LEHR MIDDLEBROOKS VREELAND & THOMPSON, P.C.

Employment Law Bulletin

JUNE 2017
VOLUME 25, ISSUE 6

Your Workplace Is Our Work®

Inside this issue:

The Effective Supervisor®

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

Huntsville.....October 17, 2017
Birmingham .....October 19, 2017

Click here for brochure or to register.

LMVT Top Tier Recognition Continues

It is with great humility that we announce that our firm received the highest rating possible for the ninth consecutive year from the Chambers USA Guide to America's Leading Lawyers for Business. According to Chambers, LMVT has a "highly regarded labor and employment practice with particular strength with union matters, including union avoidance. Sources frequently note that 'the firm does an excellent job with employment litigation matters.'" Chambers added that "sources appreciate the strong working relationship the group fosters, emphasizing that 'our franchisees and partners truly love working with them.'" Competitors describe LMVT lawyers as "absolutely at the top of [their] game," zealous advocates, and "very practical and very smart." We greatly appreciate this recognition and, to those who know us well, we take nothing for granted. We know we are "terminable at will" by our relationship partners and will continue to strive to ensure that never occurs.

Trump Administration Initiatives with DOL, EEOC, and OFCCP

During the past few weeks, the Trump administration began addressing through budget and policy initiatives important changes regarding Wage and Hour, OFCCP and EEOC. The following is a summary of those initiatives as of this time:

United States Department of Labor

On June 7, the DOL stated that it was rolling back the Obama administration's policy regarding joint employer status. The Obama administration followed the NLRB decision in *Browning-Ferris*, where an employer that had indirect control was considered a joint employer, even if that control was never used. Under *Browning-Ferris*, a business could be found to be a joint employer in any instance where it had indirect or reserved—but unexercised—control over essential working terms and conditions. (See July 2016 ELB for an in-depth discussion). Secretary of Labor Alexander Acosta announced on June 7 that DOL would return to the "direct control" standard for determining joint employer status. The rescission of the "indirect control" standard reduces the risk that a franchisor or user of independent contractors will be found to be an employer over a franchisee's employees or independent contractors, respectively.

Secretary Acosta stated that the Obama administration overtime rule will be reviewed for possible revision. Public comment will occur shortly. Secretary Acosta stated that the Obama administration's initiative to virtually double the minimum salary for overtime exemptions "created a shock to the system." Secretary Acosta has also stated that the current salary threshold of $23,660 is simply not enough, as "life gets a lot more expensive." We expect the DOL to propose an increase to the salary level, but well below the scope of the regulations promulgated by the Obama administration.

Also on the DOL "punch list" is rescinding the 2016 "Persuader" rule. The implementation of the rule has been enjoined. Under the rule issue by the Obama administration, lawyers and consultants would be required to report actions and fees where advice had a "direct or indirect object to persuade employees to remain union free." This would even include handbooks. Secretary Acosta stated that the Obama administration rule would "make it harder for businesses to obtain legal advice." We expect this rule to be rescinded.

EEOC/OFCCP Merger

The President's proposed budget for Fiscal Year 2018 calls for the merger of these two agencies by the end of FY 2018 (September 30). OFCCP's current budget is $105 million and the EEOC's is $364 million. EEOC is responsible for issuing compliance guidance and investigating alleged violations of Title VII, the Age Discrimination in Employment Act, the ADA, and GINA. The OFCCP operates within the United States Department of Labor, and its initiatives focus on government contractors and their compliance with affirmative action requirements. OFCCP also enforces anti-discrimination provisions. Government contractors and sub-contractors with at least fifty employees are usually within the purview of OFCCP investigation and enforcement jurisdiction.

Several employee and employer advocacy groups have expressed opposition to the proposed merger, asserting that the agencies actually have different missions such that consolidating both within the EEOC jurisdiction would be a disservice to employers and employees. Furthermore, the EEOC has a backlog of over 70,000 charges. Thus, those opposed to the merger point out that a merger would add OFCCP requirements to an already overburdened, underfunded agency.

