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Affordable Care Act Protects Employees From Retaliation Under New OSHA Rules

The Occupational Safety and Health Administration (OSHA), a division of the Department of Labor, has issued an interim final rule implementing Section 1558, the Affordable Care Act's (ACA) anti-retaliation provision. Section 1558 expressly prohibits an employer from retaliating against an employee for engaging in any of the protected activities under the statute, which includes, among other things, receiving a federal tax credit or subsidy to purchase insurance coverage. OSHA has also issued a fact sheet that outlines how employees may file a retaliation complaint under the ACA.

Section 1558 provides that an employer may not discharge or in any manner retaliate against an employee because he or she:

- received a premium tax credit or a subsidy to purchase health care coverage;
- provided or caused to be provided (or is about to provide or cause to be provided) to the employer, the federal government, or the attorney general of a state information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of Title I of the ACA;
- testified, assisted, or participated, or is about to testify, assist, or participate in a proceeding concerning such violation;
- objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of Title I of the ACA, or any order, rule, regulation, standard, or ban under Title I of the ACA.

Title I of the ACA includes a range of insurance company accountability policies such as: the prohibition of lifetime dollar limits on coverage, the requirement for most plans to cover recommended preventive services with no cost sharing, the prohibitions on the use of factors such as health status, medical history, gender, and industry of employment to set premium rates, and, starting in 2014, protections against pre-existing condition exclusions.

The interim final rule establishes the procedures and timeframes for handling retaliation complaints, including OSHA's investigation, hearing, and appeals procedures. The anti-retaliation provision adopts procedures similar to those used by OSHA to enforce other whistleblower statutes under its jurisdiction. Under the ACA, an employee has 180 days from the alleged retaliation in which to file a whistleblower complaint with the Secretary of Labor. The employee need only have a subjective, good faith, and objectively reasonable belief that the complained-of conduct violates the whistleblower protections. The employee does not, however, need to prove that the conduct complained of constitutes an actual violation of law.

Section 1558 also includes an employee-friendly burden of proof. The employee must prove by a preponderance of the evidence that his or her participation in a protected activity was a contributing factor to the employment action taken against him by the employer. The burden then shifts to the employer to prove by clear and convincing evidence—a much more difficult burden of proof—that the employer would have taken the same action against the employee if the employee had not engaged in the protected conduct.

OSHA will investigate the complaint and make a determination. OSHA's findings become final unless appealed within 30 days. Either party may request a hearing before an administrative law judge, whose decision may be appealed to the DOJ's Administrative Review Board. An employee would be entitled to file a complaint in federal court if a final agency order is not issued within 210 days of the filing of the initial complaint, or within 90 days after the employee receives OSHA's findings.

If a violation is found, remedies include reinstatement, compensatory damages, back pay, as well as all costs and expenses (including attorney's fees and expert witness fees) reasonably incurred in filing the complaint. If the Secretary deems the complaint to have been brought in bad faith, it may award the employer up to $1,000 in reasonable attorney's fees.

Employee rights in Section 1558 cannot be waived and are not subject to arbitration, regardless of whether or not the employee has signed a mandatory arbitration agreement.

The ACA's anti-retaliation provision adds another layer of concern to employers' efforts to comply with the ACA's confusing and often inconsistent obligations. Additionally, the recent trend has been for federal agencies to aggressively enforce and expand coverage under the respective statutes they administer. With healthcare being the Obama Administration's leading policy initiative, this trend is likely to continue with enforcement of ACA protections.

For example, it is possible that the agencies will use this provision to combat employers' attempts to reduce their workforce or reduce employees' hours in an effort to manage employer mandate related costs. Because the ACA's anti-retaliation provisions create additional classes of protected individuals who did not previously receive special protection, employers should make it a priority to train supervisors regarding the practical employee-relations issues related to the ACA.

Union Membership Lowest in 78 Years

According to the United States Department of Labor, Bureau of Labor Statistics, as of December 31, 2012, union membership declined to 6.6% in the private sector (from 6.9% in 2011), 35.9% in the public sector (from 37% in 2011), and a total public and private sector of 11.3% (a substantial decline from 11.8% in 2011).

Regarding race, gender and ethnicity, 12% of all men were union members, compared to 12.4% in 2011, 10.5% of women were union members, compared to 11.2% in 2011, 13.4% of Black adults were union members, compared to 13.5% in 2011, 9.6% of Asian adults were union members, compared to 10.1% in 2011, and 9.8% of Hispanic or Latino adults were union members, compared to 9.7% in 2011.

Six states have union membership of less than 5% of total employees – Arkansas (3.2%), Georgia (4.4%), Mississippi (4.3%), North Carolina (2.9%), South Carolina (3.3%), and Virginia (4.4%). Six states have union membership greater than 17%: Alaska (22.4%), California

(17.2%), Hawaii (21.6%), New York (23.2%), Rhode Island (17.8%), and Washington (18.5%). A substantial decline in union membership occurred in Michigan, which recently became a right to work state. In 2011, 17.5% of Michigan employees were members of unions; in 2012, it was 16.6%. A substantial decline also occurred in the union stronghold of Illinois, where in 2011, 16.2% of employees were union members, and in 2012, 14.6% were members.

