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Unions Get By With A Little Help From Their Friends (at the NLRB)

Unions thought the Employee Free Choice Act would increase their membership by eliminating the need for a secret ballot election when over 50% of targeted employees signed union cards. Although Congress never voted on EFCA, the organizing future looks bright for unions based on a little help from their friends at the National Labor Relations Board ("NLRB").

Last month, our NLRB consultant, Frank Rox, noted the NLRB decision in *DTG Operations* regarding the overwhelming presumption that the bargaining unit unions ask for in an election petition is the bargaining unit they will get. In our opinion, NLRB's decision to change the bargaining unit requirements for what constitutes a "community of interest" among similarly situated employees is one of the most significant developments in the history of the National Labor Relations Act. It's a decision we think will lead to greater union organizing opportunities.

Here is how we have arrived at that assessment. Approximately 80% of all NLRB-conducted elections involve bargaining units of fewer than 50 employees. Statistically, the smaller the group of employees, the greater the likelihood for a union win. The reason is clear: it's much easier for unions to keep a group of 15 employees focused on a common issue of concern than it is 150 employees. In the NLRB's *Specialty Healthcare* decision last August and *DTG Operations* decision in January, the Board established that an employer must "overwhelmingly" provide evidence that the bargaining unit proposed by the union is not an appropriate one. Thus, a union may seek a bargaining unit of just one shift, one department, or one job classification. The employer would have to provide "overwhelming" evidence to show that the scope of the bargaining unit should include other shifts, departments, or classifications. That's a tough burden.

The implications of these new rules are profound for employers. Remember that employee interest in unions occurs when other efforts to address workplace concerns have either not been heard or not been resolved. The new NLRB framework creates an enhanced risk of unionization in areas of the business where workplace issues are isolated. For this reason, it's important for employers to be proactive to identify the direct and indirect sources of employee unrest and get to the bottom of it before it leads to union organizing.

Company's Change of FMLA Policy – Double Damages Awarded to Employee

The case of *Thom v. American Standard, Inc.* (6th Cir., Jan. 20, 2012) involved the termination of an employee who failed to return from surgery upon the conclusion of his FMLA leave. That sounds common enough, but in this case, the employee's use of FMLA overlapped with the employer's decision to change its FMLA policy from a calendar year to a rolling 12-month period. Under the calendar year approach, the employee's full FMLA leave would have been protected. Under the rolling 12-month period, it was not.

The employee, who worked for the company for 36 years, actually tried to return to work before the expiration of his leave, but he was not fully recovered from his surgery and needed to remain off work for the duration of his leave. Under the rolling 12-month period, the employer terminated the employee because his original FMLA leave resulted in an additional 10-day absence due to the medical procedure. In concluding that the employer interfered with the employee's FMLA rights and acted in bad faith, the court said the employer did not notify the employee of the change from a calendar method of calculating FMLA to a rolling 12-month period.

The court said, "The FMLA requires employers to 'inform their employees in writing of which method they will use to calculate the FMLA leave year.' This standard is consistent with the principles of fairness and general clarity." The court explained that the employer originally approved the leave under the calendar-year method, but that then changed its calendar only after the employee's leave was well under way. Accordingly, in addition to attorney fees, back pay and back pension benefits, the employee was entitled to double damages for the employer's bad faith.

As a general rule, we recommend employers use a rolling 12-month FMLA calendar rather than the calendar-year method. The rolling calendar achieves the original intent of the FMLA (providing just 12 weeks of leave), rather than allowing an employee to exhaust 12 weeks at the end of one calendar year and then burn up another 12 at the beginning of the next year, which could result in up to 24 consecutive weeks of FMLA leave.

Union Membership Numbers Increase Slightly, Still 6.9% of Private Sector

The Bureau of Labor Statistics on January 27th released its annual report of private and public sector union membership and representation. Including the public sector, union-represented employees nationally declined from 13.1% to 13%. Overall, private sector union membership increased from 7,092,000 during 2010 to 7,202,000 during 2011, still 6.9% of all private sector employees. Although the number of employees represented by unions increased from 2010 to 2011, as a percentage of the total private sector workforce it declined from 7.7% to 7.6%.

The strongest gains in private sector union membership were in healthcare and social service organizations (102,000), construction (90,000) and retail (31,000). Those sectors with the largest declines of union representation were temporary and administrative services (63,000), financial (41,000), manufacturing (17,000), and wholesale trade (21,000).

