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$185 Million Pregnancy Related Discrimination Award Upheld

A California court upheld a $185 million punitive damages award to a single individual on November 18 in the case of *Juarez v. AutoZone Stores, Inc.* (S.D. Cal.). The $185 million in punitive damages were awarded under California's Fair Employment Housing Act. This award of punitive damages is the highest ever to an individual in any employment discrimination case. The jury also awarded her $393,760 for her past economic loss, $228,960 for her future economic loss and $250,000 in non-economic damages.

Rosario Juarez was an AutoZone manager at a store in the San Diego area. She alleged that her demotion and subsequent termination were due to her sex and pregnancy and in retaliation for alleging sex and pregnancy discrimination.

Juarez was promoted to a store manager in 2004 after she complained about what she considered a glass ceiling at AutoZone. When she announced her pregnancy in 2005, she said that her district manager told her that she could no longer handle the store manager's job and that she should remove herself from that position. When she disagreed with him, she said that he responded by putting her on a performance improvement plan, humiliating her in front of other employees and hovering over her as she performed her job duties. After the birth of her son in May 2005, she was demoted in February 2006. Juarez complained to human resources about the harassment, but she alleges that there was no investigation done at that time and merely a "sham" investigation was done by Auto Zone's legal department after she filed a charge of discrimination with the state agency. Juarez filed suit in early 2008 on these matters. As her lawsuit was progressing, Juarez had a cash register drawer on her watch come up short $400, and she was fired. Juarez alleged—and it appears the jury believed—that the shortage was orchestrated to provide a pretext to fire her. Furthermore, there was evidence that a regional vice president in reference to Juarez and other women as store managers stated, "what are we running here, a boutique? Get rid of those women." In upholding the $185 million award, the court determined that under California law, the treatment of Juarez could be viewed as "committed, authorized and/or ratified" by the corporate legal department who were closely involved in investigations of employee complaints and allegations of harassment. While acknowledging that upholding the punitive damages award presented a "close call," the judge let it stand. Needless to say, this matter will be appealed.

President Obama Takes Executive Action on Immigration Reform

Last Thursday, President Obama announced his long-awaited plan for a series of executive actions on immigration reform. While the exact details and contours of the plan are unclear, at a minimum, the President intends to allow parents of U.S. citizens and lawful permanent residents who have been in the U.S. since January 1, 2010, to request "deferred action" on deportation and to request employment authorization for three years. Affecting between 4-5 million undocumented immigrants, the President stated that this deferred action is only "temporary." The President's plan also intends to: expand the number of persons eligible for the Deferred Action for Childhood Arrivals (DACA) program to young people who came to the U.S. before turning sixteen years old and have been present since January 1, 2010; extend the period of DACA and work authorizations from two years to three years; expand the use of provisional waivers of unlawful presence to include the spouses and children of lawful permanent residents and the sons and daughters of U.S. citizens; modernize, improve, and clarify immigrant and nonimmigrant programs to grow the economy and create jobs; and promote citizenship education and public awareness for lawful permanent residents. *See* http://www.uscis.gov/immigrationaction for additional guidance.

The President, as reflected in the White House's Office of Legal Counsel's Opinion justifying his executive actions (available at http://www.justice.gov/olc/opinions), believes his executive actions are lawful exercises of the executive branch's "prosecutorial discretion" to delay enforcement under Federal Immigration Laws, particularly the Immigration and Nationality Act of 1952, as amended. Although the President claims deferring deportation is "temporary," it does not take a political pundit to forecast that a large portion of these 4-5 million workers are likely here to stay. The U.S. Citizenship and Immigration Services (USCIS) states that it will implement these directives "as soon as possible" and likely within ninety days, although it acknowledges it may take months. It is not currently accepting applications or requests from undocumented immigrants for these programs; however, it plans on rolling out timelines and a framework for doing so in the near future.

Last Friday, Republican Congressional Leaders responded by stating that they "will act" to thwart what they consider unconstitutional executive action. Although rare, courts have ruled that previous Presidential executive actions and orders were unconstitutional. For instance, in 1952, the Supreme Court found that President Truman did not have the authority to take over private steel mills in the face of what he feared would be a crippling Steelworkers strike during the Korean War. While battles between the President and Congress loom, including the potential for litigation and battles over related Congressional funding, ten prominent legal scholars—conservative and liberal—have issued a joint letter that the President's actions are lawful. *See* https://www.scribd.com/doc/247489145/Scholars-Letter-on-Immigration.

