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In a 5-4 Decision, U.S. Supreme Court Holds that the HHS Regulations Imposing Contraceptive Mandate Violates the Religious Freedom Restoration Act, As Applied to Closely Held Corporations

The United States Supreme Court held today, in a 5-4 decision, that employee health plans of for-profit companies do not have to cover all forms of contraception as mandated by the Patient Protection and Affordable Care Act (ACA), if the owners of the company have religious objections. In writing for the majority, Justice Samuel Alito said that the government failed to demonstrate that the contraceptive mandate was "the least restrictive means of guaranteeing free access to birth control." The Court rejected the argument of the Department of Health and Human Services (HHS) that the companies could not sue because they were for-profit rather than non-profit corporations, and further rejected the argument that the owners could not sue because the regulations applied only to companies rather than individual owners. In fact, the Court recognized that such a finding would "leave merchants with a difficult choice: give up the right to seek judicial protection of their religious liberty or forgo the benefits of operating as corporations."

In 2011, the HHS issued a mandate that required most health insurance policies to provide coverage ensuring that women had the right to all twenty contraceptive medications that had been approved by the Food and Drug Administration (FDA). Four of these twenty FDA-approved contraceptive methods could have the effect of preventing a fertilized egg from implanting in a woman's womb. The owners of three closely held, for-profit corporations (Hobby Lobby, Mardel, and Conestoga Wood Specialties) all demonstrated their sincere Christian beliefs that life begins at conception. These corporations originally brought separate lawsuits against HHS and other federal agencies under the Religious Freedom Restoration Act of 1993 (RFRA) and the Free Exercise Clause of the First Amendment, seeking to enjoin the application of the contraceptive mandate with regard to the four objectionable contraceptives. They argued that it would violate their religious freedom to be forced to provide access to contraceptive drugs that could operate to prevent a fertilized egg from implanting in a woman's womb after conception, which they believed would amount to facilitating abortions.

The Tenth Circuit Court of Appeals ruled in favor of Hobby Lobby and Mardel, and granted an injunction against the enforcement of the contraception mandate. The government appealed this decision. Conestoga Wood appealed a Third Circuit Court of Appeals decision that denied their request for such an injunction.

The Supreme Court held that the "RFRA applies to regulations that govern the activities of closely held for-profit corporations," and that "Congress designed the statute to provide very broad protection for religious liberty." The Court further recognized that "[p]rotecting the free-exercise rights of closely held corporations thus protects the religious liberty of the humans who own and control them."

The Court held that "the regulations that impose [HHS's contraceptive mandate] violate the RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest." Since the mandate would require the owners to "engage in conduct that seriously violates their sincere religious belief that life begins at conception….or face severe economic consequences," the Court held that the Government had failed to establish that the mandate was the least restrictive means of furthering its interest in guaranteeing cost-free access to the four contraceptive methods that were at issue.

Employers should note that the Court specifically held that this decision "should not be understood to hold that all insurance-coverage mandates, e.g., vaccinations or blood transfusions, must necessarily fail if they conflict with an employer's religious beliefs. Nor does it provide a shield for employers who might cloak illegal discrimination as a religious practice."

NLRB Affirms Employee Disrespectful and Abusive Behavior

In several recent decisions, the National Labor Relations Board has indicated how far it will go to protect insubordinate and intolerant behavior with only a tangential relationship to traditional notions of concerted activities for mutual aid and protections of workers.

In *Starbucks Corp.*, a barista involved in union organizing activity was terminated when he got into a loud argument with a manager of another store during non-working time and in front of other customers. The Board held that the termination violated the National Labor Relations Act, but the Second Circuit Court of Appeals declined to enforce the Board's order, instead remanding the case to the Board to evaluate the appropriate standard of review when a retail employee uses obscenities when customers are present. So, on June 16, 2014, the Board followed the Second Circuit's request, and ended up with the same conclusion: despite his obscenity-laden outburst, the employee should not have been terminated because his termination was motivated in part because of his union activity. The Board's determination was at least somewhat plausible in this case because the termination occurred about three weeks after the event, and the terminating manager wrote that the barista would not be eligible for rehire due to his support of the Union.

