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Your Workplace Is Our Work®

Inside this issue:

Senior NLRB Litigator, Frank F. Rox, Jr., Joins LMV

Frank F. Rox, Jr. joins Lehr Middlebrooks & Vreeland, P.C. as our NLRB Consultant. Mr. Rox served as a Senior Trial Attorney with the National Labor Relations Board for more than 30 years. Over his long tenure, Mr. Rox handled some of the most challenging and difficult work within the NLRB's Atlanta Regional Office and has served as the office's lead attorney in federal district court litigation. He has a wide breadth of knowledge in both the substantive and procedural aspects of the National Labor Relations Act. Please see Frank's insights into the controversy surrounding the new appointments to the NLRB and also recent significant decisions issued by the NLRB. Frank's articles will be regularly featured in our ELB.

Frank is a member of the State Bar of Georgia and has served as an officer and Chair of the Labor and Employment Law Section. He received his law degree from Emory University. He also attended Southern Methodist University for two years and received his bachelors degree in economics from Emory in 1976. We are pleased that Frank will provide our clients valuable insight into handling the ever-changing and aggressive actions of the NLRB nationally. Frank joins our consultants Lyndel Erwin (former District Director of the U.S. Department of Labor), John Hall (former Area Director of OSHA) and Jerome Rose (former EEOC Regional Attorney) in providing support to employers nationally.

Controversy Surrounds Recess Appointments to NLRB

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Rox can be reached at 205.323.8217. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years.

On January 4, 2012, the Obama administration announced its intent to make three (3) recess appointments, not requiring Senate confirmation, to the Board:

(1) Sharon Black, a former Deputy Assistant Secretary for Congressional Affairs at the U.S. Department of Labor. Ms. Black served from 2003 to 2006 as a senior attorney to then Board Chairman Robert Battista.

(2) Richard Griffin, the current General Counsel for International Union of Operating Engineers (IUOE). Mr. Griffin is also a Director for the AFL-CIO Lawyer Coordination Committee

(3) Terrence Flynn, current Chief Counsel to Brian Hayes, the Board's only Republic Member.

Ms. Black, Mr. Griffin and Mr. Flynn joined Chairman Mark Gaston Pearce and Member Brian Hayes on January 9, 2012, giving the Board its first full five-member complement since August of 2010. The Board now consists of three (3) Democrats and two (2) Republicans.

Without at least one additional member the Board would have been unable to continue operations. The U.S Supreme Court has ruled that the Board cannot operate and decide cases without a minimum of a three-member quorum. The Board had only two confirmed members. The controversy is that Congress may not be technically in recess, raising the possibility that recess appointments may be improper.

Obama administration officials and Democratic Congressional supporters insist that the appointments are both legal and appropriate. They argue that although Congress may be holding brief "pro forma" sessions, it is, for all practical purposes, in recess. In other words, Democrats assert that the current Congressional "non-recess" is a sham designed by Republicans to thwart presidential appointments.

Republicans have cried foul and claim that the appointments are improper, and, in all likelihood, unconstitutional. Senate Majority leader Mitch McConnell (R-Ky.) stated that Obama's action "sets a terrible precedent that could allow any future President to completely cut the Senate out of the confirmation process, appointing [the President's] nominees immediately after sending their names up to Congress."

John Kline (R-Minn.), the Chairman of the House Education and the Workforce Committee, and Phil Roe, Chairman of the Health, Employment, Labor, and Pensions Subcommittee, have argued that the recess appointments "circumvent the normal confirmation process" and are designed to ensure "the continuation of the [Obama administration's] activist agenda on behalf of union special interests."

The Bottom Line:

Both sides have strong arguments in support of their respective positions. Presidents need to appoint individuals to executive positions which are necessary for Government operations. However, the U.S. Constitution mandates Senatorial "advise and consent" during the executive appointment process. These competing governmental interests, concerning the relationship of the Executive and Legislative branches and their functioning under the separation of powers doctrine, beg for a political settlement, rather than judicial intervention by the Courts.

Given the current election year climate, it does not seem that there will be any political compromise on this issue, making a judicial resolution all the more likely. Once the NLRB issues any rule or decision, the losing party will almost certainly seek judicial review claiming that the Board had not been properly constituted. The challenges have already begun.

On January 13, 2012, the National Right to Work Legal Defense Fund and Education to Work Foundation Inc. and other groups with court challenges already pending, filed a motion with the U.S. District Court of Columbia requesting that the Court hold President Obama's recess appointments to the NLRB "unconstitutional, null and void" and that the illegality of the appointments prevents the NLRB from implementing or enforcing a new rule requiring employers to post workplace notices of employee rights under the Act. (*Nat'l Ass'n of Mfrs. v. NLRB*, D.D.C., No. 11-cv-1629, motion filed 1/13/12). The notice posting rule is scheduled to go into effect on April 30, 2012.

In the District of Columbia litigation, the plaintiffs have argued that the Obama administration and the Department of Justice have failed "to justify the President's appointments to the Board and should not be adopted by any court."

In another lawsuit, the U.S. Chamber of Commerce and the South Carolina Chamber of Commerce are also challenging the NLRB posting rule. (*Chamber of Commerce v. NLRB*, D.S.C., No. 11-cv-2516). A hearing to consider motions for summary judgment in this matter has been set for February 6, 2012.

The outcome of the litigation in the lower courts on this issue will not be the final word. It seems probable that the meaning of a legitimate Congressional "recess" will ultimately be defined by the U.S. Supreme Court.

In the meantime, with the very liberal Board majority, employers can expect a continued assault on existing Board precedent, both through rulemaking and the litigation process. Just one recent example of the Board's determination to expand the Agency's reach under Section 7 of the Act is found below:

Board Finds That Certain Mandatory Arbitration Agreements Violate the NLRA

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Rox can be reached at 205.323.8217. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years.

A growing trend in the employer/employee relationship is to require employees to sign agreements in which employees agree to submit employment disputes to arbitration rather than pursue the matter in a court of law. The Board has now served notice that it intends to slow this trend by placing limits on such agreements.

In an anticipated decision, the National Labor Relations Board has ruled that it is a violation of the NLRA to require employees to sign arbitration agreements that prevent employees from joining together to pursue employment-related legal claims in any forum, whether in arbitration or in court. *D.R. Horton Inc.*, 357 NLRB No. 183 (2012). The Board emphasized that the ruling does not require class arbitration as long as the agreement leaves open a judicial forum for group claims.

In its ruling, the Board rejected the approach taken by former General Counsel Ronald Meisburg in a 2010 GC Memorandum that provided a class-action waiver would not be considered violative of the Act if the waiver made it clear to employees that they could collectively challenge the waiver itself and would not be subjected to any employer retaliation if they did so.

The Board emphasized that their ruling was limited in scope:

> We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA.
>
> Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of class-wide arbitration. Employers remain free to insist that the arbitral proceedings be conducted on an individual basis.