For years, labor has put hundreds of millions of dollars and thousands of hours into the political process, thinking that a change in the White House would reverse labor's declining membership numbers. Although labor achieved the outcome it sought in the 2008 and 2012 elections, fundamentally, labor has yet to learn the lesson that labor needs to change its product, rather than focusing on politics.

Bob King, President of the United Auto Workers, stated that, "If we are honest with ourselves, the UAW is not strong enough to change the world ourselves. The labor movement is not strong by ourselves. The only way we win for our membership the social justice they deserve is if we build these broad coalitions in a new movement for social and economic justice. We need our sisters and brothers in the Civil Rights Movement, our sisters and brothers in the international community, in the LGBT community, in the environmental community and in the faith community." Commenting about the UAW's declining presence in the auto industry, King said that, "You can't win the justice members deserve unless you organize everybody who provides the same service or makes the same product. We have to double and triple our organizing efforts."

As a component of the broad coalition building King referred to, we also expect labor to "take to the streets" more often. Whether it was the protest and unsuccessful ballot challenge to Wisconsin's changes in public sector law or public protests in response to Michigan becoming a right to work state, or joining the "Occupy Wall Street" bandwagon before it was disassembled, we expect labor to become more visible in public protest and alliances over public issues, even if those the UAW protests with are not interested in the labor movement. We also expect labor to try to do more to publicly align themselves with business on issues that are important to our country. For example, recently labor and the U.S. Chamber of Commerce announced their coordinated views on immigration reform. This enhanced labor in two ways. First, it is a message to employees that labor is respected and a legitimate partner for business, and second, labor projects itself as an advocate on behalf of the immigrant community for expanded rights in the U.S., including the workplace.

Highest Award Ever in California – $21.8 Million for Wrongful Discharge

California has set a new record for juries taking from the employer and giving to the employee in employment litigation. On February 15, 2013, in the case of *Rodriguez v. Valley Vista Servs. Inc.,* a California jury awarded $16.6 million in punitive damages to an individual who was terminated because she took disability leave due to her panic attacks. When the $16.6 million in punitive damages are added to the other damages the individual received, the overall award was $21.8 million.

The company, based in Los Angeles area, operates in the recycling and waste collection industry. The employee suffered panic attacks at work and requested disability leave. She took the disability leave but was terminated. The jury concluded that she had a mental disability, her employer failed to accommodate her, and her employer acted with "malice, oppression and/or fraud" in its behavior toward her.

Although we anticipate these damages will be reduced on appeal, the overwhelming message to employers is to engage in bona fide reasonable accommodation discussions with an employee where a disability may be involved. Be sure that if an individual is terminated in close proximity to engaging in protected activity (the use of disability benefits), the termination decision is not a "close call."

EEOC Credit Report Lawsuit Dismissed

The EEOC received great notoriety when in 2010, it sued Kaplan Higher Education, alleging that Kaplan's use of

credit reports had a discriminatory impact based on race and, therefore, violated Title VII. Kaplan used credit reports to help in making hiring decisions for its financial aid positions. The court dismissed the EEOC's lawsuit on January 28, 2013. *EEOC v. Kaplan Higher Educ. Corp.*, N.D. Ohio.

Kaplan did not track the race of its applicants, and was not required to do so. In an effort to show a discriminatory impact based on race, the EEOC hired expert "raters" to determine the race of applicants by pictures and other information and thus evaluate whether Kaplan's practice had a discriminatory impact. In dismissing the case, the court said the EEOC failed "to present sufficient evidence that use of 'race raters' is reliable." Furthermore, the court chastised the EEOC by saying that, "It is clear that EEOC itself frowns on the very practice it seeks to rely on in this case and offers no evidence that visual means is accepted by the scientific community as a means of determining race." The court concluded that because EEOC's expert "relied on data obtained by unreliable means, the court finds that whether the jury could ultimately 'correct' the process employed by the 'race raters' is irrelevant."

The court ultimately dismissed the case because the EEOC did not provide sufficient evidence to make its case. We expect the EEOC will continue to pursue claims that the use of credit reports and other background checks have a discriminatory impact on Blacks, Hispanics and women. The EEOC will simply look for another case and try to correct the evidentiary issue that resulted in the dismissal of its claims against Kaplan.

FMLA Does Not Require "Light Duty"

The case of *James v. Hyatt Regency Chi.* (7th Cir., February 13, 2013) considered the question of whether an employer is required to provide an employee with "light duty" under the Family and Medical Leave Act. The employee received 12 weeks of FMLA, but before the conclusion of FMLA, the employee provided Hyatt with a note from his physician stating that he could return to "light duty" functions. Hyatt did not return him to light duty, and he completed his FMLA absence, several weeks of which were without pay. The employee sued, claiming that he should have returned to work under light duty during the time of the FMLA absence.

