LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

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Your Workplace Is Our Work®

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DOL Exempt Employee Salary Level to Increase

On March 12, 2019, the Department of Labor announced proposed changes to the requirements for management and professional exemptions. On March 22, Wage Hour announced that the proposed rule has been published in the Federal Register and that they will accept comments through May 21, 2019. After the end of the comment period, Wage Hour will review the comments and make any changes they believe are warranted. The final rule will then be published with an effective day sometime later. I have seen comments that indicate they expect the revisions to be effective at the beginning of 2020.

Below are listed the major areas where they have proposed changes.

1. The minimum salary level for the exemptions is increased from $455 per week to $679 per week (the equivalent of $35,308 annually). This is approximately midway between the current requirement of $455 per week and the approximately $900 per week that was advanced in the 2016 regulations.

2. The minimum salary level for the "highly compensated employees" is increased from $100,000 to $147,414 per year.

3. They propose to review the salary level requirements on a periodic basis. Although not specifically stated in the proposal, I saw an indication they expect to do these reviews every four years through the formal rule-making process. This differs from the 2016 proposed regulations that required annual adjustments to the salary requirements based on the Consumer Price Index (CPI).

4. The proposal would also allow employers to use nondiscretionary bonuses and incentive payments (including commissions) that are paid annually or more frequently to satisfy up to 10% of the minimum salary requirements. Thus, the proposal would allow an employer to pay the employee a weekly salary of $611 and use the employee's commissions or nondiscretionary (guaranteed) bonuses to meet the minimum requirements. If you choose to pay less than the full $679 per week you may determine the shortfall and make the catch-up payment at the end of each year.

5. There are special salary levels proposed for the motion picture industry and for U.S. territories that differ from the $679 per week.

6. There is no change relating to blue collar workers such as police officers, firefighters, paramedics, nurses, and laborers. Also, there is no change for non-management employees in maintenance, construction, and similar occupations.

7. There are no proposed changes to the "job duties" tests for any of the exemptions.

The Department, as a part of the 200 pages of information that was included with the suggested changes, stated that they had already received 200,000 comments regarding any proposed changes. If you would like to review the methodology that was used in determining the proposed salary level, you can find the information that Wage Hour published on their website. As they have invited the public to comment for the next 60 days, I anticipate that they will receive many more comments. During the development of the 2016 revisions that were not allowed to become final by a court, I believe Wage Hour received at least 250,000 comments. As they have stated, they will consider all timely comments in developing the final rule. I am sure that it will be several months before they complete their review and publish the final rule. In the rulemaking docket RIN 1235-AA20, the Department encourages any interested members of the public to submit comments about the proposed rule electronically at www.regulations.gov. Comments must be submitted by 11:59 pm 60 days from the Federal Register publication in order to be considered.

While we do not know at this time what the final regulations will be, I recommend that you begin to analyze your pay structure with regard to exempt employees to determine if you need to prepare to make any changes in order to comply with the new regulations. Once the final regulations are published, we plan to conduct a webinar where we will discuss the specific changes that will take effect. In the meantime, if I can be of assistance, do not hesitate to give me a call.

Note: As I have previously mentioned, Wage Hour has resumed the process of issuing formal opinion letters that deal with specific subjects. This procedure was discontinued during the previous administration even though it has been used for over 50 years. During March, Wage Hour issued 3 such letters, two dealing with the Fair Labor Standards Act and one dealing with the Family and Medical Leave Act. You can find copies of the letters on the Wage Hour website, and two of them are discussed later in this month's ELB.

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.

Employees as Volunteers

Employer engagement in community and civic matters often leads to questions about whether employee participation is considered job-related and thus compensable. On March 14, 2019, the United States Department of Labor, Wage and Hour Division issued an opinion letter on this subject, which is instructive to employers across all sectors.

The fact situation in the opinion letter involved an employer's community service program in which employees participated during the course of the year. If employees participated during their regularly-scheduled hours, they were compensated. When they participated outside of their normal work hours, they were not compensated. At the end of the year, those employees whose volunteer participation was considered by the employer to have the greatest impact received a bonus, based largely on the number of hours the employee volunteered. Employees were not required to participate as volunteers during working time or outside of work.

In determining that the employer's volunteer program was permissible without compensation owed for hours outside of working time, DOL stated that "the FLSA recognizes the generosity and public benefits of volunteering and allows people to freely volunteer time for religious, charitable, civic, humanitarian, or similar public services." DOL added that "of course, the volunteer must offer his or her services 'freely and without coercion or under pressure' direct or implied from an employer." DOL stated:

1. Employers may ask employees to participate in a volunteer program, provided "there are no ramifications if an employee chooses not to participate."

