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Your Workplace Is Our Work®

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EEOC Investigator and Mediator Joins Firm

We are delighted to announce that JW Furman, an EEOC Investigator and Mediator, has joined our firm. During her career with the EEOC, JW investigated approximately 1,200 discrimination charges and mediated approximately 1,500 claims, including discrimination charges, civil lawsuits and internal grievances. During Fiscal Year 2015, JW closed 93.5% of all cases she mediated. JW has also served as an Arbitrator and Hearing Officer in over 200 cases. JW received over 1,500 hours of arbitration and mediation training from the Federal Mediation and Conciliation Service. JW is available to employers to conduct or assist in internal investigations and to mediate disputes, charges and lawsuits. Ms. Furman can be reached at JFurman@lehrmiddlebrooks.com or (205) 323-9275.

DOL Finalizes Salary Exemption Rule – Under Review by OMB

On March 14, 2016, the Department of Labor sent its proposed final rule for "white collar" exemptions to the Office of Management and Budget's Office of Information and Regulatory Affairs. There is no minimum review period required by OMB, but the deadline for review is 90 days, which may be extended by either OMB or DOL. According to a congressional research service analysis, during Fiscal Year 2014 the OMB averaged 106 days to review proposed regulations that were considered "economically significant," such as the DOL exemption regulation. The final draft that the DOL sent to OMB for review is not publicly available during the review period.

On March 17, with the OMB's review ongoing, legislation was introduced to modify or delay the effect of the new rule. Known as the Protecting Workplace Advancement and Opportunity Act, the legislation would require the DOL to make a more careful analysis of the impact of a salary adjustment on small businesses and not-for-profit organizations. Senator Tim Scott (R-SC) is the chief sponsor in the Senate and Representative Tim Walberg (R-MI) is the primary sponsor in the House. Senator Scott said, "there is a recognition of the fact that since 2004 there hasn't been any real change [to salary levels]. So the reality of it is that where we are [salary levels] is probably too low." The legislation would ban the DOL from implementing a regulation that includes an automatic salary escalator and it would preclude the DOL from implementing a change to the duties test for exempt status (remember that no duties test changes were explicitly proposed when DOL announced a draft for public comment in July 2015). We will continue to monitor the progress of this rule and review compliance strategies once the rule is published.

Death of Justice Antonin Scalia Leads to 4–4 Affirmation of Pro-Union Decision in "Fair Share" Case

As Frank Rox noted in last month's ELB, the passing of Supreme Court Justice Antonin Scalia could result in 4-4 decisions that delay finality on certain key labor and employment issues. The effect of the now-eight-member Court coming to a 4-4 tie on cases is that the lower decision(s)—normally of the Circuit Courts of Appeal—are left standing as controlling precedent in their respective jurisdictions. As Frank predicted, on March 29, 2016, the Court deadlocked in a 4-4 tie on the constitutionality of state laws requiring public employees who objected to being union members but were employed in the bargaining unit to pay a "fair share" of union fees. *Friedrichs v. Cal. Teachers Ass'n*. The lack of a majority consensus meant that the lower Court of Appeal's decision in the union's favor was affirmed. The Center for Individual Rights, which organized the legal challenge to the "fair share" provisions, has announced that it intends to seek rehearing. Five of the eight justices would have to approve a rehearing. Even if the Court does not agree to re-hear the *Friedrichs* case, a number of similar cases in other jurisdictions are already at various stages in the litigation and appeals process.

Union Win Rate Declines under Ambush Election Rules

On February 25, 2016, the NLRB released an analysis of the first nine months under the new election rules compared to the same nine month period the year before. Contrary to widespread speculation, there was only a modest increase in the number of petitions filed by unions and there was a slight decrease in the union's success rate.

The election rules became effective April 14, 2015. Between that date and January 14, 2016, unions filed a total of 1,624 representation petitions, up slightly from 1,608 the year before. Unions won 68% of those elections compared to 70% the year before.

