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Inside this issue:

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The Federal Reserve, Race, and Opioid Use

No, this isn't a clue for a *Jeopardy!* question. Created in 1913 with the passage of the Federal Reserve Act, the Fed's monetary policies are focused on three areas: price stabilization, moderation of interest rates, and maximization of employment. The Fed has started to focus on employment issues and their effect on the economy. Recently, the Fed through its Chair, Janet Yellen, expressed concerns about an increasing gap in wages based upon race and a substantial decline of male participation in the workforce due to opioid use.

In a recent report from the San Francisco Fed, researchers found, "[e]specially troubling is the growing unexplained portion of the divergence in earnings for blacks relative to whites." For example, the wage gap between white and black men in 1979 has actually widened, from 20% to 30%. There is also an increasing gap for black women compared to white women. According to the Fed, "The opportunity to succeed is at the foundation of our dynamic economy." In this context, large, persistent, and growing shortfalls for African Americans, or any other group, are troubling. Historically, the Fed has not emphasized pay disparity issues, preferring to focus on its monetary policy functions. However, recently the Fed in Philadelphia and Minneapolis established institutes to study pay inequality. The Fed stated that the problem with wage disparity is that those who work at lower wage levels have limited opportunity to climb the economic ladder. Often they cannot afford to take time off for training or education, both of which enhance income-earning potential.

In recent Senate testimony, Fed Chair Janet Yellen stated about the opioid crisis and the decline in labor force participation among working-age men, "I don't know if it's causal or if it's a symptom of long-running economic maladies that have affected these communities and particularly affected workers who have seen their job opportunities decline." According to a study by Alan Krueger, an economist at Princeton University, "approximately 20% of all men in the prime ages for work who do not work use prescription pain killers on a daily basis."

While the Fed's primary emphasis is on monetary policy, its responsibility to maximize employment will lead to greater focus on opioid use and racial disparities in pay. The Fed's testimony on both subjects before the Senate illustrates how significant those issues are nationally.

Court tells EEOC: Cure Wellness Regulations

The EEOC in 2016 issued regulations which tried to coordinate the ADA and GINA mandate that participation in wellness programs be voluntary with wellness program regulations under the Health Insurance Portability and Accountability Act (HIPAA). The EEOC regulations became effective on January 1, 2017. In the regulations, the EEOC stated that participation in wellness programs which require disclosure of ADA and GINA protected information will be considered voluntary if the incentive does not exceed 30% of the cost of employee-only coverage. AARP sued. The basis for AARP's claim was that the 30% savings could not be the result of truly voluntary participation. For example, an employee may not be able to afford single coverage, therefore the employee participates in the wellness program to receive the 30% reduction in cost incentive.

On August 22, 2017, in the case of *AARP v. Equal Employment Opportunity Commission,* a United States District Court for the District of Columbia judge determined that the EEOC did not provide a reasonable basis for explaining at how it arrived at a 30% incentive as "voluntary." The Court stated that the EEOC did not provide any "concrete data, studies, or analysis that would support any particular incentive level as the threshold for determining that participation was 'voluntary'." The Court directed the EEOC to reassess its regulations. We expect the EEOC will issue enforcement guidance based upon this decision. Curiously, the 30% regulation remains effective until further notice from the Commission.

Union Approval Rating Increases; So What?

Since 1936, the Gallup organization has conducted a public opinion poll about labor unions. According to its most recent poll, released on August 30, 61% of respondents said they approve of unions, the highest level since 65% in 2003. The increased approval rating is largely attributed to labor's political initiatives, such as its national "Fight for 15" effort to raise wages in the hospitality and service industry. The challenge for labor, however, is to transform a positive public perception into membership.

According to AFL-CIO president Richard Trumka, "We have to ramp up the scale on how we approach organizing and we have to become better at coordinating with each other. It is no longer a smart strategy to individually pursue units." That is, Trumka suggests unions coordinate organizing activities. Although unions win nearly 75% of all elections, the number of elections continues to decline.

