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Your Workplace Is Our Work®

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Happy Thanksgiving!!

Who Lost the Most on Election Day?

We know that our loyal readers are losing their appetites for the analysis of the November 8 national election. Much of the election analysis has focused on the Republican and Democratic parties needing to reinvent themselves. However, from our perspective, the election revealed one group with an even greater need for rebirth: organized labor. Although President Obama has done everything within his power to strengthen the labor movement, union membership has declined in the private sector from 7.2% when President Obama assumed office to 6.7% today.

While labor's financial support ($120 million) of Democratic candidates was monolithic on a national level, actual union members voted in surprising numbers for Republican candidates. In the presidential race, Hillary Clinton out-polled Donald Trump among union households nationally by only 8%. In four key states with strong union bases—Wisconsin, Michigan, Ohio, and Pennsylvania—union member support put Donald Trump over the top. For example, in union households in Wisconsin, Hillary Clinton out-polled Donald Trump by only 52% of 48%. Among union households in Ohio, Donald Trump out-polled Hillary Clinton by 52% of 48%.

At the Congressional level, 91% of union contributions went to Democratic candidates, yet 43% of union households voted Republican. As one union member posted on the UAW website, "it boggles my mind how the UAW is supporting Hillary Clinton. This is the reason Detroit is a ghost town."

At the state level, Republicans and Republican labor ideals have gained traction. During the last eight years, Michigan, Wisconsin, Indiana, and West Virginia—all strong union states—became Right-to-Work states. More Right-to-Work legislation is on the way. The state election "trifecta" is when either party captures both houses of the state legislature and the governor's mansion. As of today, there are four states where the Democrats have the trifecta and, after November 8, twenty-five states where Republicans have the trifecta. Thus, we expect state legislation will further weaken unions.

As shown above, the stereotype that union members vote Democrat simply did not hold up. Much of the electorate voted in part for candidates they thought would most effectively "drain the swamp" in Washington, D.C. Union political activism throughout union history has placed the labor movement squarely in the center of the Washington power-broker process. To many union members, that political process is part of the problem, and why they voted for change. The labor movement did not see this coming, and they still don't get it—the members are not particularly concerned about legislation and politics, they are concerned about the economy and jobs.

At one time, organized labor was the political equivalent of Wal-Mart, driving the market with its ubiquitous presence and vast selection. Now, it's more along the lines of a Trader Joe's: select locations, specialty products, and a loyal but small group of followers. Unless labor changes its political and organizing strategies, it's on the way to becoming the grocery equivalent of such a specialty market.

The pro-union NLRB effort will shortly end, as President-elect Trump will fill two vacancies on the Board with Republican nominees. Despite the best efforts by the NLRB, such as the "ambush" election rules in April 2015, the labor movement has not grown. For FY 2015 (September 30), there were 1,490 elections requested by unions and they won 69% of them. For FY 2016—a full year under the ambush election rules—there were 191 fewer elections (1,299) requested by unions, and unions won 72% of them. Thus, unions continued to do well at elections, but efforts to increase the number of elections thus far have failed miserably. Other changes based upon NLRB decisions—including the scope of bargaining units, employer bargaining obligations, joint employment, and expanding organizing rights of temporary employees—have had no discernable impact on the labor movement. These changes have put employers on alert and caused frustration, but they have not caused growth within the labor movement. Now the sun is starting to set on the NLRB as a force of change for the labor movement. If labor becomes resurgent, it is going to have to do so without the help of those in Washington it has contributed to for so long.

What Employers May Expect from a Trump Administration

The election of Donald Trump has cause several employers to anticipate the elimination of Regulations and Executive Orders burdensome to business and disruptive to the workforce, including the new exemption salary levels, OSHA drug testing protocols, EEOC pay data reporting requirements, and Executive Orders protecting unions on government contracts. Our optimism is a little more tempered then many around us. We do think President Trump will move aggressively to rescind Executive Orders favoring high union wage rates on government contracts. President-elect Trump's background is in construction and with a major infrastructure bill likely, he will take whatever steps are necessary to be sure that the cost of these projects, including wages, are not padded based upon formulas that favor unions.

