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Employment Law Bulletin

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EEOC Charges Increased in FY 2015

The number of EEOC charges for FY 2015 (year ending September 30, 2015) increased for the first time in five years, according to charge processing statistics released by the Commission on February 16, 2016. A total of 89,365 charges were filed last year, compared to 88,788 during FY 2014. Notable statistics include:

1. Cause findings rose to 3.5% of all charges, from the historical low of 3.1% last year. The highest proportion of cause findings—9.9%—occurred during FY 2001. No cause decisions were issued in 65.2% of all charges, the fourth consecutive year this percentage declined. 14.6% of charges were settled or withdrawn with some benefit passed to the charging party. The remaining 16.7% of all charges were dismissed without a determination (such as where charging party or counsel requested the right to sue notice).

2. Disability discrimination charges increased to being contained in 30.2% of charges, up from 28.6% in FY 2014, the eighth consecutive year of increases from 20.4% during FY 2007. ADA charges have been on the rise each year since Congress passed the ADA Amendments Act in 2008. Additionally, for FY 2015, disability discrimination charges were more likely to result in outcomes unfavorable for employers, with 4.5% of charges resulting in a cause finding and 17.6% of charges resulting in settlement or withdrawal with benefit to the charging party.

3. Though representing just 4% of total charges, pregnancy discrimination charges increased by 4.2% for FY 2015 (from 3,400 charges to 3,543 charges). Like disability charges, pregnancy discrimination charges were more likely to result in outcomes unfavorable for employers, with 5.4% of charges resulting in a cause finding and a whopping 19.7% of charges resulting in settlement or withdrawal with benefit to the charging party.

4. Retaliation charges rose to 44.5% of all charges filed, the thirteenth consecutive year that this proportion has increased. During FY 2014, 42.8% of all charges alleged retaliation.

5. Although retaliation charges increased, only 3.0% of all such charges resulted in "cause" findings. That's below the average cause-finding rate (3.5%) and well below the highest percentage—12.0% in FY 2001—in recent history.

6. Harassment charges reached a five year high—27,893, with 3.6% overall resulting in "cause" findings. Racial harassment charges

increased over 5% from FY 2014 to 9,286 charges. The Commission found cause to suspect racial harassment occurred in 2.8% of these charges. Sexual harassment charges declined for the fifth consecutive year, to 6,822. The proportion of "cause" findings for sexual harassment charges also declined for the fifth consecutive year, to 5.5% from a high of 8.7% during FY 2010.

We believe that ADA charges will continue to increase and we expect they will become more problematic for employers. Prior to the ADAAA's enactment, very few individuals capable of working could meet the standard of "disability" under the ADA, and, as a consequence, many employers are still playing catch up when it comes to recognizing workers with disabilities as a protected class and complying with obligations to provide reasonable accommodations, especially when it comes to evaluating requests for leave, flexible scheduling, and reduced scheduling. Even where executives and HR professionals may have stayed abreast of the ADA's expanded coverage, many supervisors and frontline managers have not received training to know that universal application of attendance and other policies may need to be modified for disabled employees.

Similarly, we anticipate that many employers, managers, and supervisors have been and will continue to be caught off-guard by the newly-explicated obligation to accommodate pregnant employees described by the Supreme Court in *Young v. UPS*. (Read more in the March 2015 ELB).

Retaliation charges may also continue to increase, but few will be "quality" claims. Employers overall have done a good job of treating retaliation in the same risk management context as discrimination and harassment.

Updates to EEOC Charge Handling Processes

On February 18, 2016, the EEOC announced that it will permit charging parties or their attorneys to receive a copy of the employer's position statement and exhibits. The Commission stated that the investigator responsible for the charge will exclude confidential information. The Commission's process applies to position statements filed after January 1, 2016. Ironically, the Commission will deny employers access to charging parties' responses to their employers' position statements and evidence. The Commission also announced how employers should identify confidential information that it would want shielded from access, though it will be the EEOC's decision whether or not to abide by an employer's designation of materials as confidential.

