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Responding to Employee Activism

The month of September saw at least two major work walkouts in support of the #MeToo and #BelieveSurvivors movements. The first was the organized McDonald's protest in support of ten McDonald's workers who filed EEOC charges alleging they were subjected to near-constant sexual harassment and then retaliated against when they reported it. The second effort called on people to wear black and to walk out of their workplaces at 1:00pm Eastern on September 24 in support of women who have survived sexual assault. The latter event in particular is strongly associated with the allegations of improper sexual conduct by Supreme Court nominee Judge Brett Kavanaugh against Christine Blasey Ford and Deborah Ramirez. These two recent walk-out events are not the first and are unlikely to be the last in politically-motivated (or at least not exclusively work-related) workplace protests.

Employers should exercise caution before responding immediately with severe sanctions to employee activism. In some cases, these protests may qualify as protected concerted activity under Section 7 of the National Labor Relations Act. Section 7 of the NLRA privileges collective employee activity for the purpose of raising work-related concerns. The McDonald's workers, for instance, are fairly clearly acting in concert in an effort to bring attention to and reform the alleged misconduct that they contend affects their working conditions. Just because workplace activism addresses a more global concern (such as 2017's Day Without Immigrants or marches in favor of minimum wage increases, for example) does not mean it is automatically unprotected by the NLRA. The Supreme Court in 1978 ruled that employees did not lose their protection under the NLRA "when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*. Instead, all of the circumstances must be analyzed, including whether the protest concerned a working condition, the manner of the employee's protest, whether the protest occurred during the employee's working time or not, and the employer's ability to address the condition the employees are protesting before such a determination may be made. Employers should also consider their own risk tolerance, their ability to mitigate disruption, and other practical considerations before taking action.

To avoid complaints of favoritism or discrimination, employers should treat employee requests to engage and actual engagement in political and social protests in accordance with neutrally-written and consistently-enforced policies. For example, if an employer normally requires two weeks' notice before permitting an employee to use PTO but will bend the rule if it can arrange staffing coverage so an employee can attend a child's field trip, the

company should exhibit the same circumstance-dependent flexibility for an employee who desires time off to march. Further, if an employee does engage in detrimental conduct in the course of such activism, the employer should ensure that the employee is disciplined consistently with other employees who engaged in such detrimental conduct absent political or social motivation.

Relatedly, in some limited circumstances, employee activism might be protected conduct under employment laws prohibiting retaliation (Title VII, Section 1981, ADEA, ADA, GINA, etc.). This could be the case if an employee acts in opposition to alleged discrimination or harassment at his or her own workplace, provided the employee's manner of protest was not particularly disruptive. A court would likely be most sympathetic to allowing an employee to proceed with a retaliation claim in circumstances where the purpose of the protest was to raise a legitimate complaint to a higher-level executive after a complaining employee's prior complaints to personnel identified in the company's handbook were ignored.

Some jurisdictions have laws prohibiting discrimination based on political viewpoints or off-duty political activity. Public employers and employers that contract with public entities may also have constitutional, statutory, or contractual obligations to refrain from taking employment actions based on an employee's political activity or activism.

The bottom line is that responding to employee political or social activism can be more complex than it initially appears, and there is certainly no one-size-fits-all formula for doing it. We welcome the opportunity to partner with our clients in anticipating and responding to such situations.

Eleventh Circuit Rehabilitates Racial Harassment Claim

To state a claim for harassment or hostile work environment, a claimant must establish, among other things, that he or she was subjected to conduct that was (1) unwelcome, (2) related to his or her protected status (*e.g.*, race, sex, religion, etc.), and (3) severe or pervasive. It is often on this last element—severity and pervasiveness—that employers prevail as courts have a long-standing commitment not to turn Title VII and similar laws into a statutory civility code. When examining whether offensive conduct was truly severe or pervasive, courts look to its frequency, whether it involved physical conduct or threatening conduct, whether it had the purpose or effect of humiliation, and whether it interfered with the claimant's work, among other factors. In general, mere verbal insults will fail to tip the scales unless they occur with a weekly or greater frequency. However, certain highly derogatory language, like the n-word, is treated more like a physical assault or threat, and, if directed at the complaining employee, need only occur once or twice to meet the standard of severity and pervasiveness. Such was the case in the Eleventh Circuit Court of Appeals' September 24, 2018, decision in *Smelter v. Southern Home Care Services, Inc.*

Brenda Smelter worked as a Customer Service Supervisor for Southern Home, a home health care agency. As a Customer Service Supervisor, one of her core responsibilities was ensuring that caregivers received accurate schedules and coordinating caregivers' time entries into a telephone-based timekeeping system with Southern Home's computer system. She was the only African-American at Southern Home's Perry, Georgia, office.

