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Employment Law Bulletin

OCTOBER 2018
VOLUME 26, ISSUE 10

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Employment Disputes on the Horizon

We recently were invited to present to London insurance specialists our assessment of what we think employment disputes of the future will involve. We all know that we are in the middle of severe turbulence over workplace sexual harassment and assault matters, but, ultimately, we think that proactive employer approaches to prevent and address harassment that does occur will help reduce the incidences of sexual harassment and mitigate the risk of liability. The long-term risks that we see involve matters employers will actually have little control over, and those relate to age, disability, and FMLA issues.

Today, those who are 65 and older in the United States amount to 13.6% of our population. By 2030, it will total 71 million people, or 19.6% of our population, with 19.5 million of that group being over the age 80. Now that all sounds well and good from a life-expectancy standpoint, but here is the issue that employers will face: 30% of Americans who are at or near retirement age have less than $10,000 in liquid assets and 24% have between $10,000 and $99,000 for retirement. 53% of employers offer some type of retirement plan, such as a 401(k). Yet, 68% of employees between ages 25 and 64 do not participate in those plans, even if there is not a requirement for an employee contribution in order to receive an employer match.

These demographic trends portend a future where age discrimination claims will rise related to termination and failure-to-hire decisions. Employers will feel pressure to transition older employees in order for less experienced and recently trained or educated employees to move in. Overlay these statistics with the increasing number of retirement age Americans who support their adult children, and one can see that in the workplace, a job will be something precious for an older employee to hold on to.

American public health trends are alarming, and thus ADA and FMLA issues will increase. There are examples of what we refer to as alarming:

- 1/3 of all children and adolescents are overweight or obese.
- 70% of American adults are treated for chronic stress or disease.
- As an outcome of lifestyle and chronic illness, the primary diseases are cardiovascular, type 2 diabetes, hypertension, high cholesterol, high blood pressure, depression, anxiety, stress, and infertility. Heart disease is the leading cause of death in the U.S.

- 250 million Americans are overweight.
- Americans lead the world in obesity yet consume 80% of the world's weight loss products.
- 25% of U.S. children spend 4 hours a day watching television and playing on phones instead of engaging in physical activity.
- Children today in the U.S. will not live as long as their parents.

With a low threshold of what it means to be disabled under the Americans with Disabilities Act and also what constitutes a "serious health condition" under the Family Medical Leave Act, employers will face ever-increasing numbers of attendance, reliability, and productivity issues to manage in light of employer obligations under these laws. For example, it is a statistical probability that every employee will have an FMLA-related issue; if not the employee's issue, then a family member's. With older employees needing to remain in the workforce because of insufficient retirement savings, certain medical issues that become part of the aging process will create the double statutory issues of individuals in that protected class: ADA and ADEA (though employers have no obligation to accommodate age, many age-related conditions may qualify as disabilities).

The national focus on sexual harassment, assault, and harassment in general is long overdue and will elevate the level of respectful behavior that should occur at the workplace and beyond. However, from a long-range planning and preparation standpoint, employers should evaluate issues regarding the age of their workforce and the potential ADA and FMLA implications of employee health.

#EEOC, Too

Our colleague, Jerome Rose, was Regional Attorney of the EEOC before joining our firm. Jerry prepares a monthly analysis of EEOC lawsuits and settlements by nature of suit, employer, jurisdiction, amount and type of claim. The EEOC's Fiscal Year just concluded on September 30, 2018, and Jerry reports the following EEOC enforcement:

1. The EEOC filed 154 lawsuits during Fiscal Year 2018, compared to 184 during Fiscal Year 2017. The EEOC obtained $55.5 million in settlements of 115 lawsuits during FY 2018, an average of $482,608 per case. During FY 2017, the EEOC obtained $42.2 million in settlements for 109 cases, an average of $387,155 per case.
2. Remarkably, 40% (62) of all EEOC lawsuits during FY 2018 alleged ADA violations. This percentage is the highest single year percentage ever.
3. 22.7% of all EEOC lawsuits (35) alleged harassment: sexual, racial, national origin, and religious. Of those 35 lawsuits, nearly half (17) were filed during the last month of FY 2018, September.
4. 31.8% of all lawsuits the EEOC filed were in southern states (49 out of 154).

