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# Senate Committee Vote on Perez's Nomination as Labor Secretary Postponed

On April 24, Sen. Tom Harkin (D., Iowa), Chair of the Health, Education, Labor and Pension (HELP) Committee, announced the postponement of the HELP Committee vote on President Obama's selection for Labor Secretary, Thomas Perez. The vote was initially slated to take place on April 25. The cause for the last minute delay? Officially, to give committee members more time to consider Perez's candidacy. Unofficially, according to one of Harkin's aides, it was to prevent becoming entangled in political "shenanigans."

What "shenanigans," exactly? To answer that best requires a bit of background on Perez. And, a bit of background seems timely given the prominent role he'll play in the news and possibly in the government.

Biography: Perez, 51, was born in Buffalo, New York. His father and mother immigrated from the Dominican Republic: she the daughter of an Ambassador who was exiled for criticizing his government; he served in the U.S. Army and went on to become a doctor. Perez is a graduate of Brown University, Harvard Law School, and the John F. Kennedy School of Government (Harvard). He has worked in federal and state government for most of his career, and has also taught courses at law schools. Perez is currently the Civil Rights Division chief at the Department of Justice, a Senate-confirmable position (he was confirmed by a 72-22 vote in October 2009).

Controversies in the Civil Rights Division: Three main criticisms have emerged related to Perez's performance in the Civil Rights Division.

First, a report from the Office of the Inspector General (OIG) on the Civil Rights Division from 2001 to 2011 revealed a workplace riven by political and racial tensions, especially in the subdivision responsible for enforcing voting rights. This storyline seemed to lead the pack at the time of Perez's March nomination, but has since receded. The OIG did not find that any enforcement decisions had been made out of racial or political bias, but that certain decisions—particularly dropping a voter intimidation case against the New Black Panther Party—could have *appeared* to have arisen from racial or political bias.

Second, Perez's statements on immigration have been labeled as "outside of the mainstream" by Senator Sessions (R., Ala.). In December 2011, Perez wrote a letter to Alabama sheriff and police departments indicating that they could be sued or their federal funding could be negatively impacted if the Division found that they were enforcing Alabama's immigration law in a way that had a discriminatory effect on Latinos or other groups. (Sheriffs in particular were offended by the threat; the Alabama Sheriff's Association had opposed the law).

Third, Perez made a deal with the City of St. Paul that negatively affected two *qui tam* suits against the City. (A *qui tam* suit is one where a private citizen initiates a suit to remedy an injury to the government; if successful, the private citizen may collect a portion of the award). One of those *qui tam* suits was brought by Fredrick Newell under the False Claims Act, alleging that St. Paul had received millions of dollars in community development funds based on improper certifications that the City was complying with federal law. According to a Congressional Report published on April 15 by Republicans, several government attorneys worked with Newell and ultimately recommended the federal government join in the suit. (*Qui tam* suits can proceed without government participation). According to Perez, the DOJ's leading expert on the False Claims Act classified Newell's suit as a loser. An unrelated case between the DOJ and St. Paul, *Magner v. Gallagher*, was being appealed to the Supreme Court. According to the Congressional Report, Perez was concerned the Supreme Court could use the *Magner* case to invalidate the use of disparate impact theory in Fair Housing Act enforcement. In the end, Perez agreed not to intervene in the *qui tam* suits, and St. Paul agreed to drop the *Magner* appeal. Perez's opponents have characterized this as an improper *quid pro quo* arrangement resulting in the government's passing on a viable recovery of millions of dollars in exchange for preserving the disparate impact theory's use in FHA cases.

Back to the original question: What "shenanigans" was Sen. Harkin hoping to avoid in postponing his Committee's vote on Perez? A HELP subcommittee had invited Fredrick Newell to testify on the same day about the *quid pro quo* deal that resulted in the U.S. not intervening in his suit. The Perez Committee vote has been rescheduled for May 8. The hearing at which Newell was to testify has been postponed until further notice.

## Seven Out of Ten Major Unions Lose Membership

Around this time each year, labor unions are required by law to file membership information with the United States Department of Labor. The DOL's report on that information reveals that seven of ten major unions had fewer members in 2012 than 2011. The union with the largest membership loss was the National Education Association, losing 99,175 and dropping its membership total to 3.1 million. This was hardly a surprise given the overall reduction in public employment. The Teamsters lost 51,924, falling to a total of 1.3 million members; and the Service Employees International Union lost 44,960, dialing back to 1.9 million members. Several shrinking unions have lost members for three consecutive years. For example, the Laborers International Union of North America lost 61,540 members between 2009 and 2012, reducing their total membership to 571,065.