We are less optimistic of a major change, at least early in the administration, regarding the new overtime rules or EEOC initiatives. There are some practical reasons for our position. The Republicans have 51 votes in the Senate, not 60 to cut off debate. The major areas of emphasis during the President's initial 100 days will be corporate tax reform, infrastructure spending, Affordable Care Act changes, and immigration initiatives. Those are majestic issues for our nation, compared to the 4.2 million employees affected by the overtime rule changes, employers affected by the OSHA drug testing guidelines, and the implications of providing the EEOC with salary banned information. We do not expect a President Trump, early in his administration, to make changes that would result in a "we told you so" about the President-elect's philosophies toward women and minorities. He will use his office early to take steps to grow the economy, modify the Affordable Care Act, and enforce existing laws and perhaps enact new ones regarding the status of illegal immigrants.

Candidate Trump was an advocate of paid sick leave and pay equity. Do not be surprised if he supports legislation along those lines. Also, regulatory change, except with Executive Orders, is not immediate. It takes time to analyze what regulations to change, are the illuminated all together or revised, and when to do so. The President-elect's immediate impact will be on the National Labor Relations Board and Executive Orders covering government contractors. Relief in both areas will be welcome.

FLSA Overtime Regulation Enjoined

Immediately after the FLSA Overtime Regulation was enjoined, we provided notice to our clients and friends via a dedicated email. In the event you missed it, please read below.

A federal judge in Texas has ordered that the DOL cannot implement its new regulation raising the salary threshold for the white collar exemptions under the FLSA. The new regulation would have raised the minimum salary to qualify for the executive, administrative, and professional exemptions from $23,660 to $47,476 effective December 1, 2016. Yesterday's order prevents the DOL from implementing the new rule nationwide.

The judge's order was not only a surprise to those who have been following the case, but stunning in how far the judge went. Not only did the Texas judge invalidate the new higher salary threshold, but he also found that DOL did not have the authority to adopt *any* salary threshold for the exemptions – something DOL has been doing since 1949. In essence, the court held that DOL could only establish what types of duties qualified as exempt but could not impose any minimum salary.

What does this mean? For now, the new salary rule is on hold and its future is very uncertain. We expect an emergency appeal from the Obama DOL. If the Court of Appeals expedites its consideration (which is possible considering its sweeping breadth), the ruling could be reversed fairly quickly. If the appeal takes the normal appellate path, it would not likely be decided for many months and the Trump DOL (which takes the helm on January 20, 2017) could choose to drop the appeal and let the order invalidating the new rule stand. Or Congress or the Trump administration could adopt their own rules – either of which would take time.

What should you do now? Most employers have been planning for this change for months and many have already made the changes (raising salaries or converting employees to non-exempt status) necessary for compliance. Obviously, it will be difficult to take back raises which have already been implemented; switching employees back to exempt status will be less painful. For those who have not yet made changes, you have the option of holding off on implementing changes to see what happens. If you take this course, we recommend you be ready to implement the changes quickly should the regulation be reinstated.

Is There an Implied Reasonable Accommodation Requirement?

The recent case of *Kowitz v. Trinity Health* (8th Cir. October 17, 2016), explored the extent to which an employer is held accountable to have implied notice of an employee's accommodation needs under the ADA. Kowitz was hired in 2007 to work as a respiratory therapist. Beginning in 2010, she asked for leave under the FMLA for cervical spinal stenosis, which is a narrowing of the spine, causing numbness in the feet. While on FMLA, she had surgery and returned at the conclusion of her FMLA absence. When she returned, she provided a doctor's substantiation of work related restrictions, including the length of her shift and limitation on pulling and pushing. The employer accommodated those requests.

One month after Kowitz returned, the employer notified employees in her department that they needed to update their CPR Certifications, and, if they were not current, they needed to provide an explanation why and schedule a date to obtain the certification. Kowitz passed the written aspect of the Certification test, but provided her employer with an explanation from her doctor that she was unable to do the physical parts of the exam for an additional four months. The employer terminated her because she was unable to qualify for the CPR Certification for at least another four months.

The District Court granted the employer's motion for summary judgment. First, the District Court said that her inability to provide a current CPR Certification meant that she could not perform an essential job function. Furthermore, the Court stated that she never requested a reasonable accommodation, such as a transfer to another position that did not require proficiency in CPR.

