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Employer Wins "Dreadful" Case

With the support of our colleagues David Middlebrooks and Whitney Brown, the United States Court of Appeals for the Eleventh Circuit upheld a lower court's dismissal of an EEOC lawsuit over dreadlocks. *EEOC v. Catastrophe Management Solutions* (Sept. 15, 2016). The company had a grooming policy that required employees to wear "professional/business" hairstyles and prohibited "excessive hairstyles or unusual colors." Chastity Jones was hired to work as a Customer Service Representative and was allegedly told that she would have to remove her dreadlocks, which she refused to do. The company withdrew its offer of employment and Jones filed a discrimination charge with the EEOC, alleging that the employer's alleged policy and decision about dreadlocks was race discrimination.

The employer asserted that its decision was based upon a hairstyle, not an "immutable" characteristic, such as race. Furthermore, the employer provided the EEOC with evidence of other hairstyles or appearance issues which were also unacceptable to the employer, such as long hair on men and nose rings. Notwithstanding this, the EEOC issued a cause determination and sued the company in the United States District Court for the Southern District of Alabama. The company filed a Motion to Dismiss because the prohibition of a hairstyle was not racially discriminatory, which the District Court granted. Undeterred, the EEOC appealed the well-reasoned decision to the Eleventh Circuit.

The EEOC argued that the protected class of "race" includes "individual expression" and expression which is "culturally associated with race." In upholding the lower court's dismissal of the lawsuit, the Eleventh Circuit stated that "every court to have considered the issue has rejected the argument that Title VII protects hairstyles culturally associated with race." The Court also noted that the EEOC pursued the theory of disparate treatment (intentional discrimination), as opposed to disparate impact. In a disparate treatment claim, the plaintiff must prove that the employer's motive was illegal. In a claim of discriminatory impact, motive is not necessary in order for a plaintiff to prevail. In a disparate impact claim, the theory is that a policy which is neutral on its face has a disproportionate impact on a protected class and if so, the employer has to show the business necessity of that neutral factor and that alternatives with less of a discriminatory impact were unavailable.

The Court also considered the legislative history of "race" as a protected class. According to the Court, "in the 1960's, as today, 'race' was a complex concept that defied a single definition." However, the Court stated that Congressional intent about defining race refer to "common physical characteristics shared by a group of people and transmitted by their

ancestors." The Court rejected the EEOC's definition of race as more expansive culturally, to include the wearing of dreadlocks. The Court explained that "discrimination on the basis of black hair texture (an immutable characteristic) is prohibited by Title VII, while adverse action on the basis of black hairstyle (a mutable choice) is not."

We expect the EEOC to not take no for an answer and continue to push "cultural" bases for Title VII race discrimination claims. Employers should be aware that broader issues regarding individual expression will continue to arise, whether they may be culturally identified with a particular race, gender or other protected class.

"Cat's Paw" Footprint Expands

The "cat's paw" is referred to in the employment litigation context as a theory of employer liability where a decisionmaker who is without bias relies on the biased input of other supervisors when making an employment decision. If the plaintiff can show that the decisionmaker was influenced by the bias of others, then liability attaches to the employer, regardless of the decisionmaker's intent.

The "cat's paw" has its origin from a Seventeenth Century fable known as "The Monkey and the Cat." In this fable, at the monkey's urging, a cat pulls chestnuts from a fire, resulting in the Monkey enjoying the chestnuts and the cat licking its burned paw.

In the case of *Vasquez v. Empress Ambulance Service, Inc.* (2nd Cir. Aug. 29, 2016), the cat's paw theory was applied to falsified evidence the employer relied upon to make an adverse decision regarding the plaintiff. In this case, Vasquez, the plaintiff, complained about sexual harassment from a co-worker. This resulted in the employer conducting an investigation and according to the employer's investigation: the co-worker was actually harassed by Vasquez. As an outcome of the investigation, Vasquez was terminated. In permitting the case to go forward, the Court said that Vasquez may develop the theory that the bad intent of a co-worker and/or other witnesses as part of the employer's investigation tainted the employer's overall investigation and decision affecting her. In essence, this is a variation of the cat's pay theory. That is, if an employer relies on evidence submitted by non-supervisory employees where that evidence is false, then the employer's decision may be considered a violation of the employee's rights, even if the employer's actions are in good faith.

