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Your Workplace Is Our Work®

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Workplace Bullying and Employer Responsibilities

The Miami Dolphins are 8-6 and remain in the hunt for the AFC Wild Card. You might be surprised to find this sporting update in the ELB, but a postseason run by the Dolphins will breathe new life into the Richie Incognito-Jonathan Martin controversy on bullying. (As a very brief recap, Martin, an offensive linemen, reported that his fellow offensive lineman Incognito had threatened him and used racial slurs and profanity towards him; Incognito has admitted some bad conduct and is largely defending himself by arguing that different norms apply to a locker room).

The NFL's investigation is unlikely to conclude until sometime in 2014, but several developments have emerged that apply to any workplace.

The conduct violates policies or fails to meet expectations. The conduct that Incognito has admitted to would violate any good anti-harassment policy and any policy prohibiting workplace violence. You don't necessarily need to have the hottest policy *du jour*, just consistent enforcement of existing policies and a commitment to providing a safe workplace focused on the business' core mission.

The victim appears to have participated. A common refrain from childhood days is to "stand up" to a bully. Thus, it's not surprising that many alleged victims, including Martin (it appears), tried at one point or another to go tit-for-tat with their aggressor. Martin's attempts to return Incognito's sparring rightfully didn't disqualify him from protection. We shouldn't expect the employees who stand in our offices to have behaved perfectly.

Some of the bullying took place off-site and off-the-clock. Reportedly, some physical attack against Martin may have occurred at a party at a third offensive lineman's house. The employer's responsibility—and liability—are not restricted by the company's property lines and the time clock.

Witnesses are not complying with the organization's attempt to investigate. Anyone who has conducted a similar investigation will not be surprised to read the rumors that some of the players are not cooperating with the investigation. The Dolphins owner personally urged players to be candid and open with the investigator. In addition to showing that the investigation has the complete support of the top management, investigators can encourage cooperation by reiterating commitment against retaliation, by meeting employees off-site or after hours, by taking time to build rapport on comfortable subjects with witnesses.

Even the victim is reportedly being uncooperative. Rumors have surfaced that Martin withheld the complete record of text messages between himself and Incognito. While we can't promise complaining employees immunity, we can promise to evaluate all actions in context. Further, under harassment law, an employee who refuses to participate in his employer's investigation of his harassment complaint places any potential future suit in danger of a pretrial dismissal.

Consider using an outside investigator. The NFL hired an independent investigator. Expending capital on an outside investigator demonstrates the company's commitment to impartiality. Using an attorney in this role may enable a company to endow the investigator's findings and analysis with protections of privilege and confidentiality.

The investigator will have to make factual determinations. A true investigation goes beyond interviews and evidence. An organization must make findings about what it thinks likely occurred, based on imperfect and conflicting accounts. This *may* mean, for instance, discounting the account of a witness with strong bias, who fails to make eye contact, or who makes demonstrably false factual assertions about irrelevant matters.

The fallout cost the team two key members. Both Incognito and Martin are out for the season, and it is believed that both are continuing to receive their salaries. Interestingly, in this case, Miami's overall performance hasn't suffered. An organization must not permit perceived dependence on an individual to override its commitment to fair play.

The U.S. does not have a law banning bullying itself

For an employee to have a viable lawsuit based on bullying, he must convert it to an existing legal cause of action. Possibilities include: harassment, if there is a connection to a protected status (race, sex, religion, etc.) or protected action (like complaining of discrimination); assault or battery, if there was physical action or severe threats; or outrage or intentional infliction of emotional distress, if the behavior would shock the conscience.

A model bill, the Healthy Workplace Bill, has been introduced in 25 states since 2003, but has not been enacted. While different versions of the HWB have been introduced in at different times in different jurisdictions, most include the following key elements:

- Permits employees to pursue claims for constructive discharge if the employee had a reasonable belief that he was subjected to abusive conduct, notified the employer of abusive conduct, and resigned because of the abusive conduct. This definition would put a much lighter burden on employees than constructive discharge as it exists under current discrimination and harassment law, where employees must prove that any reasonable person would have felt forced to resign.

- Defines adverse employment actions very broadly. Most HWB bills specifically define adverse action as including non-compensatory actions, including discipline and "unfavorable" transfers. Traditional discrimination law normally requires an impact on compensation.

- Appears (falsely) to carry over the *Faragher-Ellerth* defense. Bills include a statutory affirmative defense for employers with anti-bullying plans and employees who refuse to use it, but only if no adverse action is found. As noted above, with the expansive definition of adverse action, very few employers will find themselves in a situation where no adverse action was taken.