According to Smelter, her co-workers regularly engaged in racist dialogue and remarks in her few months of working there. A fellow Customer Service Supervisor, Smallwood, remarked that black men were "lazy" and "the scum of the earth;" and further that "black women had babies on welfare." The co-worker also compared Smelter's and President Obama's appearances to monkeys. An office manager also made remarks like commenting that when she saw black people exiting a bus at Wal-Mart, it looked like they were "chained together." The office manager went on to say she wished she could "send them all back … to Africa."

According to Smelter, one day, a caregiver accused Smelter of not relaying a scheduling change to her. Smelter, who believed Smallwood had overheard her make the scheduling change, asked Smallwood to confirm that she had communicated the scheduling change. Smallwood stated she did not remember it.

Smallwood and Smelter got in a heated argument culminating in Smallwood pounding her hands on her desk and telling Smelter to "get out of my office … you dumb black n****r."

Southern Home argued to the Court that the single use of the n-word was not so egregious, along with the other remarks in a two-month period, to be severe or pervasive. The Court responded, "We strongly disagree. This Court has observed that the use of this word is particularly egregious when directed toward a person in an offensive and humiliating matter…What is more, Smallwood's use of this word was not an isolated instance—it came at the end of two months during which Smelter had endured racist comments on a daily basis."

This is not the first decision from the Eleventh Circuit or other appellate courts which strongly condemns any tolerance of this most-egregious racial slur in the workplace. However, the fact that this case is yet another case in a trendline of racial harassment cases stretching back to at least 2012 speaks to a continuing need for employers to educate against and to respond aggressively to racial stereotyping, racial insults, racially-charged symbols (examples from this line of cases include nooses, confederate flags where there is other evidence of racism, and banana peels or monkey imagery targeted to African American workers), and racial slurs.

Seventh Circuit Affirms Verdict Against Costco for Customer Harassment

As noted in the previous story, to show a hostile work environment, a claimant must prove, among other things, that he or she was subjected to conduct that was (1) unwelcome, (2) related to his or her protected status (*e.g.*, race, sex, religion, etc.), and (3) severe or pervasive. What made the case of *EEOC v. Costco Wholesale Corp.* somewhat unique was that in this case, the employee complained of hostile activity from a customer. (7th Cir. Sept. 10, 2018). According to the female employee, a male customer: repeatedly asked her out; repeatedly tried to give her his phone number; repeatedly asked her how old she was; bumped her with his cart four times; videoed her with his phone while she worked; hid behind clothes or racks or disguises to look at her; told her she was "pretty," "beautiful," and "exotic;" commented on minute details of her appearance like her makeup or the veins in her hand; and asked her where she lived, if she had a boyfriend, what her nationality was, where else she worked, and other questions. Though the employee reported her concerns, Costco was slow and tepid in its response, merely talking to the customer and waiting until the employee had obtained a restraining order on her own to prohibit the customer from shopping at the store where she worked. After this, the employee was shopping with her father at another Costco when she encountered the customer, who cursed at her and her father. Only after this behavior was he banned from all stores in the region.

A jury found that the employee had been harassed and awarded her $250,000. Costco appealed, arguing, among other things, that the employee had not been subjected to severe or pervasive behavior. After all, she had not been subjected to sexual touching, pornographic images, or explicit conversation. The Seventh Circuit Court of Appeals (covering Illinois, Indiana, and Wisconsin) held that nothing in Title VII required the harassment to be overtly sexual; rather, it had to be motivated because of sex. Further, the Court noted, it had to construe the customer's behavior holistically, not just the discrete acts. While the customer's behavior could have been merely "friendly but overeager," the EEOC had depicted—and a jury had apparently agreed—that he was "unstable and obsessive."

