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Your Workplace Is Our Work®

Inside this issue:

Obama NLRB Pays First Union Dividend

It did not take long for the Obama NLRB to issue decisions furthering union interests. In a three to two ruling (the three former union lawyers in favor), the NLRB ruled that a union's "bannering" of neutral employers did not violate the National Labor Relations Act. Eliason & Knuth of Arizona, Inc. (September 2, 2010).

This case arose out of a 2003 dispute between the Carpenters Union and a non-union construction company. The National Labor Relations Act prohibits "secondary boycotts," which involves pressuring a neutral employer to cease doing business with an employer with whom the union has a dispute. The Carpenters displayed banners that were 15 to 20 feet long and 3 to 4 feet high with large letters stating "SHAME ON [Name of Employer]" that hired the non-union construction firms. Again, the union's dispute was with the construction firms, but the union's big and bold signage was directed toward those neutral employers. Two of those neutral employers were hospitals and one was a restaurant.

The NLRB ruled that this bannering did not have the "confrontational aspect" of activity that would result in "coercion or restraint" against a neutral employer. Surely a banner 15 to 20 feet long and 3 to 4 feet high shaming a neutral, disinterested employer coerces or restrains members of the public from dealing with those employers, but not according to the Obama NLRB. We expect this bannering tactic of the Carpenters Union to be more widely used throughout construction projects, an outcome of which may be where "neutrals" feel pressure to deal with unionized firms to avoid this disruption to their business.

In the case of Kenmar Electric Co., Inc. (September 3, 2010), the NLRB ruled that a centralized referral system among electrical contractors in Houston caused a "discriminatory impact" on candidates who were applying for jobs for the purpose of trying to unionize the non-union contractors. The contractors formed a referral service to which all applications for employment were sent. The referral service would evaluate the qualifications of the applicants and then forward them to participating companies. The referral service did not retain the applications nor keep track of which applications were referred to which companies.

The Effective Supervisor Seminar

Mobile.....November 3, 2010

Webinar – Health Care Reform: A Primer For 2010 Open Enrollments

October 20, 2010

Webinars - Effective Supervisor Series

Part I ..... October 26, 2010
Part II .....November 4, 2010
Part III.....November 9, 2010

Manufacturers' Briefing

Birmingham .....November 18, 2010
Vulcan Park

Those applicants who were union "salts" – seeking employment for the purpose of unionizing the non-union employer – did not know whether they were considered for employment by any particular employer and, therefore, did not have any idea which company they should claim did not hire them. In ruling that the referral system was an unfair labor practice, the NLRB determined that this system had a "discriminatory impact" on union salts and union members. The NLRB also stated that the purpose of the program was to filter out union salts and, therefore, it violated the National Labor Relations Act.

These cases are only the beginning. We expect the Obama NLRB to do what Congress will not: make it easier for unions to organize and to retain their status as the bargaining representative.

"Participation" In Investigation Not Protected

Retaliation under fair employment practice statutes requires a plaintiff employee to show that he or she engaged in protected activity, such as opposing unlawful practices or participating in an agency investigation into unlawful practices. Opposition is more broadly interpreted, as that involves an employee who expresses concerns or "opposes" behavior which could violate anti-discrimination laws, such as sexual or racial harassment. Retaliation for "participation" involves an employee who participates in an administrative investigation of a discrimination complaint. The case of Hatmaker v. Memorial Medical Center (7th Cir. August 30, 2010) involved another attempt to extend the "participation" protection to an employer's own internal investigation.

Janet Hatmaker's employer terminated her after she participated in an investigation involving sexual harassment allegations about her supervisor, the hospital's chaplain. During the investigation, Hatmaker stated that her supervisor was "a Southern Baptist" and a "good ole' boy," and that he had problems with women and was inherently sexist. She said that "he is trying so much to be a good ole' boy and friend that he sacrifices dignity and leadership in exchange for popularity." She also made several other statements about his ability to relate to women and suggested that he needed therapy. The investigator concluded that the chaplain did not engage in a sexually hostile work environment and encouraged Hatmaker to put her negative feelings about the chaplain behind her. When she continued to express negative comments about her supervisor, the hospital terminated her. Hatmaker claimed that she was terminated in retaliation for participating in an investigation about sexual harassment.

