LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

Employment Law Bulletin

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Your Workplace Is Our Work®

Inside this issue:

Black Lives, Blue Lives, All Lives, No Lives

Notorious violent behavior in our country (and unfortunately worldwide) has increased employee and employer anxiety about the potential risk of harm at the workplace. Should certain employees be authorized to carry guns in the workplace in the event an incident occurs? How should threats be handled? What are the signals of potential workplace violence? Should employers have greater latitude to regulate employee discussions and debate in this political season?

The following are our suggestions based upon consultation with law enforcement authorities, and mental health specialists and in consideration of employer workplace rights:

1. In virtually all industries, the number one source of workplace violence is domestic violence, followed by employee to employee violence. Report to law enforcement authorities any threat of violence.

2. If the source of the violent threat is an employee, do not rush 3to terminate. Sometimes the termination decision can elevate the hostile intention. Rather, consult with mental health specialists, law enforcement authorities and get the employee off of the premises.

3. If you are interested in designated employees as your firearms resource at work, be sure this is cleared with law enforcement and also with your organization's general liability carrier. If there is an incident at work and police arrive on the scene, they may not know who is a "good guy" with a gun and who is a "bad guy." Our general suggestion is that employees should not be armed.

4. Train employees on how to handle a workplace violence incident. The Department of Homeland Security advises three actions to take in the event there is an active shooter: run, hide, and fight in that order.

5. Employers have the right to be wrong about several things, including the potential for workplace violence. If an employee does not appear fit for work or in the employer's

judgement or may pose a potential risk of harm, act immediately. Again, do so in conjunction with mental health specialist and law enforcement authorities.

6. If you are aware of an employee who receives domestic threats at work, again act aggressively with law enforcement and mental health specialists. This includes providing support for the employee who is the recipient of such threats. Domestic violence is complicated and a situation's recipient cannot often easily handle alone.

7. In terms of workplace conversations, such as about which lives matter, be understanding of employees expressing their opinions and views, provided such expression does not conflict with company principles regarding equality of opportunity, respect for others and no harassment.

EEOC Targets Staffing Agencies/Customers

According to EEOC Chair Jenny Yang, the Commission's systemic discrimination initiatives comprise approximately 22% of the Commission's lawsuits. Systemic cases usually focus on a region, company or industry where it is alleged that discriminatory practices are widespread. In particular, the Agency is focusing on staffing firms. For example, do staffing firms "steer" referrals based on customer preferences regarding protected class status? What is the basis for a customer request to remove a staffing employee? Ms. Yang noted that staffing agencies are growing at a rate of seven times "direct" employment levels.

We mentioned previously that charges alleging discrimination based on the Muslim religion are referred to the Commission's legal unit in Washington, D.C. for review. According to the EEOC, although Muslims comprise approximately one percent of our population, discrimination against Muslims accounts for over 40% of all religious discrimination charges filed with the EEOC.

The EEOC filed only four lawsuits during June, three of which were filed in southern states. Year to date, 20 of 37 EEOC lawsuits were filed in this region.

An 83 Year Old's Staffing Agency Claim Goes to Trial

Coincidentally, within a few weeks after EEOC Chair Jenny Yang mentioned the Commission's focus on staffing agencies, along came the case of *Nicholson v. Securitas Security Services USA, Inc.* (5th Cir. July 18, 2016). Securitas is one of the world's largest security staffing agencies. According to the lawsuit, Helen Nicholson was assigned as a receptionist to Fidelity, working at Fidelity's office in a Houston. Fidelity told Securitas that Nicholson did a poor job handling technology related responsibilities and asked Securitas to replace her. Honoring the customer's request, Securitas replaced the 83 year old with a 29 year old.

It certainly is a sound business reason to honor a customer's request if an assigned employee does not have the skills to handle the job. But here is what led the U.S. Fifth Circuit Court of Appeals to allow this case to go to a jury. Apparently, Securitas does not just reassign staff members just based on a customer's request. Rather, there is a company investigation into the circumstances of a customer's request for reassignment. However, Securitas did not conduct such an investigation regarding Nicholson. Also, although Fidelity's reason for the request was due to Nicholson's lack of technological proficiency, the allegations are that Securitas did not even discuss with Fidelity why Fidelity wanted her removed. The Court stated that "if Securitas failed to follow its usual practices in responding to a client's desire to have an employee removed, such a deviation can support Nicholson's claim that the company should have known of the alleged [age] discrimination."

