medical treatment relating to an injury when a primary payer exists. The Act was designed as a cost-saving measure; Medicare (i.e., the federal government) does not want to be on the hook for medical expenses for injuries that occurred on the job, as those injuries should be covered by workers' compensation.

Even though the MSPA is nearly thirty years old, the impact of the law was not felt until earlier this decade. Prior to 2001, enforcement of the MSPA was virtually non-existent. However, on July 23, 2001, the Center for Medicare and Medicaid Services (CMS) issued a memo to the insurance industry. That memo announced that compliance with the MSPA was required on workers' compensation cases, specifically with settlements that involved future medical benefits.

The memo of July 23, 2001 also discussed the use of a Medicare Set-aside Arrangement (MSA) in the settlement of workers' compensation cases. An MSA is an agreed amount of settlement funds to be "set aside" in order to shield Medicare from future medical expenses that are part of the settlement. The future medical expenses associated with the claimant's on-the-job injury are estimated (usually by an outside company that specializes in preparing MSA allocations), and this amount is set aside in an interest-bearing account. The account is then used to pay for the claimant's future medical expenses associated with the on-the-job injury. If an MSA account is properly established and utilized, then Medicare will pick up the tab for any additional expenses over and above the amount that has been set-aside in the MSA account.

Currently, CMS requires that an MSA must be submitted to CMS for approval whenever the settling claimant meets the following criteria:

(1) the claimant is already a Medicare beneficiary and the total value of the settlement, including indemnity, exceeds $25,000.00; OR

(2) the claimant is reasonably expected to become eligible for Medicare within 30 months of the settlement AND the total value of the settlement, including indemnity, is more than $250,000.00.

Situations where an individual has a "reasonable expectation" of Medicare enrollment include but are not limited to:

(1) the individual has applied for Social Security Disability Benefits;

(2) the individual has been denied Social Security Disability Benefits but anticipates appealing that decision;

(3) the individual is in the process of appealing and/or re-filing for Social Security Disability Benefits;

(4) The individual is 62 years and 6 months old (i.e., may be eligible for Medicare based upon his/her age within 30 months); or

(5) The individual has an End Stage Renal Disease condition, but does not yet qualify for Medicare based upon the same.

As discussed in a prior article, some Alabama trial judges are extremely reluctant to approve a settlement that closes future medical benefits, for fear that the injured worker will have future medical problems related to the job injury, but will not have the means to pay for the necessary medical treatment. An MSA can be used as an effective tool to convince the trial judge to approve a settlement. By explaining to the judge that the injured worker's future medical expenses will be covered with the money that is set aside into the MSA account (and if that money is not adequate to cover the medical expenses, Medicare will pick up the tab for any additional expenses), the judge will likely be more inclined to approve the settlement.

An MSA involves a lot of red tape, and a workers' compensation settlement that includes an MSA is more complex than the typical settlement. But if the MSA is properly constructed, then exposure is greatly reduced for the employer, employee, insurance company, and even

the attorneys. The end result of a successful MSA is that the employer/insurance company's liability for future medical expenses is extinguished, and the employee has access to medical care for future healthcare needs related to the on-the-job injury.

EEO Tips: The Difference Between A Past "Compensation Decision" And Other "Continuing Violations"

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.

Under the Lily Ledbetter Fair Pay Act of 2009 (LLFPA) which was signed into law on January 29, 2009, Congress overruled the Supreme Court's Decision in Lily Ledbetter v. Goodyear Tire & Rubber, where the court held that a charge of discriminatory compensation had to be filed within 180 days (or 300 days in jurisdictions having a similar anti-discrimination statute) after the discriminatory "**compensation decision**" was made. Thus, as in the case of Lily Ledbetter, if the discriminatory compensation decision was not discovered until some years later (i.e. outside of the filing period), the employee lost the right to file a charge under Title VII, the ADEA, or the ADA.

Congress in enacting the LLFPA specifically intended to restore the right of an employee to file a charge within 180 (or 300) days, regardless of when the discrimination began, after any of the following events:

- When a discriminatory compensation decision or other discriminatory practice affecting compensation is adopted;
- When the individual becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or
- When the individual's compensation is affected by the application of a discriminatory compensation decision or other discriminatory practice, including each time the individual receives compensation that is based in whole or in part on such compensation decision or other practice. (underlining added)

This raises at least two important questions: (1) what constitutes a compensation decision? and (2) whether the LLFPA has any effect on other "**continuing violations**" as that term has come to be applied.

