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Unions Optimistic for Workplace and Political Election Victories

Unions have more optimism for growth than we have seen in several years, and the facts back them up. For example, union membership increased by a net of 316,000 from 2016 to 2017, for a total of 14,817,000 members. This is the largest membership growth in a single year in more than a decade. Furthermore, unions are now organizing Millennial and Generation Z employees. Among those in the 16 to 24 age group, union membership increased from 4.4% in 2016 to 4.7% in 2017. Among those ages 25 to 34, union membership increased from 9.2% to 9.4%. There are 50 million American workers between ages 16 and 34. The only other age group where union membership increased was between ages 55 and 64 (13.3% to 13.5%), and those numbers represent 21,778,000 workers.

Union representation rates declined among those groups where it historically had steadily increased. For example, among white women, membership declined from 9.9% in 2016 to 9.7% in 2017, black male membership declined from 13% to 12.6%, and black female membership declined from 12.1% to 11.7%. Interestingly, membership among white males of all ages increased from 11% to 11.4%.

The industries where unions have had the greatest increase include healthcare and social services. In manufacturing, the issues we see with an overall robust economy are concerns about excessive workloads (even at overtime pay), safety, pay, and a question of job security in light of the fear of the impact of tariffs on the employer.

Labor's optimism regarding the political process is evidenced by its successful participation in coalitions to turn the House from Republican to Democratic control. Furthermore, labor may very well have stemmed the tide of right-to-work expansion, with the recent vote in Missouri to overturn the state's newly enacted right-to-work law. Labor's greatest optimism involves the 2020 national elections. In 2016, President Trump narrowly won labor stronghold states of Michigan, Pennsylvania, Ohio, and Wisconsin. If the Democrats nominate a candidate who connects with labor, those states could flip from President Trump in 2020. There are 700,000 union members in Michigan, 700,000 in Pennsylvania, and 600,000 in Ohio. Of all the potential Democratic candidates for president in 2020, Joe Biden would likely forge the greatest connection with those union members who left the Democratic Party in 2016 to support President Trump.

The last success that labor had politically was increasing the number of Democrat-held state government trifectas, where the executive and both legislative branches of state government are held by the same party. Prior to this month's elections, there were 26 Republican trifectas and 8 Democrat trifectas; now those numbers are 22 Republican and 14 Democrat.

Public opinion polls show that unions are viewed favorably, particularly among the 16- to 34-year-old employees. That group believes unions are "on the right side" of social, environmental and economic issues which concern them. We expect labor to raise more money than ever for the 2020 national elections, and if the trend holds, they will have more members to help contribute to that cause.

EEOC Assesses Root Cause of Workplace Harassment

For the past three years, the EEOC has had a Task Force which focused on the causes and remedies for workplace harassment. The Task Force conducted its work through public testimony and consultation with employee and employer advocacy groups, unions, and academics. Earlier this month, the EEOC issued its report identifying what it considers to be the primary root cause reasons resulting in some form of workplace harassment, not just sexual:

1. Workplaces which lack diversity. In such work environments, an employee who is "diverse" may be more susceptible to harassment.

2. "Silos" of employees based upon culture or language differences. In these situations, the EEOC says that there is a greater risk of tension or harassment between groups unless employers are proactive in the culture they establish and policies they communicate.

3. The issue of persons with power. According to the EEOC, recipients of harassment are less likely to report the behavior of individuals who are in a position of power either based upon job responsibilities or achievement and recognition. The concern among those who fail to report inappropriate behavior of a high-powered, high value employee is the belief that the company will do nothing about it or there will be retaliation because of the importance of the harasser to the organization.

4. Offices and shifts that are more remote from the leadership team. If there is not a supervisor or regular management presence at a particular office of shift, employees may become easier targets for potential harassers.

5. Boring work. The EEOC stated that where work is repetitive, routine and "mindless," individuals may engage in inappropriate behavior to deal with the monotony or the frustration of feeling stuck in that type of a job.

