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# Employment Law Bulletin

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## *Inside this issue:*



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## Union Organizing Grounded At Boeing and Delta

On March 11, 2015, the International Association of Machinists petitioned for an election covering 23,000 employees, 3,000 of whom work at the Boeing production facility in North Charleston, South Carolina and 20,000 of whom are Delta ("Don't Expect Luggage to Arrive") flight attendants. In support of its petition, the Union produced signed authorization cards from 12,000 of those employees. An election was scheduled for April 22, 2015. During the run up to the election, the Union made house visits to 1,700 employees, and as a result of those visits, concluded that it would not be successful on Election Day. In fact, some of the employees threatened to shoot the organizers if they did not leave. As a result, the Union withdrew its petition on April 6, and no election was held.

What employers can learn from this story is the importance of a cooling down and education period from the date the petition for the election was filed until the election was scheduled. In this case, there were 38 days between the petition and the scheduled election, and the Union determined it had lost—or never had—sufficient support to win the election by the 26th day. Under the new NLRB Election Guidelines, that 38 day period would have been cut at least in half, and an election could have occurred April 2nd or earlier. Why is this difference significant to employers?

A union's support peaks as of the date it files the petition for an election. Although a union needs only 30% of employees to "show an interest" for the union to request an election, typically unions do not file an election petition unless they have at least 60% to 70% of the employees signed up. This is because unions know that the emotionalism and peer pressure surrounding card signing and filing the petition diminishes as employees take a more reflective look at facts and vote by secret ballot. The prior election guidelines of 42 days from the date the petition was filed until the election which was ample time for employers to mount a meaningful campaign. (Elections with airline employees proceed under slightly different rules, hence the Boeing/Delta election was scheduled for 38 days). Even under those timetables, unions generally won about 60% of elections. So the outcome at Boeing may have been different under the new guidelines—had the election been held three weeks earlier, the Union may have concluded that it still had enough support to move ahead with the vote.

The change in NLRB election ground rules, which are reviewed in this issue by our colleague Frank Rox, should motivate employers to do a self-critical analysis of their union-free initiatives. Under the prior rules, if the filing of the

petition was the first notice the employer received of unionization, the employer often was able to recover, address issues, clear up misunderstandings, educate employees about what unionization means and does not mean, and end up winning. Now there may not be enough time for success if the first notice the employer receives is through the petition. Therefore, employers should take the following steps to maintain a solid union-free plan:

1. Be sure there is philosophical alignment among the leadership team of the commitment to remain union-free, and to apply policies and expectations accordingly.

2. Be sure front line supervisors are aligned with the leadership team regarding expectations for and the importance of a union-free future, and that supervisors overall are aligned with the leadership team on the direction of the business.

3. Be sure that supervisors and managers understand how their behavior influences employees' thoughts about the company, whether to seek unionization or a plaintiff's attorney, and establish accountability for their behavior.

4. At all levels within the organization, keep in mind to "signal before you turn." In other words, be aware of how change is communicated and implemented. Prevent decision outcomes which create employee heroes and company villains. Ask yourself: "What is the potential impact on the workforce of this business decision?"

5. Train supervisors about what it takes to remain union-free and why that is important to the company.

6. Conduct a unionization vulnerability assessment. Annual employee surveys alone will not suffice, as the information may be received too late to address.

7. Discuss with employees about the importance of remaining union-free: what that means to this location, what it means to the business.

8. The orientation process should include a comprehensive review of the location's union-free status and why. Consider showing a video about card signing, so employees understand before they even arrive at their work station what unions are all about and why employees should say "no" if approached by a union.

9. Just as most organizations have crisis contingency plans including succession, environmental or natural disasters, or adverse publicity, employers should also prepare a similar plan to deal with a union organizing campaign. Under the new election rules, there will not be time for levels of deliberation and review of the employer's response to organizing.

## National Labor Revolution Board Works Around Right-to-Work

The NLRB's re-write of U.S. labor law and policy continues. In Right-to-Work states, it is illegal for the employer and union to agree to "union security" language. That is language in a bargaining agreement where an employee is fired if the employee does not join the union or remain a member of the union. During the past four years, Indiana, Michigan and Wisconsin—states with strong union membership—have become Right-to-Work states.

The challenge for unions in a Right-to-Work state is to convince enough employees in the bargaining unit to join the union and pay dues. If employees do not like their experience as a union member, they may terminate their membership and cease paying dues. However, the union has a legal obligation to represent all employees in a bargaining unit, including non-members. The NLRB on April 15, 2015, announced that it is considering an approach to permit unions to charge non-members a fee for processing grievances on the non-member's behalf. The case of *Buckeye Florida Corporation* (NLRB April 15, 2015) involved the United Steelworkers telling a non-member employee that the union would not process an overtime grievance on his behalf unless the employee paid a "fair share representation fee." Florida is a Right-to-Work state. An administrative law judge found that the union's policy was unlawful, stating that the legal issues in this area are "well settled and unambiguous." However,

the union appealed to the union-friendly NLRB. The Board issued an invitation for briefs on whether the NLRB should permit unions to charge a fee to non-members for processing grievances. The Board asked the question "should the Board reconsider its rule that, in the absence of a valid union-security clause, a union may now charge non-members a fee for processing grievances?" The Board also asked that "if such fees were held lawful in principle, what factors should the Board consider to determine whether the amount of such a fee [is lawful]?"

