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Inside this issue:

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Honesty is Not the Best Policy, According to the EEOC

Benjamin Franklin's "honesty is the best policy" has endured for nearly three centuries, except apparently at the Equal Employment Opportunity Commission. *EEOC v. Aurora Health Care, Inc.* (E.D. Wis. May 14, 2015). The challenge to Mr. Franklin's wisdom and a widespread employer practice arose when an applicant for a hospice care coordinator position failed to respond truthfully to a post-conditional offer medical questionnaire, which resulted in the employer withdrawing its offer.

Aurora complied with the Americans with Disabilities Act in all respects (at least we think so). Kelly Beckwith, who had a mild case of relapsing/remitting multiple sclerosis and took medication for that condition, applied online for a hospice care coordinator position. Aurora's application, like many employers' applications, cautioned that it could withdraw any job offer if the applicant did not provide truthful information. Aurora extended an offer to Beckwith, but made it contingent on the results of a pre-employment physical questionnaire and exam. When completing the form, Beckwith failed to disclose that she had experienced symptoms of MS and she did not disclose her use of the prescription drug for her MS. Beckwith claimed she voluntarily disclosed these during the interview portion of the physical exam, but Aurora contends that Beckwith did not disclose the symptoms or the prescription during the interview, but only later when she was confronted with the discrepancy between her responses and her medical records. (Beckwith, like all post-offer employees, had authorized Aurora to access her medical records, which disclosed the symptoms and prescription). Acting on the reports of others and believing Beckwith had been untruthful in both her written questionnaire and verbal interview responses, an Aurora manager withdrew Beckwith's offer due to her dishonesty.

The EEOC, on Beckwith's behalf, alleged that Aurora's withdrawal of the offer wasn't because of Beckwith's dishonesty, but because of her disability. One of Aurora's many strong defenses was that Beckwith wasn't qualified for the job because honesty was an essential job function, and Beckwith didn't have it. In addition to its language on the application and its track record of terminating employees for dishonest responses of all kinds, Aurora argued that honesty was essential to the job because the job of hospice care coordinator involved entering the residences of the Company's patients and completing medical forms, all without supervision. Yet, the Court found that Aurora hadn't met its burden of showing that honesty was an essential job function in part because *honesty* was not listed on the job description. The court stated that it is up to a jury to determine whether "honesty" is an essential job function (honestly we can't make this stuff up). One would think

that honesty is one of those essential job functions for every job, but apparently the EEOC—and this Court—believe otherwise.

On this question and others raised by the case, the EEOC's stance and the Court's reasoning are puzzling, and may not pass muster with a jury or on appeal. We recommend that if employers currently hold applicants and employees accountable to telling the truth, they continue to do so in a consistent manner, and that they ensure that their written job descriptions clearly establish honesty as an essential job function.

Union Elections Increase by Forty Percent

The NLRB's "Quickie Election" rules became effective on April 14, 2015. During the month prior to that time, an average of 42 election petitions were filed each week. Between April 14 and May 14, that average increased to 60 per week. The average time for the election from the date the petition was filed moved from 48 days during the four weeks prior to April 14 to 23.5 days afterward.

We suspect that in a number of situations, unions held off filing a petition until the new election procedures became effective. After all, unions win approximately 80% of all elections that are held within 18 days of the date the petition is filed.

Time—and employer preparation—will tell whether this is rise in the number of petitions filed is a one-time spike or an ongoing trend. If employers step up their unionization vulnerability assessments and avoidance approaches, it's likely the total number of petitions filed with decline. Unions may increase the proportion of elections they win, but employer efforts to avoid becoming targets of campaigns may reduce the total number of elections held. If there are fewer elections, unions may respond by filing petitions with a lower level of support. Under the old election timetable, unions knew that the peak of support was the date the petition was filed and would decrease over the course of a five to six week campaign. Consequently, while the law requires a union to demonstrate only 30% support to petition for an election, unions typically do not petition unless they have the support of 60% or more of the employees. Under the new timetable, unions may file petitions with a lower percentage of support, believing they can build momentum for a victory, especially if it appears that the employer is unaware of the pre-petition campaign and ill-equipped to launch an effective post-petition campaign in the reduced time period.

Class Action Lawsuit on Reducing Employee Hours to Avoid ACA

On May 8, 2015, a class action was filed asserting that Dave & Buster's interfered with employee rights under ERISA by reducing their work hours to below 30 in order to avoid the Affordable Care Act insurance mandate. *Marin v. Dave & Buster's, Inc.* (S.D.N.Y.). This case involves potentially 10,000 employees whose weekly hours were reduced in 2013 when they were shifted to part-time status.

