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Your Workplace Is Our Work®

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Will DOL Change "Duties Test" for Exempt Status?

Recently, the Department of Labor stated that it may be several months before they issue their final regulations regarding the standard(s) that white collar employees must meet to be considered "exempt" from overtime pay. As you'll recall, there are three basic standards: (1) that the employee is paid on a salary (rather than an hourly, piece, or other) basis; (2) that the employee performs exempt job duties (for example, an executive supervises 2 or more FTEs); and (3) that the employee is paid a minimum salary (currently $455/week or $23,660/year). In July 2015, the DOL published its Notice of Proposed Rulemaking to amend only the third of these standards by raising the salary threshold to just over $50,000/year.

Of particular concern to us is the DOL's consideration of changing the Duties Test for exempt status. In the proposed regulations, the Wage and Hour Division asked for comment on whether changes should be made to the Duties Test for exempt employees and, if so, what changes should be made. DOL received over 260,000 comments to its proposed change to the revised regulations as a whole, at least some of which were a response to the DOL's invitation for comment on changing the Duties Test.

Currently, there is not a minimum time requirement that an individual classified as an exempt executive must spend on exempt work. Thus, in several industries (retail, hospitality, fast food, healthcare), an exempt employee may spend a substantial amount of time performing non-exempt work and still qualify for the exemption. In the proposed regulations, the DOL expressed its concern that too many exempt employees are performing too much non-exempt work. Thus, DOL invited comments about changing the Duties Test to include a threshold amount of time (such as 50%) that must be spent performing exempt tasks.

A change to the Duties Test for exemptions will have a far greater impact on employers than merely increasing the salary level. Think of the number of exempt employees within your organization who may be exempt 100% of the time, but still perform non-exempt work over half of the time. If DOL moves forward with a change to the Duties Test, those individuals will either have to be classified as non-exempt or their duties will have to change.

Additionally, the Department has indicated it is contemplating lowering the salary threshold from the initial proposal of over $50,000, to something in the range of $47,000. Additionally, the DOL is giving strong consideration to including within the salary level a non-discretionary bonus. For example, assume an exempt employee earns $35,000 a year and if certain goals are achieved, the employee receives a $15,000 year-end bonus. The DOL may

permit the $15,000 bonus will count toward the salary threshold, thus sustaining the exempt status. Under the current regulations, non-discretionary bonuses may not be included in an employer's determination of whether the salary level is sufficient for exempt status.

Wage and Hour compliance is one of those few areas where an employer's self-audit may actually eliminate the risk of liability. Even without proposed changes to exemptions, we think an annual Wage and Hour compliance audit is important to eliminate the risk of Wage and Hour liability. The end of the calendar year is an excellent time for such an audit, and it should include a review of exempt status, recordkeeping requirements, whether employees are paid appropriately for meal and break time and overtime compliance, such as employees who check emails and perform incidental work from home.

OSHA Whistleblowing Claims Increase; Expanded Budget and More Investigators Requested

OSHA whistleblower filings increased by 6% during Fiscal Year 2015 compared to FY 2014, for a total of 3,288 complaints compared to 3,098 during FY 2014. Over 4,200 other whistle blowing complaints were rejected by OSHA as untimely. Over 1,000 safety whistleblower charges were filed with state OSHA agencies.

OSHA has requested that for FY 2016, it receive a 23% increase in funds to staff whistleblowing complaints, which would also increase the number of investigators to 157 from 135. It takes OSHA approximately 291 days to resolve a whistle blowing case, which is down from 372 days during FY 2014.

According to OSHA, 62% of all whistleblowing cases filed with the Agency allege violations of the Occupational Safety and Health Act. The OSH Act cases increased by 16% from 2014. OSHA is responsible for enforcing the whistleblowing and retaliation provisions of twenty-one other statutes, including the Sarbanes-Oxley Act. Whistleblowing claims under Sarbanes-Oxley and several other statutes declined during Fiscal Year 2015 compared to FY 2014. Approximately 24% of all whistleblowing charges result in some type of a settlement.

After FMLA Ends, How Long Does ADA Apply?

In the case of *Severson v. Heartland Woodcraft, Inc.* (E.D. Wis. Nov. 12, 2015), a supervisor, who had exhausted his FMLA, was terminated rather than accommodated through an extended leave under the ADA. In granting summary judgment for the employer, the Court stated that accommodating occasional time off, "such as a few days or a couple of weeks" may be required under the ADA, but a five or six month extended absence would not be brief and thus need not be accommodated, nor must an employer create a position for an employee as an accommodation.