In rejecting the employee's claim, the court stated emphatically that "employers are under no obligation to restore an employee to his or her position if the employee is unable to perform the essential functions of the job. As noted by the district court, we have held that [t[here is no such thing as 'FMLA light duty.'" The court concluded that Hyatt did not interfere with the employee's FMLA benefits and granted the employer's motion for summary judgment.

Third Consecutive Year Almost 100,000 Discrimination Charges Filed

The EEOC released its charge analysis for FY 2012, which showed for the third consecutive year the total number of charges filed were slightly under 100,000 (99,412 for FY 2012, 99,947 for FY 2011, and 99,922 for FY 2010). Retaliation charges increased for the tenth consecutive year, from 27% of all charges filed during FY 2002 to 38.1% of all charges filed during FY 2012. This was the third consecutive year that retaliation charges outnumbered all other claims.

Disability discrimination charges also increased for the tenth consecutive year, from 18.9% in FY 2002 to 26.5% during FY 2012. Comparing FY 2011 to 2012, race discrimination charges declined from 35.4% to 33.7%; sex discrimination charges increased from 28.5% to 30.5%; national origin charges declined from 11.8% to 10.9%; age discrimination charges declined from 23.5% to 23%; and disability discrimination charges increased from 25.8% to 26.5%.

Sex discrimination charges showed the highest increase of any class from FY 2011 to 2012. Since FY 1997, the percentage of sex discrimination charges has ranged from a low of 29.1% (FY 2010) to a high of 31.5% (FY 2000).

The most easily discernible trends suggest that retaliation and disability claims will continue to increase. The good news for employers is that only about 4% of all discrimination charges result in cause findings; slightly

higher (4.5%) for disability charges. In other words, although the number of retaliation and disability charges continues to increase, the percentage of those charges found to be meritorious remains low.

NLRB Tips: Recess Appointment Controversy Continues OR "Everything You Wanted to Know About Unconstitutional NLRB Recess Appointments, but Were Afraid to Ask"

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The news that President Obama's recess appointments to the National Labor Relations Board were invalid was first reported in a January 25, 2013 LMV Employment Law Advisory, and the January 2013 issue of the LMV Employment Law Bulletin. While the battle lines are being drawn on this issue, the Board, employers and the Obama Administration have decisions to make in the near future.

In *Noel Canning Div. of Noel Corp. v. NLRB,* D.C. Cir., No. 12-1115, 1/25/13, the DC Court of Appeals held that an unfair labor practice order approved by a panel consisting one (1) Senate-confirmed member and two (2) recess appointees was unenforceable. Shortly after the decision issued, Board Chairman Mark Pierce (D) stated that the NLRB would continue to decide cases despite the ruling in *Noel Canning.*

In response to Pierce's statement, Senator Lamar Alexander (R-Tenn.), the ranking Republican on the Senate Health, Education, Labor, and Pensions Committee, called on recess appointees Sharon Block (D) and Richard Griffin (D) to "pack their bags and go home." While acknowledging that resignations by Block and Griffin would leave the Board without a quorum, Alexander asserted that the Regional offices would still be able to process unfair labor practice charges and complaints, as well as representation petitions, while the Senate considered new nominations by President Obama. A review of "where things stand" and an outline of the expected maneuvering by the protagonists follow.

NLRB Response to the Decision

Despite Chairman Pierce's statement that it will be business as usual at the NLRB, the DC circuit court decision and events have made it difficult, to say the least, to conduct the Agency mission in the same manner as it has in recent months.

As of this writing, the Regional offices apparently have not received any specific guidance from Washington as to 10(j) injunctive relief requests from unions. All requests for injunctive relief must be approved by the Board, which has now been found to be improperly constituted by the DC Circuit. Submissions for injunctive authorizations are still being made to Agency headquarters, and should injunctive authorization be challenged by litigants, it is likely that the Agency will argue that any time the Board's quorum falls below three (3) members, then a standing "delegation of authority" to the General Counsel to seek injunctive relief takes effect. In addition to questions about injunctive relief, it has been reported that some employers are refusing to comply with investigative subpoenas, as those are also approved by the current Board members.

There are numerous permutations as to how the injunctive relief scenario will play out, and LMV will follow developments closely as they unfold.

On top of questions of Board authority to act in a customary manner, significant cases, still pending in the DC Circuit, have been impacted.

On the day of the decision in *Noel Canning,* the Circuit issued orders, "on the court's own motion," holding many of the NLRA cases "in abeyance pending further order of the court." Included in the Court's orders, among many other cases decided by Board panels consisting of recess appointments, are the following matters:

- *Banner Health System* d/b/a *Banner Estrella Medical Center*, 358 NLRB No. 93 (2012) – [the hospital interfered with employee's rights to engage in protected, concerted activity by asking

them not to talk to fellow employees about internal complaints under investigation by Company management]

- *American Baptist Homes of the West d/b/a Piedmont Gardens*, 359 NLRB No. 46 (2012). – [Board overruled long standing precedent that denied union representatives access to statements obtained by employers, stating that the Board must balance the union's interest in investigating and processing grievances with the employer's and witness' need for confidentiality and privacy]

- *Chamber of Commerce v. NLRB,* D.C. Cir., No. 12-5250 – [the Chamber had originally challenged in the U.S. District Court the Board's adoption of amendments to its regulations governing representation elections (the "quickie" election rule changes). This matter was the Board's appeal of the District Court's ruling that the rule amendments had been improperly adopted. Oral argument on this case had been set for April 4, 2013, and the scheduled argument was removed from the Court's docket.

