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What Will Occur at the Trump Administration EEOC?

During my years with the Justice Department and the Equal Employment Opportunity Commission I saw several presidential changes and power shifts between the major parties in Congress. Following major political upheavals, changes certainly were made in the priorities of those agencies and even in the day to day tasks of the employees, but those changes usually came slowly. With the recent election results, I believe that changes for many agencies, including the EEOC, will occur much more quickly than we have seen previously. President Trump and the Republican Party have vowed to erase many of the programs of the previous administration and want to demonstrate their commitment to change immediately.

The groundwork for changing the direction of EEOC has already been laid. The term of appointment of the current Chair of the Commission will end in July. As soon as her replacement is named, the Commission's leader and majority will be Republican. The current agency leaders are expecting the new Commission to be much more involved in reviewing cases and deciding which ones will be filed in court. In the outgoing administration, these decisions have been made by the general counsel in conjunction with the district directors.

EEOC's general counsel, who has wielded much power since 2010, left in December. His position can be filled immediately. This general counsel utilized class actions and systemic investigations to impact and enforce discrimination laws. He was criticized by some Republicans for focusing on systemic cases where no charge was filed by an aggrieved party. These large high profile and high expense lawsuits likely will not be supported or funded by the new leadership. Even under the Obama administration EEOC's budget has been stagnant and there is no reason to believe that it will fare better now.

President Trump has been clear that he wants less regulation on business. Many in the Republican-majority Congress agree with him. I have been told that the new EEO-1 surveys which would require employers to report employee pay information are expected to be rescinded, possibly even before they go into effect next year. It is expected that reducing the backlog of administrative cases will be emphasized by shortening the process – shorter deadlines for the parties to provide information and produce evidence, more mediation, and probably fewer unsubstantiated demands by EEOC for large settlements. If the issue is pressed, I believe that EEOC's hard line against binding arbitration agreements between employers and employees also will soften. These philosophical changes will likely, in time,

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reduce the number of investigators and increase mediators (either in-house or contractors).

Mediation has accounted for most of the money and benefits secured by EEOC for its charging parties in recent years. Its mediation pilot program was born during a Republican administration (Bush I) and later expanded to include conciliation (settlement after cause finding) under Bush II. My expectation is that EEOC will fund and expand the mediation program since it is having such an impact and allowing employers more flexibility in resolving employee disputes. Mediation may become available for all charges filed with the agency.

Because of the party change in both the executive and legislative branches, I would expect to see President Obama's emphasis on LGBT, gender identity, and equal pay to decline by the time the new Chair is appointed. President Trump has said very little on these issues so, seemingly, they are not his priorities. Vice President Pence opposed equal pay legislation. We do not know who will be appointed to leadership positions in the EEOC; however, we should expect viewpoints similar to those of the nominee for Secretary of Labor, who is against more regulation on employers (opposes raising minimum wage and paid sick leave). We should expect the EEOC to become less focused on investigation/enforcement and more concerned with compliance assistance and charge resolution.

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Do Confidentiality Agreements Violate Free Speech Rights?

Employers increasingly require employees to sign confidentiality agreements, where the employee understands that during the course of or subsequent to employment several aspects about the employer's business will not be disclosed. The recent lawsuit of *Doe v. Google, Inc.* (Cal. Super. Ct., Dec. 20, 2016), alleges that such an agreement violates an employee's constitutional rights and California state law.

The confidentiality agreement at issue broadly defines what is "confidential" information and an employee agrees not to discuss that confidential during or subsequent to her or his employment. The confidential information is defined to include compensation and working conditions. Furthermore, the agreement includes a prohibition of speaking to the media about Google.

The lawsuit alleges that such an agreement is broad enough to result in the termination of an employee who "blows the whistle" on employer practices the employee believes are unethical, unlawful, or dangerous. The case also alleges that such agreements violate employees' rights to engage in collective activity under the National Labor Relations Act.

