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Your Workplace Is Our Work®

Inside this issue:

Predictions and Resolutions for the New Year

In our judgment, 2016 will be one of the most dynamic we can recall concerning workplace issues. Combining a tumultuous election cycle with regulatory agencies on steroids as President Obama's term comes to an end, employers may expect the following:

1. Aggressive OSHA enforcement. Fines have increased. Notorious workplace violence incidents raise questions about employer actions and plans to identify potential workplace violence risks and training employees on how to handle such risks. Be sure your training recognizes and addresses the four main categories of workplace violence: (1) criminal—where the perpetrator has no business relationship with the employer or victim (e.g., a robbery of a retail store); (2) customer—where the perpetrator is a customer who becomes threatening in the course of the business relationship; (3) co-worker—where the perpetrator is a current or former employee; (4) domestic violence—where the perpetrator has no business relationship with the employer and is motivated to harm or threaten the victim based on their personal or familial relationship.

2. The National Labor Relations Board will issue a decision expanding the union organizing rights of temporary employees. Temporary employees are temporary for a reason, and may find that their inability to secure regular employment status makes unionization an attractive alternative.

3. The U.S. Department of Labor will substantially increase the salary threshold for exempt status, but is likely to permit employers to include non-discretionary bonuses in that calculation. The attention focused on Wage and Hour issues—exemptions, the "fight for $15"—has increased employees' overall awareness regarding Wage and Hour compliance. Wage and Hour litigation will continue to increase; other employment related litigation has declined. Conduct you own Wage and Hour audit, with particular focus on exemptions and proper compensation for meal and break time.

4. The EEOC will become more aggressive, as it was roundly criticized for finding reasonable cause in only 2.9% of all charges filed last year. Expect more aggressive and more thorough investigations.

5. Pregnancy discrimination will be a prime area of EEOC focus. This includes adverse actions taken at any time during an employee's pregnancy or after an employee's return from pregnancy, leave for

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pregnancy related reasons if an employee does not qualify for FMLA leave and adverse compensation or promotion decisions which allegedly relate to pregnancy.

6. Unions will increase their organizing efforts at micro bargaining units.

   For example, rather than trying to organize 1,800 employees at Volkswagen's facility in Chattanooga, Tennessee, the UAW organized 170 employees who were classified as maintenance. The smaller the proposed bargaining unit, the greater the likelihood for union success. Union petitions for elections have increased by about 20% compared to last year at this time. We expect more union organizing to be directed toward factual units—to use a baseball analogy, unions will try to hit singles rather than homeruns and thus strike out less. A higher percentage of employment lawsuits go to trial than any other civil litigation. This trend will increase, particularly at the federal court level, as we are about to begin the eighth year of President Obama's authority to appoint federal district and appellate court judges. The transition of the Judiciary endures well beyond the end of any President's term.

We will, of course, remain vigilant and not only share with you "what's happening," but also provide our assessment of what we think will happen so that we can work with you to develop a strategy to avoid the storm cells and end up with a smooth landing.

We wish you, your family, and your colleagues the best for a healthy, peaceful and prosperous 2016.

Email and Overtime

Employers face a challenge of determining their obligation for counting as "working time" the time an employee spends checking email away from work. We have all been in situations, where, during a conversation or at the dinner table, someone looks at their smart phone for no apparent reason to check their email. For those employees who are not exempt from minimum wage and overtime, is that compensable time? That question was considered recently in the case of *Allen v. City of Chicago* (N.D. Ill. Dec. 10, 2015).

The issue involved 51 police officers who claimed that their responsibility to "monitor" their email meant that it should be considered compensable time. The City had a policy that required off-duty officers to check email, and if the email required them to take action, they were told to report that as working time. Officers who did not report the time said the department knew they acted on emails and should have been paid, anyway. In rejecting the claim, the court stated that officers "failed to prove that supervisors knew if and when particular officers failed to submit time due slips for off duty BlackBerry work."

