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Employment Law Bulletin

SEPTEMBER 2011
VOLUME 19, ISSUE 9

Your Workplace Is Our Work®

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Posting, Posturing and Practicality

November 14, 2011, is the effective date on which private sector employers must post a new notice to employees of their rights under the National Labor Relations Act. The National Association of Manufacturers filed a lawsuit on September 8, 2011, challenging the authority of the NLRB to issue a regulation requiring notice posting. While we agree NLRB is overreaching, we would be pleasantly surprised if the outcome of the litigation is to halt the notice-posting requirement. NAM alleges the NLRB rule is beyond the scope of its authority and is both arbitrary and capricious.

Employer thoughts about handling the notice posting have ranged from posting it in an innocuous place so it will be ignored like most other postings, posted with a component poster that also elaborates on an employee's right to remain union-free, and combining the poster with other pre-fab after-market posters that include all required postings for a particular jurisdiction (such as the ones often marketed to employers). Most employers we have spoken with border-to-border and coast-to-coast expressed the preference of posting it without fanfare. They believe that employees generally do not read federal and state notices at work and will not read this one, either.

While we think the latter approach is the preferred approach, we do not assume that the posting will be unread. Rather, we recommend that employers get serious and more aggressive with their communications to the workforce about the importance of remaining union-free, independent of the new posting requirement and without drawing attention to it. We do not expect the NLRB to back down from its active agenda to increase the power and influence of unions. As a result, employers need to be proactive in communicating their union-free message. For example, how is the employer's union-free message communicated during new employee orientation? Is it a generic “we don’t need a third party” statement, or is it a robust discussion of why your workforce has chosen to remain union-free and the company’s commitment to a culture where that remains the outcome? What communications do you provide to your existing workforce? Is it simply a “no third party” statement in the handbook, or is remaining union-free part of regular business discussions? It is appropriate in these discussions to explain how unionization is one of several threats to the opportunities afforded by the organization to its workers. In communicating this message, emphasize why remaining union-free is part of your organization's overall goals of remaining competitive, creative, and engaged with the workforce.

A recent Gallup poll found that "union positive" perceptions have declined. During the 2010 Gallup poll, 46% of those surveyed thought unions had become weaker. This year, that number rose to 55%. Forty percent (40%) of those surveyed said they would prefer that unions grow weaker, compared to 32% of those during prior polls. Thus, an employee's initial thoughts about unions are likely to be negative. Whether that employee becomes interested in a union depends on what the employer does, not a union's actions. Therefore, employers should feel comfortable that their use of the word "union" has been focus-grouped and test-marketed on a sufficient scale to feel comfortable that it will have a negative connotation. Always be sure to reinforce with your workforce why your competitors would welcome the vulnerability that unionization would bring to your organization.

Certain Facebook Firings Illegal, Rules ALJ

The cases over employer actions based on employee social media postings have largely occurred under the National Labor Relations Act. Section 7 of the NLRA gives employees the right to engage in concerted activity for their mutual aid or benefit regarding wages, hours and other terms and conditions of employment. The case of *Hispanics United of Buffalo, Inc.* (September 6, 2011) is the first decision issued by an Administrative Law Judge addressing employer actions taken in response to employee comments about the workplace posted on Facebook.

Hispanics United of Buffalo ("HUB") is a non-profit organization providing assistance to the Hispanic community in Buffalo, New York. Employee Cruz-Moore was a domestic violence counselor and court advocate. Cruz-Moore complained to her peers about their job performance and told them that she planned to review her concerns with HUB's executive director. Her peers reacted with the following Facebook postings:

> "Lydia Cruz, a coworker feels that we don't help our clients enough at HUB. I about had it! My fellow co-workers how do u feel?"
>
> "What the f . . . Try doing my job I have 5 programs."
>
> "What the Hell, we don't have a life as is, What else can we do???"

Cruz-Moore responded on Facebook, stating about another employee, "Marianna stop with ur lies about me, I'll be at HUB Tuesday."

Cruz-Moore complained to the executive director about the Facebook postings, stating those postings would cause her to have a heart attack. The executive director terminated the five employees who engaged in those postings, stating that the postings violated HUB's policy against harassment and bullying. The executive director also said the postings caused health issues for Cruz-Moore.