We recommend that employers consider confidentiality agreements generally, which when properly drafted are permissible and enforceable, including when an employee is no longer an employee of the company. However, employers should avoid the use of a "one size fits all" confidentiality agreement and instead require confidentiality agreements that are tailored to the employee's job responsibilities and access to information. The more directly the agreement focuses the employee's job responsibilities and access, the greater the likelihood of its enforceability.

Employee Exceeds Intermittent Leave: Termination Justified?

The case of *Oakman v. Michelin North America, Inc.* (N.D. Ind., Dec. 21, 2016), involves the termination of an employee whose intermittent leave exceeded the amount described in the doctor's FMLA certification. Oakman was employed as a tire builder. He provided the company with certification of a serious health condition which limited his work when he had problems with a chronic lower back condition. The doctor estimated the amount of time the

intermittent leave was necessary, but Oakman exceeded that amount. Once Oakman started to exceed the amount stated by the doctor, the company treated his absences as incidents under the company's no-fault attendance policy, which resulted in his termination.

Oakman had two bites at the apple. His union, the Steelworkers, pushed the matter to arbitration and an arbitrator concluded that the employer improperly interpreted the FMLA and ordered Oakman's reinstatement and back-pay. Oakman then sued in the United States Federal District Court, seeking double damages, attorney fees and other relief based upon the alleged willfulness of the FMLA violation.

Oakman argues that Michelin violated the FMLA by relying on a prior case, *Hansen v. Fincantieri Marine Group* (7th Cir. 2014). In that case, the court had held that the employer must notify the employee of the need for recertification prior to treating the unanticipated leave as an attendance incident. Thus, in this case, the court found that the burden was on the employer to seek a new certification or additional information related to the unanticipated absences. This follows the general principle under the FMLA, which is when the employer becomes aware of the possible need for granting or extending FMLA, the employer should require certification of the need for the absence prior to deciding whether the absence is unexcused.

Global Organizing Effort Directed at Nissan

The United Auto Workers has failed miserably in efforts to unionize Southern auto manufacturers. What the union thought would be a "headline" outcome at VW in Chattanooga turned in to litigation over organizing VW's maintenance employees. For several years, the UAW has tried to organize 5,000 employees at Nissan's plant in Clinton, Mississippi. Now the UAW has taken the Nissan organizing effort to a global level.

At the UAW's request, the global federation of unions, IndustriALL, is intervening on the UAW's behalf. IndustriALL and the UAW have appealed to the International Organization for Economic Cooperation and Development ("OECD") to act on their behalf. The OECD is comprised of 35 countries, including the United States, Japan and France. It develops guidelines to promote fair and reasonable economic policy. Members generally follow the OECD recommendations. The UAW and IndustriALL have asked OECD to investigate whether Nissan's actions in Mississippi violate OECD guidelines. According to the UAW, "We hope that OECD officials recognize the severity of the situation and will consider intervening in the interest of insuring that health, safety, and well-being of the hardworking employees in Clinton."

Obamacare - Repeal and Replace for Real?

We have been hearing these terms – repeal and replace – almost since the Affordable Care Act was first signed into law. Both houses of Congress have voted at various times on bills to accomplish this mission, but they have been vetoed by President Obama. Even before President Trump was sworn in on Friday, January 20, 2017, the Senate voted again to take the first step towards repealing Obamacare for real. On January 12, 2017, the Senate voted 51 to 48 in approval of a budget resolution they plan to use as a vehicle to speed through the repeal of the ACA. Of course, this hotly debated issue continues to have polarizing opinions on both sides of the aisle.

On January 21, 2017, the same day he was sworn in as the 45th President of the United States of America, President Trump signed an Executive Order to "ease the burden" of Obamacare. The Order, titled "Minimizing Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal," directed the agencies with authority and responsibilities under the Act to "exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act that would impose a fiscal burden on any State or a cost, fee, tax, penalty, a regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchases of health insurance, or makers of medical devices, products or medications." Although President Trump cannot repeal the ACA via Executive Order, the Obama Administration's aggressive assertion of authority to grant waivers and

delay implementation of various provisions of the law set a precedent which provides the Trump Administration much flexibility to do the same. It is anticipated that state waivers may be granted generously and that the issues related to the so-called "contraception mandate," may be resolved with exemptions granted to those employers, such as Little Sisters of the Poor, who alleged that the employer mandate under the ACA burdened their exercise of religion.

