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Your Workplace Is Our Work®

Inside this issue:

New Year Brings New Rules Requiring Employers to Evaluate Hiring Procedures

Over the past year, the federal government (and some state governments) have renewed scrutiny of employers' hiring practices. The amended Americans with Disabilities Act continues to grow in scope, and plaintiffs' attorneys and the EEOC are dusting off regulations about pre-employment medical exams and inquiries. And while employers reevaluate medical examination forms (which may not have been updated in the past 25 years) for compliance with the ADA, they also need to check them against the Genetic Information Nondiscrimination Act (GINA), and ensure that those forms don't seek prohibited information, and that they contain the required GINA disclaimer.

Another point of emphasis for the EEOC in 2013 will be the use of background information (especially criminal and credit checks) in the hiring process. But it's not just the EEOC who wants to complicate prospective employers' use of these tools: the Consumer Financial Protection Bureau presides over a technical set of regulations dictating releases, notices, and correspondence an employer must issue to an applicant/employee if it uses a third party to get background information. And, the CFPB just revised the summary of rights notice to be given to applicants and employees who are negatively impacted by background information.

If you have questions about complying with this latticework of laws, please join Whitney Brown and Jerry Rose on January 30, 2013, at 10 a.m., for a one-hour webinar: "What and When to Ask: Using Background Checks and Medical Exams in the Hiring Process." We'll focus on these big ticket changes, but we will also discuss best hiring practices and trends in employers' use of social media in the hiring process and some early legislative responses to it. Be on the lookout for registration information in your inboxes later this week.

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

Webinar – What and When to Ask: Using Background Checks and Medical Exams in the Hiring Process

January 30, 2013, 10:00 a.m. CST

"Right to Work" Works

December 11, 2012 was a remarkable day in our nation's labor history, as Michigan became our country's 24th right-to-work state. The reason why this is so remarkable is because 18.3% of Michigan's workforce is represented by unions. When this development is combined with Michigan voters rejecting a proposed labor amendment to the constitution to limit the repeal of right-to-work and other labor laws, and Wisconsin's rejection of labor's initiative to recall Governor Scott Walker, one can see that even in states with strong union membership numbers, voters rejected what unions claim to stand for.

Right-to-work evolves from Section 14(b) of the Taft-Hartley Act, passed in 1947. This provision of the law states that nothing in the federal law "shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by state or territorial law." Thus, whether an employer and union may agree to "union security" language (join or pay the equivalent of dues or fees or else face termination) is a matter of state law. In right-to-work states, such contract language is illegal.

Union security language helps unions in two ways. First, it serves unions' financial goals, because every represented employee must pay union dues or fees for representation (but not political purposes). Second, it enhances the union's strength in dealing with an employer, because all employees belong and are governed by the union's constitution. Unions have a legal responsibility to represent non-members who are part of the bargaining unit, so from a union's perspective, union security means they are paid by everyone to work for everyone.

Labor economists debate whether there is a correlation between a right-to-work environment and job enhancement. Factually, overall unemployment rates are lower in right-to-work states, but average worker wages are higher in non-right-to-work states. Regardless of the labor economic argument, the resounding message from Michigan—the international headquarters of the United Auto Workers Union and synonymous with the strength of organized labor—is that when voters have an opportunity to reduce the power of unions, they often do so.

NLRB Resumes its Pro-Labor Agenda

There was little NLRB controversy from July through November 2012, as the Board did not want to become a sideshow during President Obama's reelection campaign. Now that the election is over and labor spent over $400 million on the presidential and congressional campaigns, the NLRB payback to labor has resumed, most recently in overruling a 50-year precedent concerning dues checkoff.

In the case of *WKYC-TV, Inc.* (Dec. 12, 2012), the Board overturned the 1962 precedent first established by the Board in the case of *Bethlehem Steel*, which held that when a labor contract terminates upon its expiration date, the employer may terminate withholding union dues from employee paychecks. On December 12, the Board stated that the 50-year old precedent "should be overruled to the extent . . . that dues checkoff does not survive contract expiration under the status quo doctrine."

In *WKYC*, the employer several months after the contract's expiration notified the union that it would cease deducting union dues from employee pay. In overruling *Bethlehem Steel* and holding that the employer's actions were illegal, the Board applied the "status quo" doctrine, which is that an employer may not change the status quo unless either the union agrees to it or the employer bargains to impasse and then implements the change. The Board said, "Preserving the status quo facilitates bargaining by ensuring that the trade-offs made by the parties in earlier bargaining remain in place. Just as the employer continues to enjoy prior union concessions after the contract expires as part of the 'status quo,' so too the union continues to enjoy its bargained-for improvements . . ."

The Board noted that certain subjects do not survive contract expiration, such as the grievance and arbitration procedure for grievances arising after expiration, no-strike/no-lockout clauses and management rights clauses. The Board reasoned that those clauses all involve the "contractual surrender of statutory or nonstatutory rights." However, the Board said that

agreeing to a dues checkoff provision is not a waiver of the statutory right and, therefore, continues in effect as part of the "status quo" unless a union either agrees to a change or the employer implements on impasse.

