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Retaliation and ADA Claims Reach a Record High

According to the EEOC, 41.1% of all discrimination claims filed during FY2013 alleged retaliation. This is the twelfth consecutive year that retaliation charges climbed. Although the total discrimination charges filed during FY2013 declined from 99,412 to 93,727, the number of retaliation charges increased from 37,836 to 38,539. Disability discrimination charges as a percentage of total charges rose for the sixth consecutive year, to 27.7% from 26.5% in 2012 and 20.4% in 2008.

The expansion of what may be considered "retaliation" is the primary reason why these numbers continue to increase. We have also seen an increase in retaliation claims under the Fair Labor Standards Act, where employees allege that they have been retaliated against for speaking up about employer pay practices, and retaliation claims under OSHA, where employees allege they have been retaliated against for speaking up about safety practices. The two key retaliation prevention approaches employers should consider are: First, be sure that workplace policies address retaliation and a process for employees to report behavior they consider retaliatory. Second, be sure managers and supervisors are taught about the subtleties of retaliation and the importance of consulting with HR where there may be a potential "retaliation event" in the works, such as an employee with performance issues in the context of using FMLA.

We expect ADA challenges for employers to continue. For example, when the ADA was passed in 1990, Congress found that "43 million Americans have one or more physical or mental disabilities, and that number is increasing . . ." According to the 2000 census, 49.7 million, or 20% of our population, was considered disabled. As of today, 65 million Americans meet the ADA definition of a disability. This comprises 22% of our population. Fifty three percent of those older than age 50 have impairments that meet the definition of disability. Employers need to ensure that managers and supervisors understand the ADA reasonable accommodation principles. With the low threshold of what is considered a disability, an unknowledgeable manager or supervisor may fail to recognize that an employee medical issue includes ADA implications.

Court Delivers Bad News to UPS on its "Return to Work" Rule

UPS has a policy of terminating employees if employees cannot return to work after 12 months of leave. In the case of *EEOC v. UPS, Inc.* (N.D. IL, Feb. 11, 2014), the EEOC alleged that such a rule violates the Americans with Disabilities Act. The EEOC argued that the rule was a "qualification standard," rather than an "essential job function." According to the court, ". . . the 12 month policy can be considered a qualification standard – a medical requirement that an individual must meet in order to maintain his or her position with UPS – and not an essential job function." This class action arose when an employee with multiple sclerosis was terminated after she failed to report to work after the expiration of her 12 month leave.

The court noted that there is a difference between attendance as an essential job function and UPS's policy as a qualification standard. According to the court, the application of a hard and fast 12 month rule tends to screen out a class of individuals who have a disability. An essential job function in the EEOC's ADA regulations is defined as "the fundamental job duties of the employment position the individual with a disability holds or desires." In contrast, a "qualification standard" is "the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." Thus, the court ruled that the 12-month cutoff was a qualification standard that screened out individuals with a disability and for which UPS could not show a business necessity or job-relatedness.

Although an employer is not required to accept an indefinite leave of absence as a form of accommodation, a strictly applied automatic cutoff, such as in this case, violates the ADA. An employer may notify employees that past a certain date, the employer can no longer assure the employee that a job will be available if and when the employee is able to return to work. The employer should tell the employee that the employer will evaluate if and when the employee is able to return, what positions are available and whether the employee may be placed in a position, with or without accommodation. Under the ADA, a permitted accommodation includes placing the employee in a position that pays less.

Employer Policy Requiring Sick Employees to Remain at Home

We all know about the frustration over the use of sick days and/or FMLA tagged onto a weekend or a holiday, creating a "sickation." The case of *Corbin v. Town of Palm Beach* (S.D. FL, Jan. 23, 2014) upheld an employer's policy that employees who call off sick must remain at home.

The Town's sick leave policy provided that if an employee called in sick, the employee had to remain at home unless the employee received approval from a Town official to be elsewhere. The policy also provided that the Town could send a representative to the employee's home to confirm that the employee was there. The intent of the policy was to prevent the abuse of sick time.

Corbin was terminated after he called in sick while on vacation. The employer unsuccessfully tried to reach Corbin at home. Corbin's wife called the employer back and told the employer that Corbin was at home and sick. Corbin subsequently spoke to a Town official and said that he was at home sick, but abruptly hung up. Corbin was terminated after the Town determined that he was not at home, but rather returning home from vacation. Corbin claimed that he was diabetic and the application of the employer's policy adversely affected diabetic employees compared to any other.