2. Compensating employees who volunteer during their work hours does not render volunteering during non-work hours as compensable time.

3. Employers may use the amount of time an employee spends on volunteering in determining a bonus, provided that the volunteer activity is optional, failure to volunteer does not have an adverse effect on the employee (such as pay or promotions), and the employee is not guaranteed compensation or a bonus if he or she participates as a volunteer.

A separate issue arises as to whether time spent as a volunteer would be considered compensable if an employee were injured. The general principle is that if an employee is truly a volunteer, such as DOL described in the opinion letter, then an injury in the course of volunteering is not a job-related injury and workers' comp would not apply. This interpretation would vary from state to state. Overall, we recommend that employers establish in writing that volunteering for the employer's community or charitable activities is not required, participation or lack of participation would not affect an employee's job opportunities, participation during non-work time will not count as hours worked, and an injury to, from, or during the volunteer event will not be considered job-related.

Lactation Location Lacking: Employer Owes $1.5 million

The Affordable Care Act, passed in 2010, included a revision to the Fair Labor Standards Act which requires employers to provide employees with a private space and additional break time for lactation. Specifically, the FLSA requires that employees have a "reasonable break time to express milk for one year after the child's birth each time such employee has need to express the milk […] and the location is "shielded from view and free from intrusion from coworkers and the public." Specifically, a restroom is unacceptable.

An employee at a Kentucky Fried Chicken franchise in Delaware needed to express milk after the birth of her son. The manager told the employee to express milk in the single stall restroom. Subsequently, the manager told the employee to express milk in the restaurant manager's office, which was easily accessible to coworkers and had a camera. In fact, at times when the employee expressed milk, other employees came into the manager's office. When the employee complained about the inadequate lactation facilities and the need for more lactation breaks (she was allegedly permitted to pump only once per ten hour shift), she was demoted from her Assistant Manager position and transferred to another restaurant, and was allegedly told this was so it would be easier for her to pump (direct evidence, anyone?). She quit after she heard that her employer was going to fire her after she allegedly stole a customer's jacket.

The employee sued for violation of the FLSA and also for sex discrimination and a hostile work environment based upon sex under Title VII of the 1964 Civil Rights Act. A jury awarded her $25,000 in compensatory damages but $1.5 million in punitive damages (this number will likely be reduced to fit Title VII damages caps).

During our on-site HR audits, we have been surprised (and, frankly, disappointed) at the inadequate facilities for lactation, contrary to what is required by law. The space that the employer provides must be private (i.e., lockable and with no windows or with window covering), without unwelcome access by other employees or the public. An employer need not have a permanently set aside room (though this obviously resolves many potential issues if an employer has the space available), but it must have a plan to make a space available based on the employee's needs. An employer is not required to compensate employees for lactation breaks.

Settling the Workers' Comp Claim, But Ignoring the ADA Charge

We often see a workers' compensation claim paired with an Americans with Disabilities Act violation charge. Due to the EEOC's low threshold or what is necessary to qualify as a disability, often a workers' compensation injury may in fact qualify as a disability as defined under the ADA.

Employers should be sure that if there is a settlement of the workers' compensation claim, the settlement is broad enough to preclude a potential Americans with Disabilities Act claim. An example of this occurred recently in the case of *Peddy v. Aaron's Inc.* (E.D. La., February 21, 2019).

In *Aaron's*, an employee settled her workers' compensation claim prior to serving an ADA lawsuit on the employer. The workers' compensation settlement language provided that the employer was released from "all liability of any nature whatsoever, whether past, present or future including claims arising under the laws of Louisiana, the laws of the United States" or any other federal or state law arising out of the employee's workplace injury. The employer filed a counterclaim against the employee for breach of the settlement agreement, and the Court found for the employer, ordering the employee to pay the employer's costs and attorney fees.

The Court ruled that when the employee signed the broadly-worded release, it encompassed any claim of ADA discrimination or any state claim for personal injury. Employers should be sure any workers' compensation settlement is worded broadly enough under the state in which the employee's injury arose to foreclose the employee's opportunity to bring any other type of claim related to the injury, such as under the ADA or FMLA.

