LEHR MIDDLEBROOKS & VREELAND, P.C.

Employment Law Bulletin

MARCH 2010
VOLUME 18, ISSUE 3

Your Workplace Is Our Work®

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President Obama's March 27 NLRB Recess Appointments

On Saturday, March 27, 2010, President Obama appointed Democratic nominees Craig Becker and Mark Pierce to the National Labor Relations Board. Republican nominee, Brian Hayes, is a member of Senator Mike Enzi's staff. Hayes was not appointed on Saturday and his nomination will be up to the Senate for confirmation.

Recess appointments are exactly what they are labeled as – Presidential appointments when the Senate is in recess. These recess appointments will return to the Senate for a vote after the end of the next Congress – December 2011. A confirmation by the Senate leads to a four-year term.

Mr. Pierce is a founding partner of a Buffalo, New York law firm that represents unions. His nomination has not been controversial. Mr. Becker, however, is Associate General Counsel to the Service Employees International Union and the AFL-CIO. The President of SEIU, Andrew Stern, has visited President Obama at the White House more than anyone outside of the President's family. Craig Becker believes that even without the Employee Free Choice Act, employers "should be stripped of any legally cognizable interest in their employees' election of representatives." He also stated, "the Board should return to the principle that a union election is not a contest between the employer and the union…unlike the other proposals, however, it [EFCA] could be achieved with almost no alteration to the statutory framework." The recess appointments of Craig Becker and Mark Pierce give Democratic nominees a three to one vote on the five member Board. The other two members are Wilma Liebman, who is Chair of the NLRB and a former Teamster lawyer, and Republican appointee Peter Schaumber.

The NLRB has a significant backlog of cases, due to the fact that for the past two years there have been only two Board members – Liebman and Schaumber. The NLRB decides cases usually according to three member panels. Thus, the composition of the Board with Liebman, Becker and Pierce, will result in a flurry of decisions and regulatory initiatives which we believe will further union organizing.

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The President's efforts to enhance unionization may be achieved through the NLRB, even without EFCA. Just as the President directed Labor Secretary Solis to help make union organizing easier among employees of federal contractors, expect the NLRB to issue decisions and rules to accomplish the same.

New Health Care Reform Law Requires Employers To Provide Breaks And Space To Nursing Moms

Under a provision of the newly enacted health care reform law, employers must now provide "reasonable" unpaid breaks to nursing mothers to express milk for their infants. The frequently overlooked provision snuck into the bill as an amendment to the Fair Labor Standards Act.

In amending Section 207(r)(1) of the Fair Labor Standards Act, the new law allows nursing mothers to take a break every time they need to express breast milk and requires employers to provide a private location, other than a bathroom, where such employees may express milk. The breaks are unpaid, regardless of duration, and employees must be allowed these breaks for up to one year after their child's birth.

Employers of fewer than 50 employees are exempt if the breastfeeding requirements would "impose an undue hardship by causing the employer significant difficulty or expense."

Some states already require breastfeeding breaks at work, and under the FLSA, employers must comply with whichever standard (federal or state) is more favorable to the employee (29 U.S.C. § 218).

The new health care reform law adds a number of new requirements for employers, most of which begin with new group health plan years beginning on or after September 23, 2010. For a complete summary of how the health care reform law will affect your workplace, join us for our webinar on ***April 20, 2010 at 10:00 a.m.: "Demystifying Health Care Reform: What Employers Need to Know Now."*** During this one-hour webinar we'll provide a high level, preliminary discussion of the employer obligations under the new law. The fee for this webinar will be $50 per connection site and we'll provide a registration e-blast shortly. In the mean time, if you would like to register, please contact Edi Heavner at (205) 323-9263 or eheavner@lehrmiddlebrooks.com

U.S. Supreme Court To Decide Wage And Hour Retaliation Claim

On March 22, 2010, the United States Supreme Court agreed to hear a case to determine whether verbal complaints of wage and hour violations are protected from retaliation under the Fair Labor Standards Act. *Kasten v. Saint-Gobain Performance Plastics Corporation*.

The case involves an employee who made several verbal complaints to his supervisor, a lead person, and a member of the human resources department about the placement of time clocks, which resulted in denying him pay for donning and doffing protective gear. The employer terminated him for other reasons and Kasten sued, alleging that he was retaliated against for complaining about alleged Fair Labor Standards Act violations.