The EEOC will continue its long-term focus on ADA issues, particularly an employer's failure to reasonably accommodate. The Commission's emphasis on harassment litigation follows the tumultuous last several months regarding sexual harassment, assault, and harassment focus in general. Reflecting on what occurred in those months, there were the Justice Kavanaugh hearings; the installation and almost immediate resignation of the head of USA Gymnastics, which revived the horrors of Larry Nassar's terrible legacy of abuse; the Bill Cosby's conviction and sentencing; the ever-increasing number of celebrities accused of harassment and assault (Weinstein, Moonves, Spacey, Batali, Lauer, Rose, Keillor…); the USC $215 million settlement for systemic abuse of patients by a gynecologist; the Department of Justice launching a probe into abuse and coverups of a Pennsylvania priest; and inappropriate behavior by college and professional male athletes. Although we have not seen a precipitous increase of harassment charge filings thus far, we have seen a substantial increase in how those cases are valued. Ultimately, as employers step up their standards

of accountability for behavior, we expect the EEOC to lower its focus on harassment, but to continue to emphasize the ADA. Furthermore, we expect to see the EEOC focus more on age discrimination in hiring and termination decisions.

Diversity Discrimination?

During preparation for our meetings in London, we surveyed leading plaintiffs' attorneys about the types of cases they see on the horizon, which may be a bit different from their practice thus far. One mentioned in particular a rising caseload of discrimination cases brought by white males. While often called "reverse discrimination," this is inaccurate, as Title VII does not identify a race, color or gender. Granted, "white male" was not the protected class Congress had in mind when it passed the 1964 Civil Rights Act, but they are protected.

The basic refrain for the claims of discrimination against white males is as follows: employers are eager to enhance the representation of women and minorities at different levels of the organization, particularly manager, director, and executive roles. Thus, white males allege that either they are unjustly passed over for promotions to those positions or forced out of those positions in order to be replaced by someone in a different protected class.

Evidence that is used to try to sustain that claim may include the employer's diversity initiatives and communications. For example, in one case, a company executive testified during his deposition that a company objective was that "By 2022, at least 50% of our managers will be female."

Outside of the workplace, national focus on race and diversity is spotlighted in the current trial against Harvard University, where Asian Americans allege that they are disproportionately rejected compared to whites, African Americans, and Hispanics, because of race. The Justice Department has filed a similar case against Yale University. These college admissions cases bring to the national focus the ongoing question of what factor, if any, should an individual's race, gender, or national origin play in a hiring, promotion, or college admissions decision? Does diversity based on protected class status result in discrimination based upon protected class status? We recommend that employers review their Diversity and Inclusiveness (D & I) charters and communications to be sure that D & I focuses on equality of opportunity, not equality of result. Also, consider whether D & I can be more than protected class status. For example, differences in political views, geographic backgrounds, and interests also may enhance the richness of the workplace.

Trump Administration Ramps Up OSHA Enforcement

The generalization that a Republican president places less emphasis on employment issues enforcement is often wrong. For example, in all but two years of George W. Bush's administration, the EEOC filed more lawsuits than during the eight years of President Obama's administration. The Trump administration's OSHA has been more aggressive than the Obama administration's agency. For example:

1. The annual number of OSHA inspections increased from 31,948 during FY 2016 (the last year of President Obama's administration), to 32,396 during FY 2017 (the first year of President Trump's administration). That increase was the first increase in 10 years.

2. OSHA's budget has increased from $555 million during the last year of President Obama's administration to $560 million during the Trump administration. The number of OSHA employees has remained steady during the Trump administration, at approximately 2,000, which is where it was at the end of the Obama administration.

3. The repeat violation penalties have been substantially higher under President Trump's administration compared to President Obama's administration.

4. The number of cases during the Trump administration where penalties of over $100,000 were proposed reached an all-time high of 218;

during the last year of President Obama's administration, that number was 164.

5. OSHA's civil penalties increased during the Trump administration compared to the Obama administration.

The Trump administration's most significant changes in employment and labor include the NLRB and the Department of Labor, Wage Hour Division. The Trump administration has essentially left the EEOC to pursue the enforcement agenda it first articulated during President Obama's administration and for OSHA to pursue the initiatives created during President Obama's administration. Do not relax, employers.