The Board also added to its holiday season gifts to labor in the *Stephens Media, LLC* case, decided on December 14, 2012. The case involved an employer's termination of a union steward. The union requested the employer provide it with witness statements the employer gathered during the course of its investigation, and the employer refused. In ruling the employer's actions were illegal, the Board stated that the witness statements were not an attorney work product because they were not created in anticipation of litigation. Furthermore, the Board said that the employees who provided the statements were not assured that the statements would be confidential and did not request confidentiality.

Negligent Failure to Conduct Background Check?

Several states and the EEOC have focused on employer use of financial and criminal background information. This national focus has caused some employers either to discontinue the use of background checks or become exceedingly cautious when conducting them. The recent lawsuit of *Keen v. Miller Envtl. Grp. Inc.* (5th Cir., Dec. 10, 2012) is an example of what may occur if an employer does not conduct a criminal background check.

Miller was part of the Gulf Coast Deepwater Horizon cleanup. Aerotek, Inc. provided temporary employees to Miller to assist with the cleanup. Aerotek employee Keen alleged that she was raped by Aerotek employee Robertson. Aerotek and Miller did not conduct a background check. Had they done so, it would have shown that Robertson was convicted for robbery, cruelty to a child and contributing to the delinquency of a minor. It would have shown that Robertson was designated as a sex offender and should have registered. The background check would have also shown Robertson's arrests for battery, sexual battery, forcible rape and first-degree murder. Keen asserted that Miller and Aerotek had a duty to conduct a background check and were negligent for failing to do so.

The case arose out of Mississippi. The court stated that Mississippi law requires an employer "to exercise reasonable diligence to ascertain the competency of a prospective employee." The court observed that there is nothing in the work that Keen and Robertson were hired to perform that necessitated a criminal background check—they were hired to pick up tar balls along the beach. The court said, "If a criminal background check were necessary to screen for indicia that a manual laborer might assault a co-worker, it is difficult to envision a fact pattern in which a background check would not be necessary. Of course, the unanimous caselaw from around the country says that there is no such generalized duty on employers, to conduct pre-employment background checks on all new hires, irrespective of the particular circumstances of their prospective employments."

A duty to conduct a background check arises where others may be vulnerable to the employee due to the work environment, such as healthcare, home services and working at an isolated or secluded location. However, employers using temporary services even where those unique workplace situations do not apply may want to consider the requirement that a temporary service conduct a criminal background check of those employees it refers.

EEOC Sets Strategic Plan: An Agency in Search of a Mission

The Equal Employment Opportunity Commission on December 18, 2012 announced its strategic plan to be implemented by its offices throughout the United States. The plan focuses on six priorities:

1. Barriers to recruitment in hiring (background checks, ADA compliance; age discrimination).

2. Protecting the vulnerable workforce, such as immigrants, migrant workers and single parents.

3. Addressing and developing through litigation emerging employment discrimination issues.

4. Pursuing pay discrimination claims.

5. Enforcement and outreach regarding harassment issues.

6. Enhancing worker access to the EEOC.

The plan was passed by a 3-1 vote among the EEOC Commissioners. Commissioner Constance Barker voted against the plan, stating that she disagreed with the plan's focus "on targeted enforcement through investigation and litigation rather than prevention—as Congress intended." Furthermore, Barker disagreed with the Commission's continued policy of the EEOC General Counsel determining what lawsuits should be filed by the Commission, rather than the Commissioners approving of such litigation.

Although the EEOC's lawsuit filings are at one of its lowest points in history, the EEOC is making progress to file lawsuits against prominent employers nationally to educate all employers about best practices for compliance. For example, a $2 million settlement was achieved in the case of *EEOC v. Dillard's Inc.* (Dec. 18, 2012), over a Dillard's policy that required employees to disclose a medical condition when using employer sick leave benefits. This case initially arose out of one Dillard's store, but expanded into a national investigation when the EEOC learned that Dillard's terminated employees at the end of their medical leave if they were unable to return to work. Over 300 employees nationally were terminated under that policy. Such a policy violates the Americans with Disabilities Act, which requires an employer consider as a form of reasonable accommodation a leave of absence beyond those provided as a matter of policy.

ADA charges are rising faster than any other discrimination claim nationally. The two areas the EEOC is focusing on regarding ADA claims are an employer's failure to accommodate, including during the hiring process, and employer policies with automatic discipline or discharge provisions related to attendance and leave of absence. Remember that reasonable accommodation is an individualized, case-by-case assessment, and includes considering an exception to attendance and leave policies.

NLRB Tips: Post-Election Outlook at the NLRB – What to Expect in Months Ahead

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. 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. Mr. Rox can be reached at 205.323.8217.

It will hardly be a surprise if the Board's aggressive enforcement of the Act continues unabated for the foreseeable future. This article summarizes some broad areas of concern where the Board will continue to focus its attention in the coming months. In addition, NLRB administrative initiatives and the Board members' appointment status will be reviewed.

