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A Stitch in Time Saves 34 Million? – DOJ Announces Record Immigration Settlement

Late last month, the Department of Justice (DOJ) announced the largest settlement to date in any immigration case against any employer. The DOJ sued the employer, Infosys Corporation, an Indian multinational corporation providing consulting, technology, and outsourcing services with numerous offices in the United States, alleging systemic visa fraud and abuse of immigration processes.

Since 2011, Infosys had been under investigation by the DOJ concerning its immigration practices. The investigation likely arose out of a civil whistleblower complaint by one of its employees. In short, the DOJ alleged that Infosys violated the immigration laws by bringing foreign nationals to work for or to serve as clients in the United States by manipulating the visa system.

Specifically, the DOJ alleged that: workers on H-1B visas (a visa which generally allows for persons to enter the U.S. to work in a specialized occupation (usually requiring a bachelor's degree or higher)) did not perform services in the geographic area for which the visas were approved; the employer used B-1 visas (a visa which generally allows a temporary visitor to enter the U.S. for a specific period of time for a specific business purpose or purposes) to bring certain employees based in India to the U.S., not for specific, temporary business purposes, but rather to fill skilled labor positions that should have been awarded to U.S. citizens or H-1B visa holders; the employer issued travel and interview instructions for B-1 visa applicants that were inaccurate, including instructions to the B-1 visa applicants (e.g. a "Do's and "Don'ts" memorandum) to avoid certain terminology in the application process aimed at deceiving U.S. Immigration officials about the nature of their prospective work in the U.S; and the employer failed to maintain or properly maintain I-9s during 2010 and 2011 for its foreign employees in the U.S. With respect to the I-9 allegations, Infosys remains subject to additional penalties following an independent third-party audit.

As the case is settling, the public's access to extensive details of lessons learned is limited; however, the case should at least be considered a cautionary reminder to employers about complying with immigration laws, including ensuring I-9 compliance and by an effective I-9 review and retention process. For those employers who utilize H-1B and B-1 employees as part of their businesses or who outsource work under these visa programs, any such employer program or contract with a third-party must (obviously) not encourage non-compliance with the letter and spirit of these laws. Also, such employer programs, associated policies, and contracts with third-parties who provide outsourced employees for work in the U.S. must be able to withstand and defend inquiries concerning visa abuse and should require timely investigation and reporting by the employer if/when abuses are discovered. Some basic preventative measures such as these should avoid substantial costs associated with defending such DOJ and USCIS inquires, as well as the potential for costly fines and settlements.

DOL One Step Closer to Implementing 'Right-to-Know' Rule, while Senators Propose Bill to Fight Misclassification

Worker misclassification and impermissible use of independent contractors were hot topics in Washington over the past month. Early in November, the Department of Labor ("DOL") sent its proposed Worker Classification Survey to the Office of Management and Budget for its review and approval. Agency watchers believe the survey is intended to pave the way for DOL to implement its controversial "right-to-know" rule, which would amend Fair Labor Standards Act ("FLSA") recordkeeping rules and require employers to provide workers with an annual notice detailing their classifications for FLSA purposes.

The Worker Classification Survey is intended to be used by DOL "to collect information about employment experiences and worker knowledge as to basic employment laws in order to understand employee experiences with worker classification issues" as well as "to compile an analytical research report on the findings and results of a nationally representative survey of workers. The DOL will also report on a qualitative study of employers that includes results from in-depth employer interviews."

Just days after DOL rolled out the Worker Classification Survey, a U.S. Senate subcommittee held hearings on payroll fraud, intended to shed light on employer improper classification practices that lead to reduced wages for workers.

Shortly after the hearing, Senator Robert Casey (D-Pa) introduced a bill, the Payroll Fraud Protection Act of 2013 (which despite its name is intended to prevent, not protect, payroll fraud) to "hold employers accountable" for independent contractor misclassification. The bill, which was originally introduced in 2011, would amend the FLSA to require employers to provide notice to all individuals who receive remuneration for services provided to the employer (i.e. both employees and independent contractors) stating their classification related to FLSA obligations and explaining the basis for that classification. The Act would also impose a sweeping new system of enforcement and potential penalties that would require state agencies collecting unemployment tax to investigate violations and coordinate those investigations with DOL's Wage and Hour Division and the IRS. The bill would also authorize individual lawsuits against employers, including significant civil money penalties.

Although it is politically convenient to describe efforts to better regulate misclassification as being in the interests of short-changed workers, the fact of the matter is that federal and state agencies view worker misclassification as a conspiracy to commit tax evasion. Classifying a worker as an independent contractor excuses the employer from administering payroll tax (income taxes and FICA) withholding for that worker, in addition to avoiding the payment of federal and state unemployment taxes, the proceeds of which are necessary to pay unemployment claims. In a jobless recovery, where House and Senate legislators are expected to vote again soon on yet another extension of unemployment claim payments for individuals who continue to struggle to find work, maintaining adequate funding to pay those claims is an ongoing concern.