There is already much speculation that this Executive Order also provides for the Department of Health and Human Services to grant waivers from the individual responsibility mandate of the ACA. Regardless, the real opportunity to "repeal and replace" still lies with Congress. There are currently two ideas circulating among Republicans in Congress: (1) establishing a goal of "universal access" instead of "universal coverage;" and (2) shifting the responsibility for replacing the ACA to the states rather than the federal government. On January 18, 2017, Congressman Tom Price, who is President Trump's nominee for the Health and Human Services Secretary, testified at his confirmation hearings that the "goal here is to make sure that everybody can buy coverage or find coverage if they choose to." Although the ACA has reduced the number of uninsured persons in the United States, it has certainly not achieved universal access or coverage. In fact, there are still over 28 million uninsured Americans as of the end of 2016. There are a variety of strategies being discussed with the goal of lowering cost and increasing affordability. The other proposal that has gained steam is the concept that Congress could repeal the ACA, but leave the states in the position of charting their own course for reform, with some financial assistance from the federal government. There have also been proposals to fund Medicaid on a block grant and provide greater flexibility for the states in almost all replacement plans. In reference to possible replacement plans, Senior Trump Advisor Kellyanne Conway, mentioned "block grant Medicaid to the states, so people who are closest to those in need through Medicaid—which guarantees health insurance to the poor . . . are really administering it. You really cut out the fraud, waste, and abuse, and you really [get] help directly to them." As one would expect, Republicans are in favor of this proposal but Democrats are not.

Republicans in Congress have recently put forth more proposals. The House Republicans' Study Committee introduced a bill titled *The American Healthcare Reform Act of 2017* that would fully repeal the ACA effective January 1, 2018. It would also eliminate the tax exclusion for employer paid health insurance and replace it with a standard deduction and expand the use of health savings accounts. Senate Budget Chairman Mike Enzi (R-Wyo.) introduced a resolution instructing congressional committees to draft reconciliation bills to include provisions related to the ACA, identifying the provisions to be repealed. The budget reconciliation process will allow the Senate to pass a repeal with a simple majority of 51 votes, rather than the 60 vote supermajority required for most major bills. The ACA was originally passed by Democrats in the same manner.

Senators Bill Cassidy (R-La.) and Susan Collins (R-Me.) rolled out an ACA replacement proposal, the *Patient Freedom Act of 2017*, on Monday, January 23, 2017. This proposal would provide states with three options: (1) continue to run the ACA as it is without any changes; (2) switch to a different health insurance expansion that emphasizes automatically enrolling all uninsured residents into a federally subsidized catastrophic plan; or (3) offer no coverage expansion at all and the state would lose the money it currently receives for insurance subsidies and Medicaid expansion.

While many replacement options are being considered, for now, we are unlikely to see any further substantive action regarding the Affordable Care Act until Trump's HHS Secretary is at least confirmed. Until then, the ACA remains the law of the land.

NLRB Tips: As Employers Await President Trump, the NLRB Continues to Assault Board Precedent

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The Focus of President Trump's National Labor Relations Board

As President Trump begins his term, citizens in the labor and employment law area wonder what a newly constituted NLRB will look like and what changes it will likely make to the regulatory landscape. The following list is substantial, but by no means comprehensive, of possible changes under a President Trump dominated NLRB.

Currently, the NLRB has a 2-1 Democratic majority, and over the years they have served, the Board has pushed a liberal, precedent-changing agenda in the labor law area. LMVT has noted the many precedent-changing decisions in the employment law bulletin.

Under a Trump NLRB that should change with significant push back. In addition to anticipated Supreme Court vacancies, look for the Agency's face to change. With two seats open on the Board, and appointments coming most probably from former Republican Board members or new blood from management law firms, it seems likely that the new Board will revisit some of the more controversial rules and decisions issued under the Obama NLRB. In addition to the new Board members, expect a new Agency General Counsel (GC) to be appointed by the Trump administration. The term of Richard F. Griffin, Jr., the current appointed General Counsel's expires in early November of 2017. While Mr. Griffin may step down early, it seems unlikely.