NLRB

The President's budget proposes to cut the National Labor Relations Board budget from $274 million to $258 million. This would be the lowest budget for the NLRB in nine years and would result in a reduction of staff from 1,596 to 1,320 employees. The budget also includes a provision that would prohibit the NLRB from adopting a process in which employees could vote remotely (electronically) in NLRB conducted elections.

If the NLRB budget is passed, the greatest impact on employers will be in the agency's prosecution of unfair labor practice changes. It would take longer for the agency to process cases and the NLRB would be less prepared for trials. Furthermore, the agency out of necessity would increase its efforts to promote an early settlement of unfair labor practice charges. We do not foresee any significant changes to how the NLRB will handle the processing of petitions for voting on whether to become or remain union free.

May Employers Prohibit Workplace Recordings?

Whole Foods had a policy which prohibited employees from "recording conversations with a tape recorder or other recording devices (including a cell phone or any other electronic device) unless prior approval is received from your store or facility leadership." This policy certainly appears reasonable to us. Trust in the workplace and collegiality could be impaired if employees could record conversations with others without their knowledge or permission.

In the case of *Whole Foods Marketing Group, Inc. v. NLRB* (2nd Cir. June 1, 2017), the Second Circuit Court of Appeals upheld the NLRB's 2015 decision that Whole Food's policy prohibiting such recording was overly broad and violated employee rights under the NLRA. The NLRB ruled that such a policy could discourage employees from engaging in concerted activities protected by the NLRA, including unionization activity. The Court endorsed the NLRB reliance on its 2014 decision *Lutheran Heritage*

Village-Livonia, which held that an employer policy is unlawful if employees would interpret it in a reasonable way to prohibit protected activity under the NLRA. The Second Circuit pointed out that Whole Foods did not challenge the Board's application of the *Lutheran Heritage* standard before the Board, and therefore it could not challenge it at the appellate level. The Court said that the NLRB decision does not mean that employers may not have some limits on recording, but only that the Whole Foods policy was overly broad.

Policies prohibiting employees from recording, photographing, or filming other employees without their permission are reasonable in order to maintain a work environment of trust and candor. Employers may prohibit such conduct even without a policy that addresses it. If you have such a policy, it should be reviewed to see whether it may be interpreted as overly broad.

Are Your Employees Preparing to Leave?

With the unemployment rate now below what is considered full employment, employers in several industries and locations are dealing with the challenge of employee leverage in the job market. That is, forget for a moment about attracting new employees -- what about retaining your current ones?

According to a survey released on May 12 by ADB Research Institute, 63% of 2,156 employees surveyed in 800 businesses with 50 to 999 employees would consider leaving their employer. The survey revealed that almost one in five employees is actively engaged in a job search and almost half of those surveyed would consider leaving if they received a better offer. Interestingly, only 13% of those surveyed said they would leave for more money. Nearly 46% of those surveyed said they would leave for less money, if they thought the job move was an overall better opportunity.

Of the 2,156 employees surveyed, 27% responded that they switched jobs within the past year. Work-life balance is becoming increasingly important, even if it means earning less. The survey also revealed that employers underestimate the number of employees who were "passively" seeking to leave – "why would someone want to leave our workplace?" Overall pay increases are lagging behind the supply and demand in the job market. Adjusted for inflation, the 12-month pay increase through April 2017 was approximately 0.5%.

What's the Latest in the Health Care Shuffle?

Word has it that Senate GOP leaders are planning to vote before the July 4th recess on their version of legislation intended to repeal a large portion of the Affordable Care Act (ACA). Senate Majority Leader Mitch McConnell (R–Ky.) is intent on keeping pressure on Senate Republicans to move quickly on the bill to roll back and replace as much of the ACA as possible. As set forth in last month's ELB, the House passed the American Health Care Act (AHCA), H.R. 1628, on May 4, 2017. The Senate has proposed its version of health care which was made public on June 22nd and is called the Better Care Reconciliation Act (BCRA).

