LEHR MIDDLEBROOKS
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# Employment Law Bulletin

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## Bring-Your-Gun-to-Work Laws: Employers in the Crosshairs

Since 2003, 20 states have passed laws authorizing employees to bring firearms to work as long as they are secured in employee vehicles. Alabama and Tennessee are the latest states to enact such laws, with Tennessee's law taking effect on July 1 and Alabama's on August 1.

Tennessee's new law amends the criminal code generally to allow handgun carry permit holders to store guns in their vehicles so long as they are kept out of plain sight and are locked up when the owner is away from the vehicle. A recent opinion from the Tennessee Attorney General clarified that the new law did not restrict employers from prohibiting their employees from having firearms on company property. Many in the gun lobby have a different view of the Tennessee law, setting up a likely showdown in the courts.

Alabama's new law more directly authorizes employees to have firearms in their vehicles on the employer's property so long as the employees have a lawful right to possess or carry the firearm (they possess any requisite permits, or, in the event the firearm is a hunting firearm and it is hunting season, they have a hunting license) and the firearm is kept out of sight or locked up. The Alabama law does not regulate employer policy. It neither requires employers to have a policy on firearms nor regulates what employers may say in such policies if they have them. But the express intent of the law is to prohibit employers from prohibiting employees from storing firearms in their vehicles in compliance with the new law.

The Alabama law is similar to the Florida law, which expressly prohibits employers from firing employees who keep firearms in their vehicles. The Florida law goes a step further in barring employers from even asking employees if they have firearms in their vehicles. A similar law in Kentucky subjects employers to civil damages if they take an adverse employment action against an employee who legally possesses a firearm on company property. Under a similar law in Georgia, employers are barred generally from searching employee vehicles.

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### *Inside this issue:*

Most employers still believe strongly in policies that prohibit employees from possessing weapons, including firearms, on company property. Still, this growing trend of bring-your-gun-to-work laws requires employer attention and a review of existing policies to ensure those policies do not advertise an employer's violation of the law. In many instances, existing policy can be left virtually unchanged with little more than the addition of a clause stating that the policy applies, "to the fullest extent permissible under applicable law."

Thankfully, very few employers ever have to enforce policies against firearms at work. Still, in light of the sweeping trend of new state laws in this area, employers would be wise to review and revise workplace policies prohibiting firearms and consult counsel before carrying out discipline for violations of them.

## House Bill Authorizing Private Employers to Use Comp Time Instead of Overtime Likely Dead in Senate

In May, the U.S. House of Representatives approved by a vote of 223 to 204, the Working Families Flexibility Act, which would have given private-sector employees the same option as government employees to take comp time in lieu of receiving overtime pay. Although the vote largely came down on party lines, three Democrats joined 220 Republicans to vote in favor of the bill, sponsored by Rep. Martha Roby (R-Alabama).

Under the House bill, employees working overtime would have a choice of receiving overtime pay at a rate of time-and-a-half or an equivalent hour-and-a-half of vacation time for each overtime hour worked.

The bill would not allow employers to make it a condition of employment that employees take comp time instead of overtime pay. Employers would still be free to manage the time off taken by employees to ensure that it did not disrupt the operations of the business, and an employee could decide to take overtime pay instead of the comp time at any time.

Since the bill passed the House in May, it has been read twice in Senate sessions and referred to the Senate Committee on Health, Education, Labor, and Pensions, where it has languished. Although the U.S. Chamber of Commerce and the Society of Human Resource Management have come out in favor of the bill, labor unions and Senate Democrats have spoken out against its passage, and the White House recently threatened a veto if the bill ever made it to the President's desk.

Although government sector employers and employees continue to enjoy the benefits of comp time, under the FLSA, non-exempt private-sector employees who work more than 40 hours per workweek must be paid overtime at a rate of at least time-and-a-half.

## Many Employers Must Plan to Pay PCORI Fee by July 31, 2013 Deadline

July 31, 2013 marks the first potential deadline for insurers and employers sponsoring self-funded group health plans to pay the annual fee that will fund the Patient-Centered Outcomes Research Institute ("PCORI"). The ACA established PCORI to "assist patients, clinicians, purchasers, and policymakers in making informed health decisions by advancing the quality and relevance of evidence-based medicine through the synthesis and dissemination of comparative clinical effectiveness research findings." The fee only runs from 2013 to 2020 and applies to plans with plan years ending on or after October 1, 2012, and before October 1, 2019. Only employers whose plan years ended between October 1, 2012 and December 31, 2012 are required to pay the first fee this year by July 31, 2013 (this would include calendar year plans).

The PCORI fee is imposed on insurers of "specified health insurance policies" and plan sponsors of "applicable self-insured health plans." Generally, employers sponsoring self-funded plans that provide accident and health coverage are subject to the PCORI fee (including retiree-only plans). Importantly, the fee is imposed on the plan sponsor, and not on the plan itself. As a result, employers cannot use plan assets to pay the fee.

The amount of the PCORI fee is the product from multiplying the average number of covered lives under the plan by the "applicable dollar amount." For a plan year ending on or after October 1, 2012, and before October 1, 2013, the applicable dollar amount is $1. For a plan year ending on or after October 1, 2013, and before October 1, 2014, the applicable dollar amount is $2. The applicable dollar amount for plan years ending on or after October 1, 2014, will be increased based on increases in the projected per capita amount of national health expenditures.