- Appears (falsely) to limit emotional distress and punitive damages. Most bills include a monetary cap on emotional distress and punitive damages or require an employee to meet a heightened burden of proof to recover emotional distress or punitive damages, but only if no adverse action is found. As noted above, with the expansive definition of adverse action, very few employers will find themselves in a situation where no adverse action was taken.

IRS Notice Explains Treatment of Same-Sex Spousal Benefits Under Cafeteria Plans and Other Tax-Favored Arrangements

Building on prior guidance, the IRS has released a notice detailing the treatment of elections and reimbursements for same-sex married couples under cafeteria plans, flexible spending arrangements, dependent care assistance programs, and health savings accounts after the Supreme Court's landmark decision in *United States v. Windsor*. In *Windsor*, the Supreme Court struck down section 3 of the federal Defense of Marriage Act (DOMA), which previously prohibited the recognition of same-sex marriages for federal law purposes. Under DOMA, employers could not permit employees to elect coverage of same-sex spouses on a pre-tax basis under a cafeteria plan unless the spouse otherwise qualified as a tax dependent of the employee. The Supreme Court's decision, however, declared that all lawfully married couples, including same-sex couples, must be treated as married for all federal law purposes.

Subsequently, the IRS announced that it would follow a "state of celebration" approach for federal tax law purposes. Under the state of celebration approach, the IRS will recognize a marriage of same-sex individuals that was validly entered into in a state whose laws authorize same-sex marriage, even if the married couple lives in a state that does not recognize same-sex marriage. The recent notice answers many of the remaining questions for employers with regard to various tax-favored benefit arrangements.

Mid-Year Elections Under a Cafeteria Plan

The notice explains that an employer's cafeteria plan may treat a participant who was married to a same-sex spouse as of the date of the *Windsor* decision (June 26, 2013) as if the participant experienced a change in legal marital status. Accordingly, the employer may allow the participant to revoke an existing election and make a new election in a manner consistent with the change in legal marital status. This mid-year election change may be made at any time during the cafeteria plan year that includes June 26, 2013, or the cafeteria plan year that includes December 16, 2013.

After the *Windsor* decision some employers allowed participants with same-sex spouses to make a mid-year election change on the basis that the change in tax treatment of health coverage for a same-sex spouse resulted in a significant change in the cost of coverage. Although a change in the tax treatment of a benefit offered under a cafeteria plan generally does not constitute a significant change in the cost of coverage, the IRS notice explains that given the legal uncertainty created by the *Windsor* decision and the fact that a mid-year election change would be permitted as a change in legal marital status anyway, such plans will not be treated as having failed to meet the cafeteria plan rules.

An election made under a cafeteria plan with respect to a same-sex spouse as a result of the *Windsor* decision generally takes effect as of the date that any other change in coverage becomes effective for a qualifying benefit that is offered through the cafeteria plan. Election changes made between June 26, 2013 and December 16, 2013, however, must be effective no later than the later of (a) the date that coverage under the cafeteria plan would be added under the cafeteria plan's usual procedures for change in status elections or (b) a reasonable period of time after December 16, 2013.

The notice further explains that employers must begin treating the amount that their employees pay for their same-sex spouses as a pre-tax salary reduction under the plan no later than the later of (a) the date that a change in legal marital status would be required to be reflected for income tax withholding purposes, or (b) a reasonable period of time after December 16, 2013. This is only required, however, if the employer receives notice that such a participant is married to the same-sex individual receiving health coverage before the end of the cafeteria plan year including December 16, 2013. Participants may also choose to continue paying for their same-sex spousal benefits on an after-tax basis and seek a tax refund on amounts paid.

FSA Reimbursements

With regard to FSA reimbursements, the notice allows a cafeteria plan to permit a participant's FSA, including a

health, dependent care, or adoption assistance FSA, to reimburse covered expenses of the participant's same-sex spouse or the same-sex spouse's dependents that were incurred no earlier than (a) the beginning of the cafeteria plan year that includes the date of the *Windsor* decision (June 26, 2013) or (b) the date of marriage, if later. For this purpose, the same-sex spouse may be treated as covered by the FSA (even if the participant had initially elected coverage under a self-only FSA) during that period.

Contribution Limits for Health Savings Accounts and Dependent Care Assistance Programs

Same-sex married couples are still subject to the maximum annual deductible contribution for HSAs and the maximum annual contribution for dependent care assistance programs for married couples; however, the spouses may reduce their contributions for the remaining portion of the tax year in order to avoid exceeding the applicable contribution limits. With regard to HSAs, to the extent that the combined contributions to the HSAs of the married couple exceed the applicable contribution limit, any excess may be distributed from the HSAs of one or both spouses before the tax return due date for the spouses. If excess, undistributed contributions still remain, those amounts will be subject to applicable excise taxes. For dependent care assistance programs, if the combined contributions to the dependent care FSAs of the married couple exceed the applicable contribution limit, the amount of excess contributions will be includable in the spouses' gross income.