We prepare a position statement and attachments with the anticipation that it will become "Exhibit 1" at trial. A charging party's increased and earlier access to the position statement and the EEOC's designation and handling of sensitive employer documents raises important strategy considerations that ought to be discussed with counsel.

The Income Gap: Not the Politics

The income or wealth gap is attributed by some to Wall Street, by some to China, or some other presumed singular reason to explain the lack of income growth among middle-class wage earners. In reality, the reasons are several and complex, but one we would like to discuss is the loss of U.S. manufacturing jobs.

Between 1997 and 2012, the working age population in the U.S. increased from 203 million to 243 million. During that same time period, manufacturing jobs declined by 5 million; 1.2 million jobs alone were lost between 2000 and 2001. Furthermore, the total number of hours worked in manufacturing in the United States has declined at an annual rate of 1.3% since 1979, yet manufacturing productivity in the U.S. has increased at an annual rate during the same time period of 4.6%. Thus, the decline in manufacturing employment occurred for two reasons: (1) the increased demand for employees with high tech skills in manufacturing context, thus increasing productivity and also reducing the overall number of manufacturing jobs; and (2) the decline of manufacturing due to either plant closures or relocation to other countries with substantially lower pay and compliance costs.

Historically, manufacturing jobs have been good jobs in terms of pay and benefits. The substantial loss of manufacturing jobs in the United States in turn had a

significant impact on income opportunity. Unlike jobs in service, healthcare, retail, and distribution, we know all too well that manufacturing jobs do not have to remain within our borders. Although we as consumers appreciate the great variety of low cost products available to us, the price that we have paid for that opportunity as consumers is in part a loss of U.S. manufacturing jobs

EEOC to Expand EEO-1 Reporting Requirements

February has been a busy month for the Commission. In addition to announcing its FY 2015 charge statistics and permitting charging parties to review employers' position statements, the EEOC, on February 1, announced its proposal to require that employers submit wage data with their EEO-1 Reports. The opportunity for public comment on the EEOC proposal ends on April 1. The EEOC has said that the new report will not be required until the 2017 reporting period.

The EEO-1 Report will have two components. Component 1 is the current report based upon ethnicity, race, and sex by job category. Component 2 will cover those employers with one hundred or more employees (who also must complete Component 1), and will identify in income bands the W-2 earnings and hours worked for employees based upon ethnicity, race, and sex.

The EEOC's proposal actually began in 2010, when President Obama appointed a National Equal Pay Task Force to examine how federal laws could be more effectively enforced to address and prevent pay discrimination. The current proposal evolved from a review by the National Academy of Sciences regarding how to most effectively collect wage data in order to determine whether there are pay discrimination practices. The EEOC's February 1 proposal is an outcome of the NAS report and Commission review on that.

The Commission proposes to use W-2 wage data to capture actual pay for the significant number of employees whose pay includes bonuses, commissions, tips, or incentive payments. The W-2 is already provided by the employer, so the employer does not have to create an additional pay record. Furthermore, according to the NAS study, the Commission believes that pay disparities revealed as an outcome of this reporting process will not be due to coincidence. The EEOC is still considering how to identify the number of hours worked by salaried-exempt employees.

Employers covered by the EEO-1 reporting requirements should follow for 2016 what is currently in place. The additional compensation and hours worked information will not be required until the filing of the 2017 report for calendar year 2016. Once the EEOC finalizes its proposal, we will provide a practical and strategic approach to compliance.

Benefits Update

The IRS decision to delay the Affordable Care Act informational reporting deadlines (see, January 2016 ELB) made many employers happy; however, many employees are confused and asking "where's my 1095?" The IRS has updated its webpage Q&A regarding Health Care Information Forms for Individuals (https://www.irs.gov/Affordable-Care-Act/Questions-and-Answers-about-Health-Care-Information-Forms-for-Individuals). But the bottom line is that it is not necessary for employees to wait to receive Forms 1095-B or 1095-C in order to file their tax returns. Accordingly, employers should feel comfortable informing their employees that they can go ahead and file their taxes without waiting until they receive the reporting forms. As a reminder, the new IRS deadlines for the information reporting forms are as follows:

Forms	New IRS Due Date
Forms 1095-B and 1095-C due to employees.	March 31, 2016
Forms 1094-B, 1095-B, 1094-C and 1095-C to be filed with the IRS if filing on paper.	May 31, 2016.
Forms 1094-b, 1095-B, 1094-C and 1095-C to be filed with the IRS if filing electronically	June 30, 2016

In other ACA news, President Obama signed an omnibus spending bill that includes a two year delay of the

Cadillac Tax, meaning that it will not take effect until 2020 (rather than 2018). Furthermore, the spending law makes the amounts paid by employers pursuant to the Cadillac Tax deductible as business expenses, which is obviously a positive development for employers. Although there is much speculation that the Cadillac Tax is on the way to a full repeal, this is unlikely unless and until Congress can come up with another means of raising revenue to pay for the guaranteed and expanded coverage in the ACA.

The IRS has recently issued general guidance regarding mid-year changes in safe harbor plans in Notice 2016-16, 2016-7 IRB. Previously, the IRS's position was that a safe harbor code section 401(k) plan could only be amended mid-year if such change was officially approved by the IRS in a notice, announcement, or other guidance of general applicability. This recently issued notice provides that a mid-year change may be made to either a safe harbor plan or to a plan safe harbor notice without violating the Safe Harbor Rules provided that the applicable notice and election opportunity conditions are satisfied, and the change is not considered a prohibited mid-year change as described in Notice 2016-16. In general, the following are the mid-year changes that are prohibited, unless otherwise required by law to be made mid-year: 1) A mid-year change that increases the number of completed years of service required for an employee to have a non-forfeitable right to their account balance attributable to safe harbor contributions under a qualified automatic contribution arrangement ("QACA") pursuant to the Safe Harbor Rules under Reg. §1.401(k)-3(k)(3) or Reg. §1.401(m-3)(a). 2) A mid-year change that reduces the number or otherwise narrows the group of employees who are eligible to receive safe harbor contributions. 3) A mid-year change to the type of safe harbor plan (for example, a change from a traditional 401(k) plan to a QACA 401(k) Safe Harbor Plan. 4) A mid-year change (a) to modify or add a formula used to determine matching contributions if the change increases the amount of the matching contributions, or (b) to permit discretionary matching contributions.

The IRS has announced that plan sponsors should not complete the proposed 2015 IRS Compliance Questions on Forms 5500 and 5500-SF, and Schedules H, I, and R, as they were not approved by the Office of Management and Budget by the time the forms were published on December 7, 2015. The Department of Labor has also stated that effective February 17, 2016, plan sponsors should not complete the new IRS Compliance Questions when using the EFAST2 filing system.

NLRB Tips: The NLRB – Continued Changes in the Nation's Labor Law

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.

Captive Audience Meeting Rules Changed In Mail-Ballot Elections

In *Guardsmark, LLC,* 363 NLRB No. 103 (Jan. 29, 2016), the NLRB overruled 57-year-old precedent and held that an employer cannot hold any captive audience meetings or speeches during the 24-hour period before ballots are scheduled to be mailed to bargaining unit employees.

That 57-year-old precedent, *Oregon Washington Telephone Co*., stemmed from the *Peerless Plywood* case, which held that where an election was to be conducted in person, employers and unions could not make speeches on company time to mass assemblies of employees in the 24 hours before election time. These two rules for two different types of elections—live and mail ballot—had coexisted for decades.

The Guardsmark ballots were scheduled to be mailed at 3:00 p.m. on January 28, 2015. Guardsmark intended to hold a mass meeting the morning of January 28, which would have been permissible under *Oregon Washington*, the rule that should have applied to this mail ballot election. However, the Board agent overseeing the election told Guardsmark that it was not permitted to have any type of mass meeting 24 hours before the ballots were mailed. Guardsmark asked the Regional office for clarification and it the Region correctly stated the *Oregon Washington* rule. When Guardsmark showed the Region's letter to the Board agent, the Board agent still told Guardsmark not to hold any meetings within 24 hours of the ballots' mailing. Guardsmark decided to abide by

the Board agent's instruction. Guardsmark lost the election by a vote of 11-2 for the union. Guardsmark filed objections, arguing in part that it should have been allowed to hold a captive audience meeting on the day the ballots were to be mailed. Guardsmark argued that its inability to hold the captive audience speech resulted in a low voter turnout (less than half of the thirty eligible employees voted) and, thus, contributed to the election loss.

