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No Need for Congress to Amend Title VII, EEOC Will

Efforts have been made for several years to amend Title VII to prohibit discrimination based upon sexual orientation. However, apparently the EEOC believes that sex discrimination under Title VII includes sexual orientation, thereby negating the need for the legislative initiative it has supported for the past twenty years.

The case of *Complainant v. Foxx* was a federal sector employment discrimination case decided by the EEOC (which has judicial authority over complaints of employment discrimination against federal agencies) on July 16, 2015. The case involved a male traffic controller who alleged that the Department of Transportation did not promote him because of his sexual orientation. In a three-to-two vote, the EEOC ruled that "sexual orientation discrimination is sex discrimination [under Title VII] because it necessarily entails treating an employee less favorably because of the employee's sex." The EEOC ruled it was not bound by the categories explicitly listed in Title VII, but that it would find sex discrimination whenever an employer relied on sex-based considerations or took gender into account.

Although this case involved a federal sector employee, we expect the Commission to apply the same interpretation to private sector charges effective immediately. Commissioner Chai Feldblum confirmed this is an interview with the *Washington Blade*, where she stated, "The ruling is as significant as people are saying it is. The Commission's decision that sexual orientation discrimination is always sex discrimination under Title VII now applies across all of the Commission activities, including charges brought to us by employees and applicants who work in the private sector or for state or local governments." (emphasis added).

Though we think the EEOC has overstepped its authority, we doubt the *Foxx* decision will greatly expand the number of viable sexual orientation claims. Sexual orientation discrimination has long been a valid and viable claim under a sex stereotyping theory. Based on Supreme Court precedent, a woman or man may proceed with a claim of sex discrimination where she or he is treated differently because she or he does not meet an employer's stereotypes of how a woman or man should behave or dress. Thus, sex stereotyping and gender identity bias are and have been recognized forms of sex discrimination under Title VII.

What do we foresee as the effect of this decision? We expect that sexual orientation discrimination charges will be filed as a form of sex discrimination, without relying on sex stereotyping theory. An increase in the number of such charges—especially in states without separate sexual

orientation anti-discrimination laws—seems likely. (Turn to Jerry Rose's article to see the EEOC Charge statistics available on sexual orientation). The EEOC will not be satisfied with employer responses citing years of precedent confirming that Title VII does not actually prohibit discrimination based on sexual orientation. In essence, the EEOC has moved to change the law in this regard where Congress has not done so.

LMVT Webinar: DOL Proposed Revisions to the White Collar Exemptions

It has been a busy July for the United States Department of Labor. On July 6, 2015, DOL issued its much-anticipated proposed revisions to the regulations governing the "white collar exemptions" (those for executive, administrative, and professional employees) under the Fair Labor Standards Act. The purpose of the revisions is to increase the number of employees covered by the Act's overtime requirements.

The proposed revisions raise the minimum annual salary level required to meet the applicable white collar exemption tests from $23,660 (where it has been since 2004) to an anticipated $50,440. The minimum will be adjusted each year. To be eligible for one of the white collar exemptions, an employee must be paid at least the minimum salary, be paid on a salary basis, and primarily perform certain "exempt" duties. The DOL does not appear to have proposed any material changes to the salary basis requirements or duties tests for the exemptions. The DOL projects that this increase will make approximately 44% of white collar salaried employees no longer eligible for the exemptions.

The DOL will accept comments on the proposed regulations for sixty days after publication. We do not expect any significant revisions and estimate they will go into effect in the first quarter of 2016. Employers should start developing strategies for dealing with the new regulations, including possible salary adjustments and reclassification of positions.

On July 15, 2015, Wage and Hour Administrator David Weil issued an interpretive bulletin regarding the misclassification of employees as independent contractors.

LMVT will review these and other Wage and Hour issues during a comprehensive Wage and Hour strategic planning and compliance webinar titled "Wage and Hour Changes, Confusion, and Compliance" on August 5, 2015, from 10:00 a.m. to 11:00 a.m. Central Daylight Time, presented by Richard I. Lehr and Lyndel L. Erwin.

Richard and Lyndel will cover the following:

1. Proposed Salary Level Changes
    - Timeline to implementation
    - Self-audit
    - If not salary-exempt, what other pay options are available?
    - When to implement changes from exempt to non-exempt?
    - Compliance challenges
2. DOL's Administrator's Interpretation of Independent Contractors
3. Overtime Issues
4. Travel Time, Meal Time, Break Time
5. Working from Home or Anywhere: "Smartphone" Time
6. Employee Protected Activity
7. Enforcement and Litigation Trends

Richard has worked extensively regarding Wage and Hour matters and Lyndel served as a District Director for the DOL prior to joining Lehr Middlebrooks Vreeland & Thompson, PC.

The cost is $95 per connection site, with no limitation on the number of participants.

Join us for what promises to be an insightful, practical and strategic analysis of Wage and Hour changes and issues.