One statistic that is buried in the report but significant to labor's future involves the age of those represented by unions. 17.2% of those represented by unions are ages 55-64; only 5% are ages 16-24.

According to Rich Trumka, President of the AFL-CIO, "despite an unprecedented volley of partisan political attacks on worker's rights and the continuing insecurity of economic crisis, union membership increased slightly last year." Secretary of Labor Hilda Solis stated, "union jobs are critical to a strong economy." The Heritage Foundation explained that the reason public sector union membership is flat at 6.9% is because "collective bargaining does not appeal to most workers."

"He's Too Old" – No Age Discrimination

The recent case of *EEOC v. DynMcDermott Petroleum Operations Co.* (E.D. Tx., Feb. 15, 2012) is a great example of how an employer can still make a lawful employment decision while isolating the inappropriate, age-biased comments made about an applicant by the individual who is the ultimate decision-maker.

Swafford, age 56, applied for a job as a scheduler. Wood, the maintenance manager, supervised the schedulers and had responsibility for hiring them. Wood's supervisor, Lewis, told Wood, "I do not want you to hire Mike Swafford because of his age and his wife has cancer and he would probably be missing too much work." When Wood pushed back about Lewis's comments, Lewis reprimanded Wood for "insubordination."

On a bright note regarding the company's culture, Wood then reported this incident to company executives. They investigated and reprimanded Lewis for his comments and behavior and told him that he was excluded from providing any input into who Wood ultimately chose to hire. Lewis sent e-mails apologizing for his comments and behavior, but also said that he "acted in good faith to help our aging workforce problem." Wood ultimately hired someone else who Wood believed to be a better-qualified candidate. Swafford sued, making allegations of discrimination under the Age Discrimination in Employment Act and Americans with Disabilities Act.

The court rejected Swafford's argument that Lewis's age and ADA comments tainted the hiring process, finding that Lewis's comments were not evidence of discrimination. Rather, the court said, "there was no question" that Wood was in charge of the hiring decision, not Lewis. The court characterized Lewis's comments as "stray remarks." Furthermore, the court stated that, "there is no direct evidence that Lewis played any role whatsoever in the decision to not hire Swafford." The EEOC argued that because of Lewis's responsibilities compared to Wood's, Lewis inherently tainted Wood. The court further rejected that argument, stating, "there is no evidence that Lewis had the requisite influence, control, or leverage over Wood's decision to not hire Swafford."

There are plenty of lessons learned in a case like this. First, that Lewis would feel confident arguing for the rejection of a candidate because of age and his spouse's cancer suggests a significant oversight in supervisory training. There are lawful questions employers may ask applicants if concerned about an applicant's long-term commitment and if concerned about an applicant's reliability due to family circumstances. However, expressing those comments as a basis for not hiring someone without having the questions and dialogue with the applicant crossed the line. Another lesson learned is how the company established a culture in which Wood felt compelled and comfortable to report Lewis's comments and behavior to upper management. It takes courage for an individual to report a senior member of the leadership team's actions which, in the employee's view, are inconsistent with the company's culture and legal responsibilities. Finally, the company took prompt, remedial action to be sure that Lewis understood what he should not say and do and that the decision-making process would move forward without a role for Lewis.

EEO Tips: EEOC Shows a Strong Interest in Pregnancy and Caregiver Responsibility Discrimination

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As a follow up to similar meetings held in 2007 and 2009, the EEOC on February 15, 2012, again solicited comments on the so-called "widespread" continuing problem of pregnancy discrimination and unlawful discrimination against other caregivers. After each of its previous meetings on the subject, the EEOC issued, respectively, the following publications: In 2007, it issued an "*Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities,*" and, in 2009, it issued some helpful suggestions entitled "*Employer Best Practices for Workers with Caregiving Responsibilities.*" Apparently, from the EEOC's viewpoint,

neither of these publications has effectively stemmed the tide of unlawful discrimination against caregivers. Ironically, however, according to the EEOC's own statistics, since FY 2008, the number of pregnancy charges received has actually declined each year from 6,285 in FY 2008 to 5,797 in FY 2011. Statistics as to discrimination against other caregivers is not reported.

Nonetheless, according to EEOC Chair, Jacqueline Berrien, "Pregnancy discrimination persists in the 21st Century workplace, unnecessarily depriving women of the means to support their families … Similarly, caregivers – both men and women – too often face unequal treatment on the job. The EEOC is committed to ensuring that job applicants and employees are not subjected to unlawful discrimination on account of pregnancy or because of their efforts to balance work and family responsibilities."

