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EEOC to Write Million Dollar Background Case Check

The EEOC exhibited the classic definition of stupidity (expecting the same circumstances to yield a different result) in the case of *EEOC v. Freeman* (D. Md. Sept. 4, 2015). The Agency sued Freeman, a corporate events planning company, alleging that its background check policy had a disparate impact based upon race. A disparate impact claim does not require a showing of discriminatory intent, but generally must be supported by "[r]efined, statistical comparisons." Even though this has been the law since 1989, the EEOC pursued the *Freeman* case with only generalized statistical data about the correlation between race and sex and negative criminal and credit histories. This was wholly inadequate, the Court explained, even if the data had been otherwise accurate. (It wasn't, as we explained in a previous ELB). The Commission's stupidity was pursuing the claim after the Court found the EEOC's statistical expert's work was "inexcusably slip-shot and wholly unreliable," "mindboggling" and containing "unexplained discrepancies."

Although, the Court recognized the validity of evaluating whether an employer's background check policies had a discriminatory impact, it found the EEOC's analysis and statistics so unsound that—after its 2013 decision to exclude the EEOC's expert reports and rule in Freeman's favor, and after the Fourth Circuit Court of Appeals upheld the decision earlier this year—it awarded $938,771.50 in attorneys' fees to Freeman.

Four days after the beat down in *Freeman*, the EEOC covered its loss, obtained a $1.6 million settlement involving the required use of background checks by a contractor of BMW. *EEOC v. BMW Manufacturing Co., LLC* (D. S.C. Sept. 8, 2015). There were 56 known claimants in the case. BMW outsourced its logistics function and invited its employees to apply for employment with the logistics contractor, BMW-MC. BMW required the contractor to conduct criminal background checks of its applicants, including those who were transitioning from BMW, even if they had worked for BMW for years without incident. The EEOC alleged that the background check requirement had a discriminatory impact based upon race which could not be overcome by showing a business necessity. In addition to the financial outcome, BMW-MC agreed to establish a new background check policy, operate under a consent decree for three years and post a notice.

Criminal and credit background checks and current arrest records may be permitted when an employer is able to establish the business necessity for the information. The use of relatively recent, job-related conviction records are most likely to pass scrutiny. For example, an employer will likely pass this level of scrutiny if all applicants for cash-handling positions are

screened for theft or dishonesty-related convictions in the past seven years and if the inquiry is somewhat individualized (for example, if the applicant is given an opportunity to provide positive evidence of reform). Learn more about the EEOC's 2013 guidance on background checks—and medical inquiries—here.

Clearing Up Pay Transparency

At one time, employers commonly had policies which prohibited employees from talking to each other about their pay. Such policies are considered a violation of the National Labor Relations Act and can be a source of a retaliation claim under the Fair Labor Standards Act. In a further effort to encourage employee inquiries and discussion about pay, the Office of Federal Contract Compliance Programs on September 10th issued a Pay Disparity Rule, Executive Order 13665, to become effective on January 11, 2016. The rule covers government contractors, subcontractors, and recipients of federal funds.

The Rule prohibits employers from maintaining broad pay confidentiality requirements and from taking action against employees who either disclose their compensation or ask about their compensation, including their compensation as it compares to other employees. The Rule also requires employers to adopt a pay transparency policy (text here).

Labor Secretary Perez stated that "it is a basic tenet of workplace justice that people be able to exchange information, share concerns and stand up together for their rights. But too many women across the country are in the same situation: they don't know how much they make compared to male counterparts, and they are afraid to ask." According to the OFCCP, "pay secrecy practices will no longer facilitate the pay discrimination that is too often perpetrated against women and people of color in the workplace."

Two defenses will be available to employers where the disclosure of pay could result in disciplinary action. The first is where an individual's job responsibilities include the essential functions of reviewing and knowing employee pay. An example by DOL is a Payroll Administrator. DOL stated that the employee could not volunteer pay information to an employee that compares the employee to others. For example, the Payroll Administrator could not volunteer to an employee, "You know you are paid less than men doing the same job." However, if an employee makes an assertion or an inquiry to a Payroll Administrator about pay discrepancy, then the Payroll Administrator would be protected it he or she disclosed the pay information.