**PCORI Fee = Applicable Dollar Amount x Average # of Covered Lives**

To calculate the average number of covered lives under the plan, plan sponsors may use one of the four methods explained below; however, for fees due on July 31, 2013, employers are permitted to use "any reasonable method."

- Actual Count Method – Add the total number of lives covered for each day of the plan year and divide that total by the number of days in the plan year.

- Snapshot Count Method – Add the total number of lives covered on one date in each quarter, or an equal number of dates for each quarter, and divide the total by the number of dates on which a count was made.

- Snapshot Factor Method – Add the total number of participants with self-only coverage on the designated date(s) and the product of the number of participants with coverage other than self-only coverage on the date multiplied by 2.35, and divide that sum by the number of dates on which a count was made.

- Form 5500 Method – Add together the number of participants covered at the beginning and end of the plan year as reported on the Form 5500 filed for the applicable self-insured health plan for that plan year.

Certain plan designs may allow employers to avoid paying fees for certain participants or avoid paying more than one fee for any one participant. For example, employers that sponsor more than one self-insured plan may treat the plans as a single plan, and only pay the fee once for overlapping lives, as long as the plans have the same plan year. Also, self-insured health plans that provide accident and health coverage through fully-insured options and self-insured options may disregard the lives that are covered solely under the fully-insured options.

Although the IRS initially indicated that the PCORI fee would not be a deductible expense for employers, it recently changed its position on the issue. An IRS memorandum released earlier this year provides that the PCORI fee is deductible as an ordinary and necessary business expense under the Internal Revenue Code.

Once employers have calculated the PCORI fee, they will use IRS Form 720 to report and pay it. The IRS recently updated Form 720 and the instructions to reflect PCORI fee obligations. The updated form can be found at http://www.irs.gov/pub/irs-pdf/f720.pdf and the instructions can be found at http://www.irs.gov/pub/irs-pdf/i720.pdf. Although Form 720 is a quarterly filing, employers need only file it once per year for PCORI purposes; however, employers may still need to file a Form 720 in other quarters to satisfy additional tax obligations they may have.

For more information on the PCORI fee or to discuss strategies to minimize PCORI and other ACA-related expenses, please contact your LMV attorney.

## Union Organizers Using New OSHA Policy to Gain Access to Employer Premises

OSHA recently issued a Letter of Interpretation in which the agency said that at non-union worksites (where no union is present and no collective bargaining agreement is in place) a single employee complainant may designate a non-employee union organizer or official to act as that employee's "authorized employee representative" for the purpose of: (1) participating in OSHA's onsite investigation of the employer's premises; (2) requesting OSHA inspections; (3) participating in OSHA's confidential Informal Conferences between the agency and employer; (4) challenging the kind of abatement and abatement period described in contested OSHA citations; and (5) participating in litigation and hearings before the federal OSHA Review Commission.

OSHA's interpretation is at odds with OSHA's own procedural rules, its field operations manual, regulations, and the Act, itself, all of which generally define an "authorized employee representative" as a labor union that has a pre-existing collective bargaining relationship with the employer and has been legally certified the representative of the employees affected.

Unions are no strangers to OSHA. Safety issues are often at the core of union organizing efforts, creating the sort of divisive and passionate fervor that helps bring employees together for a common cause. We've seen more than a handful of union organizing campaigns born out of OSHA investigations.

Still, OSHA's interpretation appears to be yet another federal overreach in furtherance of the Administration's pro-union agenda. Just as many of this Administration's prior efforts to implement overreaching, pro-union rules have dragged federal agencies into court, we expect OSHA's new policy will land the agency in the same place. In the meantime, employers should be sensitive that any employee-initiated OSHA investigation now risks union involvement or even the birth of a union organizing campaign.

## Court Strikes Down DOL Rule that Made Tips the Property of Employees

Earlier this month, a federal district court in Oregon overturned a 2011 amendment to DOL regulations that prohibited employers from taking or distributing employee tips even where the employer had not claimed a tip credit. In *Oregon Rest. & Lodging Assoc. v. Solis* (D. Or. June 7, 2013), the court granted summary judgment in favor of the Oregon Restaurant and Lodging Association and the National Restaurant Association, when it held the 2011 rule, which prohibited employers from using tips even if they paid employees at or above the statutory minimum wage, was inconsistent with the FLSA and a 2010 decision by the Ninth Circuit Court of Appeals.

Prior to the 2011 rule change, employers were free to agree with tipped workers on a combined "tip pool" that would share tips with both tipped and non-tipped workers, alike. Such a practice, explained the court, "incentivized and rewarded the whole line of service, including employees, like cooks and dishwashers, who were not customarily or regularly tipped."

The 2011 amendment to the regulations put an end to this practice, declaring that "Tips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips. . . As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool." The amendments went on to provide that only regularly tipped employees could participate in the tip pool.

As the court explained, federal agencies are only permitted to issue interpreting regulations where those regulations are consistent with the underlying statute passed by Congress.