Under the Fair Labor Standards Act, "monitoring" email away from work is considered *de minimis*. That means that such time is minimal and is not compensable, provided the employees are spending their non-duty time primarily for their own benefit and with infrequent interruptions. Once an employee is required to act based upon an email, text, or voicemail, then it becomes compensable.

In this case, employees were required to check email. Another issue employers face is where employees are not required to check email away from work but choose to do so and actually engage in work responsibilities. Such time is considered compensable under the FLSA. Employers should establish parameters for when "work away from work" is required, permitted, or prohibited. It is essential to establish a process where if such work occurs, the employer becomes aware of it by the next work day, so that the employer can evaluate whether it should be compensated. Remember that if an employee performs work on behalf of the employer without the employer's permission or knowledge, it is still compensable, although the employee may be disciplined.

Domestic Violence Leave

National awareness regarding domestic violence issues has understandably had an impact on employer rights and responsibilities. Eighteen states and the District of Columbia have legislation that protects employees from

workplace consequences of domestic violence and/or provides for protected leave for the victims of domestic violence. Well-intentioned employers may find themselves as a resource and sounding board for employees facing domestic violence situations. In the case of *Rosales v. Moneytree, Inc.* (Cal. Ct. App. Nov. 30, 2015), a court was not fooled into thinking an employer's compassionate responses to its employee's domestic violence situation was evidence that the employer desired to terminate her because of her use of domestic violence leave.

Rosales, on three different occasions, requested and received leave to deal with domestic violence issues. In some of the situations, the leave was due to her physical appearance based upon the beatings she received from her boyfriend, and in other situations the leave involved time for court hearings related to her boyfriend. One of her supervisors told her that she could "do better" in selecting a partner. (What great insight!) And that she should "get on" with other choices in her life. Another supervisor expressed to Rosales concern that Rosales was not trying to remove herself from the situation—she continued to return to live with the abusive boyfriend.

Within three to four weeks after Rosales's last domestic violence leave, she was terminated because she stole bus passes which Moneytree provided to its customers. Rosales claimed that she was terminated in retaliation for using domestic violence leave. Rosales claimed that the employer did not have direct evidence that she stole the passes and, therefore, the reason for her termination must be due to the domestic violence absences.

In granting summary judgment for the employer, the court stated that "[T]he law does not require Moneytree to have irrefutable proof Rosales was untruthful and stole the passes. In discrimination cases such as this, the issue is not the objective truth or falsity of Moneytree's stated reason for terminating Rosales, but whether Moneytree honestly believed Rosales was untruthful and took the passes."

Managers understandably become frustrated when consideration and care toward an employee ends up as evidence in an employee's lawsuit against the employer. In this case, the court got it right and refused to let that happen. Employers should be encouraged to enhance their workplace culture by showing care and concern for those employees who are dealing with domestic violence matters. Furthermore, we suggest it is the responsibility of employers to become involved, because domestic violence presents a risk of workplace violence.

HR Manager Protected from FLSA Retaliation

Does an individual need to assert a claim of a Wage and Hour violation concerning the individual in order to be protected from retaliation? No, ruled the court in *Rosenfield v. GlobalTranz Enterprises, Inc.* (9th Cir. Dec. 14, 2015). The general principal regarding retaliation under the Fair Labor Standards Act is that if an individual gives "fair notice" of making an FLSA complaint, the individual is protected from retaliation for doing so. Rosenfield was the Human Resources Director and did not make a Wage and Hour complaint regarding her compensation. Rather, on multiple times she communicated to the employer that she felt the employer did not comply with the FLSA. The "fair notice" test typically covers that an individual is either asserting rights under the Fair Labor Standards Act or asking for protection under the Fair Labor Standards Act. Rosenfield did neither—she communicated to her employer concerns about whether the employer complied with the law.

Rosenfield's supervisor told her that the company would make changes based upon her recommendations. When the company did not follow through with those changes, she again complained to her boss, who terminated her five days later.

The dissent argued that Rosenfield's actions were within her responsibilities as a manager but did not involve either asserting rights regarding her own compensation or filing a complaint under the FLSA, both of which are protected from retaliation. The dissent points out that this decision gives greater protection against retaliation for managers than non-managers. "It is a strange result the Majority reaches, which treats upper management better than rank and file non-management employees for whom the Act's protections are primarily designed."

