LEHR MIDDLEBROOKS & VREELAND, P.C.

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Your Workplace Is Our Work®

Inside this issue:

Most Employers Fail FLSA Compliance

According to the United States Department of Labor, more than 80% of all employers do not comply with wage and hour requirements. Furthermore, wage and hour class actions (referred to as "collective actions"), outnumber all other employment class action lawsuits combined. Yet, for employers, wage and hour compliance too often fails to receive the same priority as concerns about workplace harassment and discrimination. Employers know best that problem prevention and management training reduce the risk of employment claims and help achieve a favorable outcome if claims arise. Let's discuss such an approach concerning wage and hour.

If there is one issue that every employee has in common and one question that most employees raise at least once a year, it has something to do with pay. Yet, many employers state that pay should not be discussed, which usually intends to cover confidential salary information. However, a by-product of this culture may be that employees do not raise concerns about pay within the organization and, therefore, go directly to a plaintiff's attorney or the Department of Labor. Note that unlike other employment claims, there is no legal requirement that an employee file a complaint with the Department of Labor – he or she may proceed directly to court.

Wage and hour claims often involve multiple individuals and can quickly amount to a lot of money. For example, if an employer is inappropriately docking an employee for a break, the chances are that employer is doing the same thing with several other employees. Multiply that by the three year look-back period for wage and hour violations, multiply that by the number of hours of the violation, multiply that by the number of employees involved, double that total and then add interest and attorneys' fees, and you can see that it does not take long before the employer's risk is into six figures.

So what to do about this? As a threshold recommendation, we suggest that pay issues should be elevated to the same level of culture, compliance and concern as workplace harassment and discrimination. Provide employees with what DOL refers to as a "safe harbor" policy, which states employer pay practices, which practices are prohibited and directs employees to whom within the organization to ask about pay. The employer's objective should be that no employee ever needs to take a question about pay to anyone outside of the organization. If you would like a copy of our model safe harbor policy, please contact Marilyn Cagle at 205.323.9263.

Employers should also on an annual basis thoroughly audit their wage and hour practices. Are exempt employees properly classified as such? Are independent contractors bona fide independent contractors (in business to make a profit), or are they misclassified? Are breaks provided, for how long and with or without pay? If your organization pays an incentive, do you calculate that incentive in determining an employee's overtime compensation? If an employee's pay may be docked, is this in writing and applied consistently?

Our firm has a unique resource available to you for wage and hour compliance. Lyndel Erwin joined our firm approximately 10 years ago, after serving as a District Director for the United States Department of Labor, Wage and Hour Division, for several years. Lyndel as an investigator and during his association with our firm has handled wage and hour issues involving employers in virtually all industries throughout the United States. For further information about developing your organization's wage and hour compliance strategies, please contact either Lyndel at 205.323.9272, Richard I. Lehr at 205.323.9260, or Albert L. Vreeland at 205.323.9266.

NLRB Issues Facebook Complaint

Section 7 of the National Labor Relations Act states that employees have the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." Section 7 rights are often associated with an employer that is facing union organizing activity or whose workforce is unionized. However, this provision of Section 7 may apply to any private sector workplace, not just those employers whose employees are unionized.

In an action that may have implications for all private sector employers, the NLRB's Hartford, Connecticut office issued a complaint on October 27, 2010 against an employer that terminated an employee due to the employee's Facebook postings. A hearing is scheduled for January 25, 2011.

The employer, American Medical Response of Connecticut, terminated an employee because she posted a negative comment about her supervisor on her Facebook page, in violation of company policy. The employee was represented by the Teamsters and was denied her request for union representation at an investigatory interview about her work performance. This led to her posting the comments about her supervisor, and her termination.

The employer has an extensive policy that addresses blogging and internet posting. For example, employees may not post a picture of themselves which depicts the company without first obtaining the company's approval. The employees also are prohibited under the policy from making comments which are "disparaging, discriminatory or defamatory . . . [about] the company or the employee's supervisors, co-workers and/or competitors."

The NLRB alleges that the company's social network policy is overly broad and interferes with Section 7 rights. Although certain aspects about this case involve the issue of union representation, the complaint based upon the employer's social media policy has implications for all private sector employers, union and non-union. Section 7 often is overlooked as a potential source of employee rights. We expect the Obama NLRB to expand the scope of employee protection through Section 7, regardless of union or non-union status.