The reader should realize that, at this point before the new administration takes office, the following predictions remain speculation. However, guidance as to the course of action the Agency will take under a Trump administration can be gleaned from reviewing the Agency's annual General Counsels Memorandum in 2017 concerning mandatory advice submissions. Expect this memo to issue in the spring of 2017.

The List

1. Class-Action Waivers

Under *D. R. Horton,* the Obama NLRB held that requiring employees to sign mandatory arbitration agreements that contained waivers violated Section 7 of the National Labor Relations Act (NLRA). *D. R. Horton* has been the topic of numerous past LMVT employment law bulletins.

As noted below, the Supreme Court has agreed to consider the Board's interpretation of mandatory arbitration so it seems that this issue may be judicially decided before the Trump Board gets to reconsider its position on mandatory arbitration agreements containing waivers.

2. Joint Employers

In a far reaching decision (*BFI,* thoroughly discussed in the August 2016 ELB), the current NLRB has loosened the standards for finding of a joint employer relationship. Under the Board's current law, employers could be considered joint employers where an employer merely has the "right to control" the other company's employees, as opposed to the old rule, where a finding of joint employer status was dependent on "actual control" of an employer's working conditions.

It seems inevitable that the Board will pursue its joint employer initiative as far as the Courts, Trump administration, and Congress will allow. Perhaps the Trump Board will recall any cases from the Circuit courts in order to reconsider its joint employer position.

3. Temporary Employees Included in Bargaining Units

On July 11, 2016, the Board reversed a Regional Director's application of case precedent that a user employer and a staffing agency must both consent before an election covering temp workers and regular

employees can be held. Overruling *Oakmont Center,* 343 NLRB 659 (2004), the NLRB stated that it was returning to the standard enunciated in *M. B. Sturgis,* 331 NLRB 1298 (2000), finding among other things:

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

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

The underlying case is *Miller & Anderson, Inc.,* 364 NLRB No. 39 (2016). The Board, in an unpublished order issued in 2015, granted review of a Regional Director's dismissal of an RC petition.

The ruling allows unions to organize temporary employees, and employees not employed by both joint employers, into a single unit when at least some of the impacted employees are jointly employed. This loosened standard makes it easier for unions to overcome the threshold test for joint employment of the temporary employees, leading to the inclusion of the solely employed user employees in the same unit.

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

4. Nonsensical Expansion of Protected Concerted Activity

Over the years under President Obama's administration, the Board has continued to ignore common sense when applying protected concerted activity (PCA) standards when reviewing insubordinate behavior by employees. The NLRB methodology applied to these types of cases has made it virtually impossible to enforce decency standards in the workplace, at least if the case is before the Agency.

The NLRB has fairly well-established principles for testing whether employer policies and rules interfere with employees' rights to engage in protected, concerted activity. However, recent application of those principles to factual situations that would seem to insulate employers from adverse action by the NLRB, but did not, has raised unease among management practitioners

It remains to be seen if the Circuit Courts affirm, wholesale, the NLRB approach to such cases. My prediction, given the limited nature of review (abuse of discretion), the NLRB expansive approach to PCA cases may stand.

However, this is not to say that company employees have *carte blanche* on social media or at the workplace while engaged in PCA. For example, in *Pier Sixty (*on social media, an employee called a company supervisor a "nasty M-F" in the context of union organizing - he was ordered reinstated by the NLRB)*,* had there been evidence that cursing at managers had not been tolerated in the past, or had the company had a more targeted policy against vulgar and obscene speech, then presumably the outcome in *Pier Sixty* might have been different.

This is a tricky area to navigate, and it is recommended that, given the existing enforcement atmosphere at the NLRB, employers contact legal counsel to have their social media and handbook policies reviewed once President Trump takes office and starts changing the law in this area.

