LEHR MIDDLEBROOKS VREELAND & THOMPSON, P.C.

Employment Law Bulletin

DECEMBER 2016
VOLUME 24, ISSUE 12

Your Workplace Is Our Work®

Inside this issue:

From our team to yours, we wish you and your colleagues the best for the holiday season and a healthy and peaceful 2017. No doubt 2016 has been a remarkable year on several fronts. Although none of us knows with certainty what will occur in 2017, one thing that you can count on is that we "have your back."

Staffing Agency Class Action: Discriminatory Hiring on Behalf of Clients

We previously discussed the EEOC's concern that staffing agencies are used to "filter" discriminatory hiring preferences of their clients. The recently-filed class action lawsuit of *Hunt v. Personnel Staffing Group, LLC* (N.D. Ill. Dec. 6, 2016) highlights how Plaintiffs' counsel and the EEOC view these filtering claims.

The lawsuit is a class action against the staffing agency and seven of its customers located in the Chicago metropolitan area. The lawsuit alleges that the staffing agency and its clients are joint employers and that the staffing agency was a conduit for filtering out primarily black employees at the request of its clients. The filter was based upon coded terms to identify whether an applicant was black or Hispanic (Hispanic applicants were preferred). Additionally, the staffing agency was told by its client that they did not want candidates who appeared to be "gang related" with tattoos and pants worn low. The staffing agency sought applicants through Spanish speaking media outlets only. When black employees were referred to the customers, they were referred to the least desirable jobs in the least desirable working conditions. Therefore, they often failed to return.

A discriminatory hiring case is one of the most difficult to prove. So how did the facts develop for this class action lawsuit to occur? There were employees of the staffing service who became whistleblowers, thus providing a basis of factual support for the lawsuit.

The temporary staffing industry is among the largest in the private sector. In Illinois alone, there are over 300 temporary staffing agencies with 900 locations.

Employers with staffing agency relationships should establish contractually that the staffing agency is responsible for referring candidates in a manner which fully complies with fair employment practice statutes. Furthermore, users of temporary staffing services should be sure that there is an established protocol for determining why a staffing employee should be removed from the worksite. With an increased focus on the joint employer relationship between the staffing agency and employer, employer and staffing agency referrals and termination of referrals need to be handled with the highest level of compliance and consistency with employer hiring and termination practices.

More Bad News for Labor: Right-to-Work on a County by County Basis?

Last month we wrote about Republicans gaining or holding "trifectas" in 25 states, where both houses of the state legislature and governorship are controlled by Republicans. Of those 25 states, it is widely anticipated that Kentucky, Missouri, and New Hampshire will push to become Right-to-Work states. In a Right-to-Work state, it is illegal for an employer and union to agree to union security language, which requires employees to join the union or pay union dues or fees or else be terminated. As if the election results on November 8 were not bad enough for Labor, an additional hit occurred ten days later in the case of *United Auto Workers Local 3047 v. Hardin County* (6th Cir. Nov. 18, 2016). That case concerned the decision of Hardin County (and eleven other Kentucky counties) that had enacted ordinances establishing themselves as Right-to-Work jurisdictions.

The United Auto Workers sued, claiming that under the National Labor Relations Act, it is a matter for a state government to determine the state's Right-to-Work status, not a county government decision. The Federal District Court agreed with the UAW, stating that the NLRA leaves it to states only to determine Right-to-Work status.

In reversing the lower court decision, the Sixth Circuit of Appeals stated that a county is a "subdivision of state government." Therefore, the term "states" as referred to in the NLRA includes governmental subdivisions, such as counties. The impact of this decision is profound. Imagine heavily unionized states, such as New York and California, where there is no chance statewide for those states to become Right-to-Work jurisdictions. Yet, based upon the *Hardin County* decision, it is now possible for a county in any state in the United States to determine that it will become a Right-to-Work jurisdiction. This is important for two reasons. First, generally Right-to-Work jurisdictions are viewed more favorably by employers seeking to expand or relocate. Second, it dilutes the strength of the Labor movement in those locations. After all, in a Right-to-Work jurisdiction 100 employees may be represented by the union but potentially only 70 are dues-paying members. In every state or county converting to a Right-to-Work jurisdiction there will likely be a loss in union membership and revenue where there are collective bargaining agreements in place with union security language.