6. Alcohol. The EEOC Task Force concluded that alcohol may reduce social inhibition and impair judgment – what revelations! However, the EEOC has a point here, which is that where alcohol is served, there is a heightened risk of individuals behaving inappropriately.

7. What occurs "outside that window" that is brought to the workplace. The political environment is highly charged with issues about immigration, the Justice Kavanaugh hearings, and the actions of law enforcement in minority communities. The EEOC stated that employees in the workforce may look at what occurs outside that window as acceptable attitudes and behaviors, and thus engage in those at work.

8. Teenage and young adult employees. The EEOC stated that these individuals may be more vulnerable to harassment; they may be targets due to their inherent susceptibility, particularly where a harasser is either a long-term or a "high value" employee. Individuals in this age group are less likely to take advantage of internal reporting process, because they are not confident in knowing what to do.

9. When employees rely on customer satisfaction or approval. We had a situation with a government contractor, where there was inappropriate behavior by the government contract monitor toward our client's employees. That monitor was in a position of great power, as he (and it was a he in this case) made a recommendation about whether or not our client met its contractual obligations, and therefore, could be paid. Fortunately, the inappropriate behavior was immediately reported and we developed an approach for our client to continue the relationship with the customer and report the monitor. Employees whose role involves direct contact with a customer or a client may be less likely to report the behavior. Stress to those employees that not only is the customer not always right, but in fact the customer may not always remain the customer.

In light of the EEOC's observations, the Commission offers the following recommendations, in addition to the obvious ones of proper policy implementation, communication and training:

1. Be attentive to potential segregation at the workplace. Do individuals of the same national origin or race break together; is there interaction among protected classes and different age groups?

2. Be sure that employees on all shifts and at all locations receive the same high level of communication about what is acceptable and unacceptable workplace behavior and how to report the latter. Do more than just hand out policies. Talk about it. Give examples. Hold those in managerial and other leadership positions to a higher level of accountability, not only for their own behavior, but also for reporting any inappropriate behavior.

Much of the EEOC's emphasis is on awareness, training, and reporting processes. We suggest in addition to that, differences should be appreciated not with the emphasis exclusively on "sensitivity training," but also through cultural experiences. Examples include music, food, even sporting events where the sport of interest to some is not "mainstream" in the U.S., such as soccer. Furthermore, employers have the right to consider how employees behave away from work, and this includes what is posted on social media. Thus, if an employer is aware that an employee away from work engaged in behavior which could potentially be harassment, hostile, or conflict with the organization's values, you have the right to act and should do so.

Inconsistency Does It Again

When it comes to compliance with Fair Employment Practices statutes and regulations, employers generally are not required to treat everyone the same. Rather, they're required to have business reasons that explain the difference in treatment and to apply those reasons consistently. In the recent case of *Donley v. Stryker Sales Corporation*, the employer's inconsistent explanations regarding its actions were enough for the court to conclude that a jury should decide whether or not an employee was terminated wrongfully. (7th Cir. Oct. 15, 2018).

The employee filed an internal sexual harassment complaint against her manager. After an investigation, the company terminated the manager. Then, the company started to investigate alleged misconduct by the employee who complained of the harassment. This alleged misconduct occurred six weeks earlier. What was the nature of the misconduct? The employee took pictures of a vendor's intoxicated chief executive officer and showed those pictures to other employees. The company terminated the employee for doing so. Note that the sequence was the employee took pictures of the vendor's intoxicated CEO, the employee reported harassment by her manager, the manager was investigated and terminated, and the company investigated and terminated the employee for the pictures she took six weeks earlier.

During the course of this litigation, the Human Resources Director and the employee's supervisor each gave a different version of when they first became aware that the employee took pictures of the intoxicated CEO. The court concluded that those inconsistencies in conjunction with

the delay in the employer's investigation of the alleged misconduct were enough for a jury to determine that the employee was retaliated against for reporting sexual harassment.

There are three important lessons learned from this case:

1. Remember the timing of an adverse action is the most critical factor in a first impression of whether the adverse action may be retaliatory. In this particular situation, the investigation and termination of the individual occurred within days after she reported the sexual harassment.