In granting summary judgment for the employer, the court stated that Corbin failed to provide any evidence that this policy was applied toward diabetics in a discriminatory manner compared to other employees. According to the court, "Plaintiff has not shown, as a matter of law, that the verification visits were being used against diabetics as opposed to chronic sick leave abusers."

Employers are becoming creative and aggressive in the use of their rights to address sick leave/FMLA abuse. The policy discussed in this case is one example of an approach employers may consider. Furthermore, more employers are utilizing surveillance regarding suspicious

sick leave absences, just as surveillance would be used for suspicious workers' compensation claims.

Temporary Impairments – When Do They Qualify as a Disability?

We know this issue of the ELB appears to be the medical/ADA issue, but there are a number of important recent developments regarding these subjects which we want to bring to your attention. For example, on January 23, 2014, in the case of *Summers v. Altarum Institute Corp.* (4th Cir.), the court became the first federal appeals court to address the expanded definition of "disability" as it relates to temporary impairments.

Summers worked for Altarum as a senior analyst. He suffered serious injuries to both legs which limited him from walking for at least seven months. He was terminated two months after suffering the injury.

Summers argued that he had a disability as defined under the Americans with Disabilities Act Amendments Act (ADAAA), while Altarum argued that his medical condition was "temporary" and did not meet the definition of a disability.

The court ruled that Summers' condition met the statutory definition of a disability. The court noted that the definition of disability is "construed in favor of broad coverage . . ." The court also noted that in its regulations implementing the ADAAA, the EEOC stated that in defining whether a temporary condition is a disability, "effects lasting or expected to last fewer than six months can be substantially limiting." In this case, Summers fractured his left leg, tore tendons in his left leg, fractured his right ankle and ruptured a tendon in his right leg and had multiple surgeries, followed by extensive therapy. His job involved meeting with clients at the client location. Summers asked to work from home, to which the company did not respond. The company terminated him effective December 1, 2011, less than two months after his accident.

In rejecting that the temporary nature of Summers' impairment did not qualify as a disability, the court noted that the EEOC's regulations state that "duration of an impairment is one factor that is relevant to determining whether the impairment substantially limits a major life activity." The EEOC regulations add that "Impairments that last only for a short period of time are typically not covered," however, impairments may be covered "if sufficiently severe." The court concluded that "Nothing about the ADAAA or its regulations suggested distinction between impairments caused by temporary injuries and impairments caused by permanent conditions. The stated goal of the ADAAA is to expand the scope of protection available under the Act as broadly as the text permits. The EEOC's interpretation – that the ADAAA may encompass temporary disabilities – advances this goal."

In contrast to Summers' situation, a court ruled that an employee with a breast infection that lasted two or three weeks did not have a disability, even under the broad protection of the ADA Amendments Act. *McKenzie-Nevolas v. Deaconess Holdings, LLC* (W.D. OK, Feb. 7, 2014). The court stated that because the infection was limited to an isolated area and "was not chronic but temporary and of short duration," she was not covered by the ADA.

UAW – VW: Union Files Objections, Blames Politicians for Loss

Although the UAW received unprecedented support from Volkswagen for unionization, the Union on Friday, February 21st, filed with the National Labor Relations Board objections to the election, claiming that U.S. Senator Bob Corker, Governor Bill Haslam and several local elected officials "threatened a loss of state financial incentives" for VW if the employees unionized. The Union lost a fairly close election by a vote of 626 in favor of the Union and 712 against the Union. A swing of 44 votes would have resulted in the Union victory.

The UAW claimed that the threats of lost state incentives were "made by powerful political leaders who, in fact, and in the reasonable perception of employees, were quite capable of putting their threat into effect."

Although there are limited situations where third party conduct may interfere with the election process, historically the NLRB has rarely set aside elections based upon comments from third parties unless the third party

comments can be connected directly to the employer. It is not unusual in high profile elections to have highly visible third parties who make aggressive statements. However, a problem for the UAW is that frequently during the campaign, VW officials reiterated that the election outcome would have no impact whatsoever on future plans for the Chattanooga facility. VW expressly denied that employee job security was in any manner at risk depending upon the outcome of the election.