The moral to the story is to be sure that investigations are truly thorough. Too often when reviewing employer investigations, we have found that they were not thorough enough. Not enough witnesses were interviewed and the questions were not probing. Furthermore, if evidence appears to contradict the allegations that resulted in the investigation, be sure to go full circle to the individual who raised the concern that lead to the investigation—explain to that individual what the results of the investigation are thus far and invite the individual to submit additional information or to respond. That did not occur in the *Vasquez* case.

Dollar General(ly) to pay $277,000.00 for ADA Violation

The case of *EEOC v. DolGenCorp, LLC* (E.D. Tenn., Sept. 16, 2016), is an important "lesson learned" for employers in two respects. First, companies need to be sure that proper policies at the corporate level are absolutely understood by those who have to follow them at the field level. Second, a policy is not necessarily rigidly applied when an ADA reasonable accommodation issue is in play.

Linda Atkins worked for DolGenCorp (Dollar General) before she was terminated for "grazing" when she drank an orange drink. "Grazing" is a term in the grocery industry for when an employee eats or drinks products without paying for them, often as the employee walks through the store. Atkins was an insulin-dependent diabetic. She asked her employer if she could keep juice close to her register in the event she felt the onset of a hypoglycemic attack due to her condition. Her manager denied the request, stating that it was company policy that cashiers may not have food or beverages at their workstation.

Atkins was working alone at the store when she started to feel dizzy due to her low blood sugar. She drank an orange drink and then, shortly thereafter when she recovered, she paid for the drink. The District Manager and Security Manager terminated her for violating the company's grazing policy.

A jury returned an award of damages and back-pay totaling $277,565.00 based upon Atkin's termination. It turned out that Dollar General had a corporate policy that would have permitted the accommodation of Atkins keeping a beverage close to her register. The problem was that Atkins's Store and District Managers did not understand that there was an exception and failed to engage in any other kind of accommodation discussion. According to the EEOC, "This case highlights another employer who failed to train its employees on the reasonable accommodation requirements under the ADA. We hope this verdict sends a message to employers." We include reasonable accommodation as a topic in our Effective Supervisor training programs.

Prepare to File ACA Forms AGAIN

In case you haven't noticed, 2016 has flown by, and, I hate to be the one to tell you, but it is already time to begin preparations for completing your ACA Information Returns again. Applicable Large Employers ("ALE") (those with 50 or more full-time employees) should not have the same learning curve they had last year; however, many employers may have just reached the threshold in 2016 and thus are preparing the forms for the first time. If so, please refer back to prior guidance (July 2015 ELB, December 2015 ELB, and January 2016 ELB). Moreover, there are a few additional changes for this year's returns. First, the transition relief the IRS offered for 2015 will not exist for 2016, which means that all ALEs now have to offer coverage to 95% of full-time employees and their dependents, instead of only to 70%. The penalties have also increased for employers that improperly report information: the penalty for failing to file correct information is now $260, with a maximum penalty of $3.1 million during a calendar year. As we told you in August (August 2016 ELB), the IRS has released new draft 1095-C and 1094-C forms which include several clarifications from the 2015 filing season.

Links to draft forms for 2016:

1094-C - https://www.irs.gov/pub/irs-dft/f1094c--dft.pdf
1095-C - https://www.irs.gov/pub/irs-dft/f1095c--dft.pdf
1094-B - https://www.irs.gov/pub/irs-dft/f1094b--dft.pdf
1095-B - https://www.irs.gov/pub/irs-dft/f1095b--dft.pdf

Link to draft instructions for 2016 Forms 1095 & 1094-C - https://www.irs.gov/pub/irs-dft/i109495c--dft.pdf

The IRS has not yet indicated whether it will apply a good faith reporting standard as it did in 2015. These forms must be filed by March 31, 2017, if done so electronically, or by February 28, 2017, if filed "on paper." Employers filing 250 or more forms are required to file electronically. Due to complaints by some employers regarding error messages they received when filing 1095-Cs and 1094-Cs earlier this year, the IRS has indicated it plans to use more specific error messages to help employers identify mistakes.