The Democratic majority stated that adherence to the previous rules on manual votes versus mail ballots "invites confusion." In order to avoid the confusion, the Board "decided to overrule *Oregon Washington Telephone,* 123 NLRB 339 (1959), to align the mail-ballot rule more closely with the manual-ballot rule." The majority acknowledged that the employer received "mixed signals" from the Regional office, but ignored that argument and stated that Guardsmark had failed to demonstrate any compelling reasons to set aside the election results.

The dissent, written by Republican-appointed member Phillip Miscimarra, noted the over 50 year old precedent and said there was no reason to overrule a "simple and clear" policy on mail ballots that "has consistently [been] applied by the Board for more than 5 decades."

On a side note, a group of 106 law professors petitioned the NLRB to promulgate a rule allowing unions to hold workday meetings on company property, effectively giving unions equal time and equal access to company property in arguing the pros of unionization. This petition is expected to gain traction during the Obama administration.

Rule-making is a powerful arrow in the NLRB's quiver, one which the Agency has utilized more since the failure of unions to get Congress to pass the Employer Free Choice Act (EFCA). However, unions already have unprecedented access under the new "quickie" election rules, the last thing needed is rule-making by the current NLRB to expand access to an employers' private property.

Conservative Supreme Court Justice Passes Away

In an unexpected and sudden occurrence, conservative Supreme Court Justice Antonin Scalia recently died at the age of 79. In light of its potential for upsetting the perceived conservative balance of the Court, Scalia's death set off an election-year controversy over his successor that will likely drag on for months.

Predictably, the Republican Senate leader, as well as all of the Republican presidential candidates, argued that President Obama's successor should choose the next Supreme Court justice. In this same vein, Senator Johnny Isackson (R – Ga.) said:

We're eight months away from an election in November and ten months away from swearing in a new President of the United States. . . . I think the next President ought to be the one to fill that vacancy and not the President who's going out.

Expect Senate Republicans to drag their heels in considering any name that President Obama sends up for confirmation. The President has stated that he will send up a name soon, or in "due course."

Many important issues are pending before the Court—including cases involving the constitutionality of state laws that require public employees who are not members of a union to pay a share of union fees for use in bargaining—and if the Court deadlocks in a 4-4 vote, the lower Circuit Court decision remains the controlling precedent, unless the Court votes to re-hear the case. In the short term, a 4-4 vote on the union fee case would likely be a victory for public sector unions, as the underlying appellate court previously ruled in favor of unions.

Circuit Courts Seem to be Reaching Unanimity on NLRB's Jurisdiction after Quorum Ruling

The Seventh Circuit and the Fourth Circuit Courts of Appeal agree that the NLRB has the authority to reconsider cases with a properly constituted Board after the vacatur of an earlier order under *Noel Canning*. The case, *Big Ridge, Inc.,* 358 NLRB No. 114 (2012), had

originally been decided by an invalid panel, according to the Supreme Court decision in *Noel Canning*.

In 2014, a validly constituted Board considered the case "anew" and again found that Big Ridge had violated the National Labor Relations Act. Big Ridge and the Board filed a petition for review and a cross-petition for enforcement, respectively, and the case was orally argued in early November of 2015. Big Ridge argued that the Board had lost jurisdiction to consider the matter once the previous decision was set aside under *Noel Canning*. The court granted the Board's petition for enforcement and denied Big Ridge's petition for review.

