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FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

Wage and Hour Webinar: The DOL's Wage & Hour Enforcement Coming to a Plaintiff's Attorney Near You

Date .... March 10, 2011
Time...........10:00 a.m. – 11:30 a.m. CST

EEOC Developments: ADA Claims Rising, Only 4.7% "Cause" Findings

According to the EEOC's recently released analysis of discrimination charges for Fiscal Year 2010 (September 30 YE), a total of 99,922 charges were filed, the highest ever. The following chart summarizes EEOC charge filings during the past three years. Note that the percentages exceed 100% because a charge may include allegations of multiple violations:

Table of EEOC Charge Statistics Reported for Fiscal Year 2010 as Compared to the Two Preceding Fiscal Years

	Fiscal Year 2008	Fiscal Year 2009	Fiscal Year 2010
Total Charges	95,402	93,277	99,922
Race	33,937	33,579	35,890
	35.6%	36.0%	35.9%
Sex	28,372	28,028	29,029
	29.7%	30.0%	29.1%
National Origin	10,601	11,134	11,304
	11.1%	11.9%	11.3%
Religion	3,273	3,386	3,790
	3.4%	3.6%	3.8%
Retaliation – All Statutes	32,690	33,613	36,258
	34.3%	36.0%	36.3%
Retaliation – Title VII Only	28,698	28,948	30,948
	30.1%	31.0%	31.0%
Age	24,582	22,778	23,264
	25.8%	24.4%	23.3%
Disability	19,453	21,451	25,165
	20.4%	23.0%	25.2%
Equal Pay Act	954	942	1,044
	1.0%	1.0%	1.0%
GINA	----	----	201
	----	----	0.2%

For the second consecutive year, the No. 1 claim alleged was retaliation. ADA claims had the highest numerical and percentage increase of any category.

We expect disability claims to increase this year, particularly after the EEOC issues its regulations implementing the ADA Amendments Act. The focus of EEOC ADA charge analysis will move from whether the individual has a disability to whether the employer complied with its reasonable accommodation requirements.

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During Fiscal Year 2010, 64.3% of all charges were dismissed with a "no cause" determination, and only 4.7% resulted in a "cause" finding. The remaining 30% of dismissals were where the charging party requested a right to sue prior to the EEOC issuing a decision or the EEOC dismissing for reasons unrelated to the merits of the claim.

The EEOC has stated and we have reviewed that the "battleground" for claims in 2011 will involve hiring issues, with the focus on age and disability claims. Although the majority of discrimination charges arise upon termination, the claim that is more difficult for a charging party, yet more dangerous to an employer, is the failure to hire claim. Be sure that those who are involved in the hiring process understand your organization's ADA obligations and ageist comments in hiring, such as characterizing an older applicant as "over-qualified" or "less energetic" than a younger person selected for the job.

Unions Approach "Mendoza Line"

What is the Mendoza Line, you may wonder? It is a term used in baseball named after a shortstop, Mario Mendoza, who batted below .200 five out of his nine major league seasons. The "Mendoza Line" is often cited as an example of futility – if a batter is out over 80% of the time, why keep playing?

The question regarding unions is whether their membership levels are approaching the equivalent of the "Mendoza Line." According to a January 20, 2011 report issued by the Bureau of Labor Statistics, total public and private sector union membership declined by 612,000 from a year ago, from 15.3 million to 14.7 million. Since 2008, the total number of union members has declined by 1.4 million.

Private sector union membership declined by 339,000, to approximately 7.1 million from 7.4 million. As a percentage, private sector membership declined from 7.2% to 6.9% and public sector membership declined from 37.4% to 36.2%.

Regarding employees overall who are represented by unions (as opposed to belonging to unions), the total public and private sector share fell from 13.6% to 13.1%, private sector from 8% to 7.7% and public sector from 41.1% to 40%.

At the state level, total membership as a percentage of the workforce, including public sector, fell in Alabama from 10.9% to 10.1%, Georgia from 4.6% to 4.0%, Illinois from 17.5% to 15.5%, Michigan from 18.8% to 16.5%, and Pennsylvania from 15% to 14.7%.

