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NLRB v. Congress: What Do We Expect (Predict)?

Conflict between the National Labor Relations Board and Congressional Republicans (primarily the House Oversight and Government Reform Committee and its chair, Darrell Issa (R-Cal.)) continues to escalate. Animosity between the two began in 2010, with President Obama's nomination of Craig Becker to the NLRB and his subsequent recess appointment of Becker to serve on the Board after Becker failed to garner sufficient Senate support to be confirmed the old fashioned way. Becker, formerly General Counsel to the Service Employees International Union, opined in his prior career that employers should have no rights to express their views about unionization during the course of a union organizing campaign. The Obama NLRB has consistently moved closer to Becker's viewpoint. Examples include initiating litigation against Boeing for building a non-union facility in Charleston, South Carolina, which neither constituted a transfer of work nor caused the layoff of any Boeing union-represented employee in Seattle. The House Oversight Committee conducted hearings in Charleston, South Carolina, and forced NLRB General Counsel Lafe Solomon to testify at those hearings.

Continuing to fuel its regulatory revolution, the NLRB on June 21, 2011, proposed sweeping changes to union representation election rules and procedures (which could result in less than 10 days between the filing of a union petition and the date of an election), to reduce the amount of time employees have available to consider all of the facts and information necessary before making such a critical decision, and to limit employer rights regarding voter eligibility.

Issa requested documents from Solomon regarding the NLRB analysis and decision to issue a complaint against Boeing. Issa gave Solomon a deadline of Tuesday, July 26, 2011, at 5:00 p.m. In refusing to comply with Issa's request, Solomon wrote that, "It remains my belief that premature disclosure of the Boeing case file would severely impact the parties' due process rights and the Agency's legal processes." The question now is whether Issa will take the next step of issuing a subpoena to Solomon and, if so, will Solomon provide the requested documents.

The time for public comment regarding the NLRB's proposed rules ends on August 22, 2011. Here is our prediction: The NLRB will move forward with issuing its rules, with very little change from what was originally proposed. The NLRB conducted hearings on July 18th and 19th, where several business advocates challenged the necessity of a change to the rules and described how smaller employers would be particularly harmed by the proposed quick election time limits. The NLRB let advocates have their say, but, at the end of the process, we expect the NLRB to state something to the effect that, "Although advocates on behalf of business and employer concerns were eloquent and provided several well-reasoned arguments in opposition to the rule, we conclude that they vastly overstate the potential harmful effects of the rule and, therefore, we believe that an expedited process will more appropriately respect employee free choice in deciding whether to become represented."

As the rule-making process plays out, the question then is whether Issa will subpoena the records from the NLRB that Solomon has refused to provide. Labor is comforted by the fact of knowing that if the House passes legislation adverse to the NLRB, it may not pass the Senate, but if it does, President Obama will surely veto it. However, to the extent that the House Oversight Committee can dig and discover information that may be embarrassing and harmful to the NLRB in its handling of the Boeing case, that may become the most effective approach to place some limits on the NLRB.

When Are Facebook Postings Not Protected Activity?

The NLRB's Division of Advice reviewed three cases of employee Facebook postings and determined that those postings were not protected, concerted activity under the National Labor Relations Act.

The first case, *J.T.'s Porch Saloon and Eatery, Inc.*, involved a posting by a bartender who groused about the fact that servers did not have to share their tips with bartenders. The bartender told a fellow employee that this policy "sucked." Approximately eight months later, during a Facebook conversation with a family member, the same bartender groused to a relative that he had not received a raise in five years, the customers were "rednecks" and he hoped that they choked on glass. The employer became aware of this posting and terminated the bartender. In concluding that these postings did not amount to protected, concerted activity, the Division of Advice stated that the issues that were posted were never discussed with other employees and the discussion eight months earlier about tips was too remote in time. Furthermore, Advice concluded that no employees responded to the posting or engaged in a Facebook discussion about the posting. Therefore, "there was no evidence the employee engaged in concerted activity and no basis for concluding that he was unlawfully fired."

