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Your Workplace Is Our Work®

Inside this issue:

The Effective Supervisor®

Decatur, AL……April 10, 2018
Montgomery, AL ..... TBD soon.

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

ADA – Employee Mental Health – Employer Right

Concerns about workplace violence, bullying, and harassment sometimes result in employers facing a difficult choice, which is either to require a mental health fitness for duty examination or wait to see if the concerns about the employee prove to be accurate. No employer has an obligation to retain an employee whose behavior creates a potential risk of harm to the employee or others.

An employer has the right under the ADA to require an employee fitness for duty examination, including for mental health, where the exam is "job-related and consistent with business necessity." "Preventing employees from endangering their co-workers is a business necessity," ruled the Seventh Circuit Court of Appeals in the case of *Painter v. Illinois Department of Transportation* (Dec. 6, 2017). Furthermore, "employers need not retain workers who, because of a disability, might harm someone; such a rule would force an employer to risk a negligence suit to avoid violating the ADA."

Deanna Painter worked for the Illinois Department of Transportation where she was required to undergo several fitness for duty tests based upon co-worker concerns about her behavior. She was argumentative, spoke to co-workers in a loud unprofessional tone, and kept a detailed journal of her co-workers' conversations and actions. Employees overall were "fearful of Deanna." Painter's behavior toward other employees was "brash, condescending, intimidating, and accusatory…" She also exhibited hostile body language text here.

Throughout her employment, Painter had been periodically required to submit to fitness for duty examinations because of her hostile and paranoid behavior. Four previous examinations had resulted in determinations that Painter was ultimately fit to return to work. However, in the Spring of 2012, while on paid administrative leave for hostility to co-workers, Painter emailed her union representative that a clock's displaying 4:30 when it was just 4:00 "told me everything I need to know." When the union representative responded that he thought the clock was just dead, Painter responded with what the representative took as a death threat: "Something's dead alright…" The psychiatrist conducting Painter's exam concluded that Painter was unfit for work because of her "paranoid thinking and highly disruptive behavior which results in her paranoia."

Painter sued claiming that the employer's requirement that she submit to a fitness for duty examination violated the ADA. The court concluded that the District Court got it right when it granted summary judgment in favor of the employer: an employer is simply not required to take the risk of employee behavior due to mental health as a form of accommodation under the ADA. "There must be a genuine reason to doubt whether the employee can perform job-related functions." In this case, the evidence submitted from different employees (and Painter's union representative) fully supported the employer's right to require a fitness for duty examination and ultimately not to return Painter to work.

Approximately 20% of American adults have some form of a mental health condition and 56% of those do not have access to mental health care. Thus, an employee may not even realize that she or he has a mental health disorder which requires treatment. An employer has the right to be proactive in requiring an assessment, making sure that the employee does not pose a risk of harm to the employee or to others and then determine whether the individual should return to work. With heightened concerns about workplace violence, harassment, bullying, and hostility, employers have to balance the risk of an ADA lawsuit against the risk of a potential violent or other disruptive outcome in the workplace. When there is genuine concern for violence or ongoing disruption, employers should act to protect other workers, customers, clients, and visitors. Don't hesitate to contact your employment counsel to evaluate the best action to take.

EEO-1 Report Filing on the Horizon

EEO-1 reports must be submitted to the Joint Reporting Committee by March 31, 2018. The Joint Reporting Committee is comprised by the EEOC and the Office of Federal Contract Compliance Programs (OFCCP). If you recall, the filing period was suspended based upon the EEOC's efforts to require compensation analysis as part of the EEO-1 report. That has been put on hold pending more comprehensive review.

The EEO-1 report is required by employers with 100 or more employees or employers with at least 50 employees and $50,000 per year in government contracts. When filing the report, the analysis is based upon all employees—full time and part time—during the look back period, which is the last quarter of 2017 (October, November and December).

If an employer is a multi-location employer, a report must be filed for each facility with 50 or more employees. Furthermore, a report must be filed for the headquarters, regardless of the number of employees. Also, a consolidated report must be filed for all locations with 50 or more employees. Finally, for those employers with multiple locations, the report must include the address of those locations with fewer than 50 employees.

