LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

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Your Workplace Is Our Work®

Inside this issue:

FMLA Litigation Increases

Employment litigation trends often correlate to the level of unemployment in the United States. The assumption is that an individual who is able to find another job has less of an interest in litigating against her or his previous employer. While most employment litigation is in decline, two narrow classes of employment litigation are on the rise: Wage and Hour and FMLA litigation. In both types of cases, there is no prerequisite for an employee to file an administrative complaint—the employee may go directly to court.

In FY 2012, private litigants filed 404 federal district court lawsuits alleging FMLA violations. Last year, that number increased to 1,181. As private lawsuits increased, FMLA complaints filed with the Department of Labor declined, from 1,723 during FY 2012 to 1,419 during FY 2015. Employees have become aware of their FMLA rights and if an FMLA issue arises, they are more likely to see an attorney than contact the DOL. Once they meet with an attorney, an experienced attorney will explain why there is no need to involve the DOL and why they should instead proceed directly with a demand letter and ultimately litigation. Medical trends suggest that FMLA-related litigation will only increase as more and more employees and their spouses, parents, and children have serious health conditions.

Despite the number of FMLA suits, there is still uncertainty about the standards employees must meet to prove an FMLA violation. For example, some courts disagree over the standard to prove retaliation under the FMLA—whether the use or request of FMLA was a "motivating" factor for the decision or a "but for" factor, where but for the employee's use or request of FMLA, the adverse action would not have occurred.

Another frequent issue involves the outsourcing to third-party administrators of FMLA leave. The employer is ultimately responsible for FMLA liability if a third-party administrator, for instance, does not provide timely notice to the employee, mistakenly denies FMLA coverage, or fails to report an employee's call-in if they are on an already-approved leave. Employers who use third-party administrators should include contractual indemnification provisions if the employer has relied on the administrator's actions and they turn out to be an FMLA violation.

Employers are wary about the extent to which they may act on information obtained through the employee's use of social media. An employer generally has the right to take action based on information posted to social media sites. While an employer should not force others to help it inspect an employee's social media accounts, an employer may act on any information that the employee leaves publically-available, available to the employer (or

HR manager or supervisor) as a friend, or which the employer gains through a friend's (often a co-worker's) voluntary disclosure. Thus, if an employee is absent for FMLA related reasons yet posts activities on social media which are contrary to the claimed reason, the employer has the right to investigate and take adverse action if the employer concludes that the employee's FMLA request was fraudulent. The employer's response should be proportional to and consistent with its responses to similar falsifications.

Age and the Employment Application Process

For several years, the EEOC has focused on age discrimination in the hiring process. Proving age discrimination in hiring is difficult because, although an applicant knows when he or she has not been hired, the applicant often does not know the age of the person employed. The recent case of *Richard M. Villarreal v. R.J. Reynolds Tobacco Company* (11th Cir. en banc Oct. 5, 2016), has made it even more difficult for individuals to prove age discrimination in the application process.

Villarreal was 49 years old when he applied several times online for a position with R.J. Reynolds. He alleged that the Company's hiring practices and those of its recruiting vendor had a discriminatory impact based upon age. According to the lawsuit, the recruiter and R.J. Reynolds targeted applicants "2-3 years out of college" and were told not to hire applicants who had eight to ten years of prior experience. The issue before the full Court was whether the Age Discrimination and Employment Act permits *disparate impact* claims to prove age discrimination. In a *disparate impact* claim, a facially-neutral employment practice is alleged to have an adverse effect on one protected class compared to another, such as these recruiting standards adversely affecting those in a protected age group. A three member Eleventh Circuit panel in November 2015 agreed that discriminatory impact claims were permitted under the ADEA. However, the full Eleventh Circuit determined that the ADEA does not permit discriminatory impact claims, and, therefore, Villarreal's claims may not proceed. The Eleventh Circuit stated that the ADEA explicitly authorizes discriminatory impact claims to be brought by "employees." Because Villarreal and other job applicants were not employees, they could not bring such a claim. Villarreal's only option was to bring a claim for intentional discrimination based upon age, which he failed to do in a timely manner.