This program has been approved for 1 hour of (General) recertification credit toward PHR, SPHR and GPHR

recertification through the Human Resource Certification Institute (HRCI).

Click Here to Register Online, or contact Jerri Prosch at **jprosch@lehrmiddlebrooks.com** or 205.323.9271 for more information.

The use of the HRCI seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

From Autos to Airplanes: Unions Try to Board Southern Aircraft Manufacturers

Labor's "Southern Strategy" to unionize the large nonunion auto industry has overall been a failure, but their dream lives on. Now the UAW will be joined in the clouds by the International Association of Machinists, which has launched an effort to organize the unopened Airbus facility in Mobile, Alabama, as well as Airbus suppliers, and continues attempts to organize Boeing's Charleston, South Carolina site. The Airbus location in Mobile will not open until 2018 and will employ in excess of 1,000. According to the Machinists, "the IAM office [in Mobile] will also provide organizing support and information for workers employed at the dozens of area vendors which will supply the Airbus assembly line."

Apparently the IAM thinks that they will be more welcome in Alabama then they were in Charleston. When IAM organizers made house calls to Boeing employees in Charleston, some of the employees met the IAM at the door with guns, telling the organizers to get off of their property.

The IAM will have a tough sell to Airbus and Boeing and their supplier work forces. Apart from the union's own brand of nepotism (the President's twenty-eight year old son is paid $175,000.00 a year as a bylaws consultant); the IAM's confrontational "good union, evil employer" style will not resonate with employees in the Southeast. It's understandable why the IAM is interested in unionizing at Boeing and Airbus - the union has its own private aviation fleet, including pilots on its payroll.

Rite Aid Prescribed $8.8 Million Individual Damage Award

A former Rite Aid store manager was awarded $8.8 million on July 16, approximately $5 million of which were punitive damages. The award was based upon disability discrimination and harassment, and retaliation for complaining about the disability discrimination and harassment and also racial harassment. *Leggins v. Rite Aid Corp.,* (Cal. Super. Ct.).

Leggins was a 27-year employee of Rite Aid, serving the last several years as a store manager. After he was injured trying to prevent a robbery, he had several absences due to surgery, recovery and dealing with continuing medical issues arising out of the robbery. According to the jury, rather than receiving accommodation, Leggins was required to perform painful tasks and denied a transfer to a position that would have involved less physical work.

Leggins also alleged that the manager, who was aware of Leggins's medical limitations, told Leggins that "all black people do is complain" and "you are on black time." Leggins also alleged that another manager told him the "you are a big, black man; you are intimidating." Leggins was terminated after receiving write ups about the condition of his store and closing his store early on New Year's Eve, although two months earlier he had received permission to do so.

The jury found that Leggins had been subjected to disability discrimination, disability harassment, and retaliation for complaining about discrimination and harassment. Leggins's claims for violations of state and federal leave laws were rejected by the jury. In justifying the $5 million punitive damages award, the jury found that Rite Aid treated Leggins maliciously and oppressively.

Employers can become frustrated with managing an employee who for medical reasons is limited in the scope of duties he or she can perform. Sometimes the frustration can be manifested in decisions about the individual that smack of retaliation. The Rite Aid case involved a 27-year employee who suffered injuries on the job while trying to stop a store robbery. The frustration an

employer has with extended limitations for medical reasons is understandable. However, there are several creative ways to address that situation without it resulting in a discrimination or retaliation charge or lawsuit.

Fourth Circuit Joins Joint Employer Jurisprudence

The temporary service industry is the largest private employment sector in our country. We all know the advantages of using temporary services. Customers need to recognize, however, that when it comes to employment discrimination, workplace harassment, and safety issues, a temporary agency employee is often also the customer's employee. The Fourth Circuit Court of Appeals found such a relationship in the case of *Butler v. Drive Auto Industry of America, Inc.* (July 15, 2015). According to the Fourth Circuit, the "control" over the employee's job responsibilities and assignments and supervision of that employee determine if the customer is in fact a joint employer. The Court used a combination of a "control" test with the "economic realities" test, both of which have been endorsed by other appellate courts. The control factor asks which employer has the practical day-to-day control of the employee. In this case, although the employee wore a uniform from the temporary service, the employee's day-to-day responsibilities and assignments were controlled by Drive, the customer. Furthermore, the temporary employees worked "side by side" with Drive's regular employees, used the same equipment as the regular employees, and performed responsibilities that were integral to the daily activities of the business. In also considering the economic realities of the temporary employee relationship, the Court noted that the temporary employee relies on the customer for his pay, not the temporary employer. That's the economic reality of the situation. Further evidence the Court considered was that the temporary employee was removed from the assignment at Drive's request.