In reversing summary judgment, the Eight Circuit Court of Appeals stated that it really did not matter that Kowitz did not expressly request reasonable accommodation. Rather, her notice to the employer of an additional four months before she could take the test was sufficient to put the employer on notice on need for accommodation. At that point, rather than terminating Kowitz, the employer should have engaged in a reasonable accommodation

dialogue to determine whether Kowitz's limitation could be accommodated or she needed to be transferred on a temporary or long-term basis to another job. Therefore, summary judgment was reversed.

One of the "lessons learned" for employers from this case was that the interactions with Kowitz over her medical limitations were handled by her department manager, without the engagement of Human Resources. Just as employees do not have to expressly say "I would like to use my FMLA benefits," an employee does not have to expressly say "I believe that I have a disability under the ADA and am requesting reasonable accommodation." If the employee provides the employer with enough information for the employer to realize that the ADA is implicated, that is sufficient notice for an accommodation request. The problem for employers is that if employees make this request of supervisors or managers, a failure to accommodate analysis may occur because either the supervisor or manager is not trained effectively regarding ADA responsibilities and/or decisions are made without consulting with HR. Terminating an employee with medical restrictions that cannot be accommodated is a six figure risk management decision. The likelihood of that risk is even greater where there is no dialogue with the employee about a possible accommodation. The EEOC, frankly, emphasizes form over substance in this regard. That is, the Commission is more concerned about whether the interactive dialogue about accommodation occurs ("form") than whether accommodation is actually made ("substance").

ACA Uncertainty on the Horizon

President-Elect Trump has repeatedly stated his intent to initiate a full repeal of the ACA when he takes office. With a Republican-led Congress in both the Senate and House of Representatives, this may seem like a "done deal" to many. However, without a filibuster-proof majority in the Senate (60 votes needed to overcome the anticipated Democratic filibuster), a full repeal is unlikely any time soon. The following types of measures anticipated to be proposed by a Trump Administration include modification of laws that inhibit the sale of health insurance across state lines; tax deductible health insurance premium payments; allowing individuals to use Health Savings Accounts (HSAs); price transparency from all health care providers; mental health programs reforms and removal of barriers to entry into free markets for drug providers that offer safe, reliable and cheaper products. Overall, the intent appears to be to pass reforms that will broaden healthcare access, make healthcare more affordable (for real this time!) and improve the quality of care available. Of course, the reform efforts must start with Congress. Senator Lamar Alexander (who is expected to continue as Chairman of the Committee on Health Education, Labor and Pensions) has stated that their intent is to ". . . ensure that more Americans can access private health insurance plans that fit their needs and budgets."

A review of prior Republican legislation (that was vetoed by President Obama) also provides insight into what we can anticipate. H.R. 3762, the "Restoring Americans' Healthcare Freedom Reconciliation Act of 2015" passed both Houses of Congress in late 2015, and if it had not been vetoed by President Obama on January 8, 2016, it would have:

- Repealed both the individual and employer mandates
- Repealed the 40% Cadillac Tax
- Repealed the 2.3% Medical Device Tax

It is important to note that the bill would have RETAINED the requirement that insurers offer coverage and set premiums without regard to pre-existing conditions and the Medicare provisions rewarding the value of procedures, rather than the volume of procedures.

Be thankful for – an ACA reporting extension!

While it remains to be seen whether and when we can expect to see real changes to the ACA, what is certain is that the ACA information reporting forms for 2016 are still required to be completed. Fortunately, the IRS has provided employers with a "November surprise" by issuing Notice 2016-70, which provides up to an additional 30 days for employers to deliver the required forms to their employees. This November 18, 2016, Notice extends the deadline for employers (or insurance

providers) to deliver the ACA reporting forms to employees from January 31, 2017, to March 2, 2017. This extension applies to the 2016 tax year. However, the IRS did NOT extend the deadline for filing forms 1094 and 1095 with the agency, and thus these forms are still required to meet the following deadlines:

February 28, 2017 – if the forms are filed by mail

March 31, 2017 – if the forms are filed electronically

The IRS also extended the "good faith transition relief" for another year, which means that employers will not be penalized for incorrect or incomplete forms so long as they can show that they made good faith efforts to comply with the requirements. No relief is available to employers who simply do not file the forms at all. Employers who do not meet the extended deadlines will be subject to penalties.

NLRB Tips: NLRB News Update

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.

