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EEOC Pursues Obama Administration Agenda

Assumptions that the EEOC under a Republican administration will be more favorable to business than under a Democratic administration are not necessarily correct. For example, during President George W. Bush's two terms, the EEOC filed an average of 400 lawsuits a year with only two years of filing fewer than that number. During President Obama's administration, only twice did the EEOC file more than 200 lawsuits in a year and during Fiscal Year 2016, it filed only 114, the lowest during the past 30 years. Furthermore, the rate of "cause" determinations also fell to a record low during the Obama administration.

With that preface, let's review the actions of the EEOC thus far during President Trump's administration. Commissioner Victoria Lipnic (Republican) was appointed Acting Chair of the Commission. She was the only commissioner who voted against the EEOC's revised EEO-1 reporting requirement, which included the onerous pay band reporting. Yet, she has suggested that although she favors "tweaking" that requirement, she does not envision the Commission revoking it. One of President Trump's objectives is to reduce the burden of federal regulation on business, with an outcome to enhance job creation. The EEOC estimated that it would take an employer 31 hours to comply with the new EEO-1 requirements, which was consistent with an SHRM survey that found it would take 30 hours. That is not the kind of regulation that is considered a burden to job creation.

As Acting Chair, Lipnic has outlined an aggressive agenda for the EEOC, which it is pursuing today. For example, this year marks the 50th anniversary of the Age Discrimination in Employment Act. The EEOC is focusing on age discrimination in hiring, as evidenced by the lawsuit it filed on May 17 against Ruby Tuesday, Inc., in the Southern District of Florida. In that case, the EEOC alleges that the employer discriminated against a 59-year-old candidate for a managerial position, because it wanted to "maximize longevity and minimize premature resignations." In a similar matter, in March the Commission and Texas Roadhouse, Inc., agreed to $12 million in settlement of a lawsuit based upon age discrimination against a class of over 40-year-olds who applied for server and host positions.

An issue pending in federal courts is whether the ADEA permits rejected job applicants to use a discriminatory impact theory. In a discriminatory impact claim, the essence of the allegation is that an employer's apparently neutral business practice has a disproportionate effect on one protected group compared to others. In the case of *Rabin v. PricewaterhouseCoopers*, the claim is that the company's reliance on on-campus recruiting at colleges had a discriminatory impact based upon age, as those in the age-protected group are generally long past their college years. In its recent U.S. Corporate Responsibility Summary Report, PWC stated that the average age of its workforce is 27 and 75% of its employees said their job with PWC was their first job out of college.

In addition to focusing on age discrimination, the Trump administration EEOC will aggressively pursue pay equity claims. Pay equity based on gender has been the primary focus nationally, but the EEOC will also pursue pay equity based on race and ethnicity. Furthermore, high on the Commission's agenda under the Trump administration will be discrimination based on pregnancy, such as denial of leave or termination of individuals who are pregnant.

Employers are well experienced with the concept of "managing expectations." This is particularly important as we move forward with the Trump administration EEOC. We do not foresee the President engaging in any policy action that will divert the EEOC from its strategic enforcement direction.

Struggling and Successful Unions

Unions recently filed their financial and membership disclosure reports with the DOL, known as LM-2s. These are available to the public without charge. They list all of the unions' employees, their compensation, total membership numbers, and union receipts and disbursements.

During 2016, the Steelworkers lost 20,000 members, the United Food and Commercial Workers lost 14,000 members, and the Teamsters and Machinists each lost approximately 5,500. The Steelworkers reported 591,318 members in 2015, but for 2016, only 571,179 members. The Teamsters reported 1,279,064 members in 2015, and 1,273,695 members in 2016. In the same period, the IAM membership declined from 568,814 to 563,314 and the United Food and Commercial Workers membership declined from 1,271,150 to 1,256,449.