There is no indication from the Court how long these pending cases will be held or how they will be resolved. At present, over thirty (30) NLRB cases pending appeal before the D.C. Circuit have been held in abeyance.

To Request Re-Hearing or Not

The Agency must decide now whether to request a re-hearing in the DC Circuit before the three member panel who decided the case initially or request re-hearing before the full court. A petition for re-hearing must be made by March 11, 2013.

The Board could also petition the U.S. Supreme Court for review within ninety (90) days of the DC court decision issued on January 25, 2013 or within ninety (90) days of the Circuit Court's denial of a re-hearing of its decision.

While the NLRB has not yet announced its intention in regard to possible appeals, it seems likely that the Agency will seek Supreme Court review as soon as possible to clarify the important constitutional issues presented in these cases.

The Board's Intention to Stay the Course:

In a speech on February 15, 2013, member Sharon Block commented on the Board's intentions to operate as normal. In her comments, Block stated that the Agency routinely "presume[s] the regularity of presidential appointments" and that it is not the Board's role to question President Obama's appointments. In addition, Block asserted that the Agency "cannot change [its] entire approach based on the decision of one court of appeals." To quote Member Block, "The President sent me to do a job, and I'll continue to do it until I'm told otherwise."

As to the course an appeal of *Noel* will take, Block stated the Executive Branch's Justice Department will make those decisions. As noted above, decisions need to be made soon as to the appeal.

Other Court Action on the Recess Appointment Issue

The constitutional and political battle over the recess appointments to the NLRB reached the U.S. Supreme Court, albeit briefly, in a case involving striking workers at nursing care facilities in Connecticut.

In an action before the 2nd Circuit of the U.S. Court of Appeals *(Kreisberg v. Health Bridge Management)*, the Court denied a motion by the employer to stay a district court injunction ordering the employer to reinstate the striking workers until a pending NLRB case is decided by the Board. The 2nd Circuit determined that the nursing home had not demonstrated that it would be "irreparably injured" absent a stay.

In response to the adverse 2nd Circuit decision, the employer sought emergency consideration of their motion to stay before the U.S. Supreme Court. On February 3, 2013, Justice Ginsberg denied consideration of the employer's motion. On Monday, February 5, 2013, the employer asked Justice Antonin Scalia to consider a stay of the injunction while the Supreme Court considers President Obama's recess appointments. Scalia referred the motion to the full court, and on February 6, 2013, the Court denied the emergency application by the employer.

The denial of the application suggests that the Supreme Court is not willing to jump into the recess appointment controversy before it is presented with a *certiorari* petition

in *Noel Canning* or another appellate court decision ruling on the validity of the appointments.

The recess appointment issue has been raised in virtually all of the U.S. Court of Appeals. The only circuits that do not have cases involving this issue are the first, eighth and tenth circuits. Three (3) representative examples are:

- On February 5, 2013, the Fifth Circuit heard oral argument in *D.R. Horton* – discussed in the January and October 2012 ELB – on whether the employer violated the NLRA by maintaining a mandatory arbitration agreement that waived the rights of employees to participate in class or collective actions. The Court determined to leave the issue of the recess appointments and the implications of *Noel Canning* for "another day" and permitted the parties to the proceeding to file supplemental briefs addressing the recess appointment issue after the oral argument on the merits of the underlying case.

- In *United Nurses & Allied Professionals (Kent Hospital*), 359 NLRB No. 42 (2012) – a case reported in the January 2013 LMV employment law bulletin – the charging party asked the DC Circuit to order the NLRB to "cease adjudicating or deciding" the case until such time the Board has a "lawful quorum" of Board members. This action was filed on February 11, 2013, and on February 22, the Court ordered the NLRB to respond to the petitioner's motion to stay the Board's work on the underlying case. (See *In re Geary*, D.C. Cir., No. 13-1029).

- Oral argument on the recess appointment issue is also expected in March of this year in the Third Circuit (*New Vista Nursing and Rehabilitation v. NLRB*, No. 12-1936). This case involves a refusal to bargain and provide requested information to the Union following the Board's certification of the Union as the bargaining agent.

The Obama Administration/Legislative Response to *Noel Canning*

On February 13, 2013, President Obama re-nominated Members Block and Griffin to the NLRB. It seems unlikely that the Senate will act favorably on the nominations, given the contentious history of this drama and the Republicans desire to avoid a NLRB seemingly dominated by union institutional interests.