The Board did not reach the "difficult" questions of whether:

- Employees could be required to waive group action in court as long as it was available in an arbitration setting;
- An employer and employee may enter into an agreement, which is not a condition of employment, to resolve either a specific complaint or all potential employment disputes through non-class arbitration rather than litigation in court. In other words, may the parties agree that a non-class arbitration resolution, rather than litigation, is binding on the parties?

The Bottom Line:

Commentators may disagree on the merits of the Board's determination, but all seem to agree that the decision will have far-reaching ramifications. Given the proliferation of private arbitration systems, most of which incorporate class or collective action waiver language, it seems certain that employers will have to deal with either modifying their arbitration agreements or litigating whether the Board's pronouncement conflicts with the Federal Arbitration Act. It is likely that the Board's General Counsel will seek 10(j) injunctive relief if employers refuse to modify existing arbitration agreements that limit employees' rights to pursue collective causes of action.

One caveat deserves mention. In *Compucredit Corp. v. Greenwood*, U.S., No. 10-948, 1/10/12, the Supreme Court ruled that consumer protection laws that include mandatory arbitration provisions that bar class actions are enforceable. The ruling may have implications for class action waivers in mandatory arbitration agreements in the employment arena and for the Board's decision in D.R. Horton, discussed herein. Experts opined that the Court's decision "shows yet again that [the Supreme Court] is serious about enforcing arbitration agreements" and that the Court will not lightly infer that private arbitration agreements are invalid.

STAY TUNED – This issue is far from settled, and the firm will watch closely for any new developments in this area of Board law. A careful review of your Company's existing arbitration agreements may avoid any potential problems down the road.

Did You Know:

- The Board will no longer defer cases to the grievance-arbitration process in situations where the matter would likely require, or has already required, NLRB deferral for more than a year. (GC Memo 12-01). Expect increased scrutiny from Regional offices before the NLRB will agree to defer, or continue to defer, unfair labor practice charges.

- The Board has applied the decision in *Specialty Healthcare* to a non-healthcare facility. In overturning the Regional Director's finding that a "wall-to-wall" unit was required, the Democratic majority found that a limited unit consisting of only "rental service agents and lead agents" was proper, since the petitioned-for employees did not have an "overwhelming" community of interest with other employees. In dissent, Board Member Hayes stated that the decision showed that the determination of the appropriate unit is now "the union's choice, and the likelihood is that most unions will choose to organize incrementally, petitioning for units of the smallest scale possible." This appears to be a sea-change in how the Board traditionally analyzes "scope" of the unit questions. [*See DTG Operations Inc.*, 357 NLRB No. 175 (2012)].

- Acting General Counsel Lafe Solomon will continue to aggressively employ the use of Section 10(j) injunctive relief where employees have been discharged illegally during a union organizing campaign. Employers must carefully consider discharge decisions in these situations in order to avoid possible U.S. District Court litigation.

Scheduling Restrictions and ADA Compliance

A question arising more frequently for employers under the ADA Amendments Act involves employee or applicant scheduling limitations due to a disability and an employer's scope of reasonable accommodation. The recent case of *EEOC v. AT&T Mobility Servs. LLC* (E.D. Mich., December 15, 2011) is a good review of an employer's rights when faced with this issue.

Cynthia Davey was a store manager at an AT&T Mobility location. The store was open every day, 10 to 12 hours a day, and Davey as manager worked several 55 to 60 hour weeks.

Davey had multiple sclerosis and ended up on a short-term disability leave of absence. She provided substantiation that her multiple sclerosis was exacerbated by her work hours. When she returned to work. she provided medical substantiation for a work schedule not to exceed 40 hours a week. The company evaluated that restriction, and told her that it could not accommodate such a restriction in her capacity as a store manager. Davey then worked a few more months at her regular hours, but again her multiple sclerosis was exacerbated. She returned with medical restrictions to work a 40 hour workweek and that she could not stand or walk for more than two hours at a time.

Davey's employer discussed with her different ways to accommodate her disability, such as whether a wheelchair would be acceptable. However, Davey's physician would not remove the limitation of a 40 hour workweek. The company concluded that it could not accommodate that restriction and still maintain Davey's status as a store manager. After a 30 day leave for Davey to attempt to find another position with the company, she was terminated.

The court granted AT&T's motion for summary judgment based upon the following:

1. AT&T proved that working 55 to 60 hours was an essential job function for a store manager and the ADA did not require the employer to remove an essential function as a form of reasonable accommodation.

2. The court concluded that it was a "*per se*" unreasonable accommodation to require the employer to hire someone else to perform some of the managerial functions for which Davey was responsible, which would have reduced her hours to 40 a week.

3. The employer attempted to accommodate Davey with a 30 day leave for Davey to find another position. It is the employee's responsibility to show that a vacant position for which she was qualified was available at the time she was terminated, and she failed to do so.

4. The employer's overall approach to accommodate Davey was "friendly and cooperative," according to Davey. The employer proactively and collaboratively engaged in the interactive process and was unable to arrive at a resolution that would fit its business needs and continue Davey's opportunity to work as a store manager.

This case is a good example of how an employer should engage in a reasonable accommodation process in conjunction with evaluating the needs of the business. Each accommodation issue has to be evaluated on a case by case basis. There is not a *per se* rule that says yes or no on a scheduling accommodation. Evaluate the needs of the business, the extent of the accommodation requested, whether the scheduling issue is an essential job function and other alternatives prior to a termination or demotion decision.

EEO Tips: EEOC Statistics Show Significant Processing and Litigation Results During FY 2011

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.

On January 24, 2012, the EEOC released its final comprehensive reports containing the details of its charge processing and litigation efforts during FY 2011. The reports show that the agency made a number of record accomplishments in processing its charge inventory. First of all, the reports show that the EEOC received a record number of charges for the second straight year, and secondly, that during the administrative process, it resolved a record number of the charges in its working inventory. Some of the specific highlights of the agency's accomplishments during FY 2011:

CHARGE PROCESSING RESULTS

1. REGULAR CHARGES. A record total of **99,947** charges were filed during FY 2011, exceeding the previous record of **99,922** charges filed in FY 2010. Among the most significant achievement was the resolution of a total of **112,499** charges, which was 7,500 charges more than the record set in FY 2010 when **104,999** charges were resolved. In the process, the EEOC reduced its ending inventory to **78,136** charges which was approximately 10% less than the ending inventory of FY 2010.

Reasonable Cause Findings. The record number of resolutions (i.e., 112,499 charges) was apparently achieved at least in part as the result of a charge inventory containing substantially fewer quality charges. According to the EEOC's reports, the Commission found "no reasonable cause" on 74,198 charges making up 66% of the total resolutions. This was the highest percentage of "no cause" findings in at least the last 10 years. Incidentally, the percentage of "no cause" findings has steadily climbed from 58.2% in FY 2008 to 66.0% in FY

2011. It follows that with such a high percentage of "no cause" findings, there would be a correlative lower percentage of "cause" findings, and that is the case. In FY 2011, the reports show that cause findings dropped to 4,325, or only 3.8% of the total resolutions.