This case has potential widespread implications. For example, employers that target recent college or professional school graduates may have a practice with a discriminatory impact, but there is no remedy for the older rejected applicant. According to AARP, employees in the protected age group are having a more difficult time finding work compared to any other demographic classification.

EEOC Enforcement Plan Update: Contractor, "Gig" Workers and Anti-Muslim Bias

On October 17, 2016, the EEOC announced a revised enforcement plan covering Fiscal Years 2017 (September 30th) through 2021. The "emerging" issues the EEOC will focus on include:

1. "Complex" employment relationships, such as temporary workers, staffing agencies, "gig" workers, and independent contractors.

2. "Backlash" discrimination, such as allegations of discrimination or harassment against Muslims, Sikhs, or those of Arab, Middle-Eastern or South-Asian descent.

3. Employer use of technology in the selection process which adversely affects protected classes.

The following areas from the just concluded Strategic Enforcement Plan will remain through Fiscal Year 2021: a focus on "vulnerable" employees, pay equity and protection, systemic harassment, barriers in recruiting and hiring, and sexual orientation and gender identity. The EEOC voted 3-2 in favor of this Strategic Enforcement Plan, with the two Republican Commissioners dissenting. The basis for their dissent was a change to the Enforcement Plan which permits the

EEOC's General Counsel to initiate litigation without prior approval from the five-member Commission.

Fair Pay and Safe Workplaces Rule Enjoined

Editor's Note: On October 24, 2016, the Eastern District of Texas granted a preliminary injunction to prevent many provisions of the final rule described below from taking effect. Chief Acquisition Officers and other necessary personnel have been instructed to abide by this Court Order and not to require this information.

If not enjoined, the Fair Pay and Safe Workplaces Rule would require that, when bidding for new federal government contracts, contractors and subcontractors would have to disclose violations of fourteen labor and employment laws and their state law equivalent. They would need to audit and report their compliance every six months. Failing to do so would result in disqualification from receiving a contract or debarment from fulfilling the contract.

If not for the injunction entered on October 24, on October 25, 2016, this rule would have begun a phase in process that would have continued through October 25, 2017. As of October 25, 2016, the rule covers prime contractors involving potential contracts of at least $50 million or more. As of April 25, 2017, that threshold for prime contractors will be reduced to $500,000. As of October 25, 2017, the $500,000 threshold will include subcontractors.

In another enjoined provision, the rule, in contracts of at least $1 million, would have prohibited employees or independent contractors from being required to enter mandatory arbitration agreements covering sexual assault claims or Title VII claims.

The paycheck transparency provisions, which take effect on January 1, 2017, were <u>not</u> enjoined. These provisions require that contractors and subcontractors will have to provide detailed hours worked information with paychecks, including hours up to forty and those hours which were considered overtime.

President Obama, when issuing the Executive Order, stated that "contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government." The President was particularly concerned with compliance with safety and wage and hour requirements and also those employers which were have found to have violated the National Labor Relations Act in connection with union organizing or union contract administration.

We will continue to monitor the progress of the legal proceedings surrounding this Rule.

The Affordable Care Act Affords More Protection for Potential Whistleblowers

The Occupational Safety and Health Administration (OSHA) published a final rule on October 13, 2016, that establishes protections for employees from retaliation for reporting violations of the various reforms found in Title I of the ACA. Under this final rule, employees are also protected from retaliation for receiving a premium tax credit or cost sharing reduction for enrolling in a qualifying health plan. The final rule establishes procedures and timeframes for handling retaliation/whistleblower complaints under the Affordable Care Act (ACA). Employees who believe they have been retaliated against in violation of the final rule may now file a complaint with OSHA. Such complaints must be filed within 180 days after the alleged retaliation occurred. Upon receipt of a complaint, OSHA will review it to determine whether certain basic requirements are met such as whether the complaint was filed on time. If so, the complaint will be investigated according to procedures required by the Act. OSHA will notify the implicated employer of the complaint and the allegations within 20 days of its receipt of the complaint. Both the employer and the employee may submit to OSHA written statements and affidavits or documents in support of their position. Parties may also request a meeting with OSHA to present their position.