In *Martinhouse, Inc.*, an employee working during the night shift for a mental health provider posted that working at night was "spooky" and she worked at a "mental institution." She also posted a comment that she thought a patient was hearing voices. These postings were reported to the employer by a former client, and the employer terminated the employee.

The Division of Advice stated that, "Her Facebook posts do not even mention any terms or conditions of employment…the Charging Party was not seeking to induce or prepare for a group action and her activity was not an outgrowth of the employee's collective concerns." Other employees did not respond to the posts, nor had this employee ever discussed the posts with other employees.

In the last case, involving Wal-Mart, an employee who was frustrated over a disciplinary action posted on his Facebook site, "Wuck Fal-Mart! I swear if this tyranny does not end in this store, they are about to get a wake-up call because lots are about to quit!" The employee also stated that, "If it don't change, walmart [sic] can kiss my royal white ass." An employee responded to the post by encouraging the individual to "hang in there." In concluding there was not concerted, protected activity, the Division of Advice stated that these posts were an individual gripe and therefore unprotected.

Again, the common denominators throughout these cases are that there was no prior discussion about an issue of concern with other employees, nor did employees engage in any such discussion in response to the Facebook posting. Therefore, in all three cases, the

postings were considered individual gripes, concerns or chit-chat, and, therefore, were not protected under the National Labor Relations Act.

Retirement Ideas? I'll File an Age Discrimination Charge

The case of *McWhorter v. Maynard, Inc.* (W.D. Ark., July 19, 2011), involved the classic situation of an employer who asked employees about retirement preferences and ended up with an age discrimination claim after terminating one of those employees.

On May 30, 2008, the president of the company met with ten employees who were at least 49 years old. He asked those employees for input regarding their expectations of the company's retirement program and to also share their preferences or thoughts regarding retirement plans. The president stated during the same meeting that, "When people get older, they tend to slow down…but in order to stay employed at Maynard, you need to give 100%."

Ten months later, Maynard terminated McWhorter, one of the employees who attended that meeting, explaining that her termination was due to a lack of business and poor job performance. McWhorter claimed that she was terminated because of her age. She cited as evidence of age discrimination the meeting with Maynard's president where he commented about older workers slowing down and solicited employee retirement plans.

In granting the employer summary judgment, the court stated that the discussion about retirement that occurred with employees "was soliciting ideas for retirement packages from the people he [the president] thought would be most interested in participating in those programs." Regarding the president's comment about older employees slowing down, the court stated that it was a "stray remark" and occurred almost a year prior to McWhorter's termination. Therefore, the court stated that such a comment did not have "significant probative value."

Some employers may think that discussing with employees retirement options, plans and preferences sets up the claim for age discrimination, as an employee pursued in this case. However, if handled properly, such discussions are not only permissible, but also appreciated by the workforce. Where organizations discuss with employees preferences, ideas and concerns regarding benefits programs, why should one of the most important and expensive benefits of all–retirement–be off limits? Where concerns about legal risk remain, we suggest appointing an individual to lead the discussion who is not, him or herself, within the chain of command to make a decision about the employee's continued employment. If not a benefits manager or HR professional, consider asking one of your third party vendors, such as a benefits broker, to lead that discussion. This third party could make the results known to the employer without spotlighting which employee said what, thus providing some insulation from the risk of a claim.

Sexual Jokes At Work Turn Out to Be No Laughing Matter

In the case of *Mandel v. M&Q Packing Co.* (M.D. Pa., July 25, 2011), an individual who participated in discussions, e-mail exchanges and jokes of a sexual nature did not get the last laugh when her behavior resulted in a court dismissing her claim.

The court stated that the workplace was one where "vulgarity and sexual innuendo were commonplace." Employee Shannon Mandel worked as a customer service coordinator and frequently interacted with the plant manager, quality manager and other members of the leadership team. She sent multiple e-mails to other managers with sexual jokes and innuendoes, and stated that she called the plant manager "gay" to provide a defense for him against allegations that he was making sexual overtures to other managers' wives.

