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Employment Law Bulletin

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DOL's Salary Exemption Gamble

The Obama administration's Department of Labor initiative to increase the salary level of certain exempt employees to $47,000 was enjoined on November 22, 2016, by Judge Amos Mazzant of the United States District Court for the Eastern District of Texas in the case of *State of Nevada v. United States Department of Labor*. That case is pending before the Fifth Circuit Court of Appeals. Judge Mazzant stated that DOL put too much emphasis on salaries rather than job duties for exempt employees and overall questioned whether the Department of Labor can increase the salary threshold at all. On June 30, the Trump administration Department of Labor made an unusual and risky request to the Fifth Circuit: "The Department requests that this Court not address the validity of the specific salary level set by the 2016 Final Rule ($913 per week) which the Department intends to revisit through new rule making."

The Department asked the Court to reverse that aspect of Judge Mazzant's decision which says that DOL does not have the authority to set the salary level. The Department also asked the Court to enforce the aspect of Judge Mazzant's decision invalidating the $913 salary level. So here's the risk: the Fifth Circuit may decide that it really cannot give DOL what it wants by reversing half of Judge Mazzant's decision (that DOL does not have the authority to set the salary level), without addressing the second aspect of the decision, which is that if DOL had the authority to set the salary level, then the $913 salary becomes effective.

The risk to employers is that the $913 salary level becomes effective until the rule making process changes it. If the Fifth Circuit rules that the $913 salary level should become effective, what will be the effective date? What should employers do during the interim between the increased $913 a week and DOL's representation that it will go through a rule-making process to lower that amount? As a stop gap measure, we recommend that if the Fifth Circuit enforces the $913 a week salary level, employers should convert exempt employees who do not meet the $913 salary level to non-exempt while the rulemaking process plays out. If and when DOL revises the salary threshold to something such as $650 or $700 a week, then employers may decide to restore those employees to exempt status.

The Rule Making Process Begins

On July 25, Secretary of Labor Acosta began the process to revise the exemption regulations by issuing a Request for Information–inviting stakeholders to respond to eleven questions that cover issues related to determining which employees should be exempt from the requirement to pay overtime compensation. Among these are:

- What methodology should be used for setting the salary threshold, and relatedly, should the 2004 threshold just be updated for inflation?
- Should there be changes made to the duties test, and should the salary test be eliminated in favor of a duties-only test for exemption?
- Should there be multiple salary levels to account for geography, employer size, or some other difference?
- Should there be different salary levels for different exemptions?
- How should bonuses and incentive payments such as commissions be treated?
- Should the salary level be automatically updated?

We view this as a very positive development – showing DOL's interest in not just revising the salary threshold but possibly re-examining the very outdated and difficult to apply duties tests. We will keep you posted as the rule making progresses.

FMLA and Call-in Requirements

Where leave is foreseeable, employees must provide at least 30 days' notice, unless it is not "practicable." In that case, the Department of Labor states that notice to the employer must be "as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case." Note that in the regulations, the employee "may be required by an employer's policy to contact a specific individual with notice of the absence." The regulation adds that "when an employee does not comply with an employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA protected leave may be delayed or denied."

Where leave is unforeseeable, notice must be provided to the employer "as soon as practicable under the facts and circumstances of the particular case." Just as with foreseeable leave, "if an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA protected leave may be delayed or denied."

If an employer outsources FMLA administration, the employer has the right to hold the employee accountable to reporting absences according to the employer's process, and also to notify the third party provider. In *Perry v. American Red Cross* (6th Cir. June 1, 2016), the employee did not follow the call-in procedures. She notified her manager that she was going to be out, but she did not notify the outsourced FMLA administrator. There were no unusual circumstances which made it impossible or challenging for her to do so. The employee knew the protocols to follow and failed to do so. The employer did not treat her absences as covered under FMLA and terminated her for excessive absences. The employer's actions were upheld.