The following are some of the similarities and differences between the House and Senate bills:

Essential Health Benefits

Both the Senate and House bills provide the states with authority to repeal essential health benefits, such as maternal care and mental health care.

Health Savings Accounts (HSAs) and Flexible Spending Accounts (FSAs)

The Senate and House bills raise the annual contribution limits for HSAs from their current 2017 levels from $3,400 (single coverage) to $6,650 for 2018, and from $6,750 (family coverage) to $13,300 for 2018. Both bills also reduce the ACA's tax on distributions that are not for qualified medical expenses from 20 percent to 10 percent. Both the House and Senate bills also repeal the ACA's annual limits on an employee's contribution to an FSA, and allow FSAs to provide reimbursement for over the counter medications.

Slowing down the phase-out of the Medicaid expansion

Senators from states that expanded Medicaid under the ACA do not want to see federal funds dry up as quickly as they would under the AHCA. Sen. Rob Portman (R-Ohio) has proposed a seven-year phase-down in the funding, while Sen. McConnell has proposed a three-year phase-down. We are likely to see a phase out somewhere in the middle of these proposals.

Tax credits may be beefed up

Sen. John Thune (R-S.D.) has been working on a tax credit structure that would provide more assistance to help pay for insurance for older Americans and low income earners. The tax credits in the House bill ranged from $2,000 to $4,000 and were based on age, not income. Those credits would phase out for individuals with an annual income of $75,000 and end completely for those who make $95,000 or more. Senator Thune's proposed credits would cut off eligibility sooner for people with higher incomes and make credits larger, tying them to age and income while giving older people more support. Senator Thune has sent different options of the proposed structure to the Congressional Budget Office to be evaluated.

Employer Mandate / Cadillac and Other ACA Taxes

Senate Republicans realize that if they want to spend more on health insurance subsidies and slow down the phase-out of the Medicaid expansion to win over more moderate votes, they must find a way to pay for these changes to the House bill. Moreover, there has been a general consensus that some ACA taxes will need to stay, at least for the short term. The House bill retroactively repealed almost all of the ACA's taxes, but delayed the repeal of the Medicare surtax on high earners until 2023, and the implementation of the "Cadillac tax" until 2026. The Senate bill also includes this delay.

One tax that could remain in the Senate bill is the net investment income tax, which imposes 3.8 percent surtax on capital gains, dividends and interest, sources have said. The taxes most likely to be abolished directly impact consumers and the health industry, including the health insurance tax, the medical device tax, the prescription drug tax, and yes, the Cadillac tax. Under the House bill, the penalty for noncompliance with the ACA's employer mandate was reduced to zero, and we are happy to report that any penalties for noncompliance with the "employer mandate" are also reduced to zero in the Senate bill!

Any penalties for noncompliance with the individual mandate are also reduced to zero.

It will try to stabilize the ACA exchanges

Insurers across the country have proposed big rate increases for 2018, and others are leaving the market altogether. Despite the desire of almost all Republicans to repeal the ACA, they also need to make sure the markets remain relatively stable, which may necessitate funding for a few years for the ACA's cost-sharing reduction payments, which reimburse insurers for giving discounts to low-income customers. The House-passed AHCA funded the payments through 2020. The Senate bill would appropriate $50 billion over four years to try to stabilize the ACA's exchanges. Sen. Rand Paul has referred to the stabilization funding as a "new entitlement" which he opposes. On the other hand, Sen. Ron Johnson (R-Wis.) has been the most vocal proponent in favor of ensuring that the insurance markets are stabilized.

Preexisting conditions

Sen. Susan Collins (R-Me.) stated recently that the House bill "grossly underfunds" high-risk pools to help people with pre-existing conditions, and that it would need at least $15 billion in its first year to work.