Since we are already on the topic of the ACA, it goes without saying that a lot of unknowns still remain for its future. Republican Presidential nominee Donald Trump has called for the repeal of the ACA and even Democrats are beginning to talk about changing the law to fix what they acknowledge are increasing problems with the marketplaces. Senator Tom Carper (D-Del) recognizes "there are things we can do and need to address restoring competition in these exchanges." Health and Human Services Secretary Sylvia Burwell has also indicated they are attempting to tighten the rules for special sign up periods, due to complaints by insurers that people are signing up only after they get sick. Speaking to a group of Senate Democrats on the Hill last week, Burwell "answered many tough questions on how to improve the competitiveness of the marketplace, stabilize plans, and improve access and affordability," according to Senator Chris Coons (D-Del). Although most Republicans remain strongly opposed to the law, Republicans on the House Energy and Congress Committee held a hearing in June on a range of proposed bills that would effectuate changes shoring up insurers' business on the ACA's marketplaces.

NLRB Tips: NLRB News Update – Labor Board Continues Pro-Union Stance

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.

Agency Busy Ahead of Member Hirozawa's Leaving the NLRB

Ending his term at the end of August 2016, Board Member Kent Hirozawa joined the majority in a rush of issuing far-reaching decisions that continued the Board's aggressive pro-union stance under President Obama's administration. Below is a synopsis of recent decisions by the Board that went the way labor organizations wanted them to go. Unless otherwise note, all decisions were reached by a panel consisting of all four (4) members, including Member Hirozawa, right before his term expired.

Issuing decisions before a term expires in not unusual; however, the impact of the decisions below is worthy of discussion.

***Columbia University,* 364 NLRB No. 90 (2016).**

The Board, in an expected move, overruled *Brown University,* 342 NLRB 483 (2004). Finding that the Bush-era Board erred in its statutory interpretation in *Brown*, the NLRB reversed *Brown* and found that the decision improperly "deprived an entire category of workers [i. e. – the graduate student assistants] of the protections of the Act, without a convincing justification in either the statutory language or the policies of the Act."

As first noted in the January 2016 ELB, the trend is for the NLRB to consider graduate students as statutory employees.

The Bottom Line

This decision, along with previous decisions involving private school graduate students at Duke, Harvard and Northwestern, opens the door to unionization efforts at private universities and will have far-reaching ramifications on campuses across the country if these decisions stand.

Expect to see the Circuit Courts to weigh in, and if a split of opinion develops in the Circuit Courts, then for the U.S. Supreme Court to ultimately decide this issue.

***King Soopers, Inc.*, 364 NLRB No. 93 (2016).**

In *King Soopers,* the primary issue was whether the NLRB should modify its current make-whole remedy to require respondents to fully compensate alleged discriminatees for "search-for-work" expenses incurred. In the past, search-for-work" expenses were just "off-set" against interim earnings deducted from gross backpay owed.

The Old Rule

As noted in the March 2016 ELB, pg. 5, the Board was asked by the General Counsel to include "search-for-work" expenses in the make-whole remedy, thereby getting rid of the old rule that such expenses were off-set against "interim earnings." The argument was that if the alleged discriminatee had little to no interim earnings to off-set, then the "search-for-work" expenses were lost to the alleged discriminatee, and thus a less than "make-whole remedy" was ordered.

The New Rule

The Board found the General Counsel's argument persuasive, as predicted, and now adds the "search-for-work" expenses into the gross back-pay amount regardless of the amount of interim earnings.

Therefore, under the NLRB's "broad, discretionary" authority under Section 10(c) of the National Labor Relations Act (NLRA), the Board has changed a rule that has been in effect since the late 1930's.

The Bottom Line

Under the Circuit Court's limited standard for review, expect this decision to stand. This case has already been appealed to the D.C. Circuit Court of Appeals on September 9, 2016. Management attorneys feel that this case is yet another example of the NLRB's and its General Counsel's efforts seeking more expansive remedies for workers.

Assertion of Jurisdiction Over Charter Schools

The NLRB's assertion of jurisdiction over two charter schools, arguably considered as a "political subdivisions" of the state, is troubling, because it appears that charter schools should be considered as "statutorily" excluded from coverage of the Act.

The recent cases that have caused uproar among management practitioners involve charter schools in New York and in Pennsylvania. If the Board's rulings withstand judicial scrutiny, then the NLRB rulings mean that the teachers employed by those charter schools may organize under the NLRA.