Our colleague, JW Furman, was an EEOC investigator and mediator. She said during her investigation of approximately 1,500 EEOC charges, she did not recall ever seeing an employer's EEO-1 report requested as part of the investigation. Realistically, the greatest risk to employers of action by a regulatory agency over the EEO-1 report is from OFCCP. However, employers need to give careful consideration to how to complete the report in the event that if OFCCP or EEOC reviews the report, nothing stands out to initiate some type of investigation or charge.

If your organization is required to comply with submitting an EEO-1 and has not done so, please contact us to review the process of how this could be established without drawing attention to your organization.

Bring On the Interns – DOL Reverses Position

The United States Department of Labor in 2010 established six-part test to determine whether an intern qualified as an unpaid intern or in fact should be a paid employee. The DOL required the employer to meet all six factors for an intern to be unpaid: the internship had to be similar to training received in an educational environment, it was solely for the benefit of the intern, did not replace regular employees, the employer did not derive economic benefit the internship, the intern was not entitled to a job

at the conclusion of work, and the intern understood that the internship was unpaid.

The federal courts took a different position from DOL, stating that whether an internship required pay should be based upon a "primary beneficiary" test. That is, who is the primary beneficiary of the relationship, the intern or the employer? DOL announced on January 5, 2018 that it will replace its 2010 internship test with a new flexible seven factor test:

- Is there a clear understanding between the intern and employer that there is no compensation?
- To what extent does the internship provide training that is similar to that which would occur in clinical, educational, or hands-on training experience?
- Is the internship part of formalized academic training, such as a semester or credit given for the internship?
- Does the internship accommodate the intern's academic calendar?
- Is the internship limited in time and does it provide beneficial learning?
- Does the internship complement the work of existing employees but not replace them?
- To what extent have the intern and employer agreed that the internship is not a prerequisite or guarantee of a future hire.

The key difference in the six factor test and the seven factor test is that now, under the seven factor test, all factors will not have to be met. Previously, if the employer did not meet all six factors, then the intern may have been considered an employee and the employer was subjected to potential Wage and Hour liability. With the new seven factor test, a balancing analysis will occur where the overall question is who primarily benefits from the intern relationship – the intern or the employer? For example, if there is a possibility or historical trend of an employer hiring unpaid interns for future employment opportunities, that would not automatically nullify the internship. We recommend that as employers considering internships should structure those internships and have a written understanding with the intern to address the seven factors which will apply to the intern relationship.

Must Employees on Leave Be Left Alone?

Issues often arise during the course of an employee's FMLA absence where the employer needs to contact the employee or may want to request the employee to perform some work. What are the employer's rights to have such discussions or requests when an employee is on FMLA leave?

Remember that when an employee is on FMLA, an employer may not take action that would be viewed as potentially interfering with or retaliating against the employee for using FMLA. Furthermore, work performed by an employee while on FMLA is considered compensable time under the Fair Labor Standards Act.

If an employee has complied with FMLA certification requirements, an employer may not require the employee to perform work while on leave. Then the next question is may the employer ask the employee to perform work while on FMLA leave? Yes, the employer may ask that, but note that if the employee says no, the employer must be sure not to engage in behavior that could be viewed as retaliatory or to discourage the employee's use of FMLA. If incidental questions arise, it is permissible for an employer to contact an employee, whether over the phone or via email. For instance, it is perfectly acceptable to ask an employee on FMLA leave where she has stored a file.

There are circumstances where during an employee's leave, whether FMLA, annual or other, the employee may miss out on an opportunity or information if the employer does not contact the employee. For example, if an employer wants to consider an employee for training or promotion, and that employee is on leave, the employer has the right to contact the employee to discuss it. If there is a benefits change, benefits survey, or other similar

benefits-related issue that arises during the employee's leave, again, the employer has the right to contact the employee. And, if an investigation arises during the leave where it is necessary for the employer to speak with the employee, the employer has the right to do so. That would be considered working time, but the employer does not have to delay the investigation until the employee returns, nor does the employer have to conduct the investigation without the benefit of communication from that employee. An exception to the latter point is if the employee's FMLA or other situation is so significant that the employee is unable to participate or respond to the employer.