The debate and potential litigation likely will take months to reach resolution; however, employers can anticipate the following in 2015:

- Deferred deportations and the creation of temporary work authorizations for the 4-5 million persons who have been in the U.S. for 5 or more years and who either came to the U.S. as children or are the parents of U.S. Citizens and lawful permanent residents (of any age);
- An increase in the number of green cards available to skilled and professional workers, as well as an increase in the employment opportunities for highly skilled workers by streamlining the permanent immigrant visa process, reducing the backlog and increasing the portability of the visas;
- Authorization of employment for spouses of professional workers with H-1B visas who have received approval of their permanent immigrant visas;
- The creation of a temporary immigration status for entrepreneurs who will create jobs in the U.S., and a related green card path for entrepreneurs, inventors, and researchers; and

- Extension of work-related training authorizations for science, technology, engineering, or mathematics (STEM) graduates of U.S. universities.

Of course, the constitutionality of the President's executive actions, or lack thereof, may preclude one or more of these directives from being implemented; however, we should assume that most of these directives will be the controlling law and may affect your workforce in 2015. We will keep you updated on future developments.

Republican Congress: Implications for NLRB, EEOC and DOL

When the 114th Congress convenes in January, the Republican Party will have an even greater majority in the House and enjoy a slight majority in the Senate. Unless Senate Republicans broaden support for their legislative initiatives, we can generally expect that bills passed by Congress will not survive a Presidential veto.

Even though the legislative front may remain stagnant, we expect more substantial oversight of the Equal Employment Opportunity Commission, the National Labor Relations Board and the Wage and Hour Division of the Department of Labor. The next chair of the Senate Committee on Health, Education, Labor and Pensions is likely to be Senator Lamar Alexander (R-Tenn.). In September, Senator Alexander introduced legislation to expand the NLRB from five to six members and to require a four-member panel for a quorum. He has also criticized the agency for what he describes as "advocacy behavior" on behalf of unions. Representative John Kline (R-Minn.) will likely continue as the Chair of the House Education and Work Force Committee. Representative Kline in September stated to the NLRB that its efforts to treat franchisors as "joint employers" was an "unprecedented" expansion of the National Labor Relations Act.

Senate Republicans have also disagreed with Secretary of Labor Thomas Perez's initiatives, particularly concerning wage and hour. Within the next few months, we expect DOL to issue proposed regulations which may substantially curtail employer rights to classify employees as exempt.

The regulatory agencies during the last two years of the Obama Administration will continue to push aggressively the President's agenda. Although Republicans will control both houses of Congress, we do not expect that control to curtail the regulatory initiatives. Pressure may be exerted on the agencies through oversight initiatives and funding, but aggressive agency initiatives will continue.

EEOC Fails First Wellness Plan Litigation Test

The EEOC has filed two lawsuits against employers who use incentives to encourage employees to participate in company wellness programs. On November 3, 2014, in the case of *EEOC v. Honeywell Int'l Inc.* (D. Minn.), the Court denied the EEOC's request to enjoin Honeywell from penalizing those employees who do not participate in wellness programs. One of the factors the Court considers when deciding whether to issue an injunction is the likelihood of the moving party prevailing on the merits. Thus, the denial of the EEOC's request for an injunction at least gives an initial impression from the Court that the EEOC's case is problematic.

Honeywell's wellness program requests employees and spouses to participate in a biometric screening process, which includes drawing blood, testing cholesterol levels, and determining body mass index. Those who do not participate are assessed an additional $500 on their medical plan costs. They may also lose company contributions to their health savings account and can be assessed further costs if they use tobacco products. The EEOC's position is that it is not opposed to wellness programs and testing, but rather to incentives or penalties associated with participation or non-participation. Honeywell's program covers 30,000 employees. Honeywell argued that there is no requirement to participate and employees with healthier lifestyles should not be required to make up the costs of those employees with unhealthy lifestyles.

The Court stated that if it determines that Honeywell's wellness program violates the Americans with Disabilities Act, an appropriate remedy is a refund to those employees who were required to pay the additional costs. However, until it decides the case on the merits, the Court concluded that continuing the wellness program as structured is in the public's best interest. Approximately 77% of company employees participate in the program.

FMLA Expires; But What About the ADA?