The new procedures reduced substantially the amount of time from the date the union filed the petition until the election was held. Under the new rules, the median days between the petition filing and the election was 24; under the old rules, it was 38. So the overall effect of the NLRB rules to streamline the election process has worked. However, the new election rules have not particularly benefited unions. Although our experience has been that under the new rules an election campaign is fast and furious, most employers have still had adequate time to run an effective campaign. To avoid a campaign or be successful on election day, employers should:

1. Know what is occurring on a location, department, and shift basis regarding workplace attitudes and issues.

2. Identify, develop, or remove ineffective supervisors.

3. Money and scheduling are major issues in several industries. How are those addressed at your workplace?

4. Develop and follow a cultural blueprint to remain union free.

5. Establish and periodically review a rapid response plan in the event of a petition.

DOL Persuader Proposal: More Support for Unions

The NLRB's ambush election rules have not helped to increase union membership, so the DOL stepped into the fray on March 23, 2016, by issuing a proposed change to "persuader" rules. Under the Labor Management Reporting and Disclosure Act of 1959, individuals who are hired by employers to speak directly to employees about remaining union free are required to file with the DOL certain financial disclosure information. There is an "advice" exemption that covers labor lawyers. For example, when we discuss strategy, analyze legal parameters of employer communications, and provide examples of legally permissible campaign materials, no disclosure information is required. The proposed changes would require financial disclosure of the arrangements between counsel and client when advice is provided in

response to a union organizing campaign or strikes, or even employee relations training. The DOL was perfectly candid that its proposal to change the persuader rule is intended to help unions organize:

> it is important for employees to know that if the employer claims that employees are a family—a relationship will be impaired, if not destroyed, by the intrusion of a third party into family matters . . . it has brought a third party, the consultant, into the fold to achieve its goals. Similarly, with knowledge that its employer has hired a consultant, at substantial expense, to persuade them to oppose union representation or the union's position on an economic issue, employees may weigh differently a claim that the employer has no money to deal with a union at the bargaining table.

These changes, initially proposed in 2011, have been harshly criticized by the American Bar Association as violating the attorney/client privilege. Our firm will be a named Plaintiff in the lawsuit with other firms to seek an injunction from these rules becoming effective.

Personal FMLA Liability Risks for HR Director

The FMLA is one of the few employment statutes where there is a risk of personal liability for the key decision maker. In the case of *Graziadio v. Culinary Institute of America* (2nd Cir. March 17, 2016), the terminated employee sued the employer and the company's HR Director for FMLA violations. Employee Cathleen Graziadio was a payroll administrator. She took ten days leave to care for her son and submitted the medical support to the HR Director. Her other son broke his leg on the date she submitted the medical certification for the first son, and she took leave to care for him as well. Graziadio and her supervisor worked out a reduced schedule to accommodate the leave and in response to Graziadio's question whether she needed additional medical certification, the supervisor referred Graziadio to the HR Director.

The HR Director told Graziadio that the medical information she submitted was insufficient and her absences were not covered by FMLA. As an outcome of Graziadio's absences to care for both sons, the HR Director terminated her for job abandonment. The HR Director failed to tell Graziadio why her medical substantiation was deficient.

In concluding that the HR Director was an appropriate party to the litigation, the court noted that under the FMLA the definition of "employer" includes an individual acting "directly or indirectly in the interest of an employer." The Court applied an economic reality test, which means that if the HR Director had the power to hire or fire or influence those decisions, control conditions of employment and affect terms and conditions of compensation, then the HR Director acted in the interest of the employer and could be personally liable. In this particular case, the Court stated that the HR Director "played an important role" in the decision to terminate Graziadio. Furthermore, because the HR Director "controlled" Graziadio's eligibility for FMLA and return to work, the HR Director was deemed an "employer" under the FMLA.

We understand the strategy of the plaintiff's attorney to name the HR Director as a party to an FMLA lawsuit. It puts pressure on the employer, further spotlights the HR function, and can lead to a situation where even though the HR Director believed that she or he handled the FMLA process properly, the Director now must be defended due to the risk of personal liability.

ACA Contraceptive Mandate Controversy – Compromise?