The district court granted summary judgment for the employer, which the Seventh Circuit Court of Appeals upheld. Both courts reasoned that unlike the broad anti-retaliation language in Title VII and the ADEA, the anti-retaliation language in the FLSA is limited to an employee who "has filed any complaint" or "instituted any proceeding under the Act or testified in such proceeding." The court stated that filing a complaint refers to a written complaint, not a mere verbal notice to the employer. Other circuits have ruled contrary to this decision and, therefore, the U.S. Supreme Court will decide.

The Fair Employment Practices statutes generally describe retaliation as prohibited conduct for an employee who has "opposed any practice" that is unlawful under the statutes. "Opposition" is not limited to how the opposition is expressed – it may be verbal or written.

We have observed the expansion of the scope of behavior considered protected from retaliation under the Fair Labor Standards Act, likely an outcome of the increase in FLSA claims during the past several years. There are two approaches (other than: do not retaliate) we recommend employers consider from a policy and communications perspective to minimize the risk of a wage and hour retaliation claim: First, communicate a written FLSA safe harbor policy. This is a policy that instructs employees how to report questions regarding their pay or pay system, whether exempt or non-exempt. The existence of a safe harbor policy may reduce an employer's damages in the event an individual is misclassified as exempt. Second, be sure that your organization's overall anti-retaliation policy is worded broadly enough to include any issue the employee raises, not just those covered by fair employment practices policies. Thus, a broadly worded policy would cover concerns about wage and hour issues, safety and business ethics.

Sexual Harassment Policy Gets It Only "Half Right"

In 1998, the Supreme Court in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton* stated how employers could prevent and defend sexual harassment complaints. The cases state that the employer must show as an affirmative defense that it took reasonable care to prevent and correct the harassment and that the plaintiff unreasonably failed to take advantage of those corrective opportunities offered by the employer.

Often the issue of "prevention" and "take advantage of corrective opportunities" focuses on the employer's policy and how it is communicated and adhered to. In the case of *Peoples v. Marjack Company* (D. MD, March 5, 2010), the court will let a jury decide whether the employer's policy was sufficient to prevent sexual harassment from occurring.

The company's policy stated that an employee who believed that he or she was the recipient of sexual harassment should complaint to either the human resources department or higher levels of management. Peoples was subjected to graphic, inappropriate, sexual comments by her lead person on a continuing basis. Peoples reported this to her supervisor, not through the process described in the company's anti-harassment policy. Only months later did a member of management learn of the harassment, which resulted in a prompt investigation and the termination of the alleged harasser.

In its defense, the company argued that the employee failed to report the behavior according to the terms of the company's policy. However, the court stated that the employee reported the harassment to her supervisor, who failed to report it to upper management or human resources. Accordingly, it is up to a jury to decide whether the company's policy was "both reasonably designed and reasonably effective." According to the court, a question exists whether "Marjack exercised reasonable care to prevent and correct promptly any sexually harassing behavior. "

Why are employers still facing these issues 12 years after the Supreme Court gave employers clear direction of what needs to be done? First, employers often fail to review their workplace harassment policies on an annual basis to see whether changes are necessary. Second, too often policies fail to state that it is each employee's responsibility to report a possible policy violation, even if the employee reporting the behavior is not the recipient of it. Third, supervisors and managers should be trained annually regarding workplace harassment issues and their responsibility as not only an agent of the company's policy, but also an "ombudsman" to report any behavior that may potentially violate the policy.

OSHA Sends Letters To 15,000 Employers With High Injury Rates

In early March, OSHA sent letters to 15,000 companies with the highest injury and illness rates, based on a 2009 survey. Employers receiving the letters also received copies of their injury and illness data, along with a list of the most frequently cited OSHA standards for their specific industry. Even though no immediate action is required, employers receiving these letters should make sure their safety house is in order. Receipt of the letter is a strong indication that an OSHA inspection may occur under OSHA's Site Specific Targeting (SST) enforcement

program. This year OSHA anticipates up to 4,500 inspections of employers identified in the SST Program.

Gauging The Impact Of Health Care Reform On Workers' Compensation

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

Will health care reform affect workers' compensation? Even though the term "workers' compensation" is not mentioned in the bill, we do anticipate both direct and indirect effects on workers' compensation from healthcare reform. However, most of the consequences are unknown at this time and may not be known for several years.

Two direct results that are already clear:

- Revisions to the federal black lung program will make it easier for coal miners and their survivors to obtain black lung benefits.

