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Your Workplace Is Our Work®

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ACA Employer Mandate Delayed, Employer Action Still Necessary

By now every employer not closed for the summer has heard about the July 2 announcement from the Treasury Department delaying the effective dates for the Affordable Care Act's ("ACA") employer mandate, in addition to two key reporting requirements under the Act. These provisions were originally scheduled to take effect on January 1, 2014, but now will not be effective until 2015. Most media reports on the delay have neglected to explain exactly what this means for employers. In fact, the vast majority of ACA remains in effect and requires prompt employer action now.

In the July 2 announcement, Treasury said it would publish transition relief guidance describing the delay and what it means for employers. Although Treasury published the transition relief guidance as promised, the document addresses very little transition (besides the additional 12 months to comply) with very little guidance or relief for employers. In essence, IRS Notice 2013-45, a simple three-page document, does little more than restate the original announcement that Treasury would delay enforcement of the employer mandate (and certain related information reporting requirements) until 2015.

As welcome as the employer mandate delay is, the lack of specific guidance from IRS raises another set of troubling issues. Much of the prior Treasury guidance on employer mandate compliance announced safe harbor processes and procedures intended to help employers crunch 2013 data in order to understand 2014 obligations. With that deadline extended to 2015, we would expect those safe harbors to be just as useful to employers who choose to use 2014 data in order to understand 2015 obligations, but Treasury has not yet said so.

In its transition relief guidance, Treasury did, however, state that employers are "encouraged to voluntarily comply" with the information reporting provisions (once the information reporting rules have been issued) and "to maintain or expand health coverage in 2014." There will be no penalties for failing to do so, however.

Even though employers now have an extra year to prepare for the employer mandate and associated reporting requirements, employers should continue their course of action for making the necessary ACA preparations (whatever that course may be). Some employers have already taken steps, such as changing job classifications and eligibility provisions, and were on pace to comply with ACA terms. These employers should use 2014 as an opportunity to fine tune their data collection and reporting systems, as well as to further analyze their full-time employee population and the effectiveness of their compliance strategies before penalties can be imposed for mistakes.

Other employers have not begun their employer mandate preparations and have now been given a reprieve from their delayed ACA compliance efforts. These employers now have the opportunity to reconsider compliance strategies and implement the necessary changes without suffering penalties.

Most employers, however, fall somewhere in the middle of these two extremes. These employers should also continue to evaluate their compliance strategies and, among others, should consider issues such as (1) the plan changes they have already announced (2) whether any changes can be rolled back or put on hold without causing issues with employees' coverage options (3) the costs that are involved (4) the benefits of using 2014 as a "trial run."

Regardless of the stage of preparation or the voluntary compliance strategy an employer chooses, employers must still prepare to address employee concerns about their need to have health coverage and their options for coverage-both from their employer and exchanges. More importantly, employers must still comply with the ACA obligations that have not been affected by the employer mandate delay.

These include:

- New group health plan requirements taking effect for 2014 plan years, including prohibition of annual dollar limits on essential health benefits, coverage for recommended preventive care, 90-day waiting period limitations, out-of-pocket limit maximums, and the elimination of preexisting condition exclusions for adults;

- New excise fees and taxes, such as the PCORI fee (payable by self-funded plan sponsors and issuers by the end of July 2013) and the transitional reinsurance fee (payable in late 2014), as well as the corresponding reporting requirements;

- Revised Summary of Benefits and Coverage notices and the required exchange notice informing employees of the availability of coverage through exchanges; and

- New guidelines for wellness programs.

The employer mandate delay only affects which employees must be offered coverage, not the nature of the coverage that will ultimately be offered. Failure to comply with these ACA obligations may result in an employer facing penalties unrelated to the employer mandate. While we are awaiting further guidance on the employer mandate and reporting delay, employers should use this much-needed breathing room to continue taking the necessary steps to make sure their plans are in compliance with all ACA obligations.

Finally, given the timing of the ACA delay, it remains possible that a legislative solution is either necessary or inevitable. Many are questioning whether a federal agency can simply delay what a statute (passed by Congress and signed into law by the President) expressly orders shall occur. As we discussed last month, a bipartisan effort is afoot in the Senate to change ACA's definition of "full-time employee" from 30 hours per week to 40. The House has already voted to delay both the employer and employee mandates for one year, but that initiative seems likely to fail in the Senate unless Senate Democrats sense vulnerability on this issue in the fall 2014 mid-term elections. At the same time, industry groups and some Administration officials have recently warned that the health insurance exchanges are terribly far behind on their October 2013 implementation deadline. Despite the black letter law of ACA, how much of it will be delayed and what will be required to comply still remain very much in a state of flux, but this does not change employer obligations to comply with the imminent deadlines that have not been delayed (at least not yet).

