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Four More Years: What Employers Should Expect

As President Obama begins his second term of office, we expect an acceleration of trends we saw at different times during the course of his initial term. The Republican House and Republicans in the Senate will have to make a strategic decision regarding to what extent they oppose agency workplace initiatives. Pundits referred to Mitt Romney as the "elected president of white males older than 50." If the Republican party wants to project itself as more inclusive, then pressure will be on Congressional Republicans to "walk the walk" of inclusion when regulatory agencies initiate their aggressive enforcement actions and legislation is proposed to further influential voting segments, such as dealing with immigration rights. We anticipate the following:

1. EEOC. Although approximately 25% of all discrimination charges involve claims of disability discrimination, 36% of the EEOC's lawsuits filed last year claimed ADA discrimination. That is the hot issue the Commission will push. They will focus on expanding the definition of a disability to even reach the point of including pregnancy. They will focus on employer hiring practices, whether there is a bona fide "interactive process" to try to accommodate an individual with a disability and the EEOC will focus on employer policies that apply automatically without consideration of accommodation for a disability, such as no fault attendance policies and termination based on exceeding leave of absence policies.

2. NLRB. The agency has resumed its efforts to serve as a division of the AFL-CIO. The Board is down to three members, all Democrats – Richard Griffin, Sharon Block and Chair Mark Gaston Pearce. (Read further in this Bulletin for our discussion of the recent ruling regarding the unconstitutionality of the President's recess appointments to the NLRB.) Expect the Board to continue its incremental efforts to enhance the opportunities for unions to organize and avoid decertification, and also to expand its efforts to promote protected, concerted activity rights among the non-union workforce throughout our country.

Ultimately, we think the NLRB's notice posting rule will not become effective, but the NLRB's "ambush election" rules will become effective. Both have been enjoined and those cases are now at the appellate court level. In essence, litigation over notice posting, ambush election rules and recess appointments can potentially delay for years and derail the Board's pro-labor agenda.

3. U.S. Department of Labor. When Labor Secretary Hilda Solis announced her resignation, the most vocal and early praise came from Rich Trumpka, President of the AFL-CIO. We expect Solis's replacement to remain committed to Solis's agenda – creating an environment where each employee is in essence a Wage and Hour "investigator." We also expect the Department of Labor to accelerate its worker safety initiatives and through the Office of Federal Contract Compliance Programs, to continue to expand OFCCP's reach regarding what it investigates and the remedies it seeks.

4. Judicial Appointments. A President's judicial appointments are for the life of the appointee. By the conclusion of the President's second term, well over half of federal judges will have been appointed by President Obama. Judicial appointments often reflect the philosophy of the President. We expect fewer cases to result in summary judgment, with settlement values increasing and more cases going to trial. For the third consecutive year, the number of employment lawsuits filed in United States federal courts increased, and we expect that trend to continue.

5. Legislation. The House has the "numbers" to block employment legislation, but for the reasons stated above, it will be difficult to oppose some type of an increase to the federal minimum wage, which is $7.25 per hour. Several states have a higher minimum wage. Similarly, Congressional Republicans may have difficulty opposing the Employment Nondiscrimination Act (prohibiting discrimination based on sexual orientation) and the Paycheck Fairness Act. Again, the difficulty about opposing such legislation will be strategically, how does opposition to the legislation fit with the Republican Party's overall objective to project itself as more inclusive?

6. Affordable Care Act. The Affordable Care Act is here to stay. How employers will respond to it remains in perpetual motion. Many employer circumvention strategies have emerged, and we expect plaintiffs' lawyers and the federal agencies to challenge some of them. In the near term, look for a steadily increasing flow of new regulations and regulatory guidance interpreting the Act. In 2013, we expect a sweeping new series of regulations to implement health insurance exchanges and we should also hear from the IRS on what exactly constitutes plan discrimination. The latter action may require significant changes to plan design.

It has been said that "if you can't change the facts, you've got to change your attitude." Based on what we anticipate the facts to become during the next four years and certainly during the next two, employers need to do a self-critical evaluation of compliance and culture, to reduce the risk of problems arising, but if they arise, to be able to end them quickly and economically.

President Obama's NLRB "Recess" Appointments Held Unconstitutional

Earlier this month, the District of Columbia Circuit Court of Appeals ("D.C. Circuit") held that President Obama's three appointments to the National Labor Relations Board in 2012 were unconstitutional. In striking down the appointments, the three-judge panel held that these appointments were invalid under the Constitution's Recess Appointments Clause.

On January 4, 2012, President Obama appointed three new members to the NLRB, Sharon Block (D), Richard Griffin (D), and Terence Flynn (R), without the advice consent of the Senate. The appointments were harshly criticized by Senate Republicans. At the time of the appointments, the Senate was in *pro forma* sessions (a brief meeting of the Senate every three days), aimed in part at preventing such recess appointments. For years, the precedent had been that there must be a recess of

more than three days to allow for constitutionally valid recess appointments. These three Board members took part in a February 8, 2012 decision adverse to an employer. The NLRB must have a quorum of three of its five members in order to take valid action.