Employers who use independent contractors should be prepared for scrutiny. Agencies will examine the economic realities of your independent contractor

arrangements and the degree of control you assert over your independent contractors to discern whether you have misclassified them. Potential penalties for misclassification are steep. Not only do employers run the risk of owing significant backpay and overtime to misclassified workers, but also the liability for back taxes, penalties and interest to multiple tax-collecting agencies.

Supreme Court Denies Review of 11th Circuit's Decision that Employer Did Not Violate ADA When It Required Fitness for Duty Exam

This month the U.S. Supreme Court declined to review a decision of the 11th Circuit that would seem to contradict EEOC guidance on what standard applies to an employer's request for a fitness for duty examination. (*Owusu-Ansah v. Coca-Cola Co.*, No. 13-460, 11/18/13).

The employee, Franklin Owusu-Ansah filed suit against his employer, Coca-Cola Co., after he was required to undergo a "fitness for duty exam" after he banged his fists on a table and said "someone is going to pay," during a 2007 interview with a manager in which Owusu had complained about perceived national origin discrimination. Owusu denied he ever engaged in the conduct.

Owusu's supervisor reported Owusu's behavior to HR and Coca-Cola put Owusu on paid leave pending satisfactory completion of a fitness for duty exam. Coca-Cola referred Owusu to an independent psychologist, who in turn referred Owusu to a psychiatrist. Owusu went to see the psychiatrist but was uncooperative, refused to answer questions, and refused to authorize the psychiatrist to discuss his impressions of Owusu with the psychologist. After Owusu submitted to a personality test that showed he was "within normal limits," Coca-Cola allowed Owusu to return to work.

Owusu filed suit, claiming that Coca-Cola failed to comply with the EEOC's guidance for lawful "medical examinations" under the Americans with Disabilities Act ("ADA"). Owusu argued, consistent with EEOC guidance, that an employer could only require a medical examination when it is "job related" and "consistent with business necessity." Owusu argued that Coca-Cola's requirement was neither.

The district court in Georgia granted summary judgment in favor of Coca-Cola. The Eleventh Circuit Court of Appeals agreed, finding that Coca-Cola's requirement that Owusu submit to a fitness for duty exam was "job related" and "consistent with business necessity" because Coca-Cola had "a reasonable belief based on objective evidence" that "an employee's ability to perform essential job functions will be impaired by a medical condition" or that the employee posed a "direct threat."

In his petition for appeal to the Supreme Court, Owusu argued that the Eleventh Circuit's decision is in conflict with the EEOC guidance it purports to apply. Owusu said that there was no objective evidence that he was unable to perform his job, and that he could not have been a direct threat because he primarily worked off-site, except for monthly meetings with his manager. Owusu also argued that he had categorically denied making the alleged threatening remarks or banging his fists on the table.

Ultimately, Owusu's claims were not enough to persuade the Court to take his appeal. As a result, the 11th Circuit's decision remains good law in this Circuit, standing for the proposition that an employer's good faith belief that an employee's actions suggest he may be a direct threat is sufficient basis to refer that employee to a qualified medical practitioner for a fitness for duty exam.

Increasingly, we hear from employers who are interested in standardizing a system under which they can require a fitness for duty examination. We continue to believe that this is not a practice that lends itself to standardization. Rather, as with most employer obligations under the ADA, employers should review the totality of circumstances unique to a particular employee before deciding what is the most reasonable approach to addressing issues of accommodations, fitness for duty, or a direct threat. Employers should not diagnose or make assumptions about physical or mental impairments of their employees, but rather rely on the advice of qualified health care professionals.

Minimum Wage Increase Vote Expected in Early December

Senator Tom Harkin (D-Iowa) announced last week that he expects his minimum wage bill to come up for a vote in the U.S. Senate after its Thanksgiving recess. With that recess scheduled to end on December 9, Harkin may have in mind a pre-holiday gift for labor. But do not discount House Speaker John Boehner's (R-Ohio) ability to play the part of the Grinch in Harkin's holiday special.

Harkin's minimum wage bill would gradually raise the minimum wage from its current level of $7.25 to $10.10 per hour and then index the minimum wage to inflation (which is a growing trend among some state-mandated minimum wage laws) on a go-forward basis. The bill would also increase the minimum wage for tipped employees (currently $2.13 per hour) to 70% of the regular minimum wage.

President Obama recently spoke in favor of passing the bill, saying he would sign it.

Although the bill has not received any vocal support from Senate Republicans, minimum wage legislation tends to garner bipartisan support in the months leading up to an important election. With both the House and Senate up for grabs in 2014 (and most Hill-watchers think the Senate is more vulnerable to a party change than the House), both parties will want to appear sensitive to low income wage earners.