Trump Wins Election in Surprise Result

Gosh, did the pundits get it wrong. In a surprising result, Donald J. Trump was elected as the President of the United States. What the impact will be on the National Labor Relations Board remains to be seen, but certain things seem clear. I anticipate that the new President will impede **all** agency rule-making ability via Congressional funding limits, rescind by executive order those regulations he can, and then slowly begin reinstituting those rules and regulations that President Trump deems worthwhile. Regardless of how it turns out, it seems the DOL's "persuader rules," the ACA, and the more aggressive NLRB enforcement policies are likely to come under extreme pressure under the new administration. In fact, the persuader rules have already been invalidated by a permanent injunction recently issuing out of Texas.

A timetable for change is unclear and unknowable, as the current NLRB administration/Board are firmly entrenched in Washington, D.C. It may be business as usual until President-elect Trump can influence the Agency by nominating his own Republicans to the NLRB. As the Board only has three current members, expect the Trump administration to quickly nominate two Republicans to bring the NLRB to a full complement, and shift the balance of power.

In the first and second quarter of 2017, readers should stay tuned for interesting developments at the NLRB. Regardless, I expect that the regulatory atmosphere under President Trump will take a less threatening or harsh course for employers.

Handbook Language Found Illegal by the NLRB

Demonstrating again that handbook language remains a focus of the Obama Board, and finding that the provisions of an employer handbook had a "chilling effect" on employees engaging in Section 7 activity, the Board decided that two rules barring "insubordination or other disrespectful conduct" and "boisterous or other disruptive activity in the workplace" were overly-broad.

The full panel agreed with the Administrative Law Judge that the discharged worker was engaged in protected activity when the worker warned a co-worker that this job was in jeopardy, and the Democrats on the panel found that the handbook language could be read to block concerted speech in violation of Section 7 of the NLRA. The Board's conclusion was made under the "reasonably construe" standard set forth in the 2004 *Lutheran Heritage* decision.

Expect this case to be appealed by the Employer. The dissent would provide the argument for the request for review.

In another case pending before the Fifth Circuit, the NLRB urged the court to enforce its finding that T-Mobile and Metro PCS handbooks contained prohibitions that would be considered overly broad.

In its response to enforcement request, the employer said that the rules were merely "common-sense and unremarkable employee policies" that promoted objectives that are beneficial to creating a modern workplace. The employer also argued that the current ruling violated existing Board precedent requiring the NLRB to consider the realities of the workplace when evaluating handbook rules as well as an employer's legitimate interest in maintaining a secure workplace. The "overly-broad" analysis argument is far from over, and I expect that some common sense may return to the Agency under a Trump administration. Stay tuned.

Jurisdiction Over Schools Affirmed by NLRB

In *Farmworker Institute of Education and Leadership Development Inc.,* an unpublished Order, the Board panel denied the Employer's request for review and affirmed a decision and direction of election allowing teachers at an adult agricultural school to unionize. Republican member Miscimarra dissented.

Assertion of NLRB jurisdiction over a charter school has now occurred for the fifth time since August of this year, and in each case, the Board applied the *Hawkins County* test. Under this test, a charter school is a political subdivision exempt from NLRB jurisdiction if it is created directly by the state and constitutes an administrative arm of government or if it's run by administrators who answer to public officials.

In agreeing with the Regional Director's Decision and Direction of Election in *Farmworker*, the panel accepted and applied the reasoning set forth in *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (2016), and *Hyde Leadership Charter School,* 364 NLRB No. 88 (2016).

It seems that the expanded jurisdiction over charter schools is here to stay, absent intervention from the courts or legislative action.

Micro-Unit Approved Under *Specialty Healthcare*

The NLRB has approved a micro-unit under the current law. In *Cristal USA, Inc.*, (Region 8 – 2016), the Regional Director applied *Specialty Healthcare* and found a bargaining unit of 28 manufacturing employees appropriate, over the protests from the manufacturer, which wanted 115 other production, maintenance and warehouse workers included in the bargaining unit (a wall-to-wall unit).

In concluding that the unit was appropriate, the decision relied upon the record that the 28 production employee had little contact with the other production employees, separate supervision and different job responsibilities.

The Director stated that:

> The employer has failed to meet its burden of showing that the maintenance employees, Plant 2 South production employees, and warehouse employees that the employer seeks to add share and overwhelming community of interest with the petitioned-for North Plant production employees.

As discussed in recent LMVT ELBs, the micro-unit is likely to remain the law, as it has met with approval in various U.S. Circuit Courts of Appeal.