We expect the NLRB to conclude that unions are permitted to charge non-members for processing grievances. The Board will do whatever it can to bypass Right-to-Work laws in order to support the faltering labor movement.

## Telecommuting Accommodation is Limited, Rules Court

Questions frequently arise about to what extent, if at all, employers must accommodate employees by permitting them to work from home. On April 10, 2015, the full Sixth Circuit Court of Appeals narrowed the scope of the circumstances when such an accommodation may be required in rehearing the case of *EEOC v. Ford Motor Company*.

Employee Jane Harris worked as a steel resale buyer. The buyers purchase steel and resale it to auto parts manufacturers, whose representatives work in the same building as Ford's buyers. Harris had irritable bowel syndrome. She requested an accommodation to work from home four days a week. Ford provided a limited work at home accommodation, and when Harris was unable to report to her regular work location, Ford terminated her. The EEOC sued, claiming that Ford failed to reasonably accommodate her in violation of the ADA.

In rejecting the EEOC's position, the Court made the following key points which are useful to employers when faced with the "work at home" accommodation issue:

1. "Regular and predictable attendance" at the work place was an essential function of the buyer's job. The Court stated that "even with the past reasonable accommodations of telecommuting. Harris could not regularly and predictably fill the essential job function of reporting to work."

2. The Court stated that "attending work onsite is essential to most jobs, especially interactive ones."

3. The Court cited the EEOC's guidance on reasonable accommodation, which stated that employers may deny a request for employees to work from home where jobs require "face to face interaction and coordination" with customers or fellow employees.

4. The Court stated that "a sometimes forgotten guide likewise supports the general rule: common sense. Non-lawyers would readily understand that regular onsite attendance is required for interactive jobs. Better to follow the common sense notion."

5. The Court also rejected the EEOC's argument that by providing telecommuting as a temporary accommodation, Ford was obligated to do so on a permanent basis. "If the EEOC's position prevailed," the Court said, then "once an employer allows one person the ability to telecommute on a limited basis, it must allow all people with a disability to telecommute on an unpredictable basis … that's one hundred eighty degrees backward. It encourages—indeed requires—unlimited telecommuting as an accommodation for any employee."

When faced with a request to telecommute as an accommodation, evaluate the impact of an employee working from home on the business. Some questions to consider include: What duration and frequency of telecommuting is the employee requesting? Could a different telecommuting schedule work, even if what the employee proposed could not work? Does the job require interaction with others where face time is important? Does the job require access to documents or other work related materials? If it does, can the access be reliably and securely provided? If a work from home accommodation is possible for a limited period of time, then under the ADA the employer should follow that as one accommodation approach. However, because regular attendance at the employer's place of business is an essential function of most jobs, it will be a difficult for an employee to show that an employer must reasonably

accommodate by shifting the employee's work location from the employer's business to the employee's home.

## EEOC Issues Proposed Rule on Wellness Programs

On April 20, 2015, the EEOC issued a proposed rule amending regulatory guidance related to wellness programs. The proposed rule provides guidance to employers and employees regarding how wellness programs can comply with the ADA and remain consistent with the provisions governing wellness programs under HIPAA and the Patient Protection and Affordable Care Act (ACA). Specifically, the rule is intended to clarify issues that have confused employers who use financial incentives in workplace wellness programs.

**Some necessary history on employer wellness programs.** Employer sponsored wellness programs must comply with all laws enforced by the EEOC, including the ADA, which generally prohibits employers from requiring medical exams of employees or making disability–related inquiries. Wellness programs must also comply with the HIPAA, which prohibits health plans from discriminating based upon an individual's health status. An exception to the HIPAA law allows discounts or rebates, and other rewards in exchange for an employee's adherence to certain requirements consistent with health promotion and disease prevention, such as those provided by many wellness programs. ACA's final regulations included additional guidance on requirements for wellness programs, and expanded the previously set limits on rewards and penalties that certain workplace wellness programs may provide. The new rules, which are applicable for plan years beginning on or after January 1, 2014, made significant changes to the criteria that wellness plans must meet in order to reward health results without discriminating based upon a health factor. They also recognized that compliance with HIPAA nondiscrimination rules (as amended by the ACA) did not ensure compliance with other laws, including the ADA. This left the door open for the EEOC's attack on the "voluntariness" of wellness programs.

There are generally two types of wellness programs under the HIPAA/ACA provisions:

1. Participatory Wellness Programs, and

2. Health-Contingent Wellness Programs (which may be either "activity-only" or "outcome-based")

A participatory wellness program is one that either does not provide a reward for participation, or offers a reward, but does not condition the reward on an individual satisfying a standard that is related to a health factor. Participatory wellness programs are permitted under HIPAA nondiscrimination rules as long as they are available to all similarly situated individuals regardless of health status. Although HIPAA does not place any limits on incentives for participatory wellness programs, the EEOC's proposed rule appears to extend the 30% limit placed on incentives for health-contingent wellness programs (see below) to participatory programs.