A usual remedy for election misconduct is a re-run election. Statistically, an employer's likelihood of remaining union-free increases when a re-run election is ordered. One remote possibility in the event a re-run election is ordered is that VW could voluntarily recognize the UAW. We think this is highly unlikely, considering that 53% of the VW employees who voted, voted No to the UAW.

NLRB Tips: NLRB Poised to Officially Change Arbitration Award Deferral Standards

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.

In the LMV June 2012 employment law bulletin, employers were advised that the NLRB was considering changing the standard for conducting *Spielberg* reviews of arbitration awards. As predicted last month, the Agency is moving ahead "full steam ahead" with its pro-union agenda. The Board's new *Spielberg* methodology, if formally adopted, will give greater weight to employees' statutory rights under Sections 7 and 8 of the Act, and less weight to the contract's "private dispute resolution" mechanism.

The Background of the Proposed Changes

In GC Memo 11-5, issued on January 20, 2011, the Acting General Counsel announced a "new approach" in considering whether to defer to arbitral awards. The framework urged by the Agency in the GC Memo is summarized below:

- The burden to demonstrate that deferral to the arbitral decision would shift to the party urging deferral to the decision. In the past, the burden of proof was on the moving party to demonstrate that deferral was not appropriate under the standards set forth in *Spielberg* and *Olin*. In other words, the winning party would have an affirmative burden to prove deferral was indicated, while the old rule required the losing party to demonstrate that deferral was not appropriate.

- In 8(a)(1) and (3) discrimination cases, the Board will no longer defer to an arbitral resolution unless it can be shown that the statutory rights of the charging party have been explicitly considered by the arbitrator. The questions to be answered include:

    1. Whether the collective bargaining agreement incorporates the statutory right or the statutory issue was presented to the arbitrator.

    2. Whether the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue.

If the party urging deferral makes this showing, the Board will defer to the decision unless the award is "clearly repugnant" to the Act.

The *Babcock & Wilcox* Decision and Agency Invitation to File Briefs

On April 9, 2012, a Board ALJ issued a decision in the *Babcock* case (28-CA022665) deferring to an arbitration panel's ruling that the discharge of Charging Party/employee Coletta Beneli did not violate either the Act or the contract. In the underlying unfair labor practice trial, Beneli was considered an "activist" job steward by the General Counsel and given the facts in the case, the GC argued the award was "repugnant to the Act."

In its appeal, the GC asked the Board to reverse the ALJ decision and formally adopt the new standards proposed in GC Memo 11-5. In the Board's Notice dated February 7, 2014, it posed four specific questions to the parties, and invited the filing of *amici* briefs.

1. Should the Board adhere to, modify, or abandon its existing standard for post-arbitral deferral under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.,* 268 NLRB 573 (1984)?

2. If the Board modifies the existing standard, should the Board adopt the standard outlined by the General Counsel in GC Memo 11-05, or would some other modification of the standard be more appropriate: e.g., shifting the burden of proof, redefining 'repugnant to the Act', or reformulating the test for determining whether the arbitrator 'adequately considered' the unfair labor practice issue?

3. If the Board modifies its existing post-arbitral deferral standard, would consequent changes need to be made to the Board's standards for determining whether to defer a case to arbitration under *Collyer Insulated Wire,* 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984); and *Dubo Mfg. Corp.*, 142 NLRB 431 (1963)?

4. If the Board modifies its existing post-arbitral deferral standard, would consequent changes need to be made to the Board's standards for determining whether to defer pre-arbitral grievance settlements under *Alpha Beta,* 273 NLRB 1546 (1985), review denied sub nom., *Mahon v. NLRB,* 808 F.2d 1342 (9th Cir. 1987); and *Postal Service*, 300 NLRB 196 (1990)?

Implications for Employers When the Change in Standards is Adopted

By soliciting briefs concerning a change in the deferral standards, the Agency is certainly signaling its dissatisfaction with how the current law considers these issues. Consequently, it would be surprising were the Board to leave the law static in this area, despite the fact that the existing standards have worked well for many, many years.

For employers, any changes mean a winning arbitration award is no longer a "sure thing" that the dispute is put to bed. If the new standards are implemented, it will be critical that employers make sure the implicated ULP issue is put before the arbitrator, that the arbitrator correctly enunciates the applicable NLRA standard in considering the ULP, and finally that the decision explicitly discusses the ULP allegations within the confines of the arbitration award.

