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Record Decline of EEOC Charge Filings

EEOC charge filings dropped during FY 2017 (September 30) to 84,254 from 91,503 during FY 2016. This drop was the largest single-year decline since the EEOC began releasing charge statistics in 1997. Although overall chare numbers are in decline, some types of claims continue to be strongly and increasingly represented in the charges that are filed. For instance, charges containing a retaliation claim comprised 48.8% of all charges, the fifteenth consecutive year retaliation charges increased as a percent of total charges. ADA charges as a percent of overall charges increased for the ninth consecutive year and now comprise 31.9% of all charge filings.

Sexual harassment charges declined for the seventh consecutive year, to 6,696 from 6,758. We expect an increase in these charges during FY 2018, as many of the notorious sexual harassment and sexual assault incidents were reported after the close of FY 2017. Reasonable cause findings in sexual harassment cases remain higher than other claims—5.7% for FY 2017—as compared to 2.9% for all types of charges overall. Overall, reasonable cause findings decreased from 3.2% during FY 2016 to 2.9% during FY 2017. The EEOC issued "no reasonable cause" findings in about 70% of cases in FY 2017, marking a new high in the proportion of cases to receive this employer-favorable determination. Almost 15% of charges resulted in findings adverse to the employer or a settlement by the employer.

Charge filing statistics often reflect the job market. For example, an additional 13,000 charges were filed from FY 2007 to FY 2008, a time of high unemployment. Prior to FY 2008, the number of annual charge filings since 1997 varied between 75,000 and 85,000. Assuming our low unemployment rate continues, we do not foresee an increase in overall charge filings, although we expect a slight increase in sexual harassment charges. Given the time limitations of 180 or 300 days to act under Title VII, there is likely a ceiling for how much the number and proportion of sexual harassment charges can grow. However, employers should be aware that Title VII's filing limitations would not apply to state law torts of assault; battery; negligent supervision, retention, training; outrage; and wrongful termination and sexual harassment (where such torts exist independently of federal law).

The sharp decline in charge filings may place the EEOC on the Trump Administration's radar for budget reductions. The EEOC asked for a very modest increase for the 2019 budget – a total increase of $1.783 million out of $363,807,086. Clearly, the EEOC does not want to face the possibility of budget and staffing reductions, such as those at the National Labor Relations Board. In addition to essentially proposing a flat budget, we expect the EEOC to increase its litigation efforts to support its position in Congress that staffing reductions should not occur.

Union Membership Increases Slightly

According to the Bureau of Labor Statistics, union membership during 2017 grew by 262,000 from 2016. A total of 14.8 million private and public sector employees were union members in 2017, 10.7% of all private and public sector employees. When BLS began compiling this information in 1983, 17.7 million employees were union members, 20.1% of the total workforce. A total of 16.4 million American workers are represented by unions, but only 14.8 million are union members. This disparity includes those in Right-to-Work states who may be represented by unions but choose not to belong to them.

Over half of all union members live in seven states: California (2.5 million), New York (2 million), Illinois (0.8 million), Michigan and Pennsylvania (0.7 million each), and New Jersey and Ohio (0.6 million each). States with the lowest union membership are South Carolina (2.6%), North Carolina (3.4%), and Utah (3.9%). The states with the highest union membership are New York (23.8%), Hawaii (21.3%), and Alaska (19.4%).

Men 16 years and over comprised 11.4% of union members in 2017, an increase from 11.2% for 2016. Women 16 years and older comprised 10% of all unions in 2017; a decline from 10.2% in 2016. White employees were 10.6% of union members in 2017, a slight increase from 10.5% in 2016. Black employees were 12.6% of union members in 2017, a decline from 13% in 2016. Asian employees were 8.9% of union members in 2017, as compared to 9% in 2016. Hispanic or Latino employees comprised 9.3% of union members in 2017, a jump from 8.8% in 2016.

So what do these statistics mean? Overall, the labor movement is flat. However, there are encouraging signs for unions. Millennials are increasing their participation in unions, which is important for labor's long term vitality. Hispanic and Latino employees are also increasing their participation in unions, which is also a positive signal for the labor movement, as historically, first or second generation immigrants have been attracted to unions as a source of protection and assimilation.