The Americans for Prosperity Foundation, which includes the Koch brothers as its supporters, commented that Trumka's latest strategy will have no impact on whether employees choose to unionize. Granted, APF is an adversary of labor, but in our perspective, they accurately stated that labor's "problems stem from their poor relationships with rank and file members, a relationship they do not help by coercing those members into paying dues."

EEOC Sues over Parental Bonding Leave

The EEOC on August 30, 2017, sued Estée Lauder for sex discrimination based upon the company's parental leave policy. The policy allows for six weeks of paid bonding leave to "primary caregivers." Those who are considered "secondary caregivers" are provided two weeks of paid parental leave for bonding. The company also provides primary caregivers return-to-work flexibility, but not so for secondary caregivers. A male employee in Maryland requested six weeks of paid parental leave for bonding purposes after his child was born. That request was denied, and he received only two weeks of paid leave. Furthermore, he did not have the flexible scheduling opportunity as a "secondary" caregiver. The EEOC alleges that the male employee was told that the only way he could qualify for six weeks of paid parental leave as a primary caregiver was if he were in a "surrogate" situation. That is, if someone other than his partner gave birth to his child and he assumed primary caregiver responsibilities for that child.

Note that in general, paid parental leave is not required. Rather, it is an example of how employers promote "family friendly" benefits and scheduling options. Such benefits should be reviewed by counsel to be sure that however well-intentioned, the outcome is not one where it has a discriminatory impact based upon a protected class status.

Is Labeling Conduct as "Sexual Harassment" Enough to Create a Potential Retaliation Claim?

Employers are sometimes faced with the question of if the employee says that he or she has been harassed or discriminated against, is that alone sufficient to protect the employee from a claim of retaliation? The answer to that question was "no" in the case of *Owens v. Old Wisconsin Sausage Company* (7th Cir. August 31, 2017).

The case involved a human resources director who had an intimate relationship with another employee. If the company became aware of a manager who was involved with another employee, the company would approach the manager and express its concern about a potential conflict of interest and the perception among other employees of inappropriate behavior by the manager. When the employer asked the HR manager about whether she had a relationship with another employee, she refused to answer. She then added that the employer's questions were "borderline sexual harassment." Ultimately, the HR manager was terminated for hiring her boyfriend and lying to the company about the relationship.

In order to have a bona fide claim of retaliation, the court stated that an employee must have an objective basis for believing that she engaged in activity protected by the laws that prohibit discrimination (including harassment and retaliation). In this particular instance, the employee presented no evidence that the employer's inquiry of her relationship with another employee was discriminatory or that her termination was discriminatory. The employer's inquiry was consistent with that it made of male managers where the employer had reason to believe they were involved in a relationship with another employee. Labeling the employer's questions of her as "borderline sexual harassment" was insufficient to constitute objective evidence that she engaged in protected activity.

If an employee in a conclusory manner accuses the employer of discrimination, harassment, retaliation, or other conduct against its policies (like bullying), the employer immediately should ask the employee to describe the specific actions or facts which the employee believes form the basis for his or her conclusion. Using the "magic words" of harassment or discrimination alone does not necessarily mean an employee has engaged in protected conduct and so is deserving of legal protections against retaliation. Furthermore, with approximately half of all employment discrimination charges alleging retaliation, the employer should be sure before taking adverse action toward the employee, it can substantiate that the action was consistent with how other analogous situations were handled and the employer would have acted in this manner without regard to an employee's potentially protected complaint.

Protecting Employee Health Information During Emergency Situations

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) maintains a "Privacy Rule" that protects a person's health information from unauthorized disclosure by "covered entities." Covered entities are health care providers and individual or group health plans that provide and pay for the cost of medical care, which often include employers. The Privacy Rule balances individual protection with disclosures necessary for medical treatment or responding to certain emergencies. For example, an employee's protected health information (PHI) can be disclosed to law enforcement to comply with a court order, respond to an administrative subpoena or investigative demand, or when PHI is evidence of a crime, among other relative situations. However, when the disclosure is not a permitted disclosure, the covered entity must obtain individual authorization.