Major unions that increased membership in 2012 include the IBEW, which gained 4,978 members; the Steelworkers, which gained 7,100 members to a total of 614,054; and the UAW, which gained 1,794 members to a total of 382,513.

The UAW credits its slight membership increase (for the second consecutive year) to the rebounding auto industry and its efforts to organize non-union manufacturers (check out uawvance.org, which is a compelling UAW website related to the union's organizing effort at Mercedes). Interestingly, the Steelworkers do not credit the increase in their membership to winning more elections. Rather, they have focused on converting non-members in right-to-work states who are covered by the bargaining agreement. The Steelworkers view non-member bargaining unit employees as "low hanging fruit" for membership.

We do not see a change to the overall downward trajectory of the U.S. labor movement, at least measured by membership. Even where labor wins a battle, it is still losing a war of attrition and disinterest. For instance, though the Machinists organized 7,500 members through

the Continental and United Airlines merger, they still lost 4,033 members overall in 2012.

## Harassing Behavior Did Not Violate Title VII

In the case of *Medina-Rivera v. MVM Inc.* (1st Cir., April 10, 2013), the First Circuit Court of Appeals held that an employee had to claim with specificity that she was being sexually harassed, and not just "bothered." Harassing behavior does not violate Title VII where the recipient fails to identify that it is based on a protected class. MVM provides security services to federal agencies. Medina-Rivera was hired to work as a detention officer on a part-time, as needed basis. She complained to a supervisor that an Immigration and Customs Enforcement (ICE) agent was bothering her. She said the agent called her at home up to 100 times and bothered her at work. Medina-Rivera's supervisor told her that she could not remove her name from a call list that ICE had access to, because MVM agreed to provide its employee contact information to ICE. Once the supervisor became aware of allegations that the ICE employee attempted to hug Medina-Rivera and sexually assaulted her, she took appropriate action and the ICE employee was removed from contact with MVM staff.

Medina-Rivera sued MVM, claiming that she was subjected to sexual harassment and MVM did nothing about it. In granting summary judgment for the employer, the court stated, "The difficulty for Medina is that Title VII does not ban harassment alone, no matter how severe or pervasive – no, as relevant here, that statute bans *sexual* harassment." (Emphasis in original). The court added that Medina did not identify which employee she claims "bothered" her until she raised allegations of sexual assault. She also failed to indicate whether the phone calls she received were in any manner related to sex. The court said that, "Of course we are not suggesting that she had to throw around buzzwords like 'sex' or 'sexual harassment.' We say only that she had to say something to put MVM on notice that the complained-of harassment was sex-based." The court added that although Medina's supervisor believed she knew which ICE employee made the calls to Medina, that did not constitute notice to the supervisor or MVM of sexual harassment.

It's hard to condone the ostrich-type behavior that the employer initially showed in response to an employee's complaint of being called one hundred times. The court may not have been so lenient if MVM hadn't reacted promptly once a more specific allegation was made.

## Boss Says, "You're Too Old" to Subordinate, Yet No Age Discrimination

It is virtually unimaginable to think that a boss could tell a subordinate that she was "too old" for the job and not end up with the employer writing a check for an age discrimination claim. However, those comments and the finding of no age discrimination occurred in the case of *Marsh v. Associated Estates Realty Corp.* (6th Cir., April 5, 2013).

Amy Horn supervised Rosemary Marsh. Horn was the property manager, and Marsh's responsibilities were to solicit potential tenants and "close the deal" on leases. Marsh's replacement was 26 years old.

Horn's supervisors evaluated Marsh based upon objective factors several times over a two year period. This included scores related to the number of contacts with potential tenants and the number of leases closed. These supervisors in March and April, notified Marsh that her scores in these areas were unacceptable and failure to improve could lead to termination. Seven months later, Marsh was put on a "performance improvement plan" but failed to improve. One month later, Horn notified Marsh that she was terminated. Horn told Marsh that, "I think you're getting too old for your job."

So how can a supervisor make that comment to a direct report without it becoming direct evidence of age discrimination? The court stated "At the most, these statements show only that Horn felt that Marsh was an elderly individual and that some stage of old age was correlated with a decrease in job performance. To hold that age was the but-for cause of Marsh's termination, a factfinder would still have to infer from these statements that Horn's supposed disdain for the elderly led her to fire Marsh." The court stated that Horn was not the decisionmaker, but Horn communicated the decision

made by others. Therefore, that statement was not evidence of age discrimination.