5. **Specialty Healthcare Reconsideration**

Despite achieving widespread acceptance in the Circuit Courts, expect the Trump Board to carefully scrutinize and possibly reverse the far reaching decision that seems to place an impossible burden on an employer, even when the requested bargaining unit is consistent with long standing precedent. The approvals of micro-units by the Obama NLRB appears well entrenched, but expect the Trump NLRB to pick and choose micro-unit cases to narrow the application of *Specialty Healthcare.*

The modification in how bargaining units are determined has the potential to be the most far reaching change in

NLRB precedent in decades. The standard articulated in *Specialty* is briefly summarized below:

***Specialty Healthcare* – The Analytical Framework**

When considering the appropriateness of a petitioned-for bargaining unit, the Board first assesses whether the unit as set forth is appropriate applying traditional community of interest standards.

If the petitioned-for unit satisfies that standard, then the burden shifts to the employer to demonstrate that the additional employees it seeks to include in the bargaining unit share an "overwhelming community of interest" with the employees in the petitioned for unit, such that there "is no legitimate basis upon which to exclude [such] employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely."

In *Specialty Healthcare,* the union sought a bargaining unit of all CNAs, while the employer contended that the smallest appropriate unit must also include in it other non-supervisory service and maintenance employees. The Board applied the new standard and concluded that the employer had failed to meet its burden to demonstrate that the employees it wished to add to the bargaining unit shared such an overwhelming community of interest with the CNAs that they must be included in the petitioned-for unit.

While waiting for *Specialty Healthcare* to be eroded, employers should be mindful not to gauge the degree of support for union organizing exclusively on a broad-base of employee sentiment, but rather to examine union support in smaller units, consisting of particular job titles, departments, and shifts

6. Status of Private University Graduate Students

In August of 2016, the current NLRB overturned established precedent and found that teaching and research assistants at private colleges are "employees" as defined in the Act, and could organize for better pay and benefits at the workplace.

Look for the Trump board to revisit this line of cases and limit the ability of graduate students to organize.

7. New Rules Applied to Health Care Employers

In a break from decades old precedent, the Obama Board has changed the rules again. It remains to be seen if this ruling stands under the Trump presidency.

During contract negotiations, unions frequently apply pressure, as they should, to employers, designed to force employers to grant concessions during bargaining.

The most common forms of such activity are 1) the use of informational pickets and 2) the use of a limited, short, or intermittent strike. These strikes last only one or two days, and are thus of a short duration. Each method is discussed below:

Informational Picketing

Typically, such picketing is performed by employees who are "off the clock," and thus no work time is lost by the picketing employees. Such picketing can nevertheless prove disruptive of operations, if the picketers are allowed unfettered access to an employer's premises.

The long standing rule on informational picketing was to balance the needs of the picketers to convey their message concerning the labor dispute v. the rights of patients, families and employees to provide the patients with needed care. Thus, under the old rule, informational "on-premises" picketing could be prohibited. Under the old rules, the noise and distractions of picketing thus would often occur in areas far removed from the hospital or nursing care facility, and according to union pundits, made the informational picketing ineffective in conveying organized labor's message.

In C*apital Medical Center,* 364 NLRB No. 69 (2016), the Board overturned long-standing precedent and found that the hospital would now have the burden of showing that a rule prohibiting on-premises picketing in non-patient care areas is necessary to avoid disruption of health care operations or disturbance of patients. As it would be determined on a "case-by-case" basis, it has become

difficult to determine the validity of a no picketing rule before it was applied.

Short –Term Strikes

Unions who represent health care workers frequently use one or two day strikes to gain leverage during contract negotiations. These short strikes typically involve serving notice on the acute care center under Section 8(g) of the NLRA. These notices inform the hospital of the union's intention to engage in a strike and contain an unconditional offer to return to work on behalf of the strikers. This forces the care center to scramble to hire replacement workers on very short notice and train them as temporary replacement workers.

Under the current law, the use of the intermittent strike is illegal and those employees who engage in them are not protected by the Act. This explains unions' hesitancy to employ this technique more often than once or twice during the same labor dispute, as more use of the short strike may result in the loss of the Act's protection.