ERISA Section 510 states that "it shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan … or for the purpose of interfering with the attainment of any right to such participant may be entitled under the plan." Although the original intent behind ERISA and Section 510 relates to retirement plans, Section 510 has been used to assert claims regarding employer medical plans. In support of its claim that Dave & Buster's reduced hours to keep employees from becoming eligible for medical plan benefits, the plaintiffs' attorneys referred to Dave & Buster's Security and Exchange Commission filings, where the company raised concerns about the cost of ACA compliance.

We have been concerned all along that what is permissible under the ACA (reducing hours) may conflict with either ERISA Section 510 or, depending upon the demographics of the affected workforce, may raise potential discrimination issues or create FLSA problems if supervisors encourage or turn a blind eye to employees'

working off the clock. With a substantial increase in healthcare costs projected during the next few years, employers who may consider reducing the number of individuals eligible for insurance should also consider how they will control for these unintended consequences.

What Do Contraceptives & Cadillacs Have In Common? The ACA, Of Course!

Contraceptives

It has been almost a year since the U.S. Supreme Court held that employee health plans of closely held, for-profit companies with owners who have sincerely held religious objections do not have to pay for all forms of contraception as mandated pursuant to the ACA. *Burwell v. Hobby Lobby*. (See our June 2014 ELB for more). However, the debate over employer provided, cost-free contraception coverage did not end there.

A little background is necessary: the ACA requires covered employers' group health plans to provide preventive care and screenings for women without any cost sharing. Although the ACA did not specify the types of preventive care that must be covered, the HHS issued a mandate in 2011 that required most health insurance policies to provide women with cost-free coverage for all contraceptive medications that had been approved by the Food and Drug Administration (FDA), including four that could prevent a fertilized egg from implanting in a woman's womb. Hobby Lobby and several other closely held corporations demonstrated that they held a sincere religious belief that life begins at conception and that these four types of contraception are akin to an abortifacient. On June 30, 2014, the Supreme Court found that the HHS regulations violated the Religious Freedom Restoration Act which "prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest." Accordingly, the Court held that closely held corporations with sincerely held religious beliefs such as Hobby Lobby did not have to pay for all forms of contraception.

Since this ruling, the controversy over cost-free contraception has continued. The National Women's Law Center (NWLC) contends that there have been widespread violations of the ACA requirements to provide women with contraceptive and preventative wellness services at no cost. In a May 2015 report, the NWLC identified three major areas of noncompliance:

- Some plans fail to provide coverage for all FDA-approved methods of birth control, or that the plans impose out of pocket costs on them.
- Some plans cover only generic birth control.
- Some plans impose costs on the services associated with birth control methods.

On May 11, 2015, the Obama administration issued guidance reaffirming that insurance companies must cover all birth control methods approved by the FDA, without a co-pay (with limited exceptions, such as those recognized by the Supreme Court in *Hobby Lobby). See* http://www.dol.gov/ebsa/pdf/faq-aca26.pdf. This new guidance is intended to close loopholes and clarify that plans and insurers must cover (at no cost) at least one form of contraception in *each* of the full range of methods (18 currently) that the FDA has approved. The guidance further provides that plans/insurers may not limit "sex-specific recommended preventive services based on an individual's sex assigned at birth, gender identity or recorded gender." Again, such coverage for the recommended preventive service must be provided without cost sharing.

Based on this new guidance, employers are encouraged to review the relevant provisions of their health plans to ensure compliance.

Cadillacs

Not the *car* –the *tax*! The controversial "Cadillac tax" does not kick in until 2018, but savvy employers are already taking action to avoid 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. A survey of employers shows that over half say they are on pace to

trigger the Cadillac tax, but only 2.5 % say they expect to face it and pay it. The others are making changes to avoid it before 2018. The most cited action these employers are taking is to move to a high-deductible or consumer-driven type plan. Other actions employers are considering include reducing benefits, shifting more costs to employees, dropping higher-cost plan options, adopting wellness incentives, and adding more "affordable" plan options.

On February 3, 2015, the IRS and Treasury Department issued guidance on the Cadillac Tax (Notice 2015-16, http://www.irs.gov/pub/irs-drop/n-15-16.pdf) and accepted comments through May 15, 2015. The comments from industry and business groups reflected several concerns, including potential conflicts with the ACA.

