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Electronic Records Create and Support Retaliation Claim

Although many refer to email as electronic mail, we actually think it is properly named "evidence mail." The recent case of *Greengrass v. Int'l Monetary Sys. Ltd.* (7th Cir. Jan. 2015) illustrates this point.

In 2007, Celia Greengrass made an internal complaint of harassment. IMS's CEO relayed the complaint by email to the alleged harasser, with the comment, "Call me before you explode." Greengrass quit later that year, and, in January 2008, she filed a charge with the EEOC. In July 2008, the EEOC requested additional information, and, in the course of discussing the Company's response, IMS's General Counsel wrote an email that included an aside remark that Greengrass was unlikely to sue individually but expressed concern that the EEOC might launch a Company-wide investigation. In January 2009, the Agency requested to interview IMS employees; in other words, the EEOC was showing the type of continued interest that could lead to a broader investigation.

IMS is a publicly-traded corporation that must make quarterly (10-Q) and annual (10-K) publicly-available filings to the SEC. One of the items these 10-Q and 10-K reports must disclose is material legal proceedings. In 2008, the Company did not judge Greengrass' EEOC Charge to have been material. But, after the EEOC request for interviews in April 2009, the Company's annual report included a description of Greengrass' Charge that mentioned her by name. Greengrass was also named in the May 2009 10-Q report, and mentioned again by name in the next annual 10-K report, which reported the conciliation of the Charge.

Once this information became public, a recruiter told Greengrass that she was "unemployable." Greengrass googled herself to confirm that searches for her name led to IMS's disclosures that she had initiated an EEOC Charge against the Company.

As things turned out, the Greengrass claim was the first time the Company disclosed in its SEC filing the individual name to a party in a lawsuit or administrative complaint. And, after reporting the conciliation of Greengrass' January 2008 Charge, the Company returned to its practice of not naming adverse parties in its financial reports.

So, in September 2010, Greengrass filed a second Charge and then a lawsuit for retaliation, claiming that the Company's break with its usual practice of not including names was retaliation for the prior charge she had filed. The Company argued that Greengrass was not able to show causation because 14 months had elapsed between her January 2008 Charge and its April 2009 disclosure—the first one to mention her by name. The trial court agreed with the Company, but the Seventh Circuit Court of Appeals disagreed and remanded the case for a jury trial. The Seventh Circuit stated that another time frame was potentially at issue: the time between the EEOC's January 2009 request for interviews and the Company's naming Greengrass in April 2009. The Court of Appeals found the General Counsel's July 2008 email provided evidence that IMS didn't take the Charge too seriously at first. As for the three-to-four month lapse between the interview request and the April 2009 disclosure? The Court noted that because the April 2009 disclosure was the next report due after the interview request, they could still be viewed as consecutive events.

Oh, and the CEO's poor choice to email Greengrass' internal complaint directly to her alleged harasser with the advice to "call me before you explode"? Well, that was just the icing on the cake. The Seventh Circuit found that a jury *could* consider his and the GC's emails as further evidence of the Company's "disdain for the EEOC process and animus against Greengrass for filing her complaints."

Remember: Electronic records created Greengrass' "Google problem;" in times before search technology, it's unlikely prospective future employers would have scanned her previous employer's SEC filings on the off chance she'd be mentioned as a litigant. Those electronic records also made it easy for any person with an internet connection to compare how IMS treated Greengrass with how it had treated other adverse parties in its reports. Finally, emails from the top—the CEO and the GC—provided evidence of animus and the foundation for an alternate timeline that rescued Greengrass' claim.

Employer Owes Another Employer's Employees $6.5 Million for Wage and Hour Violation

When we think of a misclassification of an employee under Wage and Hour law, it usually involves either an employee who should not be exempt or an employee who should not be treated as an independent contractor. However, a third scenario can create wage and hour liability for a business: when it takes substantive control of its contractor's employees. In *Shephard v. Lowe's HIW Inc.* (N.D. Cal. Jan. 2015), Lowe's offered the services of a third-party company to its customers for installing goods sold by Lowe's, such as kitchen appliances, bath and plumbing fixtures, window frames and doors.

The plaintiff, an employee of Lowe's contractor company, alleged that Lowe's in fact treated the contractor and its employees as employees of Lowe's, rather than independent contractors. The essence of the claim was that Lowe's controlled all aspects of the contractor's work, including the assignment of customers to the contractor, requiring the contractor's employees to wear Lowe's uniforms, requiring that the customers pay Lowe's for the contractor's work, requiring that the employees hold themselves out as Lowe's employees, and supervising the work performed by the contractors. The case involves 5,398 individual installers and 1,110 installation companies. The allegations in the *Shephard* case resulted in Lowe's paying $6.5 million to settle the wage and hour claims.