Still, even if the Senate passes the Harkin bill, Boehner is unlikely to bring it to a vote in the House anytime soon, certainly not before the holiday recess.

Mental Health Parity and Addiction Equity Act Final Rules Issued

Earlier this month, the Departments of Labor (DOL), Health and Human Services (HHS) and Treasury issued final regulations clarifying prior guidance and implementing the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). The final rules resolve several issues that were previously unclear, including parity determinations between medical and mental health benefits within a health plan's tiered networks.

In general, MHPAEA requires plan sponsors of group health plans to ensure that the financial requirements (such as coinsurance) and treatment limitations (such as visit limits) imposed on mental health and substance use disorder benefits are no more restrictive than the same plan features for medical and surgical benefits. Importantly, MHPAEA does not mandate that plans provide mental health and substance use disorder benefits. Instead, it requires plans that do offer such benefits to provide them in the generally same manner as the plan provides medical/surgical benefits.

Plans Subject to MHPAEA

MHPAEA applies to most health plans, including fully-insured and self-funded employer-sponsored group health coverage; however, there are limited exceptions. For example, self-funded state and local government plans may opt-out of MHPAEA's requirements if certain administrative steps are taken. MHPAEA also does not apply to retiree-only plans.

Additionally, group health plans of small employers (50 or fewer employees) are exempt from direct coverage under MHPAEA; however, fully-insured small employer plans are indirectly subject to MHPAEA rules through the Affordable Care Act (ACA). Under ACA, non-grandfathered health insurance coverage in the individual and small group markets must provide benefits in the ten categories of EHBs, which include mental health and substance use disorder benefits. HHS final rules regarding EHBs specify that the required mental health and substance use disorder benefits must be provided in compliance with the requirements of MHPAEA.

MHPAEA also contains an increased cost exemption available to plans that meet the requirements for the exemption. The increased cost exemption applies to plans and insurers that make changes to comply with MHPAEA and incur an increased cost of either (a) two percent in the first year that MHPAEA applies to the plan or (b) one percent in any subsequent plan year. The final rules establish standards and procedures for claiming the

increased cost exemption, including certain notice requirements.

To claim the increased cost exemption, a plan sponsor must provide notice of the exemption to group health plan participants and beneficiaries and to the appropriate federal agency (DOL in the case of employer-sponsored group health plans). Plan sponsors may satisfy the notice requirement to participants and beneficiaries by providing a summary of material reductions in covered services or benefits.

Clarifications in the Final Rules

The final rules clarify that the definitions of "medical/surgical benefits," "mental health benefits," and "substance use disorder benefits" include benefits for items as well as services. The rules also explain that medical conditions and surgical procedures, and mental health conditions and substance use disorders, are defined by plan sponsors under the terms of the plan and in accordance with applicable federal and state law.

The interim final rules enumerated the following six classifications of benefits to consider in conducting a parity analysis:

- inpatient, in-network;
- inpatient, out-of-network;
- outpatient, in-network;
- outpatient, out-of-network;
- emergency care; and
- prescription drugs.

The final rules retain these classifications, but specify circumstances in which a plan may create sub-classifications. The final rules incorporate previous FAQ guidance allowing plans to divide benefits furnished on an outpatient basis into two sub-classifications ((1) office visits and (2) other outpatient items and services) for purposes of applying the financial requirement and treatment limitation rules under MHPAEA.

The final rules expand this flexibility to plans (or health insurance coverage) that provide in-network benefits through multiple tiers of in-network providers (such as an in-network tier of preferred providers with more generous cost-sharing to participants than a separate in-network tier of participating providers). The final rules allow such plans to divide its benefits furnished on an in-network basis into sub-classifications that reflect those network tiers—as long as the tiering is based on reasonable factors and without regard to whether a provider is a mental health or substance use disorder provider or a medical/surgical provider. The rules further clarify that the parity analysis should be performed within each classification, or, if applicable, within each sub-classification.

The final rules also expand parity requirements to intermediate levels of care received in residential treatment or intensive outpatient settings. The interim final rules excluded a residential level of care; however, HHS determined that insurers were using this to avoid covering certain residential addiction treatments. Therefore, under the final rules, intermediate levels of mental health/substance use care must be covered equally whether delivered in residential or intensive outpatient settings.

Additionally, the final rules eliminate an exception created by the interim final rules for nonquantitative treatment limitations (plan features that are not expressed numerically, but that may limit the scope or duration of benefits). Under the final rules, parity requirements for nonquantitative treatment limitations also apply to restrictions on geographic location, facility type, provider specialty, and other criteria that limit the scope or duration of benefits for services (including access to intermediate level services).