Would the new *Spielberg* standards be impossible to meet? – Not at all. Will it require additional work by employers in the arbitration setting? – Absolutely yes.

EEO Tips: EEOC Charge Statistics for FY 2013 Suggest Opportunities for Employers to Close Cases Sooner and for Less in Payouts

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On February 5, 2014, the EEOC officially released its comprehensive statistics on the agency's charge processing and litigation activities for Fiscal Year 2013. During the year, the EEOC indicated that it had received 93,727 charges and resolved 97,252 charges including all statutes. As to resolutions, the agency reported that it had found "no cause" on 64,159 or 66.0% of the charges resolved. Conversely, it had found "reasonable cause" on only 3,515 or 3.6 % of the charges resolved. However, notwithstanding the seemingly small percentage of reasonable cause findings, the EEOC reported that it had completed 17,637 merit resolutions (mediations, settlements and withdrawals with benefits, etc.) and collected the record amount of $372.1 million in monetary benefits. This amounted to an average of $21,097 per merit resolution during the year. By way of comparison, in FY 2012, the EEOC completed 19,169 merit resolutions and collected $365.4 million in monetary benefits, amounting to an average of $19,062 per merit resolution. Thus, although there were fewer merit resolutions in FY 2013, the average merit resolution was slightly over $2,000 more than in FY 2012.

In my judgment, this record setting amount of monetary benefits obtained in FY 2013 (notwithstanding budgetary and personnel reductions) indicates, at least in part, that a considerable number of employers were "taking it on the chin" with respect to resolving the charges filed against them. They either overestimated the strength of their defenses to EEOC charges or perhaps underestimated the extent to which the EEOC would go in investigating seemingly simple charges during the administrative process – for example, charges which, unknown to employers, involved an EEOC priority issue. Although it is mere speculation, this type of miscalculation most likely contributed to the record setting amount of monetary benefits paid by employers to resolve the charges filed against them. It is also probably safe to say that most of the employers in question here were not familiar with, failed to utilize any of the various charge resolution tactics (which are also money and time-saving tactics) available to employers under the EEOC's regulations and charge processing guidelines.

On the other hand, even if your company has successfully defended or otherwise disposed of all charges filed against it for less than the average payout indicated above, this still may be a good time to consider the useful, informative charge resolution tactics available to all employers to ensure that your firm doesn't end up contributing to another record-breaking EEOC statistic during FY 2014.

Incidentally, none of the tactics being suggested here is really new. The problem is that some of them are either not well known or not used at all. They can be summarized as follows:

1. Requesting "Mediation." This must be done as soon as possible after receiving notice and a copy of a charge. Usually it is a win/win procedure for all of the parties involved including the EEOC.

2. "Controlling the EEOC's Investigation" by submitting careful, complete Position Statements and responses to Requests for Information. Providing the right information, not just a minimal response, may shift the burden of proof back to the EEOC and the charging party.

3. Requesting a "Fact-Finding conference" as soon as possible after submitting a Position Statement may help sift out the emotional misperceptions and non-factual debris that usually clutter the allegations in a given charge.

4. Requesting a "Pre-determination Settlement" if indicated by what your own internal investigation and the EEOC's evidence shows as to potential, ultimate liability.

5. Engaging in "Pro-active Conciliation" with the clear understanding that conciliation is a give-and-take process and that "full relief" does not necessarily require monetary relief in the form of back pay.

Let's take a closer look at each of these.

Accepting and/or Requesting Mediation

Mediation is generally fair, efficient and free. Resolution of the charge usually takes less than 90 days. The EEOC's mediators are required to act as neutral third parties who have no bias as to the outcome of the process. The entire cost is borne by the EEOC. The mediation proceedings are confidential and, if they fail, the charge is simply returned to the EEOC's regular investigative process and nothing said or done during mediation is included in the file. On the other hand, any settlement agreement reached during mediation does not constitute an admission of any wrongdoing or violation of any law by the employer. Mediation avoids a protracted investigation, including the submission of cumbersome, time-consuming documentation of personnel transactions, and of course it avoids costly litigation.