Costco did not appeal on the grounds that it could not be vicariously liable for the customer's actions. This is a well-settled point of law and Costco appeared to concede that its response to the employee's complaints was "unreasonably weak" (as the Court put it). Employers must be mindful that their obligation to provide a workplace free of harassment extends to the actions of third parties as well as the actions of third parties or employees that occurs off-the-clock and outside of the workplace provided there is a nexus to the workplace.

Ninth Circuit Reminds Us of the Breadth of the "Regarded As" Prong of the ADA

To bring a claim of disability discrimination under the ADA, a plaintiff must establish that he or she is entitled to coverage under the act because he or she is actually disabled, is regarded as disabled, or has a record of being disabled. As most of our readers know, the ADA Amendments Act of 2008 (ADAAA) greatly expanded the definition of *disability* under the ADA. Most of the caselaw since the ADAAA took effect has focused on this broadened definition in the context of individuals claiming they had an actual disability. However, the ADAAA also made some modifications to the ADA's *regarded as* eligibility test. Under the pre-ADAAA ADA, a plaintiff needed to prove that the employer subjectively believed that the plaintiff was substantially limited in performing a major life activity (*i.e.*, an employer needed to believe the employee was actually disabled). However, the ADAAA eliminated the requirement that the employer subjectively believe that the employee is substantially limited in a major life activity. Rather, the plaintiff need only prove that he or she was subjected to an adverse action due to an actual or perceived *impairment*, whether or not the perceived impairment was limiting enough to constitute a disability. An employer may affirmatively show that the actual or perceived impairment was transitory (lasting less than six months) and minor as an affirmative defense, but, otherwise the plaintiff is not required to prove the employer regarded his impairment as substantially limiting.

In the case of *Nunies v. HIE Holdings, Inc.*, Nunies was a delivery driver for HIE Holdings, delivering five-gallon water bottles. (9th Cir. Sept. 17, 2018). According to Nunies, he requested to transfer to a part-time, less physically demanding warehouse job due to a shoulder injury. The transfer was set to go through, but, when HIE learned that Nunies wanted the transfer due to an injury, it rejected the request and told him it no longer had funding for his position, forcing him to resign. The day before Nunies was terminated, HIE ran an ad for the part-time warehouse job Nunies had wanted. The trial court concluded that Nunies was neither regarded as nor actually disabled, because HIE had not considered his shoulder injury to be serious and because Nunies had largely been able to work through the shoulder injury: he had a lifting restriction of 25 pounds and experienced shooting pain when lifting even less than that amount above his shoulder. The Ninth Circuit Court of Appeals (which covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) found that the district court had erred in putting the burden on Nunies to prove that HIE regarded him as having an impairment that was not transitory or minor and also in deciding that Nunies was not actually significantly impaired: "In our view, a stabbing pain when raising one's arm above chest height substantially limits the major life activity of lifting and possibly working."

Current State of H-2B Visa Program Rules

The H-2B Visa Program allows U.S. employers to hire foreign citizens for temporary work in the U.S. when there are not enough Americans available or willing to fill the positions. This is a program that many trades and industries have utilized to hire necessary workers. In 2015, the Department of Homeland Security and the Department of Labor issued the final interim rule, which required employers to grant access to their job openings to U.S. workers before foreign citizens on H-2B visas. They also issued a final wage rule, which required employers to pay H-2B workers the prevailing wage for the industry and area.

Subsequently, a group of employers and trade associations, including several landscape companies and organizations, filed suit challenging the rules and another rule that required employers to have an approved labor certification by the DOL to petition DHS for the visa. The group alleged that the agencies exceeded this statutory authority by making these rules together. The group complained that the rules were making the program "dysfunctional" as it resulted in workers arriving months later than requested and expected and extensive compliance costs to the employer.

A Maryland federal court denied the group's challenge against the rules and found that the agencies acted within their legal authority based on legislative history of the

program and statutory authority granted to the agencies since the 1960s.

Despite this finding, the group's attorney seemed eager to take the issue to the federal appeals court. He believes the court's order made key points that support the group's challenge to the rules. Particularly, he noted how the court was unpersuaded by the government's argument that DHS can delegate certain immigration responsibilities.