The MHPAEA final rules also address whether plans that provide mental health or substance use disorder benefits pursuant to ACA's preventive services rules are subject to MHPAEA's requirements. The final rules explain that a group health plan that provides mental health or substance use disorder benefits only to the extent required under the preventive services rules is not required to provide additional mental health or substance use disorder benefits in any classification.

The final rules are effective for group health plans and health insurance issuers offering group health insurance coverage for plan years beginning on or after July 1, 2014, which means that the rules are effective on January 1, 2015 for calendar year plans. For plan years

beginning before July 1, 2014, plans and issuers subject to MHPAEA must continue to comply with the interim final rules.

For more information on how the MHPAEA and the final rules may affect your health plans and your overall employee benefits strategies, please contact one of our benefits attorneys.

NLRB Tips: Nomination of Richard Griffin for NLRB General Counsel "Done Deal" – A Fox in the Henhouse?

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years. Mr. Rox can be reached at 205.323.8217.

Only three days after Richard Griffin resigned his position as a Board member, President Obama nominated Mr. Griffin to act as the Agency's General Counsel, the chief prosecutorial attorney for the NLRB. Clearly, the President has every intention of advancing the pro-labor agenda that has been in place since his election in 2008. As the General Counsel, Griffin will have a great influence on the prosecutorial direction of the Board. The General Counsel typically determines whether the Board pursues cases which reverse existing Agency precedent, continue recent expansion of Section 7 protections or create entirely new theories on employer liability. When the members of the Board "signal" an area of concern in the law that they wish to re-visit, the General Counsel sends instructions to the field offices to, in effect, troll for charges with factual patterns that would lend itself to prosecution and review by the pro-union NLRB. As these cases are frequently hand-picked by the General Counsel, the outcome is usually never in doubt. This is true for litigation both before the Administrative Law Judge and the reviewing NLRB. Only an appeal to the U.S. Circuit Courts offer employers a realistic opportunity for relief.

Mr. Griffin's nomination and confirmation is cause for concern for employers, who had hoped for a more moderate General Counsel at the NLRB. Griffin has a long history as a union advocate. For almost 20 years before his 2012 recess appointment to the Board, he served as a staff attorney for the International Union of Operating Engineers, eventually serving as the union's general counsel. Mr. Griffin has also served on the board of directors for the AFL-CIO Lawyers Coordinating Committee.

If Mr. Griffin's union background is not enough to generate concern, one only need examine the controversial decisions he played a part in while serving as a member of the NLRB. Griffin has been involved many controversial decisions, involving but not limited to, the institution of micro bargaining units under *Specialty Healthcare,* rulemaking to change election procedure rules and requiring notice posting by employers, pronouncements concerning chilling of Section 7 rights in social media cases, limiting confidentiality of internal investigations under *Banner Healthcare* and the continuation of dues check off after post contract expiration.

On September 18, 2013, the Senate Committee on Health, Education, Labor and Pensions (HELP) voted 13-9 to advance Griffin's nomination to General Counsel to the full Senate. The Senate reconvened on October 28, 2013, and on October 29, 2013, the full Senate confirmed Mr. Griffin's nomination by a vote of 55-44.

- Employers should not expect any reversal of course from the NLRB Office of the General Counsel. To the contrary, expect Griffin to expand the Board's efforts to broaden its role in non-union work environments. Also expect the new General Counsel to decide several potentially controversial cases that have been pending in the Division of Advice for a substantial period of time, some for over a year since the Region has issued its recommendation on the charge.

- Union-free employers should review and update their union avoidance programs in consultation with their counsel.

- Organized employers should expect more strident and aggressive unions. When deciding whether to pursue matters involving the workplace, unions

may feel that they have the "upper-hand" down the road before the NLRB.

- Employers should, in consultation with their counsel, review their work policies and procedures to ensure they are not susceptible to NLRB challenge.

PATH IS OPEN FOR NLRB TO CHANGE RULES ON ORGANIZING TEMPORARY WORKERS

In cases arising out of Region 5 in Baltimore Maryland, the newly appointed Board is poised to significantly change the law as it applies to organizing temporary workers. These cases are discussed below:

Bergman Bros. Staffing Inc., NLRB No. 5-RC-105509, 6/20/13.

In what is likely a case of first impression, the Regional Director in Baltimore, Maryland, ordered that an election be conducted among employees supplied by a temporary staffing agency to clients on a short term basis and that the staffing agency employees constituted a unit appropriate for collective bargaining.

<u>The Old Standard under *Oakwood Care Center*, 343 NLRB 659 (2004)</u>

Under *Oakwood,* the Board held that a unit including both solely and jointly employed workers is permissible only with both employers' consent. Regional Director Gold found that *Oakwood* did not apply to *Bergman* because the union was not seeking to impose a bargaining obligation on different employers, so there was no requirement for any of Bergman's clients to consent to representation.