The UAW and SEIU, by contrast, reported membership gains. The UAW went from 408,639 members to 415,963 members, and SEIU membership increased from 1,887,941 to 1,901,106 members. The UAW membership has increased modestly each year for the past seven years, though this is largely through increased employment with existing union workforces rather than by organizing new shops. According to UAW President Dennis Williams, "Investments are still heavy into the auto industry in the U.S., and so far so good". In other words, the UAW is growing its membership based upon those auto industry employers with whom it has contracts adding to their total workforce.

Unions make a big deal about executive compensation in the business world, but their own leaders are generously paid. For example, Teamsters President James P. Hoffa was paid $386,344 last year; the UFCW president reaped $354,568 from the Union; and the IAM president took home $342,377. The six major unions discussed in this article alone spent a total of $104.6 million on political activities during 2016!

The NLRB April 2015 "ambush" election rule changes have not had their intended effect to increase the number of union elections. Although union win rates under the "ambush" election rules have increased modestly (about 2-3%), the overall number of elections for Fiscal Year 2016 declined by approximately 200 from the prior year. Even with President Obama's support from his first day through his last day in office, Labor continues to struggle overall and we do not see any initiatives from the Labor movement to change that.

Was Pregnancy the Reason for Termination?

The case of *LaPoint v. Family Orthodontics, P.A.* (Minn, April 5, 2017) involved an issue employers all too frequently encounter. That is, after an individual is hired, he or she then discloses a medical condition that will result in a significant absence. Does the employer terminate? If so, why and what are the risks?

LaPoint was hired as an orthodontics assistant. During the selection process, she was not asked about any reason why she could not work as scheduled for the foreseeable future. Two days after she accepted the offer, she told the employer that she was pregnant and anticipated taking10-12 weeks off for the birth of her child. The employer withdrew the offer, and said to LaPoint that it was surprised that she did not disclose the pregnancy during the interview. The employer then explained that due to the small size of the medical practice, the employer could not accommodate such a lengthy leave of absence. The employer had historically offered six weeks of absence for maternity leave.

The Court found that under Minnesota law, if the employer had been motivated by the anticipated disruption of twelve weeks of leave that that would not constitute unlawful pregnancy discrimination. That is the key point for employers to consider: if, after an offer is made, the employer becomes aware that the employee will need an extended absence, the only absolute federal protection is if the absence relates to military duty.

We defended a major airline where an employee was terminated shortly after she was hired, because her anticipated due date and need for leave of absence was the one time each year when the airline conducted comprehensive training for those in the employee's job classification. The court granted summary judgment for the airline, concluding that the reason for termination was not because of the employee's pregnancy, but because of her anticipated unavailability to receive training. However, as explained below, decisions to terminate or not hire pregnant employees or applicants for reasons relating to their pregnancy involve significant risk and should be reviewed with counsel.

With the EEOC spotlight on pregnancy and the ambiguous standard for pregnancy accommodation set by the Supreme Court in the *Young v. UPS* case (discussed in the March 2015 ELB), terminating an individual in LaPoint's situation will receive great scrutiny. The employer should consider the anticipated length of absence, the nature of the job, and whether the absence can be accommodated for any period of time. The employer needs to seek this information from the employee herself, rather than presuming that the employee will seek a certain period of leave or will be disabled from performing the job at any point prior to having the baby. If possible, the best scenario is for the employee to bring this information to the employer herself. If the employer considers the amount of leave the employee is seeking to be unreasonable, the employer should examine how it has treated employees with disabilities and even employees returning from workers' compensation injuries as possible comparators.

If the absence cannot be accommodated and the employee is terminated, invite the employee to reapply after the absence concludes. Another approach is to tell the employee that the company will need to fill the position and there will be no assurance of reemployment when the leave of absence ends.

Finally, don't forget that while FMLA didn't apply in LaPoint's case, it does cover eligible employees for a block of 12 weeks of leave for bonding time with a baby. Also, some state laws mandate pregnancy-related or family leave on a broader scale than that required by the FMLA.

Round and Round and Round We Go, Where the Health Care Bill Will End Up… Nobody Seems to Know!

