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Your Workplace Is Our Work®

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EEOC Sues 71 Employers In September

FY 2017 (Sept. 30) ended with the EEOC filing 71 lawsuits, the highest number in any one month we have ever reported. Thirty of those lawsuits alleged ADA violations and five alleged pregnancy discrimination. Thus, virtually half of all lawsuits alleged discrimination based on medical conditions. Eight of the lawsuits alleged Equal Pay Act violations: an indication of the agency's continued emphasis on wage inequality claims. Twenty-four lawsuits were filed in southern states. The EEOC filed a total of 165 lawsuits during FY 2017, compared to 86 for FY 2016.

The emphasis on "medical issues" discrimination is evidenced by the varied medical conditions where the EEOC alleged ADA violations: benign tumor, drug addiction, mobility impairment, hearing and visual impairments, diabetes, "situational depression," HIV, rheumatoid arthritis, panic attacks, spinal cord injury, and breast cancer. The EEOC also alleged that employer leave policies violate the ADA.

During FY 2017, the EEOC settled 90 cases with a total of $41.9 million obtained in monetary benefits, an average of $465,814 per case. This total was skewed by three cases where substantial settlements were obtained. During FY 2016, the EEOC settled 139 cases and obtained $52.2 million in monetary benefits, an average of $375,540 per case.

It is not a coincidence that the EEOC's robust litigation efforts come as its budget is under scrutiny. These case filings and monetary benefits obtained will help support EEOC's budgetary and program requests, or at least minimize budget reductions.

Which Number is Higher: Those with College Degrees or Criminal Records?

We are increasingly receiving questions from clients about workplace violence scenarios and what is an employer's right to respond. For example, an employee reported to his manager that the employee was arrested for rape. The arrest was initiated by a former girlfriend with whom he had just broken up. What may and should the employer do in that situation?

Before answering that question, let's review the magnitude of what employers in our country face regarding individuals with criminal or arrest records. According to the U.S. Department of Justice, by age 23 one in three Americans will have been arrested, 40% of black males will have been arrested, and 30% of white males will have been arrested. The report states that **"America now houses roughly the same number of people with criminal records as it does four-year college graduates."**

The reasons for violence in our country are complex. To employers, the question is what can and should an employer do when faced with comments or actions of an employee (or someone close to an employee) which the employer believes may endanger the workplace? An example of one response was *SBM Site Services, LLC* (NLRB ALJ Oct. 5, 2017), where an administrative law judge ruled that an employer was justified in terminating an employee who said that if another employee was terminated, she would make buildings "shake" or "explode" and stating that she had contacts in Colombia (where she had previously trained to use an AK-47 and had been involved in guerilla warfare) who could bomb the buildings. Following these statements (and her participation in a lawful protest), the employee was terminated. Her union grieved her termination. The administrative law judge ruled that her comments were beyond the bounds of protected speech and the employer was justified in terminating her.

The following are principles for employers to consider when evaluating potential workplace violence issue:

1. You have the right to be wrong. That is, you do not need a high level of proof to determine that an individual should be terminated or put on leave because of concerns about potential violent behavior. One question to consider is **which issue would you rather defend: the issue of an employment dispute brought by the individual you have suspended or terminated, or a tragedy that occurred because of that individual's behavior.**

2. If an employee is subjected to threats of domestic violence, the employer has the right to act toward that employee so a possible domestic violence incident does not occur at the workplace. Again, this can involve placing the employee on leave with or in some jurisdictions without pay. (Being a victim of domestic violence is a protected status in some jurisdictions).

3. When an employee is arrested for non-work related matters, the employer has the right to consider the implications of the arrest on the employer's overall reputation and its workforce. So in the example mentioned above regarding the alleged rape, the employee, who works with several women, may be placed on administrative leave with or without pay and the employer may state that the individual may not return to work unless there is an unequivocal finding of innocence. Also, the employer may terminate the individual. The reason is not because the employer concludes that the employee "did it," but rather based upon the overall circumstances the employer cannot take the continued risk of employing that individual. Due to the rapid growth and evolution of "ban the box" laws, you should check with your employment counsel before taking such action.