The ALJ concluded that the Facebook postings were protected activity under Section 7. The Facebook comments did not involve the employer, as such, but were workplace concerns which are broadly protected under Section 7. The ALJ stated that when the five employees were terminated, HUB "had no rational basis for concluding that their Facebook posts had any relationship to Cruz-Moore's health." Furthermore, the employee posts were "a first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management. By terminating the five discriminatees for discussing Ms. Cruz-Moore's criticisms of HUB employees' work, [HUB] violated [the National Labor Relations Act]." The Judge ordered reinstatement and back pay for the five employees.

Employers need to balance their legitimate concerns about employee communications through social media with the fact that, for many employees, social media is the new "grapevine" or "water cooler gossip" for the workplace. Be sure that you have in place a social media policy that reviews the parameters of permissible and impermissible social media communication. If your organization does not have a social media policy or would like to review our model policy, please contact us.

Pregnancy Complications May Be ADA Disability, Says Appeals Court

In a case of first impression under the Americans with Disabilities Act Amendments Act, the U.S. Court of Appeals for the Seventh Circuit ruled that a complicated pregnancy may be considered a disability under the ADA. *Serednyj v. Beverly Healthcare, LLC*., August 26, 2011. The court also ruled that the plaintiff could not prove that she was substantially limited in a major life activity due to her pregnancy-related condition.

Serednyj was an activities director at a Beverly nursing home in Valparaiso, Indiana. She was employed less than a year and did not qualify for leave under the FMLA. During the course of her pregnancy, she had health complications necessitating her absences from work. Those complications included cramping, spotting and an overall increased risk of a miscarriage. The company had a "light duty" policy, but that only covered work-related injuries or illnesses. The employer concluded that, due to her absences, she was unable to fulfill the essential job functions and, therefore, terminated her employment.

The court reviewed the EEOC's interpretative guidelines under the ADA, which generally state that pregnancy itself is not a disability, but pregnancy-related complications may reach the level of a disability if those complications "are the product of a physiological disorder." The court concluded that Serednyj had a physiological disorder of the reproductive system that would qualify as a disability. However, she failed to show that she was limited in her major life activities due to this condition. The court stated that "pregnancy is, by its very nature, of limited duration, and any complications which arise from a pregnancy generally dissipate once a woman gives birth. Accordingly, an ADA plaintiff asserting a substantial limitation of a major life activity arising from a pregnancy-related physiological disorder faces a tough hurdle." The court concluded that Serednyj did not overcome that hurdle, because the problems with her pregnancy were sporadic and did not last throughout the pregnancy. Therefore, she was not substantially limited in a major life activity and the employer had the right to terminate her based upon her sporadic and unpredictable attendance record.

This case is an important one for employers. When an employee is not covered under FMLA or if an employee exhausts FMLA and has a complicated pregnancy, the employer needs to assess whether the employee is covered under the ADA. If the complications due to pregnancy are more than sporadic, then the employer may have a duty to reasonably accommodate the absences. Ironically, the more unreliable the employee due to the complications related to pregnancy, the greater the likelihood of employer accommodation under the Americans with Disabilities Act.

Financial Employer Miscalculates its USERRA Obligations

In a case of first impression, the U.S. Court of Appeals for the Second Circuit addressed how an employer must restore a commission-paid military reservist to employment status he would have had had he not been absent for military service. *Serricchio v. Wachovia Securities, LLC* (September 13, 2011). Serricchio was a financial advisor for eleven months prior to a call-up for active duty. During his eleven months, he opened 130 client accounts and managed, with his colleagues, approximately $9 million in assets. His commissions from these accounts resulted in a projected annual income of $75,000.

During Serricchio's absence for military service, Wachovia moved from a commission-based compensation system to a fee-based one. Furthermore, accounts of less than $25,000 in value were handled through a national call center, rather than dealing with a specific financial advisor. A majority of Serricchio's accounts were less than $25,000 and thus transferred to the national call center. When he returned from military service and requested reinstatement, he was offered reinstatement as a financial advisor at a commission rate, but with essentially no accounts. He would be assured a monthly "draw" of $2,000, against which commissions would be set off. Serricchio sued, claiming that Wachovia's responsibilities under USERRA required that they place him in a job with pay commensurate to what he earned before he left for military duty. A jury agreed with Serricchio, and awarded him a total of $1.64 million. The court ordered reinstatement at a salary of $12,300

per month for three months and then a draw set off by commissions for $12,300 for nine additional months.

