LEHR MIDDLEBROOKS & VREELAND, P.C.

Employment Law Bulletin

MAY 2014
VOLUME 22, ISSUE 5

Your Workplace Is Our Work®

Inside this issue:

Pregnancy, Pay, Motherhood and Leave
PAGE 1

NLRB Urgently Pursuing Pro-Labor Initiatives
PAGE 2

Supervisors – Team Leaders - Team Coordinators: Exempt from Overtime?
PAGE 2

NLRB Tips: The NLRB Looks to End Restrictions on Employee Use of Email at Work
PAGE 3

EEO Tips: Some Employers Still Stumble Over the Anti-Discrimination Laws for Handling Pregnancies
PAGE 5

OSHA Tips: OSHA and Recent Interpretation Letters
PAGE 8

Wage and Hour Tips: DOL to Change Exemption Regulations
PAGE 8

Did You Know…?
PAGE 11

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

The Effective Supervisor

Birmingham..... September 25, 2014
Auburn ..... October 21, 2014
Huntsville ..... October 23, 2014

Pregnancy, Pay, Motherhood and Leave

Regulatory agencies, courts, advocacy groups and state legislatures are increasingly focusing on pay and leave issues affecting pregnant employees and working mothers. For example, citing U.S. Labor Department statistics, the National Women's Law Center estimates that 19.2% of all working mothers with children younger than age three work at jobs that pay no more than $10.10 per hour, compared to 13.9% of all employees. Approximately 34.8% of those mothers whose pay is less than $10.10 per hour have an annual income below the poverty line, compared to 13.5% of all working mothers and 6.7% of all employees. Furthermore, 53% of all low wage earning mothers are single mothers, compared to 29% of all working mothers in all wage categories.

According to the United States Department of Labor, 22.5% of all low paid working mothers are African-American, and 27% are Hispanic. Only 50.7% of lower paid single mothers work full-time hours, compared to 79.5% of all employees and 70.6% of all working mothers regardless of their wages.

As an outcome of the challenges faced by low wage single mothers, cases are pushing the boundaries of leave requirements under federal law, and states are enacting laws to expand the leave rights of working mothers. For example, the Women's Economic Security Act (WESA) was signed into law on May 11 in Minnesota. The Minnesota law will require employers to provide reasonable accommodation for pregnant employees. Under federal law, reasonable accommodation has not been required under the Pregnancy Discrimination Act (unless an employer does so for other non-occupational injuries or illnesses), nor under the Americans with Disabilities Act (unless a separate disabling condition is caused or exacerbated by the pregnancy, *e.g.*, gestational diabetes). The law also requires a certification of compliance for those who are state contractors, to show that they are paying equal wages, regardless of gender.

On April 24, in the case of *Reed v. Jefferson Parish Sch. Bd.* (E.D. La.), the court ruled that an employee who could not return to work after a six month leave of absence for pregnancy-related reasons was entitled to a continued leave of absence as a reasonable accommodation under the Americans with Disabilities Act. The court determined that the employee's inability to return to work after her leave was due to her medical condition and, therefore, the employer could not simply terminate her for absenteeism. Rather, the employer needed to evaluate whether it could accommodate her by extending the leave of absence.

An employee unsuccessfully argued that another employer should accommodate her concerns over a third pregnancy by providing reasonable accommodation in the form of a shift change. *McCarty v. City of Eagan* (D. Minn., April 28, 2014). Brea McCarty requested a shift change because, due to the anticipated birth of her third child, her childcare costs would rise significantly. In rejecting McCarty's argument, the court stated that, "Neither the fact of pregnancy itself nor the impending increase in daycare costs constitutes a pregnancy-related condition within the meaning of the ADA. . . . McCarty's reason for requesting a shift change was a pregnancy-related financial concern – not medical complications related to her pregnancy. Although the increased financial costs of an additional child are substantial and undeniable, McCarty's additional financial hardships do not require accommodation under the ADA."

The challenges that working mothers face at all income levels, particularly single mothers and particularly those at the lower income levels, will result in continued litigation to extend protection under the Americans with Disabilities Act and Pregnancy Discrimination Act. Furthermore, although we do not expect federal legislation to address this in the private sector, we anticipate that more states will pass laws focusing on pregnancy and the needs of working mothers. The challenges facing single mothers, particularly in the lower paying sectors, will be addressed through litigation and legislation if private sector employers do not.

