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Employment Non-Discrimination Act Set for November Senate Vote

On Monday, Senate Majority Leader Harry Reid (D-Nev) announced that the Senate would vote on the Employment Non-Discrimination Act (ENDA) before the Thanksgiving holiday. In the wake of multiple 2012 state ballot initiatives that increased LGBT rights or expanded same-sex marriage rights at the state level, followed by the U.S. Supreme Court's historic ruling this summer in *U.S. v. Windsor*, overturning portions of the Defense of Marriage Act, congressional leadership expects a vote on ENDA to follow the changing tide of public opinion on LGBT rights.

ENDA, introduced in the Senate on April 25 by Sen. Jeff Merkley (D-Ore) would prohibit workplace discrimination based on sexual orientation and gender identity, adding those two groups to the growing list of federally protected classes. The bill has been proposed in prior terms, dating back to 1997, without gaining sufficient congressional support, but recently some prominent GOP Senators have signed on to the list of the bill's supporters.

The legislation is currently sponsored by 54 members of the Senate, including Republicans Susan Collins of Maine and Mark Kirk of Illinois. Every Senate Democrat has signed on as a sponsor of the bill except for Sens. Joe Manchin (D-W.Va), Bill Nelson (D-Fla), and Mark Pryor (D-Ark). In July, ENDA cleared a crucial hurdle when the Senate Health, Education, Labor and Pensions Committee (HELP) approved the bill by a 15-7 vote, with Kirk and fellow Republicans Lisa Murkowski of Alaska and Orin Hatch of Utah voting in favor of the bill. As a result of the HELP Committee vote, ENDA's supporters expect additional Republicans to support the bill when it comes up for a vote on the Senate floor in November. Sens. Kelly Ayotte (R-N.H.), Jeff Flake (R-Ariz), Dean Heller (R-Nev), John McCain (R-Ariz), Rob Portman (R-Ohio), and Pat Toomey (R-Pa), are considered to be likely additional Republican votes in favor of the bill.

HELP Committee Chairman Sen. Tom Harkin (D-Iowa) has been a vocal proponent of the bill. "Ensuring that our workplaces are free from discrimination is a key part of equality and full rights for all Americans," Harkin said. "I am pleased to see that the Employment Non-Discrimination Act will soon come before the full Senate for consideration."

Senate leaders believe they have the 60 votes necessary to close debate on the bill and bring it up for a full vote, where it is expected to pass. The bill's prospects for support in the House, however, are largely unknown. The last time either legislative body had a floor vote on ENDA was in November 2007, when the House passed the bill by a vote of 235-184. Rep. Jared Polis (D-Colo) reintroduced ENDA in the House earlier this year, but it appears to have been buried in committee.

According to data released by the HELP Committee in connection with its report on ENDA, 88% of Fortune 500 companies already have anti-discrimination policies that prohibit discrimination and harassment on the basis of sexual orientation, while 57% of those companies also have policies prohibiting discrimination and harassment on the basis of gender identity.

Supreme Court's New Term Includes Six Significant Labor and Employment Cases

Despite the federal government shutdown, the U.S. Supreme Court began its term on October 7. The Court has six cases on its docket that could result in significant decisions affecting labor and employment law, including cases about President Obama's recess appointments to the NLRB and interpretation issues under the Fair Labor Standards Act, Sarbanes-Oxley Act, ERISA, and the Labor-Management Relations Act.

The case garnering the most attention will be the Court's review of *NLRB. v. Noel Canning*, an appeal from the D.C. Circuit's decision invalidating President Obama's January 2012 appointments of three National Labor Relations Board members. The D.C. Circuit held those appointments were not constitutional recess appointments because they did not occur between Senate sessions and did not fill vacancies that arose between those sessions. Since the *Noel Canning* decision, both the Third Circuit and Fourth Circuit Courts of Appeals have struck down NLRB decisions for lack of a Board quorum, finding President Obama did not validly appoint the January 2012 members.

On November 4, the Court is scheduled to hear oral arguments in the case of *Sandifer v. U.S. Steel Corp*, on appeal from Seventh Circuit Court of Appeals, which held that plaintiff steel worker employees' donning and doffing FLSA overtime suit should be dismissed because the personal protection items they allege they spent time putting on and taking off were in fact "clothes," and the time spent on "clothes" was not compensable under the FLSA. The plaintiffs contend that the FLSA should be interpreted to require compensation for putting on and taking off personal protective equipment, which is unlike ordinary clothing.

On November 12, the Court will hear oral arguments in *Lawson v. FMR, LLC*, an appeal from the First Circuit Court of Appeals which found that the Sarbanes-Oxley Act (SOX) applied to publicly-owned Fidelity mutual funds, but did not protect from whistleblower retaliation the employees of separate investment advisory firms that managed the funds. This will be the first time that SOX has come before the Supreme Court since its enactment in 2002. SOX provides whistleblower protection to employees who report suspected securities laws violations either internally or to government officials.