More surprising was the NLRB's affirmation that a car dealer illegally discharged a salesman for making concerted complaints about working conditions, even though the salesman couched his "concerted complaints" in an obscene and profane outburst against the dealer owner (the salesman called the owner a "f***ing crook," a "f***ing mother f***[er]," and an "a**hole," who was hated by his employees). *See Plaza Auto Ctr., Inc.*, (NLRB 2014).

Dissenting from the majority opinion that the conduct of the salesman was protected, Member Harry Johnson acknowledged employees have "some leeway for impulsive behavior" when they are engaged in NLRA-protected activity. However, Johnson said "the standard is 'some leeway,' not substantial leeway, not maximum leeway, and certainly not unrestrained freedom." Member Johnson stated the:

> [the majority decision would allow employees] to curse, denigrate and defy their manager with impunity during the course of otherwise protected activity, provided that they do so in front of a relatively small audience, can point to

some provocation, and do not make overt physical threats.

The Board has similarly attacked handbook provisions that suggest that employees report to work with positive attitudes and show respect to customers, co-workers, and managers.

- In *First Transit, Inc.* (NLRB 2014), the Board found that rules against stealing and loitering are lawful restrictions that don't interfere with their Section 7 rights, but a rule against showing discourtesy and an "inappropriate attitude" is too broad to pass muster under the NLRA. This ruling came despite the fact that the policy contained a savings clause that affirms the right of employees to decide whether they want to have union representation. The Board stressed that the savings language was too narrow as it was limited to union organizing and not prominently displayed in the handbook.

- In *Hoot Wing, LLC* (NLRB ALJ 2014), an ALJ found that handbook rules that barred employees from discussing tips with co-workers and customers and prohibited insubordination to manager and disrespect to employees could be reasonably construed by employees to prohibit NLRA-protected activity. For good measure, the ALJ struck down the mandatory arbitration policy under a *D.R. Horton* rationale.

In a trend long predicted, the Obama Board has weakened the requirement of "concert" before finding a protected activity insulates an employee from adverse action.

- In *Dignity Health* (NLRB 2014), the NLRB found that a hospital worker was discharged in violation of the Act when he asked co-worker to support his defense against an accusation that he threatened a fellow worker. Contrary to the Board, the ALJ had found that the discharged employee had not engaged in any concerted activity required to invoke the Act's protection, but that the contact with other employees for support was for "purely personal" reasons to confirm his own good character.

- In consolidated cases before an ALJ, *Lou's Transportation, Inc.*, and *TKMS Inc.*, the ALJ found that complaining about dangerous working conditions while talking on a CB radio isn't grounds for dismissal, but cursing a customer was not protected speech. Thus, one driver was ordered reinstated while the other driver's discharge was legal. In neither case was the element of "concert" obvious and apparent. In *Lou's,* the ALJ found that the discharge of one driver was illegal and that the driver's behavior was protected under the Act. However, in *TKMS*, the act of cursing a customer established a defense showing that the employer would have discharged that driver for cursing the customer regardless of his protected activity at a safety meeting.

As illustrated in these cases, the Board has **lost touch with the realities of the workplace**. The NLRB will apparently bend over backwards to protect employees from prospective or actual discipline or discharge if threatening and abusive behavior in any way touches—or could touch—on a protected topic. It remains to be seen if this stance withstands scrutiny by the courts.

Lessons Learned

As these and other cases make clear, the Board intends to stretch logic and common sense in an effort to expand its own relevancy in the workplace. The Board apparently could care less about workplace civility, or the impact that negative attitudes have on customers – the lifeblood of employers.

Given the fact that case results are mixed – with violations found in some cases and some policies found lawful, the following observations may be made:

1. The Board will continue to scrutinize handbook policies that contain broad language concerning employee conduct and will find them unlawful if workers reasonably could construe them as tending to chill their Section 7 rights.

2. Employee involvement in drafting conduct policies will not insulate employers from an adverse finding by the Board if the policies are considered overly broad.

3. Make sure your conduct guidelines are drafted in context and not just sweeping generalizations.

4. Savings clauses need to be proximate to conduct guidelines in order to be effective. Thus, you may have to repeat savings language throughout a handbook where it deals with employee conduct.