NLRB Urgently Pursuing Pro-Labor Initiatives

May has been a busy month for the NLRB in its efforts to help unions increase their membership numbers. Let's examine some of those initiatives:

1. The temporary help industry is our largest private sector employer. Currently, temporary employees are only eligible to unionize at their co-employer's location if their temporary employer and co-employer agree to it. The NLRB on May 12 invited comment about whether this rule should be changed, so that in joint employer situations, the proposed bargaining unit of employer (the temporary service, for example) would be sufficient for those employees to decide whether to unionize.

2. On May 12, the NLRB invited the submission of briefs on whether scholarship athletes at private universities are considered employees as defined under the National Labor Relations Act. This evolved from the April 25, 2014, vote by Northwestern University football players on whether to unionize. The ballots have been impounded pending the NLRB's review of whether those players are "employees" as defined under the National Labor Relations Act.

3. On May 1, the NLRB invited public comment on whether it should change a 2007 decision which upholds an employer's right to prohibit employee use of company email for non-work-related reasons, such as union organizing. The NLRB is asking whether it should reconsider its conclusion "that employees do not have a statutory right to use their employer's email systems (or other electronic communications systems) for [union organizing] purposes?" (See Frank Rox's comprehensive analysis in this issue of the ELB).

Organized labor spent hundreds of millions of dollars of its members' money to try to change federal labor laws to be easier to unionize (remember the Employee Free Choice Act?). Having failed miserably on its legislative initiative, labor has found a more-than-willing ally in the National Labor Relations Board to pursue changes to NLRB precedent which would enhance union organizing opportunities. We expect the NLRB to change the ground rules, particularly when adopting the "quickie" election timelines.

Supervisors – Team Leaders – Team Coordinators: Exempt from Overtime?

Earlier this month, the Sixth Circuit Court of Appeals allowed a jury trial on whether or not front-line supervisors had sufficient managerial authority to qualify for the executive exemption to the minimum wage and overtime laws. (*Bacon v. Eaton Corp.,* May 1, 2014). The Court's decision means that a lawsuit that the Company

thought had been dismissed in their favor would proceed to a jury.

In order for an employee to be exempt as an executive, Department of Labor regulations require that four tests must be met. First, the salary must be at least $455 per week. Second, the individual must manage individuals in an identifiable department or division. Third, the supervisor must regularly direct at least two other full-time employees. Fourth, the supervisor must have the authority to hire or fire employees; or, if the supervisor cannot hire and fire, the supervisor must have the authority to suggest an employee be hired, fired or disciplined, and the company must give those suggestions great weight. In this case, it was the fourth element that caused the Company's case to fail.

The degree to which a supervisor's recommendations are given "great weight," according to DOL, will depend upon the frequency of the recommendations and the frequency upon which those who receive the recommendations rely on them. In this case, the Court said that if the Company cannot show that the supervisors were involved in hiring and firing, they could still be exempt "by demonstrating that Plaintiffs were instrumental in other employment status changes such as reassignments or changes in benefits or pay." In deciding that whether the supervisors met the fourth prong was an open question to be decided by a jury, the Court noted that these front line supervisors' authority was limited to evaluating probationary employees after the probation period ended and the employees were hired (in other words, not influencing the Company's decision to retain the probationary employees). Beyond that, the supervisors were not involved in interviewing prospective employees, their recommendations for discipline were routinely overlooked, and they largely implemented directions from their supervisors. At least one of the supervisors was told by Human Resources that his input on a hiring decision was unnecessary and simply evidence of the supervisor's favoritism.

In a number of organizations, a supervisor's hiring and firing authority or influence has been diminished. Rather, supervisors are more directly involved in training and allocating the work. We encourage employers, particularly those in manufacturing, to analyze whether their supervisors classified as exempt truly meet the four-prong test for exempt status as described in this article. A misclassification of supervisors may result in up to three years of back pay liability for those supervisors, multiplied by two as liquidated damages. The risk of being wrong is significant.

NLRB Tips: The NLRB Looks to End Restrictions on Employee Use of Email at Work

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 March 2014 LMV Employment Law Bulletin, we predicted that the NLRB would be "trolling for fact patterns that lend [themselves] to allow[ing] employees blanket access to employers' e-mail systems to engage in Section 7 activity."