In upholding the lower court's award, the Second Circuit stated that USERRA requires that an employee should be restored to "a position of like seniority, status and pay." Furthermore, "where an employee previously received commissions, the relevant inquiry regarding reemployment relates to the total amount of pay the servicemember previously received – not just the rate of the commission." Accordingly, Wachovia did not restore Serricchio to a position of "like pay."

The court stated that under USERRA, restoration of the employee to a like position includes opportunities for advancement, working conditions, job assignments, job location, level of responsibility, and opportunities to earn commissions comparable to those prior to leaving for military service. The Court of Appeals stated that, in this case, it was reasonable for a jury to conclude that Wachovia failed to provide "the same opportunities for advancement, working conditions and responsibility that Serricchio would have had but for his period of military service." Furthermore, the court added that the "escalator principle" which requires reinstatement to a position the individual would have had but for his military absence, requires an employer to evaluate what would have happened to a commission-based employee's book of business had he not left for military service.

Employer Posts $5 Million Bond for $40 Million Harassment Verdict

In one of the highest verdicts we have ever seen for an individual in a case of sexual harassment, Aaron Rents was hit with a $95 million damages award on June 8, 2011. On September 6, 2011, the court ordered the employer to post a $5 million bond. *Alford v. Aaron Rents, Inc.* (S.D. Ill.).

The jury's apparent outrage was a result of the evidence they heard of substantiated continuous sexual harassment that included unwelcome touching, a supervisor who exposed himself several times, a sexual assault and a failure of Aaron Rents to take prompt, remedial action when notified of the behavior. The damages included $30 million for negligent supervision and $50 million in punitive damages. The court reduced the award to a total of $39.8 million, which was due to the jury awarding more than the statutory caps permitted for certain damages.

Too often, employers have the "right" policies but lack of training or follow-through according to the terms of the policies. For those employers with multiple locations, be sure that employees have a hot line to a company representative who is not on site, so that an employee will not be inhibited from reporting behavior which he or she believes violates company policy regarding harassment, retaliation or discrimination. Any such reports should be investigated promptly, with an outcome of the investigation shared with the employee who reported it. To the extent the report is an anonymous one, the employer still should conduct as thorough an investigation as possible, and should do so promptly.

EEO Tips: EEOC Will Close Fiscal Year 2011 With Some Notable Highlights

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Although official statistics as to the number of charges received, lawsuits filed and cases resolved in FY 2011 are not available as of this writing, the EEOC apparently has had a good year, if not an outstanding one. According to the EEOC, the total number of charges received for processing through the end of August was 90,156. Thus, unless more than 9,766 charges are received in September, the overall total number of charges for the year will not exceed the record 99,922 charges which were received in FY 2010.

However, there are some indications that the trends set in FY 2010 will continue in FY 2011. For example, preliminary EEOC reports show that ADA charges continue to make up at least 25% of all charges filed. In FY 2010, 25,165, or 25.2%, of the 99,922 charges filed

were based on ADA issues. In FY 2011 through August, 23,519, or 26.0%, of the 90,156 charges filed involved some ADA issues. It would seem that this significant increase is most likely due to the liberal interpretation of a disability under the ADAAA after its passage in 2008.

Also, according to EEOC press releases through September 26, 2011, the EEOC had filed a total of 144 lawsuits during FY 2011 (not including subpoena enforcements and other administrative actions.) Incidentally, the EEOC does not issue a press release on all lawsuits it files. Thus, more lawsuits may have actually been filed by the various district offices, which will not be reflected in these numbers. Typically, the EEOC files more lawsuits and processes more charges in the month of September than any other month in order to beat the deadline of September 30th, which is the close of its fiscal year. This year is no exception. Of the total lawsuits indicated above for FY 2011, forty two (42) were filed in September and twenty (20) of those were filed under the ADA. It should be expected that the EEOC will file a flurry of additional lawsuits before September 30th of this year.