Employers Evaluating Same-Sex Marriage Benefits after Supreme Court's DOMA Decision

Our Employment Law Advisory earlier this month reported the U.S. Supreme Court's decision in *United States v.* Windsor, a decision in which the Court found that Section 3 of the federal Defense of Marriage Act ("DOMA") is an unconstitutional deprivation of rights to same-sex spouses lawfully married under the laws of those states where same-sex marriage is licensed. Under current law, only 12 states and the District of Columbia license same-sex marriages (though on the same day as Windsor, the Court also struck down a California ballot initiative that purported to reverse California's law allowing such marriages). Although the Court's decision did not address Section 2 of DOMA, which says states have the authority to decide for themselves whether to license same-sex marriage, the Court's decision established a legal framework under which presumably any state law against such marriages could be found unconstitutional. We think state laws that prohibit same-sex marriages likely have a short shelf life.

As a result of the Court's decision, employers have a number of decisions to make. Employers operating only in states that recognize same-sex marriage might have the easiest road to compliance. Those employers can begin offering same-sex spouses the same benefits on the same tax-advantaged terms as opposite-sex spouses. Employers operating in multiple states, some that recognize same-sex marriage and some that do not, now have potential benefit plan discrimination issues to resolve.

There is no deadline to implement the changes required by the Court's decision. We continue to expect IRS to weigh in with formal guidance for employers looking for answers about timing, plan amendments, and how to reconcile the Court's opinion with differing state laws and employees who may have obtained a same-sex marriage in one state but now work and reside in a state that does not recognize that marriage.

As a result of the Court's decision, employers may be eligible for retroactive refunds for FICA taxes paid on behalf of employees for whom same-sex benefits were provided. Other employers are also considering whether to offer spousal health and welfare benefits at all (ACA does not require it), and if spousal coverage is offered, whether to extend those benefits to same-sex partners regardless of state law. These questions and the timing of any changes related to the answers will turn largely on IRS guidance, but also your business values and risk tolerance. Certainly, employers who treat same-sex marriages differently from opposite-sex marriages risk setting the stage for litigation to test the limits of the Court's decision. Please contact one of our benefits attorneys to discuss your compliance strategy.

Employee Fired After Failing Alcohol Test May Have ADA Claim, Court Says

A Chicago public school safety worker suffering from major depressive disorder, who was fired after he brought raw steak and alcohol to work, may have an ADA failure-to-accommodate claim according to a federal district court this month. In *Ortiz v. Board of Educ. of Chicago*, David Ortiz sued his former employer alleging that he would not have acted so bizarrely, resulting in his termination, had his employer allowed him additional time during a leave of absence so that he could have resolved medication complications.

A 16-year employee of the Chicago public schools, Ortiz made it known to administrators in 2008 that he suffered from mental illness. In 2010, he told a co-worker he was suicidal, and the co-worker received administration approval to take Ortiz to a hospital. After staying in the hospital for a week, Ortiz returned home and tried to kill himself by ingesting a large quantity of medication. The hospital re-admitted Ortiz for nearly a month, before releasing him with what he described as a "prescription cocktail" to manage his depression.

Ortiz was scheduled to return to work on April 5, which he did, bringing with him a package of raw meat and four bottles of Mike's Hard Lemonade. Ortiz's supervisor told him that he smelled of alcohol and would need to submit to a drug and alcohol test. Ortiz failed a breathalyzer, after which he was suspended (pending review by the personnel board) and taken home. During this time, Ortiz contacted his psychiatrist, who made changes to the prescription cocktail, which Ortiz said corrected his behavior about three weeks later. After an investigation by the personnel board, Ortiz was fired for coming to work impaired by alcohol. Ortiz represented that he would not have been impaired and would have been able to perform the essential functions of his job if he had been provided with the accommodation of additional leave time. The court ruled that Ortiz could proceed with his ADA failure to accommodate case.

Under the ADA Amendments Act, the ADA now applies to the side effects of physical and mental impairments, including the medications used to treat them. Although the employer is certainly under no obligation to accommodate an employee who works under the influence of drugs or alcohol, this case serves as a reminder that employers are best served by ensuring they have offered access to reasonable accommodations. The useful question here is, "What can we do or provide for you that will help you better be able to perform your job?"

Thomas Perez Wins Senate Confirmation to be Secretary of Labor

Last week Thomas Perez, President Obama's nominee to replace Hilda Solis as Secretary of the Department of Labor, won final confirmation from the Senate. Prior to winning confirmation, Perez served as the Assistant Attorney General for Civil Rights at the Department of Justice. Perez, a resident of Maryland, had also previously served as the state's Secretary of Labor.

Perez is expected to continue initiatives implemented under outgoing Secretary Solis, with emphasis on increased enforcement through the Department's Wage and Hour Division. Wage and Hour has been the beneficiary of previous budget battles, securing funding in recent years for a significant increase in the number of new investigators.