Remember that an employer's response at the EEOC is reviewed carefully by a plaintiff's attorney, which occurred in this case. The EEOC asked for the names of those who recommended Marsh's "discipline, demotion and/or discharge." The employer listed Horn as one of the individuals involved, the same person who told Marsh that she was getting too old for the job. However, the court generously stated that the employer's response to the EEOC "does not indicate that Horn had any decision-making power (as opposed to being one of several recommenders) and is completely consistent with [the company's] assertion that Horn merely passed along independent generated reports of Marsh's inadequate performance and that individuals higher up the chain of command…made the ultimate decision to fire Marsh."

Supervisors and managers should remember that there is no such thing as "off the record." Sometimes a supervisor or manager who knows an employee well feels comfortable offering an opinion or advice related to an adverse action that has occurred. Although an opinion or advice may be appreciated by the employee, it is not appreciated by the employer if it creates a risk of discrimination.

## Processing Discrimination Concern – Not Protected; Personal Discrimination Complaint – Protected

An employee who initiates a discrimination complaint or participates in an investigation of discrimination is protected from retaliation for those actions, but not a manager who merely processes a discrimination complaint up the chain of command. *Dunn v. Wal-Mart Stores* (S.D. Fla., April 9, 2013). Wal-Mart's managers are required to report to Human Resources any employee complaints about discrimination. The reporting process bypasses the store's general manager – the complaint goes straight to HR.

Daisy Berrios began her career at Wal-Mart as an hourly employee and ultimately was promoted to an assistant manager. Wal-Mart policy requires that "managers who observed, received reports of or otherwise became aware of possible workplace discrimination or harassment [are] required to immediately the misconduct to the Field Logistics Human Resources Manager, Employment Advisor, Market Human Resources Manager, Regional Human Resources Manager, or People Director." A manager who became aware of any employee discussions about unions was required to report that directly to Labor Relations, again bypassing the store's general manager.

Berrios heard complaints from two separate employees, one complaint involved possible discrimination based upon national origin and the other involved possible interest in unionization. Berrios reported both of those complaints according to the company's policy. Berrios alleged that after she followed the policy of bypassing the store's general manager, the general manager admonished her for doing so and threatened to terminate her. Ultimately, the general manager gave Berrios unfavorable performance reviews and in fact terminated her. In granting summary judgment for Wal-Mart, the court concluded that Berrios could not establish that the general manager's actions were because Berrios reported a complaint of discrimination, rather than for bypassing the general manager about the complaint. The court concluded that Berrios simply followed her job responsibility to report the complaint. She did not engage in the protected conduct of either opposing discrimination or participating in an investigation about discrimination. Rather, she simply did her job to report these complaints as she was directed to.

Although we appreciate the court's decision, we recommend that employers not take a great deal of comfort in it. To the extent that an employee, manager or otherwise, is part of the reporting process of a complaint of discrimination, be sure that an adverse action against that person receives careful scrutiny before it is implemented. Retaliation continues as the most popular basis for filing a discrimination claim. If an employee arguably engages in protected activity, be comfortable that an adverse decision is one which the employer can demonstrate would have been made regardless.

# NLRB Tips: Recess Appointment Update – Paralysis Sets in at NLRB

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The pace of controversial decisions and pronouncements issued by the NLRB has grinded to a virtual halt in the wake of *Noel Canning's* finding that the recess appointments of Members Block and Griffin were unconstitutional. The Obama administration continues to struggle to find a way to restore the Agency to a fully functioning body, as the continued deadlock creates uncertainty among employers, unions and labor law practitioners on both sides of the bar. Local Agency officials and Board professionals admit that it appears that the Board is "waiting for the other shoe to fall" in the pending litigation involving the broad rulemaking and decisional changes in how the NLRB administers the Act.

As noted in last month's employment law bulletin, approximately six-hundred (600) decisions have been issued by the NLRB since the January 2012 recess appointments of Block, Griffin and Flynn. All of those decisions are subject to question, and the aggressive posture taken by the NLRB to significantly change the rules of the game has been challenged throughout the U.S. federal Circuit and District courts.

A recent example of the type of judicial resistance to Agency action can be seen in the District Court's decision in New Jersey to dismiss a petition for injunction filed by the Region 22 Director. In *Lightner v. 1621 Route 22 West Operating Co.,* issued on March 1, 2013, the Court decided to "stay and administratively terminate" the petition in light of *Noel Canning* and the uncertainty created about the legitimacy of the recess appointments made by the President Obama. The Employer had petitioned the Court for the dismissal, claiming that the NLRB and the Regional Director for Region 22 (appointed by the recess appointments) each lacked authority to institute the petition for a 10(j) injunction because of *Noel Canning.*

Obviously, the failure to even have the petition set for hearing and considered by the Court constitutes a significant setback for the NLRB, and will severely impact its ability to aggressively seek injunctions providing temporary relief pending enforcement of Board Orders. Expect practitioners to raise the issue before other district courts where the Agency seeks injunctive relief against their clients, using the New Jersey matter as a model argument.