The implication in this decision is that a manager who expresses compliance concerns to another manager would have a viable claim of retaliation if that individual suffers an adverse action. This rationale behind this decision could have broader implications in other areas of the law, for instance, where a manager makes suggestions about how a policy should be revised (such as to include sexual orientation as a protected class, for example) or applied. Approximately 44% of all discrimination charges allege retaliation. Note that retaliation is the most dominant employment claim and is covered by virtually every local, state or federal employment statute or regulation.

ACA Update

On December 18, 2015, Congress passed the Consolidated Appropriations Act of 2016 which included a delay of the Cadillac Tax until 2020. Prior to the passage of the Appropriations Act, the Cadillac Tax, which imposes a 40% excise tax on high-cost coverage insurance plans, was scheduled to go into effect in 2018. Under the new law, this tax will become effective for tax years beginning after December 31, 2019. Congress has also ordered a study to be conducted on more suitable benchmarks for age and gender adjustments of the Cadillac Tax.

The IRS has developed a new resource, the "ACA Information Center for Applicable Large Employers," that is accessible at https://www.irs.gov/Affordable-Care-Act/Employers/ACA-Information-Center-for-Applicable-Large-Employers-ALEs. There is a link on the new IRS resource page for Health Care Reporting Forms that includes the 2015 version of Forms 1095-C and 1095-B. As a reminder, these reporting forms are due for the first time in early 2016 for certain employers. More detailed information about these reporting requirements is set forth in the July ELB. The 1094-B & C Forms are also available on the IRS.gov site.

On December 3, 2015, the Senate passed the "Restoring American's Healthcare Freedom Reconciliation Act of 2015, which was previously passed by the House on October 23, 2015. The bill proposes repeal of the individual mandate, the employer mandate, the automatic enrollment requirements of the ACA, the Cadillac Tax (which has now been delayed until 2020), and the Medical Device Excise Tax. Since the Senate added several amendments to the House's bill, it will now go back to the House, but if the amended bill passes in the House, a Presidential veto is expected. Although the Democrats called the bill "absurd" and "a waste of time," the Republican Chair of the Senate Finance Committee, Orrin Hatch (Utah), said that Republicans "fulfilled our promise to end the negative consequences of Obamacare by repealing the President's unaffordable health law. It's now time the Obama Administration and Democrats own up to the law's failures, reverse course, and work with Republicans to forge patient-centered reforms that reduce costs and improve care for the American people."

The IRS recently issued Notice 2015-87, which contains substantial guidance with regard to twenty-six frequently asked questions addressing the application of various provisions of the Affordable Care Act, including Health Reimbursement Arrangements, COBRA rules and ACA applicability to government entities. (*See*, https://www.irs.gov/pub/irs-drop/n-15-87.pdf). The IRS also recently issued Notice 2015-86 which addresses the effect of the Supreme Court's decision in *Obergefell v. Hodges* to qualified retirement plans and to Section 125 health and welfare plans. The IRS acknowledges in this notice that it did not expect *Obergefell* to have a significant impact on application of the tax law to employee benefit plans because same sex marriages have already been recognized for purposes of federal tax law pursuant to the 2013 Supreme Court case *U.S. v. Windsor*. Plan amendments that were previously required under *Windsor,* and the IRS's post-*Windsor* guidance, should already have been adopted and effective. Any additional plan changes may contemplated include new rights or benefits with respect to participants who have same sex spouses and are discretionary, as long as such amendments comply with the applicable qualification requirements. The deadline for adopting any such discretionary amendments is generally the end of the plan year in which the amendment is operationally effective.