Secretary Perez has been an outspoken advocate of the Right-to-Know rule, an agency proposal for a regulation that would require all employers subject to the Act to provide employees with a written disclosure of their FLSA classification and the reasons supporting that classification.

Grocery Store Owner Found Personally Liable for FLSA Violations

In 2006, a class of about 400 current and former co-managers and department managers filed an FLSA suit against Gristede's Foods, Inc., which operated about three dozen grocery stores in New York City. The suit alleged exempt misclassification of co-managers and department managers, unpaid wages, and failure to pay overtime. The court granted summary judgment in favor of the class of co-managers and department managers, finding Gristede's violated the FLSA. Shortly after this ruling, Gristede's settled with the plaintiffs, agreeing to pay them an undisclosed sum of money. The grocery chain, however, failed to pay the settlement proceeds.

As a result, the plaintiffs moved for judgment against John Catsimatidis, the owner and CEO of Gristede's. The trial court agreed, finding Catsimatidis liable for the claims of the store managers. Catsimatidis appealed that decision to the Second Circuit Court of Appeals. In upholding the trial court's decision finding the owner personally liable, the Second Circuit explained that an individual is considered to be an "employer" under the FLSA if he has "control over a company's actual 'operations' in a manner that relates to a plaintiff's employment." The court went on to explain that the FLSA does not require an individual to be "personally complicit" in the violations of law or even have direct supervisory authority over the plaintiff employee, but rather, the individual need only have a meaningful role in the "management, supervision, and oversight" of the company's general affairs.

The court found that Catsimatidis had responsibility for banking, finance, real estate, and merchandising, that he exercised influence in stores on multiple occasions, and he would address customer and vendor complaints. As a result, the court found that Catsimatidis had "functional control over the enterprise as a whole," sufficient to subject him to individual FLSA liability. After affirming the lower court's ruling on this issue, the Second Circuit remanded the case for further consideration of state law claims.

The Gristede's Foods case is a reminder that the FLSA is unlike so many of the other federal employment laws. Most employment practice liability insurance ("EPLI") will not defend and indemnify employers from FLSA claims, and unlike Title VII and the other anti-discrimination statutes, the FLSA expressly authorizes plaintiffs to sue not only the employer business, but the employer individual. As a practical matter, businesses are usually viewed as the ideal defendants because they are perceived as having the deep pockets. But with the growing number of FLSA lawsuits and the increasingly large sums of money at stake, it may become commonplace for FLSA plaintiffs (or perhaps more precisely, their lawyers) to name business owners as individual defendants to FLSA cases.

Although few EPLI carriers will cover FLSA claims, we are beginning to see some carriers start to add special endorsements for FLSA claims. Although the first order of business should be to ensure your organization is FLSA-compliant, an increasingly smart second step is to consult your insurance broker about coverage options for your business and your owners, individually.

Senate Compromise Expected to Reconstitute National Labor Relations Board

In an agreement reached behind closed doors on July 15, 2013, Senate Majority Leader Harry Reid agreed not to change Senate filibuster rules, which in essence require a two-thirds majority vote on Presidential nominees to executive positions within the federal government. In exchange for this concession, Senate Republicans agreed to allow votes on various pending executive branch nominees, but not votes on President Obama's contentious recess appointments to the NLRB, Richard Griffin and Sharon Block.

President Obama moved quickly to seal the agreement, by announcing his intention to nominate Democrats Kent Hirozawa, chief counsel to NLRB Chairman Mark Pearce and Nancy Schiffer, a former AFL-CIO associate general counsel, to fill the seats that will be vacated by Griffin and Block. Senate committee hearings on Hirozawa and Schiffer began this week, and the full Senate is expected to consider the nominations of Pearce and two Republicans, Harry Johnson and Philip Miscimarra. These three nominations have already cleared committee vetting.

It is clear that Senate Democrats expect fast track confirmation of all five Board nominees, and Reid stated that he expects confirmation of the new Board before Congress departs for the August recess, possibly as early as the end of this week.

The Bottom Line

Expect an activist NLRB to continue to push a "pro-labor" agenda in the last three years of the Obama Administration. In that sense, the concession by the Administration to withdraw the names of Griffin and Block from further consideration appears a hollow victory, as Hirozawa and Schiffer will undoubtedly continue to follow Chairman Pearce's policy lead.

In a separate action, on July 17, 2013, the U.S. Court of Appeals for the Fourth Circuit joined the D.C. and Third Circuit Courts of Appeals in finding President Obama's January 2012 NLRB recess appointments of Griffin and Block unconstitutional. *NLRB* v. *Enterprise Leasing Co. Se. LLC,* 4th Cir., No. 12-1514, 7/17/13.

