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Labor Looks for Labor Day Love

"I was lookin' for love in all the wrong places, lookin' for love in too many faces, searchin' their eyes and lookin' for traces of what I'm dreamin' of."

The song "Looking for Love," written by Wanda Mallette, aptly describes the circumstances of organized labor on this Labor Day. First celebrated in 1882 to provide a "working man's holiday," Labor Day has evolved to include an analysis of the state of labor unions. Despite labor's political expenditures and substantial support from the Obama Administration, its membership rolls continued a precipitous decline. In essence, employees are not interested in labor's message, a message which has been virtually unchanged since the turn of the century, the 20th century that is.

The labor movement has evolved from an equivalent of a "Walmart" influence on the marketplace to a Trader Joe's: a much smaller operation but with a loyal group of customers. Approximately 32% of private sector employees were union members 60 years ago; today it's only 6.4%.

Since 1990, unions spent $4.4 billion on state and federal campaigns, with 91% support for Democrats and 8% support for Republicans. During the 2016 presidential election, 43% of union households voted for Donald Trump and he carried states with double digit union membership like Michigan, Ohio, Pennsylvania, West Virginia, and Wisconsin. During the past five years, Indiana, Kentucky, Michigan, Missouri, West Virginia, and Wisconsin have joined South Carolina and the rest of the South to become right-to-work states. In a right-to-work state, it is illegal for an employer and union to agree to union security language, where employees must pay union dues and fees or else be terminated. The impact on unions of the right-to-work movement is profound. For example, Michigan became a right-to-work state on March 8, 2013. The number of dues-paying union members in Michigan during the past four years has dropped from 671,000 to 605,000.

During the Obama Administration, the NLRB election rules were changed to a process more favorable for unions, shortening the amount of time an employer can respond to a union request for an election and expanding the opportunity for unions to organize smaller groups of employees. Yet one year after these rules became effective, the number of elections filed by unions declined nationally from 1,490 to 1,299, although the union win rate in those elections rose from 69% to 72%.

Why Labor's Decline?

There are several reasons why this Labor Day, unions look in the mirror and see a continuation of a decline in the labor movement:

1. An outdated "victims and villains" organizing approach. Labor's effort to generate employee support is premised on a model of employer villains and employee victims. While it is true that poor employee relations practices may lead to any number of problems, including unionization, the primary issues that concern employees today are not the fair treatment issues of 50 years ago. Employees want to know if they do a good job today, will their job be here tomorrow, or will it be outsourced, replaced by technology or relocated. Employees want to know what they can do to increase their value to the company: how to become a more valued asset so that, in turn, they can receive more compensation. The union model based on seniority does not resonate with today's employees. Rather, employees are more entrepreneurial, they do not want to wait in the queue for their turn based upon length of service. Historically, the argument for employment decisions based upon seniority was that seniority is objective and avoids favoritism. In today's environment, employers cannot afford to play "favorites" unrelated to the job. Furthermore, an array of state and federal anti-discrimination statutes lead employers to focus on differences in treatment based on business reasons, not favoritism.

2. Labor's contributions to local, state, and federal legislative successes ironically result in employees concluding they don't need unions. For example, labor strongly supports local "Fight for $15" ordinances to raise the minimum wage to $15. These ordinances nationally have been directed at the fast food and hospitality industries. Although those affected employees no doubt appreciate labor's support for their raises, they are not interested in taking one week a year of their pay and giving it to the union in the form of dues. Thus, each legislative success unions contribute to diminishes the need for employees to seek out a union.

3. Failure to play "small ball". The smaller the group of employees – such as fewer than 50 – the greater the opportunity for union success. A smaller group of employees tends to have more issues in common that drive the interest in unionization.

An example involved the United Auto Workers and the Volkswagen facility in Chattanooga, Tennessee. On February 14, 2014, Volkswagen employees broke the UAW's heart when they voted against union representation by 626 to 712. That was a "wall to wall" vote, covering all employees in the plant. On December 4, 2015, another vote occurred at the Volkswagen plant in Chattanooga, but only among the skilled trade employees. Those employees voted by a better than a two-to-one margin for union representation, 108-44. Rather than trying to hit the "long ball" at Boeing, VW, or most recently at Nissan in Canton, Mississippi, unions would be far more effective if they focused on discrete groups of employees with issues in common, rather than the overall workforce.