5. If an employee is talking about wages, hours or other work condition concerns, this labor board will find a way to find any adverse employment action taken against that employee illegal, even if that employee is engaged in outrageous and inappropriate conduct that appears not concerted in nature.

6. This is not an intuitive area of law to navigate. Strong consideration should be given to consultation with your counsel when drafting or updating handbooks or when deciding to discipline employees for misconduct (if protected, concerted activity is involved).

Employers' Mutual "No Raiding" Costs $324.5 Million

The big dogs of Silicon Valley – Apple, Google, Intel and Adobe – had an agreement not to recruit each others' employees. After all, "can't we just all get along?" However, that agreement resulted in a class action covering 64,000 technical employees, which included software and hardware engineers, programmers and digital artists.

The employees' complaint alleged a violation of anti-trust law. Their theory was that the agreement not to hire each others' employees suppressed pay. They sought $3 billion in damages. The companies agreed on May 22 to a settlement of $324.5 million, which will be distributed among the 64,000 affected employees. The evidence, based largely on emails and documentation, included threats from the late Apple CEO Steve Jobs to the co-founder of Google that if Google hired anyone away from Apple, Apple would treat it as "war."

There are communities where employers have an implicit understanding that they will not try to recruit each others' employees. Just note that such behavior may violate anti-trust laws and that violations of those laws can lead to treble damages.

Unknown Hostile Work Environment Not Evidence of Hostile Work Environment

How do courts evaluate the situation where an employee raises allegations of workplace harassment, and as evidence to support that, the employee relies on other workplace behavior the employee was unaware of at the time the employee felt harassed? In the case of *Adams v. Austal, USA, LLC*, the Court on June 17, 2014, ruled that a plaintiff may not rely on harassment that occurred toward other employees and which the plaintiff was unaware of during his employment in order to prove the plaintiff personally experienced conduct that was objectively severe and pervasive. (11th Cir.). The Court stated, "A reasonable person in the plaintiff's position is not one who knows what the plaintiff learned only after her employment ended or what discovery later revealed."

This case involved racial harassment claims filed by 13 black employees. Six of those employees relied on "me, too" evidence which they were unaware of during their employment to prove their case. The district court granted summary judgment regarding those claims, stating that such evidence was insufficient to establish that employees experienced a hostile work environment. After all, if they didn't know about the behavior directed toward others, how could that have contributed to the hostility?

There are circumstances where "me, too" evidence is admissible. For example, in the *Austal* case, plaintiffs could submit evidence of secondhand experiences they had of harassing behavior as long as they had those secondhand experiences during employment. So, female employees were permitted to rely in part on being shown—during their employment—photographs of racial obscenities from the men's restroom. Another example is if the employer asserts as a defense that it had in place an effective anti-harassment policy, then "me, too" evidence can be used to rebut the employer's position.

Supreme Court Disallows Public Employee Union Dues Requirement

On June 30, 2014, in *Harris v. Quinn*, the Supreme Court in a 5-4 decision ruled against public unions by finding that certain health care workers cannot be compelled to pay union dues because it violates their First Amendment rights to free speech and freedom of association. In 2003, Illinois passed a law designating certain in-home health care workers as public employees of the State of Illinois; however, these workers do not enjoy many of the protections and benefits of other Illinois public employees. In fact, the only major right enjoyed by these workers under the Illinois law is collective bargaining. In other words, many considered these workers to be "public employees" in name only.

These workers elected the Service Employees International Union to serve as their exclusive representative for collective bargaining. The Union's agreement with the State required that all workers, including non-union members, pay a "fair share" of union dues, commonly referred to as "fair-share fees."

In 2010, an anti-union advocacy group sued, accusing the State of Illinois and the Union of conspiring to impermissibly label private care health providers as public employees so that the Union could collect union fees, including fair-share fees. The Supreme Court agreed and held that the Union could not force such employees to pay fair-share fees; however, the Court expressly did not prohibit the use of fair-share fees by unions as a general practice. Instead, the Court limited the precedential scope of its ruling, effectively saying that employees who are public employees in name only (not "full-fledged state employees") cannot be compelled to pay fair-share fees.

