LEHR MIDDLEBROOKS & VREELAND, P.C.

Employment Law Bulletin

JANUARY 2014
VOLUME 22, ISSUE 1

Your Workplace Is Our Work®

Inside this issue:

Time Spent Changing Into/Out of Protective Gear Not Compensable, Supreme Court Says

On January 27, 2014, the U.S. Supreme Court issued its opinion in *Sandifer v. United States Steel Corp.,* holding that the protective gear U.S. Steel required employees to wear constituted "clothes" under the Fair Labor Standards Act (FLSA) and thus time spent by the employees putting them on and taking them off (so-called "donning and doffing") is not compensable under the Act.

In 1949, Congress amended the FLSA to provide that the compensability of time spent changing clothes or washing at the beginning of or end of each workday is an appropriate subject for collective bargaining with a union, leading many FLSA specialists to the conclusion that donning and doffing was not subject to compensation. According to the Court, the term "clothes" is interpreted as having its ordinary, contemporary and common meaning found in the dictionaries from that day (1949). Accordingly, the Court found that for purposes of the FLSA, clothes are items that are both designed and used to cover the body and are commonly recognized as articles of dress. The petitioner employees argued to the Court that the term "clothes" did not include protective clothing.

U.S. Steel required employees to wear twelve of the most common kinds of required protective gear: flame-retardant jacket; pair of pants; hood; hardhat; a "snood;" "wristlets;" work gloves; leggings; "metatarsal" boots; safety glasses; earplugs; and a respirator. The Court found that each of the above items except the safety glasses, earplugs, and respirator fell within the definition of "clothes."

The Court then considered whether the time spent in donning and doffing the non-clothing items was compensable. While many lower courts have used the "*de minimis*" rule to hold that time spent putting on these relatively simple items was not compensable, the Court held that this rule does not fit comfortably with the FLSA. As a result, the Court said to determine the compensability of putting on protective gear other than clothing, employers should ask whether the period at issue can, on the whole, be fairly characterized as "time spent in changing clothes or washing." If the employee devotes the vast majority of that time to putting on and taking off equipment or other *non-clothes* items, the time *would not qualify* as time spent changing clothes, even if some clothes items were donned and doffed along with the other protective gear. But if the vast majority of time is spent

in putting on and taking off the non-clothes items would also be non-compensable. In the case of the U.S. Steel employees, the Court said they spent nearly all of their time donning and doffing the clothes and very little of it putting on safety glasses, ear plugs, and a respirator, and therefore none of the time was compensable under the FLSA.

The Court's decision certainly clarifies the law for employers who have increasingly introduced an ever-expanding list of personal protective clothing and equipment to the workplace. Employers who require the use of protective clothing and equipment should review their compensation policies in light of the clarified rules.

'What Happens In Vegas' May Justify FMLA Leave, Appeals Court Says

In a case that is destined to bolster the Vegas tourism industry as much as the appeal of your own Family and Medical Leave Act (FMLA) compliance program, the Seventh Circuit Court of Appeals ruled this month that the FMLA could provide leave for an employee's trip to Vegas with her ailing mother.

In *Ballard v. Chicago Park District* (7th Cir 2014), the employee, Ballard, was the primary caregiver for her mother, who suffered from end-stage congestive heart failure. Ballard's mother was offered a trip to Las Vegas from The Fairygodmother Foundation, an organization that offers similar experiences to the Make-A-Wish Foundation. Ballard asked her employer for FMLA leave to accompany her mother on the six-day trip. The employer refused, stating the FMLA did not provide coverage to go on a vacation.

After Ballard took the trip with her mother anyway, the employer terminated Ballard for unexcused absences, and Ballard sued for FMLA interference. The trial court, after considering the employer's motion for summary judgment, concluded that Ballard's trip could be covered under the FMLA even though the purpose of the trip was not to seek medical treatment.

The employer appealed, and a Seventh Circuit panel unanimously agreed with the lower court, finding that Ballard's trip could be covered under the FMLA. The Seventh Circuit explained that the language of the FMLA requires it to be construed broadly, in favor of coverage, and that the provisions of the Act are intended to protect leave when an employee is providing care for a family member with a serious health condition.

The court explained that Ballard presented sufficient evidence showing that her mother needed assistance with daily health care throughout the trip, and that although Ballard's mother was on vacation, Ballard continued to provide her mother with necessary daily assistance and care, sufficient to be covered under the FMLA.

