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The Trifecta: NLRB Reverses Joint Employer, Handbook Polices, and Micro-Unit Decisions

December 14 and 15, 2017, were great days for employers. The National Labor Relations Board in the case of the *Boeing Company* reversed the *Lutheran Heritage Village-Livonia* decision regarding how employer policies would be evaluated in conjunction with employee Section 7 rights. Under *Lutheran Heritage*, if "employees would reasonably construe the language [in the handbook] to prohibit Section 7 activity," then the policy violated the Act. This led to some ridiculous results and difficult employer decisions, such as some employers choosing just to not put any policies in writing. In the case of the *Boeing Company and Society of Professional Engineering Employees Local 2001*, the NLRB reversed the *Lutheran Heritage* rule and instead adopted a balancing test to determine whether an employer's policy may be considered to violate the Act.

Boeing established a policy that restricted when employees may use devices with cameras, such as cell phones, on company property. Known as the "no camera rule," the rule was developed without regard to union organizing activity or employee Section 7 rights. It seemed like a most reasonable rule which many manufacturers would have to protect confidential information and competitive processes. In applying the *Lutheran Heritage* test of whether employees "could reasonably construe" the language to inhibit their Section 7 activity, the Administrative Law Judge ruled that Boeing's no camera policy violated the Act. On review, the Board overturned *Lutheran Heritage*, and instead imposed a balancing test. The new standard balances on one hand "the nature and extent of the potential impact [of the employer policy] on employee rights," and on the other hand "legitimate justifications associated with the rule." The Board added that this approach fulfills the Board's duty to strike the proper balance between "…asserted business justifications and the invasion of employee rights in light of the Act and its policy." The Board criticized *Lutheran Heritage* as "requir[ing] perfection that literally is the enemy of the good," "limit[ing] the Board's own discretion," and "def[ying] all reasonable efforts to make it yield predictable results." Furthermore, "over the past decade and one-half, the Board has invalidated a large number of common sense rules and requirements that most people would reasonably expect every employer to maintain."

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So with the *Boeing* decision, employers may comfortably implement and apply common sense policies, such as confidentiality, videotaping, audio taping, and several others which are intended to protect the business or maintain workplace civility and decorum.

In the case of *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Company*, the NLRB reversed its *Browning-Ferris* decision regarding the standard for determining whether two employers qualify as one – a joint employer. The *Browning-Ferris* decision in essence adopted a vague "economic reality" test. That is, if one employer could exercise influence over the terms and conditions of employment of the other employer's employees, then it was a joint employer. This included customers and sub-contractors, franchisors and franchisees, and virtually any other relationship where an employer utilized the services of a third party and its employees. In *Browning-Ferris*, one employer never exercised control over the other employer's employees, but based on the Board's "economic reality" test, the Board concluded that a joint employer relationship nevertheless existed.

In *Hy-Brand*, the NLRB also concluded that a joint employer relationship existed, but in this case, the Board determined that it existed because one employer "exercises active or actual control [as distinguished from potential control] over the day-to-day operations or labor relations of the other." This case arose after the termination of employees from both employers for engaging in protected, concerted activity. The actual joint control that was exercised, according to the Board, involved direct and immediate control, it was not "limited and routine." For example, the corporate secretary for both companies "was directly involved in the decisions at both companies to discharge all seven of the discriminatees. Moreover, he identified himself as an official of [one company] when he signed letters effectively informing two of the Hy-Brand strikers that their employment had been terminated." The Board added that the same person, the sole individual who was the corporate secretary for both companies, made hiring decisions for both companies. Furthermore, employees at both companies participated in the same 401(k) and medical plans and they were both covered under the same worker's compensation policy. In conclusion, the Board stated that "the record establishes that the joint control described above was actually exercised, not merely reserved, and that it had a direct and immediate impact on Brandt and Hy-Brand employees."

This decision enables employers to follow firm, established principles when assessing whether there is a joint employer risk. For example, there must be actual control that one has over the other's employees. There must be common denominators in labor relations and employment policies, pay and benefits. The typical franchisor/franchisee relationship will be protected as an outcome of this Board decision, as will manufacturers who utilize sub-contractors and other employers to outsource certain functions.