Even in emergency situations, covered entities are expected to continue to implement safeguards to protect

patient or employment information against impermissible disclosures.

This can be a struggle for employers and other covered entities during emergencies like weather events or other natural disasters. Hurricane Harvey and Irma are good examples of emergency situations wherein certain disclosures might be necessary for medical treatment or to identify, locate, or notify family members, guardians, or other people responsible for an employee's care. Harvey and Irma displaced thousands of people, separated families across state laws, and affected communications channels through downed power lines and closed-off internet access. As such, in these situations, obtaining patient or employee permission to disclose PHI to family, public health officials, or medical treatment providers is almost impossible. Additionally, the potential for significant damage to property can impact a covered entity's computer and data systems, placing their employee and patient PHI in danger. This type of situation puts covered entities between a rock and a hard place as impermissible disclosure and/or damage of PHI can result in significant monetary penalties for the covered entity.

In response to Hurricane Harvey and Irma, Health and Human Services (HHS) Secretary Tom Price released a Limited Waiver of HIPAA Sanctions and Penalties. The Waiver explained that while the HIPAA Privacy Rule was not suspended, HHS was authorized to waive certain provisions to facilitate necessary communications and treatment. More specifically, HHS waived sanctions and penalties against hospitals that failed comply with certain HIPAA provisions including: (1) the requirements to obtain a patients agreement to speak with family members regarding medical care, (2) the requirements to distribute a notice of privacy practices, and (3) a patient's right to request privacy restrictions and confidential communications.

While this waiver was not extended to all covered entities, was solely applicable to hospitals, and was arguably not broad enough, it is important for all employers to recognize and understand it. When emergency situations like weather events or natural disasters impact your local area and cause concern for employee health and safety, where practical, you should follow HHS press releases and related news to determine if there are any relevant waivers or protocols that might impact you as a covered entity.

Many entities and health-related organizations see HHS's waiver action as a good sign that HHS will be more willing to cut through red tape in emergencies and assist covered entities in doing their job and helping employees and patients. As such, it will be important to follow future developments in this area. To aid covered entities in understanding permissible disclosures during an emergency, HHS has a HIPAA Privacy Decision Tool for Emergency Preparedness Planning located on its website.

Additionally, these recent emergency events show the importance of having systematic safeguards and protocols in place during emergencies. HHS's Office of Civil Rights issued another bulletin following Hurricanes Harvey and Irma regarding how covered entities should protect electronic protected health information (ePHI) during an emergency. HHS stressed that specifically during emergencies, it is crucial for covered entities to keep ePHI available and accessible. The bulletin reminds covered entities that they are required to create and maintain contingency plans to protect information systems that could be damaged during an emergency or natural disaster.

A covered entity's emergency contingency plan must include several details:

(1) A data backup plan designed to create and maintain copies of ePHI that is retrievable offsite or on the Cloud;

(2) Disaster recovery procedures that are designed to restore lost data, including maintenance of hardware and applications and contain information for necessary vendors; and

(3) An emergency mode operational plan, which outlines procedures to protect ePHI during an emergency, including identifying crisis team members and outside resources to support emergency operations and creating and testing an evacuation plan.

HIPAA also requires covered entities to periodically test, evaluate, and revise contingency plans to ensure effectiveness. Covered entities are also required to determine what software applications and data are most critical to support and protect during an emergency and adapt their contingency plan as necessary.

As hurricane season continues and winter weather hazards are on the horizon, it is crucial for all covered entities, including employers, to take steps to ensure data systems are sufficiently protected and can outlast a potential weather-related emergency. This will likely depend on a covered entity's size, volume of data, and operational systems currently in place. As such, it is important for any covered entity concerned about their information-systems' security protocols and procedures to discuss current and additional protections with their IT Department and legal counsel.