Well, our prediction has come true and it did not take long. In *Purple Communications Inc.*, JD-75-13 (2013), an ALJ applied *Register-Guard*, 351 NLRB 1110 (2007), *enfd. denied in part*, 571 F.3d 53 (D.C. Cir. 2009), and found that Purple Communications' policy that restricted employee use of email systems for anything "other than business purposes" did not violate the law.

The ALJ rejected the General Counsel's argument that *Register-Guard* should be overruled because of the increased importance of email as a means of employee communication. The ALJ found that the GC contentions, if meritorious, would not be his, but the Board's decision.

The *Register-Guard* Decision

In 2008, the Bush Board ruled that employers could legitimately prohibit their workers from using the office email system to spread information about union activities.

In a 3-2 decision, the Board declared that the employer did not violate the NLRA by establishing a rule against the use of computer resources for "non-job-related solicitations." The majority conceded that employees had been permitted to send and read a variety of personal,

non-work-related emails but had never permitted emails to solicit support for a group or organization.

In dissent, members Wilma Liebman and Dennis Wash argued that because the Company gave its employees access to the email system for "regular and routine" use, it should not have banned non-job-related solicitations.

The dissent opinion in *Register-Guard* is now poised to become the majority opinion of the Obama NLRB. Based upon the Board's solicitation of *amicus* briefs, the new rules could turn out even broader than what the dissenters in *Register-Guard* ever envisioned. Former GC and board member Ronald Meisburg has stated that "it is hard to imagine that the Board would seek these briefs and ask all these specific questions if they didn't at least intend to substantially reshape the holding in *Register-Guard*, if not outright overrule it."

The Notice and Invitation to File Briefs

Noting that employees currently have no statutory right to use their Employer's email system for Section 7 purposes, the Board posed five questions to parties to consider in making *amicus* submissions to the NLRB:

1. Should the Board reconsider its conclusion in *Register-Guard* that employees do not have a statutory right to use their employer's email system (or other electronic communications systems) for Section 7 purposes?

2. If the Board overrules *Register-Guard,* what standard(s) of employee access to the employer's electronic communications systems should be established? What restrictions, if any, may an employer place on such access, and what factors are relevant to such restrictions?

3. In deciding the above questions, to what extent and how should the impact on the employer of employees' use of an employer's electronic communications technology affect the issue?

4. Do employee personal electronic devices (e.g., phones, tablets), social media accounts, and/or personal email accounts affect the proper balance to be struck between employers' rights and employees' Section 7 rights to communicate about work-related matters? If so, how?

5. Identify any other technological issues concerning email or other electronic communications systems that the Board should consider in answering the foregoing questions, including any relevant changes that may have occurred in electronic communications technology since *Register-Guard* was decided. How should these affect the Board's decision?

If the Board decides this case in the predicted fashion, expect Register-Guard to be overruled, and replaced by new guidelines. In all probability, the new rules will soon require that employers make their own email systems available to employees, during their non-work time, to assist unions in organizing their own employees. Admittedly, it is not an optimistic outlook for employers.

NLRB Invites Briefs on Joint Employer Rules – New Standard Likely

In *TLI, Inc.* 271 NLRB 798 (1984), a panel appointed by President Ronald Reagan reversed an ALJ, who found that *Crown Zellarbach* was a joint employer of the drivers leased to it by the charged party, *TLI.* Now, the current Board intends to overrule that decision and adopt new standards, which, we, predict, will be designed to make it easier to find joint employer status between staffing companies and their clients.

The Old Standard under *TLI*

The standard for determining joint employer status under *TLI,* as enunciated in a Third Circuit Court decision issued in 1982, is as follows:

> Where two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for purposes of the Act.

The Reagan panel, citing *Laerco Transportation,* 269 NLRB 324 (1984), went further. The Board also required a showing be made that the employer meaningfully affects matters relating to the employment relationship

such as hiring, firing, discipline, supervision and direction of work.

Applying the articulated standard to the facts in *TLI,* the Reagan appointed majority found that the lessee, Crown, was not a joint employer with the staffing agency, *TLI.*

The Test Vehicle for Changing the Standard

Citing the standards enunciated in *TLI, a* Regional Director in California directed an election only among employees of a staffing agency (doing business as Leadpoint Business Services) that provided recycling service workers to Browning-Ferris Industries' subsidiary, BFI. The Union had contended that BFI was a joint employer with the approximately 240 workers provided by Leadpoint under its labor services agreement. Because of the decision not finding a joint employer relationship, the Union argued that the Director has prevented workers from bargaining with the employer (BFI) that really determines their terms and conditions of employment.