In rejecting the retaliation claim under the "participation" clause of Title VII, the court stated that her communication "to the investigator constituted participation in a purely internal investigation of possible sex discrimination, and even if an internal investigation is an 'investigation' within the meaning of Title VII, she was not fired for participating in it. She was fired because of comments she made that demonstrated bad judgment and a preoccupation with specific characteristics of her new boss, and for harping on irrelevant sensitive issues of religion and race." The court added that Hatmaker's complaints about her supervisor "were not suggestive of gender discrimination and thus did not trigger Title VII's retaliation provision. They were complaints about an awkward boss who the plaintiff thought might be a problem in the future . . . When she said that Stafford was a Southern Baptist and a good ole boy and therefore has inherent sexist attitudes, she was trafficking in stereotypes . . . There is no evidence that he ever expressed or acted on them."

The court concluded that Title VII did not cover her participation in an internal investigation and her termination was justified. Hatmaker did not allege any specific behavior that in any way violated Title VII, thus her comments in the investigation were not potentially "in opposition" to conduct covered by Title VII. The court added that one exception where an internal investigation may be covered under the "participation" clause of Title VII is where the investigation arose out of a discrimination charge filed with the EEOC.

Criminal Records: No Employer Policy, No Employee Claim

The case of EEOC v. Con-way Express, Inc. (8th Cir. September 26, 2010) involved an employer's use of conviction records as a practice, but not a written policy.

The EEOC sued on behalf of the charging party, Roberta Hollins, who claimed she was not hired based on her race. She applied for a part-time position at the company's Poplar Bluff, Missouri office. The company's service center manager, Kenneth Gaffney, interviewed her and recommended to his boss that the company hire her. However, Gaffney's boss expressed reservations about hiring her due to race and Gaffney told Hollins that if the company were to hire her, it would "open a can of worms" and "my boss told me not to hire you because if I hired you that was just asking for the NAACP." Surely this looks like a clear-cut case of racial discrimination, but that's not how it turned out.

On the employment application, in response to questions about prior convictions, Hollins wrote that she twice was convicted of shoplifting. Gaffney extended Hollins an offer of employment but failed to follow the company's protocol, which involved obtaining approval from Human Resources before extending an offer. Gaffney was terminated and when Hollins told Gaffney's supervisor about the employment offer, the supervisor said that he knew nothing about it and she would not be hired. A white male was hired for the position. The company stated that Hollins would not have been offered employment based upon her prior convictions.

The EEOC argued that a jury should decide the question of whether Hollins was not hired based upon her race because the employer's background check policy was unwritten. The court stated that it was irrelevant that the policy was unwritten. The company provided evidence that during the 18-month period prior to the time Hollins applied, 28 applicants were disqualified based on their criminal conviction history and no current employee had a criminal conviction. The court said, "the [EEOC] argues that a reasonable jury could conclude that the policy did not exist because it was not in writing, but they do not cite any legal authority for the proposition that a policy must be in writing to be effective."

The court got it right: An employer's practice does not have to be in writing to be a bona fide, non-discriminatory reason for an action taken. Furthermore, although the manager's supervisor expressed reservations about hiring Hollins because of her race, she would not have been hired anyway due to her conviction record – a factor the employer applied consistently to applicants.

Mini-Medical Plans May Be Eligible For Exemption From Health Care Reform Law

Employers offering limited health benefit plans ("mini-med" plans) can continue to do so without modifying those plans to comply with the Affordable Care Act provided that they obtain a waiver from the Department of Health and Human Services (HHS). Many of the companies who offer min-med plans are applying for these exemptions on behalf of their customers.