We often see employers make knee-jerk decisions when presented with questionable requests for FMLA leave. Some employees are aware of the favorable rules under the FMLA and will try to take advantage of employer compliance obligations. But employers would be wise to follow the FMLA's own guidelines for determining coverage, rather than reacting with haste to situations that, on the surface, might not appear legitimate.

We do not suggest that the Seventh Circuit's decision stands for the proposition that employees can take vacations when they are supposed to be on FMLA leave. Still, when presented with a request for FMLA leave, employers should focus on the Act's rules for qualifying leave, such as whether there is a serious health condition, what direct family relationship the employee has to the individual with that serious health condition, and whether the circumstances of leave result in the employee providing necessary care to the family member with the serious health condition. Often, tricky leave decisions should be made with the assistance of your employment counsel.

President Uses Executive Power to Increase Minimum Wage under Federal Contracts, Advocate for Broader Increase

During his State of the Union speech, President Obama announced he would sign an executive order that would require federal contractors to adhere to a minimum wage

of $10.10 per hour. The President said this order, which is still forthcoming, would apply only to new federal contracts, awarded after the order is signed into law.

The President's announcement comes after lawmakers in the House have signaled an unwillingness to revisit the federal minimum wage, citing a still-fragile labor market and economy. With a mid-term election now just months away, both parties are clamoring to add a legislative accomplishment to their re-election resumes.

Legislation to increase the federal minimum wage remains pending in both the House (H.R. 1010) and Senate (S. 1737). The bills, introduced by George Miller (D-Ca) and Tom Harkin (D-Iowa), respectively, would increase the minimum wage from its current $7.25 to $10.10 after a series of increases over a three-year period.

As we reported in our December *Employment Law Bulletin*, the states are already taking their own action to increase minimum wages.

Harkin has said he expects the Senate to vote on his minimum wage proposal by mid-March.

OSHA's 2013 Most Frequently Cited Standards and Tyson Chicken

In FY2013, OSHA cited and fined employers most frequently under the following regulations: Fall Protection (29 C.F.R. § 501); Hazard Communication (29 C.F.R. § 1910.1200); Scaffolding (29 C.F.R. § 1926.451); Respiratory Protection (29 C.F.R. § 1910.134); Electrical/Wiring Methods (29 C.F.R. § 1910.305); Powered Industrial Trucks (29 C.F.R. § 1910.178); Ladders (29 C.F.R. § 1926.1053); Lockout/Tagout (29 C.F.R. § 1910.147); Electrical/General Requirements (29 C.F.R. § 1910.303); and Machine Guarding (29 C.F.R. § 1910.212).

Employers need to handle OSHA inspections, citations, fines, and abatement measures with care, as there are significant consequences for failing to comply. One such consequence is OSHA's "Severe Violator Enforcement Program" (SVEP), started in 2010, which focuses enforcement efforts on recalcitrant employers who demonstrate indifference of the safety of their employees through willful, repeated failure-to-abate violations of the Act. Effectively, SVEP is OSHA's blacklist of repeat-offender employers. SVEP requires that the employer demonstrate specific compliance with abatement criteria in order to be removed from the SVEP list, and while on the list, the employer faces increased mandatory follow-up inspections, monetary citations, and other intrusions by OSHA.

Once such employer is a Tyson Foods chicken plant location in Kansas. Late last month, OSHA placed this employer in the SVEP, while at the same time citing it for $147,000.00 under various OSHA regulations, primarily the lockout/tagout regulation. The citations arose out of the amputation of an employee's hand during cleaning conveyor equipment. During the cleaning process, protective guarding on the conveyor was removed, exposing employees to rotating parts that were not locked out to prevent unintentional operation. One of the employee's frocks became entangled in the rotating parts, which led to his arm being pulled into the moving gears of the conveyor.

Two of the cited violations were deemed "willful" by OSHA, because they involved failing to train workers on lockout/tagout procedures and to lock out equipment to prevent its unintentional operation. Another violation was deemed "serious" by OSHA, which involved fall hazards resulting from the company's failure to provide fixed stairs to reach work areas at two plant locations. Another violation was deemed "other-than-serious," which involved the lack of legible markings on forklift levers.