Joined by forty-one Republican Senators seeking to invalidate these appointments, the employer appealed the Board's decision to the D.C. Circuit. The D.C. Circuit held that the Senate was not in "recess" on January 4, 2012, as defined by the Constitution, and, therefore, the appointments were invalid. As a result, the NLRB's February decision was also invalid because it did not have a quorum of constitutionally valid members when it ruled against the employer.

The NLRB will almost assuredly appeal the D.C. Circuit's decision to the Supreme Court; however, in the meantime, employers should consider this decision to be a damaging setback to the President's pro-labor / pro-union agenda.

Gun Issued to Unstable Employee: Employer Liability?

Our national focus on gun violence of course affects the workplace. The case of *Rollins v. Wackenhut Servs. Inc.* (D.C. Cir. Dec. 28, 2012) involved a claim arising over the suicide of a mentally ill employee who was issued a gun by his employer.

Employee Devin Bailey had a history of mental illness. He dropped out of college due to depression and was dismissed from the Navy after only a few days, when he was diagnosed with psychosis. His mother tried to transport him to a mental health hospital, but he resisted and fought with police, resulting in charges of attempted assault of a police officer with a weapon. He ultimately was committed to a mental hospital and was released after three weeks, with directions for medication. He subsequently checked into another mental hospital, and received treatment with a drug called ABILIFY, which may cause suicidal thoughts.

A month after his release from the second mental hospital and while taking ABILIFY, Wackenhut Services hired Bailey. Wackenhut is an international security firm and one of its clients is the federal government. Wackenhut conducted a background check and knew of the assault charge against a police officer. However, Wackenhut hired Bailey and when Bailey completed his gun training, issued him a pistol. A month later, Bailey killed himself with that pistol while on duty at the Walter Reed Medical Center.

Bailey's family sued the drug manufacturer and Wackenhut. They claimed that Wackenhut was negligent in issuing Bailey a gun and also did not conduct a thorough background check to learn of Bailey's mental illness.

The court ruled that generally, a plaintiff may not recover damages resulting from the suicide of another, because the suicide is considered an intentional, willful act. An exception to that rule is where there is a special relationship between the defendant and the deceased, such as physical custody or where the employer has specialized training in order to deal with mental health issues, neither of which applied to this case.

The court noted that Wackenhut's background check of Bailey was superficial, but that did not create a cause of action for Bailey's family against Wackenhut. From our perspective, the overriding principle from this case for employers to consider is where an individual may be issued a firearm, work with dangerous or potentially hazardous equipment, work unsupervised or on private property in order to perform the job duties, be sure a thorough background check is conducted. A circumstance employers are more likely to encounter than the suicide of the employee is the employee acting out toward another. Give the benefit of the doubt to the thorough background check in those situations and to determine your comfort level with placing an individual in such a position of responsibility.

Employer Entitled to Repayment of Severance Benefits - $735,000

Severance and "goodbye forever" releases often include provisions that a violation of the release means that the employee must return the money to the employer. Of particular concern to the employer is the protection of its confidential business information. In the case of *Hallmark*

Cards, Inc. v. Murley (8th Cir. Jan. 15, 2013), the appellate court upheld an order directing Murley, a former group vice president, to return her severance benefit because of a violation of the confidentiality provisions.

Murley was terminated by Hallmark as an outcome of restructuring. In her capacity with Hallmark, she had access to market research, financial information and Hallmark's strategic plans. Her severance agreement required that she not work in the industry for 18 months and that she never disclose information that was identified by Hallmark as proprietary or confidential.

After she left Hallmark, Murley became a consultant to Recycled Paper Greetings, where she was paid $125,000. American Greetings bought Recycled Paper Greetings and during the course of its due diligence, found that Recycled Paper Greetings received extensive Hallmark information from Murley, including Hallmark's business model, its processes, market research and a voluminous number of Hallmark documents. American Greetings notified Hallmark of this information.

Hallmark sued Murley and obtained a jury verdict for $735,000, plus the $125,000 Murley was paid as a consultant. In upholding the $735,000 award, the court stated that Murley's disclosure was intentional, prejudicial to Hallmark, and in bad faith. The court noted that she "retained Hallmark-related documents for five years past her termination but deleted them in the 48 hours prior to an inspection of her private computer." The court also ruled that Hallmark was not entitled to Murley's $125,000 consulting fee.

It is important that severance agreements, particularly those involving key employees, distinguish between the duration for a non-compete agreement and the duration for information that is proprietary and confidential. The severance agreement should specify the duration of the non-compete provisions but state that the confidentiality provision is "forever." If the employer fails to make that distinction, then arguably confidential information may be disclosed at the expiration of the non-compete period.

Superficial Interactive Process Under ADA: Let Jury Decide Damages

The case of *Nelson v. Hitchcock Indep. Sch. Dist.* (S.D. TX, Dec. 21, 2012) is an example of a woefully weak "interactive process" with an employee under the ADA.