On November 13, the Court is scheduled to hear oral arguments in *UNITE HERE Local 355 v. Mulhall*, on appeal from the Eleventh Circuit Court of Appeals, which held that a plaintiff employee union member could bring a suit against the union and his employer, a casino that entered into a neutrality agreement with the union under which the union agreed to give financial support to a Florida ballot initiative supporting casino gambling. In exchange for the casino's agreement to take a neutral stance toward union organizing, the union spent more than $100,000 to support the ballot initiative and agreed not to picket, strike, boycott or undertake any other economic activity against the casino. Mulhall filed suit under Section 302 of the Labor-Management Relations Act (LMRA), which makes it illegal for an employer "to pay, lend, or deliver any money or other thing of value" to a labor union, except under the circumstances expressly permitted in the LMRA (i.e. union dues or trust fund contributions). Although the trial court dismissed Mulhall's suit, the Eleventh Circuit reinstated the case, ruling that "organizing assistance can be a thing of value" that triggers the protections of Section 302 of LMRA.

In *Harris v. Quinn*, on appeal from the Seventh Circuit, the Court will decide whether home health care aides

who serve Medicaid recipients can be forced to accept a union as their exclusive bargaining representative with the state and pay a "fair share" fee for the costs of that representation. The Court will be reviewing the Seventh Circuit's decision that rejected eight home health aides' First Amendment challenge to compulsory unionism required under a 2009 Illinois executive order and a collective bargaining agreement between the state and the Service Employees' International Union.

In *Heimeshoff v. Hartford Life & Accident Insurance Co.*, the Court will consider when the statute of limitations begins to run for judicial review of an adverse disability benefits determination under the Employee Retirement Income Security Act (ERISA).

Appeals Court Rejects EEOC's Claim Abercrombie Unlawfully Rejected Muslim Applicant Wearing Hijab

The Tenth Circuit Court of Appeals this month found that EEOC failed to make a case against Abercrombie & Fitch for rejecting a Muslim candidate who wore a hijab to her job interview. In *EEOC v. Abercrombie & Fitch Stores, Inc.* (10th Cir. 10/1/13), EEOC sued the retail chain claiming that application of its "look policy" resulted in discrimination against and failure to accommodate the religious beliefs of an applicant, Samantha Elauf.

Abercrombie rejected Elauf for employment after she wore a hijab to her job interview and the hiring manager asked a district manager for advice regarding how to score Elauf's interview. Referring to Abercrombie's "look policy" which requires sales staff to dress in Abercrombie-style clothing and not wear "caps," the district manager instructed the hiring manager to lower Elauf's interview score, making her ineligible for the position.

At no time during the interview did Elauf disclose any religious beliefs related to the hijab, and no Abercrombie manager asked Elauf about her religion or the hijab. In fact, Abercrombie's policy expressly prohibits managers from asking applicants about their religious beliefs during interviews and instructs them not to assume facts about applicants. Nonetheless, in filing suit, EEOC argued that express notice of a religion-work conflict is not required in order for the employer to have the duty to reasonably accommodate the applicant's religious beliefs and practices. EEOC said that Elauf's appearance, including the hijab, gave Abercrombie constructive knowledge of the need for a religious accommodation.

The Tenth Circuit rejected EEOC's argument, explaining that religion is "uniquely personal" and only the employee/applicant knows whether a religious belief or practice is truly inflexible and whether that employee/applicant is observing the belief or practice based on religious reasons or "for cultural or other reasons that are not grounded in that religion" and thus not protected by Title VII. In other words, the employer had no obligation to provide a religious accommodation absent some specific indication from Elauf that she was wearing the hijab for religious reasons and that those religious reasons would be in conflict with Abercrombie's look policy.

The court found that this approach is also consistent with EEOC's own regulatory guidance, in which it instructs employers not to inquire into an applicant's religious beliefs and discourages employers from making assumptions or resorting to stereotypes about religion.

In ruling for Abercrombie, the Tenth Circuit explained that before a plaintiff can establish a case for failure to accommodate under Title VII's protections for religion, the plaintiff must show that she held a bona fide religious belief that conflicts with an employment requirement, that the plaintiff "informed [her] employer of this belief," and that the employee suffered an adverse employment action for failing to comply with the employment requirement. Referring to EEOC's own compliance manual, the court explained that only the individual applicant or employee really knows the reasons underlying a particular practice that might appear to others to be based on religion. There can be no actual religion-work conflict—and thus no duty to accommodate—unless the employee/applicant engages in a practice for a religious purpose that the employee/applicant believes to be inflexible, and the employee/applicant makes this known to the employer.

OFCCP Collects $350,000 Backpay Settlement from Federal Contractor

Earlier this month the Office of Federal Contract Compliance Programs (OFCCP) announced a $350,000 settlement with Baltimore Gas & Electric Co (BG&E), which OFCCP alleged discriminated against black applicants for BG&E's utility trainee positions.

In 2009, OFCCP conducted a routine compliance audit and found that between December 2007 and November 2008 black applicants were statistically underrepresented in three utility trainee classifications. BG&E explained that during this period, it relied heavily on word-of-mouth and employee referrals to fill vacancies in its trainee programs, resulting in what BG&E called an "unintended and unfortunate consequence" of lower minority hiring in those positions.