The case of *Casteel v. Charter Commc'ns Inc.* (W.D. Wash. Oct. 23, 2014), involved an employee who was unable to return to work after the expiration of FMLA and two 30-day leave extensions.

Charter hired Casteel at its Vancouver, Washington, call center in September 2007. In November 2008, she was diagnosed with fibromyalgia and by June 2009, she had exhausted her FMLA leave benefit period. During July 2009, her diagnosis was changed to cancer and the company was told that the anticipated duration of treatment was six months, but that she could return to work on August 15.

Charter extended leave for a 30-day period after her FMLA expired, and extended it again for another 30 days to September 15 when she was not able to return—as her doctor had predicted—on August 15. On September 14, Casteel provided the company with a doctor's note that said that she was unable to return until February 4, 2010. Charter terminated Casteel on October 7, 2009.

In permitting the case to go to the jury, the Court stated that Charter may have violated the ADA by not discussing with Casteel the extent of any accommodation it could offer Casteel through February 4, 2010. There was no discussion with Casteel about whether an extended leave would cause an undue hardship to Charter, nor did Charter ask to inquire of Casteel's doctor whether there could be an accommodation for Casteel to return to work before February 4.

From our perspective, there was no need to terminate Casteel at the time that she told the employer that she needed further leave. Rather, Charter could have considered Casteel's request and evaluated whether it could keep Casteel's job open for an additional five months. Presuming that it could not, Charter could have told Casteel that it will fill her position but if and when she was able to return to work with or without accommodation, Charter would evaluate at that time what may be available. Unlike returning to work at the conclusion of FMLA, an employer is not required to keep the same job open under the ADA past the FMLA expiration time, if the employer concludes that it would be an undue hardship to do so. A smoother way to handle this situation is to let the employee know that if and when the employee is able to return to work, with or without accommodation, the employer at that time will evaluate what positions are available. Tell the employee that her current position may not be available, but the company will consider what other jobs may be available that fit within the employee's experience and skills. If a job is available but it pays less, under the ADA the employer may still assign the employee to that job and at that rate of pay.

Purchaser Provokes Pregnancy Problem

The purchaser of a restaurant chain rehired most of the predecessor's managers, except it failed to even interview a manager who recently became a mother, which resulted in the lawsuit of *Bennett v. Capitol BC Rests., LLC,* (D. Mass., Oct. 23, 2014). This case has some excellent examples of what employers should not do.

Bennett was a general manager of the Bugaboo Creek Steakhouse, earning an annual salary of $62,500. She notified her supervisors in September 2010 that she was pregnant and, beginning in December 2010, her physician recommended bed rest through her delivery. Her child was born on March 24, 2011, and she received eight weeks of maternity leave.

The restaurants were sold during Bennett's maternity leave. In determining the staffing for the various restaurants, the purchaser did not contact Bennett. Rather, they appointed as the general manager of her restaurant the individual who temporarily replaced her during her leave. When Bennett found out about this and called the employer, the employer told her that because she was on leave they were unable to meet with her and therefore they did not rehire her.

After Bennett filed a pregnancy discrimination charge with the EEOC and Massachusetts Commission Against

Discrimination, the employer then offered Bennett a regional trainer position at a salary of $50,000 ($12,500 less than she had earned as a General Manager) and with responsibilities for traveling. Bennett said that she did not respond to the offer because she did not want to work for a company that had discriminated against her. Normally, an employer's offer of reinstatement operates as an end date to its backpay damages exposure. In this case, the company's offer may not have been sufficient to cut off her back pay damages, because of the substantial difference in the nature and salary of the position compared to the one she held previously.

In concluding that this case may go to trial, the Court stated that "a reasonable fact-finder [jury] could conclude that Bennett was on maternity leave, that she was qualified for the general manager position, that she applied for the position and was rejected, and that the person who was hired was a male with fewer qualifications. She therefore has established a *prima facie* case of discrimination based on pregnancy."

There are two key lessons learned for employers from this case. First, as a general principle, an employee who is on leave is still an employee. When considering staffing needs, including layoffs, evaluate that employee as if he or she were not on leave. Second, if the employer concludes that a mistake was made in terminating or laying off an employee, consider an unconditional offer to the employee to return to a position comparable in pay and responsibilities. An unconditional offer means that the employee is not requested to drop any claim against the employer. Such an offer tends to put pressure on the individual to resolve the claim, and if the individual fails to accept it, the offer may cut off an employer's financial damages and overall risk in the case.