Some companies believe that if they do not extend certain policies and procedures to temporary employees, they will enhance the argument that the temporary employees are not theirs. This is problematic for compliance with OSHA, where the injury that occurs to a temporary employee needs to be logged and if necessary, reported by the customer. Policies and procedures regarding harassment and safety need to be reviewed with temporary employees on site, as a discrimination charge or lawsuit will likely be filed against both employers and the question for the customer will be what steps the customer took to maintain a work environment free of such harassment or discrimination.

There are work environments where the temporary employee truly is supervised by a supervisor from the staffing agency. That is, a staffing agency performs a specific function at a customer's location, where they in essence are operating as a contractor. In those situations, the customer is less likely to be found to be a joint employer.

Affordable Care Act – MORE Penalties? The cost of failure to file just went up.

As employers prepare to comply with the upcoming ACA information reporting requirements, Congress has sneaked higher penalties for failing to meet these requirements into a *trade* bill. The Trade Preferences Extension Act of 2015 (H.R. 1295), passed on June 29, provides for significant increases in the previously set penalties for failing to file correct ACA information returns or furnish correct payee statements to employees. Originally, the basic penalty for failure to file/furnish was set at $100; this newly passed bill increases the penalty to $250 per statement (with the cap increased from $1.5 million to $3 million). If the employer fails to file/furnish both an information return and a payee statement, the penalties are doubled to $500 per statement (with a cap of $6 million).

These increases serve to further remind employers of the importance of preparing now for this upcoming obligation by putting procedures in place and ensuring they have the infrastructure to capture and provide the required information.

Any good news? There is still a one year "transition rule" in place which provides that penalties will not be assessed for the first year of reporting if an employer or

insurer can establish that it made a good faith effort to comply, if *incorrect or incomplete* information was furnished. Thus it seems that an employer who does not file or furnish at all could not establish a good faith effort.

With all of this in mind, here is a quick summary of the required reporting:

Sec. 6056 – Applicable Large Employer (ALE) Reporting

- Applies to employers with 50+ FTEs (full-time equivalents).
- Transition rules do not apply.
- Determined on "controlled group" basis.
- Reporting of health care coverage offered or provided by the employer to employees and dependents.
- ALE files Form 1095-C (on each employee) with the IRS by February 28 (March 31 if filed electronically).
- Use Form 1094-C for transmittal of the Form 1095-Cs.
- Purpose – helps IRS identify employers subject to the Employer Mandate penalties and helps IRS identify individuals who are eligible for a premium tax credit (subsidy).

Form 1095-C – Employer-Provided Health Insurance Offer & Coverage

- One must be filed for each employee who was a full-time employee for any month of the calendar year and for each part-time employee who enrolled in the employer's self-insured plan.
- The Form 1095-Cs are transmitted to the IRS with a 1094-C transmittal form which will also report the total number of full time employees for each month during the calendar year.
- Employer must furnish to employee by January 31, by mail unless the employee affirmatively consents to receive it in electronic format.
- Form 1095-C includes basic information on the employee and the employer's certification as to whether the employer offered its full-time employees and dependents the opportunity to enroll in coverage, by calendar month, as well as the employee's share of the lowest cost monthly premium (self-only) for coverage providing minimum value offered to that employee under an eligible employer-sponsored plan, by calendar month. The IRS has provided detailed instructions on the "indicator codes" to be used regarding the type of coverage offered and the employee's share of the premium. Draft instructions for completing these forms may be found at: http://www.irs.gov/pub/irs-dft/i109495c--dft.pdf

Sec. 6055 - Minimum Essential Coverage Reporting

- Requires ALL health insurance issuers, self-insured employers, certain government agencies and other entities that are not subject to the employer mandate to file 1094-B & 1095-B to report minimum essential coverage provided to employees and dependents during a calendar year.
- Plan sponsor (entity that establishes or maintains the plan) is responsible for this reporting for self-insured group plan. The employer is the plan sponsor for self-insured group health plans established or maintained by a single employer.
- Sec. 6055 reporting is not required for supplemental coverage such as HRAs, on site medical clinics, HSAs and wellness programs.
- Furnish 1095-B to employee by January 31.
- Form 1095-Bs due to IRS by February 28, 2016 for 2015 returns OR March 31, 2016 if filed electronically.
- Use 1094-B for transmittal of the Form 1095-Cs.
- Purpose – helps IRS identify individuals who are eligible for a premium tax credit.

Links to the Forms referenced in this article:

Form 1094-B - www.irs.gov/pub/irs-pdf/f1094b.pdf

Form 1094-C - www.irs.gov/pub/irs-pdf/f1094c.pdf

Form 1095-B - www.irs.gov/pub/irs-pdf/f1095b.pdf

Form 1095-C - www.irs.gov/pub/irs-pdf/f1095c.pdf

Employers must begin now, if they have not already done so, preparing for these requirements to ensure they are ready to provide all of the information required. As stated above, the failure to do so can be quite costly. It is recommended that employers implement procedures now for capturing all of the information required on the ACA information returns, including documentation regarding employees (and their dependents) to whom health insurance was offered, whether or not coverage was accepted or declined, the employee's share of the premium, as well as COBRA continuation coverage. Employers should coordinate with their HR department, payroll department, payroll vendor, benefits administration system, benefits broker/consultant and tax advisors to determine how each is managing – or will manage – all of the information required to be reported.