States where membership numbers increased include Alaska from 22.3% to 22.9%, California from 17.2% to 17.5%, Indiana from 10.6% to 10.9%, and Iowa from 11.1% to 11.4%.

The greatest loss of membership occurred in construction (237,000), state and local government (253,000), healthcare/social services (70,000), manufacturing (52,000), wholesale and retail (39,000), and transportation and warehousing (31,000).

We expect these numbers to continue to fall, particularly in the public sector, as more state and local governmental entities reduce their workforce or change public sector unionization statutes. Labor's hope to reverse the downward membership numbers is a combination of support from the National Labor Relations Board, initiatives directed toward the overseas assets of companies with facilities in the United States, and expansion of organizing and negotiation strategies among those employers where there is union representation at some locations but not all.

"Guilt by Association" Retaliatory, Rules Supreme Court

In a unanimous decision, the United States Supreme Court on January 24, 2011, ruled that an employee may pursue a retaliation claim based upon his relationship with an employee who engaged in protected activity. Thompson v. North American Stainless LP.

The case arose when Thompson was fired three weeks after his fellow employee and fiancé, Regaldo, filed a discrimination charge against the company. Thompson then filed a retaliation charge and lawsuit, alleging that he

was terminated in retaliation for his fiancé (now his wife) filing her discrimination charge. The trial court granted summary judgment for the employer, stating that because Thompson did not engage in any protected activity, his termination could not be considered retaliatory. This decision was affirmed by the United States Court of Appeals for the Sixth Circuit.

Retaliation claims usually involve an individual who either opposed what the individual thought was an unlawful practice under the statutes or participated in an investigation about a potential violation. Thompson did neither. However, the Supreme Court stated that "injuring [Thompson] was the employer's intended means of harming Regaldo. Hurting him was the unlawful act by which the employer punished her [for filing her discrimination charge]. In those circumstances, we think Thompson was well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue."

The employer argued that to extend retaliation to this case would mean that an employee who claims to be a close friend or otherwise associated with an individual who filed a claim could allege retaliation. In response, the Supreme Court said that "Although we acknowledge the force of this point, we do not think that it justifies a categorical rule that third party reprisals do not violate Title VII. . . . Title VII's anti-retaliation provision is worded broadly. We think there is no textual basis for making an exception to it for third party reprisals . . ."

This case is the most recent in a series of cases where the Supreme Court expanded the scope of "retaliation" under the anti-discrimination statutes. We expect the Supreme Court similarly to expand the scope of what is considered retaliation under the Fair Labor Standards Act; that decision will be issued shortly.

Employer's "Goodbye Forever" Release Inapplicable to Wage and Hour Claim

The case of Martin v. PepsiAmericas, Inc. (5th Cir. December 28, 2010) involved an employee who received a severance payment of $23,000 in exchange for signing a "Goodbye Forever" release. The release specifically stated that it provided "benefits to which [the employee] was not otherwise entitled." The employee also agreed not to file "any complaints, charges, lawsuits, or any other claims against the Company arising out of the employment relationship and/or termination of employment."

After the employee signed the release and cashed the check, the employee filed a lawsuit alleging that she was paid improperly under the Fair Labor Standards Act and entitled to back pay and liquidated damages. The company asserted that her release precluded her from filing a wage and hour claim. The trial court agreed with the employer, but the Fifth Circuit Court of Appeals did not. The Fifth Circuit also ruled that the employer could not set off the amount paid as severance against its wage and hour liability.

The court said that the severance agreement's language specifying that the severance amount was money the individual was not otherwise entitled to receive did not include a violation of the Fair Labor Standards Act, because the employee was entitled to back pay for that violation. The court also precluded the employer from a setoff of the severance amount against the wage and hour liability, stating that the severance payment was in exchange for not filing legal claims and, therefore, could not be considered for a setoff against back pay owed.