The AHCA dedicated $15 billion over nine years for states to create their pools, on top of a last-minute amendment that would give $8 billion over five years to a fund to help with premiums and cost-sharing for people with pre-existing conditions. Do the math - that works out to about $3.3 billion per year.

There's also a $100 billion pool of money in the House bill to help states stabilize their insurance markets, which can be used to help people with pre-existing conditions as well as other purposes, but Senators seem to want a dedicated source of funding specifically for the pre-existing conditions "pools." Senator Barrasso (R-Wyo.) pointed out

that "[we] need to focus on getting people with pre-existing conditions [covered] while also lowering premiums."

The Senate is gearing up to vote on the BCRA sometime this week, but only after the Congressional Budget Office (CBO) releases its score for the bill. The rules for the budget reconciliation process that the Senate is using to try to pass the bill require that the bill would have to decrease the federal deficit by at least the same amount as the House version, which is $133 billion over 10 years. If the CBO's score supports this figure, McConnell could call for a vote as early as Tuesday. Thereafter, the certain debate on the bill will begin. Of course, it is anticipated that many senators will propose amendments.

Senate leadership can only afford to lose two Republican votes on the bill in order for it to pass, and there are currently at least five who have indicated they are not in favor of the BCRA. Sens. Rand Paul, Mike Lee, Ted Cruz, and Ron Johnson do not think the BCRA goes far enough to repeal the ACA, and Sen. Dean Heller wants to preserve the ACA's Medicaid expansion.

So, don't hold your breath, but maybe the Senate will actually pass a healthcare bill before Independence Day! Let's just hope that this time the Senators actually read the bill before they vote on it!

News and Tidbits from the NLRB

Republicans in Congress Look to Overrule *Specialty Healthcare*

Johnny Isakson, a Senator from Georgia, reintroduced legislation entitled the Representation Fairness Restoration Act, to reverse the NLRB decision in *Specialty Healthcare*, which allows unions to cherry pick smaller bargaining units within the company's workforce. Last time around, the bill did not make it out of the Health, Education, Labor and Pensions (HELP) Committee, where the vote went along party lines, including ten Republicans voting for the bill. This time around, the bill will need some southern Democratic support in order to avoid a filibuster in the full Senate.

Aggressive Defense May Be the New Path for Adverse NLRB Decisions

At the end of the Obama administration, the voices of employers became more vocal over the NLRB rules against seemingly mundane workplace policies. The Board has interfered with an employer's common sense rules by invalidating common arbitration agreements (*D.R. Horton*), invalidating social media policies, and invalidating common rules of conduct for the workforce.

Fortunately for employers, changes may be coming from a Trump NLRB, albeit slowly. In the meantime, an aggressive, fact-based defense may be the best defense to an allegation that a Company's policy or practice violates the NLRA. By presenting context and legitimate business justifications, employers may ultimately prevail; especially in front of a Republican-dominated NLRB.

Of course, presenting an aggressive defense runs up the money, and employers need to understand that it may have to appeal to the U.S. Circuit Courts to gain relief. The parameters of presenting such a defense are outlined below:

Don't Stipulate to the NLRB's Aggressive Scrutiny of Workplace Policies

For almost two decades, the Board has increasingly found violations where a rule or policies can "reasonably chill" employees' ability to exercise their rights guaranteed by the NLRA. *See Lutheran Heritage Village*, 343 NLRB 646 (2004); Lafayette Park Hotel, 326 NLRB 824 (1998).

The referenced cases provided the foundation for numerous NLRB decisions during the Obama administration invalidating rules and policies that were "overbroad and unlawful" with the Board applying increasingly unreasonable views of what employees might "reasonably construe" the policy to mean.

As the facts of a particular policy are often not in dispute, the NLRB will pressure the Company to enter into a stipulated record or file a joint motion for summary judgment to the Board.