In this case, the employee had back surgery and was limited to lifting twenty pounds. When his FMLA Leave expired, he requested up to three additional months for recovery from the back surgery. The employer denied the request, because if it held the position open for Severson, it would be hard to attract someone to the position on a temporary basis and because it would need to train somebody temporarily to work in Severson's capacity as a supervisor, which the company did not want to do. The Court found that the employer failed to engage in an interactive process with Severson, but the Court added that it was a "no harm, no foul" situation. That is, because Severson could not perform the essential functions of his job with an accommodation, the company was within its rights to terminate him and there was no independent liability for not engaging in the interactive dialogue process (since it could not have uncovered an accommodation). The Court also noted that accommodating light duty for job-related injuries or illnesses did not require an employer to create a new job as a form of accommodation.

We know that an indefinite leave of absence is not a reasonable accommodation request under the ADA. When FMLA expires, this case helps employers evaluate to what extent an employer is willing to hold a job open for an individual who needs an extended absence due to

an ADA covered condition. The determination of how long that job could be held open is on a case-by-case basis, but the general principle is that it does not have to be indefinite or lengthy. Thus, if the employer could have held the job open for another four weeks, the employer could tell the individual that if he were unable to return to work after four weeks, the employer could not assure him that a job would be available if and when he would be able to work with or without accommodation.

The Battle between the ACA Contraceptive Mandate & Religious Freedom: PART 2

On November 6, 2015, the U.S. Supreme Court agreed to review whether the opt-out provisions of the ACA's contraception mandate violate the Religious Freedom Restoration Act (RFRA), which "prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest." This "opt-out" process was initiated after the Supreme Court's June 2014 ruling in *Burwell v. Hobby Lobby*. In that case, the Supreme Court held that the Department of Health and Human Services' (HHS) regulations violated the RFRA by requiring most health insurance policies to provide women with cost-free coverage for *all* contraceptive medications that had been approved by the FDA, including four that could have the effect of preventing a fertilized egg from implanting in a woman's womb. Accordingly, the Court held that closely held corporations with sincerely held religious beliefs such as Hobby Lobby did not have to pay for ALL forms of contraception.

Following the *Hobby Lobby* ruling, HHS offered a limited exception to such closely held, for profit employers who objected to the mandate; however, such regulations still require that: (1) the religious employer work with a health insurer that provides birth control directly to an employee; and (2) religious employers trigger this process by completing a form notifying the federal government that the religious employer is accepting the exemption. Religious employers have objected to this "opt-out" exemption on the basis that it still substantially burdens their religious freedom in violation of the RFRA, because they would still be required to work with another entity to provide to employees the very types of birth control that are contrary to their religious beliefs.

The U.S. Supreme Court's review is intended to settle a circuit split on this issue created when the Eighth Circuit Court of Appeals ruled in favor of the mandate's challengers. Seven other circuit courts previously ruled in the government's favor and rejected the argument that the opt-out provision substantially burdened religious freedom. The Court consolidated the appeal of the Eighth Circuit case with the seven other cases, including a prominent one involving Denver-based charity, Little Sisters of the Poor. Oral argument on the consolidated cases is anticipated in March 2016, with a decision likely in June 2016.

ACA Exchange Notifications to Employers

The HHS proposed a new rule on November 20, 2015, providing that applicable large employers will only be notified when an employee actually receives health-care coverage through an ACA exchange, rather than when an employee is found eligible for such coverage. This change is intended to reduce confusion among employers and employees. The proposed rule also allows exchanges to choose between notifying employers on an employee by employee basis, or with regard to groups of employees. The proposed rule is scheduled to be published in the Federal Register on December 2, and comments will be accepted through December 21, 2015.

Latest ACA FAQs Address Preventive Services

On October 23, 2015, the Employee Benefits Security Administration (EBSA), jointly with the IRS and HHS, issued new "FAQs" about ACA implementation that address several issues involving lactation counseling benefits, as well as guidance on weight management, colonoscopies and disclosures required by the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). "FAQ 9" actually addresses the religious accommodation "opt-out" process that will be reviewed by the U.S. Supreme Court. The new "FAQs" may be accessed here - http://www.dol.gov/ebsa/faqs/faq-aca29.html.

NLRB Tips: U.S. Circuit Courts Start Review of NLRB Findings

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.