The reports show that charges alleging Retaliation, under all statutes, outnumbered all other bases for the third straight year. A total of 37,334 charges, comprising approximately 37.4% of all charges filed, contained an allegation of retaliation.

In prior years, Race allegations had been more numerous than all others; however, in FY 2011, as in FY 2009 and 2010, they were second. A total of 35,395 race charges were filed, comprising 35.4% of all charges filed.

Disability charges continued to increase over the last four-year period to a high of 25,742 in FY 2011 and now make up 25.8%, or approximately one out of every four charges filed.

Finally, the reports show that Sex Discrimination charges apparently have leveled off or slightly declined in the last three years. 28,534 charges were filed in FY 2011, comprising 28.5% of all charges filed.

According to the reports, the EEOC secured more than $364.7 million in monetary benefits for charging parties and/or affected class members. This was the highest amount of monetary relief ever obtained by the Commission through the administrative process. The monetary relief was obtained on behalf of 20,248 individuals or merit resolutions obtained in FY 2011. This included administrative enforcement activities through mediation, settlements, conciliations and withdrawals with benefits.

It is also important to note that as the result of its intensive enforcement of the ADA, the EEOC obtained the record amount of $103.4 million in monetary relief on behalf of aggrieved individuals during FY 2011. This was an increase of approximately 35.9% over the $76.1 million obtained during FY 2010. According to the reports, back impairments were most frequently indicated as the disability in question, followed by other orthopedic impairments, depression and diabetes.

2. MEDIATION. The EEOC reported that its mediation program was also very successful. During FY 2011, the private sector part of the program completed a record 9,831 resolutions, which was approximately 5% more than the 9,362 resolutions completed in FY 2010. Additionally, more than $170 million in monetary benefits was obtained for Charging Party-participants. This exceeded the record $141 million obtained in FY 2010 by $29 million. According to the EEOC, participants almost uniformly viewed the program favorably with 96.9% reporting confidence in the program during FY 2011.

3. SYSTEMIC CASES. Also according to the EEOC's Performance and Accountability Report For FY 2011, the EEOC currently has 580 on-going systemic investigations involving some 2,067 charges, including 47 Commissioner's charges. During FY 2011, 235 systemic investigations were completed, resulting in 96 reasonable cause findings. 35 cases were settled and $9.6 million was collected on behalf of the affected class members.

LITIGATION RESULTS

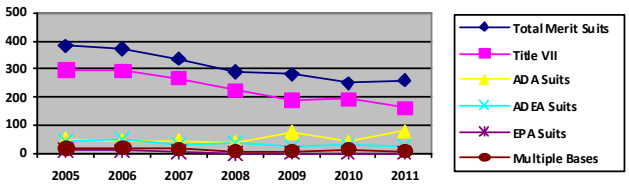
1. No records were set by the EEOC in conducting its litigation program during FY 2011, except with respect to the settlement of one ADA case in which the Commission obtained a record $20 million, the highest amount ever for an ADA case. The agency filed **261** lawsuits on the merits (i.e., direct suits, interventions, and suits to enforce administrative settlements) in FY 2011. This was an increase of 11 suits over the **250** merit suits filed in FY 2010. However, this total was far short of the 438 merit suits filed in 1999. In terms of mix, the merit suits filed in FY 2011 included **177** alleging individual harm, **61** alleging up to 20 multiple-complainants, and **23** systemic lawsuits, each of which involved over 20 affected class members.

2. In FY 2011, the EEOC's various District Offices resolved 277 merit lawsuits and obtained $90.9 million in monetary benefits on behalf of charging parties and/or affected class members. This contrasts with FY 2010 wherein a total of 287 lawsuits were resolved and $85.1 million in monetary benefits was obtained. Incidentally, within the last 12 years, the

highest number of merit lawsuits resolved was in FY 2000 wherein 407 lawsuits were resolved. The largest amount of monetary relief obtained by the Commission was in FY 2004 wherein $168.6 million was obtained. By the close of FY 2011, the EEOC reported that it had 443 cases on its active docket, of which 116 cases (or 26%) involved multiple aggrieved parties (but fewer than 20) and 63 systemic cases (or 14%) involving 20 or more aggrieved individuals.

As stated above, no records were set by the EEOC in terms of merit cases filed during FY 2011. Actually, there had been a marked decline in merit suits filed over the five preceding years before FY 2011. The chart below shows this decline:

Chart Showing the Number of Merit Lawsuits Filed by the EEOC During Fiscal Years 2005 Through 2011



In FY 2005, the EEOC filed 381 merit suits. Thereafter, in successive years until FY 2011, the EEOC filed, respectively, 371, 336, 290, 281, and 250 merit suits. As stated, 261 merit suits were filed in FY 2011. In our judgment, this general decline reflects the Commission's attempt to get "more bang for its buck" in carrying out its litigation program. Budget reductions and restrictions will probably play a major role in whether the Commission pursues systemic cases rather than individual harm cases. As the Commission's systemic program grows, it can be expected that the Commission will place more and more emphasis on cases that, potentially, will impact more aggrieved parties.

If you have any questions, please call this office at 205.323.9267.

OSHA Tips: Isn't There a 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.

While there is no shortage of OSHA rules, people are often surprised to find that there are none in some common work situations. For instance, federal OSHA has no specific requirement addressing extended or unusual work shifts. However, working hours are federally regulated with regard to consecutive hours, rest periods, etc; and for some occupations such as transportation. Some states also have regulations limiting mandatory overtime. Extended work schedules are thought to disrupt the body's regular schedule which can lead to increased fatigue, stress, and lack of concentration. These effects may increase the risk of operator error, injuries, and accidents. OSHA does factor in the increased time in determining over-exposures to noise and air contaminants.

Federal OSHA does not have a rule specifically mandating work breaks. It does have a requirement that toilet facilities be provided at fixed workplaces which implies access to them. A memorandum to the agency's field staff dated April 6, 1998 sets out the manner in which this provision was to be enforced. In part it states that the employer may not impose unreasonable restrictions on employee use of facilities.

Common concerns of employees are work areas that are too hot or too cold, and to a diminishing extent, environmental tobacco smoke (ETS). OSHA has no standard that sets an acceptable temperature range, nor prohibits smoking except for limited fire-hazard areas. The agency policy is stated in a memorandum dated February 24, 2003. It says that office temperature and humidity are generally a matter of human comfort that could not cause death or serious physical harm. OSHA therefore could not cite the General Duty Clause for a personal comfort situation. With regard to tobacco smoke it says, "in normal situations exposures would not exceed permissible exposure limits (of regulated chemical components) and,

as a matter of prosecutorial discretion, OSHA will not apply the general duty provision of the OSH Act to ETS.

There are no federal OSHA standards that set out age requirements. OSHA compliance officers are instructed to note cases of suspected under-age employees encountered in their worksite visits. These are referred as appropriate to the Wage and Hour Division of DOL in accordance with a memorandum of understanding between the two agencies. Wage and Hour has enforcement authority for child labor provisions of the Fair Labor Standards Act.