4. Failure to project itself as an asset to business. In labor negotiations, the only time I've ever hear a union ask, "What can we do to help the company," was when the company notified the union that it was closing or relocating its business. Unions do not communicate a value proposition. They do not take a position of what they can do to enhance an employer's competitiveness or expand the employer's brand. Instead, unions focus on executive compensation and other class issues. Ultimately, whether employees decide to unionize depends upon the answer to the question of do they think they'll be better off with or without a union, not how much executives are paid.

5. Male and stale union leadership. While working one's way from the shop floor to president of the union is admirable, unions need imaginative, aggressive, and shrewd CEOs – the type they belittle in the private sector. Unions are big business and they should be led by sophisticated business people.

Few businesses remain successful using a model which is equivalent of trying to force a pill down a cat's throat. Only when labor stops blaming employers and the law for why employees are not interested in unions, will labor be able to sing the joyous conclusion of "Looking for Love," which is "No more lookin' for love in all the wrong places,

lookin' for love in too many faces, searchin' their eyes and lookin' for traces of what I'm dreamin' of…"

New I-9 Form Effective September 18, 2017

United States Citizen and Immigration Services (USCIS) has issued a revised Form I-9, which verifies an employee's identity and authorization to work in the United States. Employers must use the new form as of September 18, 2017.

Employers must be sure the form is completed within the first three days of employment. The employee's requirement to complete Section 1 must be completed "no later than the first day of employment." An employer's I-9 record-keeping requirements remain unchanged. The form must be retained for at least three years after the employee's initial date of hire or one year after the employee's last date of employment, whichever is later. The records may be inspected by the Department of Homeland Security, the Department of Labor and the Department of Justice. They must be maintained in a manner which would be easily accessible for investigation. Most employers keep the I-9 forms in a file separate from an employee's personnel file.

The new I-9 does not change an employer's obligations in those states that require the use of the e-Verify program within three days after the employee's first day of work. Note that failure to comply with e-Verify may result in suspending an employer's right to act an employer, which means that the outcome would be to shut down the employer's business.

The new I-9 form is available for download here (https://www.uscis.gov/system/files_force/files/form/i-9.pdf?download=1).

Appellate Court Questions the Validity of Fixed Salary Pay System

The fixed salary for fluctuating work week pay system is permitted in most states and can be an ideal way to pay a salary to a non-exempt employee. With a fixed salary approach, the employee receives a recurring salary which is averaged over all hours worked when the employee works over 40 hours. Instead of time and a half for overtime, the employee receives "half time." This pay system requires a written understanding with the employee and is ideal for those jobs where fluctuation occurs due to circumstances beyond employee and employer control, such as the weather.

In the case of *Hills v. Entergy Operation, Inc.* (5th Cir. August 4, 2017), the U.S. Court of Appeals for the Fifth Circuit questioned whether a fixed salary pay system could be used where hours truly did not fluctuate. In this particular case, employees worked 36 hours one week and 48 hours the next. Although there might be a need for employees to work longer hours, generally, there was not. The employees were paid on a fixed salary for fluctuating workweek basis, which meant that the 48 week resulted in 8 hours of "half time."

According to the Fifth Circuit, the term "fluctuating" means exactly that – it does not cover a predictable, recurring schedule. The Fifth Circuit's decision is in contrast to other circuits, which have held that alternating between varying amounts of a fixed schedule is still fluctuating, and therefore, this pay system is permissible. The Fifth Circuit also said that in order for the fixed salary for fluctuating pay system to be acceptable, "the employee clearly understands that her salary is intended to compensate any unlimited amount of hours she might be expected to work in any given week."

Louisiana, Mississippi, and Texas comprise the Fifth Circuit. Employers in those states using this pay system should be sure their hours in fact fluctuate rather than a recurring predictable schedule.