Employee Iris Nelson was diagnosed with bilateral knee arthritis. She took medical leave from February 24, 2009 through May 26, 2009 to have surgery on her knee and for recovery. Two and a half months later, Nelson met with her supervisor and requested an additional two and a half months leave to have surgery on her other knee. Nelson's doctor advised Nelson that the surgery could not be delayed. Nelson's supervisor told Nelson that she did not have leave available until one year after returning from her prior knee surgery. Nelson replied that she would work using a cane or a walker, and just take pain pills until she had leave available. According to Nelson, her supervisor was concerned about the safety implications of working with a cane or a walker or taking pain pills during the course of the school day. Nelson formally requested leave beginning August 17, 2009 for surgery, and did not hear from her supervisor until after the surgery, when the supervisor sent Nelson a letter notifying Nelson that she did not have available leave and was terminated.

In permitting the case to go to a jury, the court stated that Nelson raised a question of fact whether her supervisor truly engaged in an interactive process as required under the ADA. The court said, "When an employer does not engage in a good faith interactive process, that employer violates the ADA – including when the employer discharges the employee instead of considering the requested accommodations." The court noted that Nelson could have postponed her surgery had the school accommodated her request to work with a cane or a walker, but the school refused to do so, nor did the school offer alternative approaches for Nelson to consider. In response to the School District's concern about Nelson working under the influence of pain medication, the court stated that, "While the court agrees that Hitchcock ISD raises serious doubts about the wisdom of supervising a classroom of children under the influence of certain pain medication, the ADA-mandated interactive process that

was ignored in this case is designed to gather the information that allows for such an assessment to be made." Simply stated, had the employer engaged in a good faith interactive process and concluded that accommodation was not necessary, there would not be a bona fide ADA failure to accommodate claim.

NLRB Tips: NLRB Continues Aggressive Enforcement of the Act – A Summary of Recent Significant Decisions

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As noted in the December 2012 Employment Law Bulletin (ELB), the NLRB has continued a pro-labor agenda in its decisional process. As the undersigned and various management commentators predicted, the Agency's program to make unions stronger and organizing easier has continued unabated after the election. If the recent past is any indication of future action by the Agency, expect an avalanche of decisions which nullify longstanding Board precedent governing relations between employers and labor organizations. The presidential race is over, and the pre-election quiet period for this Board has ended.

This article discusses the significant decisions issued at year end, most of which were decided prior to Republican member Brian Hayes's departure from the Agency.

WKYC-TV, GANNET Co. (359 NLRB No. 30)
– released December 2012

The December ELB discusses this decision in detail, where 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. The Board claimed that the general precedent against unilateral changes in terms and conditions of employment justified the decision. In essence, an employer is now forced to subsidize unions that go on strike against them. While employees man the picket line, companies will be required to withhold their union dues and pass them along to union leaders. There is no doubt such a practice will have the effect of, or at least the potential of, prolonging strikes. This decision will only be applied prospectively by the Agency.

ALAN RITCHY, INC. (359 NLRB N0. 40)
– released December 2012

In a unanimous decision that resolved the last of the two-member cases returned to the Agency following the 2010 Supreme Court decision in *New Process Steel*, the Board found that an employer whose workforce is represented by a newly certified union must bargain with the union before taking discretionary disciplinary action such as discharge or demotion actions which would have an immediate, significant impact on bargaining unit employees' terms and conditions of employment.

Obama appointees Pearce, Griffin and Block distinguished major discipline from less severe penalties and said employers may defer bargaining about less serious actions until after they are imposed. The Board admits that this strengthens the union's hand in the eyes of employees and therefore, in my mind, leverages a union's position during the bargaining process. In discussing its decision, the Board stated:

> To hold otherwise, and permit employers to exercise unilateral control over discipline after employees select a representative – i.e., to proceed with business as usual despite the fact that the employees have chosen to be represented – would demonstrate to employees that the Act and the Board's processes implementing it are ineffectual, and would render the union (typically, newly certified) that purportedly represents the employees impotent.

DISH NETWORK CORP. (359 NLRB No. 31)
– released December 2012

In a vote of 2-1, Chairman Pearce and Member Block determined that while the NLRB rules and regulations on filing of briefs allow Board members to disregard arguments that are not timely and properly raised by litigants, the Board itself retains the authority to decide a

case based on a rationale that was not raised by the parties, as long as the case is decided "upon the record" before the Agency.

In dissent, outgoing Member Hayes noted that had the majority simply wanted to make a point that nothing in the NLRA bars *sua sponte* (without a motion from the parties) reconsideration of precedent , they could have done so in a footnote to an unpublished order denying the union's original motion for reconsideration. As Hayes noted:

> I fear something more is afoot here; that is, [the Democrat appointees to the Board] are undercutting the validity of longstanding procedural precedent in order to set the stage for overruling substantive precedent, even when not relied on or challenged in a particular case.

BAPTIST HOMES D/B/A PIEDMONT GARDENS
(359 NLRB No. 46) – released December *2012*

The Employment Law Bulletin's December 2012 prediction of increased scrutiny on broadly constructed "confidentiality" requirements came quickly to fruition. In addition to *Stephens Media, LLC,* 359 NLRB No. 39 (2012), referenced at page three (3) of the December 2012 LMV employment law bulletin, the NLRB overruled a thirty-six (36) year old "bright-line rule" limiting union access to witness statements based upon a confidentiality claim. In overruling *Anheuser-Busch,* 237 NLRB 982, (1978), the Board found that witness statements relevant and necessary to a union's representation of employees are "fundamentally the same" as other information that must be provided to a bargaining agent.