A similar outcome occurred in the case of *Alexander v. Kellogg USA, Inc.* (6th Cir. January 4, 2017). An employee was terminated for excessive absenteeism and argued that some of those absences were covered by the FMLA. The employer had a requirement that employees who were approved conditionally for intermittent leave needed to notify the third party administrator within 48 hours that the absence was for the serious health condition qualifying as intermittent leave. The employee failed to do so, and the absences were treated as unprotected and ultimately resulted in termination. In the case of *Scales v. FedEx Ground Package System, Inc.* (N.D. Ill. January 24, 2017), the employee notified the employer of the need for FMLA for hip replacement surgery. The employer instructed the employee to contact the third party FMLA administrator. The employee failed to do so. The employer confirmed its actions in an email to the employee, where it attached the form for notice to the administrator. The employee's failure to comply

resulted in the absences being unprotected and as such served a legitimate basis for the employee's termination.

Employer Rights to Require Return to Work Fitness for Duty Certification

An employer has the right to require an employee to provide a fitness for duty statement when the employee returns to work from FMLA due to the employee's serious health condition. Under the FMLA, this has to be uniformly applied. For example, does the employer require this of all employees returning to work from an extended medical absence? Another approach is to require the certification of employees in a similar job classification and/or who were out for similar reasons. For example, in *Jones v. Gulf Coast Health Care of Delaware, LLC* (M.D. Fla. Feb. 18, 2016), the employer refused to let an employee return to work because the employee did not have a fitness for duty certification. The employee alleged that this violated the employee's FMLA rights, because he named two other employees who were not required to provide a fitness for duty certification. The Court ruled that those employees were not proper comparators because they had different injuries. Furthermore, the Court stated that those employees in fact provided the fitness for duty certification anyway. Employers have the right to require fitness for duty certification where the employee has been absent for an extended period due to his own illness or injury. Under the FMLA regulations, employees must be informed that a fitness for duty certification will be required in the notice of eligibility and rights of responsibilities.

Although the FMLA permits a fitness for duty certification, it does not supersede an employer's obligation under the ADA to make reasonable accommodations for employees who need such concessions to be able to perform the essential functions of their jobs. In other words, employers must not treat the right to seek a fitness for duty release as a license to insist that the employee cannot return to work until he or she is 100% healed.

Medical Marijuana: Must an Employer "Reasonably Accommodate"?

Several states have enacted laws decriminalizing marijuana possession or use. Marijuana is still prohibited under federal law, and to this point, employers in states decriminalizing marijuana still prohibit its use. The prohibition on the use of marijuana has included an employer's right to terminate an employee for a positive drug test.

The recent case of *Barbuto v. Advantage Sales and Marketing, LLC* (Mass. July 17, 2017) reviewed the issue of "reasonable accommodation of an employee's medical marijuana use as an exception to employer drug free workplace policies." The case involved the Commonwealth of Massachusetts law prohibiting discrimination based upon disability. The Plaintiff, Christina Barbuto, was medically prescribed marijuana as a form of treatment to deal with Crohn's Disease. She tested positive for marijuana on a drug test and was terminated. Note that under the ADA and most state laws, an employer may test for drugs on a random basis but not alcohol. Barbuto was not tested based upon reasonable suspicion: there were no indications of impairment at work, nor had her job performance suffered.

The Court ruled that the state law permitting the medical use of marijuana did not create a private cause of action for an employee terminated based upon using marijuana. However, the Court concluded that Crohn's Disease constituted a disability and the employer violated state disability discrimination laws by failing to consider the medical use of marijuana as a reasonable accommodation. The employer argued that because the use of marijuana was prohibited under federal law, to reasonably accommodate its use according to state law was an undue hardship and therefore not required. The Court disagreed. Although this case is binding only on Massachusetts employers, we expect to see the argument of reasonable accommodation of marijuana for medical purposes to be asserted under the ADA and laws of other states. If you have an employee in a state where state law prohibits disability discrimination and permits

the medical use of marijuana, then the Massachusetts case is one that you will need to consider, as it will be cited as precedent for other states to follow.