LMVT and Local Wage Ordinances

The case of *Lewis et al v. The State of Alabama*, pending before the U.S. Court of Appeals for the 11th Circuit, involves the issue of a state precluding local governments from enacting local minimum wage laws. In filing a brief on behalf of the Alabama Retail Association, the Alabama

Restaurant and Hospitality Association, the Business Council of Alabama, and several national employer associations, our colleague Al Vreeland stated that "Plaintiffs have challenged the uniform minimum wage act, purely economic legislation, as racially discriminatory. The Supreme Court has directed that courts should evaluate such challenges in context and using common sense. Most specifically, the Supreme Court has directed courts to evaluate whether there is an 'obvious alternative explanation' which is more plausible then the alleged intentional discrimination. If the Court finds an 'obvious alternative explanation,' a Plaintiff's challenge is due to be dismissed." Vreeland added that "a patchwork of local minimum wage regulations creates a significant compliance program for employers with multiple locations throughout the state. As we pointed out in our brief, 22 other states have adopted similar laws for this very same reason."

The case arose in 2016, after the City of Birmingham passed a law to increase the minimum wage to $10.10 per hour. The state legislature passed a law precluding a municipality from increasing the minimum wage. Fast food workers sued the state, alleging that the state law "has a disparate negative impact on black workers in Birmingham…" and the state law "preserves a racial wage gap that dates back to the Jim Crow era."

The Current Battle over the ACA: Federal Cost-Sharing Reduction Payments

Despite increasing pressure from insurers, health professionals, patient advocate groups, and health care industry leaders during the month of July, the Senate Republicans made multiple attempts to pass some form of a health care bill that repealed some or all of the Affordable Care Act. Ultimately, the Senate Republicans and President Trump could not get enough Republican support for the bill in light of the significant problems it posed: increased premiums, diminished choices, less coverage, and a drastic increase in the number of uninsured Americans. Following the dramatic demise of the Senate GOP's health care bill, the major concern among politicians, insurance companies, health professionals, and individuals is the status of the federal government's promised cost-sharing reduction payments to insurers in the Affordable Care Act ("ACA")'s marketplace.

Immediately after the Senate voted down the GOP health care bill, President Trump tweeted his support for the collapse of the ACA exchanges, where individuals can purchase health insurance: "As I said from the beginning, let Obamacare implode, then deal. Watch!" President Trump has threatened to defund the cost-sharing reduction payments, also known as subsidies, estimated to be around $7 billion this year, which the federal government has promised to insurers participating in the ACA marketplace. These payments help to reduce out-of-pocket costs for ACA customers. More specifically, these funds are given to insurers to reimburse them for giving discounted deductibles and copays to more low-income customers.

President Trump's threats have come at a sensitive time when several insurance companies have announced their intentions to leave the marketplace exchanges in certain states due to the high costs. The Kaiser Family Foundation estimates that around 25,000 ACA customers in 38 states are facing the possibility of having no insurer offering any coverage in the marketplace exchanges next year. In light of the fact that the President could likely stop funding the subsidies through executive actions alone, there has been intense fear across party lines and throughout the healthcare industry.

In a rare bi-partisan effort, Democrats and Republicans have repeatedly asked President Trump to move forward with enforcing current individual and employee mandates, funding the cost-sharing arrangements, and avoiding a collapse of the ACA exchanges. In fact, 40 House Republicans and Democrats joined together to create a funding proposal for the federal subsidies.

Congressional concerns rose even higher in August when the Congressional Budget Office ("CBO") released a report estimating the possible impact if President Trump defunded the ACA's cost-sharing reductions. The CBO determined that if President Trump ceased these payments, insurers would leave the ACA marketplaces because of the "uncertainty about the effects of the policy

on average health care costs for people purchasing plans." Insurers would pull out of ACA marketplace exchanges serving 5% of the population. This is a major increase from the current situation wherein only two counties in the country are without at least one ACA insurer. Additionally, the CBO further estimates that to account for their lost funding, insurers in the marketplace would increase premiums by 20% in 2018 and 25% in 2020.