The second example DOL provided is the consistent application of workplace rules that have implications based upon pay. For example, if an employer consistently enforced the amount of time employees may take for a break that would be a defense to an employee who claimed that he or she was treated differently in either the amount of break taken or disciplinary action for an extended break.

The DOL Rule covers government contracts. This Rule and the DOL proposal to change the exemption salary level raise the issue of how to talk with employees about pay. Our recommendation begins with the acknowledgment that if there is one practice that each employee will question at least once a year, it is likely to be pay. Therefore, what approach should an employer take so these questions are raised within the employer's environment, rather than externally? We recommend that employers communicate pay policies to encourage employees to review their pay and if they have any pay questions or concerns, identify to whom they should be addressed; these questions will be reviewed and responded to promptly. Too often, managers or supervisors shut off conversation about pay, which may discourage the employee from raising the issue to HR. Employers are vigilant in reviewing policies and philosophies about fair employment practices, no harassment and no retaliation; and pay should elevated to the same level of employee awareness and encouragement to raise concerns internally.

Anxiety and Depression under the ADA

People often say they are anxious or depressed, without those comments reflecting clinical depression or anxiety.

Employers need to be careful in how they evaluate the ADA implications when employees make such a disclosure.

In the case of *Hurtt v. International Services, Inc.* (6th Cir. Sept. 14, 2015), Hurtt was hired as a business analyst with a $70,000 annual draw and a 12% commission. Additionally, the company prepaid his travel expenses and allowed a $40 per diem food allowance. Several months after Hurtt was hired, he became exhausted, depressed, and anxious, and provided the company with a letter from his therapist stating that he had acute anxiety and depression. One day after he requested FMLA leave, the company terminated his $70,000 annual draw and placed him solely on commission and also terminated providing prepaid travel expenses. Hurtt quit and sued, claiming constructive discharge under the ADA and FMLA.

In permitting the case to go to a jury, the Court said a jury may conclude that eliminating Hurtt's guaranteed salary and prepaid expenses after he disclosed his medical condition could be constructive discharge, where the employer "deliberately created intolerable working conditions" such that a reasonable person would quit. The Court also said that "a complete failure to accommodate" under the ADA may also be a basis for constructive discharge.

In *Barber v. Subway* (M.D. Penn., Sept. 18, 2015), an employee worked for two weeks on the sandwich line, at which point she had an anxiety attack, was told by the owner to leave, did not show up for subsequent shifts, and was terminated for job abandonment. The Court ruled that it was a jury question whether the employer failed to accommodate her anxiety disorder under the ADA. .

The employer argued that it actually accommodated the employee by sending her home early, and kept her on the schedule. However, the Court said that "an objective and reasonable juror could fairly construe [the owner's] words and actions as a termination of Barber's employment, and Barber's failure to return to work is proof of her belief that she was terminated." During the pre-employment interview, Barber told the owner that she suffered from an anxiety disorder and may have an episode at work. The owner said that was not a problem and proceeded to hire her.

When an employee attributes a performance, behavior, attendance, or attitude issue to anxiety, depression, stress, or a similar condition, an employer has the right to request medical substantiation of the extent to which the condition may interfere with work, and, if so, what accommodations may be possible, if any. (Though such requests should be narrowly tailored and should include Genetic Information Nondiscrimination Act disclaimers). Use your rights to evaluate the need for accommodation. Do not dismiss employee comments with the approach of "well, everybody has that from time to time."

HIPAA Privacy & Security Audits on the Way

The U.S. Department of Health and Human Services (HHS) has indicated that it is moving ahead with its HIPAA privacy and security audit program. Accordingly, health plans and other covered entities should prepare now and be on the lookout for communications from the HHS Office of Civil Rights (OCR) by email or regular mail. OCR plans to send approximately 1,200 "screening surveys" to identify the organizations it will audit. OCR anticipates selecting 350 covered entities for desk audits, and approximately that number of business associates for audit as well. A wide variety of entities will be selected for audit, based on type of organization, location, and affiliation with other covered entities. Following this initial round of desk audits, OCR intends to conduct comprehensive onsite audits of covered entities and business associates, to determine the effectiveness of an organization's compliance efforts and internal controls.