Labor's Labor Unrest

Various job classifications of several union employers are themselves unionized. Recently, unions representing employees at the Service Employees International Union threatened to strike. The SEIU is one of the country's largest unions. They have approximately two million members and are known for having led the "Fight for $15" efforts in several cities.

The unions representing SEIU staff at its Washington, D.C. headquarters are the Office and Professional Employees International Union (OPEIU) and the Union of Union Representatives (UUR). OPEIU announced that its members by a 90% margin approved a strike against the SEIU. What is the OPEIU's gripe with the SEIU? Union busting – according to OPEIU. OPEIU states that "union jobs at SEIU and its pension fund have been cut in half, from 283 to 149." Furthermore, OPEIU states that SEIU spent $21.6 million outsourcing work to non-union consultants in 2017, much of which it alleges should have been done by union workers. SEIU and OPEIU's contract provides that if an employee with at least five years of service is laid off, SEIU must provide that employee with another job opportunity. SEIU proposed to terminate that contract provision.

The fact that unions are experiencing labor turmoil within their workforce is not a surprise. Their "business" has declined, a combination of employees showing less of an interest in joining unions (even though polls show that employees consider unions as positive influences) and recent court decisions freeing employees from mandatory payment of dues or fees.

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.

Board Decides to Revisit Its Authority to Assert Jurisdiction Over Charter Schools

In early February 2019, the NLRB announced its decision in *KIPP Academy Charter School*, wherein it decided to seek public comment on whether to assert jurisdiction over a New York charter school.

The NLRB said the Union's Request for Review "raise[d] substantial issues" about whether the Board should choose to categorically refuse to assert jurisdiction over charter schools under the NLRA. *Amici* briefs were due no later than March 6, 2019 and responses to those briefs were due no later than March 20, 2019.

What Does the Case Mean?

The case was decided strictly along party lines and Democrat Lauren McFerran filed a dissent where she said that the decision to solicit briefs was a "solution in search of a problem." Ms. McFerran stated that a change in the NLRB composition was not reason enough for reviewing existing precedent.

KIPP and the resulting solicitation of public comment arose from NLRB Regional Director John Walsh's original decision that KIPP qualified as an employer under current law and was not a state or political subdivision thereof and was therefore not exempt under NLRA jurisdiction. As a result, the NLRB asserted jurisdiction over KIPP and ordered the decertification election to proceed apace. McFerran stated in her dissent that the majority decision should adhere to precedent and return to the NLRB's sound, traditional practice of seeking public comment prior to changing precedent.

Recently the Board has been criticized for overhauling precedent without giving members of the public an opportunity to comment on the proposed changes to the law (see adjudication of independent contractor status discussed in the February ELB). The invitation for public comment was a way to avoid that criticism. Look for the NLRB to overrule the *Hawkins* decision which established the charter school general exemption.

The *Boeing* Rules and the Trump NLRB

Despite being approximately a little over a year after *Lutheran Heritage Village - Livonia* was overturned, it seems unclear exactly what conduct restrictions pass as legal before the NLRB. Under *Lutheran Heritage- Livonia,* a 2004 Obama administration decision, the NLRB said that employers violated the National Labor Relations Act by writing work rules and handbooks that workers could "reasonably construe" the rules to infringe on employees' rights to engage in protected, concerted activity (PCA) under Section 7 of the NLRA. This standard was considered overly broad by the management pundits and was used liberally by the Obama administration to frustrate employers by bringing charges against companies claiming that their work rules and handbooks violated the NLRA. The Obama dominated Board could therefore impact work rules and policies such as confidentiality, recording conversations at work and workplace civility rules.

The new rule articulated in the *Boeing* case permits employers to demonstrate a real reason for implementation of the rule. (See the December 2017 ELB for more detail). The *Boeing* rule is much more employer friendly and some say practical than the old rule articulated in *Lutheran Heritage Village – Livonia.*

Thus, the newer rule, is in essence, a balancing act, and more practical because it takes into account the employers' needs. Under the *Lutheran* rule, it seems that if there was any chance of the rule impacting on employees' rights under Section 7, then the rule was declared illegal.

Practical tips

In striking a balance between an employer's needs and employees' right to engage in protected concerted activity, the following tips are offered:

- Never implement a rule, policy, or practice in response to union activity. This applies to rules more than to legal handbooks.

- Rules should be implemented that are always legal – because they don't affect workers' rights under Section 7 of the Act or because any interference with workers' rights are outweighed by an employers' business interest.

- If there is interference, then the business justification for the rule must be weighed.