Miscellaneous NLRB Topics and News Update

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.

Long-Running Case on Supervisor Status Sent Back to NLRB for Another Round.

In *New Vista Nursing and Rehabilitation,* before the Third Circuit Court of Appeals for enforcement, the Court has remanded the case to the NLRB. This case illustrates the power of federal courts to reject petitions for enforcement when the NLRB analysis does not conform to circuit court precedent.

This case is still ongoing after more than six years after LPNs voted to be represented by the Union. Writing for the Court, Judge Brooks Smith said the Board failed to apply the correct analysis that the Third Circuit considers relevant to determining supervisory status, so the court refused to enforce the NLRB decision. The Court said the NLRB had used a four-part test to find the LPNs not to be supervisors, but the Court said the proper legal analysis only involves a three-prong test, at least in the Third Circuit.

Under the three prong test, the Court examines whether an alleged supervisor has the authority to choose between 1) different types of discipline, 2) whether the alleged employee initiates the disciplinary procedure, and 3) whether the discipline becomes a part of the employee's permanent record, with a real potential for further consequences.

Stay tuned for further developments in this apparently never-ending saga. By the way, there was a dissent by this three judge panel, and LMVT will see if it becomes a basis for a motion for reconsideration by the NLRB before the full court.

Another Supervisory Case – *National Union of Hospital and Health Care Employees*

In this case, the Board, in a split decision, found that care-managers were not supervisors within Section 2(11) of the Act. The Employer had argued that the care managers were 2(11) supervisors and that the election should be set aside because they had engaged in pro-union activity that tainted the election results.

Written by now-Chairman Philip Miscimarra, the dissent would remand the case back to the Acting Regional Director to consider whether election was interfered with by supervisors making pro-union statements. Contrary to the majority, Miscimarra would find that the care managers were supervisors because they both assign and reasonably direct other workers within the meaning of Section 2(11) of the Act.

Expect the Employer, Lakeside Avenue Operations LLC d/b/a Powerback Rehabilitation, to appeal this case by testing certification and going before a Circuit Court on a refusal to bargain charge.

D.C. Circuit Court Rules on a *Weingarten* Case – Finding Decision Only Applies to Mandatory Meetings

Employees have no right to expect union representation in their employer's peer review committee hearings. *MMC, LLC, d/b/a Menorah Medical Center* (D.C. Cir.

2017). In its August 18, 2017 decision, the Court ruled that the peer review meetings were not truly mandatory, and therefore *Weingarten* did not apply.

The disciplined nurses received letters from the hospital saying that they could appear before the peer review committee "if they choose", and invited the nurses to "submit a written statement – in lieu of an appearance."

An employee's *Weingarten* right is infringed when an employer compels him [or her] to appear at such an interview by denies him [or her] union representation. Conversely, absent compulsory attendance, the right to union representation under *Weingarten* does not arise.

As the NLRB won on some request for information allegations, the educated guess is that the NLRB will let this dog lie. The Union is not happy with the ruling and, in all probability, has standing to appeal as a permissive intervenor. It may well exercise that standing. A Union spokesperson argued that, "When there's a meeting that's going to make a determination about whether you're still going to have a job . . . it's not really voluntary. You have to go."

Interestingly, President Obama's unsuccessful Supreme Court nominee, Chief Judge Merrick Garland, sat on this panel. As you will recall, the Senate declined to vote on Garland's nomination.

A Rare Win for Confidentiality Before the Board

In *Macy's Inc.,* 365 NLRB No. 65 (2017), the Board found that the department store may prohibit employees from using or disseminating confidential customer information. The Employer's handbook prohibited employees from taking customers names and contact information from the Company records. The majority of the three member panel stated:

> Macy's is entitled to protect information contained in its own customer records, and the National Labor Relations Act 'does not protect employees who divulge information that their employer lawfully may conceal.