Block's and Griffin's nominations were sent to the Senate on the same day the House Education and the Workforce Subcommittee convened a hearing to discuss NLRB decisions in which the recess-appointed members participated, and the future of the Agency in light of the *Noel Canning* decision.

Subcommittee Chairman Phil Roe (R-Tenn.) charged that the current NLRB has attempted to "skew the balance of power even further toward union leaders." In response, the ranking democrat, Rob Andrews (D-N.J.), stated that differences in labor policy "should not be carried out by paralyzing an agency" through steps to deny a quorum of members.

Witnesses on both sides of the argument presented their views on *Noel Canning* and the appropriateness of the NLRB's rulings. Depending on one's perspective, it appears that the hearing was a draw, one which allowed politicians and interested stakeholders to make statements which appealed to their constituents.

In addition to the hearing, three (3) separate bills aimed at limiting the Board's current authority were introduced in the Senate. None are expected to ultimately pass, as Obama would veto any legislation and the Senate does not have enough votes to override a Presidential veto.

Bottom Line

If the DC court's decision is ultimately upheld by the Supreme Court, it means that hundreds of decisions issued by this Board over the past year are invalid. However, once the Board obtains a validly appointed quorum consisting of a Democratic majority – as the smart money predicts – expect it to uphold the decisions already issued by the Agency during the previous year. Absent judicial intervention, many of the Board's pro-union decisions will ultimately stand.

If you are the subject of a NLRB ruling where the decision was reached by an improperly constituted Board, you should consult with your attorney as to what steps should

be taken now, pending the outcome before the Supreme Court. The short answer, absent some compelling factual circumstance, is employers should proceed cautiously in ignoring the Board's recent controversial decisions. Most likely, until court- ordered restraint to the contrary, the General Counsel will still be enforcing the Board's Orders when they are disregarded by respondents.

EEO Tips: A Look at Some Recent EEOC Winners and Losers

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During Fiscal Years 2012 and 2013, the EEOC has had some ups and downs with respect to its litigation program. For the most part, there seem to have been more "downs" than "ups." For example, in FY 2012, the EEOC filed only 122 new cases, the lowest number filed in the last 10 years. During FY 2013, based on its press releases through January of this year, the agency has filed only **19** cases. At this same point in FY 2012, the agency had filed **30** cases and, as stated above, FY 2012 was a low year. In part, the downward trend could be attributed to the EEOC's emphasis on developing and prosecuting systemic cases and on a smaller budget for litigation purposes. However, according to recent comments by Commissioner Constance Barker at the Commission's meeting to hear updates on the working of the agency's Strategic Enforcement Plan on February 20th, the downward trend could be the result of some basic philosophical differences among the Commissioners themselves, whether the EEOC should be more engaged in preventing discrimination by educating employers than in prosecuting alleged violations.

Although there seems to be a noticeable change, this is not to say that the EEOC's litigation program has become moribund and is no longer a significant part of the agency's law enforcement activities. On the contrary, during the first quarter of FY 2013 and to date, the EEOC has resolved some 57 lawsuits and collected $12.2 million in monetary benefits on behalf of charging parties or affected class members, thus obtaining approximately $213,664 per lawsuit resolved.

Aside from those cases resolved by consent decrees during FY 2013, the EEOC has won or lost a number of cases on procedural grounds or other current issues. A few are noteworthy to mention. They can be summarized as follows.

RECENT EEOC LOSERS:

1. *EEOC v. Original Honeybaked Ham Co. of Ga.*, Inc. (D. Colorado, No. 1:11-cv-02560, 1/15/13). In this Title VII sexual harassment case, the main issues were: (1) whether the EEOC could include in its lawsuit a subclass of female employees who had not been individually identified but by reference were described to the employer during the course of conciliation as also having been sexually harassed by the same supervisor, a Mr. Jackman, who allegedly had sexually harassed the nine original complainants; and (2) whether the EEOC could include in its lawsuit another class of previously unidentified female employees who allegedly had been sexually harassed by other supervisors in other departments and as to whom the EEOC described only after its lawsuit had been filed. The EEOC asserted that the employer had been given notice about this second class of females during the course of conciliation. The EEOC representative stated to the effect that if the case resulted in litigation, it would probably include this extended affected class of female employees. However, no other details were given to the employer.

The EEOC contended that in both instances, Title VII permits the agency to pursue claims based on unlawful discrimination which it discovers during the course of its investigations but which may not have been included on the face of the charge. The District Court of Colorado held as to the first issue that the EEOC could include the subclass of female employees who allegedly had been sexually harassed by the one supervisor, who was specifically referred to in the agency's Letter of

Determination. The court allowed this class to be included because "there was sufficient information about the class to clearly identify them with this particular supervisor." However, as to the second issue, the Court rejected the EEOC's arguments for inclusion of the subclass of females who may have been sexually harassed by other supervisors because "there was nothing in the EEOC's investigation, determination letter, or the subsequent conciliation that identified unlawful conduct of any manager or supervisor other than "Mr. Jackman." The Court stated that, under the circumstances, the EEOC had failed to comply with the statutory preconditions for suit.