EEOC Focus on Age Discrimination in Hiring

We have previously reviewed the harsh realities of what some are referring to as the "new normals:" five job applicants in the U.S. for every job vacancy; unemployment of those 40 or over the highest since the 1930s; those unemployed for more than six months the highest ever; and overall unemployment rate at 9.6%. Understandably, all of these statistics put a greater emphasis on employer hiring decisions, because jobs are so precious. Employers whose workforce usually attracts the 18 to 30 year old applicant receive resumés from those 40 or older. We have this dynamic of the "older" applicant climbing down the ladder to compete with the "younger" applicant who is starting to climb the ladder. This is why the EEOC last month held its first ever hearings about employer use of credit checks and why on November 17, 2010 the EEOC held hearings on the

impact of the economy as it relates to age discrimination claims.

All five EEOC commissioners attended the hearing. Witnesses stated that older employees were the fastest growing segment of our nation's population, and many are finding that they have to work longer because of reduced home and retirement account values.

Plaintiffs' attorneys testified that they have clients who report applying for or interviewing with "hundreds" of employers, without receiving a job offer. The attorneys said the applicants believe that age discrimination occurred, but many choose not to pursue a claim because they simply were not sure of any facts to show age discrimination in hiring. It was suggested that the EEOC use its authority to investigate an employer's hiring practices, even if no charge of discrimination has been filed.

Plaintiffs' attorneys testified that a limiting factor in bringing a successful age discrimination claim is the United States Supreme Court's 2009 decision in Gross v. FBL Financial Services, Inc. The Court held that unlike other fair employment practices statutes, a plaintiff bringing an age discrimination claim must show that "but for" his or her age, the adverse action would not have occurred. This is a much more difficult standard to meet than the "mixed motive" burden in other fair employment practices claims.

Be sure that those who are involved in the hiring process understand the implications of the Age Discrimination in Employment Act. For example, how to evaluate an older applicant with no job-related experience compared to a young applicant with no experience – what questions may be asked, what factors may or may not be considered and how to select the best applicant with the minimal risk of litigation.

Unionization Elections Increase; 69.2% Union Victory Rate

According to the Bureau of National Affairs, there were 812 NLRB conducted union elections held during the first six months of 2010, compared to 591 elections during the same time period in 2009. Unions won 69.2% of those elections in 2010, compared to 72.8% in 2009. The fact that unions win approximately 70% of all elections should remind union-free employers how important it is to remain vigilant to retain that status.

A total of 32,725 employees became represented by unions as a result of the elections, compared to 23,561 in 2009. Unions won approximately 35% of all decertification elections, down slightly from 39.7% in 2009.

The Teamsters were involved in 217 elections, winning approximately 60% of them. However, the average size of the bargaining unit that selected the Teamsters was 43 employees. The Teamsters, more than most unions, tend to focus on smaller bargaining units. SEIU won 68.1% of its elections, and the Machinists won 80% of their elections.

Unions won 57.6% of all elections in manufacturing, only the third time in the past 30 years that manufacturing victories for unions increased from the prior year. Unions won 80% in construction, 64.7% in transportation and utilities, and 72% in services and healthcare. Unions also won approximately 71% of all elections involving "white collar" employees.

Do not for a minute think that the lack of action on EFCA will inhibit aggressive union organizing. The Obama NLRB will continue to change the rules of engagement with an outcome favorable to union organizing. Add to this dynamic employee concerns about job security ("Will I be here tomorrow?"), safety, the cost of benefits and retirement, and you have a perfect combination of anxious employees becoming vulnerable to union sales initiatives.

Employee Injured While Participating in Company-Sponsored Charity Event: Is the Employee Entitled to 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.

Is an employee who was injured during a company-sponsored softball game entitled to worker's compensation benefits? What if the injury occurred during the company's holiday party? What about an injury that occurs at a company-sponsored charity event? We receive these types of questions periodically. Each question requires an examination of the facts involved and the law of the particular state. An interesting recent case from Kentucky illustrates some of the factors that courts consider.

Sheila Bunch was an employee of American Greetings. In October 2007, she was participating in a relay race along with several other American Greetings employees when she slipped and injured her knee. The injury occurred in the company cafeteria during Ms. Bunch's unpaid lunch hour.

The event was part of an annual fundraising campaign that American Greetings sponsored for the past fifteen years. Events occurred over the course of four weeks and included speakers, a lip-syncing performance, bake sales, and the relay race. Participation was completely voluntary, but employees were encouraged to participate.