4. Where threats are attributed to employees, whether the use of physical force, armed force, or otherwise, act promptly, thoroughly, and aggressively. An individual who has engaged in violence is more likely to do it again. An individual who threatens violence is more likely to do so than one who does not. Therefore,

evaluate the overall circumstances of the employee's comment. If there is any concern about potential violence based upon the employee's comment, be confident in separating the individual from the workforce. Employer "zero tolerance" workplace violence policies include zero tolerance of threats.

Employers generally have the right to prohibit employees from bringing firearms or weapons into the employer's facility. Although several states permit employees to have a weapon in their car at the employer's premises, in a number of those states, the employer may prohibit the employee from having a gun at a customer's location or within company vehicles. Be vigilant in making employees aware of the employer's policy, as national tragedies such as the shooting in Las Vegas may result in employees feeling the need to arm themselves. Finally, have an internal plan to deal with an active shooter situation. This depends on the nature of the business. Where there is a potential for robbery, such as in retail, those circumstances would be different from manufacturing, where the primary source of violence is employee to employee or domestic.

OK to Say Goodbye after FMLA, Rules Court

An ADA/FMLA issue frequently arises when an employee is unable to return to work after FMLA expires. The EEOC's position is that extended leave must be evaluated by employers as a form of reasonable accommodation. However, in the case of *Severson v. Hartland Woodcraft, Inc.* (7th Cir. Sept. 20, 2017), the court ruled that an employer is not required to accommodate a significant leave request after FMLA expires.

Employee Severson worked for a company for seven years before he developed lower back problems which resulted in surgery. Severson was on FMLA for twelve consecutive weeks. Toward the end of FMLA, his surgeon decided that surgery was necessary. Severson told this to his employer and said that he would need leave for eight weeks beyond the expiration of FMLA for surgery and recovery. The company denied his request, and told him that his employment would terminate at the expiration of FMLA. He was invited to reapply when he was released to return to work. Seven weeks after surgery, Severson was released to light duty and three weeks later he was cleared to work without restrictions. At no time did Severson reapply as the company invited. Rather, he chose the ADA/FMLA litigation route.

In upholding summary judgment for the employer, the Seventh Circuit stated that an additional two months of leave was not a required reasonable accommodation under the Americans with Disabilities Act. The court explained that the point of reasonable accommodation is to help facilitate an employee's ability to perform essential job functions. According to the court, **"simply put, an extended leave does not give a disabled individual the means to work; it excuses his not working."**

In essence, the court stated that an extended leave of absence is not considered a reasonable form of accommodation, because it does not modify or address the employee's ability to perform essential job functions. As a practical matter, if the extended leave is for a brief period of time, such as a few weeks, employers who have not initiated a process to replace the employee would be hard-pressed not to grant the employee that additional time.

Another factor for employers to consider is the issue that there may be an ADA violation involving two disabled employees, but with different disabilities. Thus, an employer who grants an extended leave as an accommodation to an individual with one disability but does not do so for another employee with a different disability may face an ADA discrimination claim. Similarly, if an employer regularly grants extended leave in some circumstances (such as following a workplace injury), the failure to provide extended leave to an employee with a disability could be viewed as discriminatory. Therefore, employers should be consistent in the process with which they evaluate how much leave will be accommodated, based upon leave the employee has already taken, and the nature of the employee's job responsibilities.

Update on the Volatile State of the Affordable Care Act

Last week, President Trump took a major step in dismantling the Affordable Care Act, or "Obamacare," when he announced his Administration would stop providing federal subsidies to health insurers that help provide insurance coverage to millions of low-income Americans. As a part of the ACA, the federal government has been providing payments to health insurers to help provide affordable coverage for approximately 6 million consumers in the ACA marketplace. While President Trump has made various threats regarding these payments and caused much fear and anxiety for insurers and consumers over the past few months, last week he formally confirmed the Administration would cease the payments immediately. President Trump based his decision on Attorney General Jeff Sessions's opinion that the payments were illegal without congressional appropriation.