This will certainly be an issue that will be raised at a federal appeals court level and likely beyond. There have been other cases similar to this challenge that have resulted in inconsistent findings, signaling that, at some point, the United States Supreme Court might get involved. The Eleventh Circuit Court of Appeals previously found the DOL did not have the authority to issue H-2B regulations; however, the case did not have a lasting impact as the rules in question in that case were superseded by the 2015 rules the group is now challenging. Alternatively, a federal court in Pennsylvania previously ruled in favor of the government regarding the DOL's authority to set minimum wage requirements regarding the H-2B visa program.

While the current rules are still in place and employers are required to follow them at this time, it will be important to see how any future challenges are resolved. In the event the 2015 rules are dismantled, which likely would not occur for some time (if at all), it would give employers more freedom to utilize the H-2B visa program, obtain interested workers, and cut compliance costs. However, in light of the Trump Administration's tightening of all immigration laws and processes, it is likely that even more changes and limitations to this program will occur.

NLRB News

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 404.312.4755.

Advice Memoranda Issued on Immigration Protests and *Weingarten* Rights

In mid-August of 2018, the Division of Advice issued memos dealing with worker rights to support an immigration protest and reaffirming that *Weingarten* and bargaining rights attach at the time of an employee vote, not at the time of certification.

In the case of *International Warehouse Group*, Region 29 of the NLRB requested formal advice as to whether the employer had violated the NLRA by interrogating, threatening, and discharging Latino employees about and for their support and participation in 2017's Day Without Immigrants protest.

The Division of Advice found that the employees' participation in and support of the Day Without Immigrants was protected Section 7 activity:

> Section 7 of the National Labor Relations Act protects [employees] when they take part in "concerted [activity]" for "mutual aid and protection." These protections clearly encompass specific work-related issues like collective complaints about pay.

This was particularly so, the Division of Advice reasoned, because the Latino employees had long felt and complained that they had been subjected to unfair working conditions and lower pay due to being Latino. However, the Division of Advice also stated that workers were generally protected here because the protest responded to "the sudden crackdown on illegal immigrants and the threat of workplace raids, and ultimately deportation."

The Division of Advice also released a memo in *Corona Regional Medical Center* in response to Region 21's asking whether the employer had violated employees' *Weingarten* rights by denying them access to union representation during an investigatory interview with an employee accused of wrongdoing after the union had won the election but before the results had been certified. In 1975, the Supreme Court issued it famous *Weingarten*

decision, in which it gave employees the right to union representation during investigatory disciplinary interviews.

The Division of Advice, citing long-standing precedent, also found that employers must bargain with unions over discretionary discipline even without a collective bargaining agreement, and that the obligation to bargain attaches "not on the date of certification, but as of the date of the election."

The NLRB to Rethink Its 8(f) Relationship Rulings

On September 11, 2018, the NLRB announced its intention to reconsider the decision which establishes a collective bargaining relationship between a union and a construction industry employer (8(f) employer) based solely on the collective bargaining agreement that references majority support for a union under Section 9(a).

The Board solicited input into whether the Board should revisit its decision in *Staunton Fuel & Materials,* which held that based on the language in the CBA alone can confer 9(a) status. The current unanimous decision arises from a dispute involving an insulation company which was accused of bargaining in bad faith with the union. The company is appealing ALJ decision that found a violation of the Act applying the *Staunton Fuel* case that the company illegally failed to bargain with the union.

Look for the NLRB to reverse, or at a minimum modify, *Staunton* and apply the 8(f) provision that allows employees in the construction industry to withdraw their support from the union when the CBA expires regardless of a recognition factor present. The NLRB has set a deadline of October 26, 2018, for the filing of amici briefs.

Rulemaking on Joint Employer Issue Imminent

On September 13, 2018, the NLRB announced a proposed rule that would reverse the *Browning-Ferris* case. The new rule was published in the Federal Register on September 14, 2018, and proposes finding a joint employer relationship only if an employer controls the "essential terms and conditions" of their employment, such as wages, hours, hiring, firing, discipline and other working conditions. The control must be "direct and immediate" rather than "limited and routine."

The rule would overturn the test enunciated in the Board's 2015 *BFI* decision allowing a joint employer finding even where an employer exercises only "indirect control" over the other employer's workers. This test is a significant issue for both management and labor supporters because employees can collectively bargain with the joint employer and hold both employers liable for alleged unfair labor practices. The comment period for the rule proposal is currently open and will remain open until November 13, 2018.