Apparently, Mandel got it back as good as she gave it, with other managers commenting to her about her "tan and smooth" legs, commenting about shoes she wore as "beat me, bite me" shoes, and that she was "foolish not to use her assets" and "sitting on a gold mine."

Mandel's only complaint that was brought forth to the company was that she did not appreciate requests of managers to bring them coffee. She told a fellow employee about sexual comments she considered

offensive, but never told the individuals who made those comments to her.

The court ruled that several of her examples of sexual harassment were time-barred. The court stated that in order for Mandel's claim to proceed, she must show that the comments or behavior would objectively be offensive to a reasonable person and that subjectively she was offended by those comments or otherwise adversely affected. The court stated that a jury may conclude that the sexual comments were offensive, but the court also stated that Mandel "actively participated in creating a work environment in which vulgarity and sexual innuendo were commonplace." Therefore, she could not complain to the court that she was offended or suffered some detriment to these comments. She had the responsibility to cease making those comments on her own and to make it known to others who were making comments that she considered them offensive.

The "lesson learned" from this case is not that an employer won because of the employee's personal behavior, but that such behavior should have no permissible place at work anyway. Note that workplace harassment issues may involve claims of those who are not directly involved in the harassing conversation but hear about it or know about it.

EEO Tips: How to Limit an EEOC Request for Information and Avoid a Subpoena

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Within the last year or so (including this month), there has been a rash of subpoena enforcement cases filed by the EEOC against employers who failed or refused to supply various types of documents or other information requested during the course of an EEOC investigation. In almost every case the employer took the position that the information requested was either not relevant or overly broad in view of the apparent issues in the underlying charge. Unfortunately, from the employer's point of view, the courts found in favor of the EEOC as to most of the requests involved. Beginning chronologically in 2009, the following major cases were decided:

In November 2009, in the case of *EEOC v. United Parcel Service*, 587 F.3d 136 (2nd Cir., 2009), the Second Circuit reversed the finding of a district court and granted enforcement of an EEOC subpoena which had requested nationwide information and data concerning the impact of the employer's "appearance guidelines" pertaining to the wearing of facial hair. Although the employer had implemented a policy of allowing an exception as an accommodation for one's religion, the guidelines prohibited the wearing of facial hair below the lip and apparently continued to be enforced. The EEOC issued the subpoena as a part of its investigation of an individual charge of religious discrimination against a Muslim applicant who alleged he was denied a driver position because he refused to shave off his facial hair. However, the employer contended that the charging party was denied the position because he provided false social security numbers on his employment application.

The Second Circuit in reversing the holding of the district court found: (1) that the district court's standard of relevance was too restrictive, holding that the EEOC's subpoena should be enforced if it met the basic statutory requirements as to legitimacy, relevancy and the EEOC had followed proper procedures; (2) instructing that an employer's strong belief that a charge is without merit does not prevent the EEOC from investigating the allegations because the EEOC is not required to show "probable cause" [i.e., reasonable cause] ... or to produce evidence to establish a prima facie case of discrimination at the investigatory stage.

Likewise, in September 2010, the Third Circuit decided the case of *EEOC v. Kronos, Inc.*, 620 F.3rd 287, which involved the enforcement of a third party subpoena against the developer of a "Customer Service Assessment" test which had been used nationwide by Kroger Grocery Stores to evaluate applicants for cashier, bagger and stocker positions. The subpoena was issued in connection with the EEOC's investigation of an individual charge of disability discrimination against an applicant with a hearing disability who was denied a cashier, bagger or stocker position allegedly because of

her low score on the Customer Service Assessment test. The subpoena requested, among other things, nationwide hiring documents and information as to validity studies and any adverse impact of the use of the test upon individuals with a disability. The Third Circuit upheld enforcement of the subpoena on the grounds that: (1) "An employer's nationwide use of a practice under investigation supports a subpoena for nationwide data on that practice," and (2) that the EEOC could investigate beyond the temporal limits of the charge because information about Kroger's use of the test might 'cast light on the practice under investigation.' Citing *EEOC v. Shell Oil* (S. Ct. 1984).

