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Race, Gender and First Impressions

Recent tragedies in Ferguson, Missouri, and New York have raised broader questions about perceptions of race beyond the interactions between law enforcement officers and citizens. Rather, the broader principle, as Nicholas Kristof stated it, is that "We as a nation need to grapple with race because the evidence is overwhelming that racial bias remains deeply embedded in American life." His point and the point of other commentators is that as overt prejudice has substantially diminished, subconscious biases and preconceptions remain and have been empirically proven to influence behavior. For example, two economists studied the propensity of National Basketball Association officials to call fouls and found that white officials called fouls on black players at a higher percentage than on white players, and, while the difference was less pronounced, black officials called fouls on white players at a higher percentage than on black players. If even people whose key job is to be fair, whose fairness is subject to public and private scrutiny, and who also work in an incredibly racially-diverse field can be the victims of their unconscious biases, what about the rest of us?

In the employment context, we often think of race in the context of illegal race discrimination. Proving race discrimination is a difficult burden, as is proving any kind of employment discrimination. Even the EEOC concludes that a charge of discrimination has merit only about 5% of the time. A few years ago, a plaintiff in a race discrimination case we defended said that he could tell his supervisor was biased based on how he looked at the employee. That wasn't sufficient to sustain the claim, but was the plaintiff therefore wrong about his impression? Although employers take justifiable pride in avoiding or defending race discrimination claims, the real challenge is to examine employment decisions and workplace relationships to root out instances where unspoken and likely unconscious preconceptions about race (and gender for that matter) have influenced those decisions and relationships.

Gender stereotypes have in some ways been more persistent, at least when it comes to assumptions about "appropriate" work for each gender. Some patients assume the man in scrubs is the doctor, even though he is the nurse. Some travelers mistake female pilots for stewardesses. Consider the old brainteaser: A father and his son are in an auto accident and the father and son are rushed to the hospital. The son is brought to the operating room, and the surgeon says, "I cannot operate, this is my son." How would you explain that? The answer—that the surgeon is the boy's *mother*—challenges stereotypes about the jobs women—and mothers—are expected to hold.

We frequently rely on stereotypes (positive and negative) when interacting with new people or entering new settings. Without effort, these subconscious stereotypes can set baseline expectations even as a setting or a person becomes familiar to us (as in the workplace). The key for the workplace culture is to replace assumptions based on protected categories like race and gender with a bona fide "clean slate" in how employees are perceived and treated. Diversity training and effective fair employment practices policies often will not take a workplace to this next step. Rather, the next step must begin with frank employer discussions within the leadership team about how to identify and eliminate the impact of subconscious assumptions related to race, gender or any other protected characteristic in the work environment.

What Will Be The "Hot Issues" in 2015?

As we prepare for the new year, the following are areas we expect to heat up, some as early as January:

1. The DOL will issue its revised guidelines for exempt status under the Fair Labor Standards Act, with a substantial change to the "primary duties" test such that the "working supervisor/manager" may not be exempt. Industries particularly affected will be retail, hospitality, and food/beverage. DOL will also substantially increase the minimum salary level for exemptions.

2. The EEOC will continue its focus on the ADA. Thus far in FY 2015, seven of sixteen lawsuits filed by the EEOC involved ADA issues (eight were filed in southern states). Employer leave policies, no fault attendance policies, and overall accommodation efforts will receive the greatest scrutiny.

3. Pregnancy discrimination claims will continue to increase, even if the Supreme Court rules in *Young v. UPS* that an employer is not required to make light duty jobs available for pregnancy when those jobs are limited to a return to work or ADA accommodation situation. The EEOC will continue its efforts to push pregnancy into the ADA realm. For example, pregnancy itself is not a disability, but mandatory bed rest or restricted duty may be.

4. Sexual orientation/gender identity. Discrimination based on gender identity is sex discrimination. Although Title VII does not prohibit discrimination based on sexual orientation, more charges of sexual orientation discrimination are masked as gender identity discrimination (effeminate male; masculine female).

5. Equal pay/caregiver discrimination. Approximately 40% of women who work are the primary or sole source of household income. There is an increased focus on discrimination and pay disparities based on caregiver responsibilities and gender. If you have insureds with federal contracts, the DOL is using OFCCP's audit authority to collect staggering amounts of wage data from federal contractors—which they will likely use to attack pay disparities in other arenas.