As a matter of law, FLSA claims are not waivable by the employee unless that waiver is approved by the Department of Labor or a federal judge. Still, when asking an employee to sign a release, be sure to use language that account for the employee's receipt of all wages owed or otherwise payable and consider including a representation and warranty by the employee about his receipt of such wages.

Are Undocumented Workers Eligible for 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.

The issue of whether illegal aliens working in the United States, commonly called "undocumented workers," should be eligible for workers' compensation benefits for work-related accidents has become an important issue in workers' compensation and employment law. Employers have argued that allowing such employees to receive workers' compensation benefits is contrary to law. However, many state courts, and most recently the Court of Appeals for the District of Columbia, have rejected such arguments and held that undocumented workers do have a right to benefits under state workers' compensation laws.

In December of 2010, the District of Columbia Court of Appeals held that an employee's undocumented worker status had no effect on whether that employee was covered by D.C.'s workers' compensation law. The undocumented worker was injured when a customer threw a bottle and hit him in the eye. The employee sought medical attention and filed for workers' compensation. Upon filing, the employer discovered his undocumented status because the employee filed his workers' compensation claim under a different name than contained on his employment papers. The employer terminated him because of his undocumented status and refused to pay workers' compensation benefits.

An Administrative Law Judge held that the employee had a right to receive the benefits and that the employer's failure to pay them without following proper procedure for denying benefits was in bad faith. Although the bad faith holding was overturned for lack of a proper analysis, the D.C. Court of Appeals affirmed the undocumented worker's right to workers' compensation benefits.

The court found that the definition of "employee" under the D.C. workers' compensation law was broad and neither excluded undocumented workers nor made their immigration status relevant. The court also held the fact that an undocumented worker may be unable to work for reasons unrelated to his injury (because he is an illegal alien) does not preclude him from being entitled to workers' compensation benefits as long as the injury independently causes the disability.

State courts are divided as to whether undocumented workers may recover workers' compensation benefits. The majority view is that undocumented workers may recover workers' compensation benefits. States following this view include Georgia, Florida, Maryland, California, Minnesota, Pennsylvania, and others. One benefit for employers in these states: although undocumented workers may recover workers' compensation benefits, as a general rule, they may not bring civil actions in tort against their employers for workplace injuries, due to workers' compensation exclusivity provisions.

On the other hand, some state courts—including courts in Arizona, Virginia and Wyoming—have determined that undocumented workers are ineligible for workers' compensation benefits. In general, these courts have found that illegal aliens are not covered under workers' compensation laws because they cannot legally enter into employment contracts.

Virginia has amended its workers' compensation laws to allow illegal aliens to receive certain workers' compensation benefits. Other states to have expressly included illegal aliens in their workers' compensation coverage are California, Florida, Nevada, New York, Texas, and Utah. Idaho and Wyoming's workers' compensation statutes expressly exclude illegal aliens. State legislatures in Montana and Georgia are currently considering legislation that would exclude illegal aliens from their workers' compensation coverage.

As illustrated by the recent D.C. Court of Appeals case and legislative developments, the issue of workers' compensation for undocumented workers continues to develop.

EEO Tips: How Soon is Too Soon for the Issuance of a Right to Sue Notice

This article was prepared by Jerome C. Rose, EEO Consultant for the law firm of LEHR, MIDDLEBROOKS, & VREELAND, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in the states of Alabama and Mississippi. Mr. Rose can be reached at 205.323.9267.

Under Section 1601.28(a)(2) of the EEOC's Procedural Regulations (29 C.F.R. § 1601, et seq.). an EEOC District Director or other designated official may issue a *"… Notice*

of Right To Sue with copies to all parties, at any time prior to the expiration of 180 days from the date of filing the charge…” [*if he or she*] *“....has determined that it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge and has attached a written certificate to that effect.”* Keeping this in mind, the issue as to how soon a right-to-sue notice can be issued by the EEOC can be put into proper perspective. For example, an interpretation of this regulation was the key issue in the case of *Patroski v.Pressley Ridge Foundation*:

Having previously complained internally about being allegedly molested and sexually harassed by the CEO of Pressley Ridge Foundation, a non-profit, charitable organization, Susan Patroski, who worked in the Human Resources Department, filed a charge with the EEOC on June 2, 2010 making those same allegations. She was fired two days later on June 4th. In response to her firing, she requested and obtained a right to sue letter from the EEOC on June 8th, approximately six days after filing her charge. Thereafter, on a timely basis, she filed suit against her employer. Patroski v. Pressley Ridge Foundation, No. 2:10-CV-00967 (W.D. of Pennsylvania 12/7/10).