To survive dismissal, the employee must prove that he engaged in protected activity; the employer knew or suspected the employee engaged in the protected activity; the employee suffered an adverse action; and the circumstances were sufficient to raise an inference that the protected activity was a contributing factor in the adverse action. Unlawful retaliation includes firing or laying off an employee for engaging in protected activity, as well as reducing their pay or hours, blacklisting, demoting, denying overtime or promotion, disciplining, denying benefits, failing to hire or rehire, intimidating, making threats, and/or reassigning the employee in a manner that affects their prospects for promotion. Additional information regarding the ACA's whistleblower protections may be found at http://www.whistleblowers.gov/factsheets_page.html. It should be noted that the Affordable Care Act's whistleblower provisions do not cover alleged Medicare or Medicaid fraud or patient abuse.

As with any potential retaliation claim, employers are cautioned to be aware of the potential consequences of taking adverse action against employees who may be protected under the ACA's anti-retaliation provisions.

ACA Open Enrollment Begins on November 1st Amid Fears of Rate Hikes and Cancellation Notices from Large Insurance Carriers

On November 1, 2016, ACA Open Enrollment enters its fourth year as Americans are inundated with headlines regarding large insurance carriers like United Healthcare, Humana, and Aetna dropping out of the markets in many states, as well news that premiums are slated to rise by double digits. Health plans sold through healthcare.gov are increasing on average by 25%, and 21% of the customers shopping in the federal exchange will only find one insurance company offering them a plan. In Colorado, ACA enrollees face a 20% premium hike and voters there will decide on November 8 whether to create a new single payer healthcare system, "Colorado Care," which is estimated to cost approximately $25 billion, with funding from a 10% payroll tax, along with various other levies. Last week, President Obama said that the antidote to the loss of major private insurance companies from the Affordable Care Act is the creation of a government backed insurer to provide competition on exchanges that no longer have any competition. President Obama referred to Obamacare as "a starter home," stating that "it's a lot better than not having a home . . . but over time, you hope you can make improvements." In Florida, where President Obama was making these comments, deductibles have risen 23% and the number of insurers has been reduced from 18 to 5 options.

On a positive note, many employers do recognize that certain ACA provisions have had a positive impact on their workforce. According to a survey by the International Foundation of Employee Benefit Plans (IFEBP), the elimination of pre-existing condition exclusions and coverage of children until they reach the age of 26, as well as increase in permissible wellness incentives are the most often cited provisions employers favor. Of course, ACA's reporting and disclosure requirements and general ACA administrative costs continue to present significant challenges to employers.

No matter what the results of the November 8th election, one thing is clear. President Obama will be leaving the White House in 12 weeks, but the controversy surrounding the law that has been nicknamed after him will continue long after he is gone. The next administration will have to deal with its shortcomings, including the rising premiums and deductibles, the large number of insurers who have pulled out of ACA marketplaces, and the slow growth of enrollment. Whether it is a Republican or Democratic administration, some changes are anticipated.

NLRB Tips: NLRB to Loosen Prohibition on Intermittent Strikes

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.

Richard Griffin, the NLRB General Counsel (GC), has announced his intention to "clarify and modify" the current

Board standards for analyzing whether multiple, short-term strikes are protected under the National Labor Relations Act. The Agency has recognized that employees are increasingly engaging in intermittent or short-term strikes during labor disputes, but that the difficulty in applying the Board's current standards is "imprecise and exposes employees to discipline for activities that should be considered protected under the [NLRA]."