Suffice it to say, the report was a serious blow to President Trump's "implode" strategy, and it appears he got the message. The Trump administration recently announced it would continue to fund the ACA subsidies for the month of August. However, the administration spokesperson did not state whether the administration would provide funding after August. This move has prompted Senators to aggressively renew their efforts to craft a narrow bill of ACA "fixes" that will set aside funds for the subsidies, including scheduling bi-partisan committee hearings. These new efforts are already looking more promising than the last few attempts in light of the narrower, more bi-partisan approach.

That being said, over the past few months, the country has been on a roller-coaster of ups and downs wherein complete repeal of the ACA is likely and also seemingly dead. Some have labeled the repeal bill as a "zombie bill" that just cannot be killed. While it seems many people in Congress are ready to focus their efforts on other big goals, including tax reform, based on President Trump's tweets, it is likely he will not give up the repeal fight, despite the bi-partisan efforts to keep the core of the ACA and fix its problems. The window for making any legislative changes to the ACA is narrowing. Once Congress comes back from its August recess, it will only have a few months to tackle the ACA and other top priorities before the 2018 mid-term elections take precedent. The next few months will likely be the "make it or break it" period on health care legislation.

NLRB Tips: Circuit Courts Appear to Push Back on Activist Board

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 Courts:

Slowly but surely, the U.S. Circuit Courts of Appeal appear that they are beginning to refuse enforcement of activist Board decisions issued under the Obama administration. But, it is not all good news as the discussion below demonstrates:

Roy Spa LLC Denied Attorneys' Fees in Case Win Before Board

The NLRB in a split decision along party lines has enforced an Administrative Law Judge's (ALJ's) order dismissing the employer's request for legal fees after it won the case based on jurisdictional grounds. The dissent claimed that the General Counsel's (GC's) response to the Motion for Fees was untimely. The GC requested an untimely extension of time to file the Motion to Dismiss, but the Board found that the GC's complaint was "substantially justified." Phillip Miscimarra wrote that while he agreed on the substance of the Motion, he would dismiss the GC's response:

> In my view, the General Counsel's untimely filings in this matter cannot reasonably be explained. Accordingly, I believe the Board should have stricken the [GC's] motion to dismiss, not permitted the [GC] to file an answer to the [Equal Access to Justice Act –EAJA] application, and directed the [ALJ] to resolve the pending EAJA issues based on the record minus these untimely filings.

The Underlying ALJ Decision

ALJ Michael Marcionese, upon remand from the Board, found that Old Fashioned Barber was a legal successor to predecessor. Old Fashioned Barber made certain

unilateral changes to the bargaining unit's terms and conditions of employment. However, Marcionese also found that the Board lacked jurisdiction over the successor employer and recommended that the complaint be dismissed.

D.C. Circuit Court of Appeals Approves *Specialty Healthcare*

In mid-August 2017, the D.C. Circuit Court of Appeals approved of the *Specialty Healthcare* standard, accepting the new test as legitimate. Thus, the D.C. Circuit joins approximately seven other circuit courts finding this NLRB decision consistent with Board precedent:

> Under *Specialty Healthcare*, the Board's approach has 'remained fundamentally the same' as it was before the decision: 'are individual groups of employees so similarly situated that dividing them into separate units would be irrational.'

While pundits have predicted that the GOP majority on the NLRB would eventually overrule this decision, time is running out as *Specialty Healthcare* appears to be the law of land for the foreseeable future.

Eighth Circuit Order Reinstatement of Worker Who Shouted Racist Insults During Picketing

Meanwhile, the Eight Circuit Court of Appeals has granted enforcement of a NLRB order enforcing a decision that Cooper Tire illegally fired a worker for shouting racist insults during picket line activity.

Not all is bad news, however. Some Circuit Courts have applied, from a management perspective, common sense to the facts and come up with reasonable decisions.