No doubt the United Auto Workers will appeal this decision. It will be intriguing whether it ultimately reaches the U.S. Supreme Court and if by the time it does, the vacant position has been filled by President Trump and confirmed by the Senate.

Reasonable Accommodation, Reasonable Competition

One aspect of reasonable accommodation under the Americans with Disabilities Act is an employee transfer to a job where either the disability does not interfere with the job or the disability can be accommodated. Under the ADA, it is not strictly necessary that the employee in the new position receive the same pay and status as the position she or he is transferring from, though this may be preferable in many circumstances.

The case of *EEOC v. St. Joseph's Hospital* (11th Cir. Dec. 7, 2016), considered whether it was a reasonable accommodation to give an employee who could not perform the essential functions of her current job a leg up in a competitive application process for a transfer. The EEOC filed this lawsuit on behalf of a nurse, Leokadia Bryk. She worked in the hospital's psychiatric ward and, due to a disability, needed to use a cane while working. Her employer said that she could not use a cane while working in the psychiatric unit because it created a potential safety risk to other employees and patients. The employer said that she was free to apply for another position for which she was qualified and to transfer into that position within 30 days, or else she would be terminated. Furthermore, if the transfer was pending at the end of the 30 days, she would not be terminated until the transfer was completed. She failed to find a suitable position for transfer and was terminated.

The EEOC sued, alleging that the Hospital ought to have reasonably accommodated Bryk by awarding her an open position for which she was minimally qualified, without

having to compete with other candidates. In rejecting that argument, the Court stated that "the ADA does not say or imply that reassignment is always reasonable . . . as things generally run, employers operate their business for profit, which requires efficiency and good performance. Passing over the best qualified applicants in favor of less qualified ones is not a reasonable way to promote efficiency or good performance." Accordingly, the employer did not violate the ADA by failing to transfer the less qualified employee seeking the accommodation.

The Court also discussed that competing for an open position is not limited to qualifications. For example, assume an employer provides transfer opportunities based upon seniority and qualifications. The Court viewed seniority as part of the qualifications consideration, meaning that an employee with more seniority is not required to be "jumped over" in order to provide reasonable accommodation to another.

The Eleventh Circuit's decision in this case, while well founded in the statutory text of the ADA and consistent with common sense, is at odds with informal EEOC guidance and, obviously, the EEOC's litigation strategy. It also potentially conflicts with decisions made by courts in other jurisdictions.

Note the importance of the interactive reasonable accommodation process. If an employee cannot be accommodated in the current job, the employer should initiate the discussion inviting the employee to apply for any other available position for which they consider themselves qualified. If they apply, it is up to the employer to consider as a form of accommodation placing the individual in that job, provided it does not violate employer policies of how vacancies are filled. If an employer's policy is to give preferences for vacancies to employees who need accommodation, then that should be followed in this case. However, where the practice of filling vacancies is according to qualifications, work record and/or length of service, then the individual with a disability should be considered according to those standards as any other employee. Employers should also consider drafting explicit policies that dictate that transfer and promotion decisions will be made on a competitive basis.

Are COBRA Class Actions on the Way?

Often claims that are made against the largest employers create a potential trickle down effect on other employers nationwide. Typically, COBRA litigation has involved a "one off" claim of an individual who was wrongfully denied COBRA continuation coverage. However, the case of *Bryant v. Wal-Mart Stores, Inc.,* (S.D. Fla., Nov. 17, 2016), raises an alert to employers about the adequacy of their COBRA notices to current and former employees. Failure to comply with the COBRA notice requirements, including the language of the notice, may result in penalties of up to $110 per day per individual. That can add up. Recently, a COBRA settlement of $290,000 occurred with Sun Trust, related to the inadequacy of its COBRA notice.