Covered entities and business associates are advised to conduct "security risk assessments" to prepare for potential OCR audits, with a focus on ensuring that adequate policies are in place and that their workforces have been trained to ensure employees understand the privacy and security requirements of HIPAA.

Employee Benefit Implications of *Obergefell*

It has been almost three months since the U.S. Supreme Court ruled that all states are required to permit same sex couples to marry, and to recognize same sex marriages that have been legally licensed and performed in another State. Since that time, employers have been struggling to review and revise their benefit plans to ensure compliance with this ruling and to be prepared to address enrollment requests of their employees' same sex spouses. Employers with fully insured health and welfare benefit plans are required to offer coverage for same sex spouses if they offer coverage to opposite sex spouses. Employers with self-insured plans are not required to offer equivalent coverage to same sex spouses; however, failure to do so creates a risk of federal and state discrimination claims if the employer does offer coverage to opposite sex spouses.

Employers may also need to determine whether to continue benefits for domestic partners. *Obergefell* did not address domestic partnerships, but now that same sex marriages should be readily available throughout the United States, the need for domestic partner benefits is likely to decrease.

In addition to addressing possible coverage under medical, dental, and vision plans, employers should also consider extending coverage offers to same sex spouses with regard to group rates for supplemental life insurance plans, long term care insurance, bereavement leave, employee assistance programs, and wellness plans, as well as any other benefits for which an employer includes opposite sex spouses. Employers should review their benefit plan requirements to determine whether any plan amendments may be required before the end of 2015 (or their plan year) to clarify the administration of spousal rights and benefits post-*Obergefell.* Of course, employers need to consider the best manner in which to communicate these changes to employees.

New IRS Webpage Provides ACA Information for Applicable Large Employers

The IRS has added a new webpage aimed at assisting Applicable Large Employers (ALEs) in determining their status as an ALE, as well as addressing "what's trending," and other resources. The webpage can be accessed at http://www.irs.gov/Affordable-Care-Act/Employers/ACA-Information-Center-for-Applicable-Large-Employers-ALEs.

IRS Releases Final 2015 Versions of ACA Information Returns and Instructions

IRS has finalized the 2015 versions of the following Affordable Care Act (ACA) information returns and their instructions:

Form 1094-B (Transmittal of Health Coverage Information Returns) http://www.irs.gov/pub/irs-prior/f1094b--2015.pdf

Form 1095-B (Health Coverage) http://www.irs.gov/pub/irs-prior/f1095b--2015.pdf

Form 1094-C (Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns) http://www.irs.gov/pub/irs-prior/f1094c--2015.pdf

Form 1095-C (Employer-Provided Health Insurance Offer and Coverage). http://www.irs.gov/pub/irs-prior/f1095c--2015.pdf

These forms are required to be filed for the first time in early 2016 for calendar year 2015. The Form 1095-C instructions also offer guidance on the reporting requirements for health reimbursement arrangements.

NLRB Tips: NLRB Continues Aggressive Enforcement Posture

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.

Board Applies *Specialty Healthcare*

In *DPI Secuprint, Inc.*, 362 NLRB No. 172 (2015) the Board rejected a commercial printer's challenge to a bargaining unit it contended was too narrow and constituted a "fractured unit." In the decision, the Democrat-majority panel approved a bargaining unit of "hourly pre-press, digital press, offset bindery, and shipping and receiving employees."

The printing company's contention, that a group of hourly offset press employees should also be included was rejected by the NLRB. The Agency rejection occurred despite the employer's presentation of evidence that the offset employees shared a "significant" community of interest with other employees included in the unit, such as common supervision, benefits, pay rates, along with being "functionally integrated" with the other bargaining unit employees.