Union reaction to the RD decision was swift – calling the decision "a possible game changer" in the difficult contingent worker industry. Union business agent Dennis Desmond stated that the ruling "provid[ed] a clear roadmap for organizing temporary workers."

Bergman will open the door to increased possibilities of unionization efforts at the client facility. The unionized temporary workforce within the client facility would, at least theoretically, influence the permanent employees on the alleged positive aspects of belonging to a union. In short, the potential for a troublesome situation to develop jumps exponentially should a staffing agency's employees become unionized.

<u>Request for Review of *Bergman*</u>

Interestingly, it was the Petitioner/Union, and not the Employer, who requested review of the Regional Director's Decision and Direction of Election. In spite of winning the unit question issue, the Union has asked the Board to overrule *Oakwood Center* in its entirety. The Company has opposed this request, arguing that the issue is moot and that the NLRB should not overrule *Oakwood* in contravention of sound public policy.

Miller & Anderson, Inc., 5-RC-079249, 4/13/12.

Before *Bergman* issued, Region 5 had considered virtually the same issue in *Miller & Anderson, Inc.,* 5-RC-079249, 4/13/12. The Regional Director, citing *Oakwood* and *Greenhoot, Inc.*, determined that the petition should be dismissed because the subject employers did not "consent" to multiemployer bargaining.

In requesting review, the Petitioner urged a reversal of *Oakwood* and a return to the principles enunciated in *M.B. Sturgis*, 331 NLRB 1298 (2000). In discussing *Sturgis*, Board members Liebman and Walsh, in dissent of the *Oakwood* decision, noted the following:

> The critical difference, noted in *Sturgis,* is that where one or more supplier employers provide employees to a single user employer at a common worksite, **all** of the employees at the site work for the user employer (citation omitted). Hence the unit scope is employer-wide. Surely employees, who are working side by side, for employers who have voluntarily created that arrangement, should be able to join together in the same bargaining unit, if they [so] choose. They are part of a common enterprise and, absent a common union representative; they are potential competitors with each other with respect to the terms and conditions of their work. Accordingly, where the Board's other criteria for determining community of interest are met, it is appropriate for the joint employees to be combined with the user employer's sole employees in a joint bargaining unit.

Petitioner went on to state in brief that "in truth, it is impossible to deny that the requirement of consent from both employers effectively prevents the representation of temporary workers."

THE BOTTOM LINE

These are difficult decisions for employers, and expect to see increased organizing at temporary agencies in an attempt to "get in the door" of client businesses. This issue is pending before the Board, and now that it is "teed up", one may expect a return to *Sturgis* in the very near future.

EEO Tips: EEOC Again Holds Meeting to Enhance Title VII National Origin Enforcement

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.

On November 13, 2013, the Equal Employment Opportunity Commission conducted another hearing to receive comments concerning the growing problem of national origin discrimination. (The Commission in April 2009 also addressed this problem at the urging of the President.) In its November meeting, the Commission was seeking input from experts and stakeholders not only on how to approach the foreseeable increase in workload due to this form of employment discrimination but also whether there are some "nuanced" approaches that may be used in doing so. According to EEOC Chair, Jacqueline Berrien, "The U.S. labor force is dynamic, diverse and multi-cultural….In prohibiting discrimination based on national origin, Title VII of the Civil Rights Act of 1964 seeks to ensure that all individuals have equal employment opportunities, and that employers – and the national economy as a whole – can take advantage of the full range of the skills and talents they have to offer."

The EEOC in its Compliance Manual at one point presented the following overview of the problem:

> "As the composition of the American workforce continues to change, Title VII's prohibition against national origin discrimination has become increasingly significant in ensuring equality in employment opportunities. Today, about one in ten Americans is foreign-born. The largest numbers of recent immigrants have come from Asia, including China, India, and Vietnam, and from Latin America, including Mexico, El Salvador, and Cuba… Between 1990 and 2000, the proportion of the U.S. population of Asian origin increased substantially… The proportion of Hispanics also rose substantially, and now one in eight Americans is Hispanic. Immigration also has expanded diversity among Black Americans, including new immigrants from the Caribbean and sub-Saharan Africa. Since 1980, the proportion of Black Americans who are foreign-born has risen by about 65 percent. The American workforce has witnessed a corresponding increase in diversity. In 1999, immigrant workers numbered 15.7 million, accounting for 12 percent of U.S. workers…Between 1990 and 1998, 12.7 million new jobs were created in the United States, and 38 percent (5.1 million) were filled by immigrants. In 2000, Hispanics, Asian and American Indians constituted 15.2 percent of the workforce employed by private employers with 100 or more employees…"

It is probably safe to say that during the last 10 years, the foregoing demographics have changed radically in terms of increases in all of the ethnic groups mentioned above. Thus, for many employers (more probably, I should say, most employers), there is a potential risk that they may be charged with discrimination on the basis of national origin if their general employment practices have not changed in keeping with the demographic changes in our country over the last 12 years. For example, it is probable that:

(1) Many employers do not know that an employee does not necessarily have to be a citizen of the United States in order to be covered by Title VII, (See 29 C.F.R. 1606.5(a) of the Commissions Procedural Regulations which states that citizenship requirements are unlawful where the purpose and effect is to discriminate on the basis of national origin.

