OCTOBER 2015
VOLUME 23, ISSUE 10

Your Workplace Is Our Work®

Inside this issue:

FMLA and ERISA with a Spice of ADA

FMLA and ADA assessments often overlap. With a lower threshold of what constitutes a disability under the ADA, there is often an overlap between a serious health condition under the FMLA and an ADA disability. What is frequently overlooked, however, are the implications of FMLA or ADA-related termination decisions on employee benefits, which can lead to ERISA claims. The case of *Deka v Countryside Association for People with Disabilities, Inc.* (N.D. Ill. Oct. 14, 2015) explored the relationship of an ERISA claim to alleged FMLA and ADA violations.

The employer (ironically, a disability services organization) terminated an employee with multiple sclerosis one month after she requested FMLA intermittent leave. The employer argued that requesting FMLA leave in the future could not result in an FMLA interference claim—only interference with actual leave may be the basis for such a claim. In rejecting this, the court quoted a 2009 decision where it found, "'It would be illogical to interpret the [FMLA's] notice requirement in a way that requires employees to disclose requests for leave [that] would, in turn, expose them to retaliation or interference for which they have no remedy.'" The court similarly rejected the employer's motion to dismiss the FMLA retaliation claim. The court also ruled that the case could go to trial on the ADA discrimination claim based on Deka's theory that she was terminated after requesting a scheduling accommodation.

The court also permitted Deka's ERISA interference claim to go to trial. She argued that a motivating reason for her termination was for her employer to avoid paying health benefit costs which would arise in the future due to her multiple sclerosis. The court said that she raised a viable claim that the employer terminated her while being "motivated by an intent to frustrate [her] attainment of benefits." Deka's claims were further supported by the HR Director and Executive Director referring to FMLA and related medical leave issues as a "get out of jail free card." These and other disparaging comments about medical leave were made on the date Deka was terminated.

Note the timing in this case. Deka requested leave going forward, and within a month of that request, she was terminated. She had received excellent performance reviews and was not told that her job was on the line. Thus, when an employer terminates an employee with excellent performance reviews and no notice of imminent termination shortly after a request for intermittent FMLA and ADA accommodation, the predictable outcome is a high risk lawsuit with potential damages on several statutory fronts, including ERISA, especially if management explicitly associates the employee's health and requests with increased benefit costs.

Inconsistency Supports Age Discrimination Lawsuit

An employer should develop its theory for why an employee was terminated prior to the termination. Be sure that the theory is one you are comfortable with if the employee seeks unemployment, files an administrative complaint, or files a lawsuit. The recent case of *Milillo v. Thomas Jefferson University Hospital, Inc.* (E.D. Pa. Oct. 13, 2015) illustrates the hazards an employer faces if it appears to change its mind on the reasons for an employee's termination.

Joyce Milillo was terminated at age 60 after an internal reorganization. At the time of her termination, Milillo was told that the position was being eliminated. However, when the hospital filed its Motion for Summary Judgment, the hospital asserted that the reason Milillo was not retained in the reorganization was due to her poor customer service. In denying the employer's Motion for Summary Judgment, the court noted that everyone in Milillo's department was told that they would need to reapply for their positions due to a reorganization. Milillo applied for her current job and three others, and was not selected for any of them. Those who were selected were all substantially younger than Milillo, including three of whom were under age 30. The hospital told Milillo that she was not retained due to "difficult economic times." As it turned out, the reorganization resulted in a net increase of one FTE (Full-Time Employee) in her department, not a workforce reduction. Because the employer gave inconsistent explanations for the nature of the reorganization and Milillo's loss of employment, Milillo was entitled to have a jury decide if the hospital was motivated by her performance or her age.

Milillo's employer is hardly the first employer to get ensnared by the desire to avoid confrontation with a departing employee. (At least, we assume that was their motivation in sugarcoating the truth to Milillo). A reorganization or reduction in force often results in terminations of marginal employees who would not otherwise have been terminated at that time. Such decisions are reasonable, logical, and defendable, provided the employer doesn't make statements that undermine those determinations.