The Obama Board has now granted review of the Director's decision, and has invited parties to address the following questions:

1. Under the Board's current joint-employer standard, [citations omitted], is Leadpoint Business Services the sole employer of the petitioned-for employees.

2. Should the Board adhere to its existing joint-employer standard or adopt a new standard? What considerations should influence the Board's decision in this regard?

3. If the Board adopts a new standard for determining joint-employer status, what should that standard be? If it involves the application of a multifactor test, what factors should be examined? What should be the basis or rationale for such a standard?

Implications for Employers

It is unlikely, as stated above, that the Obama Board is looking to maintain the status quo or narrow the standards for finding a joint employer relationship. To the contrary, consistent with their agenda (which the Board denies exists), the NLRB is looking to cast a wider net over a larger group of employers.

The result of lowering the standard for finding joint employer status will be significant. For example, contracting employers who use workers from a staffing agency can be held liable for the unfair labor practices of the staffing agency (the co-employer). In addition, the contracting employer/client could play a part in the bargaining process, thereby opening it up to unreasonable and intrusive information requests by the union.

It is difficult to accept the Board's denials of an agenda as believable, given that the agency is now considering modifying a precedent that has existed for over 30 years.

Briefs are due to the Board by June 26, 2014. Stayed tuned as events unfold on this development.

EEO Tips: Some Employers Still Stumble Over the Anti-Discrimination Laws for Handling Pregnancies

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.

According to the *Pew Research Center: Social and Demographic Trends* (Nov. 2012), the U.S. birth rate (i.e., the annual number of births per 1000 women between the ages of 15 to 44) "dipped in 2011 to [to only 64.0 per 1000], the lowest ever recorded." The decline was 8% from 2007 to 2010 alone.

In similar fashion, the number of EEOC charges alleging pregnancy discrimination has been on a steady decline over the last four years as shown by the following table:

TABLE OF PREGNANCY DISCRIMINATION CHARGES FY 2010 Thru FY 2013				
	FY 2010	FY 2011	FY 2012	FY 2013
Receipts	4,029	3,983	3,745	3,541
Resolutions	4,130	4,590	4,225	3,580
No Cause	2,484	2,822	2,698	2,154
	60.1%	61.5%	63.9%	60.2%
Reasonable Cause	180	204	177	179
	4.4%	4.4%	4.2%	5.0%
Merit Resolutions	955	1,059	907	848
	23.1%	23.1%	21.5%	23.7%
Monetary Benefits (Millions)	$14.7	$13.9	$14.3	$17.0

Overall, the table shows that the number of pregnancy charges declined by approximately 12.6% between Fiscal Years 2010 and 2013. However, this tells only part of the story. The monetary awards over the same period *increased* by 15.7%, from $14.7 million to $17.0 million. Thus, in FY 2013, the average amount of monetary benefits obtained from pregnancy cases by the EEOC in FY 2013 amounted to approximately $20,047 per case. By almost any measure from an employer's standpoint, that would seem to be a significant amount to pay for a violation of the PDA.

Given our societal and cultural advancements since the 1950s and the declining birthrate, why is it that many employers still treat pregnancy as a major inconvenience, or are perceived as doing such? It is understandable that production and work flow in some instances may be slightly affected. But many women feel that it is often a matter of bald discrimination or pure prejudice by immediate supervisors in handling the situation. For example, Joan C. Williams, UC Hastings Foundation Chair Director, Center for Worklife Law, in her written remarks to the Equal Employment Opportunity Commission on the subject of pregnancy discrimination in July 2012, recounted the remarks of a supervisor in the case of *Velez v. Novartis* (S.D. N.Y. 2007) who reportedly said that he preferred not to hire young women because "*first comes love, then comes marriage, then comes flex time and a baby carriage."*

Fortunately, most employers are better informed. However, the matter of pregnancy leave can become a very complicated issue. Currently, one of the major problems is whether pregnancy or pregnancy-related medical problems should be treated as a "temporary disability," entitling the employee to minimal accommodations or as a "disability" entitling the employee to the same level of reasonable accommodations as under the Americans with Disabilities Act. Actually, the EEOC regulations have provided some guidance on that issue. Under federal law, namely the Pregnancy Discrimination Act, ordinary pregnancy is not an impairment. Nonetheless, an applicant or employee who has a pregnancy-related impairment that substantially limits a major life activity (including a major bodily function) is an individual with a disability and is protected by the ADA, even if the resulting limitation is not permanent or long-term. *See* 29 C.F.R. Section 1630 app. Section 1630.2(h) (2012).