In a representation case setting, the Board's authority to conduct union elections has also been challenged. On March 1, 2013, *Laboratory Corp. of America Holdings* filed a petition for injunctive relief in the District of Columbia U.S. District Court, arguing, in part, that the Board and Regional Director were without authority to process the r-case petition:

> Without a quorum of three properly appointed members, the Board lacks the statutory authority to direct or certify an election, as well as the authority to delegate any of those powers to the Regional Director.

Since this action was filed within the DC Circuit's jurisdiction where *Noel Canning* was decided, it will be interesting to watch how the district court rules on *Lab Corp's* petition for relief.

**President Obama's Recent Efforts to Establish a Valid Quorum at the Board**

On April 9, 2013, the President nominated Chairman Mark Pierce (D) to another term on the National Labor Relations Board, and sent the Senate two (2) additional nominations for management lawyers Harry Johnson (R) and Philip Miscimarra (R) to serve as members of the Board. Johnson, of Arent Fox, and Miscimarra, a partner in Morgan, Lewis & Bockius, were nominated for terms that end August 27, 2015, and December 16, 2017, respectively.

Sharon Block (D) and Richard Griffin (D), the two controversial recess appointments, were re-nominated in February of 2013, but their nominations were never acted upon by the Senate. Commenting on his nominations, President Obama stated:

> With these nominations there will be five nominees to the NLRB, both Republicans and Democrats, awaiting Senate confirmation. I urge the Senate to confirm them swiftly so that this bipartisan board can continue it important work on behalf of the American people.

As expected, initial comment on the nominated package was mixed. AFL-CIO President Richard Trumka voiced concern with the Johnson and Miscimarra nominations, but conceded that confirming all of the nominated members would provide needed stability on the Board. Other labor leaders lauded the President's actions.

Management labor practitioners expressed general satisfaction with the new Republican nominations. However, they are cognizant that the make-up of the Board, if all nominations are confirmed, gives the Democrats a majority. This is consistent with the historical balance on a five member panel - the party in the White House controls the majority of seats at the NLRB.

Reaction from the Congress fell along party lines.

- Senator Tom Harkin (D), chairman of the Health, Education, labor and Pensions (HELP) pledged to give "fair and timely consideration to the president's package of five nominees, and I hope that my colleagues on the other side of the aisle will do the same."

- Ranking Republican member on HELP, Lamar Alexander, repeated his objections to Block and Griffin. Alexander stated that as the Senate "considers the nominees, the two individuals who were unconstitutionally appointed should leave, because the decisions in which they continue to participate are invalid."

Despite Senator Alexander's position, the HELP committee announced that it would hold hearings on the nominations on May 16, 2013. In the meantime, the House continued to pursue passage of H.R. Bill 1120, discussed below.

**LEGISLATIVE ACTION ON H.R. 1120/"Preventing Greater Uncertainty in Labor Management Act"**

As discussed in the March 2013 Employment Law Bulletin, H.R. 1120 limits the Board from taking action that requires a three-member quorum. H.R. 1120 states:

> The Board shall not implement, administer, or enforce any decision, rule, vote, or other action decided, undertaken, adopted, issued, or finalized on or after January 4, 2012, that requires a quorum of the members of the Board.

The bill's prohibition on Board action would end upon the Agency achieving a Senate-confirmed quorum or when the Supreme Court issues a decision on the validity of the disputed recess appointments.

By a vote of 219-209, H.R. 1120 narrowly passed on April 12, 2013. Ten Republicans voted against the measure. Not surprisingly, not one Democrat voted for passage of the bill.

The legislation is not expected to win approval in the Democratic-controlled Senate, and the White House signaled passage of the bill would face a presidential veto.

**LITIGATION BEFORE THE SUPREME COURT IS FAR FROM FINAL RESOLUTION**

The NLRB petition for Supreme Court review of *Noel Canning* must be filed on or before April 25, 2013.

The decision to grant *certiorari* would not occur until shortly before the Court's term ends in June of 2013, and oral argument would not be heard until late 2013. A decision on the merits of the dispute could be expected in the first half of 2014.