Many critics—including insurance companies, policy specialists, and various state officials—have said this action will essentially sabotage the ACA marketplaces and the ACA itself. It is anticipated that such action would result in insurers leaving the marketplace because they can no longer afford to offer the discounts for consumers without the subsidies and/or a direct increase in the costs of premiums and deductibles for consumers. Ultimately, either of those outcomes will likely place coverage out of reach for many consumers, many of whom live in states that President Trump won last November. For example, according to the U.S. Centers for Medicare and Medicaid Services, approximately 4 million people benefit from the subsidies in the 30 states that the President carried in November. In Mississippi, it is estimated that premiums will increase by 47% next year as a result of ending the cost-sharing payments.

Many critics also warn of extensive litigation over the Administration's decision. Democratic-led states are already seeking injunctions against the action in order to keep payments flowing. These states argue that President Trump is violating the Administrative Procedures Act by refusing to faithfully execute federal law. Additionally, insurers will likely seek to recover the payments they believed they are owed by the federal government. While the outcome could be tied up in the courts for some time, legal experts do not expect the courts to force the Administration to continue payments during such litigation. While the decision to end the cost-sharing payments will not likely directly impact the employer-based insurance market, it is a sign that the Trump administration will continue to take action to dismantle the ACA. If the Administration and Congress can eventually repeal the ACA, the employer-based insurance market would be impacted in many ways, likely including extensive deregulation of the industry.

In addition to his announcement regarding the cost-sharing payments, President Trump also issued an Executive Order designed to rescind some ACA regulations and give several executive departments the ability to propose new regulations. More so than the withdrawal of cost-sharing payments, the President's Executive Order could impact the employer-based insurance market. President Trump's order asks certain federal agencies to relax limits on temporary insurance plans and association health plans. With regard to temporary insurance plans, President Trump is hoping to make these plans, which are exempt from most insurance rules, available to consumers for a longer period of time and with less notice requirements, than allowed under the Obama Administration's regulations. This will be beneficial to younger, healthier individuals who do not want to pay for comprehensive plans. Additionally, President Trump wants to relax regulations on association health plans, which would make it easier for smaller employers to join together and buy insurance through association health plans, which might be able to offer plans across state lines and different rates for different employers. Furthermore, President Trump's order is designed to widen employers' ability to use pretax dollars for health reimbursement arrangements that aid employees in paying for insurance premiums and medical care. President Trump reversed the Obama Administration's requirement that these arrangements can only be used for health policies that meet ACA rules.

In response to critics, the Administration has punted the funding issue to Congress and argued that Congress should appropriate the funds if it wants payments to continue. Since the last failure to repeal the ACA and

President Trump's Executive Order, there has been a renewed bipartisan effort in the Senate to restore the cost-sharing payments over the next two years. The bipartisan deal is designed to avoid chaos and keep premium increases in the marketplace at a minimum. The bill is designed to allow states the ability to make changes in their own marketplaces while still protected essential health benefits and basic coverage guarantees. While it sounds promising, Congress appears to be incapable of passing any major legislation, particularly any legislation of a bipartisan nature. As such, you might not want to hold your breath waiting for passage of a bipartisan deal.

Ultimately, the ups and downs of the ACA are important to follow regardless of whether or not you are a consumer in the ACA individual marketplace. In light of Congress's continued inability to achieve President Trump's campaign promise to repeal and replace Obamacare, you can expect that President Trump will continue to take all available executive actions to achieve that goal. Such efforts will likely result in changes to how all insurances plans operate and what types of coverage they may offer.

Miscellaneous NLRB Topics

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.

The following three cases illustrate how far the NLRB has gone while under the Obama administration. Until the Republican-dominated Board gets up to speed and begins issuing decisions where they serve as a majority on a panel, these types of cases will continue to crop-up.

American Baptist Homes of the West d/b/a Piedmont Gardens

On June 6, 2017, the D.C. Circuit Court of Appeals granted enforcement of a Board Order expanding access of the union to internal investigation statements. See, *American Baptist Homes of the West d/b/a Piedmont Gardens,* (NLRB 2015), *enforced at* D. C. Cir. 2017.