6. The NLRB will continue to expand its definition of "protected, concerted activity" and issue decisions to help unions increase membership. We expect those rules to survive legal challenges.

7. By the time President Obama's term ends, he will have appointed approximately 40% of all federal district court judges, at an average age of 51. These lifetime appointees will change the dynamic of whether a plaintiffs' attorney decides to sue and at what point to settle, if at all.

8. More states will pass employment laws which have stalled at the federal level, such as prohibiting discrimination based on sexual orientation, increasing the minimum wage and mandatory leave/sick time.

Security Screening Not Considered Work Time, Rules U.S. Supreme Court

Travelers often comment that TSA ("Thousands Standing Around") involves two people screening and the rest of them watching. In the case of *Integrity Staffing Solutions,*

Inc. v. Busk (Dec. 9, 2014), the U.S. Supreme Court unanimously ruled that employee time spent going through a security screening process was not considered working time, even if it took as long as a TSA security check.

The case arose when warehouse employees had to go through a screening process at the end of their workday. Due to the length of the security lines and time involved in the overall process, it took some employees 25 minutes to complete the security check. Those employees argued that the security check was solely for the benefit of the employer and, therefore, should be considered working time.

In rejecting that argument and reversing the appellate court decision in favor of the employees, the Court stated that an activity "is not integral and indispensable to an employee's principal activities unless it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform those activities." The Court explained that "the screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment. And Integrity Staffing could have eliminated the screenings altogether without impairing the employees' ability to complete their work." The DOL supported the employer's position. The DOL asserted that the Portal-to-Portal Act of 1947 applied to this situation. According to that Act, activities that are preliminary or postliminary to the core workday are not compensable. Thus, waiting in line to clear security is the same thing as waiting in line to check out, which is not compensable.

This decision has a significant impact on those employers who require employees to go through a security process entering or leaving the workplace, particularly wholesalers and retailers. According to the National Employment Law Project, this decision was "grossly unfair," as employees often have child care responsibilities at the end of the day and the requirement to stand in line without pay conflicts with those obligations. NELP stated that "because the employer didn't have to pay for the workers' time, it didn't care how long the screenings took, and had no incentive to add capacity to speed things up and be more considerate of the employees' time. This decision creates a perverse incentive for employers to require workers to perform more non-principal activities that would not be compensable."

NLRB Announces Final Representation Case Procedures – What Employers Need to Know About the "Quickie Election" Rules

As anticipated, the NLRB has adopted a final rule amending its representation-case procedures to, in its words, "modernize and streamline the process for resolving representation disputes." The final rule, published in the Federal Register on December 15, 2014, will take effect on April 14, 2015. The final rule available in the Federal Register details explanations regarding the rule's impact on current procedures and the views of both the majority and dissenting members.

Currently, the NLRB strives to conduct an election within 42 days of the date a petition for the election is filed. Approximately 90% of all elections are held within 56 days, a pretty good pace. Under the new election rules, elections often will be held within 21 days of the date a petition is filed. Why does the NLRB want to shorten the time frame?

The reason is another boost for organized labor. The date the petition is filed is when the support and emotionalism for the union are at its peak. A 42-day campaign enables the employer to calm things down and talk with employees factually about why remaining union-free is their best choice. Approximately 30% of the time, unions withdraw petitions before an election is held because they have lost a significant amount of support. Thus, with a 21-day election cycle, there may not be sufficient time for emotions to calm down and employees to look reasonably at the factual implications of unions – this will enhance the opportunity for more elections and more union victories.

Highlights of the rule changes include:

- Postpones all litigation over who may vote in the election until after the election is conducted;

- Regional Director now empowered to make most decisions regarding the election that used to be reserved for the Board;
- Eliminates the 25-day waiting period between the time an election is ordered and the election itself;
- Electronic filing and transmission of petitions allowed for the first time;
- Shortens time for filing of the voting list from 7 days to 2 days and requires employers to provide the union with personal employee email addresses and phone numbers.
- Post-election Board review of issues raised by a party will now be discretionary rather than mandatory.