(2) Many employers have implemented faulty work rules pertaining to "foreign accents," and "English-only Rules," which have an adverse impact on a given ethnic group or discriminate against an individual because of his national origin. This applies not only to illegal immigrants but also to regular citizens who may have "heavy accents" or "immutable [speech] characteristics" because of having been born and lived in a foreign country. (*Garcia v. Gloor*, 5th Cir. 1980).

(3) Many employers do not know that national origin discrimination can also be a matter of discrimination based on physical appearance (certain cultural traits), hair styles or dress. Here, there often is a fine line between national origin discrimination and religious discrimination. The difference is that with religious discrimination, an employer must attempt a reasonable accommodation, whereas with national origin discrimination, there is no such statutory obligation.

(4) Finally, many employers do not know that their language policies, dress codes or work rules may not be adequately justified by business necessity.

EEOC charge statistics for FY 2010, FY 2011 and FY 2012 show that the number of national origin charges steadily comprised approximately 10% of all charges filed, as follows:

	Fiscal Years		
Items	**2010**	**2011**	**2012**
Total all Charges	99,922	99,947	99,412
National Origin Charges	11,304	11,833	10,883
Merit Resolutions	2,576	2,416	2,035
Monetary Benefits In Millions	$29.6	$34.1	$37.0

The problem for employers, as the above table shows, is that the amount of monetary benefits obtained in order to resolve these charges during the administrative process steadily increased. This upward trend in the cost of resolving national origin charges may or may not continue in the future. Whether it does or not, employers should be conscious of potential national origin discrimination in executing all of its employment policies and practices.

EEO Tips: While national origin discrimination can take many forms, it frequently is found in "English-only" or "accent policies." There are a number of general concepts that employers should keep in mind to avoid serious violations of Title VII's prohibitions against discrimination on the basis of national origin.

First, as stated earlier in this article, the Commission's Regulations found at 29 C.F.R. 1605, et seq., indicate that:

- Citizenship, per se, is not a requirement for coverage under Title VII. Depending on the circumstances, discrimination against non-residents, aliens and undocumented workers may be a violation of Title VII on the basis of national origin, and

- State laws which regulate or prohibit the employment of non-citizens may be superseded where they are found to be in conflict with Title VII.

Thus, legal as well as illegal and undocumented workers may be covered by Title VII.

Secondly, the EEOC will usually "presume" that a violation has occurred whenever an employer issues an English-only Rule which prohibits employees from speaking another language **"<u>at all times</u>"** in the workplace. **The EEOC, however, will usually allow employers to enforce a rule which requires employees to speak English only at certain times or under certain specified circumstances if it can be justified by business necessity. The following defenses can be raised by an employer to justify the rule on the basis of business necessity:**

- That it enhances good communication in general but most importantly among co-workers, especially where safety would be a factor in their communicating clearly to each other for safe job performance and/or emergencies.

- That it is necessary for good communication between other employees and English- speaking customers and clients.

- That it is necessary for good communication between employees and supervisory personnel for purposes of instructions, assignments and directions.

- That it is necessary for maximum, efficient productivity. Having to use an interpreter or restate instructions may slow productivity and be less efficient.

- That it is better for customer and co-worker relations. However, the matter of customer or co-worker preference may require a showing that such a preference is essential to the safe and efficient performance of the job or operation of the business. The EEOC will likely require clear evidence to sustain this defense.

- Finally, employers should be aware that an improperly drafted English-Only Rule may result in a charge of "adverse impact," because of national origin, upon those employees whose primary language is not English. If such an allegation is made, the employer may have to show that the rule was justified by business necessity and that no other rule or practice could be used which would have a lesser impact upon the ethnic group or nationality involved.

Although the past influx of immigrants may have been reduced by current governmental oversight and general economic conditions, it is very likely in the foreseeable future that the United States will continue to attract more foreign-born persons, as residents, than any other country in the world. Such immigration in the past has been an important part of our proud national heritage. In our judgment, employers will be challenged to help keep that proud history by adopting reasonable employment policies and practices which are justified by business necessity and which avoid the pitfalls of discrimination on the basis of national origin.

OSHA Tips: OSHA and Record Maintenance

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 standard 1910.1020 requires that employers preserve medical and exposure records pertaining to their employees. Medical records must be kept for the duration of employment plus thirty years and exposure records must be kept for thirty years. Access to such records must be granted to the employee, his or her designated representative, and to OSHA. This standard does not require that any record be created but addresses only the issues of retention and exposure.