NLRB Tips: NLRB Assault on Precedent Continues Undiminished

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.

NLRB Jurisdiction Expanded to Include Tribal Casino

A Sixth Circuit Court panel has affirmed a decision of the Board extending its jurisdiction to Indian tribal casinos, despite the tribes' inherent sovereignty. The ruling tees up the possibility of a Sixth Circuit *en banc* review or a petition to the U.S. Supreme Court seeking certiorari, clarifying the law as to NLRB jurisdiction over Indian tribe employees. *Soaring Eagle Casino v. NLRB* (6th Cir. July 1, 2015).

The casino handbook included a no-solicitation policy that prohibited union solicitation on the casino property and threatened discharge or discipline for violations of the policy. The Board, while finding a violation of the Act, determined that it had jurisdiction over the tribe based upon the following:

- Restricting operations at a casino on reservation land does not interfere with the tribe's right of self-governance.
- The applicable treaties only provided for a general right of exclusion (non-Indians) and did not bar application of an act of general applicability like a NLRA.
- Nothing in the language of the NLRA or its legislative history shows a congressional intent to exclude Indians from its coverage.

This Sixth Circuit panel, in its decision granting enforcement, disagreed with a decision from another Sixth Circuit panel regarding the applicability of federal statutes of general application to Indian tribes. Additionally, there is a split among the Circuit Courts of Appeal regarding the question of whether these types of federal statutes apply to sovereign Indian tribal businesses.

This Board decision and subsequent enforcement of the decision, along with the split among Appeals courts, appear to make this issue ripe for U.S. Supreme Court review.

Due to Non-Board Settlement Between Parties, the NLRB Suspends Briefing of Issue of Non-Members Paying for Grievance Filing

On July 7, 2015, the NLRB suspended an invitation to file briefs on the legality of a union "fair share" fee paid by non-members for the processing of grievances. *Steelworkers Local 1192 (Buckeye Fla. Corp.)* (2015).

The NLRB is currently considering the parties' joint motion to remand the case to the ALJ and the propriety of the proposed non-Board settlement.

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.

It remains to be seen if the case ultimately 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 Continues to Erode Employer's Rights to Expect Confidentiality during Workplace Investigations

Remanded because of the *Noel Canning* decision, the Board has re-issued its decisions in *Baptist Homes d/b/a Piedmont Gardens* (2015) and *Banner Health System d/b/a Banner Estrella* (2015). Both cases continue to erode employer's attempts to maintain confidentiality during workplace investigations.

In *Piedmont Gardens,* the Board adopted a new standard for a union's access to an employer's witness statements. It overruled a previously-recognized blanket exemption on mandatory disclosure where a confidentiality claim was made by an employer.

The Board has adopted instead a new "balancing test" set forth in the 1979 Supreme Court case, *Detroit Edison v. NLRB.* The new test will balance the union's need for the requested information against any "legitimate and substantial confidentiality interest established by the employer."

The NLRB has ordered Piedmont to turn over the names and titles of the witnesses to a misconduct incident resulting in discharge, and any statements submitted by anonymous witnesses in support of the discharge decision.

In *Banner-Estrella*, the NLRB concluded that a narrowly tailored "request" that an employee refrain, "while this investigation is going on," from repeating what was discussed during an investigative meeting was a violation of the Act.

In the 2-1 decision, the Board found that Section 7 of the NLRA gives employees the right to discuss discipline and disciplinary investigations, and that Banner-Estrella did not offer any business justification for curbing such discussions, and further that even mere requests for secrecy were illegal.

Expect *Banner-Estrella* to be appealed to a U.S. Circuit Court. An appeal has already been filed in the D.C. Circuit by Piedmont.

The Takeaway from *Piedmont* and *Banner*

These decisions undoubtedly place greater burdens on employers conducting workplace investigations. The major problem with the *Detroit Edison* balancing test is that it makes it difficult to prove that statements need to remain confidential, and thus makes it more likely that any statement a witness files with an employer is going to be seen by the union and grievant. Now employers must conduct investigations into alleged misconduct, while at the same time trying to protect those employees reporting the misconduct.

In addition, a virtual "second-track" of litigation has been created by the balancing test (i.e. – should an information request for statement be honored by employers?) that runs on a different track from the arbitration process.

Piedmont's attorney, David Durham, stated in interviews that the *Detroit Edison* test is "unworkable and creates a huge burden:

> How is an HR representative handling a routine grievance going to know how to do the balanc[ing] test? How will they know what a union's interests are if the union is not articulating that interest? If this [decision] holds up, it's the same thing as saying you've got to turn [the statements] over.
>
> There is no evidence that unions were in any way hampered by the [previous] rule in the last 38 years. What are the facts here screaming out to change an unbroken precedent?