What exactly is a "Compensation Decision?"

It is expected that the full meaning of the term "compensation decision" will not be known until fleshed out by numerous subsequent court decisions. For example, must there be "intentional discriminatory animus" to result in a discriminatory compensation decision? Can a discriminatory compensation decision be the product of a mere mistake which results in some adverse impact on an individual or a protected class? (Incidentally, the Supreme Court as recently as on October 21, 2009 agreed to hear the case of Lewis v. City of Chicago on the issue of whether the LLFPA applies to a class of African-American employees of the City of Chicago.) Additionally, there are questions as to whether a series of generally objective decisions, which taken together result in some compensation disparity on a protected class member, collectively or individually constitute a compensation decision. If so, at what point was the discriminatory compensation decision made?

Recently, the Third Circuit in the case of Mary Lou Mikula v. Allegheny County of Pennsylvania provided a partial answer as to employer behavior which may constitute a compensation decision. In that case, Mikula was hired by Allegheny County in 2001 as a "Grants Coordinator." At some point in 2004 she discovered that she was earning approximately $7,000 less than a male manager who had similar, but not quite the same, job duties. In 2005 she asked for a raise to make her salary at least the same as her comparator. **She never got a reply to this request.** Accordingly, in March 2006, Mikula filed a formal complaint with the County Human Resources Department

alleging that she had been discriminated against because of her gender and age. The County Human Resources Department finally responded to Mikula's internal complaint on August 23, 2006, denying any discrimination and asserting in effect that Mikula's pay was correct for her job duties and pay grade. Also, in March 2006 Mikula filed a lawsuit under the Equal Pay Act in the Federal District Court for the Western District of Pennsylvania.

Thereafter, on April 17, 2007, she filed a charge of discrimination with the EEOC and after obtaining a Right To Sue, she amended her earlier complaint pending in federal district court to include a claim under Title VII. (Note that although the LLFPA was not signed into law until January 29, 2009, it was made retroactive to May 28, 2007 for all compensation claims pending under Title VII, the ADEA, the ADA and the Rehabilitation Act of 1973)

The trial court granted summary judgment to Allegheny County finding that the Title VII claim was untimely and that the difference in salary paid to Mikula's comparator was based on factors other than sex. Initially, this ruling was upheld in part by the Third Circuit. The Third Circuit agreed with the trial court's finding that Mikula's Title VII claim was untimely, notwithstanding the Lily Ledbetter Fair Pay Act, but remanded the case for further findings on the EPA claim that the pay differential was based on factors other than sex. Upon rehearing the case, the Third Circuit on September 10, 2009 reversed itself as follows:

"Despite our earlier decision, we now hold that the failure to answer a request for a raise qualifies as a compensation decision because the result is the same as if the request had been explicitly denied." However, the Third Circuit maintained its finding that an *"…investigation report does not constitute a compensation decision or other practice."*

In reaching its conclusions upon rehearing, the Third Circuit found that *"Mikula's Title VII pay discrimination claim is timely as to paychecks that she received after June 20, 2006 (300 days before she filed her EEOC charge) if they reflect a 'periodic implementation' of a previously made intentionally discriminatory employment decision or 'other practice."* It is not clear what Congress meant by the term "or other practice." It is likely that there will be considerable litigation over the interpretation of this term.

How does this differ from Other "Continuing Violations"?

In effect, the Third Circuit in the Allegheny County case found that the county had made a discriminatory compensation decision and was continuing the violation with each pay check issued to Mikula thereafter. But is every past discriminatory employment decision which might affect compensation a continuing violation? The answer to this question is not clear. For example, it is not clear whether job assignments, biased annual performance evaluations, or a failure to promote, all of which could affect compensation, qualify as "compensation decisions" within the meaning of the Lily Ledbetter Fair Pay Act. At this point it would appear that the LLFPA applies only to direct compensation discrimination. However, that term may be broadened by future case law interpretations.