President Trump's Nominee to Lead EEOC

President Trump on June 29 submitted to the Senate the nomination of Janet Dhillon as EEOC Chair. Ms. Dhillon is EVP and General Counsel of Burlington Stores and held similar positions with J.C. Penney Company and U.S. Airways Group. She was a partner at Skadden, Arps prior to her corporate career. Most prognosticators thought the President would nominate Victoria Lipnic whom he appointed as Acting Chair. Lipnic has been a Commissioner since 2010. Ms. Dhillon's husband serves as a special assistant to President Trump. Assuming Senate confirmation to a five-year term, we expect (okay, maybe hope) that Ms. Dhillon will bring a balanced perspective to the EEOC; she understands the practical and business implications of the Agency's actions.

News and Tidbits from the NLRB

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years. Mr. Rox can be reached at 205.323.8217.

In the News

As previously reported in the May 2017 ELB, President Trump has now nominated two Republicans to bring the NLRB to a full complement of five members. William J. Emanuel and Marvin E. Kaplan, if confirmed by the Senate, will give the Board its first Republican majority in over nine years.

Conservative pundits and business groups were quick to praise the nominations as being knowledgeable of the law and imminently worthy of confirmation.

Liberal groups and unions, on the other hand, have concerns about the nominations, saying that both have long records of opposing workers' rights and opposing recent NLRB decisions which vigorously enforced union and employee rights exercised by employees under the NLRA. It has been reported that various groups, including the Leadership Conference on Civil and Human Rights and the National Employment Law Project (along with approximately 45 other organizations), have sent a letter to the U.S. Senate's Committee on Health, Education, Labor and Pensions (HELP), asking that the July 13, 2017, hearings be postponed. The hearings proceeded as scheduled and a committee vote is expected next week. Barring some unexpected catastrophic news, expect both nominees to be confirmed by the full Senate soon.

What to Expect from a Republican Dominated NLRB

With Emanuel and Kaplan on their way to confirmation in the Senate, as predicted in past LMVT Employment Law Bulletins, look for the NLRB to roll-back case precedent and regulations with its first Republican controlled NLRB in nearly a decade. Among the hot topics to be re-visited, in my opinion, are:

Who is Considered a Joint Employer?

Expect a return to a closer approximation to the 30-year-old precedent where employers must actually exercise joint responsibility for terms and conditions of employment before a joint employer finding. *Browning-Ferris (BFI)* is currently pending before the D.C. Circuit Court of Appeals. *BFI* articulated the newer standard and announced a two prong test where control may be direct, indirect, or reserved right to control.

Can Graduate Students Unionize and Are They Considered Employees?

In 2016, the NLRB overturned a ruling that denied collective bargaining to graduate students. The old ruling, issued in 2004, served as a longstanding precedent finding graduate students not to be employees.

Are Micro-Units Legal under *Specialty Healthcare*?

Specialty Healthcare essentially paved the way for unions to "cherry pick" smaller units to organize. Under *Specialty*, unions need only identify a small group of

employees that share a community of interest with one another, in order to file a petition with the NLRB. Employers have argued, unsuccessfully so far, that this type of decision left the employer bargaining with only a small portion of its employees, a micro-unit, or fragmented unit.

New Board Could Limit Employee Speech That Is Currently Protected Under the NLRA

Arguably offensive language by an employee may not be protected under the NLRA, thus allowing employers more latitude to forbid objectionable conduct. Thus, NLRB rules and cases limiting language contained in employee handbooks and protection of profane language in social media rants may be short lived. Miscimarra's dissents while on President Obama's NLRB may provide the basis for new majority decisions.

Handbook/Rule and Regulations Scrutiny to Ease Up

As recently as last month's ELB, it was noted that there appears to be a slow return to common sense when it comes to enforcing "civility" rules when applying the "chilling of Section 7" activity to Company's rules and regulations. Expect the Trump NLRB to lighten up on finding common sense rules illegal.