The American Benefits Council pointed out in its comments to the IRS that the 40 percent tax forces employers to choose between offering coverage that qualifies with the ACA's "employer mandate" provisions, or offering coverage that is not subject to the Cadillac tax, which would leave workers and their families facing higher out of pocket costs. "ERIC," the ERISA Industry Committee has already responded to this request and pointed out that the implementation of the Cadillac tax will cause a significant upheaval in employee benefits, forcing many employers to significantly change virtually every aspect of plan design and systems operations. ERIC recommends that the IRS provide a two year transition period allowing employers to restructure the necessary benefit changes, systems testing, and employee communications. ERIC also urges the IRS to narrow the definition of the types of benefits subject to the tax, and to create a safe harbor that treats plans fairly across the country. And the National Business Group on Health (NBGH) expressed deep concerns over the Cadillac Tax's anticipated impact. NBGH specifically asked the IRS to exclude on-site health clinics, wellness programs, and self-insured limited scope dental and vision coverage from the applicable coverage of the tax.

Congressman Joe Courtney, a Democrat from Connecticut, has introduced the Middle Class Health Benefits Tax Repeal Act to repeal the Cadillac Tax. As support for this repeal, the Congressman has cited studies indicating that the tax will hit markets around the country disproportionately, as well as the fact that most employers expect the tax to adversely affect their health plans, leading to the anticipated changes cited above.

As we head into the summer, we are also anxiously awaiting the Supreme Court's decision in *King v. Burwell*, which will affect the future of all of these and other ACA issues employers are facing. We will continue to keep you advised of developments in this area.

NLRB Tips: Update of Three Topics in NLRB Enforcement Trends

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

Parties Jockey for Position in Upcoming Joint Employer Litigation

As readers of the ELB know, the NLRB has been threatening to change the long established test for establishing joint employer status. Under current precedent, the Board must establish evidence that the franchisee "shares or co-determines" with the franchisor/corporate entity work matters governing the essential terms and conditions of employment of franchisees' employees."

Now, the NLRB seems determined to ignore years of precedent and change the standard for determining joint employer status to one of considering the "totality of circumstances." This test looks at the way the separate entities have structured their commercial relationship. If the "putative joint employer (the corporate entity) wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence," then it would be considered a joint employer. Most notably, corporate franchisor McDonald's USA LLC has faced unfair labor practice (ULP) charges arising from an SEIU campaign targeting McDonald's stores owned by franchisees and McDonald's USA.

The ULP charges against McDonald's USA stem from the ongoing campaign by the SEIU to establish a $15 per hour wage floor for fast food workers, and the topic has been in the press over the past several months. During this time, the SEIU argued that McDonald's USA is a joint employer with its franchisees because the corporate entity exercises "substantial control" over its franchises. SEIU notes that McDonald's frequently owns and leases the store buildings to franchisees, and also requires franchisees to follow strict corporate rules on food, cleanliness, and hiring.

In addition to its public pronouncements claiming that the charges do not establish a "joint employer" relationship, McDonald's USA has buttressed its arguments in anticipation of the NLRB litigation. On April 1, 2015, McDonald's USA announced that it will raise wages and allow paid leave for workers at its "company-owned stores," but will not force these policies on franchised stores. McDonald's USA is hoping that this action underscores the point that the corporate parent is not a joint employer with its franchisees.

The Legislative Response

The Congressional response to the anticipated change in the Board's joint employer test is negative, to say the least. On March 5, 2015, two congressional labor committees questioned NLRB General Counsel Richard Griffin about his decision to pursue expanded joint employer liability in ULP cases, claiming that Griffin had previously stated that the grounds for doing so might be flawed. Specifically, on October 24, 2014, at a labor law conference sponsored by the University of West Virginia, GC Griffin admitted that franchise relationships raise "a problem, legally, for our theory." Later, on March 4, 2015, Griffin told attendees at an ABA conference that he believed the joint employer claims against McDonald's are supported by "long-standing NLRB precedent."

To date, Griffin has not responded to the Congressional inquiries.

Election Rules Implemented; Challenge to Quickie Elections Fails in D.C. District Court

In the spring of 2015, in response to an attempt by the U.S. Chamber of Commerce to enjoin the "Quickie Election" Rules from taking effect, the Board filed for summary judgment in a D. C. District Court, claiming that the Chamber failed to meet its burden to establish that the questions of whether the rule deprives employers of both a fair hearing on critical election issues and an adequate opportunity to campaign are appropriately before the trial court.

