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Supreme Court Rules That States' Same Sex Marriage Bans Are Unconstitutional

On June 26, 2015, the Supreme Court of the United States ruled by a 5-4 margin that marriage is a fundamental right that cannot be denied to same sex couples. The Court further held that states are required to recognize same sex marriages that have been legally licensed and performed in another State. *Obergefell v. Hodges* (June 26, 2015). Writing for the majority, Justice Kennedy opined that "[n]o union is more profound than marriage, for it embodies the highest of ideals of love, fidelity, devotion, sacrifice, and family." Justices Ginsberg, Breyer, Sotomayor and Kagan joined in the majority opinion which held that the Constitution grants same sex couples the right to "equal dignity in the eyes of the law."

The *Obergefell* case arose from a consolidation of six lawsuits in four states (Michigan, Kentucky, Ohio, and Tennessee) that all defined marriage as a union between one man and one woman. The plaintiffs were fourteen same-sex couples and two men whose same sex spouses were deceased who claimed that their Fourteenth Amendment rights to equal protection had been violated by their states' denial of either their right to marry, or by the failure of their states to provide full recognition of their lawfully performed marriage in another state. The Court acknowledged that states are generally free to vary the types of benefits they grant to married couples; however, the Court recognized the expanding list of rights, benefits, and responsibilities included taxation; inheritance and property rights; spousal privilege in the law of evidence; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; health insurance; and child custody, support, and visitation rules. The *Obergefell* Court declared that the Fourteenth Amendment's Equal Protection Clause provided a "fundamental right to marry" that could no longer be denied simply because the partners are of the same sex. The Court further held that the same sex marriage bans at issue burdened the liberty of same-sex couples and denied them the benefits afforded to opposite-sex couples. Accordingly, the Court held that these state laws were invalid to the extent that they excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

Four separate dissents were filed by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Chief Justice Roberts read the lead dissenting opinion chastising the majority for writing their own social perspectives into the Constitution. He noted that, although the majority suggested that "religious believers may continue to 'advocate' and 'teach' their views of marriage," they left out the word "exercise" with respect to those beliefs,

which could lead to religious institutions losing their tax-exempt status if they discriminate against married, same-sex couples. Justice Roberts opined that "[t]here is little doubt that these and similar questions will soon be before this Court." (Justice Thomas echoed this concern in his own dissent, arguing that it was "all but inevitable" that churches will face demands to "participate in and endorse civil marriages between same-sex couples," without regard for their own religious liberty.)

Justice Roberts concluded his dissent by inviting the "many Americans – of whatever sexual orientation – who favor expanding same-sex marriage … to celebrate today's decision. Celebrate the achievement of a desired goal, Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it."

Justice Scalia wrote his own dissent, acknowledging that he also agreed with everything in Justice Roberts' dissent. Noting that all the justices graduated from Harvard or Yale Law School, eight grew up on the coasts, and that not one is an evangelical Christian or a Protestant, Justice Scalia wrote that "[t]o allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation." Justice Scalia further commented that if he had relied upon the rationale adopted by the majority, he would "hide his head in a bag."

How does this ruling affect employers? The main "take away" from the decision is, of course, that all individuals who are eligible to be married may now enter into same-sex marriages in their own state of residence or any other state, and such marriages must be recognized by all states. Employers should review polices and benefit plans to ensure they are treating all married couples equally. This includes leave polices, non-discrimination provisions, benefit plans, retirement benefits and benefits offered to employees' spouses. Employee benefits such as health insurance, retirement plans, FMLA leave may be impacted by this ruling. Although neither the ACA, the IRS Tax Code, nor ERISA *require* a private employer to offer group health insurance benefits to employees' spouses, if an employer does provide health insurance and/or other benefits to opposite-sex spouses of its employees, there is a legitimate argument for same-sex spouses to claim the same right to eligibility. It is advisable that fully insured welfare benefit plans that do provide benefits to opposite-sex spouses are reviewed and revised to include the same coverage for same-sex spouses. Although the legal question arguably remains open as to whether self-insured medical plans may continue to exclude same-sex spouses from coverage, such exclusion could lead to federal discrimination claims, particularly since the EEOC has stated its position is that discrimination based on sexual orientation can be sex discrimination under Title VII. Furthermore, at least one U.S. District Court has already addressed the failure to offer the same benefits to same-sex spouses and found protection for same-sex spouses where a company provided benefits to a male spouse of a female employee, but not to the male spouse of a male employee. *Hall v. BNSF Railway Company*, (W.D. Wash., 2014). Benefits to domestic partners are also in question, and employers are cautioned against making any abrupt changes.