Staffing firms and their clients are often viewed as "joint employers" in the enforcement of laws prohibiting workplace discrimination or harassment. Therefore, the client should be prepared to articulate the legitimate nondiscriminatory business reasons for requesting the removal of the staffing employee. It is up to the staffing firm to apply discipline or remove the employee; it is up to the client firm to provide the basis for the staffing firm's actions.

Employer Work Requirements During FMLA Absence

The case of *Massey-Diez v. University of Iowa Community Medical Services, Inc.* (8th Cir. June 27, 2016) addressed the extent to which an employer may aggressively request that an employee work at home while on FMLA. Employee Madonna Massey-Diez was a Physician Assistant. She broke her foot and used FML. While absent, the employer requested her to continue completing medical charts from home. The Court said it was a case of "first impression, whether and under what circumstances an employer interferes with FMLA rights by contacting an employee on FMLA leave with the request to work."

The Court stated that an employer would interfere with an employee's FMLA rights by requesting work in such a manner as to discourage an employee from asking for or taking FML. The Court added that FMLA permits an employee's "voluntary and uncoerced acceptance of a light duty assignment while recovering from a serious health condition." The employer apparently told Massy-Diez that she had to complete these reports while she was on FML. Such a directive, according to the Court, "approach[ed] the line of interference" with the employee's FMLA rights. However, Massey-Diez did not present evidence "that UICMS's requests were a condition of her employment nor that her compliance with them was anything but voluntary." The Court also noted that Massey-Diez did not object to the request.

This case is an encouraging example of how an employer may push for an employee on FML to accept light duty assignments. Remember that the push cannot be a subtle threat, but according to the Court, the employer may urge the employee to do this work while on FML. The employer should also note when making such a request to the employee that the time spent performing the work would not be charged as FML, as that would be considered working time.

Prepare to Respond to ACA Marketplace Notices

Some employers are already receiving notices from the Affordable Care Act Marketplace advising that they may be subject to the employer shared responsibility ("ESR") payment based upon information their employees may have provided to the Marketplace when applying for a premium tax credit. Although these Marketplace Notices are separate from any determination from the IRS regarding whether the employer is subject to the ESR payment under Section 4980H of the Internal Revenue Code, prompt response to these Marketplace Notices may assist employers in avoiding a potential excise tax under the ESR provisions. If an employer receives one of these notices and it incorrectly states that an employee was not offered affordable, minimum essential health coverage, the employer should take quick steps to appeal this determination. Instructions on how to complete the Employer Appeal Request form and link to the form may be found here: https://www.healthcare.gov/downloads/marketplace-appeal-request-form-a.pdf .

Employers should note that appealing the Marketplace Notice will not determine if the organization has to pay an ESR payment as the IRS, not the Health Insurance Marketplace, determines which employers are subject to this payment.

If the Marketplace reverses its initial determination, the employer will be notified and asked to update their application on the Marketplace and will be informed of any tax liability. If an employer requests an appeal, they will receive a letter describing the appeals process and instructions for submitting additional materials if needed.

It is not too early to get a head start on the ACA reporting requirements for 2017. Since the IRS extended the deadlines in 2016 for information reporting on tax year 2015, everyone received an extra two months to distribute the forms to employees and an extra three months to file the forms with the IRS. At this point, there is no indication that the IRS will provide the same relief next year. Assuming the deadlines are not changed, the following is a summary of the ACA information reporting deadlines for 2016 tax year:

> Forms 1095-B and 1095-C are due to employees by January 31, 2017.
>
> Forms 1094-B, 1095-B, 1094-C, and 1095-C are due to the IRS by February 28, 2017, if filing on paper, or by March 31, 2017 if filing electronically.

Note that an employer filing 250 or more information returns must file them electronically. Also note that the transition relief is ending an in 2016, all applicable large employers (those with fifty or more full-time employees or equivalent) must make affordable, minimum value offers of insurance to at least 95 of their full-time employees to avoid the ACA Employer Shared Responsibility payment.

NLRB Tips: NLRB News

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Standard for Organizing Temporary Employees Goes by the Wayside – NLRB Continues Assault on Bush-Era Law

On July 11, 2016, the Board reversed a Regional Director's application of case precedent that a user employer and a staffing agency must both consent before an election covering temp workers and regular employees can be held. Overruling *Oakmont Center,* 343 NLRB 659 (2004), the NLRB stated that it was returning to the standard enunciated in *M. B. Sturgis,* 331 NLRB 1298 (2000), finding among other things:

> . . . Sturgis is more consistent with our statutory charge than Oakwood. Accordingly, [the Board] overrule[s] Oakwood and return[s] to the holding of Sturgis. Employer consent is not necessary for units that combine jointly employed and solely employed employees of a single user employer.