LATINO EXPRESS (359 NLRB No. 44)
– released December 2012

In a decision that will affect most cases in which backpay is awarded, the Board ruled that employers must compensate discriminatees for extra taxes they must pay as a result of receiving backpay in a lump sum. The NLRB also now requires an employer ordered to pay backpay to file with the Social Security Administration a report allocating the back wages to the years in which they were or would have been earned had the unfair labor practice not occurred. Member Hayes did not participate in this decision.

In an anticipated move, the General Counsel provided for the inclusion of "front pay" in Board settlements. Front pay provides for the payment of more than one hundred percent (100%) of backpay owed, and was fairly common in non-board settlement agreements that involved a waiver of reinstatement. The nuances involved in the Agency policy change in this regard, the role of the Board Agent in negotiating such settlements, and the requirement for a written waiver of reinstatement, is set forth in GC Memo 13-02.

CHICAGO MATHEMATICS & SCIENCE ACADEMY – CMSA (359 NLRB No. 41)
– released December of 2012

The NLRB found that it had jurisdiction over a non-profit corporation that operates a public charter school. The Board concluded that the charter school was not the sort of government entity exempt from the NLRA and that there was no reason for the Board to decline jurisdiction.

Member Hayes, in partial dissent, admitted that while CMSA was not a "political subdivision" of the State of Illinois or the City of Chicago, he nevertheless would have declined jurisdiction because the CMSA was "so closely intertwined with and defined by those governmental entities in providing services of a peculiarly public and local nature.

UNITED NURSES & ALLIED PROFESSIONALS (KENT HOSPITAL) – (359 NLRB No. 42)
– released December 2012

The NLRB held that a union with a collective bargaining agreement that includes a union security clause may charge nonmember dues objectors for union lobbying expenses that are "germane to collective bargaining, contract administration or grievance adjustment." The Democrat majority stated that the Board will determine on a case-by-case basis whether union expenses related to particular legislative goals are chargeable to dues objectors, and requested amicus briefs on the issue of how the NLRB should define and apply a "germaneness standard."

This ruling undermines the protections for employees who don't want their money spent on a union's political agenda. (See *CWA v. Beck* – 487 U.S. 735 (1988)).

HISPANICS UNITED OF BUFFALO INC. –
(359 NLRB No. 37) – released December 2012

The Board affirmed an Administrative Law Judge's finding that an employer illegally fired five employees who used Facebook to discuss their responses to a co-worker's criticism of their work, who claimed that their work was "sub-standard." One employee, Ms. Cole-Rivera, posted on Facebook, stating:

> Lydia Cruz, a coworker feels that we don't help our clients enough at HUB. I' [ve] about had it! My fellow coworkers how do u feel?

Cruz-Moore posted her own reply, stating "stop with [your] lies about me." Cruz then complained to HUB's executive director, who fired Cole-Rivera and four other employees for "bullying and harassment" of Cruz-Moore.

The Board found that the five employees were clearly engaged in concerted activity, as the initial posting was a first step "towards taking action to defend themselves" in anticipation that Cruz-Moore would take her criticism of their work to management. In finding that the post was also protected, the majority found that the remarks made in response to Cruz-Moore's criticism of their work were "well within the Act's protection."

Member Hayes dissented. Hayes characterized the comments by the discharged employees as "group griping" and said that there was insufficient record evidence that either the original posting or the views expressed in response were for "mutual aid or protection." Hayes further stated:

> [there was] no credible evidence that Cole-Rivera made her initial posting with the intent of promoting a group defense, or that her coworkers responded for this purpose.

This case, while not particularly egregious in its analysis, again demonstrates that this Board will continue to find borderline factual situations to be protected under the Act, where it is determined that employees were arguably engaged in concerted activity.

DID YOU KNOW:

That the NLRB experienced nearly a three percent decrease in total case intake during fiscal year 2012, with more than a six percent decrease in representation case filings. Details on the Agency statistics may be found on the Agency's website in GC Memorandum 13-01.

EEO Tips: Is Office Romance Only a Valentine's Day Problem?

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.

The season for workplace romance does not begin or end on Valentine's Day in February. It lasts all year. According to an estimate made by the American Management Association a few years ago, approximately eight million office romances will take place during any given year. Surprisingly, notwithstanding the obvious potential for mountainous personnel problems, a survey conducted by SHRM in 2007 revealed that over 70% of the businesses contacted on this subject stated that they did not have a formal policy for addressing office romances. Another study conducted in 2011 (according to *TribeHR Blog*, 2/14/12) showed that 40% of workers admit to having dated a co-worker at some point and 30% say they ended up marrying someone they met on the job. Several good examples of this include Bill and Melinda Gates, Barack and Michelle Obama, and Rupert Murdock and Wendi Deng.