Often the issue of whether an individual is an independent contractor has involved an individual working alone, such as a delivery driver or route sales person. This case illustrates that from a wage and hour compliance standpoint, control by one employer over another employer's employees may subject the controlling employer to wage and hour and benefits liabilities based upon how the contractor and its employees' work is supervised by the primary employer.

NLRB: Employer Workplace Violence Memo Violates Employee Rights

The NLRB continues to amaze (but not surprise) us with their "anything goes" acquiescence to inappropriate workplace behavior. Most recently in the case of *Care One at Madison Ave., LLC* (Dec. 2014), the Board ruled that an employer violated employee rights when a few days after a union election which the Company won 58-57, the Company posted its workplace violence policy and a memo that said, "Now that the NLRB election is behind us, I was hoping that everyone would put their differences behind them and pull together as a united team." The memo further stated that, "[t]hreats, intimidation, and harassment" could lead to discipline or discharge.

The employer's policy existed prior to the union election. However, in holding that the employer's actions of posting the policy and memo violated that the National Labor Relations Act, the Board said that there was no workplace behavior that resulted in the need to post the policy. Therefore, according to the Board, the only reason for posting the policy was in response to employee protected activity to try to unionize. The Board also stated that the memo asking that employees treat each other "with dignity and respect" expanded the scope of the policy and, again, was in direct response to the union activity.

When employers have workplace violence concerns, employers should err on the side of taking action to prevent the violence. If issues arise from such action, better to defend the challenge that risk workplace violence.

Delayed Response to Employee Threats Supports Employee ADA Claim

"I'm scared and angry. I don't know why but I wanna kill someone/anyone. Please have security accompany you if you want to talk to me. Make sure, please. I'm unstable. I'm sorry." This is a note that an employee sent to his supervisor in the case of *Walton v. Spherion Staffing LLC* (E.D. Pa. Jan. 2015). Three weeks later, the employee was terminated. The delayed termination was a basis for the Court to deny summary judgment. According to the Court, a jury may conclude that the termination was due to the employee's "need for urgent, and presumably, medical attention, rather than as a result of any workplace threat."

The Court noted that during that three week period, the employee repeatedly asked the employer for information about insurance and medical assistance for his depression. The Court said that the delay in the employer's response raised the question of "two competing but equally valid public policy interests" – the employer's need to maintain a safe workplace and the protections afforded to mental health issues under the ADA. The Court stated that had the employer promptly terminated the employee, "it would seem farfetched that Plaintiff was discharged because of his disability." However, from the time of the employee's note to the termination, the Company was notified that the employee was taken to the hospital for observation and treatment for depression.

The Court also added that even if the employer had terminated the employee earlier, that would not have necessarily addressed the potential workplace violence issue. As the Court stated, "recent history is replete with incidents in which is disgruntled, former employee returned to the worksite, with tragic results." Although that observation may be true, the problem for the employer in this case was waiting three weeks between the employee's threat and termination as a result of that threat. During the three week interlude, the employer became aware of the employee's diagnosis of depression and hospitalization. Thus, the question for the jury to decide is whether the employee was terminated because of the threat he posed with his note or as an outcome of the information the employee received regarding his condition during the three weeks thereafter.

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

On January, 8, 2015, the House of Representatives passed H.R. 30, the "Save American Workers Act," with a final vote of 252-172. The bill proposes to amend the

Internal Revenue Code to change the definition of "full-time employee" under the ACA to the industry standard of 40 hours per week. Currently, the ACA requires that "applicable large employers" must provide minimum essential coverage to all employees who work an average of 30 hours per week, or face potential fines. Proponents of the bill reference evidence that employers are reducing employees' hours to 29 per week, or laying off employees, to avoid ACA obligations or fines. The bill is now with the Senate for a vote and if it passes, the bill will go to the President, who has already vowed to veto the bill. We will continue to keep you advised as this issue develops.

Other ACA issues on the horizon include possible guidance on several key provisions of the health care reform law. Although the "Cadillac tax" does not kick in until 2018, employers are already concerned about its impact. The 40% excise tax is aimed at businesses with "generous" health benefits–those that provide coverage in excess of $10,200 for individuals and $27,500 for families. The tax is set to be paid by insurers (and third party administrators in the case of self-insured employers); however, it is expected that reimbursement from employers will be sought. It remains unclear whether employees' pretax contributions to health savings account and self-insured vision and dental plans are supposed to be included in calculating the costs of employer provided benefits for purposes of the tax. Further, many employers offer different tiers of coverage and the law is unclear which "tier" would trigger the excise tax.