However, the Board majority found that this substantial community of interest was NOT enough to demonstrate that the offset employees shared an "overwhelming" community of interest with others already included in the petitioned-for bargaining unit. The majority panel stated:

> It is undisputed that the employees in the petitioned-for unit constitute an identifiable group and share a community of interest, and the employer has not carried its burden of proving that the offset press employees share an overwhelming community of interest [with the petitioned-for group].

This case demonstrates the nearly impossible task that employers face when urging that bargaining units be expanded. The union herein simply had no support among the offset employees, and filed its petition to reflect the extent of its organizing efforts. The Republican Board members' predictions of the problems associated with the approval of micro-bargaining units are coming all too true.

Predictably, the NLRB Invalidates Boeing Company's Narrowly-Drawn Investigative Confidentiality Guidelines

Despite updating its confidentiality guidelines after an employee filed a complaint with the NLRB, the Board nevertheless found that Boeing's updated policy, which only "recommended" that employees not discuss workplace investigations, was illegal. *The Boeing Company,* 362 NLRB No. 195 (2015). In dissent, Republican Board member Harry Johnson stated:

> Fairly read, the revised notice would not reasonably be understood by employees as interfering with their Section 7 rights to discuss information regarding investigations with others. There is no mandate to refrain, either express or implicit; neither is there any suggestion that discipline could result from failing to follow the recommended course of action.

While no appeal has been filed to date, a request for review may be anticipated. It remains to be seen if the U.S. Circuit Courts will enforce this Board Order.

NLRB Wastes Little Time in Applying the New Dues Check Off Standard

In *Lincoln Lutheran of Racine,* 326 NLRB No. 188 (2015), the Board reversed a 53 year old precedent and ruled that an employer's obligation to deduct union dues from employee paychecks outlives the expiration of a collective bargaining agreement (CBA).

In reversing the previous standard, the NLRB panel ruled that dues checkoff is akin to other terms and conditions of employment and therefore continues in place beyond the expiration of a CBA that establishes the checkoff

arrangement. Only a newly negotiated CBA or a valid impasse that would permit unilateral action by the employer could change the dues checkoff provision. In other words, dues check-off is considered a "mandatory subject" of bargaining.

The dissent notes that the reversal of the earlier standard removes an economic weapon from employers during the negotiation process, and significantly changes the relative power of the parties at the bargaining table.

As pointed out in previous ELBs, this Democrat-controlled Board is not wed at all to precedent, especially where the precedent can be viewed as anti- union or anti-collective bargaining.

Labor Board Back in Front of Fifth Circuit in *D. R. Horton* Fight

In a case where the NLRB "doubled down" on its view that class action waivers are invalid under the NLRA under certain circumstances, Murphy Oil has appealed an adverse decision by the Board that its arbitration agreement barring class actions was unlawful. The Fifth Circuit Court of Appeals held oral argument on the case this month.

Sitting on a three judge panel at the Fifth Circuit, Judge Leslie Southwick, on the original *D. R. Horton* panel and author of that decision in 2013, was particularly harsh toward the Board during oral argument. When the NLRB refused to budge on the central issue of whether mandatory arbitration pacts with class waivers violated the NLRA, Judge Southwick took the offensive:

> It just seems to me an abuse of companies, when you've [the Board] received an adverse decision in a circuit court, to pummel them . . . and make them litigate back to the Circuit that's already decided in their favor.

Southwick noted that the NLRB hadn't sought Supreme Court review and stated:

> If the pattern continues as it has in the past, it's the Board that needs to seek cert., not the employer.

The Bottom Line

It is clear that Murphy Oil is going to win the request for review before the Fifth Circuit. The panel has already said as much. The question is whether the Board will finally abandon its position or will it seek review in front of the U.S. Supreme Court. At some point, unless the Board starts to win some of *D. R. Horton* cases in front of circuit courts, the NLRB will be forced to seek certiorari if the public is going to respect its decisions.

This is a classic example of a federal agency bullying employers to toe the line and comply with an untenable NLRB position. The message to employers is to expect to spend "blood and money" in appealing the *D.R. Horton* administrative decision all the way to the Circuit Courts.