The proposal comes as the Trump administration has struggled to narrow the joint employer standard by adjudication, which is the typical way the law is changed by the NLRB.

In dissent, Member Lauren McFerran noted that the Board applies different ethical standards during the adjudication process. The proposed rule in the Federal Register is a "general scope" matter – and not a "particular matter." Thus, the argument goes, that William Emanuel does not have to recuse himself during the rulemaking process, as he did in *Hy-Brand*. As the reader recalls, *Hy-Brand*, an adjudication case, overturned *BFI*. *BFI* has been a thorn in management's side since they have argued that the decision has made it difficult to determine who is a joint employer.

In a separate incident, Senator Patty Murray, the ranking member of the Senate's Health, Education, Labor and Pensions committee, said the day after the Board intended to push the change through during rulemaking:

> After a botched attempt to undermine workers' rights by grossly violating ethics rules, the board is once again attempting to give big corporations the green light [for them] to shirk their responsibility to bargain with [employees] for fair pay, better hours, safer working conditions and more. This rushed, irresponsible proposal undermines the board's own mission to encourage collective bargaining

and protect workers' right to come together in unions.

McDonald's Employees Walk Out in Support of the #MeToo Movement

As noted in our cover article, on September 18, 2018, the employees active in the Fight for $15 walked off the job at McDonald's in 10 cities. The striking employees said they will urge McDonalds to form a committee that will address sexual harassment at the workplace. The employees have said the committee should consist of employees, representatives from the corporate and franchisees' side and leaders of national women's groups.

Corporate McDonald's stated that it has always supported a culture that fosters respectful treatment of everyone:

> There is no place for harassment or discrimination of any kind at the [Company]. [McDonald's has] policies, procedures and training in place that are specifically designed to prevent sexual harassment at our company and company owned [stores], and we firmly believe that our franchisees share this commitment.

Stay tuned for developments. In the meantime, consult with experienced labor counsel before you issue any discipline to strikers.

Investigations of Employee Complaints Are Still Required

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 employees, managers, and executives have been fired or otherwise forced out of companies since the #MeToo movement began. Hundreds of cases have been reported by news sources and we can only imagine how many have not been reported. We repeatedly hear that a complaint of sexual harassment or inappropriate workplace behavior was received, and the accused was immediately discharged or allowed to step down. What we have heard less about are investigations into those complaints.

Granted, some complaints may have been presented along with clear evidence that warranted immediate and severe action, but those are few and far between. In my experience, the vast majority of harassment reports include details of the offensive actions and sometimes names of coworkers who "may" have witnessed "if" they aren't afraid to get involved. While investigating these charges, I have learned some valuable lessons: most (unfortunately not all) accusers are honest; descriptions of events are always told from the narrator's perspective; and all violations of policy or law are not equal. The best way to find the whole truth and determine what, if any, action should be taken is to take time to investigate the allegations.

In the age of instant news and social media, it is easy to follow their lead and react quickly to a situation, so you can move on to the next crisis. But breaking news stories are followed up by more in-depth reporting after they have been investigated, and who among us hasn't seen someone quickly and unjustly punished in the court of public opinion on social media because inaccurate or incomplete information was distributed? Thorough investigations, in lieu of knee-jerk reactions, serve to protect the parties involved as well as their employers. Remember that federal discrimination laws (and most state laws) require a prompt investigation of reports of harassment along with remedial action when appropriate.

The accuser deserves a meaningful investigation into her/his claims of harassment in order to move forward in career and life. A reactionary firing based solely on an accusation will leave the workforce with many concerns and fractioned over which party deserves their support. It can affect the accuser's career and reputation: will a promotion be seen as payoff for having been a victim or will a future career slump be attributed to a manager's friendship with the accused? And most accusers do not want the accused to be punished because they were

brave enough to come forward; they want any punishment to be based on and commensurate with the accused's conduct. Absent a full admission, the accused also deserves to have the allegations investigated. If support is found for the allegations, a good investigation will shed light on whether the offense is ongoing or a single incident, the offender is a predator or a human who made a mistake, and the offender should be fired or disciplined in some other way. As an added bonus, an investigation into reported inappropriate workplace behavior may show employers ways they can prevent future violations or improve policies for reporting and professional conduct.