If you can afford the litigation, DO NOT AGREE with the Region. The recent Board decision in *Dish Network LLC*, 365 NLRB No. 47 (2017), demonstrated the perils of a stipulated record. Here, the employer entered into a stipulated record and did not include any "business justifications" for its decision to suspend an employee, in part, for violating a confidentiality provision when he discussed his suspension.

While *Dish* was not technically a confidentiality policy review case, it does serve as a warning to companies that they should exercise caution before submitting a stipulated record.

Present Contextual Evidence

In *Mercedes-Benz U.S.*, 365 NLRB No. 67 (2017), the NLRB reaffirmed a Company's right to present contextual evidence when defending workplace policies and rules.

The General Counsel filed a motion for summary judgment, contending that there was no need for a hearing as there were no material facts in dispute and the matter could be determined by examining the rule on its face.

Mercedes insisted that it had a right to present, at hearing, contextual evidence justifying its "legitimate business interests." Mercedes insisted that its employees, in context, knew that the rule itself was not intended to curtail protected, concerted activity. Without a hearing, Mercedes argued that it was deprived of presenting these contextual facts.

The Board majority agreed with Mercedes and denied the motion for summary judgment. Member Mark Pierce dissented, saying the rule was on its face overly-broad and thus impermissibly chilled employee expression under Section 7 of the NLRA.

The dissent tracks, in large measure, the positions taken by Regional Directors and the trial attorneys who prosecute the cases on behalf of the General Counsel. Thus, in Pierce's view, if an employee could reasonably construe the company policy or rule to interfere with the employees' protected rights, then there should be no defense as the policy or rule is illegal on its face.

The Bottom Line

The potential changes to the Board under the Trump administration give employers more reasons to present a vigorous defense when faced with an unfair labor practice charge. At least during the investigative phase, employers should consider a vigorous position letter. If a complaint issues, the cost considerations in trying the charge will have to be considered by the employer.

It is no secret that Chairman Miscimarra does not support the "reasonably construe" doctrine, as he has variously described the standard as defying "common sense," unduly requires employers to exercise "linguistic precision," is "exceptionally difficult to apply and has "produced arbitrary results." With the appointment of two more Republicans to the Board, the NLRB will likely experience a new majority inclined to follow Miscimarra's lead.

The above, coupled with a limited budget for the Board, argues for a more vigorous approach to litigating these cases. Therefore, employers should at least consider demanding a hearing, putting the General Counsel (GC) to the trial test, and then rebutting the GC case with witnesses and evidence as to the legitimate reasons / "business justifications" for the rule or policy. In other words, provide "context" on the record that employees will "reasonably construe" the policy as lawful.

Of course, in my opinion, a trial should occur only after careful analysis of the facts by experienced labor counsel, where litigation results can be reliably predicted.

In the News

McDonald's Corporation is currently hiring lobbyists with Democratic ties to convince lawmakers to reject the NLRB's new joint employer stance. A reversal of the Board position should result in giving franchisors some protection against being found as joint employers with corporate franchisees accused of violating the NLRA.

EEOC: Investigating Claims of Harassment

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.

What should you do when an employee reports or files an EEOC charge alleging harassment in the workplace? Even if it's just an internal complaint, such a report has the potential to become the subject of a legal proceeding and should be treated accordingly. So, you take the required "prompt remedial action." But what does "prompt remedial action" mean? Since it can be interpreted many different ways in different situations, I believe its best definition here is: have a plan, know the plan, follow the plan.