OSHA "Clarifies" Position on Post-Accident Drug Testing

In the last year of the Obama administration, OSHA issued enforcement guidance which called into question the permissibility of blanket post-accident drug testing. Although the guidance did not have the force of law, it indicated that OSHA would consider that blanket post-accident testing could discourage reporting and could be challenged as a form of retaliation. This guidance suggested that the decision as to whether to drug test after an accident would have to be evaluated on a case-by-case basis.

This month, OSHA issued a "clarification" of this guidance. In the clarification, OSHA acknowledged that many employers implement drug testing and safety incentive programs for the legitimate purpose of promoting workplace safety (as opposed to deterring reporting of accidents). The clarification specifically provides that actions taken under such programs would be considered retaliation only if "the employer took the action to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety."

The clarification does not eliminate the possibility that OSHA *could* challenge a drug testing program as retaliatory, but nevertheless expressly permits a drug testing program which is for the purpose of promoting safety. The clarification specifically acknowledged that the following drug-testing would be permissible:

- Random drug testing;
- Drug testing unrelated to report of work-related injuries;
- Drug testing under a state worker's compensation law;
- Drug testing under federal law (such as DOT);
- Drug testing to evaluate the root cause of a workplace accident. If testing is part of the investigation, it should include all employees whose conduct could have contributed to the accident, not just the employees who reported injuries.

Under the clarification, the key to any drug testing program is that the criteria be applied consistently.

Immigration Policies' Impact Extending to Employers

The Trump Administration has undertaken significant efforts to impact immigration policies through executive action. If you watch the news, you will often see stories and information regarding the Administration's "crackdown" on illegal immigration. However, the news has not highlighted the impact immigration policies are having on employers.

In recent months, the United States Department of Labor has itself cracked down on employers across various industries to ensure they are complying with current immigration laws and policies. However, these measures are not exactly what you might expect. While there has been coverage on the Immigration Customs Enforcement's raids on workplaces, the DOL's actions in some situations have actually been helpful to some immigrant workers in the United States. For example, the DOL has recently recovered $2.5 million from various companies in back wages for workers.

In one investigation, the DOL discovered a contractor in North Carolina that paid immigrant workers at a lower rate than required by law. The H-2B visa program currently mandates a rate that employers can pay immigrant workers and further requires that employers help their immigrant workers get to America from their home countries. However, this employer was paying immigrant workers based on a lower wage, and in some instances, was not assisting its visa program workers in getting to the country at all.

In another investigation, the DOL obtained $1.1 million from a staffing company due to unpaid overtime and minimum wage violations. The DOL discovered the company was not paying its workers their mandated overtime rate for worked overtime hours. Additionally, the company was found to have not been adequately tracking its employees' hours resulting in major pay disparities.

The DOL recently completed two other investigations wherein it secured thousands of dollars for workers across the county due to wage violations.

Despite these "wins" for workers, many of whom are immigrant workers, the DOL is still committed to, as it says: "protect[ing] American workers and aggressively confront[ing] visa program fraud and abuse." In that vein, the DOL's Wage and Hour division, which has always been primarily responsible for governing employers' H-2B wage practices, is aware of and has approved the Department of Homeland Security and Citizen and Immigration Services to step in and assist in the agency's visa fraud program. As such, the Department of Homeland Security has undertaken additional efforts to identify and investigate potential visa fraud and misuse by employers and their workers.

Ultimately, the increased scrutiny to the program has resulted in some employers being discouraged from utilizing the program to hire foreign workers. It is likely that the Administration 's efforts to curb immigration, legal or illegal, will continue over the next couple of years. As such, employers that rely on this program need to be prepared for audits regarding their workforce as well as their wage payments and ensuring they are taking all steps to comply with the law.

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 404.312.4755.

Purple Communications Under Attack by NLRB

The NLRB continues to undo the Obama administration's changes to the NLRA. Up now is the Obama Board's decision on employee use of employer email resources in *Purple Communications*, discussed in a prior ELB. On September 28, 2018, the General Counsel, Pete Robb, has said in a brief filed in a pending case concerning employee use of employer email, *Caesars Entertainment Corp*., that "the Board should overrule *Purple Communications* for a variety of legal and practical reasons." Robb went on to state that "loss of employee productivity, security concerns and potential disruption of employers' operations" are among the other reasons the standard should be overruled.