The EEOC's focus has been on the second type of wellness program, those that are "health-contingent" and require an individual to "satisfy a standard related to a health factor to obtain a reward." Among other requirements, a reward offered under a health contingent program must meet certain parameters. A "reward" may be a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism, an additional benefit, any financial or other incentive, or the avoidance of a penalty (such as the absence of a premium surcharge or other financial or nonfinancial disincentive). The ACA regulations increased the award employers are allowed to offer under a health contingent wellness program from 20% to 30% of the cost of coverage. The maximum permissible reward was increased to 50% for wellness programs designed to prevent or reduce tobacco use.

In 2014, the EEOC filed several lawsuits targeting wellness programs established by employers who impose penalties (or even simply withhold incentives) when employees are required to participate in health assessments or tests aimed at improving their health. The basis for these suits is the ADA's prohibition on employers requiring medical exams of employees or making disability-related inquiries. The EEOC took the position that employers may conduct *voluntary* medical examinations (and obtain information from medical histories) as part of a *voluntary* employee wellness program. However, the EEOC further stated that a

wellness program is only "voluntary" if the employer neither *requires* participation, nor *penalizes* employees (by denying incentives) who do not participate. *See EEOC v. Orion Energy Systems* (E.D. Wis. 2014); *EEOC v. Flambeau, Inc*. (W.D. Wis. 2014); and *EEOC v. Honeywell* (D. Minn. 2014).

The Commission concludes in the proposed rule issued last week that "allowing certain incentives related to wellness programs, while limiting them to prevent economic coercion that could render provision of medical information involuntary, is the best way to effectuate the purposes of the wellness program provisions of both laws."

The proposed rule states that the term "voluntary" means that a covered entity:

1. Does not require employees to participate;

2. Does not deny coverage under any of its group health plans or particular benefit packages within a group health plan for non-participation or limit the extent of such coverage (except pursuant to allowed incentives); and

3. Does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees within the meaning of Section 503 of the ADA.

The rule further requires that sponsors of wellness programs provide a notice to participants that clearly explains the following:

- What medical information will be obtained
- How the medical information will be used
- Restrictions on the disclosure of medical information
- How the program will prevent improper disclosure of the medical information (including whether the program complies with the HIPAA Privacy requirements)

Comments on the proposed rule are requested through July 19, 2015. For now, employers are reminded of all HIPAA privacy obligations because these take on additional importance under the EEOC's proposed rule. Furthermore, employers should ensure that no adverse action is taken based upon an employee's actual or perceived disability, including acting on information obtained pursuant to a wellness program.

We will continue to keep you advised as this issue develops.

## NLRB Tips: The Quickie Election Rules Implemented – President Obama Stands Firm as Challenges Continue

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As the judicial challenges to the NLRB election rule changes continue in federal courts in Washington D.C. and Texas, the political infighting appears headed toward an end. President Obama vetoed the Congressional Review Act, which would stop the NLRB from implementing the rule changes, and the Senate does not appear to have the votes necessary to override the veto.

In the courtroom, the parties have filed motions for summary judgment and/or dismissal of the lawsuits. As of this writing, neither the D.C. nor the Texas court has ruled on the election rule changes, and the NLRB remains ready and willing to implement the changes effective April 14, 2015.

To this end, on April 13, 2015, the Board issued GC Memorandum 15-06, providing guidance to practitioners in the processing of representation petitions. GC-Memo 15-06 is thirty-six pages, and some highlights are outlined below.

- Section 102.60 allows for e-filing and sets forth the requirements for the initial processing of R-case petitions.

- Section 102.63(a) provides that within two business days after the service of the notice of hearing, the employer must post the Notice of Election. Section 102.63 (b) requires the non-petitioning parties (normally the employer) must file a Statement of Position form before the hearing that identifies the issues [the employer] wishes to litigate at the hearing. In addition, the employer must submit an alphabetized electronic list of employees with the full names, work locations, shifts, and job classifications of all individuals in the proposed unit, and, if the employer submits that the unit is inappropriate, a separate catalog listing the same information for its alternative bargaining unit. The employer must also list those individuals whose eligibility to vote they intend to contest at the pre-election hearing and the basis for each such contention.

This section also outlines the contents required in the Statement of Position (SOP). These requirements are detailed and burdensome, and failure to include particular issues within the SOP will result in the waiver of the employer's right to raise the issue at hearing.

- Section 102.62(d) requires that the employer provide the voting list within two business days after the Regional Director's approval of the election agreement.

- Section 102.64 sets forth the final rule amendments regarding pre-election hearings. The scope of hearings will be significantly streamlined, and considerable discretion will be vested in the Regional Director in determining what issues may be heard at a pre-election hearing.

- Section 102.66(b) provides that the SOP is introduced into the record before evidence is taken and all other parties are required to respond to any issues raised by the SOP before the hearing may proceed.

- Section 102.66(c) provides that the Regional Director shall limit the evidence taken by the hearing officer in order to conform to the issues determined as germane to the appropriateness of the proposed unit.