Before the NLRB can continue to change its operational procedures and practices, it first must manage the pending judicial challenges to both its rulemaking proposals and the recess appointments of Board Members Richard Griffin and Sharon Block. Griffin's and Block's recess appointments are scheduled to expire in December of 2013. Chairman Mark Pearce's term expires August 23, 2013. Brian Hayes's term, the sole Republican on the Board, expired December 16, 2012. As of this writing, there is no word on a possible replacement for Mr. Hayes.

Board Recess Appointment Issue:

Numerous judicial challenges to the Administration's recess appointments at the NLRB are currently winding their way through the federal courts. On December 5, 2012, the D.C. Court of Appeals heard oral argument on the validity of President Obama's January 2012 recess appointments. (*Noel Canning Div. of Noel Corp. v. NLRB,* D.C. Cir., No. 12-1115). The broader, constitutional, issue at stake is whether the President may use his appointment powers without the advice and consent of the Senate, at a time when the Senate did not consider itself in recess. If the appointments are found to be improper by the Circuit Court, then the Board decisions in which the recess appointees participated would be invalid until a properly constituted quorum was achieved. Needless to say, much uncertainty would follow such a

ruling, resulting in instability in national labor relations policy.

Counsel for Senate Minority leader Mitch McConnell (R-Ky.) and 41 other Republican senators argued that the President's recess appointments were illegal because the Senate was holding pro forma sessions to avoid a "recess" and thereby block recess appointments. In effect, the Senate contends that the recess appointments constituted an "end-run" around the advice and consent requirements of the Constitution, and constituted an impermissible power grab by the President. Senate counsel maintained that, should the court approve the recess appointments under the instant circumstances, it would be allowing the executive branch to switch from a "break the glass in emergency" measure into the "main route" for presidential appointments.

Contrary to the Senate and Noel Corporation's position, the executive branch, through the Justice Department, argued that the Senate was, in reality, in a continuous recess after mid-December of 2010, despite the pro-forma sessions. The Justice Department submitted that Senate sessions that lasted only a few seconds were a "constitutional nullity."

On November 30, 2012, the Circuit Court of Appeals for the Seventh Circuit heard arguments in two consolidated cases (*Richards v. NLRB*, No. 12-1973, and *Lugo v. NLRB*, No 12-1984) that raised the appointment issue. On December 26, 2012, the Seventh Circuit issued its decision in *Richards*, avoiding a merit determination on the quorum issue by finding that the petitioners/ employees (Richards and Lugo) suffered no injuries from the NLRB rulings they appealed and that the employees lacked standing to obtain court review of the recess appointments. Richards and Lugo, among other employees, had objected to the unions' requirement that union dues objectors annually renew their objections to the payment of dues. In commenting on the lack of injury, the Court observed:

> [Employees] either renewed their objections annually under protest or were never required to renew their objections at all, and so their only injury was the burden or threat of having to renew their objections year after year.

The unions failed to appeal the Board's finding that the notification requirement policy was unlawful, and thus the employees "simply suffered no injuries" that could be remedied on appeal.

Regardless of the finding in *Richards*, other court challenges to the NLRB appointments are pending. The issue has also been raised and briefed in four cases pending before the Third and Fourth Circuit Courts.

Ultimately, this matter appears headed for the Supreme Court of the United States. It seems probable that the meaning of a legitimate Congressional "recess" will be defined by the Court. When talking to several high-ranking Agency officials about the recess appointment issue, I sense a palpable concern that the President's position on the validity of the appointments is far from solid, and that when this issue reaches the Supreme Court, it is likely, if not probable, that the Court as presently constituted would find the appointments to be invalid.

Once the judicial challenges are resolved concerning NLRB appointments, expect the Democrat Board majority to continue its assault on existing Board precedent, both through rulemaking and the litigation process.

Regional Office Consolidation/Streamlining

A re-organization of the Agency's field offices went into effect December 10, 2012. The consolidation of some Regional offices will result in a reduction in field offices from 32 to 28.

- Region 34 (Hartford, CT) will become a sub-region of Region 1 (Boston, MA)
- Region 26 (Memphis, TN) will be designated a sub-regional office of Region 15 (New Orleans, LA)
- Region 17 (Overland Park, IL) will become a sub-region of Region 14 (St. Louis, MO)
- Region 11 (Winston-Salem, NC) will be a sub-region of Region 10 (Atlanta, GA)

Supervision of a resident office in Nashville will be transferred to Region 10 in Atlanta. The Little Rock resident office will fall under the supervision of Region 15 in New Orleans. Supervision of a sub-regional office in Peoria will be transferred to Region 25 (Indianapolis, IN) from Region 17 (Overland Park, IL)

While the Agency studied the physical consolidation of the two Los Angeles offices (Region 31), it concluded that the traffic and geographic expanse of the Los Angeles metropolitan area would prove problematic to a merging of offices and too disruptive to both the Agency's mission and its staff.