Further, federal OSHA has no standards pertaining to ergonomic hazards such as repetitive motion or manual lifting or the like. Some states and state-run OSHA programs do have requirements in the area of ergonomics. For instance some have rules pertaining to safe patient lifting in health care settings.

In the absence of a standard or rule, as in the above or other situations, OSHA may find that circumstances justify issuing a citation under the general duty clause as set out in Section 5(a)(1) of the OSH Act. This requires showing that there is a recognized hazard capable of causing death or serious physical harm to employees. Examples of the agency's use of the general duty clause in such cases include the following:

- In one case, the employer was cited under OSHA's general duty provision where employees were exposed to back injuries while pushing a loaded hand truck up an incline ramp.
- In another general duty citation, the employer was cited where a walk-in freezer had no handle or mechanism to open the door from the inside.

REMINDER: The OSHA 300A SUMMARY LOG MUST BE POSTED FEB.1 – APRIL 30.

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.

Most employers are aware that the Fair Labor Standards Act (FLSA) contains a provision prohibiting retaliation against persons exercising their rights under the Act. In December, Wage and Hour issued several fact sheets that address the issue of retaliation under not only the FLSA but also the Family and Medical Leave Act and the Migrant and Seasonal Agricultural Workers Protection Act. Shown below are pertinent sections relating to the FLSA.

Prohibitions

Section 15(a)(3) of the FLSA states that it is a violation for any person to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."

Employees are protected regardless of whether the complaint is made orally or in writing. Complaints made to the Wage and Hour Division are protected, and most courts have ruled that internal complaints to an employer are also protected.

Coverage

Because section 15(a)(3) prohibits "any person" from retaliating against "any employee", the protection applies to all employees of an employer even in those instances in which the employee's work and the employer are not covered by the FLSA. Section 15(a)(3) also applies in situations where there is no current employment relationship between the parties; for example, it protects an employee from retaliation by a former employer.

Enforcement

Any employee who is "discharged or in any other manner discriminated against" because, for instance, he or she has filed a complaint or cooperated in an investigation, may file a retaliation complaint with the Wage and Hour Division or may file a private cause of action seeking

appropriate remedies including, but not limited to, employment, reinstatement, lost wages and an additional equal amount as liquidated damages.

Proposed Changes Regarding Home Care Employees

On December 15, 2011, President Obama and Secretary of Labor Solis announced that Wage and Hour was going to publish proposed changes to the regulations dealing with Home Care employees. The proposal, published on December 27, 2011, provides that interested parties may submit comments until February 27, 2012. You may submit comments identified by RIN 1235-AA05, by either one of the following methods: Electronic comments, through the Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments. You may also submit comments to Ms. Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210.

Below are excerpts from a Fact Sheet that Wage and Hour issued outlining the proposed changes.

The Department is proposing to revise the regulations to accomplish two important purposes. First, the Department seeks to more clearly define the tasks that may be performed by an exempt companion. Second, the proposed regulations would limit the companionship exemption to companions employed only by the family or household using the services. Third party employers, such as health care staffing agencies, could not claim the exemption, even if the employee is jointly employed by the third party and the family or household.

The proposed regulations limit a companion's duties to fellowship and protection. Examples of activities that fall within fellowship and protection may include playing cards, watching television together, visiting with friends and neighbors, taking walks, or engaging in hobbies. The proposed regulations provide some allowance for certain incidental intimate personal care services, such as occasional dressing, grooming, and driving to appointments, if this work is performed in conjunction with the fellowship and protection of the individual, and does not exceed 20 percent of the total hours worked by the companion in the workweek.

The Department's proposal makes clear that employees performing services that do not fall within the revised definition of companionship services are not considered exempt from the minimum wage and overtime requirements:

- The proposal would clarify that "companionship services" do not include the performance of medically related tasks for which training is typically a prerequisite. The current regulations specifically identify trained personnel such as nurses as outside the scope of the exemption, and this clarification more clearly identifies what constitutes medically-related services.

- Under the proposed rule, any work benefiting other members of the household, such as preparing meals or performing housekeeping or laundry for other members of the household, does not fall within the allowable incidental duties of an exempt companion.

- The Department proposes to revise the third party regulation to apply the companionship and live-in domestic worker exemptions only to workers employed by the individual, family or household using the worker's services. Under the proposed rule, the minimum wage and overtime exemptions would not be available to third party employers, such as home health care agencies, even if the household itself may claim the exemption (such as in a joint employment relationship).

- The proposed regulations would revise the recordkeeping requirements for live-in domestic workers. Under the proposal, employers would be required to maintain an accurate record of hours worked by such workers, just as other covered employees must keep such records.

The Department of Labor continues to take a hard line regarding enforcement of the child labor provisions of the FLSA. Recently, the Birmingham Wage and Hour office has been conducting investigation of grocery stores in Alabama and Mississippi. As a result of the number of minors found to be employed contrary to the regulations,

Wage and Hour assessed a Civil Money Penalty of $50,000 against eleven franchise-operated stores.

If you have additional questions, do not hesitate to give me a call.

Did You Know…

…that a physician was awarded $7.6 million for retaliation when she complained about poor hospital policies and quality of care? *Renta v. Cook County* (N.D. IL, December 12, 2011). Dr. Vivian Renta worked as a health system pathologist for Cook County. Of the award, $1.1 million was backpay, $1.2 million was front pay, $936,000 for pension benefits, and $4 million for pain and suffering. Additionally, her supervisor was ordered to pay $400,000 in punitive damages. She claimed that her reputation was ruined by her supervisors in the manner they reacted when she "[showed] her unwillingness to participate in the culture of obstructionism that pervaded the Department of Pathology or to lie or cover up for the misdiagnosis, tardiness, and negligence of colleagues."

…that two former UAW officers were sentenced to jail for extorting jobs from General Motors? Justice, at last, occurred on December 19, 2011, arising out of behavior during the General Motors 1997 strike. Donnie Douglas and Jay Campbell were UAW leaders of Local 594. The two individuals pressured GM to hire relatives, or else Campbell and Douglas would prolong the UAW strike against GM. Their behavior was extortion, which violated the Hobbs Act, and a conspiracy to violate the Labor-Management Relations Act.

…that the EEOC in *Blockbuster, Inc.* agreed to a $2.3 million harassment settlement? *EEOC v. Blockbuster, Inc.* (D. Md., December 31, 2011). The claim involved seven women who worked as temporary employees. Some of the women were Hispanic. The women alleged they were frequently asked for sexual favors by male managers, were subjected to frequent sexual remarks and frequent remarks about their national origin. When they complained about the behavior, they were retaliated against with a reduction of hours. The EEOC stated that, "Employers who are customers of staffing agencies have a responsibility to protect their temporary workers from unlawful discrimination. Too frequently, such employers fail to create systems to prevent or detected abuse of temporary workers and fail to respond forcefully to it. Those employers do so at their peril." As Blockbuster is in bankruptcy, the court stated that "the timing of payment and the collection of the monetary awards shall be governed by the Bankruptcy Code." The individual amounts ranged from $300,000 to $410,000.