On May 4, 2017, the U.S. House of Representatives finally voted on and passed the much debated American Health Care Act, H.R. 1628 ("AHCA"). The next step, of course, is for the Senate to consider the bill, but one thing appears to be certain – vast changes to the current bill are expected. However, recent news reports indicate that the House may

actually need to vote on the bill again, before it can officially be sent to the Senate. Speaker of the House, Paul Ryan, has not even sent the bill to the Senate yet, as House leaders want to make sure that the bill conforms with the Senate's rules for reconciliation, which would allow the bill to be passed by a simple majority. The delay is in part due to the need for an estimate from the Congressional Budget Office on the possible effects of the bill. If the CBO's "score" establishes that the bill does not meet the reconciliation test, the House will have to vote on the bill again, but only after changes are made to satisfy the budget assumptions. This means more negotiations, which we all recall were hotly debated in the last few months. So for now, we do not know what the ultimate outcome of the AHCA will be, but we do know that the Affordable Care Act (ACA) currently remains the law.

One aspect of the ACA which may see changes soon is the much debated and litigated "contraceptive mandate." President Trump issued an executive order on May 4, 2017, taking steps toward rolling back regulations that interfere with religious liberty. Health and Human Services Secretary Tom Price has said that the HHS will take prompt action to follow this Order's intent "to safeguard the deeply held religious beliefs of Americans who provide health insurance to their employees." It is anticipated that HHS may fully exempt religious organizations, such as the Little Sisters of the Poor, from the contraceptive mandate.

Other regulatory "fixes" addressing the ACA are also contemplated, such as removing the "SHOP" (Small Business Health Options Program) enrollment portal from HealthCare.gov. If this proposal passes, the change would take effect in 2018. SHOP has largely been unused (only 0.1 percent of small businesses participate), and the idea is for small employers to have access to SHOP plans through agents, brokers, or their insurer, rather than through the HealthCare.gov site. The federal Centers for Medicare and Medicaid Services (CMS) says that its goal is to make it simpler for small business to purchase coverage for their employees.

Since the ACA is still the law of the land, employers should take note of the 2018 cost-of-living adjusted limits for health savings accounts (HSAs) and high-deductible health plans (HDHPs) issued recently by the IRS. They are as follows:

- HSA Contribution Limits. The 2018 annual HSA contribution limit for individuals with self-only HDHP coverage will be $3,450 (a $50 increase from 2017), and the 2018 limit for individuals with family HDHP coverage will be $6,900 (a $150 increase from 2017).

- HDHP Minimum Deductibles. The 2018 minimum annual deductible for self-only HDHP coverage will be $1,350 (a $50 increase from 2017), and the 2018 minimum annual deductible for family HDHP coverage will be $2,700 (a $100 increase from 2017).

- HDHP Out-of-Pocket Maximums. The 2018 limit on out-of-pocket expenses (including items such as deductibles, copayments, and coinsurance, but not premiums) for self-only HDHP coverage will be $6,650 (a $100 increase from 2017), and the 2018 out-of-pocket limit for family HDHP coverage will be $13,300 (a $200 increase from 2017).

News and Tidbits from the NLRB

As noted in previous ELBs, it is important for the Trump administration to fill the empty seats to restore the Board to its full, five-member capacity as soon as possible to have a meaningful impact upon the NLRB decisions and priorities. Examples below show both an Agency bent on pursuing its pro-union agenda as long as it can while Chairman Miscimarra makes some inroads into the Obama administration's perceived pro-union bias. Thus, as the below discussions demonstrate, it is getting harder to predict how any particular issue might be decided by the NLRB as long as Republicans do not hold a majority on the Board or the specific panel considering the case.

<u>Labor Organizations Still Entitled to Employees' Phone Numbers and Home Addresses</u>

An Administrative Law Judge (ALJ) has ruled that an employer violated the NLRA by withholding employee information from the union seeking to represent its employees.

The IBEW had asked the employer, an electric co-op, for the names, addresses, and telephone numbers of all employees, even the non-dues paying members. The

electric co-op refused, citing both privacy concerns and the contract. In finding a violation of the Act, the ALJ found that:

> [The co-op] never offered to provide the requested information to the union subject to a protective agreement for limited access or viewing or any other manner that would accommodate its concerns as required under the [NLRA]. Rather than providing any assistance [the co-op] merely asked the union to take its own steps to try and obtain the same information. . . . This was insufficient.