The Underlying Rulings:

In *Hyde Leadership Charter School – Brooklyn,* 364 NLRB No. 88 (2016), the NLRB, in a 2-1 split decision, determined that the Hyde school constituted an "employer" within the meaning of the Act, and was not statutorily excluded under Section 2(2) of the Act.

The Board majority concluded that the charter school[s] in question was created by private individuals and their governing board members were privately appointed. The Board found "no compelling reasons to discretionarily decline assert[ing] jurisdiction over this private, nonprofit education corporation."

Finally, under Section 14(c)(1), the Board did not decline to assert jurisdiction over the Hyde school "on the basis of the charter schools' local character."

The holding in the Pennsylvania case was found along similar lines. See *The Pennsylvania Virtual Charter School,* 364 NLRB No. 87 (2016).

The Dissent in *Hyde:*

Member Miscimarra, the sole Republican in both cases, dissented in both. In *Hyde,* Miscimarra stated that he believed jurisdiction was "foreclosed . . . by Section 2(2) and the "political subdivision" test set forth in *Hawkins County* [citation omitted] '

In addition, Miscimarra stated that the NLRB should decline jurisdiction consistent with Section 14(c)(1) of the Act, which gives the NLRB discretion to decline jurisdiction to "permit state and local governments to regulate charter school labor relations." A declination of jurisdiction would, as Miscimarra stated:

> . . . will provide much greater certainty and predictability than could ever be afforded by the NLRB in this area, and the rights of charter school employees would more closely align with those afforded to public school employees under state and local laws.

Other points made by Miscimarra include:

- The Hyde school was created directly by the State of New York as an administrative arm of the government.
- Hyde school officials are controlled by trustees who are responsible to public officials.

The Bottom Line

Expect the Pennsylvania Charter school case to be appealed but not the *Hyde* matter. Interestingly, in *Hyde*, the union lost the election - 23 no's to 13 yes's. The tally of ballots was issued on September 9, 2016, with no objections filed. Therefore, there is no reason for the employer to appeal the decision, and the union certainly will not appeal it as the decision and direction of election went in its favor.

If jurisdictional "creep" continues, with judicial approval, then expect additional faculties at charter schools filing for union representation, along with other workers, who previously could not be represented by a union under the NLRB's old jurisdictional standards.

Creative Vision Resources, LLC.,
364 NLRB No. 91 (2016).

A three-member panel of the Board in this case addressed the "perfectly clear successor" standard and found that Creative Vision was a perfectly clear successor because it had failed to announce new terms and conditions of employment before inviting the predecessor workers to accept employment.

According to the Board, the hiring process of the Respondent remained in "flux" throughout the month of May 2011 and the announcement finally setting the terms and conditions of employment came "too late" to permit Creative Vision to take advantage of the perfectly clear exception, which allows an employer to normally set the initial terms and conditions of employment before operating as a successor:

> Gossip, conjecture, and unsubstantiated rumors cannot take the place of the clear announcement of intent to establish a new set of conditions required by *Spruce Up.*

The *Spruce Up* Decision

In *Spruce Up,* 209 NLRB 194 (1974), *enfd. per curiam,* 529 F.2d 516 (4th Cir. 1975), the Board narrowed the circumstances under which an employer may initially set the terms and conditions of employment. (A *per curiam* decision is one issued by the court acting collectively and unanimously. No author of the decision is indicated on the decision itself).

In *Spruce Up,* the Board found that the "perfectly clear" exception was "restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment."

In subsequent cases, the NLRB has clarified the standard, finding that a new employer has an obligation to bargain with the incumbent union where the successor

> . . . displays an intent to employ the predecessor's employees without making it clear that their employment will be on different terms from those in place with the predecessor [employer].

What does this mean? In short, an employer buying a union employer should absolutely ensure that it makes "perfectly clear" that the **terms and conditions of employment will be different from those terms and conditions contained in the contract** before it expresses or exhibits any intent to hire the predecessor's employees. A letter to the predecessor's employees before any contact with the predecessor's employees and composed / reviewed by labor counsel should suffice.

The Bottom Line

It seems that the exception under *Spruce Up* has been narrowed further by this decision

Let's hope that U.S. Circuit Courts agree with Republican member Miscimarra's dissent and the administrative law judge's determination that *Creative Vision* was not a "perfectly clear" successor and thus did not violate the Act by setting the initial terms and conditions of employment for its new employees. If this decision stands upon review, it has just become more difficult to fit into the *Spruce Up* exception under the "perfectly clear" doctrine.