- If there is interference, then consider if the rule is the best method for handling the problem.

- Stay away from rules or handbooks that are so broadly written that there can really be no doubt as to the purpose of the rule (i.e. – to infringe on employees' rights under Section 7).

- Some employers will want to go as broad as they can if, after doing a risk analysis, the rule is justified, is the best response to the problem, and it is not in response to any union activity that you know of.

- Especially if a company is considering an aggressive approach, it should take steps to develop contemporaneous evidence that at the time it adopted the rule, it had no knowledge of any union or other protected concerted activity.

A common example of the balancing test is a rule that requires an off-duty employee to sign in before entering the premises of the facility. If the purpose of the rule is to discourage outside union organizing then the rule is, in all likelihood, illegal. However, if the purpose of the rule is to keep track of everyone in the facility in the case of an emergency, then in all likelihood, the rule is legal.

The balancing test is often just an exercise in common sense, but there are gray areas. An example of a gray area is a confidentiality rule that limits what an employee can say about its employer. Stay tuned as this area will undoubtedly continue to evolve.

Confused About the EEO-1?

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.

It's OK to admit it if you are. Everyone who is required to file this report is wondering what in the world is going on. Even though the online portal for filing 2018's EEO-1 report is already open and accepting submissions, the reporting requirements could change. This is what we know so far, including some history of this report.

1966 – EEOC began requiring employers with 100 or more employees (and certain government contractors and subcontractors with 50 or more employees) to file an EEO-1 form annually. The form reported numbers of employees by job category, race, sex and ethnicity.

2016 – EEOC announced its expansion of the report to include pay data, effective with the March 2018 submission. The new component would report numbers of full-time and part-time employees by demographic and job categories in each of 12 pay bands, along with aggregate hours worked by employees in each pay band.

August 2017 – Office of Management and Budget, who previously approved the addition of the pay data component to the EEO-1, stayed its prior approval, claiming collection of the information would be "unnecessarily burdensome" and "lack practical utility."

November 2017 – A lawsuit was filed against OMB in the U.S. District Court for the District of Columbia after it failed to respond to a Freedom of Information Act request seeking documents explaining OMB's decision to halt EEOC's collection of pay data after previously approving it.

2018 – Nothing happened that affected employers' responsibilities regarding the EEO-1. The lawsuit was proceeding but no rulings were made. EEOC offered no new policies or amendments. Remember, EEOC was losing Commissioners without Congressional approval of nominated replacements and it lost its General Counsel. EEOC headquarters personnel expected the new administration to cancel the pay data requirement or at least create a less burdensome system for some wage comparison information.

February 1, 2019 – EEOC announced that, because of the government shutdown, its online portal for EEO-1 reports would not open until early March and would accept submissions through May 31, 2019.

March 4, 2019 – U.S. District Court reinstated the EEO-1 pay data reporting (aka Component 2) requirement effective immediately.

March 18, 2019 – EEOC announced it " … is opening its EEO-1 online portal to receive 2018 EEO-1 **Component 1 data**." (emphasis in original). Component 1 data is the original EEO-1 form for demographic workforce information only – no pay data. Plaintiffs in the above lawsuit then asserted to the court that EEOC's statement was not compliant with the March 4 order.

March 19, 2019 – The court gave EEOC until April 3 to detail how and when it will implement the March 4 order.

As of March 26, 2019, EEOC has not appealed or stated an intent to appeal the March 4 order reinstating Component 2 reporting or requested an extension of time to respond. Its website still says, "The EEOC is working diligently on next steps in the wake of the court's order …. The EEOC will provide further information as soon as possible."

If you are required to file an EEO-1 and have not already done so, I suggest you hold off at least a couple more weeks to see what the EEOC and OMB propose on April 3 and to see if the judge or the opposing parties in the lawsuit have any immediate reaction. At the moment, employers simply cannot comply with the court order to supply Component 2 pay data as the EEOC's portal is only accepting Component 1. If you have not compiled 2018 pay data yet, I suggest you lay the groundwork to do so within a short period of time. This judge appears intent on pay data being gathered this year.