Consistent with the terms of BG&E's conciliation agreement with OFCCP, the utility company will pay $350,000 in backpay, interest, and benefits equivalencies to up to 58 rejected minority applicants, and BG&E will also make remedial job offers to six of them.

OFCCP audits continue to focus the greatest scrutiny on hiring decisions for entry level positions with high applicant volume in addition to greater focus on compensation disparities. OFCCP continues to reject calls for greater transparency in agency initiatives and has repeatedly refused employer and employer group requests to explain how it selects federal contractors for audit.

EEOC's Litigation Suggests Disconnect with EEOC's Stated Agenda

A review of EEOC's litigation filed against employers in FY 2013 suggests a much heavier emphasis on disability and sex discrimination than EEOC's stated agenda for the year.

Each year EEOC announces its national priorities in its strategic enforcement plan. For 2013, EEOC had six priorities: (1) eliminating barriers in recruitment and hiring; (2) protecting immigrant, migrant and vulnerable workers; (3) addressing emerging and developing issues; (4) enforcing equal pay laws; (5) preserving access to the legal system; and (6) preventing harassment through systemic enforcement and targeted outreach.

For 2013, out of 134 total lawsuits filed by EEOC, ADA claims are more than a third of them. The second largest group, representing another third of all lawsuits EEOC filed, are claims involving sex and pregnancy discrimination. Total lawsuits filed by EEOC in 2013 represented a slight increase over the 122 suits filed by the agency in 2012.

Almost half of all cases filed by EEOC were brought by the Charlotte, Chicago, and Philadelphia offices, which may correlate with recent funding increases in those offices.

Also, consistent with the trend of prior years, EEOC had a mad dash to the end of the government's fiscal calendar, filing 48 of its 134 lawsuits in September, alone.

As LMV's EEO Consultant, Jerome C. Rose, has counseled before, the EEOC continues to operate with much of its authority decentralized in the district offices, reflecting a litigation agenda that may diverge with national policy. Additionally, one trend that remains consistent is EEOC's aggressive effort to test—with litigation—the limits of fair employment practice laws in an effort to expand the reach of those laws' protections.

Employer Should Have Reasonably Accommodated Incontinent Nurse, Court Says

Linda DesRosiers was a nurse case manager working for the Hartford Financial Services Group in its workers' compensation unit when she claimed she was forced to quit her job after repeated "stonewalling" by managers after she asked for accommodations related to her incontinence. In *DesRosiers v. Hartford* (E.D. CA 9/25/13), DesRosiers claimed she requested a number of different accommodations that would help her do her job despite her incontinence. DesRosiers asked managers for permission to work from home or in an area closer to

a restroom. DesRosiers asked that managers consider assigning her to an office that had a restroom.

DesRosiers began to suffer from fecal incontinence after giving birth around 1990. The condition worsened after a failed surgery to correct the condition in 1997. The condition was unpredictable and worsened when DesRosiers felt stressed, requiring her to be near a restroom at all times.

In 2006, she accepted the nurse case manager position with Hartford, and began working with claims handlers, medical providers, and injured workers regarding workers' compensation claims. DesRosiers did not disclose the condition when she applied for employment with Hartford and kept it a secret initially, believing that she could control the condition and feeling relieved by word from her supervisor that the department would move toward a "remote" system, allowing case managers to work from home within a year.

Still, after several months on the job, DesRosiers decided she should ask her manager to relocate her desk to a place closer to the restroom. At the time, DesRosiers's desk was about 93 feet from a door leading to the restroom and some 180 feet from the restroom itself. She asked to be closer to the restroom so that she could properly clean up in the event of an accident. She also requested consideration for working at home, where she could ensure she was close to a restroom. DesRosiers's supervisor eventually passed these requests on to HR.

HR provided DesRosiers with a standardized "job modification request form" asking her physician to fill out the form and assist HR with a determination of necessary modifications. DesRosiers complied and her doctor filled out the form, indicating that DesRosiers needed a desk location that was within 15 feet of a restroom or that she should be allowed to work from home. A second doctor later agreed with these requests and also suggested assigning DesRosiers to an office with a private restroom.

Hartford's own medical advisor reviewed the recommendations of DesRosiers's physicians and found they were consistent with her medical needs. Still, Hartford concluded none of the requests were reasonable.

Five months after her initial requests for accommodations, Hartford informed DesRosiers that it would not allow her to work from home, and Hartford closed its file on the matter a month later. However, DesRosiers continued to request accommodations and ask for reasons why Hartford would not accommodate or consider the other accommodations she requested. After several months and in separate e-mails, Hartford's managers said it would not provide her with a private bathroom because of the cost, estimating it to be about $100,000 (though the manager admitted he obtained no real cost estimates). Hartford said it would not allow DesRosiers to work from home because case managers were required to have access to the most recent medical information related to workers' compensation claims, which were not, at that time, available via remote access. Hartford supervisors then rejected DesRosiers's request to move to a location on the first floor, closer to a restroom, because the first floor did not have the same security measures as the workers' compensation unit.