The court found that the plain language of the FLSA "implies that Congress has given employers a choice: either pay the full minimum wage free and clear of any conditions, or take a tip credit and comply with the obligations imposed by section 3(m)." Either choice, said the court, ensures that employees get at least minimum wage. Where the 2011 amendments to the regulation run afoul of the clear meaning of the Act is in their prohibition on employer use of the tips even when the employer does not take a tip credit, said the court.

Finding "the new regulations are invalid," the court ruled in favor of the industry groups, striking down the 2011 tip credit amendments. Although limited to the opinion of just one district court, we expect many restaurant and hospitality industry employers will explore reinstating the use of tip pools, even where the employer is not taking a tip credit. Such a decision should be part of your organization's overall risk tolerance and we encourage you to plan for the likelihood that this decision will be appealed to the Ninth Circuit Court of Appeals.

## Court Holds Passive-Aggressive Disorder Is Not ADA Qualified Disability

In a decision sure to shock mothers-in-law everywhere, a federal district court in California concluded this month that a fired college employee's disability discrimination claims could not proceed on the basis that his asserted disability, passive-aggressive disorder, was not a disability within the meaning of the Americans with Disabilities Act ("ADA"). In *Gliha v. Butte-Glenn Community College* (E.D. Cal June 14, 2013), the plaintiff, John Gliha, alleged that the college subjected him to hyper-scrutiny and discriminated against him on the basis of a perceived disability when it ordered him to undergo counseling for what it labeled, "passive-aggressive" behavior.

Gliha's employment record contained multiple documented disagreements with his supervisor. His supervisor twice told Gliha that he should undergo counseling for passive-aggressive disorder, even though Gliha was never formally diagnosed with this condition.

Although Gliha sued on the basis that his employer regarded him as disabled because it perceived that he suffered from passive-aggressive disorder, the court held that such a disorder is not a protected disability, either under the ADA or the California Fair Employment and Housing Act ("FEHA"), which generally has a broader definition of "disability" than the ADA.

The court went on to add that "an inability to get along with one's supervisor does not give rise to a disability within the meaning of either the FEHA or the ADA."

We have frequently quipped here at LMV that recent amendments to the ADA have made just about anything "more severe than a hangnail" an ADA-qualified disability. For once, we're glad to be wrong about that. But we increasingly see the old bright line rules of what is/is not a disability eroding away, either by regulation or court decision. The American Medical Association announced this past week that it now considers obesity to be a disability. Certainly as Americans and U.S. agencies combat health epidemics, we should expect to see only more impairments qualify as disabilities, but as *Gliha* illustrates, employers must also be cautious when using labels or throwing out informal diagnoses to categorize poor employee performance.

## Senators Propose Amending ACA to Change Definition of "Full-Time" to 40 Hours

For employers struggling to comply with the Affordable Care Act's ("ACA") employer mandate, there may be no tougher challenge than grappling with ACA's rule that employees working 30 hours per week or more, on average, are to be considered "full-time" under the Act, entitling them to a covered employer's offer of group health insurance coverage. Prior to ACA, federal and state law generally left it up to employers to determine how their employees would be classified and what constituted a full-time versus a part-time employee.

The 30-hour-per-week threshold for full-time" status is certainly one of the least welcomed aspects of the Act. Prior to ACA, most employers used a 40-hour or 32-hour threshold to distinguish full-time from part-time employees.

As a result of employer efforts to bring their classification systems and employee hours in line with the new ACA mandates, we've seen headline after headline detailing employer decisions to reduce employee hours, which in most instances also reduces employee pay.

On June 19, Senators Joe Donnelly (D-Indiana) and Susan Collins (R-Maine) introduced a bill to amend the ACA, changing the definition of full-time employee to one who works on average 40 hours per week or more. The legislation would also bring relief to employers who find themselves subject to the employer mandate by virtue of having a large number of part-time employees, whose hours get aggregated and averaged out to a full-time equivalency under ACA rules. The Donnelly-Collins bill would change the number of hours considered to equal a "full-time equivalent" from 120 hours per month to 174.

After introducing the legislation, the Senators also sent a letter to President Obama in which they explained their amendment is a solution to the employer struggle to conform reality to the impracticality of ACA rules.

"We understand that the full implementation of the health care law requires a deliberative process, and we recognize the Treasury Department's efforts to provide some initial transition relief and safe harbors through the application of the full time employee definition and the calculation for determining large employer status under the proposed rule," the Senators wrote.

"These changes, however, provide neither the certainty nor the information businesses need to plan, budget, and comply with the new employer requirements before the end of the year," said the Senators.

Senator Collins had tougher words about ACA in her press release announcing the introduction of the amendment, where she said, "The new health care law creates a perverse incentive for businesses to cut their employees' hours so they are no longer considered 'full time.' If its definition of full-time worker as someone who works only 30 hours a week is allowed to go into effect, millions of American workers could find their hours, and their earnings, reduced. This simply doesn't make sense."

The Senators' proposed amendment, S.1188, has been referred to the Senate Finance Committee for further consideration.