- Section 102.66(h) permits parties to make oral arguments on the record, but post-hearing briefs are permitted only with special permission of the Regional Director.

- Section 102.67(b) provides that elections shall be set at the "earliest date practicable" after the issuance of a decision and direction of election (DD&E) by the Regional Director. Thus, the twenty-five day waiting period after the DD&E issues has been abolished.

**Specific Issues Appropriate For Pre-Election Hearings**

1. Jurisdiction Issues

2. Labor Organization Status

3. Bars to an Election

   All potential election-bar issues, including certification bar, contract bar, recognition bar, successorship bar and election bar, must be litigated and resolved before an election can be conducted.

4. Multi-Employer and Multi-Facility Issues

5. Expanding and Contracting Unit Issues

6. Employee Status

   Issues as to whether individuals are employees within the meaning of Section 2(3) of the Act must be litigated at the initial hearing if they involve the entire unit and should likely be litigated if they concern classifications that constitute more than 20% of the bargaining unit.

7. Seasonal Operations

8. Professional Employees and Guards

9. Eligibility Formulas

10. Craft and Healthcare Employees

**Observations on the New Rules**

There can be no doubt that the final result of the rule changes will be to expedite the conduct of any election, and shorten the time from the filing of a petition to an ultimate certification for a labor organization should the union win the vote. Despite public assurances by the GC that shortened time frames for the conduct of elections and issuance of decisions are not part of the final rule changes, there will be pressure from NLRB headquarters on Regional offices to set elections sooner rather than later, and undoubtedly a Regional Director's performance evaluation (*i.e.*, their bonuses) will be tied to a significant reduction in the median time of scheduling of elections. Look for Regions to schedule elections 14 to 21 days after the filing of a petition. It remains to be seen if the Regions can reach this ambitious goal, especially if there is a significant uptick in the filing of union petitions seeking representation.

Employers must be prepared to manage the shortened time span when dealing with union efforts to organize its employees. More than ever, it is time for employers to be proactive in addressing its views on unionization and not waiting until a petition is filed, because then an election may be only two to three weeks away.

Finally, it is important to address employee work concerns **before** a union is on the scene. Any attempt to remedy employee concerns after a union organizing campaign is underway might be grounds for setting aside the election results.

LMV will track the evolution of these new election regulations, and the impact the rules have on employers wishing to remain union-free. In the meantime, hope remains that the federal courts will offer some relief of the more onerous changes made by the amendments.

# NLRB Finds Limitation on Picketing Illegal – Calls Arbitration Decision Repugnant to the Act

The General Counsel's new guidelines on deferral to arbitration awards has already been applied in *Verizon New England, Inc.*, 362 NLRB No. 24 (2015).

An arbitration panel had found that the Company was right in telling employees to remove picket signs in windows of their cars parked on company property. The panel said that the signs amounted to picketing in violation of a contractual "no-strike" provision between Verizon and the Union.

In finding that the arbitration award was "clearly repugnant to the Act," the Board found that "the contractual provisions cited by [Verizon] and considered by the arbitration panel neither address nor reasonably encompass employees' display of signs in their personal vehicles, and there is no evidence that the parties intended the contract to cover that conduct."

Accordingly, as the award was "not susceptible of an interpretation that is consistent with the Act," the Board found the award "clearly repugnant" and that NLRB deferral to the award was not inappropriate."

Member Harry Johnson III (R) dissented from the majority decision, stating that recent NLRB precedent holds that the display of placards in employees' cars parked on the employer's premises is susceptible to being interpreted as picketing because the same signs were simultaneously being used for the same informational protest in "ambulatory" picketing at another location. Johnson further asserted:

> Although my colleagues might reasonably disagree with the conclusion reached by the arbitration panel here, a disagreement over an arguable contract or legal interpretation is not enough to set aside the result from the parties' chosen dispute resolution mechanism of arbitration.

Union attorneys praised the NLRB decision while reaction from the management side was less enthusiastic. Verizon's counsel stated that this adverse decision by the NLRB "dramatically undercuts the value of arbitration" as a dispute resolution mechanism.

It will be interesting to see if the Courts agree with the Democrat-controlled Board's interpretation of the *Collyer* guidelines. If so, as pointed out in the January 2015 *Employment Law Bulletin*, employers must be prepared to follow the new guidelines scrupulously in order not to waste a winning position in arbitration. As predicted, it appears that it will not be impossible for employers to obtain a deferral from the Board to the arbitrator's decision, just more difficult.

Should an employer determine that their action under the contract is not defensible before the Board (or susceptible to an interpretation inconsistent with the NLRA), then it should give strong consideration to refusing to defer to arbitration absent a waiver by the union of its right to pursue an ULP charge before the Board. The waiver itself should take the form of a voluntary withdrawal of the ULP charge outside the six month statute of limitations period. Thus, the parties could voluntarily agree to arbitrate a matter without raising ULP issues before the Board. While this approach might, in itself, raise issues, why should a company be second guessed by the NLRB and go through arbitration if a win before the arbitrator proves fruitless and a waste of time and resources? It is recommended that employers seek legal advice before attempting this course of action, as it would need to be orchestrated and couched carefully to withstand NLRB scrutiny.