On Friday, December 15, 2017, the NLRB in the case of *PCC Structurals, Inc.* reversed its *Specialty Healthcare* decision regarding "micro" bargaining units. In *Specialty Healthcare*, the Board changed the standard of when a proposed bargaining unit submitted by the union in its petition should expand to include jobs the union did not request. Prior to *Specialty Healthcare*, the rule was that if other jobs not included in the union's proposed bargaining unit shared a "community of interest" with the proposed unit, then they could be included. This made a world of sense, as employers would not want fractured bargaining units, and, strategically, it may help employers to resist unionization to include in the petition jobs the union does not believe it has support from. In *Specialty Healthcare*, the Board said that only if the excluded units have an "overwhelming community of interest" with the union's proposed unit would they be included. This was a very difficult standard for employers to meet. In reversing *Specialty Healthcare*, the NLRB stated that "having reviewed the *Specialty Healthcare* decision in light of the Act's policies and the Board's subsequent applications of the 'overwhelming community of interest' standard, we conclude that the standard adopted in *Specialty Healthcare* is fundamentally flawed. We find there are sound policy reasons for returning to the traditional community of interest standard that the Board has applied throughout most of its history, which permits the Board to evaluate the interests of all employees—both those within and outside the petition for unit—without regard to whether these groups share an 'overwhelming' community of interests."

One word of caution to employers: manufacturers, distributors, and wholesalers are still vulnerable to "micro" units even under the community of interest standards. For example, it is not unusual for the NLRB to conclude that maintenance employees do not share a sufficient community of interest with other employees at the facility, and therefore constitute their separate bargaining unit. Employers should not assume that smaller bargaining units will not be approved by the Board.

Chairman Miscimarra's term ended as of December 16, 2017. He chose not to "re-up" for another term. Thus, with a 3-2 Republican NLRB majority through December 16, these major reversals were processed on an urgent basis, so that change could occur early in the Trump NLRB administration.

Additional changes are on the way with the NLRB, as evidenced by Frank Rox's review (on page 6) of the NLRB General Council Peter Robb's initiatives and the NLRB's disclosure that it will reconsider the "quickie" election rules.

U.S. Supreme Court Declines to Hear Sexual Orientation Discrimination Case

On December 11, the U.S. Supreme Court in the case of *Evans v. Georgia Regional Hospital* declined to hear an appeal from the Eleventh Circuit of whether Title VII's prohibition of sex discrimination includes sexual orientation. There is a conflict among the circuit courts, as the Seventh Circuit has ruled that sexual orientation discrimination is forbidden under Title VII's prohibition of sex discrimination but the Eleventh Circuit found that Title VII's prohibition against sex discrimination did not include sexual orientation. The Second Circuit is considering the matter in a case currently pending. The implication of the split between the circuits is that if an employer is located in Georgia, Florida, or Alabama, Title VII in those states does not prohibit discrimination based upon sexual orientation, but if the employer is located in Illinois, Indian, or Michigan, such discrimination is prohibited. Of course, our recommendation for an employer's overall best practice is to treat sexual orientation as a protected class, even if not required to.

On November 16, in the case of *EEOC v. Scott Medical Health Center* (W.D. Pa.), Judge Cathy Bissoon of the Western District of Pennsylvania awarded $55,000 to an employee who was discriminated against and harassed based upon his sexual orientation. This was the first lawsuit filed by the EEOC where a court rendered a decision about whether sexual orientation is a protected class under Title VII. The EEOC had previously filed a lawsuit against Pallet Companies, d/b/a IFCO, which settled in June 2016 for $202,000.

Ultimately, we expect the Supreme Court to hear a case regarding whether sexual orientation is a protected class. The conflict among the circuit courts will continue unless either Congress or the Supreme Court addresses the issue.