NLRB Tips: Recent Cases Issued by the NLRB

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Remedial Reach Expanded in Successor Area

In *Pressman Cleaners, Inc.*, 361 NLRB No. 57 (Sept. 30, 2014), the Board has once again overruled established precedent in expanding the remedial reach of the Agency. Thus, the price of failing to hire a majority of a predecessor's employees in order to avoid recognizing their union representative has just gone up significantly.

The Board, saying that it was simply returning to its "traditional approach" to remedying unfair labor practices, found that the successor employer engaged in an illegal scheme to avoid its bargaining obligation. In so finding, the Democrat-controlled NLRB overruled *Planned Building Services,* 347 NLRB 670 (2006) and ordered Pressman to 1) recognize and bargain with the union, 2) restore the "status quo" by putting in place the employment terms of its predecessor until it bargained to an agreement or impasse with the union and 3) pay the former employees unlawfully refused employment back pay and benefits under the monetary terms under the predecessor's contract, until such time as a new agreement or impasse was reached by the parties.

The Old Rule under *Planned Building Services (PBS)*

Under *PBS*, the Board held a successor could reduce its liability for illegally failing to hire former employees, by proving in a compliance hearing, that, had it acted legally, it would have bargained in good faith to an agreement or impasse with the union on less generous monetary terms than existed under the predecessor's contract. This effectively reduced any potential back pay award that an employer might owe for illegally failing to hire a majority of the predecessor's employees. The Board, in a unanimous decision, based its remedy in PBS on three basic legal principles:

1. The Board does not have the authority to issue punitive remedies;
2. The Board may not impose substantive contract terms on parties; and
3. The Board may not require a successor employer to adopt the contract terms set forth in its predecessor's contract.

Despite the judicial support that *PBS* has received over the years, the current Obama Board stated that the *PBS* rule was "based upon a misunderstanding of the NLRB's traditional remedy in successorship avoidance cases, inconsistent with other Board precedent and flawed as a matter of policy.

The Bottom Line

If this ruling stands on appeal, the effect is that a wrongdoing successor will no longer be able to escape the full brunt of a back pay award under the predecessor's terms and conditions of employment. As NLRB litigation can take years, the potential liability for employers found guilty of union avoidance could be significant.

The further bad news is that *Pressman's* is undoubtedly the precursor to the NLRB overruling *Spruce Up,* and signals the GC's commitment to finding a new "perfectly clear successor test" which would entrap any successor employer that commits, as many do, to hire a majority of the predecessor's workforce early in the process of taking over the predecessor's operations. (See GC Memo 14-1 – Mandatory Advice Submissions).

The good news is that successor/refusal to hire cases are not very common at the Agency. Whatever the ultimate outcome of this case, this ruling should give employers reason for pause when considering buying organized businesses, and they should proceed cautiously when navigating the successorship playing field as established by the NLRB.

Update on *Noel Canning* Appointment Fiasco

The decision in *Noel Canning* (Obama 2012 recess appointments to the Board ruled unconstitutional by the Circuit Courts) was issued by the Supreme Court on June 26, 2014. The Supreme Court found, in agreement with some of the lower courts, that the appointments in question were unconstitutional. However, this ruling may not slow down the NLRB, as the Agency stands ready, if necessary, to re-examine and re-issue hundreds of board actions taken over the past two years. However, as events unfold in the wake of *Noel Canning*, the Board is struggling with a backlog of over 400 cases that potentially have to be re-issued. The most recent case-handling update is provided below:

Thirty-four appellate court cases raising the validity of Craig Becker's appointment have now proceeded on their merits. The legality of Becker's appointment appears settled.

In 98 appellate cases where *Noel Canning* issues were implicated, 43 had not reached the appellate court appeal stage, and most of those cases have been dismissed by the Board, allowing the current Board to re-consider those cases on the merits.

In 51 cases where the Board decision had reached the appeal level before a circuit court, 48 of the 51 have been remanded to the Board for consideration as of October 31, 2014.

Of 97 cases that have been returned to the Board, the new panels have completed action in 35 of those cases. In all of those cases, the results of the original decision have not changed.

On a different note, there has been considerable, recent political backlash resulting from NLRB's perceived partisan activism. Do not expect Congressional attempts to change the make-up of the Board or curb the ability of the Agency to further organized labor's agenda to gain traction. Even though the Republicans have regained a majority in the Senate and increased its majority in the House, it is likely that President Obama will use his veto authority to nullify any such attempts to reform the NLRB.