The IRS issued guidance last year applying the Supreme Court's 2013 decision in *U.S. v. Windsor* (holding that the Defense of Marriage Act's definition of marriage was unconstitutional and that the federal government must recognize same-sex marriages that are recognized by states) to qualified retirement plans. Interestingly, in *Obergefell*, the Supreme Court held that this definition was invalid because it undermined "state sovereign choices about who may be married." Although the *Obergefell* decision made only passing reference to tax implications, the *Windsor* Court's deference to "state sovereignty" no longer exists and now all 50 states, including the fourteen states that have same-sex marriage bans on the books, are required to issue marriage licenses between two people of the same sex, and to provide full recognition of same-sex marriages legally performed in other states. Accordingly, employers should carefully review the beneficiary and definition sections of their qualified plans to ensure that same are compliant with this change in the law. In particular, plan sponsors should review the definition for "spouse" that

may well be buried in the plan materials as well as review the plan's default beneficiary provisions. It is clear that tax qualified retirement plans must recognize same-sex marriages for purposes of spousal rights, but it is less clear whether they must be recognized for plan based rights that aren't legally mandated. But I would be wary of differential treatment without adequately assessing risk. Notwithstanding the Court's proclamation, we do anticipate further challenges, similar to the *Hobby Lobby* challenges to the ACA, based on religious and ideological grounds.

The FMLA previously provided that married same-sex couples could only be considered married for purposes of the FMLA if they resided in a state that recognized same-sex marriage. The rule was then redefined to recognize the law of the "state of celebration" as the determinative factor in whether or not a same-sex spouse qualifies for FMLA benefits. After *Obergefell*, all legally married same-sex couples, regardless of where they were married, will presumably be eligible for FMLA benefits under qualifying circumstances.

Same-Sex Marriage: An Alabama Addendum

For those of you who have been following the status of same-sex marriage in Alabama, you will recall that there has been much controversy and conflict among our federal and state judges, as well as elected officials. The issue is presumably settled now. Following the ruling on Friday, Governor Robert Bentley acknowledged that he would follow it and said "I have to uphold not only the constitution of Alabama, but I swore to uphold the constitution of the United States and we will uphold the law of the United States. I will uphold the law of the nation and this is now the law."

However, controversy remains in the Alabama court system. On January 23, 2015, federal District Court Judge Callie V.S. Granade declared same-sex marriage bans in Alabama to be unconstitutional and void. In February Alabama Supreme Court Chief Justice Roy Moore entered an administrative order stating that the federal district court ruling was not binding on Alabama probate judges and that Alabama probate judges were prohibited from issuing or recognizing a marriage license that violated the Amendment or Act. Thereafter, confusion amongst probate judges ensued, with some issuing marriage licenses to same-sex couples, some judges issuing licenses to opposite-sex couples, and some probate judges halting the issuance of marriage licenses altogether. On March 3, 2015, the Alabama Supreme Court (Judge Moore recused himself) entered an Order requiring probate judges to discontinue the issuance of marriage licenses to same-sex couples. The Court said it had the same authority to interpret the U.S. Constitution as Judge Granade, and held that Alabama's same-sex marriage bans did not violate couples' Fourteenth Amendment equal protection and due process rights. Following this decision, several civil rights groups filed a motion asking Judge Granade to order probate judges to comply with her order and, within days, Alabama Attorney General Luther Strange asked a federal court to delay any decisions on same-sex marriage in the state until the anticipated U.S. Supreme Court ruling on the matter. On May 21, 2015, Judge Granade issued an order mandating Alabama's probate judges issue marriage licenses to same-sex couples, but stayed the effect of her order until the Supreme Court ruling.

Today, the Alabama Supreme Court issued an Order stating that, "[p]ursuant to Rule 44, Sup. Ct. R., the parties in *Obergefell v. Hodges*, have a period of 25 days to file a petition for rehearing in that case. The parties in the present case {Ex parte State of Alabama ex rel. Alabama Policy Institute, Alabama Citizens Action Program, and John E. Enslen, in his official capacity as Judge of Probate for Elmore County} are invited to submit any motions or briefs addressing the effect of the Supreme Court's decision in *Obergefell* on this Court's existing orders in this case no later than 5:00 p.m. on Monday, July 6."

Despite much debate in the news today, the Alabama Supreme Court's ruling does <u>not</u> require Alabama Probate Judges to halt issuance of marriage licenses to same-sex couples. This Order only recognizes the right of the parties to the *Obergefell* case to file a petition for rehearing on the merits of that decision within 25 days after entry of the decision. In light of this rule, the Alabama Supreme Court's order merely invites probate

judges and interested parties to the litigation that is pending before it to submit motions by July 6 on how the *Obergefell* decision impacts the Alabama Supreme Court's March Order halting the issuance of marriage licenses.

Intern? Contractor? Employee with Back Pay?

Recent developments spotlight the risk a business takes in classifying an individual as an independent contractor or an intern. For example, on June 16, 2015, in the case of *Uber Technologies, Inc. v. Berwick*, Uber appealed the California Labor Commissioner's conclusion that Uber drivers were employees and not independent contractors. The Labor Commissioner, on June 3rd, had ruled that Uber drivers were employees, as Uber is "involved in every aspect of the operation," including investigating driver backgrounds, setting fare prices, and determining a non-negotiable service fee to be paid to the drivers. Uber argued that "the number one reason drivers choose to use Uber is because they have complete flexibility and control. The majority of them can and do choose to earn their living from multiple sources." If the Commissioner's decision stands, Uber will owe all of its California drivers reimbursement for mileage and tolls, plus interest. For Berwick, the single driver in the Labor Commissioner's decision, this amount was $4,152.