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Your Workplace Is Our Work®

Inside this issue:

Senior NLRB Litigator, Frank F. Rox, Jr., Joins LMV

Frank F. Rox, Jr. joins Lehr Middlebrooks & Vreeland, P.C. as our NLRB Consultant. Mr. Rox served as a Senior Trial Attorney with the National Labor Relations Board for more than 30 years. Over his long tenure, Mr. Rox handled some of the most challenging and difficult work within the NLRB's Atlanta Regional Office and has served as the office's lead attorney in federal district court litigation. He has a wide breadth of knowledge in both the substantive and procedural aspects of the National Labor Relations Act. Please see Frank's insights into the controversy surrounding the new appointments to the NLRB and also recent significant decisions issued by the NLRB. Frank's articles will be regularly featured in our ELB.

Frank is a member of the State Bar of Georgia and has served as an officer and Chair of the Labor and Employment Law Section. He received his law degree from Emory University. He also attended Southern Methodist University for two years and received his bachelors degree in economics from Emory in 1976. We are pleased that Frank will provide our clients valuable insight into handling the ever-changing and aggressive actions of the NLRB nationally. Frank joins our consultants Lyndel Erwin (former District Director of the U.S. Department of Labor), John Hall (former Area Director of OSHA) and Jerome Rose (former EEOC Regional Attorney) in providing support to employers nationally.

Controversy Surrounds Recess Appointments to NLRB

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Rox can be reached at 205.323.8217. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years.

On January 4, 2012, the Obama administration announced its intent to make three (3) recess appointments, not requiring Senate confirmation, to the Board:

(1) Sharon Black, a former Deputy Assistant Secretary for Congressional Affairs at the U.S. Department of Labor. Ms. Black served from 2003 to 2006 as a senior attorney to then Board Chairman Robert Battista.

(2) Richard Griffin, the current General Counsel for International Union of Operating Engineers (IUOE). Mr. Griffin is also a Director for the AFL-CIO Lawyer Coordination Committee

(3) Terrence Flynn, current Chief Counsel to Brian Hayes, the Board's only Republic Member.

Ms. Black, Mr. Griffin and Mr. Flynn joined Chairman Mark Gaston Pearce and Member Brian Hayes on January 9, 2012, giving the Board its first full five-member complement since August of 2010. The Board now consists of three (3) Democrats and two (2) Republicans.

Without at least one additional member the Board would have been unable to continue operations. The U.S Supreme Court has ruled that the Board cannot operate and decide cases without a minimum of a three-member quorum. The Board had only two confirmed members. The controversy is that Congress may not be technically in recess, raising the possibility that recess appointments may be improper.

Obama administration officials and Democratic Congressional supporters insist that the appointments are both legal and appropriate. They argue that although Congress may be holding brief "pro forma" sessions, it is, for all practical purposes, in recess. In other words, Democrats assert that the current Congressional "non-recess" is a sham designed by Republicans to thwart presidential appointments.

Republicans have cried foul and claim that the appointments are improper, and, in all likelihood, unconstitutional. Senate Majority leader Mitch McConnell (R-Ky.) stated that Obama's action "sets a terrible precedent that could allow any future President to completely cut the Senate out of the confirmation process, appointing [the President's] nominees immediately after sending their names up to Congress."

John Kline (R-Minn.), the Chairman of the House Education and the Workforce Committee, and Phil Roe, Chairman of the Health, Employment, Labor, and Pensions Subcommittee, have argued that the recess appointments "circumvent the normal confirmation process" and are designed to ensure "the continuation of the [Obama administration's] activist agenda on behalf of union special interests."

The Bottom Line:

Both sides have strong arguments in support of their respective positions. Presidents need to appoint individuals to executive positions which are necessary for Government operations. However, the U.S. Constitution mandates Senatorial "advise and consent" during the executive appointment process. These competing governmental interests, concerning the relationship of the Executive and Legislative branches and their functioning under the separation of powers doctrine, beg for a political settlement, rather than judicial intervention by the Courts.

Given the current election year climate, it does not seem that there will be any political compromise on this issue, making a judicial resolution all the more likely. Once the NLRB issues any rule or decision, the losing party will almost certainly seek judicial review claiming that the Board had not been properly constituted. The challenges have already begun.

On January 13, 2012, the National Right to Work Legal Defense Fund and Education to Work Foundation Inc. and other groups with court challenges already pending, filed a motion with the U.S. District Court of Columbia requesting that the Court hold President Obama's recess appointments to the NLRB "unconstitutional, null and void" and that the illegality of the appointments prevents the NLRB from implementing or enforcing a new rule requiring employers to post workplace notices of employee rights under the Act. (*Nat'l Ass'n of Mfrs. v. NLRB*, D.D.C., No. 11-cv-1629, motion filed 1/13/12). The notice posting rule is scheduled to go into effect on April 30, 2012.

In the District of Columbia litigation, the plaintiffs have argued that the Obama administration and the Department of Justice have failed "to justify the President's appointments to the Board and should not be adopted by any court."

In another lawsuit, the U.S. Chamber of Commerce and the South Carolina Chamber of Commerce are also challenging the NLRB posting rule. (*Chamber of Commerce v. NLRB*, D.S.C., No. 11-cv-2516). A hearing to consider motions for summary judgment in this matter has been set for February 6, 2012.

The outcome of the litigation in the lower courts on this issue will not be the final word. It seems probable that the meaning of a legitimate Congressional "recess" will ultimately be defined by the U.S. Supreme Court.

In the meantime, with the very liberal Board majority, employers can expect a continued assault on existing Board precedent, both through rulemaking and the litigation process. Just one recent example of the Board's determination to expand the Agency's reach under Section 7 of the Act is found below:

Board Finds That Certain Mandatory Arbitration Agreements Violate the NLRA

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Rox can be reached at 205.323.8217. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years.

A growing trend in the employer/employee relationship is to require employees to sign agreements in which employees agree to submit employment disputes to arbitration rather than pursue the matter in a court of law. The Board has now served notice that it intends to slow this trend by placing limits on such agreements.

In an anticipated decision, the National Labor Relations Board has ruled that it is a violation of the NLRA to require employees to sign arbitration agreements that prevent employees from joining together to pursue employment-related legal claims in any forum, whether in arbitration or in court. *D.R. Horton Inc.*, 357 NLRB No. 183 (2012). The Board emphasized that the ruling does not require class arbitration as long as the agreement leaves open a judicial forum for group claims.

In its ruling, the Board rejected the approach taken by former General Counsel Ronald Meisburg in a 2010 GC Memorandum that provided a class-action waiver would not be considered violative of the Act if the waiver made it clear to employees that they could collectively challenge the waiver itself and would not be subjected to any employer retaliation if they did so.

The Board emphasized that their ruling was limited in scope:

> We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA.
>
> Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of class-wide arbitration. Employers remain free to insist that the arbitral proceedings be conducted on an individual basis.