Robb also cited First Amendment concerns with the *Purple Communications* standard, saying it forces business to pay for employee communications in violation of the Supreme Court standard under *Janus v. AFSCME.* In *Janus*, the Supreme Court concluded that public-sector unions that collect so-called "fair share fees" are violating the First Amendment.

The brief was submitted pursuant to the Republican majority's August 2018 invitation for briefs in the *Caesar's* case in order to decide "whether to keep, modify or rescind the *Purple Communications* standard." The deadline for briefs passed on October 5, 2018.

A Question of Ethics?

NLRB member Chairman John Ring's response to a letter from Democrats, led by Elizabeth Warren, that William Emanuel's probable decision to recuse himself demonstrates that the NLRB is handling the *Caesar* case ethically. Ring said:

> As I have stated, nothing about recusal decisions should be based on politics – that is, on a desired outcome in a particular case or on a position some may anticipate that a particular board member might take in the case. As you know, three of the current four board members were not on the board when *Purple Communications* was decided, [the Board looks] forward to reviewing the briefs and to carefully considering all views.

Regardless of the recusal fight, expect the NLRB to return to the *Register Guard,* with caveats, when this case is decided. As a recusal of Emanuel means a 2-1 vote in favor of changing the law back to *Register Guard (*even if the Board favors a full panel in overturning precedent), in all probability Emanuel will ultimately recuse himself. Stay tuned for developments in this fight.

A Primer in the Micro-Unit Fight at the NLRB

As you no doubt recall, the battle over the 178-member bargaining unit of mechanics at Boeing Company in South Carolina is ongoing. The mechanics voted 104 to 65 to form a union. (See our coverage in the June 2018 ELB). Earlier, in 2017, a larger group—essentially a wall-to-wall bargaining unit—of approximately 2,500 production and maintenance employees voted no to unionization. (Discussed in the February 2017 ELB).

Boeing appealed Region 10's decision to the Board in June of this year and Boeing is joined by several Chamber of Commerce *amici* briefs in urging the NLRB to return to the old community of interest tests. The National Association of Manufacturers stated the following in its brief: "the [current] law is *PCC Structurals* . . . and it appears here that the [regional office] did not comply with [the law]." (We discussed *PCC Structurals* in the December 2017 ELB).

Boeing and the *amici* briefs have argued that the Region virtually ignored the *PCC Structurals* standard and "rubber-stamped" the smaller petitioned-for unit of mechanics. *PCC Structurals* overruled *Specialty Healthcare.* Has the Region ignored *PCC Structurals*? The short answer is no.

In the overruled *Specialty Healthcare,* the NLRB found that the Board only goes beyond the petitioned for unit if the expanded unit shares an "overwhelming community of interest" with the expanded unit.

Boeing and the groups supporting Boeing argue that allowing only the mechanics to organize invites industrial chaos. Boeing says that bedlam will ensue if the Board's decision in *Boeing* is allowed to stand. Chaos, so the argument goes, occurs where the Board allows the union to carve up wall-to-wall units and petition for micro-units forcing employers to negotiate shared work terms separately with different small groups of employees.

The involved union, the Machinists, argues to the contrary, stating that *PCC Structurals* was not ignored by the Regional office by giving the go ahead to the smaller mechanics unit:

> [The Boeing decision is a good] application of longstanding NLRB case law holding that [employees] must organize in an [identifiable bargaining unit or] an appropriate unit, but not the most appropriate [bargaining unit].

Matthew Drexler, who represents the Machinists, stated that

> This is really not a complicated case. The Regional Director . . . did an exhaustive, lengthy review of the facts, and those facts show that there is a distinct group that Boeing itself has consistently treated as a cohesive, distinct group with distinct interests [from other production workers].

The problem, in my opinion, that Boeing has is that the Regional office specifically denied that it applied *Specialty Healthcare* in finding the mechanics unit appropriate and instead applied *PCC Structurals* to the finding of the bargaining unit. *PCC Structurals* was decided at the time of the decision herein and in these circumstances, the union side argument has more appeal. Stay tuned for developments in this case.