Thus, there are probably a number of understandable reasons that office relationships are quite common and tolerated by employers. Perhaps one of the most basic is that such relationships are not, at least directly, a violation of federal employment anti-discrimination laws. Specifically, the EEOC in its Policy Guidance on Employer Liability for Sexual Favoritism (Number N-915-048, January 1990) states as follows:

> "Not all types of sexual favoritism violate Title VII. It is the Commission's position that Title VII does not

prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a "paramour" (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders."

However, the EEOC also warns in this same notice that in many instances "sexual favoritism in the workplace which adversely affects the employment opportunities of third parties may take the form of implicit "quid pro quo" harassment and/or a "hostile work environment." For example, where "employment opportunities or benefits are granted because of an individual's submission to the employer's (especially a supervisor's) sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified but were denied that employment opportunity or benefit."

Thus, notwithstanding its popularity and general acceptance, most enlightened employers would find that such liaisons are tantamount to "looking for love in at least one of the wrong places." A classical case in point was *Tate v. Executive Management Services, Inc.*, U.S. District Court for the Northern District of Indiana (October 2006). In this case, Alshafi Tate, a custodian for Executive Management Services, Inc. (EMS) became involved in a sexual relationship with one of his supervisors, Dawn Burden. The relationship at first was entirely consensual by both parties. However, when Tate decided to end the relationship because of his marriage, Burden became very agitated and told Tate that he had to choose between his job and his wife. He chose his wife, whereupon Burden proceeded to process termination papers accusing Tate of failing to perform the duties of his position. Ultimately, Tate was terminated by EMS. Thereafter, he filed suit alleging both sexual harassment and retaliation. The jury found that Tate had failed to prove his claim of sexual harassment, but allowed his claim of retaliation to stand.

EMS contended that the retaliation claim should be rejected also because the employer did not have any knowledge of the supervisor's conduct and also that it had no knowledge of Tate's alleged opposition to any unlawful employment practice. However, the Court, in rejecting EMS's motion for a directed verdict on the issue of retaliation, found that an employer could be liable if the supervisor had a retaliatory motive in submitting termination papers to her superiors who actually were the decision makers and the decision makers relied on that information in making their determination to fire Tate. Also, the Court held that under certain circumstances such as in this case, opposition to behavior that amounts to sexual harassment can constitute "opposition to an unlawful employment practice."

The foregoing case rather vividly illustrates that, when an office romance goes bad, it can create many perils for the company and for the parties themselves. Here are a few other reasons why employers need to be wary of such relationships:

Foremost is the fact that, even though a workplace romance may be entirely consensual (at least at the outset), it can lead to a number of negative outcomes with respect to the work environment as follows:

- It can hamper the productivity of both parties if they allow the relationship to lap over into their work time by taking extended lunches or breaks together.

- It may lower the morale of other employees and create the perception of a conflict of interest or favoritism (whether actual or not), especially where one of the parties is in a position to show partiality, such as a foreman or team leader. This of course could lead to a charge of sex discrimination by other employees.

- The work environment may be negatively affected if one of the parties wants to end the relationship, but unfortunately they are thrust together daily by virtue of their work assignments or job stations. This situation creates a real risk of sexual harassment and may damage the morale of co-workers who must work in close proximity to either or both of the disaffected parties.

Accordingly, although it may not be lawful or possible to prohibit workplace romances altogether, it is generally wise to establish some specific rules or guidelines for such relationships, especially as between a supervisor and a subordinate. Wise employers foresee the potential for disaster and more and more of them are requiring paramours to sign a "Consensual Relationship Agreement" or "Love Contract." The following are some minimal provisions to be included in any office romance policy or agreement to address the problem.

1. That the parties should receive some counseling by the Human Resource Department to ensure that the relationship is truly consensual.

2. That the relationship insofar as possible should not be carried on during working hours and that the relationship in no wise should hinder productivity. (No lingering at your paramour's desk or the water fountain).

3. That insofar as possible the relationship should not be discussed at the office or in the workplace. (While other employees may suspect that something is going on between the two persons, that is not necessarily a reason to publish it throughout the office).

4. That consensual relationships between a supervisor and a subordinate should be discouraged. However, if such a relationship exists, it should be disclosed to upper management (or the Human Resource Department), and upper management should take steps to ensure that the parties are counseled concerning their responsibilities and that the supervisor in question is relieved of any responsibility for performance ratings, job assignments or other critical employment decisions relating to the subordinate. The fact that the two parties may work in different departments does not necessarily remove a potential conflict of interest. Some employers may even suggest that one of the parties should be moved to another job or find other employment.

5. That all parties are admonished as to the potential liability of the employer with respect to sexual harassment and their own job security in the event that the consensual relationship ends and one of the parties continues to make unwelcome sexual advances.

EEO Tip: The rules established for any given company or firm should be tailored to the size and needs of that firm. No one set of rules will fit all companies. However, employers who have fifteen (15) or more employees are especially vulnerable to the prohibitions against sexual harassment under Title VII and therefore are in need of a more comprehensive set of rules.