The Board did not reach the "difficult" questions of whether:

- Employees could be required to waive group action in court as long as it was available in an arbitration setting;
- An employer and employee may enter into an agreement, which is not a condition of employment, to resolve either a specific complaint or all potential employment disputes through non-class arbitration rather than litigation in court. In other words, may the parties agree that a non-class arbitration resolution, rather than litigation, is binding on the parties?

The Bottom Line:

Commentators may disagree on the merits of the Board's determination, but all seem to agree that the decision will have far-reaching ramifications. Given the proliferation of private arbitration systems, most of which incorporate class or collective action waiver language, it seems certain that employers will have to deal with either modifying their arbitration agreements or litigating whether the Board's pronouncement conflicts with the Federal Arbitration Act. It is likely that the Board's General Counsel will seek 10(j) injunctive relief if employers refuse to modify existing arbitration agreements that limit employees' rights to pursue collective causes of action.

One caveat deserves mention. In *Compucredit Corp. v. Greenwood*, U.S., No. 10-948, 1/10/12, the Supreme Court ruled that consumer protection laws that include mandatory arbitration provisions that bar class actions are enforceable. The ruling may have implications for class action waivers in mandatory arbitration agreements in the employment arena and for the Board's decision in D.R. Horton, discussed herein. Experts opined that the Court's decision "shows yet again that [the Supreme Court] is serious about enforcing arbitration agreements" and that the Court will not lightly infer that private arbitration agreements are invalid.

STAY TUNED – This issue is far from settled, and the firm will watch closely for any new developments in this area of Board law. A careful review of your Company's existing arbitration agreements may avoid any potential problems down the road.

Did You Know:

- The Board will no longer defer cases to the grievance-arbitration process in situations where the matter would likely require, or has already required, NLRB deferral for more than a year. (GC Memo 12-01). Expect increased scrutiny from Regional offices before the NLRB will agree to defer, or continue to defer, unfair labor practice charges.

- The Board has applied the decision in *Specialty Healthcare* to a non-healthcare facility. In overturning the Regional Director's finding that a "wall-to-wall" unit was required, the Democratic majority found that a limited unit consisting of only "rental service agents and lead agents" was proper, since the petitioned-for employees did not have an "overwhelming" community of interest with other employees. In dissent, Board Member Hayes stated that the decision showed that the determination of the appropriate unit is now "the union's choice, and the likelihood is that most unions will choose to organize incrementally, petitioning for units of the smallest scale possible." This appears to be a sea-change in how the Board traditionally analyzes "scope" of the unit questions. [*See DTG Operations Inc.*, 357 NLRB No. 175 (2012)].

- Acting General Counsel Lafe Solomon will continue to aggressively employ the use of Section 10(j) injunctive relief where employees have been discharged illegally during a union organizing campaign. Employers must carefully consider discharge decisions in these situations in order to avoid possible U.S. District Court litigation.

Scheduling Restrictions and ADA Compliance

A question arising more frequently for employers under the ADA Amendments Act involves employee or applicant scheduling limitations due to a disability and an employer's scope of reasonable accommodation. The recent case of *EEOC v. AT&T Mobility Servs. LLC* (E.D. Mich., December 15, 2011) is a good review of an employer's rights when faced with this issue.

Cynthia Davey was a store manager at an AT&T Mobility location. The store was open every day, 10 to 12 hours a day, and Davey as manager worked several 55 to 60 hour weeks.

Davey had multiple sclerosis and ended up on a short-term disability leave of absence. She provided substantiation that her multiple sclerosis was exacerbated by her work hours. When she returned to work. she provided medical substantiation for a work schedule not to exceed 40 hours a week. The company evaluated that restriction, and told her that it could not accommodate such a restriction in her capacity as a store manager. Davey then worked a few more months at her regular hours, but again her multiple sclerosis was exacerbated. She returned with medical restrictions to work a 40 hour workweek and that she could not stand or walk for more than two hours at a time.

Davey's employer discussed with her different ways to accommodate her disability, such as whether a wheelchair would be acceptable. However, Davey's physician would not remove the limitation of a 40 hour workweek. The company concluded that it could not accommodate that restriction and still maintain Davey's status as a store manager. After a 30 day leave for Davey to attempt to find another position with the company, she was terminated.

The court granted AT&T's motion for summary judgment based upon the following:

1. AT&T proved that working 55 to 60 hours was an essential job function for a store manager and the ADA did not require the employer to remove an essential function as a form of reasonable accommodation.

2. The court concluded that it was a "*per se*" unreasonable accommodation to require the employer to hire someone else to perform some of the managerial functions for which Davey was responsible, which would have reduced her hours to 40 a week.

3. The employer attempted to accommodate Davey with a 30 day leave for Davey to find another position. It is the employee's responsibility to show that a vacant position for which she was qualified was available at the time she was terminated, and she failed to do so.

4. The employer's overall approach to accommodate Davey was "friendly and cooperative," according to Davey. The employer proactively and collaboratively engaged in the interactive process and was unable to arrive at a resolution that would fit its business needs and continue Davey's opportunity to work as a store manager.

This case is a good example of how an employer should engage in a reasonable accommodation process in conjunction with evaluating the needs of the business. Each accommodation issue has to be evaluated on a case by case basis. There is not a *per se* rule that says yes or no on a scheduling accommodation. Evaluate the needs of the business, the extent of the accommodation requested, whether the scheduling issue is an essential job function and other alternatives prior to a termination or demotion decision.

EEO Tips: EEOC Statistics Show Significant Processing and Litigation Results During FY 2011

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.

On January 24, 2012, the EEOC released its final comprehensive reports containing the details of its charge processing and litigation efforts during FY 2011. The reports show that the agency made a number of record accomplishments in processing its charge inventory. First of all, the reports show that the EEOC received a record number of charges for the second straight year, and secondly, that during the administrative process, it resolved a record number of the charges in its working inventory. Some of the specific highlights of the agency's accomplishments during FY 2011:

CHARGE PROCESSING RESULTS

1. REGULAR CHARGES. A record total of **99,947** charges were filed during FY 2011, exceeding the previous record of **99,922** charges filed in FY 2010. Among the most significant achievement was the resolution of a total of **112,499** charges, which was 7,500 charges more than the record set in FY 2010 when **104,999** charges were resolved. In the process, the EEOC reduced its ending inventory to **78,136** charges which was approximately 10% less than the ending inventory of FY 2010.

Reasonable Cause Findings. The record number of resolutions (i.e., 112,499 charges) was apparently achieved at least in part as the result of a charge inventory containing substantially fewer quality charges. According to the EEOC's reports, the Commission found "no reasonable cause" on 74,198 charges making up 66% of the total resolutions. This was the highest percentage of "no cause" findings in at least the last 10 years. Incidentally, the percentage of "no cause" findings has steadily climbed from 58.2% in FY 2008 to 66.0% in FY

2011. It follows that with such a high percentage of "no cause" findings, there would be a correlative lower percentage of "cause" findings, and that is the case. In FY 2011, the reports show that cause findings dropped to 4,325, or only 3.8% of the total resolutions.