The ALJ went on to state that:

> The requested information here is presumptively relevant and is not confidential or private.

Poudre Valley Rural Electric Association Inc. v. IBEW Local 111 (Feb. 27, 2017). Exceptions to the ALJ decision are pending before the Board.

Threat to File Unfair Labor Practice Charge Over Change Is Not the Same as Demand for Bargaining

At bargaining, a union complained about a change to an awards program, a mandatory subject of bargaining. When the employer called the union to inform it that it was going to give awards only once every ten years instead of five, the union representative stated, "Oh no you don't . . . Now you know I have to file a board charge."

A divided NLRB found a violation. In a 2-1 vote, the Democratic majority found that the Union's statement constituted a demand as the remark was "sufficiently" clear as to what the union wanted (i.e. to bargain) and that the employer violated its duty to bargain to impasse with the union by unilaterally changing the awards program.

Chairman Miscimarra dissented and said that the union's statement was not enough to constitute a demand for bargaining.

The Employer appealed and the case ended up in the Sixth Circuit Court of Appeals. The Sixth Circuit refused to enforce the Board Order and instead adopted now-Chairman Miscimara's dissent. The Circuit Court stated that "[the union representative] comments were cryptic rather than clear," and thus refused to enforce the Board Order. *Ohio Edison Co. v. NLRB* (6th Cir. Feb. 10, 2017).

Employer's Non-Union Hiring Preference Not a Violation

A hospital system did not violate the NLRA when it gave non-union current employees preferential treatment as "internal applicants" when they applied for non-union positions, while current union members in union jobs were treated as "External Applicants." The policy mirrored the treatment of employees in non-union positions applying for union positions.

Overturning the Board's order to the contrary, the First Circuit said that the Board "lacked substantial evidence" for its ruling. The Court went on to state that the hospital had a "legitimate interest" in giving non-union workers preferential treatment to offset the disadvantage they faced in competing against employees represented by a labor union for the union positions. *Southcoast Hosps. Grp., Inc. v. NLRB* (1st Cir. Jan. 20, 2017).

Macy's Seeks U.S. Supreme Court Review of Micro-Unit

Seeking review from the Fifth Circuit Court's adverse decision, Macy's asked the U.S. Supreme Court to reverse the appeals court, claiming the Court failed to state any "limiting principle" and thus creates the possibility that retailers will have to negotiate with mini-bargaining units in each department, resulting in continuous labor strife throughout the year.

In its petition to the U.S. Supreme Court, Macy's argued that:

> The notion that a single department of a single store constitutes an appropriate bargaining unit is wrong as a matter of law and common sense. A test that allows the [B]oard to approve bargaining units without explaining why the interests of included and excluded employees are distinct – and why those distinctions are significant in the context of collective bargaining – leaves courts with no way to assess whether the NLRB's action was arbitrary and capricious,

> or whether the board fulfilled its obligation to exercise independent judgment in recognizing the appropriate bargaining unit.

Finally, Macy's noted that even though many Circuit Courts have approved the *Specialty Healthcare* two prong tests, the Second Circuit called for a robust weighing of the community of interest factors present in the first prong of the Specialty test.

Miscimarra's Dissents on Employer Requests for Review of Micro-Units and Quickie Elections May Become Future NLRB Policy

Signaling how the Board will likely rule on the micro-unit issue under the Trump administration, now-Chairman Miscimarra wrote a dissent in a case that the Democrats appointed under Obama administration refused to re-visit. Miscimarra, in dissent, stated that the Board was wrong not to find fault with an October 2016 decision and direction of election approving a unit of 28 warehouse workers at one of two linked plants. *Cristal USA, Inc.* (NLRB May 10, 2017).

Additionally, Chairman Miscimarra laid the groundwork to overturn the "ambush" election rules by recently issuing a dissent voicing concerns over the Obama Board's penchant for "quickie" elections. In my opinion, this is one area will be re-visited once the Board is under the control of the Republicans.