Non-unionized workers and unions both are increasingly using the "intermittent" strike to add punch to their demands in wages, working conditions, safety, and to protest discharges or discipline. Walmart and McDonald's employees stand out as examples in this effort. The appeal is obvious. It often catches the employer off-guard and employees cannot be disciplined for failing to give advance notice or failing to call in early the day of the strike (there is a health care exception to this rule). Nor can the employer count the days as absences under their existing attendance policy. Once the strike is over, normally lasting only a day, the individual employee offers to return to work "without conditions" and the employer must allow the worker to return to his or her original position. While permanent replacement is allowed, the problem, a time issue, arises in doing so **before** employees have made an "unconditional offer" to return to work.

The Board Rule Currently Prohibiting Intermittent Strikes

Current NLRB doctrine prohibits union and non-union workers from taking part in a "series" or "pattern" of short-term strikes for a common goal. Employees who participate in what the NLRB calls "hit and run" activity lose their NLRA protections and can be discharged. Most Board decisions require a minimum of three walkouts before falling under the label of intermittent, although as few as two walkouts have fallen under the prohibition.

Unfortunately, unions, if not unrepresented employees, have adapted to the enforcement proscriptions. In order to avoid the loss of the protection of the Act, employees have limited walk-outs to one and taken the following precautions:

- Hold walk-outs for differing reasons, if more than one occurs.
- Hold the walk-outs weeks or months apart.
- Hold the walk-outs shortly after the triggering event.
- Avoid campaign literature referring to quick strikes as a strategy.

The GC's Intention to Clarify the Law

While clarity is a good thing, it is doubtful, based on the model brief the GC has provided, that such clarity is a positive development for employers. The brief provided makes clear that the GC's intent is to broaden protections for workers who engage in short-duration strikes.

While the labor side bar applauded Griffin's announcement, the management side bar was not as sanguine. If the NLRB changes are implemented, it is likely that employers' will see an increase in intermittent strikes, along with the concurrent disruption to business operations. As stated by the Workplace Policy Institute:

> . . . having a better test is certainly something that is going to be important . . . but the test, from the management perspective, that the [GC] is going to propose, and . . . sure the labor board will adopt in substantial form, is not going to be management-friendly at all.

The Bottom Line

This is a difficult area of the law to navigate and discipline should only be announced and implemented only **after** consultation with experienced labor counsel. For example, should a non-union employer experience a quick walk-out in response to some perceived transgression by the employer, the reason for discipline should not be implemented as a result of the protest and walkout, but because the employees refused a valid work order. Emphasize to employees that the Company is ready to talk about their problem / grievance, but that refusing a work order is not the preferred method to resolve the matter. Time, to satisfactorily resolve the issue, and no disruption of production or operations, is the goal for an employer.

If the above occurs in a unionized setting, then insist that a grievance be filed and processed in the normal course of business. If the contract contains a no-strike clause, then cite it and solicit a grievance. Never tell employees that they are being disciplined for engaging in Section 7 activity or for organizing Section 7 activity. Only tell employees that discipline may result from their engaging in acts in violation of valid work order and thus disciplined for unprotected activity or for contract violations.

General Matters - Update

GC Memorandum 16-01

GC Memo lists updated mandatory advice submissions for the Regions to consider. Needless to say, with micro-management of the Region from Washington DC under the guise of "national" standardization of labor policy, along with the activist Board's reversal of years of precedent, the list has expanded significantly from previous years.

NLRB Submits Mandatory Waivers

To U. S. Supreme Court

Sensing an opening for a favorable decision, and apparently tired of constant criticism by courts and the public, the NLRB has decided to seek review before the Supreme Court of its decision in *Murphy Oil USA, Inc.,* coming out of the Fifth Circuit Court of Appeals. The smart money is betting that the NLRB feels that the Justice to succeed Antonin Scalia may be willing to look favorably on the Board's position that waivers of class actions taken by employees violates the NLRA.