What if circumstances arise where, during the course of the leave, the employer becomes aware of information which may result in employee discipline or discharge? Employers have a variety of protected options. One is to move forward at that point in time and communicate the disciplinary decision to the employee. This is especially appropriate in the case of a discharge decision where there is no doubt to the employee's culpability. Another is to document that the discipline or termination decision has been made, but that the employee will be notified when the employee's leave ends. Some employers prefer the latter approach out of concern that if it is communicated during the leave, the employee may extend the leave or the employee may experience further distress during a difficult time. Just establish internally the date the decision was made and why, and then communicate it with the employee upon the employee's return.

Increased Spotlight and Scrutiny on Employers Hiring Foreign Workers

Under the banner of "America First," the Trump Administration has promised to crack down on illegal immigration through various avenues. The Administration says it is committed to stopping abuses that divert jobs from American workers. This has been evident though Immigration and Customs Enforcement's ("ICE") recent raids or "worksite inspections" on businesses that are known to hire foreign workers. This month, ICE inspected around 100 7-Eleven stores across 17 states and arrested 21 employees for allegedly being illegally present in the United States. These inspections will likely increase over the next year as President Trump has called for more ICE agents and increased deportation targets.

The Trump Administration also plans to focus on the H-2B Visa Program. The H-2B Visa Program allows foreign workers to come to the U.S. to do temporary nonagricultural jobs. H-2B visas are awarded based on a cap system that allows the program 66,000 visas per fiscal year. Employers relying on workers through the H-2B program have to certify to the government that they tried to find local workers before hiring foreign temporary workers. They are also required to show that the temporary workers are being paid at a prevailing wage, which was increased significantly in 2015.

A recently resolved case between a Colorado landscaper and the Department of Labor is illustrative of potential risks for employers under the extensive regulations and heightened anti-immigrant environment. Investigators found the employer was not paying around 53 of its foreign workers the wages stated on its H-2B certification and was not paying some of these employees the proper amount of overtime as required by the Fair Labor Standards Act. The employer explained that after he secured contracts with his workers for a specific wage, the Department of Labor increased the prevailing wage. He was unable to pay his workers the new wage and instead of returning home, the workers agreed to work for their original contract wage. The employer kept the foreign workers on at the lower rate; however, he contended he had no choice. His prior ads in local newspapers for the open positions with a pay rate higher than minimum wage went completely unanswered. Despite his seemingly innocent intentions, the employer eventually agreed to pay over $500,000 in back pay to these employees and around $25,000 in penalties for the overtime and wage violations.

This is an example to all industries that rely on seasonal, temporary foreign workers through the H-2B program. You can still be penalized despite your best intentions. With the Administration's focus on "American jobs," it is more important than ever for employers in low

skilled, low wage industries and the lawn care, landscaping, and tourism industries to continue to follow all federal rules and regulations regarding the hiring of foreign workers. These industries heavily rely on these workers and will likely be targets in the Administration's immigration reform efforts. Employers need to be sure they pay workers consistently with the prevailing wage and disclose accurate information and necessary documentation, like earning statements and relevant work orders, to the Department of Labor. This was a campaign promise of President Trump and the scrutiny placed on employers who hire foreign workers will likely not be quelled, if at all, until the next Presidential election cycle.

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.

As pointed out in last month's Employment Law Bulletin, President Trump's Labor Board wasted little time in reversing some of the overreaching under the Obama administration. Thus, in *Boeing Company,* 365 NLRB No. 154 (2017); *Hy-Brand Industrial Contractors, Ltd.,* 365 NLRB No. 156 (2017) and *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017); respectively, over a period of just two days in December, 2017, reversed Obama era decisions involving the "reasonably construe" standard, the joint employer standard set forth in *Browning- Ferris,* and the micro-unit enabling decision in *Specialty Healthcare.*

All of these ground-breaking reversals were discussed in some detail in last month's ELB. Along with the General Counsel memo involving mandatory advice submissions (also discussed in last month's Employment Law Bulletin), it is clear that the NLRB under President Trump intends to move comprehensively against the perceived over-reach by the Obama Board.