Recently, in the case of *Tapia v. Artistree, Inc.*, C.D. Calif. (April 10, 2014), the employer (and the Court) had to grapple with the issue of what was the proper level of accommodation for an employee with a pregnancy-related temporary disability. The employee, Azucena Tapia, alleged in her lawsuit that she informed her supervisor that her doctor had imposed some pregnancy-related lifting restrictions on her work activity and also suggested that she might need bathroom breaks every few hours due to her pregnancy. Instead of trying to work out any other accommodation, the employer immediately placed her on full leave with pay for the remainder of her pregnancy which at that point was seven months. She contended that instead of such precipitous action, the employer should have engaged in an interactive process as required by California State Law to try to find some reasonable alternatives that would have allowed her to continue working until sometime closer to her due date. For example, some accommodation that would allow her to work in another position that that didn't require the heavy lifting function or one that relieved her of lifting

altogether in her present position if possible to do so without undue hardship on the employer.

According to Tapia, after having given birth to her child on August 4, 2012, by Caesarean section, she was told on August 7th that she must return to work immediately. However, at that time, she was still in the hospital. Subsequently on August 20, 2012, she was terminated for abandonment of her job.

In its defense, the employer asserted that the granting of paid leave in itself was a reasonable accommodation and that no further accommodation or interaction on the subject was necessary in order to comply with the California state law requirements on the subject. The employer filed a motion to dismiss.

In denying in part the employer's motion to dismiss, the court held that "paid leave is not *per se* always a reasonable accommodation, especially when the employee is subject to dismissal when the paid leave expires." Thus, the court found that the employer had not engaged in the interactive process required by state law of trying to find a reasonable accommodation suitable to both parties.

In the *Artistree* case, the court was interpreting California law. However, the holding in the case is useful for interpreting federal law on the subject in the form of the Pregnancy Discrimination Act. It is arguable that employers still have the last word in determining the level of accommodation they will provide under the PDA since the employer determines whether or not there is a business justification for the procedures it follows and whether it might create an undue hardship under the ADA. In a nutshell, the general principles of pregnancy discrimination can be summarized as follows:

- The PDA prohibits employers and other covered entities from discriminating against applicants, employees, and former employees on the basis of pregnancy, childbirth, or related medical conditions with respect to all aspects of employment. This has been interpreted by courts to include lactation discrimination, and, effectively accommodation of lactation (which is separately required under the Affordable Care Act).

- The PDA prohibits discrimination based on current pregnancy, past pregnancy, potential or intended pregnancy, or medical conditions related to pregnancy or childbirth.

- The PDA requires employers to treat pregnancy, childbirth, and related medical conditions in the same manner that it treats other temporary medical conditions that limit an employee's ability to work.

- Specifically as to light duty, the PDA requires that, unless there is a nondiscriminatory reason or business justification for doing otherwise, an employer must provide pregnant workers with the same access to light duty assignments that it provides to non-pregnant workers with other temporary medical conditions that similarly limit their ability to work. In connection with this requirement, the employer should consider modified tasks, alternative assignments, disability leaves, leaves without pay or other such measures. *See generally* 29 C.F.R. Section 1604, App'x.

- The PDA also prohibits harassment and retaliation.

In terms of best practices, it is noteworthy that Wal-Mart has recently adopted a new policy entitled: "Walmart's Accommodation in Employment Policy and Pregnancy/Disability Discrimination." The new policy specifically states that *"temporary disabilities caused by pregnancy are covered under its disability policy and that associates with temporary disabilities caused by pregnancy are eligible for reasonable accommodations."*

Several women's groups have indicated that the new policy does not go far enough, but it appears to be headed in the right direction.

OSHA Tips: OSHA and Recent Interpretation Letters

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 useful tool for employers and others wishing to understand OSHA's view regarding compliance with its standards are the agency's published interpretation letters responding to questions from the public. The agency recently issued two such letters worth discussion here.

In one letter, the General Secretary of the Ironworkers Union asked whether OSHA recognizes objects other than reinforcing steel as impalement hazards, and, if so, what standards might apply. The Agency answered in the affirmative and pointed out that in addition to standard 1926.701(b) addressing reinforcing steel, standard 1926.25(a) specifies nails and other debris. Further, it pointed out that Section 5(a)(1) of the OSH Act, known as the general duty clause, may also be used to address other impalement hazards.