EEO Tips: Fewer Charges Were Filed in Fiscal Year 2014 Against Employers Per EEOC Preliminary Report

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.

This month, the EEOC released its preliminary Performance and Accountability Report (PAR) for Fiscal Year 2014, providing statistics about the number of charges it receives, resolves, and those charges that it chooses to turn into Agency-prosecuted litigation. The charges that the EEOC is choosing to litigate itself demonstrate the EEOC's intent to concentrate on certain enforcement priorities which had been set forth in its Strategic Enforcement Plan (SEP) for 2012 through 2016, particularly by targeting cases involving systemic discrimination for investigation and litigation.

As to this item the Performance Accountability Report indicated that in FY 2014 the EEOC's field offices completed work on 260 systemic investigations resulting in 78 settlements and conciliation agreements and recovering approximately $13 million in monetary benefits for affected class members. The EEOC found cause in 118 of these investigations into alleged systemic discrimination.

With respect to litigation priorities, the EEOC filed 133 merits lawsuits (that is, not including subpoena enforcement actions or other administrative actions). The 133 lawsuits included 105 lawsuits involving individual harm, 11 (non-systemic) class suits, and 17 systemic suits. Additionally, the Commission currently has 228 cases currently active (even if filed before FY 2014). Of these, 31 (14%) were non-systemic class cases and 57 (25%) were systemic cases. The 57 systemic cases "represented the highest proportion (i.e. 25%) of systemic lawsuits by the agency since tracking began in FY 2006."

The PAR indicates that the number of charges filed against employers declined in FY 2014. The agency normally receives approximately 200,000 inquiries or contacts and gets about 90,000 charges. However in FY 2014, the EEOC reported that charging parties had filed only 88,778 charges during the year, which is nearly 5,000 fewer charges than the 93,727 charges filed in FY 2013, and over 11,000 charges less than the 99,947 filed in FY 2011, the agency's record year in terms of charges filed. The following table shows the decline in charges filed and processed and summarizes the agency's litigation results during FY 2013 and FY 2014:

EEOC Charges and Litigation Results During Fiscal Years 2013 and 2014		
Items	FY 2013	FY 2014
Total Charges Filed	93,727	88,778
Charges Resolved	97,252	87,442
Monetary Benefits obtained (In millions)	$ 372.1	$ 296.1
Merit Lawsuits Filed	131	133
Merit Lawsuits Resolved	209	136
Monetary Benefits obtained (in millions)	$ 38.6	$ 22.5

Perhaps of critical importance, the table shows that the number of charges resolved in FY 2014 was almost 10,000 less than had been resolved in FY 2013. This of course means that instead of a decrease in the agency's carryover inventory into the next fiscal year, as has been the case in the previous two years, there was an increase of cases to be processed. However, this carryover will be offset somewhat by the decrease of almost 5,000 fewer charges filed in FY 2014.

Recognizing that the number of charges and the processing of those charges was significantly below the level of such items in the past few years, Jenny Yang, the new Chair of the EEOC, offered the following justification for EEOC operations in FY 2014:

"The EEOC's accomplishments are especially noteworthy in light of extraordinary fiscal constraints and operational challenges in FY 2014, including sequestration and the government shutdown. Following two years of significant budget reductions and hiring freezes, these challenges have endangered the hard won, but fragile progress reported in recent PARs [Performance and Accountability Reports] and threatened the agency's ability to meet the demand for the EEOC's services. As an example, the significant reductions in our private sector inventory gained in FY 2011 and FY 2012 could not be sustained due to the decline in staffing and resources."

In our opinion Chair Yang's explanation of the "operational challenges" faced by the EEOC in FY 2014 are valid with respect to administrative operations including the processing of charges. However in our judgment it does not explain the marked decrease in the number of charges filed over the last two years. It may be a small point but the Chair's explanation can only apply to what happens after a charge was filed. The reason why more charges were not filed must be due to some external condition in the economy as a whole. While there is no perfect correlation between the filing of EEOC charges and the national unemployment rate there is certainly an imperfect correlation between the two. For example, in October 2013 the national unemployment rate was 7.2% and EEOC Charges for the preceding year totaled 93,727. By the same token, the national unemployment rate is now approximately 5.8% and EEOC charges filed during the year ending on October 1, 2014 was 88,778, an apparently-related drop in the number of charges filed.