EEO Tips: EEOC Expands Its Enforcement Discretion as to Systemic 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.

Recently in the case of *EEOC v Mavis Discount Tire, Inc. (*S.D.N.Y. Sept. 11, 2015), a court held that the EEOC could file pattern or practice lawsuits under Section 706 of Title VII even though such lawsuits are only expressly provided for under Section 707 of Title VII. In such cases the Court also held that the EEOC could recover compensatory and punitive damages, as provided for in Section 706, and was not limited to injunctive relief as the case would be under Section 707. The EEOC in this case alleged that its investigation revealed that between 2008 thru 2012 Mavis hired only two women among the more than 2,600 applicants selected for various store positions. According to the EEOC, during the period in question, Mavis hired 80 Store Managers, 655 mechanics and 1,688 tire installers and/or alignment technicians. None was a woman. But then, after the EEOC filed its lawsuit, Mavis hired one female Store Manager and one female

Assistant Store Manager. The EEOC claims that it identified over 40 female applicants whose credentials, at least on paper, made them well-qualified for any number of the Mavis jobs. The EEOC asserted that given these facts, Mavis was guilty of not only discriminating against specific individual females, but also of engaging in a "pattern or practice" of discrimination against females as a class.

Under these circumstances, the EEOC's reasons for attempting to bring a pattern or practice claim under Section 706 were most likely: (1) because, although the burden-shifting requirements under Section 706 pertaining to class actions provided for in *Teamsters v. United States* (S. Ct. 1977) are a bit more complicated (i.e. a showing that the discriminatory practice was the employer's "standard operating procedure"), Section 706 does allow for compensatory and punitive damages; (2) on the other hand, pattern or practice claims under Section 707 only allow for equitable relief (mainly injunctive relief) but may be proved by a somewhat simpler burden of proof (i.e. the McDonnell Douglas framework including a showing of "adverse impact"). Obviously, the EEOC wanted to take advantage of the shifting burdens of proof in the case given the investigative facts that were developed.

Mavis, in its defense, asserts that the EEOC has no authority to bring a pattern or practice case under Section 706, and argues that such cases can only be brought under Section 707. The district court, as stated above, disagreed with Mavis and held that the EEOC may bring a pattern or practice case under Section 706. The district court in this case relied heavily on the Sixth Circuit's reasoning in the case of *Serrano v Cintas Corp.* 699 F.3d 884 (6th Cir. 2012) which also held that the EEOC does have authority to pursue pattern or practice claims under Section 706.

It is expected that Mavis will appeal the decision to the Second Circuit. At this point the Second Circuit has not rendered an opinion on this specific issue.

The main point here is that in this case and other cases the EEOC is noticeably trying to expand its enforcement authority with respect to the development and litigation of systemic cases. Hence, it may be important for employers (especially large employers) to understand that the development of systemic charges is a "top priority" under the Agency's Strategic Enforcement Plan (SEP) for FY 2012 through 2016, and that the EEOC is making significant progress in processing such cases through the administrative process as well through litigation: For example it may not be known that:

1. **District Office Plans**. In furtherance of the National Strategic Enforcement Plan, District Offices are being encouraged to develop **District Complement Plans** (DCP's) for the purpose of focusing on local businesses where the alleged discrimination may have a broad impact on a given industry, profession or geographic area. District Offices are also encouraged to establish "**Lead Systemic Investigators**" to develop and coordinate systemic investigations. Hence, EEOC systemic targets in the near future will no doubt include many local as well as national businesses and employers.

2. **The Systemic Watch List.** The EEOC has developed a "systemic watch list" to keep updating its technology and improve its capacity to identify systemic violations and to manage systemic investigations and litigation. The Systemic Watch List is a software tool that matches ongoing investigations or lawsuits and is designed to improve the coordination between the investigators who are engaged in similar systemic investigations.

3. **The CaseWorks System**. The EEOC is expanding this system to provide a central shared source of litigation support tools that facilitate the collection and review of electronic discovery. The system enables the EEOC investigators to collaborate in the development of cases for litigation. For example, data on large employers who operate regionally or nationwide. The EEOC has increased its CaseWorks storage capacity by 150 percent. The system presently hosts over 30 million pages of electronic documents.