Although a limited ruling, the Court's decision in *Harris v. Quinn* opinion should be considered a setback to public unions and to the President's pro-labor/pro-union agenda.

NLRB Tips: Troubling Trends at the NLRB

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Board Looks to Expand Off-Duty Access to Employer's Facilities

In *American Baptist Homes of the West,* the Board unanimously found that the employer interfered with employee rights by restricting their off-duty access to the care home where they worked. (NLRB 2014). The Employer refused to admit two off-duty employees who sought to assist their union in presenting grievances to management.

However, the panel split on whether the written policy on access violated the NLRA. The employer maintained and enforced an access rule that allowed unlimited supervisor discretion to grant or deny employees after-hours access to the interior of the home.

Majority Finds that Policy Unlawful

Citing *Tri-County Medical Center,* 222 NLRB 1089 (1976), the Board majority stated that "a rule restricting off-duty access is valid only if it (1) limits access solely with respect to the interior of the facility and other working areas, (2) is clearly disseminated to all employees, and (3) applies to off-duty employees seeking access to the plant and not just to those employees engaging in union activity."

In dissent, Member Miscimarra said a rule would not violate the NLRA "even if the rule contains an exception permitting access if employees obtain the prior approval of a supervisor or if access is warranted by other unspecified circumstances."

Such an exception reasonably contemplates legitimate business reasons, which cannot be enumerated in advance, that predictably would warrant allowing off-duty employees on the premises.

NLRB Anticipates Expansion of *Alan Ritchey* Decision, 359 NLRB No. 40 (2012) – Duty to Bargain Prior to Discipline

The General Counsel has publicly stated that there is much to be "fleshed out" in *Alan Ritchey,* in which he, along with Chairman Pearce and Block, found an employer was required to give a newly elected union notice and opportunity to bargain before taking major disciplinary action against union-represented employees.

The Board panel in *Ritchey* allowed for an exception to the rule, finding that bargaining would not be required in the "exigent circumstances" of an emergency or other condition that made bargaining unworkable.

The General Counsel said that at least two cases are pending before the Board where he believes that the employers' arguments were undermined by their delaying action for a day or two between instances of employee misconduct and their taking the questioned disciplinary action. Thus, the employers, in the GC view, had "plenty of time to engage the union" in bargaining before discipline was issued.

ALJ Clarifies Meaning of *Ritchey*

In an apparent partial setback for the Board, an ALJ found that an ambulance service company did not, under *Ritchey,* have an obligation to include an arbitration provision under its interim grievance procedure. Judge Mary Cracraft, a former republican board member under the Reagan administration, stated that:

> I find that the two-step process agreed upon by the parties constitutes an interim grievance procedure in compliance with *Alan Ritchey.* Thus, [Medic Ambulance] did not violate [the Act] by failure to provide notice and an opportunity to engage in pre-imposition bargaining about the discharge of 12 employees.

It will be interesting to see if the current Board adopts Judge Cracraft's decision.

EEO Tips: The Supreme Court Should Clarify to What Extent EEOC Conciliation Efforts Are Reviewable

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.

For many years, employment law practitioners have struggled with the question of whether employers must accept whatever the EEOC determines to be the limits of conciliation, or whether the EEOC's self-determined failure of conciliation should be subject to review by the courts before the EEOC can successfully maintain an action against an employer.

Consistently throughout the years, the EEOC has maintained that conciliation is a part of the administrative process in resolving a charge of discrimination and that, like other steps within that administrative process (for example, investigations and reasonable cause determinations), the agency has unreviewable discretion as to the effort it may to expend on that phase of the administrative process. See, for example, the case of *EEOC v. Mach Mining, LLC (7th Cir. 12/20/13*). In this case, the court agreed with the EEOC's position and in substance held, "Title VII's language, the lack of a workable standard for applying a good-faith conciliation defense, the statute's structure and purpose, and relevant circuit case law all compel the conclusion that the EEOC's conciliation efforts are not subject to judicial review." The court also advised that the use of an "implied affirmative defense" based upon the quality of EEOC's conciliation effort would not be available because it directly contravenes the statutory prohibition that "Nothing said or done during and as a part of such informal endeavors may be made public by the Commission….or used as evidence in a subsequent proceeding without the written consent of the persons concerned." (emphasis added).