The problem is that the EEOC does not offer mediation for every charge. Charges alleging large, class-wide violations, systemic violations and those alleging unsettled legal issues such an interpretation of ADAAA coverage for a given disability will probably not be offered to the parties to mediate. On the other hand, for example, charges involving a hiring decision, promotions or whether the employer's offer of an accommodation for an employee's disability was reasonable, could well be a proper charge for mediation. The point here is that it

doesn't hurt to ask for mediation if it is not immediately offered by the EEOC.

A quick resolution of a charge may be just as beneficial to the charging party as to an employer if the EEOC could be convinced to facilitate the settlement through mediation. The request should be made as soon as possible after receipt of the charge to avoid its being included in the regular administrative process.

Controlling the EEOC's Investigation

Unlike a criminal proceeding, an EEOC charge in effect places a burden upon the respondent to prove that the respondent "did not violate the law." A proper response to an EEOC charge shifts that burden back to the EEOC and the charging party to prove that the law was broken. It is in this sense that a respondent can control the EEOC's Investigation.

In order to do this, a respondent must provide not just minimal information to support the employer's position, but the right information. In most cases, this means giving the EEOC sufficient information to undermine or dismiss the charge. This requires a careful internal investigation in order to obtain all of the facts. Thus, if necessary, a respondent must give itself sufficient time to obtain the facts by requesting an extension of time from the EEOC's investigator. Usually, the extension is granted because, with a heavy caseload, the EEOC's investigators need more time, too. But don't count on it. Always explain why the extra time is needed, for example, to obtain records from numerous out of town sources. Several other steps should also be taken: (1) verify the validity of the charge; make sure that it is timely and that the EEOC has jurisdiction; (2) provide a comprehensive, factual response to each allegation; (3) frame the response in keeping with the legal burden of proof for each issue or allegation; (4) include supporting documentary evidence whenever possible. Generally, it is prudent to consult legal counsel if you have questions as any of these steps.

Requesting A Fact Finding Conference

The operative term here is "requesting," because the EEOC is not automatically going to ask every respondent to participate in a fact finding conference. Usually, most of the fact finding is done by way of charging party statements, witness affidavits, employer position statements and requests for information. Often the investigator follows up by telephone if he or she has any additional questions. However, the EEOC is authorized by Section 1601.15 (c) of its Procedural Regulations to hold a *"fact-finding conference with the parties…to define the issues, to determine which elements are undisputed, to resolve those Issues that can be resolved and to ascertain whether there is a basis for a negotiated settlement of the charge."* Thus, in my judgment, a fact finding conference should be a windfall for respondents – perhaps not with every charge, but with any charge where the issues are elusive or where the facts are not clear but strongly contested on both sides. Hence, we suggest that employers take the initiative and request a fact finding conference to clarify the issues and pertinent facts. This request should be made at the time the respondent submits its position statement.

Fact finding conferences are much more formal than a series of telephone conversations. They are similar to mediation except the investigator is not a mediator. His or her purpose will be try to resolve as many conflicting issues and facts as possible with a view toward settling the charge. Such conferences should be attended by (1) an officer of the company with the power to settle the charge. Legal counsel may also attend but is limited in speaking as an advocate in the session; (2) the charging party or parties and legal counsel who also are limited to speak as an advocate directly in the session; and (3) the EEOC investigator. If the parties can agree on terms of a settlement, the charge may be resolved at that time. If not, the employer can certainly leave with a better knowledge of how to defend the charge in question in the event that a lawsuit is filed either by the charging party or the EEOC.

Requesting a "Predetermination Settlement"

Section 1601.20 (a) of the Commission's Regulations provides that "*Prior to the issuance of a determination as to reasonable cause the Commission may encourage the parties to settle the charge on terms that are mutually agreeable."* Given this clear provision, it is surprising that more employers do not request a predetermination settlement. Of course, much depends on the facts in the case, but we suspect that in the great majority of cases it's at least worth talking about. Again, this is one of those

measures where the EEOC investigator may not suggest it, but a predetermination settlement at this point could be very beneficial to an employer/respondent because, under the provisions of Section 1601.20(a), if the EEOC concurs with the agreement worked out by the parties, the EEOC is obligated to sign as an accommodation party and thus agree not to process the charge any further. Almost always, a settlement at this point would normally be for much less than any amount that the EEOC and the charging party might request during the conciliation process after a cause finding.