EEO Tips: Employment Law and Trump's Supreme Court

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.

How will President Trump's Supreme Court appointments affect the evolution of employment law? As expected, the two new justices came from very conservative and pro-corporation backgrounds. Justice Gorsuch was appointed after the death of Justice Scalia (a moderate conservative) and proved very quickly that he will perform exactly as expected. He believes courts should favor the words written in the Constitution and federal laws, and that government agencies' authority to interpret the laws they administer or enforce should be limited. That is important because governmental laws and regulations control or influence most decisions made by employers. Justice Gorsuch highlighted his business-friendly ideology this spring by writing the majority opinion in *Epic Systems v. Lewis*. It states that the Federal Arbitration Act trumps the National Labor Relations Act, requiring that individual employment arbitration agreements must be enforced as written.

Justice Kavanaugh just replaced the recently retired Justice Kennedy, who was known as the swing vote on the Supreme Court since 2005. Justice Kennedy generally leaned to the right throughout his judicial career but not in cases regarding individual rights and affirmative action. Although he does not seem to like being called the swing vote, Chief Justice Roberts (conservative) has become just that. He agreed with the court's liberal wing in upholding the Affordable Care Act and finding same sex marriage to be a Constitutional right. Even though he voted with the more liberal justices more frequently than Kennedy in the last term, his judicial rulings have historically been more conservative. The Chief Justice chooses who writes the majority opinion when he sides with the majority, giving him great influence over how broad or narrow the ruling and its impact are.

Obviously, Justice Kavanaugh has not yet had a direct effect on the Supreme Court. But he is reportedly the second most conservative member of the Court. His history can provide some insight on what he will likely do. An understanding of his general ideology may help predict his likely impact on employment law.

One important thing we don't know about Justice Kavanaugh is whether or not he feels an obligation to follow judicial precedent. During his recent confirmation hearing he spoke of its importance, calling precedent "the foundation of our system." In a 2003 memo (regarding the same topic – *Roe v. Wade*), he stated that the Supreme Court "can always overrule its precedent." In 2012, his concurring opinion stated that a court dismissing a case "without stating whether it is with or without prejudice operates as a dismissal with prejudice" (*Rollins v. Wackenhut Services Inc*.), despite the majority's observation that long-standing precedent mandates that "judicial prejudice is the exception, not the rule."

Justice Kavanaugh, like Justice Gorsuch, believes in strictly reading the words of the Constitution and federal laws. He wrote majority opinions in 2016 and 2017 that courts should not expand laws to include modern circumstances that did not exist when they were enacted nor accept rights that may be implied but not specified. He believes Congress is responsible for updating laws as society evolves. Both Justices have criticized and would like to pare back use of the *Chevron* doctrine, wherein courts defer to federal agencies' reasonable interpretations of statutes they enforce. Justice Kavanaugh has curbed the use of *Chevron* by citing the "major rules doctrine" which prohibits courts from deferring to agencies on questions with major economic and political significance.

On the employment front, Justice Kavanaugh has penned a number of majority decisions and dissents, most of which favored the employer. In a 2016 NLRB case, he opined that the agency must defer to arbitrators' decisions unless they are "clearly repugnant" and "palpably wrong." In a dissent regarding a union vote, he wrote that "an illegal immigrant is not an employee under the NLRA for the simple reason that … [s/he] is not a lawful employee in the United States." In another dissent,

he disagreed when the majority found that a successor employer did not discriminate against union members when they were fired and made to reapply for similar nonunion jobs.

He has also written some opinions regarding discrimination in the workplace: concurring with the majority in 2018, Justice Kavanaugh stated that one isolated incident can be severe enough to establish a hostile work environment. In 2016, he concurred when the panel decided that denial of a lateral transfer did not constitute an adverse action as it "faithfully follows our precedents." After the panel reconsidered and said that discriminatory transfers or denials of transfers are "ordinarily not actionable under Title VII" he concurred and further stated the court should establish that all discriminatory transfers and denials are actionable. And in 2008, in a Title VII disparate treatment case where the employer asserted a legitimate nondiscriminatory reason for its adverse employment action, he wrote "the district court need not—and should not—decide whether the plaintiff actually made out a prima facie case." The court should only question whether "the employee produced sufficient evidence … to find that the employer's asserted nondiscriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee."