Whatever the ultimate outcome of this case, this ruling should give employers reason for pause when considering buying organized businesses, and they should proceed cautiously when navigating the successorship playing field as established by the NLRB.

EEO Tips with an Introduction to EEO Consultant, JW Furman

This article was prepared by JW Furman, EEO Consultant Investigator, Mediator and Arbitrator for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Ms. Furman was a Mediator and Investigator for 17 years with the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). Ms. Furman has also served as an Arbitrator and Hearing Officer in labor and

employment matters. Ms. Furman can be reached at 205.323.9275.

I am very happy to be the newest addition to LMVT. Even though my practice is that of a neutral – investigation, mediation and arbitration – I have received many questions about EEOC's practices. For those of you who do not know me, I recently left EEOC after 17 years as investigator and mediator. During the eight years I mediated EEOC charges I continued to attend its investigator training. Many people I speak with see EEOC's processes as mysterious and I believe this perception is counterproductive to employers as well as the agency. I am glad to answer questions any time based on the training I received and practices I observed while with EEOC. I will also address frequently asked questions and concerns in this newsletter.

I was recently asked if the late filing of a position statement will create an adverse inference. The short answer is that a cause finding based on adverse inference can and will be issued when an employer refuses to provide a position statement or requested information. BUT, whether a late filing carries an adverse implication to an investigator usually depends on how the employer handles it. If an employer does not communicate that the position statement will be late or respond to EEOC's requests, the investigator will see that as a failure to cooperate. And the negativity that creates in the investigator's mind will influence his/her determination.

EEOC investigators are people and people respond well to cooperation. My best advice regarding submissions that cannot or will not be made by the requested date is to communicate with the investigator before that date. Let them know that you cannot meet the deadline, tell them when you believe you can provide it and, if possible, give them a reason for the delay. If you appear to be cooperative and transparent, you may find the investigator to be less adversarial.

The same is true for objectionable record requests. Let the investigator know before the due date that there is an objection or the request is too onerous. If the information requested is too difficult to extract from protected information or only exists in boxes stored off site, say so. Providing some of the information or offering an alternative which includes some of the requested material keeps the spirit of cooperation alive and will serve you well. You still may receive a form letter threatening a subpoena or an adverse inference finding but, if the investigator does not feel he/she is being ignored or played by the employer, it may stop there.

Again, a late submission alone will not trigger an adverse inference cause finding. And other adverse consequences can be avoided with timely communication.

Feel free to contact me with EEOC related questions or concerns (or for investigation, mediation or arbitration information). I look forward to hearing from you!

OSHA Tips: OSHA Interpretation Letters

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.

A letter to OSHA in one case asked if an injury and illness would meet the work-related exception of 29 C.F.R. §1904.5(b)(2)(6). In this particular case, the employee injured his hand when it was caught between two objects. He was given a post-accident drug test which indicated that he was intoxicated from alcohol at the time of the incident. The question was if the case met the OSHA standard as noted above as the worker was self-medicating for his work-related condition of alcoholism. OSHA's answer given is no and it referenced a conclusion of the Office of Occupational Medicine and Nursing that alcohol does not treat the disorder of alcoholism but rather is a manifestation of the disorder.

A second interpretation request regarded the recordkeeping regulation contained in 29 C.F.R. Part 1904 "Recording and Reporting Occupational Illnesses and Injuries." The questioner requested an interpretation regarding medical treatment beyond first aid. The

question posed involved a worker who began to experience wrist pain after spending most of his work day at a computer. Arrangements were made for him to visit the Occupational Health Clinic. Prior to going to the clinic, the employee purchased and used a rigid wrist brace. The doctor at the clinic stated that while the brace was not necessary, if the worker felt he was getting pain relief by using the brace, he should continue to wear it. OSHA's answer was that this does constitute medical treatment beyond first aid for recordkeeping purposes. They noted that OSHA's regulation 29 C.F.R. §1904.7(b)(5)(ii)(F) provides that orthopedic devices with rigid stays or other systems designed to immobilize parts of the body are considered medical treatment beyond first aid for all recordkeeping purposes. By recommending that the employee use the rigid brace, the case involved medical treatment beyond first aid and must be recorded

Wage and Hour Tips: White Collar Exemptions

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

In May 2016 Wage and Hour published some substantial revisions to the regulations governing white collar exemptions. The changes, according to DOL guidance, will be effective on December 1, 2016, which is only two months away. Hopefully, most employers have already begun the process of reviewing their pay system to ensure they are in compliance with Fair Labor Standards Act. Even though there is a significant increase in the minimum salary required the revision does not contain any changes in the duties tests. Copies of the revised regulations, along with Wage and Hour's comments regarding why the changes were made, can be found on their web site at https://www.dol.gov/WHD/.