Engaging in "Proactive Conciliation"

First of all, employers should understand that conciliation is a give-and-take process and that the finding of reasonable cause is not tantamount to a finding on the merits by a court of competent jurisdiction. Nor is it necessarily a finding based upon a preponderance of the evidence (the Commission is basically looking for "reasonable cause"). Hence, there is room to negotiate conciliation terms based upon the available facts and evidence, most of which were supplied by the employer. In our judgment, this gives the employer a slight advantage as to how the evidence should be assessed in terms of applicable law. Secondly, the employer, statutorily, is only obligated to "make the charging party whole." This does not necessarily mean that monetary relief is the only way to accomplish this obligation. For example, where the charging party has suffered no actual loss of pay, but has challenged a policy or practice that could adversely impact future benefits, there would be no current loss for which the charging party could be made whole. Of course, there may be class issues involved where some of the affected class members are entitled to relief if their claims would be timely. The important point is that there are many ways to be proactive in negotiating a conciliation agreement in order to determine the proper relief. They include making appropriate demands as to proof of compensatory damages, limiting the amount of monetary relief for the charging party and any alleged unidentified affected class members, and requesting a written copy of the EEOC's computations of back pay and/or other relief. The foregoing only scratches the surface as there are many other proactive tactics which may be used by employers to take the initiative and force the EEOC to respond during the course of conciliation. Legal counsel should be consulted in order to make sure that the appropriate tactics apply to the charge in question.

Although the EEOC's reduced budget for FY 2014 will hamper some of its operations, the agency still has the resources to effectively enforce the federal antidiscrimination statutes. Thus, employers should not make the mistake of thinking that a pending charge will probably result in a "no cause" finding, or that an employer can be lax in responding to requests for information. On the other hand, in most instances, employers can make it easier on themselves and the EEOC by attempting one or more of the foregoing tactics to expedite the processing of a pending charge.

OSHA Tips: OSHA and Incentive Programs

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.

A recent news release by OSHA announced the filing of a lawsuit against an employer for thirteen separate incidents where employees were given one to three day suspensions for reporting injuries that occurred on the job. The suit alleges that the company violated the whistleblower provisions of the Occupational Safety and Health Act of 1970.

Employers should be aware that OSHA is suspicious of safety incentive programs. For this reason, employers should be prepared to show that any such program they use does not in any way discourage employees from reporting on-the-job injuries or illnesses.

OSHA considers accurate injury/illness records essential for accomplishing the agency's mission. One very important reason for this is to help focus the agency's limited inspection resources effectively. This emphasis on recordkeeping is evidenced by the increase from rather trivial penalties of early years to very substantial amounts today. Penalties from one to several hundred dollars for

recordkeeping deficiencies have grown in numerous cases to substantial dollar amounts.

In a national press release in 2010, OSHA announced the issuance of a citation to an employer alleging 83 willful violations for failing to record, and/or improperly recording, work-related injuries and illnesses. In this case, OSHA noted that the employer had not recorded or failed to properly record 72% of the injuries and illnesses occurring during the investigated period. A penalty totaling $1.2 million was proposed.

The Assistant Secretary of Labor for OSHA, Dr. David Michaels, expressed his concern over the impact of incentive programs upon accurate injury and illness recordings in a speech to the United Steelworkers. He said "Some companies have incentive programs that work both sides by discouraging workers from reporting injuries while offering management huge bonuses for keeping their injury reports low. We've seen companies whose policies seem to work like this: if a worker is injured, management finds a safety rule to hold up and say that the worker has broken the rule, not paying attention or not working safely. This pretext is used then to fire the worker and intimidate other workers from reporting injuries or hazards."

On March 12, 2012, then Deputy Assistant Secretary of Labor Richard Fairfax issued a memorandum to OSHA Regional Administrators and other staff on this topic. The document opened with a reference to Section 11(c) of the OSH ACT which prohibits discrimination against an employee reporting an injury or illness. It notes that the potential for unlawful discrimination against an employee may increase when management bonuses are linked to lower reported injury rates. This document goes on to point out that reporting an injury is considered to be a "protected activity under the OSH Act and does not allow disciplinary action regardless of fault."