The Seventh Circuit joined the Sixth Circuit which, in the case of *EEOC v. Keco Industries* (6th Cir. 1984), held,

"The nature and extent of the EEOC investigation is beyond the scope of judicial review and the EEOC need not separately conciliate individual class members when pursuing a class based sexual discrimination claim."

However, most of the other circuits who have addressed the issue, as briefly discussed below, have held that the EEOC's conciliation efforts are reviewable, at least to an extent.

Many employers who question the EEOC's conciliation efforts have taken the position that the EEOC's conciliation was totally inadequate or in bad faith. Some have charged that the EEOC was "highhanded" and made only a "take-it or leave-it offer" during conciliation, thus forcing the employer to accede to a large monetary settlement or defend itself in a costly lawsuit. Recently, there have been a number of significant cases where employers have successfully challenged the EEOC's conciliation efforts after suit had been filed. For example, in *EEOC v. CRST Van Expedited, Inc*. (N.D. Iowa 2012), the court found that the EEOC had failed to include a significant number of affected class members in its pre-suit determination and conciliation efforts resulting in dismissal of the class and a sizeable award of court costs and attorney fees to the Defendant employer. Also, in the case of *EEOC v. La Rana Hawaii, LLC.* (D. Haw. 2012), the court took decisive action to correct conciliation inadequacies.

The statute which gives rise to this controversy is not crystal clear as to the scope of the EEOC's conciliation efforts necessary to comply with the law. At least, it does not specifically address the effort the EEOC must expend to conciliate except that the Commission must engage in it as a part of the administrative processing of a charge of discrimination. The statute itself, found at 42 U.S.C. Sec. 2000e-5(b), *et seq*., reads in pertinent part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer…has engaged in an unlawful employment practice the Commission shall serve a notice of the charge…and shall make an investigation thereof. ...If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission…or used as evidence in a subsequent proceeding without the written consent of the persons concerned. (emphasis added).

Section 2000e-5(f)(1) of the statute further provides:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government… (emphasis added).

As suggested above, the "quality" of conciliation by the EEOC is not directly addressed in the foregoing statutes. Nonetheless, in numerous cases, the courts that have interpreted these statutes have found an "implied affirmative defense" that the EEOC has not fulfilled "all conditions precedent" to filing suit if the EEOC has not conciliated in "good faith." Accordingly, they found that conciliating in good faith is a jurisdictional requirement. Meaning that if this requirement had not been met, the Court had no jurisdiction to hear the dispute. This was the position, for example, in the case of *EEOC v. Pierce Packing Co*. (9th Cir. 1982).

On the other hand, there are a number of circuits that have interpreted the statute differently. They have held that conciliation is, indeed, a condition precedent but not jurisdictional. For example, the Fifth Circuit in the case of *EEOC v. Argo Distribution, LLC* (5th Cir., 2009), found that the EEOC's failure to conciliate could result in penalties, such as an order for the EEOC to resume negotiation, but did not divest the Court of jurisdiction over the dispute.

What constitutes good faith conciliation or bad faith conciliation? In various cases, the courts have defined these as follows:

- "When the EEOC demands a large settlement based on nothing more than vague, conclusory allegations, the employer is trapped in an "evidentiary vacuum, and can neither investigate the claims nor reasonably assess the EEOC's settlement offer." Defendant's argument in *EEOC v. La Rana Hawaii* (D. Haw. 2012).

- "A good faith attempt at conciliation requires "some justification for the amount of damages sought, potential size of the class, general temporal scope to the allegations, and the potential number of individuals." *EEOC v. Evans Fruit Co.* (E.D. Wash. 2012).

- "EEOC's presentment of a settlement figure without providing information related to the class of female employees or the calculation of damages…was a failure to engage in a 'sincere and reasonable' effort to conciliate." *EEOC v. First Midwest Bank* (N.D. Ill. 1998).