Consistently, throughout the year, the EEOC appeared to be attracted to disability cases involving so called "reasonable accommodation" for persons with atypical disabilities or circumstances. Since the defendants' answers for those cases filed in September were not available, we of course do not know how reasonable the requested accommodations were or whether the employer could in fact claim "undue hardship" as to the accommodations in question. With that as a caveat, the following is a summary of several cases involving the kinds of issues which prompted EEOC to file a lawsuit under the ADA in September of this year.

On September 19, 2011, the EEOC filed Civil Action No. 2:11-cv-00834 against Wal-Mart (U.S. District Court for the District of New Mexico). According to the EEOC, the suit was filed "on behalf of a long-term employee (22 years) who had surgery related to her cerebral palsy" and had requested that she be allowed to return to work with certain restrictions prescribed by her doctor after having exhausted her medical leave. The restrictions included permitting her to take periodic breaks which the EEOC contended would have been temporary. However, according to the EEOC, the employer refused to allow her to return, and instead required that she produce a medical release with no restrictions and thereafter terminated her.

As stated above, we do not know the employer's side, but seemingly, this is a case that could have been resolved during the conciliation process.

On September 2, 2011, the EEOC filed Civil Action No. 1:11-04226-AAR-VVP against The Scooter Store in the U.S. District Court for the Eastern District of New York, alleging a refusal to accommodate an employee's request for temporary leave due to a knee injury and his subsequent discharge. The EEOC further alleged that the employee's disability was psoriatic arthritis, brought on by the knee injury and that the employee needed a leave of absence to seek treatment for the disability. The EEOC in its complaint indicated that the employee on a timely basis notified the employer that he would be incapacitated "until further notice" supported by proper medical documentation. However, according to the EEOC, the employer refused the request for leave and fired him "purportedly for job abandonment."

Again, without the employer's answer, we do not know what the employer's defense will be. However, this case raises the question of whether the employee's request for leave of absence "until further notice" may have been unreasonable, and could have resulted in undue hardship in carrying on the employer's business operations.

Finally, on September 15, 2011, the EEOC filed suit against Insource Performance Solutions, LLC. and Legrand North America, Inc. in the U.S. District Court for the District of South Carolina, No. 0:11-cv-02465 alleging disability discrimination against an employee who suffered from asthma. According to the EEOC, the employee, a forklift driver, was denied an accommodation of being allowed to perform his inventory counting job duties in the employer's warehouse by lowering the inventory to the floor and counting it at the lower level so as not to trigger breathing difficulties associated with his asthma. The employee claimed that counting the inventory in the warehouse at the higher levels, where the heat was more intense, as required by the employer, would cause an episode of asthma. According to the EEOC, the employer refused to allow any such accommodation and discharged the employee the next day for failing to complete the inventory counting assignment.

The employer's answer in this case should be very interesting. I assume that the employer had some compelling business reason why the inventory had to be counted in place rather than lowered to the floor. Otherwise, this is also a case in my judgment that probably could have been resolved during the course of conciliation.

The EEOC has also had some noteworthy settlements or resolutions of ADA cases in FY 2011 including the largest settlement of an ADA case in the agency's history. In July of this year, the EEOC obtained a consent decree in the case of *EEOC v. Verizon Communications*, No 1-11-cv-01832, District of Maryland, including 24 of its subsidiaries under the terms of which a large class of employees (estimated to be hundreds) with disabilities who had been adversely affected by the companies' "no fault" attendance policy, namely, by being disciplined or laid off, would participate in a settlement fund of $20,000,000.

The ADA is not the only area of employment law which has captured the EEOC's attention during FY 2011. Through September 22, 2011, according to EEOC press releases, the agency has filed eighty eight (88) lawsuits under Title VII, many of which included the issues of sexual harassment, racial harassment and retaliation. Notably, in a lawsuit filed against the government of American Samoa in August of this year, the first of its kind against Samoa, the EEOC alleged that the government of Samoa had discriminated against older workers by pressuring them to retire or resign by reassigning them to undesirable positions. Thus, the EEOC has been far-reaching in advancing its litigation program.