Durham predicts a large number of *amici curiae* briefs will be filed in the Circuit Court.

EEO Tips: More About the Rise of the "T" in "LGBT" Cases

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.

The "T" for "transgender" in the acronym LGBT (Lesbian, Gay, Bi-sexual and Transgender) has become a popular topic for discussion in recent months. However, even before the publicity surrounding the transition of Caitlyn Jenner (formerly Bruce Jenner), the EEOC and various courts have taken strong positions on the issue of whether discrimination against transgender individuals violated Title VII and other statutes. For example, in the case of *Glenn v Brumby* (11th Cir. 2011), a male transitioning to a female was terminated expressly because of her transition. The Eleventh Circuit (covering Alabama, Florida, and Georgina) found that since everyone is protected against discrimination based on sex stereotypes, such protections cannot be denied to transgender individuals. According to the Court, "The nature of the discrimination is the same, it may differ in degree but not in kind." The Court also suggested that discrimination based on sex stereotypes is subject to heightened scrutiny under the Equal Protection Clause, and that government termination of a transgendered person for his or her gender nonconformity is unconstitutional sex discrimination.

The EEOC has also made it clear that discrimination on the basis of sexual orientation, including "transgender status" was tantamount to discrimination "on the basis of sex." The EEOC's position was essentially based upon the Supreme Court's holdings in *Price Waterhouse v. Hopkins* (1989) (discrimination based upon "assumptions and/or expectations" about how persons of a certain sex should dress, behave, etc. … is unlawful sex discrimination) and *Oncale v. Sundowner Offshore Services* (1998) (same-sex sexual harassment is sex discrimination under Title VII). Accordingly, the EEOC over the last few years has taken the following steps:

- The agency included "sexual orientation discrimination" as a priority issue in its Strategic Enforcement Plan for Fiscal Years 2012 thru 2016;
- The EEOC, itself, since at least July 2011 has issued various Commission Decisions involving federal employees who allegedly were discriminated against because of "sex stereotyping." In each case the federal employee involved had filed a complaint alleging in substance that they had been discriminated against because of some type of gender identity issue including transgender status. In each case the Federal agency involved dismissed the respective complaints for "failure to state a cause of action." However, upon appeal, the Commission reversed the dismissal of the complaints in question and found that, indeed, a transgender employee or other employee who, allegedly had been discriminated against because of gender identity issues might very well have a cause of action under Title VII on the basis "sex stereotyping." The cases were:

  a. *Macy v. Eric Holder, Attorney General, Dept. of Justice* (April 20, 2012): Intentional discrimination against a transgender individual because that person is transitioning is sex discrimination under Title VII.

  b. *Vetetto v Patrick R. Donahoe, Postmaster General* (July 1, 2011): Reversed the agency's dismissal of the Complaint and accepted a Title VII claim that a supervisor's harassment was motivated by sexual stereotyping that men should marry only women.

  c. *Complainant v. Department of Homeland Security* (August 20, 2014): Reaffirmed previous findings that federal employees discriminated against on the basis of sexual orientation or sexual identity can establish violation of Title VII based on a theory of sex stereotyping.

  d. *Complainant v. Foxx* (July 16, 2015): In this case the EEOC went even farther in outlining its position on discrimination against LGBT employees in the Federal Sector. Previously the Commission had held that claims of discrimination on the basis of "sexual orientation" were not, per se, covered by Title VII, and that such claims had to be analyzed in terms of whether the alleged discrimination in fact

amounted to "sex stereotyping." However in this case the Commission found directly that a male Air Traffic Controller who alleged that he had been denied a promotion because he was gay could directly pursue a claim of sex discrimination under Title VII based upon his sexual orientation.

Private Sector Actions By The EEOC

In order to properly assess what's happening in the private sector with respect to LGBT issues, including transgender charges, it might be helpful to take a glance at the number of such charges that have been filed with the EEOC during the last few years. The following table shows the growth in the number of LGBT-related charges filed with the EEOC between January 2013 and March 31, 2015.

EEOC LGBT RELATED CHARGES
FISCAL YEARS 2013 THRU 2015

	FY 2013	FY 2014	FY 2015
TOTAL LGBT CHARGES	**765**	**1,093**	**603**
Sex-Gender Identity / Transgender	147	202	112
Sexual Orientation	643	918	505
% NO CAUSE FINDINGS	**64.1%**	**64.2%**	**63.4%**
Sex-Gender Identity / Transgender	62.2%	58.2%	59.3%
Sexual Orientation	65.4%	65.0%	64.2%
MERIT RESOLUTIONS	**52 15.4%**	**138 16.3%**	**85 16.8%**
Sex-Gender Identity / Transgender	9 12.2%	32 20.9%	16 19.8%
Sexual Orientation	43 15.8%	112 15.6%	71 16.4%
MONETARY BENEFITS	**$897,271**	**$2,197,149**	**$1,1044,408**
Sex-Gender Identity / Transgender	$194,449	$540,995	$119,674
Sexual Orientation	$702,822	$1,783,378	$971,908