The Agency said that the courts have shown "extraordinary" deference to the NLRB's control over its representation case procedures, and judicial review in similar cases has been confined to determining whether an agency's action has been "arbitrary, capricious or manifestly contrary to law."

In addition, the Board argued, because the various parts of the rule change are justified by different rationales and perform different functions, even if the Chamber succeeded in all of its challenges, the Court should permit the remaining unchallenged provisions to be implemented.

The NLRB's arguments substantially prevailed before the Court in a Motion for a Temporary Restraining Order (TRO). In refusing to temporarily restrain the rules change from taking effect, the Court rejected the argument that the NLRB requirement that the disclosure of employee information (i.e. – home phone numbers, addresses etc.) justified issuance of a TRO. The court said that the NLRB rule prohibited non-employer parties (i.e., unions) from using the voter information for purposes other than processing a representation petition. Stating that the employer failed to establish that any risk of information misuse was likely, or anything more than "speculative," the Judge said the assertion of employee privacy interests did not support the TRO motion.

Now, the same judge that denied the TRO application is considering whether or not to permanently enjoin the rule changes. The injunction matter has been consolidated by the judge with the trade association filings for further

consideration by the District Court. Oral argument occurred on May 15, 2015. At the hearing, the judge did not seem persuaded by the trade associations' arguments for repeal of the election rule changes. The judge focused on the "ripeness" issue, and noted that the final rule gave the Regional Director discretion to permit the presentation of evidence at the pre-election hearing. The judge questioned why she should try to resolve the debate about submitting evidence in pre-election hearings if it turns out the Regional Directors allow, in fact, such evidence.

Pending legislative challenges to the implementation of the new election rules were vetoed by President Obama, and at least for now, the NLRB and employers are operating under the new rules.

NLRB Ups the Stakes in *D. R. Horton* Cases

Murphy Oil appealed an NLRB ruling that its mandatory arbitration agreements barring employees from pursuing class or collective actions was unlawful. In its appeal to the Fifth Circuit Court of Appeals, the Company contended that the Board simply ignored the Fifth Circuit's previous ruling in *D. R. Horton*—which rejected the NLRB ruling and refused to enforce it—and, in effect, "doubled down" on its invalid rulings:

> In defiance of [the Fifth Circuit's] clear directive, on October 28, 2014, the Board issued its decision in *Murphy Oil* which reaffirmed the erroneous legal conclusions that the [NLRB] reached in *D.R. Horton.*

Claiming that failing to adhere to the Fifth Circuit's decision amounts to "utter disregard for authority," the Company urged the Court to issue a cease and desist order for its continuing non-acquiescence of the Court's decision. Should that fail to stop the NLRB, Murphy Oil requests a finding of contempt against the NLRB.

In their briefs, Murphy Oil and *amici* participants noted that many cases are pending before the NLRB involving a class action waiver issue, and that many such cases involve employers with some or all of their operations within the Fifth Circuit's jurisdiction.

> Accordingly, unless [the Fifth Circuit] takes some proactive step to preclude the Board from explicitly defying [the Fifth Circuit's] precedent in *D. R. Horton*, this forum will undoubtedly become the next stop for dozens of aggrieved employers seeking to challenge Board orders which are predicated upon the same faulty legal reasoning that the Board used to decide both *D.R. Horton* and *Murphy Oil.*

The Bottom Line

It remains to be seen if the Fifth Circuit agrees to the "extraordinary remedy" of a contempt finding, as the Board, over its history, has routinely ignored adverse court decisions. However, LMVT agrees with Murphy Oil that other employers accused of running afoul of the NLRA through adoption of arbitration agreements with class action waivers will likely seek review in the Fifth Circuit.

As Murphy Oil notes, there are dozens of pending cases at the Board involving a *D. R. Horton* issue; so it behooves the Fifth Circuit to at least consider a way to force the NLRB to appeal any adverse decision to the Supreme Court. A contempt ruling might force the Board's hand. As you may recall, the NLRB unsuccessfully sought re-hearing at the Fifth Circuit after the appellate panel's ruling in the original *D.R. Horton* case, but never sought review of the court decision before the Supreme Court – see the July 2014 ELB.

EEO Tips: Can One Remark Create a Hostile Environment?

This article was prepared by Jerome C. Rose, EEO Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in the states of Alabama and Mississippi. Mr. Rose can be reached at 205.323.9267.