Are Mandatory Employee Arbitration Containing a Waiver Legal?

D.R. Horton found that such arbitration agreements violated the NLRA, and were therefore illegal. The U.S. Supreme Court has agreed to settle the issue and we expect a decision from the Court at the end of the year or early 2018. It is not anticipated by LMVT that employers will lose before the Supreme Court. Oral arguments before the Court have been set for October 2, 2017.

Eighth Circuit Court of Appeals Declines to Enforce Jimmy John's NLRB Decision

In an *en banc* (meaning the full court) review, the Eighth Circuit Court of Appeals has refused to enforce the Board's order finding that Jimmy John's sandwich shop must reinstate employees allegedly engaged in union and protected, concerted activity. See *Miklin Enterprises, Inc.*

The Court rejected the reasoning of an Administrative Law Judge (ALJ), the Board and an Eighth Circuit panel of three judges on whether the employees could handbill challenging the company's sick-leave policy. The handbills/posters strongly implied a health risk from the sandwiches made by employees "forced" to work due to not having sick leave. As a result of the protest, Jimmy John's fired six employees who they deemed responsible for the attack and issued written warnings to three others who were deemed complicit in the protest.

The Court in full cited the *Jefferson Standard* principle, which finds that workers' communications lose their Section 7 protections when the communications constitute a "sharp, public, [and] disparaging attack upon the quality of the company's product and its business policies." The full Court went on to state that the principle applies even where the communication expressly references an ongoing labor dispute. Ultimately, the full Court explained that the communication herein could lose its Section 7 protection even in the absence of actual malice by the employees and/or the union. The Court noted that the protest posters/handbills were designed to deliberately harm the Company's reputation and affect the bottom line. To achieve these goals, the employees made "materially false and misleading statements," and the harm done by these communications far outlasted the labor dispute.

The Circuit Courts of Appeal are divided on this issue, so do not be surprised if the subject turns up for review before the U.S. Supreme Court. In the meantime, this decision gives employers some hope that their employees cannot deliberately harm the business, even if done in a union campaign context. In other words, employees cannot be disloyal to the company and expect the NLRA to protect them.

EEO Tips: Mediate or Not to Mediate

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.

When a workplace dispute arises that might be resolved through mediation, an employer can be tempted to make a snap decision based on general knowledge or a past experience. While mediation is a great option in most situations, even a mediator such as I must admit that it may not always be the best option – each dispute should be evaluated individually for the best resolution option. Here are a few things I think would be helpful for the employer to consider:

Unless you are already in litigation and a judge orders mediation, participation is usually voluntary. Just because mediation is offered (as some administrative agencies do) does not mean it is a requirement. Agencies such as the EEOC do not think less of you or investigate a charge more aggressively if you decline an offer to mediate. Remember, you are only declining the offer to participate in the agency's mediation program. The parties still have many other options, including using a private mediator who has no affiliation with the agency; communicating directly with each other to explore resolution possibilities; arbitration; or letting the administrative/legal system run its course (including other opportunities for alternative dispute resolution that judges may impose or offer). Yes, you will pay a fee for private mediation but, if the dispute is resolved quickly, you can save months or years of workplace disruption and litigation expense.

In some situations, a mediator may be assigned to your case by an agency or judge. While they probably will not allow a change in mediators if you prefer to work with someone else, you should certainly speak up if you have reason to believe that the assigned mediator will not be neutral or cannot be trusted. Write or speak to the mediation manager or judge and state the reason for your belief that the assigned mediator cannot perform neutrally regarding the particular case or parties. If that effort fails, the parties can hire a private mediator that both parties agree will be neutral and effective.