[The data for FY 2013 covers 1/1/13 thru 9/30/13 (9 months).The data for FY 2015 covers 10/1/14 thru 3/31/15 (6 months).Because the data was taken in some instances from multiple Charges, the Totals in each "issue" category do not tally in some instances with the charge totals. (Source: eeoc.gov/newsroom)]

In order to put the information from the table in proper perspective it should be mentioned that the number of total charges filed with the EEOC under all statutes was **93,727 in FY 2013** and **88,778 in FY 2014.** (The total number of all charges for FY 2015 to date was not available on the EEOC's website at the time of this writing.) Nonetheless, in this light it is clear that LGBT charges did not represent a large percentage of the total charges filed with the EEOC in the years in question. Even in FY 2014, wherein almost 1,100 charges were filed, that number represented only approximately 1.3% of the total charges. However, as can be seen from the table there was significant growth in the number of LGBT charges between FY 2013 and FY 2014, and it is reasonable to project that the number of LGBT charges will show an increase when the full year of FY 2015 is completed.

In an effort to fulfill its obligations under the Agency's ***Strategic Enforcement Plan for FY 2012 thru 2016***, the EEOC has filed three lawsuits involving transgender issues against private sector employers within the last year. They can be summarized as follows:

- In the case of *EEOC v. Lakeland Eye Clinic* (M.D. Fla. 2014), allegedly the employer fired an employee because she was transitioning from male to female. According to the EEOC, the employee had been performing her duties satisfactorily, however, after she informed the employer that she was a transgender and intended to start presenting herself as a woman, her employer, Lakeland, allegedly discharged her because she did not conform to the employer's gender-based expectations, preferences or stereotypes. Lakeland settled this lawsuit on April 13, 2015, by a consent decree calling for the payment of $150,000 to the charging party.
- In the case of *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* (E.D. Mich. 2014), the employer allegedly fired a funeral director/embalmer because she was a transgender and at the time was transitioning from male to female. The EEOC alleged that she was fired because she did not conform to the employer's gender-based expectations, preferences, or stereotypes. This case is still pending.

- In the case of *EEOC v. Deluxe Financial Services, Corp*., (D. Minn. 2015) the EEOC alleged that, Britney Austin, an employee who worked in the company's Phoenix office, consistently performed the duties of her position satisfactorily during her tenure at that office. However, according to the EEOC, after she began to present herself as a woman, she informed her supervisors that she was a transgender. Thereafter, the employer refused to allow her to use the women's restroom and she was subjected by her supervisors and coworkers to a hostile working environment including hurtful epithets and the deliberate use of the wrong gender pronouns in referring to her. The EEOC alleged that such conduct based on transgender status and gender stereotyping is prohibited by Title VII because it subjects the employee to a hostile work environment because of sex. The suit seeks both monetary and injunctive relief.

As might be expected, a number of private lawsuits, too numerous to mention here, have also been filed on behalf of transgender plaintiffs throughout the country. However, the Court in one in particular case, *Schroer v. Billington* (D.D.C. 2008), in my judgment deftly summarized the basic reason that transgender discrimination violates Title VII. In that case the court compared the Plaintiff's claim to one in which an employee is fired because she converted from Christianity to Judaism, even though the employer does not discriminate against Christians or Jews generally but only "converts." The Court reasoned that "since such an action would be a clear case of discrimination …" because of religion, "Title VII's prohibition of discrimination … because of sex must correspondingly encompass discrimination because of a change of sex."

Finally it should be mentioned that on July 23, a much broader measure entitled "The Equality Act" was introduced by members of both the House and the Senate in their respective chambers. In substance The Equality Act would be an amendment to Title VII containing provisions that would broadly prohibit discrimination on the basis of sexual orientation and gender identity not only in employment but also including housing, public schools, banks, and would prevent other entities from using the Religious Restoration Act as a shield against discrimination claims. This Bill is much broader than the Employment Non-Discrimination Act, (ENDA) which had been introduced several times but not passed since 2007. The Equality Act is apparently a reaction to the Supreme Court's holding in *Burwell v. Hobby Lobby*. It will be interesting to see what happens to this new Act (we expect that not much will happen to it).

OSHA Tips: OSHA and HEAT EXPOSURES

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.

With much of the country in line for more high temperatures, employers should be mindful of employee exposures to heat hazards on their job. While OSHA has no heat standard the agency has become increasingly willing to cite employee exposures under Section 5(A)(1) of the OSHA Act, the general duty clause.

Unfortunately, many of these citations result following fatal or life threatening exposures to employees. Examples of such cases include the following:

- In one such case an employee of a planing mill was observed by co-workers to be walking and acting in a strange manner. He lost consciousness and emergency help was summoned. Resuscitative measures were taken and the employee was transferred to a medical center where he died.