Concerns about caregiver discrimination from the EEOC's perspective might be justified by its findings several years ago and confirmed by the testimonies of most of the speakers at its hearing on February 15th. For example, several years ago (at its hearing in 2007), the EEOC had found that in 1970 approximately **43%** of women were in the workforce, while in 2005, that figure had grown to **59%**. Moreover, it found that **68%** of African-American women in the workforce had a child or children under the age of 3 years old. Similarly, **58%** of white women**, 53%** of Asian-American women, and **45%** of Hispanic women in the workforce had a child or children under the age of 3. Today, according to Emily Martin, V.P. of the National Women's Law Center, one of the speakers at the February 15th hearing, women now make up **47%** of the nation's workforce and are the primary or co-primary breadwinners in nearly two-thirds of families. She goes on to say that "because of this, women cannot afford to lose their job[s] or income due to pregnancy or childbirth."

Another speaker, Professor Stephen Benard of Indiana University, characterized pregnancy discrimination as a measurable **"motherhood wage penalty**" of as much as 5% after controlling for education, experience and other factors known to affect wages. He further stated that this "may be due to unconscious stereotyping of the capabilities of mothers and concluded that 'motherhood' constitutes a significant risk factor for poverty" and that possibly "the gender gap in wages may be primarily a motherhood gap."

But how does an employer, either wittingly or unwittingly, commit Caregiver Responsibility Discrimination (CRD)? According to a number of the speakers at the EEOC's hearing, the most obvious way is to base personnel actions on faulty generalizations and inaccurate stereotypes of the role of men and women with respect to caregiving which may somehow have crept into the employer's personnel policies and practices. For example, employers may limit the employment opportunities of female employees who have caregiving responsibilities by unlawfully refusing to promote them to higher paying managerial positions that may require moving to another city, by assigning them to dead-end positions where their absence from work supposedly would have less impact on the business, and by making unlawful inquiries during the hiring process as to marital status and/or child status. Such actions by an employer are referred to as building a "maternal wall" or even "glass ceiling" to limit a female employee's advancement. On the other hand, a married male employee who requests leave to carry out some caregiving responsibilities may encounter discrimination because of the popular assumption that females are better caregivers than men.

The tendency of employers to engage in this type of discrimination was recognized by Chief Justice Rehnquist in the case of *Nevada Dept. of Human Resources v. Hibbs*, (Sup. Ct, 2003). "The faultline between work and family is precisely where sex-based overgeneralization has been and remains strongest." Also, the EEOC in its ***Enforcement Guidance: Unlawful Disparate Treatment of Workers With Caregiving Responsibilities***, issued on May 23, 2007, summarizes on page 3 the matter of caregiving stereotypes as follows:

> "Employment decisions based on such stereotypes violate the federal anti-discrimination statutes, even when an employer acts upon such stereotypes unconsciously or reflexively. As the Supreme Court has explained, "We are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group. (*Thomas v. Eastman Kodak*, 1st Cir. 1999). Thus, for example, employment decisions based on stereotypes about working mothers are unlawful because" the anti-

discrimination laws entitle individuals to be evaluated as individuals rather than as members of groups having certain average characteristics." (*Lust v. Sealy*, 7th Cir. 2004).

This raises the question of how this new emphasis on Caregiver Responsibility Discrimination (CRD) relates to the **Family Medical Leave Act (FMLA**), which would appear to cover the same subject matter. Actually, they are parallel but not identical in coverage. The FMLA in effect creates a statutory entitlement to medical leave for family medical, caregiving purposes for up to 12 weeks a year to each employee where an employer has 50 or more employees. CRD addresses itself to discrimination by employers with 15 or more employees against employees who may need extended leave, possibly, beyond the 12 weeks granted by the FMLA in order to carry out their family caregiving responsibilities.

In addition to the FMLA, caregiving responsibility discrimination is prohibited in part by the Pregnancy Discrimination Act (ADA), the Americans With Disability Act (ADA) and, to some degree, the Equal Pay Act (EPA). The Pregnancy Discrimination Act directly prohibits discrimination against females on the basis of sex, since only females can get pregnant. Thus, an employer who refuses to promote an expectant mother because of her future caregiving responsibilities to her unborn child would be guilty of CRD. The ADA prohibits discrimination against an employee who "associates" with a person with a disability. In this case, an employer who assigns an employee, whether male or female, to a dead-end job because of their caregiving responsibilities to a disabled family member would be guilty of CRD as prohibited by the ADA. The EPA requires equal pay for persons who perform work requiring equal skill, effort and responsibility in the same establishment. Accordingly, it would be a violation of the EPA and a form of CRD to pay a female or a male with caregiving responsibilities less than an employee who has no such responsibilities for work requiring equal skill effort and responsibility in the same establishment.