- The law contains new taxes on pharmaceutical and medical device manufacturers. Those taxes will eventually be pushed onto policyholders, potentially resulting in higher workers' compensation insurance costs.

The indirect effects of healthcare reform on workers' compensation are not as easy to determine, but will likely have more far-reaching effects. One likely indirect result: the frequency and importance of medical utilization review is likely to increase, as health insurers and workers' compensation insurers increasingly battle over responsibility for medical expenses.

A key question that remains is whether healthcare reform will increase or decrease the number of workers' compensation claims.

One provision of the new bill allows health insurers to charge smokers 50 percent more for health insurance coverage. Another provision provides that employees enrolled in a company wellness program or meeting certain health standards may obtain a 30 percent reduction in health insurance premiums. In theory, as a result of these provisions, overall employee health will go up, and better overall health will result in fewer workers' compensation claims.

Some theorize that, because more employees will have health insurance to fall back on, employees will be less likely to file questionable or hard to prove workers' compensation claims. If health insurance will cover it, why go through the rigmarole of proving an on-the-job injury?

On the other hand, some believe workers' compensation claims will increase as a result of the new bill. One theory in support of that notion is that more workers will have health insurance. As a result, workers will increasingly utilize medical services, including surgeries. More medical treatment and surgeries means more time away from work for medical reasons. More time away from work for medical reasons may mean an increase in workers' compensation claims, as employees attempt to receive indemnity benefits while off work.

Those are some of the theories surrounding the issue. In our view, it is just too early to determine the indirect effects of health care reform on workers' compensation. Administrative regulations will follow which will go a long way toward shaping the law's impact on workers' compensation.

One thing we don't anticipate: the federalization of workers' compensation. Some in the industry see health care reform as a step toward federalized workers' compensation. Adding support to this theory is that a bill was introduced in the House on January 22, 2009—H.R. 635—that would create a National Commission on State Workers Laws to examine state workers' compensation programs. Many see this bill as a precursor to federalized workers' compensation.

Despite the introduction of H.R. 635, we see very little interest on Capitol Hill—and none at the state level—in federalizing workers' compensation. H.R. 635 is stalled in committee and doesn't seem to be going anywhere. Moreover, since 1913, when New York became the first state to enact a workers' compensation act that passed judicial scrutiny, workers' compensation laws have been controlled at the state level (with a few exceptions such as railroad workers, who are covered by the Federal

Employers Liability Act). We will continue to monitor the issue.

EEO Tips: The Growing Problem Of Defending Against Retaliation Charges

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.

According to recent EEOC Charge statistics (including all statutes) the number of charges in which retaliation alone or retaliation along with some other violation was alleged increased from 18,198 in 1997 to 33,163 in 2009. As a percentage of total charges filed, this represented an increase from 22% in 1997 to 36% in 2009, or a net increase of 163% during the decade. The records show that the increases were not sporadic but steady in almost every intervening year. What has been fueling this prolific, consistent rise in the number of retaliation charges filed?

As with most complicated matters, there probably is no single reason. In recent years, however, one could point to several notable Supreme Court cases where the perimeters of retaliation in the context of employment have been widened. In *Burlington Northern and Santa Fe Ry. Co. v White* the court held that the scope of retaliation under Title VII goes beyond activity which affects the terms and conditions of employment and includes actions which "could well dissuade a reasonable worker from making or supporting a charge of discrimination." In *CBOCS West, Inc. v. Humphries* the court extended the issue of retaliation to cases filed under Section 1981, and recently in *Crawford v. Metropolitan Government of Nashville and Davidson County*, the court widened the "opposition clause" under Title VII by holding that the clause extends protection to an employee who opposes discrimination when asked about it during the course of an internal investigation, even though that employee may not have otherwise openly opposed the discrimination in question. Thus, it could be said that these holdings made it easier for an employee to allege and sustain a charge of retaliation.

However, these cases would not account for the steady increase in retaliation charges that preceded them. For these we think that employers were not attuned to the serious implications of their actions in response to informal complaints of discrimination, whether or not the complaints or charges in the employer's eyes were justified. Generally, the right to file a charge is embedded in Title VII and other statutes as a matter of public policy. Thus, even though the EEOC may ultimately find no reasonable cause as to the charge itself, any actions by the employer to thwart that right may result in a charge of retaliation. *EEOC v. Shell Oil, Co. (1984) and General Telephone Co. v. EEOC* (1980).