Fifth Circuit Finds Workplace Rules Legal

The Fifth Circuit has partially denied enforcement of a NLRB order, finding that certain provisions of T-Mobile's / Metro PCS' employee handbooks were, in part, legal. The Fifth Circuit found that a rule that encouraged employees to "maintain a positive work environment," a workplace integrity rule that prohibited employees from arguing, fighting, or failing to treat others with respect, and an acceptable use policy limiting the usage of electronic information without approval were ALL LEGAL. These types of rules previously had been found illegal under President Obama's NLRB.

The Company argued in brief that its policies were simply "common-sense and unremarkable employee policies" that promoted objectives that are beneficial to creating a "modern workplace." The Court found that eleven other handbook policies violated the Act, and enforcement has been granted as to that finding.

D.C. Circuit Finds Employer Not Responsible For Union Arrests

Claiming that the NLRB acted more as an "advocate than an adjudicator," the D.C. Circuit refused to enforce a Board finding that ordered compensation for union organizers' arrest.

> The Board's opinion is more disingenuous than dispositive; it evidences a complete failure to reasonably reflect upon the information contained in the record and grapple with contrary evidence – disregarding entirely the need for reasoned decision-making The Board's actions in this are matter are more consistent with the role of advocate than an adjudicator.

Common sense prevailed in this decision.

Status of *Purple Communications* – NLRB Decision Giving Employees Right to Use Company E-Mail to Organize a Union

The Ninth Circuit is currently accepting briefs from the parties arguing their contrary positions. In 2014, the NRLB issued its controversial ruling establishing the standard that work email could be used by employees for unionization and other protected activity. Current Chairman Miscimarra, in dissenting opinions, opposed the Board's original decision, saying it was "incorrect and unworkable." Stay tuned for developments in this appeal and cross-petition by the NLRB for enforcement.

D.R. Horton Appeals Currently Pending Before the U. S. Supreme Court

The Board has now weighed in concerning the applicability of *D.R. Horton* class action waivers agreements between employees and employers, saying in brief that Federal Arbitration Act (FAA) does not require that the Court, in essence, overrule the National Labor Relations Act (NLRA).

The NLRB argued that upholding contracts requiring workers to give up their collective rights in favor of private arbitration agreements as a condition of employment would "eviscerate the public rights Congress protected in the NLRA."

Of course, that is NOT what arbitration agreements require if they contain "savings" clauses specifically reserving the rights of employees to engage in union or protected, concerted activity. LMVT will report on developments in this important area of the law.

Eleventh Circuit Court of Appeals Backs Waffle House

While not primarily challenged on the grounds that its class action waiver violated Section 7 NLRA rights, Waffle House's mandatory arbitration agreement has been upheld by the Eleventh Circuit Court of Appeals. The Court panel stated that:

> In the face of the Federal Arbitration Acts (FAA's) clear preference for and presumption in favor of arbitration, [the court] is obliged to enforce the parties' clear intent to arbitrate these issues.

As noted in this and previous LMVT employment law bulletins, the question of whether class action waivers violate Section 7 of the NLRA is set for decision by the U.S. Supreme Court, with a decision likely this fall or early 2018.

Partial Reversal by the D.C. Circuit Invalidates Finding that Corporate CNN a Joint Employer

The Court's panel found the Board failed to explain why its current tests for joint employer applied to corporate CNN and a staffing agency used by CNN. Thus the Court handed CNN a rare victory on overturning a joint employer finding under the NLRB's new standard. This case has been pending since 2004, and deals primarily with the discharge of staffing employees that were employed by the staffing agency, not corporate CNN. Thus, as to that portion of the petition of enforcement, the Board judgement was denied. On remand to the Board, the Court said that the NLRB could apply a "correct analysis" to find corporate CNN was a joint employer with the staffing agency. Put simply, the NLRB just failed to cross its t's and dot its i's in writing its decision.

Unfortunately for CNN, it was found to be a successor to the staffing agency employees employed formerly by CNN's Team Video Services (TVS), and thus was found guilty of manipulating the re-hiring process to avoid unionization. If this decision stands, CNN is on the hook for a large back-pay award for employees illegally not hired for their union affiliation. Look for the Republican Board to return to the old joint employer standard. However, this current partial win seems a hollow victory for CNN.