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Decatur, AL – May 14, 2019
8:30am - 4:00pm Central
City of Decatur Fire and Police Training Center
4119A Old Highway 31, Decatur, AL 35603

Birmingham, AL – October 3, 2019
8:30am - 4:00pm Central
Vulcan Park and Museum
1701 Valley View Drive, Birmingham, AL 35209

Huntsville, AL – October 17, 2019
8:30am - 4:00pm Central
Redstone Federal Credit Union
220 Wynn Drive, Huntsville, AL 35893

Click here for the agenda 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

DOL Issues FMLA Opinion Letter

On March 14, 2019, the United States Department of Labor, Wage and Hour Division addressed the issue of whether an employee may elect not to receive FMLA benefits and whether an employer may extend the amount of FMLA benefits available to an employee. The employer permitted the employee to use other forms of leave when an FMLA-related absence arose, prior to tapping into the 12 weeks of FMLA. According to the Wage and Hour Division, the employer is responsible in all circumstances for designating leave as FMLA qualifying and giving notice of a designation to the employee. Failure to follow this notice requirement may constitute and interference with, restraint on, or denial of an employee's FMLA rights. Nothing in the FMLA prevents employers from adopting leave policies more generous than those required by the FMLA. However, an employer may not designate more than 12 weeks of leave or more than 26 weeks of military caregiver leave as FMLA–protected. The Wage and Hour Division stated that "an employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA leave. Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave." An employee does not even need to specifically request FMLA. Rather, if an employee provides the employer with information which puts the employer on notice that the FMLA may apply, the employer is required to make a reasonable inquiry and determination within five days of receiving that information whether the FMLA applies. Therefore, neither the employee nor the employer may "defer" a determination of whether leave qualifies under FMLA even if the employer and employee want to agree to defer as part of an employer's generous leave policy

Free Snacks, But No Free Lunch

The IRS announced that employer-provided lunches would be considered taxable income to an employee, but employer-provided snacks would not. The employer argued that providing meals should not be considered income, because the employer had non-compensatory reasons for providing the meals, including enhancing workplace culture, providing healthy meal alternatives for employees, making sure employees had a meal if they did not have an adequate meal break and providing employees with meals so that they were available to return to work in an emergency. The Internal Revenue Code excludes as income meals an employer provides to employees if those meals are for the employer's convenience. The IRS stated that providing snacks is not considered income to employees and, therefore, not taxable. Note that this IRS Memorandum does not preclude employers from providing celebratory meals or other periodic meals to employees. Rather, the Memorandum addressed an employer that provided meals for employees on a daily basis.

Salary History Decision Overturned by U.S. Supreme Court

In the case of *Rizo v. Yovino*, a Ninth Circuit decision prohibited employers from paying women less than men based upon salary history. However, on February 25, 2019, the United States Supreme Court vacated the Ninth Circuit decision because the Ninth Circuit judge who authored the decision died before the decision was issued. According to the Supreme Court, "judges are appointed for life, not for eternity." The case will now be reconsidered by the Ninth Circuit, to determine whether an applicant's pay history may be a factor under the Equal Pay Act to justify lower pay for a woman compared to a man. Note that several states have enacted laws which prohibit employers from considering an applicant's salary history. These include California, Connecticut, Delaware, Massachusetts, Oregon and Vermont. Also, several cities have enacted similar ordinances.

NLRB Comments on Handbook Policies

The NLRB issued two guidance memos regarding employee handbooks and the implications of handbook policies on employee Section 7 rights. Specifically, the Board stated that it is unlawful to require employees to keep the handbook confidential, as this would preclude employees from discussing wages, hours and conditions of employment. Note, however, that the employer may require a terminating employee to return the handbook, as its company property. The Board said that a broad policy prohibiting employees from discussing payroll also violates Section 7. However, an employer may prohibit employees who handle payroll from disclosing payroll information (other than their own pay) to others. Regarding limiting cell phone use policies, the Board said that cell phones may be used for solicitation purposes, thus employer restrictions must be consistent with Board law regarding solicitation and distribution policies. For example, prohibiting solicitation during "work hours" is overly broad, as it includes paid break time. Rather, employers may prohibit solicitation/distribution during "work time." This includes the restriction on cell phone use. Note that employers may prohibit employees from having cell phones at work at all times. More employers are implementing such policies, as apparently some employees view their cell phone as indispensable to use, regardless of when or where.

OFCCP sets VEVRAA Hiring Benchmark at 5.9%

Federal contractors subject to the affirmative action obligations of the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) must utilize a hiring benchmark for covered veterans in their annual plans. Employers may set their own benchmark using methodologies approved by the OFCCP (frankly, not recommended), or use the national benchmark set each year. Effective March 31, 2019, the national benchmark is 5.9%. The national benchmark has lowered each year of its existence, from 7.2% in 2014 to 5.9% now.

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