Second Circuit Joins Seventh Circuit in Recognizing Sexual Orientation Discrimination as Discrimination Because of Sex in Violation of Title VII

On February 26, 2018, the Second Circuit Court of Appeals (covering Connecticut, New York, and Vermont) joined the Seventh Circuit Court of Appeals (covering Illinois, Indiana, and Wisconsin) in finding that Title VII's prohibition against discrimination because of sex includes discrimination due to sexual orientation. The Court heard the appeal *en banc*, which is required to overturn controlling precedent. (Like all other appellate courts to have considered the matter, the Second Circuit had previously ruled that sexual orientation discrimination was not prohibited by Title VII).

Five judges joined the full opinion, which embraced all three rationales advanced by advocates in favor of this interpretation of Title VII: (1) that sexual orientation inherently depends on an individual's own sex because, for example, a woman who is attracted to other women who is discriminated against on that basis would not be discriminated against if she were a man attracted to women; (2) sexual orientation is inseparable from sexual stereotype discrimination; and (3) sexual orientation discrimination is associational discrimination and no different than, for instance, unlawful discrimination against someone for being in an interracial relationship. Four more judges joined parts of the opinion, with three filing separate concurrences. A tenth judge concurred in

the judgment but filed his own brief concurring opinion. Three judges dissented, each filing their own dissent.

As discussed in the March and April 2017 ELBs, there is now a circuit split on these very recent sexual orientation decisions, with the Eleventh Circuit affirming the more traditional view that sexual orientation discrimination is not prohibited by Title VII and the Seventh Circuit finding that sexual orientation is prohibited by Title VII. The Supreme Court refused to hear the employee's appeal from the Eleventh Circuit, and the employer in the Seventh Circuit case did not appeal the adverse decision against it. The defendants in the Second Circuit suit have said they do not plan to appeal the decision, but of course they still have some time to pursue an appeal if they change their minds.

Department of Justice Targets Employer "No Poaching" Agreements

According to Makan Delrahim, Assistant Attorney General for the Department of Justice Anti-trust Division, DOJ will begin issuing criminal indictments against companies that agree not to hire or recruit each other's employees. DOJ considers a "no poaching" agreement to be anti-competitive. For many years, DOJ's initiative to stop the use of these agreements was through civil litigation. However, now DOJ plans to focus on the conduct by seeking criminal indictments. The DOJ focus on no poaching agreements applies even to employers that don't produce competitive goods or services. DOJ's concern is that certain skilled employees may be viewed as part of the "no poaching" agreement.

In addition to "no poaching" agreements, DOJ is also focusing on employer agreements to fix wages. Recently, a wage fixing class action of 90,000 was certified against 15 au pair recruiting companies. A class action was also filed regarding an agreement between Duke University and the University of North Carolina not to hire each other's medical school professors.

With a tight labor market in several job classifications, employers need to be sure their recruitment, hiring and pay practices do not amount to a form of "no poaching" or wage level fixing. These are potential anti-trust violations and the assumption that a Trump Administration DOJ will tread lightly in this area is absolutely false. Be prepared for criminal indictments if such practices continue.

OFFCP Initiates 2018 Audit Process

On February 1, 2018, OFCCP sent 1,000 corporate scheduling announcement letters (CSAL) to federal contactors stating that they may be subject to an audit for compliance with affirmative action and non-discrimination requirements. The establishments who received the CSAL letter are selected from OFCCP's federal contractor selection system.

If you receive a corporate scheduling announcement letter, prepare for an OFFCP audit. Thus, conduct a self-audit to determine compliance. Also, if your organization has multiple facilities, notify each facility of the potential for them to receive the CSAL or an audit scheduling letter and have them forward that to corporate HR immediately.

Save the Date – LMVT's Employer Relations Summit, November 15, 2018

Save the date for our 2018 Employer Relations Summit. The "off-year" national elections will be held on Tuesday, November 6. Our Summit, scheduled for November 15, will include a review of the workplace implications of those elections and what employers may anticipate during the remaining two years of President Trump's first term. Additionally, speakers from LMVT will review current and future hot issues for employers. Mark the date now, with more information to be provided in the near future. The Summit is complimentary and will be held at the McWane Center in Birmingham, Alabama. Lunch and refreshments will be provided, and complimentary parking will be available.