Management offered DesRosiers access to the first floor's locker room and shower, if she needed to clean up after an incident. After DesRosiers said she would be embarrassed to have to walk past her coworkers and down a staircase after an incident, one of Hartford's managers suggested DesRosiers keep a long garment or trench coat in her cubicle so that she could cover herself when walking to the locker room.

After exhausting her medical leave, DesRosiers resigned her employment with Hartford citing management's "stonewalling" of her accommodation requests, and then DesRosiers filed suit claiming disability discrimination and failure to accommodate.

After the close of discovery in the case, Hartford filed a motion for summary judgment. The court, rejecting Hartford's motion, found there were a number of outstanding factual disputes that should be decided by a jury, including "numerous accommodation requests, and the consideration of numerous factors (which run the gamut from security and collaboration to privacy and proximity) that raise numerous triable issues" not appropriate for summary judgment.

In focusing on DesRosiers's request for a first floor work space, closer to the restroom, the court found a triable

question "whether Hartford could reasonably be required to make various changes to its security protocols for confidential patient information that would have included moving patient data from its secured location on the second floor to the first floor (through use of a locked cart, for instance)." The court also noted that management's suggestion that DesRosiers keep a trench coat in her cubicle "so she could cover up before rushing to the restroom, also raises triable issues as to whether Hartford even intended to offer reasonable accommodations."

Notably, just one day after the court reported its decision, the parties notified the court that the matter had been settled with terms subject to a confidentiality agreement.

On the heels of the ADA Amendments Act, DesRosiers's case reflects a sweeping trend in the federal courts to take a more expansive view of the rights afforded the disabled. Discussions about disability accommodations must involve an "interactive process" in which the employer considers all potential accommodations that may help an employee perform essential job functions. This interactive process can seldom be reduced to a standardized HR form, like Hartford's "job modification request form," because each interactive discussion about job accommodations is necessarily circumstance-specific. Employers are always wise to rely on the advice of qualified health care professionals, rather than attempt to diagnose conditions and arrive at accommodation options on their own.

ACA's Individual Mandate Requires Purchase of Health Insurance by March 31, 2014

The Affordable Care Act's individual mandate requires all American citizens to have minimum essential health insurance coverage for 2014 or else pay a tax penalty. For most taxpayers, that tax penalty will be the sum of the monthly penalty for each month in 2014 in which the taxpayer did not have minimum essential coverage for the taxpayer and any qualifying dependents, payable on the taxpayer's 2014 income tax return. ACA makes some exceptions to the tax for months in which the taxpayer experiences a "short coverage gap" of less than three months. This month, the Obama Administration clarified that it would use the 3-month short coverage gap as a grace-period for which a taxpayer would not owe a tax penalty provided that the taxpayer obtained coverage from the Exchange/Marketplace during the open enrollment period, which continues until March 31, 2014.

The Administration and Department of Health and Human Services insist that this is just a "clarification" of the rules and not a substantive change; however, it appears the intent of the clarification was to grant an extension to individuals using the Exchange/Marketplace to buy their insurance coverage.

Many in Washington continue to debate whether other, more substantive delays to the ACA's individual mandate should be implemented. Stay tuned.

NLRB Tips: NLRB Back in Business after Government Shutdown

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On October 17, 2013, the NLRB re-opened for business after an extended shutdown due to lack of funding. As you know, Congress reached a temporary funding measure which extended the debt ceiling and reopened government. In anticipation of the shutdown, the Board granted, *sua sponte*, an extension of time to file or serve any documents for which the grant of an extension is permitted by law.

As a result of these extensions, all unfair labor practice hearings, representation case hearings and scheduled elections were indefinitely postponed. If you had any pending matters before the NLRB, expect on order rescheduling the matter soon. If in doubt as to the status of a matter, contact your local field office to determine the Board's anticipated timetable of any resumed case. The Agency set forth general guidelines to follow in the filing of documents:

- The NLRB has added sixteen (16) days to any due date of documents due since October 1, 2013. For

example, it a document was due on 10/8/13, it is now due on 10/24/13 (10/8 plus 16 days equals October 24th).

- Any due date created prior to 10/1/13 was tolled during the shutdown, even if the due date falls outside the shutdown. For example, if on 9/23/13 the parties were assigned a due date of 10/21/13, the new due date would be 11/6/13 (10/21/13 plus 16 days equals November 6th).

If you need more time to respond to a resumed case, by all means request an extension of time to respond to a charge or prepare for a hearing. Any such request should contain the specifics of the conflict(s) in your schedule.

Employers' operations did not cease during the shutdown and scheduling problems might exist now that did not exist at the time of the shutdown. The NLRB will have difficulty denying any reasonable request for more time under the present circumstances.

FOURTH AND D.C. CIRCUIT COURTS DENY BOARD'S BID FOR REHEARING ON NOTICE POSTING RULE

The Fourth Circuit and the District of Columbia Court of Appeals, on August 12 and September 4, 2013, respectively, denied the Board's request for *en banc* rehearing on the adverse decisions issued by both courts regarding the legitimacy of the notice posting rule promulgated by the Agency. The notice posting rule was first proposed via rulemaking in August of 2011.