Second Circuit Enforces Facebook "Like" Decision – Court Finds Employees Engaged in Protected, Concerted Activity

The underlying Board decision in *Triple Play Sports Bar* held that a profane comment by one employee and another employee's liking a former employee's post that the company could not do paperwork correctly constituted protected activity. The decision was discussed in detail in the September 2014 ELB, and the case was further noted in the January 2015 ELB. The case was appealed to the Second Circuit Court of Appeals, which has now issued its decision, and it is not good for employers. The Court found that the workers' actions on Facebook amounted to a group of employees discussing labor issues and were not meant to defame the sports bar or its products:

> The Facebook discussion clearly disclosed the ongoing labor dispute over the income tax with[h]holdings, and thus anyone who saw [the cook's] "like" or [the bartenders [obscene] statement could evaluate the message critically in light of that dispute.

***Triple Play's* Contentions**

Relying on *Starbucks Corp.,* 679 F.3d 70 (2nd Cir. 2012), the Employer asserted that the employees' conduct here was akin to the Starbucks situation, when it fired an employee after he engaged in an angry obscenity-laced confrontation with a supervisor inside a coffee store in front of customers.

The court rejected *Triple Play's* arguments, and found that accepting its assertions that *Starbucks* applies because the "Facebook discussion took place 'in the presence of customers' could lead to the undesirable result of chilling virtually all employee speech online."

Unlike in *Starbucks,* the Court found that in *Triple Play,* the Board discussed and applied Board and Court precedent in determining that the employees in question did not engage in "disloyal" conduct warranting their discharge.

Implementation of Quickie Election Rules Makes its Way to the Fifth Circuit Court of Appeals

As predicted in the August 2015 ELB, the adverse rulings by two U.S. District Court Judges have not ended the litigation over the "quickie election" rules. One case is currently pending before the Fifth Circuit Court of Appeals. *Associated Builders and Contractors of Texas Inc. et al. v. National Labor Relations Board/*

The NLRB has responded by brief to various trade organizations' attempts to overturn the implementation of rules streamlining the union election process, stating that the rules were properly enacted within the scope of its rulemaking authority granted by Congress.

The election rule changes, which took effect in April of this year, made a number of adjustments to the NLRB practices and procedures, including eliminating a 25-day waiting period between a decision and direction of election and the election itself, and requiring employers to challenge voter eligibility issues after the election is conducted. (You can read more in the April 2015 ELB).

The lead plaintiffs, along with amici trade associations, took the current appeal to the Fifth Circuit, asking the Court to vacate the District Court's ruling in Texas, and declare the new election rules invalid on their face under the Administrative Procedures Act and the National Labor Relations Act.

Stay tuned for development in this interesting challenge to the election rule changes. If the employer cannot win in front of the Fifth Circuit, then the U.S. Supreme Court might be the only hope for a reversal of the rule changes. The "smart money" says the NLRB will prevail in this

matter despite the Fifth Circuit's apparent antipathy toward the NLRB.

Independent Contractor Standard Change Now Before the D.C. Circuit Court of Appeals

The *FedEx* NLRB case out of Hartford, Connecticut, decided in September of 2014, found that FedEx home delivery drivers were employees and not independent contractors. The case is before the D.C. Circuit Court of Appeals, as FedEx hopes to reverse the Board decision. FedEx argued in its August 2015 brief to the D.C. Circuit that the NLRB decision was at odds with a 2009 District Court decision that found the Boston area FedEx workers were independent contractors, and that the 2009 decision was "materially indistinguishable" from the current matter.

The Original Board Decision

The Agency applied a "refined" approach in the instant case and applied "common law" principles in determining employee status. The NLRB asserts that its refined approach is in line with congressional intent and U.S. Supreme Court precedent.

The D.C. Circuit, although not necessarily the Board, has decided that "entrepreneurial opportunity" is to be considered as a significant factor in determining whether an individual is providing services as part of an independent business or is really employed by the employer (*i.e.*, FedEx here). If there is no entrepreneurial opportunity for the worker, then an independent contractor finding would not be appropriate.

On the other hand, NLRB takes into account the following factors in determining independent contractor status, with no one factor considered as a predominant consideration:

1. The extent of control which, by the agreement, the master may exercise control over the detail of the work.
2. Whether or not the one employed is engaged in a distinct occupation or business.
3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
4. The skill required in the particular occupation.
5. Whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work.
6. The length of time for which the person is employed.
7. The method of payment, whether by the time (employee) or by the job (contractor).
8. Whether or not the work is part of the regular business of the employer.
9. Whether or not the parties believe they are creating the relation of master and servant.
10. Whether the principal is or is not in the business.