U.S. Supreme Court to Hear General Counsel Nomination Kerfuffle

In June of 2016, after a request from the NLRB, the Supreme Court agreed to hear whether acting general counsel, Lafe Solomon, became ineligible to serve as acting counsel once the president nominated him to be the permanent general counsel in January 2011.

The D.C. Circuit found that Solomon's continuing service as the acting general counsel violated the Federal Vacancies Reform Act (FVRA).

As noted in the February 2016 ELB, 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 D.C. 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 its 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.

Once the Court decided to hear the case, and in its reply brief to the Supreme Court, the Board argued that:

> [The Employer's] reading to the FVRA would undo nearly 150 years of practice under the [Vacancies Act of 1868], by forbidding virtually all [presidentially appointed, Senate-confirmed] officers from simultaneously serving as nominee and acting official. . . . But it would be surpassingly strange for congress to have undone such a long-standing practice without any discussion or explanation as to why Congress would have allowed non-Senate confirmed first assistants to serve in an acting capacity when nominated, but would have forbidden such acting service by Senate-confirmed individuals.

According to the pundits, the Board's oral argument before the Court did not go well and the Justices appeared skeptical of the NLRB's position. Time will tell on the outcome of the case. Officials of the NLRB have declined comment on the pending litigation.

The U.S. Supreme Court case cite is *NLRB v. SW General Inc.,* No. 15-1251 (S. Ct. 2016). Oral argument was heard on November 7, 2016. Audio and a transcript of the oral argument can be accessed on the Supreme Court website.

OSHA Tips:

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.

In a news release on November 17, 2016, OSHA announced a final rule that updates the agency's walking-working surfaces and addresses personal fall protection systems requirements. It notes that the final rule will increase workplace protection from those hazards, especially fall hazards that are a leading cause of worker deaths and injuries. In the release, OSHA expresses the belief that advances in technology and greater flexibility will reduce these worker deaths and injuries from falls. This rule, in addition to reducing deaths and injuries, will also increase consistency between construction and general industry which will help employers and workers that work in both industry areas.

OSHA estimates that the final rule will prevent twenty nine fatalities and more than 5,842 injuries annually. The rule will become effective on January 17, 2017, and will affect approximately 112 million workers at 7 million worksites.

The agency notes that the rules most significant update will be allowing employers to select the fall protection system that works best for them, choosing from options that include personal fall protection systems. It is noted that OSHA has permitted use of personal fall protection systems in construction since 1994 and the final rule adopts similar requirements for general industry.

Other changes include allowing employers to use rope-descent systems up to 300 feet above a lower level; prohibiting the use of body belts as part of a personal fall protection system; and requiring a personal fall arrest system which requires worker training on personal fall protection systems and fall equipment.

Wage and Hour Tips: Tipped Employees under 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.

Wage and Hour continues to devote substantial resources to certain "low wage" industries each year. Among those regularly targeted are Fast Food, Grocery Stores, Construction, and Restaurants. According to statistics on the Wage and Hour website they conducted almost 4,800 investigations of Restaurants during FY 2015 resulting in more than 47,000 employees being due some $38 million in back wages. A large part of these back wages were as a result of improper use of the tip credit provisions of the Act. Thus, I felt we should revisit the requirements for claiming the tip credit. While my article will address only the requirements of the FLSA, you should be aware that several states do not allow tip credit and almost one-half of the states have their own tip credit regulations, although Alabama does not, that are more stringent than the FLSA. Information regarding the differing state requirements is available on the Wage and Hour web site.

The Act defines tipped employees as those who customarily and regularly receive more than $30 per month in tips. Section 3(m) of the FLSA permits an employer to take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage of $2.13 and the minimum wage. Thus, the maximum tip credit that an employer can currently claim under the FLSA is $5.12 per hour (the minimum wage of $7.25 minus the minimum required cash wage of $2.13).

The relatively recent regulations, which became effective in April 2011, state that the employer must provide the following information to a tipped employee before using the tip credit:

1. The amount of cash wage the employer is paying a tipped employee, which must be at least $2.13 per hour.

2. The additional amount claimed by the employer as a tip credit;

3. That the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;

4. That all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and

5. That the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

The regulations state that the employer may provide **oral or written notice** to its tipped employees informing them of the items above. Further, they state that an employer must be able to show that he has provided such notice. They also state that an employer who fails to provide the required information cannot use the tip credit provisions and thus must pay the tipped employee at least $7.25 per hour in wages plus allow the tipped employee to keep all tips received. In order for an employer to be able to prove that the notice has been furnished the employees, I recommend that a written notice be provided.