In a long dissent, Miscimarra severely criticized that the new election rules favored speed at the expense of all other considerations. The dissent was written in response to the Board's refusal to delay an election at a food importer's facility. Miscimarra stated in his dissent that:

> . . . this case demonstrates the downside associated with the [quickie election] rule's preoccupation with speed between petition-filing and the election. Here, the election date set by the regional director – pursuant to election rule's mandate – only gave three days' notice to a substantial number of employees that they would be voting in a union-representation election.

Miscimarra went on to state numerous objections to the so called "quickie" election rules. *European Imports, Inc*. (NLRB Feb. 23, 2017). Look for these rules, even though approved in various Circuit Courts, to come under scrutiny by the Trump NLRB.

In the News:

In old news, the U.S. Supreme Court has found that Acting General Counsel Lafe Solomon served illegally in violation of the Federal Vacancies Reform Act (FVRA), when he continued to serve as General Counsel (GC) after then-President Obama nominated him to serve a full term as permanent GC.

In late March 2017, the Supreme Court affirmed the D.C. Circuit Court of Appeals decision that Solomon had improperly served as GC for almost three years from January 2011 until late 2013. *NLRB v. SW Gen., Inc.* (March 21, 2017). Solomon's permanent appointment, at the time, was held up in the Republican-controlled Senate.

Region 10 of the NLRB (which covers Georgia, South Carolina, North Carolina, and portions of Alabama, Tennessee, Kentucky, Virginia, and West Virginia) claims to have received virtually no guidance on how to handle this potentially sticky wicket for the Agency. Outgoing Regional Director Chip Harrell stated that the Regions nationwide merely read the Supreme Court decision and were told to contact the Division of Operations should a party raise an issue as a result of the decision. Harrell went on to state that neither employers or unions wished to re-open cases that had either been settled or adjudicated in the past, regardless of Solomon's lack of authority to serve in his capacity as the GC. To date, Region 10 has had no issues raised as a result of the Supreme Court decision.

The real impact of the decision rests in the Supreme Court's limiting power of the executive branch (i. e. Presidential Powers) to appoint senior level positions within the federal government. The FVRA, enacted in 1998, gives the President the power to appoint acting officers to serve in these executive positions while the nominee completes the lengthy confirmation process.

The ruling certainly has the potential to impact the Trump administration's, and future President's, ability to quickly fill executive positions with their preferred candidate – because their top pick cannot serve in that position as an acting officer, thus requiring the nominee to be confirmed before working in the designated capacity. The real impact of the decision may be felt by all parties – management and union alike – when the current GC's term expires in November of 2017.

Speaking of Which – Will NLRB Appointments Come Soon?

The Trump administration has narrowed the choices for filling the NLRB vacancies to two choices: Marvin Kaplan and William Emanuel. Kaplan currently works as an attorney for OSHA, with a background as a management attorney. Emanuel is a management-side attorney in private practice in Los Angeles. Both are Republicans and their confirmation by the Senate would finally swing the Board majority back to the Republican Party.

EEO Tips: EEOC Predetermination Letters

This article was prepared by JW Furman, EEO Consultant Investigator, Mediator and Arbitrator for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Ms. Furman was a Mediator and Investigator for 17 years with the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). Ms. Furman has also served as an Arbitrator and Hearing Officer in labor and employment matters. Ms. Furman can be reached at 205.323.9275.

After weeks, or sometimes months, of silence from the EEOC regarding a discrimination charge that was filed against your company or client, you may receive a letter stating that the Commission will likely determine that the law was violated. It will sometimes summarize the evidence that supports the allegations in the charge. Sometimes it simply says that evidence supports those allegations or does not support your stated defense. The letter usually gives you around ten days to respond or provide further information to be considered.