In a 2014 case, Judge Kavanaugh disagreed that OSHA violations occurred when a trainer was killed during a SeaWorld show. He found it unreasonable for DOL to enforce its safety regulations at SeaWorld, likening the show's danger to NFL and NASCAR and describing the employees as willing participants.

Unless one of the major parties clearly controls both houses of Congress, I don't imagine we will see much major employment legislation any time soon. But, with the current makeup of the Supreme Court, employers are likely to see more favorable interpretations of the laws and regulations that are in place. The major exception to this general rule will probably be in EEO decisions. Even very conservative jurists are now calling out discrimination and harassment when they see it.

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

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

As I reported last month there appears to be an effort by Wage Hour to revise the requirements for the executive, administrative and professional exemptions. In addition to the "listen sessions" that were held in September, they had another one in Washington this month. While Wage Hour has not put forth any proposals, it appears they are seriously considering an increase in the $455 salary requirement, and plan to issue proposed regulations in March 2019. Thus, I suggest that you try to keep abreast with the issue so that you will not be unprepared for any increase that may take effect.

Earlier this month, Wage Hour announced they recovered a record $304 million in back wages during the fiscal year that ended on September 30, 2018. As this is a substantial increase from previous years it indicates the Department is still very much in the enforcement business. At the same time, they also completed a record number (more than 3,600) of compliance outreach visits as a part of their efforts to educate both employers and employees regarding the requirements of the Fair Labor Standards Act.

The FLSA

History of the FLSA

In 1938, Congress passed the Fair Labor Standards Act of 1938 which established a minimum wage of $.25 per hour for most employees. In an effort to create more employment, the Act also set forth certain additional requirements that established a penalty on the employer when an employee works more than a specified number

of hours during a workweek. The initial law required overtime after 44 hours in a workweek but eventually limited the hours without overtime premium to 40 in a workweek.

Key Provisions of the FLSA

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

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

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

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

Some Typical Problems

Fixed Sum for Varying Amounts of Overtime: A lump sum paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium. This is true even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis. For example, a flat sum of $100 paid to employees who work overtime on Sunday will not qualify as an overtime premium, even though the employees' straight-time rate is $8.00 an hour and the employees always work less than 8 hours on Sunday. Similarly, where an agreement provides for 6 hours pay at $10.00 an hour regardless of the time actually spent for work on a job during overtime hours, the entire $60.00 must be included in determining the employees' regular rate and the employee will be due additional overtime compensation.

Salary for Workweek Exceeding 40 Hours: A fixed salary for a regular workweek longer than 40 hours does not discharge FLSA statutory obligations. For example, an employee may be hired to work a 50-hour workweek for a weekly salary of $500. In this instance, the regular rate is obtained by dividing the $500 straight-time salary by 50 hours, results in a regular rate of $10.00. The

employee is then due additional overtime computed by multiplying the 10 overtime hours by one-half the regular rate of pay ($5 x 10 = $50.00).

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

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

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

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.

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.

In the News

Employees Reject Contract, Union Overrides

On October 5, 2018, the Teamsters ratified a five-year agreement with United Parcel Service, even though the 260,000 Teamster-represented employees voted down the contract. 44% of the 260,000 eligible voters voted and 54% of them voted "No." According to the Teamsters' constitution, when there is such a low turnout, two-thirds of those who vote need to reject the contract; that failed to occur. Thus, there is now a collective bargaining agreement which was not ratified by the members.

Town-By-Town Right-to-Work?