The ongoing controversy revolving around the Affordable Care Act's contraceptive mandate reached the U.S. Supreme Court last week. The contentious debate centers around the ACA's requirement that all providers of health insurance, including companies that administer self-insured employer health plans, must cover the full cost of a wide range of contraceptives for women. Although an exemption exists for religious institutions and houses of worship, the exemption does not apply to religious non-profit organizations. Many of these groups,

such as the Little Sisters of the Poor, have complained that this requirement violates the Religious Freedom Restoration Act of 1993 (RFRA), and/or the free exercise, establishment or free speech clauses of the First Amendment, leading to lawsuits all over the country. The Supreme Court consolidated seven of these cases for oral argument, which was held on March 23, 2016. The official case name is *Zubik v. Burwell*, but the consolidated cases are popularly called the *Little Sisters of the Poor* cases. With Justice Scalia's untimely death only a few weeks ago, the Court could easily split 4-4, leaving the decisions of the cases below intact. The decisions below sided with the government's accommodation, which provides that the objecting groups may provide their insurance companies (or the federal government) with a form (EBSA Form 700) noting their objections to providing the approved contraceptives. Thereafter, the government contracts with a third party to provide the contraceptives cost-free to the employees (or students) of the religious group. The religious non-profits contend that this work-around still requires them to facilitate the provision of morally objectionable birth control methods to their employees/students by virtue of their involvement in the process (completion of Form 700). Also in debate is whether the government actually deals with a third party, or whether it uses the same insurance companies the religious groups have hired to provide the non-objectionable coverage. Justice Kennedy seemed to agree with this position during oral argument, and referred to the federal government's actions as "hijacking" the religious groups' plans so that it – the government – could provide the contraceptives.

On March 29, 2016, the high court floated the possibility that it seeks a compromise that would allow the religious non-profit groups to avoid any connection with the offer of cost-free insurance coverage for the objectionable contraceptive methods, while still ensuring that their employees/students receive the coverage. The Justices have requested that attorneys for both sides of the cases at issue submit additional briefs addressing this subject. The Court's Order specifically provides that "[t]he parties are directed to address whether contraceptive coverage could be provided to petitioners' insurance companies, without any such notice [Form 700] from petitioners…Petitioners would have no legal obligation to provide such contraceptive coverage, would not pay for such coverage, and would not be required to submit any separate notice to their insurer, to the federal government, or to their employees." Contraceptive Compromise may prevail!

It is also worth noting that the Eleventh Circuit, which has appellate jurisdiction over district courts in Alabama, Florida and Georgia, joined seven other circuit courts earlier this month in holding that the ACA's accommodation for the nonprofit religious organizations did not violate the RFRA. *Eternal Word Television Network, Inc. v. Secretary of U.S. Dep't HHS* (11th Cir. Feb. 18, 2016).

In Other Benefit News . . .

On March 3, 2016, HHS issued final regulations that include the benefit and payment parameters for 2017. Such guidance is primarily directed at insurers; however, there are some items applicable to employers, such as a new "vertical choice" option in the federal SHOP and cost-sharing parameters setting the maximum annual limitation at $7,150 for individual coverage and $14,300 for family coverage (an increase from 2016 limits of $6,850 for individuals and $13,700 for families).

The IRS recently addressed 403(b) plans that exclude same-sex spouses from their definition of "spouse." A 403(b) plan is one under which employees of tax-exempt educational, charitable, and religious, etc., organizations or public schools receive special tax advantages from annuities purchased for them by their tax-exempt employers. The IRS's Memo, "Spousal Provisions in Internal Revenue Code § 403(b) Applications for Opinion and Advisory Letters," provides guidance on how these plans should be treated where the definition of "spouse" specifically excludes same-sex spouses.

A new summary of benefits and coverage (SBC) template and the associated documents are in the process of revision by EBSA, IRS, and HHS ("the Departments"). On February 26, 2016, the Departments solicited public comments on their proposed revisions and updates to the SBC template, with such comments being due by March 28, 2016. It is anticipated that the new version of the SBC and related documents will be required to be used on or

after April 17, 2016, based upon the open enrollment dates (or plan year) of plans and issuers.

NLRB Tips: NLRB Changes to Continue – Employers Contend that Playing Field More than Level Now

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.

Backpay Calculation Method Likely to Change

On February 19, 2016, the NLRB announced that it will solicit briefs related to whether it should change its treatment of search-for-work and interim employment expenses as part of the compensation for unlawfully discharged employees, even if the discharged employees weren't successful in finding meaningful replacement employment.

The underlying matter is *Geaslin v. King Soopers Inc.*, where an administrative law judge (ALJ) ordered the employer to reinstate and pay back-pay to an employee who was interrogated, suspended and ultimately fired for her union activity.