While this is not the place to make a detailed analysis of the relationship between these two items over the last five years or so, it would seem logical that, at the very least, the number of charges alleging some form of discrimination in hiring, for example, would decrease in an era where there has been a significant decrease in the overall unemployment rate. It is arguable that this is what happened during Fiscal Year 2014. Consequently, there may be nothing that the EEOC needs to explain with respect to the decline in the number of charges filed during FY 2014 or any other year. It may have much to do with the national unemployment rate over which the EEOC has no control.

Chair Yang indicated, however, that she expected that with the increased hiring which took place near the end of FY 2014, together with certain "investments in technology," that the agency will be able to "more effectively investigate charges in a timely fashion" while also improving the quality of the agency's intake and investigatory process. A listing of some of the new investments in "new technologies" referred to by Chair Yang to improve case processing by the Commission are listed below:

- The EEOC claims it is developing systems that will allow customers to check the status of their charge, provide self-service and online-scheduling options for potential charging parties,
- Transform the current paper process into a digital charge system.

According to the EEOC these "technology projects" will reduce calls and wait times for charging parties and respondents seeking information about charges and reduce agency staff time spent on administrative tasks. Importantly for employers, the EEOC plans to make some parts of the charge filing process available and automated online. However, at least under the current plans for technological improvement (whenever those might occur), the EEOC would still require potential charging parties to set appointments for a pre-charge intake counseling session with an EEOC employee. In other words, we are not (yet) nearing the day where a disgruntled employee can file a frivolous charge with the same ease that a disgruntled customer can write a negative Yelp review.

OSHA Tips: OSHA and Interpreting Standards

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 very useful tool in understanding how OSHA will enforce its various standards are the interpretation letters the agency issues in response to questions posed by the regulated public.

In one such case the question involved an issue where an employee was bitten by a deer tick in his work environment. The employee did not contract Lyme disease or any other illness as a result of the bite. There was no sign of other illness and no time was lost from work. The physician, however, did prescribe antibiotics as a prophylactic measure. The question was posed as to whether there would be an exception from considering this a recordable treatment case in light of there being no signs of Lyme disease.

OSHA's answer was that "the issuance of prescription antibiotics is considered medical treatment beyond first aid for OSHA injury and illness recordkeeping purposes." The scenario described above is a work-related injury involving medical treatment and use of prescription medications is not first aid because they are powerful substances that can only be prescribed by a licensed health care provider.

Another agency interpretation response involved the issue of work-relatedness. In this account, an employee traveled out of town to attend a one-day meeting at the direction of his supervisor. The employee arrived in the town the evening before and stayed at a nearby company apartment. He planned to travel back home directly from the meeting. On the way to this meeting, the employee was injured in a car accident. He went to the emergency room and received medical treatment. The question was asked whether this travel fell under the "home away from home" exception and therefore the injuries would not have to be reported. OSHA's answer to this question was in the affirmative, stating that the fact that the employee did not return to the apartment after his meeting does not affect the status of the trip from the apartment to the meeting. A normal commute is generally comprised of two legs; a trip from the residence to work and a return trip from work to residence. Under the scenario described above, only the trip from the temporary residence to the meeting is considered the normal commute.

In another interpretation request OSHA responded to a requestor that a loss of consciousness from a mandatory blood draw is work-related and recordable.

An inquirer notes that the revised hazard communication standard, among other things, calls for new safety data sheets and notes that suppliers may be out of business and fail to furnish them. OSHA answers that the employer's obligation remains, to maintain the most recently received version of the MSDS or SDS.

Wage and Hour Tips: Tipped Employees 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.

The Wage and Hour Division continues to devote substantial resources to certain "low wage" industries each year. Among those regularly targeted are Fast Food, Grocery Stores, Construction and Restaurants. According to statistics on the DOL's website, it conducted over 6,000 investigations of Restaurants during FY 2013 resulting in almost 48,000 employees being due some $35 million in back wages. A large part of these back wages were as a result of improper use of the tip credit provisions of the Act. Thus, I felt we should revisit the requirements for claiming the tip credit. While my article will address only the requirements of the FLSA, you should be aware that seven states do not allow tip credit and twenty-four states have their own tip credit regulations that are more stringent than the FLSA. Information regarding the differing state requirements is available at http://www.dol.gov/whd/state/tipped.htm.