This recent Tyson Foods example not only reinforces the fact that the above frequently cited violations remain at or near the top of OSHA's list going forward (i.e. Fall Protection (29 C.F.R. § 501); Lockout/Tagout (29 C.F.R. § 1910.147); Powered Industrial Trucks (29 C.F.R. § 1910.178); and Machine Guarding (29 C.F.R. § 1910.212)), it also demonstrates that employers must carefully draft and execute their internal OSHA compliance programs and checklists, particularly lockout/tagout, to ensure that all employees are aware of and comply with these rules prior to working on any equipment (and certainly prior to removing any protective guards on machines). Although a cautionary tale, the

Tyson Foods example illustrates that the consequences for failing to address these hot-button OSHA issues/regulations could result in immediate six-figure-plus fines as well as being blacklisted under the Severe Violator Enforcement Program, which could result in further citations and associated monetary fines.

Supreme Court Says "Reasonable" Limitations Periods in Employee Benefit Plan Documents are Enforceable, Will Issue Additional Decisions Important to Plan Sponsors in 2014

In December 2013, the United States Supreme Court issued an opinion favorable to plan sponsors, holding that limitations periods for filing suit that are written into plan documents are valid, as long as those periods are "reasonable." The decision, *Heimeshoff v. Hartford Life & Accident Insurance Co.*, resolved a circuit split on whether plan-imposed limitations periods for filing suit are valid and should be enforced.

The case involved an employee of Walmart that stopped working after complaining of chronic pain and fatigue for which she was ultimately diagnosed with lupus and fibromyalgia. She filed a claim for long-term disability benefits under a policy purchased by Walmart and issued by the defendant, Hartford Life & Accident. Hartford initially denied the claim for failure to provide satisfactory proof of loss because the employee's rheumatologist failed to respond to Hartford's request for additional information. After two more physicians retained by Hartford reviewed the employee's claim, Hartford issued a final denial.

The plan contained a provision requiring participants to bring suit within three years after proof of loss is due. Because proof of loss is due before the plan's administrative process can be completed, however, the plan's administrative exhaustion requirement effectively shortened the contractual limitations period.

The employee filed suit just shy of three years after the final denial, but more than three years after proof of loss was due. Hartford and Walmart moved to dismiss the complaint on the grounds that the complaint was barred by the plan's limitations period. The district court granted the defendants' motion to dismiss and the Second Circuit Court of Appeals affirmed.

Upon review, the Supreme Court rejected the employee-plaintiff's argument that the plan's limitations period conflicts with the general rule that statutes of limitations commence when the cause of action accrues because a participant must first exhaust the plan's administrative proceedings before it may file suit. Instead, the Court concluded that, absent a controlling statute to the contrary, a participant and a plan may agree by contract to a particular limitations period, even one that starts to run before the cause of action accrues, as long as the period is reasonable.

The Court cited earlier opinions holding that parties can contract, not only for the length of a limitations period, but also to its commencement. According to the Court, the general principle that contractual limitations provisions ordinarily should be enforced as written is especially appropriate when enforcing the terms of a plan subject to ERISA. Therefore, the Court held that a plan's limitations provisions should be given effect, unless the period is unreasonably short, or a controlling statute prevents the limitations provisions from taking effect.

As to the issue of reasonableness, the Court noted that regulations governing health plans' internal review procedures generally require that most claims be resolved internally within approximately one year. The fact that, in the case at hand, the administrative review process took much longer than the typical claims process did not invalidate the limitations period because the three year limitations provision would provide a much longer period in most cases and still provided the particular employee with approximately a year after the process was complete to file suit. Therefore, reading between the lines, limitations periods that provide or result in at least one year to file suit after the plan's administrative process is complete are likely reasonable and acceptable under the Court's decision.

In addition to the *Heimeshoff* decision, the Supreme Court will also issue two decisions in 2014 that are important for plan sponsors. Specifically, in *U.S. Airways v. McCutchen*, the Supreme Court's decision will affect the operation of subrogation provisions in employee welfare benefit plans. In *McCutchen*, the Supreme Court will decide whether a benefit plan administrator is entitled to full reimbursement for payments made to a plan participant injured in an accident where the participant sues and recovers damages from a third party. The lower court decided that, although the plan's subrogation provision was enforceable to require the participant to reimburse the plan, the participant should be able to offset the reimbursement with a portion of the attorneys' fees paid out of the recovery.