In the *FedEx* case here, the Board found that most of the above factors favored a finding of employee, rather than independent contractor status for the drivers. In addition, the Board found that drivers had little, if any, "entrepreneurial opportunity" to increase their compensation while working for FedEx.

Stay tuned for developments in this case. A win by the NLRB would solidify its agenda to erode standards for the finding of employee, rather than independent contractor status. While the Court's finding in 2009 seems to be at odds with the current decision by the Board, as the NLRB points out, the Agency is responsible for defining national labor policy and is "free to refine its analyses, so long as it provides a reasoned justification."

NLRB Wants *En Banc* Review of D.C. Circuit Panel Decision on NLRB's General Counsel Lafe Solomon's Legitimacy of Actions

The NLRB has asked for an *en banc* review (a review by the full court) of an adverse decision by the D.C. Circuit on whether a person may perform the duties of a vacant presidentially appointed office in an acting capacity (*i.e.*, Lafe Solomon) after a president nominates them to that office. In this case, the "back story" is that President Obama simply left Mr. Solomon as the Agency's "Acting"

General Counsel for over three years because the administration failed in obtaining Mr. Solomon's confirmation in the U.S. Senate. During his time as the General Counsel, Mr. Solomon presided over the prosecutorial arm of the NLRB during some of its most prolific times in tilting the playing field in favor of unions.

The Circuit Court Panel Decision

The Court said that, once an individual is nominated, the Agency must submit the name to the Senate and then withdraw the name upon failure to obtain confirmation. Failure to do so violates the Federal Vacancies Reform Act (FVRA). The FVRA prohibits a person from being both the acting officer and the permanent nominee.

Board reaction to the adverse decision was predictable:

> The decision casts an unwarranted cloud over the designations and service in an acting capacity of many past and present senior officers
>
> The decision threatens the ability of future presidents to fill important posts temporarily with the individuals most suited to carry out those offices' responsibilities and to nominate such individual to permanently fill offices, thereby undermining efficiency and continuity in government . . . .

Solomon served as the Acting GC beginning in August 2010, and was then nominated to become permanent GC in January of 2011. Solomon stepped aside on November 4, 2013, when his name was withdrawn in favor of current GC Richard Griffin, Jr. Griffin obtained Senate confirmation of his nomination in late October of 2013.

Fifth Circuit Rules against NLRB in *Murphy Oil USA, Inc.*

The Fifth Circuit again rejected the NLRB's arguments that an employer commits an unfair labor practice by requiring employees to sign mandatory arbitration agreements waiving their right to pursue class actions. *Murphy Oil USA, Inc.*

While the Court refused to enforce the Board order in the case as it relates to class action waivers, it stopped short of finding that the NLRB's nonacquiescence with the Court's decision in *D. R. Horton* required the issuance of sanctions against the Board. The Court noted that the NLRB had not failed to apply the court's *D. R. Horton* ruling in that case or other cases on which the Court had ruled.

What Happens Next

Under the Federal Rules of Appellate Rules and the local court rules, the NLRB and Murphy Oil have 45 days from the entry of a court judgment to file a petition for rehearing by the panel or an *en banc* hearing before the full court. It is doubtful that Murphy Oil will request rehearing, and it may be in the NLRB's court on whether to seek review in the U.S. Supreme Court.

Until the Supreme Court rules on the legality of the NLRB approach on mandatory waivers of class actions, it is likely that the Board will continue to ignore the Fifth Circuit and continue to apply the *D. R. Horton* rationale to mandatory class action waivers.

EEO Tips: Ten Types of Employment Discrimination Not Enforced by EEOC

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.

It is generally well known that the EEOC has authority to investigate and resolve, or if necessary, prosecute a broad spectrum of employment discrimination under the following federal laws:

- Title VII of the Civil Rights Act of 1964, (Including the Pregnancy Act)
- Title I of the Americans With Disabilities Act of 1990,

- The Equal Pay Act of 1963
- The Age Discrimination in Employment Act of 1967 (ADEA)
- Title II of the Genetic Information Nondiscrimination Act of 2008
- Sections 501 and 503 of the Rehabilitation Act of 1973.

However, the heading of this article may be misleading. While there are at least ten types of employment discrimination or regulation of the workplace that are not enforced by the EEOC under the statutes listed above, this is not to say that the types of employment discrimination in question can be done with impunity. Consequently, employers should be aware of some of the other employment-related types of discrimination which are prohibited or where there is some form of workplace regulation which is not enforced by the EEOC. Although, arguably, there may be a few more, the following listing in our judgment includes the most important.