Wellness programs are certain to remain in the forefront for 2015 as well. Despite the apparent encouragement of wellness programs by the Administration, the EEOC has targeted them by suing employers for violation of the ADA when they impose penalties on (or, more commonly, withhold incentives from) employees who choose not to participate in health assessments, tests or programs aimed at improving their health. The EEOC filed three suits on this basis in 2014, alleging that employee health and wellness programs were not "voluntary" if they offered a reward, discount, or other incentive for employee participation in these programs. In August 2014, the EEOC sued Orion Energy Systems, arguing that Orion's program was not "voluntary" when an employee was required to pay full cost of premiums after she objected to participation in a wellness program that included a health risk assessment, blood work and a "fitness component." *EEOC v. Orion Energy Systems* (E.D. Wis.). In September 2014, the EEOC sued another employer, alleging that its wellness program was not "voluntary" since it required employees to submit to a screening process to receive a "reward." *EEOC v. Flambeau, Inc*. (W.D. Wis.). Most notably, in *EEOC v. Honeywell*, the EEOC sought an injunction to prevent Honeywell from imposing a $100/month surcharge on health insurance for employees who chose not to participate in biometric tests, whose results would be shared only with the employees themselves. (D. Minn. Oct. 2014). The district court denied the injunction. We hope that further guidance on this issue will be forthcoming so that employers will be encouraged to continue incentivizing employees to stay (or get) healthy.

We will keep you updated as these and other ACA issues develop.

NLRB Tips: Potential Impact of NLRB Decision to Grant Employee Access to Company Email Systems

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As predicted, the NLRB reversed long-standing precedent and overturned its 2007 decision in *Register Guard* and held that employee use of email on nonworking time for Section 7 purposes (read: union organizing) must presumptively be permitted by employers who have chosen to give employees access to their email systems.

<u>The ALJ's Original *Purple Communications* Decision</u>

Purple Communications had an electronic communications policy requiring that company computers, internet, and email be used for "business purposes only." The Company also "strictly prohibited" employees from using the Company computer, internet, voicemail and email systems for engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company . . . and from sending "uninvited email of a personal nature."

The Administrative Law Judge (ALJ) found the policy legal under the *Register Guard* rationale and thus determined that there was no discriminatory application of the electronic communications policy. All parties filed exceptions and cross-exceptions and the Board invited all interested parties to file briefs on whether the NLRB should overrule *Register Guard.*

The NLRB Decision in *Purple Communications*

The Charging Party's Arguments

The Charging Party, in urging the Board to reverse *Register Guard,* made several contentions:

A) Board should adopt a "presumption" that employees may access employer email or other communication systems to speak to Section 7 matters if their employer generally allows them to access the system to communicate about wages, hours, or other working conditions.

B) The Board failed, in *Register Guard,* to recognize NLRB precedent and properly apply the NLRB "equipment" cases.

C) NLRB should recognize that email communication is often less time consuming or disruptive to work productivity of the recipient than face-to-face speech among employees.

D) Availability of alternative means of communication among employees should be irrelevant in measuring the right of employees to engage in Section 7 activity.

The Respondent's / Employer's Contentions

A) Availability of alternate means of communication, such as personal email and smart phone texts, has strengthened the employer's property interest and outweighs employees' interest in using Company email to engage in Section 7 communications.

B) Allowing unfettered use of company email would cause numerous work productivity issues. In short, the NLRB approach does not address employers' interests in maintaining production and discipline, protecting confidential information, preventing computer viruses, and ensuring that worktime is actually used for work.

Amicus Briefs

Amici briefs in support of the Charging Party and General Counsel basically maintained that the NLRB should overrule *Register Guard* and apply a different analytical framework to find that a broad ban on non-business use of email is unlawful absent a particularized showing of need by the employer based upon productivity or distribution of its product.

Briefs in support of employers generally urged the NLRB to maintain the *Register Guard* precedent, and find that an employer's property rights outweigh the rights of employees guaranteed under the NLRA.

The Board Decision

The Board essentially adopted the Charging Party and General Counsel positions, and reversed the *Register Guard* decision.