2. A delay investigating misconduct, whether it involves harassment or other inappropriate or offensive behavior, may be perceived as evidence that an employer really did not take the matter seriously.

3. Before terminating an employee, establish the consistent explanation for the termination. What will the employer tell the employee as the reasons for termination? How will the employer respond to unemployment compensation inquiries? How would the employer respond to a discrimination charge or lawsuit? Establish the business reasons and the timing of those reasons in a manner that shows consistency among the key decision-makers involved, which in this situation were the employee's supervisor and the HR Director.

FMLA Protection Before FMLA Eligibility

What if an employee is mistakenly told that the employee's absence will be covered under FMLA when the employee is not yet eligible for such protection? In the case of *Reif v. Assisted Living by Hillcrest LLC d/b/a Brillion West Haven*, employee Angel Reif was hired on January 25, 2017. (E.D. Wis. Nov. 6, 2018). Prior to her one-year anniversary for FMLA eligibility, she discussed with her HR Coordinator the need for surgery to repair a knee and hip. The Coordinator told her that she would not be eligible for FMLA until January 25, 2018, so Reif notified the coordinator that she intended to take FMLA as of January 31, 2018, the day of surgery. After the HR Coordinator spoke with the Administrator of the facility, the Coordinator told Reif to clock out immediately and not return to work until she was completely healed (even though Reif was not under any workplace restrictions). The Coordinator told her she should schedule her surgery as soon as possible, and that she would work with Reif to ensure her FMLA would be approved so that her job would be available for her when she was able to return to work. Accordingly, Reif submitted a request for FMLA leave to become effective on January 10, 2018 and had the surgery one week later. Two days after surgery, the HR Coordinator sent Reif a letter telling her that she was not eligible for FMLA. On January 24, 2018, Reif received an additional letter from the HR Coordinator stating that the company would not hold the position for her. On February 9, 2018, Reif received yet another letter from the HR Coordinator telling her that her position had been filled. Reif sued, claiming under state law misrepresentation and promissory estoppel and also claimed under federal law interference with her FMLA rights.

The employer sought dismissal of the FMLA claim, asserting that since Reif was not eligible under FMLA, she had no right to raise an FMLA violation. In rejecting that claim, the court stated that "it would be fundamentally unfair to allow an employer to force an employee to begin a non-emergency medical leave less than two weeks before she would become eligible under the FMLA, assure her that she would receive leave and her job would be waiting for her when she returned, and then fire her for taking an unauthorized leave." The message to employers is when making a decision about whether an employee will receive FMLA benefits they may not be entitled to, it may actually create some form of a contractual right or FMLA protection for that employee. We see this occur where employers voluntarily extended FMLA benefits to employees who are at a location where there are not 49 other employees within a 75-mile radius of where that employee works. In essence, if you tell the employee that he or she will be covered under FMLA, be prepared to adhere to that even if the employee would not have been.

Marijuana Industry Employees Exempt from the FLSA?

We are not suggesting that when Congress passed the Fair Labor Standards Act in 1938, they thought it was a good idea to exempt the marijuana industry from coverage. Rather, the issue involves the interplay of the Fair Labor Standards Act with the Controlled Substances Act and state laws which de-criminalized the use of marijuana. Under the Controlled Substances Act, a federal statute, marijuana is considered a Schedule I drug – it is illegal under federal law. The illegality includes possession as well as manufacture and distribution. Even if marijuana is permitted or de-criminalized at the state level, the federal law still applies. The question before the Tenth Circuit Court of Appeals in the case of *Kenney v. Helix TCS, Inc.* is whether an employee who works in the marijuana industry – which is illegal under the Controlled Substances Act – is therefore not protected by the Fair Labor Standards Act. Helix provides security and transport services for businesses in Colorado that grow and ship marijuana. Kenney argues that Helix misclassified him and other employees by not paying them overtime. Helix asserted that those employed in an industry that is illegal under federal law should not be entitled to Wage and Hour protection: "Participants in Colorado's recreational marijuana industry voluntarily assume the risk that their activities will subject them to federal criminal sanction. No participant is entitled to benefits under federal law, nor should they expect federal courts to aid their conduct." The case will be decided by the Tenth Circuit, but it certainly raises an interesting issue in the expanding marijuana industry nationally.