The General Counsel requested that the ALJ include search-for-work and interim employment expenses in the backpay award, but the judge deferred to the Board to make this change. The old rule was that those types of expenses were used to reduce any interim earnings—those interim earnings in turn are used to reduce gross backpay—if an employee had obtained replacement employment after his/her discharge. However, if the alleged discriminatee had little or no interim earnings, then these expenses were lost to the illegally fired worker. Therefore, the GC asked that the judge include these expenses in the gross back-pay amount regardless of the amount of interim earnings amount.

The Board asked that *amicus* briefs be filed by March 18, 2016, on this issue. The NLRB has asked for input on the following questions:

1. Should the Board adopt the change requested by the General Counsel?

2. What considerations warrant retaining the Board's traditional treatment of search-for-work and interim employment expenses?

3. What considerations warrant making the requested change?

The General Counsel contends that "where interim earnings are non–existent or less than these [types] of expenses, the failure to award these expenses means the [discharged worker] will receive less than make-whole relief." Expect the Board to make these changes as requested after the briefing period expires.

NLRB Invites Amicus Briefs on ALJ-Recommended Consent Orders

In a case involving a settlement approved by an ALJ over the GC's and union's objection, the GC filed a special appeal to the Board seeking reversal of the ALJ's approval of a proposed settlement. The amici briefs are due to the Board no later than March 18, 2016.

The Agency posed two questions to interested parties:

1. May the Board, consistent with Section 3(d) of the National Labor Relations Act, continue to permit administrative law judges to issue a 'consent order,' subject to review by the Board, incorporating the terms proposed by a respondent to settle an unfair labor practice case, to which no other party has agreed, over the objection of the General Counsel?

2. If Section 3(d) does allow the Board's current practice, should the Board alter or discontinue the practice as a matter of policy?

(Citations omitted).

The ALJ Decision

The ALJ, in approving the settlement, stated that the unfair labor practice case involved a "single instance of threatening employees with more vigorous enforcement or rules if they choose to be represented by a union steward or seek support and /or assistance from a union." The Judge concluded that the Postal Service's settlement offer better effectuated the purposes of the NLRA than continuing to litigate the case.

The Special Request to Appeal the ALJ Decision

The Postal Service, in opposition to the GC's request to appeal the ALJ decision, agrees that *Independent Stave*, 287 NLRB 740, (1987), applies to the instant matter and claims that applying the principles of *Independent Stave* demonstrates that the settlement adequately effectuates the purposes of the Act.

The four (4) factors examined under *Independent Stave* are:

1. whether the charging party(ies), [and] the Respondent(s) . . . have agreed to be bound, and the General Counsel's position has been taken into account;

2. whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation;

3. whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and

4. whether the respondent has engaged in a history of violation of the Act or has breached previous settlement agreement resolving unfair labor practice disputes.

The Postal Service agrees with the GC that factor 1 weighs against the acceptance of the settlement and that factor 3 is inapplicable. Where the parties disagree is factors 2 and 4. The GC claims that the cost of litigating the matter is negligible because the parties had already prepared for trial and the parties to the litigation were all local. Thus, the GC argues, that as the acceptance of the settlement occurred on the day of the start of the trial, the parties would incur no trial preparation costs as all the work had already been accomplished.

As to factor 4, the GC claims that the respondent is, in fact, a recidivist and therefore factor 4 militates against acceptance of the settlement.

The ALJ noted that the settlement provided for a 60 day posting at the facility in question and remedied the alleged violation, and thereby "provides almost the same remedy that would be awarded if the General Counsel fully prevailed on the complaint."

Finally, the ALJ rejected the GC argument that the Postal Service was a recidivist violator simply because there are judgements, consent orders, and settlements involving the Postal service nationwide. The Judge noted that there was no history of prior violations of the Act or breach of prior settlements at the USPS's Swartz Creek Post Office.

LMVT will follow developments in this case as they occur and inform readers as the case proceeds to a final decision.

Eighth Circuit Joins the Sixth Circuit Court of Appeals in Enforcing the *Specialty Healthcare* Standard

On March 7, 2016, the Eighth Circuit joined the Sixth Circuit Court of Appeals in finding that the NLRB's controversial *Specialty Healthcare* standard for determining appropriate units in union representation cases is a "reasonable interpretation" of the law that is entitled to judicial deference. *Fed Ex Freight, Inc. v. NLRB* (8th Cir. March 7, 2016).