NLRB Tips: Recent Decisions and a Statistical Look at Election Results

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NLRB Continues to Ignore Fifth Circuit – Overturns Class Action Waivers

In spite of the Fifth Circuit Court of Appeals' decisions in *D. R. Horton* (Dec. 2013) and *Murphy Oil USA* (Nov. 2015), the Board continues to apply its reasoning in waiver cases involving mandatory arbitration agreements. As pointed out in the LMVT November 2015 ELB, the "clock is ticking" on the NLRB asking the U.S. Supreme Court to settle the matter once and for all if it is ever going to have its viewpoint enforced in the circuit courts. The cases discussed below illustrate the Board's intransigence on this issue, and all of the cited cases involve variations on "opt-out" language.

1. *On Assignment Staffing Services, Inc.* (Aug. 2015) – the Board found, in August of this year, that the right to join with co-workers to bring challenges over terms and condition of employment is by definition protected, concerted activity, and therefore cannot be restricted in any fashion by an employer-required class waiver or individual worker arbitration agreement.

   In *On Assignment,* the panel was presented with an arbitration agreement that provided an "opt-out" provision within ten (10) days of beginning employment with the Company. As such, the employer argued the agreement was not a required condition of employment, and that *Murphy Oil* did not apply.

   The Board found that the "opt-out" procedure was in itself a burden on the exercise of rights protected under the NLRA, and thus was illegal. The Agency noted that the opt-out provision required employees to "prospectively waive" their right to engage in protected, concerted activity.

2. *Nijjar Realty, Inc.* (Nov. 2015) – A divided panel determined that a mandatory arbitration agreement containing a class and collective action waiver was illegal even though employees could opt out of the agreement.

   The panel's decision was decided along party lines. Democrats Chairman Mart Gaston Pierce and Member Lauren McFerran reaffirmed the Board's position that a prospective waiver of employee rights, even if the waiver is voluntary, is illegal.

   In dissent, Republican appointee Philip A. Miscimarra found that the opt-out provision makes the waiver legal. Miscimarra stated that text of the NLRA supports, rather than limits, the rights of employees to waive participation in class or collective procedures.

3. *Professional Janitorial Services of Houston* (Nov. 2015) – another opt-out case, the Company attempted to validate its mandatory arbitration agreement by **specifically** exempting labor board claims from the waiver. The policy excluded "non-waivable statutory claims" including the filing of NLRB charges from its policy.

   The Board found this illegal, saying that the language used by the employer failed to convey to employees "any clear meaning." Finding that the policy, as stated, suggested that workers would have to arbitrate unfair labor practice claims, the panel found the policy illegal.

   The policy language provided:

   > [A]ny non-waivable statutory claims, which may include wage claims within the jurisdiction within a local or state labor commission or administrative agency, charges before the Equal Employment Opportunity Commission, National Labor Relations Board, or similar local or state agencies, are not subject to exclusive review by arbitration.

   The Employer might have had its waiver found legal had it not also added that employees must "use arbitration if [the employee] wish[es] to pursue further [their] legal rights, rather than filing a lawsuit on the

action," once the Agency had completed its investigation.

Of course, the importance of making arbitration mandatory for employees is obvious. Not being able to enforce the arbitration agreement before the NLRB defeats the purpose of the mandatory waiver, and renders the policy superfluous.

4. *U.S. Xpress Enterprises, Inc.* (Nov. 2015) – here again, in an opt-out situation, the NLRB found the mandatory arbitration agreement with a class-action waiver illegal. In *U.S. Xpress,* the Company argued that the opt-out provision made the signing of the arbitration agreement voluntary, and therefore not a condition of employment.

   The Administrative Law Judge, in the underlying decision, rejected the Company's argument:

   > [The arbitration agreement] strikes me as patently skewed in favor of the employer and to make illusory any free choice on the part of employees to opt-out of the [mandatory arbitration agreement].

   Again, Member Miscimarra dissented, and stated in relevant part:

   > The legality of such a waiver is even more self-evident when the agreement contains an opt-out provision based on every employee's . . . right to present and adjust grievances on an 'individual' basis and each employee's right to 'refrain from' engaging in protected, concerted activities.