In granting the petition for enforcement, the Seventh Circuit found that the initial decision was not made on the merits, and that the court fully expected the NLRB to reconsider the case once it had a proper quorum again. Writing for the court, Judge Flaum stated:

> Thus, the Board was not precluded from conducting further proceedings and having a properly constituted Board decide the case on the merits.

The Seventh Circuit's decision is in line with an earlier Fourth Circuit decision which was decided along similar grounds, *Huntington Ingalls, Inc. v. NLRB*.

Review of Former Acting General Counsel's Authority Pending in Courts

A smattering of pending cases that concern the authority of former acting general counsel Lafe Solomon to appoint positions throughout the Agency will be resolved in 2016. The most notable case currently pending is the D.C. Circuit's decision in *SW General, Inc. v. NLRB,* in which the D.C. Circuit denied a request for an *en banc* hearing on the court's previous decision, finding that Solomon was precluded from serving in the General Counsel's position after the President appointed him to serve as permanent GC on January 5, 2011.

If this decision stands, it may potentially have a far-reaching impact on Agency decisions involving Mr. Solomon between the dates of January 5, 2011, and November 4, 2013. One important caveat applies here: the employer can only make this argument if it timely raised the defense during its initial appeal(s) of an adverse action by the NLRB. Failure to do so risks an employer having waived the defense and the D.C. Circuit expressly notes this in its decision.

> We doubt that an employer that failed to timely raise an FVRA objection - regardless whether enforcement proceedings are ongoing or concluded – will enjoy the same success.

The ball is in the NLRB's court, and is currently considered a "hot topic" throughout the Agency. The current thinking at the NLRB is that there are not a significant number of cases in existence where this issue was raised in a timely fashion.

Fifth Circuit Court of Appeals Issues Its Judgment in *Murphy Oil* Case

In formally issuing its final judgment in *Murphy Oil*, the Fifth Circuit starts the clock ticking for a possible appeal to the U.S. Supreme Court. The Agency now has fifty-two days from February 18, 2016, to ask the Fifth Circuit for an *en banc* (full court) review of its previous decision or petition the Supreme Court to consider its argument that the class action waivers signed by Murphy Oil employees violated the NLRA.

In the Fifth Circuit's previous ruling refusing to enforce the Board decision finding the waiver illegal, the court stated, in part:

> Reading the Murphy Oil contract as a whole, it would be unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing of Board charges when the agreement says the opposite.

Given the uncertainty on the Court after Justice Scalia's death (see above), LMVT does not expect the NLRB to risk a Supreme Court appeal, as an adverse finding or even a 4-4 ruling would leave the Fifth Circuit decision intact.

OSHA Tips: Looking at OSHA in 2016

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.

Looking forward in 2016, it is anticipated that OSHA will enact a number of quite significant changes.

First, employers should be prepared for a healthy increase in monetary penalties. In accord with the Federal Civil Penalties Inflation Adjustment Act 2015, amounts assessed will increase significantly. This will be the first increase since 1990. The budget allows a catch-up with a one-time increase of up to 80%. This would potentially increase the maximum penalty for a serious violation from $7,000 to $12,500 and the top penalty for willful and repeat violations from $70,000 to $125,000. Such increases are set to take effect by August 2016.

Employers should also expect to see OSHA make a change in its inspection focus, so as to allow for more complex inspections. Such inspections would address issues such as ergonomics, process safety management, heat stress, chemical exposures, work place violence, and combustible dust exposures.

Additionally, employers should be aware of the potential for new electronic reporting requirements, as OSHA is currently working to make employer injury and illness records available online.

Finally, OSHA's Fall 2015 regulatory agenda contained a number of rules for final action in 2016. These include the following: exposures to crystalline silica; walking and working surfaces; personal fall arrest systems (slips, trips, and fall prevention); and eye and face protection. The silica rule, in particular, is being closely watched as many believe it will provide a much-needed update to the permissible exposure limit for silica.