Because a large percentage of the violations found by Wage and Hour are due to the misclassification of employees I am revisiting the requirements for the management exemptions even though I had discussed the revisions earlier this year. (May 2016 ELB). For many years these were referred to as "White Collar" employees but in today's world they no longer carry that connotation.

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $913 per week beginning December 1, 2016. The minimum salary also may be paid at the rate of $1,826 biweekly, $1,978 semi-monthly or $3,956 monthly. The new regulations also allow a portion of minimum salary to be paid as a nondiscretionary bonus, incentives or commissions. The regulations allow up to 10% of the $913 to be paid in this manner provided the additional payments are paid at least quarterly. For example, a stipulated profit sharing bonus must be paid at least once each quarter rather than one lump payment at the end of the year.

Under the current regulations there is a separate duty test for "highly compensated employees" that is established at $100,000 annually. Effective December 1, 2016, this minimum compensation will be increased to $134,004 annually.

There is an additional change that will become effective on December 1 that provides that the minimum salary will be adjusted every three years. Thus, on January 1, 2020 the salary level will be adjusted based on the 40th percentile of weekly earnings of full time non-hourly workers. The amount will be determined by the statistics published by the Bureau of Labor Statistics for the second quarter of the preceding year; consequently, the adjustment in the minimum salary required for 2020, 2021 & 2022 will be based on the earnings for the second quarter of 2019.

Note: Earlier this month twenty-one states and the U.S. Chamber of Commerce filed separate suits in an attempt to get the changes overturned. However, I recently read an article by a former Wage and Hour Administrator that served during the George W. Bush

administration recommending that employers not count on getting the regulations overturned but rather planning for them to take effect on December 1.

Even though the changes in salary requirements are the primary issue, employers must remember the application of the exemption is not dependent on job titles but on an employee's specific job duties and salary. In order to qualify for an exemption the employee must meet all the requirements of the regulations.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $913 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

This exemption is typically applicable to managers and supervisors that are in charge of a business or a recognized department within the business such as a construction foreman; warehouse supervisor; retail department head or office manager.

Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $913 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

This exemption may be applicable to certain management staff positions such as Safety Directors, Human Resources Managers, and Purchasing Managers. Of the exemptions discussed in this article, the administrative exemption is the most difficult to apply correctly due to application of the "discretion and independent judgment" criteria with respect to matters of significance. The administrative exemption does not apply to administrative assistants.

Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $913 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Examples of employees that could qualify for the exemption include engineers, doctors, lawyers and teachers.

Creative Professional Exemption

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $913 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Typically this exemption can apply to artists and musicians.

Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than $913 per week or at an hourly rate not less than $27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:
  1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
  4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

This exemption does not apply to employees who maintain and install computer hardware.

Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

You will note that this exemption is the only one in this group that does not have a specific salary or hourly pay requirement. Thus, the exemption may be claimed for outside sales employees that are paid solely on a commission basis.

The application of each of these exemptions depends on the duties actually performed by the individual employee rather on what is shown in a job description plus the employee must meet each of the requirements listed for a particular exemption in order for it to apply. Further, the employer has the burden of proving that the individual employee meets all of the requirements for an exemption. Therefore, it is imperative that the employer review each claimed exemption on a continuing basis to insure that he or she does not unknowingly incur a back wage liability. If I can be of assistance in reviewing your positions please do not hesitate to contact me.

Note to Government Contractors

A couple of years ago the President issued an Executive Order setting a minimum wage for employees working on certain government contracts. The Order also provided that wage would increase each year based on increases

in the Bureau of Labor Statistics wage data. The Department of Labor recently published the rates for 2017. The minimum wage will increase to $10.20 per hour on January 1, 2017, and the rate for tipped employees will increase to $6.80 per hour.