EEOC Litigation Increases

The number of lawsuits the EEOC filed during Fiscal Year 2015 (ending September 30) increased to 135 from 117 during FY 2014. Approximately 35% of all lawsuits alleged a violation of the Americans with Disabilities Act. During FY 2014, approximately 36% of all lawsuits alleged ADA violations. Although the number of EEOC-prosecuted lawsuits filed is low compared to the total number of charges, the lawsuits filed indicate the Commission's emphases when handling charges. Also, 32.5% of all EEOC lawsuits are filed in Southern states, the single highest geographical concentration of the EEOC's litigation initiatives. During FY 2014, 36.7% of all lawsuits filed were in Southern states.

The EEOC recovered $61,200,000 in case settlements during FY 2015, a nearly three-fold increase from $20.8 million during FY 2014. Forty-nine of the 112 cases that were settled involved ADA allegations, with an average monetary settlement of $126,500. Fifty-four cases were settled that involved Title VII allegations, resulting in slightly under $1,000,000 per settlement. A distinction between the Title VII and ADA cases involves class action and sexual and racial harassment litigation, thus resulting in a substantial settlement average.

ACA Update

Piecemeal Repeal?

The United States House of Representatives passed H.R. 3762, the "Restoring Americans' Healthcare Freedom Reconciliation Act of 2015," on October 23, 2015 by a vote of 240-189. If the bill is passed by the Senate, and if it survives a Presidential veto (unlikely), the bill would repeal the ACA's individual and employer mandates, the 40% Cadillac tax on high cost employer sponsored health coverage, the 2.3% medical device tax, the Independent Payment Advisory Board (which has authority to make changes to achieve Medicare savings), the Prevention and Public Health Fund, and the employer requirement for automatic health insurance enrollment. Ways and Means Committee Chairman (and contender for the Speaker of the House position soon to be vacated by John R. Boehner), Paul D. Ryan (R-Wis), stated that "[w]e can put on the president's desk a bill that will dismantle Obamacare and lay the foundation for a patient-centered system." The Senate has not said when it will take up the bill; however, President Obama has already indicated that he will veto this bill if it passes the Senate.

PACE – Repeal of Small Group Market Expansion

On October 7, 2015, the "Protecting Affordable Coverage for Employees" Act ("PACE") was signed into law by President Obama. PACE revises the non-tax definition of "small" and "large" employers under the ACA, modifying the rules permitting some qualified health plans (QHPs) to be offered through cafeteria plans. (H.R. 1624). Currently, a QHP that is offered through a health insurance exchange generally does not qualify as a benefit that may be offered through a cafeteria plan unless a "qualified employer" offers its employees the opportunity to enroll in a QHP through a health insurance exchange "group market."

For purposes of the ACA, a QHP is a plan that meets certain certification requirements, provides "an essential health benefits package," and is offered by an insurer that meets detailed ACA requirements. A "health insurance exchange" is a federally supervised marketplace for health insurance policies that meets specific criteria for eligibility and benefits for qualifying individuals and employer groups of graduated sizes. A "qualified employer" is a "small employer" that elects to make all of its full time employees eligible for one or more QHPs offered in the "small group market" through an exchange that offers QHPs.

Prior to the passage of PACE, a "small employer" was one that employed an average of at least one but no more than 100 employees on business days during the preceding calendar year, and employs at least one employee on the first day of the plan year. However, under Ppe-PACE law for plan years beginning before January 1, 2016, a state was able to treat an employer with no more than 50 employees as a "small employer."