Finding that "The necessity of communication among employees as a foundation for the exercise of their Section 7 rights that can hardly be overstated," the NLRB emphasized that:

> There is little dispute that email has become a critical mean of communication, about both work-related and other issues, in a wide range of employment settings.

To add insult to injury, the Board decided to apply the new rules "retroactively" to pending matters. In the event *Purple Communications* withstands judicial scrutiny, employers' remedial obligations will be limited to rescission of the policy and standard notifications to employees.

The Dissents

Calling the majority's decision an "unfortunate and ill-advised departure" from long-standing precedent, Member Miscimarra (R) made the following points:

- The decision improperly presumes that limiting access to a company email system constitutes "an unreasonable impediment to self-organization." Given the current state of the electronic communication revolution, Miscimarra finds no rational basis for that presumption.

- The majority fails to accommodate the substantial employer property rights associated with its computer resources.

- The majority's new right adversely affects a number of other legal requirements, including those under the NLRA. One example includes questions regarding possible surveillance of protected activities versus the ever-increasing need to monitor systems for security intrusions. Another example includes the likely confusion created in trying to sort out one of the "most easily applied of the Board's standards – 'working time is for work.'"

- The majority fails to adequately consider what the decision means in the area of productivity and discipline – where even small workplaces may generate "thousands of electronic messages" a day.

Member Johnson (R) joined in dissent, making many of the same points as Member Miscimarra, and emphasized that in this case, the NLRB does not deserve any deference by the courts to its decision.

Practical Impact of the Decision

While the decision is decidedly pro-union, in reality it is limited in some respects that will enable employers to manage its potential ramifications. Employers need to re-consider sweeping, blanket prohibitions on email use for purposes other than work, but otherwise may take the following practical steps to limit the damage this decision could portend:

- Employers are not required to make computers / email available to those whose jobs don't require such access. If access is given, then the policy should specify that such access to the employer's email system for personal use is only available during non-work time and that employees who are off work (or off the clock) have no right to access to use employer email for any personal purpose at any time.

- Although employees using company email for personal reasons during non-work time may email other employees during their work time, employers may prohibit employees from opening personal emails during work time.

- If employees take breaks away from work stations, there is no need to make computers / email available for those taking breaks on their own time. Thus, employers may limit access to employer email systems away from working time, requiring employees to use only personal email capabilities in those circumstances (i.e., smart phones).

- Employers have the right to prohibit the sending / receiving of emails from outsiders unless business related – either on work or non-work time.

- Employers have the right to monitor use of email under a valid, legal email use policy and then act upon violations of that policy.

- Employers may choose not to adjust their rules regarding personal email use during work and non-work time. While this is an option, if an employer allows employees unfettered access to its email system, understand that it may lead to posts regarding unionization at the employer's place of business or other complaints concerning wages, hours or working conditions, i.e., employees engaged in protected, concerted activity.

LMV understands policing and enforcing these suggestions may be easier said than done. However, it may be worth the effort.

Controversial NLRB Decisions Teed-Up for Judicial Review

"Quickie Election" Rules Challenged

The change in rules governing the processing of representation petitions, scheduled to take effect on April 25, 2015, has been challenged in two lawsuits brought by the U.S Chamber of Commerce and various trade organizations, claiming that the rules are overly-broad and illegally impinge on employers' free speech rights. One suit was filed in the District of Columbia District Court, the other in a Texas District Court.

The adoption of the rule changes marked the NLRB's second pass at amending its representation case procedures. The NLRB re-introduced the regulations in 2014, after a scaled-back version was finalized in 2011 and subsequently struck down by a federal district court judge in May of 2012.

Micro-Bargaining Units Under Scrutiny

The *Nestle Dreyer's Ice Cream Co.* case has been appealed to the Fourth Circuit Court of Appeals. In that case, Nestle contends that the NLRB's decision (affirmed by the Sixth Circuit Court of Appeals) in *Specialty Healthcare* to permit micro-bargaining units marked a significant departure from existing precedent without any reasoned analysis, and therefore constitutes an abuse of discretion.

In addition, Nestle contends that *Specialty Healthcare* ignored twenty-year-old Fourth Circuit case law, where the Court refused to recognize the legitimacy of an "overwhelming community of interest" test to determine the appropriateness of a bargaining unit.

In a similar case, the NLRB ordered Macy's to bargain with a microunit of cosmetics and fragrance employees at a single store. Macy's has appealed that decision to the Fifth Circuit Court of Appeals. Thus, the stage is set for an appeals court battle over micro-bargaining units.