Should you bother responding when it sounds like the investigator's mind is made up? Absolutely! By the time this predetermination letter is issued, the investigator has heard a lot more from the charging party than from the employer. This is your opportunity to be heard. Even if the investigator cannot be swayed at this point, someone with higher authority (from the Enforcement Supervisor to the District Director) will review that file before the final determination is issued. If the EEOC is considering using this charge as a basis for litigation, it will also be reviewed by agency attorneys.

Some investigators communicate well with both parties during the investigation so neither is surprised or confused by the predetermination letter. Some operate under a different philosophy. The predetermination letter may tell you enough that you realize you do have some relevant information or documentation that did not seem important based solely upon the charge allegations. Even if you have no further evidence to submit, you may want to rewrite your position statement (response to the charge) when it becomes apparent that you and the investigator approached the issues from completely different perspectives.

A predetermination letter can also surprise you with information that the investigation revealed evidence of violations that were not alleged in the charge. You may learn that an individual charge turned into a class investigation. Since these new issues could not have been addressed in your original position statement, now is the time to do it. And, even if you are just asking for more time to investigate issues you were not aware of, explain your position in writing within the given time frame. Remember, the final decision maker is not the investigator and your written response in the file is your only means of communication with that person.

We all know that a charging party can pursue a claim in federal court whether or not the EEOC finds cause to believe a violation occurred. So, why should you care how an investigation turns out? It stands to reason that the more cause findings an employer gets, the more scrutiny it will get. Once a company is targeted by EEOC, all charges filed against it receive more attention individually and collectively, and sometimes Commissioner charges are filed. Also, I have seen many cases where charging parties had lost interest in their charges until cause determinations were issued. With newfound support for their forgotten claims, litigation ensued. Alternatively,

many who were adamant about their charges and very active during the investigations immediately forgot about them when violations were not found.

Writing one more letter or making one more submission can, and sometimes does, make all the difference in EEOC's findings. Those findings can make the difference in whether a lawsuit is filed or by whom. In my experience, it is time well spent.

OSHA Tips: OSHA and Workplace Violence

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.

OSHA has defined workplace violence as "any act or threat of physical violence, harassment, intimidation or other threatening disruptive behavior that occurs at the worksite." It ranges from threats and verbal abuse to physical assault and even homicide.

While there are no specific standards for workplace violence, OSHA's general duty clause, section 5(a)(1) of OSHA, requires employers to provide their employees with a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm. An employer who has experienced acts of workplace violence or becomes aware of threats or intimidation or the like should be on notice of workplace violence threats.

OSHA states that nearly 2 million workers report having been victims of workplace violence each year. It is suggested that many more go unreported. These can involve employees, clients, customers, or visitors. Homicides rank high on the list of fatal occupational injuries.

Research has identified factors that increase the risk of violence to some workers at certain worksites. These factors include exchanging money with the public; working with volatile, unstable people; working alone in isolated areas; providing services such as healthcare; working late at night or in areas with high crime rates; working where alcohol is served; working alone or in small groups; delivery drivers; public service workers, customer service agents; and law enforcement personnel.

How can workplace violence be reduced? OSHA offers the following suggestions. Where there is a risk of assault or other potential factors, exposures may be minimized or controlled if the employer takes appropriate precautions. One of the best protections that an employer can offer their workers is to establish a zero-tolerance policy toward workplace violence. The policy should cover all workers, patients, clients, visitors, contractors, and anyone else who may come in contact with company personnel. Employers should assess their worksites and identify methods of reducing the likelihood of incidents occurring.

OSHA believes that a well-written and implemented workplace violence prevention policy combined with engineering controls, administrative controls, and training can reduce the incidence of workplace violence.

Wage and Hour Tips: Current Wage Hour Issues

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.

The President's nomination for the position of Secretary of Labor has been approved by the Senate. He is Alexander Acosta and is now serving in the position. Secretary Acosta is a Florida native and son of Cuban immigrants. After graduating from Harvard Law School in 1994, he clerked for now-Justice Samuel Alito, then a federal appellate judge for the Third Circuit. After spending several years in private practice, he turned to public service, first as a member of the NLRB, next as the civil rights chief at the Department of Justice, and then as the U.S. Attorney for the Southern District of Florida. Since 2009, he has

served as Dean of the Florida International University College of Law.