EEO TIP: In this case, the EEOC apparently failed, not just to conciliate, but also to give sufficient information so that the employer could engage in meaningful conciliation with respect to the second sub-class of employees at issue. The EEOC, at a minimum, should have recast its Letter of Determination to address its findings pertaining to the additional supervisors and sub-class of affected female employees. It raises the question of whether the EEOC was arbitrary in setting its own limits on the sufficiency of conciliation and, therefore, whether under the circumstances it was conciliating in good faith.

2. *EEOC v. Swissport Fueling Inc.,* (D. Arizona No.2:10-cv-02101, 1/7/13). In this case, the EEOC was seeking $5.5 million in back pay and damages on behalf of a class of 42 African-American immigrant employees who worked at Sky Harbor Airport in Phoenix, Arizona. The lawsuit was filed under Title VII and alleged that the employees had been subjected to racial harassment, discrimination and retaliation. However, according to the court, the EEOC failed to specifically identify a sub class of 21 of these employees during the conciliation process and had also refused to give the employer sufficient, specific information as to how the damages for all of them were calculated. The court rejected the EEOC's contentions that under the Administrative Procedures Act, the manner in which the agency carried out its pre-suit investigatory and conciliatory matters was not subject to review. The Court asserted that the EEOC's failure to specifically identify the 21 class members and provide specific information as to damages constituted a failure to comply with the statutory preconditions for suit.

EEO TIP: The EEOC's practice of reserving to itself the extent of its pre-suit investigation and conciliation before declaring that conciliation had failed is subject to challenge. In this case, the District Court of Arizona rejected the EEOC's freedom to set its own boundaries on the matter of investigation and conciliation.

RECENT EEOC WINNERS:

1. *EEOC, et al., v. United Parcel Service, Inc.,* No. 09-cv-05291 (N.D. Ill.,1/11/13). In this ADA case, the court on its own motion reversed itself and denied the defendant's motions to dismiss the EEOC's lawsuit. The EEOC filed its lawsuit in 2009 alleging that UPS had violated the ADA by allowing disabled employees only 12-month leaves of absence and failing to provide them with reasonable accommodations thereafter instead of firing them. Previously, the court had granted the defendant's motion to dismiss because it found that the EEOC had not provided enough information about unidentified UPS employees for whom the EEOC was seeking relief. However, the court allowed the EEOC to file an amended complaint. Actually, after filing two amended complaints in which the EEOC did not identify by name more than two of its class members in any of the complaints, the court accepted one of the complaints because the court found that (1) the complaint offered detailed factual allegations as to how the policy affected two employees … and alleged that the same policy was applied across the board to other employees;" (2) that the role of the EEOC is such that courts generally have allowed complaints with 'class' allegations comparable to those asserted here to move forward; and (3) that the law "does not require plaintiffs, including the EEOC, to plead detailed factual allegations supporting the individual claims of every potential member of a class." The court also stated that it must "defer to the EEOC's investigatory judgment." Hence, the case was allowed to go forward.

EEO Tip: At first glance, the holding in this case would seem to be a direct contradiction of the cases referenced above, which the EEOC lost. However, there is a difference between pleading standards and the statutory pre-conditions for suit. In this case, it is not clear what took place during the course of the pre-litigation investigation and conciliation, which could be an issue as the case proceeds.

2. *EEOC, et al. v. Cintas Corp.*, Nos. 10-2629/11-2057 (6th Circuit, 1/17/13). In this Title VII case, the Sixth Circuit made final its ruling of November 9, 2012 in which the Court overturned the district court's dismissal of the EEOC's lawsuit against Cintas, reversed significant procedural rulings, ordered the district court to reconsider whether the EEOC should be allowed to depose Cintas' Chief Executive Officer, and found no basis for the district court's ordering the EEOC to pay $2.6 million in attorney's fees.

   In the underlying lawsuit, the EEOC had sued Cintas in 2005 in the U.S. District Court for the Eastern District of Michigan alleging that Cintas had discriminated against women by failing to hire them into services sales representative positions. In dismissing the EEOC Complaint, the District Court found that the suit had been filed under Section 706 instead of Section 707, thus requiring the EEOC to "focus on individual acts of alleged discrimination and away from what it alleged was an overall discriminatory practice that affected a class." The district court denied the EEOC's motion to expand discovery and to depose the Cintas CEO. Ultimately, the district court dismissed the EEOC's entire case because of procedural requirements of investigation and conciliation and awarded Cintas $2.6 million in attorney's fees. As stated above, the Sixth Circuit reversed in total the district court's holdings.

EEO TIP: In this case, perhaps the most significant issue was whether the EEOC can bring a lawsuit under Section 706 of Title VII but still use a Section 707 (i.e., systemic or pattern or practice) approach to the evidence as permitted by the Supreme Court in the 1977 case of *International Brotherhood of Teamsters v. United States.* The Sixth Circuit's ruling that the EEOC can do so relieves the EEOC of having to find each individual act of discrimination but may instead find that the unlawful, discriminatory conduct in question was the employer's "standard operating procedure" and then apply that finding to an affected class of employees. This gives the EEOC a great deal of leeway during the course of its investigation and subsequent conciliation to include class members who have not been specifically identified and thereafter to include them in any subsequent lawsuit.