Facebook Cases Facing Judicial Review

Triple Play Sports Bar has appealed the NLRB decision finding that the Company unlawfully discharged workers who posted "obscene" Facebook comments. The request for review, filed in the Second Circuit Court of Appeals, urges the court to reverse an August 2014 NLRB decision where the Board said that the firing of two employees violate the Act after they had complained in the post about the Company's apparent inability to properly calculate their tax withholdings.

Triple Play argues that the Board ignored the Second Circuit's previous decision in *Starbucks,* where an employee was discharged legally for an obscene outburst in front of customers. The bar would not draw any distinction between a Facebook post, open for public review, and the Starbucks employee outburst at the store:

> The comments were made in a public forum and were viewed by customers of [the bar]. Like the employer in Starbucks, Triple Play has a legitimate interest in refusing to tolerate such obscenities in the presence of its customers and the [NLRB] has failed to consider that interest.

It will be interesting to see how the courts deal with these, and other, controversial NLRB decisions coming down the pipe. Expect the Board to continue to keep up the pace of its pro-labor agenda, and any adverse court decisions will simply be treated the same as adverse judicial pronouncements in waiver of class action rights in mandatory arbitration agreements. In those cases, the Board simply ignores the Circuit Court decisions and forges ahead in prosecuting and finding violations of the Act. *See D.H. Horton*.

EEO Tips: EEOC's Enforcement Road Had its Peaks and Valleys in 2014

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The past 15 months have not been so good for the EEOC: its litigation priorities have been sharply criticized by members of Congress, its effort to obtain an important preliminary injunction in its seminal case involving a wellness program was summarily denied, and its conciliation procedures were challenged and are now pending review by the Supreme Court. There have been bright spots, however: the Commission obtained a number of significant judgments in its favor by various courts, and an appellate court reversed a huge award of attorney's fees and court costs against the EEOC, an important precedent for an agency pursuing what could charitably be called "novel" cases. With Fiscal Year 2014 under its belt, let's look at how well the EEOC met its first strategic objective in the agency's Strategic Enforcement Plan. That objective was: "to combat employment discrimination through strategic law enforcement."

At first glance, this objective is so broad that seemingly any effort by the EEOC to process charges or file lawsuits would make it achievable. However, based on the criticisms leveled at the EEOC by the courts and some members of Congress, there are many who would argue that the agency's law enforcement efforts were neither strategic nor reasonable. Of course, there are those who would argue otherwise. While it is beyond the scope of this article to list them all, let's review a few of the EEOC's peaks and valleys in the two key components of "strategic law enforcement," charge processing and litigation pursued by the EEOC itself.

Disclaimer: While official FY 2014 statistics are not yet available, key data have already been released in its *Performance and Accountability Report for FY 2014 (PAR)* and in statements from EEOC officials.

Charge Processing Peaks and Valleys

- **Charge Receipts:** The *PAR* shows a clear valley for FY 2014, with only 88,778 Charges, the lowest number of charges received in the last five fiscal years. Additionally, the report states that due to budgetary constraints in hiring investigators and other personnel, the EEOC was unable to reduce its inventory of pending charges by as much as it had in FY 2013. The inventory of pending charges that will be carried over to FY 2015 increased from 70,781 to 75,935, or by 7.3%.

- **Monetary Benefits Obtained During the Administrative Process**: The *PAR* shows another valley performance here. The PAR indicates that, in resolving charges through the administrative process, the EEOC was able to obtain $296.1 million in monetary benefits on behalf of charging parties and affected class members. This figure represents over a 20% drop from the $372.1 million obtained in FY 2013 and the lowest amount obtained from that source in the last four years.

- **Mediation:** Chairperson Jenny R. Yang reported that the agency conducted 10,221 mediation sessions and had a success rate of 77% in resolving charges through mediation. From mediation, the agency obtained $144.6 million in monetary benefits on behalf of charging parties. This was among the highest amounts received from that source in recent years, but was still less than the $160.9 million from FY 2013.

- **Systemic Program:** The *PAR* stated that during FY 2014, the agency completed 260 systemic case investigations, which was a significant increase over past years. The processing of these investigations resulted in 78 settlements and/or conciliation agreements under the terms of which approximately $13 million was obtained on behalf of affected class members. These actions were directly related to the agency's stated objective of making systemic cases a priority, and thus, from the agency's viewpoint, would no doubt be a peak experience during FY 2014.