Earlier this month, the Eighth Circuit decided the case of *EEOC vs. Schwan's Home Service* (#10-3022, 7/13/11) in which the EEOC sought to expand its initial request for information pertaining to the charging party's sex discrimination claim with respect to her participation in a General Management Development Program (GMDP) to include systemic gender discrimination company-wide in the administration of the program and the selection of females for managerial positions.

The charging party, Milliren, completed the GMDP but was informed by Schwan's that she had not demonstrated the leadership skills necessary to graduate. The company offered her a service job instead. Milliren resigned and filed a charge with the EEOC in June 2007, alleging sex discrimination. In its position statement in response to the charge, Schwan's stated that Milliren's performance problems arose prior to her complaints of discrimination and that she was offered the option of continuing in the GMDP for three months or transferring to another position in the company.

Thereafter, based upon additional allegations that Schwan's discriminated against females as a class and that even if Milliren had successfully completed the GMDP, she would be "one of only two Local General Managers out of 500 …nationwide" who are female, the EEOC requested information as to the name, gender and date of hire of the employees who had participated in the GMDP in 2006 and 2007. Schwan's gave a partial answer to this request but failed to include a breakdown by gender of the employees who participated in the program in 2006 and 2007. The EEOC continued its efforts to obtain the requested information by filing a subpoena in July 2008. Schwan's complied in part, but still refused to turn over information regarding the gender makeup of the company's general managers, the selection process for the GMDP and the gender breakdown of successful graduates of the GMDP.

In the meantime, Milliren filed an amended charge in February 2009 repeating her original allegations and adding "…the Respondent discriminates against females, as a class, in regards to the GMDP." However, Schwan's asserted that the amended charge was untimely because it was filed more than 300 days after Milliren resigned. The EEOC, thereafter, filed a second subpoena requesting the information which Schwan's had refused to provide after the first subpoena. Schwan's filed a Petition To Revoke or Modify the subpoena, which EEOC denied, and EEOC ordered Schwan's to comply. Schwan's refused to do so, resulting in the subpoena enforcement litigation in question.

The district court found in favor of the EEOC on all issues. Upon appeal, the Eighth Circuit affirmed the findings of the district court holding that: (1) If the charge that the EEOC is investigating is valid and the subpoena seeks information relevant to the charge, the employer must comply with the subpoena; (2) As to the alleged 300-day defect in the amended charge, "… this argument is premature…the appropriate time to address the timeliness issue is if and when an actual lawsuit is filed, not during the subpoena enforcement stage;" and (3) "… even if Milliren's systemic gender discrimination charge were invalid, the information sought in the subpoena is nonetheless within the scope of the EEOC's investigative authority."

There are of course many other cases (too numerous to mention here) in which the EEOC's subpoenas have not been enforced for one reason or another. However, the point is that this obviously favorable track record of winning major enforcement actions cannot be attributed solely to the litigation skills of the EEOC, but rather it reflects, in my judgment, a fundamental misunderstanding by employers of the far-reaching, statutory scope of the EEOC's authority to obtain so-called "relevant" information during the investigative stage of a charge. Employers should know that the EEOC's statutory authority under Title VII can be found at 42 U.S.C. Section 2000e-8. The EEOC's regulations which

allow the Commission to issue subpoenas to supplement its investigations can be found at 29 C.F.R. 1601.16(a). Employers should be familiar with both of these statutes and regulations.

A careful review of the above statutes will show that the matter of relevance is very broad and undefined in the statute itself. Thus, it is arguable that the EEOC may have broader authority to obtain records during the course of its investigation of a charge than it has under the Federal Rules of Civil Procedure and/or the Federal Rules of Evidence after it files an actual lawsuit to enforce a finding of reasonable cause. This is not to suggest that employers should simply capitulate to every Request for Information made by an EEOC investigator. It is to say that an employer should "know when to hold them, and know when to fold them." That is, carefully pick its battles during the investigative stage, knowing when to take a stand and when to compromise in supplying at least some of the information being requested.