In response to another letter—this time, from an employment attorney—OSHA addressed questions about recording employee accidents. The attorney described an incident where an employee experienced an injury while walking up approximately eighty feet of steps while performing his assigned job duties. The employee's knee suddenly "popped" and he could not place any weight on it. The employee was subsequently diagnosed by a physician as having a sprained left knee. The question posed was whether the described accident in this case constituted an identifiable event and/or exposure for the purposes of the agency's recordkeeping regulation even if there was no slip, trip, or fall involved before or after the knee popped.

OSHA answered as follows, "Yes, walking up the stairs in the work environment is an identifiable event under OSHA's recordkeeping system. Normal body movements in the work environment such as walking, bending down, or sneezing are events which trigger the presumption of work relatedness if they are discernable cause of the injury."

In a second question, the requestor asked, hypothetically, should a physician determine that the injury is not a new case, would the employer then be relieved from determining whether the case should be recorded. Out-lawyering the lawyer, OSHA responded that the attorney's hypothetical made no mention of the employee's previous knee problems, so therefore the injury must have been a new case.

In a third question, the requestor asked if the initial physician's treatment determined or documented that the knee pain was due to a work-related injury, would the second physician's opinion be considered "contemporaneous" for recordkeeping purposes? OSHA responded that the concept of "contemporaneous" conflicting medical opinions is not applicable to decisions regarding work-relatedness. The response notes that the employer has the ultimate responsibility to determine work-relatedness.

Wage and Hour Tips: DOL to Change Exemption Regulations

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

In March, President Obama signed a Presidential Memorandum requiring the Department of Labor to take steps to revise some regulations relating to the Fair Labor Standards Act. The specific regulations are those that define the exemptions from both minimum wage and overtime for executives, administrative, professional and outside sales employees. Those regulations were last revised in 2004 and had not been revised previously since 1975. While many of the articles regarding this announcement indicated this is something that would be done immediately, that is not the case. In order to make

changes in the regulations, the Department must go through the rule-making process. It is expected that the Department will prepare and publish some proposed changes for public comment. Typically, the comment period will be 60-90 days. Once the comments are received and reviewed, they will issue a final regulation which will most likely not be effective for another 90 days.

I saw a quote from the Secretary of Labor that it would be months before they issued the proposed changes. During the process of issuing the 2004 regulations, Wage and Hour received over 75,000 written comments that required their review, which took several months. I would expect them to receive at least this number of comments regarding any proposed changes at this time. In view of the steps required to change a regulation, I would anticipate it to be at least a year before any new regulations are effective.

While it is not known what changes may be proposed, there are several items that I expect to be considered:

- As you know, the current minimum salary requirement for these exemptions is $455 per week. According to a White House official, if the salary had kept up with inflation for the past 10 years, that minimum would now be over $550 per week. I saw another article stating that if the 1975 minimum salary of $155 per week was adjusted for inflation, it would be $970 per week. While the amount they will propose is anybody's guess, I expect there will be a substantial increase in the minimum salary requirement. I recently saw a quote from a respected attorney using the figure of $50,000-$52,000 per year.

- Another area that I expect to be addressed is the definition of "primary duty of management" as used in the regulations, which allows an employee to be considered as managing while performing routine (such as running a register, putting up stock, etc.) duties. Some states have statutes that require the management time to be more than 50% of the employee's work time and the employee is not considered managing while performing the routine duties. Substantial changes to the regulations in this area would not surprise me.

- The current regulations relating to the professional exemption allow for exemption to apply to certain employees such as chefs, cooks, nursery school teachers, funeral directors and others, even though those occupations do not require degrees in a field of science or learning. I have seen comments that they expect the revised regulations may require an academic degree in order to qualify for the exemption. This exemption was substantially broadened in the 2004 regulations, so I believe they will most likely make some changes to limit the applicability of the exemption.

From my experience in seeing Wage and Hour revise regulations in the past, I expect there will be many changes in the final regulations and, while they may not take effect for several months, employers need to be on the alert to ensure they make any necessary changes when the new regulations are put in place.