- **Overall Administrative Processing of Charges:** The EEOC's performance here was flat, given the agency's budgetary restraints and personnel shortcomings. The agency had been subjected to a hiring freeze, like all federal agencies, and had lost a significant number of investigators through retirement or other means. Toward the end of FY 2014, the agency was able to hire over 300 staff members including investigators and attorneys. However, their impact would not be noticeable until an accounting of the agency's performance is made for FY 2015.

Litigation Peaks and Valleys

- **Systemic Cases:** The EEOC prioritized systemic, class-type cases, and had peak experiences in the following cases:

  - *EEOC v. Global Horizon and Maui Pineapple, et al* (D. Haw. Dec. 2014). Judgment of $8.7 million on behalf of 82 Thai farmworkers who were allegedly discriminated against based on race and national origin. Also, a judgment of $2.4 million on Sept. 8, 2014, on behalf of some 500 Thai workers against four of the co-defendant companies who allegedly discriminated against the workers on the basis of race and national origin. The four companies settled their respective parts of the lawsuit earlier leaving Global Horizons and Maui Pineapple to make their own settlements or continue the litigation.

  - *EEOC v. Dart Energy Corporation* (D. Wyo. Dec. 2014). In this case, three related well-servicing companies agreed to pay $1.2 million to settle EEOC's lawsuit alleging discrimination on the basis of race, national origin harassment and retaliation on behalf of 12 employees.

  - *EEOC v. Battaglia Distributing Corp*. (N.D. Ill. Nov. 2014). In this case, a food distribution company agreed to pay $735,000 to settle an allegation of racial harassment brought on behalf of 30 former and current employees.

- **Avoiding Responsibility:** The EEOC also had a peak experience in overturning an award of attorneys' fees and court costs against it for pursuing litigation unreasonably.

  - *EEOC v. CRST Van Expedited, Inc.* (8th Cir. Dec. 2014). In this case, the Eighth Circuit reversed a trial court's order requiring the EEOC to pay $4.7 million in attorneys' fees and costs incurred by the employer in defending against a lawsuit filed by the EEOC involving allegations of sexual harassment of 157 female driver trainees. Ultimately, after almost six years of litigation, the trial court found that only one of the females had a viable case and her case was settled for $50,000. Among other things, the Defendant Company alleged that the EEOC had failed to conciliate in good faith with respect to 67 of the female driver trainees and to identify other class members prior to a "fishing expedition" during the course of discovery after the lawsuit had been filed. Under these circumstances, the trial court dismissed the case and ultimately awarded the $4.7 million to the Defendant in payment of attorney fees and costs.

    Thus, at least for now, the EEOC, once again with the help of the Eighth Circuit, was able to dodge a bullet with respect to attorney's fees and costs in a case in which both the EEOC's investigative procedures and conciliation were critically in question.

- **Monetary Benefits:** The EEOC filed 133 merits suits in FY 2014 (131 merits cases were filed in FY 2013) and obtained $22.5 million in monetary benefits for charging parties and affected class members. This was the lowest amount obtained through litigation in the last 10 years. However, among the merits suits filed the agency had included 17 systemic cases, thus continuing an upward trend in this category of cases litigated.

- **Outside Criticism:** Congressional hearings were a definite valley experience for the EEOC.

  - According to various Republican members of the Senate's Health, Education, Labor and Pension committee (HELP), in a minority staff report, the EEOC was criticized as having "misguided litigation strategies and investigative tactics which were causing losses in court, costing taxpayers, and also creating unfair burdens on employers. The report also stated that since 2011 certain Federal Courts have awarded attorney's fees against the EEOC in 10 cases after finding that the agency's actions in filing cases were frivolous or excessive given the facts in the case in question. However, the majority report of the

HELP committee did not agree with these criticisms and credited the EEOC for having effectively carried out its enforcement mandates.

- The confirmation of the EEOC's General Counsel, David Lopez, for another term was sharply opposed by a number of Republican members of the Senate, but nonetheless approved by a vote of 53 – 43 by the Senate as a whole.

- According to various sources, it is expected that there will be greater scrutiny of the EEOC's enforcement programs in the next Congress when Republicans control both houses.

- **Pending Supreme Court Decision:** The EEOC has a statutory obligation to conciliate "in good faith" (whatever that means). The EEOC has long taken the position that it has discretion to determine the amount of effort it must extend in conciliation, and that it only need produce a modicum of evidence to prove it met this standard, such that no meaningful judicial review is possible. Nearly every court to have considered this question has found that it has some authority to review the effort, though there's been no meaningful consensus on the definition of "good faith." The EEOC got the Seventh Circuit Court of Appeals to agree with it, however, and now that case is being appealed to the Supreme Court. *Mach Mining, LLC v. EEOC* (oral argument Jan. 13, 2015). The Seventh Circuit held in effect that no judicial review was available if the EEOC submits documents showing that it was unable to reach a conciliation agreement which was acceptable to the agency. The EEOC must feel optimistic because it did not oppose Mach Mining's Petition to the Supreme Court for a review of this issue. Litigators generally prefer asking for an affirmance of a lower court's decision rather than an overturning of that decision, so it makes sense that the EEOC would prefer the Court review one of its wins rather than one of its losses.