IRS Begins Enforcing Affordable Care Act Penalties against Employers

As some employers have learned in the last few months, the Internal Revenue Service has begun assessing penalties against employers who allegedly failed to provide qualifying health insurance coverage to eligible employees in 2015.

The Affordable Care Act ("ACA")'s employer mandate requires employers with more than 50 full-time or full-time equivalent employees to provide minimum essential coverage that is affordable and provides minimum value to eligible employees. If employers do not comply with the employer mandate and an eligible employee receives a premium tax credit through the ACA's Health Insurance Marketplace, the ACA imposes penalties depending on the number of employees who received the tax credit and the number of months they received the tax credit. For 2015, the penalties for each employee could range from $2,000 to $3,000 per month.

Some employers are receiving penalty assessments amounting to millions of dollars. The Congressional Budget Office previously estimated that companies would owe around $139 billion in penalties from 2016 to 2024. Employers and their counsel are already trying to fight back. Many opponents argue that the IRS lacks authority to impose the assessments, particularly because they did not receive notifications from the ACA marketplaces that employees were buying insurance on the marketplace, which is required before a penalty can be imposed. Employers and business groups are urging lawmakers, particularly Republicans, to repeal the employer mandate and dismiss and forgive the penalties.

Many opponents have also raised issues with the short time given to respond to the penalty assessments. Generally, employers have around two to three weeks to respond. This is problematic for the employers who receive penalties for multiple employees over several months. In order to oppose the penalties, employers are required to correct any errors on the Form 1095-C for each individual employee and provide a signed statement explaining the correction. This often requires reviewing previously submitted reporting forms, employee time records, and employee coverage forms and records. Employers cannot simply reject the penalty and expect it to go away. Moreover, many employers are still confused on the reporting requirements for the Form 1095-C, which is used to report coverage for individual employees on an annual basis. In light of this confusion that the IRS has still not fully addressed, many employers inadvertently report incorrect information on the Form 1095-C and are not sure how to correct the form to contest a penalty.

The best recommendation for employers trying to contest a penalty or trying to prevent any penalties in the future is to utilize available their available resources. The IRS has detailed instructions and examples on its website. While it could always provide more explanation, it is a good place to start for any new or inexperienced Human Resources employee. Additionally, if your company utilizes a third party vendor for reporting or data compilation purposes, you should immediately report any penalties to the vendor and obtain the necessary documentation from the vendor to contest the penalty. Additionally, if possible, you should consult your in-house or outside counsel regarding any penalties or questions on how to properly offer and report coverage for your eligible employees. At present, the penalties do not appear to be going away. As such, it is crucial to ensure that your employees understand the employer mandate and its reporting requirements to try to prevent penalties at the onset.

NLRB Topics and News Update

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years. Mr. Rox can be reached at 205.323.8217.

Browning-Ferris (BFI) Joint Employer Test Reinstated; *Hy-Brand* Vacated (for now)

The NLRB has vacated its recent *Hy-Brand* decision (discussed in the December 2017 ELB) based on a report by the NLRB Inspector General critical of Board Member William Emanuel's participation in the original decision. Because Emanuel's former firm Littler Mendelson PC

represented BFI's contract labor provider Leadpoint, NLRB Inspector General David Berry said that the argument in *Hy-Brand* was "essentially a continuation" of the *BFI* matter, and, under government ethics rules, Emanuel should have recused himself during the *Hy-Brand* case. A NLRB ethics official thereafter determined that Emanuel should have initially recused himself from the case.

Expect the Board to request a return of the *Hy-Brand* decision from the D.C. Circuit, where it was pending enforcement. For now, "indirect control" of wages, hours, and working conditions will suffice to establish a joint employer relationship. This is the new, looser standard enunciated in the *BFI* case, which is discussed in depth in the August 2015 ELB. The order vacating the *Hy-Brand* decision was issued on February 26, 2018.

The Underlying *Hy-Brand* Decision

In *Hy-Brand,* the full Board led by then-Chairman Miscimarra and other Republicans, members Kaplan and Emanuel, voted along party lines to reverse *BFI* and return to the "direct and immediate control" standard applied prior to *BFI*.

A lengthy 13-page dissent was penned by the Democrats on the Board: former chairman Mark Pearce and member Lauren McFerran. In their dissent, the Democrats claim that the Board majority had resurrected a "restrictive joint employer standard" by reflexively reversing precedent announced in the *BFI* decision.