At the end of 2016, DOL published some statistics regarding their enforcement activities during FY 2016 which ended on September 30, 2016. The report states that Wage Hour collected almost $266 million in back wages an increase of $19 million over the previous year. These wages were paid to 283,000 employees with the average employee receiving slightly than $1,000.

As in recent years they have concentrated their efforts on "low wage" industries. Those industries include agriculture, day care, restaurants, garment manufacturing, guard services, health care, hotels and motels, janitorial and temporary help. This resulted in over 100,000 employees receiving almost $70 million in back wages. Among this group were 4,800 investigations of restaurants that resulted in back wage collections of almost $40 million.

Another industry where they spent a large amount of time was the construction industry. These investigations resulted in 27,000 construction workers receiving almost $42 million in back wages. The report also indicates that 17,000 health care workers received over $14 million in back wages.

Following their recent policy the Wage Hour Division has continued their targeted approach with more than 45% of their investigations last year being in these industries. One reason they are able to spend this much time in the targeted industries is the fact that they received only 20,500 complaints, a number that has continued to drop in recent years. During FY 2016 they completed only 28,000 investigations which continued at the level from the previous year. This is only about one-half the number they completed in 1998 when they had substantially less staff than they currently have. The report also points out that approximately 20% (both directed and complaint) of the investigations found the employer to have paid his employees properly under the FLSA.

In addition to the Wage Hour enforcement activities, private litigation continues to rise each year. During the year there were approximately 9,000 FLSA cases filed in federal court with the largest number of cases being filed in Florida, New York, and California. There were almost 100 cases filed in Alabama

According to a GAO report, 97% of FLSA cases are filed against private employers with 95% alleging nonpayment of overtime. In addition to those filed in federal court there were a substantial number of cases filed in state and local courts. Thus employers need to take every precaution they can to ensure they are doing their upmost to comply with the FLSA. As you are aware, the employer can be liable for back wages for a two or three year period. Additionally, there is the potential for liquidated damages (an amount equal to the back wages) plus attorney fees.

Further a couple of years ago, Wage Hour began assessing Civil Monetary Penalties for repeat and/or willful violations of the Act. In 2015 Congress passed the Federal Civil Penalties Inflation Adjustment Act which increased the amount of the maximum penalty. Effective January 13, 2017, the maximum penalty for minimum wage or overtime violations is increased to $1,925 per employee that is found to be improperly paid.

The status of the revised salary requirements for an employee to qualify for the "white collar" exemptions continues to be in limbo. At the request of the Department of Labor, the Fifth Circuit Court of Appeals has agreed to delay further action to give the new appointees time to determine how they wish to proceed. At this time it is not known when the Court may proceed in the matter. Stay tuned as I expect there will be significant Wage Hour issues raised in the next few months. In the meantime if I can be of assistance please give me a call.

2017 Upcoming Events

EFFECTIVE SUPERVISOR®

Huntsville – October 17, 2017
Redstone Federal Credit Union
220 Wynn Drive
Huntsville, AL 35893
(256) 837-6110
www.redfcu.org

Birmingham – October 19, 2017
Vulcan Park & Museum
1701 Valley View Drive, Electra Room
Birmingham, AL 35209
(205) 933-1409
www.visitvulcan.com

Click here for brochure or to register.

This activity has been approved for 6.0 hours of (General) recertification credit toward GPPHR, HRBP, HRMP, PHR, and SPHR recertification through the HR Certification Institute (HRCI). This activity is also valid for six (6) PDCs for the SHRM-CP or SHRM-SCP.

"The use of the HRCI seal is not an endorsement by the HR Certification Institute of the quality of the activity. It means that this activity has met the HR Certification Institute's criteria to be pre-approved for recertification credit."

Lehr Middlebrooks Vreeland & Thompson, P.C. is recognized by SHRM to offer Professional Development Credits (PDCs) for SHRM-CP® or SHRM-SCP®.