1. **Section 1981 of the Civil Rights Act of 1866 and Civil Rights Act of 1871** – These Acts protect the equal right of all persons within the jurisdiction of the United States to make and enforce contracts without respect to race. This includes all contractual aspects of the employment relationship, such as hiring, discharge, and the terms and conditions of employment. The Supreme Court has held that the statute also prohibits retaliation against persons who complain about race discrimination prohibited by the statute. Moreover, the jurisdictional minimum of 15 employees as required by Title VII does not apply, nor does the Title VII cap on compensatory and punitive damages.

   This law is enforced by individuals, not a federal agency. Under circumstances where an employee does not have standing to sue under Title VII, the employee may allege a violation of Section 1981 of the Civil Rights Act of 1866. This statute however does not proscribe gender-based discrimination only race-based discrimination.

2. **The Family and Medical Leave Act of 1993 (FMLA)** – This Act is generally well know and requires employers with 50 or more employees in each of 20 calendar weeks in the current or preceding year to grant up to 12 weeks of leave during a 12-month period to "eligible employees" who need time off because of a "serious health condition" that they or someone in their family is experiencing. An "eligible employee" is one who has worked for the employer for at least a year, and has worked at least 1,250 hours during the 12-month period immediately before the requested leave. FMLA leave can sometimes overlap with the Title VII requirements concerning leave for pregnancy and pregnancy-related conditions and ADA and Rehabilitation Act requirements concerning leave as an accommodation for an employee with a disability

   The Family and Medical Leave Act is enforced by the U. S. Department of Labor, Employment Standards Administration, Wage and Hour Division.

3. **The Immigration Reform and Control Act of 1986 (IRCA)** (Also known as the **Simpson–Mazzoli Act**) This act was signed into law by President, Ronald Reagan in November, 1986 and was intended to hold employers accountable for recruiting or hiring illegal immigrants. This law legalized certain seasonal agricultural illegal immigrants and also legalized other illegal immigrants (i.e. gave amnesty to them) who had entered the United States before January 1, 1982. Thus, in effect it made it unlawful for employers to fire or refuse to hire certain illegal immigrants on the basis of that person's national origin or citizenship. IRCA also makes it illegal for an employer to request employment verification only from people of a certain national origin (e.g. Hispanics) or only from people who appear to be from a foreign country. Paradoxically, an employer who has citizenship requirements or gives preference to U.S. citizens, under certain circumstances, may also be found to have violated the provisions of IRCA. (Note: there is some overlapping of Title VII and IRCA provisions relative to discrimination on the basis of National Origin.) Generally the employers targeted by this

act were in the agricultural business. The jurisdictional minimum of 15 employees as under Title VII does not apply to IRCA.

The Immigration Reform and Control Act of 1986 is still in effect, and is enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices under the control of the Department of Justice, Civil Rights Division.

4. **Title VI of The Civil Rights Act of 1964** - This statute is a part of the Civil Rights Act of 1964 which contained 10 Titles including Title VII. This statute makes it illegal to discriminate on the basis of race, color, or national origin in programs and activities receiving federal financial assistance. Generally the provisions of this Act have been used to prosecute discrimination by grantees of federal funds for purposes of services or research on a given subject. For example, Public Transportation Commissions, Medicaid and Medicare agencies, extended care facilities, nursing homes, adoption agencies, medical research grantees, adoption agencies, Day Care, Mental Health and senior citizen centers. The primary focus of the Statute is not on employment discrimination but on the inclusion or exclusion of persons with limited English proficiency, race or national origin from the benefits of the project or program in question

   Title VI is enforced by the Department of Justice, Civil Rights Division or The Office of Civil Rights for the Department of Health and Human Services.

5. **Executive Order 11246 of 1965 (as amended)** – This Executive Order prohibits federal contractors and federally-assisted construction contractors and subcontractors, who do over $10,000 in Government business in one year, from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin. The Executive Order further requires Government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment. Additionally, the Executive Order prohibits federal contractors and subcontractors from (under certain circumstances) taking adverse employment actions against applicants and employees for asking about, discussing, or sharing information about their pay or the pay of their co-workers.

   Executive Order 11246 could apply to small employers with less than 15 employees who perform government work costing $10,000 or more. Executive Order 11246 is enforced by the Department of Labor's Office of Federal Contract Compliance (OFCCP).