Under PACE, a "small employer" is now defined as one that employed an average of at least one but no more than 50 (rather than 100) employees on business days during the preceding calendar year and at least one employee on the first day of the plan year. Although, under PACE, a state may choose treat as a "small employer" an employer who employed an average of at least one but not more than 100 employees on business days during the preceding calendar year and at least one employee on the first day of the plan year, it is not anticipated that many states will do so. Thus, under the revised definition of small employer, participation in the Small Business Health Options Program (SHOP) Exchanges are limited to employers with no more than 50 employees (unless a state does elect to extend the cutoff to 100).

PACE was designed as a non-tax measure, and according to one of its co-authors, Senator Jeanne Shaheen (D-NH), its intent is to protect small businesses from the healthcare premium increases under the ACA. This change in the law aligns the definition of applicable large employer (those with 50 or more full time employees) under Sec. 4980H, except for employers with exactly 50 employees. As a result, the small group market will consist of employers with between 1 and 50 employees, beginning in 2016. Those employers who have 1-49 employees will not be subject to the Code Sec. 4980H shared responsibility provisions, but those with exactly 50 employees will be. This change in the law is designed to avoid the anticipated higher costs that would occur if businesses with 51-100 employees were pushed into the small group insurance market.

Should Coverage for Inpatient Hospital & Physician Services be included in "Minimum Value?"

The IRS is seeking input from the public regarding new rules defining "minimum value" in employer sponsored health plans. A notice of proposed rulemaking published September 1, 2015, indicates that the U. S. Departments of Health and Human services and the Treasury will define "substantial coverage" for hospitalization and physician services. The proposed rule is intended to reconcile accumulated guidance from 2013 and 2014 regarding "minimum value." The IRS is withdrawing portions of the 2013 rule that discussed minimum value with the intent of replacing them with new rules incorporating newly-proposed language. These changes are important to employers since an individual may not receive a subsidy to purchase insurance on an exchange if he has received an offer of minimum essential coverage (MEC) from his employer. Applicable large employers may face employer shared responsibility penalties if they fail to offer MEC to their full time employees, and at least one such employee receives a subsidy to buy coverage on an exchange. For coverage to be considered "minimum essential," it must be both affordable and convey "minimum value." Comments on the proposed rule will be accepted by the IRS until November 1, 2015.

NLRB Tips: Miscellaneous NLRB Hot Topics

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.

Browning-Ferris Back at NLRB

Setting the stage for a request for review of the NLRB original order changing the joint employer standard, Browning-Ferris (BFI) refused to bargain with the Teamsters over terms and conditions of employment with its subcontractor/staffing agency Leadpoint. The Teamsters filed its unfair labor practice (ULP) charge against BFI on September 25, 2015.

The refusal to bargain comes a mere three weeks after the ruling by the Board that BFI and Leadpoint were joint employers of the staffing agency employees. As discussed in previous LMVT employment law bulletins, under the new joint employer standard, two entities can be deemed joint employers of a single workforce if they are both employers within the meaning of common law, and they share or co-determine matters governing the essential terms and condition of employment.

The stakes are high in this matter, and LMVT will keep readers apprised of developments on this front as they arise.

NLRB Allows Electronic Signatures to Demonstrate Showing of Interest

Ignoring years of experience, and further paving the way for "virtual organizing," the NLRB's General Counsel has issued a memorandum setting forth "whether, when, and how electronic signatures can practicably be accepted" to support the filing of a representation petition.

Predictably showing little regard for decades of policy and experience, the Board will no longer require "actual" signatures to support a showing of interest. GC Memorandum 15-08, issued on September 1, 2015, sets forth the requirements for submitting electronic signatures in support of the petition.

- The card signer's name;
- The card signer's contact information such as e-mail address or social media account;
- The card signer's telephone number;
- The language on the authorization card (e.g. – that the signer wishes to be represented by the union for purposes of collective bargaining);
- The date the electronic signature was submitted; and
- The name of the employer of the card signer.