Sexual Harassment, Harassment, Non-Disclosure and Arbitration Agreements

Al Franken, John Conyers, Judge Alex Kozinski, Mario Batali, and Matt Lauer were the most recent figures disgraced in the headliner for allegedly engaging in sexually harassing and predatory behavior. The delay of several victims reporting the behavior has resulted in an examination of how the workplace must change so that individuals will feel more confident in stepping forward to report sexual and other forms of harassment. Federal and state legislation has been proposed to remove certain reporting barriers. On December 6, 2017, a bill known as the "Ending Forced Arbitration of Sexual Harassment Act" was introduced by Senator Lindsey Graham (R-SC), Representative Walter Jones (R-NC), Senator Kirsten Gellibrand (D-NY), and Senator Kamala Harris (D-CA). This bill would preclude employers from enforcing mandatory arbitration agreements where claims of sexual harassment or gender discrimination under Title VII were alleged.

At the state level, legislation has been proposed to preclude employers from including claims of sexual

harassment or discrimination in employer confidentiality agreements. The overall emphasis of these legislative initiatives is to prevent a situation in which sexual harassment or discrimination is concealed. Thus, legislation in New York and Arizona would prohibit anyone from agreeing to the restricted disclosure of information relating to a sexual assault or harassment.

The suppression of reporting sexually harassing or predatory behavior has resulted in employer review of internal confidentiality and non-disclosure policies. For example, if you have such a policy, does it explicitly state that confidentiality/non-disclosure does not apply to employees reporting any concern regarding discrimination, harassment or retaliation? Although an overly broad confidentiality policy may be legally permitted, if there is any lesson learned from the disclosure of sexually harassing or predatory behavior after it has been suppressed for so long, it is that recipients are unlikely to report the behavior if they perceive that to do so violates the "confidentiality" required by their employer. Review your confidentiality policy to ensure that it incorporates by reference your policies prohibiting discrimination, harassment, and retaliation, so employees understand that confidentiality concerns information, not behavior. Although the proposed federal and state legislation focuses on sexual harassment and gender discrimination, we recommend that employers in revising confidentiality policies or agreements include all forms of discrimination, harassment, and retaliation.

NLRB to Consider Revision or Revocation of "Quickie" Election Rule

In April 2014, the NLRB substantially overhauled representation election rules, to in essence cut the time from the date of petition to vote in half from approximately 42 days to 21 days. This Board initiative was to help unions win elections. Since the filing of the election rules change, union win rates have increased slightly, but the number of elections has decreased substantially.

The NLRB on December 12 stated that it will file a Request for Information in the Federal Register asking for input into the 2014 election rule. Specifically, the Board Request is as follows:

1. Should the 2014 election rule be retained without modification?

2. If it should be retained with modifications, what modifications should be made?

3. Should the rule be rescinded entirely? If so, should the Board revert to the election rules that were in place prior to the 2014 change, or should the Board make other changes?

From an employer's perspective, the greater the amount of time between the date a petition is filed and employees vote, the greater the opportunity for the employer to defeat the unionization effort. The union petition is filed at the peak of union support. Employees often mistakenly believe that change will be immediate, so the delay between the petition and the election helps an employer to correct or address the reasons for employee dissatisfaction and may result in some employees determining that the changes they seek may not occur as quickly as they want, if at all. An employer who stays on top of its employee relations will avoid the issue of a petition and the timing of an election. For the employer who is "blindsided" by an election petition, the approximately 21-day period between petition and vote often is not enough for an employer to turn around the workplace environment such that employees choose to remain union free.

Whitney Brown – Rising Star

We are proud to announce that our colleague, Whitney Brown, has been selected by Super Lawyers as a Rising Star in the labor and employment law field. We at LMVT know that Whitney is a rising star. Whitney's selection as a Rising Star results in five of our firm's nine lawyers chosen by Super Lawyers, an honor of which we are proud.

Trump Administration Expands Exemptions to Employer's Contraceptive Mandate

Last month, five state Attorneys General joined together in a lawsuit against the Trump Administration challenging new regulations that allow employers to forego providing coverage for contraceptives based on moral or religious grounds. The Affordable Care Act (ACA) specifically mandated that some employers provide coverage for employee contraceptives, something that has been controversial since its adoption. In October, the Department of Health and Human Services (HHS) announced it would exempt employers that have "seriously held religious beliefs" or "moral convictions" from complying with the contraceptive mandate. In response to this, the Attorneys General argue that the new regulations violate ACA provisions forbidding HHS from blocking access to health care and prohibiting discrimination on the basis of sex and favor religious beliefs over secular beliefs in violation of the Establishment Clause of the Constitution. While there were previous exemptions for certain entities like churches, the Attorneys General argue that the new exemptions exceed those previous exemptions and essentially amount to religious endorsement.