## Supreme Court Defines "Supervisor" for Purposes of Vicarious Liability Under Title VII

Yesterday, in a Title VII hostile work environment case based on race, the Supreme Court held that an employer may be vicariously liable for a supervisor's unlawful harassment only when the employer has empowered that supervisor to take tangible employment actions against the victim. In *Vance v. Ball State University*, the Court defined "supervisors" as those persons who have the power to take "tangible employment actions" against employees, *i.e.*, to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Only employees empowered to take such tangible employment actions are supervisors for purposes of vicarious liability under Title VII, as discussed further below.

In agreeing with the lower court's definition of supervisor, the Court included (or at least appears to have included) as "supervisors" those persons empowered to merely discipline employees and possibly those persons who make recommendations about tangible employment actions. When there is some question as to whether the employee's empowerment and associated employment action count as a tangible employment action, the key is whether the action has "economic consequences" to the employee.

The Court also reaffirmed its tripartite framework for determining when an employer may be held liable for its employees' creation of a hostile work environment. First, employers are vicariously (or strictly) liable for harassment by a supervisor where the supervisor takes a tangible employment action against the employee. Second, even when a supervisor's harassment does not culminate in a tangible employment action, the employer is vicariously liable for the supervisor's creation of a hostile work environment if the employer is unable to establish an affirmative defense. The employer establishes this affirmative defense, commonly known as the *Faragher / Ellerth* affirmative defense, to mitigate or avoid liability by showing (a) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (b) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were provided. Third, an employer may be held liable for a hostile work environment based on the actions of a co-worker by demonstrating the employer was negligent in controlling working conditions, *i.e.* the employer knew or should have known about the harassing conduct and failed to stop it. The Court noted that relevant evidence of employer negligence includes evidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, and/or effectively discouraged complaints from being filed.

Importantly, the Court indicated that this tripartite framework, including the *Faragher / Ellerth* affirmative defense, applies to all hostile work environment claims (*e.g.* racially hostile work environments). Prior to *Vance*, it was unclear whether this framework applied to hostile environment claims other than those based on sexual harassment.

# NLRB Tips: Recess Appointment Battle Continues in U.S. Senate

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Democratic leaders in the Senate plan a summer showdown over President Obama's stalled nominations to federal agencies, including secretary of labor nominee Thomas Perez and five nominees to the NLRB. In addition, the majority intends to introduce filibuster reforms aimed at expediting the confirmation process.

The move to force Senatorial action on the Board and labor secretary nominations is planned after the July 4, 2013 recess. With the latest news (announced this week) that the U.S. Supreme Court will grant review on the *Noel Canning* decision (which held the President's recess appointments to the Board were unconstitutional), the Senate will have decide whether to beat the Court to the punch or risk a showdown between the branches of government.

The White House press secretary, Jay Carney, expressed concerns about the delays in the confirmation process in the Senate:

> The time lapse between consideration . . . between committee hearings and consideration on the [Senate] floor . . . I believe is three to four times longer than under President Bush. It's unacceptable. And it's not an appropriate way to conduct the Senate's constitutional obligations when it comes to the confirmation process.

In a separate action, the Senate minority leader, Mitch McConnell, along with 44 other Republican senators, filed an amicus brief with the U.S. Supreme Court, urging the Court to accept the NLRB petition for review of the *Noel Canning* decision concerning recess appointments. Said McConnell:

> The President's decision to circumvent the American people by installing his appointees at [the NLRB] while the Senate was continuing to hold sessions, and without obtaining the advice and consent of the Senate, is an unprecedented power grab [by the President].

**<u>Private Sector Response</u>**

Advocates for organized labor are increasingly concerned that the NLRB will lose its quorum and its ability to issue decisions and rulings, unless the Senate confirms the President's nominees by August 27, 2013, when the term of Chairman Mark Pearce expires.

CWA President Larry Cohen, in coordination with various other pro-labor interest groups, has recently begun a print campaign to urge confirmation of the five nominees to the NLRB. An example of a typical advertisement, appearing in *Politico* on June 6, 2013, and sponsored by the NAACP, stated that a strong NLRB is "absolutely crucial to protecting the rights and concerns of racial and ethnic minorities as well as all Americans who work under the opportunities and protections offered by labor unions."

In addition to the ad campaign, Cohen has advocated for a change in the U.S. Senate rules that would allow nominees to the NLRB and other posts to be confirmed by a simple majority. Currently, sixty (60) votes are needed to avoid a filibuster. In an interview, Cohen said the Agency is in danger of losing its quorum:

> [The Agency] could be 'out of business in seven or eight weeks' – the NLRB is the 'floor in terms of workplace protection for 80 million workers. . . . all too often we focus only on union members covered by the Board. But it applies to all workers.

**STAY TUNED AS THIS DISPUTE UNFOLDS IN THE COMING WEEKS**

**<u>FOURTH CIRCUIT U.S. COURT OF APPEALS FINDS NLRB NOTICE POSTING REGULATION NOT AUTHORIZED BY STATUTE – THE FINAL NAIL IN THE COFFIN</u>?**

On June 14, 2013, the Fourth Circuit Court of Appeals became the second appellate court to strike down the NLRB's August 2011 regulation requiring businesses to post notices of worker rights, finding that the NLRA never authorized or empowered the federal agency to promulgate such a notice-posting requirement. (*Chamber of Commerce* v. *NLRB*, 4th Cir., No. 12-1757, 6/14/13).