Problems Posted by the Coming Rule Changes:

- Employers must quickly prepare for a shortened campaign, as pre-election hearings will not result in any delays in the scheduling of elections. The shortened process limits employers' ability to effectively communicate with their employees about the negative consequences of unionization.
- Additional pressure on employers to identify Section 2(11) supervisors early in the process, as the NLRB will not rule on this issue prior to the election. This is important because any unfair labor practice activity by a supervisor may result in the election results being overturned.
- Unfavorable rulings may not even be considered by the NLRB, thus limiting avenues for appeal of adverse rulings.

We will present a webinar on the new election rules and practical implications for employers – How To Prepare For a Campaign Without Having One. Look for information about the webinar shortly after January 1.

Update on the Patient Protection & Affordable Care Act ("ACA")

The time is here for employers with 100 or more full time employees (or full time "equivalents") to "pay or play." Effective January 1, 2015, "applicable large employers" must offer affordable, minimum value health coverage to at least 70% (95% beginning in 2016) of its full time employees (minus up to 80 full time employees in 2015, and 30 thereafter) and their applicable dependents, or be subject to an annual penalty of $2,000 per each full-time employee who receives a premium tax credit or "subsidy" through a health care exchange/marketplace. If an applicable large employer offers health coverage to at least 70% (95% beginning in 2016) of its full time employees and their applicable dependents, but such coverage is not deemed "affordable" or the coverage does not provide "minimum value," then the employer may be assessed an annual penalty of up to $3,000, calculated on a monthly basis, based on each full time employee who receives a premium tax credit or "subsidy" through a health care exchange/marketplace.

Coverage is considered to be "*affordable*" if an employee's share of the premium does not cost the employee more than 9.5% of that employee's annual household income. Most employers are choosing to use the employee's W-2 wages for the affordability test, which is considered a safe harbor.

A plan is considered to provide *minimum value* if it covers at least 60 percent of the total allowed cost of benefits that are expected to be incurred under the plan. The Department of Health and Human Services (HHS) and the IRS have produced a *minimum value calculator* which may be accessed at the following link: http://cciio.cms.gov/resources/regulations/index.html.

The above-referenced requirements are effective beginning January 1, 2016, for employers with 50-99 full time employees (or full time equivalents).

Many employers are still working diligently to identify who qualifies as a "full-time employee" for purposes of the requirement to offer coverage. Under the ACA, a "full-time employee" is any employee who performs an average of 30 or more hours of service per week.

Employers may choose to use the “month to month” method to determine full time status, or, the “look back” method using a pre-determined 3-12 month standard measurement period. For mid-size employers (50-99) whose obligations will be effective in 2016, now is the time to determine which method it will use to determine full time employee status.

A covered employer does not have to offer coverage to part time employees, even if those employees were counted in the determination of the employer size. Employers should be cautioned, however, to document the method used to determine the status of all employees, including those who work “variable hours.” If a new employee is hired and is reasonably expected to work full time (average of 30 hours or more per week), then such employee must be offered coverage within three months (90 days) of their hire date. Similar rules also apply to employees who are transferred, or have another “change in status” that could affect their work hours.

Some transitional relief is available for “non-calendar year” plans. Eligible plans may be able to delay implementation of the “affordable” and “minimum value” requirements until the beginning of its plan year in 2015; however, ALL full time eligible employees must be offered coverage beginning on January 1, 2015, or penalties may still result.

Additional obligations of which employers should be reminded include the following:

- **Retaliation and Whistleblower Protection:** The ACA prohibits an employer from taking an adverse employment action against an employee for, among other things, receiving a subsidy to purchase coverage from a public health care exchange.

- **Breaks for nursing mothers:** The ACA amended the Fair Labor Standards Act (FLSA) to require employers to provide reasonable break time and a suitable location for a nonexempt employee to express breast milk for her nursing child (this has been effective since March 23, 2010).

- **Cap on health flexible spending accounts:** Employee contributions are capped at $2,550/ year for 2015.

- **Transitional Reinsurance Program Fees:** The Transitional Reinsurance Program fee provides funding to assist health insurers with the additional costs associated with insuring high risk individuals in the individual marketplace. The fee of $63/covered life per year ($5.25 /month) applies to major medical plans. For self-funded plans, the plan sponsor is ultimately responsible for the fee. The first payment is due January 15, 2015, and the second payment is due November 15, 2015.