The NLRB had gotten rid of a blanket exemption on mandatory disclosure of witness statements that had been in place since the *Anheuser-Busch* decision in 1978. The Board's new test is to balance the union's need for the requested information against any "legitimate and substantial confidentiality interests established by the employer." The employer's counsel summed up his disappointment:

> The big problem with the new standard is that employers can no longer assure employee witnesses who provide statements against fellow union members that their statements will remain confidential, so we fear that issues involving patient neglect, harassment or other misconduct will go unreported.

The majority decision in this case was written by Judge Merrick Garland, the U. S. Supreme Court nominee under President Obama, which the Senate refused to confirm.

Expect the Board to return to the *Anheuser–Busch* precedent under a President Trump-dominated NLRB. Both the Board and Circuit Court Order are prospective in nature.

Nissan Allegedly Surveils Employees at its Mississippi Plant

According to the NLRB complaint of September 19, 2017, Nissan has actively "maintain[ed] an employee surveillance, data collection and rating system that records employee union activity and rates workers according to their perceived support for or [against] . . . the UAW."

Expect the NLRB to issue an investigative subpoena in this matter, though it is far from clear that it will be enforced in the district courts, as the complaint has already issued.

Nissan, as of yet, has not commented on the allegations. This case has all the ear-markings of stolen documents from Nissan. The good news is that Nissan can probably settle the case with a notice posting, along with dismantling of the alleged record keeping program. Of course, this assumes Nissan is guilty of the accusations.

Midwest Terminals of Toledo International, Inc., 365 NLRB No. 134 (2017) – Loose Demand for Bargaining Approved by Split Board

In a split decision vote by 2-1, the Board approved of a very loose "demand" for bargaining, finding that a union representative "demanded" bargaining when he repeatedly insisted that crane operators should have on-the-job work opportunities before entering into formal training.

The panel decision, led by former Chairman Mark G. Pierce, stated that there "was little doubt" the Union properly demanded bargaining about a change in the status quo.

The Dissent

Written by now-Chairman Philip Miscimarra, the dissent claimed that "complaining" about an alleged change does not constitute a demand for bargaining. Thus a finding of a unilateral change should not have been found under Board law. Miscimarra said that the union complaint concerning no seat time did NOT contain an express demand for bargaining on the issue.

Miscimarra noted that the Sixth Circuit Court of Appeals had rejected a factually similar case in 2017. As of yet, the employer has not filed an appeal of the NLRB order.

In the News

On September 25, 2017, by a vote of 49-47, the U.S. Senate confirmed President Trump's NLRB nominee, William Emanuel. Backers of Emanuel have said that he will help restore the non-partisan balance of the NLRB in future decisions and rulemaking. Emanuel's most recent experience came as a labor lawyer.

In other news, President Trump is looking to replace Board Chairman Miscimarra when his term expires in December of this year.

Vermont Management Attorney Nominated for NLRB General Counsel

Peter Robb, President Trump's nominee for NLRB General Counsel (GC), appears to have enough support to be confirmed in the U.S. Senate. Robb will replace the current GC, Richard Griffin, when his term expires in November 2017. The GC plays a substantial role in shaping national federal labor policies and functions as the keeper of the gate who decides what the Board members ultimately hear. Expect many of President Obama's initiatives to be undone by a Republican-dominated NLRB.

House Republican Panel Recommends Bill to Roll Back Joint Employer Test

A Republican-sponsored bill in the House to limit the impact of the *Browning-Ferris* decision was approved by the Education and Workforce Committee by a vote of 23-17. The vote, which occurred along party lines, requires that an employer exert "direct, actual, and immediate" control of employees to be considered as a joint employer. It remains to be seen if this proposal ever gets to President Trump's desk to be signed into law. The *Browning-Ferris* decision is pending review in the D.C. Circuit Court of Appeals.

NLRB and EEOC Not Close in Reaching Accord

The NLRB and EEOC are in apparent conflict over competing laws. While it is illegal to harass a fellow worker on the job under EEOC guidelines, the NLRB takes a dim view of comportment laws that go too far under the NLRA. A real life example of this is where the employer fired a worker for racist remarks on the picket line, and the NLRB ordered him reinstated, with Court of Appeals approval, because his remarks were made on the picket line and thus related to union activity.