There is, however, a significant difference between a single discriminatory pay compensation decision which becomes a continuing violation and a series of discrete discriminatory acts which may or may not become the basis for the more generic continuing violation with respect other types of discrimination. The limits of a continuing violation for Title VII offenses prior to the LLFPA were established by the Supreme Court in the case of National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). In that case the court stated that:

> [D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed.

The Fifth Circuit recently in the case of Stewart v. Mississippi Transportation Commission (No. 08-60747 filed on Oct. 21, 2009) relied on the Morgan case in finding

that there was no "continuing violation" when the plaintiff, Jelinda Stewart, was reassigned away from a supervisor who allegedly sexually harassed her. Approximately a year later she was reassigned to the same supervisor who allegedly verbally harassed her. Stewart then filed a lawsuit alleging a hostile work environment and retaliation for reporting sexual harassment. The Fifth Circuit upheld the district court's grant of summary judgment to the employer. The court found that Stewart's reassignment was "an intervening action (quoting National Railroad Passenger Corp. v. Morgan) that cut off the employer's liability for the earlier harassment;" and also found that the supervisor's offensive comments did not create an actionable hostile work environment in 2006, and that Stewart was not subject to a materially adverse retaliatory action.

In substance, the difference between a discriminatory pay compensation decision under the LLFPA and a regular continuing violation can be summarized as follows:

- Under the LLFPA a discriminatory pay compensation decision may be actionable even though it occurred outside of the regular 180/300 day limitations period if the employee's current compensation is based in whole or in part upon the discriminatory compensation decision.

- Under current case law applicable to other types of unlawful discrimination, a continuing violation is limited to one or more discrete violations with the 180/300 day limitations period.

The whole subject of "continuing violations" is expansive. For example, the EEOC in its Compliance Manual has explicit instructions on processing charges which raise both timely and untimely events. The EEOC's perspective on the matter of "continuing violations" will be the subject of another ELB Article in the near future.

In the meantime if you have any questions about compensation decisions or potential continuing violations, please call this office at (205) 323-9267.

OSHA Tips: OSHA Recordkeeping Focus

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 promised, OSHA has issued its emphasis program on recordkeeping. It is set out in Directive 09-08 (CPL 02) entitled "Injury and Illness Recordkeeping National Emphasis Program (RK NEP)." The effective date of this NEP is September 30, 2009 with the program scheduled to run for one year.

This program responds to media and congressional concerns raised by indications of significant under-reporting of workplace injuries and illnesses. The background statement notes that at the request of the Senate Committee on Health Education Labor and Pensions and the House committee on Education and Labor, the GAO initiated a study on the accuracy of employer injury and illness records. It is also pointed out that the NEP will complement a Bureau of Labor Statistics effort to investigate factors accounting for differences in the number of workplace injuries and illnesses they have estimated as compared to other data sources.

OSHA states in an accompanying press release that "the NEP involves inspecting injury and illness records prepared by businesses and appropriately enforcing regulatory requirements when employers are found to be under-recording injuries and illnesses." In designing this emphasis program OSHA postulates that the most likely places where under-recorded injuries and illnesses might be found would be in establishments reporting low injury rates while operating in historically high-rate industries.

The NEP will target worksites that are in high injury and illness rate industries who have reported low (0.0-0.2) DART rates. Establishments will be selected using 2007 data submitted through the OSHA DATA Initiative. Each OSHA Area Office will be provided a list of establishments to be inspected under the program.

The above inspections will consist of a records review, site walkaround, and interviews. Records requested will include OSHA logs, Workers' Compensation First Reports, medical records, first aid, accident and insurance reports, payroll records and company policies pertaining to accident/injury reporting. Interviews will be conducted with employees, record keepers, management and medical staff. The walkaround will be limited but will address any violations in plain view.