In the Wal-Mart case, the class action claim alleges that Wal-Mart's notices were "confusing" and "ambiguous." The case alleges that Wal-Mart did not use the U.S. Department of Labor's model COBRA continuation form. Instead, Wal-Mart created its own, which was defective in several respects. First, it was confusing. Furthermore, the plan administrator was not identified. The notice did not state that the spouse of an employee may elect continuation coverage on behalf of others, such as children. The notice failed to adequately explain that coverage opportunities would be lost if certain specific actions be the recipient were not taken.

The COBRA notice requirements remind us of requirements under the Fair Credit Reporting Act where technical violations may result in significant costs to the employer. For example, it is a violation of the Fair Credit Reporting Act to fail to provide the disclosure and authorization form on a stand-alone page. Similarly, it is a violation of COBRA not to identify specifically the actions the recipient must take and consequences of failing to do so. If your organization has developed its own COBRA notice form, rather than using the Department of Labor's model form, be sure that your form complies with COBRA requirements.

Good News for Small Employers

Last week, President Obama signed the *21st Century Cures Act* (the "Cures Act"), which provides funds for cancer research and drug abuse. Among the various health related provisions lies good news for small employers – the opportunity to reimburse their employees for premiums paid for insurance purchased on the individual marketplace. This practice was previously prohibited under the Affordable Care Act (ACA). Prior to the ACA, many employers sponsored health reimbursement arrangements (HRAs) that paid or reimbursed employees for insurance premiums and other eligible health expenses. However, the IRS and other related agencies determined that HRAs were "group health plans" subject to the ACA market reforms and were thus prohibited (see, Notice 2013-54, FAQ XXII, Notice 2015-17 and Notice 2015-87). Unfortunately, this guidance meant that employers could not use HRAs to reimburse employees for premiums paid for individual market coverage because, by their very design, stand-alone HRAs could not satisfy all of the ACA's market reforms. In limited circumstances, the only way for an HRA to comply with the ACA market reforms is for the HRA to be integrated with an ACA-compliant group health plan. Now, the newly passed Cures Act will allow small employers to set up HRAs in the form of qualified small employer health reimbursement arrangement ("QSEHRA"). In many ways, QSEHRAs are just like pre-ACA HRAs – employer payments through the QSEHRA are deductible and reimbursements from the QSEHRA are excludible from employees' income. However, there are some important differences. Important aspects of the QSEHRAs under the Cures Act include:

- Only small employers may establish QSEHRAs, which means that applicable large employers ("ALEs") may not avail themselves of QSEHRAs.
- The QSEHRA must be offered on the same terms to all eligible employees. Eligible employees are defined as all employees, subject to the following exclusions: employees who have been employed fewer than 90 days; employees under the age 25; part-time and seasonal employees; union employees, unless the relevant collective bargaining agreement provides for eligibility, and non-resident aliens with no U.S.-source income. If a QSEHRA is limited to premium reimbursement, the QSEHRA will still be treated as being offered on the same terms despite variation in premiums based on age and family size.
- QSEHRA amounts are capped at $4,950 (single) or $10,000 (family), subject to adjustment for inflation. Employees eligible for only part of a year are subject to a pro-rated cap. Employees cannot contribute to QSEHRAs through salary reduction or otherwise.
- Eligible employees must provide employers with proof of coverage before receiving reimbursement. If an employee is not enrolled in minimum essential coverage, the employee could be subject to an individual mandate penalty and any QSEHRA reimbursement could be includible in taxable income.
- Employers must provide employees with written notice no later than 90 days before the start of the plan year (or the start of eligibility for a new employee) describing the amount of reimbursement available under the QSEHRA and explaining that the employee must disclose the presence of the QSEHRA when applying for or renewing coverage purchased from the Marketplace. If an employer fails to provide the notice, the employer could face a penalty of $50 per employee per failure with a maximum penalty of $2,500.
- The amount available under a QSEHRA will be coordinated with any available premium tax credit available on the Marketplace. For example, if an employee covered by a QSEHRA is eligible for a premium tax credit, the amount available through the QSEHRA will offset the amount of the premium tax credit. It is possible for a QSEHRA to disqualify an individual from any premium tax credit if the QSEHRA is considered affordable coverage. A QSEHRA will be considered affordable coverage if the excess of the Marketplace premium for the second

lowest cost silver plan over the QSEHRA amount available does not exceed 9.5% (indexed for inflation) of household income.