Now, GC Richard Griffin has issued Operation Management Memorandum (OM Memo 17-02), providing Regions with a briefing insert and urging the Board to reconsider the prior rules and loosen the standard to sanction any intermittent strike that meets the standards set forth in the OM Memo.

The hospital has requested review of the Board's decision in the Court of Appeals. It seems likely that this guidance will be abandoned by the NLRB under Mr. Trump's presidency.

Supreme Court Grants Review of Class Action Waivers under *D. R. Horton*

In mid-January of 2017, the Supreme Court officially granted review of whether the NLRB has correctly interpreted the application of mandatory arbitration agreements containing waivers. This will finally resolve the issue that has resulted in divided Circuit Courts.

The three consolidated cases involve the Fifth Circuit's *Murphy Oil USA Inc.,* and two other cases in which the Circuit Courts ruled against the employers and ruled in favor of the NLRB. The other cases are *Epic Systems Corp.* and *Ernst & Young.* The issue has been framed in *Murphy Oil* as follows:

> Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under [Section 8(a)(1) of the Act], because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection", [Section 7 of the Act], and are therefore unenforceable under the saving clause of the Federal Arbitration Act [FAA], 9 U.S.C 2.

Over the last several years, the NLRB has issued numerous decisions invalidating arbitration agreements because they contain class waivers. The guess here is that a Trump nominee to the Court to replace Antonin Scalia will tip the Court towards enforcement of mandatory arbitration agreements. Look for the case to be orally argued in the spring of 2017, with the decision issuing in the fall of 2017.

OSHA Tips: OSHA after Trump

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.

What will an OSHA after Trump look like? Time will tell, but he likely will proclaim it "Great." Expectations of a Trump OSHA should be revealed in his naming of a Secretary of Labor and Assistant Secretary of Labor for OSHA. There is speculation this will likely see aggressive enforcement of safety standards being replaced with an emphasis on voluntary compliance by employers.

Perhaps there will also be repealing of controversial regulations. A Trump administration might choose to repeal rules such as those for silica and the anti-retaliation rules. Another issue that Trump may look at is walking-working surfaces. He has indicated that for every new regulation, two others would be eliminated.

Whether or not various rules are adopted or remain in place, a Trump regime may be less inclined to enforce them. The general consensus seems to be Trump will not be high on the enforcement of any rules by this agency. Even under President Obama, the number of OSHA inspections has gone down in recent years. The guess is that Trump will not reverse this trend. He may find that he cannot quickly change rules to comport with his wishes and to make some changes may challenge his temperament. He may order OSHA to implement a notice of proposed rulemaking to amend or withdraw OSHA regulations but the process may take years to complete.

In general, Trump's OSHA may be expected to take actions to curtail OSHA enforcement by cutting the agency's budget, eliminating particularly objectionable standards, issuing a temporary moratorium on certain standards and the like. There seems to be a consensus that the new administration would see the enforcement side of OSHA reduced. There is speculation that in Trump's OSHA a Voluntary Protection Program approach might be promoted. Some have suggested, however, that Trump's paring back of OSHA might alienate some of his union, pro-employee supporters.

Wage and Hour Tips: Attendance at Training Meetings

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.

From time to time employers may desire to have employees attend training programs or meetings and may not be sure whether the employee must be paid for this time. The Wage and Hour regulations state that an employee's attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:

(a) Attendance is outside of the employee's regular working hours;

(b) Attendance is in fact voluntary;

(c) The course, lecture, or meeting is not directly related to the employee's job; and

(d) The employee does not perform any productive work during such attendance.

If a non-exempt employee fails to meet any of the criteria above then the employee must be compensated for these hours. Of course, the employer does not have to provide additional compensation to exempt employees for any time spent attending such training meetings.

Outside the employee's regular working hours - The training meeting must be during hours or days that are not during the employee's regularly scheduled work hours. For example, consider an employee who is scheduled to work from 8 AM to 5 PM Monday through Friday. In order for the training not to be considered as work time it would either have to be on Saturday or Sunday or after 5 PM and before 8 AM Monday through Friday.