The Notice Posting Rule

The original rule as proposed by the NLRB required employers to post a statement of employees' rights under the National Labor Relations Act. Under the rule, employers that customarily post such notices on intranets or websites would also have to publish the notice on those sites.

The Board's final rule also provided that failure to post the notice would have been considered an unfair labor practice, could have been considered evidence of an employer's anti-union motive, and could have tolled the six-month statute of limitations for filing unfair labor practice charges.

The reaction from employers to the proposed rule was immediate. Most employers considered the language on the notice to be one-sided and clearly pro-union, while the Board considered the notice neutral, only serving to publicize employees' rights under the Act.

The Fourth Circuit Decision on the Notice Posting Rule

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).

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 free speech rights of employers.

Implications of the Circuit Court Decisions

In 2011, the Agency suspended enforcement of the notice posting rule because of various the legal challenges. Now, both the Fourth and D.C. Circuits have declined to rehear the cases *en banc*.

For the foreseeable future, the notice posting rule will not be enforced by the Agency. Any future "split" among the U.S. circuit courts increases the probability for review of the notice posting rule by the Supreme Court in the latter part of 2014.

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. Employers should 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.

In the meantime, the Agency launched a new mobile phone application for smart phone users that allows them to obtain free information about the Agency and the National Labor Relations Act. This application was announced on August 30, 2013 on the NLRB webpage, with links to the Apple App store and Google Play, where the free app is available for download.

FOURTH CIRCUIT FINDS THAT FACEBOOK "LIKE" BUTTON CONSTITUTES SPEECH – HAS POTENTIAL IMPLICATIONS UNDER THE NLRA

The Fourth Circuit Court of Appeals found that Facebook "likes" are a form of speech covered by the First Amendment of the U.S. Constitution. The ruling foreshadows future decisions by the NLRB that employees "likes" will be considered concerted statements if the underlying message deals with wages, hours, or other working conditions.

The Court Decision

The court's decision that a sheriff's deputy's "like" of a candidate challenging the incumbent for the sheriff's position was protected by the First Amendment. The Court stated that clicking the "like" button publishes an expression of support that is a "substantive statement" and that "liking" political opponents Facebook page is an unmistakable demonstration protected by the free speech provisions of the First Amendment. The Court went on to explain that whether the message is conveyed through a single mouse click or through the numerous key strokes required to type a message does not matter under its approach.

In a case out of the Hartford sub-regional field office called *Triple Play Sports Bar*, the Board is considering whether merely "liking" statements on Facebook constitutes protected, concerted activity. Look for the already pre-disposed Board to find that clicking "like" constitutes concerted speech if the conduct is otherwise protected under the NLRA. It is doubtful that the Board will delve into the underlying subjective meaning of an employee's "like" decision, but rather simply conclude that an objective analysis leads to the conclusion that the act of "liking" protected activity signals support of the activity online and is thus concerted under the NLRA.

EEO Tips: Should EEOC Conciliation Always Face Court Review?

This article was prepared by Jerome C. Rose, EEO Consultant for the law firm of LEHR, MIDDLEBROOKS, & VREELAND, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in the states of Alabama and Mississippi. Mr. Rose can be reached at 205.323.9267.

To many employers who find themselves defending a lawsuit by the EEOC, the agency's actions leading to this point are frequently alleged to be either smug, unreasonable, or arbitrary, or a combination of all of the above. It adds to the exasperation where the employer believes that it has been cooperative and responsive to the EEOC's requests for information during the administrative phase of the underlying charge. Additionally, even though the employer is comfortable with the legality of the employment actions in question and that it will ultimately prevail on the merits of the case itself, the employer foresees that it will still be put to great expense in defending its actions in terms of litigation costs and attorney fees. Thus, among other responses in answer to the EEOC's complaint, the employer will assert as an affirmative defense that prior to suit the EEOC failed or refused to conciliate the underlying charge in "good faith."

The statutory requirement for conciliation under Title VII is set forth in 42 U.S.C. Section 2000e5(b) and provides in pertinent part that after a finding of reasonable cause (but before filing suit) for an alleged violation of Title VII, the EEOC must *"endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion."*

Although the statute by implication, if not expressly stated, requires that the conciliation must be in good faith, it is not always clear as to what constitutes "good faith" under all circumstances. One of the problems is that Section 2000e5(f)(1) also provides that "*if within 30 days after a charge is filed or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action….*" (underlining added).

This raises many questions which employers might have to consider. For example:

- If the conciliation agreement must be acceptable only to the Commission, does that mean that "good faith conciliation" is whatever the EEOC says it is in a given case? Or that an employer must accept whatever conciliation terms the EEOC offers in order to resolve the underlying charge during the administrative process?

- Does not this force the employer to defend its position at the risk of considerable expense in terms of litigation costs and attorney fees after the EEOC files a lawsuit in order to effectively protest the reasonableness of the Commission's conciliation decision?

- Are there any concrete parameters or guidelines that define whether the EEOC has conciliated in good faith or bad faith? And,

- What sanctions do the courts have to rein in "bad faith" conciliation decisions by the EEOC?

In the past, various courts have tried to answer most of these questions and there does seem to be a general consensus on some of them. Unfortunately, however, because the facts in virtually every case differ, each of these questions must be answered on a case-by-case basis.