On June 12, 2015, FedEx agreed to a $228 million settlement for misclassifying drivers as independent contractors under California law. Drivers were required to sign "operating agreements" stating they were independent contractors, including language that "no officer or agent or employee of FedEx shall have the authority to direct the driver as to the manner or means employed." This on its face is strong language for the argument that the driver was an independent contractor. However, the case revealed the details with which drivers must comply with FedEx policy, including grooming standards, the assignment of service areas and schedules, and the requirement of logos and colors on the FedEx trucks. According to the court, the operating agreement gave FedEx "a broad right to control the manner in which the drivers performed their work. The most important factor of the right to control test thus strongly favors employee status."

This misclassification of employees is a primary focus area of the Department of Labor, Wage and Hour Division. While there are over a dozen factors that agencies and courts can look at in deciding whether a worker is a contractor or an employee, it all boils down to whether the business reserves the right to direct and control the individual in how she or he performs the job task. If the business reserves the ultimate right of control, then in all likelihood the individual should be considered an employee. Historically, a business' limited right to control a contract worker has aligned with the contract worker's exercising his freedoms as a freelancer to provide the same services to other businesses and individuals. In other words, a bona fide contract worker looks a lot like a business himself, deciding when he'll do the work; what tools or materials he'll use; and what work to accept, both who he will work for and how much work he will perform. However—and here's where a lot of businesses (though not necessarily Uber or FedEx) get confused—the quantity and the frequency of the work aren't controlling factors.

Technology has expanded businesses' ability to parse out work to several strangers instead of one steady employee. This remotely-working, "sheddable" workforce will only continue to expand. Employers are attracted to the workforce because of its reduced overhead; and individuals—including Uber drivers—like the flexibility of deciding, minute-by-minute, whether they're going to work or not work. If your organization will utilize the services of individuals working remotely or who are "sheddable," be sure they are properly classed as independent contractors or employees. We will be happy to help you analyze your current classifications and also to advise you about improving business practices or documentation to solidify an independent contractor classification.

A number of college graduates seek unpaid internship positions as a first level of entry into their chosen field. However, this relationship has become highly scrutinized to determine whether the interns in fact are employees. For example, on May 28th, Viacom agreed to a $7.2 million settlement involving claims of 12,500 interns who

are entitled to back pay—they were employees, not interns. *Ojeda v. Viacom Inc.* (S.D.N.Y.). The challenge for employers when utilizing interns is first, does the intern in fact perform the work that would otherwise be done by a regular employee? Second, is the intern part of a bona fide internship program at the employer or if the intern is a student, at the intern's college or university? Other factors include: Does the internship have a fixed duration? When internships tend to be indefinite, the likelihood increases that the unpaid intern should be treated as a paid employee. Does the overall value of the intern relationship primarily benefit the intern or the employer? Some employers have chosen to discontinue internship programs out of compliance concerns, even if the intern is the child of an employee. If your organization has established or plans to establish an intern program, we can review the process to develop a bona fide internship program that will minimize the risk of a claim for past wages.

Discriminatory Decision by a Non-discriminatory Manager

The case of *Godwin v. WellStar Health System, Inc.* involved a termination decision by a non-discriminatory officer who relied on the information provided by a discriminatory supervisor. (11th Cir. June 17, 2015). Known as the "cat's paw" theory of discrimination, the principle is that discrimination can occur where a decision-maker relies on the biased input from another manager.

Mary Godwin, age 63, alleged that she was terminated due to her age. As evidence, she introduced comments that her 35-year-old supervisor who recommended her termination asked how old she was, asked why she was still working at her age, told her that she should have planned for the expense of retirement, and told her that she was going to put Godwin "out to pasture."

The supervisor recommended to her vice-president that Godwin be terminated due to performance issues. Relying on the supervisor's comments, the vice-president terminated Godwin. In asserting that the supervisor's age based comments were a basis of termination, Godwin successfully argued that under the cat's paw theory, the terminating vice-president "rubber stamped" the supervisor's decision without conducting an independent investigation. The court stated that the supervisor with the ageist comments had a "determinative influence" over the vice-president's decision to fire Godwin. Where a biased supervisor's recommendations have a determinative effect on the ultimate decisionmaker, liability may occur where that decision maker does not conduct an independent investigation of the basis for termination, which includes a discussion with employee to be terminated. Therefore, the court stated that it was up to the jury to decide whether Godwin was terminated based upon her age.

Many organizations as a matter of risk management require a termination decision to be reviewed by a member of the leadership team not directly involved in the process. This can be an effective approach to reduce the risk of an employment dispute, but for it to really be effective, that decisionmaker needs to dig into the underlying circumstances for the termination and satisfy herself or himself that the reasons are appropriate. Otherwise, it may come across as a "rubberstamp," and the bias of the individual or individuals recommending termination will be attributed to the ultimate decision maker.