Overall, including all statutes, the EEOC reported through its press releases that it has settled a total of 164 cases and collected approximately $82.3 million in monetary benefits for charging parties or affected class members. By comparison, in FY 2010, the EEOC reported that it had resolved 287 cases and collected $85.1 million in monetary benefits. Thus, it would appear that the EEOC has obtained almost the same in monetary benefits while resolving fewer cases.

Of course, the EEOC has also had its setbacks in FY 2011. Recently in the case of *EEOC v. Cintas Corp.*, E.D. of Michigan, No. 04-40132, August 4, 2011, the court ordered the EEOC to pay court costs and attorneys fees totaling $2.6 million as the result of "unnecessary" litigation of the case over a 10-year period. According to the Court, the EEOC had "…engaged in other egregious and unreasonable conduct…by pursuing the litigation even after Cintas had prevailed on more than a dozen motions filed by the commission…EEOC's conduct served only to prolong this decade-long litigation." The EEOC voiced its strong objection to the Court's judgment and characterization of its litigation efforts in this case. However, it is not clear whether the EEOC will appeal.

The foregoing is only a snapshot of the EEOC's enforcement activities from an outsider's viewpoint before its actual fiscal year has ended. I suspect that its official, final statistics will show a slightly more favorable picture. Incidentally, it should be mentioned that according to recent Congressional Committee Reports, the EEOC's budget for Fiscal Year 2012 has been reduced by $7.3 million. It now stands at $359 million in total funding. So far the EEOC has not indicated which of its programs will be directly adversely affected by the reduction.

OSHA Tips: OSHA and Workplace Violence

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.

On September 8, 2011, OSHA issued a compliance directive setting out enforcement procedures the agency will follow to address workplace violence exposures and incidents. The Directive, **CPL 02-01-052,** became effective as of the date of this release.

Workplace violence has been defined by the National Institute of Occupational Safety and Health (NIOSH) as "any assault, threatening behavior or verbal abuse occurring in the work setting. It includes, but is not limited to, beatings, stabbing, suicides, shootings, rapes, near suicides, psychological traumas such as threats, obscene phone calls, an intimidating presence, and harassment of any nature as being followed, sworn at, or shouted at." According to the National Crime Victimization Survey, an

average of 1.7 million violent victimizations were committed against persons at work in the years between 1993 and 1999.

OSHA's background segment for their newly released workplace violence directive notes that the Census of Fatal Occupational Injuries (CFOI) developed by the Bureau of Labor Statistics shows an average of 590 homicides a year from 2000 through 2009. This made homicides remain as one of the four leading causes of work-related injuries. Workplace homicides also continued to be the leading cause of workplace death for women in 2009.

OSHA has no specific standards that address the hazard of workplace violence and must employ the general duty clause, Section 5(a)(1) of the OSH Act, for any citations. Rather than charging such a violation, the agency has issued Section 5(a)(1) warning letters for workplace violence hazards on occasions where the facts might not sustain a violation. These letters put employers on notice that corrective measures should be considered to guard against violent incidents or avoid future citations.

In the period from 1993 through 1995, OSHA issued a number of general duty clause citations. A decision in one of these cases rendered in 1995 by an administrative law judge of the Occupational Safety and Health Review Commission raised concerns as to OSHA's prevailing in such cases. In this case, an apartment management employer, Megawest Financial, was cited under the general duty provision for failing to provide security for staff who had been subjected to violent attacks and feared future occurrences. As in all Section 5(a)(1) citations, OSHA needed to establish in this case each of the following: (1) the existence of a hazard, (2) employer awareness or recognition of the hazard, (3) the potential for serious injury and (4) existence of a feasible means to eliminate or materially reduce the hazard. In this case, the judge found that while there was a hazard, it was not recognized by Megawest or its industry, within the meaning of Sec.5(a)(1) of the OSH Act. Since this required element was not established, it was ordered that the alleged violation be vacated.

OSHA has continued to utilize the general duty clause in a number of cases. Examples of some of those are as follows:

In July of this year, OSHA issued a citation charging a general duty clause at a mental health facility in Massachusetts. The investigation was prompted when an employee of the facility was fatally injured by one of the residents.