Wage and Hour Tips: Wage and Hour Update

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

The Government Accountability Office (GAO) issued a report, authored by Gayle Cinquegrani, on January 27, 2014, stating the Labor Department's Wage and Hour Division (WHD) should develop a methodical strategy for developing guidance to explain the Fair Labor Standards Act. The report, "Fair Labor Standards Act: The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance," is posted on the GAO website.

There are several different areas discussed in the report that I believe might be of interest to employers. Thus, I will discuss some of the items that I believe could be helpful to employers to ensure they are attempting to comply with the FLSA and thereby limit their liabilities under the Act.

The report states that, because Wage and Hour does not have a systematic approach for identifying areas of confusion about the FLSA or assessing the guidance it has published, they may not be providing the guidance that employers and workers need. It is also recommended that the Wage and Hour Division develop a systematic approach for identifying areas of confusion regarding the requirements of the FLSA.

Another area of the report stated that it is not clear whether a recent surge in FLSA litigation is related to insufficient guidance from the Wage and Hour Division. It also added, "A clearer picture of the needs of employers and workers would allow the agency to more efficiently design and target its compliance assistance efforts, which may, in turn, result in fewer FLSA violations."

During recent years, there have been "substantial increases" in the number of civil lawsuits filed in federal district court alleging violations of the Fair Labor Standards Act, the report pointed out. Since 1991, the number of FLSA lawsuits filed has increased by over 500 percent, with a total of 8,148 FLSA lawsuits filed in fiscal year 2012, the report said. Approximately 57 percent of the FLSA lawsuits were filed against employers in four industries: accommodations and food service,

manufacturing, construction, and other services such as laundry services, domestic work and nail salons. The accommodations and food service industry—which includes hotels, restaurants and bars—led the way, accounting for 23 percent of all FLSA lawsuits filed by workers, the report said.

Federal courts in most states have experienced increases in the number of FLSA lawsuits filed and the percentage of total civil lawsuits that were FLSA cases, but large increases were concentrated in a few states, particularly Florida and New York. Federal judges in those states stated that the concentration of FLSA litigation could be associated with the large number of restaurant and service industry jobs there. In an attempt to determine the reason for the increase, GAO interviewed lawyers who specialize in wage and hour cases, judges, academics and officials from organizations representing workers and employers. It said the interviewees "frequently cited increased awareness about FLSA cases and activity on the part of plaintiffs' attorneys as a significant contributing factor" to the increase in litigation. In addition, the GAO said, some interviewees said "financial incentives, combined with the fairly straightforward nature of many FLSA cases, made attorneys receptive to taking these cases," and that in some states, specifically Florida, plaintiffs' lawyers advertise heavily to attract wage and hour claimants.

Moreover, the report stated that the recession could have increased FLSA litigation, because "workers who have been laid off face less risk when filing FLSA lawsuits against former employers than workers who are still employed and may fear retaliation." Furthermore, the report said, "during difficult economic times, employers may be more likely to violate FLSA requirements in an effort to reduce costs, possibly resulting in more FLSA litigation." Lawyers interviewed by the GAO said more FLSA guidance from the WHD would be helpful, particularly guidance on determining whether specific workers are exempt from overtime pay and other requirements.

In developing its enforcement plans, the report said, the WHD uses historical enforcement data to study trends in FLSA complaints and investigation outcomes in particular areas and it considers data from industry groups, advocacy organizations and academia. In planning its enforcement efforts, WHD targets industries it determines have a high likelihood of FLSA violations, the report said. According to the report, the WHD focuses its investigations on industries "where workers may be particularly vulnerable," such as those where workers are unlikely to complain about violations or where business models such as franchising or subcontracting splinter the employment relationship.

For many years, in an effort to encourage compliance with the FLSA, the WHD provides "compliance assistance," the report noted. This assistance can take the form of training for employers and workers, online tools and fact sheets that explain the law and regulations and informal guidance provided over the telephone, the GAO said.

The GAO recommended that the WHD develop a systematic approach for identifying areas of confusion about FLSA requirements and improving the guidance it provides in those areas. This approach could include compiling and analyzing data on requests for guidance on FLSA issues and gathering and using input from FLSA stakeholders through an advisory panel or other means. In its response, the WHD agreed with the recommendation and stated that it is in the process of developing systems to further analyze trends in communications from stakeholders that it will use when developing or revising guidance. The WHD added, "The overarching purpose of WHD's guidance efforts is to increase compliance with the FLSA."