The Agency's FMCS Mediation Program

As part of its ongoing effort to encourage the settlement of cases, the NLRB has contracted with the Federal Mediation and Conciliation Service (FMCS) to provide mediators to parties who participate in the Board's alternative dispute resolution program. The efficacy of this program remains open to question.

Judicial Challenges to the Notice Posting Rule/ Revisions in R-Case Election Procedures:

Both the employee rights poster (which requires all employers under the NLRB's jurisdiction to post a notice informing employees of their rights to unionize and/or engage in protected, concerted activity) and the revisions to the Board's election procedures (known as the "quickie" or "ambush" election provisions), are both stalled by court ordered injunctions.

The election rule changes, which were scheduled to take effect April 30 2012, eliminated some roadblocks between employees deciding to file a petition to unionize and the holding of a union representation election. Prior to the changes, disputes about who could vote in the election were heard by the Agency before the election. Union side attorneys contend that those hearings delayed elections for too long, dragging out the process to the point that employees' desire to unionize was compromised. The new rules postpone most issues/hearings until after the election, a change that will dramatically shorten the time between the filing of the petition and the conduct of the election.

Expect this litigation to be resolved in the spring of 2013. Should the NLRB ultimately prevail, look for the Agency to move ahead with implementation of even more election rule changes, which will expand on the currently proposed changes. LMV will keep you posted on developments in these areas.

Court/Legislative Challenges to *Specialty Healthcare*

The election rule changes, coupled with the decision in *Specialty Healthcare,* represent a significant challenge to employers. There have been numerous objections to the Board's new paradigm under *Specialty Healthcare*. Several *amici* briefs have been filed both before the Circuit Courts (6th and 4th Circuits) and the NLRB. These cases are currently pending.

- In June of 2012, the NLRB urged the U.S. Sixth Circuit to uphold the standards enunciated in *Specialty Healthcare*. The Board argued it merely codified the old standard - not created a new one. The Board further asserted that it is required only to approve an appropriate unit – not the best unit or one that is most convenient for the employer.

- Employers have argued that the new standard represents a "sea change" that impacts all employers falling under the Board's jurisdiction and potentially makes every job classification (i.e., job title) a viable bargaining unit, essentially delegating unit determination to the petitioning unions.

This decision, if it stands, coupled with the change in procedures governing NLRB elections, constitute substantial risk to employers in the future who face unionization campaigns.

The Push to Expand Protected, Concerted Activity Protections Will Continue Unabated

An activist National Labor Relations Board intends to expand its regulatory reach in the in the area of protected concerted activity (PCA). Partially in response to the Court ordered injunction delaying the implementation of the Agency's notice posting rule, referenced above, the Board has launched a website (in June of 2012) outlining typical scenarios involving concerted employee action

that would be protected under the Act. In effect, the prosecutorial agency is advertising and "soliciting" business by explaining to employees how to protect themselves from retaliatory actions by an employer should they complain about working conditions. Board Chairman Mark Pearce stated:

> The right to engage in protected concerted activity is one of the best kept secrets of the National Labor Relations Act, and more important than ever in these difficult economic times. Our hope is that other workers will see themselves in the [highlighted cases] and understand that they have strength in numbers.

The potential exists for the Board to expand the use of injunctive relief in appropriate PCA cases where an adverse employment action taken against an employee has a significant "chilling effect" on employees voicing complaints about wages, hours, or other working conditions. Look for developments in this area should an appropriate test vehicle (from a factual standpoint) arrives before the General Counsel.

Statistical Evidence of Uptick in PCA Cases

Preliminary anecdotal and statistical evidence indicates that the Agency's efforts to raise its profile regarding PCA charges have not gone unrewarded. In talking to Region 10 office personnel, there is a sense that most of the current case filings that are found meritorious have involved concerted activity charges and overly-broad employer policies that the Region have concluded tend to "chill" employees' Section 7 activity. In other words, the Region admits there is a shortage of ULP charges being filed that involve traditional union organizing activity.

In Region 10's sub-regional office in Winston-Salem (Region 11), fully twenty-five percent (25%) of all category 3 charges filed in FY 2012 have either involved either PCA discharge allegations or allegations that employers' work rules are overly-broad and impinge on Section 7 activity.

Nationwide, the evidence of increased PCA charge activity is impressive, and is statistically significant. Between 2006 and 2012, total C-case intake dropped from 23,091 to 21,624 charges filed, more than a **6%** drop. Within that statistic, 8(a)(3) charges (those most associated with traditional union activity) declined from 7,205 charges filed to only 6,073 (almost a **16%** drop in 8(a)(3) filings).

During the same time period, PCA filings went up – from 1,452 filings in 2006 to 2,243 in 2012, over a **50%** increase in such case filings.

PCA filings nationwide, since the Agency push began, increased as a percentage of c-case total filings by approximately **4%,** despite the drop in overall unfair labor practice filings, and constituted **10.37%** of the NLRB's total case intake by FY 2012.

Social Media Issues Will Continue at the Forefront of the Agency Agenda

At a recent ABA meeting in Atlanta, Georgia, Acting General Counsel Lafe Solomon told attendees that the right of employees to engage in concerted activity for their mutual aid or protection is "embedded" in federal labor law and that the Board would continue to focus on social media to adapt concerted activity principles to social media platforms.