Former Chairman Mark G. Pierce predictably dissented, saying that since employees frequently use the information in the performance of their duties, employees should be able to use the information in organizing or lawful protests.

The NLRB found several other handbook provisions illegal, and the Order, in my opinion, is expected to be enforced, in all likelihood voluntarily.

In the News

NLRB General Counsel Nomination

Management attorney Peter Robb has been nominated to replace NLRB General Counsel (GC) Robert Griffin when his term expires in October 2017. The next GC will play a significant role in deciding whether the NLRB pursues the expanded joint employer test based upon the Board's 2015 *Browning-Ferris* decision.

Although Robb has met with some Democratic opposition in the Senate, expect him to be ultimately confirmed by this September or early October 2017.

Labor Organizing Slows in Right-to-Work States

While the Trump administration slowly moves to put its stamp on federal labor and employment policy, some States have made it more difficult to organize. In this regard, some 28 states have passed right to work laws. While petitions are down overall now, they are really down in right to work states: in 2016, 3.3 times as many petitions were filed in non-right-to-work states than in right-to-work states. A Teamster organizer said that "disincentives" in right-to-work states were problematic, "You end up working at a great expense with unknown outcomes and an unknown number of workers who will actually decide to pay dues."

Smaller micro-units and the free-rider issue appear to be significant problems for unions in right-to-work states.

What is going on with EEO-1?

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.

Employers who are required to submit EEO-1 reports probably already know that an indefinite reprieve has been issued as far as the new form requiring data on employee wages and hours worked (a.k.a. Component 2). On August 29, the Office of Management and Budget (OMB) published its stay of the new sections of the EEO-1 form pending review. The EEOC announced on September 15 that until further notice, EEO-1 filers should not supply the income and W-2 data required by its notice issued in September 2016. Both agencies state that employers should continue to submit the race, ethnicity, and gender information as required in the past.

OMB is authorized to determine whether collections of information meet the standards of the Paperwork Reduction Act. And it may review a previously approved collection of information if the circumstances related to that collection have changed and/or the burden estimates provided by the EEOC were erroneous. OMB stated that each of these conditions for examination of the revised EEO-1 were met. After approval, EEOC released data file specifications for employers to use in submitting EEO-1 data that were not released for public comment, were not included in the supporting statement for collection of information, and were not accounted for in its burden estimates. OMB also cited concerns that some aspects of the expanded EEO-1 lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues.

I seriously doubt that Component 2 of the EEO-1 form will return in the foreseeable future, if ever. President Trump campaigned against burdensome regulations on businesses/employers. Acting EEOC Chair Victoria Lipnic voted against it while a Commissioner and voiced opposition to it after her appointment as Acting Chair. However, her opposition to these reporting requirements is not an indication that she is soft on equal pay issues. She has stressed them as a priority for the agency but questioned whether employer reporting requirements are the best way to accomplish the goals of equal pay laws. Janet Dhillon, President Trump's nominee to chair the EEOC, vowed during her confirmation hearing on September 19 to make collection of pay data by the agency a priority. Since Ms. Dhillon has spent her career advising and representing corporations, if confirmed, I do not expect her to support more regulation on businesses or the return of Component 2. I do expect that she and the new majority Republican Commission will look for more creative and less onerous ways to obtain some comparative wage data.

Even though employers will not need to collect or submit the wage and hours worked information during OMB's review, it is important to note that the new submission dates and snapshot periods announced by the EEOC in September 2016 remain in effect. The 2017 EEO-1 report is to be submitted by March 31, 2018, and the snapshot period for that year and going forward will be October 1 through December 31. Given that the future snapshot range will change to October through December, employers in retail and other industries that hire large numbers of temporary employees during that period should be mindful that some snapshot data may not be representative of their workforces.