Pressley Ridge promptly filed a motion to dismiss, asserting that the court lacked subject matter jurisdiction because in issuing Patroski’s right to sue authorization “a mere six days” after her charge had been filed, the EEOC had not fulfilled all of its statutory obligations. The court agreed and granted the employer’s motion for dismissal based on Patroski’s failure to exhaust her administrative remedies with instructions that the case should be returned to the EEOC for further processing [we assume] within the remainder of the 180-day period set by statute. More specifically, the court held:

- The issuance of the right to sue notice **only six days after it was filed** was entirely too soon because the EEOC had not properly exercised its discretion in that, apparently, it had not notified the employer of the charge prior to the issuance of the right to sue or attempted to make any type of investigation.
- While Section 1601.28(a)(2) of the EEOC’s Procedural Regulations allowed the Commission to use its “discretion” in determining whether to issue a right to sue notice within the 180-day period after a charge is filed, this did not mean that such discretion was “completely unfettered.” The court stated that the EEOC was obligated to exercise its discretion in keeping with its statutory responsibilities.

Thus, to this court, six days was too soon under the circumstances. The court further suggested that when it appears “that a charge has received little, if any consideration, other than the issuance of an early right-to-sue notice, the case will be remanded for further administrative processing.” At this point, it is unknown to this writer as to whether the holding in this case has been appealed. As stated above, it was decided on December 7, 2010.

However, the issue of ***How Soon is Too Soon*** is far from being settled as the courts are clearly divided on the matter of early rights-to-sue under Title VII. Under similar circumstances, the Eleventh Circuit has taken a totally opposite point of view as to the matter of remanding a case back to the EEOC for further processing after the issuance of an early right to sue notice and apparently has set no specific limits on how early a right-to-sue notice may be issued. For example, in the lead case of *John Sims v. Trus Joist MACMILLAN*, 22 F.3d 1059 (11th Cir. 6/9/94), the charging party, John Sims, alleged that he had been discriminatorily terminated on the basis of his race and retaliated against in violation of Title VII. His charge was filed on March 19, 1992, but actually received and date-stamped by the EEOC on March 20, 1992. However, his request for a right to sue notice was received on March 19th, one day earlier than the actual date of his charge. Nonetheless, the EEOC’s district director certified that the charge could not be processed within 180 days and issued the requested right to sue notice on March 31, 1992, just eleven days after his charge was filed.

Sims filed suit on June 26, 1992. The court dismissed the case for lack of subject matter jurisdiction holding that the EEOC had exclusive jurisdiction over the charge during the first 180 days after filing and remanded the case back to the EEOC for further processing. Upon appeal the Eleventh Circuit reversed and remanded holding that:

- The procedural requirements of Title VII were to be viewed as conditions precedent and not

jurisdictional requirements citing _Zipes v. Transworld Airlines, Inc._, 102 S. Ct. 1127.

- 42 U.S.C.S. § 2000e-5(f)(1) did not prohibit the EEOC from issuing a right to sue letter before the 180 days had expired. And also that an appellant (or Plaintiff) did not have to wait until the 180 days had expired before bringing an action in federal court.

- The 180-day period was intended to afford victims of employment discrimination a private cause of action where the EEOC does not act, or does not act in a timely fashion. The EEOC's regulation simply recognizes that the caseload will sometimes be so heavy that it can be determined early on that no action can be taken within 180 days and the issuance of an early right to sue letter is a reasonable implementation of the Act (citing Rolark v. University of Chicago Hospitals, 688 F. Supp. 401).