Have a plan that follows through from receipt of a report through investigation through determination through end action. An employee who knows or hears of a harassing situation, a supervisor who receives a report, or a clerk who receives an EEOC notice of charge needs to know exactly whom to notify and that it should be done immediately. ("Immediately" is very important to EEOC and most courts.) Know who will investigate the allegations so they can begin promptly. Whether they be in-house or not, do not wait until you have a situation to start looking for an investigator. If using an outside investigator is appropriate, your employment attorney will have one on staff or be able to recommend someone. An investigative plan will be created based on the initial information received. Designate who is to receive the investigative report and have the decision makers meet within a designated time period. No matter the outcome, meet with the employee who made the allegations. When an alleged victim of harassment feels ignored, an EEOC charge will surely follow. Make sure your plan brings closure to all those involved and that it can be implemented promptly.

Everyone should know his or her part in the plan, whether it be in receiving an initial report, during investigation or implementing the determination. The best plans lose effectiveness when those involved are busy learning their parts during their execution. Everyone should know that the plan is to be followed without regard to personal feelings about the report received or people involved.

Most investigations can take unexpected twists and turns. In my experience, harassment investigations can produce more distractions than most. You certainly need to follow the investigation where it leads, but following a well thought out plan will help you make decisions on which appropriate action to take. And having followed that plan, you will be able to present organized and easily understood evidence to support that action if the need arises.

It is important to note that "prompt remedial action" does not necessarily mean that the law has been violated or someone needs to be punished. It is important to promptly determine if unlawful or inappropriate conduct happened. If you find that unlawful harassment or inappropriate conduct has occurred, extreme punishment is not mandated in all cases. The action taken must be effective and designed to ensure that the harassment does not happen again. Some courts have determined that employers complied with this standard even though harassment reoccurred because the reoccurrence could not be foreseen. EEOC usually finds that the action was not effective if harassment reoccurs.

OSHA's Standard Interpretation Letters

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.

Interpretation letters issued by OSHA may be a very useful tool in understanding what the agency will look for and consider compliance with the agency's many standards.

Examples include the following:

The agency responds to a request for a letter of interpretation as to compliance with the employer's hazard

communication sheets. OSHA replied "Your concept of providing abbreviated, plain English Hazcom data would not be a violation of the hazard communication standard (29 C.F.R. §1910.59). As you acknowledge in your letter, providing such data sheets would not be a substitute for mandated material safety data sheets for those who want them."

In another case, the question was raised as to whether a lessor building owner or lessee tenant with employees would be responsible for correcting identified hazards which involved floor loading conditions. It was noted that the employer would be responsible for correcting an identified floor loading condition.

OSHA responds to a question about alarm systems as follows: "With respect to standard 1910.165(b)(2), you requested clarification of the word 'perceived'. It is pointed out that it means that employees shall be able to hear, see, or feel an alarm signal to the extent necessary to understand what it means. If an establishment uses an alarm system that utilizes sound as a means of signaling employees, then the sound must be loud and clear enough to be understood by all employees of the establishment."

OSHA responds as follows to an employer's inquiry concerning issuance of citations where there are no painted markings of permanent aisles and passageways for dirty floor or floors covered with sand or dust. The response by OSHA was that the standard 29 C.F.R. § 1910(b)(2) wording that aisles and passageways be appropriately marked does not require marking by painted yellow lines only. This method is the most convenient and inexpensive way to mark aisles and passageways since they last several years without maintenance or additional painting. Other appropriate methods such as marking pillars, powder stripping, flags, traffic cones, and other devices may be considered appropriate as well.

OSHA responds as follows to questions about its standard 29 C.F.R. §1910.22 entitled "General Requirements" which is often referred to as the housekeeping standard. OSHA explains that this standard requires clean, orderly and sanitary conditions. It also requires that floors should be kept dry and be provided with proper surfaces appropriate to the circumstances.

The Motor Carrier Exemption Under the Fair Labor Standards Act

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act. Mr. Erwin can be reached at 205.323.9272.

As I prepare this article, Wage Hour does not have a new Administrator. I recently saw an article that mentioned a possible candidate, Ms. Cheryl Stanton, who is currently the Executive Director of the South Carolina Department of Employment and Workforce that may be appointed to the position but when or if that will happen is unknown at this time. Even when a person is nominated he/she must be confirmed by the Senate, which is usually an extended process.