Framing a reasonable set of rules for your company without infringing upon the private rights of your employees to associate freely either on or off the job can be a complex matter which requires the help of legal counsel. Please call this office at 205.323.9267 if you have questions and/or need our legal assistance.

OSHA Tips: Targeting OSHA Inspections

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.

Each year many of OSHA's worksite visits are driven by events or information coming to the agency's attention. These include things like fatalities and catastrophes, reports of imminent danger, employee complaints, referrals from outside sources, observation of hazards by agency compliance officers and follow-up visits to confirm corrective actions. These type inspections are referred to as "unprogrammed" and are given a priority in scheduling visits. The remainder of agency enforcement time is devoted to selective, "programmed," inspections. A challenge for OSHA since its beginning has been to direct the agency's inspection resources towards those worksites having the highest injury and illness rates. Initially non-construction inspections were targeted at random within those **industries** known to have the highest rates. Too often with this approach, worksites

with good safety programs and experiencing relatively few injuries were included in OSHA's inspection visits. To address this and focus its limited resources on work-sites with the greatest numbers of injuries and illnesses, the agency adopted a "site-specific inspection targeting system."

Since 1996, OSHA has been using an annual "Data Initiative Survey" to collect actual data from employers to identify worksites for programmed inspections. Prior to this collection of data, as noted above, OSHA inspections were targeted on an industry-by-industry basis from Bureau of Labor Statistics data. This aggregate data was found to be useful but did not identify specific employers having serious injury/illness problems. In 1999, OSHA implemented its first site-specific targeting plan (SST) for scheduling programmed inspections at non-construction work sites. These inspections were based upon self-reported injury and illness data submitted by employers.

In a news release on January 8, 2013, OSHA announced its 2012 inspection plan that will "direct enforcement resources to work places where the highest rates of injuries and illnesses occur." It is indicated that at least 1260 worksites will be inspected under this plan in 2013. The release states that the plan is based upon data collected from a survey of 80,000 establishments in high-hazard industries. It also notes that for SST-2012, OSHA's Nursing and Personal Care Facilities National Emphasis Program will conduct programmed inspections of nursing and personal care establishments, unlike previous years when these inspections fell under the SST program.

OSHA's inspections may also be conducted as part of eleven current National & Special Emphasis Programs which include: combustible dust, federal agencies, hazardous machinery, hexavalent chromium, lead, nursing and residential care facilities, primary metal industries, process safety management, ship breaking, silica, trenching and excavation.

OSHA worksite visits may also be triggered from over 100 active regional and local emphasis programs. Some of the most common of these programs include as follows: fall hazards, powered industrial trucks, noise, and electrical hazards.

Programmed inspections in the construction industry are scheduled separately from the general industry listings. As noted in the implementing directive, "the mobility of the construction industry, the transitory nature of construction worksites and the fact that construction worksites frequently involve more than one construction employer, inspections are scheduled from a list of construction worksites rather than construction employers. For this reason," the National Office will provide to each Area/District Office a randomly selected list of construction projects identified or known covered active projects. This list will contain the projected number of sites the office plans on inspecting during the month."

Wage and Hour Tips: Overtime Exemption for Commissioned Employees

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.

There are several little known exemptions in the Fair Labor Standards Act that can provide some relief and protection for employers. One is an overtime exemption set forth in section 7(i) for certain commission paid employees of a retail or service establishment.

A retail or service establishment is defined as an establishment 75% of whose annual dollar volume of sales is not for resale and is recognized as retail in the particular industry. Some examples of establishments which may be retail are: automobile repair shops, bowling alleys, gasoline stations, appliance service and repair shops, department stores and restaurants.

If an employer elects to use the Section 7(i) exemption for commissioned employees, three conditions must be met.

1. The employee must be employed by a retail or service establishment, and

2. The employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked, and

3. More than half the employee's total earnings in a representative period must consist of commissions.

Representative Period: May be as short as one month, but must not be greater than one year. The employer must select a representative period in order to determine if this condition has been met.

If the employee is paid entirely by commissions, or draws and commissions, or if commissions are always greater than salary or hourly amounts paid, the-greater-than-50%-commissions condition will have been met. If the employee is not paid in this manner, the employer must separately total the employee's commissions and other compensation paid during the representative period. The total commissions paid must exceed the total of other compensation paid for this condition to be met. To determine if an employer has met the "more than one and one-half times the applicable minimum wage" condition, the employer should divide the employee's total earnings attributed to the pay period by the employee's total hours worked during such pay period.

Hotels, motels and restaurants may levy mandatory service charges on customers that represent a percentage of amounts charged customers for services. If part or all of the service charges are paid to service employees, that payment may be considered commission and, if other conditions are met, the service employees may be exempt from the payment of overtime premium pay. Tips paid to service employees by customers are not considered commissions for the purposes of this exemption.

Top 10 Wage and Hour Investigation Issues for Employers

The Department of Labor's Wage and Hour Division conducts wage and hour investigations for a number of reasons, all having to do with enforcement of the laws and assuring an employer's compliance. During a wage and hour investigation, employers may be called on to produce records and answer questions regarding a wide variety of issues. The significant issues that may be raised by an investigation are listed below:

1. Minimum Wage: The federal minimum wage is $7.25 per hour. The Fair Labor Standards Act (FLSA) requires employers to pay nonexempt employees at least the minimum wage for all hours they work. Twenty states have laws requiring a higher minimum wage than the federal government. For example, Washington's minimum wage is $9.19 per hour.