- A second case involved a construction job and a masonry laborer working in a temperature exceeding 91 degrees without any protective measures being taken.

- An employee working in a sawmill was pulling through cut lumber from a green chain when he became dizzy and started to stagger. His supervisor ordered a break but upon returning to work, the employee began to stagger again and fainted. He

was rushed to the hospital where he arrived unconscious with a temperature of 108 degrees. Upon being transported to a major hospital, he died without regaining consciousness.

- In another case a 31 year old construction worker had been leveling gravel and installing forms for a swimming pool in extreme heat and had to be air-lifted to a trauma center and was later pronounced dead.

In July 2013, Assistant Secretary of Labor, David Michaels, held a press conference and asked for help for his Agency's heat stress awareness campaign. Michaels noted 5 key pieces of advice in addressing this occupational hazard:

1. Drink water every 15 minutes whether you are thirsty or not.
2. Rest in the shade to cool down.
3. Wear a hat and light colored clothing.
4. Learn the signs of heat stress and what to do in an emergency.
5. Keep an eye on fellow workers.

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.

The latest "hot issue" relating to Wage and Hour deals with the proposed changes to the regulations that define the requirements for the executive, administrative, professional, and outside sales exemptions. On July 6, 2015, DOL published proposed changes to regulations for public comments. The major change relates to the minimum salary requirements for the exemptions which is currently $455.00 per week. The proposal sets the estimated salary requirement for 2016 to be $970.00 per week. In addition, the salary amounts would increase each year. Although the proposal does not propose changes in the duties tests for these exemptions DOL invited the public to make suggestions in this area. Comments may be submitted for a 60 day period which ends on September 4, 2015. Once the comments are reviewed Wage and Hour will then issue the final regulation that will most likely have an effective date 60 to 90 days after the new regulation is published. In view of the time frame, it is not anticipated that the revisions will become effective until sometime in 2016. You can access a copy of the proposal and some of DOL's other content in support of the proposed change at http://www.dol.gov/whd/overtime/NPRM2015/. You can make comments on the proposal (which are publicly-accessible) at http://www.regulations.gov/#!docketDetail;D=WHD-2015-0001.

As evidenced by the increasing number of lawsuits filed in 2014, FLSA issues continue to be very much in the news. As employers are continually getting into trouble for making improper deductions from an employee's pay, I thought I should provide you with information regarding what type of deductions that can be legally made from an employee's pay.

Employees must receive at least the minimum wage free and clear of any deductions except those required by law or payments to a third party that are directed by the employee. Not only can the employer not make the prohibited deductions it **cannot require or allow** the employee to pay the money in cash apart from the payroll system.

Examples of deductions that can be made:

- Deductions for taxes or tax liens.
- Deductions for employee portion of health insurance premiums.
- Employer's actual cost of meals and/or housing furnished the employee. The acceptance of housing must be voluntary by the employee but the employer may deduct the cost of meals that are provided even if the employee does not consume the food.

- Loan payments to third parties that are directed by the employee.
- An employee payment to savings plans such as 401K, U. S. Savings Bonds, IRAs, etc.
- Court ordered child support or other garnishments provided they comply with the Consumer Credit Protection Act and applicable state law.

Examples of deductions that cannot be made if they reduce the employee below the minimum wage:

- Cost of uniforms that are required by the employer or the nature of the job.
- Cash register shortages, inventory shortages, and also tipped employees cannot be required to pay the check of customers who walk out without paying their bills.
- Cost of licenses.
- Any portion of tips received by employees other than those allowed by a tip pooling plan.
- Tools or equipment necessary to perform the job.
- Employer required physical examinations.
- Cost of tuition for employer required training.
- Cost of damages to employer equipment such as wrecking employer's vehicle.
- Disciplinary deductions. Exempt employees may be deducted for disciplinary suspensions of a full day or more made pursuant to a written policy applicable to all employees.

If an employee receives more than the minimum wage, in non-overtime weeks the employer may reduce the employee to the minimum wage. For example, an employee who is paid $9.00 per hour may be deducted $1.75 per hour for up to the actual hours worked in a workweek if the employee does not work more than 40 hours. Also, DOL takes the position no deductions may be made in overtime weeks unless there is a prior agreement with the employee. Consequently, employers might want to consider having a written employment agreement allowing for such deductions in overtime weeks.

Another area that can create a problem for employers is that the law does not allow an employer to claim credit as wages for money that is paid for something that is not required by the FLSA. In 2011, the Fifth Circuit Court of Appeals ruled in a case brought against Pepsi in Mississippi. A supervisor, who was laid off, filed a suit alleging that she was not exempt and thus was entitled to overtime compensation. The company argued that the severance pay the employee received at her termination exceeded the amount of overtime compensation that she would have been due. The trial court had ruled the severance pay could be used to offset the overtime that could have been due and dismissed the complaint. However, the Court of Appeals ruled that such payments were not wages and thus could not be used to offset the overtime compensation that could be due the employee. Therefore, employers should be aware that payments (such as vacation pay, sick pay, holiday pay, etc.) made to employees that are not required by the FLSA cannot be used to cover wages that are required by the FLSA.