4. **Systemic Investigations in FY 2014**. According to the EEOC's Performance Results for FY 2014

(the results for 2015 are not yet available), the EEOC completed 260 systemic investigations. 78 of the investigations were resolved by voluntary agreements. 34 of these were resolved by a "predetermination settlement" (i.e. before a finding of "cause" was made); 44 were resolved by a conciliation agreement. The EEOC in FY 2014 obtained approximately $13 million in monetary relief on behalf of affected class members.

5. **Systemic Lawsuits**. The EEOC filed 17 systemic lawsuits in FY 2014. At the end of FY 2014 systemic lawsuits made up 13% of all the EEOC's lawsuits filed on the merits. In total at the end of FY 2014 there were 57 systemic cases on the EEOC's active docket making up 25% of all active cases on the EEOC's docket for that year. This was the largest proportion of systemic cases on the EEOC's active docket since FY 2006 when the agency began keeping record of such cases individually. It is expected that the number of systemic cases in the administrative process and in litigation will increase in FY 2015. Additionally, as outlined above employers should be aware of the fact that the EEOC is gradually acquiring all of the tools it will need to aggressively investigate and prosecute systemic cases.

Thus, having made the development of systemic cases a major priority under the EEOC's Strategic Enforcement Plan for FY 2012 through 2016; it is not surprising that the Agency is now taking the above steps to implement that plan. However, it should be clear from cases such as *EEOC v Mavis Discount Tire* that the EEOC is not merely trying to increase the number of systemic cases, but is also trying to expand, depending on the facts, the scope of its discretion under Title VII to investigate and litigate systemic cases.

OSHA Tips: OSHA and Amputation Injuries

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.

OSHA's trade news release dated August 13, 2011, sets out updates for the agency's National Emphasis Program (NEP) on amputation injury. The program has been in existence since 2006 and is targeted to industries with high numbers and rates of amputations. In this updated program OSHA is using current enforcement data of the Bureau of Labor Statistics (BLS) data to select inspection targets. It is noted that manufacturing employers reported 2,000 workers suffered amputation injuries in 2013. This rate is twice that of all private industry. The NEP includes a list of industries with high numbers and rates of amputations as reported by BLS. The directive updates the 2006 NEP regarding this issue.

OSHA's regional news release dated September 14, 2015 included the following statement. "The US Department of Labor's Occupational Safety and Health Administration conducted the inspection under its National Emphasis Program on amputations after an unguarded machine crushed a worker's index and middle fingers and amputated part of his ring finger. During the OSHA inspection, a machine sheared off the tip of another worker's thumb." OSHA's proposed penalty for this inspection was $119,000. Included in the agency's press release was the following quote, "for somebody working with a die stamp, a proper machine guard can mean the difference with keeping your fingers or losing them." The violations at this facility led two workers to be permanently injured. OSHA's standards addressing these hazards have existed for decades.

On August 13, 2015, OSHA issued an updated NEP (CPL-03-00-019) that significantly expands the industries targeted for inspections. This updated NEP applies to general industry workplaces in which machinery or equipment is likely to cause amputations is present.

According to the NEP, targeted inspections will include an evaluation of employee exposures during operations such as clearing jams and making adjustments while machinery is running, cleaning, oiling, or greasing machines or machine pans, and locking out machinery to prevent accidental start- up.

Under the NEP amputation is defined as a traumatic loss of limb or other external body part. Amputations include a part such as a limb or appendage that has been severed, cut off, amputated (either completely or partially), fingertip amputation with or without bone loss, medical amputations resulting from irreparable damage, and amputation of body parts that have since been attached. Amputations do not include evulsions, deboning, scalping, severed ears, or broken or chipped teeth.

The NEP on amputations focuses on industries which have a high number and a high rate of amputations or plants where workers have suffered amputations in the past.

Wage and Hour Tips: Current Wage and Hour Highlights

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act. Mr. Erwin can be reached at 205.323.9272.