2. Overtime Laws: The FLSA requires enterprises engaged in interstate or foreign commerce and state and local governments to pay overtime of 1.5 times an employee's regular rate of pay for hours worked in excess of 40 hours in a workweek.

3. Exempt Employees: The FLSA exempts broad categories of "white-collar" jobs from minimum wage and overtime requirements if they meet certain tests regarding job duties and are paid a certain minimum salary. These categories of employees are commonly known as "exempt" employees and include executive, administrative, professional, and outside sales personnel, as well as certain specialized computer personnel, certain highly compensated employees, certain retail sales employees, and employees covered by the Motor Carrier Act (MCA). Employers often get into trouble with the DOL when they have misclassified their employees as exempt from overtime.

4. Recordkeeping. Employers are required to make, keep and preserve employees' records, including wages earned and hours worked, for a specified period of time. Although there is no particular form for the records, they must include certain identifying information about each employee and accurate data about the hours worked and wages earned.

5. Child Labor. The child labor provisions of the FLSA prohibit employers from hiring minors (individuals under the age of 18) to work at dangerous occupations, for an excessive number of hours, and at unsuitable times of the day or night. States

also have child labor laws and, when state and federal laws differ, the stricter law applies. In addition, there are rules on proof of age, minors driving motor vehicles, minimum wage rates, children working in agriculture, and work under federal contracts. An employer that employs a minor who is injured or killed while being illegally employed may be assessed a civil money penalty of up to $100,000 by the Department of Labor.

6. Paychecks. The payment of wages is regulated by federal and state law. Employers must pay wages in cash or its equivalent, and direct deposit is gaining in popularity as a convenient method for paying wages. In addition to the method of payment, state laws also regulate how frequently employees must be paid. Many states have laws regarding the payment of wages upon the termination of employment, including accrued vacation, and these rules often differ depending on whether the termination is voluntary or involuntary.

7. Notices and Postings. Every employer subject to the minimum wage provisions must post a notice in conspicuous places in every division where employees work. If workers are not subject to minimum wage provisions because of an exemption in FLSA, then the notice may be modified to state that overtime provisions do not apply in certain situations.

8. Rest Periods. Federal law does not require rest or meal periods, but it does set standards for when work breaks, including meal periods, rest periods and sleeping time must be counted as paid work time. The laws of some states do require that paid and/or unpaid rest and meal periods must be provided.

9. Deductions from Pay. The federal law on deductions from pay contains few restrictions when compared to the laws in many states. Certain deductions may specifically reduce pay below the minimum. However, there are a number of deductions that may not be made if they result in pay that is less than the minimum wage. These rules apply only to nonexempt employees who are covered by minimum wage requirements. In general, deductions from pay should be made only where required by law or authorized in writing by the employee. Deductions from the pay of exempt employees are only allowed in a few, very specific situations.

10. Equal Pay. Two federal statutes prohibit gender-based differences in pay: the Equal Pay Act of 1963 (EPA) and Title VII of the Civil Rights Act of 1964 (Title VII). The EPA prohibits differentials in pay that are based primarily on gender. Employers covered by the EPA must ensure that male and female employees are paid equal wages for performing substantially equal jobs. Title VII requires the same equal treatment of employees regardless of gender.

Family and Medical Leave Act

Earlier this month, Wage and Hour issued some clarification regarding the right of an employee to use FMLA leave to care for a son or daughter. The regulations limit this type of leave to the care of a child under the age of 18. However, the regulations also provide for the use of FMLA leave to care for a son or daughter who is 18 or older and incapable of self-care because of a physical or mental disability at the time the FMLA leave is commenced. The Wage and Hour position statement, which can be found on the Wage and Hour website (www.dol.gov/wagehour) states that disability does not have to have occurred or diagnosed prior to the age of 18 and that the onset of a covered disability may occur at any age for purposes of the definition of a “son or daughter.” Thus, employers should consider these factors when determining whether to grant FMLA leave to an employee to care for a child who is 18 or older.

In 2011, Wage and Hour announced that it was partnering with the Internal Revenue Service and several states in an effort to ensure that employees are not being misclassified as independent contractors. Earlier this month, they announced that Iowa has become the 14th state to join the partnership and stated that they have collected over $9.5 million in back wages for some 11,000 workers that had been classified as independent contractors when they were actually employees. If you have persons working for you that you are classifying as independent contractors, I recommend that you look at

the situation to make sure that they are correctly classified.