Stay tuned for further developments in this interesting area of aggressive enforcement of the Act by the NLRB.

## EEO Tips: Is The EEOC Really "Out Of Control"?

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Over the last year or so certain aspects of the EEOC's litigation program have been characterized by members of Congress as being "out of control" and needing to be "reined in." Most notably, Senator Lamar Alexander (R-Tenn.), and Representatives Tim Walberg (R-Michigan) and John Kline (R.-Minn.) have contended that in the conduct of its litigation program, the EEOC has frequently overreached in filing lawsuits, that the five-member Commission itself has improperly delegated its litigation authority to the General Counsel, and that there has been a lack of transparency or accountability in conducting its litigation activities.

On the other hand the EEOC, through its General Counsel David Lopez, argues that the EEOC is merely following the Strategic Enforcement Plan the agency adopted for FY 2012 through 2016. He explained that the agency does this through policy guidance, outreach, public education, its charge processing procedures including investigation and conciliation and if necessary through litigation. Lopez also reviewed various cases filed by the EEOC presently before the U. S. Supreme Court, which may clarify its enforcement powers and procedures and thus, have a positive impact on the overall enforcement of Federal anti-discrimination laws. Unsurprisingly, Lopez has not corroborated Congress' view that the EEOC has overreached in its litigation and rulemaking.

Thus, the answer to the question of whether the EEOC is really "out of control" or needs "reining in" is obviously a matter one's perspective on the role of the EEOC in enforcing the federal anti-discrimination statutes for which it is responsible. Summaries of legislation recently proposed by members of congress and some of the arguments the EEOC might make against the need for such legislation are presented below.

**Summaries of Recent Anti-EEOC Legislation**

To address the alleged EEOC abuses and enforcement flaws mentioned above, Rep. Walberg and a number of other Representatives introduced four bills in the House of Representatives in January of this year. Rep. Walberg, speaking on March 24, 2015, at a hearing held by sub-committees of the House Education and Workforce Committees stated that "these bills are necessary because the EEOC is making misguided enforcement

and litigation choices that create uncertainty for employers and have been rejected by some courts." The four bills can be summarized as follows:

1. H.R. 548, the Certainty of Enforcement Act of 2015, was introduced on January 27, 2015, and would amend Title VII to "deem an employer's… consideration or use of credit or criminal records or information, as mandated by federal, state, or local law to be job related and consistent with business necessity." It would clarify that employers may outright reject certain applicants convicted of crimes if permissible under state laws, without risk of violating the EEOC's Guidelines for employers pertaining to Arrest and Convictions issued on April 25, 2012. (Discussed in that month's ELB). These Guidelines generally suggest that where an applicant has an arrest or criminal record, the employer should make an "individualized assessment" as to whether the applicant's criminal record is job related and gave no deference to state or local laws authorizing or requiring that applicants with certain convictions be prohibited from performing certain jobs. H.R. 548 would allow employers to outright reject the applicant if permitted by other federal or state laws. (Incidentally, based on its Press Releases, the EEOC, apparently, has not filed any cases against employers involving the issue of criminal background checks where there has been a conflict of state laws with Title VII.)

This bill was, admittedly, a reaction by its sponsors to criticism directed at the EEOC for pursuing two notable criminal background check cases, both of which it lost, namely: *EEOC v. Peoplemark*, and *EEOC v Kaplan*. In the *Peoplemark* case the EEOC had alleged that the company maintained a companywide policy of utilizing criminal background checks to eliminate applicants where in fact no company-wide policy existed. In the *Kaplan* case the EEOC failed to prove there was any disparate impact on minorities caused by the use of background checks.

2. H.R. 549, the Litigation Oversight Act of 2015, was introduced on January 27, 2015, and would require the EEOC Commissioners to approve or disapprove by a majority vote whether the Agency shall commence or intervene in litigation involving (1) multiple plaintiffs (class actions) or (2) systemic or pattern or practice cases. It would also require the Commission within 30 days after commencing or intervening in such actions to post on its website (1) information regarding the case including the allegations and causes of action; and (2) how each Commissioner voted on the action. Incidentally, the EEOC already requires Commission approval of certain large class actions and systemic cases.

3. H.R. 550, the EEOC Transparency and Accountability Act, was introduced on January 27, 2015, and in substance "directs the EEOC to provide information on its public website regarding each case brought by the EEOC after a judgment is made with respect to any cause of action." The information provided on each case should include: (1) all cases wherein the EEOC was ordered to pay fees or costs; (2) cases in which a sanction was imposed on the EEOC; (3) the total number of charges filed under each of the federal statutes it enforces: namely, Title VII, the ADEA, the ADA, the Equal Pay Act; and (4) the cases of systemic discrimination including pattern or practice discrimination. This bill would also prohibit the EEOC from bringing a lawsuit unless it exhausts its obligation to engage in informal conciliation and certifies that it has reached an impasse. Additionally, the bill included provisions to determine whether the EEOC has engaged in *bona fide* conciliation subject to judicial review. Finally, H.R. 550 directs the EEOC Inspector General to notify Congress of any sanctions, fees, or costs imposed on the EEOC. The case of *EEOC v. Mach Mining* is presently before the Supreme Court to consider the issue of whether the EEOC's self-determined conciliation efforts are reviewable. Also, no doubt the various members of Congress who sponsored the foregoing legislation were also concerned about several well-publicized cases in which the EEOC was assessed significant court costs and attorneys' fees, the most prominent of which was *EEOC v CRST Van Expedited, Inc*. In this case the EEOC was assessed attorneys' fees and court costs totaling $4.7 million in payment of the Defendant's expenses unnecessarily incurred due to the stance taken by the EEOC during the prosecution of the case. However, the Eighth Circuit, on December 22, 2014, reversed the trial court's order and remanded the case to determine, among other things, whether the Defendant was a "prevailing party" on the various claims as required by law. This matter is still pending.