After injuring her knee during the relay race, Ms. Bunch made a claim for workers' compensation. American Greetings denied the claim as not occurring in the course and scope of her employment.

In determining whether a recreational injury is compensable under Kentucky's Workers' Compensation Act, the Court of Appeals of Kentucky considered four factors. An injury that occurs during recreational activity may be viewed as being work-related if: 1) It occurs on the premises, during a lunch or recreational period, as a regular incident of the employment, and occurs during working hours; or 2) The employer brings the activity within the orbit of the employment by expressly or impliedly requiring participation or by making the activity part of the service of the employee; or 3) The employer derives substantial direct benefit from the activity beyond the intangible benefit of an improvement in employee health and morale that is common to all kinds of recreation and social life; or 4) The employer exerts sufficient control over the activity to bring it within the orbit of the employment.

The parties conceded that the injury occurred on the employer's premises. The Court also found that the injury occurred during "working hours," as it occurred "in the middle of the workday during an unpaid lunch break when employees are more likely to remain on the employer's premises and continue to be encompassed within the scope of their employment." Finally, because the fundraising event lasted for four weeks and occurred annually, the Court determined that it was "a regular incident of the employment."

The Court acknowledged that "it is difficult to determine when an employee's recreational activities fall within the course of his employment." The Court further stated the circumstances of each case "must be examined in their entirety." Upon considering the facts of the case and the four factors noted above, the Court found that Ms. Bunch sustained a compensable injury.

EEO Tips: Handling EEOC Charges with Technical Defects

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.

Notwithstanding the EEOC's Regulations (29 C.F.R. 1601.12) which permit a charging party to amend his or her charge during the administrative process to correct technical defects, the courts apparently are not so lenient. In three recent cases, namely: *Mozdszierz v. Accenture LLP*, (E.D. Pa., 10/29/10); *Logsdon v. Turbines Inc.,* (10th Cir., unpublished opinion 10/20/10), and *Lewis v. Asplundh Tree Expert Co.*, (11th Cir. unpublished opinion 11/8/10), the court in each case made it clear that a failure to check the appropriate box, clearly indicate the statute and type of discrimination, or name a probable co-respondent on the EEOC's Charge form required dismissal of the subsequent lawsuit. In substance, the courts reasoned that such technical defects constituted a failure to exhaust the charging party's administrative remedies by not making clear to the EEOC what the scope of its investigation should be or by depriving an improperly identified co-respondent of the opportunity to engage in

the conciliation process. The essential facts in these cases can be summarized as follows:

In *Mozdszierz v. Accenture LLP*, (E.D. Pa., 10/29/10), Mozdszierz, the charging party, had originally filed a charge in 2004 alleging a failure to accommodate a disability as the result of a back-pain ailment. He settled this charge with Accenture for $60,000. Among other conditions in the settlement, the charging party would be terminated on January 1, 2005, waiving all rights to any and all actions he may have had against the company. However, in December, 2004, Accenture sent a letter to all employees on disability leave notifying them that they could retain their leaves of absence instead of being terminated on January 1, 2005. Inadvertently, Mozdszierz also received this letter. Realizing its mistake, Accenture sent a letter to Mozdszierz on January 10, 2005 correcting its earlier notice to him. Thereafter, he was terminated in keeping with the terms of his settlement, including the cancellation of his medical benefits.

Mozdszierz then filed a new charge with the EEOC alleging that Accenture's actions constituted retaliation. However, he only checked the "Retaliation" box and the "other" box, but not any other statutory type of discrimination. The EEOC apparently did not complete an investigation and issued a Right-To-Sue Letter to Mozdszierz. He filed suit and Accenture moved to dismiss. The court granted Accenture's motion, holding that the complaint did not sufficiently state a claim for disability discrimination because the plaintiff had failed to exhaust his administrative remedies under the ADA. Specifically, the court found that the plaintiff, in addition to checking the retaliation box, had checked the "other" box instead of checking one of the statutory boxes as the bases for the discrimination he was trying to allege. (Actually, there is no "discrimination" box per se. The discrimination section has a number of boxes for purposes of indicating the statutory bases upon which the alleged discrimination is based.)

The court rejected the plaintiff's argument that checking the "other" box alone can be a substitute for checking one of the statutory boxes. According to the court, if checking the "other" box was acceptable, "it would transform the 'other' box on EEOC charges into a litigation wildcard that could later be turned into any cause of action a plaintiff wishes to assert."