The union or other party submitting the electronic signatures must also submit a letter which sets forth the technology used in obtaining and submitting the e-signature (e.g. – scan of the actual signed card or email received), and that the electronic signature is that of the signing employee. It is required that the actual employee signed their name electronically and that the information transmitted to the NLRB was what was seen and signed by the signing employee.

As noted in the June 2015 ELB, it appears that the groundwork is being laid for "virtual organizing by unions." Along with other decisions issued by the Obama Board over the last two years (*Specialty Healthcare* micro-units, quickie election processing, survival of dues check-off after expiration of a contract), the advent of virtual organizing has arrived. Virtual organizing permits union to conduct organizing campaigns in secrecy, thus even escaping notice by employers entirely until an r-case petition is filed. Expect unions to exercise its right to submit electronic signatures in the near future where such submission is deemed advantageous to the union. Thus, it is more important than ever that an employer keep their "ear to the ground" for signs of disgruntled employees.

Successor Rules Re-Visited under GVS Properties LLC

In *GVS Properties LLC*, decided on August 27, the NLRB considered the "proper application of the successorship doctrine" in cases where a state law requires a successor to retrain the predecessor's employees for a specified period of time.

Under 1972 precedent, when a new employer (the successor) continues the old employer's business (the predecessor) in substantially unchanged fashion and hires a majority of the predecessor's work force, then it is obligated under the "successorship doctrine" to bargain with the union that previously represented the predecessor's workers.

In arguing its case before the NLRB, GVS claimed that the successorship doctrine did not apply because it did not voluntarily hire a majority of the predecessor's employees. Rather, it was merely complying with the state law which required GVS to retain all the workers for 90 days.

The Board rejected the employer's arguments. The Agency found that GVS violated the NLRA when it refused to bargain with the predecessor's union and was not affected by the temporary or probationary status of the workers hired under the state retention statute.

<u>The Problem with the GVS Decision</u>

The dissent, by outgoing Member Harry Johnson III (Johnson's term expired August 27, 2015), succinctly noted the problem with the decision:

> Ironically, [GVS Properties] could prove the death knell for local worker retention statues. By allowing a local statute to control a matter of federal labor law, the majority paves the way for these statutes to run headlong in the Supremacy Clause of the [U.S.] Constitution.

The Supremacy Clause is the provision in Article Six, Clause 2 of the Constitution that establishes the U.S. Constitution, federal statutes, and treaties as "the supreme law of the land." It provides that these are the highest form of law in the United States legal system, and mandates that all state judges must follow federal law when a conflict arises between federal and state law.

The dissent believes that the only time to consider application of the successorship doctrine is **after** the state retention period has expired and the ostensible successor considers hiring the workforce on a voluntary basis.

The risk of job losses and the resultant economic impact on the GDP is real, and the Obama Board ignores these threats to the workplace. LMVT will keep you apprised of developments in this area of the law.

EEO Tips: Age Cases Still Persist But Face a Steep Climb in Terms of Proof

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.

Recent cases in the private sector show the difficulty employers can face in winning ADEA cases. In previous pages, we discussed the *Mililo* case, where the employer appeared to give inconsistent reasons for an older employee's non-selection in a reorganization. The case of *Salazar v. Cargill Meat Solutions Corp.,* illustrates the related principle that if an employee's termination appears to contravene an employer's usual practices, a court may give a jury the chance to determine if the inconsistent practice resulted from discrimination. In that case, the Fifth Circuit found that the trial court's grant of summary judgment against a 56-year-old truck driver, who was discharged for insubordination after "shrugging" his shoulders in response to his supervisor's query about the condition of his truck, was inadequate and premature. Evidence was produced to show that notwithstanding an unblemished employment record for twenty years, the Plaintiff was discharged immediately and replaced by a 19-year-old driver with limited experience after the shrugging incident. The Plaintiff explained that he had shrugged his shoulders in response to his supervisor's question because his mouth was full at that moment and he couldn't answer otherwise. In fact, he said his truck was in good condition. Cargill, the employer, had contended that Salazar was insubordinate and that Salazar could not prove that the employer's hasty discharge was a pretext for age discrimination. In remanding the case to the court for the Northern District of Texas, the Fifth Circuit stated that the trial court had misapprehended the Plaintiff's burden to withstand summary judgment. "To withstand summary judgment," the Plaintiff "need only present a prima facie case of age discrimination together with evidence that the employer's justification for firing him was false." However, the burden of proving that the employer's justification was false is not easily done because of the subjectivity involved in discerning a supervisor's mentality at the time of the offense.