And so, notwithstanding the Supreme Court's recent holdings, the issue of retaliation keeps resurfacing in my judgment because it is still difficult to understand the murky, somewhat subjective standards of **coverage, protected activity** and what constitutes **"an unlawful adverse employment action."** This would seem to account for the meteoric increase in charges filed with the EEOC over the last decade.

There are numerous other anti-retaliation statutes with which an employer must deal involving state or federal investigations, or "whistleblowers" who report some allegedly illegal act by their employer. For example, not counting the myriad state anti-retaliation statutes there are at least **nineteen (19) other federal statutes** (besides Title VII) that prohibit retaliation against applicants or employees for reporting certain illegal acts by companies or employers as follows:

Employment Related Anti-retaliation Statutes:

Name of Act	Found at:
Age Discrimination In Employment Act	29 U. S. C., Section 623(d)
Americans With Disabilities Act of 1990	42 U. S. C., Section 12203

ERISA Act of 1974	29 U. S. C., Section 1140, 1141
Family & Medical Leave Act	29 U. S. C., Section 2615
The Federal Bankruptcy Code	11 U. S. C., Section 525(b)
Jury Service & Selection Act of 1968	28 U. S. C., Section 1875
National Labor Relations Act	29 U. S. C., Section 158
Rehabilitation Act of 1973	29 U. S. C., Section 794(d)
Civil Rights Act of 1866	42 U. S. C., Section 1981
USERRA Act of 1994	38 U. S. C., Section 4301 – 4333
The Fair Labor Standards Act	29 U. S. C., Section 201-219

Whistleblower Statutes

Name of Act	Found at:
The Occupational Safety & Health Act	29 U. S. C. Section 660 (c)
The Sarbanes- Oxley Act of 2002	18 U. S. C. Section 1514 A
The Railway Safety Act	45 U. S. C., Section 441
The Clean Air Act	42 U. S. C., Section 7622
The False Claims Act	31 U. S. C., Section 3730 (h)
Federal Water Pollution Control Act	33 U. S. C., Section 1367
Asbestos School Hazard Detection Act	20 U. S. C., Section 3608
Surface Transportation Assistance Act	42 U. S. C., Section 2305

It would be a monumental undertaking and far beyond the scope of this article just to summarize the critical, anti-retaliation components of each of the various acts listed above. Consequently our discussion in this article must be limited to a brief analysis of the anti-retaliation provisions applicable to Title VII, the ADA, the ADEA and the EPA. As to these statutes, all have certain provisions in common:

- All have a limited, specific definition of the persons who are protected;
- All have limitations as to the kind of acts that are protected; and
- All have provisions for the remedies or damages available to the complainant.

Thus, at the very outset there are at least four basic questions that an employer should ask in responding to almost all retaliation claims arising in an employment context. For example:

1. **Does the employee meet the procedural prerequisites that would qualify him or her for protection under the statute in question?** (Was the alleged retaliation against an applicant or employee as defined in the underlying statute?)

2. **Did the employee engage in "protected activity" under the statute in question?** (Was the employee's conduct protected by the **"Participation"** or **"Protest"** clause under Title

VII, or some similar clause under the other acts?)

3. **Was the employee subjected to any *"adverse employment action?"*** (Did the alleged retaliation result in a termination, demotion, refusal to hire, loss of wages or denial of a promotion, or other adverse tangible employment action?)

4. **Is there a causal connection between the employee's protected action and the adverse employment action?** (Does the evidence tend to show that the adverse employment action was, more or less, a direct result of the employee's protected activity?)

A clear answer to each of the foregoing questions can be blurred by the circumstances in any given case. Here are a few brief examples of why there may not be a simple answer.

Question 1: *Was the employee protected* (or covered)? The obvious answer would be that **only an applicant or current employee would qualify for protection under Title VII.** However, in the case of *Robinson v. Shell Oil*, the U. S. Supreme Court held otherwise. In that case, *Robinson*, a former employee who had been discharged by Shell Oil Co., filed a charge with the EEOC alleging that he had been discharged because of his race. He applied for a job with another employer and in response to the prospective employer's inquiry Shell gave a negative reference about him, at least in part, because of his charge with the EEOC. The Supreme Court held that in filing his charge Robinson had engaged in protected activity, and that this protection "encompassed individuals other than current employees." Thus, including **former employees**.