4. H.R. 1189, the Preserving Employee Wellness Programs Act, was introduced on March 24, 2015, by Representative John Kline (R. Minn.) (An identical bill, S.620, was introduced in the Senate by Senator Lamar Alexander.)

H.R. 1189 is a reaction to the EEOC's attempt to obtain a preliminary injunction against Honeywell's implementation of its wellness program which contained certain monetary inducements or rewards for those who joined in the program and certain monetary punishments in terms of health coverage for those employees who did not join the program. While it was still investigating a Charge alleging violations of ADA and GINA, the EEOC sought from the Minnesota district court an injunction to stop Honeywell from continuing this program. The court denied the motion and counseled the EEOC for attempting to circumvent the statutory procedures for bringing the action prior to the close of its investigation and engaging in conciliation.

The bill in substance provides that workplace wellness programs that offer a reward to participants do not violate the ADA or GINA if the program complies with Public Health Service Act requirements. The bill also provides that the "collection of information about a family member's manifested disease or disorder is not considered an unlawful acquisition of genetic information with respect to another family member participating in a workplace wellness program."

A very significant provision of this Bill is that it would "take effect as if enacted on March 23, 2010." Accordingly, any wellness programs which had been implemented within the last five years would be covered by its provisions.

Incidentally, on March 23, 2015, the EEOC submitted its long-awaited notice of proposed rulemaking on the interplay between the ADA and the ACA regarding employer-sponsored wellness programs to the White House Office of Management and Budget for review and clearance. (These rules are discussed earlier in this month's ELB).

**Summary of the EEOC's Argument Against Further Legislation**

However, even as Congress is seeking to "rein in" the EEOC's so-called "misguided enforcement and litigation choices…," as Rep. Walberg called them, the agency would argue that over the last four years it has already begun to narrow the scope of its litigation by concentrating on class actions and systemic cases which would provide relief from discrimination to a broader class of persons. Instead of filing 300 lawsuits alleging individual harm, the EEOC, under its Strategic Enforcement Plan, would look for a case in which it could provide relief for 500 individuals by bringing a single class action or other systemic suit based upon a pattern or practice of unlawful discrimination. The EEOC, apparently, has had some success with its "strategic" litigation philosophy. Within the last two years, the agency, for example, resolved a number of class actions and obtained significant monetary benefits for large classes of affected individuals including the following:

- *EEOC v. Unit Drilling* (D. Ariz. Consent Decree April 22, 2015). $400,000 for women applicants denied jobs because Unit Drilling told women it did not hire women because it only had "man camps."

- *EEOC v. Patterson-UTI Drilling Co*. (D.Colo. Consent Decree April 17, 2015). $14.5 million on behalf of all minorities nationwide employed by the Company between Jan. 1, 2006 to the date of the decree including Hispanic, Latino, black, American Indian, Asian and Pacific Islanders allegedly discriminated against on the basis of race or national origin, as well as, retaliation.

- *EEOC v. Global Horizon and Maui Pineapple, et al.* (D. Haw. 2014). $8.7 million on behalf of 82 Thai farmworkers allegedly discriminated against based on race and national origin. Also $2.4 million on September 8, 2014, on behalf of some 500 Thai workers who worked for related, co-defendant companies who were discriminated against on the basis of race and national origin.

The EEOC would argue that while the actual number of "merit" lawsuits has declined significantly from the 261 in FY 2011 to just 133 in FY 2014, the number of individuals

who benefitted from the agency's actions during that period appears to be increasing. (One must say apparently, because the exact number of affected class members cannot be determined at this time in recent cases such as the Patterson-UTI and Global Horizon cases because the affected classes are nationwide and are still being identified.) Of course, looking only at its successes, EEOC's supporters can argue that the Agency is not, in fact, out of control.

However, the matter of "conciliation" to the EEOC is somewhat different. The EEOC does not want to be reined in, but apparently would not object to the Supreme Court's clarification of the perimeters of conciliation by the agency, hoping that the EEOC's position would be confirmed upon review.