CRD may also be manifested as a **hostile work environment** or **retaliation**. Under a hostile work environment scenario, an employee may be harassed by other employees or the employee's supervisor because of the need to be absent periodically for caregiving purposes. A pregnant female employee, for example, may be subjected to negative remarks about pregnancy in general or about the increased workload that others must bear because of her pregnancy leave. After pregnancy, the remarks may take the form of negative comments about production because of the employee's need to be absent periodically for nursing her infant child or for medical appointments for either the child or herself.

A caregiver employee who complains about negative comments, harassment or a hostile working environment because of his/her caregiving responsibilities may be very vulnerable to **retaliation** by the employer. Such employees often have much difficulty in balancing their work and their family responsibilities and an employer may see it as an act of benevolence to change their work schedules, reduce their working hours, or assign them to a less important position. However, the danger to an employer is that any of these actions might be found to be retaliation. Under the Supreme Court's holding in the case of *Burlington Northern & Santa Fe Railway v. White*, (Feb. 2006), the Court stated that "any action which might dissuade a reasonable worker (in this case a working mother) from making or supporting a charge of discrimination" would constitute unlawful retaliation. The court specifically observed that *"A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children."* Accordingly, the manner in which an employer handles harassment or a hostile work environment can be critically important.

EEO TIP: The EEOC's Guidance on Caregiver Responsibility Discrimination applies only to disparate treatment or intentional discrimination. It does not apply to disparate impact discrimination. Title VII does not directly prohibit discrimination based solely on parental or other caregiver status. It would not be a violation, for example, if an employer treated both working mothers and working fathers unfavorably (or for that matter, favorably) as compared to workers who are childless. However, it would be a violation under Title VII for an employer to discriminate against working mothers because of their sex even if it did not discriminate against working mothers who are childless.

As stated above, neither Title VII nor the ADA prohibits discrimination based solely on parental or caregiver status. Thus, unlawful CRD must be based on some aspect of caregiving **plus** sex, gender or retaliation. Accordingly, an employee's caregiving status does not shield him or her from an employer's adverse actions so long as those actions are not based on assumptions or stereotypes because of the employee's sex or gender. For example, an employer may reassign, downgrade or even terminate an employee based solely on the employee's poor job performance even if (at least for now) the performance in question was the result of the employee's caregiving responsibilities.

It is not clear whether the EEOC intends to seek some additional, specific statutory protection for pregnant employees and/or caregivers in general. However, it is logical to assume that the sheer number of Commission hearings on the subject (three within the last five years) are intended to gather information in support of some significant enforcement action. We will keep you posted on any future developments on this topic.

Decisions concerning potential Caregiving Responsibility Discrimination (CRD) will require careful consideration by employers after the EEOC fully implements its initiative in this area. If you have any questions or would like legal assistance in determining whether your firm is vulnerable to such a charge, please call this office at 205.323.9267.

OSHA Tips: Shaping Outcome of OSHA Visit

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.

Much has been written on the topic of "OSHA-proofing" workplaces or at least readying them to survive that dreaded inspection visit. Considerable overlap and agreement is found in the many writings on this topic that spell out common mistakes and recommended actions. Some of the important and commonly offered suggestions include the following:

Don't wait until OSHA is at your door to prepare for a site inspection. The "head-in-the-sand" approach is not a good idea. Efforts to fix or hide potential problems ahead of the compliance officer's plant walk-around are unlikely to succeed. Some employee will be only too happy to point out when a "problem" machine is taken off line prior to the area being inspected. While you can stall an inspection, for instance, require a warrant, don't expect enough time to create injury-illness records, training records, or required safety programs such as "lockout-tagout" or "hazard communication."

Don't miss the opportunity to make a good first impression. Generally, the first things the compliance officer will ask to see are your OSHA injury/illness records and various written programs. You are not off to a good start if you have difficulty in locating these. The ease with which you provide these and the general orderliness and appearance of the worksite will likely influence how the inspection visit progresses. Upon finding records in good shape and clean and orderly work areas, the compliance officer may be less inclined to turn over every rock during the inspection tour. On the contrary, expect the officer to be making copious notes should he or she have to duck, step over, and squeeze through work areas that are in disarray.