The Eleventh Circuit further commented that "it seems illogical to us that a complainant who receives a right to sue letter from the EEOC stating that it is unable to investigate the complainant's charge within the prescribed time must sit idly by until the 180-day period expires." The court gave no indication as to any limits on how soon a right to sue letter could be issued, only that the EEOC must certify that it probably could not complete its processing within 180 days, whenever that occurred.

However, in the case of _Martini v. Federal National Mortgage Assn._, 178 F.3d 1336 (D.C. Cir. 1999), the court said, "although the statute allows some flexibility in the timing of reasonable cause determinations, the Commission's duty to investigate is both mandatory and unqualified." And that the legislative history of the statute demonstrated that the "informal resolution of charges, even as late as the 180th day, would be preferable to allowing complainants to sue earlier." This would seem to be a point well taken in that in Section 706 of Title VII, it clearly states that the preferred means of resolution should be by "conference, conciliation and persuasion."

I suspect that this controversy will eventually have to be resolved by the Supreme Court. In the meantime, however, the Eleventh Circuit's position as to how soon a right to sue notice can be issued would seem to be prevalent, that is, any time after a determination is made by the EEOC that the processing of the charge in its discretion could not be completed within the first 180 days after it is filed, regardless of when that occurs.

If you have any questions, please feel free to call this office at (205) 323-9267 as indicated above.

OSHA Tips: OSHA and Criminal Sanctions

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.

A recent press release by the Occupational Safety and Health Administration serves as a reminder that employers may risk more than a monetary penalty should they ignore their obligations under the OSH Act. The release announced the arrest of the former and subsequent owners of companies engaged in stone and masonry work. It stated that the Eighth Circuit Court of Appeals had ordered the arrest and incarceration of these individuals for repeatedly failing to comply with court sanctions enforcing OSHA citations that had become final orders of the Occupational Safety and Health Review Commission.

It was noted that the above companies had been issued numerous willful, serious and repeat citations since 2003 for violations related to fall, scaffold erection and power tool hazards. When they failed to comply with the court's order enforcing the OSH Review Commission's final orders, the Department of Labor's Office of the Solicitor filed petitions for contempt. Upon finding these individuals in contempt, the Eighth Circuit Court of Appeals ordered a number of sanctions including payment of outstanding penalties with interest, $100 daily penalties, weekly notification to OSHA of their jobs, and meeting a number of worker training requirements.

There has been lingering criticism of OSHA's weak or relatively modest penalty authority. There are recent indications that this may be changing. We may expect to

see more accounts similar to the above in the future. It is likely that the agency will seek more enforcement orders from the federal courts. Section 11(b) of the OSH Act states that "the Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States Court of Appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office." Section 11(b) concludes by saying that the Court of Appeals may assess the penalties provided in Section 17 (of the OSH Act) in addition to invoking any other available remedies." One indication that use of enforcement orders will increase is found in OSHA's "Severe Violator Enforcement Program (SVEP)." The SVEP was devised to direct inspections and enforcement actions toward employers who demonstrated indifference to their obligations imposed by the OSH Act. The SVEP directive, CPL 02-200-149, effective 6/18/10, states in this regard that SVEP cases **should be strongly considered** for Section 11(b) orders when it appears that such orders may be needed to assure compliance.

Section 17 of the OSH Act spells out penalties available under the statute and paragraphs (e) through (h) address provisions for criminal sanctions. None of these are treated as more than misdemeanors, which has been a point of criticism. Section (e) provides that a willful violation that caused the death of an employee shall, upon conviction, be punishable by a fine of not more than $10,000, imprisonment for not more than six months , or by both.

Section (f) provides that any person who gives advance notice of any inspection to be conducted under the Act without authority shall, upon conviction, be punished by a fine of not more than $1,000, imprisonment of not more than six months, or by both.

Section (g) states that whoever knowingly makes any false statement, representation or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to the Act shall, upon conviction, be punished by a fine of not more than $10,000, imprisonment of not more that six months, or by both.

Finally, Section(h) provides that one who kills a person while engaged in or on account of the performance of related investigative, inspection, or law enforcement function shall be punished by any term of years of for life.