Several pending Circuit Court cases might be decided on the recess appointment issue before the Supreme Court votes on whether to accept the petition for review, thereby influencing the Court's vote either yea or nay. In addition, a Senate confirmation of the five nominated members would also influence a vote on granting *certiorari*. However, because of the important issues surrounding the President's recess appointment authority,

it is likely that this case will be considered by the Supreme Court.

**BOTTOM LINE**

It is not clear that the Senate will act, either for or against confirmation, on the current nominations until some judicial decisions start issuing on the recess appointment matter. Eventually, the Board will have a valid quorum and the Agency will renew its aggressive pro-labor agenda. Stayed tuned and LMV will follow closely how this all turns out.

## EEO Tips: Should Employers Really Fear an EEOC "Reasonable Cause" Finding?

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It is generally well known that after a charge is filed with the EEOC, the agency is required to conduct an investigation and make a determination as to whether there is (a) "reasonable cause" to believe that the charge is true, or (b) "no reasonable cause" to believe that a violation has occurred. Obviously, from an employer's standpoint, a "no cause" finding together with an outright dismissal would be the best outcome. But, should an employer feel undone when, despite all of its efforts to cooperate with the EEOC in supplying objective, exculpatory evidence during the course of the ensuing investigation, the agency nonetheless determines that there is "reasonable cause" to believe that the charge is true? No. There are several reasons not to lose heart:

First of all, under established case law, it has always been the case that an EEOC Determination (whether "cause" or "no cause") is not the last word, that Determinations, if admitted into evidence, are subject to review by the courts, and that the EEOC doesn't always get it right. This was certainly true, according to the court, in the recent case of *Sellers v. BNSY Ry. Co.* (E.D. Tx., March 18, 2013). In that case, the court found that the EEOC's Determination was seriously flawed and carried little, if any, probative value because it was based in part upon unsigned, unsworn statements by key witnesses and failed to specifically identify a key aspect of the charging party's retaliation claim, namely, the protected activity engaged in by the charging party which, allegedly, was covered by the statute.

Even before this case, the question of how much deference should be given to the EEOC's Determinations by employers, as well as the courts, has been a worrisome, if not critical, issue. For many years, the courts have given deference to the EEOC's interpretation of the statutes which it enforces (for example, its regulations and guidelines), but the same thing doesn't necessarily hold as to the admissibility and deference that courts have given to the EEOC's Determinations. The Fifth Circuit in the case of *Smith v. Universal Service*, 454 F.2d 154 (Jan. 1972) issued one of the earliest decisions on this matter. In that case, the Fifth Circuit held:

1. That EEOC Determinations are not quasi-judicial in nature and do not determine the rights of the parties subject only to review by the courts.

2. That the parties are entitled to a trial *de novo*, completely separate from the actions (Determinations) of the EEOC.

3. That EEOC Determinations are admissible but not binding on the trial court and are to be given no more weight than other testimony at trial.

4. However, the Fifth Circuit opined that in most cases it would be a great waste of the EEOC's general expertise not to use the findings of the EEOC in considering all of the available evidence before the Court in any given case.

Incidentally, the terms "Letter of Determination" or "Determination" are generally used by the EEOC to report findings of "Reasonable Cause" or "No Reasonable Cause" to believe that a violation has occurred under Title VII of the Americans With Disabilities Act. The term "Letter of Violation" is often used by the EEOC to state that a violation has occurred under the ADEA. If the charge involved multiple bases, the EEOC will frequently call the report a "Determination." For purposes of this

article, the EEOC investigative reports in question will be collectively referred to as "Determinations."

Perhaps a starting point in this discussion should be in trying to define the current standard of evidence used by the Commission to determine whether or not reasonable cause exists. Actually, in the past (according to EEOC Instruction Manuals and Publications), there have been two standards of evidence that may constitute reasonable cause, thus making reasonable cause a "moving target." For example, the Commission has used:

1. The **"More-Likely-Than-Not Standard"** which requires only a minimal amount of evidence to establish that it was more likely than not that a violation occurred. Meeting this standard did not necessarily require a preponderance of the evidence.

2. The **"Litigation Worthiness Standard"** which requires a preponderance of the evidence or at least a sufficient level of evidence that would allow the Commission to prevail on the major issues if the case is litigated by the Commission. (That is, a level of evidence that would give the Commission at least a 50% or better chance of prevailing if litigated by the Commission.)

These standards are clearly subject to change but, as stated above, they have been used in the past as a measuring stick to bring about some uniformity in cause determinations by EEOC's various district offices throughout the country.