NLRB Tips: Keeping Your Internal Investigations Confidential

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BANNER HEALTH CARE SYSTEM, d/b/a BANNER ESTRELLA MEDICAL CTR., RE-VISITED

All employers understand the importance of preserving confidentiality during the course of internal investigations. Where confidentiality is not maintained, it is likely that some employees would be reluctant to report theft, discrimination, retaliation, or other forms of employee wrong-doing or misconduct. In addition, the EEOC has emphasized that one of the cornerstones of any anti-harassment policy is a confidentiality element. Nonetheless, in Banner Estrella Medical Center, 358 NLRB No. 93 (2012), the NLRB found that an employer who merely "suggested" that employees maintain confidentiality during investigations violated the Act.

On July 30, 2013, Board members Griffin and Block, also the subject of the recess appointment controversy, held that Banner Hospital illegally interfered with employee rights under the National Labor Relations Act (NLRA) by asking employees not to talk to co-workers about internal complaints that were under investigation by the hospital.

The Board majority found that the hospital's "generalized concern" about the integrity of its internal investigations did not outweigh the right of employees to engage in concerted activities that are protected by the NLRA. This article examines the Board's finding in the original case, and discusses recent developments that will enable employers to craft confidentiality policies that will withstand Agency scrutiny when faced with a charge in this circumstance.

THE ORIGINAL DECISION:

In reversing the Administrative Law Judge's findings of law, Members Griffin and Block determined that the employer's practice of trying to keep its work-related investigations confidential did not "outweigh employees' Section 7 rights" to discuss among themselves such investigations.

Citing *Hyundai American Shipping Agency*, 357 NLRB No. 80 (2011), the Board majority said that it was the employer's burden "to first determine whether in any give[n] investigation witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up."

Finding the hospital's "blanket approach" of asking silence in every investigation could not be justified, Griffin and Block stated that Banner's policy had a "reasonable tendency to coerce employees" even without a direct or specific threat of disciplinary action.

In dissent, Republican Member Brian Hayes, argued that Banner did not promulgate any confidentiality work rule at all, but merely suggested that employees not discuss workplace issues under investigation.

In August of 2012, *Banner Estrella* petitioned the D.C. Circuit Court of Appeals for review of the Board's decision. However, the Circuit Court has held the matter in abeyance since its ruling in *Noel Canning*, finding that President Obama's recess appointments to the NLRB were unconstitutional.

NLRB'S DIVISION OF ADVICE WEIGHS IN/SUGGESTS LANGUAGE THAT SAVES ALLEGED OVERLY BROAD CONFIDENTIALITY PROVISION

The Acting General Counsel's Division of Advice has issued an opinion that suggests a way for employers to write confidentiality policies that pass NLRB scrutiny under *Banner Estrella.*

On April 16, 2013, the Division of Advice released its opinion in *Verso Paper*, [Div. of Advice, No. 30-CA-89350], where it found that the employer maintained an overbroad rule that violated the NLRA under a *Banner Estrella* analysis.

The employer operates paper mills across the United States and maintained a code of employee conduct that prohibited employees from discussing ongoing company investigations. The code provided:

[The employer] has a compelling interest in protecting the integrity of its investigations. In every investigation, [the employer] has a strong desire to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. To assist Verso in achieving these objectives, we must maintain the investigation and our role in it in strict confidence. If we do not maintain such confidentiality, [employees] may be subject to disciplinary action up to and including immediate termination."

In finding a violation, the Division of Advice stated that the code, as written, "reasonably chills" employees in the exercise of rights guaranteed by Section 7 of the Act.

> [Verso] may not avoid its burden [under *Banner Estrella]* by asserting its need to protect the integrity of every investigation, but rather must establish this need in the context of a particular investigation that present specific facts giving rise to a legitimate and substantial business justification for interference with the employees' Section 7 rights.

The Division of Advice found that *Verso* violated the Act because the code of conduct failed to take into account the employer's burden to show in each particular situation the existence of a business need for confidentiality that outweighed employees' rights.

Despite instructions to issue complaint, Advice suggested language that would save the overly-broad language contained in the code of conduct. The General Counsel suggested deleting the last two (2) sentences of the existing rule and replacing them with language consistent with *Banner Estrella:*

> Verso may decide in some circumstances that in order to achieve these objectives, [the employer] must maintain the investigation and our role in it in strict confidence. If Verso reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination."

Thus, by tweaking its code of conduct, the employer could make its confidentiality policy, at least on its face, valid. Admittedly, if an employee violates the policy, the employer may still have some work to do in justifying its insistence on the confidentiality requirement. However, the details of most internal investigations, especially if it involves "neutral" witnesses, will virtually guarantee a finding that such a requirement is reasonable and does not infringe on employees' Section 7 rights.