The min-med plan market, which by some estimates provides coverage to over 3 million Americans, has been rocked by the requirements of the Affordable Care Act. Mini-med plans, which offer limited benefits but low deductibles and co-pays, have become a cost-effective way for employers with high turnover and low wage earners to provide their employees with a basic level of health insurance. If mini-meds were forced to comply with the Affordable Care Act's rules including those that impose "minimum essential coverage" requirements or eliminate lifetime or annual caps on benefits, the entire mini-med market would dissolve, leaving 3 million Americans without even the most basic coverage.

As a result, mini-med plans are prevailing upon HHS to grant them an exemption from the Affordable Care Act in order to protect the basic level of

coverage for their insureds. Waiver applications must be submitted at least 30 days before the beginning of the plan year for plans starting between September 23, 2010 and September 23, 2011. For calendar year plans, the deadline to apply for a waiver is December 1. Plans receiving a waiver must re-apply each year until the waiver program ends in 2014.

Any plan—not just mini-med plans—are free to apply for a waiver from the Affordable Care Act provided they can show the following:

- The plan covers both full-time and part-time workers; and
- Without a waiver, premiums would rise so much that employers would drop the plan or workers would refuse to buy into them.

If you offer a min-med plan, contact your plan's insurance carrier or your benefits broker to see if the plan has applied for or obtained an exemption. Note, however, that the exemptions are just a short-term fix. HHS will have some tough decisions to make about these plans when the exemption period ends in 2014. Ultimately, min-meds may be the kind of health insurance coverage that dooms the Affordable Care Act's design to force all American citizens into "minimum essential coverage" by 2014.

RICO Litigation Update: Court Finds RICO Claims Are Preempted By Exclusive Remedy Provisions Of Michigan's Workers' Compensation Act

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.

In our May Employment Law Bulletin, we discussed a case in which six truck drivers filed a federal lawsuit over an alleged scheme to wrongfully deny workers' compensation claims. The case is Brown v. Cassens Transport, et al. The plaintiffs allege the employer and the employer's workers' compensation third party administrator conspired with physicians to wrongfully deny valid Michigan workers' compensation claims. The plaintiffs filed a federal lawsuit under the Racketeer Influenced and Corrupt Organizations Act (RICO), which allows for triple damages.

The case has been closely monitored because of the possibility that workers' compensation claims—traditionally reserved for state court—could be re-characterized as RICO claims and end up in federal court, and with a different damage structure.

Alas, on September 27, 2010, Judge Paul D. Borman of the Eastern District of Michigan dismissed the lawsuit, finding the plaintiffs did not state valid claims under RICO. Specifically, Judge Borman found that the plaintiffs' RICO claims are indeed preempted by the exclusive remedy provisions of the Michigan Worker's Disability Compensation Act ("MWDCA"). That is to say, the MWDCA provides the plaintiffs with their exclusive remedy for job injuries; all other claims—including RICO claims—are preempted.

Judge Borman's order left no wiggle room for the plaintiffs. "Regardless of how Plaintiffs frame their claim, a conclusive finding that Plaintiffs were wrongly denied workers compensation benefits is essential to their theory and resolution of such workers compensation benefits claims has been firmly vested in the comprehensive administrative enforcement scheme embodied in the MWDCA."

The court further found that even if the RICO claims weren't preempted by the MWDCA, the plaintiffs' claims are barred because they did not allege an "injury to business or property," which is an essential element of a RICO claim. The plaintiffs allege personal injuries but not "business or property" injuries.

In addition, Judge Borman found that the plaintiffs' claims for damages are "too speculative." Speculative damages are not recoverable under

RICO. Accordingly, the plaintiffs do not have standing to maintain the lawsuit.