The right-to-work movement has gained ground during the past several years, with Indiana, Michigan, Kentucky, and Wisconsin becoming right-to-work states. In a right-to-work state, it is illegal for a union and employer to agree to union security language, where an employee must join or pay the equivalent of union dues or fees or else be terminated. The case of *International Union of Operating Engineers Local 399 v. Village of Lincolnshire* (7th Cir. Sept. 28, 2018), involved the question of whether a municipality may enact its own right-to-work law. The Village of Lincolnshire is in Illinois, which is not a right-to-work state. However, in 2015, Lincolnshire passed an ordinance that prohibited union security agreements in its town. A court of appeals ruled that the NLRA preempts the right of a municipality to enact such a law and, therefore, Lincolnshire's ordinance was invalid. Note that the Seventh Circuit's decision conflicts with the 2016 Sixth Circuit case of *UAW v. Hardin County, Kentucky*. In that case, the Sixth Circuit ruled that the National Labor Relations Act does not preempt the right of a municipality to enact its own right-to-work law. Thus, municipalities covered by the Seventh Circuit (Illinois, Indiana, and Wisconsin) may not pass the right-to-work laws, while those covered by the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee may do so. Due to the Circuit split, we expect this case or a similar one to end up before the United States Supreme Court.

Joint-Employer Test for Title VII

Much focus has been placed on the NLRB's joint-employer test, particularly as it relates to franchisors and franchisees. The recent case of *Frey v. Hotel Coleman et al.* (7th Cir. Sept. 11, 2018) involves the joint-employer test in a Title VII context. The owners of Hotel Coleman hired a hotel management company, Vaughn Hospitality, to operate the hotel. The owner of Vaughn Hospitality was alleged to have sexually harassed an employee who was hired and paid by the Hotel Coleman's management team. The actual supervision and direction of Hotel Coleman's employees was left exclusively to Vaughn Hospitality. The terminated employee sued the Hotel Coleman ownership team and Vaughn Hospitality. The Seventh Circuit Court of Appeals applied the "economic realities" test to determine which entities should be considered employers. The appellate court directed the lower court to reevaluate its analysis in determining that Vaughn and Hotel Coleman were not co-employers. Under the "economic realities" test, there are several factors to consider, including hiring, supervision, direction, compensation, benefits, terms and conditions of employment and termination of employment. We expect that at a minimum, the reevaluation of the lower court will lead to a conclusion that the management group and the ownership team were joint-employers.

Primary Duty or Not for Executive and Administrative Exemptions?

Under the Fair Labor Standards Act, the primary duty of a managerial or administrative employee must be to perform exempt work. The primary duty test can be met even if the manager is concurrently performing non-exempt tasks, such as a manager who supervises a team at a fast food restaurant and serves customers. In the case of *Clendenen, et al. v. Steak N Shake Operations, Inc.* (E.D. Mo., Sept. 28, 2018), the court granted a class certification of Steak N Shake restaurant managers who claim that they are entitled to overtime compensation. They assert that while they had management duties, their primary responsibilities were "largely the same as the non-exempt employees they supervised." In prior cases involving Burger King, courts have ruled that "one can still

be managing if one is in charge, even while physically doing something else." Thus, in the Burger King cases, the courts ruled that assistant managers were exempt because their job duties were "critical to the success of the restaurant," even though at the same time they performed non-exempt tasks. Retailers, hospitality, and fast food restaurants need to take a careful look at the classification of managers as exempt. It may be that the amount of their non-exempt work is so overwhelming that it will be hard to sustain that their "primary duty" is exempt work.

Positive Drug Test – Discriminatory Decision Not to Hire

Employers in some states may get "smoked" by those states' medical marijuana laws. For example, in *Noffsinger v. SSC Niantic Operating Co. LLC* (D. Conn. Sept. 5, 2018), an employer withdrew a conditional offer because of the applicant's medical use of marijuana. The employer's reasoning was that under federal law, marijuana is considered an illegal substance, and the Drug-Free Workplace Act (DFWA) required employers to make a good faith effort for a drug-free workplace. The court ruled that the DFWA and federal illegality of marijuana do not supersede state law which prohibits an employer from refusing to hire an applicant because of the applicant's medical use of marijuana. At least in Connecticut, an employer may not simply rescind its conditional offer of employment because an applicant uses marijuana for medical purposes. An employer may require confirmation of the medical need and evaluate whether the use of medical marijuana could interfere with the employee's safe and reliable job performance. Employers in other states where medical marijuana is permitted need to consider this decision as they evaluate whether to withdraw an offer from or terminate an employee who tests positive and has a medical reason.

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