- "The EEOC does not have to identify by name each potential class member under Section 706 or conciliate each individual claim of alleged discrimination to meet the good-faith conciliation standard." *EEOC v Bass Pro Outdoor World, LLC* (S.D. Tex. 2014).

- "To show a good-faith attempt at conciliation, the EEOC must: (i) outline to the employer the reasonable cause for its belief that Title VII has been violated; (ii) offer an opportunity for voluntary compliance; and (iii) respond in a reasonable and flexible manner to the reasonable attitudes of the employer." *EEOC v. Klinger Electric* (5th Cir. 1981).

The foregoing is but a small sample of how the courts have defined good faith or bad faith conciliation. Unfortunately, there is no universal definition. As with certain other determinations that must be made in applying federal anti-discrimination laws, the determination of good faith or bad faith conciliation probably will have to be made on a case-by-case basis. Nonetheless, it would be helpful to practitioners if the Supreme Court laid out a set of guiding principles that could be used in all jurisdictions and generally in all circumstances. That may not be likely, but it would be very helpful if the Supreme Court at least answered the following questions:

1. If the EEOC does not conciliate in good faith, does it deprive the court of subject matter jurisdiction, resulting in dismissal?

2. Are the EEOC's conciliation efforts subject to judicial review, and, if so, to what extent?

The Seventh Circuit's Decision in the case of *EEOC v. Mach Mining* is currently before the Court for review. Since this decision is at variance with most of the other circuits on the limits of judicial review, this could be an ideal case for the court to consider answering the foregoing questions.

OSHA Tips: OSHA Emphasis on Amputation Hazards

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.

In 1997, OSHA launched a program directed at preventing amputation injuries. It included mechanical power presses, press brakes, saws, shears, slitters and slicers. The program was set out in Program Directive CPL 2-1.35. It allowed the agency to focus additional attention on jobs with amputation risks. OSHA has a number of standards requiring machine guarding, work practices and training designed to protect against amputation hazards. The general machine guarding standard at 29 C.F.R. §1910.212 requires one or more methods of guarding to protect the operator and other employees in the machine area from hazards such as point of operation, ingoing nip points, rotating parts, etc. This standard, along with §1910.213 for woodworking machinery and §1910.217 which addresses mechanical power presses, covers the equipment to which the national emphasis program applies. Failure to comply with these standards has resulted in many amputations.

Unguarded power transmission equipment, i.e., belts and pulleys, chains and sprockets, etc. present significant amputation hazards. The OSHA standard governing these is found in the standard at §1910.219.

Another significant exposure to amputation hazards arises from the unexpected startup of equipment during repair and maintenance work. The hazard can be eliminated by ensuring that the equipment is safely de-energized during such activities.

Amputation injuries are costly. OSHA penalties alone for violating requirements can be substantial. Associated violations will be cited as serious and frequently will also be alleged to be willful. This means that the resultant amount can be as much as $70,000.

OSHA recently posted on the agency's website notice of a citation for a violation of its machine guarding requirements. A repeat violation was charged following the crushing of a worker's hand in a 150 ton mechanical power press. The worker had been removing a metal piece from the power press with the necessary safeguards missing. No barrier guard was installed and lockout/tagout procedures were not used. Unfortunately, accidents similar to this are not uncommon. OSHA notes that failure to provide proper machine guarding and follow lockout/tagout procedures are two of the most frequently violated OSHA standards.

OSHA's general requirement for guarding is set out in standard 1910.212(a)(1). It states as follows: One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are – barrier guards, two-hand tripping devices, and electronic safety devices, etc.

OSHA's home page currently describes the following recent worker fatalities attributable to these types of violations:

- 4/8/2014: Colorado: Worker struck and killed by a power saw;
- 3/5/2014: Michigan: Worker crushed by an injection molding machine while inspecting parts;
- 4/24/2014: Iowa: Worker killed when shirt sleeve was caught in a conveyor belt roller;
- 3/12/2014: Kentucky: Worker killed in a press when trying to retrieve a dropped hammer;
- 3/27/2014: Georgia: Worker died when entrapped by sweep auger in grain storage silo.