Each month when I start to put together an article I try to decide which area of the Fair Labor Standards Act is most on everyone's mind and each month it gets harder to decide because I continue to see much litigation concerning many different areas. According to an article in the Daily Labor Report earlier this month it is expected that more than 8,800 Fair Labor Standards Act suits will be filed in Federal Courts during the fiscal year ending September 30, 2015. This is an increase of almost 500 suits above the number filed in the previous year. Thus, this month I am going to try to touch on the highlights of several different sections of the law.

Litigation and Wage and Hour investigations under the Act continue to generate large judgments and/or settlements. One area that is very much in the forefront is whether persons are bona fide independent contractors or whether they should be treated as employees. On July 15, 2015, the Wage and Hour Administrator issued a position paper explaining how they determine who is to be considered an employee. The document stressed several points including whether the person is in business for himself and an "economic realities" test. Additionally, Wage and Hour has signed agreements with more than 20 states to share information regarding the use of independent contractors. It appears that Wage and Hour will be looking very closely at persons that are working for you that you are treating as independent contractors. If you have persons in this category I suggest that you obtain a copy of the position paper which is available on the Wage and Hour web site and review it closely to ensure that you are not misclassifying workers. I just saw where an Alabama Logging and Trucking Contractor was required over $100,000 in back wages and liquidated damages to some 45 employees that he had misclassified as independent contractors.

There continues to be a push by the President and the Secretary of Labor to increase the minimum wage. Previously the push was to increase the wage to $10.10 per hour but current bills are proposing to increase it to still higher levels. Also several cities either have passed legislation or are considering raising their local minimum wage. For instance, the Birmingham City Council passed an ordinance to raise their minimum wage to $8.50 in July 2016, and $10.10 in July 2017. The specifics of the statute were published in The Birmingham News on August 30, 2015.

In addition to pushing for an increase in the minimum wage, Wage and Hour has published some proposed changes to the regulations defining the executive, administrative, professional and outside sales exemptions. When the proposal was issued in July the agency invited the public to submit comments by September 4, 2015. They are now in the process of reviewing those comments and it is expected they will issue the final regulations either late this year or in early 2016 with an effective day during the first or second quarter of 2016. The major change set forth in the

proposal is an increase in the minimum salary from $455 to more than $900 per week. Employers need to begin evaluating their salary structure for exempt employees so they can make any necessary changes before the effective date of the new regulations. I understand that more than 250,000 comments were submitted.

Class Action v. Collective Action Litigation: I know that frequently you see articles about "class action" suits against employers for various issues such sex, race or religious discrimination and occasionally you may see one using the term "collective action". This probably makes you wonder what the difference between the two types of suits is. The FLSA, which was passed by Congress in 1938, does not allow the filing of a "class action" where the employee is automatically covered by the suit unless he/she chooses to opt out of the suit. Thus you see "collective actions" under the FLSA which is where the employee must choose in writing to be a party of the suit.

In the "collective action" process a small group of employees (even one or two) may file a suit against a company alleging violations of the FLSA and then file a motion with the Court seeking to get the establishment of a collective action on behalf of all employees performing similar duties. If the Court approves the collective action it normally will allow the Plaintiff Attorney to send a letter to each employee in the similarly situated group to join in the litigation. For example, I am involved in a case in another state where one employee alleged non-payment of proper overtime in a few weeks in 2010 and 2011. At this point some 15 employees have joined the suit but the court has allowed the plaintiff's attorney to notify other employees of the pending suit and is expected up to 400 current and former employees may join the suit.

Recently, DOL posted some statistics on its website regarding activities during several previous years. In FY 2014 they collected almost $240 million in back wages for some 270,000 employees. For the past several years Wage and Hour has looked at several "low wage" industries which include agriculture, restaurants, guard services and janitorial services. In looking at some specific industries I note that by far the industry where they found the most underpayments were restaurants with almost $35 million in back wages paid to some 44,000 employees. Based on their findings I would expect they will continue to take a close look at the restaurant industry and hospitality industry in upcoming years. If you would like to take a more detailed view of their activities you can find a link on the home page of their web site.