While employers (and lawyers) often view it as a failure when cases go to a jury, an employee verdict is hardly a foregone conclusion. In *Housley v. Spirit Aerosystems, Inc.,* the Tenth Circuit affirmed a jury verdict in favor of the employer. The 56-year-old Plaintiff had not been hired by Spirit Aerosystems after that company had taken over a Boeing Company workplace, even though it had hired approximately 85% of all of Boeing's former employees. At trial the Plaintiff was able to get into evidence a secret recording in which Boeing officials were clearly directing questions to her about her plans for retirement. Spirit claimed it did not hire Housley because Boeing did not recommend Housley and said she had issues with teamwork and performance. Notwithstanding that "smoking gun" secret recording and other evidence which a jury could have interpreted as evidence that age was on management's mind, the jury decided Spirit had the more plausible story and concluded that the ADEA had not been violated.

These cases are simply samples of the pre-trial problems of proof that employers can face and the during-trial problems of proof that plaintiffs can face. Legal scholars may recall the 2009 Supreme Court case of *Gross v. FBL Financial Services, Inc.*, which increased the ultimate burden of proof on plaintiffs to a but-for standard. This appears to have had a slightly negative effect on total age discrimination charge filings and a more pronounced negative effect on EEOC-prosecuted ADEA litigation. For example, during Fiscal Years 2008 and 2009 Age Discrimination Charges totaled 24,582 and 22,778 respectively and constituted approximately 25% or 1 out of every 4 charges filed with the EEOC those years. Since FY 2011, ADEA charges have slipped to approximately 23,000 each year constituting approximately 23% of all charges filed. It is noteworthy that in FY 2006, before the Supreme Court's ruling in *Gross*, the EEOC filed 50 ADEA lawsuits, or approximately 1 out of every 7 merit suits filed. This was the highest number of ADEA suits filed since 1997. In contrast the EEOC only filed 7 ADEA lawsuits in FY 2013, the lowest number ever filed. In FY 2014 the agency filed 12 ADEA lawsuits, and a tally of unofficial Press Releases indicates that about the same number were filed in FY 2015.

The practical implications of the holding in *Gross v FBL Financial* lean heavily in favor of employers. For example:

1. It simplifies an employer's defense with respect to mixed motive cases under the ADEA. It allows an employer to concentrate its defense on "reasonable factors other than age," presumably based upon business necessity, without also having to show that its decision would have been the same whether or not age was a factor.

2. It establishes a higher level of proof for a plaintiff to show that "but for" the employee's (or applicant's) age the decision would not have been made. The "but for" standard almost requires direct evidence (or something close to an admission by the employer) that age was the motivating factor in making the decision. At any rate this kind of proof is more likely to be available to Defendant-Employers than to Plaintiff-Claimants because it usually involves the subjective mental processes

of the supervisor, manager or other decision maker. Even if the decision maker admits that the Plaintiff's age crossed his or her mind, that would not necessarily prove that the decision would not have been made "but for" the employee's or applicant's age.

3. There is no shifting of any burden of proof or burden of going forward for the employer at any point along the way. The entire burden of persuasion is upon the Plaintiff at all times.