Wage and Hour Tips: The Motor Carrier Exemption Under the Fair Labor Standards Act

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

First, I will give you some information I recently saw regarding the continued rise in the number of Wage and Hour suits filed in the federal courts. According to the Federal Judicial Center, there were 8,126 suits filed during the 12 months ending March 31, 2014. This is an almost 5% increase over the 7,764 in the previous 12 months and marks the 7th straight year of increases. Of these, 112 were filed in Alabama during the period ending March 31, 2014. While I have not seen numbers for suits filed in state courts, I expect they have also increased. Also, in DOL's posting regarding proposed regulatory changes, it indicated it expects to publish the recommended changes in the "white collar" exemptions in November 2014.

As reported previously, Wage and Hour has a new Administrator who was recently confirmed by the Senate. In an interview, he stated that Wage and Hour is responsible for 7.3 million workplaces and 135 million workers. He said that he intends to continue strategic enforcement in certain targeted industries. In recent years, those targeted industries included agriculture, day

care, restaurants, garment manufacturing, guard services, health care, hotels and motels, janitorial and temporary help. He also stated that one-third of the $250 million in back wages collected in FY 2013 was in those industries. If you operate in one of the above industries, the chances of your having a visit from Wage and Hour are much greater than if you operate in a different industry.

On June 12, 2014, Wage and Hour published some proposed regulations relating to employees working on government contracts that will implement the President's proposal to increase their minimum wage to $10.10 per hour. A copy of the proposal can be found on the Wage and Hour website. Interested parties may submit comments during the next 30 days. The new regulations are scheduled to be published by October 1 and will apply to all new contracts beginning January 1, 2015. Once the final regulations are published, I will provide additional information.

I have discussed the application of Motor Carrier exemption previously, but I continue to see where employers are facing litigation regarding the proper application of the exemption. As there have been some changes in the criteria for the overtime exemption, I thought I should provide an updated overview to the requirements. Section 13(b)(1) of the FLSA provides an overtime exemption for employees who are within the authority of the Secretary of Transportation to establish qualifications and maximum hours of service pursuant to Section 204 of the Motor Carrier Act of 1935, except those employees covered by the small vehicle exception described below. 29 U.S.C. §213(b)(1).

Thus, the 13(b)(1) overtime exemption applies to employees who are:

1. Employed by a motor carrier or motor private carrier,

2. Drivers, driver's helpers, loaders, or mechanics whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce, and

3. Not covered by the small vehicle exception.

The driver, driver's helper, loader, or mechanic's duties must include the performance of safety-affecting activities on a motor vehicle used in transportation on public highways in interstate or foreign commerce. This includes transporting goods that are on an interstate journey, even though the employee many not actually cross a state line. Further, safety affecting employees who have not made an actual interstate trip may still meet the duties requirement of the exemption if the employee could, in the regular course of employment, reasonably have been expected to make an interstate journey or could have worked on the motor vehicle in such a way as to be safety-affecting. An employee can also be exempt for a four-month period beginning with the date they could have been called upon to, or actually did, engage in the carrier's interstate activities.

In 2007, Congress inserted a Small Vehicle Exception to the application of the overtime exemption, which severely limits the exemption, especially for small delivery vehicles such as vans and SUVs. This provision covers employees whose work, in whole or in part, is that of a driver, driver's helper, loader or mechanic affecting the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways in interstate or foreign commerce, except vehicles**:**

(a) Designed or used to transport more than 8 passengers, including the driver, for compensation; or

(b) Designed or used to transport more than 15 passengers, including the driver, and not used to transport passengers for compensation; or

(c) Used in transporting hazardous material, requiring placarding under regulations prescribed by the Secretary of Transportation.

Due to the Small Vehicle Exception, the Section 13(b)(1) exemption does not apply to an employee in any workweek the employee performs duties related to the safety of small vehicles, even though the employee's duties may also affect the safety of operation of motor vehicles weighing greater than 10,000 pounds, or other vehicles listed in subsections (a), (b) and (c) above, in the same work week. For example, this means that a mechanic who normally spends his time repairing large

vehicles who also works on vehicles weighing less than 10,000 pounds is not exempt in any week that he works on the small vehicle. When determining whether the vehicle meets the 10,000 pounds requirement a U.S. District Court in Missouri, confirming Wage and Hour's position, recently ruled that if a vehicle is pulling a trailer, you consider the combined weight of both the vehicle and the trailer to apply the exemption.