2016 Upcoming Events

EFFECTIVE SUPERVISOR®

Opelika – October 13, 2016
3000 Robert Trent Jones Golf Trail
at Grand National
Opelika, AL 36801
(334) 749-9042
www.rtjgolf.com/grandnational/

Huntsville – October 20, 2016
U.S. Space and Rocket Center
One Tranquility Base
Huntsville, AL 35805
(256) 837-3400
www.rocketcenter.com

Click here for brochure or to register.

2016 Employee Relations Summit

Birmingham - November 17, 2016
8:30 a.m. – 4:30 p.m.
WorkPlay
500 23rd St. S
Birmingham, AL 35233
(205) 879-4773
www.workplay.com

Registration Fee – Complimentary
Registration Cutoff Date - November 11, 2016

To register click here.

Hotel Accommodations:

DoubleTree by Hilton Hotel Birmingham
808 South 20th Street
Birmingham, Alabama 35205
Phone: 205.933.9000

Call DoubleTree Reservations at (205) 933-9000 or 1-800-222-TREE (8733) using **Group Code LAW** prior to the cut-off date of October 17, 2016 or **access the direct link to our LMVT Group Page by clicking here**. Discounted parking rates will also be available for the group.

Please note that hotel reservation requests after the cut-off date of October 17, 2016, will be provided on a space available basis at prevailing rates.

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 the Service Employees International Union has been ordered to pay an employer $5.3 million in damages? *Professional Janitorial Service of Houston, Inc. v. Service Employees Local 5* (Tex. Dis. Ct., Sept. 6, 2016). The company sued the union as an outcome of the union's "Justice for Janitors" campaign in Houston. The SEIU's campaign included public pressure directed toward Professional Janitorial Services. The union publicly accused the company of Wage and Hour and Labor law violations, even though there were no such violations. The jury verdict represented the company's loss in profits as an outcome of the union's objective to create pressure on the company's customers to use another contractor. The company's theory of liability was "business disparagement."

. . . that a nationwide class action brought by Assistant Branch Managers against JPMorgan may proceed? *Varghese v. JPMorgan Chase & Co.* (S.D.N.Y. Sept. 9, 2016). The case alleges that assistant managers throughout the country were misclassified as exempt under the Fair Labor Standards Act. JPMorgan & Chase has paid hefty settlements for other wage and hour claims, including $12 million in October 2014 to 145,000 tellers and other hourly employees and $42 million in 2011 for 3,800 misclassified loan processors. Other prominent misclassification cases that are pending in the

banking industry include cases against PNC Bank MA and Fifth Third Bank.

. . . that LG Corporation and Samsung Electronics Company are alleged to have participated in an "anti-poaching" Agreement? *Frost v. LG Corp.* (N.D. Cal., Sept. 9, 2016). The allegation is that the companies agreed not to "solicit or hire one another's workers." The Complaint alleges that this Agreement has suppressed wages and opportunities for employees of both companies. According to the Complaint, the Agreement has existed for approximately eleven years and "the impact of this bilateral Agreement is exacerbated because of the similarity between LG and Samsung's businesses and the scope of the business lines in which LG and Samsung compete in the U.S." In 2015, a similar lawsuit involving Apple and Google resulted in a settlement of $415 million which covered 64,000 employees.

. . . that work schedule legislation initiatives are expanding? On September 19, the city of Seattle passed an Ordinance related to schedule "predictability" pay. The Seattle Ordinance requires retail employees to know their schedules at least fourteen days in advance. If the schedule is expanded within the fourteen day period, employees receive an additional amount of "predictability pay." Employees who are sent home early will be paid for one half of the scheduled hours they did not work. Similar ordinances are being considered in Washington, D.C., and New York City, as well as in California, Connecticut, Illinois, Indiana, Maine, Minnesota, New York, Oregon, and Rhode Island.

. . . that Hewlett-Packard agreed to pay $750,000 based upon OFCCP allegations of discriminatory hiring? The issue arose out of a Hewlett-Packard location in Conway, Arkansas. OFCCP conducted a compliance review, the outcome of which showed a significant statistical disparity involving 504 minority applicants, including 349 blacks. The settlement amount will be distributed to the 503 class members. Furthermore, the company agreed to hire class members for inside sales positions as those positions become available. This is one of the few situations where OFCCP initiatives have focused on hiring practices related to professional employees.

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