The majority had stated in *Hy-Brand* that:

> [The Board] agrees that Hy-Brand and Brandt are joint employers, but [the Board disagrees] with the legal standard the judge applied to reach that finding. The judge applied the standard adopted by a Board majority in [*BFI*]. In [*BFI*], even when two entities have never exercised joint control over essential terms and conditions of employment and even when any joint control is not "direct and immediate," the two entities will still be joint employers based on the mere existence of "reserved" joint control, or based on indirect control or control that is limited and routine. [The Board finds] that the *[BFI]* standard is a distortion of common law as interpreted by the Board and the courts, it is contrary to the Act, it is ill-advised as a matter of policy, and its application would prevent the Board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations. Accordingly, [the Board] overrules [*BFI*] and returns to the principles governing joint-employer status prior to that decision. [citations omitted].

The decision itself, which meant reinstitution of actual direct control over working conditions to support a joint employer finding, is almost thirty-five pages long. While this decision is undoubtedly a setback, expect a Republican-controlled NLRB to revisit the decision as soon as they can sit an untainted Board majority, and reverse *BFI* again. In the meantime, the *BFI* decision stands as the law applied to joint employer cases.

Government Shutdown?

The government shutdown lasted one work day. It had little, if any, impact on NLRB operations, as employees came into work to perform "shutdown functions" and then reported to work the next day.

A second shutdown was virtually avoided as of this writing, by the tentative passage of a two year budget deal/resolution. There is still a chance of a shutdown in 2018 if Congress cannot finalize the spending/DACA/border wall details.

"Ambush" Election Rules Up For Rulemaking by NLRB

As predicted, the rulemaking process has started on the quickie election procedures.

The deadline for public comment has been extended by the NLRB from February 12, 2018, until March 19, 2018. No specifics have been provided as to why the deadline was moved.

The rules, implemented along party lines under the Obama administration, were meant to "streamline and make more efficient" the case handling procedures for the processing of election petitions.

The new rules, first published in December 2014 and implemented in April 2015, included putting off employer challenges to voter eligibility until after an election where the challenges were determinative, and eliminating the 25-day waiting period for the ordering of an election after a Regional Director directs an election in a decision.

The request for public comments is on the NLRB website. The questions include the following:

1. Should the 2014 Election Rule be retained without change?

2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?

3. Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Representation Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Representation Election Regulations? If the Board should make changes to the prior Representation Election Regulations, what should be changed?

The Democrats on the Board dissented to the questions posed. Apparently, they see at least some modifications of the 2014 procedures in the future. The 2014 Election Rule has withstood court challenges as a reasonable exercise of the NLRB's discretion. We have discussed the 2014 election procedures extensively in past ELBs, including at the Rule's publication, implementation, and in reviewing its effects.

Micromanage the Regions?

General Counsel Peter Robb has proposed additional layers of oversight of the Regions and the demotion of Regional Directors from senior executive service to GS-15. The RDs, who belong to a union called an "association," were caught off guard, and stated in response to the Robb conference call that the proposed demotion and oversight will result in a "severe and negative impact on [the] agency and stakeholders," and push senior officials "whose institutional knowledge is a valuable asset to the agency" to retire.

The pros of the proposed change include:

- More consistency of decision making process – the proposal by Robb includes oversight by "district" directors, who apparently would be based in Washington, D.C. In theory, the RDs should implement current Board policy; however, in practice, there is a wide discrepancy between Regions depending on the RD and his biases.

- More efficient operations – when asked, the NLRB said that "budgetary issues" had forced GC Robb into this decision. A downgrading of RDs would save some retirement costs and salaries. The proposal anticipates some closure of Regional offices and/or consolidation of Regions into "super" regions.

The cons include:

- A perception that the move is one that emasculates the RDs and turns the NLRB into the "anti" NLRB. By giving more control of the Regions to GC Robb, he could stop cases from even reaching the Board in Washington D.C.

- A war at the NLRB – the Robb proposal is the opening salvo in what is expected to turn into a protracted legal battle and a heated conflict. There are few, if any, RDs that trust GC Robb. Robb is viewed as having a not-so-hidden agenda.

One pundit has stated, "The fact that the [RD's] have issued this letter … and it has become public … suggests we have almost a civil war inside the [NLRB]."