The Section 13(b)(1) overtime exemption also does not apply to employees not engaged in "safety affecting activities", such as dispatchers, office personnel, those who unload vehicles, or those who load but are not responsible for the proper loading of the vehicle. Only drivers, drivers' helpers, loaders who are responsible for proper loading, and mechanics working directly on motor vehicles that are to be used in transportation of passengers or property in interstate commerce can be exempt from the overtime provisions of the FLSA under Section 13(b)(1). Further, the overtime exemption does not apply to employees of non-carriers such as commercial garages, firms engaged in the business of maintaining and repairing motor vehicles owned and operated by carriers, or firms engaged in the leasing and renting of motor vehicles to carriers.

Employers that operate motor vehicles should carefully review how they are paying drivers, drivers' helpers, loaders and mechanics to be sure they are being paid in compliance with the FLSA. Failure to do so can result in a very large liability. If I can be of assistance, please give me a call.

2014 Upcoming Events

Webinar: Wage and Hour Claims Increase; Are You in Compliance?

When: July 17, 2014
Time: 10:00 a.m. – 11:00 a.m. CDT

Presented by:
Al Vreeland and Lyndel Erwin

HRCI credits will be awarded. You can register for this webinar for $125 per connection site, with no limitation on the number of participants.

To register for this webinar, please visit our website (www.lehrmiddlebrooks.com). Or you can contact Jerri Prosch at jprosch@lehrmiddlebrooks.com or 205.323.9271 for more information.

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 employer use of payroll cards is receiving greater scrutiny, most recently with an Illinois state law limiting such use? The Illinois law amends the state's Wage Payment and Collection Act. It limits fees that employers may impose on employees regarding the use of pay cards and requires employers to offer payment via cash, check, direct deposit, or payroll cards. The theory behind such a statute is that "people shouldn't have to pay to get their pay."

…that law school graduate employment declined for the sixth consecutive year? According to the National Association for Law Placement, 12.9% of 2013 law

graduates did not have jobs nine months later. Also, a record low 64.4% of those graduates with jobs work at jobs that require passing a bar exam. The total number of jobs available to law school graduates rose in 2013 from prior years, but the overall increase in percentage decline of job opportunities was due to a continuing over-supply of law school graduates.

…that the Department of Labor, Wage and Hour Division, proposes to revise the definition of "spouse" to cover same sex marriages? In announcing a proposed rule on June 22, the Department of Labor stated that whether a same sex couple is covered by the FMLA will depend upon the law of the state where the relationship legally occurred. This means that if a same sex couple was married lawfully in one state but work in a state where same sex marriage is prohibited, FMLA benefits would be available to the couple.

…that an employee terminated after returning from FMLA leave for reasons resulting in discipline prior to leave does not have a FMLA interference claim? In the case of *Ross v. Gilhuly* (3rd Cir. 2014), employee Ross was placed on a performance improvement plan before leaving for FMLA-protected reasons. After Ross returned from leave, the employer extended the PIP for an additional 60 days and terminated him for his failure to perform under the PIP. Ross argued that the employer interfered with his FMLA rights. In rejecting this claim, the Court said that, "for an interference claim to be viable, the plaintiff must show that FMLA benefits were actually withheld." Ross's argument was "misdirected," because "Ross does not allege that [the employer] withheld any entitlement guaranteed by FMLA, he fails to state a claim for interference."

…that on June 6, 2014, the IRS, DOL, and HHS issued regulations clarifying that one month is the maximum time period employers can require as a "reasonable and bona fide" new employment orientation prior to the maximum 90-day waiting period under the Affordable Care Act (ACA) beginning to run for covered group health plans? Note that the "orientation period" is only considered to be permissible for new employees who are hired into a benefit-eligible position. Employers may not impose this "orientation period" simply to delay the effective date of coverage.

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