Wage and Hour Tips: Current Wage and Hour Highlights

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

Status of New White Collar Regulations

In March 2014 President Obama instructed the Department of Labor to issue some revised regulations defining the requirements for the executive, administrative, professional, and outside sales exemptions. Initially, the Department indicated they would issue the proposed regulations by the end of 2014. However, DOL's proposal, which will more than double the minimum salary requirements, was not issued until Summer 2015. Interested persons were invited to submit written comments and almost 300,000 were submitted. The Department is now in the process in reviewing those comments. In late January the Solicitor of Labor told an audience that they are planning to issue the final regulations in July 2016. Most likely once they are issued employers will have 60-90 days to make the required changes necessary. Stay tuned for further updates.

Other Current News Items: Increases in the Minimum Wage

The Birmingham, Alabama, City Council had passed an ordinance that would have increased the minimum wage for persons working in the city to $10.10 per hour. In response to that ordinance's looming effective date, the Alabama legislature considered and passed a law prohibiting local governments, like Birmingham, from setting their own minimum wages. Though the Birmingham City Council accelerated the timetable on its ordinance to beat the State action, it wasn't fast enough, and the State legislature passed its law and got Governor Bentley's signature on February 25, 2016. Birmingham's law department has acknowledged that its minimum wage ordinance is now void and will never take effect.

Also the New Jersey legislature is considering a bill that would increase their state minimum wage to $15. The bill will need to be approved by a vote of the people in order for it to become law. Also the Oregon legislature recently passed a bill that will increase their state minimum wage to $14.75 per hour by 2022.

In 2013, the people living in the city where the Seattle Airport is located passed an ordinance setting a minimum wage of $15 per hour. Apparently many employers that operate in the airport have not chosen to comply with the ordinance. As a result recently there was a suit filed against 14 separate employers that alleges employees are being paid only an average of $13 per hour. In the filing it is estimated that there are some 5,000 employees that are currently underpaid.

Other Current News Items:
Jail Time for Employer Refusal to Pay Back Wages

I also read this month where a U.S. District Court in California has ordered an employer to be incarcerated for failure to pay a judgment that had been rendered against him. In a suit brought by the Department of Labor he was individually determined to be liable for $56,000 in back wages which he had refused to pay. Thus, he has been held in contempt of court and the Court ordered him to be incarcerated.

Overtime Exemption for Commissioned Employees

There are several little known exemptions in the FLSA that can provide some relief and protection for employers. One is an overtime exemption set forth in Section 7(i) for certain commission-paid employees of a retail or service establishment.

A retail or service establishment is defined as an establishment 75% of whose annual dollar volume of sales is not for resale and is recognized as retail in the particular industry. Some examples of establishments which may be retail are: automobile repair shops, bowling alleys, gasoline stations, appliance service and repair shops, department stores, and restaurants.

If an employer elects to use the Section 7(i) exemption for commissioned employees, three conditions must be met:

1. The employee must be employed by a retail or service establishment, and

2. The employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked, and

3. More than half the employee's total earnings in a representative period must consist of commissions.

Representative period: may be as short as one month, but must not be greater than one year. The employer must select a representative period in order to determine if this condition has been met.

If the employee is paid entirely by commissions, or draws and commissions, or if commissions are always greater than salary or hourly amounts paid, the-greater-than-50%-commissions condition will have been met. If the employee is not paid in this manner, the employer must separately total the employee's commissions and other compensation paid during the representative period. The total commissions paid must exceed the total of other compensation paid for this condition to be met. To determine if an employer has met the "more than one and one-half times the applicable minimum wage" condition, the employer should divide the employee's total earnings attributed to the pay period by the employee's total hours worked during such pay period.

Hotels, motels, and restaurants may levy mandatory service charges on customers that represent a percentage of amounts charged customers for services. If part or all of the service charges are paid to service employees, that payment may be considered commission, and, if other conditions are met, the service employees may be exempt from the payment of overtime premium pay. Tips voluntarily paid to service employees by customers are not considered commissions for the purposes of this exemption.