My prediction is that this proposed change will get little traction, as the RDs circle the wagons. I retired from the NLRB in 2011, in time to avoid the worst of micromanaging of the Regions. A strong RD is required to resist the micromanaging from Washington, D.C., though it is not clear how much discretion will be left to the RDs.

John Ring Nominated to Replace Miscimarra

John Ring, a longtime management-side labor lawyer, has been nominated to replace NLRB member Miscimarra. Ring has agreed to sit out decisions where his firm has represented entities over the past two years, absent a waiver. In addition, Ring has agreed to not participate in any matter in which his former clients are a party for a period of one year after Ring provided service to that client.

D.C. Circuit Remands NLRB Case

Speaking of the D.C. Circuit, the court on January 29, 2018, remanded a case to the NLRB to consider the case given the Board's recent ruling on handbook rules and the revamping of *Lutheran Heritage.* The court stated:

> Because the board's decisions regarding these seven [unfair labor practice] matters rest on the now- replaced "reasonably construe" test, the board no longer seeks enforcement thereof and instead seeks remand to reconsider [the ULP's] in light of the new *Boeing* test. [The court] accordingly remands.

The *Boeing* decision announced a new standard where the NLRB will now consider the "nature and extent" of a challenged rule's "potential impact of NLRA rights" and any "legitimate justifications associated for the rule."

EEO: Leaves of Absence as an ADA Accommodation

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.

There are always so many questions about disability-related leaves of absence. Most employers are well aware of their obligations regarding Family Medical Leave, but what about Americans with Disabilities Act reasonable accommodations? While some courts disagree, EEOC has always believed that a leave of absence can constitute a reasonable accommodation in certain circumstances. And neither the courts nor EEOC's published guidance provide concrete rules for the treatment of such requests. The requirements for individualized assessments and interactive processes don't really allow for concrete rules. For employers dealing with many regulations, not being able to point to a rule that requires a certain action or outcome in a given situation is frustrating. What employers can do is show that that they followed the required processes and reached a reasonable conclusion based upon real information garnered from those processes. Of course I can't promise that a court will agree with an employer's decision, but I can say with certainty that if EEOC sees that the employer used individualized assessments and engaged in the interactive process in reaching its decision, EEOC will have little interest in litigating that charge.

Once it is determined that an employee has a disability and is qualified to perform the job (with or without accommodation) under the ADA, an employer must participate in the processes when a leave of absence accommodation is requested. Before assessments regarding a request can begin, employers must understand exactly what is being requested and how the absence will enable the employee to remain productive. Prompt interaction with the employee is essential. Approaching the employee with goals of helping both him or her and the company be successful and produce more useful information for assessment, and ease what could be an uncomfortable situation. (Employees dread their bosses' reactions to requests for time off.) Additional medical information may be needed but, mostly, an understanding of what that employee needs to perform her job and how that effects the company/department is needed.

There is nothing wrong with exploring alternatives or modifications to the requested accommodation; that is part of the interactive process. The way those alternatives are approached can be a red flag in an EEOC investigation or make an employee feel defensive about the process. If, before informed assessments can

be made, the employer's attitude conveys that an alternative to a leave of absence must be found, actions the employer sees as complying with the ADA-required interactive process may be viewed by EEOC (and possibly a court) as a pretense. It can also make the employee feel as though further information they have will not be considered. An employer can avoid these impressions by being prepared for employees and their medical providers: know what points need to be made, know what questions need to be answered, know what will be said and how it will be said. Additionally, employers should have appropriate personnel conduct such interviews. This will normally be HR or a higher-level executive and not the employee's direct supervisor. An emotional employee in fear of losing his or her job can take a conversation to unforeseen places. Improvising can have disastrous results for an employer. Always have a plan and stick to it, or be able to guide the conversation back to it.

Continuing employee involvement during assessments is also important. It can help keep the employer focused on the required individual assessment and not solely on its work rules and policies. Employers who abide strictly by their attendance policies to assure that no employee is treated more favorably than another may have trouble assessing a request for extra leave as an accommodation under the ADA. Remember that even though other discrimination laws were enacted to ensure equal treatment of all applicants and employees, the ADA seeks to give qualified individuals with disabilities assistance that allows them to compete equally in the workforce.