A recent U.S. Supreme Court, *DirecTV v. Imburgia*, case appears to damage the NLRB stance on binding arbitration/mandatory waivers, at least in consumer contracts. In a 6-3 decision, issued on December 14, 2015, written by Stephen Breyer, the Court reversed a California Appeals Court decision that found that the language of DIRECTV's service contracts were subject to a state law banning class action waivers. The Supreme Court stated that the problem with the California Appeals Court decision is that it ignored the Court's earlier ruling that the Federal Arbitration Act (FAA) preempted state action on class action waivers. Admittedly, this case involving the DIRECTV waiver did not involve a federal statute such as the NLRA, but the decision demonstrates the Supreme Court's "interpretation" of waivers in arbitration cases involving private contracts under the FAA, and the Court's affinity for the FAA in general.

The Bottom Line

Expect all four decisions to be appealed in the circuit courts with the opt-out provisions playing a major role in whether or not the circuits enforce the Board orders. In the meantime, just understand that it remains difficult, if not impossible, to implement a mandatory arbitration agreement with class-action waiver features that will withstand NLRB scrutiny. As noted here and in earlier LMVT bulletins, it remains to be seen whether the U.S. Supreme Court will ultimately buy the NLRB's stubborn adherence to its *D. R. Horton* decision.

Micro-Unit of Maintenance Employees Found Appropriate at VW Chattanooga

On November 18, 2015, the Regional Director of Region 10 ordered a representation election be held among a unit of skilled maintenance workers at the Volkswagen ("VW") Chattanooga facility. While VW contended that the only appropriate unit included all production employees, the Region applied *Specialty Healthcare* and determined that VW failed to establish that the production workers shared an "overwhelming community of interest" with the maintenance employees petitioned for by the Union:

> Although the Employer's contentions may establish that the broader unit sought by the Employer is an appropriate unit, they are insufficient to establish that production employees share such an overwhelming community of interest as to require their inclusion in the unit.

The election was held on December 3 and 4, 2015. The Union won the election by a wide margin, 108 yes to 44 no votes. It is unclear if VW will appeal the decision to order the election in a micro-unit, although it has announced that it intends to appeal the Director's decision ordering the election. Volkswagen has fourteen

days from the date of the certification of results, on December 14, 2015, to decide whether to seek review of the finding of a micro-unit consisting only of skilled maintenance employees.

Even if VW Chattanooga appeals to the Board in Washington D.C., look for the Agency to affirm the decision and direction of election by refusing to review the Director's decision. Thus, the only effective way to challenge the election is for VW to refuse to bargain after the election results are certified The UAW filed a 8(a)(5) refusal to bargain in Region 10 on December 21, 2015, signaling its intention to request review by the Board by December 28, 2015.

UAW Secretary-Treasurer Gary stated that it is "unfortunate that, in the middle of [VW's] widening emissions scandal, we had to spend weeks debating workers' rights that clearly are protected under federal law. Looking ahead, our hope is that the company now will recommit to the values that made Volkswagen a great brand – environmental sustainability and true co-determination [of working conditions] between management and employees."

The UAW is obviously ready to move ahead with gaining representation rights plant-wide. To this end, look for the UAW to use this election as a first step in organizing the VW Chattanooga facility in its entirety. While a bargaining unit consisting only of production employees will be harder to organize than the small unit of maintenance employees, look for the UAW to try for the broader unit as early as 2016.

LMVT will keep you apprised of developments as they unfold in VW / Chattanooga.

Election Results after Rule Changes Do Not Indicate Significant Union Advantages—Yet

A review of NLRB-provided statistics does not indicate the "end of the world" posited by some management representatives after the April 14, 2015, implementation of the new "quickie" election rules. (Discussed in the April 2015 ELB).

Two observations are appropriate: 1) statistics can be twisted to reflect anything and 2) the time from the filing of the representation petition until the time of the election has been significantly compressed.

As to the compression of time, the rule changes have accomplished their purpose. For decades before the changes, the NLRB strove for a 45-day election, and actually recently achieved a median time of 38 days from the filing of the petition to the election. Since the implementation of the rule changes, the median time for the timing of an election from the filing of the petition has fallen to 23 days. This is a significant two week shrinkage – or almost forty percent reduction of time from the filing of the petition to the holding of the election. Since the passage of time to the holding of an election has been a major complaint by unions, the implementation of the rules, as far as time reduction, may be judged as a success by the activist NLRB.