Lastly, "even if the plaintiffs stated a cognizable claim under RICO, the court would abstain from deciding Plaintiffs' claims and would stay proceedings pending a final WDCA administrative determination of Plaintiffs' entitlements to workers compensation benefits." In other words, even if the plaintiffs' claims were not foreclosed for all of the reasons the judge provided, the court still would not tackle the case until the plaintiffs exhausted all administrative remedies available to them under the MWDCA.

The plaintiffs may appeal Judge Borman's decision, or move to reconsider. We will continue to monitor this case and other similar cases.

The "exclusive remedy" concept is a central, balancing theme of workers' compensation. In exchange for the protection of workers' compensation benefits, employees give up their right to any other remedy for workplace injury. The "exclusive remedy" rule is frequently challenged and may bend from time to time, but it seldom breaks, as shown by this case.

EEO Tips: Be Wary Of EEOC's Ramped Up Enforcement Of The ADA Amendment Act

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.

In recognition of the 20th anniversary of the passage of the Americans With Disabilities Act of 1990, the EEOC released some interesting statistics earlier this month about the impact of the ADA on the EEOC's charge processing workload. The following points were of particular interest:

- In 1993, the EEOC processed 15,274 charges of disability discrimination and obtained $15,496,811 in monetary relief for some 1,851 individual charging parties (or affected class members) through the administrative process.

- In 2009, the EEOC received 21,451 charges (approximately a 30% increase) and obtained $67,826,112 in relief for 3,238 charging parties (or affected class members).

- Between 1992 and 2009, ADA charges rose from 17.4% of all charges filed with the Commission to 23% of all charges filed, as ADA charges became a greater part of the EEOC's workload.

- During the same period (that is, 1992 thru 2009), the EEOC filed 874 lawsuits claiming ADA violations and collected a total of $86,633,804 as monetary relief on behalf of ADA charging parties or other affected class members.

According to the EEOC, many courts took a narrow view of some of the ADA's key provisions during its first 18 years, especially as to whether certain marginal categories of disabilities should be included as covered disabilities. The EEOC and the plaintiffs' bar, on the other hand, argued for broader interpretations of the ADA making it necessary for Congress to clarify the intent of the statute by passing the *Americans With Disabilities Amendments Act of 2008.* That Act, while leaving the basic definition of a disability in tact, greatly expanded how that definition should be interpreted. The ADAAA became effective on January 1, 2009. Now the impact of the ADAAA is beginning to be felt by employers as the EEOC ramps up its enforcement efforts with the expectation that the courts will more liberally interpret the definition of a covered disability. For example, during the last 23 months (FY 2009 and 2010 to date), the EEOC has filed one hundred (100) lawsuits under the ADA, 76 in FY 2009 and 24 to date in FY 2010. Three of these lawsuits which were filed earlier this month

involved ADAAA issues and show typically some of the issues under scrutiny by the EEOC.

- EEOC v. Fisher, Collins & Carter, No. 10-cv-2453, a federal case in Maryland. In this case, the EEOC alleged that the employer fired two employees who, respectively, had diabetes and hypertension. According to the EEOC, these disabilities were unknown to the employer until they and other employees were required to complete a questionnaire regarding their health conditions and medications. Both employees had successfully worked in their respective jobs for eight years or more (one had worked for over 15 years) before having to complete the questionnaire. The EEOC further alleges that despite their many years of successful performance, the company unlawfully selected the two employees for a reduction-in-force on January 21, 2009 on the basis of their disabilities.

- EEOC v. IPC Print Services, Inc., No. 10-cv-886, a federal case in Michigan. In this case the EEOC alleged that an employee, who sought to continue working part-time while he completed his cancer treatments, was discharged for exceeding the maximum hours of leave under company policy. The EEOC contends that this decision violated IPC's obligation to provide a reasonable accommodation under the ADA.

- EEOC v. Eckerd Corporation d/b/a Rite Aid, No. 1:10-cv-2816-JEC, a federal case in Georgia. In this case, the EEOC alleged that the employer refused to provide a stool to sit on as a reasonable accommodation for a cashier with a severe arthritic condition in her knee. According to the EEOC, the employee was terminated after the store's management decided that the ability to stand was an essential function of the cashier position and could not be done while sitting on a stool. The EEOC is challenging Eckerd's refusal of the requested reasonable accommodation.