Recently, the President released his budget requests for the fiscal year beginning October 1, 2014. This budget includes a request for an additional 300 employees for Wage and Hour. This would bring the total authorized employees to slightly over 2,100. Over 230 of these new positions will be dedicated to investigations of business models that are considered at high risk of wage and hour violations. An additional 35 positions will be dedicated to investigate worker misclassification such as classifying employees as independent contractors rather than as employees. While it is not known what Congress will approve in the budget, employers need to be aware that Wage and Hour is going to continue its stepped-up enforcement with all of its resources.

On April 28, the Senate approved the nomination of Dr. David Weil to be Wage and Hour Administrator. This is the first time Wage and Hour has had an administrator during the current administration. Dr. Weil has previously worked as a professor at Harvard and most recently as a Distinguished Faculty Scholar at Boston University School of Management. In his testimony before the Senate, he stated that a "fundamental role of Wage and Hour Administrator is making sure that the laws entrusted to the agency are administered efficiently, effectively, fairly, transparently and rigorously." In a report he helped to prepare, he listed several priority industries, including

eating and drinking establishments, hotels/motels, construction, janitorial companies, and health care service providers, among others. The report also recommended the assessment of liquidated damages and civil money penalties where employers were found to have violated the FLSA.

On April 30, the Senate considered a bill to increase the minimum wage in the near future. However, the bill failed to receive enough votes to overcome a filibuster. The bill that is being pushed would increase the minimum wage $.95 per hour each year for the next three years with the minimum wage to reach $10.10 per hour. The bill would also make substantial changes to the tip credit provisions in the law, as well as insert a requirement that the minimum wage be adjusted for inflation each year as is done is several states. While it appears the bill is dead at this time, there are no guarantees that it will not come up again during this session of Congress.

The amount of Fair Labor Standards Act litigation continues to be very high, not only through actions brought by the Department of Labor, but also through actions brought by private individuals and their attorneys. I recently saw a case brought by firefighters at the City of Los Angeles, California, regarding offsetting excess overtime paid in one workweek against overtime due in another workweek. The Court of Appeals stated that this was not permissible, upholding the Wage and Hour position that each workweek stands alone regarding overtime requirements.

I also saw where a McDonald's franchise in New York City has recently been required to pay over $500,000 at its seven locations to employees because they had allowed employees to work off the clock, by not permitting the employees to punch in when they were supposed to start their shift; requiring the employee carry out trash and clean up the restaurants after they had punched out; requiring the employees to close out their cash drawers after they had punched out; and, issues related to the furnishing of uniforms. These areas formerly were very common problems in the fast food industry, but I had thought these were no longer issues in the industry. Apparently I was incorrect in my thinking.

In many investigations, Wage and Hour now not only seeks back wages, but they also seek liquidated damages in an amount equal to the amount of back wages that are owed. For example if they determine that an employer owes $10,000 in back wages, they will also request another $10,000 in liquidated damages. Damages collected in this manner are distributed to the employees that are due the back wages. They have been using this procedure for several years when they are involved in litigation, but only recently have they instituted this in administrative investigations that involve repeated or willful violations of the FLSA. Last month, I attended a meeting with Wage and Hour where they raised the issue and requested the employer not only to pay the back wages but also pay an equal amount of liquidated damages. That fact that, even in administratively-settled matters, employers can be requested to pay twice the amount of back wages makes it even more imperative that you do everything you can to comply with the Fair Labor Standards Act.

If you have additional questions, do not hesitate to give me a call.

2014 Upcoming Events

EFFECTIVE SUPERVISOR®

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 on May 13, 2014, a judge approved a collective action involving 3,000 unpaid interns who allege that they were improperly classified under Wage and Hour law? *Grant v. Warner Music Grp. Corp.* The interns alleged that they should have been classified as employees, because they performed the same duties as actual employees. They also stated that they displaced regular employees and worked under the same conditions as those employees. The interns did not receive college credit for their work and argued that they were owed minimum wage and overtime.

…that a non-compete agreement was unenforceable against an employee who signed it after he was hired? *Socko v. Mid-Atl. Sys. of CPA, Inc.* (Pa. Super. Ct., May 13, 2014). The court stated that for a non-compete agreement to be enforceable for a current employee, there must be additional consideration provided for that employee to sign the agreement. The employer argued that Socko was notified of the need to sign the agreement prior to the time he was offered employment. However, the court stated that the agreement must be executed before the employee is hired, in which case there is adequate consideration – the employee's employment. Whether or not a non-compete requires new employment or even additional compensation varies from state to state, and can be changed judicially or legislatively. It's worth it to have an attorney review any non-compete agreement that you would hope to enforce to prevent these valuable agreements from being tossed out on a technicality.