Finally, in *Sebelius v. Hobby Lobby Stores and Conestoga Wood Specialties v. Sebelius,* the Supreme Court will hear arguments on the Affordable Care Act's much-debated contraceptive mandate that generally requires employers' group health plans to offer first-dollar coverage of certain reproductive health services, including birth control, or face penalties of up to $100 per day, per participant. The cases come to the Supreme Court after the Third and Tenth Circuit Courts issued conflicting opinions on whether secular, for-profit corporations are entitled to religious freedom protections of the First Amendment (the Tenth Circuit held that such corporations are entitled religious freedom protections in *Hobby Lobby*, while the Third Circuit decided against *Conestoga Wood*, holding that for-profit, secular corporations cannot engage in religious exercise). The Court is expected to hear arguments in March and issue an opinion in June, two years after the court's last major encounter with the health care law.

Employers sponsoring employee benefit plans should review their plan materials in light of these decisions. Insurance policy documents and third party administrator materials often fail to meet ERISA's plan document requirements and often fail to include important provisions that provide extra protection to plan sponsors, such as limitations periods and subrogation provisions; therefore, employers should make sure their plan materials contain these extra protections and that those provisions are reasonable, as well as making sure that their plans otherwise comply with ERISA's requirements. Additionally, employers should consider their position on the ACA's requirement to cover contraceptive coverage mandate and take steps to prepare for the Supreme Court upholding or invalidating the contraceptive coverage mandate.

To discuss these issues or to evaluate your plan's overall compliance with ERISA and ACA requirements, please contact one of our benefits attorneys.

NLRB Tips: The Year Ahead for the NLRB – What To Expect in 2014

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.

With a full complement of members on the NLRB, expect the agency to step up its efforts to further its pro-union agenda in both the coming year and into the foreseeable future. The only constraint upon the Board and its general counsel in making significant changes to the substantive and procedural processes before the agency will come as a result of judicial review.

In addition to its continued focus on expanding the coverage of protections for non-union employees engaging in Section 7 activity (i.e. – protected, concerted activity), look for the Board to continue to develop its regulatory reach into areas previously untouched by the NLRB. Some of these likely areas of expansion are explored below.

Judicial Review of NLRB Cases

- *Noel Canning*

On June 24, 2013, the U.S. Supreme Court granted review of the recess appointment issue raised by *Noel Canning.* The Court heard oral argument on January 13, 2014, and employers should expect a decision from the Court by mid-year of 2014.

Should the Court decide that the recess appointments were unconstitutional, the immediate labor relations

impact would be the potential invalidation of all decisions issued by the NLRB since January 2012, up until the U.S. Senate confirmed new members to the Board in July of 2013.

The group of Board decisions that could be nullified should the Supreme Court find that the recess appointments were invalid includes controversial decisions involving social media, employer confidentiality rules, off-duty employee access to employer property, dues check-off after expiration of the contract, and employee discipline. Specific examples include:

1. Social Media – *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012) – holding that an employer's policy that prohibited electronic postings that "damage the Company, defame any individual or damage any person's reputation" unlawfully interfered with employees' Section 7 rights.

2. Confidentiality Rules – *Banner Health System,* 358 NLRB No. 93 (2012) – holding that an employer violated the Act by asking an employee under an internal investigation to refrain from discussing the matter while the employer conducted the investigation, thereby prohibiting the employee from engaging in protected, concerted activity.

3. Off-Duty Access Rules – *Sodexo America LLC,* 358 NLRB No. 79 (2012) – holding that an employer's off-duty access rule was invalid because the rule granted the employer "unfettered discretion" to determine which employees could access the premises while off-duty.

4. Dues Check-Off – *WKYC-TV, Gannett Co.,* 359 NLRB No. 30 (2012) – holding that an employer's duty to collect union dues from employees pursuant to a dues check-off provision continues even after the expiration of the collective bargaining agreement.

5. Employee Discipline – *Alan Ritchey, Inc.,* – holding that unionized employers must give the union notice and an opportunity to bargain before imposing discretionary discipline involving demotions, suspensions, and terminations where the applicable collective bargaining agreement does not establish a grievance-arbitration process.

