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Inside this issue:

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Labor Losing Patience with Obama Administration

The national dismantling of the strength of public sector labor unions, combined with a private sector loss in membership of approximately 400,000, have resulted in some labor leaders looking for "one throat to choke" over their circumstances. Some of those leaders have decided that the fault lies with President Obama.

On April 13, 2011, the AFL-CIO conducted a full day meeting to plan its political initiatives for the 2012 election cycle. This meeting involved the AFL-CIO executive council, which is comprised of several AFL-CIO member union presidents. International Association of Machinists President Tom Buffenbarger stated that many "executive council members have a bone to pick with the Administration." He described the meeting as a "round robin venting" over Administration policies resulting in a lack of support for labor. Even AFL-CIO President Richard Trumka joined in the criticism, stating that the Obama Administration's fiscal policy "does not yet have the balance right between spending cuts and new revenue. Without significant new revenues, we will just end up balancing the budget on the backs of the poor and the middle class." Some unions, such as the Machinists, may not endorse any candidate for President in 2012.

Labor's disappointment with the Obama Administration began with the Administration's decision not to push the Employee Free Choice Act prior to healthcare reform. That resulted in another lost opportunity for labor. The expiration of stimulus funds to state and local governments are resulting in national initiatives to dismantle public sector bargaining rights, such that state and local governmental entities can more effectively deal with employee compensation, healthcare and retirement costs. President Obama has not demonstrated to labor any level of leadership to address the dismantling of the strength of public sector unionization.

Remember that in 2010, for the first time in our nation's history, public sector union membership exceeded private sector membership, although private sector jobs outnumber the public sector by a ratio of five to one. In our view, public sector union strength will never be what it was, which will continue the erosion of the strength of the labor movement. The only hope organized labor has during the next two years is through the National Labor Relations Board.

NLRB's Monthly Boost to Unions

It seems that every month, we have new initiatives or decisions from the National Labor Relations Board to review, where the NLRB creates some wind for the sails of organized labor. Let's review the NLRB's most recent initiatives.

NLRB Acting General Counsel Lafe Solomon on April 11, 2011, stated what the Board considers appropriate extraordinary remedies for unfair labor practices in organizing situations. The remedies the NLRB will consider includes (1) union access to the employer's electronic communications network, (2) providing union organizers with access to non-work areas on employer premises and (3) providing union organizers with equal time to meet with employees where employers have had "captive audience" speeches.

On April 19, 2011, the NLRB issued a complaint against Boeing, Inc., where the remedy sought by the Board is for Boeing to close its newly built non-union Dreamliner production facility in Charleston, South Carolina, terminate the 1,000 employees who were hired in Charleston and move the work back to Seattle, Washington. The Board's theory is that Boeing moved the production to Charleston in retaliation for the union's 58-day strike in Seattle in 2008. Boeing is still producing the often-delayed 787 Dreamliner in Seattle, but it added a second production process in Charleston. According to the Board, Boeing stated that the reason why it established this production line in Charleston was to avoid the possibility of strikes or potential strikes, such as what occurred in 2008.

In a case decided on March 29, 2011, the NLRB ruled that where supervisors solicited employees to sign pro-union petitions, it was unnecessary to set aside an election won by the union. Employees who are faced with supervisors pressuring them to sign a union petition often sign – one can understand why. However, the NLRB ruled that aggressive pro-union actions by supervisors did not justify setting aside an election in the case of Terry Machine Co., because the employer's strong campaign to remain union-free "mitigated" the influence the supervisors had over the workforce. Thus, according to the NLRB, supervisors who support the union and actively campaign for the union do not taint the results of a union victory in an election. Employers have the right to discharge supervisors who engage in such behavior, but unfortunately there are times when employers are unaware of such supervisor activity until after the election is held.

EEOC Told to Pay Employer $752,000 in Fees

There are circumstances where an employer is entitled to recover its fees and costs in defending a discrimination claim, such as where the claim is frivolous and meritless. On March 31, 2011, in the case of EEOC v. Peoplemark, Inc. (W.D. Mich.), the court ordered the EEOC to pay $752,000 in employer legal fees and expert costs because the EEOC pursued a case that was without foundation.

After a three-year investigation, the EEOC sued Peoplemark in September 2008, alleging that it had a policy of not hiring applicants with criminal convictions. The EEOC sought a class action status and alleged that Peoplemark's policy had a discriminatory impact based on race.