The Board intends to continue to scrutinize facially neutral employer policies regulating the use of social media to determine if they are "overly-broad" and whether they tend to chill employees' right to engage in protected, concerted activity (PCA). Indeed, Solomon admitted that most, if not all, recently reviewed social media policies written to control communications among employees have been found by the Agency to be overbroad and unlawful.

Thus it is important for employers to review their social media policy to ensure that their policy, as written, will not be construed as chilling employee rights to engage in protected, concerted activity.

Other Areas of Agency Scrutiny:

- Board review of "at-will" provisions will continue. On October 31, 2012, the NLRB Division of Advice found two at-will provisions lawful, applying the "reasonably construe" analysis used in social media cases.

Careful drafting of "at-will" policies will avoid running afoul of the NLRB's new approach in this area of the Act's enforcement.

- An employer's "blanket" confidentiality requirements will continue to be struck down by this Board. Employers must now demonstrate a "legitimate need" for confidentiality during internal workplace investigations.

- *D.R. Horton* and the legality of private/mandatory arbitration agreements are still up in the air. This topic has been extensively vetted in previous LMV Employment Law Bulletins in the January and October 2012 issues. Expect this issue to reach the U.S. Supreme Court by late 2013 or early 2014.

EEO Tips: EEOC's Biggest Cases Filed and Biggest Cases Settled in Fiscal Year 2012

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.

According to statistics found in the EEOC's preliminary **Performance and Accountability Report** issued last month, concerning its new **Strategic Enforcement Plan**, FY 2012 was a banner year with respect to the processing and resolution of charges through the administrative process. It shows that **99,412** charges were filed, **111,139** charges were resolved and **$365.4 million** in monetary benefits, the highest amount ever, was collected on behalf of charging parties and/or affected class members. However, the picture was not so bright with respect to the agency's litigation program. Early reports indicate that only **122** merit lawsuits were filed during FY 2012,(as compared to 261 merit suits in 2011), and only **$44.2** million was reported to have been obtained on behalf of charging parties and/or affected class members. This was the lowest amount reported from this source in at least the last 10 years. Incidentally, the number of merit cases resolved was not shown in the report.

However, in keeping with its systemic program, the EEOC did file a significant number of nationwide lawsuits on various issues and the EEOC did obtain some comparatively large settlements to resolve a number of cases it had been litigating. The following in our judgment is a summary of the most noteworthy cases filed and a similar summary of the cases from which the EEOC obtained the largest settlements during Fiscal Year 2012 as reported by the agency.

EEOC's Biggest Cases Filed in FY 2012

- *EEOC v. Mavis Discount Tire, Inc., et al.*, No. 12-CV-0741(JGK)(GWG), Southern District of New York, filed on January 31, 2012. In this case, the EEOC alleged that Mavis had violated Title VII by refusing to hire women for any of a variety of positions, even though in many instances they had superior qualifications. The specific positions at issue were in the Defendant's stores and service centers and included tire installers, mechanics, assistant managers, managers and related positions. The EEOC alleged that since at least 2008, only one woman had been employed in any of these positions out of approximately 800 employees holding such positions. Also, the Commission alleged that out of some 1,300 hires made between 2008 and 2010 for these positions, not one was a female. According to the EEOC, the potential affected class included all females who had applied and were not hired because of their sex for any of the positions in question during the relevant period. The EEOC seeks to recover past and future wages for all female applicants who were discriminated against because of their sex. This lawsuit has not been resolved and is still in court.

- *EEOC v. Texas Roadhouse*, No. 1-11:cv-11732-DJC, District of Massachusetts, filed on October 3, 2011. In this case, the EEOC alleged that Texas Roadhouse, a national restaurant chain, had violated the ADEA by engaging in a nationwide pattern or practice of age discrimination in hiring "front of the house" employees, since 2007. The

class of "front of the house employees" allegedly discriminated against specifically included servers, hosts, bartenders, and other public, visible positions at the Defendant's various chain restaurants nationwide whom were over the age of 40 years. According to the EEOC, Texas Roadhouse instructed its managers to hire younger job applicants for all of its restaurants and consistently emphasized youth when training managers about hiring employees for the positions in question. Among other things, the EEOC asserted that all of the images of employees in the Texas Roadhouse Training and Employment Manuals were of young people. This lawsuit has not been resolved and is still in court.

- *EEOC v. Bass Pro Outdoor World, LLC* (Bass Pro), No. 4-11-CV-3425, S.D. of Texas, filed on September 21, 2011. (Service of Complaint in FY 2012). In this case, the EEOC alleged that Bass Pro, a nationwide retailer of sporting goods, sporting apparel and miscellaneous other products, engaged in a pattern or practice of failing to hire African-American and Hispanic applicants for positions in its retail stores nationwide and retaliated against employees who opposed the allegedly unlawful discriminatory practices, all in violation of Title VII. Among other things, the EEOC also claims that Bass Pro unlawfully destroyed or failed to keep personnel records or documents related to employment applications and internal discrimination complaints. This lawsuit has not been resolved and, also, is still in court.