Employers who choose to have human resources professionals or in-house counsel investigate harassment claims should be sure they are trained for the task. Knowledge of laws and policies does not always prepare someone to perform meaningful investigations of sensitive topics. Because of the increased scrutiny given to these cases recently, many employers are hiring professionals for exploring such accusations. A qualified third-party investigator will have extensive training and experience in fact-finding and handling sensitive matters and provide a fair and balanced report of findings. No matter what the issue, well-informed decisions always serve employers better than quick reactions, and the #MeToo has not changed that.

White Collar Exemptions

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act. Mr. Erwin can be reached at 205.323.9272.

The possible changes to the requirements for these exemptions are still active. As you will remember there were some regulations, scheduled to become effective December 1, 2016, that would have more than doubled the current salary requirements that were put on hold by the courts. Since that time, I have seen various indications that Wage Hour is still considering making some substantial changes to the regulations. This month, they held "listening sessions" in Atlanta, Seattle, Kansas City, Denver, and Providence, RI, where they invited the public to comment on the need for changes to the regulations. While it is anyone's guess as to what they might propose, I expect to see something published in the next few months. So, all I can say is to stay tuned for the next episode of the saga that first began early in the previous administration.

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

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional, and outside sales employees. To qualify for an exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Under the current regulations there is a separate duty test for highly compensated employees that is established at $100,000 annually.

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

Executive Exemption

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

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

- The employee's primary duty must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise;

- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and

- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

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

Administrative Exemption

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

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

- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

This exemption may be applicable to certain management staff positions such as Safety Directors, Human Resources Managers and Purchasing Managers. Of the exemptions discussed in this article, the Administrative exemption is the most difficult to apply correctly due to application of the "discretion and independent judgment" criteria with respect to matters of significance.

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

Professional Exemption

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

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

- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

- The advanced knowledge must be in a field of science or learning; and

- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Examples of employees that could qualify for the exemption include Engineers, Doctors, Lawyers and Teachers.

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

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

- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Typically, this exemption can apply to artists and musicians.

Computer Employee Exemption

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

- The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week or at an hourly rate not less than $27.63 an hour;

- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;

- The employee's primary duty must consist of:

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

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

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

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

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

Outside Sales Exemption

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

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

- The employee must be customarily and regularly engaged away from the employer's place or places of business.

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

The application of each of these exemptions depends on the duties actually performed by the individual employee rather on what is shown in a job description plus the employee must meet each of the requirements listed for a particular exemption in order for it to apply. Further, the employer has the burden of proving that the individual employee meets all of the requirements for an exemption. Therefore, it is imperative that the employer review each claimed exemption on a continuing basis to ensure that he or she does not unknowingly incur a back-wage liability.

Enforcement

While it may seem that the current Wage Hour enforcement policies are not as strenuous as those during the previous administration, private litigation still is very much in play as there were almost 7,700 FLSA cases filed in federal courts during 2017. The most

concentrated areas were south Florida (932 cases) and New York City (813 cases). There was a total of 117 cases filed in Alabama during this period. Thus, employers need to be diligent in monitoring their pay practices to ensure that the employees are being paid correctly. If I can be of assistance, please contact me.

Government Contracts

During the previous administration, DOL published an executive order setting a higher minimum wage for certain employees working on covered contracts. The new rate, effective January 1, 2019, will be $10.35 and tipped employees must be paid a case wage of at least $7.25 per hour. If you have government contracts, you should check with your contracting agency to determine if the new rates apply and if you may qualify for a contract adjustment to cover the additional wages.

2018 Upcoming Events

2018 Employee Relations Summit

Birmingham - November 15, 2018
McWane Center
200 19th St N, Birmingham, AL 35203
We are at capacity for this event.
E-mail Dora Lajos to join the waiting list!

Click here to view the Agenda.

Effective Supervisor®

Huntsville – December 4, 2018
8:30AM - 4:00PM
U.S. Space and Rocket Center
One Tranquility Base, Huntsville, AL 35805
Click here to register

Birmingham – December 6, 2018
8:30AM - 4:30PM
Vulcan Park & Museum
1701 Valley View Drive, Birmingham, AL 35209
Click here 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.