Undue hardship to the employer is a factor to be considered in assessing most requests for accommodations. Unlike accommodations in which the main consideration is expense (purchasing equipment or altering work space), most employers need to look at the impact an employee's absence will have on the operation of the business. A basic consideration is whether they will be able to meet work goals and serve customers/clients adequately. They must ensure a sufficient number of qualified employees to accomplish required work. Of course, the expense of overtime or temporary workers to complete the absent employee's work also is a concern.

To receive meaningful consideration when being reviewed by EEOC or a court, elements of each step of the process, including an undue hardship claim, must be well documented. Even though they may not like or agree with the end decision, showing that the processes outlined in the ADA were followed is paramount. Again, the ADA is not a concrete rule requiring individuals with disabilities be given advantages over all other employees, its goal is to equalize opportunities in the workplace while recognizing that the circumstances of each job and medical condition are different.

OSHA Safety Training

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 places a great deal of importance on safety training. The agency posts the following regarding this issue: "Let's be honest. Safety can be boring and cumbersome at times. People often look at safety professionals as the 'safety police' which can tend to create a barrier. These professionals must lead their teams to effectively get the safety messages across and build a strong safety culture."

How do you turn around an unresponsive audience and have a great classroom training session or safety committee meeting? Honestly, safety can really be boring sometimes. It can be especially difficult when an audience does not participate and is otherwise disengaged. This happens at times during meetings and other encounters. The following OSHA tips are suggested to perhaps assist in focusing more attention on safety training sessions:

Start the session by having employees write down on the name tag how long they have been working at the company. Encourage the older employees to interact with the newer employees. Have the group talk about accidents they have seen or heard about during their jobs or even at other times. It is noted that in these sessions

there will be at least one person that other attendees turn to or look up to as having the most information. It is suggested that this person is identified and involved prominently in the session.

In closing, safety can be an exciting field as lives can be changed or even saved because of someone's knowledge.

Current Wage and Hour Highlights

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.

Status of New White Collar Regulations

Initially, the current administration dropped the appeal of the injunction prohibiting the implementation of the new regulations, and then later asked that the appeal be reinstated. In addition, the present administration has asked for input from the public regarding possible changes to the current regulation. Consequently, the status of possible changes to regulation remains uncertain at this time.

Overtime Exemption for Commissioned Employees

There are several little known exemptions in the Fair Labor Standards Act that can provide some relief and protection for employers. One is an overtime exemption set forth in Section 7(i) for certain commission-paid employees of a retail or service establishment.

A retail or service establishment is defined as an establishment 75% of whose annual dollar volume of sales is not for resale and is recognized as retail in the particular industry. Some examples of establishments which may be retail are: automobile repair shops, bowling alleys, gasoline stations, appliance service and repair shops, department stores, furniture stores, and restaurants. Other types of businesses that may also qualify include pest control companies, hotels/motels, movie theatres, and barber/beauty shops. Examples of businesses that are not considered as retail and thus cannot qualify for the exemption include medical/dental clinics and banks/credit offices.

If an employer elects to use the Section 7(i) exemption for commissioned employees, three conditions must be met:

1. The employee must be employed by a retail or service establishment, and

2. The employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked, and

3. More than half the employee's total earnings in a representative period must consist of commissions.

Employers should note that the employee must earn in total pay at least time and one half the minimum wage ($10.88) for each hour worked during a workweek. If the employee fails to earn at least this amount the employer must include "make-up" pay in order for the exemption to be applicable. Failure to do this could raise the specter of losing the exemption in other weeks.

Representative period: may be as short as one month, but must not be greater than one year. The employer must select a representative period in order to determine if this condition has been met.

If the employee is paid entirely by commissions, or draws and commissions, or if commissions are always greater than salary or hourly amounts paid, the-greater-than-50%-commissions condition will have been met. However, if the employee is not paid in this manner, the employer must separately total the employee's commissions and other compensation paid during the representative period. The total commissions paid must exceed the total of other compensation paid for this

condition to be met. To determine if an employer has met the "more than one and one-half times the applicable minimum wage" condition, the employer should divide the employee's total earnings attributed to the pay period by the employee's total hours worked during such pay period.