While only a relatively small number of the above type cases are referred to the Justice Department each year, and few of those are prosecuted, the number of such cases has been increasing.

Wage and Hour Tips: Overtime Pay Requirements of the Fair Labor Standards Act

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.

Although the FLSA has been in effect for more than 70 years, many employers still do not understand the overtime requirements of the Act. Due to the extensive litigation that is presently underway, I believe that it is imperative that employers review their pay practices to ensure they are paying overtime in a manner that is acceptable under the Act. Recently, the Deputy Wage and Hour Administrator, Nancy Leppink, stated that they received 35,000 complaints in FY2009 and 40,000 complaints in FY2010. She also stated that they informed approximately 10% of the complainants that Wage and Hour was declining to pursue their claims but that the complainants could pursue the claims on their own. According to Ms. Leppink, Wage and Hour will target the agricultural, janitorial, construction and hotel/motel industries during this year, as well as focus on ending the misclassification of employees as independent contractors.

An employer who requires or permits an employee to work overtime is generally required to pay the employee premium pay for such overtime work. Unless specifically exempted, covered employees must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay. Overtime pay is not required for work on Saturdays,

Sundays, holidays, or regular days of rest, unless the employee has worked more than 40 hours during the workweek. Further, hours paid for sick leave, vacation and/or holidays do not have to be counted when determining if an employee has worked overtime.

The FLSA applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. It need not coincide with the calendar week, but may begin on any day and at any hour of the day. For example, you may begin your workweek at 11 p.m. on Tuesday if you believe that would enable you to better control the amount of overtime hours that are worked. Different workweeks may be established for different employees or groups of employees but they must remain consistent and may not be changed to avoid the payment of overtime. Averaging of hours over two or more weeks is not permitted.

Normally, overtime pay earned in a particular workweek must be paid on the regular payday for the pay period in which the wages were earned. On the other hand, if you are not able to determine the amount of overtime due prior to the payday for the pay period, you may delay payment until the following pay period. Often, employees will request to be allowed to work an extra day during a workweek in order to have the time off in connection with a holiday. However, if the working of the extra shift during the previous workweek causes the employee to exceed 40 hours, you must pay time and one-half for the overtime hours.

The regular rate of pay cannot be less than the minimum wage. The regular rate includes all remuneration for employment except certain payments specifically excluded by the Act itself. Payments for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays are excluded. Also, discretionary bonuses, gifts and payments in the nature of gifts on special occasions and payments for occasional periods when no work is performed due to vacation, holidays, or illness may be excluded. However, payments such as shift differentials, attendance bonuses and "on-call" pay must be included when determining the employee's regular rate.

Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. Where an employee, in a single workweek, works at two or more different types of work for which different straight-time rates have been established, the regular rate is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. Where non-cash payments are made to employees in the form of goods or facilities (for example meals, lodging & etc.), the reasonable cost to the employer or fair value of such goods or facilities must also be included in the regular rate.

Some Typical Problems

Fixed Sum for Varying Amounts of Overtime: A lump sum paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium. This is true even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis. For example, a flat sum of $100 paid to employees who work overtime on Sunday will not qualify as an overtime premium, even though the employees' straight-time rate is $8.00 an hour and the employees always work less than 8 hours on Sunday. Similarly, where an agreement provides for 6 hours pay at $10.00 an hour regardless of the time actually spent for work on a job performed during overtime hours, the entire $60.00 must be included in determining the employees' regular rate.

Salary for Workweek Exceeding 40 Hours: A fixed salary for a regular workweek longer than 40 hours does not discharge FLSA statutory obligations. For example, an employee may be hired to work a 50-hour workweek for a weekly salary of $500. In this instance, the regular rate is obtained by dividing the $500 straight-time salary by 50 hours, results in a regular rate of $10.00. The employee is then due additional overtime computed by multiplying the 10 overtime hours by one-half the regular rate of pay ($5 x 10 = $50.00).

Overtime Pay May Not Be Waived: The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance.