- **PCORI Fee:** Employers sponsoring self-funded plans must pay the applicable fee for each covered life per year under the health plan to help fund the Patient Centered Outcomes Research Institute (PCORI). The fee is $2.08 for each covered life for plan years ending on or after October 1, multiplied by the average number of covered lives under the policy. The first payment for most plans is due by July 31 of the year immediately following the last day of the plan year.

- **W-2 Reporting:** Employers that generate 250 or more W-2’s must report the cost of employer-sponsored health coverage on their employees’ W-2.

- **HPID:** The requirement that health plans register for a Health Plan Identifier (HPID) number has been delayed pending further guidance.

As employers navigate through these and other ACA requirements, changes, and delays, one issue looms largely in the background. We alerted you on July 22, 2014, that two federal appeals courts issued contradictory rulings with regard to the availability of subsidies under the ACA. In *Halbig v. Burwell*, the D.C. Circuit Court of Appeals ruled that the ACA only authorized the availability of tax credits/subsidies to individuals who buy insurance through exchanges “established by the states.” Just a few hours later, the Fourth Circuit Court of Appeals ruled in *King v. Burwell* that regulations issued by the IRS properly interpreted the ACA to allow individuals to

purchase subsidized health insurance coverage through the federal marketplace.

The Supreme Court has agreed to review one of these cases, *King v. Burwell*, to address the following question: "Whether the IRS may permissibly promulgate regulations to extend tax credit subsidies to coverage purchased through exchanges established by the federal government under Section 1321 of the PPACA?" A decision is expected to be handed down mid-2015. If the Supreme Court rules that the IRS regulations extending tax credits to individuals who purchase insurance through the federal marketplace, rather than just those who buy it through a state exchange, were not permissible, the employer mandate may be rendered meaningless.

For now, employers must proceed "full steam ahead" with the obligations as they currently stand.

NLRB Tips: Division of Advice Clarifies NLRB General Counsel's Position on Bargaining Over Discretionary Discipline

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years. Mr. Rox can be reached at 205.323.8217.

Clarifying the General Counsel's position on the applicability of the *Alan Ritchey* decision in discipline cases, the Division of Advice continues to maintain that an employer must bargain with the union before taking discretionary disciplinary action against its employees.

Stating that *Alan Ritchey* was "soundly reasoned" and that the new Board should adopt its rationale, the Division nevertheless concluded that the employer did not violate the National Labor Relations Act when it failed to bargain with a union about its decision to discharge an employee during a hiatus between contracts because the employer applied the disciplinary policy contained in the expired contract. *Washington River Protection Solutions,* (NLRB Div. of Advice 10/14/14 [released 11/18/14]).

Before looking at the *Washington River* Advice Memorandum, consideration of the holding in *Alan Ritchey* is instructive.

The *Alan Ritchey* Decision

In this decision, the Board concluded that discretionary discipline was a mandatory subject of bargaining where imposition of such discipline had the potential to alter employees´ terms and conditions of employment. The Board decided that employers had both a duty to maintain an existing policy governing terms and conditions of employment and a duty to bargain over certain discretionary decisions when applying an existing policy. Thus, when a union has yet to attain an initial contract, or as here, has an expired contract, or has failed to reach an agreement on the grievance procedure that addresses discipline, then the employer must, absent exigent circumstances, give the union notice and an opportunity to bargain over the discretionary aspects of the decision to impose discipline. The bargaining must occur before the discipline is implemented if the decision to discipline will affect tenure, status, or earnings.

The Board articulated two policy reasons to impose a pre-agreement bargaining obligation upon an employer:

1. Requiring bargaining before discipline is issued precludes the "harm caused to the union's effectiveness" if the bargaining occurred after the imposition of discipline, and therefore prevents the employer from undermining a newly-certified union.

2. Bargaining before discipline occurs allows the union to present additional evidence or facts that could mitigate the contemplated discipline, resulting in a potentially better result.