In the *Fed Ex* case, the Agency relied on *Specialty Healthcare* in certifying the Teamsters at two company terminals. Fed Ex had argued, unsuccessfully, that any appropriate unit should have included more than 200 dockworkers in the bargaining unit. The Court stated that there were "common sense logical distinctions" between the company drivers and the dockworkers, and that, under *Specialty Healthcare*; the Board had substantial

evidence to support its conclusions on the appropriateness of the drivers-only unit.

***Specialty Healthcare* – The Analytical Framework**

When considering the appropriateness of a petitioned-for bargaining unit, the Board first assesses whether the unit as set forth is appropriate applying traditional community of interest standards.

If the petitioned-for unit satisfies that standard, then the burden shifts to the employer to demonstrate that the additional employees it seeks to include in the bargaining unit share an "overwhelming community of interest" with the employees in the petitioned for unit, such that there "is no legitimate basis upon which to exclude [such] employees from" the larger unit because the traditional community of interest factors "overlap almost completely."

In *Specialty Healthcare*, the union sought a bargaining unit of all certified nursing assistants (CNAs), while the employer contended that the smallest appropriate unit must also include in it other non-supervisory service and maintenance employees. The Board applied the new standard and concluded that the employer had failed to meet its burden to demonstrate that the employees it wished to add to the bargaining unit shared such an overwhelming community of interest with the CNAs that they must be included in the petitioned-for unit.

The Sixth Circuit Court of Appeals Was the First Appeals Court to Approve the Logic of *Specialty Healthcare*

In a judicial decision that paved the way for more organizing based upon the extent of a union's support among a small group of employees, the Sixth Circuit affirmed the Board's authority to adopt a version of its traditional "community of interest" test to find that a small bargaining unit) was an appropriate bargaining unit. The unit was limited to only a nursing home employer's certified nursing assistants (CNAs) and did not have to include other similarly situated employees with different job titles.

In *Kindred Nursing Centers East v. NLRB* (6th Cir. 2013), the employer objected that additional, similarly situated employees should have been allowed to vote with the CNAs, regardless of their different job titles. In deference to the NLRB's determination that a CNA-only bargaining unit was permissible, the court said the NLRB "cogently explained its reasoning for rejecting the company's position, and thus acted within its 'wide-discretion' under the NLRA."

Ultimately, the Sixth Circuit upheld the NLRB's standard that a union's petitioned-for bargaining unit was appropriate where the unit is made up of (i) an identifiable group of employees; (ii) those employees share a community of interest with one another; and (iii) no other employees will be added to the petitioned-for unit unless they shared an overwhelming community of interest with employees already included by the union. According to the Sixth Circuit, what "overwhelms" the NLRB is within the vast discretion of the NLRB, provided that discretion is not exercised arbitrarily or capriciously, which the court said was not the case here.

The Bottom Line

Now, the Eighth Circuit has joined the Sixth Circuit, putting its seal of approval on the NLRB standard for organizing smaller bargaining units. With two circuit courts approving the NLRB reasoning in *Specialty Healthcare*, it appears that the shouting is about over concerning the approval/enforcement of micro-bargaining units found by the Board. LMVT will follow this trend to see if it becomes a significant tactic used by labor organizations to get their foot "in the door" of employers' facilities.

OSHA Tips: OSHA in 2016 and Beyond

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.

Historically, annual evaluations of OSHA's area offices have focused largely on the number of inspections

accomplished. Beginning in 2016 this emphasis on quantity is expected to change to allow for fewer but more complex inspections. This shift would permit more comprehensive inspections across the board and allow for scheduling more complex work sites. This new focus of the agency's inspection priorities is known as the "Enforcement Weighting System." This system gives the go-ahead for the Agency to conduct fewer inspections while increasing its focus on complex hazards. Examples include process safety management ergonomics, heat hazards, permissible chemical exposures, workplace violence, and combustible dust issues.

Expect to see increased use of the General Duty Clause (Section 5(a)(1) of the OSHA ACT), which allows OSHA to address serious hazards for which there are no applicable standards. Examples of conditions that might be cited in this manner include exposures to extreme temperatures, arcflash/arcblast, ergonomics, and combustible dust.