The Act defines tipped employees as those who customarily and regularly receive more than $30 per month in tips. Section 3(m) of the FLSA permits an employer to take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage of $2.13 and the minimum wage. Thus, the maximum tip credit that an employer can currently claim under the FLSA is $5.12 per hour (the minimum wage of $7.25 minus the minimum required cash wage of $2.13).

The new regulations, which became effective in April 2011, state that the employer must provide the following information to a tipped employee before using the tip credit:

1. The amount of cash wage the employer is paying a tipped employee, which must be at least $2.13 per hour.
2. The additional amount claimed by the employer as a tip credit;
3. That the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;

4. That all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and
5. That the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

The regulations state that the employer may provide oral or written notice to its tipped employees informing them of the items above. Further, they state that an employer must be able to show that he has provided such notice. They also state that an employer who fails to provide the required information cannot use the tip credit provisions and thus must pay the tipped employee at least $7.25 per hour in wages plus allow the tipped employee to keep all tips received. In order for an employer to be able to prove that the notice has been furnished the employees, I recommend that a written notice be provided. A prototype notice is on the web site of the National Restaurant Association.

Employers electing to use the tip credit provision must be able to show that tipped employees receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined. If an employee's tips combined with the employer's direct (or cash) wages of at least $2.13 per hour do not equal the minimum hourly wage of $7.25 per hour, the employer must make up the difference.

The regulations also state that a tip is the sole property of the tipped employee regardless of whether the employer takes a tip credit and the regulations prohibit any arrangement between the employer and the tipped employee whereby any part of the tip received becomes the property of the employer. The Department's 2011 final rule amending its tip credit regulations specifically sets out Wage and Hour's interpretation of the Act's limitations on an employer's use of its employees' tips when a tip credit is not taken. Those regulations state in pertinent part:

"Tips are the property of the employee whether or not the employer that has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): as a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool."

Yet, they do allow for tip pooling among employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, and service bartenders. Conversely, a valid tip pool may not include employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs, and janitors. One positive change is the regulations no longer impose a maximum contribution amount or percentage on valid mandatory tip pools. The employer, however, must notify tipped employees of any required tip pool contribution amount and may only take a tip credit for the actual amount of tips each tipped employee ultimately receives.

When an employee is employed in both a tipped and a non-tipped occupation, the tip credit is available only for the hours spent by the employee in the tipped occupation. An employer may take the tip credit for time that the tipped employee spends in duties related to the tipped occupation, even though such duties may not produce tips. For example, a server who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses is considered to be engaged in a tipped occupation even though these duties are not tip producing. However, where the tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing non-tipped duties, no tip credit may be taken for the time spent in such duties.

A compulsory charge for service, such as a charge that is placed on a ticket where the number of guests at a table exceeds a specified limit, is not a tip. The service charges cannot be counted as tips received, but may be used to satisfy the employer's minimum wage and overtime obligations under the FLSA. If an employee receives tips in addition to the compulsory service charge, those tips may be considered in determining whether the employee is a tipped employee and in the application of the tip credit.

Where tips are charged on a credit card and the employer must pay the credit card company a fee, the employer may pay deduct the fee from the employee's tips. Further, if an employee does not receive sufficient tips to make up the difference between the direct (or cash) wage payment (which must be at least $2.13 per hour) and the minimum wage, the employer must make up the difference. When an employee receives tips only and is paid no cash wage, the full minimum wage is owed.

Where deductions for walk-outs, breakage, or cash register shortages reduce the employee's wages below the minimum wage, such deductions are illegal. If a tipped employee is paid $2.13 per hour in direct (or cash) wages and the employer claims the maximum tip credit of $5.12 per hour, no deductions can be made without reducing the employee below the minimum wage (even where the employee receives more than $5.12 per hour in tips).

The new regulations state that if a tipped employee is required to contribute to a tip pool that includes employees who do not customarily and regularly receive tips, the employee is owed all tips he or she contributed to the pool and the full $7.25 minimum wage.

Computing Overtime Compensation for Tipped Employees

When an employer takes the tip credit, overtime is calculated on the full minimum wage, not the lower direct (or cash) wage payment. The employer may not take a larger tip credit for an overtime hours than for a straight time hours. For example, if an employee works 45 hours during a workweek, the employee is due 40 hours x $2.13 straight time pay and 5 hours overtime at $5.76 per hour ($7.25 x 1.5 minus $5.12 in tip credit).