…that a three-year gap between protected activity and an adverse decision was timely for a retaliation claim? *Rao v. Tex. Parks & Wildlife Dep't.* (S.D. Tex., May 8, 2014). Employee John Rao applied for a promotion, which was denied. He asked a member of the promotion committee why he was not selected. A member of that committee stated that, "you didn't do anything wrong, but you filed that Complaint," in reference to a three-year old EEOC charge Rao filed. Rao's prior charge alleged that he was retaliated against for assisting an employee who filed a discrimination charge. In permitting the case to go to trial, the court ruled that a decision-maker's comment about the prior charge as a reason for not receiving the promotion was direct evidence of retaliation. The court stated that there is nothing else the decision-maker could have meant by commenting about the prior charge, "so it seems perfectly clear that the 'complaint' referred to Rao's EEOC complaint."

…that the NLRB on May 9 concluded that a hospital violated the National Labor Relations Act by failing to provide a union with information about the hospital's staffing patterns and safety surveys? (*Wash. Hosp. Ctr. Corp.*) The hospital conducted a survey on patient safety through the Agency for Healthcare Research and Quality. The National Nurses United Union, on behalf of the hospital's nurses that it represented, requested a copy of the survey. The hospital refused, stating that it was confidential. The union had offered to sign a confidentiality agreement, but the hospital still refused to provide the survey results. The Board ruled that the employer was required to provide the union with this information. Furthermore, the employer was required to provide "the current staffing matrix, tracking tools, and data currently used to follow how many patients are on each unit per shift and how many nurses and patient care technicians work on each unit on each shift, acuity measuring tools used by [the hospital], and a spreadsheet showing when and where the patient care technicians have been utilized as sitters during the past 12 months."

…that a terminated employee who alleged that the employer engaged in a "Ponzi scheme" was entitled to reinstatement and back pay, according to the NLRB?

(*The Fund for the Public Interest* (May 13, 2014)). The NLRB upheld a decision that the former employee was terminated illegally for engaging in protected activity. After the employee's termination, he commented publicly that he no longer believed in his employer's mission and that the employer's business was a "Ponzi scheme." The employer argued that such comments disqualified the employee from reinstatement. In disagreeing with the employer, the NLRB ruled that unless the employer could show that the employee's statements were a threat to the employer's operations or made the employee unfit to do his job, the reinstatement had to occur. It seems to us that such publicly disparaging comments about an employer support a basis for termination and a reason for refusing to reinstate a terminated employee.

…that an employee did not violate the Computer Fraud and Abuse Act by deleting her emails prior to resignation? *Instant Tech. LLC v. DeFazio* (N.D. Ill., May 2, 2014). Damage to an employer's electronic files under the CFAA is illegal. However, the court stated that the employer did not suffer a "loss" under the law when the employee deleted her emails. The employer was still able to gain access to the emails from the employee's trash folder and the employer's exchange server. The employer attempted to recover its expert consultant fees due to the employee's email deletion, but the court stated that those fees were not a "loss" under the CFAA because the expert was not retained for the purpose of determining the financial impact of the loss or assessing the extent to which data was lost.

LEHR MIDDLEBROOKS & VREELAND, P.C.

Richard I. Lehr 205.323.9260
rlehr@lehrmiddlebrooks.com

David J. Middlebrooks 205.323.9262
dmiddlebrooks@lehrmiddlebrooks.com

Albert L. Vreeland, II 205.323.9266
avreeland@lehrmiddlebrooks.com

Michael L. Thompson 205.323.9278
mthompson@lehrmiddlebrooks.com

Whitney R. Brown 205.323.9274
wbrown@lehrmiddlebrooks.com

Jamie M. Brabston 205.323.8219
jbrabston@lehrmiddlebrooks.com

Michael G. Green II 205.323.9277
mgreen@lehrmiddlebrooks.com

Lyndel L. Erwin 205.323.9272
(Wage and Hour and Government Contracts Consultant)
lerwin@lehrmiddlebrooks.com

Jerome C. Rose 205.323.9267
(EEO Consultant)
jrose@lehrmiddlebrooks.com

Frank F. Rox, Jr. 205.323.8217
(NLRB Consultant)
frox@lehrmiddlebrooks.com

John E. Hall 205.226.7129
(OSHA Consultant)
jhall@lehrmiddlebrooks.com