Although there has been much speculation regarding how Wage Hour will operate during the new administration, we will not know what to expect until the new administrator is in place. For the past several years, Wage Hour has used strategic enforcement in certain targeted industries. In recent years, those industries included agriculture, day care, restaurants, garment manufacturing, guard services, health care, hotels and motels, janitorial, and temporary help. Although they may not specifically target these industries, as long as I have been involved in Wage Hour enforcement, they have always devoted significant resources to "low wage" industries. Thus, I expect that Wage Hour will continue to spend a lot of enforcement time in these areas.

Previously, I have discussed the application of Motor Carrier exemption but I continue to see where employers are facing litigation regarding the proper application of the exemption. As there have been some changes in the criteria for the overtime exemption, I thought I should provide an updated overview to the requirements. Section 13(b)(1) of the FLSA provides an overtime exemption for employees who are within the authority of the Secretary of Transportation to establish qualifications and maximum

hours of service pursuant to Section 204 of the Motor Carrier Act of 1935, except those employees covered by the small vehicle exception described below.

Thus, the 13(b)(1) overtime exemption applies to employees who are:

1. Employed by a motor carrier or motor private carrier

2. Drivers, driver's helpers, loaders, or mechanics whose duties affect the safety of operation of motor vehicles in transportation, on public highways, in interstate or foreign commerce and

3. Not covered by the small vehicle exception.

The driver, driver's helper, loader, or mechanic's duties must include the performance of safety-affecting activities on a motor vehicle used in transportation on public highways, in interstate or foreign commerce. This includes transporting goods that are on an interstate journey even though the employee may not actually cross a state line. Further safety-affecting employees who have not made an actual interstate trip may still meet the duties requirement of the exemption if the employee could, in the regular course of employment, reasonably have been expected to make an interstate journey, or could have worked on the motor vehicle in such a way as to be safety-affecting. An employee can also be exempt for a four-month period, beginning with the date they could have been called upon to, or actually did, engage in the carrier's interstate activities.

In 2007, Congress inserted a Small Vehicle Exception to the application of the overtime exemption, which severely limits the exemption, especially for small delivery vehicles such as vans and SUVs. This provision covers employees whose work, in whole or in part, is that of a driver, driver's helper, loader, or mechanic, and affect the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways, in interstate or foreign commerce. Exceptions are vehicles:

a. Designed or used to transport more than 8 passengers, including the driver, for compensation; or

b. Designed or used to transport more than 15 passengers, including the driver, and not used to transport passengers for compensation; or

c. Used in transporting hazardous material, requiring placarding under regulations prescribed by the Secretary of Transportation;

Due to the Small Vehicle Exception Section, the 13(b)(1) exemption does not apply to an employee during any work week when the employee performs duties related to the safety of small vehicles, even though the employee's duties may also affect the safety of operation of motor vehicles weighing more than 10,000 pounds, or other vehicles listed in subsections (a), (b), and (c) above. For example, this means that a mechanic who normally spends his time repairing large vehicles works on a vehicle weighing less than 10,000 pounds is not exempt in any week that he works on the small vehicle. When determining whether the vehicle meets the 10,000 pounds requirement, a U.S. District Court in Missouri, confirming Wage Hour's position, ruled that if a vehicle is pulling a trailer, you consider the combined weight of both the vehicle and the trailer to apply the exemption.

The Section 13(b)(1) overtime exemption also does not apply to employees not engaged in "safety affecting activities," such as dispatchers, office personnel, those who unload vehicles, or those who load but are not responsible for the proper loading of the vehicle. Only drivers, drivers' helpers, loaders who are responsible for proper loading and mechanics or work directly on motor vehicles that are to be used in transportation of passengers or property in interstate commerce can be exempt from the overtime provisions of the FLSA under Section 13(b)(1). Furthermore, the overtime exemption does not apply to employees of non-carriers, such as commercial garages, firms engaged in the business of maintaining and repairing motor vehicles owned and operated by carriers, or firms engaged in the leasing and renting of motor vehicles to carriers.