The reports show that charges alleging Retaliation, under all statutes, outnumbered all other bases for the third straight year. A total of 37,334 charges, comprising approximately 37.4% of all charges filed, contained an allegation of retaliation.

In prior years, Race allegations had been more numerous than all others; however, in FY 2011, as in FY 2009 and 2010, they were second. A total of 35,395 race charges were filed, comprising 35.4% of all charges filed.

Disability charges continued to increase over the last four-year period to a high of 25,742 in FY 2011 and now make up 25.8%, or approximately one out of every four charges filed.

Finally, the reports show that Sex Discrimination charges apparently have leveled off or slightly declined in the last three years. 28,534 charges were filed in FY 2011, comprising 28.5% of all charges filed.

According to the reports, the EEOC secured more than $364.7 million in monetary benefits for charging parties and/or affected class members. This was the highest amount of monetary relief ever obtained by the Commission through the administrative process. The monetary relief was obtained on behalf of 20,248 individuals or merit resolutions obtained in FY 2011. This included administrative enforcement activities through mediation, settlements, conciliations and withdrawals with benefits.

It is also important to note that as the result of its intensive enforcement of the ADA, the EEOC obtained the record amount of $103.4 million in monetary relief on behalf of aggrieved individuals during FY 2011. This was an increase of approximately 35.9% over the $76.1 million obtained during FY 2010. According to the reports, back impairments were most frequently indicated as the disability in question, followed by other orthopedic impairments, depression and diabetes.

2. MEDIATION. The EEOC reported that its mediation program was also very successful. During FY 2011, the private sector part of the program completed a record 9,831 resolutions, which was approximately 5% more than the 9,362 resolutions completed in FY 2010. Additionally, more than $170 million in monetary benefits was obtained for Charging Party-participants. This exceeded the record $141 million obtained in FY 2010 by $29 million. According to the EEOC, participants almost uniformly viewed the program favorably with 96.9% reporting confidence in the program during FY 2011.

3. SYSTEMIC CASES. Also according to the EEOC's Performance and Accountability Report For FY 2011, the EEOC currently has 580 on-going systemic investigations involving some 2,067 charges, including 47 Commissioner's charges. During FY 2011, 235 systemic investigations were completed, resulting in 96 reasonable cause findings. 35 cases were settled and $9.6 million was collected on behalf of the affected class members.

LITIGATION RESULTS

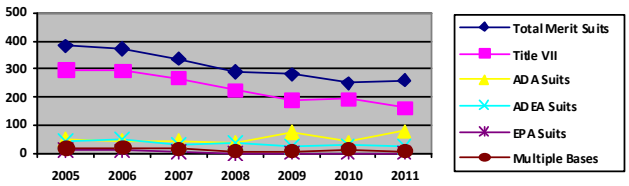
1. No records were set by the EEOC in conducting its litigation program during FY 2011, except with respect to the settlement of one ADA case in which the Commission obtained a record $20 million, the highest amount ever for an ADA case. The agency filed **261** lawsuits on the merits (i.e., direct suits, interventions, and suits to enforce administrative settlements) in FY 2011. This was an increase of 11 suits over the **250** merit suits filed in FY 2010. However, this total was far short of the 438 merit suits filed in 1999. In terms of mix, the merit suits filed in FY 2011 included **177** alleging individual harm, **61** alleging up to 20 multiple-complainants, and **23** systemic lawsuits, each of which involved over 20 affected class members.

2. In FY 2011, the EEOC's various District Offices resolved 277 merit lawsuits and obtained $90.9 million in monetary benefits on behalf of charging parties and/or affected class members. This contrasts with FY 2010 wherein a total of 287 lawsuits were resolved and $85.1 million in monetary benefits was obtained. Incidentally, within the last 12 years, the

highest number of merit lawsuits resolved was in FY 2000 wherein 407 lawsuits were resolved. The largest amount of monetary relief obtained by the Commission was in FY 2004 wherein $168.6 million was obtained. By the close of FY 2011, the EEOC reported that it had 443 cases on its active docket, of which 116 cases (or 26%) involved multiple aggrieved parties (but fewer than 20) and 63 systemic cases (or 14%) involving 20 or more aggrieved individuals.

As stated above, no records were set by the EEOC in terms of merit cases filed during FY 2011. Actually, there had been a marked decline in merit suits filed over the five preceding years before FY 2011. The chart below shows this decline:

Chart Showing the Number of Merit Lawsuits Filed by the EEOC During Fiscal Years 2005 Through 2011



In FY 2005, the EEOC filed 381 merit suits. Thereafter, in successive years until FY 2011, the EEOC filed, respectively, 371, 336, 290, 281, and 250 merit suits. As stated, 261 merit suits were filed in FY 2011. In our judgment, this general decline reflects the Commission's attempt to get "more bang for its buck" in carrying out its litigation program. Budget reductions and restrictions will probably play a major role in whether the Commission pursues systemic cases rather than individual harm cases. As the Commission's systemic program grows, it can be expected that the Commission will place more and more emphasis on cases that, potentially, will impact more aggrieved parties.

If you have any questions, please call this office at 205.323.9267.

OSHA Tips: Isn't There a 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.

While there is no shortage of OSHA rules, people are often surprised to find that there are none in some common work situations. For instance, federal OSHA has no specific requirement addressing extended or unusual work shifts. However, working hours are federally regulated with regard to consecutive hours, rest periods, etc; and for some occupations such as transportation. Some states also have regulations limiting mandatory overtime. Extended work schedules are thought to disrupt the body's regular schedule which can lead to increased fatigue, stress, and lack of concentration. These effects may increase the risk of operator error, injuries, and accidents. OSHA does factor in the increased time in determining over-exposures to noise and air contaminants.

Federal OSHA does not have a rule specifically mandating work breaks. It does have a requirement that toilet facilities be provided at fixed workplaces which implies access to them. A memorandum to the agency's field staff dated April 6, 1998 sets out the manner in which this provision was to be enforced. In part it states that the employer may not impose unreasonable restrictions on employee use of facilities.

Common concerns of employees are work areas that are too hot or too cold, and to a diminishing extent, environmental tobacco smoke (ETS). OSHA has no standard that sets an acceptable temperature range, nor prohibits smoking except for limited fire-hazard areas. The agency policy is stated in a memorandum dated February 24, 2003. It says that office temperature and humidity are generally a matter of human comfort that could not cause death or serious physical harm. OSHA therefore could not cite the General Duty Clause for a personal comfort situation. With regard to tobacco smoke it says, "in normal situations exposures would not exceed permissible exposure limits (of regulated chemical components) and,

as a matter of prosecutorial discretion, OSHA will not apply the general duty provision of the OSH Act to ETS.

There are no federal OSHA standards that set out age requirements. OSHA compliance officers are instructed to note cases of suspected under-age employees encountered in their worksite visits. These are referred as appropriate to the Wage and Hour Division of DOL in accordance with a memorandum of understanding between the two agencies. Wage and Hour has enforcement authority for child labor provisions of the Fair Labor Standards Act.