The NLRB will apply a traditional community of interest factors for determining the appropriateness of a combined bargaining unit.

The Bottom Line

This anticipated decision has been applauded by unions nationwide. The ruling allows unions to organize temporary employees, and employees not employed by both joint employers, into a single unit when at least some of the impacted employees are jointly employed. This loosened standard makes it easier for unions to overcome the threshold test for joint employment of the temporary employees, leading to the inclusion of the solely employed user employees in the same unit. As articulated by Member Miscimarra, the majority has "substantially enlarge[d]" the expanded joint-employer platform created in *Browning-Ferris* and that the NLRA precludes the Board from certifying multi-employer bargaining units without the consent of the parties:

The {Board's] expansion of Browning-Ferris here will only make it more difficult for parties to anticipate whether, when or where this new type of multi-employer / non-employer bargaining will be required by the Board , nor can anyone reasonably predict what it will mean in practice.

The NLRB's emphasis on making organizing by unions easier is beyond doubt at this point. This is expected to be the opening salvo in this fight as the case will certainly be appealed.

Lafe Solomon's Authority Challenge Goes to the U. S. Supreme Court for Review

On June 20, 2016, the U. S. Supreme Court granted review of whether President Obama improperly nominated, under the Federal Vacancies Reform Act (FVRA), the acting General Counsel (GC) Lafe Solomon to serve a full-term as GC. See *NLRB v. SW General, Inc.,* U. S., No. 15-1251, *cert. granted,* 2016.

As noted in the February 2016 employment law bulletin, the "hot topic" at the NLRB resulted in a decision to seek *certiorari* in this case. The NLRB claims that the court misread the FVRA that prohibited acting GC Lafe

Solomon from serving as the acting GC once he was permanently nominated to the position of GC in January of 2011.

In its appeal to the Supreme Court, the Board said that the DC Circuit decision conflicts with the interpretation of the FVRA that every president has relied on since the law was passed in 1998. The NLRB continues to adhere to it position that individuals like Solomon – those who are not considered as "first assistants" – are not barred by the Act from serving after being nominated for permanent appointment:

> [The Supreme Court] should grant review to ensure that the new president will not face uncertainty during that transitional time regarding the legal constraints that govern his or her selection of acting officers and nominees.

Expect the Supreme Court to rule on this case in early 2017, after the election cycle runs. As pointed out earlier, and as stated by the district court, the appealing Company challenge to the GC's authority reached the appeals court only because the Company raised the FVRA issue in its appeal of the underlying ALJ decision to the Board. The Court has stated that it does not expect its ruling to "retroactively undermine a host of NLRB decisions" because many litigants failed to raise the issue before the Board.

Joint Employer Rules Re-Visited – Long Standing Business Relationships Threatened

This is a re-print, with updates, of an article first appearing in the August 2015 LMVT employment law bulletin. The case has finally made its way to the D.C. Circuit Court of Appeals.

In *Browning-Ferris Industries of California d/b/a BFI Newby Island Recyclery,* 362 NLRB No. 186 (2015), the Board reversed a Regional Director's decision and direction of election, and predictably, changed the standards for finding joint employers. Claiming that previous precedent was "increasingly out of step with changing economic times", and that it was merely applying sound "common law" precedent to "encourag[e] the practice and procedure of collective bargaining . . . when otherwise bargainable terms and conditions of employment are under the control of more than one statutory employer", the NLRB reversed long-standing precedent and relaxed the requirements for the finding of joint employer status:

> [The Board] <u>will no longer require</u> that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority. (the old rule) Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-joint employment inquiry. (citations omitted). As the Supreme Court has observed, the question is whether one statutory employer 'posesse[s] sufficient control over the work of the employees to qualify as a joint employer with' another employer.
>
> Nor will [the Board] require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised <u>directly and immediately</u>. If otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint-employer status. (Citations omitted – emphasis supplied)

More succinctly stated the Board's new test is summarized below. Employers may be found as joint employers if:

> . . . they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment.

"Essential terms and conditions" of employment consist of matters such as "hiring, firing, discipline, supervision and direction" –

> Other examples of control over mandatory terms and conditions of employment . . . include dictating the number of workers to be supplied; controlling scheduling, seniority, and

> overtime, and assigning work and determining the manner and method of work performance.