For purposes of this standard, the following definitions apply:

"Employee exposure record" means environmental (workplace) monitoring of a toxic substance or harmful physical agent, biological monitoring results which directly assess the absorption of toxics or harmful physical agents, material safety data sheets indicating hazards to human health, chemical inventories, and any other records revealing the use of toxic substances or harmful physical agents.

"Employee medical record" means a record concerning the health status of an employee which is made or maintained by a physician, nurse, or other healthcare personnel or technician, including medical or employment questionnaires, results of medical exams, medical opinions, diagnoses and recommendations, first aid records, descriptions of treatments and prescriptions, and employee medical complaints.

Employee medical records **do not** include the following:

(1) Physical specimens such as blood or urine samples.

(2) Insurance or workers' compensation claims where they are maintained separately from the employer's medical program records and where they are not accessible to the employer by employee name or other identifier.

(3) Records created solely in preparation for litigation which are privileged under the applicable rules of procedure or evidence.

(4) Records concerning employee participation voluntary assistance programs (drugs, alcohol, or personal counseling.

(5) First aid records for one-time treatment of minor cases (not meeting OSHA criteria for recording) made on-site by a non-physician where these are maintained separately from the employer's medical program and records.

Points that may be of help in addressing the requirements of the above are as follows:

- The standard does not apply where the only "exposure" is to safety hazards such as trips, falls, cuts, etc.
- X-rays for fractures do not have to be preserved as a medical record where the examining physician finds no relationship between the event and a toxic substance or harmful physical agent. (Where x-rays are required to be retained, they may be stored on microfilm except for chest x-rays which must be kept in their original state.)
- Where a specific OSHA standard mandates retention of exposure records for a time period different than thirty years, the specific standard takes precedence. (For example OSHA'S noise standard (1910.95) calls for a 2 year retention of such records and would govern.
- Personal medical records for employees working less than one year do not to be retained if they are provided to the employee upon separation.
- An alternative to storing material safety data sheets (MSDS) is to keep a record of the identity of the substance or agent with information on where and when it was used.
- Upon initial employment and at least annually, each current employee should be advised of the existence of exposure and medical records and their right to access.
- The employer needs to notify the Director of the National Institute of Occupational Safety and Health at least three months prior to disposing of records that have reached the end of the required retention period.

Wage and Hour Tips: Tipped Employees Under the Fair Labor Standards Act

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

The Department of Labor's Wage and Hour Division continues to devote substantial resources to certain "low wage" industries each year. Among those regularly targeted are fast food, grocery stores, construction and restaurants. Even though I have written about this topic previously, I continue to see that restaurants have been found to owe substantial back wages. Thus, I felt we should revisit the requirements for claiming the tip credit. While my article will address only the requirements of the FLSA, you should be aware that many states have their own tip credit regulations which in many cases are more stringent that the FLSA.

The Act defines tipped employees as those who customarily and regularly receive more than $30 per month in tips. Section 3(m) of the FLSA permits an employer to take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage of $2.13 and the minimum wage. Thus, the maximum tip credit that an employer can currently claim under the FLSA is $5.12 per hour (the minimum wage of $7.25 minus the minimum required cash wage of $2.13).

The new regulations, which became effective in April 2011, state that the employer must provide the following information to a tipped employee before using the tip credit:

1) The amount of cash wage the employer is paying a tipped employee, which must be at least $2.13 per hour;

2) The additional amount claimed by the employer as a tip credit;

3) That the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;

4) That all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and

5) That the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

The regulations state that the employer may provide oral or written notice to its tipped employees informing them of the above items. Further, the regulations state that an employer must be able to show that it has provided such notice. The regulations also state that an employer who fails to provide the required information cannot use the tip credit provisions and thus must pay the tipped employee at least $7.25 per hour in wages, plus allow the tipped employee to keep all tips received. In order for an employer to be able to prove that the notice has been provided, I recommend that a written notice be provided. A prototype notice is on the web site of the National Restaurant Association at http://www.restaurant.org/tips.

Employers electing to use the tip credit provision must be able to show that tipped employees receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined. If an employee's tips combined with the employer's direct (or cash) wages of at least $2.13 per hour do not equal the minimum hourly wage of $7.25 per hour, the employer must make up the difference.

The regulations also state that a tip is the sole property of the tipped employee regardless of whether the employer takes a tip credit and prohibit any arrangement between the employer and the tipped employee whereby any part of the tip received becomes the property of the employer. The Department's 2011 final rule amending its tip credit regulations specifically sets out Wage and Hour's interpretation of the Act's limitations on an employer's use of its employees' tips when a tip credit is not taken. Those regulations state in pertinent part:

> Tips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

The regulations do, however, allow for tip pooling among employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, and service bartenders. Conversely, a valid tip pool may not include employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs, and janitors. One positive change is the regulations no longer impose a maximum contribution amount or percentage on valid mandatory tip pools. The employer, however, must notify tipped employees of any required tip pool contribution amount, and may only take a tip credit for the actual amount of tips each tipped employee ultimately receives.