With that in mind, it is time to consider some areas that bear reversal by the NLRB and/or courts. Three cases to be aware of in 2018 are currently pending before the U.S. Supreme Court. They are:

1. *D.R. Horton* – This Fifth Circuit decision rejected the NLRB's position that class action waivers violated protections for concerted activity under the NLRA. (An in depth discussion of that initial decision in the January 2012 ELB). While the NLRB elected not to appeal *D.R. Horton*, it continued to adhere to its position, which some appellate courts rejected and others embraced, creating a circuit split for the Supreme Court to resolve. A decision by the Supreme Court is expected in the first half of 2018.

2. The overturning of the *Abood v. Detroit Board of Education* (U.S. Supreme Court 1977) case – The decision in this case allows public sector unions to charge dues to employees, so long as the fees are generally not full and employees are not forced to pay for union political activities.

   The Supreme Court now has conservative Justice Gorsuch on the bench, and the smart money is on a reversal of the *Abood* decision by the Court in the pending case of *Janus v. AFSCME Council 31*. As one pundit put it, the "writing is on the wall" for a reversal. I agree.

3. The "Religious Freedom" case – whether a Christian baker may legally refuse to bake a cake for a same sex couple. The case presents the Court with the question of whether a baker's religious beliefs, protected by the First Amendment, trump the State of Colorado's non-discrimination law in the context of a commercial transaction.

   While the case is being litigated in a public accommodations context, the First Amendment argument could have "downstream impact" on other cases, including employment cases, where employees say that rules do not apply to them because they violate their religious beliefs.

   This case is harder to call than the *Janus* case, as the Supreme Court has already found that constitutional rights exist to same-sex marriage. Stay tuned for the outcome.

Legislative Outlook for 2018

The pro-business shift, begun in 2017 under the Trump administration, will continue in 2018. Thus, the DOL will undoubtedly set new standards for the payment of overtime and the application of any exemptions, while the Senate looks to force through a new joint employer standard.

The OT Exemption under President Obama

President Obama's DOL more than doubled the threshold to $47,476 for application of an exemption established in 2004.

There is no question that the 2004 exemption needs updating, and DOL chairman Acosta under President Trump has already announced a plan to update the 2004 exemption.

The FLSA lets businesses exempt employees from overtime if they earn a certain salary and perform certain enumerated "executive, administrative, or professional" tasks.

Expect the updated rule to happen in 2018 through the rule-making process.

The Senate's Joint Employer Rule

While *Browning-Ferris (BFI)* has already been reversed by the Labor Board, a future Democratic majority could restore the *BFI* standard. The pending bill, known as the "Save Local Business Act," would amend the NLRA and the FLSA to establish a "direct control" rule.

This bill faces an uphill battle and is not expected to go anywhere, as it will in all probability, be filibustered in the Senate. This assumes no changes in the Senate filibuster rules.

The "Quickie Election" Rule Rollback

I predict a rule-making change back to the old rules. This will take some time as the rule-making rules are arcane.

EEOC Pay Data Initiative

The current EEOC chairperson, Chai Feldblum, has indicated that the OMB has directed the EEOC to go "back to the drawing board", not scrap the initiative entirely. Look for some changes to take place where the more onerous requirements are abandoned by the EEOC, but more reporting is required than is required presently.

State and Local Trends

States are trying to rein in confidentiality agreements when settling sexual harassment cases in light of the Harvey Weinstein scandal. Critics claim that overly restrictive confidentiality agreements keep the settlements under wraps and allow the harassers to remain in positions of power.

In the country's more liberal states, the local municipalities and cities have passed wage laws, restricting the use of salary history in setting wage offers, and requiring employers to give employees paid time off. I do not expect much, if any, support of these measures on the federal level under a Trump administration or in Republican-controlled state legislatures.

In the News

In an information request case, in a decision where the D.C. Circuit Court of Appeals had refused enforcement of a Board decision, a Board panel has reconsidered the case and found that the credited testimony at the hearing warranted a dismissal of the case in its entirety.

The credited testimony is that a union the day after the information request stated that the entire request was "bulls_ _ t", thereby conceding the irrelevance of the information request.

What is amazing is that the Board at first found that the request was "presumptively relevant" and thus the company had a duty to respond in a timely fashion. The employer had eventually responded untimely to the request stating it was irrelevant and merely harassment. It was not until the court remanded the case to the Board to explain itself did the NLRB come to its senses. *Iron Tiger Logistics, Inc.*, 366 NLRB No. 2 (2018).