This is exactly the type of control typically exercised by franchisors and businesses which employ temporary employees through staffing agencies.

The Background Leading to this Point

This controversial NLRB decision reverses the Director's decision issued in August of 2013, which concluded that Leadpoint Business Services was the sole employer of workers at a BFI-owned recycling plant. In finding that BFI was a joint employer with Leadpoint, as discussed above, the Agency relied on indirect and direct control that BFI possessed over "essential terms and conditions of employment" of the employees supplied by Leadpoint as well as BFI's "reserved authority" to control such terms and conditions. As a result of the Board ruling, the impounded ballots will now be opened and counted.

The democratic majority on the panel denies the "doomsday scenarios" that the decision spells the death-knell of business relationships governed under franchisor / franchisee or staffing agency rules, and claims that such predications are based upon "exaggerations of the challenges that can sometimes arise when multiple employers are required to engage in collective bargaining."

The Fall-Out from the Decision

LMVT is not as sanguine as the Board concerning the impact of this game-changing decision. The number of businesses that could be saddled with unfair labor practice findings and bargaining obligations has been significantly expanded by the NLRB.

Pundit responses were quick and predictable. Organized labor supporters praised the ruling, saying that the ruling would help "working people" across the country.

Republican politicians promised to introduce legislation to "nullify the 'harmful ruling,' " and the International Franchise Association (IFA) said the decision ignored "decades of legal precedent and would hurt the U.S economy." IFA President and CEO Steve Caldeira stated that:

> [The] *Browning-Ferris* decision jeopardizes the ongoing viability of franchising and that Congress should step in and halt the NLRB's 'out-of-control, unelected Washington bureaucrats.'

Regardless of how this plays out in the Circuit Courts, employers should brace themselves for a significant expansion of joint employer findings. This change arguably sets the stage for labor to contend that various business arrangements – outsourcing and vendor relationships – are appropriate for joint employer status. If this decision stands, and further decisions are issued over time by the NLRB, this could be the proverbial "shot in the arm" that organized labor has been seeking in order to reverse years of declining membership.

In the short run, this decision does not bode well for McDonald's in its litigation with the NLRB. OSHA, in an internal memorandum, stated that it was considering the potential for a joint employer finding between franchisors and franchisees when investigating safety complaints.

**NLRB Joint Employer Finding
Goes to the D.C. District Court on Appeal**

In its opening brief *Browning-Ferris* (BFI) urged the circuit court to not adopt the looser joint employer test found by the NLRB:

> Any joint-employer test must give the parties a comprehensible statement of its boundaries, so [the parties] may lawfully and predictably create the relationships they desire, or restructure them. The new test fails to do so and instead creates an amorphous, unworkable fog.

The Bottom Line

While the new standard may or may not be good social policy, the NLRB's shameless return to the 1947 common law standards for a finding of a joint employer may not withstand judicial scrutiny. The outcome of this matter depends significantly on the panel that BFI draws during the course of the litigation.

The Board has requested a two (2) month extension to file an answering brief and a Request for Enforcement of its Decision. Briefing for *amici* responses (briefs for interested parties) will be scheduled after the Agency responds to BFI's brief. Stuart Newman, counsel for BFI, does not expect the Supreme Court to rule on this case before its spring 2017 session.

LMVT will keep readers updated on developments in this case as it progresses through the judicial process

OSHA Tips: OSHA Answers

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.

An OSHA compliance officer arrives unannounced to begin an inspection but the employer's representative whom the employer desires to manage the inspection by OSHA is not present at the site. Can the employer request that the OSHA inspector return later or wait to start the inspection until the employer's chosen representative is available? The answer given is as follows: "yes" the employer can request that the compliance officer return at a later time or wait a reasonable time until the representative is available. OSHA's Field Operations Manual explains that the agency believes waiting approximately one hour is a reasonable amount of time to delay the start of the inspection.

In another case, OSHA explains in an opening conference with the employer, that an impending inspection is in response to an employee complaint about a machine guarding hazard in the maintenance shop. A request is made that the employer's representative grants a general tour of the entire workplace. The question is posed as to whether this request should be granted. The answer given is "no" in the absence of a related special emphasis program, warrant, or a hazard in plain view, OSHA cannot expand the scope of an inspection without the employer's consent. To minimize the risk of the Compliance Officer expanding the scope of the inspection based on his observing hazards in plain view in other locations, the employer's representative should follow a route to the complaint location that introduces the compliance officer to the least sensitive areas of the facility. This is true even if that means walking the representative to a different entrance closer to the location of the complaint.