As noted in previous LMVT employment law bulletins, the NLRB has expanded the protections under Section 7 of the Act, thus making it very difficult to discharge employees that engage in truly obnoxious behavior if related to protected activity.

The two agencies appear to be on a collision course over ideology if some accommodation is not reached. Where does an employee's right to speak freely end because sexual or racial harassment begins? Regardless of the answer, before you take an adverse action against an employee, where there is even a hint of protected activity surrounding the worker activity; consult with your labor counsel regarding the proper course of action to take.

A spokesperson with the NLRB claims that the agencies are working to develop joint guidance for employers; however, no timetable has been announced for the release of the guidance.

On a side note, the NLRB will, in all likelihood, change its approach in how it determines when employee handbooks, work rules, and policies impact the rights of workers under the NLRA. At the center of the dispute is the test articulated in *Lutheran Heritage Village –Livonia,* where the NLRB found that a rule legal on its face could be considered illegal where it could be "reasonably construed" as prohibiting employees from engaging in protected, concerted activity under the law. The Board has continually invalidated seemly valid work rules under the "reasonably construe test." Look for the Republican-dominated NLRB to adopt the Chairman's numerous dissents as a new balancing test.

OSHA and Job Stress

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.

Job stress may be defined as the harmful physical and emotional responses that occur when requirements of the job do not match capabilities, resources, or needs of the worker. Job stress can lead to poor health and possible injuries. A few suggestions from OSHA to avoid job stress:

1. Be aware of your surroundings so as to avoid hazardous areas.
2. Keep correct posture to protect your back.
3. Take regular breaks. If possible schedule most difficult tasks early in the shift. It is noted that many injuries occur when a worker is tired.
4. Use machines and tools properly. It is noted that one of the leading causes of workplace injury is taking shortcuts.
5. Keep emergency exits easily accessible and to keep clear access to equipment shutoffs.
6. Report unsafe conditions to your supervisor. It is noted that the employer is legally obligated to correct.
7. Use mechanical aids whenever possible. An example of this is that they need to obtain any needed equipment to complete the job.
8. Stay sober. Around 3% of workplace fatalities occur due to alcohol and drugs.
9. Next on the list is job stress that can lead to depression and concentration problems. Common causes of workplace stress include long hours, heavy workload, job insecurity, and conflicts with other workers or managers.
10. Wear correct safety equipment. If an employee is not wearing correct safety equipment for a task, an injury could certainly result. Items such as earplugs, hard hats, safety goggles, gloves, or facemasks reduce injury risk.

Wage and Hour Tips: Overtime Pay Requirements of the Fair Labor Standards Act

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

and Walsh-Healey Act. Mr. Erwin can be reached at 205.323.9272.

I am sure that you are aware that the pending revisions to the requirements for the executive, administrative, and professional exemptions have gone away due to court rulings and the dropping of Wage Hour appeals. However, Wage Hour has requested the public to submit information relating to possibly increasing the salary requirements for these exemptions. While Wage Hour has not put forth any proposals, it appears they are seriously considering an increase in the $455/week salary requirement. Thus, I suggest that you try to keep abreast with the issue so that you will not be unprepared for any increase that may take effect.

In 1938, Congress passed the Fair Labor Standards Act, which established a minimum wage of $.25 per hour for most employees. In an effort to create more employment, the Act also set forth certain additional requirements that established a penalty on the employer when an employee worked more than a specified number of hours during a workweek. The initial law required overtime after 44 hours in a workweek but eventually limited the hours without overtime premium to 40 in a workweek.

An employer who requires or allows an employee to work overtime is generally required to pay the employee premium pay for such overtime work. Unless specifically exempted, covered employees must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rate of pay. Overtime pay is not required for work on Saturdays, Sundays, or holidays unless the employee has worked more than 40 hours during the workweek. Furthermore, hours paid for sick leave, vacation, and/or holidays do not have to be counted when determining if an employee has worked overtime, although some employers choose to do so.

The FLSA applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. The workweek need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees, but they must remain consistent and may not be changed to avoid the payment of overtime. Averaging of hours over two or more weeks is not permitted. Normally, overtime pay earned in a particular workweek must be paid on the regular payday for the pay period in which the wages were earned. However, if you are unable to determine the amount of overtime due prior to the payday for the pay period, you may delay payment until the following pay period.