Employers that operate motor vehicles should carefully review how they are paying drivers, drivers' helpers, loaders, and mechanics to make sure they are being paid in compliance with the FLSA. Failure to do so can result in

a very large liability. 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 GPHR, 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.

Did You Know…

. . . that President Trump for Fiscal Year 2018 has allocated $20 billion to establish a "federal/state paid parental leave program?" The program would provide up to six weeks of paid leave for mothers and fathers (including adoptive parents). The program would begin during Fiscal Year 2020. Such a program could result in increased unemployment taxes for employers. Some states have enacted such programs, such as California, New York, New Jersey, Rhode Island, and Washington.

. . . that employers are becoming less inclined to use criminal history as a disqualifier for employment? Where there is a labor shortage, employers in those industries or locations either increase wages and/or make adjustments regarding who may be considered for employment. One adjustment is not conducting pre-employment alcohol and drug tests. Another adjustment is considering applicants with a criminal history record. There are approximately 5.7 million job vacancies in the United States, close to an all-time record. According to the Center for Economic Policy Research, 1.9 million individuals with criminal records were not hired in 2014. An unemployment rate of 4.7% is considered "full employment." Most recently, the unemployment rate fell to 4.4%. According to the National Employment Law Project, approximately 70 million Americans have an arrest or conviction record and between 14 million and 16 million working age individuals have felony convictions. Thus, employers are beginning to compromise standards where conviction records had previously been disqualifying. This is particularly the case where the conviction record does not relate to the essence of what the job requires.

. . . that legislation has been proposed to undo major NLRB decisions during President Obama's administration? On June 6, a bill was introduced by Representative Tim Walberg (R-Mich.) that would overturn the NLRB's "micro unit" decision and the "ambush" election timetable. Another bill introduced by Representative Joe Wilson (R-S.C.) would reduce the amount of information an employer must provide a union about employees during the course

of a union campaign. Currently, that information includes e-mail addresses, phone numbers and regular addresses. Under Representative Wilson's bill, only one contact source for each employee would be provided, rather than multiple ones.

. . . that it is not retaliation to discharge someone for falsely accusing another of sexual harassment? *Villa v. CavaMezze Grill, LLC* (4th Cir. June 7, 2017). Employee Patricia Villa reported a sexual harassment claim that turned out to be untrue. It was unsupported by individuals she identified as witnesses and denied by the alleged perpetrator. The employer terminated her, and she claimed retaliation. The employer's investigation concluded that Villa made up the substance of a conversation with an employee Villa said reported sexual harassment. The Court stated that it was not retaliatory where the employer in good faith concluded that the employee's harassment complaint was a lie. Employers have the right to terminate if an employer believes in good faith that an employee falsified claims, such as the need for a FMLA absence, or in this case, harassment. However, most courts have held that an employer may not terminate for filing an EEOC charge, other agency complaints, or lawsuits with false allegations, or for making false statements in an EEOC investigation. Additionally, false statements in even internal complaint proceedings may be protected under some state civil rights statutes.

. . . that an employer's policy on references violated the NLRA, according to an Administrative Law Judge? *BGC Partners, Inc.* (May 10, 2017). BGC had a policy that required employees to forward job reference requests to Human Resources. Without citing any precedent to support his conclusion, the ALJ stated that this policy could be reasonably construed by employees as deterring them from engaging in protected activity under the NLRA. The Judge stated that a restriction on how references are provided violates the NLRA "to the extent that it bans workers from supplying information to outside entities without authorization." This decision is a far-fetched reading of employee Section 7 rights under the National Labor Relations Act and we do not believe it will be sustained on appeal.

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
Claire F. Martin	205.323.9279 cmartin@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