**General Admissibility of EEOC Determinations**

EEOC Determinations are generally admissible in all federal courts under Rule 803(8)(C) of the Federal Rules of Evidence (FRE) as an exception to the hearsay rule which in pertinent part exempts "factual findings resulting from an investigation made pursuant to authority granted by law unless the sources of information or other circumstances indicate a lack of trustworthiness."

However, under Rule 403 of the FRE, federal district courts may exclude EEOC Determinations, notwithstanding their general admissibility under Rule 803(8)(C), if, in the district court's judgment, their probative value is substantially outweighed by their potentially prejudicial effect. Some courts make a distinction between the admissibility of EEOC Determinations in bench trials as compared to jury trials and may limit their admissibility where the court believes the Determination's probative value is outweighed by the danger of unfair prejudice in the minds of the individual jurors.

**EEO Tip:**

Although it might not be much comfort to an employer against whom a Reasonable Cause Determination has been made, it is noteworthy that over the past five years the rate at which the EEOC has found reasonable cause has been steadily declining. For example, although the total number of charges filed steadily increased from **95,402 in FY 2008** to **99,412 in FY 2012**, during the same period, the rate of Reasonable Cause findings has steadily decreased from **4.6% in FY 2008** to **3.8% in FY 2012**. This would seem to be good news for employers, since it appears that there is over **a 95% chance** that Reasonable Cause will not be found on charges filed or that the charges will be resolved by some other means by the EEOC.

**EEOC Seeks Input on Improving and Measuring Quality Investigations**

On March 21, 2013, the EEOC held a meeting to seek input into the development of the agency's Quality Control Plan called for in the EEOC's Strategic Enforcement Plan for 2012-2016. Among other things, the Quality Control Plan will revise the criteria used to measure the quality of EEOC investigations and conciliations throughout the nation.

It is not clear whether the increasing charges and decreasing number of reasonable cause findings or budgetary restraints contributed to this self-examination. (Possibly all of these could be a part of the reason.)

The EEOC received input from senior staff members and also the general public, including employers, advocacy groups and other interested stakeholders. The agency was specifically seeking recommendations for quality indicia of investigations, conciliations and methods of improving the intake process. Among other things, the

participants discussed whether the agency should uniformly, throughout the nation, release an Employer's Position Statement to the Charging Party (with confidential items redacted) and whether Employers should be advised as to how the agency classified any given charge against them, i.e., "**A,**" high priority; "**B**," more investigation needed; or "**C**," low priority subject to dismissal. Finally, the Commission listened to suggestions as to how to determine reasonable cause. One participant suggested that one piece of credible evidence should be enough to determine either reasonable cause or no reasonable cause. The Commission did not announce any final conclusion as to the suggestions offered by the various participants but, hopefully, the Commission will adopt a high level of investigative quality and will not lower the standard of evidence necessary to find Reasonable Cause.

In answer to the initial question posed by this article, employers need not shudder in fear of a Reasonable Cause finding. Although such a finding is nothing to brag about, the employer is not without many legal maneuvers that can be taken to minimize its impact and/or prevent it from being admitted into evidence. Here are a few things to remember:

- First of all, remember that EEOC Determinations are not always totally correct and may be challenged. Moreover, a court or jury will not automatically always agree with the EEOC.

- Secondly, remember that, although EEOC Determinations are generally admissible, they are not binding on the trial court and are to be given no more weight than other testimony at trial.

- Thirdly, an employer can try to show that the Determination's findings are based upon broad factual conclusions without a clear analysis of evidence obtained from the charging party or objective witnesses and would thus be prejudicial.

- Finally, an employer can attempt to show that the Determination has no probative value since all of the facts contained in it eventually will be presented to the court or jury through direct testimony, depositions or exhibits at trial.

Employers should obtain legal counsel in order to properly present the foregoing defenses. Please call this office at 205.323.9267 if you need legal counsel to assist in defending the actions of your firm against a finding of Reasonable Cause by the EEOC.

## OSHA Tips: Electrical Violations

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May has been designated as national electrical safety month. Electrical hazards in workplaces are a primary focus of the agency's inspections. Given the extent of its use at virtually all worksites It isn't surprising that electrical exposures are the issue in many violations alleged by OSHA. In fact, if you include the control of hazardous energy (lockout-tagout), which often involves an electrical source, electrical violations would be the most commonly cited violations by the agency.

OSHA's concern with electrical hazards should also be expected in light of the serious and often fatal consequences of resulting accidents. One of OSHA's weekly fatality/catastrophe reports included the following six fatalities:

- A worker was in a scissor lift installing conduit when he came in contact with an overhead crane rail's energized conductors and was electrocuted.