Written Plan Amendment

Cafeteria plans are required to be maintained in writing and amendments must also be in writing. Many cafeteria plans already include written terms permitting a change in election upon a change in legal marital status; therefore, those plans generally are not required to be amended to permit a change in status election with regard to a same-sex spouse in connection with the *Windsor* decision. If, however, a cafeteria plan sponsor chooses to permit election changes that were not previously provided for in the written plan document, the cafeteria plan must be amended in writing. For changes as a result of the *Windsor* decision, the IRS notice allows a cafeteria plan to amend the plan on or before the last day of the first plan year beginning on or after December 16, 2013. Although employers essentially have an additional year to make the necessary written amendments, employers may make the amendment effective retroactively to the first day of the plan year including December 16, 2013, as long as it operates the cafeteria plan in accordance with the IRS notice.

In light of the *Windsor* decision and recent IRS guidance, employers should review their cafeteria plan materials and plan administration practices to evaluate their compliance with the changes to the treatment of same-sex spousal benefits. Additionally, with the most significant aspects of the Affordable Care Act taking effect in 2014 and the heightened focus on benefits compliance by the IRS, DOL, and HHS, it is more important than ever for employers to take the opportunity to audit their plans for compliance and evaluate their benefits strategies. For additional information on the IRS notice or to discuss your benefits strategies and compliance issues, please contact one of our benefits attorneys.

Federal Court of Appeals Applies Joint Employer Status to Prime Contractor in Case of Racial Harassment and Retaliation of Subcontractor's Employees

The Sixth Circuit (covering Kentucky, Michigan, Ohio, and Tennessee) ruled in favor of the EEOC and against a prime contractor who sought to avoid liability for alleged racial harassment and retaliation on the job site. In *EEOC v. Skanska USA Building, Inc.* (6th Cir. 12/10/13), Skanska USA Building, Inc., was the general contractor for the construction of a new hospital in Memphis, Tennessee. Skanska contracted with C-1, Inc., to provide buck hoist operators. Buck hoists are temporary elevators operating on the outside of buildings under construction.

At least three of C-1's buck hoist operators were—according to the EEOC's allegations—treated in deplorable fashion: they were called racial slurs; subjected to racial graffiti, including a visual threat; and one employee had liquid from a porta-potty thrown on

him. The employees reported these incidents to C-1's owner and Skanska managers, but received no relief. Skanska removed the complaining employees by request to C-1 and by assigning its employees to the buck hoist elevator work. The Hospital eventually overturned Skanska's assumption of the work, permitting C-1 to reinstate two employees, one of whom was terminated shortly thereafter and one of whom remained employed until the end of buck hoist elevator operations on the project.

Skanska obtained summary judgment at the trial court on the grounds that it was not a joint employer of the employees. The Sixth Circuit overturned the trial court. The Sixth Circuit—for the first time applying the joint employer theory under Title VII—explained that an entity's status as a joint employer depends on its ability to hire, fire, discipline, demote, promote, change pay or benefits of, supervise, and direct workers. In this case, Skanska set the buck hoist operators' hours of work and particular assignments; Skanska provided the supervision while no C-1 representative was on-site; C-1 removed workers at Skanska's request without investigation; when C-1 workers had problems (including racial harassment) on the job, C-1's owner directed them to Skanska; Skanska could send operators home or call them into meetings without clearance from or notice to C-1; Skanska created a buck hoist operator job description on Skanska letterhead and made the C-1 employees sign it; and, Skanska's own executive testified that buck hoist operators "represent[ed] Skanska" and "work, you know, under our direction." The Court summed it up, "The reality is that C-1 was a nonentity on the construction site."

It seems the *only* evidence that Skanska didn't exercise the privileges of a joint employer was the contract between Skanska and C-1, which provided for C-1 to be present on-site and take a more active role. The Sixth Circuit quickly discarded this paperwork in favor of testimony and other evidence about the actual conditions of the worksite. Employers should remember and be wary that when it comes to employment law, courts are willing to set aside complicated corporate formations, contracts, and other arrangements whose existence is not supported by the reality of the workplace.

ACA's Online SHOP Exchange Enrollment Delayed by One Year

In yet another Affordable Care Act (ACA) delay announcement, President Obama has announced a delay in the online enrollment process for the Small Business Health Options Program, known as the "SHOP exchange." Employers interested in offering coverage through the SHOP exchange, the online health insurance marketplace that was intended to allow small employers to offer their employees different health plan options, will not be able to sign up online. Instead, these employers will need to go through an agent, broker, or insurance company to buy coverage this year.