This same rationale applies after impasse has been reached and the employer has lawfully implemented a disciplinary procedure but refuses to arbitrate a grievance under the imposed system. Therefore, where an employer unilaterally implements a policy after impasse is reached, and the policy provides the employer with discretion to discipline, the employer must still continue to bargain over discretionary disciplinary decisions since there is not a "binding agreement" to resolve disputes.

These principles were applied by the General Counsel in *Washington River*.

The Facts of *Washington River*

Washington River is a contractor at the Hanford nuclear power facility located in Washington. In October of 2013, an unidentified white powder was discovered in a storage shed. The employer's industrial hygiene department was sent to test the substance, and an argument ensued between the testing technician and the reporting electrician, resulting in a safety breach caused by the electrician. The employer concluded that the electrician was guilty of "extremely serious misconduct" and fired him without bargaining with the union.

When the union attempted to arbitrate the discharge, the employer refused, stating that the arbitration clause had expired along with the expiration of the contract. The union filed a ULP charge alleging that the discharge decision violated the Act because the Employer failed to bargain with the union prior to making the decision.

The Holding by the GC's Division of Advice

The General Counsel concluded that the Employer in *Washington River* did not violate Section 8(a)(5) when it continued to apply the expired contract's disciplinary policy, accepted a grievance but then refused to arbitrate the discharge decision. There was no evidence to suggest that the employer deviated from its application of the discipline policy in a manner that would constitute an unlawful unilateral change to that policy.

Unlike the situation in *Alan Ritchey*, the parties in this case had an established bargaining relationship and the Union filed a grievance over the employee's discharge, which was accepted and processed until the final step of arbitration. The GC concluded that the grievance procedure from the expired contract was the "functional equivalent of the agreed-upon interim procedure for resolving differences between the parties that was described in *Alan Ritchey*."

In addition, since the employer applied the expired grievance procedure and disciplinary procedures to the electrician's discharge, there was no chance that the union's credibility was undermined as the union attempted to convince the employer not to discharge its employee during the grievance process, even if it was not a successful effort.

Finally, the employer was not under an obligation to arbitrate the discharge, as that provision of the contract had expired without agreement to extend the arbitration provisions. This appears to be tacit approval of ALJ Mary Cracraft's decision that arbitration provisions need not be made a part of an agreed-upon "interim grievance procedure" in an expired contract situation. Judge Cracraft's decision was noted and discussed in the June 2014 LMV Employment Law Bulletin.

VW / CHATTNOOGA LABOR TURMOIL CONTINUES – HAS VW LAID GROUNDWORK FOR ULTIMATE RECOGNITION OF UAW ?

On December 8, 2014, VW informed its production workers that UAW membership exceeded 45% of the workforce at the Chattanooga VW facility. Therefore, under the new labor policy announced by VW in mid-November of 2014, UAW will be entitled to the "highest level of engagement" opportunities under the new VW program. VW and UAW will soon begin discussing the new workplace arrangement available to the UAW, such as bi-weekly meetings with Company officials concerning workplace issues.

In response to the announcement by VW, the UAW stated that, in fact, it had over 50% support of the production employees and that the end goal for the UAW remains to receive voluntary recognition from VW as the exclusive bargaining representative.

While recognizing that VW's "community organization engagement" (COE) policy does not permit the UAW to use the company policy to authorize any request for recognition from the UAW, UAW official Gary Casteel stated that while the access policy does not provide a "pathway" for collective bargaining, neither does the policy "prohibit it."

The Bottom Line

Expect UAW to push VW toward voluntary recognition in the ensuing weeks and months. Now that the UAW has its "foot in the door" with VW, and despite its recent loss

in the NLRB held election, it appears only a matter of time before VW acquiesces to UAW demands and voluntarily recognizes the Union as the exclusive bargaining representative of unit employees.

The VW COE allows multiple "labor organizations" to apply for and receive engagement opportunities, but, to date, the rival group of employees – American Council of Employees (ACE) – organized specifically to rival the UAW - has yet to submit any evidence of support among VW employees. ACE representatives claim that it is already certified as a Section 2(5) labor organization, but that it is waiting to provide verification of its 2(5) status to the Department of Labor.