There is an old adage that "one robin does not make it spring." The same adage could apply to a plaintiff's burden to establish harassment: one insult normally does not establish an illegal hostile working environment.

Except that sometimes it does, at least according to a recent holding of the Fourth Circuit, which recently held that one racial slur was enough to create a hostile working environment where the slur was made by an employee's supervisor or even one having apparent supervisory authority. *Boyer-Liberto v. Fontainebleau Corp.* (May 7, 2015)(en banc).

The Fourth Circuit's holding should not be surprising since the Supreme Court, in the case of *Faragher v. City of Boca Raton,* indicated that a series of incidents or an "isolated incident" of harassment, if extremely serious, could create a hostile work environment. However, the Fourth Circuit's reasoning in the *Boyer-Liberto* case was somewhat unusual because in virtually all of the other jurisdictions, including the Fourth Circuit itself, it typically takes more than a single act of hostility to establish unlawful harassment.

Before summarizing the *Boyer-Liberto* case it might be well to review the major points of law under Title VII pertaining to a hostile working environment:

- A hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

- This determination is made by looking at all the circumstances including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance.

- Generally, whether a work environment is objectively hostile or abusive is judged from the perspective of a reasonable person in the plaintiff's position.

- In terms of frequency, the mere utterance of an epithet which engenders offensive feelings, generally, does not sufficiently affect the conditions of employment to make the working environment "hostile." The same goes for simple teasing and offhand jokes or comments.

- In measuring the severity of harassing conduct, the status of the harasser may be a significant factor. A supervisor's power and authority makes his or her use of a racial epithet, for example, far more serious with respect to the work environment than a co-worker's.

- The employer is strictly liable for the supervisor's harassing behavior if it culminates in a tangible employment action, but the employer may escape liability if the employer can show that: (1) the employer exercised reasonable care to prevent and correct any harassing behavior, and (2) the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.

- For purposes of an employer's vicarious liability, a harasser qualifies as a supervisor rather than a co-worker if her or she is empowered to take tangible employment actions against the victim, or empowered to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits. The employee need not have the final say as to the tangible employment action, instead, the employee's decision may be subject to approval by higher management. (As recently clarified in the Supreme Court's decision in the case of *Vance v. Ball State Univ*.)

Keeping the foregoing basic principles in mind, the case of *Boyer-Liberto v. Fontainebleau Corporation, et al.* can be summarized as follows:

- Reya Boyer-Liberto, an African-American female worked as a cocktail waitress at the Clarion Resort Fontainebleau Hotel in Ocean City, Maryland. Boyer-Liberto alleged that a Caucasian, "restaurant manager," Trudi Clubb, called her a "Porch Monkey" twice in the work area within a period of 24 hours, once on September 14 and another time on September 15, 2010, because Boyer-Liberto had accommodated a customer by serving a drink to him that required special handling. Clubb claimed that she had been calling Boyer-Liberto while she was

attempting to serve the customer and Boyer-Liberto ignored her calls. Clubb also threatened to fire Boyer-Liberto because of the incident. It is not clear from the facts in the case whether Trudi Clubb was a "Manager" with supervisory authority or merely a "Glorified Hostess." However, it seemed undisputed that she "had the owner's ear" with respect to personnel decisions pertaining to the restaurant and bar areas of the hotel. Soon after reporting Clubb's racial epithets to an actual Food and Beverage Manager, Boyer-Liberto was fired by the owner of the hotel, Dr. Leonard Berger.

- In the action that ensued against the Fontainebleau Corporation and Berger, Boyer-Liberto alleged claims of a racially hostile working environment and retaliation under both Title VII and 42 U.S.C. §1981. The District Court awarded summary judgment to the defendants, and a split three-judge panel (2 to 1) of the Fourth Circuit affirmed. However, when the entire Fourth Circuit heard the matter, it found that Boyer-Liberto's claims for harassment and reatliation should not be dismissed, but heard by a jury.

- In vacating the trial court's summary judgment in favor of the Defendants and remanding for further proceedings on Boyer-Liberto's claims, the Fourth Circuit stated that "we underscore the Supreme Court's pronouncement in *Faragher v. City of Boca Raton*that an isolated incident of harassment, if extremely serious, can create a hostile work environment. We also recognize that an employee is protected from retaliation when she reports an isolated incident of harassment that is physically threatening or humiliating, even if a hostile work environment is not engendered by that incident alone." The court also overruled a previous case that had been construed to "require more than a single incident of harassment" in virtually every hostile work environment case.