6. **Title II of The Americans With Disabilities Act of 1990 (ADA)** – This section of the ADA makes it illegal to discriminate against people with disabilities in all programs, activities and services provided by State and Local governmental agencies. This includes public transportation services and physical access to local government buildings.

   Title II of the ADA is enforced by the U.S. Department of Justice, Civil Rights Division.

7. **Title III of The Americans with Disabilities Act of 1990 (ADA)** – This section of the ADA prohibits disability discrimination by private entities that provide services to the public (i.e. "any public accommodation). Public accommodations include for example, restaurants, hotels, movie theaters, stores, doctors' offices, parks, and schools. The law applies to buildings, programs, and services. Under the law, entities who offer public accommodations may have to provide "auxiliary aids and services" such as sign language interpreters, assistive listening devices, or large print materials, unless to do so would cause an "undue hardship."

   Title III is enforced by the U. S. Department of Justice, Civil Rights Division

8. **The National Labor Relations Act of 1935 (as amended (NLRA).** The NLRA was intended to guarantee to workers the right to join unions without fear of management reprisal. In substance the law was intended to protect workers who desired to form, join or support a union, or who were already represented by a union. It also protects workers who join together (i.e. two or more employees) without a union seeking to

modify their wages or working conditions. The Act created the National Labor Relations Board (NLRB) to enforce these rights and prohibited employers from committing unfair labor practices that might discourage organizing or prevent workers from negotiating a union contract. In 1947 the Taft-Hartley Act was passed to curtail some of the union rights. For example provisions were added that allowed unions to be prosecuted, enjoined, and sued for a variety of activities, including mass picketing and secondary boycotts. The NLRA was further amended in 1959 by the Landrum-Griffin Act to clarify the rights of unions and to define unfair labor practices by both unions and employers.

The NLRA is enforced by the National Labor Relations Board.

9. **The Fair Labor Standards Act of 1938 (FLSA).** This Act is probably well known to almost all employers. The FLSA establishes minimum wages, overtime pay eligibility, recording and child labor standards affecting full-time and part-time workers in the private sector and in federal, state and local governments.

   The FLSA is enforced by the Wage and Hour Division of the U.S. Department of Labor.

10. **Workers Compensation Laws**. These laws are also generally well known to all employers. Worker's Compensation is a "form of insurance providing wage replacement and medical benefits to employees injured in the course of employment in exchange for mandatory relinquishment of the employee's right to sue" his or her employer for negligence. Every State and the federal government, has some form of this law. Some Workers Compensation programs require employers to provide job modifications or alternative assignments, which also may be a reasonable accommodation under the ADA. It is important to note that if an employee's occupational injury is covered under both State Workers' Compensation and the ADA (or Rehabilitation Act), the employee may be entitled to a job modification or reassignment under both laws.

There are several other laws which are not enforced by the EEOC such as Sections 503, 504 and 508 of the Rehabilitation Act. However, these sections in substance prohibit discrimination by federal contractors or agencies that receive federal financial assistance against persons with a disability with respect to affirmatively hiring them, the provision of services and activities, and access to the government's information technology.

As stated above, while there may be some consolation that there are a number of employment practices and policies that are not enforced by the EEOC, there may be little comfort in knowing that, for the most part, some other governmental agency is charged with monitoring the policy or practice in question and enforcing some underlying law pertaining to them. Enlightened employers know this already.

OSHA Tips: OSHA and Top Violations 2015

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.

In the fall of each year OSHA releases a listing of standards that were found to be most violated in the past year. The list for the year 2015 was announced at the National Safety Council's Congress and Expo this year. It should be noted that this year's list remains very similar to those of previous years. The number one sited item in 2015 was the lack of fall protection in the construction industry. When fall distances of 6 or more feet exists protection is required in the form of a guardrail or other means. The cited standard is 29 C.F.R. §1926.501. The second item on the list of most frequently violated OSHA standards was issues involving the Hazard Communication Standard. (29 C.F.R. §1910.1200). Leading citation issues in this revised standard involves training, data sheets, and labeling requirements. The third most cited OSHA item for the year was the Construction Industry Standard for scaffolds. (29 C.F.R. §1926.451).

The fourth most violated standard for FY 2015 was the General Industry Standard for Respiratory Protection. (29 C.F.R. §1910.134). Issues involved failing to obtain medical evaluation, perform fit testing, and to provide a written respiratory program among other requirements.