The foregoing is only a partial picture of the various peaks and valleys the EEOC went through in traveling down its enforcement road. However, the items mentioned would seem to be fairly representative of what happened in total. In our judgment, it is doubtful that the EEOC itself would conclude that, overall, it has been one of its peak years.

OSHA Tips: OSHA and Falls Hazards

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As I write this, the screen crawler on OSHA's website is displaying the following: worker killed in fall from a skylight; temporary worker killed in fall from 3rd floor landing platform; and 2 workers killed from a fall from a scaffold.

As noted by the National Institute of Occupational Safety and Health (NIOSH), falls are a persistent hazard found in all occupational settings. Exposures range from walking across a floor or climbing a stepladder to changing a light bulb to those involving significant heights encountered by iron workers or work on cell towers.

Not surprisingly, OSHA devotes much of its attention during worksite inspections to assessing hazards. This is true with respect to general industry worksites as well as construction. This is evidenced by the fact that each year you may expect to see fall hazards to be near the top of OSHA's most cited standards.

The most cited OSHA standard in 2014 was construction standard 1926.501. This standard requires the employer to provide fall protection for employees working at 6 feet or more above ground or lower level.

Fall hazards have been a focus of OSHA and this has primarily been directed at the construction industry. That industry has seen about 40% of workplace deaths and around 1/3 of these have resulted from falls.

While deaths from falls have been most notable in the construction sector, they are not limited to that industry.

Outside of construction, the highest number of non-fatal fall injuries has occurred in the health services and wholesale and retail industries.

Same level falls due to slips or tripping take a significant toll. Many back injuries may be attributable to slips on walking surfaces.

OSHA has numerous standards in construction and general industry that address fall protection. Examples of these frequently found to be in violation include the following:

- 29 C.F.R. §1910.23(c)(1) - This often sited standard requires that every open-sided floor or platform that is 4 feet or more above the adjacent floor or ground level be guarded by a standard railing.
- 29 C.F.R. §1910(22)(a)(1) is known as the housekeeping standard. This provision calls for maintaining passageways, storerooms, and service rooms in a clean and orderly state.
- 29 C.F.R. §1926.501(b)(1) - This construction industry standard requires that each employee on a walking/working surface with an unprotected edge which is 6 feet or more above ground level must be protected from falling by a guardrail, safety net, or fall arrest system.
- 29 C.F.R. §1926.503(a)(1) - This construction standard requires that an employer provide a training program for each employee who might be exposed to fall hazards.

Wage and Hour Tips: White Collar Exemptions

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As we begin a new year, I thought we should take a look back at some of the recent Wage and Hour issues. First, although Alabama is one of five states that does not have a separate minimum wage law, more than one-half of the states do and you should be aware that 20 states are increasing their minimum wage in 2015. The increases range from $0.12 in Florida to $1.25 per hour in South Dakota. If you have operations in multiple states, you should check the website for those states to make sure you are paying the correct wage in 2015. According to a chart I saw, over 2.5 million employees will receive a direct increase in their wages as a result of these changes.

In 2013, DOL had issued revised regulations, to be effective on January 1, 2015, regarding the application of the Fair Labor Standards Act to household employees. These changes substantially increase the number of employees that are subject to the minimum wage and overtime requirements of the Act. On January 15, 2015, a District Court Judge in Washington, D.C. issued an injunction against enforcement of the new regulations stating that DOL had overstepped its authority. However, I do not expect this to be the final order regarding this, as I will be surprised if Wage and Hour does not appeal the case to the U.S. Court of Appeals.

As you are aware, the President ordered DOL to revise the regulations that are used to determine if an employee is exempt. Initially it was thought that the revisions would be published in 2014 but now it appears the proposed changes will not be published before February. However, once they are published, there will be a public comment period (usually at least 90 days) and then Wage and Hour will have to review the comments prior to issuing a final rule. From prior experience, I would not expect any final changes to become effective prior to late in 2015 or even into 2016.