However, there was a problem with the EEOC's claim – the EEOC was wrong. Peoplemark provided evidence that showed that 22% of the alleged discriminatees in fact were hired. Peoplemark also provided evidence to show that it did not have a policy that prohibited hiring an individual with a criminal conviction record. The court stated that after this information was provided to the EEOC, "it should have become clear to the EEOC within a month that it could not prevail on its claim of a blanket policy. Given this reality, the EEOC should have acted to terminate the lawsuit promptly. It did not. Instead, it continued to let it drag on." The court added, "Once the EEOC became aware that its assertion that Peoplemark categorically refused to hire any person with a criminal record was not true, or once the EEOC should have known that, it was unreasonable for the EEOC to continue to litigate on the basis of that claim . . ."

One may think that the $752,000 was for attorney fees, but actually the greatest amount of money involved expert witness fees. The company paid its expert $526,172 to analyze over 200,000 pages of company documents that involved job applicants over a five-year period, plus payroll records and several depositions. Of the total award, $219,000 represented the attorney fees.

Before getting too excited about the award, employers should consider that the court did not reject a theory that refusal to hire individuals based on conviction records may have a discriminatory effect based on race. Rather, the court stated that once the employer showed it had no such policy and that its hiring practices further evidenced no such policy, the EEOC should have dropped the claim. We expect the EEOC to continue to pursue this theory, but they will become selective to be sure they have their facts straight.

While on the subject of background checks, it is worthwhile to note that on April 19, 2011, in the case of Hall v. Vitrin Express, Inc. (N.D. Ohio), the company paid $2.6 million to settle a claim involving its use of background checks. The allegations were that the company failed to comply with the Fair Credit Reporting and Disclosure Act requirements when it conducted criminal background checks. The case involved almost 3,000 applicants. Applicants alleged they were denied employment based on a background check, yet the employer failed to obtain the proper authorization from applicants to conduct the background check and to notify applicants of the results of the background check.

EEO Tips: EEOC Gets Rebuffed for "Overreaching"

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.

Although the EEOC frequently has been successful in helping to establish the outer limits of coverage on many of the issues under the statutes it enforces, recently, in the case of EEOC vs. Philips Service Corp., the agency has been rebuffed for trying to enforce an oral agreement allegedly made during the course of conciliation.

In the case of EEOC vs. Philips Services, eight African-American employees filed charges with the EEOC alleging that Philips allowed racial harassment and otherwise discriminated against them, individually, because of their race under Title VII. Following its investigation, the EEOC found reasonable cause as to the race discrimination allegations of the eight individual charging parties and also found reasonable cause to believe that Philips discriminated against an affected class of other African-American employees on the same or similar basis.

In keeping with its statutory requirement, the EEOC engaged in what it deemed to be "extensive" conciliation in February 2009 of all of the charges over a period of approximately two weeks. After that two-week period, the company withdrew from the process. However, according to the EEOC, during the active period of conciliation, Philips made a number of oral promises including (1) to take corrective action to eliminate the racial discrimination, (2) to pay $506,500 to the individual charging parties, and (3) to create a settlement fund amounting to $50,000. The EEOC further claimed that it was in the process of reducing the "agreement" to writing when it became clear that Philips was not going to abide by its oral promises with respect to its taking corrective action and making payments to the charging parties. Thereafter, the EEOC filed suit to enforce the terms of the alleged "oral agreement."

The trial court granted the defendant's motion to dismiss, and the EEOC appealed to the Fifth Circuit, which in turn upheld the dismissal. In doing so, the Fifth Circuit opined that under Section 706(b) of Title VII (42 U.S.C. 2000e-5(b), the statute expressly limits the use of evidence obtained during the course of conciliation. It specifically provides that: "...nothing said or done during and as a part of such informal endeavors, may be made public ... or used as evidence in a subsequent proceeding without the written consent of the persons concerned." The court reasoned that in order for the Commission to prove that an oral agreement had been made, the Commission would have to "reveal what was 'said or done' during conciliation in order to prove that Philips had entered an oral agreement that was never reduced to writing." The court further stated, "such disclosure … is clearly prohibited in a subsequent proceeding to establish the existence of an oral conciliation agreement."

EEO TIP: It goes without saying that the EEOC disagreed with the Fifth Circuit and argued that the prohibition of "anything said or done" applies only to the merits of a charge, not the enforcement of an oral agreement during the course of conciliation. It is not clear whether the EEOC will appeal the decision in this case to the Supreme Court. However, what is clear is that in the Fifth Circuit, the confidentiality of what happens during the conciliation process remains intact and employers may engage in conciliation without apprehension that their bargaining proposals could be used against them.