But private litigants, as well as the EEOC, have also been busy filing lawsuits under both the old ADA and the newer, ADAAA, challenging work-related decisions by employers. The following are good examples of some of the current issues being raised by them:

- Hoffman v. Carefirst of Fort Wayne Inc., d/b/a Advanced Healthcare, No. 1:09-cv-00251 (8/31/10). In this case, the plaintiff alleged that the employer refused to accommodate his request to continue working only 40 hours per week, instead of increasing those hours to 65-70 hours per week, as requested by his employer. The plaintiff had recovered from surgery for stage three renal cancer, which had been performed 13 months ago, and his doctor recommended the limitation of his work to 40 hours per week. The employer at first refused to grant the plaintiff's request, but later approved a limited 40 hour workweek while requiring him to transfer to the employer's Ft. Wayne office, located away from his home. The plaintiff refused this accommodation because, according to him, it would require 2-3 hours of unpaid commuting time that would add to his day. This left the parties at an impasse and the plaintiff never returned to work. Later, Hoffman filed suit under the ADAAA claiming the employer failed to accommodate his disability and fired him because he was disabled or regarded as being disabled.

  The employer filed a motion for summary judgment asserting among other things that Hoffman failed to establish a prima facie case of any disability in that he was not substantially limited in any major life activity since tests showed that he was currently cancer-free. Also, the employer argued that there was no evidence that Hoffman was perceived as being disabled. Among other

things in rebuttal, Hoffman testified that his doctor told him that his type of cancer returns 80%of the time within two years, and is fatal 60 percent of the time.

The court, interpreting the ADAAA, found that the Act requires a holding that an employee who has cancer is considered to be "disabled" for statutory purposes even if his or her condition is in remission at the time of the alleged adverse employment action. Stated more precisely, the court said the ADAAA specifies that an "impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." Accordingly, Hoffman, who was recovering from renal cancer, did not have to show that he was substantially limited in a major life activity at the time that he requested an accommodation as to his work hours.

- Sulima v. Defense Support Services LLC (DS2) and Tobyhanna Army Deport, No. 08-4684, 3rd Cir. (4/12/10). In Sulima, the plaintiff, who was laid off after experiencing gastrointestinal distress from weight-loss drugs prescribed for his morbid obesity and sleep apnea, argued that he was disabled within the meaning of the ADA. The district court granted summary judgment to the employer, holding that while the side effects of prescribed medication may render an individual disabled within the meaning of the ADA, the plaintiff lacked an ADA claim because he could not show that the medications prescribed were medically necessary. By "medically necessary," the court stated that it meant that the prescription was "required in the prudent judgment of the medical profession and there must not be an available alternative that is equally efficacious but lacks similarly disabling side effects." The 3rd Circuit affirmed noting, however, its agreement with other circuits (including the 8th and 11th Circuits) that a disabling impairment caused by the side effects of prescribed medicine may constitute an ADA "disability" even if the individual's underlying condition was not a disability. Incidentally, although this case was tried under pre-ADAAA standards, the 3rd Circuit stated that the results would be the same.

- So far, in other cases, the courts show no inclination to interpret the ADAAA as liberally as hoped for by the EEOC and private plaintiffs. For example, in the case of Kirkeberg v. Canadian Pacific Railway, No. 09-1422 (8th Cir. 8/27/10), the 8th Circuit upheld the trial court's finding that the employer had not discriminated against an employee on the basis of his disability when it outsourced his work and fired him after he lost his vision in one eye. Also in the case of Anthony v. Cellco P'ship d\b\a Verizon Wireless, No. 2:09-cv-01024, E.D. of Cal., (8/27/10), the court was not the least bit sympathetic to a plaintiff who claimed that his termination was due to illegal disability discrimination when his employer fired him soon after an evening of excessive drinking and gross misconduct. He claimed that his behavior was the result of being drugged by another person with marijuana, which caused anxiety, depression and/or bipolar disorder. Not surprisingly, the court found no evidence of a disability but stated that even if he had a disability, the employer had adequate grounds to discharge him for a violation of its rules of conduct.