- The Fourth Circuit suggested in its remand that the issue of whether the two references to the Plaintiff as a "Porch Monkey," although taken as one isolated incident, was severe enough to warrant a jury determination as to whether it constituted a hostile work environment under all of the circumstances.

- As to the also-revived retaliation claim, the Court held, "an employee is protected from retaliation when she opposes a hostile work environment that, although not fully formed, is in progress."

Thus in answer to the question of whether one isolated remark or one incident could be enough upon which to base a hostile environment claim, the answer in the Fourth Circuit would surely be "Yes" if the incident it was physically threatening or humiliating. The Fourth Circuit did not define how threatening or humiliating the remark or incident would have to be. According to the Court, that would depend on the facts in the case and that should be left up to a jury.

Additionally, the Court speculated that in a case such as the one in question, it would be possible for a jury to find that no hostile environment had been created by the isolated incident in question, but that the Plaintiff had been retaliated against in violation of Title VII if the Plaintiff reasonably believed that the underlying incident was unlawful.

This case is not over. If the case does not settle, a jury will decide whether the Plaintiff in this case was subjected to a "hostile work environment" based upon the isolated but apparently "serious" racial epithets directed at her. A determination of the issue of retaliation is also pending. We will follow the case and report the Trial Court's findings in this column when they are finalized. In the meantime employers should be aware of the rather unique holdings by the Fourth Circuit as to a hostile work environment.

OSHA Tips: OSHA and Training Requirements

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at 205.226.7129.

The time is approaching when you may need to make safety related training plans and projections for the

upcoming year. Such training may reduce costly illnesses and injuries in your workplace. While there may be some dispute as to the exact return on investment for such training there can be no doubt that it is required by numerous OSHA standards.

There are over 100 training requirements found in OSHA's standards. Many of them are very specific in setting out the nature, frequency, scope, etc., of such training while others are more general. For instance, some standards require that an employee allowed by an employer to perform certain tasks must be "certified, qualified, or competent" in the performance of that task.

Virtually all of the OSHA standards at the top of the most frequently violated standards each year include a training provision. Not infrequently, OSHA press releases announcing issuance of citations with significant monetary penalties include charges of training deficiencies. You may also be sure that a very important question to be answered following a serious work-related accident will involve the victim's relevant training.

Some OSHA training standards call for an annual review or refresher training. For example, the confined space entry standard requires that those employees assigned rescue duties practice a permit entry at least once every twelve months. Where an employer has provided portable fire extinguishers for employee use, training in their use is required at least annually. Employees with occupational exposure to blood-borne pathogens must receive annual refresher training. Employees exposed to noise levels at or above 85 decibels must receive annual training regarding the effects of noise and the means of protection. Employees must receive yearly training that is comprehensive and understandable when their duties require them to use respirators. Most of the chemical-specific health standards such as those for asbestos, lead, formaldehyde, etc., call for annual training.

A number of standards call for employee safety training upon initial assignment to the job and retraining when there is a change in potential exposures. For example, the hazard communication standard requires further training anytime a new physical or health hazard is introduced to the employee's work area. Refresher training is also required when a powered industrial truck operator is noted by observation or evaluation to be operating unsafely, or is involved in an accident, or when workplace conditions change that might alter truck operations. Finally, employees required to use personal protective equipment (PPE) in their jobs must be retrained when the employer has reason to believe the employee does not have adequate understanding or skill to properly use the PPE.

Some of OSHA's training requirements call for written documentation and some specify a retention time. For example, the blood-borne pathogens standard requires a record of training must be kept for three years. A certification of training must be kept for employees required to use PPE but no time is set for retention. The lockout/tagout standard requires a certification of training without specifying a retention time. Whether or not OSHA requires a specific training record, we strongly advise that an employer keep a record of all safety and health training. At the very least it may serve as evidence of an employer's ongoing efforts to comply with standards and promote a safe workplace.

OSHA Publication 2254, "Training Requirements in OSHA Standards and Training Guidelines," is an excellent source for an employer to access a worksite's needs and requirements. This document may be viewed, downloaded, or ordered by going to the publications topic of OSHA's website www.OSHA.gov or by following this link: OSHA 2254 1998 (Revised).

Wage and Hour Tips: Current Wage and Hour Highlights

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, 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. Mr. Erwin can be reached at 205.323.9272.