Turning to the election results themselves, the outcomes are not so easily judged. The aggregate statistics on results do not necessarily reflect that unions are translating the compressed timing of elections into better outcomes. In total elections filed (RC, RD and RM petitions), unions, in fiscal years 2013, 2014 and 2015, have won 60%, 63% and 66% of the time, respectively. In the RC category, by far the most prevalent classification, unions have won 63%, 68% and 69% of the time in each respective fiscal year.

In the first month of fiscal year 2016, unions won 67% of total elections held, and won 70% of RC petitions filed.

How does one reconcile the predictions of overwhelming labor success with the statistics? Anecdotally, neither management nor labor practitioners are seeing a substantial number of micro-unit filings by labor organizations. Labor still prefers a larger bargaining unit, and the dues money that comes from representing more employees. Therefore, while this weapon is available, it has not played out as of yet. The majority of smaller bargaining units appear in the retail and hospitality industries – though the hard statistics to bear this feeling out have not been provided by the Agency. Were these statistics available, one might expect unions to win close to 80% of these types of elections.

OSHA Tips: OSHA Standards and Written Procedures

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 Safety and Health standards include many that specify written procedures. The following, while not all inclusive, are among those that do require specific written procedures or programs.

One such standard is the Emergency Action Plan. 29 C.F.R. §1910.38. This standard requires that an emergency plan must be in writing, kept in the workplace, and is available for review by employees. An employer with 10 or fewer employees may communicate the plan orally to employees.

A hearing conservation program must be employed whenever employees are exposed to noise levels equal to an 8 hour time-weighted average of 85 decibels as set out in OSHA standard. 29 C.F.R. §1910.95.

OSHA requires that all necessary protective equipment be provided, used and maintained in a sanitary and reliable condition. 29 C.F.R. §1910.132.

Permit required confined spaces must be identified and access allowed only to those appropriately trained. 29 C.F.R. §1910.146.

OSHA requires an emergency action plan when it is specified in a standard. These must be in writing unless the employer has 10 or fewer employees and must be available in the work-place. 29 C.F.R. §1910.38.

OSHA requires documentation of energy control procedures. 29 C.F.R. §1910.47.

OSHA requires a written exposure control plan for bloodborne pathogens. 29 C.F.R. §1910.30.

OSHA requires an employer to have an emergency action plan in writing whenever an OSHA standard requires one. This would include procedures for reporting fires, evacuating the facility and the like. 29 C.F.R. §1910.38.

The employer is charged with maintaining fire detection and alarm systems. 29 C.F.R. §1910.164-65.

OSHA requires employers to perform an assessment to determine personal protective equipment needs and maintain PPE. 29 C.F.R. §1910.132

The employer is required to verify that the worksite hazard assessment has been performed through a written certification that identifies the workplace evaluated, the person certifying that the evaluation has been performed, the dates of the assessment, and identifies the document as certification of hazard assessment.

Wage and Hour Tips: Application of the Fair Labor Standards Act to Domestic Service

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

In September 2013, the Department issued a final rule concerning domestic service workers under the Fair Labor Standards Act that makes substantial changes to the minimum wage and overtime protection to the many workers who, by their service, enable the elderly and individuals with disabilities to continue to live independently in their homes and participate in their communities. The Final Rule, which became effective January 1, 2015, contains several significant changes from the prior regulations, including: (1) the tasks that

comprise "companionship services" are more clearly defined; and (2) the exemptions for companionship services and live-in domestic service employees are limited to the individual, family, or household using the services; and (3) the recordkeeping requirements for employers of live-in domestic service employees are revised.

Prior to the new regulations taking effect, some Industry Associations filed suit attempting to overturn the changes. However, after hearing the various appeals the U.S. Court of Appeals for Washington, D.C. upheld the regulations and the U.S. Supreme Court has refused to block the application. Thus, the Department has begun their enforcement.