Disabled Employees Need Not Be Most Qualified for Placement in Vacant Positions (At Least in Some Jurisdictions)

In the case of *EEOC v. United Airlines, Inc.*, United agreed to pay more than $1 million to settle a lawsuit regarding reasonable accommodation issues for disabled employees. (N.D. Ill., June 11, 2015). The lawsuit focused on to what extent an employer is required to assign a disabled employee to a vacant position as a form of reasonable accommodation. United permitted the reassignment of a disabled employee, but stated that reassignment must be on a competitive basis. That is, in order for the disabled employee to move into the vacancy, the employee must apply for it and be considered with any other employee. According to United's transfer policy, the "disabled employee [must] be

the best qualified individual, or tied in qualifications with the best qualified individual, to receive priority consideration for placement in a vacant position needed as an accommodation." The district court dismissed the EEOC's lawsuit, and the Seventh Circuit reversed its precedent in holding that assignment to a vacant position as a form of accommodation and may not be on a competitive basis.

According to the EEOC, "as the Seventh Circuit's decision highlights, requiring the employee to compete for positions fall short of the ADA's requirements. Employers should take note: when all other accommodations fail, consider whether your employee can fill a vacant position for which he or she is qualified." This decision is consistent with the appellate courts of the Tenth Circuit and District of Columbia, but conflicts with the Eighth Circuit Court of Appeals, which holds that the ADA does not require preferential treatment to fill a vacancy as a form of accommodation.

Under the ADA, transfer to a vacant position for which the employee is qualified is a potential form of accommodation, even if that position pays less. Until recently, it was generally agreed that the employer still had the right to select the most qualified applicant for the position, even if the applicant pool included an internal candidate who could no longer perform his current position because of a disability. That premise is now in question as more courts agree with the EEOC that assignment to a vacant position does not require the employee to compete for that assignment, only that he hold the minimum qualifications.

The Supremes Save the Subsidies In *King v. Burwell*

On June 25, 2015, the U.S. Supreme Court issued a highly anticipated ruling upholding the extension of subsidies to insurance coverage purchased on the Federal marketplace. This decision focused on the interpretation of the Affordable Care Act's (ACA) language stating that subsidies are available under Section 1311(1) of the Act to those enrolled in health care plans acquired *through an Exchange established by a State*" While recognizing that the ACA "contains more than a few examples of inartful drafting," Chief Justice Roberts, writing for the six-Justice majority, wrote that this language was ambiguous and that "[t]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." In his opinion, Justice Roberts further stated that "…the Act's context and structure compel the conclusion that [the law] allows tax credits for insurance purchased on the Exchange created under the Act. Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the calamitous result that Congress plainly meant to avoid." Justices Kennedy, Breyer, Ginsburg, Kagan, and Sotomayor joined in the majority opinion.

Justice Scalia filed a dissenting opinion in which Justices Alito and Thomas joined, stating that the majority's decision that the phrase "Exchange established by the State" actually means "Exchange established by the State *or the Federal Government,*" was absurd. Justice Scalia further referred to the majority's opinion as "pure applesauce" and "interpretive jiggery-pokery" that ignored the plain language of the ACA. He also said that instead of referring to the ACA as "Obamacare," "[w]e should start calling this law SCOTUScare."

What does this ruling mean for employers? Most employers have already spent countless hours determining whether they are an "applicable large employer" for purposes of the ACA's "employer mandate." This decision does not affect such determinations. Rather, the ruling confirms the continuation of the "mandate," and extends the possibility of penalties employers whose employees purchase coverage and receive subsidies on a Federal exchange. Employers should be reminded, however, that the ACA does not actually *mandate* that employers provide coverage for their full time employees; however, penalties are triggered when an employee signs up for coverage in an exchange and receives a premium tax credit (or subsidy). This "requirement" has been phased in, and became effective January 1, 2015, for employers with 100 or more full time (or full time "equivalent") employees. The requirement goes into effect for employers with 50 or more full time or full time equivalent employees on January 1, 2016. Employers with less than 50 FTEs are not subject to the penalty.

Although the Supreme Court's decision has been described as the second time the Supreme Court has saved "Obamacare," there are many issues that continue to remain in debate. The "Save American Workers Act," which passed in the U.S. House of Representatives on January 8, 2015, proposes to amend the Tax Code to change the definition of "full-time employee" under the ACA to the industry standard of 40 hours per week, rather than the current ACA standard of 30 hours per week. This bill is still pending in the Senate. Employer groups are also pursuing additional changes to the ACA, such as streamlining the reporting requirements and pushing for the repeal of the upcoming "Cadillac" tax. We will continue to keep you updated on these and other ACA developments.

For now, employers that have been waiting on the *King v. Burwell* decision to get into compliance with the ACA are encouraged to do so as soon as possible to avoid potential penalties.