Likewise, an announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not relieve the employer from its obligation to pay the employee for overtime hours that are worked. The burden is on the employer to prevent employees from working hours for which they are not paid.

Many employers erroneously believe that the payment of a salary to an employee relieves him from the overtime provisions of the Act. However, this misconception can be very costly as, unless an employee is specifically exempt from the overtime provisions of the FLSA, he/she must be paid overtime when he/she works more than 40 hours during a workweek. Failure to pay an employee proper overtime premium can result in the employer being required to pay, in addition to the unpaid wages for a period of up to three years, an equal amount of liquidated damages to the employee. Further, if the employee brings a private suit, the employer can be required to pay the employee's attorney fees and, if the Department of Labor makes an investigation, it may assess Civil Money Penalties of up to $1100 per employee.

In order to limit their liabilities, employers should regularly review their pay policies to ensure that overtime is being computed in accordance with the requirements of the FLSA. If I can be of assistance, do not hesitate to give me a call.

2011 Upcoming Events

Wage and Hour Webinar: The DOL's Wage & Hour Enforcement Coming to a Plaintiff's Attorney Near You

March 10, 2011, 10:00 a.m. – 11:30 a.m. CST

For more information about Lehr Middlebrooks & Vreeland, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Marilyn Cagle at 205.323.9263 or mcagle@lehrmiddlebrooks.com.

Did You Know…

…that the Ledbetter Act may not apply to state fair employment practice laws? Tarrant Ward District v. Villaneva (Tx. Ct. App., December 23, 2010). The Ledbetter Act extends the time period for filing a charge alleging discrimination in pay, benefits or other compensation, such that each pay period is considered a renewed violation. The court ruled that the Ledbetter Act does not apply to the Texas Labor Code prohibiting discrimination; there is no "automatic incorporation" language in Texas law to incorporate all federal changes to Title VII. Texas state law, according to the court, "continues to provide for the execution of Title VII's policies, albeit on a timetable different from the one now followed under the federal statute. The differences between Title VII and [Texas law] are not unusual." Because the plaintiff "was aware of the allegedly discriminatory employment decision more than 180 days before she filed her complaint, her complaint was untimely."

…that employer-restrictive "on-call" policies resulted in a back pay obligation of more than $1 million? DOL announced this recovery on January 13, 2011 involving 865 government contractor employees at Fort Erwin, California. Under the Fair Labor Standards Act, employers are not usually required to pay an employee for "on-call" time, provided the employee's freedom is not restricted, such as remaining at or close to home. Employers may without compensation prohibit certain employee behavior when employees are on-call, such as consumption of alcohol. In this particular case at Fort Erwin, employees were so restricted geographically when on-call that the Department of Labor concluded it was "working time" and compensation was owed. The contractors who violated the Fair Labor Standards Act and paid more than $1 million in overtime wages.

…that a governor's promotion of union-free status resulted in a lawsuit by a union and state labor organization? IAM v. Haley (D.S.C., January 21, 2011). This case involves the newly elected governor of South Carolina, Nikki Haley. The suit also names the state's Director of the Department of Labor, a former management attorney. When announcing that Director's appointment, Governor Haley stated, "We're going to fight the unions and I need a partner to help me do it." The lawsuit alleges that Haley's opposition to unionization violates constitutional free speech and association rights. The "battleground" leading to this claim involves the manufacture of the Boeing Dreamliner aircraft, near

Charleston, South Carolina, which employs 3,800 non-union workers.

…that the Supreme Court upheld NASA's right to require private information from applicants? NASA v. Nelson (January 19, 2011). The case involved pre-employment questions and references about honesty and trustworthiness. The Supreme Court stated that these inquiries "do not violate a constitutional right to information privacy." Plaintiffs' attorneys were actually pleased with the Court's decision, because they think it affirms a constitutional right to the privacy of personal information, and only stated in this case that the information requested did not violate that right. In a concurring opinion, Justice Scalia stated that the Court's reasoning will increase the number of privacy-related claims, "a generous gift to the plaintiffs' bar."

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