In March 2014, President Obama signed a Presidential Memorandum requiring the DOL to take steps to revise the regulations relating to the "White Collar" exemptions

in the FLSA. The specific regulations are those that define the exemptions from both minimum wage and overtime for executives, administrative, professional and outside sales employees. Those regulations were last revised in 2004 and had not been revised previously since 1975. While many of the articles regarding this announcement indicated this is something that would be done immediately, as you can see, that is not the case since it has been over a year without the proposal being issued. On May 5, 2015, the DOL sent their proposal to the Office of Management and Budget for review. It is my understanding the OMB is supposed to complete their review in 30-60 days, however, I have known of instances where they took longer to conduct their review.

In order to make changes in the regulations they must go through the rule making process. It is expected that the Department will prepare and publish their proposed changes for public comment. Typically, the comment period will be 60-90 days. Once the comments are received and reviewed they will issue a final regulation which will most likely not be effective for another 90 days. I saw a quote from the Secretary of Labor that it would be months before they issued the proposed changes. During the process of issuing the 2004 regulations the DOL received over 75,000 written comments that required their review, which took several months. I would expect them to receive at least this number of comments regarding any proposed changes at this time. In view of the steps required to change a regulation, I would anticipate it to be at least a year before any new regulations are effective.

While it is not known what changes may be proposed there are several items that I expect to be considered.

- As you know the current minimum salary requirement for these exemptions is $455 per week. According to a White House Official, if the salary had kept up with inflation for the past 10 years, that minimum would now be over $550 per week. I saw another article stating that if the 1975 minimum salary of $155 per week was adjusted for inflation it would be $970 per week. While the amount they will propose is anybody's guess, I expect there will be a substantial increase in the minimum salary requirement. I recently saw a quote from a respected attorney using the figure of $50,000-$52,000 per year.

- Another area that I expect to be addressed is the definition of "primary duty of management" as used in the regulations which allows an employee to be considered as managing while performing routine (such as running a register, putting up stock, etc.) duties. Some states have statutes that require the management time to be more than 50% of the employee's work time and the employee is not considered managing while performing the routine duties. It would not be surprising if the proposed regulations contain a similar rule that a specific portion of time be spent in management duties.

- The current regulations relating to the professional exemption allow for exemption to apply to certain employees such as chefs, cooks, nursery school teachers, funeral directors and others even though those occupations do not require degrees in a field of science or learning. I have seen comments that they expect the revised regulations may require an academic degree in order to qualify for the exemption. This exemption was substantially broadened in the 2004 regulations so I believe they will most likely make some changes to limit the applicability of the exemption.

From my experience in seeing the DOL revise regulations, I expect there will be many changes in the final regulations and, while they may not take effect for several months, employers need to be on the alert to ensure they make any necessary changes when the new regulations are put in place.

Dr. David Weil is the current Wage and Hour Administrator. He has previously worked as a professor at Harvard and most recently as a Distinguished Faculty Scholar at Boston University School of Management. During his confirmation hearing before the Senate he stated that a "fundamental role of Wage and Hour Administrator is making sure that the laws entrusted to the agency are administered efficiently, effectively, fairly, transparently and rigorously." In a report he helped to prepare he listed several priority industries including eating and drinking establishments; hotels/motels;

construction; janitorial and health care services among others. The report also recommended the assessment of liquidated damages and civil money penalties where employers were found to have violated the FLSA.

This month, a new minimum wage bill was introduced to increase the wage in the near future to $12.00 per hour. While it appears unlikely the bill will pass at this time, there are no guarantees that it will not come up again during this session of Congress. The amount of FLSA litigation continues to be very high, not only through actions brought by the DOL, but also in the area of private litigation. There were over 8,000 FLSA suits filed in federal courts during 2014. While most litigation concerning the Wage and Hour law involves only civil actions, the Act does contain criminal provisions. I saw this month where an employer was charged under the criminal provisions because he offered a $10,000 bribe to a DOL investigator in exchange for closing an investigation that involved $100,000 in back wages.

In many investigations, the DOL not only seeks back wages, they also seek liquidated damages in an amount equal to the amount of back wages that are owed. For example if they determine that an employer owes $10,000 in back wages they will also request another $10,000 in liquidated damages. Damages collected in this manner are distributed to the employees that are due the back wages. They have been using this procedure for several years when they are involved in litigation but only recently have they instituted this in administrative investigations that involve repeat or willful violations of the FLSA. That fact, even in administratively settled matters where employers can be requested to pay twice the amount of back wages owed, makes it even more imperative that you do everything you can to comply with the FLSA.