Below are excerpts from a Wage and Hour Fact Sheet that outlines the major changes in the regulations.

Minimum Wage and Overtime Protections. This Final Rule revises the definition of "companionship services" to clarify and narrow the duties that fall within the term and prohibits third party employers, such as home care agencies, from claiming the companionship or live-in exemptions.

Companionship Services. The term "companionship services" means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. Under the Final Rule, "companionship services" also includes the provision of "care" if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek.

Fellowship and Protection. Under the Final Rule, "fellowship" means to engage the person in social, physical, and mental activities. "Protection" means to be present with the person in their home or to accompany the person when outside of the home to monitor the person's safety and well-being. Examples of fellowship and protection may include: conversation, reading, games, crafts, accompanying the person on walks, and going on errands, to appointments, or to social events with the person.

Care. The definition of companionship services allows for the performance of "care" services if those services are performed attendant to and in conjunction with the provision of fellowship and protection and if they do not exceed 20 percent of the employee's total hours worked in a workweek per consumer. In the Final Rule, "care" is defined as assistance with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).

Household Work. The Final Rule limits household work to that benefitting the elderly person or person with an illness, injury, or disability. Household work that primarily benefits other members of the household, such as making dinner for another household member or doing laundry for everyone in the household, results in loss of the companionship exemption and thus the employee would be entitled to minimum wage and overtime pay for that workweek.

Medically Related Services. The definition of companionship services does not include the provision of medically related services which are typically performed by trained personnel. Under the Final Rule, the determination of whether a task is medically related is based on whether the services typically require (and are performed by) trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants. The determination is not based on the actual training or occupational title of the worker performing the services. Performance of medically related tasks during the workweek results in loss of the exemption and the employee is entitled to minimum wage and overtime pay for that workweek.

Live-In Domestic Service Employees. Live-in domestic service workers who reside in the employer's home permanently or for an extended period of time and are employed by an individual, family, or household are exempt from overtime pay, although they must be paid at least the federal minimum wage for all hours worked. Live-in domestic service workers who are solely or jointly

employed by a third party must be paid at least the federal minimum wage and overtime pay for all hours worked by that third party employer. Employers of live-in domestic service workers may enter into agreements to exclude certain time from compensable hours worked, such as sleep time, meal time, and other periods of complete freedom from work duties. (If the sleep time, meal periods, or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked.) Under the Final Rule, these employers must also maintain an accurate record of hours worked by live-in domestic service workers. The employer may require the live-in domestic service employee to record his or her hours worked and to submit the record to the employer.

Third Party Employers. Under the Final Rule, third party employers of direct care workers (such as home care staffing agencies) are not permitted to claim either the exemption for companionship services or the exemption for live-in domestic service employees. Third party employers may not claim either exemption even when the employee is jointly employed by the third party employer and the individual, family, or household using the services. However, the individual, family, or household may claim any applicable exemption. Therefore, even if there is another third party employer, the individual, family, or household will not be liable for unpaid wages under the FLSA provided the requirements of an applicable exemption are met.

Paid Family or Household Members in Certain Medicaid-Funded and Certain Other Publicly-Funded Programs Offering Home Care Services. In recognition of the significant and unique nature of paid family and household caregiving in certain Medicaid-funded and certain other publicly-funded programs, the Department has determined that the FLSA does not necessarily require that once a family or household member is paid to provide some home care services that all care provided by that family or household member is part of the employment relationship. Where applicable, the Department will not consider a family or household member with a pre-existing close personal relationship with the consumer to be employed beyond a written agreement developed with the involvement and approval of the program and the consumer (or the consumer's representative), usually called a plan of care, that reasonably defines and limits the hours for which paid home care services will be provided.

Although the revised regulations became effective on January 1, 2015, the Department announced that it would not take any enforcement actions to enforce the new regulations until July 1, 2015, and it further stated that it would be judicious in its enforcement activities during the remainder of 2015. As this period of particularly restrained enforcement comes to an end, I encourage employers to review their pay practices to ensure that they are paying their employees properly. Furthermore, the fact that the Department has limited its enforcement activities during 2015 did not and does not preclude an employee from instituting a private action when he believes that he is not being paid in compliance with the Fair Labor Standards Act.