NLRB Tips: NLRB KEEPS UP FAST AND FURIOUS PACE IN MAKING SIGNIFICANT CHANGES TO THE LAW

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 Continue to Voice Opposition to Proposed Joint Employer Change

The Board continues to consider arguments of litigants and interested parties in *Browning-Ferris Industries*, in which the NLRB is considering whether to revise its joint employer test. The last case activity in *Browning-Ferris* occurred in July of 2014, *amici* filings ended in June of 2014. The nuts and bolts of the proposed changes are outlined in last month's LMVT Employment Law Bulletin.

The latest opinion on the issue comes from the Competitive Enterprise Institute (CEI), which has written a paper, dated June 1, 2015, claiming that the GC of the Board is "pushing a radical redefinition" of employer-employee relationships under the NLRA. The CEI urges that Congress take legislative action to relieve "businesses and workers who would suffer as a result of the NLRB's aggressive, pro-union agenda."

In its paper, CEI argues that the standard proposed by GC Griffin in *Browning-Ferris* "would be broad and sweeping enough to classify typical franchises, contractors, staffing agencies and suppliers as joint employers." Stating that joint employers can be sued "more readily" for alleged employment misdeeds, CEI contends that "more parties and deeper pockets to sue translate into more business costs and hampered job growth."

Stay tuned for further developments.

Right-to-Work Laws – Under Attack by the NLRB?

In a potentially damaging move that signals possible changes to right-to-work laws, the Board has invited parties to file briefs on whether the NLRB should reconsider a long-standing rule that in the absence of a valid union-security clause, a labor organization may not charge non-members a fee for processing their grievances. *Steelworkers Local 1192 (Buckeye Fla. Corp.)* (2015). Brief filing must be completed by July 15, 2015.

Union security clauses are clauses in a CBA where the employer promises to require the covered employees to join the union or pay union dues. Right to Work laws prohibit these clauses.

The current law, established in 1976, states that the right to avail oneself of the grievance process is a "matter of right," and that discriminating against non-members by charging them for what is due them under the labor laws is a violation of the NLRA. In other words, the union has to support free riders in their grievances against the employer.

It remains to be seen if the case in question will be the first step in eroding right-to-work laws, as the current

litigation only applies to the "processing of grievances." Right-to-Work laws are specifically authorized by Section 14(b) of the NLRA.

NLRB Finds that Ban on Vulgar Union Buttons and Stickers Unlawful

The NLRB has found that an employer's ban on admittedly vulgar union buttons while at work was illegal. Some buttons read "WTF Where's the Fairness" and "Cut the Crap! Not My Healthcare." On June 2, the three-member Board panel found that

> … the possible suggestion of profanity, or 'double entendre' … is not sufficient to render the button and stickers unprotected here, where an alternative, non-profane, inoffensive interpretation is plainly visible and where, further, the buttons and stickers were not inherently inflammatory and did not impugn the Respondents' business practices or product.

In so finding, the Board determined that the employer failed to demonstrate any special circumstances that would outweigh employees' Section 7 right to wear union insignia. In particular, the NLRB rejected the employer's argument that allowing the buttons and stickers would violate company policy against non-branded apparel and a separate standards/dress code policy.

This case is yet another example to the NLRB pushing the bounds of common sense and making it extremely difficult for employers to maintain any civility in the workplace.

Board Ruling Finding Facebook 'Like' Button Protected Faces Scrutiny

In *Triple Play Sports Bar*, the Board considered whether merely "liking" statements on Facebook constituted protected, concerted activity. In adopting the ALJ's decision, the NLRB concluded that the Employer unlawfully discharged two workers over a profanity-laced Facebook discussion criticizing the employer's tax withholding calculations.

This case was discussed most recently in the LMVT September 2014 ELB, and the sports bar has urged the Second Circuit Court of Appeals to deny enforcement of the Board's 2014 Order. On June 15, 2015, in its reply brief to the NLRB's application for enforcement, Triple Play argued that:

> It cannot reasonably or logically be concluded that an employee's 'liking' of a defamatory statement by a non-employee is intended to improve the terms and conditions of employee's employment.

Critically, the sports bar's arguments appear to hinge on the presence of customers when the offending comments were made. Triple Play notes that two "patrons" participated in the online discussion. Triple Play went on to note that the use of obscenities in front of customers does not have to be tolerated by an employer, even when not made at the company premises but made online.

As previously noted, if the ruling on appeal is adverse for the Agency, it could be a signal that the Board's aggressive enforcement posture will not be rubber-stamped by the U. S. courts.

Is "Virtual Organizing" on the Horizon?