There is ample evidence that OSHA does not consider injury and illness recordkeeping violations to be a mere "paperwork" (no harm-no foul) issue. Rather, maintaining complete and accurate injury-illness records is seen as a fundamental building block of an effective safety program. Note that OSHA's egregious citation policy, which permits a separate penalty to be proposed for each instance in which a standard is violated, evolved from cases with major recordkeeping deficiencies. This approach was first employed in 1986 and is now described in OSHA Directive CPL 02-00-080 "Handling of Cases To Be Proposed for Violation-by-Violation Penalties." Use of this "egregious" or "violation by violation" policy for calculating penalties is limited, among other factors, to cases with "willful" violations. A number of OSHA's higher penalty cases have been triggered by or significantly involved recordkeeping violations. For instance, in one case OSHA proposed a penalty of $2.59 million when the company was alleged to have willfully failed to record over 1,000 job-related injuries and illnesses. In another case, OSHA alleged 66 willful, instance-by-instance violations with a penalty of $528,000 for failure to record each work-related injury and illness.

While most employers will not be targeted for inspection under the current emphasis program, all might benefit from a review of their recordkeeping. It should be expected that compliance officers will be scrutinizing injury/illness records more carefully in all inspections. Much useful information can be found on OSHA's website at www.osha.gov.

Wage And Hour Tips: Payment Of Overtime Using A Fixed Salary For Fluctuating Hours Pay Plan

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.

I have written about this pay plan previously but apparently many employers still have the misconception that by paying an employee a salary the employee does not have to be paid overtime. Unless an employee is specifically exempt from the overtime provisions of the statute, the employee must be paid overtime when he or she works more than 40 hours during a week. One method that an employer can use to pay employees on a salary basis and still comply with the Fair Labor Standards Act is to use the "fixed salary for fluctuating workweek" pay plan that is provided for in the regulations.

Quite often an employee, employed on a salary basis, may have hours of work which fluctuate from week to week. The salary may be paid pursuant to an understanding with the employer that he or she will receive such fixed amount as straight time pay for whatever hours he works in a workweek.

Where there is a clear mutual understanding of the parties that the fixed salary is compensation for all hours worked each workweek, whatever their number, such a salary arrangement is permitted by the Act if:

- The amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked, and

- The employee receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half the regular rate of pay.

Since the salary is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week. The regular rate is determined by dividing the total number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. The overtime is then computed by paying one-half the applicable hourly rate for each hour of overtime worked. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

For example, an employee whose salary is $350 a week, during the course of four weeks works 40, 44, 60, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $8.75, $7.95, $5.83, and $7.29, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half time pay is due for the 44 and 48-hour weeks with no overtime due in the 40-hour week. For the 44-hour week the employee is due $365.90 ($340 plus 4 hours at $3.98), and for the 48-hour week he is due $379.20 ($350 plus 8 hours at $3.65).

However, in the 60-hour week the salary ($350 ÷ 60 = $5.83) fails to yield the employee the minimum wage. Thus, the employee must be brought up to the minimum wage and paid time and one-half the minimum wage for all overtime hours worked. Therefore, he is entitled to $ 507.50 (40 X $7.25 = $ 290.00 + 20 X $7.25 x 1½ = $217.50).

In using this pay plan the employer must remember two specific problems that can arise which can invalidate the plan and thereby require the employee to be paid time and one-half for all overtime hours:

1. The salary must be great enough so that the employee will always earn at least the minimum wage for all hours worked during a workweek.

2. If the employee works any portion of the workweek he must receive his full salary no matter how few or how many hours he works during the workweek. For example, if an employee, who has exhausted his leave bank, works on the first day of the workweek and is out ill for the remainder of the week, he is still entitled to his full salary for the week. Recently, I became aware of an employer that had correctly computed and paid the additional one-half time but had failed to pay employees the full salary when they worked less than 40 hours during a workweek. The employer is now facing an investigation by Wage and Hour and potentially a substantial back wage liability.

While most employers would prefer not to have to pay salaried employees any additional money when they work overtime, this pay plan provides a method that can comply with the FLSA without incurring such a large cost.

A word of caution for employers that employ persons under the age of eighteen. I recently read where a Utah firm was assessed a child labor penalty of more than $500,000 for employing minors under the age of 16 for more hours than are permitted by the child labor regulations. The employer, a market research firm, had worked almost 1500 minors during hours that either exceeded the number allowed per day or during hours that are not permitted. The regulations limit a 14 & 15-year-old minor to working:

- no more than 3 hours on a school day,
- no more than 8 hours on a non-school day,
- no more than a total of 18 hours in a school week, and
- 40 hours during weeks when school is not in session.