Once you have decided to try to resolve the dispute and have a mediator you trust, please enter the process with an open mind. Deciding on an agenda or result before giving the mediation process a chance undermines chances of success. Remember that a dispute requires two parties and so does a resolution. No matter what you think of the situation or the other party initially, it is important for each party to know how the other perceives the dispute and its background, as well as what the other believes will resolve it, and why. The other party's view of the situation could be completely erroneous (as you may suspect) but you still cannot resolve it until you know. And you may learn some details you were not previously aware of. No one's position will change without hearing another point of view.

The purpose of mediation is to reach a mutually agreed upon resolution. The terms of agreement may not make either party happy or proclaim a winner; they do end the dispute without further actions or proceedings. Yes, those terms usually include money, but not always. Our civil justice system includes monetary damages in most civil settlements and judgments, so we usually think in those terms initially. Mediation is not simply a means of relaying offers back and forth. Mediators should explore with the parties all of their interests in resolving the dispute: what they want to accomplish, what they want to get, what they are willing to give, and *why*. Understanding the backstories and why these things matter to the parties enables mediators to craft agreements that address their interests, and may even reduce future workplace disputes. People are much more agreeable (even about money) when they feel valued, when someone acknowledges and addresses their concerns. This process can take some time so you will need to commit to it – initial meetings can be lengthy.

Mediation can also be successful in situations where a dispute has not risen to a filed charge or lawsuit. I have seen very successful results from intervening when valued employees seem unable to work together. Instead of the employer having to decide which employee must

leave, we have been able to resolve their differences through mediation and return a peaceful and productive workplace. Even disputes between management and groups of employees can be mediated with positive results for all. I recently worked with groups who appeared stalemated over how to achieve required productivity within government regulations and strict industry guidelines. Mediator involvement helped open communication and enabled them to resolve the issues. As mentioned earlier, mediation can be a great option in resolving most workplace disputes. Evaluate each situation independently. Feel free to call if you have questions about mediation or have a topic you would like to see covered in a future article.

OSHA Tips: Explaining OSHA

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.

A posting by the National Safety Council provides information about OSHA, what it is, what it does, what are its requirements, etc.

First, they address the "what is OSHA" question:

> OSHA was created by Congress in 1970 under the Occupational Safety and Health Act as part of the United States Department of Labor. The goal of this legislation was to prevent workers from on the job death and serious injury. OSHA sets and enforces safety guidelines to assure safe working environments. It also provides education and assistance for employers to meet those guidelines. Generally speaking, the agency requires that each employer maintain a safe and healthy workplace and comply with occupational and safety standards as required by law.

The NSC goes on to explain OSHA's broad scope of coverage, covering the vast majority of private sector employers and their employees nationally and in U.S. territories and other jurisdictions. OSHA coverage extends to most, but not all, private sector employers and their workers. OSHA rules cover numerous industry workplaces from construction to maritime to agriculture, and of course, manufacturing. Some states have state plans, which expand upon federal OSHA regulations.

Enforcement of its standards is one of OSHA's tasks. This extends to referral of violators for possible criminal prosecution. Fines may also be issued that extend into tens of thousands of dollars. To avoid citations and penalties, employers are advised to conduct their own routine inspections, fix problems as they are identified, train employees, and always enforce safety rules.

Wage and Hour Tips: Current 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 number one issue on many employers' minds is the status of the large increase in the minimum salary requirements relating to the executive, administrative, and professional exemptions. While it was scheduled to become effective December 1, 2016, the minimum salary for an exempt employee was to increase to $913 per week. A Texas Court issued an injunction putting the increase on hold. I saw recently that DOL filed a brief with the Fifth Circuit Court of Appeals requesting that the court further delay the implementation of the new regulations while they go through the process of revising the proposed increase. The Department also recently issued a document withdrawing a policy regarding the definition of "independent contractors" and reverting back to Wage Hour previous guidance on the issue.

Furthermore, the new Secretary of Labor has stated that Wage Hour will again begin responding to requests for “opinion letters” from both employers and employees. Prior to 2010, Wage Hour had regularly issued such guidance letters which were made available to the general public and, beginning around 2000, they were posted on their website.