However, it is still early in the game. These cases may not be typical of how the various aspects of the ADA and ADAAA will be interpreted by the courts in the near future. They may be forced to decide these cases less favorably for employers. Still, we do not expect the EEOC to let up anytime soon on its enforcement efforts of any viable ADA claims.

EEO TIPS. Employers should be aware that the EEOC is likely to be very persistent over the next year or so in investigating and, especially, litigating charges under the ADA in order to establish favorable case law under the so called "liberal"

provisions of the ADAAA. Employers should also be aware that the EEOC has not issued its final regulations as required by the ADAAA. Accordingly, employers should carefully examine requests for disability accommodations and seek legal counsel whenever unusual requests are made. Your present employment policies pertaining to disabilities may need to be changed once the ADAAA regulations are issued.

OSHA Tips: OSHA Playing Hardball

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.

For months, OSHA has been promising tougher enforcement. In a recent speech to the Annual Judicial Conference, agency head, David Michaels, offered some evidence that tougher enforcement has been accomplished. He said that "by the end of this month and the fiscal year, OSHA will have issued more egregious and significant cases than it has at any time in the past decade. We expect to issue 19 egregious cases this year and close to 160 significant cases – including the $87 million case against BP and the $16 million case against the Kleen Energy facility."

The agency has for years publicized citations and enforcement actions that involve substantial penalties or novel issues. This has been done with the view that such publicity serves the public purpose of educating employers and employees and fostering compliance. A citation with proposed penalties of $100,000 and above has been deemed to be "significant." The issuance of these cases would usually be accompanied by a press release along with their being posted on OSHA's website under its "What's New" topic.

While comparing a recent period of significant case postings with an earlier period is not proof of more aggressive enforcement, it may be suggestive. From August 1, 2009 through September 18, 2009, OSHA's site displayed seven such cases with total penalties proposed of $2,746,750. Included in these cases were combined citations issued to two employers for failing to take adequate safeguards to protect employees from the exposure to lead. Another case drew a penalty in excess of $300,000 due primarily to failing to correct previously cited conditions. Citations with penalties approaching $600,000 were issued for violations including fall hazards, equipment guarding, and lockout-tagout deficiencies in three plants of an employer.

OSHA's significant cases displayed in the period of August 1, 2010 through September 18, 2010 include 11 citations with penalties totaling $26,194,800. Skewing the data somewhat for this period is one $16.6 million case. This case involved an explosion with multiple fatalities at the Kleen Energy Systems power plant construction site. Another case resulted in a penalty of $2,099,600 arising from exposures of employees to lead hazards at a gun range. A release in August advised of a citation and proposed penalty of $721,000 issued to a grain cooperative after an employee was engulfed in soybeans and nearly died. The agency also posted a notice of a citation with penalties totaling $369,500 that was issued to a meat packing company. This was predominantly for failing to comply with OSHA's requirements for addressing high noise levels and for failing to record many injuries at the facility.

Inspections of three U.S. Postal Service sites during this 2010 period also produced citations and penalties totaling $932,000. These violations were for electrical issues. The Postal Service is the only federal employer who may be cited and penalized in the same manner as covered, private sector employers.

To avoid negative press coverage and substantial monetary penalties, employers should be particularly sensitive to conditions that OSHA might find to be WILLFUL, REPEATED or UNCORRECTED (after being cited in an earlier OSHA inspection). Probably the surest way to receive these steep penalties is to do nothing. To

reduce the prospect of a willful citation, an employer should not fail to address hazards that are well known to exist in his industry or to take some action to address clusters of recurring injuries. In-house inspections should carefully assess compliance with those items previously cited by OSHA at any of the employer's locations. Finally, if a citation item is not contested by the employer or subsequently withdrawn by OSHA, acceptable corrective action should be taken before the final abatement date that is shown on the citation.