EEO: Looking Back at 2017 and Forward to 2018

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.

Many federal agencies and their regulations experienced a lot of changes during 2017. EEOC, by contrast, had a relatively uneventful year. No new major controversial issues surfaced, key leadership positions were left unfilled, and some EEO issues are important to the President's daughter. So far, during this administration it has held the status quo.

2017 ended with two Commissioner seats and the General Counsel spot at EEOC being unfilled. At some point in 2018, EEOC will most likely have a majority Republican Commission. President Trump nominated Janet Dhillon and Daniel Gade but they have not yet been confirmed by the Senate (both likely will be). No one has yet been nominated for General Counsel. While the courts have differing opinions on whether Title VII covers sexual orientation and gender identity, EEOC has been steadfast regarding coverage. I was with the agency throughout the Bush II and Obama administrations and our training never changed on this point. During their confirmation hearings, neither Dhillon nor Gade would commit as to whether the law does or should protect LGBT individuals from discrimination and harassment. Both have voiced conservative views concerning employment matters in the past. Referring to the Justice Department's recent opinion counter to EEOC's view, Dhillon said it is "critical that the federal government ultimate speak with one voice" on this issue. The Supreme Court is not weighing in yet; they just declined to hear an appeal from the 11th Circuit (covering Alabama, Florida and Georgia) regarding the firing of a lesbian employee. After these vacancies are filled, I expect that EEOC will file fewer of these cases until the Supreme Court clarifies the law.

Sexual harassment has been at the forefront of the news for months and will likely stay there for a while. More EEOC charges and lawsuits should be expected as women feel more empowered by the news coverage. It is important to remember the law has not changed – the definition of unlawful harassment in the workplace has not changed. As we discussed in November, employers need to ensure their supervisors/managers are aware of the law and their policies, policies are administered consistently and without fear of reprisal, and employees are educated regarding what constitutes unlawful harassment, internal policies concerning harassment and reporting of offensive conduct.

Although the Office of Management and Budget stopped the new EEO-1's pay data collection plan in August 2017, it may be resurrected in some form in 2018. EEOC Commissioner Feldblum (Democrat, nominated to continue serving until 2023) said she believes the EEOC was directed to rework the form, not scrap it entirely. Chair nominee Janet Dhillon said during her confirmation hearing that she would look at what additional data the Commission needs to enforce the equal pay laws and suggested that employers might be made to turn over more pay data than they do now. So, it is likely that some pay data will be added to the EEO-1.

In August 2017, the court said that EEOC did not give good reasons for letting employers offer incentives of up to 30% of the cost of health insurance in exchange for employees' participation in wellness programs. Current rules were left in place until January 1, 2019, and the agency was required to issue a notice of proposed rulemaking detailing plans for the new rules by August 2018. Last week, however, the court partially granted EEOC's request to reconsider. The agency now has no set schedule for issuing notices or implementing new rules but its present rules for workplace wellness programs will still be vacated January 1, 2019. EEOC had previously said it might not have new rules in effect until 2021. So, for 2018, it looks like there will be no change.

President Trump continues to promise to make the country's regulations more business-friendly.

The two Commission nominees have stressed less litigation and more conciliation. The large systemic cases EEOC has filed in recent years are expensive for both the agency and employers. While the new General Counsel has not even been nominated, those in-the-know predict fewer of these cases will be filed once the new Commission settles in. Cooperation, outreach and training to help companies comply with the law will be the focus of the Trump administration's EEOC, whenever it is seated.

OSHA Fatality Information

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 posted the following fatality case data on work related fatalities in response to those fatalities that occurred under federal OSHA and state OSHA jurisdiction that have been closed on or after January 1, 2017.

Employers must report worker fatalities to OSHA within 8 hours. OSHA investigates all work-related fatalities in all covered workplaces. The agency has up to 6 months to complete an investigation and determine whether citations will be issued. For this period OSHA reports the following fatal cases. It is noted that the information is not comprehensive:

In South Dakota, a worker died in a fall from the roof of a barn under construction.

In North Roberts, Idaho, a worker died when clothing became caught in a conveyer motor drive shaft.

In Plainfield, Indiana, a worker drowned in a dunk tank during a company celebration.