A liberal think tank, the Century Foundation (CF), which claims on its website that it "seeks to foster opportunity, reduce inequality, and promote security at home and abroad", argues that the time is ripe for an online tool enabling workers to efficiently organize union support and file representation petitions with the NLRB that would allow employees to "leverage recent [Board] decisions and provide an "essential boost" for union organizing. In other words, CF is advocating that union organizing take place in secret, where employers are blind-sided by employee support for a union and have very little time to respond to an organizing campaign. The article states, in part:

> Given the success of many commercial and consumer based online tools, why shouldn't there be a new, highly sophisticated online tool that leverages state-of-the-art technology to

help promote one of America's bedrock values: getting a fair shake at work

The Board seems to endorse online organizing, and has laid the ground work for future efforts on this front. The decision in *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), which allows the use of company email during nonwork time to engage in protected, concerted activity, and the implementation of the rule amendments to the election rules (quickie election rules) are two examples of NLRB recognition of new organizing techniques.

The Century Foundation article was written by the same authors that wrote the 2012 book *Why Labor Organizing Should Be a Civil Right.* LMVT will continue to monitor developments as they unfold. It remains to be seen if unions take advantage of the demographics of "younger workers," which currently drive social media and digital platforms in the workplace.

EEO Tips: EEOC'S GROWING CONCERN ABOUT RETALIATION CHARGES

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.

On June 17, 2015, the EEOC held a public hearing entitled *Retaliation in the Workplace: Causes, Remedies and Strategies for Prevention*. Various EEO experts, both from within the Commission and outside, were invited to speak in person or present written comments on the serious problem of retaliation charges that were being filed with increased frequency. In general, the percentage of retaliation charges (under all statutes) directly or as a secondary allegation over the past 10 years has jumped from 29.5% of all charges filed in FY 2005 to 42.8% of all charges filed in FY 2014. In FY 2014 retaliation charges were the most commonly-filed charge, exceeding race (35%) and sex (29.3%).

The following table shows, perhaps more clearly, the steady growth of retaliation charges and the results of the EEOC's processing of such charges over the last four years.

EEOC COMPARATIVE RETALIATION CHARGE PROCESSING RESULTS FISCAL YEARS 2011 THRU 2014

	FY 2011	FY 2012	FY 2013	FY 2014
Total Charges – All Statutes	99,947	99,412	93,727	88,778
Total Retaliation Charges	37,334 37.4%	37,838 38.1%	38,539 41.1%	37,955 42.8%
Total Resolutions	41,743	42,025	38,831	36,907
No Reasonable Cause	26,161 62.7%	27,077 64.4%	24,611 63.4%	23,219 62.9%
Reasonable Cause	1,707 4.1%	1,800 4.3%	1,454 3.7%	1.079 2.9%
Merit Resolutions	7,467 17.9%	7,422 17.7%	7,014 18.1%	6,357 17.2%
Monetary Benefits (In Millions)	$147.3	$ l77.4	$169.4	$140.5
Average Obtained Per Merit Resolution	$19,727	$23,902	$24,152`	$22,102

(Per EEOC Statistics @ eeoc.gov)

Perhaps one redeeming statistic which the table shows is that although the percentage of Retaliation charges has steadily increased over the last four years, the percentage of No Reasonable Cause determinations has remained about the same, between 62.7% and 64.4%. Also the statistics indicate that Charging Parties are not reaping higher benefits from filing retaliation charges; the average amount obtained per merit resolution has actually decreased during the last three years from a high of $24,152 in FY 2013 to $22,102 in FY 2014.

According to Raymond Peeler, Senior Attorney-Advisor in the EEOC's Office of Legal Counsel, who was a participant in the EEOC's hearing on June 17th, there were several reasons why the EEOC needed to address the surge in retaliation charges namely because, as he put it: (1) retaliation is the linchpin for all civil rights enforcement - if employees fear the repercussions of filing a charge or complaint, then their rights are unlikely to be enforced; (2) there have been seven Supreme

Court decisions about retaliation since the EEOC's Compliance Manual was adopted in 1998, and (3) several new and important issues have arisen in the lower courts about this issue. Peeler suggested that these were matters of great concern to the Commission.

As with most complicated matters there probably is no single reason for the surge in retaliation charges. However, one could point to several notable Supreme Court cases where the perimeters of retaliation in the context of employment laws have been widened in favor of Plaintiffs. For example, in *Burlington Northern and Santa Fe Railway Co. v. White*, the Supreme Court held that the scope of "adverse action" under retaliation goes beyond concrete decisions (like termination or lowering pay) and includes actions which "could well dissuade a reasonable worker from making or supporting a charge of discrimination," even if they don't affect the employee's paycheck. In the case of *Crawford v. Metropolitan Government of Nashville and Davidson County*, the court widened the "opposition clause" under Title VII by holding that the clause extends protection to an employee who speaks out about discrimination when asked during the course of an internal investigation even though that employee may not have otherwise openly opposed the discrimination in question. In the 1997 case of *Robinson v. Shell Oil,* the Supreme Court held that former employees who received a negative reference because of complaining of discrimination may be protected under the anti-retaliation provisions of the law. In *Thompson v. North American Stainless*, the Supreme Court again widened the class of protected individuals to those closely-associated with the complaining individual (in that case, Thompson's fiancée and co-worker complained of discrimination, resulting, Thompson alleged in his termination). Thus, it could be said that these holdings made it easier for an employee to allege and sustain a charge of retaliation.