Because a large percentage of the violations found by DOL are due to the misclassification of employees, I am revisiting the requirements for the management exemptions. For many years, these were referred to as "White Collar" employees but in today's world they no longer carry that connotation.

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. The application of the exemption is not dependent on job titles but on an employee's specific job duties and salary. In order to qualify for an exemption, the employee must meet all the requirements of the regulations.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

This exemption is typically applicable to managers and supervisors that are in charge of a business or a recognized department within the business, such as a construction foreman; warehouse supervisor; retail department head or office manager.

Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

This exemption may be applicable to certain management staff positions such as Safety Directors, Human Resources Managers and Purchasing Managers. Of the exemptions discussed in this article, the administrative exemption is the most difficult to apply correctly due to application of the "discretion and independent judgment" criteria with respect to matters of significance.

Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Examples of employees that could qualify for the exemption include Engineers, Doctors, Lawyers and Teachers.

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Typically, this exemption can apply to artists and musicians.

Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week or at an hourly rate not less than $27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:

  1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

  2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

  3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

  4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

This exemption does not apply to employees who maintain and install computer hardware.

Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

You will note that this exemption is the only one in this group that does not have a specific salary or hourly pay requirement. Thus, the exemption may be claimed for outside sales employees that are paid solely on a commission basis.

The application of each of these exemptions depends on the duties actually performed by the individual employee rather on what is shown in a job description, plus the employee must meet each of the requirements listed for a particular exemption in order for it to apply. Further, the employer has the burden of proving that the individual employee meets all of the requirements for an exemption. Therefore, it is imperative that the employer review each claimed exemption on a continuing basis to ensure that he does not unknowingly incur a back wage liability. If I can be of assistance in reviewing your positions, please do not hesitate to contact me.

Did You Know…?

…that an employer could not avoid wage and hour liability when an employee intentionally underreported overtime hours? *Bailey v. TitleMax of Ga., Inc.* (11th Cir., Jan. 15, 2015). An employee did not complain to upper management when the employee's immediate supervisor told the employee to lower the number of overtime hours he was claiming. Allegedly, the supervisor told the employee that the Company did not pay overtime. The employer could not rely on the employee's failure to report this to the Company, stating that "it cannot escape FLSA liability by asserting equitable defenses based on that underreporting. To hold otherwise would allow an employer to wield its superior bargaining power to pressure or even compel its employees to underreport their work hours, thus neutering the FLSA's purposeful reallocation of that power."

…that on January 13th, the International Association of Machinists filed a petition for an election among 20,000 Delta Airlines' flight attendants? Delta (known to some who fly it often as "Don't Expect Luggage To Arrive") has a largely non-union workforce, except for its pilots. Sixty percent of the 20,000 flight attendants signed a petition to be represented by the Machinists. The election will be conducted by the National Mediation Board. Delta's response is that "while we respect our employees' right to decide whether unionization is best for them, Delta flight attendants have already rejected union representation three times since 2002." According to IAM, Delta is "the world's most profitable carrier and leads the industry in almost every financial and operational measure. Yet, we lag the industry in wages, benefits and work rules. That will change once we win our election and negotiate the industry best contract we deserve."

…that on December 30th, Michigan passed a law to prohibit college athletes from unionizing? The legislation was signed into law by Governor Rick Snyder (R). Under the law, student athletes are not treated as employees and are excluded from public sector unionization and bargaining rights. Public sector employers are not covered under the National Labor Relations Act. Northwestern University is a private institution. The NLRB is reviewing the Regional Director's decision as to whether Northwestern University football players meet the definition of "employee" under the National Labor Relations Act. If the Board rules that they are employees, then the scholarships for those college athletes would likely be considered taxable income.

…that PetSmart agreed to a $1 million wage and hour settlement arising out of its use of pay cards? *Pace v. PetSmart, Inc.* (C.D. Cal. Jan. 2015). The case involved 1100 employees who claimed that issuing pay cards instead of a final check violated state law to pay employees their full compensation upon separation. Financial institutions charged a fee to process pay cards. Thus, the 1,100 former employees argued that they were not "paid in full" upon separation, as required under state law.

…that Apple, Adobe Systems, Intel and Google agreed to pay $415 million to settle a hiring antitrust claim? *In re High-Tech Emp. Antitrust Litig.* (N.D. Cal. Jan. 2015). The antitrust case arose out of allegations that Silicon Valley high-tech companies agreed to refrain from hiring each other's employees. The settlement still must be approved by the Court. Had the case gone to trial, the companies faced the potential of $9 billion in damages.

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