In Nashville, Tennessee, a worker died after being struck by a vehicle.

In Vineyard, Utah a worker died in a fall from a balcony.

In Beaumont, Texas, a worker died after being struck by pipes that had fallen off a trailer.

In Houston, Texas, a worker was fatally crushed between in a vehicle door frame.

In Cyprus, Texas, a worker died in a fall from a tree.

In Magnolia, Texas, a worker died in a fall from a roof.

As new information is reported to OSHA, this list will be updated and investigated.

Wage and Hour Update

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.

Anticipated Effect of the Change in Administration

The current administration has been in office for a year and they have begun to make several changes in how the Department operates. For as long as I have been involved with Wage Hour enforcement they have had a practice of issuing "opinion letters" that could be used by employers desiring to ensure they were complying with the Fair Labor Standards Act. In 2009, at the beginning of the previous administration, the Department discontinued this practice. This month Wage Hour announced they would begin issuing letters again and in fact they even reissued some letters from the end of the Bush administration. There were 17 such letters that had been signed, but not mailed, on the final day of the Bush era that Wage Hour has now released. All of the letters that have been issued since early in the 21st century are available on the Wage Hour web site.

Even though it appears that the current administration is taking a lower key enforcement policy, Wage Hour collected some $270 million in back wages during 2017. In addition the ten largest settlements of privately filed Wage Hour cases resulted in employers paying $525 million in back wages. Consequently, employers should remain diligent to ensure they are complying with the various Wage Hour statutes.

Increases in the Minimum Wage

While there has not been an increase in the FLSA minimum wage for many years, several states have instituted increases this year. Some organizations are continuing to advocate for a $15 minimum wage. While that is unlikely to happen, you should be aware that some 29 states plus the District of Columbia have established a minimum wage higher than $7.25, with $12.50 per hour being the highest. Most states in the Southeast do not have a higher minimum wage; however, Florida's rate in 2018 is $8.25 per hour. If you operate in states other than Alabama, I suggest that you check to make sure that you are not required to pay a higher minimum wage. A list containing the minimum wage for each state can be found on the Wage Hour website under "State Laws." If you have employees for whom you taking a tip credit toward the minimum wage, you should also check the Wage Hour website as several states either do not allow an employer to take a tip credit or only allow a smaller amount of tip credit.

Attendance at Training Meetings

From time to time employers may desire to have employees attend training programs or meetings and may not be sure whether the employee must be paid for this time. The Wage Hour regulations state that an employee's attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if the following four criteria are met:

(a) Attendance is outside of the employee's regular working hours;

(b) Attendance is in fact voluntary;

(c) The course, lecture, or meeting is not directly related to the employee's job; and

(d) The employee does not perform any productive work during such attendance.

If a non-exempt employee fails to meet any of the criteria above then the employee must be compensated for these hours. Of course, the employer does not have to provide additional compensation to exempt employees for any time spent attending such training meetings.

Outside the employee's regular working hours - The training meeting must be during hours or days that are not during the employee's regularly scheduled work hours. For example, consider an employee who is scheduled to work from 8 AM to 5 PM Monday through Friday. In order for the training not to be considered as work time it would either have to be on Saturday or Sunday or after 5 PM and before 8 AM Monday through Friday.

Attendance must be voluntary – Where the employer (or someone acting on his behalf) either directly or indirectly indicates that the employee should attend the training, the attendance is not considered voluntary. For example, a vendor tells the employer that he will provide a dinner for the employees at which they will discuss a new product or a proposed marketing method and the employees are encouraged to attend. Thus, the time spent at the dinner would be considered as work time.

However, where a state statute requires individuals to take training as a condition of employment, attendance would be considered as voluntary. An example would be the childcare worker who must complete a 40 hour class before being able to work in the childcare industry. Conversely, if a state requires the employer to provide training as a condition of the employer's license, then attendance at the training would not be considered as voluntary. Therefore, this criterion would not be met and the employer would have to consider the training as work time.