The regular rate of pay cannot be less than the minimum wage. The regular rate includes all remuneration for employment except certain payments specifically excluded by the Act itself. Payments for expenses incurred on the employer's behalf, premium payments for overtime work, or the true premiums paid for work on Saturdays, Sundays, and holidays are excluded. Also, discretionary bonuses, gifts, and payments in the nature of gifts on special occasions, and payments for occasional periods when no work is performed due to vacation, holidays, or illness may be excluded. However, payments such as shift differentials, attendance bonuses, commissions, longevity pay, and “on-call” pay must be included when determining the employee’s regular rate.

Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. Where an employee, in a single workweek, works at two or more different types of work for which different straight-time rates have been established, the regular rate is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. Where non-cash payments are made to employees in the form of goods or facilities (for example meals, lodging & etc.), the reasonable cost to the employer or fair value of such goods or facilities must also be included in the regular rate.

Some Typical Problems

Fixed Sum for Varying Amounts of Overtime

A lump sum paid for work performed during overtime hours, without regard to the number of overtime hours worked, does not qualify as an overtime premium. This is

true even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis. For example, a flat sum of $100 paid to employees who work overtime on Sunday will not qualify as an overtime premium, even though the employees' straight-time rate is $8.00 an hour and the employees always work less than 8 hours on Sunday. Similarly, where an agreement provides for 6 hours pay at $10.00 an hour regardless of the time actually spent for work on a job performed during overtime hours, the entire $60.00 must be included in determining the employees' regular rate and the employee will be due additional overtime compensation.

Salary for Workweek Exceeding 40 Hours

A fixed salary for a regular workweek longer than 40 hours does not discharge FLSA statutory obligations. For example, an employee may be hired to work a 50-hour workweek for a weekly salary of $500. In this instance, the regular rate is obtained by dividing the $500 straight-time salary by 50 hours, results in a regular rate of $10.00. The employee is then due additional overtime computed by multiplying the 10 overtime hours by one-half the regular rate of pay ($5 x 10 = $50.00).

Overtime Pay May Not Be Waived

The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. Likewise, an announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not relieve the employer from his obligation to pay the employee for overtime hours that are worked. The burden is on the employer to prevent employees from working hours for which they are not paid.

Many employers erroneously believe that the payment of a salary to an employee relieves them from the overtime provisions of the Act. However, this misconception can be very costly as, unless an employee is specifically exempt from the overtime provisions of the FLSA, he or she must be paid time and one-half his regular rate of pay when he or she works more than 40 hours during a workweek. Failure to pay an employee proper overtime premiums can result in the employer being required to pay, in addition to the unpaid wages for a period of up to three years, an equal amount of liquidated damages to the employee. Further, if the employee brings a private suit the employer can also be required to pay the employee's attorney fees. When the Department of Labor makes an investigation and finds employees have not been paid in accordance with the Act, they may assess Civil Money Penalties of up to $1,894 per employee for repeat and/or willful violations.

In order to limit their liabilities, employers should regularly review their pay policies to ensure that overtime is being computed in accordance with the requirements of the FLSA. If I can be of assistance, do not hesitate to give me a call.

Did You Know…

…that automatic payroll deductions for meal time may create Wage and Hour violations? Certain jobs make it difficult for employers to monitor and assign break times. This is often the case in healthcare or when employees operate company vehicles in order to perform their jobs. Many employers prefer to notify employees that a certain amount will be deducted for a meal, such as half an hour per day. The challenge for the employer is to prove the employee took the meal when the employee asserts that he or she did not. Employers should clearly communicate that if employees are unable to take the meal or their meal is interrupted, they should notify their manager that day. Employers should implement a process where the employee sends an email or text notifying the employer that the employee's meal break has begun. Employee managers should know not to interrupt an employee during a meal, unless it is essential. Otherwise, the meal time will likely have to become compensable.