Note for employers who have government contracts: I am sure you are aware that the President issued an Executive Order requiring employees working on those contracts to be paid at least $10.10 per hour. The Order also said that the minimum rate would be adjusted each year to keep up with increases in the cost of living and required the Department of Labor to issue the rates for the following year by October 1st. This month Wage and Hour issued the rates beginning January 1, 2016 to be $10.15 per hour and the rate for tipped employee's increases from $4.90 per hour to $5.85 per hour.

If I can be of assistance with any of your wage hour questions do not hesitate to give me a call.

2015 Upcoming Events

EFFECTIVE SUPERVISOR®

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 Apple and Google will pay $415 million to settle a hiring conspiracy lawsuit? *In re High-Tech Employees Antitrust Litigation* (N.D. Cal. Sept. 2, 2015). The case arose out of a practice of Apple and Google to refrain from hiring each other's employees. The Court rejected the original settlement agreement of $324.5 million dollars as inadequate. The Court also awarded $40 million dollars (that's not a typo) to the employees' attorneys. The case included email communications between the leadership teams of both companies, apologizing for violating their "no poaching" agreement.

. . . that Target is purchasing Fitbits for its 335,000 employees? Target announced on September 15 that in an effort to promote better employee health and reduce employer and employee health costs, it was purchasing Fitbits for everyone. Target's CEO stated that, the "cost of a Fitbit device and the associated services is very small compared to the savings from a healthier employee population." According to Fitbit's corporate services department, other employers that have purchased Fitbits for their workforce have shown a reduction in healthcare costs and in employee medical related absenteeism. Target also announced that it will provide employees with a discount to purchase healthful foods.

. . . that Delta employees will receive a 14.5 % pay raise? Delta, known as an acronym for "Don't Expect Luggage To Arrive," is reaping the benefits of reduced capacity, uncomfortable full flights, and lower fuel costs. On September 16, Delta announced that 70,000 employees will receive the pay raise on December 1. Delta also announced that it is increasing its employee 401k match from 5% to 6%. Delta will adjust its profit sharing formula where employees will receive a higher percentage of profits in a poor year then a good year.

. . . that the Workplace Action for a Growing Economy (WAGE) Act will provide a private right of action for a National Labor Relations Act violation? Introduced on September 16th by Senator Patty Murray (D-Washington) and Representative Bobby Scott (D-Virginia), the bill would provide employees the right to file a federal court lawsuit against their employer for a violation of the National Labor Relations Act. The bill would permit an employee to recover treble damages, require civil penalties of up to $50,000 for employers who commit unfair labor practices and $10,000 a day in fines for employers that fail to comply with NLRB orders. This bill has no chance of passing. The bill reflects organized labor's "wish list" for action by the time President Obama leaves office.

. . . that an Olympic Gold Medalist did not have "extraordinary ability" to qualify for an EB-1 visa? *Integrity Gymnastics & Pure Power Cheerleading, LLC v. US Citizenship Immigration and Service* (S.D. Ohio, Sept. 14, 2015). An EB-1 visa is considered the top priority employment visa, generally reserved for those individuals who are preeminent in their field and who enter the U.S. to work in that field. The very nature of the visa application requires evidence that the individual has "extraordinary ability." Natalia Laschenova was a gold medal gymnastics winner at the 1988 Olympics. In 1999, she came to the U.S. as an H-1B guest worker to coach gymnastics. Her visa was extended, but then she was denied an EB-1 visa which would have extended her stay in the U.S. Her employer, Integrity, sued, claiming that Laschenova's record as a gold medal winner certainly substantiated her "extraordinary ability." In rejecting the claim, the Court noted that although she reached an extraordinary level as an athlete, the visa was based upon her role as a coach, and "competitive athletics and coaching are not in the same area of expertise." The court stated that the evidence was insufficient to establish that her extraordinary achievements as an athlete were matched by extraordinary achievements as a coach. The EB-1 visas are among the most difficult to obtain and require a talent at the highest echelon of science, medicine, education or athletics. As a coach, she did not qualify.

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