This lawsuit is significant as the new regulations directly impact employers and employees across different industries instead of the narrow group of employers in the previous exemption: religious groups, nonprofit groups that have a religious or moral objection to contraception coverage, and closely-held for-profit groups that are not publicly traded. This month, the Court heard arguments on the States' Motion for a Preliminary Injunction against the regulations. The States' counsel made several arguments. The first, most basic argument was that HHS failed to follow administrative procedures pursuant to the Administrative Procedure Act prior to enacting the regulations. HHS failed to provide the public with notice or a comment period. The States argued that the Court would be within its legal power to issue an injunction on that basis alone.

The States also dug deeper into their gender discrimination argument. The States specifically raised the argument that implementing these regulations would allow employers to deny health coverage to millions of women by simply invoking his or her own "religious beliefs." Counsel for the States also raised several policy concerns with the regulations: increased costs for contraceptives, increased unplanned and unwanted pregnancies, and a financial strain on state programs.

In response, the Department of Justice also argued regarding procedure. First, the DOJ argued that it did not violate the Administrative Procedures Act because public comment was unnecessary. The DOJ argued that this issue has been publicly known and discussed since the ACA was enacted and thus any specified time of comment was unnecessary. The DOJ also argued that the States might not even have standing to sue regarding the regulations as they failed to identify one individual who would be harmed under the regulations. Last, the DOJ argued that it was too "uncertain" that any employees would have their contraception coverage taken away. This last argument seems questionable. While it might be technically uncertain, it is highly probable that some employers will use their new ability to object to providing coverage for contraceptives on the basis of religious or moral objections. While this idea might sound crazy in some parts of the country, employers in deeply religious and conservative states like Alabama will likely jump at the chance to avoid following a government mandate that runs afoul their beliefs and could save them money.

Currently, 55 million women receive contraceptive coverage without copayments because of the employer mandate, and the new exemptions allow for for-profit companies, whether they are owned by one family or thousands of shareholders, to deny coverage. This is one reason that a Pennsylvania District Judge temporarily blocked the regulation in a similar lawsuit. The Pennsylvania Court reasoned that in additionally to not following the proper notice and comment requirements, the regulation had "remarkable breadth" and could have an "insidious effect" on women in the workplace. The Court also agreed with the state that the loss of coverage would cause many women to rely on the state for the same services, which would result in higher costs to Pennsylvania.

Whatever the California court's decision, it is likely this issue will continue to be litigated either by the Trump Administration seeking to enforce the regulation or by plaintiff-employees who have been denied contraceptive coverage.

In the event the regulations go into effect, it is important to note that for employers claiming an exemption from the mandate, they are not required to file a notice with the government; however they are required to inform employees regarding the change.

If you are an employer who might be interested in relying on these new regulations, it is crucial that you follow the outcome of this injunction and potential future litigation. Even if the injunction is denied and the regulations take full effect, any employer who acts under the regulations could still be at risk for employees filing gender discrimination charges or lawsuits. It seems likely that until this issue reaches the U.S. Supreme Court, employers will be at risk for litigation. As many employers are aware, even when some employees might have weak or likely unsuccessful claims, they can still file a charge and cost you defense costs and a headache.

New NLRB General Counsel Quickly Changes Obama Board Initiatives

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.

General Counsel Peter Robb Issues Mandatory Advice Submissions

In General Counsel memorandum 18-02, new NLRB GC Robb has outlined mandatory advice submissions for the coming year. The memo, dated December 1, 2017, often reads as a wish list for reconsideration of the least popular decisions issued under the Obama administration.

The identified topics include, but are not limited to, cases where "obscene, vulgar or other highly inappropriate conduct" may be protected under Section 7 of the Act, those cases involving the *Purple Communications* decision allowing use of an employer's email system to engage in union activity, the *Browning-Ferris* decision involving the definition of a joint employer, and those rules found illegal in company handbooks under President Obama's administration.