Note that Missouri and Utah have joined 31 other states in de-criminalizing marijuana. Michigan still permits an employer from refusing to hire an individual or to discipline an employee for the use of marijuana. Missouri permits the use of marijuana for medical reasons but also states that an individual may not bring a claim "against any employer, former employer, or prospective employer for wrongful discharge, discrimination or other similar causes of action or remedies" where the employer prohibits the employee, former employee, or prospective employee from being under the influence of marijuana at work or attempting to work under the influence of marijuana."

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.

NLRB Member Becker Returning to Union Roots

Craig Becker, a former union official, will return to the AFL-CIO, where he will serve as co-General Counsel. Becker, a President Obama recess appointment, was appointed in March of 2010 by the President, after being blocked by the Senate by a vote of 52-33 in February of 2010.

Becker supported two controversial rules: 1) the requirement that both union and non-union employers to post notices detailing employee rights under the Act and 2) the promulgation of the "quickie election" rules. Both rules are under review by the federal courts and have been put on hold by the current Trump Board.

What the Mid-Term Elections Mean for the President's Agenda

The blue wave failed to materialize, though Democrats did take over as the majority in the House of Representatives, while Republicans maintained control of the Senate. This is not enough to meaningfully impact the deregulation push by President Trump. Expect the regulatory reform ambition to continue under the President's agenda. The President claims that the agenda will save approximately $18 billion in costs to private sector employers. An administration official was quoted as saying that "[the administration] has been focused here on common-sense regulatory reform, eliminating regulations that are no longer working for the American people."

It does seem unlikely that the tax cuts will be extended and made permanent by Congress. One thing is certain -

the House will press for the President's tax returns and most likely the dispute about the President's tax returns will end up in court. I do not expect to see an impeachment effort, unless there is an overreach by the Democrats in the House of Representatives.

Married Man's Glass Company Not Alter Ego of Wife's Company

An administrative law judge has found that a glass installer did not create his company to circumvent his wife's bargaining obligation with an association of local painter's unions. *Glass Fabricators, Inc. and Glass and Metal Solutions, Inc, alter-egos*. ALJ Randazzo rejected the NLRB's argument that the husband's business was the "alter-ego" of his wife's glass installer business. The ALJ stated:

> The evidence in this case does not establish that Pat Dotson [the husband alleged as an alter-ego], GFI's owner, retained financial control over the operations of GMS [the wife's business] warrants the application of the close familial relationship exception. The credible and undisputed testimony is that [the wife – Dale Dotson] independently incorporated and financed and was the only person authorized to conduct business on [GMS's] behalf.

The ALJ admitted that the husband and wife had some business ties, but did not share ownership of their businesses. In addition, the companies did not perform the same work: "… both performed some glass installation and repair work, GFI mostly cut and fabricated glass, while GMS mostly installs glass provided by its [customers]."

As of this writing, the union has not decided whether to file exceptions to the ALJD.

<u>Alter Ego Law in a Nutshell</u>

The good news is that the law has not changed for many years. The law is summarized below:

1. Determination of status is question of fact to be determined by the Board.

2. The two businesses have substantially identical ownership, business purpose, operations, management, supervision, premises, equipment, and customers. *Island Architectural Woodwork, Inc.,* 364 NLRB No. 73 (2016).

3. No one factor listed above is determinative, nor do all indicia need to be present to establish alter ego status.

4. Unlawful motivation is not necessary in finding alter ego, but the Board will consider whether the business was started to avoid a bargaining obligation.