Practical Outcome of the Decision in *Noel Canning*

In one possible outcome, with Justice Kennedy serving as the swing vote, the Court could vacate and remand the Circuit Court decision. If that happens, then the underlying ULP decision in *Noel Canning* would be considered by the newly constituted and validly appointed Board members, thus avoiding a constitutional controversy. Other decisions in other circuit courts could be re-considered and parties wishing to have their case re-considered by the new Board could so request.

Thus, as a practical matter, even if the Supreme Court invalidates the recess appointments (which observers of the oral argument believe will happen); the new Board will move quickly to re-issue its decisions in the more controversial cases. At best, employers may expect a temporary reprieve from the impact of these far-reaching decisions.

Expected Judicial Review of NLRB Decisions

1. *D. R. Horton,* 357 NLRB No. 83 (2012) – holding 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 NLRB has acknowledged that the U.S. Circuit Courts have not followed *D.R. Horton* in other mandatory arbitration situations outside of a NLRA setting. This case seems destined for the U.S. Supreme Court, despite the adverse decision in the Fifth Circuit Court of Appeals. The Supreme Court will have to determine the appropriate balance between other statutes and doctrines (such as the FAA, wage and hour regulations, etc.) and the application of national labor policy underlying the Act (i.e. – protecting the Board's interest in upholding employee rights under a protected, concerted activity framework).

As noted in the December 2013 LMV employment law bulletin, it is conceivable that the Agency re-considers 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. Therefore, expect this to remain an issue in 2014, with possible Supreme Court review of the Fifth Circuit decision in the latter part of 2014.

2. *Banner Health System,* 358 NLRB No. 93 (2012) – this case, referenced above under pending judicial review matters, is being held in abeyance in the D.C. Circuit Court of Appeals pending the outcome of *Noel Canning*.

Once the recess appointment issue is settled, expect the circuit court to resume processing the appeal of the Board's decision in this case. In a supporting *amicus* brief to the court, the U.S. Chamber of Commerce argued that the NLRB's requirement to analyze application of confidentiality on a "case-by-case" basis unreasonably imposes a burden on an employer that is "impractical, unjustified, and contrary to law." Further, the Chamber contended that the Board's ruling failed to accommodate the NLRA to other federal employment laws requiring effective workplace investigations.

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.

On December 9, 2013, in a move to facilitate implementation of the election rule changes, the NLRB voluntarily dismissed its appeal of the D.C. Circuit's ruling that the Board lacked a valid quorum when it originally issued the rule in 2011.

Expect Board action on the election rule changes shortly after the Supreme Court issues its decision in *Noel Canning*. Therefore, employers can expect that the NLRB will ultimately implement the rule changes by the end of year 2014 or early 2015. The re-issued rules will likely resemble the original, more expansive agency proposal. The "quickie election" rules, coupled with the decision in *Specialty Healthcare*, dramatically change the organizing landscape in favor of unions. Employers must be prepared to proceed to quick elections, where scant time exists to demonstrate to employees the disadvantages of unionization.

Expect More Activity under a *Specialty Healthcare* Framework

In *Specialty Healthcare,* 357 NLRB No. 83 (2011), the Board overruled *Park Manor,* 305 NLRB 872 (1991), which established clear categories of appropriate bargaining units for non-acute care facilities. The NLRB's new approach, announced in *Specialty,* offers unions a major boost toward winning an election among small, cherry picked groups of employees where support for the union is the strongest.

Now that the Sixth Circuit Court of Appeals has affirmed the NLRB's analysis in *Specialty*, look for expanded micro-unit organizing to take place in 2014, especially once the new election rules are implemented.

Organizing Temporary Employees in 2014

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

Bergman, which provides a clear roadmap for organizing temporary workers, will open the door to increased possibilities of unionization efforts at an employer's facility. The unionized temporary workforce would, at

least theoretically, unduly influence the permanent employees to join a union. In short, the potential for trouble to develop jumps exponentially should a staffing agency's employees become unionized.

This issue is currently pending before the Board, and employers may expect an expansion of organizing among temporary employees in 2014. Therefore, it is critical for employers to be aware of nascent union sentiment at their facility and focus on developing thorough union-free communications with its employees.