A few years ago, Congress passed a law allowing agencies to increase the amount of administrative penalties they may assess under various statutes. The Department of Labor published their changes to become effective January 13, 2017. Those changes that apply to violations of the Fair Labor Standards Act are increased as follows: The maximum penalty for “repeat or willful” violations of the minimum wage or overtime provisions increased to $1,925 per employee. Wage Hour policy states that if an employer has previously been investigated and was found to owe back wages, any current violations will be considered to be repeat violations. Consequently, they almost always assess a penalty for each employee found to be in violation in addition to the back wages owed. Furthermore, the penalties for illegal employment of a minor who suffered a serious injury increased to $55,808. If the violation is repeated or willful, the maximum penalty increases to $111,616. There are similar increases in the penalties for violations of other labor laws. A copy of the complete penalty structure is available on the Department of Labor website. In 2013, Wage Hour instituted a procedure where they request liquidated damages (an additional amount equal to the amount of back wages) in nearly all investigations. Virtually every week, I see reports where employers have been required to pay large sums of back-wages and liquidated damages to employees because they failed to comply with the Fair Labor Standards Act.

As evidenced by the increasing number of lawsuits filed each year, Fair Labor Standards Act issues continue to be very much in the news. Employers are continually getting into trouble for making improper deductions from an employee’s pay, thus I thought I should provide you with information regarding what type of deductions that can be legally made from an employee’s pay.

Employees must receive at least the minimum wage free and clear of any deductions (except those required by law or payments to a third party) that are directed by the employee. Not only can the employer not make the prohibited deductions, he cannot require or allow the employee to pay the money in cash apart from the payroll system.

Examples of deductions that can be made:

- Deductions for taxes or tax liens.
- Deductions for employee portion of health insurance premiums.
- Employer’s actual cost of meals and/or housing furnished to the employee. The acceptance of housing must be voluntary by the employee, but the employer may deduct the cost of meals that are provided even if the employee does not consume the food.
- Loan payments to third parties that are directed by the employee.
- An employee payment to savings plans such as 401k, U.S. Savings Bonds, IRAs, etc.
- Court ordered child support or other garnishments, provided that they comply with the Consumer Credit Protection Act.

Examples of deductions that cannot be made if they reduce the employee below the minimum wage or affect overtime pay:

- Cost of uniforms that are required by the employer or the nature of the job.
- Cash register shortages, inventory shortages, and tipped employees cannot be required to pay the check of customers who walk out without paying their bills.
- Cost of licenses.
- Any portion of tips received by employees other than those allowed by a tip pooling plan.
- Tools or equipment necessary to perform the job.
- Employer-required physical examinations.
- Cost of tuition for employer-required training.
- Cost of damages to employer equipment such as wrecking employer’s vehicle.

• Disciplinary deductions. Exempt employees may be deducted for disciplinary suspensions of a full day or more made pursuant to a written policy applicable to all employees.

If an employee receives more than the minimum wage, in non-overtime weeks the employer may reduce the employee to the minimum wage, provided that state law does not prohibit such a deduction. For example an employee who is paid $9.00 per hour may be deducted $1.75 per hour for the actual hours worked in a workweek if the employee does not work more than 40 hours. Wage Hour takes the position that no deductions may be made in overtime weeks unless there is a prior agreement with the employee. Consequently, employers might want to consider having a written employment agreement allowing for such deductions in overtime weeks.