Further, federal OSHA has no standards pertaining to ergonomic hazards such as repetitive motion or manual lifting or the like. Some states and state-run OSHA programs do have requirements in the area of ergonomics. For instance some have rules pertaining to safe patient lifting in health care settings.

In the absence of a standard or rule, as in the above or other situations, OSHA may find that circumstances justify issuing a citation under the general duty clause as set out in Section 5(a)(1) of the OSH Act. This requires showing that there is a recognized hazard capable of causing death or serious physical harm to employees. Examples of the agency's use of the general duty clause in such cases include the following:

- In one case, the employer was cited under OSHA's general duty provision where employees were exposed to back injuries while pushing a loaded hand truck up an incline ramp.
- In another general duty citation, the employer was cited where a walk-in freezer had no handle or mechanism to open the door from the inside.

REMINDER: The OSHA 300A SUMMARY LOG MUST BE POSTED FEB.1 – APRIL 30.

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.

Most employers are aware that the Fair Labor Standards Act (FLSA) contains a provision prohibiting retaliation against persons exercising their rights under the Act. In December, Wage and Hour issued several fact sheets that address the issue of retaliation under not only the FLSA but also the Family and Medical Leave Act and the Migrant and Seasonal Agricultural Workers Protection Act. Shown below are pertinent sections relating to the FLSA.

Prohibitions

Section 15(a)(3) of the FLSA states that it is a violation for any person to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."

Employees are protected regardless of whether the complaint is made orally or in writing. Complaints made to the Wage and Hour Division are protected, and most courts have ruled that internal complaints to an employer are also protected.

Coverage

Because section 15(a)(3) prohibits "any person" from retaliating against "any employee", the protection applies to all employees of an employer even in those instances in which the employee's work and the employer are not covered by the FLSA. Section 15(a)(3) also applies in situations where there is no current employment relationship between the parties; for example, it protects an employee from retaliation by a former employer.

Enforcement

Any employee who is "discharged or in any other manner discriminated against" because, for instance, he or she has filed a complaint or cooperated in an investigation, may file a retaliation complaint with the Wage and Hour Division or may file a private cause of action seeking

appropriate remedies including, but not limited to, employment, reinstatement, lost wages and an additional equal amount as liquidated damages.

Proposed Changes Regarding Home Care Employees

On December 15, 2011, President Obama and Secretary of Labor Solis announced that Wage and Hour was going to publish proposed changes to the regulations dealing with Home Care employees. The proposal, published on December 27, 2011, provides that interested parties may submit comments until February 27, 2012. You may submit comments identified by RIN 1235-AA05, by either one of the following methods: Electronic comments, through the Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments. You may also submit comments to Ms. Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210.

Below are excerpts from a Fact Sheet that Wage and Hour issued outlining the proposed changes.

The Department is proposing to revise the regulations to accomplish two important purposes. First, the Department seeks to more clearly define the tasks that may be performed by an exempt companion. Second, the proposed regulations would limit the companionship exemption to companions employed only by the family or household using the services. Third party employers, such as health care staffing agencies, could not claim the exemption, even if the employee is jointly employed by the third party and the family or household.

The proposed regulations limit a companion's duties to fellowship and protection. Examples of activities that fall within fellowship and protection may include playing cards, watching television together, visiting with friends and neighbors, taking walks, or engaging in hobbies. The proposed regulations provide some allowance for certain incidental intimate personal care services, such as occasional dressing, grooming, and driving to appointments, if this work is performed in conjunction with the fellowship and protection of the individual, and does not exceed 20 percent of the total hours worked by the companion in the workweek.

The Department's proposal makes clear that employees performing services that do not fall within the revised definition of companionship services are not considered exempt from the minimum wage and overtime requirements:

- The proposal would clarify that "companionship services" do not include the performance of medically related tasks for which training is typically a prerequisite. The current regulations specifically identify trained personnel such as nurses as outside the scope of the exemption, and this clarification more clearly identifies what constitutes medically-related services.

- Under the proposed rule, any work benefiting other members of the household, such as preparing meals or performing housekeeping or laundry for other members of the household, does not fall within the allowable incidental duties of an exempt companion.

- The Department proposes to revise the third party regulation to apply the companionship and live-in domestic worker exemptions only to workers employed by the individual, family or household using the worker's services. Under the proposed rule, the minimum wage and overtime exemptions would not be available to third party employers, such as home health care agencies, even if the household itself may claim the exemption (such as in a joint employment relationship).

- The proposed regulations would revise the recordkeeping requirements for live-in domestic workers. Under the proposal, employers would be required to maintain an accurate record of hours worked by such workers, just as other covered employees must keep such records.

The Department of Labor continues to take a hard line regarding enforcement of the child labor provisions of the FLSA. Recently, the Birmingham Wage and Hour office has been conducting investigation of grocery stores in Alabama and Mississippi. As a result of the number of minors found to be employed contrary to the regulations,

Wage and Hour assessed a Civil Money Penalty of $50,000 against eleven franchise-operated stores.

If you have additional questions, do not hesitate to give me a call.

Did You Know…

…that a physician was awarded $7.6 million for retaliation when she complained about poor hospital policies and quality of care? *Renta v. Cook County* (N.D. IL, December 12, 2011). Dr. Vivian Renta worked as a health system pathologist for Cook County. Of the award, $1.1 million was backpay, $1.2 million was front pay, $936,000 for pension benefits, and $4 million for pain and suffering. Additionally, her supervisor was ordered to pay $400,000 in punitive damages. She claimed that her reputation was ruined by her supervisors in the manner they reacted when she "[showed] her unwillingness to participate in the culture of obstructionism that pervaded the Department of Pathology or to lie or cover up for the misdiagnosis, tardiness, and negligence of colleagues."

…that two former UAW officers were sentenced to jail for extorting jobs from General Motors? Justice, at last, occurred on December 19, 2011, arising out of behavior during the General Motors 1997 strike. Donnie Douglas and Jay Campbell were UAW leaders of Local 594. The two individuals pressured GM to hire relatives, or else Campbell and Douglas would prolong the UAW strike against GM. Their behavior was extortion, which violated the Hobbs Act, and a conspiracy to violate the Labor-Management Relations Act.

…that the EEOC in *Blockbuster, Inc.* agreed to a $2.3 million harassment settlement? *EEOC v. Blockbuster, Inc.* (D. Md., December 31, 2011). The claim involved seven women who worked as temporary employees. Some of the women were Hispanic. The women alleged they were frequently asked for sexual favors by male managers, were subjected to frequent sexual remarks and frequent remarks about their national origin. When they complained about the behavior, they were retaliated against with a reduction of hours. The EEOC stated that, "Employers who are customers of staffing agencies have a responsibility to protect their temporary workers from unlawful discrimination. Too frequently, such employers fail to create systems to prevent or detected abuse of temporary workers and fail to respond forcefully to it. Those employers do so at their peril." As Blockbuster is in bankruptcy, the court stated that "the timing of payment and the collection of the monetary awards shall be governed by the Bankruptcy Code." The individual amounts ranged from $300,000 to $410,000.

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