In addition to identifying specific areas ripe for reconsideration, the regions must submit to the Division of Advice those cases involving "significant legal issues" (SLIs). SLIs are defined as those issues where legal precedent was overruled during the past eight years, and involved at least one dissent, "cases involving issues that the board has not decided and any other cases that the region believes will be important to the [GC]."

The eight years happens to coincide with the tenure of President Obama. GC Memo 18-02 identifies fifteen topics that are considered as priorities for the Trump administration. Robb was confirmed as the GC early last month.

GC Memo 18-02 also rescinds six memos and one OM memo. Finally, five "initiatives" set forth in Advice memos have been rescinded.

Management counsel lauded the Memo, just as the labor side bar criticized GC Robb and the Memo.

Supreme Court's Docket Considered Light but Significant

The current session of the U.S. Supreme Court is light on labor and employment cases.

Anticipated decisions issuing in the spring term involve class action waivers under *D. R. Horton* and the definition of a whistle-blower under financial laws (Dodd-Frank laws).

Interestingly, in the *D.R. Horton* line of cases, the NLRB position is different from the Justice Department under the Trump Administration. The Justice Department has flipped-flopped since President Obama was in office and now takes the position that class action waivers are legal pursuant to the Federal Arbitration Act, while the NLRB intends to defend its position that class action waivers are illegal under certain circumstances.

The Supreme Court's level of deference to the NLRB's decision will be at issue. Regardless of how the high court decides the *D. R. Horton* issue, there will be finality now in this area of the law.

Another Supreme Court case in the news is the "cake shop" case. As you no doubt recall, the issue is whether a Colorado bakery can refuse, on religious grounds, to bake a wedding cake for a same sex couple. See, *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Commission*.

The Trump Justice Department has supported the idea that the bakery should be exempt from the state's public accommodation laws based on the right of free-speech and the free exercise of religion, while the state takes the opposite position.

Blocking Charge Policy May Be Reconsidered by the NLRB

For years, the NLRB has "blocked" decertification elections where there are outstanding unfair labor practices. By blocking the processing of the petition, the policy is supposed to protect employees from further "coercion" during the election process. Critics have criticized the rule, saying that unions have abused the procedure to frustrate and inordinately delay the will of employees who want to change bargaining representatives or decertify the union entirely.

A building materials company may have now laid the foundation for the NLRB to review the blocking charge policy. The Board's case-handling rules set forth the current blocking charge rule. With the Republicans now dominating the NLRB, look for changes to the blocking charge policy. Several cases are currently pending before the NLRB. Stay tuned for developments.

Union Election Filings Drop

During the fiscal year ending in October 2017, election filings have dropped since the implementation of the "quickie" election rules. The election rules were adopted in 2015.

RC election petitions were down from 2,029 in Fiscal Year 2016 to 1,854 in FY 2017. The NLRB data also showed that of 1,366 elections held in FY 2014 through 2009, unions won, on average, 929. In FY years 2015 and 2016, unions won over 1,000 elections.

While elections held have dropped, the ones processed have been moving quickly. The median time for the processing of an election petition was just 23 days in FY 2017. That number was 33 and 38 in the previous five years before 2015. 98.5 percent of all elections in FY 2017 were conducted in under 56 days, and nearly 92 percent of elections were held pursuant to stipulated agreements.

It appears that if the NLRB intends to change the rules, if they change at all, it will have to be by the rulemaking process. Even this appears to be a long shot.

Lauren McFerrin, the lone Democrat currently on the Board, noted that the quickie rules have withstood legal challenges under the Administrative Procedures Act and that the Board would face a difficult time in the Court of Appeals if the rules are not followed by the NLRB, stating:

> The rule is what it is and [the NLRB] can't change it in an individual adjudication. Love it or hate it, the rules say what they say, and they proscribe the consequences that they proscribe, and they give discretion when they give discretion, and they don't when they don't. . . . We have to be [extremely] careful to make sure that [the NLRB is] complying with the letter of our rule[s].

OSHA's Revised Standards for Fall Hazards

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 has posted a final rule updating its General Industry Standards for fall protection hazards. The agency notes that falls from heights and on the same level are among the leading causes of serious work-related injuries and deaths. OSHA notes that it issues this final rule to better protect workers in general industries from these hazards by updating and clarifying standards and adding training and inspection requirements to its rules on this issue.