Another area that can create a problem for employers is when the law does not allow an employer to claim credit as wages (money that is paid for something that is not required by the FLSA). In 2011, the Fifth Circuit Court of Appeals ruled in a case brought against Pepsi in Mississippi. A supervisor who was laid off filed a suit alleging that she was not exempt and thus was entitled to overtime compensation. The company argued that the severance pay the employee received at her termination exceeded the amount of overtime compensation that she would have been due. The U.S. District Court stated that the severance pay could be used to offset the overtime that could have been due and dismissed the complaint. However, the Court of Appeals ruled that her severance payments were not wages and thus could not be used to offset the overtime compensation that could be due the employee. Therefore, employers should be aware that payments (such as vacation pay, sick pay, holiday pay, etc.) made to employees that are not required by the FLSA cannot be used to cover wages that are required by the FLSA.

Due to the amount of activity under the both the Fair Labor Standards Act and the Family and Medical Leave Act, employers need to make themselves aware of the requirements of these acts and make a concerted effort to comply with them. If I can be of assistance do not hesitate to call me.

2017 Upcoming Events

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Redstone Federal Credit Union
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www.redfcu.org

Birmingham – October 19, 2017
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Birmingham, AL 35209
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Did You Know…

…that the House Appropriations Committee has approved funding cuts of 11% each for the NLRB and DOL? The House bill would also reverse the NLRB's *Browning-Ferris* decision, which expanded joint employer liability, and the NLRB's *Specialty Health Care* decision, which created the opportunity for unions to organize "micro" bargaining units. The reduction for the DOL is lower than the 20% first proposed in May, and the reduction for the NLRB increased from the initial 6% reduction also proposed during May.

… that the EEOC on July 20 sued a Texas employer that required its laborers to speak Spanish? *EEOC v. Champion Fiberglass, Inc.* (S.D. Tex.). The EEOC alleges that its requirement to speak Spanish has a discriminatory impact on non-Hispanic laborers. The lawsuit alleges race and national origin discrimination because of the "speak Spanish" requirement. The lawsuit began when an individual sought a laborer position, but was not given an employment application because he could not speak Spanish.

… that the proof required for an individual to show a violation of the FMLA has been lessened? *Woods v. START Treatment and Recovery Centers, Inc.* (2nd Cir. July 19, 2017). The jury was instructed to determine whether employee Cassandra Woods would not have been terminated "but for" her use of FMLA benefits. The Appellate Court concluded that the Plaintiff has a lower burden rather than the "but for" test; a Plaintiff must only show that the use of FMLA was a "motivating factor" in the employer's decision. Under the "but for" standard, the practical impact is that an individual must show essentially that the only reason for termination was the use of FMLA rights. Under the "motivating factor" standard, an employer may have several permissible reasons for taking an adverse action against the individual. However, if the use of FMLA benefits was a "motivating factor" for the adverse action, then the conclusion may be an FMLA violation, regardless of all the permissible reasons for the employer's decision.

… that approximately 3,000 employees at Nissan Motor Company's Canton, Mississippi facility will vote on August 3 and 4 to decide whether they want to be represented by the UAW? The organizing effort at Nissan has extended over several years. The union accused Nissan of intimidating employees, to which the company replied, "Nissan respects and values the Canton workforce, and our history reflects that we recognize the employees' rights to decide for themselves whether or not to have third party representation. Voters have the right to know the company's perspective on what is best for our future and the full story on what it means to have a union. The union only wants employees to hear one side of the story." The union says that employees at Canton are interested in union representation for more money, better benefits, and job security. According to the union, "right now management can just fire them. Workers want a voice in the workplace. They need a contract so the employer can't just come in and take away their pension."

… that according to a Bloomberg News report issued on July 18, 2017, social security beneficiaries have increased by 32% since 2003, from 46 million to 61 million and covered employees and families increased 14% during that time, from 150 million to 171 million? Bloomberg reports that the social security trust fund for retirement and disability benefits will no longer be funded by 2034, resulting in a benefits cut of approximately 25%. Medicare is also on a similar path, with its benefits to be cut by 25% in 2029. According to the U.S. census data for 2016, over 22 million people would be considered impoverished without social security benefits. The average social security benefit is $16,300 per year. Of those millennials who were surveyed, 81% believed that social security will be unavailable to them when they retire.

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