- The QSEHRA is considered "applicable employer-sponsored coverage" for purposes of the excise tax on high-cost employer-sponsored health coverage (the so-called "Cadillac Tax"). The effective date of the Cadillac Tax, however, was previously delayed until 2020.
- The amount available under the QSEHRA must be reported on Form W-2 as the cost of coverage under an employer-sponsored group health plan.

QSEHRAs may be adopted effective for plan years beginning on or after January 1, 2017.

NLRB Tips: NLRB News Update / Employers Await President Trump

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.

While the pace of precedent changing pronouncements appears to have slowed somewhat awaiting the new Trump administration's swearing in, the NLRB has continued to apply the law as it has interpreted it under President Obama's term over the last eight years.

President-elect Donald Trump's nominee for the Secretary of Labor, Andrew Puzder, signals a more business friendly environment. Puzder has, in the past, openly criticized overly-aggressive rulemaking and also been critical of the NLRB decision in *Browning-Ferris,* which loosened standards for the finding of joint-employer status.

D. R. Horton Continues to be Applied Pending U.S. Supreme Court Review

In an easy call, especially given the factual finding that employees were "coerced" into signing the mandatory arbitration agreement, an Administrative Law Judge (ALJ) found that the mandatory arbitration agreement was overly-broad and illegal. The employer was ordered to "cease and desist" promulgating and maintaining a mandatory arbitration program that requires employees, as a condition of continued employment, to waive the right to maintain class or collective actions in all forums, without the consent of the employer.

In *PennyMac,* an ALJ found that the mortgage lender must revise its arbitration provision, finding that it violated the proscriptions contained in *D.R. Horton* in that it illegally forced employees to waive their right to collectively pursue any employment-related claims:

> As [I] concluded that the [Employer] has unlawfully maintained an arbitration policy that precludes class or collective actions by employees, I shall recommend that it be ordered to rescind or revise that policy to make it clear to employees that the policy and agreements made pursuant to the policy do not constitute a waiver in all forums of their right to maintain class or collective actions relating to their wages, hours, or other terms and conditions of employment.

The ALJ admitted that the Board's interpretation of mandatory class waivers has not met with much approval in the Circuit Courts of Appeal, but noted that he was bound to follow the current Board law in this area. As noted in previous ELBs, the U.S. Supreme Court is currently considering granting review of the issue.

Big Surprise – NOT – Columbia Graduate Teaching Assistants Vote to Join the UAW

In early December of 2016, graduate teaching and research assistants at Columbia University voted to be represented by the UAW. The vote was 1,602 to 623 in

favor of union representation. The vote, which was opposed by the University, caps off an organizing effort where precedent was overturned and sparked similar drives on other private school campuses.

Currently, the Board is in the process of resolving over 1,200 challenged ballots in the election held at Harvard University in November of 2016. Expect Harvard assistants to vote for union representation when the challenges are resolved.

The Second Circuit Now Joins the Third, Fourth, Fifth, Sixth and Eighth Circuits in Approving *Specialty Healthcare*

As noted in the June 2016 ELB and the August 2016 ELB, the NLRB decision approving micro-units appears here to stay. As of October of 2013, Circuit Courts have applied the *Specialty Healthcare* analysis and the "overwhelming community of interest" standard to smaller bargaining units in about 90 decisions.

Now, another Circuit Court of Appeals has affirmed the Board's application of *Specialty Healthcare* in determining appropriate bargaining units, but remanded the case to the Board to "engage in a full analysis (under step one of the two prong test announced under *Specialty)* prior to shifting the burden to the employer." Expect the current Board to add some meat to its "bare-bones" analysis and resubmit the matter to the Second Circuit, in short order, for enforcement.

Despite the remand, a unanimous Second Circuit rejected the employer's contention that *Specialty* places too heavy a burden on an employer trying to expand a proposed bargaining unit:

> It seems to [the court that the test] does not significantly redefine the showing required of a party seeking board approval in establishing a bargaining unit. Nor does it contravene Section 9(c) of the [National Labor Relations Act] by giving union organizers an inappropriate degree of control.