5. The burden of proof of proving alter ego is on the General Counsel.

NLRB Decides that Employers May Withdraw Recognition Before A Collective Bargaining Agreement Begins

The NLRB ruled on October 26 that employers may challenge whether a union still enjoys majority support from their designated bargaining units during the time period between when a collective bargaining agreement is reached and the time it becomes effective. *Silvan Industries and United Association of Plumbers, Steamfitters, and Pipefitters*.

The ruling by the Board chips away at a contract bar presumption, whereby an employer is precluded from filing a RM petition if they agreed upon a contract. In her dissent, Democrat Lauren McFerrin said that the Regional Director's dismissal of the RM petition should be upheld:

> Policy and precedent . . . dictate a different result [than the NLRB majority]: When an employer enters into a collective bargaining agreement with a union, even an agreement with a delayed effective date, [the company] should not be permitted immediately to undermine the agreement, by challenging the union's majority status.

The majority disagreed with the dissent, and focused instead on giving employees the right to vote, as contemplated by the NLRA:

> [The majority] believe[s] that the cost to employee free choice would be too high were the [NLRB to decide] to deny the employees the opportunity to express their wishes concerning representation in a Board conducted election for at least three years, on the basis of a contract that had not yet taken effect at the time the petition was filed, simply because employees [choose to entrust their petition] to the employer instead of filing it with the [regional office] themselves.

Other News

The deadline for comment on the joint-employer rule has been extended from November 13, 2018, until December 13, 2018. The proposed directive, published in September of 2018, proposed a rule that an employer will only be deemed a joint-employer if that employer directly controls the employees of another company. In other words, an employer must directly control the "essential terms and conditions of employment, such as hiring, firing, discipline and supervision. That control must be substantial, direct and immediate rather than limited and routine."

The rule, if passed – and it will pass in some form – will overturn one of the most controversial decisions issued under the Obama administration, *Browning-Ferris (BFI)*, discussed in many previous ELBs, including August 2015, July 2016, December 2017, and May 2018.

As you no doubt recall, *BFI* re-defined the joint-employer relationship to include indirect control of the employment relationship.

Considering Mediation for the First Time?

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.

My recent correspondence indicates that a number of employers who historically have not used mediation to resolve legal and workplace issues are now considering it. Some have asked why they should mediate EEO cases (administrative charges or lawsuits) and what, if anything, they should do in preparation for a mediation conference. For those of you who don't normally try mediation for these cases, I want to stress that participation does not mean that you are obligated to agree to anything. It does mean that you have an opportunity to settle a case early, in a less contentious setting than you will find later in the process. (You certainly can use mediation in later stages also, though you will probably have a few more issues to work through. The later you wait, the more lines have been drawn, hard positions have been taken, and more time and money already expended.). Since the parties sign agreements stating that nothing learned in mediation can be used as evidence if the dispute is not resolved and the mediator is bound by confidentiality, you have little to lose by trying it.

Once you decide to schedule a mediation conference, remember that the goal is to resolve the dispute. Please, PLEASE, do not show up "just to hear what the other party has to say." Of course, it is important to listen and learn how the other side views the dispute and what can settle it. But, in order to accomplish the goal, you need to do your homework as well. If you are the employer, investigate the allegations to determine whether they are factual, and, if so, whether there were circumstances the complainant could not have known. Know the applicable law. Have a good idea of what each party will need to show in order to prevail. Know your authority. Monetary authority is important, but, depending on the type of

dispute, personnel actions, union contracts, insurance, and retirement benefits can all come into play. If the representative at the conference does not have knowledge/authority in the different areas that may become involved in the negotiations, make sure those who may be needed are on call. Any information that you think might be helpful should be brought to the meeting (better to have it and not need it). Voluminous records can usually be transported electronically. If you are undecided about the relevance of certain records or have some records that are particularly burdensome to bring, you or your counsel may want to discuss that with the mediator in advance to get his/her feedback about the value of those records and potential compromises, like bringing a subset of records, sample records, redacted records, or blank forms.