Attendance must be voluntary – Where the employer (or someone acting on his behalf) either directly or indirectly indicates that the employee should attend the training, the attendance is not considered voluntary. For example, a vendor tells the employer that he will provide a dinner for the employees at which they will discuss a new product or a proposed marketing method and the employees are encouraged to attend. Thus, the time spent at the dinner would be considered as work time.

However, where a State statute requires individuals to take training as a condition of employment attendance would be considered as voluntary. An example would be the childcare worker who must complete a 40 hour class before than can work in the child care industry. Conversely, if a State requires the employer to provide

training as a condition of the employer's license then attendance at the training would not be considered as voluntary. Therefore, this criterion would not be met and employer would have to consider the training as work time.

Training must not be directly related to the employee's job – Training that is designed to make the employee more efficient at his job would be considered as work time while training for another job or a new or additional skill would not. Training, even if job related, that is secured at an independent educational institution (i.e. – trade school, college & etc.) that is obtained by the student on his own initiative would not be considered as work time. Also, training that is established by the employer for the benefit of employees and corresponds to courses that are offered by independent educational institutions need not be counted as work time. An example would be a course in conversational English that an employer makes available to his employees at his facility.

The employee performs no productive work during the training course – Training that is conducted away from the employers facility usually does not pose a problem but that conducted at the employer's business can potentially cause a problem. Many times the employee receives the training using the employer's equipment, which could have some benefit to the employer and thereby make the time compensable.

Prior to a nonexempt employee attending a training course the employer should make sure that attendance meets each of the four criteria listed above, otherwise he must be prepared to compensate the employee for the time spent attending the training. Employers should also remember that when the training hours are determined to be work time then this time must be added to the employee's regular work time for overtime purposes.

New Employee Orientation & Completion of Employment Related Documents

In today's world of electronic records many employers are now having their new employees complete the employment related documents on-line prior to actually physically reporting to work. Also some employers are having the new employees view on-line videos as a part of their orientation to the firm. Once the employee is hired any time spent in these activities is considered as work time and must be paid for at a rate not less than the current minimum wage of $7.25 per hour. You should track this time and record it in the payroll records. If the time spent in these activities when added to the employee's hours in their initial workweek causes the employee to work more than 40 hours then you should pay them time and one-half for all hours over 40.

Increases in the Minimum Wage

While there has not been an increase in the FLSA minimum wage for many years there continues to be activities aimed at increasing the wage. Some organizations are advocating a $15.00 minimum wage. While that is unlikely to happen you should be aware that some 29 states have established a minimum wage higher than $7.25 with a couple of states being at $11.00 per hour. Most states in the Southeast do not have a higher minimum wage but Florida's rate is $8.10 per hour. If you operate in states other than Alabama I suggest that you check to make sure that you are not required to pay a higher minimum wage. A list containing the minimum wage for each state can be found on the Wage Hour web site under "State Laws." If you have employees for whom you taking a tip credit toward the minimum wage you should also check the Wage Hour web site as several states either do not allow an employer to take a tip credit or only allow a smaller amount of tip credit.

Anticipated Effect of the Change in Administration

With the election of a new president I feel sure you have some questions regarding how Wage Hour will operate. As has been announced the CEO of a nationwide fast food chain has been nominated to be Secretary of Labor. According to information I have read his Congressional hearing has been postponed until February. In addition, I have seen at least one article stating the he is considering withdrawing his name.

While it is not widely known, the Wage and Hour division of the Department of Labor is directed by a Wage and Hour Administrator who must be nominated by the President and approved by the Senate. As of this time no

one has been nominated for the position. Normal time frame for Senate approval is usually several months after a name is submitted by the President. Thus I expect that Wage and Hour will continue as it is currently operating for some time. The present Administrator will be gone and the agency will most likely be run by career Wage and Hour employees that are generally reluctant to make wholesale changes in operational procedures. Therefore, I expect Wage and Hour to still pursue not only back wages but also liquidated damages and assessing large civil money penalties for repeat and/or willful violations.

If you have additional questions or would like to discuss the matter further do not hesitate to give me a call.

Did You Know . . . ?