In a third case, OSHA asks to conduct an interview of a non-management employee who responds to his supervisor that he does not feel comfortable speaking to OSHA and does not want to be interviewed. The suggested response to the employee should be to advise him that it is his choice but also that OSHA has subpoena authority and may compel his participation.

At the conclusion of an interview with a manager the OSHA Compliance Officer asked that he sign the notes verifying their accuracy. The question is posed as to whether he should agree to sign or write out his statement. The answer was given that OSHA no authority to require the witness to sign any document. It is noted that OSHA can issue a subpoena compelling a witness to submit to an audio or video recorded interview.

Wage and Hour Tips: Current Wage and Hour Issues

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.

The number one issue on most employers' minds is the large increase in the minimum salary requirements relating to the executive, administrative and professional exemptions. Effective December 1, 2016 the minimum salary for an exempt employee will be $913 per week.

Also, Congress recently passed a law allowing agencies to increase the amount of administrative penalties they may assess under various statutes. This month the Department of Labor published their changes that become effective August 1, 2016 and apply to any violations that occurred after November 15, 2015.

Those changes that apply to violations of the Fair Labor Standards Act are increased as follows. The maximum penalty for “repeat or willful” violations of the minimum wage or overtime provisions increase from $1100 per employee to $1894 per employee. Wage and Hour policy states that if an employer has previously been investigated and was found to owe back wages any current violations will be considered to be repeat violations. Consequently, they will almost always assess a penalty for each employee found to be in violation in addition to the back wages owed. Also the penalties for illegal employment of a minor that suffers a serious injury increase from $50,000 to $54,910. If the violation is repeated, or willful, the maximum penalty increases to $109,820. There are similar increases in the penalties for violations of other labor laws. A copy of the complete penalty structure is available on the Department of Labor web site (DOL.gov).

Further, in 2013 Wage and Hour instituted a procedure where they are requesting liquidated damages (an additional amount equal to the amount of back wages) in nearly all investigations. Virtually every week I see reports where employers have been required to pay large sums of back-wages and liquidated damages to employees because they have failed to comply with the Fair Labor Standards Act.

As evidenced by the increasing number of law suits filed each year, Fair Labor Standards Act issues continue to be very much in the news. Also, employers are continually getting into trouble for making improper deductions from an employee’s pay, thus I thought I should provide you with information regarding what type of deductions that can be legally made from an employee’s pay.

Employees must receive at least the minimum wage free and clear of any deductions except those required by law or payments to a third party that are directed by the employee. Not only can the employer not make the prohibited deductions he **cannot require or allow** the employee to pay the money in cash apart from the payroll system.

Examples of deductions that can be made:

- Deductions for taxes or tax liens.
- Deductions for employee portion of health insurance premiums.
- Employer’s actual cost of meals and/or housing furnished the employee. The acceptance of housing must be voluntary by the employee but the employer may deduct the cost of meals that are provided even if the employee does not consume the food.
- Loan payments to third parties that are directed by the employee.
- An employee payment to savings plans such as 401k, U. S. Savings Bonds and, IRAs.
- Court ordered child support or other garnishments provided they comply with the Consumer Credit Protection Act.

Examples of deductions that cannot be made if they reduce the employee below the minimum wage:

- Cost of uniforms that are required by the employer or the nature of the job.
- Cash register shortages, inventory shortages, tipped employees cannot be required to pay the check of customers who walk out without paying their bills.
- Cost of licenses.
- Any portion of tips received by employees other than those allowed by a tip pooling plan.
- Tools or equipment necessary to perform the job.
- Employer required physical examinations.
- Cost of tuition for employer required training.
- Cost of damages to employer equipment such as wrecking employer’s vehicle.

- Disciplinary deductions. Exempt employees may be deducted for disciplinary suspensions of a full day or more made pursuant to a written policy applicable to all employees.

If an employee receives more than the minimum wage, in non-overtime weeks the employer may reduce the employee to the minimum wage. For example an employee who is paid $9.00 per hour may be deducted $1.75 per hour for up to the actual hours worked in a workweek if the employee does not work more than 40 hours. Also, Wage and Hour takes the position no deductions may be made in overtime weeks unless there is a prior agreement with the employee. Consequently, employers might want to consider having a written employment agreement allowing for such deductions in overtime weeks.