The rule affects a wide range of workers from painters to warehouse workers. It does not change construction or agricultural standards with regards to this workplace issue. The rule incorporates advances in technology, industry best practices, and national consensus to provide effective and cost -efficient worker protection. OSHA estimates that these changes will prevent 29 fatalities and 5,842 workday injuries every year.

This new rule benefits employers by providing greater flexibility in choosing a fall protection system.

Wage Hour Update: Application of the Fair Labor Standards Act to Domestic Service

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.

While it has been more than four years since these regulations were issued, I find that many employers are still not aware of the revisions and thus are subjecting themselves to potential liabilities relating to household domestic employees.

In September 2013, the Department of Labor issued a rule concerning domestic service workers under the Fair Labor Standards Act (FLSA) that makes substantial changes to the minimum wage and overtime protections to the many workers who, by their service, enable individuals with disabilities and the elderly to continue to live independently in their homes and participate in their communities. The rule, which became effective January 1, 2015, contains several significant changes from the prior regulations, including: (1) the tasks that comprise "companionship services" are more clearly defined; (2) the exemptions for companionship services and live-in domestic service employees are limited to the individual, family, or household using the services; and (3) the recordkeeping requirements for employers of live-in domestic service employees are revised.

Below are excerpts from a Wage Hour Fact Sheet that outlines the major changes in the regulations.

Minimum Wage and Overtime Protections. This Final Rule revises the definition of "companionship services" to clarify and narrow the duties that fall within the term and prohibits third party employers, such as home care agencies, from claiming the companionship or live-in exemptions.

Companionship Services. The term "companionship services" means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. Under the Final Rule, "companionship services" also includes the provision of "care" if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek.

Fellowship and Protection. Under the Final Rule, "fellowship" means to engage the person in social, physical, and mental activities. "Protection" means to be

present with the person in their home or to accompany the person when outside of the home to monitor the person's safety and well-being. Examples of fellowship and protection may include: conversation; reading; games; crafts; accompanying the person on walks; and going on errands, to appointments, or to social events with the person.

Care. The definition of companionship services allows for the performance of "care" services if those services are performed attendant to and in conjunction with the provision of fellowship and protection and if they do not exceed 20 percent of the employee's total hours worked in a workweek per consumer. In the Final Rule, "care" is defined as assistance with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).

Household Work. The Final Rule limits household work to that benefitting the elderly person or person with an illness, injury, or disability. Household work that primarily benefits other members of the household, such as making dinner for another household member or doing laundry for everyone in the household, results in loss of the companionship exemption and thus the employee would be entitled to minimum wage and overtime pay for that workweek.

Medically Related Services. The definition of companionship services does not include the provision of medically related services which are typically performed by trained personnel. Under the Final Rule, the determination of whether a task is medically related is based on whether the services typically require (and are performed by) trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants. The determination is not based on the actual training or occupational title of the worker performing the services. Performance of medically related tasks during the workweek results in loss of the exemption and the employee is entitled to minimum wage and overtime pay for that workweek.

Live-In Domestic Service Employees. Live-in domestic service workers who reside in the employer's home permanently or for an extended period of time and are employed by an individual, family, or household are exempt from overtime pay, although they must be paid at least the federal minimum wage for all hours worked. Live-in domestic service workers who are solely or jointly employed by a third party must be paid at least the federal minimum wage and overtime pay for all hours worked by that third party employer. Employers of live-in domestic service workers may enter into agreements to exclude certain time from compensable hours worked, such as sleep time, meal time, and other periods of complete freedom from work duties. (If the sleep time, meal periods, or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked.) Under the Final Rule, these employers must also maintain an accurate record of hours worked by live-in domestic service workers. The employer may require the live-in domestic service employee to record his or her hours worked and to submit the record to the employer.