When an employee is employed in both a tipped and a non-tipped occupation, the tip credit is available only for the hours spent by the employee in the tipped occupation. An employer may take the tip credit for time that the tipped employee spends in duties related to the tipped occupation, even though such duties may not produce tips. For example, a server who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses is considered to be engaged in a tipped occupation even though these duties are not tip producing. However, where the tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing non-tipped duties, no tip credit may be taken for the time spent in such duties.

A compulsory charge for service, such as a charge that is placed on a ticket where the number of guests at a table exceeds a specified limit, is not a tip. The service charges

cannot be counted as tips received, but may be used to satisfy the employer's minimum wage and overtime obligations under the FLSA. If an employee receives tips in addition to the compulsory service charge, those tips may be considered in determining whether the employee is a tipped employee and in the application of the tip credit.

Where tips are charged on a credit card and the employer must pay the credit card company a fee, the employer may deduct the fee from the employee's tips.

Where an employee does not receive sufficient tips to make up the difference between the direct (or cash) wage payment (which must be at least $2.13 per hour) and the minimum wage, the employer must make up the difference. When an employee receives tips only and is paid no cash wage, the full minimum wage is owed.

Where deductions for walk-outs, breakage, or cash register shortages reduce the employee's wages below the minimum wage, such deductions are illegal. If a tipped employee is paid $2.13 per hour in direct (or cash) wages and the employer claims the maximum tip credit of $5.12 per hour, no deductions can be made without reducing the employee below the minimum wage (even where the employee receives more than $5.12 per hour in tips).

The new regulations state that if a tipped employee is required to contribute to a tip pool that includes employees who do not customarily and regularly receive tips, the employee is owed all tips he or she contributed to the pool and the full $7.25 minimum wage.

Computing Overtime Compensation for Tipped Employees:

When an employer takes the tip credit, overtime is calculated on the full minimum wage, not the lower direct (or cash) wage payment. The employer may not take a larger tip credit for overtime hours than for straight time hours. For example, if an employee works 45 hours during a workweek, the employee is due 40 hours X $2.13 straight time pay and 5 hours overtime at $5.76 per hour ($7.25 X 1.5 minus $5.12 in tip credit).

The National Restaurant Association, along with several other groups, filed suit against the DOL seeking to overturn the regulations. However, the court allowed the new rules to take effect. Wage and Hour issued a Staff Enforcement Bulletin in February 2012, which can be found on the Wage and Hour website, instructing their investigators to enforce the new regulations.

During the November elections, voters in New Jersey approved, with a 61% majority, a boost in the state's minimum wage, effective January 1, 2014, to $8.25 per hour. In addition, the law provides for future increases as the consumer price index escalates. Governor Christie has vetoed a similar bill earlier this year. New Jersey becomes the 20th state to have a minimum wage greater than the federal minimum wage.

If you have questions regarding these new rules or other Wage and Hour issues, do not hesitate to give me a call.

Did You Know…

…industry groups, including the Associated Builders and Contractors ("ABC") are taking legal action to block the implementation of new OFCCP rules regarding affirmative action for disabled workers? On November 19, ABC filed suit against OFCCP, seeking an injunction from the court that would block what ABC says was an overreach by OFCCP, which it claims "exceeded its statutory authority, altered longstanding precedent, and imposed wasteful and burdensome data collection and reporting requirements on government contractors without any supporting evidence from the agency that contractors weren't meeting the previous requirements."

…on November 20, Illinois became the 16th state to legalize same-sex marriage? The Illinois legislature passed the law, which was received the signature of Gov. Pat Quinn. In guidance issued by federal agencies implementing the U.S. Supreme Court's *Windsor* decision handed down last summer, the federal agencies have said that the "state of celebration" of a lawful same-sex marriage will govern how the federal government will treat same-sex couples for federal tax purposes. Earlier this month, the Senate passed with bipartisan support (64-32) the Employment Non-Discrimination Act, which would outlaw employment discrimination on the basis of sexual

orientation or transgender status. The Act has not been scheduled for a vote in the House.

…on November 8, OSHA proposed a new rule requiring employers to submit injury and illness data electronically to OSHA on a quarterly or annual basis? Employers are already required to keep track of this data, but adding an electronic reporting obligation to that duty would be a new and burdensome requirement. Under the proposed rule, employers with 250 employees or more would be required to file data electronically on a quarterly basis. Employers with more than 20 but less than 250 employees would be required to file annually. The proposed rule is open for public comment until February 6, 2014.

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