EEO TIPS: The following are several of the biggest mistakes employers make in responding to a Request for Information and/or an EEOC Subpoena:

1. As to a Request for Information, employers often fear that the EEOC may be on a "fishing expedition" because the request is broad, sweeping and may appear to be beyond the scope of the charge. (As a matter of fact, many EEOC RFI's are "boiler plate requests" based on certain general issues.) Accordingly, the employer decides to provide as little information as possible. The mistake in taking this approach is that it may only increase the EEOC's appetite for more information resulting in a subpoena, which may be even broader. A better solution would be to negotiate with the EEOC investigator in trying to provide a response that includes only those documents, time-frames and or other documentation that strictly (if possible) but reasonably at least conform to the issues in the charge.

Also, as to a Request for Information, employers frequently believe that a given charge has no merit and are therefore dismissive of Requests for Information by the EEOC that suggest otherwise. Accordingly, in responding, they attempt to denigrate the charging party rather than providing complete comparative information and data, including documentation that would totally undermine the allegations in the charge. In most instances, this kind of information should have been provided in the employer's position statement. If so, the employer can use the RFI to amplify the information given in the position statement. However, try to keep the information provided focused on the issues in the individual charge.

2. As to a subpoena, a big mistake may be in failing to file a "Petition To Revoke or Modify" within five (5) days (excluding Saturdays, Sundays and federal holidays) after service of the subpoena as required by Section 1601.16(b) of the Commission's Regulations. The five-day period is crucial. Many courts deem the employer to have failed to exhaust its administrative remedies or waived them by missing this deadline. The other obvious mistake is that the employer will not have been able to argue its point of view as to the relevancy of the documents requested, some of which the EEOC may agree with and modify the request. Moreover, if and when the matter does get before a court, the employer is in a good position to argue the reasonableness of its position with respect to the relevancy of the documents or information in question.

Responding to an EEOC Request for Information can be a very routine matter in most instances, but the mere fact that more information is being requested after submitting a position statement should be a red flag to indicate danger. While an employer need not capitulate to the EEOC's every demand, employers should choose carefully where to draw a line in what they will release to the EEOC. Almost always, there is room to negotiate. When faced with this kind of a decision, expert legal counsel should be consulted.

Please feel free to call this office at (205) 322-9267 if you have questions about pending EEOC Requests for Information or subpoenas.

OSHA Tips: Paperwork Violations

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.

Most can understand an OSHA citation and penalty for a violation such as exposing an employee to a fall from a significant height due to a missing guardrail. Also, it would likely be acknowledged that operating a power saw without eye protection might qualify for a sanction. Such a concession is less likely when it comes to those items that might be viewed as just "paperwork items." In any case, an often-voiced complaint directed at OSHA has been that enforcement has too often been directed at mere paperwork issues rather than endangerment of workers. Driven in part by this, OSHA issued a directive in 1995 entitled "Citation Policy for Paperwork and Written Program Requirement Violations." In this release, OSHA said it "recognizes that in some situations, violations of certain standards which require the employer to have a written program to address a hazard, or to make a written certification are perceived to be 'paperwork deficiencies' rather than critically important implementation problems." In other circumstances, violations of such standards have a significant adverse impact on employee safety and health. This paperwork directive is CPL 02-00-111.

Although some employers are exempt, one of the most widely applicable "paper" requirements is that of maintaining injury and illness logs. Full and accurate injury/illness data is important to OSHA in targeting enforcement efforts and should be important to employers in identifying safety and health problems at their facility. Very substantial penalties in a number of cases indicate the seriousness with which the agency takes injury and illness recordkeeping. For example, in one case, OSHA cited the employer with 83 willful violations and a penalty totaling $1.2 million. Following congressional and other suggestions of significant underreporting of workplace injuries and illnesses, OSHA launched a national emphasis program to focus on enforcement of their recordkeeping rule. The program calls for a comprehensive review of injury and illness recordings and related documents of selected employers. The enforcement procedures for this emphasis program are set out in Directive Number 10-07 (CPL 02) which has an expiration date of February 19, 2012.