In last month's LMV employment law bulletin, the D.C. Circuit decision was discussed in detail. (D.C. CIRCUIT COURT OF APPEALS STRIKES DOWN NLRB NOTICE POSTING RULE) Now, the Fourth Circuit has joined the D.C. Circuit, and on different grounds, it also invalidated the notice posting rule. The Court found that the Act was "reactive" by design, not "pro-active". Citing the legislative history, Justice Duncan found that in enacting the NLRA, Congress did not intend to grant the Board the authority required to adopt the disputed regulation.

If anything, it appears to have been the intent of Congress that the Board not be empowered to play such a [pro-active] role (emphasis supplied).

In affirming the lower court's decision, the Fourth Circuit said it did not need to address the D.C. Circuit's additional ruling that the regulation was invalid as an infringement of the frees speech rights of employers.

**The Final Nail in the Coffin?**

With two adverse appellate court decisions on the books, the smart money is betting that the NLRB will drop this particular effort to publicize the Act's unfair labor practice provisions among the U. S. workforce. Instead, expect the Agency to focus on obtaining a valid quorum and winning before the Supreme Court on the recess appointment issue. I do not expect an appeal of these appellate court decisions. Therefore, for the foreseeable future, employers are safe from having to post this biased, pro-union notice in their workplace.

## U.S. HOUSE COMMITTEES URGE DEPARTMENT OF LABOR TO RECONSIDER PROPOSED CHANGES TO ADVICE EXEMPTION AND PERSUADER REPORTING RULES

On May 29, 2013, Representatives John Kline (R-Minn.) and Phil Roe (R-Tenn.) expressed continued concerns with the DOL's intention to narrow the "advice" exemption under the Labor-Management Reporting and disclosure Act (LMRDA) and expand required reporting of "persuader" agreements between employers and labor relations consultants.

In June of 2011, the DOL Office of Labor-Management Standards issued the proposed rule that would revise the interpretation of "advice", which would increase reporting requirements of any "persuader" agreements between employers and labor relations consultants. To date, the final rule has not been put in place.

**The Old Rule**

Section 203 of the LMRDA requires the disclosure of agreements between employers and consultants under which the consultant performs activities to directly or indirectly persuade workers concerning whether or not to exercise, or the manner of exercising, their rights to join a union and bargain collectively. However, employer and consultants do not have to file a report if the consultant is merely advising the employer. "Advice" has always been exempted from reporting unless the consultant has direct contact with the employees.

**The New Rule**

The proposed rule would make an agreement reportable when the consultant engages in persuader activities that go beyond the plan meaning of "advice," even if the consultant has no direct contact with workers. This constitutes a significant expansion of persuader reporting requirements.

An agreement would be reportable when a consultant engages in specific persuader actions or communications, such as planning a campaign to counter a union organizing or collective bargaining effort, even if the consultant also advises the employer.

**Opposition to the Proposed Rule**

Employers quickly criticized the proposed rule, saying that the measure was pro-union and could lower business profits and increase employers' ULP violations by making it harder for companies to obtain expert advice.

In addition, the American Bar Association (ABA) warned that implementation of the rule could seriously undermine the confidentiality of the client-attorney relationship. The

ABA voiced concern that the proposed reporting requirements would discourage employers from seeking legal representation, thereby effectively denying employers their right to counsel.

**Questions about the Regulatory Burden of the Proposed Rule**

Congress expressed additional concerns about the cost associated with implementation of the reporting rule. While the DOL estimated employers' annual cost to employers as approximately $826,000.00, other studies indicated that the true cost to the economy could cost upward of over $10 billion dollars in the first year of implementation, and between $4.5 and 6.5 billion thereafter.

**Conclusion**

Representative Kline's statement that "workers have a right to hear from their employers on important issues surrounding union representation – yet the Obama administration is engaged in a campaign to silence employers on union matters" is not far from the truth. The DOL proposed persuader reporting rule, coupled with rulemaking actions taken by the NLRB ( such as "quickie" election rules and authorization of micro-bargaining units) demonstrates a disturbing trend under the current administration to stifle the Section 9(c) free speech rights of employer's to legally communicate to employees its views on unionization.

Should the DOL continue to insist on the implementation of the new rule as proposed, expect a flurry of litigation from employer groups, law firms and others aligned in opposition to this measure.

## EEO Tips: The Continuing Problem of Gender-Based Pay Discrimination After 50 Years Under the EPA

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According to the EEOC, time doesn't necessarily heal all (gender based, pay discrimination) wounds. At least not very quickly. In commemoration of the 50th anniversary of the Equal Pay Act, which was signed into law on June 10, 1963, EEOC Chair, Jacqueline Berrien, made the following observation: "Although the progress of the last 50 years is undeniable, pay discrimination remains a pressing problem for women in America… In 2012, women generally earned 77% of men's wages, and for African-American women and Latinas, the number is even lower. At the rate we are progressing, the gender pay gap will not close until 2057."

The EEOC's concerns about gender-based pay discrimination find support in a recent Pew Research Center Report which showed that women have become the primary providers in 40% of American households with at least one child under the age of 18 years old. (Reported by Frank Bruni, New York Times, June 11, 2013). Thus, there is a sense of urgency about this matter at the EEOC, and the agency affirms that the elimination of gender-based pay discrimination has become one of six priority issues under its Strategic Enforcement Plan for Fiscal Years 2013 – 2016.