In separate news breaking on December 11, 2014, ACE claimed that the UAW's 45% showing of interest submitted to the independent auditor is based on outdated, signed authorizations cards, and, in numerous cases, on cards where the signing employee specifically rescinded his / her support for the UAW. Sean Moss, acting-President of ACE stated:

> While we continue to play by the rules, the UAW, supported by members of VW management, has manipulated the process and has gone so far as to attempt to represent employees who have specifically withdrawn any support for the UAW whatsoever.

LMV will continue to monitor the news coming out of VW / Chattanooga, and bring readers any breaking updates as they develop.

BREAKING NEWS

AS PREDICTED, THE NLRB REVERSES *REGISTER – GUARD* – CALLING IT "CLEARLY INCORRECT

In a seventy-four page decision decided along expected political lines, the Board, on December 11, 2014, reversed long-standing precedent and found that employees have a right to use their employers' email systems for non-business purposes, including communicating with each other about union organizing. *Purple Communications, Inc.*, 361 NLRB No. 126 (2014).

This decision had been anticipated by LMV as early as March 2014, when we noted that the NLRB was "trolling for facts" that would lend themselves to a reversal of the *Register-Guard* precedent. (See also a discussion of this topic and *Purple Communications* in a LMV December e-blast and the May 2014 LMV Employment Law Bulletin). Stay tuned for a more in-depth analysis of both the majority and the dissent opinions of this pro-union decision in next month's Employment Law Bulletin.

THE NLRB REGULATORY AGENDA REMAINS UNCHANGED FOR 2015

The most recent NLRB regulatory agenda, issued in mid-November of 2014, remains essentially unchanged from the previously released agenda issued in February of 2014. The new agenda adds one rulemaking item – the implementation of the election rule changes – which have been under consideration by the NLRB since 2011. As discussed earlier in this issue, the Board recently published the change in election rules in the Federal Register and the changes are scheduled for implementation in April 2015.

OSHA Tips: OSHA and Recordable Cases 2013

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.

Recently, Dr. David Michaels, the Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA), released his annual statement regarding the Bureau of Labor Statistics survey of occupational injuries and illnesses for 2013. He noted that the survey found in that year there were approximately three million workers in America who experienced a serious injury or illness on the job. While this is a high number, the OSHA chief sees encouragement in that the rates have continued to decline over the last few years. This was even during a period of healthy economic growth when we would expect the rate of injuries to rise. The Assistant Secretary went on to state that "the decrease in the injury rate is a product of tireless work of those employers, unions,

worker advocates, and occupational safety and health professionals all coupled with the government organizations that make safety and health a priority each and every day."

Assistant Secretary Michaels concluded by noting that we cannot ignore those three million workers who were injured in 2013. He states "the severity of their injuries and illness varies widely; some are amputees, some suffer back injuries, and some have to struggle for each breath. Work injuries can instantly pull the rug out from a family striving for a good middle-class life.

"While a single death is tragic, there is cause for encouragement in the trend of such accidents. When OSHA came on the scene in 1970, there were around 14,000 or 38 per day. This had been reduced to around 12 deaths per day in 2012. This reflects a reduction of over 65%. At the same time worker injuries and illnesses have come down from 10.9 per 100 workers in 1972 to 3.4 per 100 in 2011."

REMINDER: OSHA changes in 2015

Starting January 1, 2015, all employers must report the following to OSHA:

- All work related fatalities within 8 hours
- Inpatient hospitalizations
- Amputations
- Losses of an eye

These may be reported by calling your nearest OSHA office or 1-800-321-6742.

Effective January 1, 2015, there are changes in the employers who may be exempt from maintaining OSHA injury and illness records. First, employers with fewer than ten employees will retain their exemption from maintaining such records. Other employers who are partially exempt from maintaining such records will be changed since OSHA has opted to use the North American Industry Classification System (NAICS) rather than the Standard Industrial System (SIC) which was used previously.

Wage and Hour Tips: Application of the Fair Labor Standards Act to Domestic Service

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

In September 2013, the Department issued a final rule concerning domestic service workers under the Fair Labor Standards Act (FLSA) that makes substantial changes to the minimum wage and overtime protection to the many workers who, by their service, enable individuals with disabilities and the elderly to continue to live independently in their homes and participate in their communities. The Final Rule, which becomes effective January 1, 2015, contains several significant changes from the prior regulations, including: (1) the tasks that comprise "companionship services" are more clearly defined; (2) the exemptions for companionship services and live-in domestic service employees are limited to the individual, family, or household using the services; and (3) the recordkeeping requirements for employers of live-in domestic service employees are revised.