The fifth most violated standard involved lockout/tagout over the control of hazardous energy. (29 C.F.R. §1910.147). This standard requires procedures to be in place and to be followed to prevent the release of hazardous energy while maintenance or service could expose employees to equipment activation or release of energy.

In sixth place of the year was powered industrial trucks. (29 C.F.R. §1910.178). This standard spells out requirements for design, maintenance and use of industrial trucks as well as requirements for their operators.

The seventh place for most violated standards for the year is requirements for ladders. OSHA's applicable standard is 29 C.F.R. §1926.1053.

The eighth most violated standard for the past year were those addressing electrical wiring methods. (29 C.F.R. §1910.305).

The ninth most violated standard cited in 2015 involved machine guarding issues. (29 C.F.R. §1910.212).

Lastly, the tenth most cited violation in 2015 involved electrical issues as set out in 29 C.F.R. §1910.303.

Wage and Hour Tips: Tipped Employees under 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.

Wage and Hour continues to devote substantial resources to certain "low wage" industries each year. Among those regularly targeted are Fast Food, Grocery Stores, Construction, and Restaurants. According to statistics on the Wage Hour website they conducted over 5000 investigations of Restaurants during FY 2014 resulting in more than 44,000 employees being due some $34 million in back wages. A large part of these back wages were as a result of improper use of the tip credit provisions of the Act. Thus, I felt we should revisit the requirements for claiming the tip credit. While my article will address only the requirements of the FLSA, you should be aware that several states do not allow tip credit and almost one-half of the states have their own tip credit regulations, although Alabama does not, that are more stringent than the FLSA. Information regarding the differing state requirements is available on the Wage and Hour website.

The Act defines tipped employees as those who customarily and regularly receive more than $30 per month in tips. Section 3(m) of the FLSA permits an employer to take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage of $2.13 and the minimum wage. Thus, the maximum tip credit that an employer can currently claim under the FLSA is $5.12 per hour (the minimum wage of $7.25 minus the minimum required cash wage of $2.13).

The new regulations, which became effective in April 2011, state that the employer must provide the following information to a tipped employee before using the tip credit:

1. The amount of cash wage the employer is paying a tipped employee, which must be at least $2.13 per hour.
2. The additional amount claimed by the employer as a tip credit;
3. That the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;
4. That all tips received by the tipped employee are to be retained by the employee except for a valid

tip pooling arrangement limited to employees who customarily and regularly receive tips; and

5. That the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

The regulations state that the employer may provide **oral or written notice** to its tipped employees informing them of the items above. Further, they state that an employer must be able to show that he has provided such notice. They also state that an employer who fails to provide the required information cannot use the tip credit provisions and thus must pay the tipped employee at least $7.25 per hour in wages plus allow the tipped employee to keep all tips received. In order for an employer to be able to prove that the notice has been furnished the employees, I recommend that a written notice be provided.

Employers electing to use the tip credit provision must be able to show that tipped employees receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined. If an employee's tips combined with the employer's direct (or cash) wages of at least $2.13 per hour do not equal the minimum hourly wage of $7.25 per hour, the employer must make up the difference.

The regulations also state that a tip is the sole property of the tipped employee regardless of whether the employer takes a tip credit and prohibit any arrangement between the employer and the tipped employee whereby any part of the tip received becomes the property of the employer. The Department's 2011 final rule amending its tip credit regulations specifically sets out Wage and Hour's interpretation of the Act's limitations on an employer's use of its employees' tips when a tip credit is not taken. Those regulations state in pertinent part:

> Tips are the property of the employee whether or not the employer that has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

Yet, they do allow for tip pooling among employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, and service bartenders. Conversely, a valid tip pool may not include employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs, and janitors. A factor in who may be included in the tip pool concerns whether the employee has direct interaction with the customer. One positive change is the regulations no longer impose a maximum contribution amount or percentage on valid mandatory tip pools. The employer, however, must notify tipped employees of any required tip pool contribution amount, may only take a tip credit for the actual amount of tips each tipped employee ultimately receives.

When an employee is employed in both a tipped and a non-tipped occupation, the tip credit is available only for the hours spent by the employee in the tipped occupation. An employer may take the tip credit for time that the tipped employee spends in duties related to the tipped occupation, even though such duties may not produce tips. For example, a server who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses is considered to be engaged in a tipped occupation even though these duties are not tip producing. However, where the tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing non-tipped duties, no tip credit may be taken for the time spent in such duties.