NLRB Gives Up Trying to Implement Notice Posting Rule

As noted in the previous January 13, 2014 LMV e-blast, and predicted in the July 2013 employment law bulletin, the NLRB finally issued a statement that it will not seek Supreme Court review of two U.S. Court of Appeals decisions invalidating the agency's notice posting rule.

In the Board announcement, the agency encouraged employers to voluntarily post the notice, and will continue to publicize the Act through the "outreach" program and the Board's mobile phone application for smart phone users. However, as the notice posting requirement has not been enforced by the courts, LMV does not recommend posting the proposed pro-union notice.

Conclusion

Since the legislative failure of the Employee Free Choice Act (EFCA), the Obama Administration has provided a pro-labor environment at the NLRB in order to further organized labor's agenda. The Agency's actions, under the guise of "leveling the playing field," are at least partially, if not completely, motivated by a desire by the President to assist organized labor gain relevancy and stature in workplace.

The NLRB's policy changes which occurred in the Mr. Obama's first term have come through both the rulemaking and adjudication process. In 2014, no NLRB precedent that is considered "anti-union" by the current administration is safe from review by the activist members of the Board.

EEO Tips: Joint Employer Issues Never Seem To Go Away

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.

Notwithstanding the many regulations, guidelines and court decisions which have addressed the simple question of what makes one employer responsible for the actions of another employer's employees, the joint employer issue consistently arises and never seems to be easily resolved. It arises whenever a contractor signs an agreement with a subcontractor whose employees will perform the work contemplated by the underlying agreement in question. It may arise in the context of a franchisor and franchisee working relationship. It may arise in the context of a wage and hour claim as, for example, in the currently pending case of *Carrillo v. Schneider Logistics Trans-Loading & Distribution*, C.D. of Cal., No. 11-cv-8557, Orders 1/14/14), where the plaintiffs are trying to include Wal-Mart as a joint employer. Finally, it may arise as a jurisdictional issue for coverage under Title VII, or certain other employment discrimination statutes where two employers, neither of which has 15 or more employees (or some other required number), utilize the services of common employees.

Additionally, this problem is exacerbated by some confusion by practitioners as to the difference between the concept of whether two or more employers were operating as a "**single employer**" or a "**joint employer**." The single employer concept involves the question of whether two (or more) allegedly separate business enterprises should in fact be treated as a single entity. According to one court, "The difference between the "**joint employer**" and the "**integrated (single) employer**" tests (sic) turns on whether the plaintiff seeks to impose liability on the legal employer or another entity…The former looks to whether there are sufficient indicia of an employer/employee relationship to justify imposing liability on the plaintiff's non-legal employer. The latter applies where…liability is sought to be imposed on the legal employer by arguing that another entity is

sufficiently related, such that its action…can be attributable to the legal employer." *Engelhardt v. Richards, Inc.* (1st Cir. 2006).

Thus, the obvious reason for this constant problem is that the matter of being a "joint employer" or "single employer" and thus sharing joint liability for violations of federal anti-discrimination statutes is basically a factual question and must be determined on a case-by-case basis.

As recently as last month, the Sixth Circuit, applying a joint employer theory to a Title VII case for the first time, found that a joint employer relationship may have existed between the general contractor for the construction of a hospital and one of its subcontractors engaged to operate a hoist elevator. The case in question was *EEOC v. Skanska USA Bldg., Inc.*, 6th Cir. No. 12-5967, (unpublished opinion Dec. 10, 2013). The EEOC had filed suit on behalf of several black workers against Skanska alleging among other things a racially hostile working environment and retaliation. The black workers had been hired by C-1 Inc., a subcontractor to Skanska, to operate a buck hoist (temporary elevator) on the construction site of a new hospital. The black workers complained of severe racial harassment, including frequent use of the N word, racist graffiti in the site's portable toilets, and on one occasion liquids from a portable potty were thrown on the arms and in the eyes of one of the black workers. The EEOC asserted that the black workers complained to Gerald Neely, the owner of C-1, Inc., but he told them that he could do nothing about it and that they should take their complaints to Skanska. The evidence showed that they then complained to Norberto Jiminez and Robert Jones, two Skanska managers, but to no avail.

During this whole episode, C-1, Inc. apparently had very little authority or direction over the work, and Neely, the owner of C-1 Inc., visited the worksite on only a few occasions.