Approach the process with an open mind. Employers and employees alike usually begin mediation with absolute limits regarding what they will or won't do to resolve their dispute based on their knowledge of the situation. No matter how thorough an investigation you conducted, there is always a chance you will learn something new during the exchange of information at mediation. It may be something that will cause you to rethink your previous valuation of the case, make you go back and take a closer look at a piece of evidence, or assure you that your prior conclusions were absolutely correct. Whether or not you gain new knowledge of the evidence, gaining understanding of what the other party believes and why can go just as far in resolving a charge or lawsuit.

The parties need to find a mediator they trust and are comfortable working with. Do not be afraid to talk to a mediator or ask about his or her background before deciding who to choose. Most mediators are happy to be interviewed, explain the process, and discuss preparation for the meeting. It is imperative that you use someone to whom you can disclose the facts surrounding the dispute and your true goals and priorities. Remember, the mediator is bound by confidentiality: she or he will not disclose anything to the other party you do not approve of, and he or she can present ideas to both in ways that do not expose weakness. Government agencies (like the EEOC) assign mediators and usually do not consider party preferences. However, in the off chance that you are assigned a mediator you have reason not to trust or know you cannot work with, talk with the supervisor and see if they will reassign the charge. If reassignment is not an option, you can always hire a private mediator that both parties are comfortable with, even at the administrative level.

Employers will likely and should use their employment process in this process. An attorney will provide an early and important third-party perspective, anticipate questions the mediator (or later a judge or jury) will ask, and can advise an employer about reasonable and likely settlement ranges as well as explore non-monetary options. An attorney will craft talking points or themes for each round of mediation and advise employers how to make their points effectively without being repetitive. Attorneys are also better able to handle, analyze, and respond to surprise information in a mediation (e.g., a damning recording).

Mediation can provide the opportunity to settle disputes in ways that will give some satisfaction to the parties on a personal level as well as resolve their legal woes. Parties need to work with a mediator they can trust and relate to. The mediator needs to hear about the dispute directly from the parties, how it affects them, and what would resolve the issues in their minds. This kind of information is what really helps mediators find the common ground that produces settlements.

Tipped Employees under 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.

Wage Hour continues to devote substantial resources to certain low wage industries each year. Among those regularly targeted are fast food, grocery stores, construction, and restaurants. According to statistics on

the Wage Hour website they conducted 5,751 investigations of food service establishments during FY 2018, resulting in more than 41,000 employees being paid almost $43 million in back wages. A large part of these back wages was a result of improper use of the tip credit provisions of the Act. Thus, I felt we should revisit the requirements for claiming the tip credit. While my article will address only the requirements of the FLSA, you should be aware that several states do not allow tip credit. Almost one half of the states have their own tip credit regulations (although Alabama does not) that are more stringent than the FLSA. Information regarding the differing state requirements is available here.

The Act defines tipped employees as those who customarily and regularly receive more than $30 per month in tips. Section 3(m) of the FLSA permits an employer to take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage of $2.13 and the minimum wage. Thus, the maximum tip credit that an employer can currently claim under the FLSA is $5.12 per hour (the minimum wage of $7.25 minus the minimum required cash wage of $2.13).

The new regulations, which became effective in April 2011, state that the employer must provide the following information to a tipped employee before using the tip credit:

1. The amount of cash wage the employer is paying a tipped employee, which must be at least $2.13 per hour;

2. The additional amount claimed by the employer as a tip credit;

3. That the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;

4. That all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and

5. That the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

The regulations state that the employer may provide oral or written notice to its tipped employees informing them of the items above. Further, they state that an employer must be able to show that he has provided such notice. An employer who fails to provide the required information cannot use the tip credit provisions, and thus must pay the tipped employee at least $7.25 per hour in wages plus allow the tipped employee to keep all tips received. For an employer to be able to prove that the notice has been furnished the employees, I recommend that a written notice be provided.

Employers electing to use the tip credit provision must be able to show that tipped employees receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined. If an employee's tips combined with the employer's direct wages of at least $2.13 per hour do not equal the minimum hourly wage of $7.25 per hour, the employer must make up the difference.