If you have questions, please don't hesitate to call this office at (205) 323-9267.

OSHA Tips: OSHA'S Multi-Purpose Rule

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.

Recognizing the futility of adopting a rule to address every conceivable exposure to a workplace hazard, authors of the OSH Act included a "general duty" clause. Set out in Section 5(a)(1) of the Act, each employer was charged with providing "his employees employment and a place of employment which are free of recognized hazards that are causing or likely to cause death or serious physical harm." This first duty specified in Section 5(a)(1) was followed by the second duty, which was to comply with occupational safety and health standards promulgated under the Act.

After launching its worksite inspections in 1973, OSHA data indicates that a violation of the general duty clause was not charged by the agency until 1984. From this beginning, it appears that annual citations for general duty clause violations grew to a few hundred and exceeded 2000 in fiscal years 1989 and 1990. The numbers include both federal and state program data. There appears to be some hint of correlation in the aggressiveness of OSHA's enforcement with the number of general duty clause violations cited. Following their rise, the number of such violations dipped and remained down through the nineties. Notably this included the period during which the agency was in something of a survival mode. The number of general duty clause violations alleged in the 1995-96 year was down to around 566. From this point, the number of such violations increased each year and exceeded 3000 in both 2009 and 2010 fiscal years.

In order to establish a general duty violation, OSHA must show the employer failed to keep the workplace free of a recognized hazard to which his employees were exposed and that such hazard was likely to cause death or serious physical harm. Additionally, there must be shown a feasible and useful method of correcting the hazard. On occasion, OSHA will cite an adopted standard to address a hazard and will also cite the general duty clause in the alternative.

The general duty provision has been used to address a wide assortment of safety and health exposures and issues. Hazards involving workplace violence, ergonomics, combustible dust, and extreme heat and cold, where adopted standards are lacking or deficient, have often been addressed by employing Section 5(a)(1) of the OSH Act.

A recent decision of the Occupational Safety and Health Review Commission involving the general duty clause and Wal-Mart Stores drew considerable attention. The Administrative Law Judge upheld an OSHA citation for inadequate crowd control and an accompanying penalty of $7,000. The citation had been issued in May of 2009 following the agency's investigation of a worker's death in November 2008. The investigation of this accident found that employees were exposed to the hazard of being crushed by a crowd of shoppers in the absence of effective planning and crowd management.

In another example, Section 5(a)(1) was employed by OSHA following their investigation of the death of an employee at Orlando's Sea World in February 2010. In this case, a trainer for the attraction was attacked and killed by an orca whale. OSHA concluded the employer had not met its general duty obligation and issued a willful violation with a proposed penalty of $70,000. The alleged violation and penalty have been appealed.

It has been indicated by OSHA that a top priority of the agency is to craft and implement an injury illness prevention program requirement. This proposed rule, known as I2P2, would require an employer to develop and implement a plan to identify all hazards at his worksite and to fix them. This broad-based, non-specific charge to employers has led some to note a degree of similarity to the general duty clause.

Wage and Hour Tips: Current Wage and Hour Highlights

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

On April 5, 2001, the Department of Labor published several revisions to the regulations affecting the Fair Labor Standards Act. The revised regulations become effective on May 5, 2011. Most of the changes were minor in that they put into the regulations changes that had been made to the Act by Congress over the past several years. However, there are three specific changes that could be a problem for employers.

1. Tip Credit – The FLSA allows employers to claim a credit against the minimum wage for those employees that received at least $30.00 per month in tips. The statute requires that the employee be paid a cash wage of at least $2.13 per hour and the employee must receive enough tips to ensure that he/she earns at least the minimum wage of $7.25 per hour. The new regulations require that the employer inform the employee the amount of the cash wage to be paid; the amount of tip credit being claimed; that all tips must be retained by the employee (except the employer may use a valid tip pooling arrangement); and the tip credit shall not apply to any employee who has not been informed of these requirements. One positive change for the employer is that the new regulations no longer limit the maximum tip pool to 15% of the employee's tips. However, the new regulations also state that, even if the employer does not claim a tip credit toward the minimum wage, the tips are the property of the employee and may not be taken by the employer. While the new regulations do not mandate that employee notice be provided in writing, it recommended that employers do so in order to be able to prove that the proper notices were provided.