You should not make the mistake of failing to listen to employee safety concerns … and acting on those found to be valid. Any OSHA office will likely have a number of examples where inspections with sizeable penalties ensued after an employee went to OSHA following a failure of the employer to address his/her concern.

Another mistake that can have costly consequences is to have safety rules that are not enforced. It would seem to be a good approach to have only the rules you need and enforce the rules you have. Having rules that are only given lip service or those that are only casually enforced and having signs posted that are routinely ignored, outdated, or unneeded could likely undermine plant safety efforts. An employer should make sure that necessary safety rules are in place, but should not let them become confused with non-mandatory advisories and the like. Note that one defense against an OSHA citation is to show that an employee violated a relevant work rule that was clearly communicated and enforced.

Finally, while it is desirable to establish a good rapport with the compliance officer, it is not your job to identify problems or potential violations. Remember that he or she is obliged to propose citations for observed violations of OSHA's standards.

Wage and Hour Tips: Family and Medical Leave

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

On February 15, 2012, Wage and Hour published a Notice of Proposed Rulemaking (NPRM) to Implement Statutory Amendments to the Family and Medical Leave Act. The Act was recently amended to expand the military family leave provisions and to incorporate a special eligibility provision for airline flight crew employees.

The FMLA was amended in 2008 to provide an expanded leave entitlement to permit eligible employees who are the spouse, son, daughter, parent, or next of kin of a service member (National Guard, Reserves, or Regular Armed Forces) with a serious injury or illness incurred in the line of duty to take up to twenty-six workweeks of FMLA leave during a single 12-month period to care for their family member (military caregiver leave), and to add a special military family leave entitlement to allow eligible employees whose spouse, child, or parent are called up for active duty in the National Guard or Reserves to take up to twelve workweeks of FMLA leave for "qualifying exigencies" related to the call-up of their family member (qualifying exigency leave).

Recent statutory amendments expanded the FMLA's military caregiver leave and qualifying exigency leave provisions. The amendments also expanded qualifying exigency leave to eligible employees with family members serving in the Regular Armed Forces, and added a requirement that for all qualifying exigency leave the military member must be deployed to a foreign country.

The Airline Flight Crew Technical Corrections Act established a special FMLA hours of service eligibility requirement for airline flight crew members, such as airline pilots and flight attendants, based on the unique scheduling requirements of the airline industry. Under the amendment, an airline flight crew employee will meet the FMLA hours of service eligibility requirement if he or she has worked or been paid for not less than 60% of the applicable total monthly guarantee and has worked or been paid for not less than 504 hours during the previous 12 months.

The major provisions of the NPRM include:

- the extension of military caregiver leave to eligible family members of recent veterans with a serious injury or illness incurred in the line of duty;
- a flexible, three-part definition for serious injury or illness of a veteran;
- the extension of military caregiver leave to cover serious injuries or illnesses for both current service members and veterans that result from the aggravation during military service of a preexisting condition;
- the extension of qualifying exigency leave to eligible employees with covered family members serving in the Regular Armed Forces;
- inclusion of a foreign deployment requirement for qualifying exigency leave for the deployment of all service members (National Guard, Reserves, Regular Armed Forces);
- the addition of a special hours of service eligibility requirement for airline flight crew employees; and
- the addition of specific provisions for calculating the amount of FMLA leave used by airline flight crew employees.

Upon publication, interested parties are invited to submit written comments on the proposed rule at http://www.regulations.gov/. Only comments received during the comment period, which ends April 16, 2012, will be considered part of the rulemaking record.

Employers still need to be very diligent when confronted with employees who may be eligible for FMLA leave. Recently, I saw a couple of situations that could cause problems for an employer. In the first instance, an employee was returning to work from being on FMLA leave and the employer required a fitness for duty certification by the employee's medical provider stating the employee was able to perform his essential job functions. Upon receipt of the medical certification, the employer wished to have this verified by the employer's company appointed physician. The employer may seek clarification from the employee's health care provider regarding the health serious condition but cannot require the additional medical certification from the employer's preferred medical provider. Further, the FMLA bars employers from seeking medical certification from employees returning to work after "intermittent leave."

As we have previously discussed in this issue, the case of *Thom v. American Standard, Inc.* (6th Cir., Jan. 20, 2012) shows how an employer who fails to properly notify its employees about changes in the way it determines eligibility for FMLA can face a serious liability. The FMLA regulations require that the employee be given a 60-day notice of any change in the method of computing the 12 weeks. Since the employer failed to do so, the District Court awarded the employee back wages exceeding $100,000 plus attorney fees of almost $100,000.