As always, feel free to contact me with EEOC related questions or topics you would like to see addressed in this bulletin.

OSHA and Fatal Injuries in 2017

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.

As usual, OSHA activities in 2017 included the investigation of fatal accidents. Examples of these include the following:

- A worker died in a fall from a tree
- A worker died in a fall from a ladder
- A worker died after being struck by a front-end loader
- A worker drowned when a cart fell into a dam
- A worker was fatally injured when a wall collapsed
- A worker died in a trench collapse
- A worker was fatally crushed between a bulldozer and a storage container
- A worker was fatally crushed when a truck rolled over him
- A worker was fatally crushed by a load of steel sheets
- A fatality occurred when a worker was crushed by a compactor plate

Occupational injuries and fatalities may be encountered in a wide range of work activities. Some exposures tend to prevail in frequency. These include falls and electrical exposures.

Wage and Hour: White Collar Exemptions

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 previously discussed, Wage Hour published some substantial revisions to the regulations governing these exemptions to be effective on December 1, 2016. In September 2016, twenty-one states and the U.S. Chamber of Commerce filed separate suits in an attempt to get the changes overturned. In November 2016, a U.S. District Court in Texas found that Wage Hour did not have the authority to make those changes and issued a nation-wide injunction prohibiting the changes from taking effect. In addition, on August 31, the Court issued an opinion striking down the rule. On September 5, the U.S. Department of Justice asked the Fifth Circuit Court of Appeals to drop the appeal that was filed last December. Thus, it appears that the proposed changes are dead at this time. Even though the District Court order remains in effect, there could be changes in the salary requirements in the near future as Wage Hour has issued a request for information regarding possibly revising the suggested changes in the salary rate. Thus, I am of the opinion that Wage Hour will most likely issue some revisions later this year with a substantially lower salary requirement. At this time we do not know what Wage Hour might propose.

Because a large percentage of the violations found by Wage Hour are due to the incorrect application of the duties tests, I am revisiting the requirements for the management exemptions. For many years these were referred to as “White Collar” employees but in today’s world they no longer carry that connotation, and they are now referred to as the EAP (Executive, Administrative and Professional) regulations.

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional, and outside sales employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at no less than $455 per week. Under the current regulations there is a separate duty test for “highly compensated employees” that is established at $100,000 annually.

Even though the salary requirements may be the primary issue, employers must remember the application of the exemption is not dependent on job titles but on an employee’s specific job duties and salary. In order to qualify for an exemption, the employee must meet *all* the requirements of the regulations.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week;

- The employee's primary duty must be managing the enterprise or managing a customarily recognized department, or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

This exemption is typically applicable to managers and supervisors that are in charge of a business or a recognized department within the business such as a construction foreman, warehouse supervisor, retail department head, or office manager.

Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

This exemption may be applicable to certain management staff positions such as Safety Directors, Human Resources Managers, and Purchasing Managers. Despite its name, it does not apply to administrative assistants (except in rare circumstances where an administrative assistant also performs such functions). Of the exemptions discussed in this article, the administrative exemption is the most difficult to apply correctly due to application of the "discretion and independent judgment" criteria with respect to matters of significance.

I recently saw where the Ninth Circuit Court of Appeals determined that a bank's mortgage underwriters lacked the duties to qualify for the exemption. The Court held that the employees were engaged in "production" work rather than management of the firm and thus were not exempt. The Court went on to quote for a 1945 U. S. Supreme Court opinion that held that application of the FLSA was to be "construed widely while exemptions are to be construed narrowly." In the 1945 ruling the Supreme Court referred to a statement made by President Franklin Roosevelt in the 1930s setting forth this premise.

Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Examples of employees that could qualify for the exemption include engineers, doctors, lawyers, and teachers.

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring invention,

imagination, originality or talent in a recognized field of artistic or creative endeavor.

Typically this exemption can apply to artists and musicians.

Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week or at an hourly rate not less than $27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:

  1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

  2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

  3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

  4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

This exemption does not apply to employees who maintain and install computer hardware.

Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

You will note that this exemption is the only one in this group that does not have a specific salary or hourly pay requirement. Thus, the exemption may be claimed for outside sales employees that are paid solely on a commission basis.

The application of each of these exemptions depends on the duties actually performed by the individual employee rather on what is shown in a job description plus the employee must meet each of the requirements listed for a particular exemption in order for it to apply. Further, the employer has the burden of proving that the individual employee meets all of the requirements for an exemption. Therefore it is imperative that the employer review each claimed exemption on a continuing basis to insure that he does not unknowingly incur a back wage liability. If I can be of assistance in reviewing your positions please do not hesitate to contact me.

Wage Hour Administrator

On September 1, 2017, the White House announced the nomination of Cheryl Stanton to become the Wage Hour Administrator. Presently, Ms. Stanton is the head of the South Carolina Workforce Agency. Previously, she had worked for the White House during the George Bush administration and with a couple of large law firms that represent employers. The position is subject to Senate confirmation so it may be some time before she can be approved and begin working in the position.

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
(205) 933-1409
www.visitvulcan.com

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 Alana Ford at 205.323.9271 or aford@lehrmiddlebrooks.com.

Did You Know…

…that renegotiation of NAFTA will include focus on right-to-work laws? Twenty-eight states have enacted right-to-work laws, which prohibit employers and unions from agreeing to "union security" language. The U.S., Canada, and Mexico comprise the NAFTA participants and are about to begin a renegotiation of that treaty. Canada is pushing for the U.S. to eliminate right-to-work laws. Why? Canada is concerned that Canadian companies will find U.S. right-to-work states attractive for relocating their businesses. Advocates for the Canadian proposal state that "protections for workers are crucial for addressing the job losses and stagnant incomes NAFTA has produced in the United States over the past few decades."

…that it was illegal for an employer to terminate an employee who failed to sign a confidentiality agreement? *NLRB v. Long Island Ass'n for AIDS Care, Inc.* (2nd Cir. August 31, 2017). Employees were required to sign a comprehensive confidentiality agreement protecting client and patient information and also promising not to disclose employment related matters to co-workers. An employee agreed with confidentiality language regarding patients and clients, but wrote on the confidentiality agreement that he was signing it "under duress" because he disagreed with the limitation of sharing information with employees. Rather than simply accepting the form as the employee presented it, the employer responded by terminating his employment. The court upheld the NLRB's position that prohibiting discussions with co-workers violated the employee's Section 7 rights. The Court stated that "an employer may not require even one individual employee to agree to abide by unlawful restrictions as a condition of employment."

…that the Senate Appropriations Committee rejected merging the EEOC and the OFCCP? The Trump administration had proposed combining both agencies, because of its belief they had overlapping responsibilities and in an effort to reduce costs. According the Senate Appropriations Committee, the agencies have different areas of focus and enforcement structures and, therefore, merging the two was unreasonable.

… That Iowa's "Recertification" law became effective September 12? There are 1,203 public sector bargaining units in Iowa covering 120,000 employees. Iowa enacted a state law that requires each time before a new contract can be negotiated on behalf of public sector employees, those employees must vote on whether or not they want to continue with union representation. Furthermore, in order for the union to continue as the certified bargaining representative, it must receive a majority of votes among all eligible voters, not just among those who vote. Previously in Iowa and currently under the National Labor Relations Act, a union will be selected as the bargaining representative if a majority of those who vote choose the union. Thus, if there are 100 employees, 80 of whom vote, 41 of those employees may bring about union representation for all 100. In Iowa, if 80 vote, 51 of those 80 must vote for the union – that's a majority of all employees, not just all voters. The Iowa law is another

example of how unions will have to focus their resources on trying to reduce the drain of members and funds which will inevitably be an outcome of laws such as Iowa's and right-to-work.

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