Currently, the regulations also state that a tip is the sole property of the tipped employee regardless of whether the employer takes a tip credit and the regulations prohibit any arrangement between the employer and the tipped employee whereby any part of the tip received becomes the property of the employer.

The Department's 2011 final rule amending its tip credit regulations specifically sets out Wage Hour's interpretation of the Act's limitations on an employer's use of its employees' tips when a tip credit is not taken. The current regulations state in pertinent part:

> Tips are the property of the employee whether or not the employer that has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

Yet, they do allow for tip pooling among employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, and service bartenders. Conversely, a valid tip pool may not include employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs, and janitors. A factor in who may be included in the tip pool concerns whether the employee has direct interaction with the customer. One positive change is the regulations no longer impose a maximum contribution amount or percentage on valid mandatory tip pools. The employer, however, must notify tipped employees of any required tip pool contribution amount, and may only take a tip credit for the actual amount of tips each tipped employee ultimately receives.

When an employee is employed in both a tipped and a non-tipped occupation, the tip credit is available only for the hours spent by the employee in the tipped occupation. An employer may take the tip credit for time that the tipped employee spends in duties related to the tipped occupation, even though such duties may not produce tips. For example, a server who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses is considered to be engaged in a tipped occupation even though these duties are not tip producing. However, where the tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing non-tipped duties, no tip credit may be taken for the time spent in non-tip duties. Wage Hour issued an Administrator's Opinion Letter on November 8, 2018, to further delineate when a tip credit may be used for employees that are engaged in dual jobs that involve both tip producing duties as well as duties that do not produce tips.

A compulsory charge for service, such as a charge that is placed on a ticket where the number of guests at a table exceeds a specified limit, is not a tip. The service charges cannot be counted as tips received but may be used to satisfy the employer's minimum wage and overtime obligations under the FLSA. If an employee receives tips in addition to the compulsory service charge, those tips may be considered in determining whether the employee is a tipped employee and in the application of the tip credit.

Where tips are charged on a credit card and the employer must pay the credit card company a fee, the employer may deduct the fee from the employee's tips. Further, if an employee does not receive enough tips to make up the difference between the direct (or cash) wage payment (which must be at least $2.13 per hour) and the minimum wage, the employer must make up the difference. When an employee receives tips only and is paid no cash wage, the full minimum wage is owed.

Deductions from an employee's wages for walk-outs, breakage, or cash register shortages that reduce the employee's wages below the minimum wage are illegal. If a tipped employee is paid $2.13 per hour in direct (or cash) wages and the employer claims the maximum tip credit of $5.12 per hour, no deductions can be made without reducing the employee below the minimum wage (even where the employee receives more than $5.12 per hour in tips).

The current regulations state that if a tipped employee is required to contribute to a tip pool that includes employees who do not customarily and regularly receive tips, the employee is owed all tips he or she contributed to the pool and the full $7.25 minimum wage.

Computing Overtime Compensation for Tipped Employees

When an employer takes the tip credit, overtime is calculated on the full minimum wage, not the lower direct (or cash) wage payment. The employer may not take a larger tip credit for overtime hours than for a straight time hours. For example, if an employee works 45 hours during a workweek, the employee is due 40 hours X $2.13 straight time pay and 5 hours overtime at $5.76 per hour ($7.25 X 1.5 minus $5.12 in tip credit).

The National Restaurant Association, along with several other groups, filed suit against the Labor Department seeking to overturn the regulations. However, the Supreme Court allowed the new rules to take effect. If you have questions regarding these rules or other Wage Hour issues do not hesitate to give me a call.