In *Logsdon v. Turbines Inc.*, (10th Cir., unpublished opinion 10/20/10), the main issue was whether the charging party, Lorrie Logsdon, had implied but not actually alleged in her charge that she had been unlawfully terminated. Logsdon's charge filed with the EEOC included detailed statements about her demotion, her denial of a promotion and certain disciplinary claims but only a "fleeting" reference to her termination. After she filed suit under Title VII and the ADEA, Turbines filed a motion to dismiss for failure to exhaust her administrative remedies, arguing that among the particulars of her EEOC charge there were no particulars concerning any termination in 2007. The trial court judge agreed and dismissed the complaint as to the issue of termination on the basis that Logsdon had failed to exhaust her administrative remedies with respect to that issue.

The 10th Circuit affirmed the trial court's decision but found that the trial court should have dismissed the case on the premise that failure to exhaust is jurisdictional, not an affirmative defense in that circuit. It remanded the case to make that change in the trial court's decision.

According to the 10th Circuit, "it was entirely unclear" from the timelines set forth in the statements which accompanied Logsdon's EEOC charge that she was complaining about her discharge. The court further stated that although she had time to review the charge before she signed it, she did not add the termination claim. However, Logsdon argued that Turbines referred to her termination in its position statement which had been submitted to the EEOC. The Court rejected this argument stating that it would not be reasonable to expect the EEOC to investigate her discharge as being discriminatory or retaliatory based upon the discussion of her discharge in Turbines' position statement."

However, this latter statement by the 10th Circuit is not necessarily true. The EEOC could have investigated the termination issue based upon information in Turbines' position statement as a matter which is "like and related" to the issues which were set forth in the charge.

In the third case, *Lewis vs. Asplundh Tree Expert Co.* (11th Cir. unpublished opinion 11/8/10), the charging party, Robert Lewis, was employed by Asplundh and alleged in his charge that Asplundh had discriminated against him because of his race, African-American, allowed him to be

subjected to racial harassment and discharged him in retaliation for complaining. Asplundh was an independent contractor doing work for the City of Gainesville. Lewis claimed that the racial harassment was done by James Evans, an inspector employed by the Gainesville utilities agency. He alleged that Evans placed a noose around his neck and threatened to hang him. Lewis filed suit against Asplundh and the City of Gainesville. Lewis settled his claim with Asplundh but the claim against the City of Gainesville at that point was unresolved. Thereafter, the City of Gainesville filed a motion to dismiss asserting that the City had not been named as a party (or co-respondent) in Lewis's EEOC charge. The trial court granted the motion and Lewis appealed to the 11th Circuit.

On appeal, Lewis argued that he had identified James Evans in the charge as the harasser and also indicated that Evans was employed by the City of Gainesville and that Evans and various other responsible city employees had actual notice of his charge and the EEOC's investigation. Thus, according to Lewis, the City had been put on notice that it too could be named in any subsequent lawsuit and therefore was not prejudiced by being included now.

The 11th Circuit allowed that Title VII's "naming preconditions" must be liberally construed in keeping with the holding in *Virgo v. Riviera Beach Assoc. Ltd*, (11th Cir. 1994) that any such subsequent naming must fulfill the purposes of Title VII. The Court went on to articulate the five factors the courts should use to determine whether the purposes of Title VII were being met. Among those factors was whether the "unnamed party was actually prejudiced by its exclusion from the EEOC proceedings. Ultimately, the Court concluded that "the City was prejudiced by facing a lawsuit without notice from Lewis or the EEOC that they would seek to impose Title VII liability against the city "…without an adequate opportunity to participate in the conciliation process." Accordingly, the 11th Circuit affirmed the trial court's grant of summary judgment because the city was not named in the underlying charge filed with the EEOC.

EEO Tips:

Employers should carefully examine any and all charges filed against them for technical defects. The real question, however, is what should an employer do about any technical defects found during the administrative process? There is no easy answer since much depends on the nature of the case, for example, whether the case involves only minimal individual harm issues or a potential class action which would require a costly, extensive production of records and investigative time. Other related questions are: Should the defects be mentioned in the employer's position statement? Are the defects jurisdictional, legally substantive or merely inconsequential errors?

On the one hand, addressing the technical defects early in the administrative process may serve to reduce the scope of the investigation, get the charge dismissed or lead to a favorable resolution. However, if this option is taken, there is the possibility that the charging party will be able to amend the charge to remove the technical defect and the amendment will revert back to the date of the original charge. It is also possible that the EEOC could use the charge as drafted and make a "like and related" finding as to the issue in question. (Of course, the EEOC could not add parties who were not mentioned.)