EEOC's Biggest Case Settlements in FY 2012

- *EEOC v. Yellow Transportation, Inc. and YRC, Inc.* (Yellow and YRC, Inc.), No. 09-CV-7693, N.D. of Illinois. This suit was resolved by a Consent Decree filed June 29, 2012 totaling **$11,000,000** in back pay and damages to 324 African-American employees. The EEOC alleged that Yellow and YRC, Inc. had violated Title VII by subjecting the African-American employees in question to a hostile working environment, discriminatory terms and conditions of employment and racial harassment at their Chicago, Illinois Ridge facility. Specifically, the disparate treatment was allegedly directed at African-American dockworkers, hostlers, janitors, clericals and supervisors who worked at the facility in question between 2004 and September 2009. The Decree also includes a group of 14 other black employees who initially filed a class action suit under Section 1981 in October 2008 against Yellow Transportation, Inc., No. 08-CV-5908, which was consolidated with the current lawsuit for purposes of settlement.

- *EEOC v. WRS Environment and Infrastructure, Inc.* (dba WRS Compass), No. 09-cv-4272, N.D. of Illinois. The suit was resolved by a Consent Decree filed on August 27, 2012 totaling **$2,750,000** in back pay and damages payable to a total of 11 employees. The EEOC's complaint alleged that WRS had violated Title VII by subjecting 7 blacks and 4 whites, who had associated themselves with the black employees, to a hostile work environment including harassment and retaliation. The alleged harassment against the black employees included multiple hangman's nooses, repeated use of the "N-word," and less favorable assignments and equipment. The 4 white employees who supported the black charging parties were physically threatened by other white employees. The terms of the consent decree providing prospectively for additional racial harassment policies applied nationwide to the company.

- *EEOC v. Fry's Electronics, Inc.*, No. 2:10-CV-1562-RSL, District of Washington. The EEOC alleged that Fry's had violated Title VII by failing to stop the sexual harassment perpetrated against one female employee and the subsequent retaliatory discharge of the supervisor who "stood up for her" in confirming the harassment. The suit was resolved by a Consent Decree filed on August 30, 2012 totaling **$2,300,000** in back pay, damages and court-ordered sanctions including a penalty of $100,000. The settlement was the highest ever on a per-claimant basis because of certain court-ordered discovery sanctions. Under the terms of the three year consent decree, Fry's is required to provide appropriate training on sexual harassment and implement other measures to prevent sex discrimination.

- *EEOC v. Blockbuster, Inc.*, No. RWT-07-CV-2612, District of Maryland. The EEOC alleged that Blockbuster had violated Title VII by subjecting temporary female employees to sexual harassment, retaliating against them for resisting sexual advances and complaining, and subjecting Hispanic temporary employees to national origin and race harassment. According to the EEOC, the alleged discrimination took place at one of Defendant's distribution centers in 2004 and 2005. The suit was resolved by a consent decree entered on December 14, 2011 totaling **$2,000,000** in back pay and other monetary benefits payable to a class of 7 female employees, four of whom were Hispanic. Blockbuster, Inc. filed a bankruptcy petition during the pendency of the action. Thus, in effect, this case is not totally resolved.

Actually, the EEOC resolved four additional cases by consent decrees which required the payment of $1,000,000 or more during FY 2012. Thus, notwithstanding the relative small amount of total monetary benefits obtained (that is, $44.2 million) in FY 2012, the amount obtained per case may be a source of encouragement for the EEOC. However, to employers, it should be a not-too-subtle warning that the EEOC is looking for quality in the cases it files, not the quantity.

If you have any questions about any of the foregoing cases, please feel free to call this office at 205.323.9267.

OSHA Tips: OSHA and Fall Hazards

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.

As noted by the National Institute of Occupational Safety and Health, "Falls are a persistent hazard found in all occupational settings. A fall can occur during the simple acts of walking or climbing a ladder to change a light fixture or as a result of a complex series of events affecting an ironworker 80 feet above the ground."

Addressing the hazard of falls has been, and remains, a high priority of the Occupational Safety and Health Administration. Fall prevention requirements rank near the top each year among the most frequently violated OSHA standards. The continuing high number of fatalities in construction work keeps the industry a principal target of the agency's inspections. About forty percent (40%) of workplace deaths are in this industry and about one-third of these are due to falls.

While the highest frequency of fall-related fatalities are in the construction sector, fall hazards and resultant injuries are by no means limited to construction. The highest counts of nonfatal fall injuries are in the health services and the wholesale and retail industries. There were 666 fatalities resulting from falls which account for about fourteen percent (14%) of all fatal work injuries. Falls to a lower level account for about fourteen percent (14%) of these deaths. It was also noted that about one in four of the latter involved falls of less than ten feet. Such incidents range from falls of hundreds of feet from communication towers to falls from the bottom step of a stepladder.