BOTTOM LINE:

The following lessons may be gleaned in light of the recent pronouncement from the General Counsel's Division of Advice:

- In writing a policy as it relates to internal investigations, the employer should adopt the language suggested by the NLRB almost verbatim, as it ensures a finding that the policy is valid on its face should a disgruntled employee file a complaint with the NLRB. It also puts employees on notice that the employer expects confidentiality to be maintained when investigations are underway.

- Once an internal investigation is underway, the employer should be aware of its burden(s) under *Banner Estrella*, and tailor the investigation to meet its burden under the case law. As a practical matter, internal investigations frequently involve neutral witnesses whose identities should remain confidential under any rational analysis, given the possibility of retaliation by the individual under investigation and the need for the employer to insure future cooperation during investigations.

In spite of the Board's efforts to limit confidentiality of investigations, every effort should be taken to maintain the confidentiality of a workplace investigation. Employers should stress to all participants and witnesses that confidentiality is critical and that the information obtained during the process will only be shared on an "as needed" basis. With the exercise of some caution, an employer will be able maintain witness confidentiality and avoid any adverse actions by an activist NLRB.

EEO Tips: Title VII Plaintiffs Recently Take a Number of Hits and the Newest EEOC Commissioner Restates the Agency's Enforcement Priorities

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Within the last two months the Supreme Court has not made it easier for the EEOC or other Title VII plaintiffs to prove cases involving the issues of retaliation and employer vicarious liability. As a matter of fact, most employment lawyers believe that the Court has made it significantly harder. Under these circumstances, the EEOC's newest Commissioner, Jenny R. Yang, reemphasized a number of the agency's enforcement priorities under its Strategic Enforcement Plan that may be more important than ever before.

The Supreme Court Makes It Harder For Plaintiffs to Prove Retaliation

Over the last 10 years, "retaliation" has been one of the fastest growing issues alleged by charging parties. In FY 2012, a total of **99,412** EEOC charges were filed and **38%** of those charges alleged retaliation. Also, in FY 2012, the EEOC obtained $177.4 million in monetary benefits from the resolution of retaliation charges, which was almost one-half of the $365.4 million obtained from all sources during the administrative process. But that may change abruptly.

In the case of *University of Texas Southwest Medical Center v. Nassar*, No. 12-484, decided on June 24, 2013, the Supreme Court made a clear distinction between what it called "status-based discrimination" under Title VII, namely, discrimination on the basis of race, sex, color, national origin or religion, and retaliation which the court asserted rested on a very different statutory basis. Justice Kennedy, who wrote the majority opinion, concluded that, while status-based discrimination claims under Title VII may be established by showing that one of the prohibited bases was a "motivating factor" in the alleged discriminatory act, that standard will no longer suffice to establish a claim of **retaliation.** As to Title VII retaliation, Justice Kennedy found that, according to the specific language of the Act in Section 2000e-3(a), a plaintiff must prove "*that the desire to retaliate was the **but-for** cause of the challenged employment action."* This calls for a significantly higher burden of proof on Title VII plaintiffs who allege retaliation. Incidentally, this is the same position the Supreme Court took in the case of *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167, which was filed under the ADEA and contained similar "because of" language in order to establish a violation.

Perhaps the hardest hit was to the preeminence of the EEOC's interpretation of Title VII and (possibly) all of the other statutes which it enforces. The Supreme Court declined to give deference to the EEOC's interpretation of Section 2000e-3(a) of Title VII pertaining to retaliation. According to the EEOC, a retaliation claim may be established on the same basis as the so-called status-based discrimination claims based upon Section 2000e-2(m) of the Civil Rights Act of 1991 (amending Title VII of the CRA of 1964) which reads in pertinent part as follows:

> "*An unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor…even though other factors also motivated the practice."* (underlining added)

By reading Title VII as a whole, without separating out the section pertaining to retaliation, the EEOC had assumed that the "motivating factor" provisions added by the Civil Rights Act of 1991 applied to all claims including retaliation.

The EEOC's General Counsel, David Lopez, expressed great disappointment at the Supreme Court's holding, especially since it discarded a long standing interpretation of the statute to which most courts have given deference. Other plaintiffs' attorneys also have expressed dismay at the ruling, and one opined that 90% to 95% of retaliation claims have been seriously undermined by the Supreme Court's interpretation of Section 2000e-3(a) of Title VII.

The Supreme Court Decreases An Employer's Potential Vicarious Liability by Narrowing the Definition of a Supervisor

In 1998, the Supreme Court decided the two major cases which, until last month, shaped the main body of case law pertaining to an employer's vicarious liability for the acts of supervisory employees. They were: *Faragher v. Boca Raton,* 524 U.S. 775 and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742. As to supervisors, the Court held that "if the supervisor's harassment culminates in a tangible employment action (i.e., "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) the employer is strictly liable. Those cases also provided the employer with certain affirmative defenses if no tangible employment action had been taken, or if the harassment had been done by a co-worker instead of a supervisor.