Below are excerpts from a Wage and Hour Fact Sheet that outlines the major changes in the regulations:

Minimum Wage and Overtime Protections. This Final Rule revises the definition of "companionship services" to clarify and narrow the duties that fall within the term and prohibits third party employers, such as home care agencies, from claiming the companionship or live-in exemptions.

Companionship Services. The term "companionship services" means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. Under the Final Rule, "companionship services" also includes the provision of "care" if the care

is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek.

Fellowship and Protection. Under the Final Rule, "fellowship" means to engage the person in social, physical, and mental activities. "Protection" means to be present with the person in their home or to accompany the person when outside of the home to monitor the person's safety and well-being. Examples of fellowship and protection may include: conversation; reading; games; crafts; accompanying the person on walks; and going on errands, to appointments, or to social events with the person.

Care. The definition of companionship services allows for the performance of "care" services if those services are performed attendant to and in conjunction with the provision of fellowship and protection and if they do not exceed 20 percent of the employee's total hours worked in a workweek per consumer. In the Final Rule, "care" is defined as assistance with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).

Household Work. The Final Rule limits household work to that benefitting the elderly person or person with an illness, injury, or disability. Household work that primarily benefits other members of the household, such as making dinner for another household member or doing laundry for everyone in the household, results in loss of the companionship exemption and thus the employee would be entitled to minimum wage and overtime pay for that workweek.

Medically Related Services. The definition of companionship services does not include the provision of medically related services which are typically performed by trained personnel. Under the Final Rule, the determination of whether a task is medically related is based on whether the services typically require (and are performed by) trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants. The determination is not based on the actual training or occupational title of the worker performing the services. Performance of medically related tasks during the workweek results in loss of the exemption and the employee is entitled to minimum wage and overtime pay for that workweek.

Live-In Domestic Service Employees. Live-in domestic service workers who reside in the employer's home permanently or for an extended period of time and are employed by an individual, family, or household are exempt from overtime pay, although they must be paid at least the federal minimum wage for all hours worked. Live-in domestic service workers who are solely or jointly employed by a third party must be paid at least the federal minimum wage and overtime pay for all hours worked by that third party employer. Employers of live-in domestic service workers may enter into agreements to exclude certain time from compensable hours worked, such as sleep time, meal time, and other periods of complete freedom from work duties. (If the sleep time, meal periods, or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked.) Under the Final Rule, these employers must also maintain an accurate record of hours worked by live-in domestic service workers. The employer may require the live-in domestic service employee to record his or her hours worked and to submit the record to the employer.

Third Party Employers. Under the Final Rule, third party employers of direct care workers (such as home care staffing agencies) are not permitted to claim either the exemption for companionship services or the exemption for live-in domestic service employees. Third party employers may not claim either exemption even when the employee is jointly employed by the third party employer and the individual, family, or household using the services. However, the individual, family, or household may claim any applicable exemption. Therefore, even if there is another third party employer, the individual, family, or household will not be liable for unpaid wages under the FLSA provided the requirements of an applicable exemption are met.

Paid Family or Household Members in Certain Medicaid-Funded and Certain Other Publicly Funded Programs

Offering Home Care Services. In recognition of the significant and unique nature of paid family and household caregiving in certain Medicaid-funded and certain other publicly funded programs, the Department has determined that the FLSA does not necessarily require that once a family or household member is paid to provide some home care services that all care provided by that family or household member is part of the employment relationship. Where applicable, the Department will not consider a family or household member with a pre-existing close personal relationship with the consumer to be employed beyond a written agreement developed with the involvement and approval of the program and the consumer (or the consumer's representative), usually called a plan of care, that reasonably defines and limits the hours for which paid home care services will be provided.

Although the revised regulations become effective on January 1, 2015, the Department has announced that it will not take any enforcement actions to enforce the new regulations until July 1, 2015, and further stated that it will be judicious in its enforcement activities during the remainder of 2015. However, the fact that the DOL will limit its enforcement activities during 2015 does not preclude an employee from instituting a private action when he believes that he is not being paid in compliance with the FLSA. Thus, I encourage employers to review their pay practices to ensure that they are paying their employees properly.