This marks another misstep in a string of ACA delays, including one that already limited the available plan offerings on the SHOP exchange. Earlier this year, the administration announced that instead of being able to provide workers with a choice of health plans, there would only be one health plan option for the first year of the SHOP exchange. The Obama administration has promised that the online SHOP exchange will be fully functional by November 2014, including the ability to offer choices between multiple plans.

In a set of FAQs, the administration explained that small employers still have the ability to offer coverage through the SHOP exchange, but employers will need to use a different process, referred to by the administration as "direct enrollment." The direct enrollment process requires employers to work with an agent, broker, or insurance company to fill out a paper application for SHOP eligibility and send it in to the SHOP exchange. The paper application is only required for qualifying for a Small Business Tax Credit, which is only available for coverage offered through the SHOP exchange. The employer and insurance company (or agent or broker) can then begin enrolling employees directly into the plan; however, if the SHOP exchange later determines that the employer is ineligible to participate in the SHOP exchange, the employer would not receive a Small Business Health Care Tax Credit for the coverage offered to their employees.

According to the President, the delay is due to the mounting problems with HealthCare.gov, the online portal

to the federal health insurance "marketplace." The website's technical problems have also been blamed for a delay in the enrollment deadline (December 15, 2013, to December 23) for marketplace coverage to be effective on January 1, 2014. The website was also blamed for a six-week extension on the deadline for individuals to avoid penalties for failing to get coverage (the new deadline is March 31).

Because employees may already be enrolled in SHOP exchange coverage by the time an employer is determined ineligible to participate in the SHOP exchange, it's more important than ever for employers to evaluate their eligibility and reassess their overall ACA and benefits compliance strategies. For additional information or to discuss your benefits strategies, please contact one of our benefits attorneys.

Who Could Hang a $575,000 Settlement On You? Six Ruby Tuesday Restaurants Settle an Age Discrimination in Hiring Class Action With The EEOC

Last week, the Equal Employment Opportunity Commission (EEOC) announced a $575,000.00 settlement with six Ruby Tuesday locations arising out of alleged age discrimination against applicants 40 years of age and older. The EEOC brought the class action lawsuit against six Ruby Tuesday locations in Ohio and Pennsylvania alleging that these locations engaged in a pattern or practice of age discrimination in hiring in violation of the Age Discrimination in Employment Act (ADEA). As part of the settlement, Ruby Tuesday must not only pay the aforementioned sum, it must also comply with the terms of a 42-month consent decree prescribing certain actions in its hiring process, discussed further below.

The EEOC alleged that Ruby Tuesday engaged in a pattern or practice of age discrimination in hiring servers, hosts and hostesses, bartenders, bussers and food preparation workers at five locations in Pennsylvania and one location in Ohio. The EEOC further alleged that Ruby Tuesday failed to preserve employment records, including job applications, as required by the ADEA and EEOC regulations, 29 C.F.R. §§ 1602.14, 1627.3. Section 1602.14 requires that employers maintain all personnel records for a period of at least one year from the date of the making of the record or personnel action involved (including termination documents), whichever is later. Section 1627.3 requires that employers keep and maintain payroll records for three years, including the employee's name, address, date of birth, occupation, rate of pay, and compensation earned each week. It also requires that employers who make, obtain, or use any personnel or employment records (including job applications, resumes, responses to job advertisements and records pertaining to the failure or refusal to hire any individual) to maintain those documents for a period of at least one year from the date of the personnel action.

Under the consent decree, although it is not admitting any liability, Ruby Tuesday will establish a settlement fund, consisting of the $575,000.00, under the supervision of a third-party claims administrator that will distribute monetary relief to eligible claimants identified by the EEOC. Ruby Tuesday must also pay the administrator's fees in connection with administering this fund. The eligible claimants are persons who were 40 or older when they applied for jobs at any of the six locations between January 1, 2005 and December 9, 2013.

The non-monetary terms of the settlement are expansive. Among other things, Ruby Tuesday must designate a compliance monitor from among its corporate officers or managers, implement numerical goals for recruitment and hiring of job applicants 40 or older, review job advertisements to ensure they do not violate the ADEA, conduct self-audits (including random reviews of hiring decisions), adopt and maintain an electronic applicant tracking system for the geographic area covered by the consent decree including applicant's ages, periodically provide applicant flow data to the EEOC, conduct annual EEO reviews by the compliance monitor, file annual reports with the EEOC that summarize the numbers of applicants by age, and conduct at least 10 hours of initial EEO training for the compliance officer(s) and all human resources personnel. Although not a requirement, EEOC's "goal" for Ruby Tuesday is to increase the percentage of protected age group individuals who apply for open positions by at least 1.5 percent above the protected age group applicant flow calculation for the previous year.