Wage and Hour Tips: When Is Travel Time Considered Work Time?

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Erwin can be reached at 205.323.9272. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act.

As previously reported, there continues to be much litigation under the Fair Labor Standards Act (FLSA). According to some statistics from the federal courts, there were 5,516 suits filed federal court during 2009, an increase from the 5,203 filed in 2008. One of the most difficult areas of the FLSA is determining whether travel time is considered work time. The following provides an outline of the enforcement principles used by Wage and Hour to administer the Act. These principles, which apply in determining whether time spent in travel is compensable time, depend on the kind of travel involved.

Home To Work Travel: An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

Home to Work on a Special One-Day Assignment in Another City: An employee who regularly works at a fixed location in one city is given a special one-day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct (not count) time the employee would normally spend commuting to the regular work site. Example: A Birmingham employee that normally spends ½ hour traveling from his home to work that begins at 8:00 a.m. is required to attend a meeting in Montgomery that begins at 8:00 a.m. He spends two hours traveling from his home to Montgomery. Thus, the employee is entitled to 1½ hours (2 hours less ½ hour normal home-to-work time) pay for the trip to Montgomery. The return trip should be treated in the same manner.

Travel That is All in the Day's Work: Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

Travel Away from Home Community: Travel that keeps an employee away from home overnight is travel away from home. It is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy, Wage and Hour does not consider as hours worked that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

Example – An employee who is regularly scheduled to work from 8 a.m. to 5 p.m. is required to leave on a Sunday at 2 p.m. to travel to an assignment in another state. The employee, who travels via airplane, arrives at the assigned location at 8 p.m. In this situation, the employee is entitled to pay for 3 hours (2 p.m. to 5 p.m.) since it cuts across his normal workday but no compensation is required for traveling between 5 p.m. and 8 p.m. If the employee completes his assignment at 5 p.m. on Friday and travels home that evening, none of the travel time would be considered hours worked. Conversely, if the employee traveled home on Saturday between 8 a.m. and 5 p.m., the entire travel time would be hours worked.

Driving Time – Time spent driving a vehicle (either owned by the employee, the driver, or a third party) at the direction of the employer transporting supplies, tools, equipment or other employees is generally considered hours worked and must be paid for. Many employers use their exempt foremen to perform the driving and thus do not have to pay for this time. If employers are using nonexempt employees to perform the driving, they may establish a different rate for driving from the employee's normal rate of pay. For example, if you have an equipment operator who normally is paid $15.00 per hour, you could establish a driving rate of $8.00 per hour and thus reduce the cost for the driving time. However, if you do so, you will need to remember that both driving time and other time must be counted when determining overtime hours and overtime will need to be computed on the weighted average rate.

Riding Time - Time spent by an employee in travel, as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job, which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.

The operative issue with regard to riding time is whether the employee is required to report to a meeting place and whether the employee performs any work (i.e., receiving work instructions, loading or fueling vehicles) prior to riding to the job site. If the employer tells the employees that they may come to the meeting place and ride a company provided vehicle to the job site and the employee performs no work prior to arrival at the job site, then such riding time is not hours worked. Conversely, if the employee is required to come to the company facility or performs any work while at the meeting place, then the riding time becomes hours worked that must be paid for. In my experience, when employees report to a company facility, there is the temptation to ask one of the employees to assist with loading a vehicle, fueling the vehicle or some other activity, which begins the employee's workday and thus makes the riding time compensable. Thus, employers should be very careful that the supervisors do not allow these employees to perform any work prior to riding to the job site. Further, they must ensure that the employee performs no work (such as unloading vehicles) when he returns to the facility at the end of his workday in order for the return riding time not to be compensable.