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

2013 Upcoming Events

EFFECTIVE SUPERVISOR®

Huntsville – April 10, 2013
U.S. Space & Rocket Center

Montgomery – April 25, 2013
Hampton Inns & Suites, EastChase

Birmingham – September 25, 2013
Rosewood Hall, SoHo Square

Huntsville – October 9, 2013
U.S. Space & Rocket Center

EFFECTIVE SUPERVISOR® WEBINAR SERIES

PART I – "The Laws"
February 26, 2013, 9:00 a.m. to 11:00 a.m. CST

PART II – "The Relationships"
March 5, 2013, 9:00 a.m. to 11:00 a.m. CST

PART III – "The Leaves"
March 7, 2013, 9:00 a.m. to 11:00 a.m. CST

Attendees can attend any one of these sessions or can sign up for the entire series. You can register for the 3-part series for $350 per connection site, with no limitation on the number of participants, or participants can attend any single session for $125 per connection.

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…?

…the Bureau of Labor Statistics announced this month that U.S. union membership has declined to its lowest levels in 97 years? In 2012, the percentage of American workers represented by a union declined to just 11.3% of the total work force, down from 11.8% in 2011. This is the lowest percentage of union-represented workers in the United States since 1916, when 11.2% of American workers were represented by unions. When government employees are subtracted from these figures, the numbers get even worse for unions. Just 6.6% of American private sector workers are union members, down from 6.9% in 2011. Private sector union membership peaked at about 35% in the 1950s.

…that "veganism" may be a religious belief protected under Title VII? *Chenzira v. Cincinnati Children's Hosp. Med. Ctr.* (S.D. Ohio, Dec. 27, 2012). An employee was terminated after she refused her employer's request to take a flu vaccination. She received the vaccination during prior years, but she said that she is a vegan and she does not eat or absorb animal products or byproducts. Apparently, the flu vaccine is grown in chicken eggs. The court noted that the EEOC's interpretive guidelines state that a "religious practice" as defined under Title VII includes "moral or ethical beliefs as to what is right and wrong" if those beliefs are "sincerely held with the strength of religious views."

…that questions of a pregnant employee regarding motherhood and work responsibilities can be evidence to support a pregnancy-related termination claim months after delivery? *Quinlan v. Elysian Hotel Co.* (N.D. IL, Jan. 4, 2013). Quinlan was employed in public relations for the hotel. During her pregnancy, her supervisor (female), who was one of the hotel's investors, talked to Quinlan about staying home with her newborn child and that she could reenter the public relations field "later in life." The supervisor also talked about the difficulty of balancing job responsibilities with motherhood. Several times, the supervisor asked Quinlan if she is certain that she wanted to return to work after she gave birth. Business declined, and the hotel in one of its several cost-cutting moves determined that it could outsource the public relations responsibilities and thus terminated Quinlan. She alleged that the termination was motivated by her pregnancy several months earlier, and according to the court,

"Quinlan seems to be making the argument that she was fired due to her supervisor's illegal gender-stereotyping and assumption that women who are new mothers are not able to remain committed to their work and are better off staying at home with the young child." The supervisor's comments, alone, "are sufficient circumstantial evidence that discrimination may have influenced [the employer's] decision to fire Quinlan."

…that an adult child with a disability is a "child" for FMLA purposes? *U.S. Dept. of Labor, Wage and Hour Division, Administrator Interpretation No. 2013-1.* According to the Department of Labor's analysis of the 2008 final rules revising the FMLA regulations, "an employee is entitled to take FMLA leave to care for a son or a daughter with a serious health condition who is 18 years of age or older and incapable of self-care because of a disability regardless of when that disability commenced." Many employers assume that care for a child ends when the child turns 18. However, the regulations state that the FMLA applies for absences to care for children "18 years of age or older and incapable of self-care because of a mental or physical disability." It does not matter when that mental or physical disability occurs. If a child becomes mentally or physically disabled at age 25, then an employee's absence to care for that child is protected.

…that the NLRB invalidated a mandatory arbitration agreement because it believed the agreement would deter employees from filing unfair labor practice charges? *Supply Techs. LLC* (Dec. 19, 2012). The mandatory arbitration agreement requires employees to submit to an alternative dispute resolution system "claims relating to my application for employment, my employment, or the termination of my employment" and "claims under any federal, state, or local statute." The agreement listed examples of federal statutes, but did not include the National Labor Relations Act. In a 2-1 vote, the Board stated that the company's mandatory arbitration agreement could be viewed by employees "to restrict their right to file unfair labor practice charges or otherwise access the Board's processes." Former Board member Brian Hayes, in dissent, stated that "a disturbing aspect of this case is the apparent continuing antipathy of the Acting General Counsel and a Board majority towards private mandatory dispute resolutions programs in the nonunion setting."

…that according to a report released on January 15th by the Pew Charitable Trust, cities collectively are $217 billion short of fulfilling their pension and retiree health obligations? The report analyzed the pension and retiree obligations of 61 cities with a population of more than 500,000. $118 billion of the gap relates to retiree health care benefits; the majority of the remainder relates to pension benefits. The report stated that among the 61 cities, they can cover 74% of their pension obligations to retirees. Pew stated that, "Cities for the most part have yet to tackle the looming bill for retiree health care, and the strains will be even greater as baby boomers retire in record numbers. Cities also are likely to face greater public scrutiny of retirement costs because of financial reporting changes that soon could make their funding levels look worse than they do today."

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