. . . that overall union membership fell to 10.7 percent in 2016? In 2015, overall (public and private) union membership was 11.1 percent. Union membership declined in almost every demographic for which statistics were provided. For instance, in 2016, men aged 55 to 64 had a relatively high rate of union membership at 13.8%. But that demographic was also the age/sex cohort with the largest percentage reduction in union membership, losing a full percentage point from the 14.8% representation rate in 2015. This age/sex cohort experienced this loss of union representation even while adding 250,000 jobs overall. In 2016, black men had the highest rate of union membership by race and sex at 14.1%, which was still a decline from 14.5% in 2015. Public sector workers have a much higher rate of union representation (34.4%) than do private sector workers (6.4%). As in the demographic groups above, both of these representation percentages declined since 2015 when the rates were 35.2% in the public sector and 6.7% in the private sector. These numbers are from the Current Population Survey, a monthly survey by the Bureau of Labor Statistics.

. . . that OSHA inspections during 2016 were the lowest in 20 years? OSHA conducted 31,948 inspections during Fiscal Year ("FY") 2016, a decline of 11% from the previous year. Part of the reason has been the continuing decline in funding for OSHA, resulting in a reduction in staff members. However, OSHA has increased the frequency of finding violations. During FY 2016, 74% of inspections resulted in violations compared to 69% for FY 2015. OSHA issued citations during FY 2016 for 58,549 violations, a high number but the lowest since 1996, when OSHA issued citations for 55,093 violations.

. . . that Uber drivers may be owed for "waiting time"? *Razak v. Uber Techs., Inc.* (E.D. Penn. Dec. 14, 2016). A Wage and Hour issue arises when an employee has to wait at the employer's request for a job assignment. Typically, "waiting time" is considered compensable time. There are issues pending throughout the country regarding whether Uber drivers are employees or independent contractors. In the *Razak* case, the allegation is that the Uber drivers are employees and their waiting time is for **U**ber's benefit and thus counts as hours worked for Wage and Hour purposes. The plaintiffs argue that in order to meet Uber's expectation of prompt service, Uber drivers remain in areas of anticipated passenger volume. Plaintiffs allege that such waiting time is for Uber's benefit and thus should be compensable.

. . . that Kentucky became the country's 27th Right to Work state? On January 7, 2017, Kentucky's Governor approved Right to Work legislation passed by the Kentucky house and senate. In a Right to Work state, it is illegal for an employer and union to agree that employees must join the union or pay union dues or fees or else be terminated. According to Kentucky's Governor, becoming a Right to Work state "will mean incredible new opportunities for the Commonwealth of Kentucky. This will mean incredible opportunity for the attraction of economic development and business."

. . . that a new I-9 Form requirement became effective January 22, 2017? The United States Citizens and Immigration Service issued a revised Form I-9 in November 2016. The Form includes revised questions regarding employee names in Section 1, special prompts to avoid mistakes and an area on the Form for providing additional information. The Form also has been developed to complete online. Although the Form's effective date is January 22, the Form lists its revision date as November 14, 2016 with an expiration date of August 31, 2019. It is unnecessary to request that current employees complete this Form. It only applies to new hires. You may access this form by following this link:

https://www.uscis.gov/i-9 which is the I-9, Employment Eligibility Verification page on the Official Website of the Department of Homeland Security.

. . . that an employee claiming a Wage and Hour violation may sue for emotional distress? *Pineda v. JTCH Apartments, LLC* (5th Cir. Dec. 19, 2016). The emotional distress charges are permitted in claims of retaliation, ruled the Fifth Circuit Court of Appeals. Five other Circuit Courts of Appeals have taken the same position. The Court's reasoning to permit emotional distress claims for retaliation is connected to the 1977 FLSA amendment permitting employees to sue for retaliation. The *Pineda* Court stated that the language of that 1977 amendment "should be read to include the compensation for emotional distress" which frequently is available to employees who claim retaliation under other statutes. Note that although nationally overall employment litigation has declined during the past several years, Wage and Hour litigation has increased; in fact, it has doubled during the past six years alone.

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