In January 2011, OSHA employed the general duty clause to cite an employer for "failing to provide employees with adequate safeguards against workplace violence." The agency noted in an accompanying release that there had been at least 115 instances between 2008 and 2010 of employees being assaulted by patients at this psychiatric hospital and clinic.

In May of 2008, a Texas convenience store received an OSHA citation for violation of the general duty clause. In this case, the employer was charged with exposing employees to injuries from physical assaults in that it had not implemented adequate measures to protect employees.

All employers, and particularly those in healthcare, social services, late-night retail and similar higher risk activities, should assess the exposures and protective measures for their workplaces. One source of information on workplace violence may be found at OSHA's website under its Safety/Health Topics Pages.

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.

Wage and Hour continues to take actions on a regular basis that make news and also can have great impact on employers and employees. On September 2, 2011, the agency published proposed changes to the regulations that cover minors who are employed in agriculture. As you are aware, Congress had substantially increased the penalties that can be assessed when a minor employee is

employed contrary to the regulations. A penalty of up to $100,000 can be assessed if an illegally employed minor is seriously injured or killed while engaged in the prohibited employment. The proposal will update the regulations that were first published in 1970. Among the changes proposed is the prohibition of farm workers under the age of 16 operating almost all power-driven equipment. Minors under 18 also could no longer be employed at grain elevators, feed lots, stockyards and livestock auctions. According to an agency news release, the public is invited to provide comments on the proposal by November 1, 2011, and a public hearing will be held following the comment period. A link to the proposed regulations can be found on the Wage and Hour website at http://www.dol.gov/whd/index.htm.

On Thursday, September 8, 2011, Nancy J. Leppink, Acting Wage and Hour Administrator, announced that Wage and Hour has begun a far-reaching inquiry into possible minimum wage and overtime violations in the residential construction industry. She indicated they were focusing on the industry because it has so many vulnerable immigrant workers and because some construction contractors had been misclassifying workers as independent contractors. The official stated that last year during individual investigations they uncovered widespread violations in the industry which resulted in Wage and Hour imposing more than $7 million in fines involving 4000 workers. Apparently, several of the largest homebuilders in the country have already received letters requesting employee pay records. Although not mentioned by the official in the interview, I have read where IRS is also looking at the issue of whether the workers are employees or independent contractors. Thus, I would expect that Wage and Hour would also be taking a close look at this question. While I have not heard anything about this issue locally, I do know that at least one of the national firms that has been contacted operates in Alabama. Consequently, I recommend that residential construction firms take a close look at their pay systems to ensure they are complying with the Fair Labor Standards Act.

On September 19, 2011, the heads of the Labor Department, the Internal Revenue and eleven state agencies signed an agreement to coordinate their efforts to fight employee misclassification. This agreement will allow the agencies to share information regarding persons that are being classified as independent contractors. The stated purpose of the coordinated effort is to “level the playing field for law-abiding employers and to ensure that employees receive the protections to which they are entitled under federal and state law.” While Alabama is not one of the eleven states that signed the agreement, it appears that Wage and Hour and IRS will be sharing information regarding their activities. Also, a Senate Committee is considering legislation that would require employers to notify persons in writing if they are considered as independent contractors. The proposal would create a $5000 penalty for misclassifying an employee as an independent contractor.

Another area where the question of independent contractor versus employee classification often raises its head is related to exotic dancers. An Atlanta strip club had classified its dancers as independent contractors and did not pay them any wages. They worked for tips only and in fact the dancer had to pay the club a fee for working. Further, the dancer had to share her earnings with the club’s disk jockeys and “house moms,” who oversee the dancers’ dressing room and help them prepare for their shifts. On September 7, 2011, a U.S. District Court stated that, in applying the “economic realities” test set forth by the Supreme Court in 1985, the dancers should be classified as employees and therefore subject to the minimum wage and overtime provisions of the FLSA.

More than 850 police officers working for a large city were found to be entitled to $850,000 in liquidated damages in addition to the $850,000 in back wages that they were paid. In 2005, the Fraternal Order of Police had complained that the city was not paying proper overtime because it failed to include longevity pay and shift differentials when computing overtime. After consultation with Wage and Hour in 2006, the city agreed to change the practice and to pay the back wages. However, the city never got around to making the payments and the FOP sued them in 2009. Finally, in September 2010, they computed the actual amounts due and paid the officers in March 2011. The Court found that the city did not operate in “good faith” by delaying the payments for some 5 years and awarded the employees the liquidated damages.