The U.S. District Court for the Western District of Tennessee granted summary judgment in favor of Skanska. However, upon review, the Sixth Circuit found evidence that Skanska: (1) generally supervised and controlled the buck hoist operator's day-to-day activities and performance; (2) assigned the operators' supervisors, and responded to their complaints about job conditions; (3) set the daily assignments; (4) determined the hoist operators' hours and collected their time sheets; (5) trained them on the use of the buck hoist; and (6) retained all authority over them with respect to removal or evaluation of their work performance.

The Sixth Circuit stated that in applying the test to determine whether an entity is the plaintiff's joint employer, "*we look to an entity's ability to hire, fire, or discipline employees, affect their compensation and benefits, and direct and supervise their performance.*"

Accordingly, based on the foregoing factual determinations, the Sixth Circuit concluded that there was enough evidence to find that Skanska at the very least could have been a joint employer with C-1, Inc. with respect to the black workers in question and reversed the District Court's grant of summary judgment to the Defendant, Skanska. The case was remanded for further proceedings on the issue.

Actions Which Indicate a Joint Employer Relationship

The *Skanska* case is one of many cases containing actions by a putative joint employer which might indicate that a joint employer relationship exists. For Title VII purposes, the ultimate inquiry is the degree to which each of the employers in question **exercises control over the terms and conditions of employment of the employees** they share in common. Based upon the holdings in *Skanska* and other cases, courts have found that the following factors (where applicable) should be considered in making a determination whether a joint employer status exists:

- Supervision of the employees' day-to-day activities;
- Authority to hire, fire, or discipline employees;
- Authority to promulgate work rules, conditions of employment, and work assignments;
- Participation in the collective bargaining process;
- Ultimate power over changes in employer compensation, benefits and overtime; and

- Authority over the number of employees.

EEO TIPS:

It is probably safe to say that, normally, in the context of a specific work or project agreement between a general contractor and a subcontractor, the parties do not intend to be held jointly liable for violations of Title VII or other federal employment statutes by the other party's employees. Hence, it is simply a matter of drafting a sound agreement that addresses the foregoing factors to make sure of the parties' intent with respect to liability for such violations. The exact language in the agreement of course will depend on the nature of the work and other related circumstances. However, at the very least, it would seem advisable for the parties to include a "hold harmless" clause or other disclaimer of liability for the unlawful actions of the other party's employees.

OSHA Tips: OSHA 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.

OSHA plans to release a final rule on confined spaces for the construction industry in February of 2014. OSHA issued a rule in the early 1990's to protect employees who enter confined spaces within the general industry sector but did not extend it to construction because of unique characteristics of that industry's worksites. A 2007 settlement caused OSHA to issue a separate proposed rule for construction.

OSHA lists on its agenda a notice of proposed rulemaking for crystalline silica which was added September 12, 2013. It would substantially lower the existing permissible exposure level (PEL) for silica, prescribe control methods that contradict the existing safety practice, and mandate new recordkeeping and training requirements.

On November 8, 2013, OSHA issued a notice of proposed rulemaking that would require employers to submit specific injury and illness date electronically to OSHA on a quarterly basis that would be posted in an online database that would be accessible to all. Under the rule, establishments with 250 or more employees will be required to submit injury and illness records on a quarterly basis to OSHA. Employers with 20 or more employees in industries with high injury and illness rates, such as construction, will be required to submit a summary of their work-related injuries and illnesses electronically once a year. This proposal has stimulated considerable response and concern. OSHA's posted agenda has the NPRM comment period ending on 2/6/14.

The agency's combustible dust standard is scheduled to go to the review process of the Small Business Regulatory Enforcement Fairness Act (SBREFA) in April 2014.

OSHA's much discussed "Injury Illness Prevention Standard," known as I2P2,would require employers to devise internal safety programs that would "find and fix" workplace hazards at their work-sites on an on-going basis. A program of this nature has been required in some states operating their own OSHA programs. Dr. Michaels, Assistant Secretary of Labor for OSHA, has indicated that having federal OSHA adopt such a program is his number one priority. The agency's agenda currently shows a date of September 9, 2014 for the Notice of Proposed Rulemaking (NPRM).