In August 2016 employers should anticipate a substantial increase in OSHA penalties. The current maximum fine for repeat and willful violations would rise to $126,000. The $7,000 fine for serious and failure-to-abate violations will become a $12,600 penalty.

Going forward in 2016, occupational exposure to crystalline silica is perhaps a top priority of OSHA. Anticipated is a comprehensive rule with reduction of the permissible exposure limit, exposure monitoring, training, surveillance, and the like. OSHA points out that 500 American workers died from silica exposure between 2009 and 2013, and further, the permissible exposure limit has not been updated since 1968.

Also on the table for 2016 is OSHA's electronic record-keeping rule. This rule would require electronic transmission of injury-illness data that employers are already required to maintain. Businesses with 250 or more employees will be required to electronically submit injury and illness data on a quarterly basis. Finally, all businesses with 20 or more employees in specifically designated industries will be required to submit information electronically on an annual basis.

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.

FMLA Highlights

The Family and Medical Act (FMLA), which is more than twenty years old, still commands a substantial amount of attention due to its impact on employers. In looking at some recent statistics published by Wage and Hour it appears the number of FMLA complaints they receive is getting smaller. For example, they only received about 1,400 complaints in FY 2015 (year ending September 30, 2015) as compared to a high of more than 2,100 in FY 2011. Of course, unlike Title VII claimants who must exhaust claims before the EEOC, employees alleging violations of the FMLA are not required to bring their complaint before the DOL. The level of employers found in violation of the FMLA requirements remains at slightly less than 50% of those investigated and resulted in employers being required to pay more than $1.9 million in back wages to more than 800 employees. The largest number of violations resulted from improper termination of employees requesting FMLA leave with discrimination being the second most prevalent area of violations. Refusal to grant FMLA leave and refusal to restore an employee to an equivalent position were two other areas where there were substantial numbers of complaints filed.

One area that continues to be a problem for employers is the requirement that employees be allowed to use intermittent leave for certain types of treatments. While the requirements of the FMLA state that the employer must allow the use of intermittent leave when it is determined to be medically necessary there are certain limitations that may be imposed by employers. For instance, the employee can be required to attempt to schedule the treatments outside of his normal working hours so as not to interfere with his job requirements. If

you have employees that are seeking to use intermittent leave it is very important that you seek guidance from your counsel to insure that you are properly applying the regulations.

There also continues to be a substantial number of FMLA cases filed and decided. I recently saw a case out of Tennessee where a U.S. District Court had ruled that there could be some flexibility in the FMLA rules. *Puckett v. Yates Svcs., LLC* (M.D. Tenn. Feb. 24, 2016). The regulations that deal with the definition of a "serious health condition" require that an employee seek medical attention within seven days of the first day of incapacity. In this case the employee alleged that she experienced the problem on November 29 and scheduled an appointment with her doctor for December 4. However, due to the doctor's illness the employee was unable to see the doctor until December 9, which was more than seven days after the beginning of her incapacity. The employer had filed a motion for summary judgment due to the fact that the employee did not get medical treatment within the required time period. However, the Court denied the motion stating that a jury must decide the issue.

Proposed Changes to "White Collar" Exemption Rules Sent to OMB

Of course, the number one DOL issue is the proposed change to the regulations that define the executive, administrative, professional and outside sales exemptions. The week of March 14, the Department sent their proposed changes to the OMB for final approval. The review process may last up to 90 days, though I expect review to be completed in 30-60 days. Thus, as previously mentioned, it is expected that the revised regulations will be issued this summer and we normally expect they will become effective 60-90 days later.

U.S. Supreme Court Upholds Donning and Doffing Award

On March 22, 2016, the U.S. Supreme Court upheld by a 6-2 margin a judgment against Tyson Foods. In a 2011 case a jury had ruled that Tyson had failed to properly compensate employees in one if its plants in Iowa for the time they spent "donning and doffing" sanitary and protective gear and awarded the employees $2.9 million in back wages. The company had appealed the judgment on the basis that the amounts were determined using statistical data rather than actual data. In its effort to overturn the decision Tyson had argued that there were over 400 different jobs that included many where the employees did not work the extra time but the jury found that Tyson kept no records of this preparation time and thus they could rely on precedent permitting such averaging. By upholding this judgment the Court affirmed that class (or collective) actions may still be used in many situations.