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Jennifer Hix at 205.323.9270 or jhix@lehrmiddlebrooks.com.

Verdict for the Defense

Congratulations to our colleagues Mike Thompson and Al Vreeland, who won a jury verdict for the employer on all claims. The case involved five employees who claimed age discrimination related to their terminations. Mike and Al were brought in late in the case to take over the defense form another law firm. Although the trial lasted a week, the jury only had to deliberate an hour and a half to reach a defense verdict on all claims. It's no secret what makes an employer successful in avoiding or defending such claims: consistent application of policy, accurate record keeping, and clear communications to the affected employees.

Did You Know…

. . . that employee political activities may be protected under various statutes? Multiple "days of action" protests raise the question about whether employees are protected when missing work for political activities. Where the employee's protest may involve employer terms and conditions of employment, such activity is likely protected. Where the protest does not involve collective activity, or a connection between the activity and workplace concerns, then it would be unprotected. In that situation, the employer should follow its general approach regarding workplace absences. If there is advance notice of the absence, typically that is treated differently from an employee calling in, or a "no call no show" on the day of the protest.

. . . that the NLRB on May 3, 2017 declined to extend *Weingarten* rights to non-union employees? In a unionized setting, an employee has the right to request the presence of the union steward if the employer conducts an investigatory interview which may result in discipline of the employee who is interviewed. This is known as an employee's *Weingarten* rights, based on the Supreme Court decision *NLRB v. J. Weingarten, Inc.* (1975). If the purpose of the meeting with the employee is to issue discipline and not to investigate, then unless provided otherwise under the labor agreement, the employee is not entitled to union representation during that meeting. The NLRB had considered expanding the *Weingarten* rights to the non-union work setting. That is, if a non-union employer interviewed an employee with the intent that the information gained may result in discipline of that employee, the employee would have the right to request the presence of another employee. The NLRB declined to change the law, even though at this time the NLRB is comprised of two Democrats and one Republican appointed by President Obama.

. . . that the "clock starts ticking" for a FMLA retaliation claim when the leave concludes, not when it beings? *Jones v. Gulf Coast Healthcare of Delaware, LLC* (11th Cir. April 19, 2017). When an individual files a FMLA claim,

the individual normally must show that the adverse action he complains of occurred close to the time when the individual used FMLA. There is a conflict among the courts whether the time for retaliation is measured from the beginning of the leave or the end of leave. In this case, the decision was that it is measured from the end of the leave, which results in additional protection for employees. For example, assume an employee is terminated three months after the conclusion of FMLA. If the timing was measured from beginning of leave, that could be as long as six months, which courts may consider to be too remote to be retaliatory in the absence of other evidence. With its decision that retaliation is measured from the end of the leave, a three month period is likely viewed as close enough to be potentially retaliatory.

. . . that the House passed the Working Family's Flexibility Act to extend comp time to private sector employees? The bill passed May 2, 2017 by a vote of 229-197. The bill would permit employees to agree to receive up to one and a half hours of compensatory time for overtime, up to a cumulative total of 160 hours of leave per year. The use of the leave would have to be approved by the employer. The Senate version of the bill is pending. Republican supporters in the Senate will need votes from Democrats to avoid a filibuster. As employers well know, often employees welcome the opportunity to have additional time off, rather than receive overtime pay. Comp time is currently permitted for public sector employees, but efforts to extend it to private sector employees have failed for years.

. . . that Michigan's right to work law permits teachers to resign from a union at will? *Saginaw Education Association v. Eady-Miskiewicz* (Mich. Ct. App. May 2, 2017). Michigan became a right-to-work state in 2012. At the time the legislation was passed, the Michigan Education Association (a union) had 151,771 members. Four years later, that membership had dropped to 127,785 members. The union provides an annual "window" when members may drop out of the union. The unanimous court ruled that Michigan law permits members to resign at will. Right-to-work legislation has had a substantial impact on the decline of union membership. For example, in 2009, 15.1% of employees in Wisconsin belonged to unions. After becoming a right-to-work state in 2016, only 8.1% of Wisconsin employees were union members.

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