In other news, in *Macy's,* the Fifth Circuit denied an *en banc* rehearing of the original decision and upheld its decision.

Six dissenting judges would have reheard the case in full and criticized the NLRB as issuing a decision that shows its "determination to disregard established principles of labor law." Noting that the Board in the past has found appropriate storewide units of department store sales workers, the dissent stated:

> [Labor peace and stability] are weakened by the balkanization of bargaining units in a single, coordinated workplace.

The dissent argued that an *en banc* rehearing was appropriate, as the NLRB had abused its discretion in finding the micro-unit appropriate.

The Browning-Ferris (BFI) Ruling at The D. C. Circuit Court of Appeals:

The new joint employer standard, discussed in depth last in the August 2016 ELB, was articulated in *Browning-Ferris Industries (BFI)*.

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

The case is now at the D.C. Circuit Court under review. In its final brief to the Court in November of 2016, BFI argued that the new joint employer test "creates an amorphous, unworkable fog" for employers.

Before *BFI,* joint employer standard rested on an employer having "direct and immediate" control over the terms and conditions of employment of the staffing agency. After *BFI,* the standard changed to include "indirect control," or the ability to exert such control. The BFI decision, along with similar decisions, signals that the NLRB is not contemplating abandoning the new, looser, joint employer standard, unless compelled to do so by the Trump administration or the Courts.

OSHA Tips: OSHA and Workplace Deaths

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 recent posting on the agency's website OSHA addresses the recurring causes of workplace deaths. It notes that more than 4,500 workers are killed every year. Falls are one of the leading causes of deaths, particularly in the construction industry. Many workers are killed or injured when machinery starts suddenly, while undergoing repairs. A lack of proper respiratory protection often is found that may contribute to long term health issue. Next on the list are violations involving forklifts or powered industrial trucks. A frequent issue here is lack of proper training.

The following was recently posted by OSHA: Every October the Department of Labor's Safety and Health Administration releases a preliminary list of the most frequently cited safety and health violations for the fiscal year. This list is compiled from nearly 32,000 inspections of workplaces by federal OSHA staff. One remarkable thing about the list is that it rarely changes. Year after year, inspectors see thousands of the same on-the-job hazards, any one of which could result in a fatality or a serious injury. In addition to the 4,500 workers killed on the job approximately 3,000,000 more are injured, despite the fact that by law employers are responsible for providing safe and healthful workplaces for their workers. If all employers simply corrected the top ten hazards we may be confident that the number of deaths, amputations and hospitalizations would drastically decline. Perhaps the following should be viewed as a starting point for worker safety: fall protection, hazard communication, scaffolds, respiratory protection, lockout/tagout, powered industrial trucks, ladders, machine guarding, electrical wiring, and electrical-general requirements.

Wage and Hour Tips: Wage and Hour Update

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.

Status of Changes to the Exemption regulations that were to be effective on December 1, 2016

As I feel sure you have heard the U.S. District Court in Houston issued a nationwide injunction delaying the application of the new regulations. However, Wage and Hour has filed an appeal with the Fifth Circuit Court of Appeals requesting that court to remove the injunction. The Fifth Circuit has issued an Order giving each party until January 17, 2017, to file briefs in the case and requiring responses be filed by January 31, 2017. Once these documents are filed, it will be up to the Court to decide how they will proceed. Stay tuned for regular updates.

Application of the Fair Labor Standards Act to Domestic Service

In September 2013 the Department issued a rule concerning domestic service workers under the FLSA that makes substantial changes to the minimum wage and overtime protection to the many workers who, by their service, enable individuals with disabilities and the elderly to continue to live independently in their homes

and participate in their communities. The rule, which became effective January 1, 2015, contains several significant changes from the prior regulations, including: (1) the tasks that comprise "companionship services" are more clearly defined; and (2) the exemptions for companionship services and live-in domestic service employees are limited to the individual, family, or household using the services; and (3) the recordkeeping requirements for employers of live-in domestic service employees are revised.

Below are excerpts from a Wage and Hour Fact Sheet that outline the major changes in the regulations.