**Conclusion**

The foregoing only briefly touches upon the arguments of the EEOC's detractors and its supporters as to whether the agency is out of control. As suggested above, the answer to that question depends on an individual's point of view as to the role of the EEOC itself in our society. In my judgment while Congress may statutorily restrict or loosen the authority of the EEOC to conduct its administrative or litigation program, such legislation should not be done as a hasty reaction to some enforcement misstep by the agency in accomplishing its overall important mission of eradicating unlawful discrimination. On the other hand the EEOC must always be mindful that in resolving claims of discrimination its primary method of doing so is by conference, conciliation, and persuasion. There must be some give and take by the EEOC in the process.

## OSHA Tips: OSHA Action Items

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With continuing evidence of aggressive enforcement and stiffer monetary penalties, employers might be wise to assess their readiness for an OSHA inspection. Such an assessment should include insuring that the required annual or periodic actions called for in a number of standards have been addressed. Examples of some of the generally applicable standards having such a requirement include the following:

- All recordable injury and illness cases must be entered on an establishment's injury and illness log within 7 days of receiving information of a case. The calendar year summary of injuries and illnesses needs to remain posted from February 1 through April 30st of each year.

- When a facility has employees with occupational exposure to blood or potentially infectious material, the required "exposure control plan" must be reviewed and updated at least annually.

- Employers must inform employees upon initial hire and at least annually about the existence and right of access to their medical and exposure records.

- Employees exposed to an 8 hour time-weighted average noise level at or above 85 decibels must have a new audiogram at least annually.

- OSHA's permit, required confined space standard, requires that the program be reviewed by using cancelled permits within one year of each entry. The standard also allows a single annual review utilizing all entries made within the 12 month period.

- Under OSHA's standard for hazardous energy (lockout/tagout) an employer is required to conduct a periodic inspection of the energy control procedure to ensure that the requirements of the standard are being met. This must be done at least annually with certification that it has been accomplished.

- After the initial testing of an employee's tight-fitting respirator there must be another fit test at least annually. Further, employees wearing such respirators must be trained at least annually.

- Annual maintenance checks must be made of portable fire extinguishers and records documenting these must be maintained. Also when an employer

has provided an extinguisher for employee use the employee must be trained for such use initially and at least annually thereafter.

- OSHA standards require inspections of cranes and their components at established intervals. For instance crane hooks and hoist chains must be inspected daily with monthly inspections that include certification records. Complete inspections of cranes must be made at "periodic" intervals which are defined between 1 to 12 months.

- Operators of powered industrial trucks, such as forklifts, must have their performance evaluated at least once every 3 years.

- Mechanical power presses must be inspected no less than weekly with a certification record of date, serial number, and press identifier.

Note that many OSHA substance-specific health standards contain periodic action requirements for exposure monitoring, training, and the like.

## Wage and Hour Tips: Employment of Minors

*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.*

Each year as we approach the end of another school year I try to remind employers of the potential pitfalls that can occur when employing persons under the age of 18. While summer employment can be very beneficial to both the minor and the employer, one must make sure that the minor's employment is permitted under both the state and federal Child Labor laws. It appears DOL is not spending nearly as much of its resources investigating child labor violations as it has done previously. However, the Department still found more than 1,150 minors employed contrary to the child labor requirements of the FLSA last year. Consequently, employers still need to be very aware of those requirements before hiring a person under the age of 18.

In 2008, Congress amended the child labor penalty provisions of the FLSA establishing a civil penalty of up to $50,000 for each child labor violation that leads to **serious injury or death**. Additionally, the amount can be doubled for violations found to have been repeated or willful. Since then, I have seen numerous instances where employers have been fined in excess of $50,000.

The Act defines "serious injury" as any of the following:

1. Permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

2. Permanent loss or substantial impairment of the function of a bodily member, organ or mental faculty; including the loss of all or part of an arm, leg, foot, hand or other body part; or

3. Permanent paralysis or substantial impairment causing loss of movement or mobility of an arm, leg, foot, hand or other body part.

Previously, the maximum penalty for a child labor violation, regardless of the resulting harm, was $11,000 per violation. The $11,000 maximum remains in effect for the illegal employment of minors that do not suffer serious injury or death. Congress also codified the penalties of up to $1,100 for any repeated and willful violations of the law's minimum wage and overtime requirements.

**Prohibited Jobs**

There are seventeen non-farm occupations, determined by the Secretary of Labor to be hazardous, and these are out-of-bounds for teens below the age of 18. Those that are most likely to be a factor are:

- Driving a motor vehicle or being an outside helper on a motor vehicle.

- Operating power driven woodworking machines.

- Operating meat packing or meat processing machines (includes power driven meat slicing machines).
- Operating power driven paper products machines (includes trash compactors and paper bailers).
- Engaging in roofing operations.
- Engaging in excavation operations.

In recent years Congress has amended the FLSA to allow minors to perform certain duties that were previously restricted. However, due to the strict limitations that are imposed in these changes and the expensive consequences of failing to comply with the rules, employers should obtain and review a copy of the regulations related to these items before allowing an employee under 18 to perform these duties. Below are some of the more recent changes.

1. The prohibition related to the operation of motor vehicles has been relaxed to allow 17 year olds to operate a vehicle on public roads in very limited circumstances. However, the limitations are so strict that I do not recommend you allow anyone under 18 to operate a motor vehicle **(including the minor's personal vehicle)** for business related purposes.