Employers electing to use the tip credit provision must be able to show that tipped employees receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined. If an employee's tips combined with the employer's direct (or cash) wages of at least $2.13 per hour do not equal the minimum hourly wage of $7.25 per hour, the employer must make up the difference.

The regulations also state that a tip is the sole property of the tipped employee regardless of whether the employer takes a tip credit and prohibit any arrangement between

the employer and the tipped employee whereby any part of the tip received becomes the property of the employer. The Department's 2011 final rule amending its tip credit regulations specifically sets out Wage and Hour's interpretation of the Act's limitations on an employer's use of its employees' tips when a tip credit is not taken. Those regulations state in pertinent part:

> Tips are the property of the employee whether or not the employer that has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

Yet, they do allow for tip pooling among employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, and service bartenders. Conversely, a valid tip pool may not include employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs, and janitors. A factor in who may be included in the tip pool concerns whether the employee has direct interaction with the customer. One positive change is the regulations did not impose a maximum contribution amount or percentage on valid mandatory tip pools. The employer, however, must notify tipped employees of any required tip pool contribution amount, may only take a tip credit for the actual amount of tips each tipped employee ultimately receives.

When an employee is employed in both a tipped and a non-tipped occupation, the tip credit is available only for the hours spent by the employee in the tipped occupation. An employer may take the tip credit for time that the tipped employee spends in duties related to the tipped occupation, even though such duties may not produce tips. For example, a server who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses is considered to be engaged in a tipped occupation even though these duties are not tip producing. However, where the tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing non-tipped duties, no tip credit may be taken for the time spent in such duties.

A compulsory charge for service, such as a charge that is placed on a ticket where the number of guests at a table exceeds a specified limit, is not a tip. The service charges cannot be counted as tips received, but may be used to satisfy the employer's minimum wage and overtime obligations under the FLSA. If an employee receives tips in addition to the compulsory service charge, those tips may be considered in determining whether the employee is a tipped employee and in the application of the tip credit.

Where tips are charged on a credit card and the employer must pay the credit card company a fee, the employer may deduct the fee from the employee's tips. Further if an employee does not receive sufficient tips to make up the difference between the direct (or cash) wage payment (which must be at least $2.13 per hour) and the minimum wage, the employer must make up the difference. When an employee receives tips only and is paid no cash wage, the full minimum wage is owed.

Deductions from an employee's wages for walk-outs, breakage, or cash register shortages that reduce the employee's wages below the minimum wage are illegal. If a tipped employee is paid $2.13 per hour in direct (or cash) wages and the employer claims the maximum tip credit of $5.12 per hour, no deductions can be made without reducing the employee below the minimum wage (even where the employee receives more than $5.12 per hour in tips).

The 2011 regulations state that if a tipped employee is required to contribute to a tip pool that includes employees who do not customarily and regularly receive tips, the employee is owed all tips he or she contributed to the pool and the full $7.25 minimum wage.

Computing Overtime Compensation for tipped employees:

When an employer takes the tip credit, overtime is calculated on the full minimum wage, not the lower direct (or cash) wage payment. The employer may not take a larger tip credit for an overtime hours than for a straight

time hours. For example, if an employee works 45 hours during a workweek, the employee is due 40 hours X $2.13 straight time pay and 5 hours overtime at $5.76 per hour ($7.25 X 1.5 minus $5.12 in tip credit).

In 2011, the National Restaurant Association, along with several other groups, filed suit against the DOL seeking to overturn the regulations. However, the Court allowed those rules to take effect. According to some information I have seen there have been more than 90 Fair Labor Standards Act suits filed in Alabama in 2016. A substantial number of these suits are against restaurants.

Did You Know . . . ?