This case should be (at least) a cautionary reminder to employers about monitoring applicant flow data to identify any patterns of potential discrimination, including workers 40 years of age and older, as well as a reminder to managers and human resources personnel to confirm document retention practices are compliant with federal and state laws. In particular, employers in industries with hiring practices favoring younger applicants on average, e.g. the food service industry, should consider periodic reviews of hiring practices to evaluate whether age (or other impermissible considerations) is a factor. If the potential adverse monetary consequences were not enough of a deterrent for employers, the EEOC has made clear that it intends to demand onerous and expensive monitoring requirements as a part of any such monetary settlement, not only creating an administrative headache for employers, but also creating fertile ground for additional litigation.

NLRB Tips: Fifth Circuit Court of Appeals Strikes Down NLRB's *D.R. Horton* Decision

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On December 3, 2013, the Fifth Circuit Court of Appeals held 2-1 that the Agency erred in finding *D.R. Horton* interfered with employee rights to engage in protected, concerted activity. Horton's mandatory arbitration agreement waived the rights of employees to participate in class or collective actions (*D.R. Horton, Inc.* v. *NLRB*, 5th Cir., No. 12-60031, 12/3/13). While the court decision is undoubtedly a setback for the NLRB, it remains to be seen whether the agency will back off its continued assault on mandatory arbitration agreements which contain class action waivers. Indeed, in a decision issued the day after the circuit court decision in *Horton,* an NLRB ALJ out of Atlanta, Georgia applied the Board's reasoning in *Horton,* invalidating the employer's mandatory arbitration agreement, despite having "opt-out" provisions included in the policy.

In its original decision, *D.R. Horton*, 357 NLRB No. 183 (2012), the NLRB ruled mandatory arbitration agreements that limited employee rights to pursue employment claims on a collective basis were illegal, where no other forum was available to proceed on a class basis.

> [The Board] need not and do[es] not mandate class arbitration in order to protect employees' rights under the NLRA.
>
> Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of class-wide arbitration. Employers remain free to insist that the arbitral proceeding be conducted on an individual basis.

The Agency's general antipathy towards employee mandatory class action waivers is detailed in General Counsel Memorandum 10-06, issued June 16, 2010. As outlined in the September 2013 *Employment Law Bulletin*, an avalanche of adverse decisions continue to emanate from the Board invalidating these arbitration agreements.

In the Fifth Circuit's decision, writing for the majority, Judges C. King and L. Southwick said the Agency "did not give the proper weight to the Federal Arbitration Act (FAA)," which legitimize mandatory arbitration agreements with class action waivers. Southwick stated that the Act "should not be understood to contain a congressional command overriding the application of the FAA."

In discussing the FAA, the court stated that, while the courts have given judicial deference to NLRB interpretations of ambiguous provisions of federal labor law, the federal judiciary has . . . "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."

In the court's eyes, the FAA and the NLRA have "equal importance in our review." The Fifth Circuit rejected the

Board's view that the policy behind the NLRA (the right of employees to engage in protected, concerted activity) trumped the different policy considerations in the FAA that supported enforcement of arbitration agreements."

Finally, the court noted that the NLRA does not explicitly provide for, nor does the legislative history support, collective actions or procedures for collective claims. As a result, "there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA."

While the court reversed the Board finding that the mandatory arbitration agreement was illegal under the NLRA, it found that the NLRB was entitled to enforcement of its order that Horton revise its arbitration agreement to clarify that it would not preclude employees from engaging in concerted action protected by Section 7 of the Act.

While employers and their representatives were predictably pleased with the court's decision, organized labor and employee trial attorneys were equally disappointed by the ruling. One pundit declared the decision a "devastating" loss for the employees. Because many plaintiffs' attorneys are unwilling to take on individual lawsuits for limited wage claims, the decision in *Horton* allows employers to force employees to "sign away" the only effective method of vindicating their rights under federal or state wage and hour laws.

> With the blessing of the federal courts, employers now have a way to immunize themselves [against many wage and hour claims].

What's Next for the Board?

To date, the Board has not announced whether it intends to appeal the circuit court's decision. It may seek a re-hearing *banc* before the Fifth Circuit, or request the U.S. Supreme Court to grant *certiorari* and hear the case.

It is conceivable that the agency will back off its continued attack on employer's mandatory arbitration agreements that contain waivers of class actions - as long as the policy in question makes clear that employees are not waiving their right to engage in Section 7 activity.

Given the virtually unanimous judicial rejection of the Board's interpretation invalidating arbitration agreements containing class action waivers, this is a possibility, albeit an unlikely one.

The current judicial atmosphere on the arbitration issue reminds one of the situation several years ago when the Board argued that union "bannering" (with large inflatable rats) constituted "signal picketing" and therefore violated Section 8(b)(4) of the Act. After losing every attempt at enforcement of its position in the U.S. Circuit Courts, the agency simply closed the books on this chapter of its enforcement effort and began holding such cases in abeyance. With the election of President Obama, the democratically-controlled NLRB changed its stance on bannering and adopted the judicial interpretation of bannering as protected by the free speech provisions of the First Amendment of the U.S. Constitution.