Recently, in the case of *EEOC v. Bass Pro Outdoor World, LLC*, Case # 4:11-cv-03425 (S.D. Texas, 10/2/13), the EEOC challenged the defendant's standing (and indirectly even the court's authority) to review the sufficiency of its conciliation decisions based on the statutory provisions of Title VII and the Administrative Procedures Act.

In this case, the EEOC had filed a systemic case against Bass Pro alleging that the company had discriminated against black and Hispanic job applicants and apparently was able to show, as a preliminary matter, that the company had engaged in a pattern or practice of race discrimination by using a certain "profile" of desirable employees which favored whites. At some point thereafter, the company filed a motion for summary judgment asserting that the EEOC did not make a good faith effort to conciliate various settlement claims it made during the course of conciliation, including a $30 million settlement, without providing sufficient information to support the amount "demanded."

The EEOC in response filed its own motion for a partial summary judgment requesting that the court rule that "the sufficiency of the Commission's conciliation efforts" were not subject to review. The EEOC, relying on Section 2000e5(b), contended in substance that whether or not the EEOC engaged in conciliation is reviewable but the matter of *how* it conducted conciliation is not reviewable by the Courts.

The court for the S.D. of Texas rejected the EEOC's basic argument on this point and cited the case of *EEOC v. Klinger Electric Corp.* (5th Cir. 1981) which held that:

> "*In evaluating whether the EEOC has adequately fulfilled this statutory requirement, the fundamental question is the reasonableness and responsiveness of EEOC's conduct under all the circumstances*."

In the case of *Argo Distribution, LLC* (5th Cir., 2009) the Fifth Circuit amplified its earlier holding on this subject by stating that:

The Commission must: *"(1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer."*

The Fifth Circuit concluded that if the EEOC fails to meet this responsibility, the court may impose a stay of proceedings or dismiss the action in its entirety.

Thus, in the *Bass Pro* case at hand, the court for the S.D. of Texas rejected the EEOC's arguments as to the sufficiency of its conciliation based on Fifth Circuit case law. It is not clear whether the EEOC will appeal this ruling.

This view however is not universally held by all courts. For example, the Sixth Circuit in the case of *EEOC v. Keco Industries, Inc*. (6th Cir. 1984) held that *"the form and substance of conciliations….is within the discretion of the EEOC as the Agency created to administer and enforce our employment discrimination laws and is beyond judicial review…..However, the EEOC must make a good faith effort to conciliate the claim…and that the District Court should only determine whether the EEOC made an attempt at conciliation."*

The Tenth Circuit has held that while good faith efforts are required, "a court should not examine the details of the offers and counteroffers between the parties." *EEOC v. ZIA Co.* (10th Cir. 1978)

The Eleventh Circuit takes the view that some scrutiny of EEOC's conciliation efforts may be made. For example, in the case of *EEOC v. Asplundh tree Expert Co.* (11th Cir. 2003), the Eleventh Circuit stated that courts [have] found "good faith lacking" in instances where EEOC had (1) presented only one offer, (2) demanded a remedy that was "impossible to perform," (3) refused to extend the defendant further time to consider conciliation, (4) ignored the defendant's attempt at communication, and (5) did not identify any plausible theory of liability against the defendant.

Finally it should be mentioned that most courts have found that conciliation by the EEOC is not jurisdictional. Thus, neither good faith conciliation nor conciliation generally were considered to be absolutely necessary prerequisites to the EEOC's filing suit in a district court. However, since conciliation by the EEOC is one of the "conditions precedent," an employer can attack the sufficiency of EEOC's conciliation as an affirmative defense. *EEOC v. Crownline Boats, Inc.* (S.D. Illinois, June 2005).

Recently, the EEOC was severely sanctioned on this issue by the Court in the case of *EEOC v. CRST Van Expedited, Inc.* (N.D. Iowa, 8/1/2013). The court dismissed certain of the EEOC's claims, namely members of an affected class which had not been individually identified and thus not subject to conciliation by the Defendant-employer. Consequently, the court awarded considerable attorney fees (a total of over $280,000 overall on this issue) to the Defendant for the EEOC's failure to complete the administrative process as to them. In substance, the Court held that the EEOC has the special burden of proving that it satisfied its pre-suit obligation of conciliation of each claim. The court stated that "This is not a jurisdictional prerequisite; rather, it is an ingredient of the EEOC's claim. Thus, the court's dismissal of claims due to the EEOC's failure to satisfy its pre-suit obligations is a dismissal on the merits of the EEOC's claims." The Eighth Circuit upheld the trial court's decision.

However, the Supreme Court recently declined to review the Sixth Circuit's holding in the case *Cintas Corp. v. EEOC* (*cert. denied*, 10/7/2013) involving basically the same issue. In that case, the Sixth Circuit held that the EEOC could proceed with its suit against Cintas Corp., a Cincinnati based uniform company, even though the Commission had not fulfilled all of its pre-suit obligations to identify and conciliate each and every member of an affected class of employees in the Commission's sex discrimination lawsuit. The Sixth Circuit's holding would seem to be directly in contradiction to the Eighth Circuit in the *CRST* case, above.