Third Party Employers. Under the Final Rule, third party employers of direct care workers (such as home care staffing agencies) are not permitted to claim either the exemption for companionship services or the exemption for live-in domestic service employees. Third party employers may not claim either exemption even when the employee is jointly employed by the third party employer and the individual, family, or household using the services. However, the individual, family, or household may claim any applicable exemption. Therefore, even if there is another third party employer, the individual, family, or household will not be liable for unpaid wages under the FLSA provided the requirements of an applicable exemption are met.

Paid Family or Household Members in Certain Medicaid-funded and Certain Other Publicly Funded Programs Offering Home Care Services. In recognition of the significant and unique nature of paid family and household caregiving in certain Medicaid-funded and certain other publicly funded programs, the Department has determined that the FLSA does not necessarily require that once a family or household member is paid to provide some home care services that all care provided

by that family or household member is part of the employment relationship. Where applicable, the Department will not consider a family or household member with a pre-existing close personal relationship with the consumer to be employed beyond a written agreement developed with the involvement and approval of the program and the consumer (or the consumer's representative), usually called a plan of care, that reasonably defines and limits the hours for which paid home care services will be provided.

As we begin a new year the minimum wage in almost one-half states will also increase. Several states link their minimum wage to the Consumer Price Index (CPI) which did not increase this year. Almost one-half of the states have established a minimum greater than the federal rate of $7.25 while there are five states, including Alabama, which do not have a minimum wage statute. If you operate in multiple states it would behoove you to check with the Labor Department in the individual states to make sure you are paying the correct rate in that state. Also many of the states have a different "tip credit" from the requirements of the Fair Labor Standards Act.

If you have any questions do not hesitate to give me a call.

Did You Know…

…that Ondray Harris has been named the new director of OFCCP? Mr. Harris previously led employment litigation at the Justice Department, was director of the Community Relations Service at the Justice Department, Executive Director of the Public Employee Relations Board in Washington, D.C. and was in private practice as a lawyer and consultant. We expect Mr. Harris to lead the Trump administration's efforts to reduce the scope of OFCCP in conjunction with reducing its budget.

… that a class action lawsuit against Google based upon gender discrimination and pay was dismissed on December 4, 2017*? Ellis v. Google, Inc.* (Cal. Sup. Ct). The court stated that "there is no reasonable possibility that the requirements for class certification will be satisfied." The plaintiffs brought the class on behalf of female Google employees throughout California, only. Their lawsuit alleged that Google maintained a "centrally determined and uniformly applied policy and/or practice of paying its female employees less than male employees for substantially similar work." This case arose out of an OFCCP investigation in 2015, where OFCCP concluded that Google had "systemic compensation disparities against women pretty much across the entire workforce." According to Judge Wiss, the evidence that the plaintiffs offered in support of their class certification had "no means by which those class member who have claims can be identified from those who should not be included in the class." The court also added that OFCCP's conclusion of widespread compensation disparities against women did not show that "Google implemented a uniform policy of paying all female employees less than male employees for substantial similar or substantial equal or similar work."

…that a federal court in Kentucky is permitting a W-2 data breach class action against an employer to proceed? *Savidge v Pharm-Save, Inc.* (W.D.Ky. Dec. 1, 2017). The employer was a victim of a phishing email scheme in 2016, where the employer disclosed current and former employee W-2's to the phishing criminals. The plaintiffs alleged that the employer was negligent, breached an implied contact, negligently inflicted emotional distress and breached employee privacy by failing to safeguard the W-2 information. The current and former employees claim as damages the expenses incurred in protecting their confidential information from fraudulent tax returns and other criminal actions based upon the data breach.

… that in 2011, the U.S. Department of Labor issued a rule that prohibited those employees who receive tips from sharing their tips with non-tipped employees, such as cooks, dishwashers and other employees who are not directly involved in providing customer service? The Department's December 5, 2017, proposal is that where an employer does not use the tip credit, the employer may require the sharing of tips with non-tipped employees. The tipped and non-tipped employees must each earn at least the minimum wage and the employer may not take the tip credit toward the pay of the tipped employees. According to DOL, permitting the sharing of tips would "help decrease wage disparities between tipped and non-tipped workers." The comment period for

responding to the proposed changes was January 4, 2018; DOL has extended that by 30 days. Note that some states have more stringent requirements regarding tip pooling than the United States Department of Labor. For example, some states prohibit it entirely.

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