The NLRB seems emboldened by the recent Seventh and Ninth Circuit decisions, where the Courts expressed support for the NLRB position on class action waivers. The Second Circuit also recently suggested that it was inclined to side with the NLRB had it not been bound by its own precedent.

Marshall Babson, a former Board member, stated that:

> I think the board feels it has some ammunition that it can muster in support of its arguments why the Fifth Circuit got it wrong and why the [Supreme Court] should agree with the Seventh Circuit and Ninth Circuit majority opinions.

Since both the employer and the NLRB have asked for Supreme Court review, the odds of *certiorari* being granted are increased. The *D. R. Horton* controversy has been the previous topic of many comments in the LMVT Employment Law Bulletin. If review is granted, it appears that the issue will finally be settled, not necessarily in the employers' favor. Stay tuned for developments as they unfold.

EEO Tips: What Do Plaintiffs Really Want in Mediation?

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.

The question I have been asked most often by employers in mediation conferences is: What does the charging party/plaintiff really want? Most of the plaintiffs I have dealt with truly believe that they have been wronged by their employers and management does not care. Filing a charge is a very big deal to them and they just want to see an end to an intimidating and seemingly endless process. Granted, there are some who just want something for nothing (another topic for another article) but I am talking about the majority.

Most plaintiffs want to feel like someone listened to them and treated them with respect. Hopefully, the mediator you choose will set a tone that helps accomplish this feeling, deflects some of the blame being felt, and directs the meeting toward a rational settlement discussion. Something offered by the employer can go a long way toward setting that tone, too—an acknowledgement or apology that their employment experience or separation was not what either party desired, maybe (depending upon the circumstances) an apology that their concerns were not known by those in authority.

Yes, money is usually a component of settlement of these disputes. It is the basis of our legal system: if the plaintiff prevails he/she will be awarded money. Most negative employment actions that lead to charges affect the plaintiff's wallet. But, offering money early in the process (before many paychecks have been missed) can settle the dispute for much less than defense of the claim will cost AND help the plaintiff feel like you heard his/her plight and cared that the discharge/demotion/whatever action effected that family's standard of living.

When the employer comes to mediation with the goal of settling the dispute, usually it can be accomplished. Listening to the plaintiff and crafting offers around his/her concerns is vital to settlement. In my experience, since most plaintiffs who file charges feel disregarded by their employers, crafting settlements they feel good about can be more important than their pre-mediation expectations or demands. No matter how you feel about the allegations against your company, restoration of the dignity the plaintiffs feel they lost is what they want most.

Feel free to contact me with questions about EEOC processes or for investigation, mediation or arbitration information. I am happy to address your questions in future Employment Law Bulletins or speak with you privately.

OSHA Tips: OSHA's New Anti-Retaliation Requirements

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 new final OSHA rule will become effective on January 1, 2017, that will ensure comprehensive reporting of workplace injuries and illnesses. This final rule will require that some of the recorded information on these cases be submitted to OSHA electronically for posting on the OSHA website. The agency emphasizes that this involves information and data that employers are already required to use to further worker safety.

One suggested benefit possible in this public posting might be to encourage employers to increase their efforts to prevent employee injuries and illnesses. Another potential benefit suggested is that it might enable researchers to examine data to aid in workplace safety.

This final rule includes provisions that encourage workers to report work-related injuries and illnesses to their employers and prohibits them from retaliating against them for this.

It is anticipated that public disclosure of data will "nudge" employers to reduce these injuries and illnesses and demonstrate to investors, job seekers, customers, and the public that the employers provide safe and healthy work environments for their employees. It is noted that currently employers cannot compare their injury experience with other businesses in their industry; they can only compare theirs with their industry as a whole. Now access to establishment-specific data will enable employers to benchmark their safety and health performance against industry leaders and thereby encourage them to improve their safety programs.

Wage and Hour Tips: Overtime Pay Requirements of the Fair Labor Standards Act

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.