2. The regulations related to the loading of scrap paper bailers and paper box compactors have been relaxed to allow 16 & 17 year olds to **load (but not operate or unload)** these machines.

3. Employees age 14 and 15 may not operate power lawn mowers, weed eaters or edgers.

4. Fifteen year olds may work as lifeguards at swimming pools and water parks but they may not work at lakes, rivers or ocean beaches.

**Hour Limitations**

There are no limitations on the work hours, under federal law, for youths 16 and 17 years old. However, the state of Alabama law prohibits minors under 18 from working past 10:00 p.m. on a night before a school day. Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, and non-hazardous jobs (basically limited to retail establishments and office work) up to:

- 3 hours on a school day
- 18 hours in a school week
- 8 hours on a non-school day
- 40 hours on a non-school week
- work must only be performed between the hours of 7 a.m. and 7 p.m., except from June 1 through Labor Day, when the minor may work until 9 p.m.

To make it easier on employers, several years ago the Alabama Legislature amended the state law to conform very closely to the federal statute. Further, the state of Alabama statute requires the employer to have a work permit on file for each employee under the age of 18. Although the federal law does not require a work permit, it does require the employer to have proof of the date of birth of all employees under the age of 19. A state issued work permit will meet the requirements of the federal law. Currently, work permits are issued by the Alabama Department of Labor. Instructions regarding how to obtain an Alabama work permit are available on the Alabama Department of Labor website (www.labor.Alabama.gov).

The Wage and Hour Division of the DOL administers the federal child labor laws while the Alabama Department of Labor administers the state statute. Employers should be aware that all reports of injuries to minors, filed under Workers Compensation laws, are forwarded to both agencies. Consequently, if you have a minor who suffers an on-the-job injury, you will most likely be contacted by either one or both agencies. If DOL finds the minor to have been employed contrary to the child labor law, they will assess a substantial penalty in virtually all cases. Thus, it is very important that the employer make sure that any minor employed is working in compliance with the child labor laws.

If I can be of assistance in your review of your employment of minors do not hesitate to give me a call.

## 2015 Upcoming Events

### EFFECTIVE SUPERVISOR®

Huntsville – May 13, 2015
U.S. Space & Rocket Center
1 Tranquility Base
Educator Training Facility
Huntsville, AL 35805

Decatur – May 14, 2015
Sykes Place on Bank
726 Bank Street
Decatur, AL 35601

Click here for brochure or here to register.

## Did You Know…

… that Americans born between 1957 and 1964 held nearly twelve jobs between ages 18 and 46? This is according to United States Department of Labor report issued on March 31, 2015. DOL began surveying almost 10,000 people between ages 14 and 22 in 1979 and continued the survey for the next 36 years. Although most job hopping occurs before age 30, those between ages 40 and 48 worked at an average of two and a half jobs during that period of time and 32% of those jobs lasted less than one year. Those between ages 18 and 24 averaged five and a half jobs during that time. Whites spent the most time working full time (80%), followed by Hispanics (72%) and Blacks (69%). Individuals across all demographics with less than a high school education worked 60% of the time; those with a Bachelor's degree or higher worked 84% of the time.

… that Maryland recently enacted legislation protecting unpaid interns from workplace discrimination? Governor Larry Hogan (R) on April 14th, signed legislation that extends state fair employment practices statutes to unpaid interns. Fair Employment Practices statutes typically cover employees and applicants. However, recognizing the importance of an internship to ultimate job opportunities, the Maryland statute says that an employer may not "fail or refuse to offer an internship, terminate an internship, or otherwise discriminate against an individual with respect to the terms, conditions, or privileges of an internship … " based upon the individual's protected class. Oregon, New York and California are other states which have extended employment discrimination protections to interns.

… that a union is not responsible for a members' threatening Facebook posts on the union's Facebook page? *Weigand v. NLRB* (D.C. Cir. April 17, 2015). A union member posted threats against a bargaining unit member who was not a union member on the union's Facebook page. In concluding that the union was not responsible for the threats, the court upheld the NLRB's assessment that the Facebook page was limited to members only and, therefore, the threats were not widely disseminated. This is somewhat curious reasoning, because how widely disseminated do threats have to become before a union's failure to address would be considered an unfair labor practice?

… that writing "health reasons" for an employee's termination supported an employee's ADA claim? *Church v. Sears Holding Corp*. (3rd Cir. March 30, 2015). The employee had a significant brain injury as a result of an automobile accident. She had limitations at work which Sears was able to accommodate. However, the employee claims that new managers ended the accommodation even though she still had work restrictions. The managers concluded that the employee was unable to perform and, therefore, she was terminated. Part of processing the termination decision included completing a form with a reason for termination. The Sears manager wrote on the form that the employee was terminated for "health reasons." In permitting this case to go to the jury, the Court stated that "the content of the Termination Form is strong enough to make the fact finder [jury] infer that a discriminatory attitude was more likely than not a motivating factor in [the employer's] decision." The Court added that the form was "completed contemporaneously with Church's termination" and, therefore, reflected the thought process of the decision makers at the time the termination occurred.

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