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

2016 Upcoming Events

EFFECTIVE SUPERVISOR®

Florence – March 23, 2016

Robert Trent Jones Golf Trail at The Shoals
990 SunBelt Parkway
Muscle Shoals, AL 35661
(256) 446-5111
www.rtjgolf.com/theshoals

Montgomery – April 20, 2016

Staybridge Suites Montgomery – Eastchase
7800 Eastchase Pkwy
Montgomery, AL 36117
(334) 277-9383
www.staybridge.com/Montgomery

Decatur – May 12, 2016

Sykes Place on Bank
726 Bank St NE
Decatur, AL 35601
(256) 355-2656
www.sykesplace.com

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Ashley Marler at 205.323.9270 or amarler@lehrmiddlebrooks.com.

Did You Know . . . ?

. . . that on February 12, West Virginia became a "right-to-work" state? In a right-to-work state, union security language is illegal. That is, a union and an employer may not agree that an employee may be terminated if the employee does not join the union or pay union dues or fees. In West Virginia, 12.4% of its private sector employees are union members. During the past four years, Michigan, Wisconsin, and Indiana also became right-to-work states.

. . . that on February 1, OSHA issued revised guidance concerning how it will investigate Whistleblower Claims? OSHA is responsible for enforcing the anti-retaliation provisions of twenty-two statutes. In the manual issued on February 1, 2016, OSHA stated that it will use a "reasonable cause" standard to determine whether retaliation occurred. According to OSHA, "under the reasonable cause standard, OSHA must believe, after evaluating all of the evidence gathered in the investigation from the Respondent, the Complainant, and other witnesses or sources, that a reasonable judge could rule in favor of the Complainant." Furthermore, OSHA stated that "the evidence does not need to establish conclusively that a violation did occur." This change is significant because OSHA's definition of "reasonable cause" is a low standard—whether a "reasonable" judge could rule against the employer.

. . . that Yahoo! Inc. allegedly adjusted the outcomes of six hundred employee performance appraisals to substantiate its layoff decisions? In *Anderson v. Yahoo Inc.*, filed in the Northern District of California, Anderson alleges that the evaluation system was restructured and manipulated in order to downgrade certain employees. The employees claim they were never told about their numeric ranking or how their ranking was determined. They allege that their supervisors were told to rank them from "best to worst," which then resulted in readjusting employee performance appraisals to support the ranking decision. Among other things, Anderson alleged that this manipulation was used to discriminate against him because of his sex (male), to violate California public policy, and to violate the California WARN Act. Remember: A layoff decision is in essence a hiring decision for determining what skills and responsibilities are needed for those who will remain. Someone who had a record of good performance reviews may not necessarily fit the future in the event of a workforce reduction is needed.

. . . that an employee who was terminated after complaining about the CEO's salary may be protected under the National Labor Relations Act? *MCPc, Inc. v. NLRB* (3rd Cir. Feb. 12, 2016). During a company "team building" session, an employee publicly complained about the company hiring an executive at $400,000 a year. The employee said that the company could have hired additional engineers with that money, which were needed more so than another executive. Other employees agreed with the employee who made the statement. The company investigated how the employee became aware

of the executive's salary, and terminated the employee for not responding truthfully during the investigation. The employee filed an Unfair Labor Practice charge, which resulted in an administrative ruling that the firing was illegal. According to the ALJ and upheld by the Board, the employer's policy prohibiting the disclosure of confidential information was overly broad. The Third Circuit Court of Appeals remanded the case to the NLRB to determine whether the employer's motive for the termination was the protected conduct—expression of concerns about pay—or untruthfulness in response to a company investigation about a breach of confidentiality.

. . . that CVS agreed to pay over $400,000 for improper withholding of unused paid holidays? *Reyes v. CVS Pharmacy, Inc.* (E.D. Cal. Feb. 10, 2016). The case involved employees who worked over a six year period at two CVS distribution centers. Employees were eligible to schedule floating holidays. If the employee quit or was terminated, unused floating holiday pay would be forfeited. Under the settlement, employees will receive the amount of the holiday owed plus under state law, an additional 25%. In some states, an employer does not have the right to require employees forfeit accrued but unused vacation or holiday benefits. If you have such a policy, be sure it is permissible in the states where it applies.

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