Within a year thereafter (in 1999), the EEOC issued its *Guidance On Vicarious Employer Liability For Unlawful Harassment by Supervisors.* The guidance specifically addressed the question of who qualifies as a supervisor and answered that question as follows: *(1) an individual authorized "to undertake or recommend tangible employment decisions affecting the employee" including "hiring, firing, promoting, demoting, and reassigning the employee;" or (2) an individual authorized "to direct the employee's daily work activities."*

On June 24th, the Supreme Court "clarified" its previous holdings in the above cases in the case of *Vance v. Ball State University, et al*, No. 11-556. In *Ball State*, the main issue was whether Ball State University was strictly liable for the actions of one of the petitioner's co-workers as a supervisor, because the co-worker was allowed to exercise a number of "supervisory" functions over the petitioner, namely, to make certain daily assignments of work.

Based on the facts in *Ball State*, the Supreme Court distinguished it from *Faragher* and *Ellerth* and found that the alleged harasser was a co-worker, not a supervisor. But the Court went farther and modified, intentionally, the EEOC's Guidance on the vicarious liability of supervisors by eliminating individuals who were "authorized to direct the employee's daily work activities." The Supreme Court defined a Supervisor simply as follows:

> *"We hold that an employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim."*

According to the Supreme Court, this comprehensive but simplified definition is "one that can be readily applied." On the other hand, the Court found the EEOC's definition (above) to be somewhat ambiguous or vague and stated: "By contrast, the vagueness of the EEOC's standard would impede the resolution of the issue before trial," possibly requiring extensive jury instructions with respect to whether the alleged harasser was a supervisor or a co-employee.

Justice Ginsberg, who wrote the dissent, joined by three other Justices, strongly disagreed with the majority. She stated that the majority opinion "is out of accord with agency principles that *Faragher* and *Ellerth* affirmed, [and] govern Title VII…It discounts the guidance of the EEOC…Under that guidance, the appropriate question is: Has the employer given the alleged harasser authority to take tangible employment actions or to control the conditions under which subordinates do their daily work? If the answer to either inquiry is yes, vicarious liability is in order, for the superior-subordinate working arrangement facilitating the harassment is of the employer's making."

Newest EEOC Commission Reemphasizes the Agency's Enforcement Priorities

It is not clear whether the timing of Commissioner Jenny R. Yang's reemphasis of the EEOC's Enforcement Priorities under its Strategic Enforcement Plan on June 28th at the Annual Conference of the National Employment Lawyers Association convention was intended to raise the spirits of plaintiffs who may have been disheartened by the Supreme Court's two adverse decisions, but it appeared to be timely in that respect. Commissioner Yang, a Democrat, is the newest EEOC Commissioner, and her appointment brings the EEOC back to full strength in terms of having the statutory complement of five commissioners for the first time in a year or so.

According to Commissioner Yang, the EEOC should complement the efforts of the private bar by increasing the filing of pattern and practice cases in those areas where private enforcement is limited or blocked. (For example, large class action cases similar to *Wal-Mart Stores Inc. v Dukes*, 131 S. Ct. 2541.) She also suggested that the EEOC should be involved in cases addressing the issue of mandatory arbitration and class-action waivers.

Although they are not new, Commissioner Yang specifically reemphasized six of the EEOC's national enforcement priorities as follows:

1. Elimination of barriers in recruitment and hiring including the barriers erected by screening out older workers by asking for information as to date of birth; screening out other applicants by the use of credit and arrest records.

2. Protecting immigrant, migrant and other vulnerable workers with regard to disparate pay, job segregation, workplace harassment, and human trafficking.

3. Addressing emerging and developing issues such as coverage, reasonable accommodation, qualification standards, undue hardship and direct threat issues under the ADA. Also addressing issues involving the intersection of pregnancy issues with respect to reasonable accommodation under the ADA Amendments Act; and coverage issues involving lesbian, gay, bisexual, and transgender workers under Title VII.

4. Enforcement of equal pay laws, including targeted compensation systems that discriminate based on sex through directed investigations.

5. Preservation of access to the legal systems by targeting overly broad waivers and onerous settlement terms that discourage or prohibit individuals from exercising their EEO rights or impede the EEOC's investigations or enforcement efforts.

6. Prevention of harassment through systemic enforcement and outreach. Here the EEOC would intensify its enforcement and outreach to make sure that employers "get the message" that workplace sexual or racial harassment is against the law. It is intended that "outreach" to employers would be a significant part of this priority.