Question #2*: What is protected activity?* In general under Title VII employees and/or witnesses are engaged in protected activity if they "**oppose**" an unlawful practice or "**participate**" in the filing of a charge, testify as a witness, or assist in an investigation or hearing of a charge under the Act. As stated earlier in this article, the U.S. Supreme Court in *Burlington Northern and Santa Fe Ry. Co. v. White* held that the scope of retaliation under Title VII goes beyond activity which affects the terms and conditions of employment and includes actions which "could well dissuade a reasonable worker from making or supporting a charge of discrimination."

Question #3: *What is an adverse employment action?* Obviously, a discharge, demotion, reduction in pay, or denial of a promotion can be easily identified as adverse employment actions. However, there are some subtle actions such as a reduction of privileges or benefits as happened in the case of *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002) which also may constitute an adverse employment action. While the term "adverse employment action" may sometimes be hard to define in any given case, most courts agree that it must involve a "significant change in employment status" which is detrimental to the employee. For example, a temporary change of shifts with no loss of benefits may or may not constitute an adverse employment action depending upon the circumstances. That is why it is so important to get all of the facts when responding to a retaliation claim.

Question # 4: *What constitutes a causal connection?* The matter of causation is one of the most basic elements that must be proved in a retaliation case under virtually all of the retaliation statutes, whether state or federal. Under Title VII, a plaintiff must prove that there is a "causal connection" between the protected activity and the adverse employment action that followed. In many cases this can be proven just by time, that is, the closeness in proximity between the protected activity and the adverse employment action (e.g. *Tinsley v. First Union National Bank*, 4th Cir. 1998). In other cases, plaintiffs may attempt to prove it by a preponderance of the evidence. For example in the case of *Simmons v. Camden County Board of Education* (11th Cir. 1985) the Court held that the plaintiff merely had to establish that the protected activity and the adverse action "**were not wholly unrelated**." Obviously, in the Eleventh Circuit employers must be extra careful to avoid taking any action after a charge has been filed which could be construed to be an "adverse employment action."

The foregoing provides only a narrow outline of the many complicated issues that arise in the context of analyzing and resolving a retaliation charge. We suggest that you seek legal counsel whenever this issue arises. Our office may be contacted at (205) 326-3002 to assist you in

finding the proper resolution for any retaliation charge, whatever the context may be, employment or otherwise.

OSHA Tips: OSHA Enforcement

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.

Around one year of data is now in on the agency's anticipated tougher stance on enforcement under the Obama Administration. While some numbers suggest aggressive enforcement and the arrival of the promised "new sheriff in town," they don't indicate a dramatic shift as yet.

Federal OSHA conducted slightly over 39,000 inspections in fiscal year 2009, beginning on October 1, 2008 and ending on September 30, 2009. This is a greater number than in any year since 2000 except for 2007 when 39,324 inspections were accomplished. In about 25% of 2009 inspections, the employer was found to be in compliance, which was virtually the same as for recent years. The average penalty per serious violation in FY 2009 was $983, which is down from $1012 for the previous fiscal year.

Data available through about one third of fiscal year 2010 might offer some indication of a tilt toward enforcement. During this period only 17% of inspections found the employer to be in compliance, where in recent years this rate has been around 25%. Total violations are on a pace to be near 100,000 for the year, where they have been running around 87,000 annually. For this period, the average penalty for a serious violation was $1155, which is higher than in prior years. Also for the 2010 period, the percentage of total violations issued as serious, willful, and repeat is 83%, which are a few percentage points higher than earlier in years.

In addition to the above, there are other reasons to believe that OSHA enforcement may be on the upswing. A principal reason would be statements made by the leadership of the Department of Labor and OSHA. The tone has been set by remarks made by Secretary of Labor Hilda Solis such as, "I have said since my first day on the job – the Department of Labor is back in the enforcement business."

In a recent public address, David Michaels, Assistant Secretary of Labor for Occupational Safety and Health appeared to leave little doubt that enforcement would be a key focus of the agency. In his words, "first and foremost we will emphasize strong enforcement." He noted that in the previous fiscal year four egregious cases had been filed while thirteen such cases had been initiated in the last quarter. Another comment attributed to Michaels further indicated the agency's posture on enforcement when he stated, "we do not see enforcement as OSHA's only function, but we do see it as our most useful function."

The Assistant Secretary recently testified before the House Committee on Education and Labor, Subcommittee on Workplace Protections regarding the proposed Protecting America's Workers Act (PAWA). One key provision in this proposed legislation addresses the issue regarding claims that OSHA monetary penalty allowances are outdated and insufficient. OSHA monetary penalties have been adjusted only once in its 40 year history. That occurred in 1990. In his testimony, Michaels related a specific case bearing on the adequacy of penalties. He said, "in 2001 a tank full of sulfuric acid exploded at a refinery. A worker was killed and his body literally dissolved. The OSHA penalty was only $175,000. Yet in the same incident thousands of dead fish and crabs were discovered, allowing an EPA Clean Water Act violation amounting to $10 million – 50 times higher."