. . . that the DOL Persuader Rule is dead, based upon permanent injunction issued on November 16, 2016? Our firm was a Plaintiff in one of the three lawsuits against the DOL over its issuance of the Persuader Rule. This rule would have required employers and their lawyers to report specific legal advice that occurred regarding compliance with the NLRA in responding to union organizing activity, including the fees spent on those services. On November 16, 2016, in the case of *National Federation of Independent Business v. Perez,* (N.D. Tex.), Senior U.S. District Judge Sam R. Cummings permanently enjoined the DOL from implementing this rule. The Court ruled that the DOL violated the First and Fifth Amendments of the U.S. Constitution, and the Labor-Management Reporting and Disclosure Act. The Court stated that the DOL had no legal authority to change what was expressly permitted by the statute.

. . . that a class action lawsuit was filed against Kroger for failure to accommodate pregnant employees? *Jessica Craddock v. The Kroger Company, et al.,* (M.D. Tenn., November 15, 2016). Craddock was pregnant and during the course of her pregnancy was required to continue to lift heavy objects such as crates of frozen food. She was told by her manager to provide a doctor's note of her limitations, which she did. The manager then said that "light duty" is reserved for job-related injuries, only. Therefore, Craddock was put on unpaid leave until there was a change in her medical condition. The lawsuit alleges that Kroger's light duty singled out pregnancy for discrimination and, furthermore, it retaliated against Craddock after she requested a reasonable accommodation. Remember that an employer takes a substantial legal risk of violating the Americans with Disabilities Act or the Pregnancy Discrimination Act if it reserves light duty jobs for work-related injuries only. Pregnancy should be considered for accommodation, as any other medical condition. It does not mean that the employer is required to accommodate, but the employer is required to consider accommodation.

. . . that employers should consider the potential legal implications of what may occur at an organization's holiday party? We certainly don't want to give advice that would put a damper on good cheer around the holiday season. According to a recent survey by the consulting firm Challenger, Gray & Christmas, Inc., 76% of those who responded to the survey said their organizations would host a holiday party this year, up from 69% last year. According to the survey, "companies are spending more than ever on creating an environment where people want to work." Holiday parties, according to the consulting firm, "are a big component of that." Just note that injuries which occur at the holiday party may be considered work-related and employers may have responsibility if an employee consumes too much alcohol and is involved in a job-related accident. Be sure that you have insurance coverage in the event an unfortunate incident occurs at a holiday party and have certain members of the leadership team have the responsibility at the party to informally monitor overall behavior. Unfortunately, sometimes at organization holiday parties, too much alcohol is consumed by some individuals who then engage in behavior that would not occur in the typical workplace setting (and which still should not be permitted to occur even at a holiday party).

. . . that a union-represented employee was entitled to union representation when submitting to a drug test? *Manhattan Beer Distributors, L.L.C. v. NLRB,* (2nd Cir. Nov. 16, 2016). A driver was terminated after an employer believed he smelled of marihuana and the driver refused to take a drug test. The driver stated that he would not take the drug test unless he had a union representative present during the test. The employer told the individual to submit to the test without union representation or else face termination. Knowing that the test would be positive, the employee refused to take the

test and was terminated. Under the NLRA, the employee had the right under *Weingarten* to have a union representative present at an investigatory interview that may result in discipline of that employee. A drug test, according to the NLRB in this instance, was an investigatory interview of that employee. The Second Circuit agreed with the NLRB's decision that requesting union representation under these circumstances was "inextricably linked to his assertion of *Weingarten* rights." The Court of Appeals ruled that the NLRB's interpretation of Weingarten was reasonable.

… that a Federal District Court has permitted litigation to proceed alleging sex discrimination under Title VII includes sexual orientation? *EEOC v. Scott Medical Health Center*, *P.C.* (W.D. Pa., November 4, 2016). The case arose out of sexual harassment directed toward a gay employee. In permitting the EEOC to pursue its claim that sexual orientation discrimination is a form of sex discrimination under Title VII, the Court stated that "there is no meaningful distinction between bias based on sexual orientation and discrimination because of sex." The full Seventh Circuit Court of Appeals will consider the same question in oral argument on November 30, 2016; the Eleventh Circuit will consider the same issue during oral argument on December 5, 2016; and the Second Circuit will consider this during oral argument on January 5, 2017. It is our prediction that one of the circuits will conclude that discrimination based upon sex includes sexual orientation. A historic analogy for this is that if an employee is engaged in a biracial relationship and suffers adverse consequences, it is because of that employee's race, regardless of the race (white employee with black non-employee, black employee with white non-employee). The same reasoning could very well apply to discrimination based upon "sex."

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