Minimum Wage and Overtime Protections. This Final Rule revises the definition of "companionship services" to clarify and narrow the duties that fall within the term and prohibits third party employers, such as home care agencies, from claiming the companionship or live-in exemptions.

Companionship Services. The term "companionship services" means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. Under the Final Rule, "companionship services" also includes the provision of "care" if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek.

Fellowship and Protection. Under the Final Rule, "fellowship" means to engage the person in social, physical, and mental activities. "Protection" means to be present with the person in their home or to accompany the person when outside of the home to monitor the person's safety and well-being. Examples of fellowship and protection may include: conversation; reading; games; crafts; accompanying the person on walks; and going on errands, to appointments, or to social events with the person.

Care. The definition of companionship services allows for the performance of "care" services if those services are performed attendant to and in conjunction with the provision of fellowship and protection and if they do not exceed 20 percent of the employee's total hours worked in a workweek per consumer. In the Final Rule, "care" is defined as assistance with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).

Household Work. The Final Rule limits household work to that benefitting the elderly person or person with an illness, injury, or disability. Household work that primarily benefits other members of the household, such as making dinner for another household member or doing laundry for everyone in the household, results in loss of the companionship exemption and thus the employee would be entitled to minimum wage and overtime pay for that workweek.

Medically Related Services. The definition of companionship services does not include the provision of medically related services which are typically performed by trained personnel. Under the Final Rule, the determination of whether a task is medically related is based on whether the services typically require (and are performed by) trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants. The determination is not based on the actual training or occupational title of the worker performing the services. Performance of medically related tasks during the workweek results in loss of the exemption and the employee is entitled to minimum wage and overtime pay for that workweek.

Live-In Domestic Service Employees. Live-in domestic service workers who reside in the employer's home permanently or for an extended period of time and are employed by an individual, family, or household are exempt from overtime pay, although they must be paid at least the federal minimum wage for all hours worked. Live-in domestic service workers who are solely or jointly employed by a third party must be paid at least the federal minimum wage and overtime pay for all hours worked by that third party employer. Employers of live-in domestic service workers may enter into agreements to

exclude certain time from compensable hours worked, such as sleep time, meal time, and other periods of complete freedom from work duties. (If the sleep time, meal periods, or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked.) Under the Final Rule, these employers must also maintain an accurate record of hours worked by live-in domestic service workers. The employer may require the live-in domestic service employee to record his or her hours worked and to submit the record to the employer.

Third Party Employers. Under the Final Rule, third party employers of direct care workers (such as home care staffing agencies) are not permitted to claim either the exemption for companionship services or the exemption for live-in domestic service employees. Third party employers may not claim either exemption even when the employee is jointly employed by the third party employer and the individual, family, or household using the services. However, the individual, family, or household may claim any applicable exemption. Therefore, even if there is another third party employer, the individual, family, or household will not be liable for unpaid wages under the FLSA provided the requirements of an applicable exemption are met.

Paid Family or Household Members in Certain Medicaid-funded and Certain Other Publicly Funded Programs Offering Home Care Services. In recognition of the significant and unique nature of paid family and household caregiving in certain Medicaid-funded and certain other publicly funded programs, the Department has determined that the FLSA does not necessarily require that once a family or household member is paid to provide some home care services that all care provided by that family or household member is part of the employment relationship. Where applicable, the Department will not consider a family or household member with a pre-existing close personal relationship with the consumer to be employed beyond a written agreement developed with the involvement and approval of the program and the consumer (or the consumer's representative), usually called a plan of care, that reasonably defines and limits the hours for which paid home care services will be provided.

As we begin a new year the minimum wage in almost one-half states will also increase. Several states link their minimum wage to the Consumer Price Index (CPI) which did not increase this year. Almost one-half of the states have established a minimum greater than the federal rate of $7.25 while there are five states, including Alabama, which do not have a minimum wage statute. If you operate in multiple states it would behoove you to check with the Labor Department in the individual states to make sure you are paying the correct rate in that state. Also many of the states have a different "tip credit" from the requirements of the Fair Labor Standards Act.

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

Did You Know . . . ?