In the News:

Miscimarra Not to Return to NLRB in 2018

Chairman Philip Miscimarra has informed President Trump that he will not accept a reappointment to the Board when his current term expires in December of this year. Miscimarra cited family concerns as a reason for not accepting another term. Miscimara wrote that:

> As much as I would like to accept a reappointment, I reluctantly concluded it would not be reasonable to expect my family to make the sacrifice that would be associated with my public service for an additional five years.

Expect Miscimara to return to private practice. Marvin Kaplan was confirmed to the Board last month, while William Emanuel still awaits a vote in the U.S. Senate.

After Losing the Nissan Representation Election, the UAW Files Unfair Labor Practice Charges

The UAW has claimed that Nissan's "vicious" anti-union campaign caused it to lose the Nissan election at the Mississippi plant. In a press release, the UAW stated that

> Perhaps recognizing they couldn't keep their workers from joining our union based on the facts, Nissan and its anti-worker allies ran a vicious campaign against its own workforce that was comprised of intense scare tactics, misinformation and intimidation.

Look for the UAW to file objections to the results of the election tracking their instant filed ULP charges. Stay tuned as the battle unfolds.

EEO Tips: Notice of Right to Sue May Not End Investigation

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 the EEOC issues a Notice of Right to Sue ("RTS") its investigation is over. If the charging party does not file a private lawsuit within 90 days, the charge is dead. Right? Probably, but not necessarily.

The Code of Federal Regulations states, "Issuance of a notice of right to sue shall terminate further proceeding of any charge that is not a Commissioner charge unless [EEOC] determines at that time or at a later time that it would effectuate the purpose of Title VII, the ADA, or GINA to further process the charge." EEOC's Compliance Manual addresses "effectuate the purpose" – "Ordinarily continue investigating when the charge covers persons other than the requestor or involves an acknowledged/documented respondent policy or possible pattern of discrimination affecting others; or when the [District Director] otherwise determines that continued action would effectuate the purposes of Title VII/ADA." So the EEOC interprets this regulation as allowing the continuing processing of charges that allege pattern/practice violations and those affecting individuals beyond the charging parties. It also concludes that its District Directors have authority to continue investigation of essentially any charge after a RTS is issued, or even reopen an investigation at some later date. And there seems to be no time limit regarding that "later" date.

Even in cases where charging parties have settled with the respondents, the EEOC can still continue to investigate. If it then finds cause to believe that unlawful discrimination occurred, it can still file suit on behalf of that person. Even though the terms of settlement likely preclude that charging party from receiving any proceeds of further settlement or judgment, the EEOC will collect any judgment.

These post-RTS investigations, like any EEOC investigations, may focus on the specific allegations stated in the charge, may expand to cover individuals not named in the charge or may expand to issues discovered during the investigation. The circuit courts are divided on how far the agency can expand an investigation from the original charge allegations, and are even divided on whether an investigation can continue after the RTS is issued. The majority of circuits have ruled that continued investigations and expanded investigations are allowed. They do vary on the circumstances and degrees of expansion. However, EEOC is responsible for interpreting the laws it enforces and regulations that govern it until or unless the Supreme Court interprets differently. The EEOC rarely changes its interpretations or guidance for enforcement based upon district or circuit court decisions, even for its offices within those districts or circuits. For the time being, the EEOC can and will increase the scope of an investigation based on the number of individuals effected by a suspect policy, the number reporting to a specific decision maker, or policies/practices discovered while investigating a filed charge.

The vast majority of investigations do end when the RTS is issued. But if a charge contains an issue of particular interest to the EEOC, or it discovers something that

peaks its interest during the investigation, it is important to know that it does not have to close its case.

OSHA Tips: OSHA and Injury Tracking Rule

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 launched its injury tracking application on August 1, 2017, from which certain employers must electronically submit their completed 2016 Form 300A. The Agency previously published a notice of rulemaking to extend the date by which these employers must electronically submit this information from July 1, 2017, to December 1, 2017. The application which is on a secure website provides three options for this data submission: manually entering data into a web form, uploading a CSV file, and transmitting data via an AP application programing interface (API). The website includes a set of ITA job aids and FAQs. The application also includes a help request form that can be accessed at the bottom of each page within the application.