- A worker was digging up an underground electrical conduit when he reached into the ground, grabbed the conductor and was electrocuted.

- Another worker was installing a light fixture when he received an electrical shock and fell off of the ladder.

- A worker was installing a satellite dish and received an electrical shock from an unknown source.

- A worker was changing a ballast and capacitor for an indoor floodlight with 277 volts and was electrocuted.

- A worker was conducting testing and exposed to 270 volt supplied conductors contained in an electrical box when he was electrocuted.

A number of OSHA's electrical requirements are found to appear annually on the agency's list of most frequently violated standards list. The last such report that covered the period October 2011 through September 2012 was no exception. The fifth most violated standard on that list was the 1910.147, Control of Hazardous Energy or lockout-tagout standard. While not exclusive to electrical hazards, they are a major focus of the standard.

The seventh most cited requirement on this list was 1910.305, entitled Wiring Methods, Components and Equipment for General Use. The tenth most frequently cited standard during this period was 1910.303, General Requirements, which addresses things such as splices in conductor cords and marking of equipment.

Employers should make it a priority to have a qualified person regularly inspect electrical equipment.

## Wage and Hour Tips: Employment of Minors

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As we approach the end of another school year, many employers will again be asked to employ minors. Thus, I want to remind you of the potential pitfalls that can occur when employing persons under the age of 18. While this can be very beneficial to both the minor and the employer, one must make sure that the minor's employment is permitted under both the State and Federal Child Labor laws. The Wage and Hour Division of the U.S. Department of Labor administers the federal child labor laws, while the Alabama Department of Labor administers the state statute.

In September 2011, Wage and Hour published some proposed changes to the Federal Child Labor regulations as they apply to minors working in agriculture. During the comment period, they received much resistance to the changes. Consequently, on April 26, 2012, they issued a notice withdrawing the proposal and stating no further changes would be proposed during the Obama administration.

In 2008, Congress amended the child labor penalty provisions of the Fair Labor Standards Act establishing a civil penalty of up to $50,000 for each child labor violation that leads to **serious injury or death**. Additionally, the amount can be doubled for violations found to have been repeated or willful. Since then, I have seen numerous instances where employers have been fined in excess of $50,000.

The Act defines "serious injury" as any of the following:

1. permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

2. permanent loss or substantial impairment of the function of a bodily member, organ or mental faculty; including the loss of all or part of an arm, leg, foot, hand or other body part; or

3. permanent paralysis or substantial impairment causing loss of movement or mobility of an arm, leg, foot, hand or other body part.

Previously, the maximum penalty for a child labor violation, regardless of the resulting harm, was $11,000 per violation. The $11,000 maximum will remain in effect for the illegal employment of minors that do not suffer serious injury or death. Congress also codified the penalties of up to $1,100 for any repeated and willful violations of the law's minimum wage and overtime requirements.

**Prohibited Jobs**

There are seventeen non-farm occupations, determined by the Secretary of Labor to be hazardous, that are out of bounds for teens below the age of 18. Those that are most likely to be a factor are:

- Driving a motor vehicle or being an outside helper on a motor vehicle;
- Power-driven wood-working machines;
- Meat packing or processing (includes power-driven meat slicing machines);
- Power-driven paper-products machines (includes trash compactors and paper bailers);
- Roofing operations;
- Excavation operations.

In recent years, Congress has amended the FLSA to allow minors to perform certain duties that they previously could not do. However, due to the strict limitations that are imposed in these changes and the expensive consequences of failing to comply with the rules, employers should obtain and review a copy of the regulations related to these items before allowing an employee under 18 to perform these duties. Below are some of the recent changes:

1. The prohibition related to the operation of motor vehicles has been relaxed to allow 17 year olds to operate a vehicle on public roads in very limited circumstances. However, the limitations are so strict that I do not recommend you allow anyone under 18 to operate a motor vehicle (including the minor's personal vehicle) for business related purposes.

2. The regulations related to the loading of scrap paper bailers and paper box compactors have been relaxed to allow 16 and 17 year olds to load (**but not operate or unload**) these machines.

3. Employees age 14 and 15 may not operate power lawn mowers, weed eaters or edgers.

4. Fifteen year olds may work as lifeguards at swimming pools and water parks but they may not work at lakes, rivers or ocean beaches.