A Word of Caution to Employers

While the EEOC's guidance as to the vicarious liability of supervisors may have taken a hit, employers would do well to remember that under *Faragher* and *Ellerth*, subordinate employees who think that they have been harassed by a co-worker, whether that co-worker eventually is determined to be a supervisor or not, still have recourse to the employer's anti-discrimination and/or anti-harassment policies. While the path under such policies may be more circuitous, the employer, if negligent, may still be held to be liable for the harassment and/or discrimination. However, on the other hand, employers may, as suggested in the dissent in the *Ball State University* case, attempt to minimize harassment liability by designating only a very few workers as having authority to make tangible employment actions while still allowing some co-workers to give directions to other co-workers.

OSHA Tips: OSHA and Heat Hazards

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at 205.226.7129.

With much of the country in line for weeks of high temperature, employers should be mindful of employee exposures to heat hazards on their jobs. While OSHA has no heat standard, the agency has become increasingly willing to cite employee exposures under the general duty clause of the OSH Act. Unfortunately many of these result following fatal exposures to employees. Examples of such cases include the following:'

In one such case, an employee of a planning mill was observed by co-workers to be walking and acting in a strange manner. He lost consciousness and emergency help was summoned. Resuscitative measures were taken and the employee was transported to a medical center where he died.

A second case involved a construction job and a masonry laborer working in temperatures exceeding 91 degrees without any protective measures taken.

An employee working in a sawmill was pulling rough cut timber from a green chain when he became dizzy and started to stagger. His supervisor ordered a break but upon returning to work the employee began to stagger again and fainted. He was rushed to a hospital where he arrived unconscious with a temperature of 108 degrees. Upon being transported to a major hospital, he died without regaining consciousness.

In another case, a 31 year old construction worker had been shoveling gravel and installing forms for a residential swimming pool over a period of 11 hours in the hot sun. The employee became sick and the company owner summoned medical help. The worker's body core temperature was 109.4 degrees. He was air-lifted to a trauma center suffering from heat stroke, and was pronounced dead later that evening.

Employees in another case were constructing a building in temperatures exceeding 100 degrees and reached a high of 106 degrees. A heat advisory had been issued by the National Weather Service. An employee complained of the heat and was sent to rest in the company vehicle around 4:00 p.m. The crew left the site at about 5:00 p.m. and returned to their hotel. When the ailing crew member was found to be unresponsive, he was taken to a nearby hospital where he died of hyperthermia.

In July 2013, Assistant Secretary of Labor for OSHA David Michaels held a press conference with meteorologists and weather forecasters to discuss the agency's heat stress awareness campaign. He asked for help from this audience in getting out the word to employers about this occupational hazard. In this regard, he noted five key pieces of advice as follows:

1. Drink water every 15 minutes even if you are not thirsty.
2. Rest in the shade to cool down.
3. Wear a hat and light-colored clothing.
4. Learn the signs of heat illness and what to do in an emergency.
5. Keep an eye on fellow workers.

Wage and Hour Tips: Deductions from Employee's Pay

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.

Last year plaintiffs filed more than 7,000 FLSA lawsuits, many of them alleging their employers took improper deductions from employee pay.

Employees must receive at least the minimum wage free and clear of any deductions except those required by law or payments to a third party that are directed by the employee. Not only can the employer not make the prohibited deductions, he **cannot require or allow** the employee to pay the money in cash apart from the payroll system.

Examples of deductions that can be made:

- Deductions for taxes or tax liens.
- Deductions for employee portion of health insurance premiums.
- Employer's <u>actual</u> cost of meals and/or housing furnished the employee.
- Loan payments to third parties that are directed by the employee.
- An employee payment to savings plans such as 401k, U. S. Savings Bonds, IRAs, etc.
- Court-ordered child support or other garnishments provided they comply with the Consumer Credit Protection Act.

Examples of deductions that cannot be made if they reduce the employee below the minimum wage:

- Cost of uniforms that are required by the employer or the nature of the job.
- Cash register, inventory shortages, and also tipped employees cannot be required to pay the check of customers who walk out without paying their bills.
- Cost of licenses.
- Any portion of tips received by employees other than allowed by a tip pooling plan.

- Tools or equipment necessary to perform the job.
- Employer-required physical examinations.
- Cost of tuition for employer required training.
- Cost of damages to employer equipment such as wrecking employer's vehicle.
- Disciplinary deductions. Exempt employees may be deducted for disciplinary suspensions of a full day or more made pursuant to a written policy applicable to all employees.

If an employee receives more than the minimum wage, in non-overtime weeks, the employer may reduce the employee to the minimum wage. For example, an employee who is paid $9.00 per hour may be deducted $1.75 per hour for up to the actual hours worked in a week the employee does not work more than 40 hours. Also, Wage and Hour takes the position that no deductions may be made in overtime weeks unless there is a prior agreement with the employee. Consequently, employers might want to consider having a written employment agreement allowing for such deductions in overtime weeks.