Training must not be directly related to the employee's job – Training that is designed to make the employee more efficient at his job would be considered

as work time, while training for another job or a new or additional skill would not. Training, even if job-related, that is secured at an independent educational institution (i.e. – trade school, college & etc.) that is obtained by the student on his own initiative would not be considered as work time. Also, training that is established by the employer for the benefit of employees and corresponds to courses that are offered by independent educational institutions need not be counted as work time. An example would be a course in conversational English that an employer makes available to his employees at his facility.

The employee performs no productive work during the training course – Training that is conducted away from the employer's facility usually does not pose a problem but training that is conducted at the employer's business can potentially cause a problem. Many times, the employee receives the training using the employer's equipment, which could have some benefit to the employer and thereby make the time compensable.

Prior to a nonexempt employee attending a training course the employer should make sure that attendance meets each of the four criteria listed above, otherwise he must be prepared to compensate the employee for the time spent attending the training. Employers should also remember that when the training hours are determined to be work time then this time must be added to the employee's regular work time for overtime purposes.

New Employee Orientation & Completion of Employment Related Documents – In today's world of electronic records many employers are now having their new employees complete the employment-related documents online prior to actually physically reporting to work. Also, some employers are having the new employees view online videos as a part of their orientation to the place of work. Once the employee is hired, any time spent in these activities is considered as work time and must be paid for at a rate not less than the current minimum wage of $7.25 per hour. You should track this time and record it in the payroll records. If the time spent in these activities when added to the employee's hours in their initial workweek causes the employee to work more than 40 hours then you should pay them time and one-half for all hours over 40.

If you have questions or would like to discuss the matter further, do not hesitate to give me a call.

2018 Upcoming Events

EFFECTIVE SUPERVISOR®

Decatur, AL – April 10, 2018

City of Decatur Fire and Police Training Center
4119A Old Highway 31, Decatur, AL 35603

Montgomery, AL – TBD

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Jennifer Hix at 205.323.9270 or jhix@lehrmiddlebrooks.com.

News Briefs

On January 4, the Teamsters Union filed a motion with the D.C. Circuit Court of Appeals to keep alive the *Browning-Ferris* case regarding prior NLRB joint employer standards. On December 15, 2017, in the case of *HY-Brand Industrial Contactors*, the NLRB reversed the Obama Board joint employer standard from "economic reality" to "actual control" that one employer has over another employer's employees. On December 22, 2017, the D.C. Circuit remanded its case to the NLRB for an assessment in light of its *HY-Brand* decision. We believe that the Court of Appeals will deny the Teamsters's request.

The labor union IG Metall has 3.9 million members in Germany, where it dominates in the metal and electrical industries. Of interest to us is IG Metall's current negotiating position which it says will lead to strikes if employers refuse to accept it. The union is pushing for a

flexible 28 hour work week and for pay increases of 6%. The union claims its proposals increase the employees' quality of life, particularly as they care for children and elderly relatives. Furthermore, after two years the union wants a guarantee that employees will receive a 35 hour work week.

Employer efforts to reduce medical costs by changing "lifetime" medical benefits to retirees risk as a consequence class action litigation. Most recently, a court permitted a class action case to continue against PPG Industries based upon the employer's action of requiring retirees to pay the full cost of their medical benefits. This case began in 2005, and now in 2018 a federal judge certified the class. Steelworkers and other unions have been successful in seeking remedies through a collective bargaining agreement's arbitration process, claiming that the employer's change to retiree medical benefits violated the bargaining agreement. No doubt employers will continue to contemplate changes to retiree benefits. Union or non-union, be sure to evaluate the various theories those affected retirees could bring to challenge the employer's action. In the unionized setting, the employees could have multiple "bites at the apple." An outcome through the collective bargaining agreement would not necessarily be the exclusive remedy should unions lose arbitrations over this issue.

The labor movement has been widely criticized for being "male, pale and stale." Labor is moving rapidly to change the composition of its leadership to reflect the demographics in today's workplace. Thus, 47% of the delegates at a recent AFL-CIO convention were women and minorities, and 7% of the 50 AFL-CIO unions are now led by women. Unions are continuing to pursue this diversity effort in addition to becoming more attractive to millennials, who will comprise 75% of the workforce in 2025. In our view, labor's change in demographics does not alter the fact that it simply is not offering enough of what would attract employees to want to join. Millennials and others may appreciate the contribution unions make regarding policy, but that does not mean they want to be represented by unions.

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