…that the EEOC was ordered by a court to pay $1.9 million in employer legal fees? *EEOC v. CRST Van Expedited, Inc*.(N.D. Iowa, Sept. 22, 2017). This case arose in 2007, when the EEOC sued alleging discrimination against women drivers and also accused the company of permitting sexual harassment of women driver trainees. The court concluded that several of the

claims brought by the EEOC were frivolous, and the EEOC continued to litigate those claims after it became apparent that there was no basis to them. The court had originally ordered the EEOC to pay $4.5 million in fees.

… that an arbitrator awarded an employee $40 million based upon workplace harassment? Arbitration is often viewed by employers as a more favorable forum than the jury system, but that is not necessarily so. In a May 31, 2017 decision, the arbitrator, a former judge, awarded $40 million to a former senior vice president of a marketing company. The arbitrator concluded that the executive's complaints about harassment based upon gender and sexual orientation were ignored and the individual's termination was the result of "malicious, insidious and humiliating" behavior by the employer. The arbitrator's award includes back pay, emotional distress, and liquidated damages.

… that the U.S. Supreme Court will consider whether public sector union fees are unconstitutional? *Janus v. AFSCME Council 31* (cert. granted, Sept. 28, 2017). This case involves a practice in the public sector where employees who are not members of the union are required to pay the equivalent of union fees or costs for representation. These costs are called "fair share" fees. In the public sector, unions are required to represent non-members as well as members, just as in the private sector. Typically, fair share fees are equivalent to the cost of union dues. The Supreme Court will consider whether the fair share fee requirement for public employees is a form of compulsory unionism, which violates the Constitutional rights to freedom of association.

… that the United Farm Workers agreed to a $1.3 million Wage and Hour settlement for improper payment of overtime and docking employees for meal breaks? *Cerritos v. United Farm Workers of America*, (Cal. Ct. App. Oct. 2, 2017). The case involved 24 UFW organizers who claimed they were entitled to overtime pay and mealtime pay. The Union had treated the organizers as exempt, but in May a court ruled that they were not exempt and thus entitled to back pay.

… that effective January 1, 2018, it will be easier for temporary reinstatement of employees in California who claim retaliation? This is due to California Senate Bill 306, signed into law on October 3, 2017, by Governor Brown. Under this law, the California Labor Commission may obtain injunctive relief to put an individual back to work who claims that the termination was due to retaliation for making a wage claim. The standard that must be shown to put an employee back to work under this law is "whether there is reasonable cause to believe a violation has occurred." This is a low threshold for the California Labor Commission to show. Typically, immediate relief to put someone back to work while a case in pending requires showing that the employee will suffer "irreparable harm" if not reinstated. "Irreparable harm" is a much more difficult standard to meet than "reasonable cause."

… that OFCCP has issued a revised complaint form for individuals to allege discrimination against government contractors? The complaint form is available online and assists the individual in asserting a complaint of discrimination based upon race, color, religion, sex, sexual orientation, gender identity, national origin, disability or veteran's status. In particular, the form invites complaints that the employer did not hire the individual based upon protected class status or took adverse action toward the applicant or employee for asking about, discussing, or sharing information about pay.

LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

Richard I. Lehr 205.323.9260
rlehr@lehrmiddlebrooks.com

David J. Middlebrooks 205.323.9262
dmiddlebrooks@lehrmiddlebrooks.com

Albert L. Vreeland, II 205.323.9266
avreeland@lehrmiddlebrooks.com

Michael L. Thompson 205.323.9278
mthompson@lehrmiddlebrooks.com

Whitney R. Brown 205.323.9274
wbrown@lehrmiddlebrooks.com

Claire F. Martin 205.323.9279
cmartin@lehrmiddlebrooks.com

Lyndel L. Erwin 205.323.9272
(Wage and Hour and lerwin@lehrmiddlebrooks.com

Government Contracts
Consultant)

Jerome C. Rose 205.323.9267
(EEO Consultant) jrose@lehrmiddlebrooks.com

Frank F. Rox, Jr. 205.323.8217
(NLRB Consultant) frox@lehrmiddlebrooks.com

John E. Hall 205.226.7129
(OSHA Consultant) jhall@lehrmiddlebrooks.com

JW Furman 205.323.9275
(Investigator, jfurman@lehrmiddlebrooks.com
Mediator & Arbitrator)