The EPA was enacted as an amendment to the Fair Labor Standards Act of 1938. Although the Act was mainly intended to help women, its provisions were worded to help men also. The Act prohibits employers from paying unequal wages to men and women who perform jobs that require equal skill, effort and responsibility which are performed under similar working conditions within the same establishment. The only wage differentials permitted, under the Act, are those based upon seniority, merit, quantity or quality of production or factors other than sex. The Act applies to employers with two or more employees and covers executive, administrative, and professional employees as well as state and local government employees. This would seem to be sufficiently broad to equalize the pay between men and women in almost all working conditions and positions. But, apparently, it hasn't. As stated above, reliable statistics show that, even today, women are earning only 77% of what men earn.

This begs the question of why the EPA, enacted in 1963, has not been more effective in bringing about pay parity for women given the fact that it had a "head start" by over two years on the protections afforded by Title VII of the Civil Rights Act of 1964 (effective July 1, 1965). There is probably no single answer, and much depends on who you ask.

It has been said that pay discrimination is a "silent offense." The perpetrators of course don't talk about it and the victims don't know about it. Thus, proponents of the federal Paycheck Fairness Act, which was originally introduced in Congress in 2009 (reintroduced in 2011) but failed to pass, would argue that one of the main reasons for the incessant gap is that, generally, employees are not allowed to talk to each other about their wages, and therefore, most often, are denied information as to any compensation discrimination. The effect of this lack of knowledge was acknowledged in the Supreme Court's ruling in the case of *Ledbetter v. Goodyear Tire and Rubber* (S. Ct., May, 2007) but not resolved in the Plaintiff's favor. Neither was this particular issue resolved in the Lilly Ledbetter Fair Pay Act of 2009 ("LLFPA"), which was passed in response to the Supreme Court's holding in *Ledbetter*. Thus, at least to a major degree, it is argued, the lack of information as to what other employees in the same job class are earning remains a high hurdle to overcome in assessing and remedying pay discrimination. Of course, they would also argue that the other reasons all amount to rank sex discrimination.

> NOTE: The major issue in the LLFPA was the question of <u>when pay discrimination claims</u> may be brought in order to be timely. In counteracting the holding of the Supreme Court that a charge of pay discrimination must be filed within 180 days, the LLFPA provides that pay discrimination is actionable: (1) when a discriminatory compensation decision or other practice is adopted, (2) when an individual becomes subject to a discriminatory compensation decision or other practice, or (3) when an individual is affected by application of a discriminatory compensation decision or practice, <u>including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice</u>. Thus, under the LLFPA, each discriminatory check can now be treated as a new, actionable offense.

On the other hand, employers and certain other labor market analysts argue that the differences in pay between men and women can be attributed to a number of non-discriminatory factors. For example, Peter Coy and Elizabeth Dwoskin in their article entitled: *"Shortchanged; Why Women Get Paid Less Than Men,"* (Bloomberg Business Week June 21,2012) make the following observation:

> "*Only some of the pay gap is the result of discrimination by employers. Men crowd into high-paying fields like engineering, while women dominate lower-paying fields like education and social service. And women are more likely than men to fall off the career track when they have children. They take time off and lose skills, or they opt for less-demanding jobs so they can spend more time at home. Most fathers, in contrast, manage to skate through parenthood without the slightest harm to their careers. Employers could offer family-friendlier policies on leave and flextime, but they can't be blamed for dads who don't do enough around the house."*

Certain recent statistics from the Bureau of Labor Statistics (see ***Women and Men in Management, Professional, and Related Occupations***, 2008) would seem to suggest that after allowing for all of the other reasons in accounting for the difference between the earnings of women and men in the major job categories, some aspect of gender discrimination remains. For example, BLS statistics for 2008 (the latest on this point) show that even though women outnumber men in several managerial or professional occupational fields, their average median weekly earnings are still less than those paid to men in the same field as follows:

- In the field of "***Business and Financial Operations,***" women outnumber men approximately 2.9 million to 2.2 million. However, the median weekly earnings for men in 2008 was $1,167 to $885 for women.

- In the field of "***Education, Training & Library,***" women outnumber men approximately 4.9 million to 1.8 million. However, the median weekly earnings for men in 2008 was $1,020 to $818 for women.

- In the "***Legal***" field, women outnumber men 693,000 to 508,000. However, the median weekly earnings for men in 2008 was $1,696 to $962 for women.

Whatever the reasons may have been in the past, the EEOC seems convinced that it must do something to mitigate pay discrimination in the future. In keeping with its stated intent to target pay discrimination as a priority under its Strategic Enforcement Plan, the agency warned on June 10th that it will be ***"…utilizing its directed investigation authority under the Equal Pay Act to pursue evidence of pay discrimination as appropriate."***

> NOTE: A directed investigation under Section 211 of the EPA allows the EEOC to "investigate and gather data regarding the wages, hours and other pay-related conditions and employment practices of an employer." This includes payroll records, job descriptions and other documentation pertaining to pay plans or pay schedules in order to verify that the law is not being broken. The EEOC's action may be initiated on its own volition and does not have to be based on a formal charge. For example, the EEOC's actions may be based on a tip from a current or former employee or any other legitimate source available. It may be commenced by written notice to the employer from the EEOC of its intent to make an on-site investigation and requests the employer to produce the records within a reasonable time period.