Note: I am sure that you are aware of the pending revisions to the requirements for the executive, administrative, and professional exemptions. The revised regulations, which are widely available, are scheduled become effective on December 1, 2016. However, there have been multiple suits filed in an attempt to delay their implementation. In view of the language in the FLSA I will be surprised if the Court rules against Wage Hour. Therefore, I recommend that you take the necessary steps to ensure that you are in compliance with the new regulations.

Also, although there has not been a real effort in Congress to increase the FLSA minimum wage this year there are four states that will be voting whether they should have a state minimum wage greater than the federal one. Four years ago five states voted to increase their minimum by a large margin and it is expected that these current initiatives will all pass.

In 1938 Congress passed the Fair Labor Standards Act of 1938 which established a minimum wage of $.25 per hour for most employees. In an effort to create more employment the Act also set forth certain additional requirements that established a penalty on the employer when an employee works more than a specified number of hours during a workweek. The initial law required overtime after 44 hours in a workweek but eventually limited the hours without overtime premium to 40 in a workweek.

An employer who requires or allows an employee to work overtime is generally required to pay the employee premium pay for such overtime work. Unless specifically exempted, covered employees must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rate of pay. Overtime pay is not required for work on Saturdays, Sundays, holidays unless the employee has worked more than 40 hours during the workweek. Further, hours paid for sick leave, vacation and/or holidays do not have to be counted when determining if an employee has worked overtime although some employers choose to do so.

The FLSA applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. The workweek need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees but they must remain consistent and may not be changed to avoid the payment of overtime. Averaging of hours over two or more weeks is not permitted. Normally, overtime pay earned in a particular workweek must be paid on the regular payday for the pay period in which the wages were earned. However, if you are unable to determine the amount of overtime due prior to the payday for the pay period you may delay payment until the following pay period.

The regular rate of pay cannot be less than the minimum wage. The regular rate includes all remuneration for employment except certain payments specifically excluded by the Act itself. Payments for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays are excluded. Also, discretionary bonuses, gifts, and payments in the nature of gifts on special occasions and payments for occasional periods when no work is performed due to vacation, holidays, or illness may be excluded. However, payments such as shift differentials, attendance bonuses, commissions, longevity pay and “on-call” pay must be included when determining the employee’s regular rate.

Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. Where an employee, in a single workweek, works at two or more different types of work for which different straight-time rates have been established, the regular rate is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. Where non-cash payments are made to employees in the form of goods or facilities (for example meals, lodging & etc.), the reasonable cost to the employer or fair value of such goods or facilities must also be included in the regular rate.

Some Typical Problems

Fixed Sum for Varying Amounts of Overtime: A lump sum paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium. This is true even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis. For example, a flat sum of $100 paid to employees who work overtime on Sunday will not qualify as an overtime premium, even though the employees' straight-time rate is $8.00 an hour and the employees always work less than 8 hours on Sunday. Similarly, where an agreement provides for 6 hours pay at $10.00 an hour regardless of the time actually spent for work on a job performed during overtime hours, the entire $60.00 must be included in determining the employees' regular rate and the employee will be due additional overtime compensation.

Salary for Workweek Exceeding 40 Hours: A fixed salary for a regular workweek longer than 40 hours does not discharge FLSA statutory obligations. For example, an employee may be hired to work a 50-hour workweek for a weekly salary of $500. In this instance the regular rate is obtained by dividing the $500 straight-time salary by 50 hours, resulting in a regular rate of $10.00. The employee is then due additional overtime computed by multiplying the 10 overtime hours by one-half the regular rate of pay ($5 x 10 = $50.00).

Overtime Pay May Not Be Waived: The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. Likewise an announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not relieve the employer from his obligation to pay the employee for overtime hours that are worked. The burden is on the employer to prevent employees from working hours for which they are not paid.