2018 Upcoming Events

EFFECTIVE SUPERVISOR®

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

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

Employer "No Pins" Rule

An employer with a policy that prohibited "any type of pin or sticker" violated the National Labor Relations Act, ruled the Fifth Circuit Court of Appeals in the case of *In-N-Out Burger, Inc. v. NLRB* (5th Cir. Jul. 2018). An employee wore a "Fight for $15" pin and was told by his employer to remove it. The employer's explanation was that it prohibited employees from wearing pins because of the employer's concerns about food safety. However, the employer permitted two exceptions to this a year, one for a button that celebrated the holiday season and the other to support the employer's foundation. The court stated that generally, a broad prohibition of employees from wearing pins or buttons violates the NLRA. The court acknowledged that there is an exception where an employer can show that "special circumstances [are] sufficient to outweigh employees' rights and legitimize the regulation of such insignia." An example, according to the court, is where wearing the insignia or button would impair the employer's public image. The court stated that in this particular matter, In-N-Out Burger "failed to demonstrate a connection between the no pins or stickers rule and the company's interests in preserving a consistent menu and ownership structure, ensuring excellent customer service, and maintaining a sparkling clean environment in its restaurants" – all explanations given by the employer for its policy. The court also said that the employer violated its own policy by allowing exceptions. Accordingly, the court concluded that an employee wearing a size appropriate "Fight for $15" pin did not either implicate food safety or impair the employer's public image.

When HR Sues the Employer

In the case of *Gogel v. Kia Motors Manufacturing of Georgia, Inc.*, the Eleventh Circuit Court of Appeals considered whether an employer had the right to terminate a human resources representative who referred an employee to a plaintiff's attorney to pursue the employee's discrimination complaint. The employer argued that the employee's actions breached a duty of loyalty to the employer. The court determined that the employer prohibited the representative from investigating a discrimination complaint raised by an employee. Gogel also had concerns about alleged discriminatory treatment, which the employer (according to the court and Gogel) ignored. Kia asserted that Gogel's possible solicitation of a discrimination charge from another employee in referring that employee to an attorney was the conflict of interest and inappropriate for Gogel's role. The court ruled that Gogel had tried to resolve the matters internally but the employer's restrictions on her role precluded her from doing so, and therefore, her actions in referring an employee to an attorney to handle a discrimination complaint were appropriate.

Supreme Court Expands Public Sector Coverage of the ADEA

On November 6, the United States Supreme Court in a unanimous 8-0 decision ruled that the Age Discrimination in Employment Act covers all public sector employers regardless of their size. *Mount Lemmon Fire District v. Guido*. The Fire District argued that it was not covered by the ADEA because it had fewer than 20 employees. Under the ADEA, an employer must have at least 20 or

more employees and the term "employer" includes "a State or political subdivision of a State." The Court stated that since the statute says the ADEA's definition of an employer also includes a state or political subdivision of a state, the 20-employee threshold was not required. Rather, that 20-employee threshold is necessary for private sector employer coverage under the ADEA, but not states or political subdivisions.

Bonuses and Fixed Salary Pay System

On October 18, 2018, in the case of *Dacar v. Saybolt LP*, Fifth Circuit Court of Appeals ruled that an employer may not use incentive payments in conjunction with the fixed salary for fluctuating workweek pay system. Under the fixed salary for fluctuating workweek pay system, an employer may average an employee's salary over all hours worked to end up paying "half time" for those hours over 40. This can be a considerable saving to employers, but it also has certain obligations, such as not deducting an employee's pay for absences of less than one week. In *Dacar*, the company paid its oil and gas inspectors an incentive when they had to work less desirable hours. This incentive was on top of the regular salary.

The district court ordered the company to pay over $3 million in back pay and an equal amount as liquidated damages. The court ruled that "the FWW [fluctuating workweek] method requires a fixed weekly salary that does not vary by the number of hours worked, and Saybolt's incentive payments caused weekly variance in the FWW's inspector's straight time pay." The court considered cases in which it ruled that paying an employee additional compensation for certain shifts violated the fixed salary for fluctuating workweek pay system, because it was not based on performance or production, but rather to influence work hours, which should be included in the overall regular salary, and not subject to the "half time" calculation. Under the FWW pay system, the weekly salary must be the same, recurring salary. The court concluded that the payments for working less favorable hours caused the actual weekly salary to vary. Again, this is differentiated from an additional form of compensation based on production or performance.

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