There is an exemption from the overtime provisions of the FLSA for driver, drivers' helpers, loaders and mechanics who perform safety-affecting duties on commercial motor

vehicles transporting goods in interstate commerce. In 2005, Congress amended the transportation act to limit a commercial motor vehicle to one having a gross vehicle weight of at least 10,001 pounds. In 2008, Congress passed another amendment to the transportation act to provide jurisdiction to the Department of Transportation regarding the safety-affecting duties but retained the overtime requirements for persons operating the smaller vehicles. This month a U.S. District Court confirmed the Wage and Hour position that an employee who operates a small vehicle (10,000 pounds or less) in the same week he operates a large vehicle is still entitled to overtime. Thus, employers having both large and small vehicles should make sure that employees do not move back and forth between the two types of vehicles without paying the employee proper overtime if he works in excess of 40 hours during a workweek.

A federal judge in Georgia has approved an agreement by Tyson Foods to pay $32 million in back wages and attorney fees due to their failure to properly pay some 17,000 present and former employees for time spent donning and doffing protective gear. The gear included smocks, plastic aprons, hair nets, special gloves and ear plugs that were necessary for safety and sanitation when working on a processing line. The settlement affects employees that worked in Tyson's poultry plants in twelve states between 2008 and 2011.

Due to the continued enforcement activities by Wage and Hour, as well as private litigation, I strongly recommend that employers review their pay plans and policies to ensure that they are in compliance with the FLSA.

If I can be of assistance, do not hesitate to give me a call.

Did You Know…

…that an employer legally terminated an employee for failure to report a work-related injury according to the employer's policy, although it was a shorter reporting period than required under state law? The case is *Geronimo v. Caterpillar, Inc.* (6th Cir., September 7, 2011). Tennessee workers' compensation law provides that claimants have up to 30 days to report an injury. Caterpillar's policy required an employee to report within 48 hours any job-related injury. Geronimo, a seven-year employee, transferred to a new job within Caterpillar's facility at Dyersburg, Tennessee. For approximately two weeks after beginning the new job, Geronimo experienced pain but did not tell the employer. She thought that the pain was due to muscle soreness arising out of her new job tasks. When she reported the pain, she was terminated for failing to report it in a timely manner. The court ruled that the statute gives the employee 30 days to file for state workers' compensation benefits, but the statute does not preclude an employer from establishing an earlier deadline by which job-related injuries or illnesses must be reported.

…that the Senate Appropriations Committee reduced EEOC funding for FY 2012? The EEOC's 2011 fiscal year ended September 30. For FY 2012, the Senate approved $359 million in funding for the EEOC, a reduction from $366.3 million for FY 2011. President Obama had requested $385.5 million for the EEOC for FY 2012.

…that according to a Manpower survey of 18,000 employers, hiring will decrease during the fourth quarter of 2011? This decrease will be the first in approximately 2½ years. According to Manpower's survey, "employers are hesitant to make big decisions when it comes to hiring in the fourth quarter. When all eyes are focused on jobs as a true indicator of economic stability, our survey results suggest no significant hiring increases at least through year end." During the third quarter, 11 out of 13 industries surveyed by Manpower increased hiring, ranging from 17% in retail and wholesale to 8% in durable goods manufacturing. Construction hiring declined by 4% and government hiring declined by 3%.

…that on September 13, 2011, Tyson Foods agreed to a $1.2 million settlement with OFCCP over its hiring practices? The case involved a class of 750 female applicants for laborer positions at the company's Joslyn, Illinois location. The case arose out of an OFCCP statistical analysis of the Joslyn hiring practices, where only 21% of all female applicants were hired, compared to 39.2% of male applicants. The difference in hiring rate was 9.85 standard deviations. OFCCP said there were 118 women who should have been hired. The settlement includes approximately $646,000 in back pay and $587,000 in interest, plus ongoing reporting to OFCCP regarding the hiring status of women, in general, and class members, in particular.

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