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

2015 Upcoming Events

EFFECTIVE SUPERVISOR®

Birmingham – September 22, 2015
Birmingham Marriott
3590 Grandview Parkway
Birmingham, AL 35243

Opelika – October 13, 2015
Robert Trent Jones Golf Trail at Grand National
3000 Robert Trent Jones Trail
Opelika, AL 36801

Huntsville – October 22, 2015
U.S. Space & Rocket Center
1 Tranquility Base
Educator Training Facility
Huntsville, AL 35805

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Katherine Gault at 205.323.9263 or kgault@lehrmiddlebrooks.com.

Did You Know…

… that foreign-born workers in the U.S. amount to 16.5 % of the total workforce? This is according to DOL statistics issued on May 21, 2015. The percentage increased from 16.3% in 2013. When the Department of Labor first began collecting this data in 1996, only 10.8% of the U.S. workforce was foreign-born. The participation of foreign born workers increased by 1.6% last year, compared to 0.1 % of native-born workers. The unemployment rate for foreign-born workers last year dropped by 1.3% to 5.6%, compared to native-born workers, for whom the unemployment rate dropped 1.2% to a total of 6.3%. Forty-eight percent of the foreign-born workers are Hispanic and 24.1% are Asians.

… that an employer is not required to accommodate an employee's absences to care for a disabled family member? *Golfin v. Alorica, Inc.* (M.D. Fla. April 23, 2015). An employee's daughter had a disability as defined under

the ADA. The employee requested scheduling accommodations in order to care for her daughter, which the employer determined it was unable to provide. Ultimately, the employee quit and claimed that she was constructively discharged. The employee alleged that the employer's lack of accommodation violated the ADA. In granting the employer's motion to dismiss, the Court stated that "requesting a reasonable accommodation for her daughter's disability" does not necessarily amount to disability discrimination under the ADA, as the ADA does not require reasonable accommodation to care for a family member. The employee argued that the employer's denial of her request was "associational discrimination" under the ADA—an employer may not discriminate against an individual because of an associational relationship with someone with a disability. The associational prohibition on discrimination, however, does not require an employer to reasonably accommodate the disability of the non-employee.

… that 60% of employees have updated their résumés during the past three months? According to a survey released on April 28, 2015, by Monster and Survey Sampling International, 43% of current employees are likely to consider another job opportunity. Also, the survey revealed that 60 % of those surveyed (a total of 1,004 full-time employees) have updated their résumés during the past three months. Furthermore, 79% of those surveyed between ages 25 and 44 have worked at their current job for less than six years.

… that the U.S. Supreme Court will consider when the clock should begin to run for filing a constructive discharge claim under Title VII? *Green v. Donahoe* (April 27, 2015). The case arose after the United States Postal Service gave employee Marvin Green a choice to retire or accept a substantial pay reduction at a job that was 300 miles away from his current job location. Months later Green quit and claimed that he was constructively terminated, but, according to the trial court, the time for filing a charge began to run from when Green was given the choice to retire or work for less money at the location 300 miles away, not from the time that Green actually resigned. Therefore, Green failed to file his discrimination charge within the statutory period of time required and his case was dismissed. There is a conflict among the U.S. Circuit Courts whether the time for filing a charge begins to run from the date of the constructive discharge or the date the individual becomes aware of the events which led to the constructive discharge. The decision in this case may resolve this conflict

… that an individual may not insist on a reasonable accommodation of his or her choice? *Noll v. International Business Machines Corporation* (2nd Cir. May 21, 2015). Noll is deaf and was accommodated by IBM in several ways, including providing translators for live meetings and videos. Noll argued that instead of providing a video interpreter, all videos should be captioned. In rejecting Noll's ADA claim, the Court stated that the ADA does not require the employer to provide an alternative accommodation preferred by the employee when the accommodation offered by the employer is "plainly reasonable." An interactive process is not required when the employer has offered a reasonable accommodation—the point of offering a reasonable accommodation is to determine whether the employee's disability could have been accommodated."

… that the DOL finally got around to updating its FMLA forms to include language resembling a Genetic Information Nondiscrimination Act (GINA) disclaimer? Employers are not required to use the DOL's form (thank goodness, as it has been non-compliant with GINA for years). LMVT has provided our clients with sample forms or cover sheets for the DOL's forms with the appropriate GINA disclaimer for years. Those using the DOL's forms will want to update by downloading the forms here.

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