As we begin a new year, the minimum wage in several states will increase. For example, Florida's rate will increase from $7.93 to $8.05 per hour. Almost one-half of the states have established a minimum greater than the federal rate of $7.25, while there are five states, including Alabama, which do not have a minimum wage statute. If you operate in multiple states, it would behoove you to check with the Labor Department in the individual states to make sure you are paying the correct rate in that state. Also, many of the states have a different "tip credit" from the requirements of the FLSA.

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

Did You Know…?

…that Wisconsin will consider becoming a "right to work state" when its legislative session convenes in January 2015? "Right to work" means that it is illegal for an employer and union to agree to union security language, where an employee must either join the union or pay union dues or fees or else be terminated. Twenty-four states are right to work states, most recently Michigan and Indiana. Those who advocate a right to work law in Wisconsin are contemplating exempting building trades unions, which have been supportive of Governor Scott Walker.

…that a "Retail Workers' Bill of Rights" law was enacted in San Francisco, the first of its kind in our country? The law becomes effective as of July 5, 2015, and covers employers with at least 20 employees in the city of San Francisco and at least 20 retail establishments worldwide. The law requires employers to post work schedules 14 days in advance, provide compensation for last minute schedule cancellations and provide part-time employees with the opportunities for the same pay, work hours and time off as regular full-time employees. Advocates of the law stated that "We are proud to make San Francisco the first city in the nation to address the problem of erratic, unsustainable scheduling for men and women in the retail sector."

…that an employee's failure to ask for extended leave precludes an ADA claim for failure to accommodate? *Judge v. Landscape Forms, Inc.* (6th Cir., Nov. 21, 2014). The Court stated that the employee bears the burden of showing that he requested a reasonable accommodation under the ADA. The Court ruled that the employee failed to provide evidence that he had requested an extended leave. The company terminated the employee because of its need to fill the position and the employee's failure to provide an approximate return to work date. The Court stated that "As part of establishing a failure-to-accommodate claim under the ADA, an employee must demonstrate that he or she requested an accommodation before being fired."

…that OFCCP will implement a final rule prohibiting bias against LGBT employees? The rule was published in the December 9 Federal Register and will become effective on April 8, 2015. No changes in affirmative action

obligations are required, nor is an employer obligated to ask applicants or employees to disclose on a voluntary basis their LGBT status. The regulation will require contractors to include in their equal employment opportunity policies a statement that applicants and employees are treated "without regard to their sexual orientation and gender identity." This change will also include equal employment opportunity statements in workplace notices and job solicitations. Although an employer may ask an employee or applicant to self-identify their LGBT status, we do not think doing so is in an employer's best interests.

…that a Court ordered the EEOC to disclose to BMW information about the EEOC's criminal background check policy? *EEOC v. BMW Mfg. Co.* (D.S.C., Dec. 8, 2014). The EEOC sued BMW in 2013. BMW required its new logistics services provider to conduct a criminal background check as a condition of doing business with BMW. Based upon the background check, 69 black employees were not retained by the new logistics services provider. The EEOC resisted BMW's request to provide the information, arguing that it was irrelevant, as the EEOC's use of a criminal background check is for jobs which do not relate to the positions involved in the lawsuit. The Court noted the broad latitude parties are allowed in discovery and that the EEOC failed to "explain precisely why its objections are proper given the broad and liberal construction of the federal [discovery] rules."

…that an Administrative Law Judge found that Wal-Mart's policy permitting union buttons was illegal? *Wal-Mart Stores, Inc.*, NLRB ALJ (Dec. 9, 2014). This case arose as an outcome of the organizing effort by OUR Walmart, which is not a union but is funded by a union (the United Food and Commercial Workers). Wal-Mart permitted employees to wear buttons, provided the buttons were not larger than the Wal-Mart button, and provided that it was not offensive or distracting. In concluding Wal-Mart's policy was overly broad, the ALJ stated that "The [NLRB] has upheld the right of employees to wear union insignia of a variety of sizes, including insignia sizes much larger than Walmart's."

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