As noted in the September ELB, employers will have to weigh whether it is worth the potential headache to have employees sign mandatory arbitration agreements which include class action waivers.

Given the ever growing hostility of the federal courts towards the agency's approach, employers who are concerned about employment class actions should consider implementation of a mandatory arbitration program. LMV will be pleased to assist employers in crafting arbitration policies that will withstand judicial scrutiny should the NLRB claim the policy violates the NLRA. Of course, the best course of action is to get legal advice if in doubt of whether your FMLA wage and hour practices are in compliance with federal and state law.

NLRB Signals Adoption of Election Rule Changes – No Change in NLRB Regulatory Agenda

On November 26, 2013, the Board issued its semiannual regulatory agenda that again focused a single issue – the proposed changes in representation case procedures that have been under consideration for more than two (2) years.

Describing the proposed rule changes as "long-term action," the Agency nevertheless stated that it "is continuing to deliberate on the rest of the proposed amendments" (emphasis added). In addition to setting the

rule changes as a priority in its legislative agenda, NLRB officials iterated, at the ABA convention in New Orleans, its warning that it is actively considering implementation of all proposed rule changes as soon as the recess appointment issue is resolved by the U.S. Supreme Court.

Expect Board action on the election rule changes shortly after the Supreme Court issues its decision in *Noel Canning*. Whatever the outcome before the Supreme Court, employers can expect that the NLRB will ultimately implement the rule changes by the end of year 2014 or early 2015. The "quickie election" rules, coupled with the decision in *Specialty Healthcare*, dramatically change the organizing landscape in favor of unions.

EEO Tips: Are "ENDA" Protections Already Available Under Title VII?

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On November 7, 2013, the Senate passed a version of the **Employment Non-Discrimination Act** (known as "ENDA"). However, the outlook is dim that this ENDA bill, or any other such bill, would be passed by the current House of Representatives. The current version of ENDA would make it unlawful to discriminate against an individual with respect to hiring, firing, promotions, demotions and all other terms and conditions of employment because of an individual's actual or perceived sexual orientation or gender identity including transgender status. Other versions of ENDA have been introduced in the U.S. Congress almost every year since 1996. Most of them have not made it out of committee, and none has passed both houses.

The fact that none of the ENDA bills introduced in the past has moved successfully through the legislative process since 1996 raises a question, at least in some minds, whether such a bill is necessary. Those who hold this view suggest that the prohibition against sex discrimination under Title VII, if broadly construed, provides sufficient cover for discrimination on the basis of sexual orientation or perceived sexual identity.

A case in point, *EEOC v. Boh Bros Construction* Co. (No. 11-30770, 9/13), was recently decided by a full panel of the Fifth Circuit Court of Appeals. In that case, the EEOC alleged on behalf of the charging party, Kerry Woods, that Woods had been severely harassed by his supervisor, Chuck Wolfe, because Wolfe perceived that Woods was not sufficiently "masculine." Allegedly, among other things, Wolfe frequently referred to Woods to his face as a "pussy," "princess," "faggot," "queer," and, on several occasions, exposed his penis and taunted him by simulating various sexual acts. According to the EEOC, this pervasive sexual harassment was because Wolfe perceived that Woods was not manly (i.e., "masculine enough") in his appearance and demeanor.

At the trial court level, a major issue in the case was whether the EEOC could establish sex discrimination by showing that the allegedly severe harassment was based on "gender or sex stereotyping." The EEOC prevailed on this issue and at the close of trial the jury awarded Woods $201,000 in compensatory damages (which was later reduced to $50,000 to comply with the statutory limits) and $250,000 in punitive damages.

Initially, upon appeal, a three-judge panel of the Fifth Circuit found that the EEOC's evidence was inadequate to support a "sex stereotyping" theory and also inadequate to support the jury's finding that the alleged harassment was based on "sex." Subsequently, however, a majority of the full court found that the EEOC could use gender stereotyping evidence to establish a same-sex harassment claim, citing the Supreme Court's holding in *Price Waterhouse v. Hopkins* (S. Ct. 1989) and also *Oncale v. Sundowner Offshore Services, Inc.* (S. Ct. 1998). In the case at hand, the Fifth Circuit concluded that considering "…the record as a whole, a jury could view Wolfe's behavior as an attempt to denigrate Woods because – at least in Wolfe's view – Woods fell outside of Wolfe's manly-man stereotype." The full court, however, did indicate that the record contained certain evidential issues pertaining to the compensatory and punitive damages awarded and remanded the case for clarification as to them.