The report included some Wage and Hour data for fiscal year 2012, which shows they conducted investigations or conciliations in response to approximately 20,000 FLSA complaints and concluded approximately 7,000 targeted FLSA investigations. Approximately ninety-five (95) percent of the FLSA lawsuits filed alleged overtime violations, and thirty-two (32) percent alleged minimum wage violations. Almost thirty (30) percent of the FLSA lawsuits alleged that workers were forced to work "off-the-clock" so records would not indicate they should be paid for that time, and sixteen (16) percent alleged workers were misclassified as being exempt from FLSA protections.

In view of the information included in the report, I continue to encourage employers to review their pay

practices in order to limit any liabilities related to non-compliance with the FLSA. If I can be of assistance, please contact me.

2014 Upcoming Events

EFFECTIVE SUPERVISOR®

Huntsville – April 2, 2014
U.S. Space & Rocket Center

Montgomery – April 23, 2014
Hampton Inn & Suites, EastChase

Decatur – May 15, 2014
Turner-Surles Community Resource Center

Birmingham – September 25, 2014
Rosewood Hall, SoHo Square

Auburn – October 21, 2014
The Hotel at Auburn University and
Dixon Conference Center

Huntsville – October 23, 2014
U.S. Space & Rocket Center

2014 Client Summit

Date:	November 18, 2014
Time:	7:30 a.m. – 4:30 p.m.
Location:	Rosewood Hall, SoHo Square Homewood, AL 35209
Registration Fee:	Complimentary
Registration Cutoff Date:	November 13, 2014

Registration information for the Client Summit will be provided at a later date.

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

Did You Know…?

…that the EEOC is attempting to renew its failed lawsuit over background checks? *EEOC v. Freeman* (4th Cir. Jan. 29, 2014). Summary judgment was granted for the employer on August 9, 2013, on the basis that the EEOC failed to identify a "specific employment practice" in how the company used criminal and credit histories when making employment decisions. Furthermore, the court had ruled that the EEOC's expert witness reports were unreliable. In asking the Court of Appeals to reverse summary judgment, the EEOC said that the requirement of a "specific employment practice" is not mandated under Title VII when there is a claim of discriminatory impact. Rather, the EEOC asserts that Title VII only requires a "particular employment practice" which allegedly causes the disparate impact.

…that several unions have complained they have been "mistreated" under the Affordable Care Act? On January 27, the Laborers International Union and UNITE HERE sent a letter to Senate Majority Leader Harry Reid and House Minority Leader Nancy Pelosi stating that they have received "virtually no assistance" regarding regulatory assistance for multi-employer health plans. According to the letter, "Any representations from the administration that it has addressed our concerns or problems is false. If the administration honestly thinks that these proposed rules are responsive to our concerns, they were not listening or they simply do not care." Unions have been pushing the White House to permit unions to offer their multi-employer health plans on the open marketplaces (exchanges).

…that AOL, Inc. announced, due to Affordable Care Act costs, it was reducing its contribution to employees' 401(k) plan? According to AOL, "Obamacare is an additional $7.1 million expense for us as a company. We have to decide whether to pass that expense to employees or cut other benefits." Recently, United Parcel Service, which is the nation's fourth largest private sector employer, announced it was discontinuing health care coverage to exempt employee spouses who can get it through their employer, because of ACA costs. Previously, IBM also announced a reduction in its contributions to employees' 401(k) plans, although it did not cite the ACA as a basis for that reduction.

…that the NLRB ruled a company's handbook prohibiting the dissemination of confidential information violated employee rights under the National Labor Relations Act? The policy included the prohibition of "conversations regarding prices, service, problems, or other information specifically about one vendor or customer to another. Any employee who compromises information may be subject to disciplinary action or possible dismissal. In addition, the gossip or dissemination of confidential information within the company . . . will subject the responsible employee to disciplinary action or possible termination." The ALJ ruled and the NLRB agreed with the decision that the confidentiality requirement in general was permitted, but the rule was overly broad "because it might reasonably deter employees from engaging in legally protected activity such as discussing the terms and conditions of their employment or raising complaints about their working conditions." In essence, the company appropriately prohibited the discussion and dissemination of the information to non-employees, but violated the Act by prohibiting "gossip or dissemination of confidential information within the company."

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