Recently, I saw where a fast food franchisee has been sued over the method that he has chosen to pay his employees. The firm pays the employees, via a "debit card," at a rate slightly above the minimum wage. However, the bank that issues the cards charges a fee each time the card is used and the employees have alleged that these fees reduce their pay below the minimum wage. Also, the New York Attorney General has begun an investigation into the practice. As a part of his investigation, he has requested pay practice information from several large employers, including Wal-Mart and Home Depot. Several years ago, an Alabama temporary help firm was sued by Wage and Hour over its pay methods. The firm employed "day laborers" and paid them the minimum wage via a check at the end of each day. However, the firm charged the employee a fee of $1.00 for writing the check. The court found that this charge effectively reduced the employee below the minimum wage and required the firm to discontinue the practice.

Another area that can create a problem for employers is that the law does not allow an employer to claim credit as wages money that is paid for something that is not required by the FLSA. In 2011, the Fifth Circuit Court of Appeals ruled against Pepsi, finding that a laid off supervisor was not exempt and thus was entitled to overtime compensation. The company argued that the severance pay the employee received at her termination exceeded the amount of overtime compensation that she would have been due. The district court stated the severance pay could be used to offset the overtime that could have been due and dismissed the complaint. However, the Fifth Circuit ruled that such payments were not wages and thus could not be used to offset the overtime compensation that could be due to the employee. Therefore, employers should be aware that payments (such as vacation pay, sick pay, holiday pay, etc.) made to employees that are not required by the FLSA cannot be used to cover wages that are required by the FLSA.

The Act provides that Wage and Hour may assess, in addition to requiring the payment of back wages, a civil money penalty of up to $1100 per employee for repeated and/or willful violations of the minimum wage provisions of the FLSA. Thus, employers should be very careful to ensure that any deductions are permissible prior to making the deductions. Virtually every week, I see reports where employers have been required to pay large sums of back-wages to employees because they have failed to comply with the Act.

In a victory for employers, the Court of Appeals for the District of Columbia issued an opinion on July 2 regarding the application of the administrative exemption to Mortgage Loan Officers. In 2006, Wage and Hour had issued an opinion stating that these employees could qualify for the administrative exemption but in a position paper issued in 2010, the Wage and Hour Administrator withdrew the earlier letter and stated the employees did not qualify for the exemption. The Mortgage Bankers Association brought suit and the court stated that in order for the change in position to be valid, Wage and Hour was required to follow established "rule making" procedures. Since Wage and Hour failed to do this, the 2010 position is invalid; however, the court stated they were not ruling on the merits of the position but just the fact that Wage and Hour failed to follow the correct procedures when changing their position. One can expect Wage and Hour to begin the process to correctly implement the revised position.

On a different subject, for employers subject to the McNamara-O'Hara Service Contracts Act, contracts that are to be effective June 19, 2013 or afterward will have increased health and welfare rates. The new rates are $3.81 per hour for all states except Hawaii, which mandates health insurance coverage and thus is allowed a reduced rate of $1.55 per hour.

Some members of Congress continue to work toward an increase in the minimum wage. Since it has been more than five years since there has been an increase in the minimum wage, I would not be surprised if an increase is approved at any time.

While most southeast states do not have a state-mandated minimum wage, there are several states that do and many of these states increase their wage each year. I recently saw where Connecticut passed a law to increase their minimum wage to $8.70 per hour on January 1, 2014, with a further increase to $9.00 per hour on January 1, 2015. The Nevada Labor Commissioner has announced the minimum wage in that state will not increase from $7.25 for those employees receiving qualifying health benefits; however, if the employer does not provide the qualifying health benefits the employees must be paid $8.25 per hour.

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…

…EEOC continues to pursue disparate impact discrimination charges against employers who use criminal background checks? This month, EEOC persuaded national trucking firm, J.B. Hunt Transport, Inc., to sign a five-year conciliation agreement under which it pledges to comply with EEOC's April 2012 enforcement guidance. EEOC advises employers using criminal background checks to evaluate the nature and gravity of each offense, the time elapsed since conviction or arrest, and the job-relatedness of those records, before disqualifying an applicant with a criminal record.

…nursing home RNs serving as charge nurses are considered to be supervisors for purposes of the National Labor Relations Act according to a decision by the Sixth Circuit Court of Appeals this month? In *Golden Living Ctr-Springfield v. NLRB*, the employer sued the NLRB, arguing that the Board incorrectly classified RNs as unit employees (helping the union win the election), resulting in an improper election result. The Sixth Circuit, citing the significant role each RN had in nursing home employee discipline, agreed with the employer, vacating the Board's election result.

…a survey conducted last month by Glassdoor found that 20% of American employees surveyed are concerned about being laid off in the next six months, up 2% from 2012? Surveyed employees cited recent layoffs and declining business prospects as the reasons behind their lack of confidence in continued employment.

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