Wage and Hour Tips: White Collar Exemptions

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

As we begin a new year, I thought we should take a look back at some of the recent Wage and Hour issues of 2013. According to figures from the Federal Judicial Center, there were 7,764 Wage and Hour suits filed during the 12 months ended March 31, 2013. This was a

10% increase above the number filed during the previous 12 months and a fourfold increase from 2000. Further, Wage and Hour recently released a summary of its activities during the fiscal year ended September 30, 2013 showing that it collected almost $250 million in back wages for 270,000 employees.

As a large percentage of the violations found are due to the misclassification of employees, I am revisiting the requirements for the management exemptions. For many years, these were referred to as "White Collar" employees but in today's world they no longer carry that connotation.

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional, and outside sales employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. The application of the exemption is not dependent on job titles but on an employee's specific job duties and salary. In order to qualify for an exemption, the employee must meet all the requirements of the regulations.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

This exemption is typically applicable to managers and supervisors who are in charge of a business or a recognized department within the business, such as a construction foreman, warehouse supervisor, retail department head or office manager.

Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

This exemption may be applicable to certain management staff positions such as Safety Directors, Human Resources Managers, and Purchasing Managers. Of the exemptions discussed in this article, the Administrative exemption is the most difficult to apply correctly due to application of the "discretion and independent judgment" criteria with respect to matters of significance.

Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is

predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

- The advanced knowledge must be in a field of science or learning; and

- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Examples of employees that could qualify for the exemption include engineers, doctors, lawyers and teachers.

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;

- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Typically, this exemption can apply to artists and musicians.

Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week or at an hourly rate not less than $27.63 an hour;

- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below; and

- The employee's primary duty must consist of:

  1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

  2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

  3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

  4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

This exemption does not apply to employees who maintain and install computer hardware.

Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

- The employee must be customarily and regularly engaged away from the employer's place or places of business.

You will note that this exemption is the only one in this group that does not have a specific salary or hourly pay requirement. Thus, the exemption may be claimed for outside sales employees that are paid solely on a commission basis.

The application of each of these exemptions depends on the duties actually performed by the individual employee rather than what is shown in a job description, plus the employee must meet each of the requirements listed for a particular exemption in order for it to apply. Further, the

employer has the burden of proving that the individual employee meets the requirements for an exemption. Therefore, it is imperative that the employer review each claimed exemption on a continuing basis to ensure that he does not unknowingly incur a back wage liability.

If I can be of assistance in reviewing your positions, please do not hesitate to contact me.

2014 Upcoming Events

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

Did You Know…?

…a group of Northwestern University football players, working in conjunction with the United Steelworkers, has asked the National Labor Relations Board to approve their petition to unionize the football team? Board watchers do not expect the Board to approve the petition, but any ruling from the Board that the players are "employees" within the meaning of the National Labor Relations Act could have far-reaching implications for major college sports.

…20 states have filed friend-of-the-court briefs with the Supreme Court, urging the Court to overturn the Affordable Care Act's so-called contraceptive mandate, a rule requiring employer group health plan sponsors to cover contraception as part of the minimum essential coverage offered under a compliant plan? The states have joined private employers in arguing against the mandate as a sweeping violation of their religious freedom.

…if employers provided more paid sick leave, employers would find greater productivity, healthier workers, and employees with a more stable family life, according to a recent study by the Aspen Institute? According to the study, about 40 million American workers do not have access to paid sick or family leave. Although about half of American employers are required to offer leave under the Family and Medical Leave Act, employees underutilize FMLA leave because it is unpaid and they cannot afford to forego compensation, the study said. The study found that employees who do not have paid sick time are more likely to delay receiving medical attention, come to work sick, pass sickness to other workers, end up missing more work than necessary, and harm the employer's overall productivity.

LEHR MIDDLEBROOKS & VREELAND, P.C.

Jamie M. Brabston	205.323.8219
Whitney R. Brown	205.323.9274
Matthew J. Cannova	205.323.9279
Lyndel L. Erwin (Wage and Hour and Government Contracts Consultant)	205.323.9272
Michael L. Green II	205.226.7129
John E. Hall (OSHA Consultant)	205.226.7129
Richard I. Lehr	205.323.9260
David J. Middlebrooks	205.323.9262
Jerome C. Rose (EEO Consultant)	205.323.9267
Frank F. Rox, Jr. (NLRB Consultant)	205.323.8217
Matthew W. Stiles	205.323.9275
Michael L. Thompson	205.323.9278
Albert L. Vreeland, II	205.323.9266