The National Restaurant Association, along with several other groups, filed suit against the Labor Department seeking to overturn the regulations. However, the court allowed the new rules to take effect. Wage Hour issued a Staff Enforcement Bulletin, which can be found on the Wage Hour web site, in February 2012 instructing their investigators to enforce the new regulations.

If you have questions regarding these new rules or other Wage Hour issues do not hesitate to give me a call.

Did You Know…?

…that the second largest producer of tobacco in the U.S. has implemented a policy prohibiting smoking at its corporate offices? Reynolds America produces Camel cigarettes and also electronic cigarettes. Smoking will be permitted only in designated smoking areas, but electronic cigarettes will be permitted in private offices. According to the company, "e-cigarettes and vapor products are different from traditional cigarettes. There is no combustion, there is no smoke, there is no second-hand smoke. As a result, they should be treated differently regarding use restrictions." The company estimates that approximately 5,200 of its 60,000 employees smoke.

…that efforts to unionize fast food workers are focusing on international support? The Service Employees International Union is providing organizing and financial support to the National Alliance of Fast Food Workers, which seeks to raise pay to a minimum of $15 an hour. SEIU funded travel for six U.S. fast food employees to visit several European countries where employees earn substantially more than in the U.S. and also are represented by unions. These include locations in Denmark, Scotland and France. According to McDonald's, approximately 76% of its sales are from overseas locations.

…that a union's challenge to Indiana's new right-to-work law was rejected by the Indiana Supreme Court? The case, *Zoeller v. Sweeney* (Nov. 6, 2014), involved a challenge by Operating Engineers Local 150. The union argued that the Indiana constitution prohibits an individual from rending services without just compensation. The union claimed that the right-to-work law means that unions provide services without compensation to bargaining unit employees who are not members. In rejecting the union's argument, the Supreme Court stated that, "On the face of the Indiana Right to Work Law, there is no *state* demand for services; the law merely prohibits employers from requiring union membership or the payment of monies as a condition of employment."

…that the EEOC's broad request for information in charge processing was unenforceable? In the case of *EEOC v. Royal Caribbean Cruises, Ltd.* (11th Cir., Nov. 6, 2014), an assistant waiter filed a charge with the

EEOC, claiming that his contract was not renewed due to his disabilities. The EEOC requested information about all employees who were terminated, whose contracts were not renewed, or who were not hired due to a medical reason. The employer objected that the request and ultimately the subpoena was overly broad. In denying the EEOC's request to enforce the subpoena, the Court stated that, "The EEOC wasn't permitted to expand the scope of [the charge] in order to eradicate unlawful bias and protect "other as-yet undiscovered victims' – however 'laudatory' those goals might be – without first making the necessary showing of relevancy." The Court stated that the EEOC's request for company-wide information was irrelevant to investigate this particular charge and was intended to discover "members of a potential class of employees or applicants who suffered from a pattern or practice of discrimination," rather than focusing on information needed to investigate the particular charge.

…that a fast food restaurant's requirement for employees to sign non-compete agreements has provoked regulatory and Congressional inquiry? This involves sub sandwich franchisor, Jimmy John's. Employers in 44 states and the District of Columbia are required to sign confidentiality and non-competition agreements. Members of Congress have requested the Labor Department and Federal Trade Commission to investigate this requirement, stating that, "this hiring practice is clearly anti-competitive and intimidating workers." Furthermore, "non-competition agreements may sometimes make sense for well-compensated core company leadership, who are privy to company secrets and strategies. However, applying them to a company's entire workforce looks more like bullying under color or law, as well as a violation of Labor's rights." Properly drafted non-competition agreements are often upheld. However, such agreements should be used to address employer concerns as narrowly as possible. Courts will balance the relative bargaining positions of the parties as a factor when deciding to enforce these agreements. A fast food restaurant employee will be viewed by most courts as having limited bargaining power when faced with signing a non-compete agreement or else losing or not receiving an offer of employment.

…On November 12, 2014, President Obama withdrew the nomination of Sharon Block (D) to serve as a member on the NLRB. Block had been re-nominated by the President to begin at the expiration of Member Schiffer's term on December 16, 2014. Mr. Obama instead submitted the name of Lauren McFerran (D), the current chief labor counsel for the senate Health, Education, Labor, and Pensions Committee (HELP). Block's nomination was facing vigorous opposition in the Senate.

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