The foregoing "Winners and Losers" show that the investigative and conciliation boundaries which the EEOC allows or imposes upon itself are not a matter of settled case law in all jurisdictions. The District Courts in Colorado and Arizona apparently require definite minimal investigations and broad conciliation subject matter in order to find that the EEOC's has fulfilled its statutory preconditions for suit. On the other hand, the court for the N. D. of Illinois and the Sixth Circuit give some deference to the EEOC's self-defined guidelines. It is always wise to consult competent legal counsel to assist in limiting the scope of EEOC investigations and conciliation whenever a charge involves a potential class action.

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

OSHA Tips: OSHA in 2013

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.

The "new sheriff in town" who brought to OSHA four years ago a strong emphasis on enforcement has departed, but it appears likely that this focus will go forward in 2013 and beyond. Apparently, Assistant Secretary David Michaels will remain as head of the agency and becomes its first leader to serve two terms.

Noting that OSHA penalties were too low to have sufficient impact on compliance with regulations, Michaels employed a number of "administrative enhancements" to rectify this. Changes to the agency's

penalty policy became effective on October 1, 2010. The new system included measures such as a higher minimum proposed penalty, an increased exposure to repeated violations, and greater limits for allowing good faith, size and history reductions on penalties.

Impact of the above changes may be seen with the increase in proposed penalties from an average of $1,053 in 2010 to $2,132 in 2011. The agency has indicated a desire to advance this average to about $3,000 per serious violation. Coupled with the above higher penalties came greater restrictions on local area directors in reducing penalties in order to settle cases. A continuing emphasis on promoting compliance by imposing increased penalties should be expected. The practice of publicizing significant violations and penalties, often referred to as "regulation by shaming" is likely to continue as well.

OSHA issued its last Regulatory Agenda/Plan on January 8, 2013. Items included in this release are Bloodborne Pathogens (BBP); Silica; Beryllium; Confined Spaces in Construction; Electrical Power Transmission and Distribution and Electrical Protective Equipment.

Other regulatory or programmatic items that could move forward in the new term include:

An Injury and illness Prevention Program rule (I2P2), which has been a priority for OSHA and has received much attention. It would require all covered employers to develop and employ a method of "finding and fixing" all hazards within their workplaces. Such a program has already been required by some state-operated OSHAs.

Additional reporting requirements by employers have been proposed by OSHA. This would require employers to report all work-related amputations and all in-patient hospitalizations to OSHA within eight hours. Currently, OSHA only requires the reporting of hospital admissions of three or more employees as a result of a worksite incident or an amputation involving a power press within 30 days (29CFR1910.217).

The final rule for Occupational Injury and Illness Recording and Reporting, NAICS Update and Reporting Provisions is projected to be out soon. The rule will update the list of industries partially exempt from the requirement to maintain a log of occupational injuries and illnesses.

Employers should be aware of the revisions to the hazard communication standard. Changes have been made to bring the United States into alignment with the Globally Harmonized system of classification and labeling of chemicals (GHS). It has been said that the Hazard Communication Standard in 1983 gave workers the "right to know" and the newly adopted GHS gives them the "right to understand." The single duty United States employers will have under the GHS this year will be to train employees on the new label elements and Safety Data Sheets format by December 1, 2013.

Wage and Hour Tips: Current Wage and Hour Highlights – Family and Medical Leave

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

The Family and Medical Leave Act (FMLA) turned 20-years-old in February, and Wage and Hour published a Notice of Final Rulemaking to implement several amendments to the Act. They included expansion of the military family leave provisions and incorporation of a special eligibility provision for airline flight crew employees.

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

to twelve workweeks of FMLA leave for "qualifying exigencies" related to the call-up of their family member (qualifying exigency leave).

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

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

The major provisions of the Final Rule include:

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

Wage and Hour has also issued a revised (February 2013) FMLA poster that is to be used beginning March 8, 2013. Private companies have the poster available for purchase along with other required postings or you can download a copy of the poster from the Wage and Hour website.

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

An employer who fails to properly notify its employees about changes in the way it determines eligibility for FMLA can face serious liability. Last year, the U.S. Sixth Circuit Court of Appeals ruled that a large manufacturer not only owed back wages and attorney fees but also owed liquidated damages to an employee. The employer amended its published FMLA policy to formally adopt the "rolling" method of calculating an employee's 12-month period for FMLA leave instead of continuing to use the calendar year method. A couple of months later, a long-term employee requested FMLA leave to have surgery and the leave was approved. The leave period was actually 10 days longer than the 12 weeks the employee was entitled to under the rolling method. When the employee attempted to return to work, he was terminated because he was outside of the FMLA period.