However, there are also some potential negative implications of the Court's holding which do not favor employers. For example:

1. It may complicate an employer's defense of a case in which the Plaintiff alleges both Title VII and age claims in the same action based upon essentially the same facts. For instance if the allegations include both race and age, or sex and age, an employer must be prepared to defend the race or other Title VII portions of the case using the shifting burdens under *Price Waterhouse* or Title VII while the age portion of the case must be defended according to the standards set forth in *Gross v FBL Financial Services*. It is likely that in most cases the same basic evidence, including witnesses' testimony, will have to be used (in different ways) to prove or disprove the allegations under each statute.

2. It is also unclear whether *Gross* will apply to state age discrimination laws. This creates a potential choice of forum problem if a Plaintiff decides to file his or her age claims in State Court and his or her Title VII claims in a Federal Court.

OSHA Tips: Monitoring OSHA Compliance

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.

Employers should consider periodically assessing their readiness for an OSHA inspection. Such an assessment should include insuring that the required annual or periodic actions called for in numerous OSHA standards have been addressed. Examples of a number of the generally applicable standards having such a requirement include the following:

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

- When a facility has new employees with occupational exposure to blood or potentially infectious material, the required exposure control plan must be reviewed and updated annually. 29 C.F.R. §1910.1030(c) and (d).

- Employers must inform employees at their initial hire and at least annually about the existence and their right of access to their medical and exposure records. 29 C.F.R. §1910.1020(g) and (i).

- Operators of powered industrial trucks such as forklifts must have their performance evaluated at least once every three years. 29 C.F.R. §1910.178.

- Mechanical power presses must be inspected no less than weekly with a certification record giving the date, serial number, or press identifier and signature of the person who performed the inspection. The most recent records of such inspections should be retained.

- Many of OSHA substance specific health standards contain periodic action requirements for exposure monitoring and training.

- Employees exposed to an eight hour time-weighted average noise level at or above 85 decibels must have a new audiogram at least annually. 29 C.F.R. §1910.95(g)(6).

- OSHA's permit-required confined space standard requires that the program be reviewed by using cancelled permits within one year of each entry. The standard also allows a single annual review utilizing all entries made within the twelve month period. 29 C.F.R. §1910.146(d)(14).

- Under OSHA's standard for the control of hazardous energy (lockout-tagout) an employer is required to conduct a periodic inspection of the energy control procedure to insure the requirements of the standard are being met. This must be done at least annually with a certification that it has been accomplished. (29 C.F.R. §1910.147(c)(6).

- After the initial testing of an employee's tight-fitting respirator, there must be another fit test at least annually. 29 C.F.R. §1910.134(k)(5).

- OSHA requires annual checks of fire extinguishers to be documented and include a training requirement. 29 C.F.R. §1910.157(a)(3).

Wage and Hour Tips: Overtime Pay Requirements of the Fair Labor Standards Act

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.

Note: I am sure that you are aware of the pending revisions to the requirements for the executive, administrative and professional exemptions. In response to the publishing of the proposed changes in July Wage Hour has received over 290,000 comments. At this time they are in the process of reviewing those comments which will take them sometime. They are posting some of the comments on their web site and when I looked at it last week there were more than 5,000 individual comments available to be read. We do not know if they are going to post all of them or just a sample. What they decide to do could have an effect on when they plan to publish the final regulations. As soon as we can determine when the new regulations will be published we will let you know.

In 1938 Congress passed the Fair Labor Standards Act of 1938 which established a minimum wage of $0.25 per hour for most employees. In an effort to create more employment the Act also set forth certain additional requirements that established a penalty on the employer when an employee works more than a specified number of hours during a workweek. The initial law required overtime after 44 hours in a workweek but eventually limited the hours without overtime premium to 40 in a workweek.

An employer who requires or allows an employee to work overtime is generally required to pay the employee premium pay for such overtime work. Unless specifically exempted, covered employees must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rate of pay. Overtime pay is not required for work on Saturdays, Sundays, holidays unless the employee has worked more than 40 hours during the workweek. Further, hours paid for sick leave, vacation and/or holidays do not have to be counted when determining if an employee has worked overtime although some employers choose to do so.