Many employers erroneously believe that the payment of a salary to an employee relieves him from the overtime provisions of the Act. However, this misconception can be very costly as, unless an employee is specifically exempt from the overtime provisions of the FLSA, he/she must be paid time and one-half his regular rate of pay when he works more than 40 hours during a workweek. Failure to pay an employee proper overtime premium can result in the employer being required to pay, in addition to the unpaid wages for a period of up to three years, an equal amount liquidated damages to the employee. Further, if the employee brings a private suit the employer can also be required to pay the employee's attorney fees. When the Department of Labor makes an investigation and finds employees have not been paid in accordance with the Act they may assess Civil Money Penalties of up to $1894 per employee for repeat and/or willful violations.

In order to limit their liabilities, employers should regularly review their pay policies to ensure that overtime is being computed in accordance with the requirements of the FLSA. If I can be of assistance do not hesitate to give me a call.

2016 Upcoming Events

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

LMVT is pleased to announce that we have reached our limit as to registrants for this event. We look forward to seeing everyone on November 17, 2016!

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 over half of all men between ages 25 and 54 who are not working suffer from a serious health condition? This is based upon a report by Allen Krueger, a Princeton University Labor Economist. According to Krueger, “nearly half of prime age not in the labor force men take pain medication on a daily basis, and two-thirds of cases commonly take prescription pain medication.” He stated that decline of male participation in the workforce within this age group has been an ongoing problem. Although he believes the primary problem is the failure of this group to become healthy, he also noted that improvements in video games have added a reason why some in this group prefer to be at home rather than work. Women's participation in the workforce is also declining, though not at the rate of American men between ages 25 and 54.

. . . that approximately one-third of American workers earn money from contingent jobs? This is according to a study of over 6,000 workers by the Freelancers Union and Upwork. According to the study approximately 55 million worked at a temporary project, contract or "gig" job within the past twelve months. The scope of those who were considered "freelancers" ranges from those who drive Uber to those who babysit. The magnitude of those who participate in temporary, contract or project arrangements "means that they need real policy solutions to get them the benefits and protections they deserve," asserts the Freelancers Union. According to the survey, over half of those who work on a freelance basis hold down traditional jobs.

. . . that a state law prohibited an employer from paying employees with debit cards? *Siciliano v. Albert/Carol Mueller* (Penn. Super. Ct., Oct. 21, 2016). This case was based upon the Pennsylvania Wage Payment and Collection Law. The law does not specifically address pay cards but it defines a "paycheck" as to mean dollar bills and coins with value or where someone is directed to be paid on demand. Neither of these requirements applies to payroll debit cards and, therefore, the employer in this case (a McDonald's franchisee) violated state law. Note that as of October 1, 2017, the Consumer Financial Protection Bureau will phase in disclosure rules where a payroll debit card is issued, to include fees associated with that debit card and whether an employee's balance on that card is protected if the card is lost or stolen.

. . . the use of salary history may be considered to perpetuate pay inequality? A Massachusetts statute which becomes effective in 2018 prohibits employers from asking applicants about salary history. The basis for the law is to eliminate the perpetuation of lower paid salary histories, particularly for women who receive less pay in several industries. The thought is that the employer should make an offer based upon the employer's assessment of value of the candidate to the organization, rather than considering the employee's past salary history. We expect other states and cities to pass similar legislation and also to see pay equity litigation where this protected-class-neutral information is claimed to have a disparate impact based upon protected class status.

. . . that the NLRB was ordered to pay more than $17,000.00 to an employer for its attorney fees? *Heartland Plymouth Court, MILLC* (D.C. Cir., Sept. 30, 2016). The NLRB ruled that a Michigan employer unlawfully refused to bargain with the union about a reduction in hours. According to the NLRB, the union did not "clearly and unmistakably" waive its right to bargain about the effect of a reduction in work hours. The D.C. Circuit disagreed, stated that the issue was covered by a collective bargaining agreement and therefore the employer did not have to bargain with the union about the subject. The Board's effort to seek enforcement of its decision made the company "waste time and resources fighting for a freedom the Board knew our precedent would provide." The Court added that the Board showed "a stubborn refusal to recognize any law."

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