NOTE: On June 22, 2011, OSHA announced in a Notice of Proposed Rulemaking a couple of significant changes to their recordkeeping and reporting requirements. Under the proposed rule, an employer would be required to report to OSHA within eight hours all work-related fatalities, **all work-related in-patient hospitalizations**, and within 24 hours, all work-related **amputations**. The current requirement calls for reporting to OSHA within eight hours of all work-related fatalities and in-patient hospitalization of three or more employees. Secondly, the proposal would update Appendix A of the recordkeeping rule (1904 Subpart B) that lists industries that are now partially exempt from maintaining injury and illness logs due to low injury/illness rates. Those rates were based on the Standard Industrial Classification (SIC) system, which is being replaced by the North American Industry Classification System (NAICS). This proposed rule change will mean that some industries that are currently exempt will no longer be, while others who have been required to keep injury logs will become partially exempt from the requirement. OSHA is requesting public comments on the proposal and will receive them until September 20, 2011. Visit OSHA's "Recordkeeping" web page for more information on the proposed changes.

There are many instances in which OSHA has assessed significant penalties when written programs or certifications were lacking or deficient. In addition to injury/illness records, some of the more frequently cited include the following: hazard communication, permit-required confined spaces, lockout-tagout, bloodborne pathogens, and personal protective equipment. The "paperwork" directive, CPL 02-00-111, referenced above, may be consulted to demonstrate how OSHA distinguishes between minor or technical paperwork violations and substantive issues that could affect employee safety or health.

Wage and Hour Tips: Deductions from Employee's Pay

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.

Fair Labor Standards Act issues continue to be very much in the news. One of the areas where employers can get into trouble is making improper deductions from an employee's pay. Thus, I thought I should provide you with information regarding what type of lawful deductions can be made from an employee's pay.

Employees must receive at least the minimum wage free and clear of any deductions except those required by law or payments to a third party that are directed by the employee. Not only can the employer not make the prohibited deductions, he **cannot require or allow** the employee to pay the money in cash apart from the payroll system.

Examples of deductions that can be made:

- Deductions for taxes or tax liens.
- Deductions for employee portion of health insurance premiums.
- Employer's actual cost of meals and/or housing furnished the employee.
- Loan payments to third parties that are directed by the employee.
- An employee payment to savings plans such as 401k, U.S. Savings Bonds, IRAs, etc.
- Court-ordered child support or other garnishments, provided they comply with the Consumer Credit Protection Act.

Examples of deductions that cannot be made if they reduce the employee's wage below the minimum wage.

- Cost of uniforms that is required by the employer or the nature of the job.
- Cash register, inventory shortages, and also tipped employees cannot be required to pay the check of customers who walk out without paying their bills.
- Cost of licenses.
- Any portion of tips received by employees other than tip pooling plan.
- Tools or equipment necessary to perform the job.
- Employer-required physical examinations.
- Cost of tuition for employer-required training.
- Cost of damages to employer equipment, such as wrecking employer's vehicle.
- Disciplinary deductions. Employees being paid on a salary basis may not be deducted if they work any part of week, except for employees that are considered as exempt may be docked for "major safety infractions."

If an employee receives more than the minimum wage, in non-overtime weeks, the employer may reduce the employee to the minimum wage. For example, an employee who is paid $8.00 per hour may be deducted $.75 per hour for up to the actual hours worked in a week the employee does not work more than 40 hours. Also, Wage and Hour takes the position no deductions may be made in overtime weeks unless there is a prior agreement with the employee. Consequently, employers might want to consider having a written employment agreement allowing for such deductions in overtime weeks.