In January 2012, the U.S. Third Circuit Court of Appeals held, in a Delaware case, that an individual's supervisor was personally liable under the FMLA. An office manager for a state agency missed a lot of work due to various illnesses. Her boss, in a written performance evaluation, stated that the employee "needed to improve her overall health…and start taking better care of herself." He placed the employee on a six-month probation, which required weekly progress reports and formal monthly meetings. At the end of six months, he recommended the employee be terminated and his bosses followed his recommendation. The employee filed suit under several statutes including the FMLA. The court concluded that supervisors can be considered as an "employer" and subject to FMLA liability when exercising supervisor authority over a complaining party and was responsible in whole or part for the alleged violation.

Even though the FMLA has been in effect for more than 15 years, employers are still finding it difficult to be in compliance with the statute. Consequently, I recommend that you review your FMLA policies and make a concerted effort to ensure that you are in compliance. If I can be of assistance, do not hesitate to give me a call.

2012 Upcoming Events

EFFECTIVE SUPERVISOR®

Huntsville – April 4, 2012
U.S. Space & Rocket Center

Montgomery – April 24, 2012
Hampton Inns & Suites, EastChase

Birmingham – September 18, 2012
Bruno's Conference Center, St. Vincent's

Huntsville – September 26, 2012
U.S. Space & Rocket Center

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

Did You Know…

…that over half of all mass layoffs which occurred during 2011 were in the temporary help services, manufacturing and construction sectors? According to the Bureau of Labor Statistics, 17.7% of all layoffs during 2011 were in manufacturing (184,757), which was substantially below the number laid off during 2010. Approximately 64% of those employers who laid off employees anticipated recalling some of those individuals, which BLS reports is the most positive indicator of the return to work of laid off employees in six years.

…that on February 1, 2012, a lawsuit alleging failure to pay interns violated the Fair Labor Standards Act was filed against the Hearst Corporation (*Wang v. Hearst Corp.* (S.D. N.Y.))? The case alleges that interns worked approximately 55 hours a week and that "unpaid interns

are becoming the modern day equivalent of entry level employees, except that employers are not paying them for the many hours they work." The complaint alleges that the interns do not qualify for unpaid intern status under Department of Labor regulations. A non-compensable intern classification must involve a structure where the internship is part of an educational training program, the intern is not performing productive work that would be performed by other employees and the employer does not gain economic benefit from the interns' efforts. The high youth unemployment rate (as high as 40%) has resulted in an increase of individuals who seek employment opportunities initially as an unpaid intern. Employers who do not follow DOL guidelines for a proper internship program are vulnerable to claims of state or federal wage and hour law violations.

…that the prohibition of retaliation for filing a wage and hour claim does not apply to an applicant for employment? *Dellinger v. Science Applications International Corp.* (Feb. 21, 2012). Dellinger alleged that Science Applications did not offer her a job when it learned that she had filed a wage and hour claim against her prior employer. The appellate court upheld the lower court's dismissal of the case, stating that only "employees" were protected from retaliation and, as an applicant, she was not an employee. The United States Supreme Court refused to hear the case, thus the appellate court's decision stands.

…that the focus of states on "misclassification" of workers recently included legislation that became effective in California? California is the twelfth state to pass a law addressing the issue of employee misclassification. California is focusing on industries where it believes there is widespread misclassification of workers, such as those providing services to the internet, residential construction and maintenance providers. The U.S. Department of Labor has reached a Memorandum of Understanding with those 12 states establishing a statutory and regulatory framework to address employee misclassification.

…that President Obama has proposed a substantial increase in funding for the National Labor Relations Board and a reduction in funding for the U.S. Department of Labor? According to the President's budget for Fiscal Year 2013, the NLRB will receive a 5% increase from its current funding. The President has requested $292.8 million for the NLRB, which currently receives $278.8 million. Interestingly, the NLRB does not project a meaningful increase in the number of unfair labor practice charges or requests for elections. The President's proposed funding for the U.S. Department of Labor would be a $600 million decrease (5%) to $12 billion. This would primarily relate to a reduction in the administration of unemployment benefits. The President's proposal for the EEOC is to increase its funding by approximately 3% for Fiscal Year 2013. Ironically, the EEOC forecasts well in excess of 100,000 charges to be filed during fiscal year 2013. Additionally, the EEOC is also responsible for federal sector employment discrimination claims, which have also risen.

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