The Act also provides that DOL may assess, in addition to requiring the payment of back wages, a civil money penalty of up to $1100 per employee for repeated and/or willful violations of the minimum wage provisions of the FLSA. Thus, employers should be very careful to ensure that any deductions are permissible prior to making such deductions. Further, in 2013, Wage and Hour instituted a procedure where they are requesting liquidated damages (an additional amount equal to the amount of back wages) in nearly all investigations. Virtually every week I see reports where employers have been required to pay large sums of back-wages and liquidated damages to employees because they have failed to comply with the FLSA.

There continues to be efforts to increase the minimum wage with the latest proposals suggesting $12.00 to $15.00 per hour. Several times a week I see articles that either advocate an increase or ones that put forth the argument that an increase in the minimum wage would just increase unemployment without helping low wage workers. Due to the political climate at this time, I doubt that we will see an increase this year. However, the President has issued an Executive Order requiring employees working on government contracts to be paid

at least $10.10 per hour on all new contracts beginning January 1, 2015.

In a short-lived victory for employers, the D.C. Circuit Court of Appeals had issued an opinion on July 2, 2013, regarding the application of the administrative exemption to Mortgage Loan Officers. In 2006, DOL had issued an opinion stating that these employees could qualify for the administrative exemption but in a position paper issued in 2010, the Wage and Hour Administrator withdrew the earlier letter and stated the employees did not qualify for the exemption. The Mortgage Bankers Association brought suit and the Court stated that in order for the change in position to be valid, Wage and Hour was required to follow established "rule making" procedures. Since Wage and Hour failed to do this, the 2010 position is invalid; however, the D.C. Circuit stated they were not ruling on the merits of the position but just fact that DOL failed to follow the correct procedures when changing their position. DOL petitioned the Supreme Court to review the ruling and the Court ruled that DOL was within its rights to change it position. *Perez v. Mortgage Bankers Ass'n* (March 9, 2015).

Due to the amount of activity under both the Fair Labor Standards Act and the Family and Medical Leave Act employers need to make themselves aware of the requirements of these Acts and make a concerted effort to comply with them. If I can be of assistance do not hesitate to call me.

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 an employer violated California state law by asking applicants whether they had previously used a false Social Security Number? *Guerrero v. California Department of Corrections and Rehabilitation* (N.D. Cal. July 21, 2015). The Court ruled that such a question had a disparate impact on Latinos compared to any other protected class. The Court stated that an employer "has not met its burden of effectively linking Guerrero's Social Security Number misuse to the ability to maintain integrity, honesty, and good judgment as a corrections officer. Thus, CDCR's decision based on [this question] amounted to an arbitrary barrier to employment in violation of Title VII." The Court added that had the employer inquired as to why a previous Social Security Number used by Guerrero was false, the employer would have realized that that was the number supplied by his parents when he was eleven years old.

… that a former union official in Philadelphia was sentenced to nineteen years in jail for extortion, arson and assaults? *U.S. v. Dougherty* (E.D. Pa. July 20, 2015). Joseph Dougherty was a business manager of the Bridge, Structural and Ornamental Iron Worker's Local 401 in Philadelphia. In addition to nineteen years in jail, Dougherty was ordered to pay over $558,000 in restitution. He was convicted of arson at a warehouse that was under construction and also attempted arson at a commercial building that was under construction. He was also convicted of assaulting non-union employees with a baseball bat. Under Dougherty's leadership, the Local created "goon squads" including one squad that used the acronym "THUGS – The Helpful Union Guys."

… that a supervisor's claim of sexual harassment by a subordinate will go to trial due to the employer's failure to remedy this situation? *Simmons v. DNC Hospital Management of Oklahoma, LLC* (E.D. Okla. July 20, 2015). The supervisor reported that her subordinate repeatedly asked her out for dates, made sexual overtures to her and made aggressive, threatening statements to her. The supervisor was disciplined when the employer became aware that she had a relationship with another employee whom she supervised. The Court found that the supervisor continuously "complains of harassing and/or statements on every occasion … clearly, [the employer] did not take adequate action to stop the harassment as the harassment continued for months." We all understand the fact that a subordinate may be a source of sexual harassment toward a supervisor. What we don't quite understand is why the subordinate was not terminated for such behavior. Frankly, it is our observation that employers overall are too tolerant of inappropriate and disrespectful behavior from subordinates. The employer is not an employee's workplace concierge. Just as supervisors and managers are held accountable for a certain standard of behavior, so should employees be held accountable for their behavior toward supervisors and managers.

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