Obviously, from these two cases alone, it can be seen that the issue of what constitutes good faith or bad faith conciliation is far from being settled on some kind of universal basis. Unfortunately for employers, the only solution currently available seems to be to put the issue before the court after a lawsuit is filed.

OSHA Tips: OSHA's Most Violated Standards

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 recently announced its most frequently violated standards in 2013 at the annual conference of the National Safety Council. As has been the case in most years, the rank order of these standards varies, but there is little change to those making the list. It includes those standards that are frequently involved in tragic worksite accidents such as falls from elevation, lack of equipment guarding, and electrical hazards. This argues strongly that employers should carefully monitor these conditions at their workplaces.

The most cited standard violation again this year is **29 CFR 1926.501**, a construction industry standard requiring fall protection. Specifically, it requires that any elevated surface on which an employee stands be structurally sound and that any edge or open-sided floor have protection afforded by a guardrail, safety net system, or personal fall arrest system.

Number two on OSHA's most cited violation list in 2013 is **29 CFR 1910.1200**. This general industry standard is the hazard communication or "right to know" provision. It requires a written program detailing how hazardous chemicals will be identified and handled at a workplace. It includes a requirement for employee training.

Number three on this most cited list is a construction standard **29 CFR 1926.451** which is entitled "General Requirements." This standard details how scaffolds must be designed, erected, and used.

Fourth on this year's list is **29 CFR 1910.134** is entitled "Respiratory Protection." This general industry standard involves the use, selection and requirements for respirators, and a respiratory protection program.

The fifth most frequently cited violation in 2013 was general industry standard **29 CFR 1910.305** "Electrical Wiring Methods." It addresses the use of temporary wiring, flexible cords, electrical boxes, and fittings.

The sixth most cited violation in 2013 was OSHA general industry standard **29 CFR 1910.178**, "Powered Industrial Trucks." Among violations often noted here are failure to perform proper maintenance to the truck, operator training deficiency, and unsafe truck operations.

Number seven on the 2013 most violated list is **29 CFR 1926.1053** – which has a number of requirements regarding the use of ladders in construction work. This standard has numerous requirements that apply to the design, integrity, and use of portable and fixed ladders.

The eighth most cited standard in 2013 **was** 29 **CFR 1910.147**, the control of hazardous energy **(lockout/tagout).** This standard is designed to ensure there is no unexpected startup of equipment or release of energy where employees would be exposed while engaged in work such as the servicing or repair of equipment.

Number nine on the most-cited standard list in 2013 was **29 CFR 1910.303** which addresses electrical conditions and is entitled, General Requirements. This standard includes items such as guarding of live parts, splicing of conductors, and marking of equipment.

The final standard in 2013's top ten most cited is **29 CFR 1910.212** which is entitled "General Requirements for all machines" and calls for the guarding of points of operation, ingoing nip points and other machine hazards to which the operator or others in the machine area might be exposed.

Wage and Hour Tips: Overtime Pay Requirements of 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.

More than 75 years ago, Congress passed the Fair Labor Standards Act of 1938 which established a minimum wage of $.25 per hour for most employees. In an effort to create more employment, the Act also set forth certain

additional requirements that established a penalty on the employer when an employee works more than a specified number of hours during a workweek. The initial law required overtime after 44 hours in a workweek but eventually limited the hours without overtime premium to 40 in a workweek.

An employer who requires or allows an employee to work overtime is generally required to pay the employee premium pay for such overtime work. Unless specifically exempted, covered employees must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rate of pay. Overtime pay is not required for work on Saturdays, Sundays, and holidays unless the employee has worked more than 40 hours during the workweek. Further, hours paid for sick leave, vacation and/or holidays do not have to be counted when determining if an employee has worked overtime.

The FLSA applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours – seven consecutive 24-hour periods. It need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees but they must remain consistent and may not be changed to avoid the payment of overtime. Averaging of hours over two or more weeks is not permitted. Normally, overtime pay earned in a particular workweek must be paid on the regular payday for the pay period in which the wages were earned. However, if you are not able to determine the amount of overtime due prior to the payday for the pay period, you may delay payment until the following pay period.

The regular rate of pay cannot be less than the minimum wage. The regular rate includes all remuneration for employment except certain payments specifically excluded by the Act itself. Payments for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays are excluded. Also, discretionary bonuses, gifts and payments in the nature of gifts on special occasions and payments for occasional periods when no work is performed due to vacation, holidays, or illness may be excluded. However, payments such as shift differentials, attendance bonuses and "on-call" pay must be included when determining the employee's regular rate.

Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. Where an employee, in a single workweek, works at two or more different types of work for which different straight-time rates have been established, the regular rate is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. Where non-cash payments are made to employees in the form of goods or facilities (for example meals, lodging, etc.), the reasonable cost to the employer or fair value of such goods or facilities must also be included in the regular rate.