The employee then filed suit and during the trial, union officials testified they were aware of the change in the

method being used to determine the 12 weeks of eligible leave but the employer had never communicated this change to the employees. The FMLA regulations require that the employee be given a 60-day notice of any change in the method of computing the 12 weeks. Since the employer failed to do that, the trial court awarded the employee back wages exceeding $100,000 plus attorney fees of almost $100,000 but did not award liquidated damages since the employer acted in "good faith." The Court of Appeals ruled that the employer had not acted in "good faith" and thus the employee was entitled the liquidated damages that can double the amount of back wages due.

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

In connection with the 20th anniversary of the FMLA, Wage and Hour released the results of an employer survey that it commissioned in 2012. The survey was conducted by Abt Associations, Cambridge, Massachusetts, between February and June and included responses from more than 2800 employees and over 1800 worksite interviews.

Among the findings, many that were unexpected, the surveys revealed the following:

- 91% of employers reported that complying with the FMLA had a positive effect or no noticeable effect on employee absenteeism, turnover and morale.
- 85% of employers reported that complying with the FMLA is very easy, somewhat easy or has no noticeable effect.
- While 60% of employees meet all the criteria for coverage and eligibility under the FMLA, only 13% of all employees reported taking FMLA leave during the previous year.
- While many employers have the most difficulty with employees taking intermittent leave, the surveys showed only about 24% of FMLA is intermittent leave and only 2% of employees take the leave for a day or less.
- The survey also showed that fewer than 2% of the worksites reported confirmed misuse of FMLA leave while fewer than 3% of covered worksites reported suspicion of FMLA misuse.
- While the FMLA does not require an employer to compensate the employee while on leave, the survey showed that 48% of employees received full pay and an additional 17% received partial pay while talking FMLA leave.

A copy of the complete survey is available on the Wage and Hour website.

Even though the FMLA has been in effect for 20 years, many employers, contrary to the findings mentioned above, are still finding it difficult to be in compliance with the statute. Consequently, I recommend that you review your FMLA policies and make a concerted effort to ensure that you are in compliance. If I can be of assistance, do not hesitate to give me a call.

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

Did You Know…?

…that the United States Supreme Court will review whether "donning and doffing" safety equipment is compensable time under the Fair Labor Standards Act? *Sandifer v. U.S. Steel Corp.*, February 19, 2013. Under the Fair Labor Standards Act, time spent "changing clothes" is not considered compensable. There is a conflict among circuits whether donning and doffing specialized safety equipment is "changing clothes" or different from that and, therefore, compensable.

…that extended layoffs during 2012 rose to 1.15 million from 1.11 million during 2011? This is according to a Bureau of Labor Statistics report issued on February 14, 2013. 57% of those who layed off employees on an extended basis during 2012 anticipate recalling some of those employees. The largest extended layoffs were administrative and waste services, manufacturing, construction, information, and hospitality and food services.

…that 37 senators urged President Obama to issue an executive order prohibiting government contractors from discrimination based on sexual orientation and gender identity? The senators wrote that President Obama is "in a position to protect millions of American workers immediately by including sexual orientation and gender identity alongside long-standing anti-discrimination policies." This initiative is an outgrowth of the successful effort to pass the Employment Nondiscrimination Act, which would prohibit discrimination based on sexual orientation and gender identity. According to the senators, "ENDA's premise is simple: It would make federal law reflect the basic principle that Americans should be judged on their skills and abilities in the workplace, and not on irrelevant factors such as their sexual orientation and gender identity." The senators also stated that five of the largest government contractors have established policies prohibiting discrimination based on gender identity and sexual orientation: Lockheed Martin, Boeing, Northrop Gruman, Raytheon, and General Dynamics.

…that a pregnant employee denied extended leave may pursue a claim of disability discrimination due to the pregnancy? *Sanchez v. Swissport Inc.* (Cal. Ct. App., February 21, 2013). This case arose under the California Pregnancy Disability Leave Law. However, it is instructive for employers throughout the country, as we expect the EEOC to develop claims that pregnancy is a disability requiring reasonable accommodation. In this case, the employer complied with allowing the amount of leave available under California law. However, in permitting the case to continue, the court stated that a disabled employee may request "leave of no statutorily fixed duration" provided that the leave can be reasonably accommodated by the employer. This employee had a high risk pregnancy, requiring extended bed rest. According to the court, the amount of leave available under state law was not the ceiling on the employer's leave responsibilities; it should have considered as a form of reasonable accommodation extending the leave.

…that a government employee union pension trustee embezzled $379,000? On January 23, 2013, Ava Ramey, formerly a trustee of the United Government Security Officers of America, pled guilty and was sentenced to two years in jail and ordered to pay restitution after she admitted embezzling $379,000. *United States v. Ramey*, D. Md. (January 23, 2013). During a four-year period, she wrote over $80,000 in checks from the union's account, charged over $70,000 to the union's debit card, and stole $60,000 using the union's ATM card. She also transferred an additional $100,000 in union funds to her account and helped herself to over $60,000 in writing checks from the union fund to her account. It's hard to believe that a union trustee who steals $379,000 may spend only two years in jail.

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