A compulsory charge for service, such as a charge that is placed on a ticket where the number of guests at a table exceeds a specified limit, is not a tip. The service charges cannot be counted as tips received, but may be used to satisfy the employer's minimum wage and overtime obligations under the FLSA. If an employee receives tips in addition to the compulsory service charge, those tips may be considered in determining whether the employee is a tipped employee and in the application of the tip credit.

Where tips are charged on a credit card and the employer must pay the credit card company a fee, the employer may deduct the fee from the employee’s tips. Further if an employee does not receive sufficient tips to make up the difference between the direct (or cash) wage payment

(which must be at least $2.13 per hour) and the minimum wage, the employer must make up the difference. When an employee receives tips only and is paid no cash wage, the full minimum wage is owed.

Deductions from an employee's wages for walk-outs, breakage, or cash register shortages that reduce the employee's wages below the minimum wage are illegal. If a tipped employee is paid $2.13 per hour in direct (or cash) wages and the employer claims the maximum tip credit of $5.12 per hour, no deductions can be made without reducing the employee below the minimum wage (even where the employee receives more than $5.12 per hour in tips).

These April 2011 regulations established that if a tipped employee is required to contribute to a tip pool that includes employees who do not customarily and regularly receive tips, the employee is owed all tips he or she contributed to the pool and the full $7.25 minimum wage.

Computing Overtime Compensation for tipped employees:

When an employer takes the tip credit, overtime is calculated on the full minimum wage, not the lower direct (or cash) wage payment. The employer may not take a larger tip credit for an overtime hours than for a straight time hours. For example, if an employee works 45 hours during a workweek, the employee is due 40 hours X $2.13 straight time pay and 5 hours overtime at $5.76 per hour ($7.25 X 1.5 minus $5.12 in tip credit).

The National Restaurant Association, along with several other groups, filed suit against the Labor Department seeking to overturn the regulations. However, the Court allowed the new rules to take effect. Wage and Hour issued a Staff Enforcement Bulletin, which can be found on the Wage and Hour website, in February 2012 instructing their investigators to enforce the new regulations. According to some information I have seen there have been almost 100 Fair Labor Standards Act suits filed in Alabama in 2015 including numerous restaurants.

Changes in the Requirements for the "White Collar" Exemptions

I know most of you are anxious to learn when Wage and Hour will issue the revised regulations that propose to substantially increase the salary requirement for these exemptions. In a notice published last week by the Office of Management and Budget their target date is July 2016. However, as with most regulations the actual date could be subject to change, and we expect the date to be later in the year.

If you have questions regarding these rules or other Wage and Hour issues do not hesitate to give me a call.

Did You Know . . .?

. . . that time spent in line for security checks is not considered working time under the Fair Labor Standards Act? *Frlekin, et al. v. Apple, Inc.* (N.D. Cal. Nov. 7, 2015). According to the Court, the Apple employees were not "suffered or permitted to work," which is the "working time" definition under the Fair Labor Standards Act. Furthermore, the security check did not "relate to their job responsibilities." Whether to bring any items to the workplace was an employee choice, not an employer choice or requirement. Thus, bringing items to work was an "optional benefit" for employees. That employee option to bring or not bring personal items to work was "fatal to their claims," ruled the Court.

. . . that IBEW members have filed a retaliation claim against the union for failing to refer them to jobs due to their age? *Kazolias v. IBEW Local Union No. 363* (2nd Cir. 2015). Employees filed age discrimination charges, claiming that the union did not send them out to jobs from the hiring hall based upon their age. Then, the same employees filed another charge and lawsuit, claiming that the union retaliated against them for filing the initial charge. The union argued that the case should be preempted by the National Labor Relations Act. However, the Appellate Court stated that a union's hiring hall practices are covered by the age discrimination and employment act and thus a retaliation claim was viable. Evidence was presented that the union's business manager, in reference to the plaintiffs, stated that he wasn't going to let "a few assholes" destroy the business manager's efforts on behalf of the union.

. . . that female participation in the workforce has dropped as more women remain in school? According to an analysis released on November 6, 2015, by the Federal Reserve Bank of Richmond, the percentage of women over age sixteen who remain in high school and attend college increased from 10% to 15%, while their labor force participation declined from 65.52% in 2000 to 59.5% in 2015. This analysis was part of an overall Federal Reserve Bank review of the declining participation in the U.S. labor force, which it views as an impediment to a robust economic recovery. Among married women, 58.52% participated in the labor force, down from 61.38% in 2000. Also, the analysis indicated that women with children under age six, whether single or married, participated in the labor force at a much higher percentage than those without similarly aged children.

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