On the other hand, if it seems likely that the charging party is going to file suit regardless of the EEOC's investigation results, it might, strategically, be advantageous to use the technical defect either as an affirmative defense or assert it as a failure to exhaust administrative remedies, as in the cases reviewed above.

If you have questions or need legal counsel on the matter of technical defects in charges filed against your firm, please don't hesitate to call this office at (205) 323-9267.

OSHA Tips: What OSHA is Citing

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.

Posted on OSHA's website, you may now find their sequential listing of the most frequently cited violations for the recently completed fiscal year of 2010. An employer wishing to avoid citations might be wise to take note of those conditions that are often the source of charged

violations. The standards most violated in FY 2010, as well as their rank order, are very similar to past years.

Leading the way again this year was 1926.451, "General Requirements" under the construction standard for scaffolding. Given that a large portion of Federal OSHA inspections each year is in the construction sector, and with the prevalence of scaffolds on these sites, this might be expected. Conditions leading to many alleged violations relate to the design or integrity of scaffolds, access, absence or deficiency of guardrails, and the like. This was the fourth most expensive violation with a penalty of about $1005.

The second most cited violation was again a construction standard, 1926.501, "Duty to have fall protection." Falls continue to be a leading cause of fatalities and remain high on OSHA's target list. Not surprisingly, it was the second most costly alleged violation with an average penalty of around $1467 per violation.

The third most cited violation for the year was 1910.1200, the hazard communication standard. Violations of this standard involve not having a written description of the facilities hazardous chemical program, not labeling chemicals, not maintaining material safety data sheets, and not providing relevant information and training to employees.

Number four on the most violated list was 1926.1053. This is the construction standard for ladders. It specifies how ladders should be constructed, used, and maintained.

In fifth place was the 1910.134 standard for the selection and use of respirators. It calls for a written program and requires a medical evaluation, fit testing, and training.

The sixth most violated standard was 1910.147, the general industry requirement for the control of hazardous energy (lockout/tagout). The standard requires the implementation of a written program that ensures employees will not be exposed to the release of hazardous energy while performing maintenance or service work. This was the third most expensive with an average assessment of about $1234.

The electrical standard for wiring methods, components, and equipment for general use, 1910.305, was seventh on the most violated list. This standard addresses the use of flexible cords, cabinet enclosures, etc.

Number eight on the list was 1910.178, the standard that addresses the use of powered industrial trucks in general industry. It includes requirements for truck maintenance and operation as well as for operator training and certification.

Another electrical standard (1910.303) entitled General Requirements, came in as number nine on the list. It includes requirements for marking electrical equipment, guarding of live parts, and working clearances and enclosures.

Last on the top-ten list was general industry standard 1910.212, "General Requirements for all Machines." This spells out the requirements for machine guarding. It calls for guarding to protect the operator and others in the machine area from hazards such as point of operation, in-running nip-points, rotating parts, flying chips, and the like. This item carried the highest penalty of these ten most frequently violated standards. The average penalty for this citation item was $1594.

Wage and Hour Tips: How Should an Employer Handle Pay During Business Closings Due to Inclement Weather…Such as Winter Storms?

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

As we are approaching winter, there may be instances where employers will be forced to close, due to weather issues or due to the loss of vital services such as electric power, their business in order to ensure the safety of

employees. In order to allow you to plan for such an event, I will try to provide some general guidelines regarding the matter. Below are some frequently asked questions:

1. When a company closes because of inclement weather, must the company pay an hourly non-exempt employee for the day(s) when the business was closed?

A. No. The employer is not required to pay an hourly non-exempt employee for the time when the business was closed. At the company's discretion, the hourly non-exempt employee may be allowed to use his/her vacation days.

2. If a non-exempt employee is not able to leave the company's facility because of inclement weather, and continues to work, must the company pay the employee overtime for any hours worked in excess of forty (40) in the workweek?

A. Yes. Non-exempt employees who work more than forty hours (40) in a workweek must be paid overtime. If the employee is at the employer's facility more than 24 hours, is relieved from duty, and is provided adequate sleeping facilities, the employer may be able to deduct up to eight (8) hours of sleep time per day. Otherwise, the employee is considered to be working all of the time he is at the establishment.

3. Must a non-exempt employee who reports to work and then is sent home because of inclement weather be paid for the full day?