**Hours Limitations**

There are no limitations on the work hours, under federal law, for youths 16 and 17 years old. However, the state of Alabama law prohibits minors under 18 from working past 10:00 p.m. on a night before a school day. Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, and non-hazardous jobs (basically limited to retail establishments and office work) up to:

- 3 hours on a school day
- 18 hours in a school week
- 8 hours on a non-school day
- 40 hours in a non-school week
- Work must only be performed between the hours of 7:00 a.m. and 7:00 p.m., except from June 1 through Labor Day, when the minor may work until 9:00 p.m.

To make it easier on employers, several years ago, the Alabama Legislature amended the state law to conform very closely to the federal statute. Further, the state of Alabama statute requires the employer to have a work permit on file for each employee under the age of 18. Although the federal law does not require a work permit, it does require the employer to have proof of the date of birth of all employees under the age of 19. A state-issued work permit will meet the requirements of the federal law. Currently, work permits are issued by the Alabama Department of Labor. Instructions regarding how to obtain an Alabama work permit are available on the Alabama Department of Labor website (www.labor.Alabama.gov). In 2012, the Alabama legislature passed a bill amending the state child labor law with respect to record keeping, proof of age, required postings, civil money penalties, and the types of adult establishments where minors are not permitted to work.

Employers should be aware that all reports of injury to minors, filed under workers' compensation laws, are forwarded to both the state and federal agencies. Consequently, if you have a minor who suffers an on-the-job injury, you will most likely be contacted by either one or both agencies. If Wage and Hour finds the minor to have been employed contrary to the child labor law, they will assess a substantial penalty in virtually all cases. Thus, it is very important that the employer make sure that any minor employed is working in compliance with the child labor laws.

If I can be of assistance in your review of your employment of minors, do not hesitate to give me a call.

## 2013 Upcoming Events

### EFFECTIVE SUPERVISOR®

Decatur – May 14, 2013
Turner-Surles Community Resource Center

Birmingham – September 25, 2013
Rosewood Hall, SoHo Square

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

## Did You Know…

…that the International Association of Machinists joined the 20th century by electing two women as vice-presidents? Oh, excuse us, it's the 21st century. For the first time in the union's history, two women were elected as officers of the International Union: Diane Babineaux and Dora Cervantes were elected general vice-presidents.

…that Puerto Rico has agreed to one of the highest wage and hour settlements in the public sector ever? On April 12, 2013, Puerto Rico agreed to pay over $35 million to approximately 4,500 current and former corrections officers. Under the Fair Labor Standards Act, public sector law enforcement personnel may receive up to 480 hours of compensatory time, which is banked. The Puerto Rico Department of Corrections and Rehabilitation routinely allowed employees to accrue unpaid comp time in excess of 480 hours. The amount the government has agreed to pay, which includes interest, covers merely the excess over 480 hours.

…that President Obama's proposed FY 2014 budget includes increases for the NLRB, EEOC and Department of Labor? Released on April 10th, the President's proposed budget would increase NLRB funding by $5 million to over $280 million; the EEOC's by $13 million to $373 million; and the Department of Labor's to $12.1 billion, an increase from $12 billion for FY 2013. Within the Department of Labor, OFCCP's budget would increase from $105.8 million to $108.5 million; the Wage and Hour Division's budget would increase by $3.4 million; and OSHA's budget would increase by $5.9 million. Additionally, the Wage and Hour Division would receive $14 million to focus on national initiatives regarding the misclassification of employees as non-exempt and independent contractors.

…that a Racketeer Influenced and Corrupt Organizations Act claim may proceed based upon denial of workers' compensation benefits? *Cassens Transport Co. v. Brown* (U.S. *cert.* denied April 1, 2013). The United States Supreme Court refused to hear a Sixth Circuit decision that workers' compensation benefits are a property interest and, therefore, employees may bring a RICO claim, which includes potential criminal penalties and triple damages. The employees alleged that their employer, Cassens Transport Co., a company physician and a claims adjuster conspired to deny employee workers' compensation benefits. The employees claim they had job-related injuries but the doctor, adjuster and company denied coverage based upon fraudulent medical information. Other appellate courts have ruled that workers' compensation claims are personal rather than property and not recoverable under RICO.

…that according to Bloomberg BNA, 2013 wage increases for first year contracts increased by 0.4% compared to the same time last year? The increase for overall contracts in the first year thus far has been 2.1%. On average, increases in year two have been 1.9% and year three 2.1%. Manufacturing first year increases were 1.7% (2.1% last year). Overall non-manufacturing increases thus far this year were 3.2%, compared to

2.2% last year. Surprisingly, first year increases for state and local government employees were 1.5%, an increase from 1.2% last year. Note that 23% of all contract settlements included lump sum payments.

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