Several states will increase minimum wage rates as 2015 becomes 2016. Almost one-half of the states have established a minimum greater than the federal rate of $7.25 while there are five states, including Alabama, which do not have a minimum wage statute. If you operate in multiple states it would behoove you to check with the Labor Department in the individual states to make sure you are paying the correct rate in that state. Also many of the states have a different "tip credit" from the requirements of the FLSA.

If you have any questions do not hesitate to give me a call.

Did You Know . . . ?

. . . that only 1/3 of U.S. workers believes that becoming a manager will advance their careers? This was based upon a survey by Addison Group, a professional staffing website. The survey involved fifteen hundred employees born between 1946 and 1995. Only 25% of those surveyed who were managers cared to become more effective managers. 17% of those surveyed said they had no interest in managing anybody. Approximately 25% of Millennials are seeking upward mobility, compared to 19% of Gen Xers and 9% of Boomers. If Millennials do not think they can advance in a job, they are more likely

than any other generation to leave it. Also, and what initially would appear to be contradictory, "we're seeing more millennials who want to be knowledge experts today, rather than in charge of other people."

. . . that United States Senate cafeteria workers were on strike? These employees work at the Dirksen Senate Office Building cafeteria and the Capital Visitor Center. They were on strike to gain a minimum wage of $15 per hour. The individuals are employed by the Compass Group, a private contractor. The strike was also part of an attempt to gain union representation. It was the sixth one-day strike this workforce engaged in during the past twelve months.

. . . that a township in Illinois passed a "right-to-work" law covering private sector employees? In a "right-to-work state," union security language is illegal. Union security is often referred to as "union shop." It means that employees must join and remain members of the union or pay the equivalent of union dues or fees or else be terminated. In a right-to-work state, union security language is illegal. Illinois is not a right-to-work state, but on December 14, 2015, the village of Lincolnshire enacted a "work empowerment" ordinance. Lincolnshire, a community of approximately 7,300, now prohibits union security language and prohibits anyone from pressuring an employee to "join, affiliate with or financially support a labor organization." The legality of this action will be challenged, but it is an interesting alternative in a state that is unlikely to become a right-to-work state.

. . . that an owner who mocked an employee's accent ended up owing $2.2 million dollars in damages? *Rosas v. Balter Sales Company, Inc.* (S.D.N.Y. Nov. 25, 2015). Rosas alleged that one of the owners, Marc Balter, mocked his accent in response to questions Rosas asked. Rosas also alleged that Balter made derogatory comments about other Hispanic and Black employees. Rosas spoke up and said, "You can't be talking to us like this. It's disrespectful. It's offensive to me." However, the behavior continued. Rosas was terminated after he was accused of stealing $700 worth of customers' orders. He was arrested, but ultimately the charges were dropped. The damages award included $1.4 million in punitive damage and $250,000 in compensatory damages. There was a perfect storm in this case: offensive and discriminatory behavior combined with a false accusation of theft and an outcome of retaliatory discharge.

. . . that a union member was unlawfully retaliated against by her union? The case is *Operating Engineers, Local 627 v. NLRB* (10th Cir. Dec. 3, 2015). Member Stacy M. Loerwald repeatedly asked the Operating Engineers to examine their "out-of-work" list. This is a list of members who would be assigned work by the Local when contacted by employers. Not only was she not allowed to examine the list, but her name was removed from the list as a consequence of her repeated questions. She filed an Unfair Labor Practice charge with the NLRB and also a sex discrimination charge with the EEOC (which was eventually settled after she filed suit). An Administrative Law Judge at the NLRB ruled in her favor, as did the Tenth Circuit Court of Appeals. The Court determined that the union violated its duty of fair representation when it denied her the opportunity to examine the out-of-work list. Furthermore, the union violated the National Labor Relations Act when it removed her from the list after she made repeated requests to examine the list.

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