The requirement to electronically submit injury and illness records applies to establishments with 250 or more employees. These establishments are currently required to keep OSHA injury and illness records as are establishments with 20-249 employees that are classified in certain industries with high rates of occupational injuries and illnesses. Covered establishments with 250 or more employees must electronically submit information from OSHA Form 300 (log of work-related illnesses and injuries) and also OSHA Form 301 (injury and illness report). Covered establishments with smaller numbers of employees must electronically submit information OSHA Form 300A.

Wage and Hour Tips: When is Travel Time Considered Work Time?

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.

Travel Time

One of the most confusing areas of the FLSA is determining whether travel time is considered work time. The following provides an outline of the enforcement principles used by Wage Hour to administer the Act. These principles, which apply in determining whether time spent in travel is compensable time, depend upon the kind of travel involved.

Home to Work Travel

An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

Home to Work on a Special One-Day Assignment in Another City

An employee who regularly works at a fixed location in one city is given a special one-day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct (not count) time the employee would normally spend commuting to the regular work site. Example: A Huntsville employee that normally spends ½ hour traveling from his home to his work site that begins at 8:00am is required to attend a meeting in Montgomery that begins at 8:00 am. He spends three hours traveling from his home to Montgomery. Thus, employee is entitled to 2 ½ hours (3 hours minus the ½ hour normal home to work time) pay

for the trip to Montgomery. The return trip should be treated in the same manner.

Travel That is All in the Day's Work

Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

Travel Away from Home Community

Travel that keeps an employee away from home overnight is considered as travel away from home. It is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy, Wage Hour does not consider working hours the time spent in travel away from home outside of regular working hours, such as a passenger on an airplane, train, boat, bus, or automobile.

Example – An employee who is regularly scheduled to work from 9am to 6pm is required to leave on a Sunday at 3pm to travel to an assignment in another state. The employee, who travels via airplane, arrives at the assigned location at 8pm. In this situation the employee is entitled to pay for 3 hours (3pm to 6pm) since it cuts across his normal workday but no compensation is required for traveling between 6pm and 8pm. If the employee completes his assignment at 6pm on Friday and travels home that evening, none of the travel time would be considered as hours worked. Conversely, if the employee traveled home on Saturday between 9am and 6pm, the entire travel time would be hours worked.

Driving Time

Time spent driving a vehicle (either owned by the employee, the driver, or a third party) at the direction of the employer while transporting supplies, tools, equipment or other employees is generally considered hours worked and must be paid for. Many employers use their “exempt” foremen to perform the driving in order not have to pay for this time. If employers are using nonexempt employees to perform the driving, they may establish a different rate for driving from the employee’s normal rate of pay. For example, if you have an equipment operator who normally is paid $20.00 per hour you could establish a driving rate of $10.00 per hour and thus reduce the cost for the driving time. The driving rate must be at least the minimum wage. However, if you do so you will need to remember that both driving time and other time must be counted when determining overtime hours and overtime will need to be computed on the weighted average rate.

Riding Time

Time spent by an employee in travel, as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions, to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5pm and is sent to another job, which he finishes at 8pm, and is required to return to his employer's premises arriving at 9pm, all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.

The operative issue with regard to riding time is whether the employee is required to report to a meeting place and whether the employee performs any work (i.e. receiving work instructions, loading or fueling vehicles and etc.) prior to riding to the job site. If the employer tells the employees that they may come to the meeting place and ride a company provided vehicle to the job site and the employee performs no work prior to arrival at the job site, then such riding time is not hours worked. Conversely, if the employee is required to come to the company facility or performs any work while at the meeting place, then the riding time becomes hours worked that must be paid for. In my experience, when employees report to a company facility there is the temptation for managers to ask one of the employees to assist with loading a vehicle, fueling the vehicle, or some other activity which begins the employee’s workday and thus makes the riding time

compensable. Therefore, employers should be very careful that the supervisors do not allow these employees to perform any work prior to riding to the job site. Further, they must ensure that the employee performs no work (such as unloading vehicles) when he returns to the facility at the end of his workday in order for the return riding time to not be compensable. Recently, an employer told me that in an effort to prevent the employees performing work before riding to a job site, he would not allow the employees to enter their storage yard but had the supervisor pick the employees up as he began the trip to the job site. In the afternoon the employees were dropped off outside of the yard so they would not be performing any work that could make the travel time compensable.