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

2016 Upcoming Events

EFFECTIVE SUPERVISOR®

Montgomery – April 20, 2016
Staybridge Suites Montgomery – Eastchase
7800 Eastchase Pkwy
Montgomery, AL 36117
(334) 277-9383
www.staybridge.com/Montgomery

Registration Cutoff: April 12, 2016, at 5:00 p.m.

Decatur – May 12, 2016
Sykes Place on Bank
726 Bank St NE
Decatur, AL 35601
(256) 355-2656
www.sykesplace.com

Registration Cutoff: May 4, 2016, at 5:00 p.m.

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 March 1, the EEOC filed two lawsuits alleging sexual orientation discrimination? *EEOC v. Scott Medical Center* (W.D. Pa.); *EEOC v. Pallet Companies*, (D. Md.). These are the first lawsuits the EEOC has filed alleging that sex discrimination under Title VII prohibits discrimination based upon sexual orientation.

. . . that on March 9, 2016, in *Christiansen v. Omnicom Group, Inc.* (S.D.N.Y), a court granted the employer's Motion to Dismiss a sexual orientation discrimination claim under Title VII? The Court questioned the precedent that Title VII prohibits discrimination based upon sexual stereotyping but not sexual orientation, stating "the lesson imparted by the body of Title VII litigation concerning sexual orientation discrimination when sexual stereotyping seems to be that no coherent line can be drawn between the two sorts of claims."

. . . that a staffing firm was required to disclose to the EEOC information about its clients? *EEOC v. Aerotek, Inc.* (7th Cir. March 4, 2016). In an investigation of Aerotek's 286 locations, the EEOC discovered that at 62 of them Aerotek clients requested the assignment of employees based upon protected class factors. For example, one employer requested "young and energetic guys." The Court ruled that the EEOC's subpoena for this information was within the scope of its authority and relevant to its investigation of age discrimination claims against Aerotek. According to the Court, "the identification of the clients will allow the EEOC to investigate discriminatory activity that has not been recorded in the database information that is clearly relevant to its investigation."

. . . that part-time retail employees may pursue a class action for the employer's failure to pay out accrued vacation time? *Garcia v. JC Penney Corp., Inc.* (N.D. Ill. March 8, 2016). Under the employer's plan, once vacation pay accrued, employees were eligible to use it only if they were still employed and if they had averaged at least 25 hours of work per week. The lawsuit claims that once vacation was earned, it may not be forfeited simply because an employee failed to use the accrued vacation before leaving the company. Whether accrued vacation may be forfeited is usually an analysis on a state-by-state basis. In this particular case, an Illinois law precluded the employer from establishing this forfeiture provision.

. . . that there may be "no harm, no foul" for an employer's failure to make a religious accommodation? *EEOC v. Jet Stream Group Services, Inc.* (D. Colo. March 8, 2016). The EEOC alleged on behalf of an employee that the employer refused to let her wear a hijab at work. The Court noted that reasonable accommodation for religious practices or observances is not the same standard as under the Americans with Disability Act. Under the ADA, failure to accommodate is a "free standing, distinct cause of action" even if there is no actual harm to the employee. Under Title VII, the Court stated that there must be an "adverse action" due to the failure to accommodate. For example, if an applicant requests accommodation and is not hired, that would be an adverse action. In this case, however, simply saying "no" to an employee is not an adverse action and, therefore, not a basis to claim a Title VII violation based upon religion.

LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

Richard I. Lehr 205.323.9260
rlehr@lehrmiddlebrooks.com

David J. Middlebrooks 205.323.9262
dmiddlebrooks@lehrmiddlebrooks.com

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

Michael L. Thompson 205.323.9278
mthompson@lehrmiddlebrooks.com

Whitney R. Brown 205.323.9274
wbrown@lehrmiddlebrooks.com

Jamie M. Brabston 205.323.8219
jbrabston@lehrmiddlebrooks.com

Brett A. Janich 205.323.9279
bjanich@lehrmiddlebrooks.com

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

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

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

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

JW Furman 205.323.9275
(Investigator, Mediator & Arbitrator) jfurman@lehrmiddlebrooks.com