In the News

EEOC Sues Taco Chain for Sexual Harassment, Discrimination, and Retaliation

On September 17, 2018, the EEOC sued taco chain Del Taco LLC, alleging that the organization subjected female employees to sexual harassment, sex discrimination, and retaliated against a then-teenaged female worker that complained about the harassment. The EEOC contends that Del Taco ignored employee complaints about the harassment. According to the Commission, two of the five complainants were teenagers at the times they were harassed, and their harassment stemmed solely from an unidentified shift leader. The Del Taco suit reflects the EEOC's strategic enforcement priorities of addressing systemic harassment and acting on behalf of underserved workforces, like young workers and low wage workers who might be unaware of their rights. *EEOC v. Del Taco, LLC* (C.D. Cal.). Employers in high turnover, low wage, and youth-dominated fields like fast food should be sure that anti-harassment and conduct and professionalism policies are communicated and enforced, as there is no legal defense based on the relative immaturity of the workforce, *i.e.*, "kids these days."

Workers Contend Facebook and Employers Discriminated on the Basis of Sex and Gender Identity in Job Ads

A group of prospective employees and the Communications Workers of American union have filed EEOC charges alleging that ten employers and Facebook discriminated by requesting and targeting job advertisements towards cis-gendered men. The law firm that is assisting the workers and the Union in filing these Charges is currently prosecuting a lawsuit against Amazon.com, Inc., and T-Mobile, alleging that those companies violated age discrimination laws by targeting younger applicants in Facebook ads. That suit is currently pending in federal court.

Is Obesity a Disability?

At least two courts are currently considering whether or not obesity is an impairment under anti-disability discrimination statutes. Plaintiff Mark Richardson and a number of obesity and disability advocacy groups are asking the Seventh Circuit to overturn a lower court's decision that obesity was not a disability under the ADA. The trial court had held that plaintiff needed to show an underlying disorder or condition causing the obesity to qualify as disabled. The plaintiff and advocacy groups argue that as obesity affects several bodily functions and life activities that it is a disability even without an underlying cause. *Richardson v. CTA* (7th Cir.). The Ninth Circuit Court of Appeals requested an opinion from the Washington Supreme Court as to whether obesity would be an impairment under that state's anti-discrimination law. *Taylor v. Burlington Northern Railroad Holdings, Inc.* (9th Cir. Sept. 17, 2018).

EEOC Alleges Walmart Discriminated Against Pregnant Workers by Not Offering Them Light Duty

On September 21, 2018, the EEOC filed suit against Walmart, alleging that it denied pregnant workers the right to participate in light duty work that was provided to employees with work-related injuries. According to the EEOC, Walmart denied a pregnant employee's request for light duty work, telling her it was only provided to employees with workplace injuries. The EEOC has targeted this type of policy for years now, arguing that employers with light duty programs must provide light duty work as an accommodation to employees who have non-work-related disabilities under the ADA and to pregnant workers under the PDA. The *Young v. UPS* case (discussed in-depth here) technically left open the possibility that employers could continue to reserve carefully-administered light duty programs for employees with work-related injuries, but understandably left many employers anxious to continue such programs on this basis. If it progresses, this case could resolve those questions, at least with respect to pregnant workers' right to accommodation under the PDA.

New Suits Under Illinois Biometric Privacy Law

Wendy's International (of fresh, never frozen burgers), and plastics manufacturer Amcor have been hit with suits under Illinois' biometric privacy law. The complaints, filed by the same firm, allege the employers scanned employees' fingerprints without permission and without policies for the collection, storage, and destruction of this and other private employee information. Under the biometric privacy law, the claimants can be awarded $1,000 for each violation.

LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

Richard I. Lehr 205.323.9260
rlehr@lehrmiddlebrooks.com

David J. Middlebrooks 205.323.9262
dmiddlebrooks@lehrmiddlebrooks.com

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

Michael L. Thompson 205.323.9278
mthompson@lehrmiddlebrooks.com

Whitney R. Brown 205.323.9274
wbrown@lehrmiddlebrooks.com

Claire F. Martin 205.323.9279
cmartin@lehrmiddlebrooks.com

Lyndel L. Erwin 205.323.9272
(Wage and Hour and Government Contracts Consultant) lerwin@lehrmiddlebrooks.com

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

Frank F. Rox, Jr. 404.312.4755
(NLRB Consultant) frox@lehrmiddlebrooks.com

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