The FLSA applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. The workweek need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees but they must remain consistent and may not be changed to avoid the payment of overtime. Averaging of hours over two or more weeks is not permitted. Normally, overtime pay earned in a particular workweek must be paid on the regular payday for the pay period in which the wages were earned. However, if you are unable to determine the amount of overtime due prior to the payday for the pay period you may delay payment until the following pay period.

The regular rate of pay cannot be less than the minimum wage. The regular rate includes all remuneration for employment except certain payments specifically excluded by the Act itself. Payments for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays are excluded. Also, discretionary bonuses, gifts and payments in the nature of gifts on special occasions and payments for occasional periods when no work is performed due to vacation, holidays, or illness may be excluded. However, payments such as shift differentials, attendance bonuses, commissions, longevity pay and "on-call" pay must be included when determining the employee's regular rate.

Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. Where an employee, in a single workweek, works at two or more different types of work for which different straight-time rates have been established, the regular rate is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. Where non-cash payments are made to employees in the form of goods or facilities (for example meals, lodging & etc.), the reasonable cost to the employer or fair value of such goods or facilities must also be included in the regular rate.

Some Typical Problems

Fixed Sum for Varying Amounts of Overtime: A lump sum paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium. This is true even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis. For example, a flat sum of $100 paid to employees who work overtime on Sunday will not qualify as an overtime premium, even though the employees' straight-time rate is $8.00 an hour and the employees always work less than 8 hours on Sunday. Similarly, where an agreement provides for 6 hours pay at $10.00 an hour regardless of the time actually spent for work on a job performed during overtime hours, the entire $60.00 must be included in determining the employees' regular rate and the employee will be due additional overtime compensation.

Salary for Workweek Exceeding 40 Hours: A fixed salary for a regular workweek longer than 40 hours does not discharge FLSA statutory obligations. For example, an employee may be hired to work a 50-hour workweek for a weekly salary of $500. In this instance the regular rate is obtained by dividing the $500 straight-time salary by 50 hours, results in a regular rate of $10.00. The employee is then due additional overtime computed by multiplying the 10 overtime hours by one-half the regular rate of pay ($5 x 10 = $50.00).

Overtime Pay May Not Be Waived: The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. Likewise an announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not relieve the employer from his obligation to pay the employee for overtime hours that are worked. The burden is on the employer to prevent employees from working hours for which they are not paid.

Many employers erroneously believe that the payment of a salary to an employee relieves him from the overtime provisions of the Act. However, this misconception can be very costly as, unless an employee is specifically exempt from the overtime provisions of the FLSA, he/she is must be paid time and one-half his regular rate of pay when he works more than 40 hours during a workweek. Failure to pay an employee proper overtime premium can result in the employer being required to pay, in addition to the unpaid wages for a period of up to three years, an equal amount liquidated damages to the employee. Further, if the employee brings a private suit the employer can also be required to pay the employee's attorney fees. When the Department of Labor makes an investigation and finds employees have not been paid in accordance with the Act they may assess Civil Money Penalties of up to $1,100 per employee for repeat and/or willful violations.

In mid-September, DOL announced a special enforcement policy relating to the revised regulations pertaining to domestic service employment. In 2013 they had issued some significant revisions that become effective on January 1, 2015, but enforcement has been delayed due to pending litigation. On August 21, 2015, the a federal Court of Appeals upheld the revised regulations and the new regulations became effective October 13, 2015. The DOL special enforcement policy states they will "exercise prosecutorial discretion" until December 31, 2015. However, if you have household domestic employees you need to be aware of these changes and pay the employees accordingly. Information regarding these changes can be found on the DOL website under the link to Homecare.

In order to limit their liabilities, employers should regularly review their pay policies to ensure that overtime is being computed in accordance with the requirements of the FLSA. If I can be of assistance do not hesitate to give me a call.