In addition, these minors can only work between the hours of 7:00am and 7:00pm when school is in session and may not work past 9:00pm during the period of June 1 to Labor Day. In this case the firm's penalty averaged almost $375 per minor. The regulations, however, provide that penalties of up to $11,000 per violation may be assessed and in the case of the serious injury or death of a minor the penalty may be up to $100,000.

If you have questions regarding the operation of the fixed salary for fluctuating workweek pay plan, the child labor

requirements or any other wage hour issues do not hesitate to give me a call at 205.323.9272.

2009 Upcoming Events

AFFIRMATIVE ACTION FOR THE SAVVY EMPLOYER: STAYING UP-TO-DATE ON THE CHANGING OFCCP LANDSCAPE

December 8, 2009 9:30 a.m.–11:00 a.m. CST

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 on October 6, the U.S. Senate passed a bill eliminating the mandatory arbitration rights of government contractors? The bill amended a Defense Department appropriations bill by stating that the Defense Department would be prohibited from using funds to pay a contractor that requires its employees to arbitrate employment and workplace injury claims. The motivation for this bill arose after a Haliburton employee alleged that she was raped by other employees, but was required to arbitrate several of those claims.

…that the "Obama Board" is about to take shape? It is likely that President Obama's three nominations to the National Labor Relations Board, Craig Becker (Associate General Counsel to the Service Employees International Union), Mark Pearce (lawyer representing Unions) and Brian Hayes (Republican Senate Staff Member) will go to the Senate floor for a vote and confirmation. When including the Chair of the NLRB, Wilma Liebman (former Teamsters in-house attorney), this means that the five person Board will have a majority comprised of two former in-house union attorneys and an attorney whose law firm represents unions. Becker is the most objectionable nominee, as he has advocated that the NLRB push the provisions of the Employee Free Choice Act even if the Act does not pass. Keep your seatbelts fastened; the NLRB air will be turbulent for several years.

…that contract employees hired to splice cable as part of the Hurricane Katrina repair effort were employees, not independent contractors? Cromwell v. Driftwood Electric Contractors, Inc. (5th Cir. October 12, 2009). Driftwood's customer was BellSouth. Driftwood's "independent contractors" worked 12 hour days for 13 consecutive days, followed by a day off. Driftwood treated these individuals as independent contractors and, therefore, did not compensate them for overtime. The district court ruled that the cable splicers were independent contractors because they operated their own businesses. In reversing that decision, the Fifth Circuit looked at the "economic reality" test. Even though the individuals had their own businesses, during the time they were performing these services for Driftwood, they worked exclusively for Driftwood, and were under the direction and control of Driftwood and Driftwood's customer, BellSouth.

…that the AFL-CIO and Change to Win Coalition deserve "credit" for renewed focus on the public option provision of health care reform? Labor's influence in Washington is at its highest level in more than 40 years. The Steelworkers were instrumental in President Obama placing a tariff on tires produced in China. The AFL-CIO and CWC have put extraordinary pressure on Congress to include a public option provision to health care reform and to eliminate increased taxes on "Cadillac" health care plans. AFL-CIO President Rich Trumpka stated that "we support a robust public option." Trumpka added that an excise tax on Cadillac plans is "totally unacceptable." Labor's concern is that the cost of the tax will be passed on to lower paid workers.

…that Title II of the Genetic Information Nondiscrimination Act ("GINA") becomes effective 11/21/09? This act prohibits employers from acquiring or using genetic information; genetic information includes genetic tests and family medical history. Many post-offer medical questionnaires may ask about family history; employers should stop requesting that information and ensure that all genetic information is maintained separately from personnel files. New EEO postings referencing GINA must be posted by 11/20/09; the EEOC has issued its new EEO poster and you can obtain a copy through the agency's

website (www.eeoc.gov). Finally, be sure to update your policies so that you add "genetic or family medical history" as additional bases upon which you will not discriminate.

…that on October 28, 2009, President Obama signed a defense bill into law that provides further expansions to the new military leaves under the FMLA? Under the new law, “qualifying exigency” leave is now available to active duty members of the regular military; QE leave was previously available only to families of members of the National Guard and Reserves. The law also extends caregiver leave to family members of veterans, where it was previously available only to family members of current service members.

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