Another area that can create a problem for employers is that the law does not allow an employer to claim credit as wages money that is paid for something that is not required by the FLSA. Earlier this year, the U.S. Fifth Circuit Court of Appeals ruled in a case brought against Pepsi in Mississippi. A supervisor, who was laid off, filed a suit alleging that she was not exempt and thus was entitled to overtime compensation. The company argued that the severance pay the employee received at her termination exceeded the amount of overtime compensation that she would have been due. The U.S. District Court stated the severance pay could be used to offset the overtime that could have been due and dismissed the complaint. However, the Court of Appeals ruled that such payments were not wages and thus could not be used to offset the overtime compensation that could be due the employee. Therefore, employers should be aware that payments (such as vacation pay, sick pay, holiday pay, etc.) made to employees that are not required by the FLSA cannot be used to cover wages that are required by the FLSA.

The Act provides that Wage and Hour may assess, in addition to requiring the payment of back wages, a Civil Money Penalty of up to $1100 per employee for repeated and/or willful violations of the minimum wage provisions of the Fair Labor Standards Act. Thus, employers should be very careful to ensure that any deductions are permissible

prior to making such deductions. Virtually every week, I see reports where employers have been required to pay large sums of back-wages to employees because they have failed to comply with the Fair Labor Standards Act.

On a different subject, I am sure several of you have government contracts that are subject to the McNamara-O'Hara Service Contracts Act. You should be aware that contracts effective June 17, 2011 or afterward will have increased Health and Welfare rates. The new rates are $3.59 per hour for all states except Hawaii, which mandates health insurance coverage and thus allows for a reduced rate.

Consequently, employers need to be very aware of the requirements of the Fair Labor Standards Act and make a concerted effort to comply with it. If I can be of assistance, do not hesitate to call me.

2011 Upcoming Events

EFFECTIVE SUPERVISOR®

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 EEOC had yet another hearing on the issue of employer use of background checks? The hearing occurred on July 26, 2011. The EEOC is concerned about the discriminatory impact of credit, arrest and conviction records on racial minorities and Hispanics. The EEOC has not issued guidance on the use of arrest and conviction records since 1990. One commissioner stated that our country is "very much a nation of second chances," yet another commissioner said although this is true, employers must feel confident about the persons to whom they give the second chance. The EEOC is contemplating establishing a fixed time at which point conviction records should no longer be considered.

…that first year negotiated wage increases average 1.4%? The Bureau of National Affairs on July 25, 2011 issued its analysis of contract increases based upon labor agreements negotiated thus far in 2011. The average increase of all settlements was 1.4%, compared to 1.4% in 2010. In manufacturing, the average increase to 1.9%, compared to 1% in 2010, and in construction the average increased to 1.5%, compared to .1% in 2010. When including lump sums, the average increase overall for 2011 first year contracts is 1.7%, compared to 1.9% in 2010. This means that although wage increases are higher in certain sectors (manufacturing, construction), the use of lump sum payments has declined.

…that the proposed Protecting Jobs From Government Interference Act (HR2587) has cleared the House Education Workforce Committee? This occurred on July 21, 2011 by a vote of 23 to 16. This bill would amend the National Labor Relations Act to prohibit the National Labor Relations Board from ordering an employer or seeking an order against an employer "to restore or reinstate any work, product, production line, or equipment, to rescind any relocation, transfer, subcontracting, outsourcing, or other change regarding the location, entity, or employer who shall be engaged in production or other business operations…" Known as the "Boeing Law," this law would preclude the NLRB's current case against Boeing and also the recent NLRB decision ordering an employer to restore work that was subcontracted 11 years ago and reinstating with backpay those employees who were terminated as an outcome of that subcontracting decision.

…that OFCCP continues to push pay equity issues? Just as the failure of the Employee Free Choice Act has resulted in an out-of-control National Labor Relations Board, the failure of the Paycheck Fairness Act is resulting in analogous behavior by the Office of Federal Contract Compliance Programs. Through 2010, rarely did OFCCP conciliation agreements focus on race or sex discrimination in pay. Typically, they focused on discrimination in hiring. However, now OFCCP routinely insists on pay data based on race and gender, and pursues settlements based upon its belief that there has

been bias in compensation. Employers should consider retaining information related to those factors that determine an individual's starting compensation, such as job-related experience and a prior pay history.

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