Same level falls due to slips or tripping, while rarely fatal, take a significant toll. Many back injuries may be attributed to slipping on walking surfaces.

OSHA's ongoing emphasis on fall hazards may be witnessed in the agency's press releases. These often announce citations with significant penalties that are issued to employers for failing to comply with fall protection provisions.

OSHA has numerous standards in construction and general industry that address fall protection. Examples of these frequently found in violation by OSHA include the following:

29 CFR 1910.23(c)(1) – This standard requires that every open sided floor or platform that is four feet or more above the adjacent floor or ground level be guarded by a standard railing.

29 CFR 1910.22(a)(1) – Known as the housekeeping standard, this provision calls for maintaining passageways, storerooms, and service rooms in a clean and orderly state.

29 CFR 1926.501(b)(1) – This construction industry standard requires that each employee on a walking/working surface with an unprotected edge which is six feet or more above a lower level must be protected from falling by a guardrail, safety net, or personal fall arrest system.

29 CFR 1926.503(a)(1) – This construction standard requires that an employer provide a training program for each employee who might be exposed to fall hazards.

Violations involving fall hazards meet with a firm enforcement stance by OSHA as noted in a recent press release. A citation with proposed penalty of $136,000 was issued to a masonry contractor. This occurred when a worker was injured by falling from a sixth floor balcony while attempting to access a scaffold.

Fall hazards in construction have been an ongoing focus of agency enforcement. In August 2012, the Atlanta region announced increased enforcement efforts in those work activities posing significant risks of falls.

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.

Even though the Fair Labor Standards Act (FLSA) has been in effect for over 70 years, there has been more litigation filed during 2012 than in any previous year. The area that continues to generate most of the litigation involves the exempt status of certain employees. During this year, the U.S. Supreme Court heard an appeal regarding pharmaceutical representatives. The instant case dealt with drug sales representatives, and the Court found the employees to be exempt as outside sales employees. The Supreme Court's ruling, which benefited employers, potentially affected some 90,000 employees.

Another area where there continues to be much litigation is whether the donning and doffing of protective gear is compensable. Section 3(o) of the FLSA allows for the exclusion of time spent in changing clothes if done so by custom or practice. Thus, the primary issue is determining whether personal protective gear such as uniforms, aprons, etc., is clothing. Earlier in this century, Wage and Hour had taken the position that these items were in fact clothing and thus the employer was not required to pay for this time. In June 2010, Wage and Hour issued an Administrator's interpretation that stated that such items were not clothing and thus the time was compensable. However, at least two Circuit Courts of Appeal have held that these items are clothing and therefore the donning and doffing time was not compensable. Another issue that comes into play is that Wage and Hour opined that the time spent walking from the change house to their work site is compensable as the clothes changing began the employee's continuous workday. In one recent decision, a circuit court held that while the clothes changing was not compensable, the walking time would be compensable if the time was more than "de minimis."

Although there were several bills introduced in Congress to increase the minimum wage, none were passed and typically those measures come about in election years. Thus, I doubt there will be an effort to increase it this year. However, 20 states have their own minimum wage that is greater than the Federal rate and three cities have a minimum wage of at least $10.00 per hour. Alabama is one of the five remaining states that do not have a state-mandated minimum wage.

The Department of Labor continues to take a hard line regarding enforcement of the child labor provisions of the FLSA. The statute allows for the assessment of Civil Money Penalties of up to $100,000 in the case of the death or serious injury of a minor that is illegally employed. If you employ any person under the age of 18, you should carefully review both the federal and state regulations. Alabama also has some very strict child labor regulations that closely track the federal regulations and

are in some cases more restrictive than the federal regulations.

Wage and Hour is continuing to work with the Internal Revenue Service and several state agencies to coordinate their enforcement efforts to ensure that independent contractors are correctly classified. There is also a little known provision in the FLSA that prohibits the shipment of goods in interstate commerce that were produced by employees who were not paid in compliance with the Act. Recently, I have seen where Wage and Hour has been using this provision against fruit and vegetable growers to prevent the shipment of perishable items such as apples and blueberries. Because of the perishable nature of the items, the employers basically have to acquiesce to Wage and Hour's demands in order to be able to ship their products.

I have also been told recently that Wage and Hour is testing a pilot program where they will not only seek back wages when they conduct an investigation, they will also be seeking liquidated damages in an amount equal to the amount of back wages that are owed. They have been using this procedure for several years when they are involved in litigation but, if they institute this in administrative investigations, they will be attempting to increase the liabilities of employers to a new level.

Several months ago, I had mentioned an Executive Order issued by the President in 2009 regarding employees working on government contracts subject to the McNamara-O'Hara Service Contracts Act. The order requires that a successor contractor offer the employees of the predecessor contractor the right of first refusal to continue working on the new contract. On December 21, 2012, Wage and Hour published the final regulations which will become effective on January 18, 2013. If you have employees working on SCA contracts, you should obtain a copy of the regulations, which are available on the Wage and Hour website, to ensure that you are complying with the new requirements.