. . . that employer penalties under the Affordable Care Act may reach $31 billion for 2016? This is according to the consulting firm Accenture in a November 17 report. According to Accenture, $21 billion in penalties will be due to employers not offering health insurance coverage and $10 billion due to employers who are considered "unintentionally non-compliant." According to Accenture, "there is still a bit of unawareness of the potential magnitude [of penalties]" as penalties have not yet been assessed for 2015. Unless and until there is ACA reform under the Trump Administration, some version of employer reporting will continue to persist, whether in short term or longer term, and that said it's very important for employers to have a solution in place to minimize future exposure."

. . . that a California jury ordered Wal-Mart to pay over $54 million in backpay to Wal-Mart drivers? *Ridgeway v. Wal-Mart Stores, Inc.* (November 23, 2013). The Claim alleged that the drivers were not paid at least the minimum wage for non-driving tasks, including pre- and post-trip inspections and rest breaks. The Court said that when an employer directs, commands, or restrains an employer from leaving the workplace during his or her lunch hour, and thus prevents the employee from using the time effectively for his or her own purposes, the employee remains subject to the employer's control. Wal-Mart argued that non-compensable activities occurred at

the same time as compensable activities. The Court stated that the manner in which Wal-Mart paid for the compensable activities may not be spread out to include the non-compensable activities.

. . . that "age" tends to be left out of diversity and inclusion considerations? According to a survey by PricewaterhouseCoopers, employer diversity and inclusion strategy comprises 33% of an emphasis on gender, 24.5% of an emphasis on race, 8% of an emphasis on age, 7.2% of an emphasis on disability and 1.1% on religion. According to one consultant, "older workers getting left behind in diversity…" Furthermore, "if we could eliminate the filter of age and false stereotyping about aging, we could see older workers have experience, institutional awareness, and history" and "bring a lot of benefits to the work place that are valuable." According to the National Capital on Aging, 40% of Americans 55 and older will be employed as of 2019 and will comprise 25% of the total US workforce. According to the Bureau of Labor Statistics, unemployed individuals older than age 40 stayed unemployed for a longer period of time than those younger than 40, particularly involving women and minorities.

. . . that a founder and president of a New Jersey labor union was sentenced to three years in jail for embezzlement? *United States v. Faye* (D. NJ, November 22, 2016). Assane Faye founded the United Security and Police Officers of America. Apparently business was good. He added to the union payroll a female with whom he had a romantic relationship. She was supposed to lead the union's organizing efforts in Manhattan, but she spoke limited English and spent six months of the time that she was on the payroll in her home country of Senegal. During that time, she received $244,000 from the Union. He also padded the expenses he submitted to the Union for the use of his car and collected unemployment benefits based upon misrepresenting his employment status. He was sentence to 37 months in jail and ordered to pay restitution of $350,000. From our perspective, the jail term and restitution are woefully insufficient compared to his abuse of responsibilities and theft from the union members.

LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

Richard I. Lehr	205.323.9260 rlehr@lehrmiddlebrooks.com
David J. Middlebrooks	205.323.9262 dmiddlebrooks@lehrmiddlebrooks.com
Albert L. Vreeland, II	205.323.9266 avreeland@lehrmiddlebrooks.com
Michael L. Thompson	205.323.9278 mthompson@lehrmiddlebrooks.com
Whitney R. Brown	205.323.9274 wbrown@lehrmiddlebrooks.com
Jamie M. Brabston	205.323.8219 jbrabston@lehrmiddlebrooks.com
Brett A. Janich	205.323.9279 bjanich@lehrmiddlebrooks.com
Lyndel L. Erwin (Wage and Hour and Government Contracts Consultant)	205.323.9272 lerwin@lehrmiddlebrooks.com
Jerome C. Rose (EEO Consultant)	205.323.9267 jrose@lehrmiddlebrooks.com
Frank F. Rox, Jr. (NLRB Consultant)	205.323.8217 frox@lehrmiddlebrooks.com
John E. Hall (OSHA Consultant)	205.226.7129 jhall@lehrmiddlebrooks.com
JW Furman (Investigator, Mediator & Arbitrator)	205.323.9275 jfurman@lehrmiddlebrooks.com