Another area that can create a problem for employers is that the law does not allow an employer to claim credit as wages, money that is paid for something that is not required by the FLSA. In 2011 the U. S. Fifth Circuit Court of Appeals ruled in a case brought against Pepsi in Mississippi. A supervisor, who was laid off, filed a suit alleging that she was not exempt and thus was entitled to overtime compensation. The company argued that the severance pay the employee received at her termination exceeded the amount of overtime compensation that she would have been due. The U. S. District Court stated the severance pay could be used to offset the overtime that could have been due and dismissed the complaint. However, the Court of Appeals ruled that such payments were not wages and thus could not be used to offset the overtime compensation that could be due the employee. Therefore, employers should be aware that payments (such as vacation pay, sick pay, holiday pay and etc.) made to employees that are not required by the FLSA cannot be used to cover wages that are required by the FLSA.

Due to the amount of activity under the both the Fair Labor Standards Act and the Family and Medical Leave Act employers need to make themselves aware of the requirements of these acts and make a concerted effort to comply with them. If I can be of assistance do not hesitate to call me.

2016 Upcoming Events

The Effective Supervisor®

Birmingham	September 21, 2016
Opelika	October 13, 2016
Huntsville	October 20, 2016

Click for brochure or to register.

2016 Employee Relations Summit

Date:	November 17, 2016
Time:	8:30 a.m.–4:00 p.m.
Location:	WorkPlay Birmingham, AL
Registration Fee:	Complimentary
Registration Cutoff Date:	November 11, 2016

To register, click here.

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Jerri Prosch at 205.323.9271 or jprosch@lehrmiddlebrooks.com.

Did You Know . . . ?

. . . that Starbucks may cost ten bucks as an outcome of pay increases? Not really, but Starbucks announced on July 11, that it will increase employee pay in amounts ranging from 5% to 15%. It will also double the size of its stock awards to employees who have been employed with the company for at least two years. The primary reason for the increase is due to hiring and retention pressures. In addition to compensation increases, Starbucks is changing its dress code to provide "more room for self-expression" and permit employees "to choose from items that may already be part of your everyday wardrobe."

. . . that Lyft will pay at least $27 million for drivers to remain independent contractors? *Cotter v. Lyft* (M.D. Cal. June 23, 2016). Lyft and the drivers had previously agreed to a $12.5 million settlement which the Court rejected. According to the Court, the $27 million figure "fixes the monetary flaws the Court previously identified and enhances the non-monetary benefits at least to some degree." Lyft drivers will receive an amount ranging from $141.98 to $5,556.00. For Lyft, it is a small price to pay if the outcome is to sustain the drivers' status as independent contractors.

. . . that the state of Texas may proceed with its lawsuit against the EEOC regarding background checks? *Texas v. EEOC* (5th Cir. June 27, 2016). Texas sued over the EEOC's 2012 guidance regarding the employer use of background information. Texas alleged that compliance with the EEOC's guidance would be a considerable cost to the state. The question before the District Court was whether the EEOC exceeded its authority in issuing these guidelines. Several Texas state agencies refused to hire convicted felons. According to the Court, Texas's lawsuit "ultimately seeks to question whether a bar on hiring felons constitutes an unlawful employment practice under Title VII." The EEOC takes the position that a "blanket" exclusion of job applicants based upon felony convictions has a discriminatory impact based upon race and national origin and, therefore, violates Title VII. The Court stated that Texas may continue with its lawsuit because it has "suffered an injury" based upon the EEOC's actions. According to the Court, the guidance, at the very least, forces Texas to undergo an analysis, agency by agency, regarding whether EEOC enforcement guidance's standards overrides the State's interests in not hiring felons for certain jobs.

. . . that a union may sue a former employee who expressed support for a rival union? *International Union, Security, Police and Fire Professionals of America v. Faye* (DC Cir. July 15, 2016). While employed by the union, Assane Faye urged support of a rival union. She was terminated and the union sued claiming that she breached a fiduciary duty to the union. The Court upheld the union's right to file such a lawsuit.

. . . that an employee with alcoholism was not considered disabled under the Americans with Disabilities Act? In a decision that surprised us, *Young v. Town of Bar Harbor* (D. Me. June 26, 2016), the Court concluded that a police chief who enrolled in an alcohol treatment program was not considered covered under the ADA. The Court stated that the chief did not substantiate that alcoholism limited a major life activity, that he had a record of impairment, or that his employer treated him as if he were disabled. The Court explained that enrolling in an alcohol treatment program does necessarily mean that a person meets the ADA definition of disability. Town leaders knew of the chief's prodigious drinking habits, but no evidence suggested they considered the chief an alcoholic with impairments that would reach the level of protection under the American with Disabilities Act.

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