A. It depends on the pay plan that is in effect for that employee. Alabama does not have a law requiring that an employee be paid for a minimum number of hours when they report for duty and thus you must only pay the employee for the hours actually worked. However, some states do have state statutes requiring employees to be paid for 2-4 hours of reporting time. Thus, if you have employees in other states, you should check for any state or local laws that may be applicable.

If the non-exempt employee is paid on a "fixed salary for fluctuating workweek" pay plan, the employee must be paid his/her full salary for the week if he/she works any portion of the workweek. Consequently, if your firm was open on Monday but was closed due to inclement weather the remainder of the workweek, an employee working under this plan would be entitled to his/her full salary for the workweek.

4. How is a salaried exempt employee to be treated for the day(s) when the business was closed?

A. The regulations related to the requirements for exemptions state that "an employee is not paid on a salary basis if deductions … are made for absences occasioned by the employer or the operating requirements of the business. The Department of Labor has interpreted this to mean that you may not deduct the employee's salary for time missed due to the business being closed for inclement weather. Further, the DOL takes the position that an employer cannot require the exempt employee to use his or her vacation days for the time period when the business was closed.

Conversely, if the business is open but the employee chooses to not report to work for a full day or more, you may dock his pay as provided in the regulations. Also, you may charge a partial-day absence against the employee's leave bank as is allowed under the regulations.

While I trust that we will not have any ice or snowstorms that require firms to close for one or more days, I hope this will provide you with some guidance should the situation arise.

Even though the economy is very fragile and the Consumer Price Index (CPI) has risen very little during this year, six states (Arizona, Montana, Ohio, Oregon, Vermont and Washington) will raise their state minimum wage on January 1, 2011. Two other states, Florida and Missouri, have announced that even though their state minimum wage is tied to the CPI, they will not increase their minimum wage above $7.25 per hour. If you have operations in any of the states listed, you should check to

make sure that you are paying employees working in those states at least the applicable rate.

If you have additional questions, do not hesitate to contact me.

Did You Know…

…that approximately 20,000 Delta flight attendants and 18,000 fleet services workers voted "No" for representation by the Association of Flight Attendants? The merged union-represented flight attendants of Northwest and non-union flight attendants of Delta voted under new rules established by the National Mediation Board where a union needed only a majority of those who voted, as opposed to all eligible voters. 9,216 voted for the union (49%), 9,544 (51%) voted against the union. Of the fleet services workforce, 5,024 (47%) voted for the union and 5,569 (53%) voted against the union. Delta (affectionately known among travelers as "Don't Expect Luggage To Arrive") has approximately 16,500 (including Northwest) passenger services employees who are voting through December 7 on union representation by the IAM.

…that an individual supervisor may be held liable for workplace retaliation? Calaway v. Practice Management Services, Inc. (Ark. S. Ct., November 11, 2010). This case involved a claim under the Arkansas Civil Rights Act. The Court stated that language defining "employer" in the prohibition of discriminatory acts was narrowly worded, compared to language identifying "person" as a source of prohibited retaliatory behavior under the Arkansas Civil Rights Act. To the extent other state statutes distinguish "employer" from "person" in a similar manner, we can expect more retaliation claims to include individual managers and supervisors.

…that AFL-CIO unions spent approximately $200 million dollars on the 2010 elections? That amount is not surprising, but what is remarkable is the higher than usual percentage of union members who voted Republican – 36% in House and 38% in Senate races. In Pennsylvania, the Democratic candidate, Joe Sestak, was an early supporter of EFCA. He had the support of the Steelworkers and other leading Pennsylvania unions. Yet, 44% of union members in Pennsylvania voted for the Republican victor, Pat Toomey. According to the American Federation of State, County and Municipal Employees (not an AFL-CIO member), they spent $91 million dollars on Democratic candidates in the 2010 election and were "very disappointed with the results, certainly in the House."

…that according to Mercer, healthcare cost increases in 2010 were the highest since 2004? In a survey released on November 17th, Mercer stated that the average health benefit costs are $9,562 per employee. The overall increase for 2010 was 6.9%. Employers reported that approximately one to two percent of the cost increases were due to the Patient Protection Affordable Care Act. Mercer stated that if employers make no changes to their health plans for 2011, they expect next year's costs to increase by approximately 10%. Those employers with 500 or more employees averaged a cost increase of 8.5%, compared to those below 500, which averaged 4.4%. More employers added consumer-directed health plans and wellness program incentives.

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