According to an EEOC Press Release this month, the agency resolved a number of lawsuits in 2011 and 2012 involving pay discrimination (under both the EPA and Title VII) which resulted in significant monetary settlements as follows:

- *EEOC v. Forest City Grocery* (settled in 2011 for $125,000);
- *EEOC v. National Railroad Passenger Corp. (Amtrak*) (settled for $ 171,483); and
- *EEOC v. Texas Department of Rural Affairs* (joint action with the Department of Justice, settled for $175,000 in 2012).

Thus, the EEOC's warning to make pay discrimination a priority issue under its current Strategic Enforcement Plan should not be taken lightly.

**<u>SOME EEO TIPS ON HOW TO AVOID EPA PROBLEMS</u>.**

1. First of all, employers should be aware that while coverage under Title VII's provisions regarding sex discrimination requires 15 or more employees, coverage under the EPA could be as few as two employees. Thus, virtually all employers and all positions are covered by the EPA including administrative and executive positions.

2. Secondly, because of what is called the "Bennett Amendment" which was intended to reconcile the EPA with Title VII, any wage discrimination because of sex under the EPA would also normally be a violation of Title VII. (i.e., assuming coverage and the burdens of proof under Title VII can be met).

3. Because of the foregoing coverage provisions and the fact that the EPA is a strict liability statute, we suggest that employers conduct periodic surveys of their pay plans or schedules and job descriptions to <u>make sure</u> that the wages paid to men and women working under the same job descriptions (or even different job descriptions but basically the same job) do not violate the EPA or Title VII.

If you have questions or would like more information on how your firm could benefit from an audit of your firm's wage data, job descriptions and related compensation documents to ascertain whether your wage policies comply with the EPA, please call this office at 205.323.9267.

# OSHA Tips: OSHA and HAZCOM

*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.*

OSHA's chemical hazard communication standard, 1912.1200, covering general industry was issued in 1983. In the late eighties, such coverage was extended to the construction industry under 29 CFR 1926.59. Subsequently, hazard communication violations have ranked at or near the top of OSHA's most frequently violated standards list as released by OSHA each year.

Under provisions of the hazcom standards, employers are required to maintain an inventory of all hazardous materials present in the work areas, keep material safety data sheets for all hazardous materials, ensure that all such hazardous materials are labeled, provide training for employees as to the safe use of such materials and to have a written program describing how the foregoing will be accomplished.

The hazcom standards have been sufficiently complex to generate many questions and subsequent letters of interpretation by the agency. Examples of these include the following:

What are temporary agency employers required to do to meet hazcom requirements? The agency employer would be expected to provide generic hazard training and information concerning categories of chemicals employees may potentially encounter. Host employers would be responsible for providing site specific hazard training.

Can MSDS be stored on a computer to meet the accessibility requirements of hazcom? If the employee's work area is where the MSDS can be obtained, then maintaining MSDS on a computer would be in compliance. If, however, the MSDS can be accessed only out of the employee's work area(s), then the employer would be out of compliance with paragraphs (g)(8) or (g)(9) of the hazcom standard.

What is considered proper training under the hazcom standard? Employees are to be trained at the time they are assigned to work with a hazardous chemical. The intent is to have information prior to exposure to prevent the occurrence of adverse health effects. This purpose cannot be met if training is delayed until a later date.

The training provisions of the HCS are not satisfied solely by giving an employee the data sheets to read. An employer's training program is to be a form for explaining to employees not only the hazards of the chemicals in their work area, but also how to use the information generated in the hazard communication program. This can be accomplished in many ways (audiovisuals, classroom instruction, interactive video), and should include an opportunity for employees to ask questions to ensure that they understand the information presented to them. Training need not be conducted for each specific chemical found in the workplace, but may be conducted by categories of hazard (e.g., carcinogens, sanitizers, acutely toxic agents) that are or may be encountered by an employee during the course of his or her duties.

Furthermore, the training must be comprehensible. If the employees receive job instructions in a language other than English, then the training and information to be conveyed under the HCS will also need to be conducted in a comprehensible language.

OSHA published a proposed rulemaking in 2009 to align the agency's hazcom standard with the "Globally Harmonized system." This was published in the Federal Register in March of 2012 to become effective sixty days later. Employers accordingly must train their employees on the new label requirements and on the safety data sheets.

Employers who have not already conducted or planned for the above HCS training should place this on their calendar so it can be accomplished by the due date of December 1, 2013.

# Wage and Hour Tips: The Motor Carrier Exemption Under the Fair Labor Standards Act

*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.*

As there have been some changes in the criteria for the overtime exemption, I thought I would provide an updated overview to the requirements. Section 13(b)(1) of the FLSA provides an overtime exemption for employees who are within the authority of the Secretary of Transportation to establish qualifications and maximum hours of service pursuant to Section 204 of the Motor Carrier Act of 1935, except those employees covered by the small vehicle exception described below.