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.

I recently ran across an article that listed the "top 10" wage and hour investigation issues. The writer listed them as follows.

1. Minimum Wage: Presently $7.25/hr, unless higher as a matter of state law.

2. Overtime Laws: Nonexempt employees must be paid time and one-half their regular rate of pay for all hours worked in excess of 40 in a workweek.

3. Exempt employees: The Act exempts broad categories of employees with the most prevalent being the executive, administrative, professional, computer professional and outside sales occupations. Requirements for these exemptions are outlined later in this article.

4. Record Keeping: Employers are required to maintain certain records on each employee with the most important being an "accurate" record of the daily and weekly hours worked by each nonexempt employee.

5. Child Labor: The FLSA sets limitations on the occupations and hours of work that may be performed by minors under the age of 18. Failure to comply with these limitations can result in Wage & Hour assessing Civil Money Penalties. Recently Congress increased the amount of the penalties up to $50,000 (may be $100,000 in the case of a willful violation) in case of a minor who is seriously injured or killed while illegally employed.

6. Paychecks: both federal and state laws regulate the payment of wages. Payment must be made in cash or its equivalent, although direct deposit is gaining popularity as a convenient method. Many states also have laws regarding the payment of wages upon termination.

7. Notices and Postings: Every employer, subject to the minimum wage provisions, must post a notice (a copy may be downloaded from the Wage & Hour web site) in a conspicuous place.

8. Rest Periods: The federal law does not require rest or meal periods but it does have requirements related to the pay of employees if they are provided such breaks.

9. Deductions for Pay: Normally, an employee must always receive the minimum wage, however, there are some limited instances (such as a wage garnishment or a voluntary assignment of wages) where the employee's wages may be reduced below the minimum wage.

10. Equal Pay: The Equal Pay Act of 1963 prohibits wage discrimination between men and women that are performing equal work. This Act, while a part of the Fair Labor Standards Act, is enforced by the Equal Employment Opportunity Commission rather than Wage Hour.

If your firm is chosen for an investigation these are the main items that you can expect the Wage & Hour investigator to review.

It has now been over five 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 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 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. Therefore, employers should have an ongoing evaluation of pay practices to ensure that employees are correctly classified as failure to do so can become very expensive. If I can be of assistance you may reach me at (205) 323-9272.

2010 Upcoming Events

WEBINAR -

"Demystifying Health Care Reform: What Employers Need To Know Now"

April 20, 2010 at 10:00 a.m. CST

EFFECTIVE SUPERVISOR®

Muscle Shoals – April 7, 2010
Marriott Shoals

Huntsville – April 21, 2010
U.S. Space and Rocket Center

Montgomery – September 9, 2010
Hampton Inn & Suites

Birmingham – September 22, 2010
Bruno's Conference Center

Huntsville – September 30, 2010
U.S. Space & Rocket Center

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 a two week trial in California began on March 23, 2010 in a lawsuit filed by the Service Employees International Union against a rival union, The National Union of Health Care Workers? *Service Employees International Union v. Rosselli* (N.D. Cal.). UHW was an SEIU Local of approximately 150,000 members. UHW broke off to become its own union and the SEIU sued

alleging that UHW violated the SEIU's constitution and stole membership information.

…that in another effort to focus on employer misclassification of independent contractors, the Connecticut Attorney General on March 17 announced a legislative initiative addressing employer misclassification of employees? According to the Attorney General, "calling workers independent contractors when they are really employees cost workers benefits, taxpayers revenue and honest businesses a fair opportunity to compete for work." The proposed legislation would result in daily violations of $300.00 each and criminal sanctions.

…that a court permitted a class action to proceed against a chain of grocery stores, based upon failure to promote women into management positions? *Duling v. Gristede's Operating Company* (S.D.N.Y., March 8, 2010). The class action involves approximately 700 women who allege that store managers used subjective, unwritten factors to determine which employees were promoted into which positions. Women were slotted as cashiers and rarely provided the opportunity to move form the "front" of the store into management positions. They alleged there were no formal policies or training on hiring and promotions, nor guidance to each store manager to how such decisions should be made.

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