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

2013 Upcoming Events

WEBINAR – What and When to Ask: Using Background Checks and Medical Exams in the Hiring Process

January 30, 2013, 10:00 a.m. CST

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 post-termination compliments about a terminated manager may be evidence to show age discrimination? *Kragor v. Takeda Pharm. Am. Inc.* (11th Cir., Dec. 20, 2012). Employee Kragor sold pharmaceuticals to physicians. She was terminated for allegedly giving improper gifts to a physician. Kragor's husband was a Delta pilot and a good friend of the physician. Kragor gave the physician free passes on Delta from her husband, but said that she was the "messenger" and it was not a gift from her. The individual who terminated Kragor told the physician that Kragor was "an exceptional employee." The court said, "When the employer's actual decisionmaker, after terminating an employee for misconduct, says without qualification that the employee is exceptional . . . that contradiction – when combined with a prima facie case – is enough to create a jury question on the ultimate issue of discrimination."

…that a decisionmaker's lack of knowledge of a supervisor's ageist comments was insufficient to overcome an age discrimination claim? *Alfonso v. SCC Pueblo Belmont Operating Co. LLC* (D. Colo., Dec. 17, 2012). Belmont Lodge provided assisted living and nursing care to its residents. Employee Alfonso was terminated after a resident complained about her behavior. Alfonso alleged that the supervisor who recommended her termination frequently made ageist comments to Alfonso, including that she was "as old as the woodworks" and "an old penny that keeps coming back." Alfonso also alleged that her supervisor told her she was too old for the job. In permitting the case to

move to trial, the court said that although there is no evidence connecting the ageist comments to her termination, “plaintiff does allege that remarks about her age were made on a continuous basis during the months immediately preceding her termination and that many of them pertained to her ability to perform her job or contained termination threats.” Because her supervisor was instrumental in her termination, the court determined that the ultimate decisionmaker’s lack of knowledge of these comments did not protect the employer from the age claim.

…that an employer terminated employees improperly due to Facebook postings which violated employer harassment policies? *Hispanics United of Buffalo Inc.* (N.L.R.B., Dec. 14, 2012). A fellow employee criticized other employees for not responding to clients promptly and failing to show sensitivity to client concerns. An employee reacted to the criticism by posting her objection on Facebook and inviting other employees to join in. The employer investigated and determined that the postings violated employer policies on bullying and harassment. However, the NLRB ruled that the employees were engaged in concerted activity under the National Labor Relations Act for mutual aid or protection and, therefore, the terminations were illegal, even if harassing. Note the employer’s dilemma: Enforce its no bullying, no harassment policies in response to social media posts, and risk unfair labor practice charges of interfering with employee rights.

…that the fixed salary for fluctuating workweek pay system may not apply retroactively for employees misclassified as exempt? *Blotzer v. L-3 Commc’ns Corp.* (D. Ariz., Dec. 6, 2012). The case involved employees who were improperly classified as exempt from overtime. They worked as field inspectors for the employer and the employer concluded that they were exempt as administrative employees. The employees alleged that sometimes they worked 86 hours a week. The employer claimed that back pay should be based upon the fixed salary for fluctuating workweek “half-time” pay calculation method, which is substantially less than owing employees time and a half. The court rejected the employer’s argument, stating that although there is a difference of opinion among courts in whether applying fixed salary for fluctuating workweek is a permissible approach for back pay, there is no prior decision in the judge’s circuit (9th) and a misclassification may not be corrected through retroactively applying the fixed salary for fluctuating workweek method.

…that the U.S. Supreme Court has declined a request to temporarily ban a provision under the Affordable Care Act that would require all employers to provide health insurance coverage for emergency contraceptives, including the "morning-after-pill?" *Hobby Lobby Stores, Inc., et al., v. Kathleen Sebelius, Secretary of Health and Human Services, et al.*, 568 U. S. __, 81 U.S.L.W. 3286 (2012). Hobby Lobby Stores and Mardel, Inc., a chain of Christian bookstores, sued the federal government, asking that they be excused from this requirement because providing coverage for these contraceptive services would be against their religious beliefs. The petition to the Supreme Court came after a federal district court ruled against the companies, holding that the exemption for churches and other religious organizations from the birth-control provisions did not apply because "Hobby Lobby and Mardel are not religious organizations." In rejecting the petition, Justice Sonia Sotomayor, the Justice responsible for handling emergency appeals from the 10th Circuit, said the applicants failed to meet "the demanding standard for the extraordinary relief." Justice Sotomayor specified that she was not ruling on whether the constitutional challenge would ultimately succeed, but that the companies must bring their challenge in the lower courts and return to the Supreme Court, if necessary, following a final judgment. Company officials say they must decide whether to violate their faith or face a daily $1.3 million fine beginning January 1, 2013, if they ignore the law. The Supreme Court recently remanded a similar lawsuit back to the Fourth Circuit for a review of the merits of the case, which challenges the individual and employer mandates. *See Liberty University v. Geithner*, No. 11-438, 2012 U.S. LEXIS 9594 (2012).

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