Thus, the 13(b)(1) overtime exemption applies to employees who are:

1. Employed by a motor carrier or motor private carrier;

2. Drivers, driver's helpers, loaders, or mechanics whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce; and

3. Not covered by the small vehicle exception.

The driver, driver's helper, loader, or mechanic's duties must include the performance of safety-affecting activities on a motor vehicle used in transportation on public highways in interstate or foreign commerce. This includes transporting goods that are on an interstate journey even though the employee may not actually cross a state line. Further, safety affecting employees who have not made an actual interstate trip may still meet the duties requirement of the exemption if the employee could, in the regular course of employment, reasonably have been expected to make an interstate journey or could have worked on the motor vehicle in such a way as to be safety-affecting. An employee can also be exempt for a four-month period beginning with the date they could have been called upon to, or actually did, engage in the carrier's interstate activities.

In 2007, Congress inserted a Small Vehicle Exception to the application of the overtime exemption, which severely limits the exemption, especially for small delivery vehicles such as vans and SUVs. This provision covers employees whose work, in whole or in part, is that of a driver, driver's helper, loader or mechanic affecting the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways in interstate or foreign commerce, except vehicles:

(a) Designed or used to transport more than 8 passengers, including the driver, for compensation;

(b) Designed or used to transport more than 15 passengers, including the driver, and not used to transport passengers for compensation; or

(c) Used in transporting hazardous material, requiring placarding under regulations prescribed by the Secretary of Transportation.

Due to the Small Vehicle Exception, the Section 13(b)(1) exemption does not apply to an employee in any workweek the employee performs duties related to the safety of small vehicles even though the employee's duties may also affect the safety of operation of motor vehicles weighing greater than 10,000 pounds, or other vehicles listed in subsections (a), (b) and (c) above, in the same workweek. For example, this means that a mechanic who normally spends his time repairing large vehicles and works on a vehicle weighing less than 10,000 pounds is not exempt in any week that he works on the small vehicle. When determining whether the vehicle meets the 10,000 pounds requirement a U.S. District Court in Missouri, confirming Wage and Hour's position, recently ruled that if a vehicle is pulling a trailer, you consider the combined weight of both the vehicle and the trailer to apply the exemption.

The Section 13(b)(1) overtime exemption also does not apply to employees not engaged in "safety affecting activities," such as dispatchers, office personnel, those who unload vehicles, or those who load but are not responsible for the proper loading of the vehicle. Only drivers, drivers' helpers, loaders who are responsible for proper loading, and mechanics working directly on motor vehicles that are to be used in transportation of passengers or property in interstate commerce can be exempt from the overtime provisions of the FLSA under Section 13(b)(1). Further, the Section 13(b)(1) overtime exemption does not apply to employees of non-carriers such as commercial garages, firms engaged in the business of maintaining and repairing motor vehicles owned and operated by carriers, or firms engaged in the leasing and renting of motor vehicles to carriers.

Employers that operate motor vehicles should carefully review how they are paying drivers, driver's helpers, loaders and mechanics to make sure they are being paid in compliance with the FLSA. Failure to do so can result in a very large liability. If I can be of assistance, please give me a call.

Last month's article dealt with attempts by Congress to amend the FLSA's overtime provisions to allow the use of comp time by private employers as well as proposed changes to the minimum wage. Along that same line, I recently saw where there was an attempt in the U.S. House of Representatives to limit the enforcement of the Davis-Bacon Act by Wage and Hour. The Davis-Bacon Act sets prevailing wage rates for employees working on federally funded construction projects. The proposed amendment, introduced by Representative Steven King (R-Iowa), was defeated by a vote of 192-231. I expect there will be additional attempts to pass amendments to various wage payment laws during this year but I doubt that many, if any, of the attempts will be successful.

## 2013 Upcoming Events

### EFFECTIVE SUPERVISOR®

Birmingham – September 25, 2013
Rosewood Hall

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

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

## Did You Know…

…the U.S. Health and Human Services Department's Office of Civil Rights received its first complaints under the Affordable Care Act ("ACA") last month when the National Women's Law Center complained that five employers—Beacon Health System, Auburn University, Battelle Memorial Institute, Gonzaga University, and the Pennsylvania State System of Higher Education—had violated Section 1557 of the ACA by excluding pregnancy and related medical care from their group health insurance plans? Section 1557 of ACA prohibits health care programs receiving federal funds from discriminating on the basis of sex, race, color, national origin, age, disability, gender identity, and sexual stereotypes.

…employer use of temporary staffing agencies is on the rise in the U.S., with such agencies employing 2.9 million employees in the first quarter of 2013, according to a June report of the American Staffing Association? The first quarter numbers represent a 2.9% increase over the same data from 2012, a 13th consecutive quarter of year-to-year staffing industry job growth.

…the United States continues to be the only developed nation that does not have laws requiring employers to provide employees with paid holidays or vacations? A recent study by the Center for Economic Policy and Research found that the U.S.'s closest comparator among developed countries is Japan, where applicable law guarantees employees at least 10 paid days off, annually. Austria is the most generous of the developed countries, where applicable law requires 22 paid vacation days, 13 paid holidays, and a month's advance pay to help employees pay for their vacation expenses.

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