These results have been tempered by the 2013 decision of the Supreme Court in the case of *University of Texas Southwestern Medical Center v. Nassar* considerably tightened proof of retaliation in the employer's favor. The Court held that although some Title VII claims could be pursued under either a "but for" or a "motivating factor" analysis, a Plaintiff under Title VII would be required to prove that retaliation was the "but for" cause of any adverse action.

Thus, although the process has become more complicated because of current case law developments, the best way for an employer to avoid a retaliation charge is still to provide the right kind of direct, meaningful training to supervisors who interact on a daily basis with its employees. The EEOC is concerned about retaliation and its statistics show that it finds "no cause" on average on over 60% of the retaliation charges filed. Employers should be concerned also and make sure their policies and practices keep them in that 60% group.

EEO TIP: In general, retaliation occurs when an employer unlawfully takes action against an individual as punishment for exercising his or her rights under the Federal EEO laws including Title VII, ADA, ADEA, FMLA, Equal Pay Act, and the Rehabilitation Act. However, it should be noted that in addition to these employment-oriented laws, there are approximately fifteen other federal statutes—and dozens of state statutes—which contain anti-retaliation provisions that employers should be aware of. All of them have similar provisions as to the specific persons who are protected thereunder, limitations as to the kind of acts protected, and remedies or damages available to a complainant.

OSHA Tips: OSHA and Interpretation of Standards

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.

A useful tool in understanding how OSHA will enforce its standards is to look at the agency's responses to questions posed by employers. A number of recent examples include the following:

A question was posed as to whether there was a requirement to test hepatitis B antibodies once an employee completed the three-dose vaccination series.

The answer given was "yes" with a reference to the BBP standard and the U.S. Public Health Service.

Another question was whether the employer must pay for testing of the source patient. The answer given was "yes."

A third question involved a recordkeeping issue arising from employee travel. In this case an employee returned from an out of town work trip. He arrived at the airport on Saturday, a non-workday. He drove home, stopping at a store on the way. When he resumed his trip home, he had an accident and was injured. OSHA decided that the employee's injury was work-related for recordkeeping purposes. OSHA's answer notes that injuries or illnesses are not considered work-related if they occur while the employee is on a personal detour. OSHA notes that this case does not fit the exception "for personal reasons," because the employee was on a reasonably direct route home.

In another interpretation letter OSHA responds to a question that relates to transporting oxygen tanks by mobile medical equipment and the definition of "secure" in that regard. OSHA responds that 29 C.F.R. §1910.101(b) requires that the in-plant handling, storage, and utilization of all compressed gasses and cylinders, portable tanks, rail tank cars and motor vehicle cargo tanks shall be in accordance with Compressed Gas Association pamphlet P-1-1965, Section 3.2.6 requiring use of a suitable hand truck, roll platform, or similar device. The cylinder must be firmly secured during the transporting and unloading. It is further noted that cylinders should not be dragged or rolled in the horizontal position. There are multiple options to secure a cylinder. A suitable hand truck, a pallet system or similar material-handling device may be employed.

Wage and Hour Tips: Current Wage and Hour Issues

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 a speech earlier this month, to New York University's 68th Annual Wage Conference, Wage and Hour Administrator David Weil discussed how Wage and Hour is charged with monitoring 7.3 million workplaces and protecting 135 million workers. He said that he intends to continue with strategic enforcement in certain targeted industries. In recent years those industries included agriculture, day care, restaurants, garment manufacturing, guard services, health care, hotels and motels, janitorial and temporary help. He also stated that one-third of the $250 million in back wages collected in FY 2013 was in those industries. If you operate in one of the above industries the chances of you having a visit from Wage Hour are much greater than if you operate in a different industry.

In a June 15 speech to a Labor Research and Action Network Conference, Mr. Weil discussed Wage and Hour's heightened efforts to facilitate better outreach to the public, both employers and employees. Earlier this year Wage and Hour began to hire Community Outreach planners to develop ways to better improve this effort. At this point they have in place 36 of these specialists located in District Offices throughout the country. He stated that his goal is to have a specialist located in each of the 52 District Offices before he leaves office. He also pointed out that presently there are 1,050 Wage and Hour Investigators across the country and the budget request for FY 2016 would increase the number of investigators to about 1,300. This would be the largest number of investigators the agency has ever employed. When I began working for the agency in 1962, they were hiring additional staff to bring the level up to 1,000 investigators to enforce the FLSA covering a workforce of approximately 60 million. Today the workforce is more than twice as large with only a small number of additional investigators.