Accordingly, given the law developed in many cases containing basically the same issues as in *EEOC v. Boh Bros*, *Price Waterhouse v. Hopkins* and *Oncale v. Sundowner Offshore Services,* why is there a need for additional statutory protections for the lesbian, gay, bisexual and transgender community? Isn't the basic, underlying issue sex discrimination? That may be so but, according to the sponsors of ENDA, the protections under Title VII are only indirect and discrimination based on sex (especially sexual orientation) is difficult to prove. ENDA, specifically, would make such discrimination unlawful.

According to the Center for American Progress (Article by Winnie Stachelberg and Crosby Burns, April 2013), ENDA is needed for at least the following reasons:

- It currently is perfectly legal in America to fire someone for being lesbian, gay, bisexual, and transgender (LGBT), rather than being evaluated on their skills, qualifications, and ability.

- LGBT workers are all too often not hired, not promoted, or, in the worst cases, fired from their jobs solely due to their sexual orientation and gender identity. In a majority of states and under federal law, these employees have no legal recourse to challenge this discrimination. (Statistics show that 21 states already have laws which in general prohibit discrimination on the basis of sexual orientation and 16 states prohibit discrimination on the basis of gender identity).

- It (ENDA) would finally put in place uniform and comprehensive protections for the LGBT workforce in all 50 states.

To address the foregoing concerns, the drafters of ENDA included most of the same basic provisions found in Title VII. For example, some of the key provisions in the ENDA bill (Senate Bill S.815), which passed the Senate on November 7, 2013, can be summarized as follows. The Bill:

- Declares that it shall be unlawful for an employer, because of an individual's actual or perceived sexual orientation or gender identity, to: (1) fail or refuse to hire, to discharge, or to…discriminate with respect to…compensation, terms, condition, or privileges of employment.…(Following the same basic provisions in Title VII);

- Specifies that such unlawful employment practices include actions based on the actual or perceived orientation or identity of a person or persons with whom the individual associates;

- Limits the claims…to be brought…to disparate treatment (thereby specifying that disparate impact claims are not provided for under this act);

- Prohibits retaliation (Following the same basic provisions in Title VII);

- Makes the act inapplicable to corporations, associations, educational institutions, or institutions of learning, or societies exempt from the religious discrimination provision of the Civil Rights Act of 1964 (thereby establishing a religious employer's exemption).

On November 12, 2013, Senate Bill 815, as passed, was referred to a number of Committees in the House of Representatives as required, including the Committee on Education and the Workforce, Oversight and Government Reform and the Judiciary for consideration of those provisions that fall within their respective jurisdictions. As suggested above, given the conservatism in the House of Representatives, it is not very likely in my opinion that ENDA will be passed into law anytime in the near future.

OSHA Tips: OSHA Adjusts Targets in 2014

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.

Since its creation in the early seventies, an annual task of the Occupational Safety and Health Administration (OSHA) has been to determine which workplaces would be targeted for inspections in the upcoming year. These are identified as "programmed" inspections. The

remainder of the agency's inspection sites, referred to as "unprogrammed," inspections, are identified for OSHA. These include employee complaints, fatalities, accidents with multiple hospitalizations and referrals from within the agency or sources such as local fire or health departments.

The agency's original programmed inspection targets included marine cargo handling, roofing and sheet metal work, meat processing, miscellaneous transportation equipment such as mobile home manufacturing, and lumber and wood products.

Programmed health inspections targeted asbestos, lead, silica, carbon monoxide and cotton dust. With the exception of cotton dust, the above continue to receive the attention of OSHA.

Construction activities have in the past and will continue to receive significant attention in OSHA's inspection scheduling.

Going forward in 2014, OSHA has announced a significant shift in its selection of worksites to be inspected. Historically the agency has been graded, and to an extent, graded itself, by the number of inspections completed each year. Obviously by that measure a half day visit to a construction site with multiple employers, thus several inspections, trumps six months to complete one inspection of a huge manufacturing complex. Therefore, it would appear that this would be taken into account when developing an annual inspection plan.

In announcing an adjustment in the focus of the annual inspection plan, the agency stated as follows: "OSHA has operated under the assumption that more inspections are better. The problem with this model is that all inspections are not created equal, as some inspections take more time and resources to complete than the average or typical OSHA inspection." It is noted that, on average, a safety inspection takes 22 hours and a health inspection 34 hours. An ergonomics inspection can take hundreds of hours, while a process safety management inspection of an oil refinery can take a thousand plus hours.

To adjust its inspections to the above, OSHA plans to conduct 450 more health inspections than were made in 2013. Also, the 2014 goal will be to conduct 2,200 fewer safety inspections than were conducted in 2013.