Did You Know…

. . . that retiree participants of the Teamster's Central States Pension Fund will have their benefits cut by as much as $18,000 to $20,000 a year? The cuts are to occur on July 1, 2016, which the Teamster's announced on Oct. 15, 2015. The Fund simply does not have the resources to pay full benefits to the number of retirees. The Multiemployer Pension Reform Act (2014), provides the platform for the Fund to make these cuts. Adding insult to injury, retirees who now seek employment because of the shortfall will be penalized by the Fund. On October 9, 2015, the United Autoworkers announced that it has a 16 billion dollar gap to fund medical benefits for 700,000 UAW retirees among the Big Three Automakers.

. . . that 70% of employees would leave their current employer for the opportunity to work from home? This is according to a report released on October 13, 2015, by Softchoice. Softchoice surveyed 1,700 full-time employees in the United States and Canada. The study, entitled "Death of the Desk Job," said that employees are seeking flexibility to work when they want and where they want. The majority of respondents felt that the standard eight hour work day was "passé" and 62% responded by saying they would be more productive if they could work outside of the office. According to the study, "not everyone has the same definition of work-life balance, so it is up to the employer to set clear expectations around acceptable work activities beyond business hours."

. . . that the discriminatory motive of a supervisor not attributed to the employer when the termination decision was for unrelated reasons? *Woods v. City of Berwyn* (7th Cir. Oct. 15, 2015). The law of the land is that if an independent decision maker's decision is influenced by a biased subordinate, then that independent decision maker's actions are considered biased. Woods, a firefighter, alleged that he was terminated based upon the age and disability discriminatory motives of his immediate supervisor. When the employer reviewed the reasons for termination, the employer became aware of threats Woods made to "kill somebody, all of them" and "tune them up." According to the court, even if the recommended reasons by Woods's supervisor were biased, the ultimate decision makers terminated him because of his threats, which was a reason completely independent from the biased recommendation of his supervisor.

. . . that older U.S. workers are expected to increase their workforce participation? According to an analysis by the Organization for Economic Cooperation and Development, the workforce participation rates of 55 to 64-year-olds in the United States has lagged behind several other countries during the past seven years. According to an economist with Goldman Sachs, "the difficult job market likely depressed participation among older American workers, but the later retirement trend is likely to resume eventually. This should partially offset the impact of population aging on the aggregate participation rate." Another factor contributing to the lack of growth in the labor participation rate is the Affordable Care Act (ACA), as employer sponsored health benefits no longer hold the same allure for individuals seeking employment as they did prior to the passage of the ACA. The general thought is that the older employees will likely sit on the sideline unless there is either a significant economic downturn or uptick. That is, either the need is created to return to the workforce or a robust economy will offer job opportunities for those individuals to seek.

LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

Richard I. Lehr 205.323.9260
rlehr@lehrmiddlebrooks.com

David J. Middlebrooks 205.323.9262
dmiddlebrooks@lehrmiddlebrooks.com

Albert L. Vreeland, II 205.323.9266
avreeland@lehrmiddlebrooks.com

Michael L. Thompson 205.323.9278
mthompson@lehrmiddlebrooks.com

Whitney R. Brown 205.323.9274
wbrown@lehrmiddlebrooks.com

Jamie M. Brabston 205.323.8219
jbrabston@lehrmiddlebrooks.com

Brett A. Janich 205.323.9279
bjanich@lehrmiddlebrooks.com

Lyndel L. Erwin 205.323.9272
(Wage and Hour and Government Contracts Consultant) lerwin@lehrmiddlebrooks.com

Jerome C. Rose 205.323.9267
(EEO Consultant) jrose@lehrmiddlebrooks.com

Frank F. Rox, Jr. 205.323.8217
(NLRB Consultant) frox@lehrmiddlebrooks.com

John E. Hall 205.226.7129
(OSHA Consultant) jhall@lehrmiddlebrooks.com