Another area that continues to cause employer's problems is the failure to pay employees for all of their work time. Recently, Walt Disney World, after an investigation by Wage and Hour, paid over $400,000 to employees working in the food and beverage departments because they had not compensated the employees for work performed before and after their scheduled shifts. In addition, there were employees who had performed work at home and during their meal times for which they had not been paid.

In another Florida case, Central Florida Investments, a timeshare company in Orlando, paid over $800,000 in back wages to workers who scheduled tours of timeshare properties. A large portion of the wages due were because the employees did not earn the minimum wage (apparently not enough timeshare sales were being made) and other wages were due to the failure to include employee commissions when computing overtime compensations.

A Salt Lake City firm that operates multiple call centers is paying almost $2 million in back wages because they failed to compensate employees for breaks of less than 30 minutes and for time spent waiting for work areas to become available. Over the past few years, Wage and Hour has taken a very

hard look at whether employees are completely relieved for a period long enough to be used for the employee's benefit. Consequently, if you have employees who are being relieved from duty for short periods of time without being paid for the time, you should review your policy and practices to ensure that you are following the regulations.

If you have questions or need further information, do not hesitate to contact me.

2010 Upcoming Events

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Mobile – November 3, 2010
Five Rivers Delta Resource Center

WEBINAR - HEALTH CARE REFORM: A PRIMER FOR 2010 OPEN ENROLLMENTS

October 20, 2010

WEBINARS – EFFECTIVE SUPERVISOR SERIES

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Did You Know…

...that according to the Bureau of Labor Statistics, Americans born between 1957 and 1964 held an average of 11 jobs by the time they turned age 44? Those with the least education had the highest number of jobs; those without a high school diploma averaged 13.3 jobs compared to 11 jobs among those who graduated from college. According to BLS, "these baby boomers continue to have large numbers of short duration jobs even at middle age." Those with a higher level of education also were employed for longer periods of time. Those who graduated from high school were employed for a total of 68.3% of the time, compared to 47.2% of those who did not graduate from high school.

…that the Obama Administration is pushing Congress to pass legislation addressing the misuse of independent contractors? Several tax-related bills are pending that address worker misclassification. One bill, the Fair Playing Act, would require that independent contractors receive a statement of their tax obligations, the employment laws that do not apply to them as independent contractors, and their right to have their independent contractor status assessed by the IRS.

…that website access is an increased area of focus concerning ADA compliance? The Department of Justice is pursuing initiatives to be sure that websites are accessible under the "public access" and employment requirements of the ADA. This includes captioning audio and visual applications, allowing more keyboard navigation and establishing easier accessibility systems for hiring processes.

…that the Senate rejected efforts to reverse the National Mediation Board's change to airline industry union elections? The NMB supervises union elections among railway and airline employees. For 75 years, unions had to obtain a majority of all eligible employees, not just those who voted, to be selected as the bargaining representative. This rule existed because of how difficult it was for voters who travel to vote in a timely fashion. In July, the NMB announced that the outcome of an election will be based as it is under the National Labor Relations Act, where the union must obtain a majority only of those who vote in order to be selected as the bargaining representative. According to the President, "the administration is committed to helping working Americans exercise their right to organize under a fair and free process and bargain for a fair share of the wealth their efforts helped to create. The fairest and most effective to determine the outcome of a union representation election is by the majority of votes cast." Senator Harkin (D. Iowa),

who chairs the Senate Health, Education and Pensions Committee, stated that the 75-year history was “irrelevant.”

…that the Teamsters were selected by 40 employees who work for a company in California that grows marijuana for medical purposes? The grower, Marjyn Investments, LLC, reached a two-year agreement with the Teamsters in September. The employer considers unionization a signal of “acceptance” of its business and which results in a stable, committed workforce. The president of Teamsters Local 70, in describing why the union welcomes this new bargaining unit, stated that “We’ve had our problems, so we’ve had to diversify [where we find members].”

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