For the year, OSHA projects more health inspections, fewer safety inspections and fewer total inspections. The agency will continue to target high risk industries and hazards. While fewer inspections are projected for states with their own OSHA programs, this is being attributed to budgetary constraints.

Wage and Hour Tips: Current Wage and Hour Highlights

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.

In the 75-year history of the Fair Labor Standards Act (FLSA), the industry that generates most of the FLSA litigation is the retail industry. Some 29% of cases settled this year are in the retail area, with the next highest area being the financial services industry. Allegations of overtime violations are the most prevalent, with missed meals/breaks and misclassification being second and third respectively. The greatest numbers of cases were from California, New York, and Illinois.

Earlier this year, the U.S. Supreme Court heard arguments in a case where employees in the steel industry brought suit alleging the donning and doffing of protective gear is compensable. During the arguments before the Court, several justices had numerous questions for both sides, so there was no clear reading as to how the Court may rule.

There have been several bills introduced in Congress to increase the minimum wage and the Senate is expected to consider a bill in January 2014. However, 20 states have their own minimum wage that is greater than the federal rate and three cities have a minimum wage of at least $10.00 per hour. While Alabama is one of the five remaining states that do not have a state mandated

minimum wage, I know many of you operate in multiple states, so I will pass along information regarding states that will increase their rates in 2014:

New York	$8.00
Connecticut	$8.70
New Jersey	$8.25
Oregon	$9.10
Washington	$9.32
Missouri	$7.50
California	$9.00*
Arizona	$7.90
Florida	$7.93
Montana	$7.90
Rhode Island	$8.00
Colorado	$8.00
Vermont	$7.73

*effective July 1, 2014

Several states allow a tip credit toward the minimum wage to employees who receive tips while performing their assigned duties. However, the amount of the credit varies widely, so it is imperative that an employer check to determine the amount of credit that may be taken in the states where they operate.

In November, the residents of SeaTac, Washington, a Seattle suburb of 27,000, passed an ordinance establishing a $15.00 per hour minimum wage. The ordinance, which only passed by 77 votes, also contains a clause that ties future minimum wage increases to the cost of living. This new wage, which becomes effective on January 1, 2014, will affect some 6,000 employees at the Seattle, Washington airport. Alaska Airlines, one of the largest employers at the airport, has filed a court challenge to the law.

The Department of Labor continues to take a hard line regarding enforcement of the child labor provisions of the FLSA. The statute allows for the assessment of civil money penalties of up to $100,000 in the case of the death or serious injury of a minor who is illegally employed. If you employ any person under the age of 18, you should carefully review both the federal and state regulations. Alabama also has some very strict child labor regulations that closely track the federal regulations and are in some cases more restrictive than the federal regulations.

Wage and Hour is continuing to work with the Internal Revenue Service and several state agencies to coordinate their enforcement efforts to ensure that independent contractors are correctly classified. Recently, I saw where Wage and Hour signed an agreement with the State of New York to coordinate their enforcement in the misclassification area. Fourteen states have signed up to participate in the program.

Wage and Hour now has a program where they will not only seek back wages when they conduct an investigation, they also seek liquidated damages in an amount equal to the amount of back wages that are owed. For example, if they determine that an employer owes $10,000 in back wages, they will also request another $10,000 in liquidated damages. Damages collected in this manner are distributed to the employees that are due the back wages. Wage and Hour has been using this procedure for several years when they are involved in litigation, but only recently have they instituted this in administrative investigations that involve repeat or willful violations of the FLSA.

Did You Know…

…the EEOC collected a record-setting $372.1 million in damages and backpay on behalf of charging parties in fiscal year 2013? EEOC reported that it received 93,727 discrimination charges in 2013 and it resolved 97,252 charges, consistent with its trend to try and reduce the backlog of pending charges. EEOC reported filing 131 lawsuits against employers in 2013, a slight increase over 2012.

…Senator Elizabeth Warren (D-Mass) introduced legislation in the Senate this week that would prohibit employers from conducting credit checks on new hires? Warren and six fellow Democrat senators proposed the bill, saying employment credit checks disproportionately hurts poor applicants. A group of over 40 community, financial reform, labor, and civil rights organizations have signed on in support of the bill.

…a recent survey of 2,002 adults conducted by the Pew Research Center found that 51% of women surveyed said “society generally favors men over women” and 75% said “this country needs to continue making changes to give men and women equality in the workplace”? The Bureau of Labor Statistics (BLS) recently reported that for workers between the ages of 18 and 32, compensation for women equaled about 93 cents for every dollar earned by similarly situated men, the narrowest hourly wage gap of any age group. According to the BLS report, of all age groups, millennial women have made the most pay progress over the past 30 years. In 1980, women in that same age group received just 67% of the pay received by similarly situated male workers.

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