Some Typical Problems

Fixed Sum for Varying Amounts of Overtime: A lump sum paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium. This is true even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis. For example, a flat sum of $100 paid to employees who work overtime on Sunday will not qualify as an overtime premium, even though the employees' straight-time rate is $8.00 an hour and the employees always work less than 8 hours on Sunday. Similarly, where an agreement provides for 6 hours pay at $10.00 an hour regardless of the time actually spent for work on a job performed during overtime hours, the entire $60.00 must be included in determining the employees' regular rate and the employee will be due additional overtime compensation.

Salary for Workweek Exceeding 40 Hours: A fixed salary for a regular workweek longer than 40 hours does not discharge FLSA statutory obligations. For example, an employee may be hired to work a 50-hour workweek for a weekly salary of $500. In this instance, the regular rate is obtained by dividing the $500 straight-time salary by 50 hours, results in a regular rate of $10.00. The employee is then due additional overtime computed by multiplying the 10 overtime hours by one-half the regular rate of pay ($5 x 10 = $50.00).

Overtime Pay May Not Be Waived: The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. Likewise, an announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not relieve the employer from his obligation to pay the employee for overtime hours that are worked. The burden is on the employer to prevent employees from working hours for which they are not paid.

Many employers erroneously believe that the payment of a salary to an employee relieves him from the overtime provisions of the Act. However, this misconception can be very costly as, unless an employee is specifically exempt from the overtime provisions of the FLSA, the employee must be paid overtime when he/she works more than 40 hours during a workweek. Failure to pay an employee proper overtime premium can result in the employer being required to pay, in addition to the unpaid wages for a period of up to three years, an equal amount liquidated damages to the employee. Further, if the employee brings a private suit, the employer can be required to pay the employee's attorney fees. When the Department of Labor ("DOL") makes an investigation and finds employees have not been paid in accordance with the Act, the DOL may assess Civil Money Penalties of up to $1100 per employee.

In order to limit their liabilities, employers should regularly review their pay policies to ensure that overtime is being computed in accordance with the requirements of the FLSA.

2013 Upcoming Events

2013 CLIENT SUMMIT

When: November 12, 2013, 7:30 a.m.-4:30 p.m.
Where: Rosewood Hall, SoHo Square
2850 19th Street South
Birmingham, Alabama 35209
Registration Fee: Complimentary
Registration Cutoff: November 8, 2013

Hotel accommodations are available at Aloft Birmingham SoHo Square, 1903 29th Avenue South, Homewood, Alabama 35209. You may make reservations by calling toll-free at 1.877.822.1111 and ask for the discounted "Lehr Middlebrooks" rate. Or you may book directly at https://www.starwoodmeeting.com/book/lehrmiddlebrooks. Reservation requests received after Monday, November 4, 2013 will be provided on a space available basis at prevailing rates.

To register, contact Marilyn Cagle at 205.323.9263, or mcagle@lehrmiddlebrooks.com. You may register online by visiting our website – the registration link is http://www.lehrmiddlebrooks.com/register/contact-form.html.

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…

…employees newly-represented by labor unions have received, on average, pay increases of 2% in the first year of their union contracts negotiated in 2013 according to a recent study by Bloomberg BNA? First-year wage increases are up from just 1.6% for the same period in 2012.

…22 states now have laws that guarantee employees the right to possess firearms while commuting to and from work, and to store them in their locked vehicles while at work? States with bring-your-gun-to-work laws now include: Alabama, Alaska, Arizona, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Nebraska, North Dakota, Ohio, Oklahoma, Tennessee, Texas, Utah, and Wisconsin.

…a federal judge in New York this month found that an unpaid intern was not an "employee" for purposes of the New York City Human Rights Law? The court's decision in *Wang v. Phoenix Satellite Television U.S., Inc.* (S.D. N.Y. 10/3/13) raises serious concerns for employers about the status of unpaid interns. The court said that in deciding who is an employee for purposes of the local human rights law, it applied the standards under Title VII

of the Civil Rights Act of 1964, finding that the "absence of remuneration" defeats the intern's protections as an employee. Although this decision suggests unpaid interns may not be entitled to the whole host of workplace protections, it also suggests that employers may not benefit from the limited liability under state workers' compensation laws for on-the-job injuries sustained by employees.

…temporary staffing agency employment increased by nearly 1 million jobs since the end of the recession in 2009, leading to temporary staffing's highest share of the total employment market since 2000? The American Staffing Association's 2013 economic analysis reported that between the second quarter of 2009 and the second quarter of 2013, temporary staffing services accounted for nearly 16% of the overall payroll gains during that period. Staffing agency employment gains and losses have historically ebbed and flowed with the economy, but the extraordinary growth since the end of the last recession, coupled with perceived compliance loopholes in the Affordable Care Act, may indicate a possible shift to a more permanent and significant role for temporary staffing in the U.S. labor market.

…Vynamic, a Philadelphia-based health care consultancy announced last month a system under which employees will be barred from sending business e-mails between the hours of 10 a.m. and 6 p.m. on weekdays or any time on Saturdays and Sundays? Vynamic's approach, reported on this month by *Fast Company*, is intended to fight burnout and compel a better work-life balance. The same system might prove helpful in limiting overtime or the risk of FLSA claims for unpaid overtime.

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