2. Service Writers, Service Managers, and Service Managers in auto, truck and farm implement dealerships – There is an overtime exemption in the FLSA for partsmen, salesmen and mechanics employed by establishments primarily engaged in the sale of automobiles, trucks or farm implements to the ultimate consumer. Previously, due to several court decisions, Wage and Hour had taken the position that service writers, etc., qualified for this exemption, as they were engaged in making sales. However, the new regulations state that the salesmen exemption applies only to those employees primarily engaged in making sales of automobiles, trucks or farm implements. Thus, the exemption would not apply to those employees (service writers, etc.) who are making sales of service and repairs of vehicles. In order to lessen the impact of this change, employers might want to consider changing these employees to the "commission sales" pay plan that that can be used by retail establishments.

3. Employees paid on a fixed salary for fluctuating hours pay plan – Section 778.114 of the regulations provides a pay plan where the employee receives a salary to cover all hours worked and the overtime premium is determined by dividing the employee's hours worked into the salary and multiplying one-half the resulting rate by the number of overtime hours worked in the pay period. Many employers have used this plan for employees whose hours may fluctuate due to hours of operation, customer requirements or seasonal workload. Many of these employers may also pay incentive pay (for example, shift differentials, attendance bonuses or production bonuses). Previously, Wage and Hour has approved of the payment of the additional pay provided it was

included with the employee's salary when determining the regular rate of pay that was used to compute the employee's overtime premium. While Section 778.114(b) was changed to include updated amounts of pay, the basic explanation remains the same. However, in their discussion relating to this section of the regulations, Wage and Hour states "While the Department continues to believe that the payment of bonus and premium payments can be beneficial for employees in many other contexts, we have concluded that unless such payments are overtime premiums, they are incompatible with the fluctuating workweek method of computing overtime under Section 778.114." Thus, Wage and Hour, while not changing the regulation, has stated a position that is contrary to what they have enforced for many years and contrary to positions that have been taken by courts. It is expected that someone will initiate litigation very soon to test the application of this position by DOL. While I do not believe, based on the revised regulations, that the Department's position will prevail, employers that choose to use the "fixed salary" pay plan should be aware of the possible ramifications should they make incentive payments above the employee's salary.

While most of the changes to the regulations should not cause most employers a great deal of difficulty, I expect we will see some additional litigation brought about by these changes. Thus, I recommend that employers make a thorough review of their pay system to ensure they are complying with the FLSA to the best of their ability. If I can provide assistance, do not hesitate to give me a call.

2011 Upcoming Events

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Birmingham – September 15, 2011
Bruno's Conference Center, St. Vincent's

Huntsville – September 29, 2011
U.S. Space & Rocket Center

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

Did You Know…

…that the President of Workers United, Bruce Raynor, is under investigation by the union due to the possible falsification of expense reports? Raynor is accused of $2,300 worth of expense reimbursement falsification, including for ten dinners which did not have a business purpose.

…that first year wage increases for contracts negotiated in 2011 averaged 1.5%? In 2010, the amount was 1.6%. Construction averaged the highest increases in 2011, 2.2%, compared to 1.7% for manufacturing and 0.6% for state and local government. When including lump sum payments in the settlement calculation, the amount of first year increases for all settlements was 1.9%.

…that an Iranian employee terminated for failing to obtain a security clearance could pursue his national origin discrimination claim? Zeinali v. Raytheon Co., (9th Cir. April 4, 2011). Zeinali was hired in 2002 and told that his continued employment depended on obtaining a security clearance. Through several years of proceedings, ultimately Zeinali was denied a security clearance and Raytheon fired him on November 7, 2006. In addition to the security clearance issue, the company considered work performance as a factor contributing to the termination. In reversing the district court's summary judgment decision, the Ninth Circuit reinstated Zeinali's claim that the employer treated him differently by terminating him compared to other employees who were also denied security clearance. He alleges that employees who are not Iranian or of Middle Eastern origin who were denied security clearance remained employed, whereas he was terminated.

…that a plaintiff was awarded $451,000 in a case of same sex sexual harassment? EEOC v. Boh Bros. Construction Co. (E.D. La., March 28, 2011). The EEOC claimed that Kerry Woods (an ironworker, not an often injured baseball pitcher) was subjected to sexual harassment by his supervisor and retaliated against when he complained to the employer. Woods was labeled by his supervisor as "feminine" and "not masculine enough" to be an ironworker. The employer did not have a sexual harassment policy in place, and Woods alleged that when he complained about the behavior, he was transferred to another location at a lower pay rate and ultimately laid off.

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