Hotels, motels, and restaurants may levy mandatory service charges (such as banquet fees) on customers that represent a percentage of amounts charged customers for services. If part or all of the service charges are paid to service employees, that payment may be considered commission and, provided the other conditions are met, the service employees may be exempt from the payment of overtime premium pay. Conversely, tips voluntarily paid to service employees by customers are not considered commissions for the purposes of this exemption and have to be retained by the employee if the employer is claiming a tip credit toward the minimum wage.

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

EFFECTIVE SUPERVISOR®

Decatur, AL – April 10, 2018

8:30am-4:00pm Central

City of Decatur Fire and Police Training Center

4119A Old Highway 31, Decatur, AL 35603

Montgomery, AL – April 12, 2018

8:30am-4:00pm Central

Hampton Inn Montgomery

7800 East Chase Parkway, Montgomery, AL 36117

Click here for brochure or to register.

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

2018 Employee Relations Summit

Birmingham - November 15, 2018

McWane Center

200 19th St N, Birmingham, AL 35203

www.mcwane.org

Registration Fee – Complimentary

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

Upcoming Events

Presenter: Whitney R. Brown

Employment Law Update in Alabama

Webinar

February 28, 2018

12:00-1:30pm Central

Register at a 50% discount at

http://www.lorman.com/401468?discount_code=W8796558&p=15999

Presenter: Richard I. Lehr

Employer Rights Update

Speech

March 14, 2018

Shoals Economic Development Association

To register, email Adam Himber at

Adam.Himber@SEDA-Shoals.com

In the News

Teamsters Facebook Unfair Labor Practice

The NLRB General Counsel determined that Teamsters Local Union 610 violated the National Labor Relations Act by setting up a Facebook page to "ostracize" and "humiliate" its own members. The issue began when the Teamsters negotiated a two-tier wage agreement but no employees from the lower tier were represented on the union's bargaining committee. One employee from the lower tier circulated a petition to include lower tier employees on the bargaining committee, but not only was he denied that request, the union responded by setting up a Facebook page that excluded him. Union members were able to post their comments about him and other low tier employees who wanted to be on the bargaining committee. The Facebook group was called the "Wolf Space WP Pact." Many union members were invited to join. According to the General Counsel, the union violated the National Labor Relations Act "because the Facebook group had a tendency to restrain and coerce [employees] … by excluding, ostracizing and humiliating them."

EEOC Pregnancy Discrimination Litigation

Pregnancy discrimination continues to be a focal point of the Equal Employment Opportunity Commission. Most recently the EEOC settled a lawsuit for $80,000 alleging that a residential care facility, Silverado Menominee Falls in Wisconsin, refused to accommodate a pregnant employee. The employee was denied light duty and terminated because of her inability to do the job, which she claimed was due to her pregnancy. The EEOC alleged that the employer provided light duty to employees with non-pregnancy-related medical conditions, such as job-related injuries and illnesses. Therefore, the EEOC asserted that the employer needed to offer light duty to this employee, because it offered light duty to non-pregnant employees.

OSHA Reporting Deadlines

OSHA's deadline for electronic reporting is on the horizon. By July 1, 2018, employers with 250 or more employees covered by OSHA's record keeping regulations must submit data for 2017 forms 300A, 300 and 301. Thereafter, submission of that information beginning in 2019 will be required by March 2nd. Those employers with between 20 and 249 employees in high risk industries (such as construction) are also required to submit their injury report according to this schedule. Note that the reporting rule includes anti-retaliation provisions, which prohibit employers from discouraging employees to report injuries, accidents or illnesses.

NLRB to Reduce Budget, Staff

The NLRB's proposed budget for 2019 reflects a 9% reduction. According to NLRB General Council Peter Robb, "If we're going to have a lower budget, it's going to have to come in substantial part out of the number of full time employees. We are either going to do it ourselves and get right sized or somebody's going to do it in the budget. I don't like that alternative." The reduction in head count follows years of declining petitions for representation and unfair labor practice charge filings. In addition to the reduction in head count, the NLRB may consolidate 26 regional offices into a smaller number of district offices. This would facilitate a reduction in head count as well. Expect organized labor to refer to the proposed reductions at the NLRB as "union busting" by the majority Republican Labor Board and Trump Administration. However, in any organization, private or public sector, years of declining sales and production inevitably lead to a decline in the total workforce. What the NLRB is considering is long overdue in our opinion.

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