As I am preparing this article we are still expecting the release of the proposed regulations that deal with the executive, administrative, professional and outside sales exemptions. In late May, DOL sent their proposal to the Office of Management and Budget for approval. It is expected the proposal will be released by the end of this

month. Once the suggested regulations are released, I plan to review the projected changes and will distribute an outline of their suggested changes. When the new recommended regulations are released I anticipate there will be at least a 90 day comment period where the public can express their concerns and questions. When these regulations were last revised in 2004, the Department received some 75,000 comments on the suggested changes. I believe there will be an even greater number this time so it will take several months for DOL to review and consider all of the comments. Then the Department will publish the final rule which will most likely not become effective for at least 90 days. Consequently, I do not expect any changes to become effective until sometime in 2016.

Even though what the proposal will contain is not known, Congress has already begun hearings regarding the changes. On June 10 the House Education and the Workforce subcommittee held a hearing where an attorney representing the U. S. Chamber of Commerce testified regarding the enhanced enforcement tactics that are being used by DOL. These include the assessment of civil money penalties where there are repeat or willful violations of the FLSA as well as liquidated damages. The attorney believes that the current enforcement tactics are putting too much pressure on employers to agree to demands from Wage and Hour investigators without giving the employers a chance to consult with his/her representative.

Stay tuned as I expect there will be significant Wage and Hour issues raised in the next few months. In the meantime if I can be of assistance please give me a call.

2015 Upcoming Events

EFFECTIVE SUPERVISOR®

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

Auburn/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 a Texas law effective June 13 permits employees to carry handguns openly at work? The law does not permit employees to carry a gun inside the employer's premises. Covering pistols only, the law permits employees to have unconcealed pistols in their vehicles. Texas also passed the "campus carry" bill which permits pistols to be brought onto the campuses of public colleges. The Texas law does not cover private universities.

… that almost 75% of employees have no idea what to do in the event of a physical threat at work? According to a recent Harris Poll, 30% of those surveyed do not believe the workplace is secure from attacks from another person and 30% also believe that the workplace does not have adequate cyber security. Eighty-five percent believe the workplace is well protected in the event of a natural disaster and 83% believe their workplace is well protected in the event of weather threats. Approximately 40% do not believe their employer has a plan in place to deal with workplace violence, threats, or incidents.

… that work and family responsibilities are driving increasing focus on workplace accommodations for fathers? Pursuant to a survey led by MenCare, which is a global campaign to promote men as caregivers, "it's about time we really took fatherhood seriously. We're

finding from research around the world that men can't do this alone. It's literally about time—who spends time with children." The report recommends employers provide for paid family leave and extensive paid sick time, regardless of whether the employee is covered FMLA. According to MenCare, "gender justice" includes father-friendly workplace policies. Richard Branson recently made headlines by announcing that full-time Virgin Atlantic employees who had worked for the company for four years would be eligible for one year of fully-paid maternity/paternity leave.

… that a "conflict of interest" rule violated the National Labor Relations Act, according to the NLRB? One would think that a conflict of interest policy is rather basic to the integrity of an employee's commitment to an employer. Not so, according to the National Labor Relations Board in the decision of *Remington Lodging & Hospitality, LLC* (June 18, 2015). The employer's rule focused on competing against the employer or disclosing confidential business information. According to the NLRB, "employees would reasonably fear that the rule prohibits any conduct the Respondent may consider to be detrimental to its image or reputation or to present a conflict with its interests, such as informational picketing, strikes or other economic pressure." A factor that influenced the NLRB in this decision was the existence of other employer rules and actions which were considered a violation of employee rights. In our view, a well drafted conflict of interest policy, will adequately protect the employer's needs and not conflict with employee rights under the NLRA.

… that the Big Three auto negotiations will begin on July 13, covering 140,000 hourly employees? It is anticipated the UAW will try to eliminate two-tier pay systems, which provide for a $9 an hour gap between tiers 1 and tier 2 employees. Forty-three percent of Chrysler employees are paid on the lower scale, compared to 19% at GM and 28% at Ford. With Michigan now a Right-to-Work state, the UAW considers the elimination of the two-tier structure essential to retaining the dues paying members who are paid according to the lower tier.

LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

Richard I. Lehr	205.323.9260 rlehr@lehrmiddlebrooks.com
David J. Middlebrooks	205.323.9262 dmiddlebrooks@lehrmiddlebrooks.com
Albert L. Vreeland, II	205.323.9266 avreeland@lehrmiddlebrooks.com
Michael L. Thompson	205.323.9278 mthompson@lehrmiddlebrooks.com
Whitney R. Brown	205.323.9274 wbrown@lehrmiddlebrooks.com
Jamie M. Brabston	205.323.8219 jbrabston@lehrmiddlebrooks.com
Michael G. Green II	205.323.9277 mgreen@lehrmiddlebrooks.com
Lyndel L. Erwin (Wage and Hour and Government Contracts Consultant)	205.323.9272 lerwin@lehrmiddlebrooks.com
Jerome C. Rose (EEO Consultant)	205.323.9267 jrose@lehrmiddlebrooks.com
Frank F. Rox, Jr. (NLRB Consultant)	205.323.8217 frox@lehrmiddlebrooks.com
John E. Hall (OSHA Consultant)	205.226.7129 jhall@lehrmiddlebrooks.com