Update on the White Collar Regulations

The status of the revised regulations that deal with the "white collar" exemptions for executive, administrative, professional, and outside sales employees continues to be in the forefront. As I am sure you know, a U.S. District Court in Texas issued an injunction in late 2016, putting the regulation on hold. The previous administration of the Department of Labor filed an appeal with the Fifth U.S. Circuit Court of Appeals which is still pending. According to the latest information I have seen the Appeals Court has set a hearing in the case for early October. At this time we can only guess when that court might issue a ruling in the case, so stay tuned as I will try to give you updates each month. In addition, Wage Hour has issued a request for information from the public regarding the possibility of revising the regulation even before it goes into effect.

If you have questions or need further information, do not hesitate to contact me.

2017 Upcoming Events

EFFECTIVE SUPERVISOR®

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

Birmingham – October 19, 2017
Vulcan Park & Museum
1701 Valley View Drive, Electra Room
Birmingham, Alabama 35209

Click here for brochure or to register.

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.

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Alana Ford at 205.323.9271 or aford@lehrmiddlebrooks.com.

Did You Know…

… that retailers reached a $3.5 million wage and hour settlement for employee "screening time"? The case involved T.J. Maxx, Marshalls and HomeGoods and affected 82,500 employees. The issue was whether time employees spent at the end of their shift going through security screening was considered "working time." The U.S. Supreme Court in 2014 ruled that end of the shift security screenings for order pickers at Amazon was not compensable, as it was not considered "integral and indispensable" to the job. Apparently, the Supreme Court's decision was not the last word on this matter.

… that UPS agreed to pay $1.7 million to settle its "maximum leave" litigation with the EEOC? *EEOC v. United Parcel Service, Inc.* (N.D. Ill., July 28, 2017). The case involved a policy where employees who could not return to work at the end of a 12-month medical leave were automatically terminated. The EEOC alleged that

this automatic termination violated the Americans with Disabilities Act. Under the ADA, an employer is not required to accommodate an indefinite leave or a leave where it is not certain that the employee will be able to return to work at its conclusion. However, a policy with a fixed cutoff date is inconsistent with the ADA's requirement to evaluate reasonable accommodation on an individual basis.

… that President Trump submitted a nominee to fill the last vacancy at the EEOC? President Trump on August 1 announced that he was submitting the name of Daniel Gade for the last open seat on a five-member Commission. If the Senate confirms Gade and the President's nominee for Commission Chair, Janet Dhillon, that will result in a 3-2 Republican to Democratic presence among Commissioners. Gade, a military veteran, received two purple hearts and lost his right leg in a tour of duty in Iraq. He recently taught at the United States military academy at West Point and served in the George W. Bush administration. When Dhillon and Gade are confirmed by the Senate, we expect the Commission to immediately consider rolling back the pay band EEO-1 reporting rule scheduled to become affective in March 2018.

… that time off for a temporary employee may not necessarily be a reasonable accommodation? *Punt v. Kelly Services* (10th Cir. July 6, 2017). Punt was a temporary employee assigned to General Electric as a receptionist. The job defined the essential functions as "being physically present at the lobby/reception desk during business hours". Early in her assignment at GE, Punt was absent several times due to her diagnosis of breast cancer. After she told GE that she would need an undetermined amount of additional time off, GE terminated her temporary assignment. In ruling in GE's favor, the court stated that time off may be a reasonable accommodation when "in the near future" it will enable the employee to perform the essential job functions. Because the employee in this case needed leave for an indefinite period of time, the accommodation request was unreasonable and did not have to be honored. The Court also noted that "particularly for temporary employees, the ability to report to work consistently is a necessary part of the job."

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